UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re:

"AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

MDL 381

04 CV 0400
(JBW)

THE VIETNAM ASSOCIATION FOR
VICTIMS OF AGENT ORANGE/DIOXIN
ET AL.

Plaintiffs,

- against -

THE DOW CHEMICAL COMPANY
ET AL.

Defendants.

BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS, EARTHRIGHTS INTERNATIONAL AND THE INTERNATIONAL HUMAN RIGHTS LAW CLINIC AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

I. INTRODUCTION

Amici are public interest organizations devoted to the enhancement of human rights through litigation, public education, and lobbying. Amici seek to address only a few of the many issues raised by defendants' motion to dismiss. The issues discussed are of general interest to the human rights community, which has sought, through various means, to further recognition of those international legal norms that are binding upon all nations and peoples.

Amici address first the question of whether the claims asserted are justiciable and cite to controlling authority which compels the conclusion that courts may review conduct which occurred during wartime. Amici next demonstrate that aiding and abetting liability has long been recognized under both international law and U.S. law, and therefore is actionable under the Alien Tort Statute (ATS), 28 U.S.C. §1350. Amici are particularly concerned with defendants' failure to recognize the well-developed precedents for the imposition of aiding and abetting liability. Similarly, defendants' argument that corporations are not subject to liability for violations of the law of nations is inconsistent with applicable case law. Amici also describe how war crimes are within the category of specific, universal and obligatory norms which are actionable under the ATS. Next, amici provide a background to the development of the prohibition of crimes against humanity as a specific, universal and obligatory norm which is actionable under the ATS. Finally, amici demonstrate that the government contractor defense does not apply to these ATS claims.

The Statement of Interest of the United States (Statement of Interest), as well as Defendants' Memorandum of Law (Def. Mem.), argue for an imperial executive whose decisions are beyond review and whose interpretation of international law commands total deference. For over one hundred years, from *The Paquete Habana*, 175 U.S. 677 (1900), to *Sosa v. Alvarez-*

Machain, 124 S. Ct. 2739 (2004), *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004), the Supreme Court has made clear that it is the obligation of federal courts to determine the content of international law and it is within the power of the courts, in appropriate circumstances, to determine if the conduct of the executive branch is in conformity with that law.

II. ARGUMENT

A. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

Defendants argue that this case should be dismissed as a non-justiciable political question. They rely on several broad propositions that are unsupported by either legal authority or the application of the law to the specific facts of this case.

There is no general "principle[] of abstention" that allows courts to dismiss a case simply because it implicates U.S. foreign policy. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 408-410 (1990). Indeed, courts ordinarily have the obligation to decide a properly presented case, even where the controversy may potentially implicate foreign affairs. *Id.* at 409. Courts cannot "shirk this responsibility merely because [a] decision may have significant political overtones." *Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) ("The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.").

1. Plaintiffs' Amended Complaint, Which Alleges Injuries from Illegal Conduct Committed by Corporate Employees, Is Not Barred by the Political Question Doctrine.

Defendants state broadly that this case is non-justiciable because in their view, "[t]he Nation's military decisions are unequivocally committed to the political branches, not the courts." Def. Mem. at 18. Defendants' sweeping statement is simply wrong. In *The Paquete Habana*, 175 U.S. 677, the Supreme Court overturned the decision of field commanders on the seizure of fishing vessels in the middle of the Spanish-American war. The Paquete Habana was a fishing vessel, sailing under the Spanish flag, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba. The vessel was captured when returning along the coast of Cuba, condemned as prize of war, and sold. The Supreme Court concluded that it was "the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause." *Id.* at 714. On this basis the Court ordered that the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

Just last term, the Supreme Court held that an ATS claim against the U.S. government challenging acts taken in prosecuting the war against al Qaeda and the Taliban regime was justiciable. *Rasul v. Bush*, 124 S.Ct. at 2698. Defendants ignore the decision of the majority and simply cite the concurrence by Justice Kennedy. Def. Mem. at 19. Defendants' broad assertion that courts may never entertain suits alleging that the government violated international law in its conduct of military operations is without legal support.

The *Rasul* petitioners were foreign citizens captured abroad during hostilities between the

United States and the Taliban, and held by the U.S. military at the U.S. naval base at Guantanamo Bay, Cuba. The petitioners challenged the legality of their detention. Some sought to assert jurisdiction under the ATS. The Court explicitly held that a district court could hear petitioners' ATS claims. It noted that the ATS:

> explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims. *Id.* at 2699.

Indeed, in permitting petitioners' ATS claims to proceed, the Court rejected precisely the justiciability argument that defendants make here. The government argued in *Rasul*, as defendants do here, that the conduct of foreign affairs is committed to the political branches, particularly with respect to the Executive's conduct of military operations abroad. Resp't Br. at 41-42, *Rasul* (No. 03-334).[1] The government further claimed that:

> exercising jurisdiction over actions filed on behalf of the Guantanamo detainees would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas, second-guessing the military's determination as to which captured aliens pose a threat to the United States or have strategic intelligence value, and, in practical effect, superintending the Executive's conduct of an armed conflict—even while American troops are on the ground in Afghanistan and engaged in daily combat operations. *Id.* at 43.

The Court rejected this position and, again, allowed the prisoners to challenge the legality of their detentions. Given that the petitioners in *Rasul* challenged the conduct of *ongoing* operations, defendants' argument that court review of conduct in Vietnam thirty years ago would "interfere" with a foreign policy stands on an even weaker foundation. The Supreme Court's

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[1] *Available at* http://supreme.lp.findlaw.com/supreme_court/briefs/03-334/03-334.mer.resp.pdf.

holding that federal courts have authority to entertain the claims in *Rasul* clearly counsels against any notion that the claims at bar are inherently non-justiciable.

Similarly in *Hamdi v. Rumsfeld*, the plurality opinion "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in assessing whether a U.S. citizen captured during war was properly deemed by the Executive to be an enemy combatant. *Hamdi*, 124 S. Ct. at 2650. The plurality noted that while the military does have wide discretion in waging war, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 2649-50, *citing Sterling v. Constantin*, 287 U. S. 378, 401 (1932) (**"**What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

United States courts have a long history of deciding damage claims for wrongful conduct committed by soldiers, commanders, or private persons during war. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Chief Justice Marshall spoke for a unanimous court in holding a captain in the U.S. Navy liable for damages to a ship owner for the illegal seizure of his vessel during wartime. The Court held that the President's orders authorizing the seizure of the ship did not immunize the captain from a lawsuit for civil damages where the President's instructions *went beyond his statutory authority*. *Id.* at 179. The Court held, "the [President's] instructions cannot . . . legalize an act which without those instructions would have been a plain trespass [or unlawful act." *Id.* at 179.

The Supreme Court has repeatedly permitted damage actions to be brought against individual soldiers and officers for wrongful or otherwise tortious conduct taken in the course of

warfare. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (U.S. soldier sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594, 605-06 (1878) (reviewing soldier's civil liability for trespass and destruction of cotton and evaluating in accordance with the usages of civilized and lawful warfare); *Freeland v. Williams*, 131 U.S. 405, 417 (1889); *see also* 54 Am. Jur. 2d. *Military and Civil Defense* § 293 (1971); W. Winthrop, *Military Law & Precedents* 780 n. 31, 887-89 (2d ed 1920).

More recently, various Courts of Appeals have rejected the political question defense in actions suing individuals or government officials for wrongful, illegal conduct during wartime. For example, the Court of Appeals for the Ninth Circuit in *Koohi v. U.S.*, 976 F.2d 1328, 1331-32 (9th Cir. 1992), held that federal courts are well equipped to review military decisions:

> Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.

976 F.2d at 1331. *See also Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (allowing tort claims by non-combatant civilian in conflict outside the U.S. and holding that political question doctrine did not apply when there was no challenge to the legitimacy of United States foreign policy concerning the contras and when the court was not required to say which side was "right" in Nicaraguan civil war); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988) (refusing to dismiss as non-justiciable political question a Fifth Amendment claim by American citizens against U.S. officials for funding the Nicaraguan contras who were intentionally targeting their lives and liberty); *Kadic v. Karadzic*,

70 F.3d 232, 249-50 (2d Cir. 1995) (rejecting political question defense in class action for damages brought by Croat and Muslim citizens of Bosnia-Herzegovina who claimed they were victims of various atrocities, including brutal acts of rape and other torture and summary execution carried out by Bosnian-Serb military forces in the course of the Bosnian genocide), *Deutsch v. Turner Corp.*, 324 F.3d 692, 713 n. 11 (9th Cir. 2003) (rejecting political question doctrine in wartime reparations case, holding that "no political question, however, is raised by the simple application of the requirements of a treaty to which the United States is a party."). Here, plaintiffs are asking the Court to review decisions and actions taken by American corporations, not decisions made by the military.

Claims such as plaintiffs' seeking the vindication of individual and personal legal rights rarely trigger the political question doctrine. Such claims are not subject to dismissal as presenting non-justiciable political questions simply because they may have important foreign policy implications. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962)(political question doctrine "is one of 'political questions', not one of 'political cases'"); *Pangilinan v. INS*, 796 F.2d 1091, 1096 (9th Cir. 1986) (political question doctrine does not bar court from hearing cases involving individual rights to equal protection and due process); *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985) ("[a]n area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action."); *Eain v. Wilkes*, 641 F.2d 504, 516 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981) (political question doctrine does not preclude court from determining whether there is an adequate protection of rights for a person whose extradition is requested; *Sharon v. Time*, 599 F. Supp. 538, 552 (S.D.N.Y. 1984) ("[j]udicial

abstention on political grounds has similarly been found inappropriate when individual rights in domestic affairs are at stake, even where the litigation touches upon sensitive foreign affairs concerns, or deals with a subject allocated in the main by the Constitution to another branch.").

In sum, the mere fact that this action arises out of conduct related to military action does not render the claim non-justiciable.

2. Applying the *Baker v. Carr* "Discriminating Analysis" Factors Here Supports Plaintiffs' Jurisdictional Claims.

The Supreme Court has often cautioned that lawsuits relating to foreign relations must not be automatically dismissed as non-justiciable political questions, but rather must be subjected to a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action." *Baker v. Carr*, 369 U.S. 186, 211-12 (1962). Judicial refusal to reject claims as political questions is particularly evident in *damage actions* alleging violations of individual rights. *See Koohi*, 976 F.2d at 1332 ("Damage actions are particularly judicially manageable" and "are particularly nonintrusive."). Indeed, the Supreme Court has adjudicated claims in a variety of foreign policy contexts, including a challenge to an Executive agreement settling individual claims with a foreign nation. *See Dames & Moore v. Reagan*, 453 U.S. 654 (1981) (determining the constitutionality of the Executive agreement settling claims arising out of the crisis with Iran). *See also Regan v. Wald*, 468 U.S. 222 (1984) (adjudicating challenge to ban on travel to Cuba).

Ignoring the Supreme Court's admonition in *Baker*, defendants broadly mischaracterize plaintiffs' claims here as ones that sweepingly challenge United States foreign policy during the

Vietnam War. Plaintiffs seek resolution of a far narrower claim: whether a specific practice exceeded the accepted limits of the laws of war. Resolution of that issue involves a legal question, not a non-justiciable political question.

Although defendants purport to apply the six factors from *Baker,*[2] those factors compel the denial of defendants' motion. As regarding *factor one*, the Second Circuit has explicitly held that the branch of government to which the resolution of international human rights claims has been constitutionally committed is the Judiciary. *Kadic*, 70 F.3d at 249. The resolution of claims of human rights violations committed by private corporations in the context of United States military operations is not constitutionally committed to the political branches. As demonstrated above, federal courts have historically adjudicated damage actions for unlawful actions committed on United States territory, on the high seas, or in foreign countries in times of war. Indeed, the judiciary is constitutionally permitted to rule on personal injury and damage claims alleged to be caused by wrongful acts of *soldiers* (let alone the corporate employees at issue

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[2] The factors are:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
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> (2) a lack of judicially discoverable and manageable standards for resolving it;
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> (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> (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. *Baker*, 369 U.S. at 217.

here) that occurred during war. As is made clear by those precedents, the fact that the alleged wrongful conduct occurred during ongoing hostilities does not, without more, transform a damages case into a political question.

Regarding *factors two and three*, this case involves well accepted rules of international law. *See Sections F and G infra.* As the Second Circuit noted in *Kadic*, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." 70 F.3d at 249.

Kadic also held that: "The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Id.* at 249. Thus the Court need not consider those factors unless defendants present evidence that the Congress or the Executive made a prior decision on the issue of reparations to those Vietnamese injured by the use of Agent Orange. Defendants have failed to do so.

Defendants make much of Senator Humphrey's statement during hearings on the adoption of 1925 Geneva Protocol that the use of herbicides in Vietnam was in "accordance with the U.S. prevailing interpretation of the protocol." Def. Mem. at 48, n. 65. Defendants err because interpretation of a treaty is within the competence of a federal court and the executive branch's interpretation of a treaty is not binding on the courts. *See Ungaro-Benages v. Dresdner Bank,* 379 F.3d 1227, 1236 (11th Cir. 2004). The opinion of a member of Congress on an interpretation of a treaty provision does not constitute an "initial policy decision," or render the

question inappropriate for judicial determination. Courts routinely interpret treaty provisions. Even if the executive branch did, in fact, believe that the use of herbicides in Vietnam was consistent with the Protocol, such an interpretation is not impervious to subsequent court review.

In sum, the six *Baker* factors and the well-established law relating to the political question doctrine clearly compel denial of defendants' motion to dismiss.

Defendants rely heavily on a series of District Court opinions dismissing reparation claims arising out of World War II as presenting non-justiciable political questions. *See, e.g.*, *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 666-67 (N.D. Cal. 2002); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 691 (N.D. Cal. 2003) (citing *Iwanowa*, 67 F. Supp. 2d at 486) (firmly-established policy that claims arising out of World War II "be resolved through government-to-government negotiations"). Those reparation cases are fundamentally different from the issues presented here because each involves a United States government commitment to resolve reparations claims arising out of World War II through numerous treaties and agreements. *Zivkovich*, 242 F. Supp. 2d at 669; *Nazi Era Cases*, 129 F. Supp. 2d at 376; *Alperin*, 242 F. Supp. 2d at 691; *Iwanowa*, 67 F. Supp. 2d at 485. No such treaties or agreements between the United States and Vietnam exists to bar the pending claims.

In the absence of such a treaty, courts have allowed reparations claims to proceed. In *Ungaro-Benages v. Dresdner Bank,* 379 F.3d at 1236, the Eleventh Circuit denied a motion to dismiss as non-justiciable claims against German banks for property confiscated during the Nazi era. The court declined to follow the district court decisions holding that Nazi era claims were

non-justiciable and instead looked to the relevant treaty to conclude that claims against German corporations and the German government were contemplated by international treaty.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 347-49 (S.D.N.Y. 2003), the court rejected a corporation's political question defense to a claim by Sudanese citizens alleging a corporation's wrongful conduct during the ongoing civil warfare in Sudan. The court held that the Holocaust cases were "readily distinguishable" because, *inter alia*, there was not a statement by the executive branch that all reparations from World War II should be dealt with by treaty or similar agreement and because there were in place a series of treaties and agreement which created a compensation system. *Id*. at 349. In a variety of other contexts unrelated to World War II, courts have refused to dismiss lawsuits on political question grounds for damages due to alleged egregious conduct during warfare. *See, e.g.*, *Kadic*, 70 F.3d at 249-50; *Koohi*, 976 F.2d at 1331.

In *Koohi,* the court noted that "governmental operations are a traditional subject of damage actions in the federal courts." *Id.* The court considered the Supreme Court decision in *The Paquete Habana* to be controlling. *Id.* (citing *Paquete Habana*, 175 U.S. at 686-713**)**. As noted above, *The Paquete Habana* involved the seizure of two Spanish fishing vessels by United States naval forces during the Spanish-American War. The Supreme Court found that the question of whether the seizure of the vessels was militarily justified could be reviewed by the Court. *The Paquete Habana*, 175 U.S. at 686-713. The Court then held that the decision to seize the vessels was not justified by military necessity and that the vessels must be returned. *See id.* at 714. The *Koohi* court concluded that *The Paquete Habana* stands for the principle that claims for damages arising out of military action are justiciable "in time of war as well as in time of

peace, and with respect to claims by enemy civilians as well as by Americans." 976 F.2d at 1332.

B. THE TEXT, HISTORY, AND CASE LAW OF THE ALIEN TORT STATUTE SUPPORT AN AIDING AND ABETTING THEORY OF LIABILITY.

Federal courts have repeatedly confronted the question of whether the ATS encompasses the liability of private actors, including private corporations, for violations of international law. Federal courts, including those of this jurisdiction, have consistently answered the question in the affirmative.[3] In support of its motion to dismiss, defendant has proffered the expert opinion of Kenneth Anderson that there is no corporate liability under international law. Declaration of Kenneth Howard Anderson, Jr. (Anderson Dec.) ¶¶ 88-102. His conclusions are wrong on several points as described more fully below. First, aiding and abetting liability is well established in international law and has been recognized as part of customary law long before the

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[3] *See, Kadic v. Karadzic,* 70 F.3d at 239 (the reach of international law is not limited to (state actors)*; Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 321 (holding that "ATCA suits [may] proceed based on theories of conspiracy and aiding and abetting"); *Abdullahi v. Pfizer, Inc.,* 77 Fed. Appx. 48 (2d Cir. 2003); *Wiwa v. Royal Dutch Petroleum Co.,* No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (finding that private corporations could be held liable for "joint action" with state actors); *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000) (holding that subject matter jurisdiction existed under the ATCA, where plaintiffs alleged a French bank had been complicit with the Nazi regime); *Iwanowa,* 67 F. Supp. 2d at 445 ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."); *see also Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, *35-36 (9th Cir. 2002) *vacated* 2003 U.S. App. LEXIS 2716; *Burnett v. Al Bar Investment & Development Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) ("United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law." (citing cases)); *Eastman Kodak Co. v. Kavlin,* 978 F. Supp. 1078, 1090-95 (S.D.Fla.1997) (holding that subject matter jurisdiction existed in an ATCA action against a Bolivian corporation); *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-114 (5th Cir. 1998) (assuming without deciding that ATCA confers jurisdiction over private parties who aid, abet or conspire in human rights violations).

Vietnam War. Second, corporations do not stand in any special category which immunizes them from liability.

U.S. courts have repeatedly determined that the ATS encompasses aiding and abetting liability, in a variety of different circumstances. For example, *Presbyterian Church of the Sudan,* 244 F. Supp. 2d at 320-24, held that allegations that a Canadian oil company aided and abetted war crimes and other gross human rights violations were actionable. Similarly, the court in *Mehinovic v. Vuckovic,* 198 F. Supp. 2d at 1355-1356*,* found a former Serb soldier liable for aiding and abetting war crimes and other human rights violations in Bosnia-Herzegovina. In *Hilao v. Estate of Marcos,*103 F.3d 767, 776 (9th Cir. 1996), the Ninth Circuit affirmed a jury instruction allowing a foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance.'" Likewise, *Burnett v. Al Baraka Investment*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003), held that allegations by victims of the September 11 attacks that various entities aided and abetted the perpetrators stated a claim. In *Bowoto v. ChevronTexaco,* 312 F.Supp.2d 1229, 1247 (N.D. Cal. 2004)*,* the court held that plaintiffs could proceed on their claims against an oil company for aiding and abetting military killings in Nigeria. Similarly, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000), held that claims that defendant banks aided and abetted the Vichy and Nazi regimes in plundering plaintiffs' assets were actionable under the ATS. There is simply no question that the ATS provides for aiding and abetting liability.

Defendants' claim that "it is doubtful" than a norm prohibiting aiding and abetting existed at the time of the Vietnam War is clearly erroneous. Def. Mem. at 55. The liability of private actors, as aiders and abettors, for violations of international law was understood at the

time the ATS was enacted. In a 1795 opinion issued by Attorney General Bradford specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war.[4] *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). In that opinion, the Attorney General considered an incident involving private actors, acting in concert with, but not controlling the French naval vessels. *See id.*

Six years after the passage of the ATS, the Supreme Court in *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 156 (1795), found that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention with the law of nations and was liable for the value of the captured assets. *See also id.* at 167-68 (Iredell, J., concurring) ("It is impossible that Ballard can be guilty of a crime, and Talbot, who associated with him, in the wilful commission of it, can be wholly innocent of it."). Justice Paterson wrote[5] that Talbot's liability sprang from his actions in aiding Ballard to arm and outfit, in cooperating with him on the high seas, and using him as the instrument and means of capturing vessels. *Id*. at 157. In

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[4] The Bradford opinion was cited as authority in the recent opinion in *Sosa* for the proposition that the ATS was intended "to provide jurisdiction over what must have amounted to common law causes of action." *Sosa*, 124 S. Ct. at 2759. In *Kadic*, the Court specifically relied of the Bradford Opinion in reaching the conclusion that the private actors could be held liable under the ATS. 70 F.3d at 239.

[5] The Justices of the unanimous Court delivered their opinions seriatim, *id.* at 152, but all opinions accepted that Talbot was liable for restitution, thereby endorsing Paterson's theory of aiding and abetting liability. *See id.* at 167 (Iredell, J., concurring) ("This claim **. . .** would undoubtedly be good, if [Talbot] was not a confederate with Ballard. But it is clear that he was, that he cruised before and after, in company with him. . . . He abetted Ballard's authority. . . .); *id.* at 168 (Cushing, J., oncurring) ("[E]ven supposing that Talbot was, bona fide, a French citizen, the other circumstances of the case are sufficient to render the capture void."); *id.* at 169 (Rutledge, J., concurring) (awarding restitution and stating that "[t]he capture **. . .** was a violation of the law of nations, and of the treaty with Holland.") Justice Wilson, the final member of the Court, did not participate in the judgment because he decided the case in the circuit court. *Id.* at 168.

finding the defendant liable, Justice Paterson found that the defendant had surrendered his protection under international law when he supplied his accomplice's ship with guns and used him "as the instrument and means of capturing vessels." *Id*. at 156. Judge Iredell, writing in concurrence, agreed, finding Talbot to have "abetted Ballard" when he "cruised before and after, in company with him [and] put guns on board of [Ballard's] vessel." *Id*. at 167. Clearly, Prof. Anderson's contention that international law does not provide a precedent for the imposition of civil liability on private actors is inconsistent with federal case law dating back more than two hundred years which recognized liability for aiding and abetting violations of international law norms.[6]

International jurisprudence dating back to the Second World War recognized aiding and abetting as a basis for liability for non-state actors. For example, in *U.S. v. Friederich Flick*, a civilian industrialist was convicted because he knew of the criminal activities of the SS and nevertheless contributed money that was vital to its financial existence even though he did not condone SS atrocities. 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 1216-1223)(1949). Similarly, in *In re Tesch* (*Zyklon B Case*), 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946), industrialists were convicted for sending poison gas to a concentration camp, knowing it would be used to kill.

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[6] Professor Anderson opines that the precedents from criminal law are inapplicable to civil claims under the ATS. ¶93. He asserts that civil liability is not a feature of present international law and was not at the time of the Vietnam War. Again, Professor Anderson's position is contrary to precedent. In *Kadic,* the Court noted that while international law is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies. 70 F.3d at 239 **(**citing the Restatement (Third) of the Foreign Relations Law of the United States (1986) ("Restatement (Third)") § 404 cmt. b). *Kadic* found that the ATS is just such a tort action authorized by international law. *Id.*

International law clearly and specifically defines aiding and abetting liability. United States courts applying such liability under the ATS have correctly held that under international law, the actus reas of aiding and abetting consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," and that the mens rea required is the knowledge that these acts assist the commission of the offence; the accomplice need not share the principal's wrongful intent. *Mehinovic*, 198 F. Supp. 2d at 1356 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1/T, judgment, ¶¶ 192-249 (ICTY Trial Chamber, Dec. 10, 1998), *reprinted at* 38 I.L.M. 317 (1999)); *accord Presbyterian Church of the Sudan*, 244 F. Supp. at 323-24. Critically, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, upon which the *Mehinovic* and *Talisman* courts relied, was based on an exhaustive analysis of the jurisprudence of the post-World War II tribunals. *See, e.g.*, *Furundzija* IT-95-17/1**,** ¶¶ 195-97, 200-25, 236-49. Clearly, customary international law provides a "specific, universal and obligatory" norm against aiding and abetting that was well-established long before the Vietnam War.

In *Sosa v. Alvarez-Machain*, the Supreme Court specifically concluded that ATS claims are "claims under federal common law." 124 S. Ct. 2739, 2765 (2004). As a tort statute, the ATS should be read in the context of tort principles. Under the ATS, international law is part of federal common law. *See id.* at 2764; *see also In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992); *Kadic*, 70 F.3d at 246; *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980). Thus, international law principles of aiding and abetting should inform issues ancillary to the ATS to determine liability.

In any event, there is no requirement that aiding and abetting liability be "specific,

universal and obligatory" in order to be actionable. That requirement applies only to the question of whether the underlying abuse is an actionable violation of international law, not to every liability rule in the case. *Sosa,* 124 S. Ct. at 2774-75. Since ATS claims are common law claims, courts may apply common law liability rules while drawing on international principles. Defendants incorrectly argue that every legal principle in an ATS case must have universal adherence in international law. Def. Mem. at 45-46. Such a principle would eviscerate the ATS, because international law is silent as to many ancillary issues. Defendants' position contradicts *Sosa*'s holding that the ATS was intended to afford redress for international law violations. *Sosa,* 124 S. Ct. at 2761, 2764. It is also inconsistent with the use of the word "tort," which indicates that tort principles would be used to effectuate the jurisdiction granted in the ATS.[7] Aiding and abetting is recognized generally under federal common law.[8] *See Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) ("Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct."). United States tort law, like international law, requires only that one *knowingly* provide substantial assistance to a person committing a tort. *Restatement (Second) of Torts* § 876(b)(1977). Thus, whether the court looks to federal common law tort principles or international law, aiding and abetting is actionable.

Aiding and abetting liability holds a defendant accountable for its own acts; it is not

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[7] Defendants' argument, Def. Mem. at 45, is based on a misreading of footnote 20 of *Sosa*. There, the Court held only that courts should look to international law to determine whether a given norm requires state action. *Sosa*, 124 S. Ct. at 2766 n.20.

[8] Beth Stephens, "Corporate Liability: Enforcing Human Rights through Domestic Litigation," 24 *Hastings Int'l & Comp. L. Rev.* 401, 408-9 (2001); *see also* Stephens and Ratner, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS, Transnational Publishers, Inc. (1996) 120-122.

vicarious liability. Because international law prohibits aiding and abetting human rights violations, such complicity is itself a "tort . . . committed in violation of the laws of nations." ATS, 28 U.S.C. § 1350. Thus, the plain words of the statute compel recognition of aiding and abetting liability.[9] Indeed, courts have repeatedly looked to federal common law as well as international law to find aiding and abetting liability under the ATS. *See, e.g., Presbyterian Church of the Sudan v. Talisman Energy*, *Inc.,* 244 F. Supp. 2d 289, 320-24 (S.D.N.Y. 2003) (conspiracy and aiding and abetting are actionable under ATCA); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322 (N.D. Ga. 2002) ("United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law."); *Abebe-Jira v. Negewo,* 72 F.3d 844, 845-48 (11th Cir. 1996) (affirming verdict for torture and cruel, inhuman or degrading treatment where defendant supervised or participated with others in "some of the acts of torture" against plaintiffs); *Carmichael v. United Technologies Corp.***,** 835 F.2d 109, 113-114 (5th Cir. 1988) (ATS jurisdiction over "private parties who conspire in, or *aid or abet,* official acts of torture by one nation against the citizens of another nation.") (emphasis added); *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1332 (S.D. Fla. 2002) ("Defendant may be held liable under the ATCA for indirectly participating in a common scheme or conspiracy, or aiding and abetting others, in committing the alleged abuses."); *Eastman Kodak Co. v. Kavlin,* 978 F. Supp. 1078, 1091-92 (S.D. Fla.1997) (asserting ATCA jurisdiction over claim of conspiracy between private

[9] Congress codified this principle in the 1992 Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note. The Senate noted that the TVPA covered "lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No 1, 249 102nd Cong., 1st Sess. (1991). Given that torture requires state action, recognition of aiding and abetting liability in the TVPA demonstrates that such liability applies to private parties who aid and abet government torts even if the tort requires state action.

defendant and state actors to cause plaintiff's arbitrary and inhuman detention); *see also Hilao v. Estate of Marcos,* 103 F.3d 767, 776 (9th Cir. 1996) (affirming district court's jury instruction allowing foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance'").

Defendants erroneously assert they are immune from suit unless they had the ability to control how the military used their products. Def. Mem. at 56. As detailed above, however, control is not a requirement of either the actus reus or mens rea of aiding and abetting liability. Defendants misstate the holdings from the post-World War II tribunals. Def. Mem. at 55-56. For example, in *U.S. v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1217, 1222 (1952), Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. Steinbrinck obviously had no control over the Nazis, yet he was convicted of complicity. In the same case, Flick, the head of a group of industrial enterprises, was convicted of slave labor based on an employee's decision to increase production quotas knowing forced labor would be required to do so. *Id.* at 1194-1202. The Tribunal held Flick fully responsible although the slave labor program had its origin in and was operated by the Nazi regime, and he did not "exert any influence or [take] any part in the formation, administration or furtherance of the slave-labor program." *Id.* at 1196, 1198. Likewise, in *In re Tesch*, there was no suggestion that those convicted could control how the Nazis used poison gas at Auschwitz;

they were deemed only to have had knowledge. *See* 13 Int'l L. Rep. at 250.[10] As *Presbyterian Church* held, "providing certain means to carry out crimes constitutes substantial assistance even if the crimes could have been carried out some other way." 244 F. Supp. 2d at 324. The Nuremberg defendants were convicted of the same abuses alleged here, (war crimes and crimes against humanity), *e.g. Flick*, 6 Trials at 1194, 1202, and indeed in *Tesch* (*Zyklon B Case*), of the same act, providing materiel. The prohibition on aiding and abetting clearly applies to these defendants.

The Government claims that aiding and abetting liability is unwarranted because it would allow plaintiffs to challenge the acts of foreign governments by suing individuals complicit in government abuses, and therefore will lead to "greater diplomatic friction." Statement of Interest at 44. *Sosa*, however, expressly approved of cases like *Marcos* and *Filartiga* which challenged the abuses of former government officials themselves, including a former head of state. 124 S. Ct. at 2774-75. Moreover, the Government raised these kinds of concerns in *Sosa*, and the Court held they are appropriately addressed, if at all, on a "case-specific" basis. 124 S. Ct. at 2766 & n.21. Clearly, the Government's vague and speculative references to the possibility of future tensions with foreign governments, arising out of cases not before this court, do not support a wholesale refusal to recognize under the ATS the aiding and abetting liability enshrined in

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[10] Defendants' argument that an aider and abettor must have some influence over the acts of the principal is based on a misreading of their own expert's opinion. As Professor Anderson notes, Anderson Dec. at ¶97, in *Tesch (Zyklon B Case)*, the Judge Advocate asked whether one defendant, who was in a "subordinate position" in the firm, was in a position to "influence the transfer of gas to Auschwitz." 13 Int'l. L. Rep. at 253. In other words, the question was whether the defendant had any control over whether *assistance* was given, because if not, he could not have been charged with assisting. *Tesch* does not support defendants' argument that the defendant must have control over whether the principal commits the crime.

international and domestic law.

Defendants erroneously argue that *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), precludes recognition of aiding-and-abetting liability in the ATS context. Def. Mem. at 25. *Central Bank* is inapposite. Therein, the Court rejected aiding-and-abetting liability in the context of violations of the Securities Exchange Act.

The *Central Bank* holding was based on the text of Section 10(b) of the Act, which prohibited the use of any "manipulative or deceptive device or contrivance" in connection with a securities transaction. Because aiders and abettors did not themselves use any manipulative or deceptive device or contrivance, the Court found no liability. 511 U.S. at 175. The Court specifically held that this language in Section 10(b) "resolves the case," 511 U.S. at 178, and expressly limited its holding to the securities context**.** *Id*. at 182. Courts have correctly rejected the argument that *Central Bank* precluded aiding-and-abetting liability in the context of ATS claims, based on the text of the ATS, and the existence of other ATS cases specifically upholding such liability. *Presbyterian Church of the Sudan,* 244 F. Supp. 2d at 320-21.

In contrast to Section 10(b) of the Securities Exchange Act, both the text and congressional intent of the ATS support aiding and abetting liability. Given international law's express prohibition against aiding and abetting human rights abuses, a person who does so has himself committed a tort in violation of international law and is therefore liable by the statute's plain terms. *See, supra at Section B***;** *see also* U.S. Department of Defense, *Military Commission Instruction No. 2*, Art. 6(C), at 16-17 (April 30, 2003) (abettor is responsible "as a principal, even if another individual more directly perpetrated the offense).

In *Boim v. Quranic Literacy Institute*, the Government argued and the Seventh Circuit

held that *Central Bank* is inapplicable to 18 U.S.C. § 2333(a), which permits U.S. nationals "injured . . . by reason of an act of international terrorism" to sue for damages**;** the court did so, in part because Congress intended "to import general tort law principles, and those principles include aiding and abetting liability." 291 F.3d 1000, 1019 (7th Cir. 2002). The ATS is indistinguishable in this regard from § 2333(a), since it creates a common law tort claim which thereby authorizes federal courts to import common law rules of liability. *See id*. at 1010. The Seventh Circuit also observed that the Supreme Court "carefully crafted *Central Bank*'s holding to clarify that aiding and abetting liability would be appropriate in certain cases, albeit not under 10(b)." *Id.* at 1019.

Finally, prudential concerns also favor aiding-and-abetting liability here. While *Central Bank* expressed concern that imposing aiding-and-abetting liability in the securities context might lead to excessive deterrence and therefore inefficient markets, 511 U.S. at 188, *Boim* found such arguments inapplicable to "cutting off the flow of money to terrorists," 291 F.3d at 1019. Economic efficiency concerns are similarly inapplicable to aiding-and-abetting liability for war crimes and crimes against humanity.

Defendants also erroneously assert that *Central Bank* precludes recognition of aiding and abetting liability under the TVPA. Def. Mem. at 25-26. In *Wiwa v. Anderson,* the court properly rejected this exact argument, holding that "the language and legislative history of the TVPA supports liability for aiders and abettors." 2002 U.S. Dist. LEXIS 3293 at 49-52 (S.D.N.Y. 2002). Remarkably, defendants base their argument on claims about "the legislative history of the Act," Def. Mem. at 25-26, but simply ignore the fact that the legislative history expressly provides for aiding and abetting liability. S. Rep. No. 1, 249 102nd Cong., 1st Sess. (1991) (TVPA

covered "lawsuits against persons who ordered, abetted, or assisted in the torture").

C. DEFENDANTS' STATUS AS CORPORATIONS DOES NOT IMMUNIZE THEM FROM LIABILITY.

The Supreme Court has specifically held that international law allows courts to pierce the corporate veil in certain circumstances. *First Nat'l City Bank (FNCB) v. Banco Para El Comercio*, 462 U.S. 611, 628-30 (1983). If, as defendants contend, corporations are per se immune from international law liability, the ruling in *FNCB* would have been unnecessary.

1. Courts Have Consistently Recognized Corporate Liability under the ATS.

The potential liability of corporations under the ATS has been widely recognized or assumed by federal courts.[11] The Supreme Court acknowledged that corporations can be sued under the ATS. *Sosa v. Alvarez-Machain*, 124 S.Ct. at 2766, n.20. The Second Circuit has considered numerous cases where plaintiffs sued a corporation under the ATCA for alleged breaches of international law. *Jota v. Texaco, Inc.,* 157 F.3d 153 (2d Cir.1998) (vacating the district court's dismissal, on the grounds of *forum non conveniens*, international comity and failure to join an indispensible party, and remanding); *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88 (2d Cir. 2000) (reversing dismissal on *forum non conveniens* grounds and finding personal jurisdiction over the defendant corporations); *Bigio v. Coca-Cola Co.,* 239 F.3d 440 (2d Cir. 2000) (affirming dismissal of the ATS claim because the defendant corporation did not "act under color of law" simply by purchasing property from the government); *Aguinda v. Texaco, Inc.,* 303 F.3d 470 (2d Cir. 2002) (dismissed based on *forum non conveniens*). Although none of

[11] In *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428 (1989), the Court did note that the ATS "by its terms does not distinguish among classes of defendants." *Id.* at 438.

these cases explicitly addressed the liability of corporations under the ATS, the disposition of these cases is inconsistent with the assertion that no claim under the ATS can be brought against corporations. In each of these cases, the Second Circuit acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility. *See also Carmichael v. United Technologies Corp.,* 835 F.2d 109, 113-14 (5th Cir. 1988) (assuming explicitly that the ATS provided subject matter jurisdiction for a claim against a corporation).

The issue of corporate liability under the ATS was decided affirmatively in numerous district court cases. In *Presbyterian Church of the Sudan v. Talisman*, 256 F. Supp. 2d at 311-19, the court reviewed the various precedents in federal common law and before international tribunals, which support the view that a corporation could be held liable for a violation of an international legal norm. The *Talisman* court noted with approval the same conclusion analyzed by Steven R. Ratner in "Corporations and Human Rights: A Theory of Legal Responsibility," 111 *Yale L.J.* 443 (2001) and INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), available at http://www.ichrp. org/ac/excerpts/41.pdf. In *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004), the court held that sufficient evidence precluded summary judgment and permitted plaintiffs to proceed against a U.S. corporate defendant on the theory that its Nigerian subsidiary was acting as defendants' agent or that the defendant corporation aided and abetted in the human rights abuses.

Defendants present no policy reason why corporations should be uniquely exempt from tort liability under the ATS, and no court has presented one either. Concluding that corporations

could be subject to liability under the ATS, the *Talisman* court stated:

> Such a result should hardly be surprising. A private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law. *See* Jordan J. Paust, Human Rights Responsibilities of Private Corporations, 35 Vand. J. Transnat'l L. 801, 803 (2002). ... Given that private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations. Indeed, while Talisman disputes the fact that corporations are capable of violating the law of nations, it provides no logical argument supporting its claim.

244 F. Supp. 2d at 318.

In any event, even if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS. As noted above, the Supreme Court made clear that an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts.

2. Courts Have Also Recognized Corporate Liability in the Context of the Post-WWII Tribunals and U.S. Criminal Law.

Of particular note, in the context of this case, is the analysis of the precedents from the post Second World War tribunals. The Nuremberg Charter permitted the prosecution of "a group or organization" and allowed the tribunal to declare that entity a "criminal organization." Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, 1951, arts. 9, 10, 82 U.N.T.S. 279. Defendants' international law experts in *Talisman* and in the present case point out that the tribunals heard charges against officials of various corporations which cooperated with the Nazi regime in carrying out atrocities. However, the tribunals "consistently spoke in terms of corporate liability." *Talisman*, 244 F. Supp. 2d at 315-16, citing Ratner, 111 *Yale L.J.* at 478

(quoting *United States v. Krauch* and *United States v. Krupp)*.

U.S. corporations and individuals are already subject to criminal prosecution for aiding and abetting torture, genocide, and war crimes *even when committed abroad*, *see* 18 U.S.C. §§ 2, 1091, 2340A, 2441, as well as for aiding and abetting numerous crimes. *See, e.g.*, *id.* §§ 2, 1589.[12]

3. **Courts Have Recognized Corporate Liability under the Torture Victim Protection Act (TVPA).**

Defendants argue that by its plain language, the TVPA precludes corporate liability for involvement in torture. This assertion is inconsistent with the case law. In *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla 2003), the court held that a suit against a corporation would lie under the TVPA. The *Sinatrainal* court gave three primary reasons for its conclusion that Congress did not intend to exclude corporations from the TVPA. First, the purpose of the TVPA is "to permit suits 'against persons who ordered, abetted, or assisted in torture.' " *Id.* at 1358 (citing S. Rep. No. 249, 102d Cong., 1st Sess. (1991) (1991 WL 258662, *9-10)). Second, the court noted that the Senate Judiciary Report does not mention any exemptions for corporations and that courts have held corporations liable for violations of international law under the ATS. *Sinaltrainal*, 256 F. Supp. 2d at 1358. Finally, the *Sinatrainal* court found persuasive the Supreme Court's holding in *Clinton v. New York,* 524 U.S. 417, 428, n. 13 (1998), that the term "individual" is synonymous with the term "person," and that the term "person" often has a broader meaning in the law than in ordinary usage. 256 F. Supp. 2d 1358-59. The reasoning of *Sinatrainal* was approved in *Rodriguez v. Drummond*, 256 F. Supp. 2d 1250, 1267

[12] *See U.S. v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (1989) (prosecution of corporate defendants).

(N.D. Ala 2003). Bearing in mind that a corporation generally has the same status as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could have and would have expressly stated so.[13]

D. THE COURT NEED NOT DEFER TO THE GOVERNMENT'S INTERPRETATION OF INTERNATIONAL LAW.

The government argues that substantial deference should be given to the Executive's opinion on the content of both treaty and customary law. Statement of Interest at 47-49. The fallacy in the Government's argument about customary law is apparent from the Supreme Court's analysis of customary law in *Sosa v. Alvarez-Machain.* Therein, the Court reviewed numerous sources to determine whether the detention at issue violated customary law before it concluded that it did not. 124 S.Ct. at 2766-69. Nowhere in that analysis is a discussion of the Government's position that the detention did not violate customary law. If, as the Government maintains, the Executive's determination of the content of customary law were entitled to deference, *Sosa* would have made some reference to the Government's position. It did not do so. Indeed, *Sosa* discusses the ATS as a grant to the courts as jurisdiction to interpret customary law: "The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction." *Id.* at 2765.

Similarly, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, involved the detention of an alleged enemy combatant, associated with the Taliban, during military operations in Afghanistan. The Government took the position that the President's determination that Taliban detainees do not

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[13] The *Rodriguez* court specifically rejected the contrary holding in *Beanal v. Freeport-McMoRan, Inc.,* 969 F.Supp. 362, 382 (E.D.La.1997). *Id.* at 1266-1267.

qualify as prisoners of war is conclusive as to Hamdi's status and removes any doubt that would trigger application of the Geneva Convention's tribunal requirement. *Id.* at 2658 (Souter, J., concurring). Nevertheless, the Court looked to the customary laws of war, and specifically to Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 to determine that Hamdi's detention could not last longer that active hostilities. *Hamdi.* 124 S.Ct at 2641. Thus, *Hamdi*, like *Sosa*, stands for the principle that it is the proper role of the court to determine the content of customary law.

The dissent in *Paquete Habana* expressed a rule of deference to the Executive such as is now argued by the government. As Justice Harlan, 175 U.S. at 720-21, opined:

> In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.
>
> Exemptions may be designated in advance, or granted according to circumstances, but carrying on was involves the infliction of the hardships of war, at least to the extent that the seizure or destruction of enemy's property on sea need not be specifically authorized in order to be accomplished.

However, the majority rejected this principle of deference to the Executive branch in the interpretation of international law. The majority looked to "precedents and authorities" to determine that by " general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law," that fishing vessels are exempt from capture as a prize of war. *Id*. at 708.

In *The Paquete Habana,* 175 U.S. at 700, the Court held: "International law is part of our law, and *must be ascertained and administered by the courts* of justice of appropriate

jurisdiction, as often as questions of right depending upon it are duly presented for their determination" (emphasis added). Just last term, the Supreme Court in *Sosa* affirmed the continuing vitality of the *Paquete Habana* decision. 124 S.Ct. at 2764. This court should likewise reject the Government's argument for deference to its interpretation of international law.

The cases on which the Government relies do not support a rule of deference argued by the Government. The Government cites a series of cases involving interpretation of bilateral treaties which do not counsel deference to the Executive's interpretation of international law. In the context of bilateral treaties, the court's role is to give effect to the intentions of the parties to the treaty. *Sumitomo Shoji America, Inc. v. Avagliono*, 457 U.S. 176, 185 (1982) (The court's "role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.") Thus the principle of deference is inapplicable to customary law which is not "negotiated." Similarly, the opinions of parties to the agreement other than the United States governments are equally significant. The language of the treaty and the history of negotiations are also relevant. *See, e.g., Sumitomo Shoji America,* 457 U.S. at 185. Indeed, the courts look first to language of the treaty itself. *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000), *citing United States v. Alvarez-Machain,* 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.") *See also*, *United State v. Al-Hamdi*, 356 F.2d 564, 570 (4th Cir 2004) ("When interpreting a treaty, we "first look to its

terms to determine its meaning.")[14]

Finally, the government fails to include in its citation to *Kolovrat v. Oregon*, 366 U.S.187, 193 (1961), the first half of the sentence quoted, which states that, "courts interpret treaties for themselves," and thus ignores the primary role of the court in interpreting even bilateral treaties. Statement of Interest at 48. *See also, Charlton v. Kelly*, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight").

The government's reliance on the Restatement (Third) of the Foreign Relations Law of the United States, Statement of Interest at 48, does not support its claim for deference of an opinion presented in a particular case. The Restatement distinguishes between such expressions of executive opinion and those presented in diplomatic negotiations.

> Courts are more likely to defer to an Executive interpretation previously made in diplomatic negotiation with other countries, on the ground that the United States should speak with one voice, than to one adopted by the Executive in relation to a case before the courts, especially where individual rights or interests are involved. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984). Compare the discussion of determinations of international law in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432- 33, 84 S.Ct. 923, 942, 11 L.Ed.2d 804 (1964).

Restatement, (Third) § 326 note 2.

E. THERE IS NO "CONTROLLING EXECUTIVE ACT" HERE WHICH VITIATES OBLIGATIONS UNDER INTERNATIONAL LAW.

The courts have long acknowledged that customary law is incorporated into federal

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[14] *Al-Hamdi* concerned the diplomatic certification issued by the United States.

common law. 124 S.Ct. at 2765. *Sosa* recognized the power of Congress to limit the reach of customary law as part of domestic law. *Id*. Likewise, courts have recognized that "a controlling executive act" may have a limiting effect.[15] *Paquete Habana*, 175 U.S. at 699. The Government attempts to transform this principle into a doctrine which would find that any act undertaken by the executive branch would constitute a "controlling executive act" sufficient to override the application of customary law.

Paquete Habana, 175 U.S. at 711, requires more.

> The decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court, even *by direction of the Executive*, without express authority from Congress, appears to us to repel any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court, for want of a distinct exemption in a treaty or other public act of the government. (Emphasis added).

In support of its argument that a "controlling executive act" modified any customary law which would prohibit the use of Agent Orange in Vietnam, the government points out that President Kennedy authorized the restricted use of defoliants and required that "the targets should be chosen so as to cause the least damage possible to non-Viet Cong farmers." Statement of Interest at 11. However, this pronouncement falls far short of the type of sweeping declaration claimed by the Government. Indeed, a 1965 United States Department of the Army Field Manual mandated that only the destruction of crops by chemicals "harmless to man" is permitted. *See,* U.S. Dept. of the Army, Field Manual 27-10, *The Law of Land Warfare* at 18

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[15] The Court need not address the question of whether the executive could issue a declaration that exempts the United States from the application of universal and obligatory norms, such as the prohibition of crimes against humanity, because in this instance, no such declaration was made by the executive.

(July 1965). There is no statement by the executive that provides for the use of a poison against the civilian population of Vietnam, and certainly no statement by the President which was comparable to that discussed in *The Paquete Habana*. Thus, there is no evidence of a "controlling executive act" by the president which nullified the obligations of the United State not to engage in war crimes or crimes against humanity. Just as the Court could review the seizure of the Paquete Habana, this court can consider whether the use of poison on a civilian population violated customary law.

Moreover, according to the Government's argument, the policy of the United States government to use Agent Orange would act as a shield to the corporate defendants, despite the allegations of the Amended Complaint that defendants knew of dangers in the use of Agent Orange which they did not reveal to the Government. Thus the Government's acts, taken in ignorance, would provide a shield for the corporation.

F. PLAINTIFFS HAVE STATED A CLAIM FOR WAR CRIMES

1. Under International Law, Wartime Acts must Conform to the Principles of Necessity and Proportionality.

The prohibition against war crimes has long been recognized as a human rights norm. *Sosa*, 124 S. Ct. at 2783; *Kadic,* 70 F.3d 232. *Presbyterian Church of the Sudan,* 244 F. Supp. 2d at 305. Some norms, such as the prohibition against genocide or the use of poison against civilian food and water supplies, are strictly outlawed under international law. *See infra* at Section F.3. Others, as defendants concede, such as international law prohibiting war crimes, require that military action be limited by the principles of military necessity and proportionality. Def. Mem. at 52; Opinion of W. Michael Reisman (Reisman Opinion) at 54-55. Thus, "loss of

life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained." Def. Mem. at 52, quoting U.S. Dept. Of the Army, Field Manual 27-10, *The Law of Land Warfare* ¶41. Nonetheless, defendants erroneously contend that this well established norm is never actionable under the ATS because it lacks specificity. *Id.* Defendants misconstrue the ATS' "specificity" requirement in a manner fatal to their argument.

To be "specific" for ATS purposes, a norm need only be sufficiently determinate to demonstrate international recognition that the particular conduct at issue violates international law. *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 520, 526 (S.D.N.Y. 2002), *affirmed* 343 F.3d 140 (2d Cir. 2003); *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995); *Forti v. Suarez-Mason*, 694 F. Supp. at 709. The Supreme Court followed this established approach in *Sosa*. 124 S.Ct. at 2769 ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.")

Moreover, the Supreme Court has held that a norm must contain no "less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted." *Id.* at 2765. The Court cited *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163-180, (1820), as an illustration of the specificity with which the law of nations defined piracy. *Id.* In *Smith,* the Court expressly noted the "diversity of definitions" of piracy, but held that despite that diversity, "all writers concur, in holding, that robbery, or forcible depredations' upon the sea, *animo furandi*, is piracy," and a defendant could be convicted of these acts. 18 U.S. at 161.

Thus, it is clear that the question is not whether the proportionality principle is always determinate; rather, as the Government concedes, the only question is whether the military's use of these defoliants in Vietnam was necessary and proportional to the military objective. Statement of Interest at 36, n. 26**.**

2. <u>It Is Inappropriate to Evaluate the Necessity and Proportionality of the Use of Defoliants at this Stage in the Litigation.</u>

Defendants concede that the norm of proportionality is enshrined in U.S. criminal law. Def. Mem. at 57. The presence of necessity and proportionality as part of the legal system does not in any way suggest, as defendants argue, that Congress intended to *limit* enforcement of the norm to criminal prosecution, any more than a federal criminal prohibition on murder would preclude civil actions in tort. Moreover, the presence of this concept in the United States criminal system demonstrates that the norm is well accepted by the United States and definable.

Even if this Court finds that the principle of necessity and proportionality is applicable to the war crime of poisoning of crops or water, dismissal on that basis would be inappropriate. That particular issue simply cannot be decided against plaintiffs at this stage of the proceedings. A motion to dismiss must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). At this stage, the court must accept as true plaintiffs' allegations that up to four million people were exposed to defoliants, that not less than three million people have already been injured by this exposure, and that extensive environmental damage with devastating ecological effects also resulted from the spraying. Amended Complaint (AmCmplt) at ¶¶ 81-83,

252-53. Defendants have not moved for summary judgment; they have not produced any evidence contradicting plaintiffs' allegations concerning the scale of the harm, nor have they sought to introduce any evidence concerning the scope of the military benefit realized through the use of defoliants. In the absence of any factual record, it manifestly does not "appear beyond doubt" that plaintiffs will be unable to show that the harms from the use of defoliants were so disproportionate to the expected military benefits that the spraying violated international law. In short, defendants' argument that plaintiffs cannot prevail on their war crimes claims is premature.

3. The International Law Norm Against the Use of Chemicals and Poisons Was Well Established Before the Vietnam War.

"There is no authority for the view that poisoning of crops or water is permissible in order to achieve military objectives." *See* Opinion of Professor George P. Fletcher, submitted with Plaintiffs' Opposition to Defendants' Motion to Dismiss (Fletcher Opinion) at 54. The necessity and proportionality arguments do not apply. *See* Fletcher Opinion at 51-55 (esp. at 53-54) (citing Gerhard Werle, Volkerstrafrecht, at Point 1081, at 406 (2003) ("The use of poison cannot be justified as a matter of military necessity."). Despite the authorities to the contrary, defendants urge that the norm is limited by the doctrine of necessity and proportionality.

As far back as the Lieber Code of 1863, international instruments reflected the fact that customary laws of war prohibited "the use of poison in any way" even in the face of claims of "military necessity" (Art. 16). Article 70 of that Code states that, "the use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war." *See* Opinion of Professor

Jordan J. Paust (Paust Opinion) at 15. The Hague Convention IV Article 23 (1907) reflected the prohibition: "In addition to the prohibitions provided by special Conventions, it is especially forbidden: (a) To employ poison or poisoned weapons." Hague Convention Respecting the Laws and Customs of War on Land, Art. 23(a), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. In addition, the "limited means" provision of Article 22 of the 1907 Hague Convention as well as the "unnecessary suffering" language of Article 23(e) should prohibit a combatant party from employing chemical weapons or any similar substances. *Id*.

The Preamble to the1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare reflected the fact that the prohibition against the use of poisons as an instrument of war was already a universal norm:

> The undersigned Plenipotentiaries, in the name of their respective governments: Whereas the use in war of asphyxiating, poisonous or other gases *and of all analogous liquids, materials or devices* has been justly condemned by the general opinion of the civilized world, and Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the World are Parties; and To that end this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and practice of nations; … ."

Protocol for the Prohibition of the Use in War of Asphyiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 L.N.T.S. 65, No. 2318 (1929) (signed at Geneva) (emphasis added).

International law scholars, "*e.g.* Lauterpacht, Schwarzenberger, Stone, and Blix hold the view that the Protocol was a mere declaration of existing customary international law."[16] Wil D.

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[16] In challenging reliance on the 1925 Geneva Protocol, defendants misconstrue *Sosa* by suggesting that a customary norm cannot be actionable if it is contained in a treaty which the

Verwey, RIOT CONTROL AGENTS AND HERBICIDES IN WAR, 264**,** A.W. Sijthoff: Netherlands (1977), *citing* L. Oppenheim / Hersch Lauterpacht, INTERNATIONAL LAW, 344, vol. II, McKay (1955); Georg Schwarzenberger, THE LEGALITY OF NUCLEAR WEAPONS, 38, London, Stevens (1958); Julius Stone, LEGAL CONTROLS OF INTERNATIONAL CONFLICT, 556, London, Stevens (1959); and H. Blix, MEMORANDUM ON A GENERAL ASSEMBLY DECLARATION CONCERNING THE PROHIBITION OF BIOLOGICAL AND CHEMICAL WARFARE, 12-13 (*on stencil*, Stockholm, 14 Nov. 1969) (Blix holds that "it is impossible to read the proceedings which led to the adoption of the 1925 Protocol without gaining the impression that the majority of delegates felt they were largely confirming an existing prohibition, formulated most lately in the Washington Treaty." Verwey at 264.

In a six-volume study, the Stockholm International Peace Research Institute (SIPRI) discussed the application of the Geneva protocol to herbicide warfare, concluding that, "no grounds can be found for excluding antiplant agents from the prohibition of the Protocol." THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE, A STUDY OF THE HISTORICAL, TECHNICAL,

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U.S. has not ratified or which the Senate declares to be non-self-executing. Def. Mem. at 41-42, 48. However, after mentioning the non-self-executing declaration in a relevant treaty, *Sosa* went on to examine whether the customary norm prohibiting arbitrary detention applied to Dr. Alvarez's circumstances. 124 S.Ct. at 2767-69. If *Sosa* had accepted defendants' argument, it would have dismissed Alvarez's claim simply by referring to the fact that the treaty was not self-executing. Moreover defendants' position is inconsistent with *Sosa* and would render the ATS a dead letter, because the Senate has attached non-self-executing declarations to *every* human rights treaty it has ratified, including those for example that prohibit torture. There is simply *no* evidence that the Senate intended to repeal the ATS *pro tanto* when it conditioned U.S. ratification of human rights treaties with a non-self-executive declaration. There are many reasons a government may refuse to ratify a treaty or make it self-executing while still adhering to a customary norm embodied therein. For example, a non-self-executing declaration is necessary to avoid the operation of Article VI of the U.S. Constitution which would otherwise have made *every* provision of these treaties judicially enforceable whether they were customary norms or not.

MILITARY, LEGAL, AND POLITICAL ASPECTS OF CBW, AND POSSIBLE DISARMAMENT MEASURES, Vol. III, *CBW and the Law of War* 76, SIPRI (1973).

> Even if it could not be maintained that a broad interpretation of the Protocol is unambiguously imposed, it is nonetheless only in a relatively limited set of situations that the use of anti-plant agents might be held to be at all permissible. These consist principally of the use of chemical substances on a scale where ecological effects are not likely to occur, and their use against industrial crops serving as war munitions, against vegetation hampering military operations, or *under certain highly restrictive conditions*, against food crops and domestic animals.

Id. at 78 (emphasis added).

Similarly, the Nuremberg Charter (1945) and Nuremberg Principles (1951) prohibit the use of poisons as a violation of customary law.[17] The Charter, Art 6(b), states: "War Crimes: namely, violations of the laws and customs of war. Such violations shall include, *but not be limited to*, *murder, ill-treatment* or deportation to slave labor or for any other purpose *of civilian population* of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, *or devastation not justified by military necessity."* (Emphasis added). Article 6(b) was specifically "…based on Hague Convention IV on Land Warfare of 1907 and the Geneva Conventions of 1929," and thus incorporates the prohibition on poisons articulated in those conventions. Machteld Boot, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT p. 187 (2002). The Nuremberg Tribunal noted that the crimes defined by Art.

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[17] The Charter was signed by the U.S., and 22 other nations, including France, Great Britain, the USSR and Australia. Machteld Boot, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 185, Transnational Publishers/ Intersentia (2002).

6(b) of the Charter were already recognized as war crimes under international law, as covered by the Hague Convention of 1907. "That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument." 22 IMT Trials at 497, *c.f.*, Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, 89 Oxford University Press (2001) (noting that the international military tribunal found these rules so well settled that they even applied to WWII belligerents not parties to the 1907 Hague Convention).

The Geneva Conventions of 1949, Article 50, lists among the grave breaches "*willfully causing great suffering or serious injury to body or health*." According to scholars Abrams and Ratner: "Although the Convention does not define the […] terms [of the list of grave breaches], the official commentary and scholars have elaborated on the scope of these crimes based on general principles of law among states. The grave breaches provisions serve to criminalize a core set of violations by mandating [under Art. 146] that states enact penal legislation and then extradite or prosecute offenders." *See,* Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, 85-86. According to the official commentary on the Geneva Conventions: "Grave breaches . . . shall be those involving any of the following acts, *if committed against persons or property protected by the Convention*: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destructions and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Jean S. Pictet, Commentary for The Geneva Conventions of 12 August 1940, 370 ICRC: Geneva (1952) (emphasis added).

Although defendants contend that the use of Agent Orange against a civilian population in Vietnam was official approved U.S. policy, this is contradicted by official U.S. military protocol which forbids the use of substances such as Agent Orange. For example, a 1965 United States Department of the Army Field Manual mandates that only the destruction of crops by chemicals "harmless to man" is permitted. *See*, U.S. Dept. of the Army, Field Manual 27-10, *The Law of Land Warfare* at 18 (July 1965). According to the Amended Complaint, Agent Orange had harmful effects on humans of which defendants were aware and about which defendants failed to warn the Government. AmCmplt at ¶¶ 88-19, 116. Had the Government been aware of the dangers, military procedure would have required that the toxin be removed from the arsenal of potential weapons. Taken together, the practice of states during WWII, the public statements of U.S. officials, and the internal guidelines of the U.S. military indicate that state practice at the time of the Vietnam War supported the universal ban on chemical weapons.

4. <u>The Geneva Conventions Are Enforceable in U.S. Courts.</u>

While the federal courts have divided on whether the Geneva Conventions are enforceable in federal courts,[18] the text and history of the Convention clearly establish the drafters' intent to confer individual rights enforceable in domestic courts. The language of the

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[18] *Compare Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (declaring that the GPW "under the Supremacy Clause has the force of domestic law"); *United States v. Lindh*, 212 F. Supp. 2d 541, 553-554 (E.D. Va. 2002) ("[T]he GPW provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause.") (footnotes omitted); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POW in a court of law") *with Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2633 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (opinion of Bork, J.); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (holding that Geneva Conventions are not self-executing).

Conventions explicitly refers to the protections afforded as "rights." The Conventions provide that the "protected person may in no circumstances renounce in part or in entirety *the rights secured to them by the Present Convention*." Geneva Convention Relative to the Treatment of Protection of Civilian Persons in Time of War, Aug. 12, 1949, Article 8. Article 7 of that Convention states that nations cannot "*restrict the rights* which [the Conventions] confer upon [protected persons]." (Emphasis added). The 1949 Conventions adopted the unanimous recommendation of the Red Cross Societies "to confer upon the rights recognized by the Conventions 'a personal and intangible character' allowing the beneficiaries to claim them irrespective of the attitude adopted by their home country." Official Red Cross Commentary on IV Geneva Convention (J. Pictet ed. 1952) at 79.

The Conventions sought to ensure that protected persons could use whatever means available, including domestic judicial remedies, to protect their rights. Thus, the drafters explicitly contemplated proceedings in domestic courts:

> [i]t should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation.

Commentary I at 84. *See also Commentary III* at 92. "From the practical standpoint . . . to assert that a person has a right is to say that he possesses ways and means of having that right respected." *Id.* at 83. Protected persons can claim the protections of the Convention "not as a favor but as a right," and "in case of violations, [Article 8 of the Convention] allows them, to employ any procedure available...." Commentary IV at 79. Further, the Commentary contemplates that protected persons may bring legal actions "in those countries at least in which individual rights may be maintained before the courts. *Id.* (emphasis added).

In general, treaty provisions such as Common Article 3, that can readily be given effect

by executive or judicial bodies, federal or State, without further legislation, are deemed self executing. Restatement on Foreign Relations (Third), ¶ 111, reporter's note 5, at 53; *Rainbow Navigation Inc. v. Dep't of Navy*, 686 F. Supp. 354, 357 (D.D.C. 1988); *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 557 (5th Cir. 1946); Inasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis", 27 *Va. J. Int'l L.* 627, 656 (1986); *Cook v. United States*, 288 U.S. 102, 119 (1933) (finding a treaty self-executing in that no legislation was necessary); *United States v. Raushcer*, 119 U.S. 407, 427-28 (1886) (holding that a treaty providing "that certain acts shall not be done" is self-executing).

The drafters of the Geneva Conventions were well aware that diplomatic measures contained in the 1929 Conventions had failed badly during wartime. *See Commentary III* at 632 (analyzing ineffectiveness of article 30 of 1929 Geneva Convention); A. Hammarskjold, *Revision of Article 30 of the Geneva Convention*, *in* International Committee of the Red Cross, *Report on Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929* at 83, 91 (1938). The very failure of these measures highlighted the need for rules directly enforceable by individuals.

The Convention's clear language and intent to create individual, enforceable rights is not negated by the provision, not involved in this case, mandating each country to enact legislation criminalizing certain grave breaches. Treaties that contain provisions enforceable by the states parties may also include provisions that confer rights upon individuals "which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. 580, 598 (1884) (analyzing provisions of a treaty separately to determine whether they are self-executing); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); Restatement, (Third), § 111, cmt. H ("Some provisions of an international agreement may be self-executing and others non-self-executing.").

In sum, the weight of authority permits plaintiffs to pursue in federal courts their rights under the Geneva Conventions. That outcome best serves the federal interest in stopping and

redressing war crimes, and is the most practical way to ensure that the Conventions' terms are respected by government contractors with the motive and opportunity to commit such violations.

G. DEFENDANTS MAY BE HELD LIABLE FOR CRIMES AGAINST HUMANITY.

The customary law norm prohibiting crimes against humanity was clearly established before the war in Vietnam. Courts have repeatedly held that crimes against humanity are actionable under the ATS, and this Court should do likewise.[20]

1. The Prohibition of Crimes Against Humanity Was Well Established Prior to the Vietnam War.

The prohibition of crimes against humanity was widely accepted among the community of nations prior to the Vietnam War. Indeed, according to international law expert, Cherif Bassiouni,

> crimes against humanity have existed in customary international law for over half a century and are also evidenced in prosecutions before some national courts. The most notable of these trials include those of Paul Touvier, Klaus Barbie, and Maurice Papon in France, and Imre Finta in Canada. But crimes against humanity are also deemed to be part of *jus cogens* - the highest standing in international legal norms. Thus, they constitute a non-derogable rule of international law.[21]

The concept of crimes against humanity originated in the 1907 Hague Convention preamble, which codified the customary law of armed conflict.[22] In 1945, the Allied Powers drafted the Nuremberg Charter for the International Military Tribunal,[23] and enacted Control

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[20] *See Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352-53 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999); *see also Sosa*, 124 S. Ct. at 2783 (Breyer, J., concurring) (noting that crimes against humanity are among the offenses which are both "universally condemned" and for which there is "agreement that universal jurisdiction exists to prosecute").

[21] Cherif Bassiouni, "Crimes Against Humanity," *in* Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know*, W.W. Norton (1999), available on line at: http://www.crimesofwar.org/thebook/crimes-against-humanity.html (last visited Jan. 16, 2005).

[22] *Id.*

[23] Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c) 1544, 1547, 82 U.N.T.S. 279, 288 (1945) [hereinafter Nuremberg Charter].

Council Law No. 10,[1] which condemned crimes against humanity and set forth basic definitional requirements. The prohibition of crimes against humanity – indeed the Nuremberg Charter as a whole – was reaffirmed in the Nuremberg Principles, drafted in 1950 by the International Law Commission at the request of the UN General Assembly.[2]

In the decades following World War II, the global condemnation of crimes against humanity is further evidenced by other international declarations. The United Nations issued repeated statements confirming the position of the community of nations. General Assembly Resolution 3 makes specific reference to the concept of crimes against humanity as stated in the Nuremberg Charter.[3] General Assembly Resolution 2391, issued in 1968, also explicitly reaffirmed the Nuremberg Charter and the Nuremberg Principles and proclaimed that "war crimes and crimes against humanity are among the gravest crimes in international law." Resolution 2391 established that no statute of limitations exists for crimes against humanity, which was even more firmly established through the 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[4] and provided further evidence of the strong international commitment to bring war criminals to justice.

2. <u>Crimes Against Humanity Are Well-defined in International Law.</u>

The Nuremburg Tribunals established that crimes against humanity encompass:

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24 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

25 Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. No. 12, at 1, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 374-378.−The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950*, vol. II, available on line at: www.un.org/law/ilc/texts/nurnberg.htm (last visited Jan. 16, 2005).

26 G.A. Res. 3, UN GAOR, 1st Sess., at 10, U.N. Doc. A/ (1946).

27 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968 (entry into force 11 November 1970), 754 U.N.T.S. 73, *available at* http://www.icrc.org/ihl.nsf/0/d9f5ba047e4af9e4c125641e004add28?OpenDocument (last visited Jan. 17, 2005).

"atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds . . ." Control Council Law No. 10, Art. II(1)(c), *quoted in United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1191 (1949).[28] As the Tribunal noted, Control Council Law No. 10 is a "statement of international law which previously was at least partly uncodified." *Flick*, 6 Trials at 1189. Time and again, the international community has defined crimes against humanity in virtually identical terms to those used in Control Council Law No. 10.[29]

3. Crimes Against Humanity Do Not Require State Action.

As the Second Circuit specifically held, crimes against humanity does not have a state action requirement. *Kadic*, 70 F.3d at 236. In so holding, the Second Circuit agreed with the U.S. government, which argued that private persons may be found liable under the ATS for violations of international humanitarian law. *Id.* at 239-40.[30]

That private actors can commit crimes against humanity has been clear since Nuremberg. The Nuremberg Charter directly addresses accomplice liability in Article 6, which states: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of

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[28] The "civilian population" requirement necessitates "either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident." *Prosecutor v. Tadic*, IT-94-1, Trial Chamber ¶648 (May 7, 1997)(Decisions of the ICTY are available at www.icty.org.) The notion of widespread abuses includes "the cumulative effect of a series of inhumane acts." *Id.* January 8, 2005.

[29] *E.g.* Charter of the International Military Tribunal, Art. 6(c), *in The Nurnberg Trial*, 6 F.R.D. 69, 130 (Int'l. Milit. Trib.1946); Statute of the International Tribunal for Rwanda, Art. 3, S/RES/955/Ann.1, 33 I.L.M 1602, 1603 (Nov. 8, 1994); Statute of the International Tribunal For the Former Yugoslavia, Art. 5, S/25704/Ann.1, 32 I.L.M. 1192, 1194, *adopted* S/Res/827, 32 I.L.M. 1203 (May 25, 1993); Rome Statute of the International Criminal Court, U.N. doc. A/CONF. 183/9*, July 17, 1998, Article 7.

[30] *See also*, Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds, 17 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL LAW, VOL. I (2000)(recognizing that under international law, acts constituting crimes against humanity need not be state policy).

a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[31] Indeed, such concern was included as well in Control Council Law No. 10:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he . . . (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) *was connected with plans or enterprises involving its commission* . . . or (f) with reference to paragraph 1 (a) if he . . . *held high position in the financial, industrial or economic life* of any such country.[32]

The Nuremberg Principles also expressly incorporate liability for accessories to international crimes; Article VII states that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI [defining crimes against peace, war crimes, and crimes against humanity] is a crime under international law."[33]

For example, under Control Council Law No. 10, the prohibition against crimes against humanity applied to "[a]ny person, without regard to. . . the capacity in which he acted." Art. II(2).[34] Accordingly, the Nuremberg Tribunals convicted a number of purely private actors for

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[31] Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c) 1544, 1547, 82 U.N.T.S. 279, 288 (1945)

[32] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). Article II, para. 2, (emphasis added).

[33] Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. No. 12, at 1, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 377. Commentary to the formulation of the Nuremberg Principles refers to the underlying norm: "[I]nternational law may impose duties on the individual, without any interpretation of domestic law directly." *Id.* At 192.

[34] Art.II, para. 2 of Control Council Law No. 10 states in relevant part: "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he . . . (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) *was connected with plans or enterprises involving its commission* . . . or (f) with reference to paragraph 1 (a) if he . . . *held high position in the financial, industrial or economic life* of any such country." (Emphasis added.) The same was true in the post-World War II Tokyo Tribunals. Charter of the International Military Tribunal for the Far East, Art. 5 (Tribunal may punish those "who as individuals or as members of organizations" committed crimes against humanity.)

crimes against humanity. For example, in *Flick*, industrialists charged with crimes against humanity argued that "individuals holding no public offices and not representing the State" could not be held responsible. 6 Trials at 1192. The Tribunal explicitly rejected that contention, holding that "[a]cts adjudged criminal when done by an officer of the government are criminal also when done by a private individual." *Id.* Although defendants "were not officially connected with the Nazi government," they were nonetheless convicted of crimes against humanity. *Id.* at 1191, 1202. Other industrialists were likewise convicted of crimes against humanity. *See, e.g., U.S. v. Krauch (I.G. Farben Trial)*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1190-92 (1949).

Thus under international law, defendants can be held liable for their participation in crimes against humanity.

H. DEFENDANTS SEEK TO CREATE A NEW HURDLE TO ATS JURISDICTION NOT RECOGNIZED IN *SOSA*.

Defendants are attempting to manufacture a new series of judicially-created barriers to the ATS jurisdiction which are not part of the Congressional design authorized by the First Congress or of the Supreme Court's holding in *Sosa*. In particular, defendants suggest that to be actionable, a norm must conform with "legislative guidance," and that claims are limited where enforcement of a norm is subject to "the check imposed by prosecutorial discretion." Def. Mem. at 31-32, 48-49, 56-57, *quoting* 124 S.Ct. at 2762-63 There is no such test in *Sosa*. Once a plaintiff alleges a "specific, universal and obligatory" norm that meets the evidentiary standard in *Sosa*, a plaintiff may enforce such norms in federal court under the ATS. The "practical considerations" discussed in § IVA of the *Sosa* opinion are not part of an additional test; they are an explanation of the rigorous standard the Court decided on in *Sosa* which does limit ATS claims to a relatively small category of human rights violations. Defendants' contrary argument would plainly thwart the Congressional intent, found by the Court in *Sosa*, that federal courts redress "torts" committed in violation of the "law of nations."

I. DISMISSAL OF PLAINTIFFS' AMENDED COMPLAINT BASED ON THE GOVERNMENT CONTRACTOR DEFENSE IS INAPPROPRIATE BASED ON THE ALLEGATIONS OF THE AMENDED COMPLAINT AND CONTRARY TO SECOND CIRCUIT PRECEDENT.

1. Because Defendants Have Not Met the Third Prong of the Military Contractor's Defense, It May Not Be a Basis for Dismissal.

The Government contends that plaintiffs' claims are barred by the "government contractor" defense. Statement of Interest at 50. The Government's arguments fails to analyze the basic elements which are necessary to that defense. The Amended Complaint alleges that defendants knew of the extraordinary dangers to civilian populations created by the use of Agent Orange, AmCmplt at ¶¶ 88-109, and failed to warn the government of those dangers. AmCmplt at ¶ 116. In such circumstances, the necessary elements of the "government contractor" defense are not met.

The elements necessary to "government contractor defense" were clearly articulated by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In that case, the Supreme Court held that the supplier of a military helicopter was not liable under Virginia state law for alleged design defects that contributed to the drowning death of a United States Marine. *Id.* at 512. The Supreme Court reasoned that state product liability claims against government contractors may be preempted by federal law if "uniquely federal interests" significantly conflict with the application or operation of state law. *Id.* at 504, 507. The Supreme Court determined that state tort law liability for design defects law is preempted "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

Assuming without conceding that the government contractor defense is applicable to

federal as well as state law claims,[35] the defense fails here because the third prong is not met. The Government recognizes that, to be entitled to the defense, the contractor must have given the warnings about the dangers of which the supplier but not the government is aware. Statement of Interest at 50.

The military contractor carries the burden of establishing the elements of the defense, including that it met its duty to warn the government of the dangers in the use of its product. *See, e.g., Beaver Valley Power Co. v. National Engineering & Contracting Co.,* 883 F.2d 1210, 1217 n. 7 (3d Cir.1989) (when the defendant moves with respect to an affirmative defense, it must establish that there is no genuine issue of material fact as to every element of that defense); *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 (9th Cir. 1997) ("The military contractor defense is an affirmative defense; [the contractor] has the burden of establishing it"); *Deniston v. The Boeing Company*, 1990 WL 37621 (N.D.N.Y.) ("The military contractor defense is an affirmative defense").

Because the Amended Complaint alleges both that defendant defense contractors had knowledge of the dangers inherent in the use of Agent Orange and failed to warn the Government of those dangers, there is no basis for concluding that the defense applies. The Government's arguments simply disregard the allegations of the Amended Complaint and the requirements of *Boyle.* Here, upon a motion to dismiss, neither defendants nor the Government meet the burden with regard to defendants' duty to warn.

The issue of fact, whether defendants had knowledge of the hazards to the Vietnamese civilians, is distinct from prior Agent Orange litigation. In the prior cases, the plaintiffs were military personnel and others whose exposure to Agent Orange was transient. Therefore the factual issues related to the hazards of such exposure. The hazards involved for those living

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[35]As the Government itself notes, *Boyle* recognized a federal common law defense for military contractors which, in certain instances, displaces duties imposed pursuant to state tort law. Statement of Interest at 52.

permanently in an environment where the earth has been saturated with Agent Orange, and the water has also been contaminated, is distinct. Plaintiffs here should have an opportunity to prove the allegations concerning whether defendants were aware of the hazards Agent Orange presented to them and whether they conveyed that information to the government.[36]

2. The Military Contractor Defense Does Not Bar Federal Claims[37]

As the government acknowledges, *Boyle* "was decided in the context of federal displacement of state law causes of action." Statement of Interest at 52. In *Malesko v. Correctional Services Corporation*, 229 F.3d 374 (2d Cir. 2000), *rev'd. on other grounds,* 534 U.S. 61 (2001), the Second Circuit declined to extend *Boyle* to a *Bivens* type case, emphasizing the distinction between state law claims and those that arise under federal law: *Malesko* followed the *Boyle* analysis that the government contractor defense, which was intended to prevent the "application of *state law* [claims], would frustrate specific objectives of federal legislation." *Malesko*, 229 F.3d at 382, n.4, quoting *Boyle*, 487 U.S. at 507. Like the *Bivens* action at issue in *Malesko,* the ATS was intended to advance federal interests, the incorporation of the law of nations, into U.S. law. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 103-04 (2d Cir. 2000).

The concern of the "government contractor defense" with the potential conflict between federal and state interests was reflected in this court's decision in *Isaacson v. Dow Chemical*, 304 F.Supp.2d 442, 450 (E.D.N.Y. 2004):

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[36] The government warns that "[a]llowing such claims to proceed would have even further reaching implications for military procurement that the claims at issue in *Boyle*, for it would expose defense contractors to potential liability for possibly unforseen uses of the goods ordered by American Armed Forces." Statement of Interest at 51-52. However, according to the allegations of the Amended Complaint, defendants knew of the circumstances in which its product was to be used. AmCmplt at ¶112. In such circumstances, there is no danger that the government contractor would be exposed to liability for 'unforseen" uses of its product.

[37] The government's contention that international law norms are not applicable in the civil context, Statement of Interest at 55, are considered *supra*, in the context of plaintiffs' discussion of aiding and abetting liability.

> If cases such as those in this present wave of Agent Orange claims were scattered throughout state courts, manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government. Since the advent of the Agent Orange litigation in 1979, mass tort law has become more hazardous for defendants. While on balance *state tort law* does more good than harm, its vagaries and hazards would provide a significant deterrent to necessary military procurement.

(Emphasis added.)

In the context of the ATS , two federal policies are involved, efficiency in military procurement and compliance with international law which is part of the federal common law. Under *Malesko*, there is no basis for extending the "government contractor defense" to a claim based on the ATS. The policy behind the "government contractor defense" likewise counsels against its application in the context of ATS claims. In its analysis of the basis for the government contractor defense, *Boyle* held:

> Displacement [of state law] will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," or the application of state law would "frustrate specific objectives" of federal legislation (citations omitted).

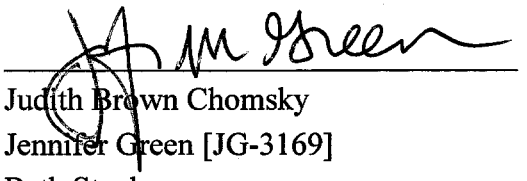
There is no public policy or interest in enabling the government to engage in an unlawful act. In *Yearsley v. W.A.Ross Const. Co.,* 309 U.S. 18, 20-21, 60 S.Ct. 413(1940), the Supreme Court considered the liability of a contractor for work performed on a government contract to be related to the issue of whether "what was done was within the constitutional power of Congress." The starting point for the *Yearsley* analysis remains valid. The government lacks authority to contract for an unlawful act. Here the Amended Complaint alleges that the contractor knowingly engaged in war crimes and crimes against humanity. Even assuming that the government knew that the use of Agent Orange was a poison and therefore its use was prohibited under the law of nations, the government lacked the authority to engage a contractor to commit that unlawful act. Whether or not the government knew the use of Agent Orange was unlawful, it is surely beyond the scope of the government contractor defense to shield a contractor which knowingly undertakes to engage in unlawful conduct.

IV. CONCLUSION

For the reasons set forth above, plaintiffs' Amended Complaint should not be dismissed.

January 18, 2005

Respectfully submitted,



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Under penalty of perjury, I hereby certify that service of the Motion for Leave to File Brief Amici Curiae of the Center for Constitutional Rights, EarthRights International and the International Human Rights Law Clinic at the University of Virginia Law School and the proposed Brief Amici Curiae was made this 18th day of January 2005, by first class mail to all parties at the addresses listed below.

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