

November 2, 2004

Declaration on Issues of the Laws of War, Corporate Liability and Other Issues of International Law in Agent Orange Ats Litigation

Kenneth Anderson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE VIETNAM ASSOCIATION FOR VICTIMS:
OF AGENT ORANGE/DIOXIN, PHAN THI PHI:
PHI, NGUYEN VAN QUY, Individually and as
Parent and Natural Guardian of NGUYEN
QUANG TRUNG and NGUYEN THI THUY
NGA, His Children, and DUONG QUYNH HOA,
Individually and as Administratrix of the Estate of:
Her Deceased Child, HUYNH TRUNG SON, On
Behalf of Themselves and Others Similarly
Situated,

Plaintiffs,

-against-

THE DOW CHEMICAL COMPANY,
MONSANTO COMPANY, MONSANTO
CHEMICAL COMPANY, PHARMACIA
CORPORATION, HERCULES
INCORPORATED, OCCIDENTAL CHEMICAL
CORPORATION, ULTRAMAR DIAMOND
SHAMROCK CORPORATION, MAXUS
ENERGY CORPORATION, THOMPSON
HAYWARD CHEMICAL COMPANY,
HARCROS CHEMICALS INC., UNIROYAL,
INC., UNIROYAL CHEMICAL, INC.,
UNIROYAL CHEMICAL HOLDING
COMPANY, UNIROYAL CHEMICAL
ACQUISITION CORPORATION, C.D.U.
HOLDING, INC., DIAMOND SHAMROCK
AGRICULTURAL CHEMICALS, INC.,
DIAMOND SHAMROCK CHEMICALS,
DIAMOND SHAMROCK CHEMICALS
COMPANY, DIAMOND SHAMROCK
CORPORATION, DIAMOND SHAMROCK
REFINING AND MARKETING COMPANY,
OCCIDENTAL ELECTROCHEMICALS
CORPORATION, DIAMOND ALKALI
COMPANY, ANSUL, INCORPORATED,

04-CV-00400-JBW-JMA

**DECLARATION OF
KENNETH HOWARD ANDERSON JR.**

HOOKER CHEMICAL CORPORATION,	:
HOOKER CHEMICAL FAR EAST	:
CORPORATION, HOOKER CHEMICALS &	:
PLASTICS CORP., AMERICAN HOME	:
PRODUCTS CORPORATION, WYETH,	:
HOFFMAN-TAFF CHEMICALS, INC.,	:
CHEMICAL LAND HOLDINGS, INC., T-H	:
AGRICULTURE & NUTRITION COMPANY,	:
INC., THOMPSON CHEMICAL	:
CORPORATION, RIVERDALE CHEMICAL	:
COMPANY, ELEMENTIS CHEMICALS INC.,	:
UNITED STATES RUBBER COMPANY, INC.,	:
SYNTEX AGRIBUSINESS INC., and "ABC	:
CHEMICAL COMPANIES 1-50",	:
	:
Defendants.	:
	:
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I, Kenneth Howard Anderson Jr., declare as follows:

I. Introduction

A. Professional Background

1. My full name is Kenneth Howard Anderson, Jr. I am a Professor of Law at Washington College of Law, American University, and a Research Fellow of the Hoover Institution on War, Revolution and Peace, Stanford University. I specialize in international law, both public and private, with a particular focus in human rights and the laws of war, and related US domestic law. I have extensive experience on the ground as a human rights monitor in armed conflicts as well as specialist academic knowledge of international law, human rights law, and the law of armed conflict. I am admitted to law practice in New York (1989 First Department). A full biography is attached to this Declaration.

2. I have taught extensively in the fields of international law, human rights, and the laws of war, and related US domestic law. In addition to teaching fulltime at American University since 1996, I was John Harvey Gregory Lecturer on World Organization at Harvard Law School between 1993-95, teaching international human rights and the laws of war. In 2000, I was a visiting associate professor of law at Harvard Law School, teaching the laws of war. In 1993-95, I also taught the laws of war as a lecturer at Columbia Law

School, and in 1988-90, I taught human rights as a lecturer at Fordham Law School. I have published extensively in the fields of international law, human rights, and the laws of war, most recently in a forthcoming issue of the Harvard Law Review, and in the past three years in the Harvard Human Rights Journal, the Yale Journal of Human Rights and Development, and the Chicago Journal of International Law, among other publications. I also served as legal editor of Crimes of War (Roy Gutman & David Rieff, general editors, WW Norton 1999).

3. In addition to academic work in these areas, I have an extensive background in practical human rights work. Between 1984 and 1992, I undertook reporting missions for Human Rights Watch, New York, visiting and reporting on armed conflicts and conflict related issues of human rights, the laws of war, and refugee issues in the countries of Guatemala, El Salvador, Nicaragua, Panama, Yugoslavia, and Georgia. In 1992, I headed a joint mission of Human Rights Watch and Physicians for Human Rights of forensic anthropologists investigating and excavating evidence of massacres in Iraqi Kurdistan, including through the use of chemical weapons, against the Kurdish population by the regime of Saddam Hussein in the Anfal campaign against the Kurds in 1987-88; that mission brought back chemical bombshell remains resulting in proof of the use of chemical weapons. In 1987, I was Guatemala representative for the International Human Rights Law Group, reporting from there on the transition from civil war to civilian government; I also covered the human rights situation in Panama under General Manuel Noriega for that organization (returning to Panama in the Panama conflict to deal with laws of war issues for Human Rights Watch in 1990). In 1992, I was appointed the first director of the Human Rights Watch Arms Division, with responsibilities for monitoring the use and transfer of weapons used in abuses of human rights and violations of the laws of war, as well as the then-nascent international campaign to ban landmines which led to the 1997 Ottawa Convention banning landmines.

B. Questions Presented

4. I have been asked to offer this Declaration on certain matters of public international law and related US domestic law in connection with Defendants' motions to dismiss and/or motion for summary judgment. I understand Plaintiffs' action to be based upon the Alien Tort Statute, 28 U.S.C.A. 1350 ("ATS"). In order to establish a claim under the ATS, Plaintiffs must, among other statutory requirements, show a violation of either (a) the law of nations or (b) a treaty of the United States (collectively, "international law"). It appears from paragraphs 1, 75-76, 87-89, 117, 236, 244, 249, 251, 254, 261-

263, 265-267, 269-271, 273, 275-276, 328 of the Amended Complaint that Plaintiffs allege both.

5. The central questions with respect to violations of the law of nations or US treaties are as follows. First, at the time of the events complained of in the Vietnam War, was Agent Orange (which I understand to be an herbicide) an illegal weapon, meaning that any and all uses of Agent Orange were prohibited *per se*? Second, even if Agent Orange did not constitute a *per se* illegal weapon, then did the uses to which it was put in the Vietnam War violate international law, as that body of law existed at the time of the events alleged? Third, assuming that the herbicide Agent Orange was a *per se* illegal weapon and/or that its specific uses constituted a violation of international law at that time, did international law during the period of the Vietnam War recognize the possibility of liability by a corporate actor?
6. This Declaration addresses these questions, as well as certain related matters, in the following order.

Part II considers the sources and authorities to be taken into account in making determinations of international law.

Part III considers whether the herbicide Agent Orange was a *per se* illegal weapon under international law at the time of the Vietnam War, meaning that any or all uses of Agent Orange were *per se* prohibited (question one, above).

Part IV considers whether the uses of Agent Orange in Vietnam could constitute a violation of international law at the time of the Vietnam War (question two, above).

Part V considers whether there was any basis for holding a corporation liable for violations of international law at it existed at the time relevant to this complaint (question three, above).

Part VI considers whether the actions alleged by the Amended Complaint could amount to genocide, crimes against humanity or torture as claimed by Plaintiffs.

Part VII briefly sets forth my conclusions. Those are, in summary, that:

- (1) Agent Orange was plainly not a *per se* prohibited weapon at the time of its use in Vietnam and likely would not be *per se* prohibited even today.

(2) The particular uses to which the herbicide Agent Orange was allegedly put under the Amended Complaint did not constitute a violation of international law.

(3) International law did not during the Vietnam period, and does not even today, recognize the liability of a corporate actor (as opposed to a State or individual).

(4) The actions alleged under the Amended Complaint do not come close to meeting the definitions of genocide, crimes against humanity or torture.

II. Sources and Authorities in Determining International Law

A. Traditional Sources of International Law

7. The traditionally accepted definition of what constitutes a binding rule of public international law, whether treaty law or customary international law, is set out in the Restatement (Third) of the Foreign Relations Law of the United States (1987) (hereinafter “Restatement (Third)”), at § 102:

“(1) A rule of international law is one that has been accepted as such by the international community of states: (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. (3) International agreements create law for the state parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”

8. The traditional statement of sources of law for determining the existence and content of rules of public international law, including both treaties and custom, found in the Statute of the International Court of Justice (ICJ), at Article 38(1):

“(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) ... judicial decisions and the teachings of the most

highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.”¹

9. The above definitions will be taken as providing the basic sources and authority for the determination of rules of public international law in this Declaration. The ATS requires, among other things, a violation of “the law of nations or a treaty of the United States.”² Taken together, the “law of nations” and treaties of the United States are what this Declaration will refer to as “international law.”
10. The term “law of nations” refers to rules of public international law so well established that they have general acceptance among the community of states; they are rules which “command ‘the general assent of civilized nations’.”³ For purposes of the questions addressed in this Declaration, the law of nations is otherwise known as customary international law, within the meaning of the Restatement (Third) and the ICJ Statute. Authorities agree that the requirement for showing the existence of a rule of customary international law is a highly exacting one.⁴ It is a fundamental assumption of this Declaration that claims of the existence and content of a rule of customary international law must meet stringent standards of evidence, to show the necessary level of general acceptance as binding law.
11. In this Declaration, I do not deal with domestic law requirements under the ATS as expounded by the Supreme Court in Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 159 L.Ed. 2d 718 (2004). However, I note that requirements for establishing a cause of action under Sosa are even more restrictive than those ordinarily required under international law. For example, under the language of the ATS itself, a treaty (for purposes of establishing an ATS claim) must be not just any treaty, no matter how widely ratified by states, but specifically a “treaty of the United States.”⁵ In addition, a cause of action under Sosa must

¹ 59 Stat. 1055, June 26, 1945. “Publicists” is taken to mean scholars who publicize international law, principally in the sense of producing treatises, reports, and compendia of primary sources. See Restatement (Third), § 103, Reporters’ Notes 1.

² 28 U.S.C.A. § 1350.

³ Filartiga v. Pena-Irala, 630 F. 2d 876, 881 (2d Cir. 1980).

⁴ See e.g., North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), Judgment of 20 February 1969, 1969 I.C.J. Rep. 3, para. 79 (declining to recognize the equidistance principle as a rule of customary international law because the evidence cited was “inconclusive and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances...”).

⁵ 28 U.S.C.A. § 1350. Thus, for example, even a treaty as widely ratified as the Convention on the Rights of the Child – ratified by every state except for the United States and Saudi Arabia – would not qualify as a treaty for purposes of stating an ATS claim.

have a higher degree of specificity and a greater historical grounding than is generally called for under customary international law. Similarly, Sosa identifies important separation of powers concerns which require that the views of the United States as to what constitutes international law be given much greater deference than is likely to be the case under general international law.⁶ This reflects the principle that simply because a norm may be binding on a state as a matter of international law before international tribunals, this does not mean that it is necessarily binding on that state as a matter of domestic law before domestic courts.

B. Applicable Treaty Law

12. At the time period of the events raised by Plaintiffs in the Amended Complaint, the years of the Vietnam War, the following (even arguably relevant) treaties mentioned by Plaintiffs were in force with respect to the United States: the 1907 Hague Regulations⁷ and the 1949 Fourth Geneva Convention.⁸ An additional treaty, relevant because of its importance for the issue of chemical weapons, is the 1925 Geneva Protocol;⁹ although the United States signed the treaty in 1925, it did not ratify until 1975. Hence it was not a “treaty of the United States” during the Vietnam War.

13. *The Hague Regulations.* The Hague Regulations were not the first attempt to draw up a systematic treaty covering the conduct of land warfare, but of the early attempts they have been the most enduring. The Hague Regulations are not only a treaty continuing in force, but a text that has achieved the status of customary international law, as well as being the textual source of much language of the national military law handbooks of leading states, including those of the United States.¹⁰ Substantively, the Hague Regulations cover the whole range of military operations on land, from means and methods of warfare to treatment of prisoners of war (POWs) and other noncombatants.

⁶ See Sosa, 124 S.Ct. at 2763.

⁷ Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277 (hereinafter the “Hague Regulations”).

⁸ The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter the “Fourth Geneva Convention”).

⁹ Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (hereinafter the “1925 Geneva Protocol”).

¹⁰ See US Department of the Army, Field Manual: The Law of Land Warfare (FM-27-10) 1956 (hereinafter “US Field Manual”), much of which simply follows the Hague Regulations, article by article, with commentary and specifically US views of their meaning: see paras. 6, 28, 29, 31, 32, 33, 34, 37, 39, 43, 45, 47, 48, 53, 54, 58, 62, 75, 359, 363, 372, 380, 393, 397, 400, 403, 405, 406, 408, 411, 412, 425, 428, 429, 448, 460, 463, 466, 471, 480, 482, 489, 492, 494.

Their greatest importance for this Declaration, however, lies in their rules for the actual conduct of hostilities – permissible and impermissible means and methods of war, including poison weapons – while their rules regarding the treatment of particular categories of noncombatants have largely been overtaken by the Geneva Conventions. The United States became a party to the Hague Regulations in 1909.

14. *The Fourth Geneva Convention.* The four Geneva Conventions of 1949 are not treaties covering the conduct of hostilities as such. Instead, they address the treatment of four particular categories of *noncombatants* – soldiers rendered *hors de combat* by wounds or sickness or other cause, sailors rendered *hors de combat* by wounds, sickness, or shipwreck at sea, POWs, and civilians in general and under conditions of occupation. The Amended Complaint cites the Fourth Geneva Convention, although it is not clear to which articles it refers. Because these four conventions address treatment of categories of noncombatants in the hands of enemy forces, rather than the conduct of hostilities and specifically means and methods of warfare, they are less relevant to our inquiry than the Hague Regulations, although they are universally accepted as customary international law as well as being treaties in force. The United States became a party to the Fourth Geneva Convention in 1955.
15. *The 1925 Geneva Protocol.* The 1925 Geneva Protocol was the outcome of a post-World War I conference seeking limitations on trade in arms and weapons, convened under the auspices of the League of Nations. Limitations on trade in arms did not succeed in becoming a treaty, and what emerged instead was a treaty prohibiting the use in war of “asphyxiating, poisonous or other gases,” and of “bacteriological methods of warfare.” Although the treaty prohibited only the use of such weapons – states remained free to, and did, produce and stockpile such weapons – the prohibition on use was categorical upon those ratifying, subject to the reservations they entered. As noted, however, the United States signed the 1925 Geneva Protocol that year, but did not ratify until 1975; as such, the 1925 Geneva Protocol was not a treaty of the United States in the relevant time frame. Moreover, in ratifying, the United States followed numerous other states in reserving the right to respond in kind to a belligerent’s first use of such weapons.
16. Thus, for purposes of maintaining an ATS action, the number of treaties of the United States, *qua* treaties, within the relevant scope of time and which address the subject matter of the Amended Complaint, is actually quite limited – the Hague Regulations, because it addresses the conduct of hostilities, being the only one plainly on point. The text of other treaties may enter the threshold discussion of an ATS action by reason of having become customary

international law, but this requires separate argumentation and, compared with the task of citing the authoritative language of a ratified treaty of the United States, is always more difficult to establish.

C. Treaties as Evidence of Customary International Law

17. The Hague Regulations and the Geneva Conventions are unquestionably also customary international law, binding on all states whether they acceded to them as treaties or not, and in my view this was so during the period of the Vietnam War.
18. The 1925 Geneva Protocol presents a more difficult case in establishing whether or not it constituted customary international law at the time of alleged violations. The protocol had not been widely ratified by states at the beginning of the Vietnam War – although it has received wide ratification today – with only 47 states having ratified it by 1961.¹¹ It is highly doubtful that this was sufficient to create customary law status at that time. In addition, neither the United States nor Vietnam had ratified the treaty as of the Vietnam War – the United States did not ratify until 1975 and Vietnam did not ratify until 1980.¹² It is very unlikely that a treaty unratified by a principal state, such as the United States, which was also a leading military power, would have achieved the status of customary international law.
19. The proposition that the treaty had customary law status during the Vietnam War is further undermined by the significant reservations entered by nearly half of the ratifying states.¹³ These reservations largely fell into two categories. The first was a reservation limiting the prohibition on first use, meaning that these states reserved the right to use such weapons if other parties to the conflict used these weapons against them. The second, perhaps even more important for this case, was a reservation limiting the treaty obligation to apply only with respect to other treaty parties. This second reservation means that even these ratifying states did not view the prohibition as a general customary obligation binding on them with respect to all other states; rather, they saw it as a narrow bilateral treaty obligation, creating no general rule. Thus, none of the countries making the second type of reservation would have considered the treaty binding on conduct towards

¹¹ Documents on the Laws of War (Adam Roberts and Richard Guelff, eds, 3rd ed. 2000) (hereinafter “Roberts and Guelff”) at 160-64 (chart of ratifications and reservations).

¹² Id.

¹³ 22 of the 47 states that had ratified by 1967 entered one or (in most cases) both of the reservations discussed. See Roberts and Guelff, id., at 160-67.

Vietnam during the 1960s and 1970, since Vietnam did not ratify the treaty until 1980.

20. Nonetheless, the Protocol's fundamental rule (leaving aside questions of scope, interpretation and ambiguity), prohibiting the use of gas weapons of a chemical or biological nature, has been broadly followed.¹⁴ The difficulty is not the general rule, but its scope and limitations – to what agents does it apply, and in particular does it prohibit herbicides? These concerns will be considered in Part III, but with respect to the status of the general rule solely, during the period of the Vietnam War, my view is that at least the first use of chemical gas weapons of the kind employed in the First World War (that is, designed to be lethal and intentionally used against people) is prohibited by customary international law.¹⁵

D. Determining the Content of Customary International Law

21. If the content of treaty law can be ascertained by reference to an authoritative text, supplemented in certain cases by its *travaux préparatoires* (which provide the negotiating history of the text of treaties) as a guide to the evolution of treaty language, the content of customary international law is by its nature more difficult to ascertain – both to determine the existence of a customary rule and to spell out its content. For purposes of determining customary international law bearing on the questions in this Declaration, I will consider the acts and practices of states; statements, declarations, and opinions of various kinds by official bodies such as international tribunals, national courts, international organizations and their organs; and the statements of scholar-publicists. The evidentiary weight of these sources varies widely.

¹⁴ Neither the Second World War nor subsequent wars saw the use of gas weapons in the fashion, for example, of the First World War. The notable exceptions have been the use of gas weapons by Italy in its invasion of Ethiopia (1935-36), the quite extensive use of gas by Japan in its invasion and occupation of China (1937-45) and, most recently, by Iraq in both the Iran-Iraq War (1980-88) and against its own civilian, mostly Kurdish, population in the Anfal campaign (1987-88). These exceptions do not seem to me enough to dislodge the general rule. See Roberts and Guelff, *supra* note 11, at 156-57.

¹⁵ Roberts and Guelff, *supra* note 11, at 157 (“The weight of opinion has long been that *at least the first use of lethal chemical and biological weapons is prohibited by customary international law*”) (emphasis added).

22. *State practice and opinio juris*. The practices and acts of states are evidence of a rule of customary law. State practice includes not only such acts as behavior in armed conflict, but also official and diplomatic acts, including official pronouncements and statements, military manuals and regulations, diplomatic notes, etc. Importantly, however, state practice also includes the *inaction* of states as well as the *reaction* of states to the actions of other states or international actors.¹⁶ The *Restatement (Third)* notes that there must be “general and consistent” state practice to establish a rule of law, but not necessarily unanimity or perfect compliance.¹⁷ In addition, such acts will only be evidence of customary international law if they are performed out of a sense of international legal obligation. This is known as the *opinio juris* of states.¹⁸ Thus, while treaties may provide some evidence of customary international law, the ICJ has emphasized that state practice and *opinio juris* are the most important evidence of the content of customary international law:

“It is, of course, axiomatic that the material of customary international law is to be looked for *primarily in the actual practice and opinio juris of States*, even though multilateral conventions may have an important role to play in recording and

¹⁶ The settled practice of states, that is, may result in many years, even many decades, without a legal rule being disturbed or challenged; the inaction of states, far from undermining the legal rule, is instead evidence of its existence (if supported, of course, by other elements such as *opinio juris*). See Hugh Thirlway, *The Sources of International Law*, in *International Law* 126 (Malcolm Evans, ed., 2003) (hereinafter “Thirlway”) (“[S]tate practice is two sided; one State asserts a right, either explicitly or by acting in a way that impliedly constitutes an assertion, and the State or States affected by the claim then react either by objecting or refraining from objection. The practice on the two sides adds up to imply a customary rule, supporting the claim if no protest is made, or excluding the claim if there is a protest.”). An absence of violations of a norm, often thought of as inaction, may also count as state practice in favor of the existence of that norm. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 61 (1989) (hereinafter “Meron”) (“Violations are, of course, much more visible than practice demonstrating respect for a norm.”)

¹⁷ *Restatement (Third)*, § 102.

¹⁸ Formally, *opinio juris* refers to a state regarding its state practice as being legally obligatory, of doing it from a sense of genuinely legal obligation, rather than merely for reasons of custom or convenience. As Brownlie says, the term refers “to ‘a general practice *accepted as law*’”; he regards it as a “necessary ingredient” to turn state practice into law. Ian Brownlie, *Principles of Public International Law* 8 (6th ed. 2003); see also *North Sea Continental Shelf Cases*, *supra* note 4, at para. 77 (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”)

defining rules deriving from custom, or indeed in developing them.”¹⁹ (emphasis added).

23. Not only is state practice the most important evidence of rules of customary international law, the practices of leading states, as well as those of states most associated with a particular activity, weigh more heavily than the practices of less significant states or states that are not involved in the activity. Thus, for example, the views of Japan in establishing customary international law count for more than the views of Trinidad. Similarly, the views of a maritime state such as Great Britain weigh more heavily in the formation of customary international maritime law than those of, say, a landlocked state such as Bolivia. The *Restatement (Third)* acknowledges this in observing, for example, that the failure of a “significant number of important states to adopt a practice can prevent a principle from becoming general customary law.”²⁰
24. In the context of the present litigation, this aspect of how customary law is formed has special importance in regard to the rules of contemporary armed conflict. Although many states may have many views on matters of armed conflict, and although all those views indeed count for something in the evolution of customary law, the practices of states that actually fight wars count for more in the formation of customary law than those that do not. There is not complete equality between states on this matter; the state practices of the United States, Britain, France, China, India, and so on, count for more than the state practices of, for example, Luxembourg, Costa Rica (which by law has no army), or Jamaica. The state practices of a longtime martial nation such as the United States – especially as found in its military law, regulations, and law of war manuals – are important, indeed indispensable, evidence of customary international law of war, notwithstanding that the litigation at hand involves claims about the actions of the United States itself.²¹
25. *Official statements and pronouncements of international organizations; opinions of courts and tribunals.* Evidence of the content of customary international law can also be found in official statements, pronouncements,

¹⁹ *Case concerning the Continental Shelf, (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, 1985 I.C.J. Rep. para. 27.

²⁰ *Restatement (Third)*, § 102, cmt. b.

²¹ Indeed, as James Brown Scott said in reporting the 1899 and 1907 Hague Peace Conferences, “while States are, legally speaking, equal, we know that in the world of affairs they do not possess equal influence ... the support of the larger nations is necessary in order to give international support and effect to a proposition....” James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, vol. 1, 37 (1909).

declarations, and so on of international organizations, such as the United Nations and its organs. However, the weight to be accorded to such official statements varies widely according to circumstances. Resolutions of the United Nations General Assembly are, by the terms of the UN Charter, not legally binding.²² These Resolutions may provide some evidence of customary international law, but only to the extent that they are adopted by a unanimous or near unanimous vote, and reflect actual state practice rather than being merely aspirational. As the *Restatement (Third)* says, “even a unanimous resolution may be questioned when the record shows that those voting for it considered it merely a recommendation or a political expression, or that serious thought was not given to its legal basis. A resolution is entitled to little weight if it is contradicted by state practice....”²³ General Assembly resolutions, precisely because they carry no legal consequences, easily become a vehicle for pronouncements of many kinds, many of which are simply platforms for particular political causes and few of which, in my view, provide useful evidence of customary international law.

26. Judicial opinions of international tribunals, including the ICJ, as well as other tribunals established by authority of the Security Council, such as the International Criminal Tribunal for Yugoslavia (ICTY), also carry “substantial weight” in determining whether a rule has become international law.²⁴
27. *Writings of international law scholar-publicists.* The ICJ Statute allows for the introduction of writings of international law publicists (scholars) to provide evidence of the content of customary law.²⁵ The *Restatement (Third)* says that such writings include

“treatises and other writings of authors of standing, resolutions of scholarly bodies such as the Institute of International Law ... and the International Law Association; draft texts and reports of the International Law Commission, and systematic scholarly presentations of international law such as this Restatement.”²⁶

²² Charter of the United Nations, June 26, 1945, art. 10, 59 Stat. 1031 (“The General Assembly may discuss any questions or any matters within the scope of the present Charter ... [and] may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters”); see also Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* 378 (7th rev. ed. 1997) (“the General Assembly has no power to take binding decisions, nor does it have any power to take enforcement action; it can only make recommendations”).

²³ *Restatement (Third)*, § 103, Reporters’ Note 2.

²⁴ *Restatement (Third)*, § 103(2).

²⁵ See *ICJ Statute*, June 26, 1945, art 38 (1)(d), 59 Stat. 1055.

²⁶ *Restatement (Third)*, § 103, Reporters’ Note 1.

28. Reliance on these writings, however, is subject to two important disabilities (in addition to the ICJ Statute's restriction of consideration to only those writings of the "most highly qualified publicists of the various nations"). First, even those writings offer only a "*subsidiary* means for determination of rules of law."²⁷ Thus these writings may be valuable in describing evidence of customary international law, but they do not provide such evidence of customary international law themselves.
29. Second, the nature of academic writing has changed over time, and academic writing of today provides less reliable evidence of customary international law than in times past. In earlier periods, what counted as the most important academic writing about international law consisted of deliberately descriptive, expositive, highly objective statements of the law. Academic law largely values a different model of scholarship today, in which the expression of a point of view and argument take first place.²⁸ In addition, the emergence of the scholar- advocate has also facilitated the emergence of scholarship which, however intellectually intriguing, cannot be called objective. It is important to be clear that the ICJ Statute and the *Restatement (Third)* have in mind less individual scholars (except in the area of expositive treatises) than the consensus texts of such institutions as the International Law Commission.
30. To be perfectly clear, I do not believe that the writings of international law scholars, including my own, count for very much in providing evidence of customary law. I hope that writings such as this Declaration or any other declarations, or my or others' scholarly writings, may be useful to the Court in understanding the structure and body of international law, particularly in highly specialized areas such as the law of war. But in the formal, highly specific sense of the *Restatement (Third)*, of providing evidence of customary international law as such, I do not think such contemporary academic writings count for very much, especially as compared with state practice.²⁹

²⁷ See ICJ Statute, June 26, 1945, art. 38(1)(d), 59 Stat. 1055.

²⁸ See ¶ 31, below, *Flores v. Southern Peru Copper Corporation*, 343 F.3d 140, n 26 (citing Professor Jack Goldsmith).

²⁹ Indeed, I note that this is a criticism which has been leveled even at the *Restatement (Third)* itself – particularly that it has an unstated agenda to broaden the application of international law in United States courts and is thus less objective than it might be. In this Declaration, I refer to the *Restatement (Third)* for standard propositions of international law that are widely accepted by leading authorities. However, I do not and would not rely on the *Restatement (Third)* in other areas where it is less objective, such as its uncritical acceptance of certain human rights norms as customary despite a paucity of state practice and evidence of general acceptance. See Paul B. Stephan, *The New York University – University of Virginia Conference on Exploring the Limits of International Law: Consitution and Customary Law: The*

31. The Second Circuit recognized the distinction between scholar-publicists and scholar-advocates in *Flores v. Southern Peru Copper Corporation*, where it stated that:

“The ICJ Statute’s emphasis on the works of publicists ... suffers from an anachronism, as the work of international law scholars during the nineteenth and early twentieth century differed considerably from that of contemporary scholars. In ‘the nineteenth century positivist heyday of international law’, international law scholars ‘did the hard work of collecting international practices’. (Remarks of Jack L. Goldsmith, Panel Discussion, Scholars in the Construction and Critique of International Law, 94 ASIL Proceedings 317, 318 (2000).) The practice of relying on international law scholars for summaries and evidence of customary international law ... makes less sense today because much contemporary international law scholarship is ‘characterized by normative rather than positive argument, and by idealism and advocacy’.”³⁰

32. Thus, academic writings can only be taken into consideration, if at all, to the extent that they reflect what the law is rather than what the law should be. The effect of this is to severely to curtail judicial reliance on the views and opinions of contemporary scholarship, forcing courts to look instead to evidence of state practice, as evidenced by behavior, statements, declarations, law and regulations, etc.
33. In conclusion, the most important evidence in establishing customary international law is state practice, not scholarly opinion. If there is no general and consistent state practice, a custom cannot be found on the back of scholarly opinion. Unanimity among scholars might count for something, as a secondary backup to state practice. But cacophony among scholars, whether as to ultimate conclusions or as to grounds for reaching one conclusion or another, serves as an indication, in the absence of the weightier evidence of state practice, that no genuine legal rule exists.

E. General Observations on the Nature and Development of International Law

34. Several observations about the nature and development of international law should be noted before turning to the laws of war applicable in this case.

Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States, 44 Va. J. Int'l L. 33 (2003).

³⁰ *Flores v. Southern Peru Copper Corp.*, 343 F. 3d 140, n 26 (2d Cir. 2003).

First, as a general rule, states are presumptively free to act unless there is an international norm prohibiting them from acting. The sovereignty possessed by states – what Lincoln called “a political community, without a political superior” – signifies that states are free to act where they are not affirmatively prohibited from acting by international law.³¹ A check upon state freedom of action by reason of international law is the exception, not the norm. As the Permanent Court of International Justice (the precursor to the current International Court of Justice) observed in the *Lotus* decision, rules of international law binding upon states emanate “from their own free will,” and thus “[r]estrictions upon the independence of States cannot therefore be presumed.”³² Thus, even though the “right of belligerents to adopt means of injuring the enemy is not unlimited,”³³ a state has latitude to select means and methods of warfare according to circumstances and necessity, provided that those means and methods are not prohibited by the international law of war.

35. Second, in determining whether there is by treaty or customary law a rule prohibiting a state from using certain means and methods of warfare, it is crucial to look at the law that was in force when the disputed actions took place, in this case, the period of the Vietnam War. International law as a general proposition does not admit of retroactive application.³⁴ The policy behind such a legal rule is plain. International law could hardly develop if states believed that by accepting newly developed norms of international law,

³¹ Abraham Lincoln, Special Session Message to Congress, July 4, 1861, reprinted in A Compilation of the Messages and Papers of the Presidents 1789-1897, 27 (James D. Richardson, ed. Government Printing Office 1897).

³² The Case of the S.S. “Lotus” (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, 18 (Sept. 7).

³³ 1907 Hague Regulations, *supra* note 7, art. 22; see also “The Martens Clause”, in e.g., Hague Convention (II) Respecting the Laws and Customs of War on Land, 27 July 1899, 32 Stat. 1803, T.S. No. 403 (“Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”) as reprinted in The Reports to the Hague Conferences of 1899 and 1907, 126 (J.B. Scott, ed., 1917).

³⁴ Akehurst’s treatise refers to the “general principle that laws should not be applied retroactively.” Peter Malanczuk, Akehurst’s Modern Introduction to International Law 155 (7th rev. ed. 1997). Two specific treaty examples suffice to demonstrate the proposition. Article 28 of the Vienna Convention on the Law of Treaties, titled the “non-retroactivity of treaties,” provides that unless a special intention is established, a treaty’s provisions “do not bind a party in relation to any act or fact which took place ... before the date of the entry into force of the treaty with respect to that party.” 1155 U.N.T.S. 331 (entry into force 27 January 1980). The Rome Statute of the International Criminal Court similarly denies retroactive application; Art. 22(1) provides that a person “shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court”, while Art. 24(1) provides that “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.” 2187 U.N.T.S. 90 (entry into force 1 July 2002).

the result would be to hold them liable under today's norms for behavior acceptable under yesterdays. This consideration has particular importance for the international law of war – a body of law in which all acts for which individuals might be held liable are criminal; indeed, a body of law in which the acts at issue are ones involving great death, destruction, and violence. States, in the interests of protecting their soldiers, would not agree to new and more restrictive rules, including criminal liability, if they believed that it would subject them and their military personnel to ex post facto liability.³⁵

36. Thus, states are free to act where there is no international law prohibition, and international law is not retroactive. And finally, in the way of general considerations, it is crucial for the authority and development of international law that courts not overreach in determining international law. International law is based on state consent and, in the absence of a world police force – a genuinely global legal order of commands backed by force – the willingness of states to conform their behavior to international law is the touchstone of its legitimacy. Aggressive interpretations of international law, however well-intentioned, have the effect of undermining the authority of international law by disconnecting it from how states actually behave. They also undermine the development of international law because states are less likely to embrace international law as a general matter if they believe that they will be held accountable to norms that they have not accepted.

III. Did International Law of War Prohibit Use of Herbicides *Per Se*?

37. We now turn to the substantive questions of international law, the first of which is, did international law of war at the time of the Vietnam War prohibit all uses of herbicides in war – that is to say, did international law prohibit *per se* herbicides such as Agent Orange? The question divides into two broad considerations – first, did herbicides fall under the customary law prohibition against poison and poison weapons and, second, did herbicides fall under such customary law prohibitions as derived from the 1925 Geneva Protocol outlawing gas warfare? In addition, there is a residual consideration as to

³⁵ The result is that acts which would be regarded as horrific war crimes today – driving civilians under fire back into a besieged city, for example, in order to hasten the city's surrender through starvation – were in fact legal at an earlier time. These were the facts of the von Leeb case at Nuremberg; at as late a date as the Second World War, German Field Marshal von Leeb was acquitted of war crimes on these charges arising from the siege of Leningrad. See “High Command Case” (U.S. v. von Leeb et al., 1948), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 563 (1950); see also, Matthew C. Waxman, Siegecraft and Surrender: The Law and Strategy of Cities as Targets, 39 Va. J. Int'l L. 353 (1999), at 407-9.

whether herbicides could be considered outlawed *per se* under customary law prohibitions against weapons causing unnecessary suffering.

A. Poison and Poison Weapons

38. Article 23(a) of the Hague Regulations provides in relevant part that “it is especially forbidden ... to employ poison or poisoned weapons.”³⁶ Identical language is found in the edition of the US Army law of war field manual, in force during the Vietnam War and today.³⁷ The ultimate question is whether this prohibition reaches to herbicides such as Agent Orange. We start first, however, with the inquiry as to whether the Hague Regulations 23(a) prohibition against poison or poisoned weapons even reaches to chemical weapons that are designed and intended to be lethal, such as those used in gas warfare in the First World War. If the Hague Regulations 23(a) prohibition on poison and poisoned weapons does not – or did not during the Vietnam War – reach chemicals designed and intended to be lethal or crippling harmful to human beings, then it likewise does not (or did not, during the Vietnam War) reach anti-plant chemicals.

39. Despite the fact that in ordinary language, the Hague Regulations 23(a) term “poisoned weapons” might seem to cover chemical gas shells containing chlorine or mustard gas, for example, state practice demonstrates that the term in fact has had a narrow legal meaning that has not included such weapons. Hague Regulations 23(a) was promulgated in 1907; by 1916, chemical gas weapons designed and intended to be lethal to people were being extensively employed by the Germans, British, and French in the First World War, and the United States was prepared to use them (the 1918 armistice rendered its plans moot).³⁸ The belligerents in the First World War seem to have regarded Hague Regulations 23(a) as not applying to shells filled with asphyxiating and other types of lethal gases, but instead only to such traditionally poisoned

³⁶ Poison weapons are the “subject of one of the oldest established *jus in bello* prescriptions. It was found in ancient Greek and Roman practice and long pre-dates the structures of modern public international law.” Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* 244 (1992).

³⁷ *US Field Manual*, *supra* note 10, at para. 37. This manual was relatively new during the period of the Vietnam War, so it can be considered reasonably “up to date” evidence of customary law for the purposes of this Declaration. While it remains in force today, it has been only partly revised and updated to reflect changes in US law, policy, and regulations since 1956, so it must (in current times) be read in conjunction with other legal materials. A note at the back of FM 27-10 notes that the United States ratified the 1925 Geneva Protocol in 1975, thus correcting the comment to paragraph 38 of the manual; other legal policies in the manual remain unrevised. See *Change No. 1, The Law of Land Warfare (FM 27-10)*(Headquarters, Department of the Army, 15 July 1976)

³⁸ See Amos A. Fries and Clarence J. West, *Chemical Warfare* (1921), for an exhaustive history of development and use of such weapons up to and including the First World War.

weapons as poison-tipped projectiles. This conclusion is borne out by the very fact that these same leading military states were those that thought it necessary to create a special treaty, the 1925 Geneva Protocol, to outlaw the chemical gas weapons used in the First World War; they did not believe that such weapons were already outlawed under Hague Regulations 23(a). A thorough, state-by-state examination of state practice up through 1960 brought a leading writer in this matter, Major Joseph Burns Kelly, to conclude that the term “poisoned weapons” as used in the Hague Regulations has “not been applied generally by states in connection with poison gas.”³⁹

40. US government policy and *opinio juris* reinforces the conclusion that although the 1925 Geneva Protocol banned such weapons, Hague Regulations 23(a) did not. The US Army field manual, *The Law of Land Warfare*, states that the United States could not use “poison or poisoned weapons” (citing the exact language of Hague Regulations 23(a)), but then says that the United States (not at that date having ratified the 1925 Geneva Protocol) is “not a party to any treaty ... that prohibits or restricts the use in warfare of toxic or nontoxic gases.”⁴⁰ These provisions remained in force during the entire Vietnam War, making it clear that the US regarded the use of toxic or nontoxic gases as consistent with its obligations under Hague Regulations 23(a). It is true that the United States, by 1945, had concluded that a customary law rule had developed which outlawed the first use of lethal chemical gases (leaving open, however, reprisal use), but this was on the basis of a perceived gradual ripening of the principle of the 1925 Geneva Protocol, not Hague Regulations 23(a).⁴¹ The United States did not regard Hague Regulations 23(a) as addressing lethal chemical weapons.

41. If chemical weapons designed and intended to be lethal to human beings are not covered by Hague Regulations 23(a), then it follows that herbicidal chemicals designed and intended to kill plants are likewise not covered. This is the conclusion reached by Detter in her leading treatise on land warfare. Despite a reputation as an aggressive proponent of protections for non-combatants, Detter concludes that the Hague Regulations “do not in the opinion of many cover chemical warfare,” whether lethal chemical gases or herbicides.⁴² An examination of the *travaux préparatoires* leading up to the 1907 Hague Regulations also reveals no attention by drafters of the treaty to the possibility of anti-plant agents.

³⁹ Major Joseph Burns Kelly, Gas Warfare in International Law, 9 Mil. L. Rev. 1, 44 (1960).

⁴⁰ US Field Manual, *supra* note 10, at para. 38.

⁴¹ See Major General Myron C. Cramer, Judge Advocate General, Memorandum for the Secretary of War: Destruction of Crops by Chemicals, SPJGW 1945/154 (March 1945), at 10 I.L.M. 1304 (1971).

⁴² Ingrid Detter, The Law of War 253 (2nd ed. 2000)(hereinafter “Detter”).

42. The International Court of Justice, in its opinion on the “Legality of the Threat or Use of Nuclear Weapons,”⁴³ gives an authoritative interpretation of the scope and meaning of Hague Regulations 23(a). The ICJ observes that the general pattern of international law has been for weapons of mass destruction (whether nuclear weapons, chemical weapons, or biological weapons) to be “declared illegal by specific instrument.”⁴⁴ (emphasis added.) Hence, chemical gas weapons were outlawed by the specific provisions of the 1925 Geneva Protocol, rather than by the very general provisions of Hague Regulations 23(a). The court notes that the Hague Regulations do not define the term “poison or poisoned weapons” and that “different interpretations exist on the issue.”⁴⁵ The view of the ICJ, therefore, is that prohibitions on weapons of mass destruction, including chemical weapons, proceed generally on a pattern of specific instruments of prohibition, rather than general rules such as Hague Regulations 23(a). As a consequence, if there were to exist a prohibition on herbicides, it would have to be sought elsewhere than in the general language of Hague Regulations 23(a).
43. The conclusion of the ICJ is reinforced by the state practice and *opinio juris* of both the United States and Britain in their submissions to the ICJ in the nuclear weapons case. The office of the US State Department Legal Adviser opined that Hague Regulations 23(a) was a prohibition that was “established with particular reference to *projectiles* that carry poison into the body of the victim. It was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, *even though they also may create toxic byproducts*.”⁴⁶ (emphasis added). The British Foreign Office legal adviser similarly opined that Hague Regulations 23(a) was intended to apply to weapons whose primary and intended effect was to be “poisonous and *not to those where poison was a secondary or incidental effect*.”⁴⁷ (emphasis added). The view of these two leading military states is that Hague Regulations 23(a) does not apply to weapons which are not primarily intended to kill human beings, even if they have a poisonous

⁴³ Case Concerning the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, General List No. 95, 1996 I.C.J. 226. Available at <http://www.icj-cij.org/icjwww/idecisions.htm>.

⁴⁴ Id., at 248, para. 57.

⁴⁵ Id., at 249, para. 55.

⁴⁶ Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States, at 24, written pleadings in Case Concerning the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, General List No. 95, 1996 I.C.J. 226.

⁴⁷ Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom, together with Written Statement of the Government of the United Kingdom, at 48, written pleadings in Case Concerning the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, General List No. 95, 1996 I.C.J. 226.

secondary effect. Accordingly, the two treaties would not apply to herbicides aimed at killing plants, regardless of their alleged side effects on human beings.

44. Similarly, Fleck's Handbook of Humanitarian Law in Armed Conflicts (written by leading scholars, practitioners and government ministry lawyers) observes that:⁴⁸

“[t]he most important point concerning all these disputes about the definition of ‘poisonous gases’ ... is the intentional design of a weapon in order to inflict poisoning as a means of combat. Only in so far as the poisoning effect is the intended result of the use of the substances concerned does the use of such munitions qualify as a use of ‘poisonous gases’. If the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism intended principally to cause totally different results (as e.g. the use of nuclear weapons), then the relevant munition does not constitute a ‘poisonous gas’.”⁴⁹

45. My conclusion is thus that Hague Regulations 23(a) does not apply to herbicides; the ICJ is correct in its view that *specific* weapons are outlawed by *specific* international instruments, which might over time ripen into *specific* rules of customary international law. That was not the case at the time of the Vietnam War and, with respect to Hague Regulations 23(a) and herbicides, is not the case today. In addition, the Hague Convention appears to only cover materials whose primary and intended purpose was to poison, and not materials with different purposes, even if they had secondary side effects on human beings.

B. Superfluous Injury and Unnecessary Suffering

46. I briefly address an adjunct claim arising from the Hague Regulations, viz., that herbicides were prohibited under Hague Regulations 23(e), which prohibits the use of “arms, projectiles, or material calculated to cause unnecessary suffering.” The Amended Complaint asserts at paragraph 261 that the use of herbicides violated laws of war provisions prohibiting the “employment of weapons ... calculated to cause superfluous injury or unnecessary suffering.” In general, the same point made with respect to

⁴⁸ Fleck's Handbook, *infra*, it should be noted, tends to merge the discussion of Hague Regulations 23(a) with the discussion, below, of the 1925 Geneva Protocol, but the general point is still apt for both treaties.

⁴⁹ Stephan Oeter, Means and Methods of Combat, in The Handbook of Humanitarian Law in Armed Conflicts 149 (Dieter Fleck, ed. 1995).

Hague Regulations 23(a) concerning poison and poisoned weapons applies here to Hague Regulations 23(e). Since the weapon was not designed intentionally to inflict suffering or injury apart from its intended purpose, then it cannot give rise to a claim as a violation of the Hague Regulations.⁵⁰

47. Plaintiffs seem unaware, moreover, of the special meaning given to the terms “superfluous injury or unnecessary suffering” in the relevant provisions of the law of war, and specifically the Hague Regulations 23(e). These terms make reference to prohibitions, stretching back at least to the St. Petersburg Declaration of 1868, on weapons which cause unnecessary or superfluous injury because they cause additional, and unnecessary, injury to a combatant *already* rendered *hors de combat* by some other means. Thus, for example, a bullet treated with an agent designed to inflame a wound is illegal because the bullet will suffice to render the combatant *hors de combat* and the inflammation is superfluous and unnecessary.⁵¹ This legal concept does not refer, contrary to what Plaintiffs seem to believe, to what might be opined to be excessive use of force or collateral damage. Its legal claim in these circumstances is inapposite.

48. Finally, the terms of the prohibition are so vague, that it is difficult to apply this prohibition to weapons other than those that states refrained from using out of a recognition that they cause superfluous injury or unnecessary suffering. According to a leading International Committee of the Red Cross (ICRC) treatise by Kalshoven and Zegveld:

“The rule on unnecessary suffering ... is too vague to produce by itself a great many practical results. Apart from cases in which states expressly agree to forbid employment of a specified weapon (as they did in 1868 with respect to explosives or inflammable projectiles weighing less than 400 grammes) states have not been known to lightly decide unilaterally to

⁵⁰ See Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States, *supra* note 46 at 28 (“This prohibition was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission”).

⁵¹ US Field Manual, *supra* note 10, at para. 33(b) (“What weapons cause ‘unnecessary injury’ can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades. Usage has, however, established the illegality of the use of lances with barbed heads, irregular shaped bullets, and projectiles filled with glass, the use of any substances on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring or the surface or the filing off of the ends of the hard cases of bullets”).

discard a weapon, once introduced into their arsenals, because it is considered to cause unnecessary suffering.”⁵²

C. Did Customary International Law Deriving From the 1925 Geneva Protocol Prohibit Herbicides *Per Se*?

49. The language of the 1925 Geneva Protocol makes no reference to herbicides. The Protocol’s sole definitional language (the preamble) prohibits the “use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices.” As Roberts and Guelff note, the terms leave “considerable room for divergent interpretations.”⁵³ Although there is today a customary prohibition on at least the first use of chemical gas weapons, the question is whether the definition of those chemicals extends to herbicides. My view is that it did not during the Vietnam War, and probably does not now.
50. With respect to state practice, the United States actively used herbicides during the Vietnam War with consultation, approval, and instruction from the highest levels of the US government. Decisions to initiate defoliation as a means of denying cover to the enemy were made by President Kennedy and top advisors, after full consultation with executive branch officials, beginning in 1961.⁵⁴ Political, rather than legal, sensitivity to the question of herbicide use appears to have ensured that decisions concerning the use of herbicides were monitored closely by senior political, military, and legal officials. According to a 1971 letter from the Department of Defense to Senate Foreign Relations Committee Chairman J.W. Fulbright, “operation plans are routinely submitted to the Office of the Judge Advocate General of both the Department of the Air Force and the Department of the Army ... there has never been a legal objection raised when plans have proposed or referred to the use of chemical herbicides in Vietnam.”⁵⁵

⁵² Frits Kalshoven and Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law 41-42 (ICRC 2001) (hereinafter “Kalshoven and Zegveld”).

⁵³ Roberts and Guelff, supra note 11, at 155; this collection of texts together with commentary is one of the most influential treatises on the law of war today. As Roberts and Guelff point out, the text contains a significant ambiguity even as between its authentic languages; where the English text refers to “other” gases, the French text uses the word “similaires.” See Roberts and Guelff, supra note 11, at 155-156.

⁵⁴ William A. Buckingham, Jr., Operation Ranch Hand: The Air Force and Herbicides in South East Asia 1961-1971 9-11 (1982)(hereinafter “Buckingham”). It should be noted that a legal review of the use of chemical herbicides for the destruction of crops was made by Major General Myron C. Cramer on 11 January 1945; see supra note 40.

⁵⁵ Second Letter from J.Fred Buzhardt, General Counsel of U.S. Department of Defense, to Senate Foreign Relations Committee Chairman J.W. Fulbright, 1971, reprinted in “United States: Department of

51. With respect to *opinio juris*, it is clear that the United States used herbicides with a pronounced public view – both within the US and before the international community – that it did not consider herbicides to be per se prohibited under international law. The United States strongly defended its legal interpretation in UN dealings. For example, in 1966, responding to Soviet Union charges in the UN that the US was in violation of the principles of the 1925 Geneva Protocol, James M. Nabrit, Jr., the Deputy United States Representative to the UN answered:

“The Geneva Protocol of 1925 prohibits the use in war of asphyxiating and poisonous gas and other similar gases and liquids with equally deadly effects. It was framed to meet the horrors of poison gas warfare in the First World War and was intended to reduce suffering by prohibiting the use of poisonous gases such as mustard gas and phosgene. It does not apply to all gases ... the Protocol does not apply to herbicides.”⁵⁶

52. When the United States finally ratified the 1925 Geneva Protocol, in 1975, President Ford issued an Executive Order renouncing the use of herbicides in most circumstances of war, but calling its renunciation a matter of “national policy,” not compelled by international law.⁵⁷ This means that the Executive Order does not create *opinio juris* of a customary prohibition against the use of herbicides post 1975, let alone pre 1975 – rather, quite the other way around. Indeed, the United States was so pronounced and public across such a long period of time in its insistence that herbicides (and tear gases) were not covered by international law that even if it were somehow concluded that a rule of customary international law did prohibit herbicides *per se*, the United States would be counted as a persistent objector to the rule and would therefore not be bound by it.⁵⁸

Defense Position With Regard to Destruction of Crops Through Chemical Agents,” 10 I.L.M.1300, 1304 (1971).

⁵⁶ John Norton Moore, Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis, 58 Va. L. Rev. 3, 433, 466 (1972)(quoting Statement of United States Representative Nabrit to the U.N. General Assembly, Dec. 5, 1966, as documented in 21 U.N. G.A.O.R. A/P.V. 1484 U.N. Doc – (1966)).

⁵⁷ Executive Order 11850 (April 8, 1975), reprinted in 40 Fed. Reg. i, 16187 (April 10, 1975).

⁵⁸ A state may present itself as a “persistent objector” to a rule of customary international law, if it persistently and publicly objects and declares that it will not be bound, as the rule is ripening into customary law. The consequence of being a persistent objector is that although custom ordinarily binds all states, a persistent objector is not so bound. See Restatement (Third), § 102, cmt. d (“[A] state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.”); Ian Brownlie, Principles of Public International Law 11 (6th ed., 2003)(“[A

53. As to the state practice of other countries, Britain used similar herbicides in the Malaya Emergency between 1952-54, for purposes of crop destruction and defoliating forests.⁵⁹ Not only was there no outcry by other states in response to this use, but the United States viewed it as establishing a precedent for the lawful use of herbicides in jungle warfare. Indeed, Secretary of State Dean Rusk advised President Kennedy that the “use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war. Precedent has been established by the British during the emergency in Malaya in their use of helicopters for destroying crops by chemical spraying.”⁶⁰ Moreover, US allies in Vietnam, principally Australia and the Republic of Vietnam itself, either participated directly or fought alongside the United States in circumstances relying on defoliation and crop destruction.
54. With respect to diplomatic and other acts in the public record in the negotiations leading up to the 1925 Geneva Protocol, there is little indication of discussions of anti-plant chemicals and none that were followed up.⁶¹ The lack of discussion seems to have resulted from the fact that technology had not developed to the point that such agents were feasible or even seriously contemplated. Given the paucity of evidence that the parties intended in 1925 that the Protocol extend to cover anti-plant chemicals, the question is whether the Protocol has been *subsequently* amended by a customary law interpretation extending the Protocol to such agents.⁶² But little attention was paid to this issue during the Second World War, although herbicides were developed and contemplated for use on remaining island pockets of Japanese resistance at the close of the war.⁶³ Likewise, little or no attention was paid to

state may contract out of a custom in the process of formation.”); Robert Jennings and Arthur Watts, Oppenheim’s International Law 29 (9th ed. 1996) (“express dissent by a state in the formative stages of a potential rule of customary law may prevent it ever becoming established, at least as against the dissenting state”); Fisheries Case (U.K. v. Norway), Judgment of 18 December 1951 (Merits), 1951 I.C.J. 116, 131 (holding that even if a particular customary rule did exist, it would not apply to Norway because Norway had persistently objected to such a rule).

⁵⁹ See e.g., Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 16 (1987) (“[T]he British, embroiled in a colonial war in Malaya, successfully used 2,4,5-T to destroy enemy crops and cover.”); Buckingham, supra note 54, at 4-5.

⁶⁰ Memorandum from Secretary of State Dean Rusk to President Kennedy, Subject: Defoliant Operations in Viet-Nam, 24 November 1961.

⁶¹ See R.R. Baxter and Thomas Buergenthal, Legal Aspects of the Geneva Protocol of 1925, 64 Am. J. Int’l L. 853, 866-67 n66-67 (1970)(hereinafter “Baxter and Buergenthal”)(citing e.g., League of Nations, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in the Implements of War (1925)).

⁶² See Moore, supra note 56, at 433, 466 (1972).

⁶³ See Buckingham, supra note 54, at 4.

the issue in public diplomacy through the Korean War and the Malaya Emergency.

55. As the 1960s progressed, however, an increasing number of countries took active public stands against the use of herbicides, denouncing the position of the US as contrary to the principles, if not the literal text, of the 1925 Geneva Protocol, understood as customary international law. Colored inevitably, in part, by international politics of the Cold War, these efforts came to a head with the adoption of General Assembly Resolution 2603A (XXIV), 16 December 1969. This Resolution purported to interpret not only the 1925 Geneva Protocol – to which the United States was still not a party in 1969 – but also what the Resolution described as its “generally recognized rules” of customary international law, prohibiting “any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.”⁶⁴ The resolution passed by eighty votes to three (the United States, Australia, and Portugal voting against), with thirty-six abstentions.⁶⁵
56. Although GA Resolution 2603A is cited in the Amended Complaint as evidence of a customary international law rule in force against the use of herbicides *per se* in war, it is, in fact, evidence of the reverse. As noted above, General Assembly resolutions have no legally binding force. The Restatement (Third) – not unfriendly to the expansion of customary international law – takes a cautious approach to the evidentiary weight of General Assembly resolutions:

“A resolution purporting to state the law on a subject is some evidence of what the states voting for the resolution regard the law to be, although what states do is more weighty evidence than their declarations or the resolutions they vote for. The evidentiary value of such a resolution is high if it is adopted by consensus or by virtually unanimous vote ... [M]ajorities may be tempted to declare as existing law what they would like the law to be and less weight must be given to such a resolution when it declares law in the interest of the majority and against the interest of a strongly dissenting minority ... Even a unanimous resolution may be questioned when the record shows that those voting for it considered it merely a recommendation or a political expression ...

⁶⁴ G.A. Res. 2603A (XXIV), U.N. G.A.O.R., 24th Sess., (December 16 1969).

⁶⁵ United Nations Resolutions, Ser. I, Vol. XII, 1968-69 (Dusan J. Djonovich, ed., 1975), at 104.

A resolution is entitled to little weight if it is contradicted by state practice....”⁶⁶

57. All of these cautions weigh heavily against according much, if any, evidentiary value to General Assembly Resolution 2603A. It was contradicted by long-standing, publicly enunciated state practice of a principal and strongly affected state (the United States); the circumstances of the Resolution were highly political and charged with both Cold War and anti-American politics; and the debates carried more of an air of evidence of what states wanted the law to be rather than what it was. Moreover, of the 80 states voting in favor, only 41 of them were actually parties to the Protocol.⁶⁷ In addition, approximately one-third of all countries voting abstained (36 of 119), meaning that they refused to recognize the existence of a treaty or customary prohibition on the use of herbicides. These abstaining states included France, the United Kingdom, Denmark, Norway, the Netherlands, and Turkey (almost all the US’s leading NATO allies⁶⁸); and Japan, China, Thailand, Malaysia, Singapore, and Laos (leading Asian states as well as jungle countries, such as Laos, that might expect to be affected by herbicides in war).⁶⁹ Thus Moore concludes that GA Resolution 2603A must be viewed through the lens of the “failure by more than half of the [then] parties to the Protocol to take an unequivocal stand on chemical herbicides.”⁷⁰ For these reasons, GA Resolution 2603A provides little evidentiary value in ascertaining if there was a customary rule in the Vietnam War against the use of herbicides.

58. Treatise writers are hesitant to offer any general rule, one way or the other, even with respect to the law today, let alone that in force during the Vietnam War. Detter comes closest to a general acceptance of herbicides; she says that there are “different interpretations of the Geneva Protocol, especially as to

⁶⁶ Restatement (Third), § 103, Reporters’ Note 2.

⁶⁷ Compare United Nations Resolutions, Ser. I, Vol. XII, 1968-69 (Dusan J. Djonovich, ed., 1975), at 104 (documenting G.A. vote on Res. 2603A) with Roberts and Guelff, supra note 11, at 160-164 (documenting State parties to the 1925 Geneva Protocol). See also Moore, supra n 56, at 468.

⁶⁸ The only then-leading NATO power missing is West Germany, but neither East or West Germany were Members of the United Nations at this time, so they had no voting rights in the General Assembly. Baxter and Buergenthal remark that “dissenting and abstaining states included most of the members of NATO and a number of other important military powers, many of them parties to the Protocol.” Baxter and Buergenthal, supra note 61 at 854 n 7.

⁶⁹ United Nations Resolutions, Ser. I, Vol. XII, 1968-69 (Dusan J. Djonovich, ed., 1975), at 104.

⁷⁰ Moore, supra n 56, at 468. Moore adds as well that during the UN First Committee debates “prior to the adoption by the General Assembly of G.A. Res. 2603 (XXIV), only a handful of states specifically adverted to and took the position that the use of riot-control agents and chemical herbicides was banned by the Geneva Protocol.” Id., at 468 n 180.

whether it covers herbicides,” but adds in another context that “it would seem that it would not be illegal for a State to use a defoliant such as Agent Orange.”⁷¹ L.C. Green does not address herbicides at all; likewise, neither do McCoubrey and White.⁷² Roberts and Guelff simply state that “[s]tates have taken different positions on whether or not tear gas and other normally non-lethal gases, or herbicides and similar agents, fall within the Protocol’s prohibitions.”⁷³ The view of the treatise writers concerning the law today, in other words, is that it is unclear there is a rule even today. It is untenable that there would have been a prohibition during the Vietnam War.

59. I conclude, therefore, on the basis of state practice, *opinio juris*, and other evidence noted above, that herbicides were not prohibited by customary international law arising from the 1925 Geneva Protocol during the Vietnam War.

D. Non-Contemporaneous International Law and Chemical Herbicides

60. In addition to looking at the binding law that existed at the time the alleged actions took place, it is also informative to look at subsequent developments in the law. This section examines three subsequent developments: the Chemical Weapons Convention, 1977 Protocol I and the emergence of international environmental norms. In each case, these norms clearly do not apply to the conduct of the United States in Vietnam because developments in international law cannot be applied retrospectively and because, in some cases, the United States has refused to ratify the relevant treaties. However, these developments are still useful in establishing two points. First, there is no agreement even today on whether the use of herbicides is prohibited by international law; current disagreement provides strong evidence that no such consensus existed during the Vietnam War. Second, to the extent that admittedly new norms of international law were adopted subsequent to (and perhaps because of the use of herbicides in Vietnam), the international

⁷¹ Detter, supra, at 256, 226. See also, discussion of Protocol III, infra.

⁷² See L.C. Green, The Contemporary Law of Armed Conflict (1993); Hilaire McCoubrey and Nigel D. White, International Law and Armed Conflict, supra note 36.

⁷³ Roberts and Guelff, supra note 11, at 155. Scholars writing articles in the law reviews diverge somewhat more; this is unsurprising given that, as noted above, a function of contemporary international law scholarship is to give more argumentative judgments. Moore concludes, on the one hand, that “tear gas and herbicides may lawfully be used in the Indo-China War to the extent specific uses do not contravene particular prohibitions on the conduct of warfare.” Moore, supra note 56, at 477. Baxter and Buergenthal, on the other hand, cautiously state that “the case seems stronger for including anti-plant chemicals within the prohibition of the Protocol than for excluding them. It should be emphasized, however, that the evidence to support this interpretation is by no means as strong as is the evidence for including irritant chemicals.” Baxter and Buergenthal, supra note 61, at 867.

community has recognized that there was no applicable customary law governing the subject during the relevant period.

61. *The 1993 Chemical Weapons Convention (CWC)*. Although the law which must be applied is that of the Vietnam War, rather than law existing today, it is noteworthy that the herbicides were not included in the state of the art chemical weapons treaty of the 1990s, the CWC. Even though States Parties agreed to include a prohibition on tear gas in Article 1(5) of the CWC, they removed a draft prohibition on the use of herbicides from the binding articles of the treaty. Instead, a political compromise was struck to put a reference to a prohibition on herbicides as a method of warfare into the non-binding preamble at paragraph 7.⁷⁴ According to the leading commentary on the Chemical Weapons Convention, “[h]erbicides will not be regarded as chemical weapons if used with an intent to destroy plants. That would apply even if the (secondary) effect of such use were the killing or harming of people, for example by toxic side effects of denial of food supplies.”⁷⁵ Thus, even under today’s law – in a sweeping treaty that deliberately extends far beyond the mere use of chemicals in war, to enact prohibitions on the production, trade and stockpiling of chemical weapons – states could not agree to include a binding prohibition on the use of herbicides. If there was a lack of agreement as late as 1993, there could hardly have been customary prohibition on the use of herbicides a quarter century earlier during the Vietnam War.
62. *1977 Additional Protocol I*. 1977 Additional Protocol I to the 1949 Geneva Conventions (hereinafter “1977 Protocol I”) – a sweeping revision of the laws of war that deliberately took account of the experience of Vietnam, widely ratified but also a treaty which the United States has aggressively declined to ratify⁷⁶ – contains certain requirements for the protection of the natural environment in the course of warfare. Article 55 of 1977 Protocol I requires that care be taken “in warfare to protect the natural environment against widespread, long-term and severe damage.” This provision, responding in considerable part to the experience of the Vietnam War, is acknowledged as innovative in the treaty law of war. For example, the International Committee

⁷⁴ Walter Krutzsch and Ralf Trapp, A Commentary on the Chemical Weapons Convention 8, n5 (1994).

⁷⁵ *Id.*, at 30.

⁷⁶ On January 29, 1987, President Ronald Reagan informed the United States Senate that 1977 Protocol I would not be submitted for Senate advice and consent to ratification. See Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, to 100th Cong, 1st Sess (January 29, 1987), reprinted in 26 I.L.M. 561 (1987); see also Meron, supra note 16, at 62-70.

of the Red Cross Commentary on article 55 of 1977 Protocol I states that provision for the protection of the natural environment

“is a *new feature*. Respect for the environment, even in peacetime, has only recently become a matter of concern ... The ecological concerns expressed previously by isolated but prophetic thinkers were recognized at an international conference in 1972 ... The massive use of defoliants during the war in Viet Nam is not unrelated to this.”⁷⁷ (emphasis added)

63. The fact that these treaty provisions were considered to be innovative and a response to the Vietnam experience demonstrates that there was no established customary prohibition on the use of herbicides during the war.⁷⁸ The provisions also could not be applied retrospectively to the Vietnam situation, because the Protocol was not adopted until 1977 and the United States has refused to ratify it to this day.

64. *Developments in international environmental law.* Plaintiffs’ allegations with respect to environmental damage cannot bear legal weight because, at the time of the Vietnam War, no international law existed with respect to the impact of the conduct of war on the environment. The negotiation in the late 1970s of innovative treaty law, such as 1977 Protocol I and ENMOD (Environmental Modification treaty)⁷⁹, covering damage to the environment in war, indicates

⁷⁷ International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 662 para. 2125 (Sandoz, Swinarski, Zimmerman, eds., ICRC 1987) (hereinafter “ICRC Commentary”); see also 1977 Protocol I, Art 35(3) which states that it “is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” The ICRC treatise adds by way of commentary that: “As regards the newly added third principle (inspired mainly by the large-scale measures of deforestation carried out by the Americans in the course of the war in Vietnam), its terms and, in particular, the words qualifying the concept of ‘damage to the natural environment’, are too vague and restrictive for much to be expected of a concrete application of this ‘basic rule’. Kalshoven and Zegveld, supra note 52, at 92.

⁷⁸ The novelty of the idea of environmental violations of the laws of war is confirmed in the treatise of Leslie C. Green, The Contemporary Law of Armed Conflict 127 (2nd 2000) (describing Art. 35(3) as a “new ‘basic rule’ regarding the methods and means of warfare” that had “no origins in customary law”).

⁷⁹ The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) prohibits using the environment as a weapon in conflicts. Adopted by the UN General Assembly on 10 December 1976 and opened for signature on 18 May 1977, ENMOD entered into force when Laos, the twentieth State Party, deposited its instrument of ratification on 5 October 1978. The United States is a party, although it is questionable whether the treaty’s provisions have yet reached the status of customary law today; they certainly had not during the Vietnam War. See, e.g., Michael D. Diederich, Jr., “Law of War” and Ecology – A Proposal for a Workable Approach to Protecting the Environment through the Law of War, 136 Mil. L. Rev. 137, 146 n47 (1992) (prior to the United States’ use of herbicides in Vietnam, the use of poison against nature was permitted, but that, subsequent to the

just how novel the idea was at that time. Many commentators acknowledge that concern about environmental protection was motivated, in part, by the experience of the Vietnam War.⁸⁰ That environmental norms developed after and because of the Vietnam War is itself proof that such norms did not exist during the Vietnam War. Furthermore, even today, the enforcement of rules against environmental damage in warfare is virtually non-existent.⁸¹

IV. Were the Specific Uses of Herbicides in the Vietnam War Prohibited?

65. Even if no customary international law rule existed prohibiting herbicides or all their uses in war *per se*, there remains the possibility that actual uses of the herbicide in the Vietnam War still violated the laws of war as they existed at that time if it was used in a disproportionate manner. I assess two uses to which herbicides were put in the Vietnam War. The first was defoliation in order to deny cover to enemy combatants. The second was to destroy civilian crops in order to deny their partial use as sustenance to enemy combatants. Neither of these possible uses of herbicides, in my view, violated any rule of customary international law in force during the Vietnam War and, in particular, neither violated the customary law rule requiring proportionality between military advantage and civilian damage in military operations.

Vietnam War, the 1977 Protocols and ENMOD were added to the law of war to protect the environment); Richard Falk, Environmental Disruption by Military Means and International Law, in Environmental Warfare: A Technical, Legal and Policy Appraisal 33, 36 (A.H. Westing ed., 1984) (“International law did not regard environmental protection as a distinct goal of the law of war until the upsurge of specific environmental concerns in the 1970s”).

⁸⁰ See e.g., ICRC Commentary, *supra* note 77.

⁸¹ A report to the prosecutor of the International Criminal Tribunal for Yugoslavia (ICTY) on the conduct of NATO forces in the 1999 Kosovo war indicates that Article 55 of 1977 Protocol I has a “very high threshold for application ... conditions for application are extremely stringent and ... scope and contents imprecise.” Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ICTY, at para. 15. The same reluctance to recognize international claims for environmental damage is evident in U.S. case law. For example, in Flores, the Second Circuit rejected the view that, even today, evidence has been presented to show the existence of a customary international law rule against ‘intranational’ pollution. Flores draws upon other cases, such as Beanal v. Freeport-Morgan, Inc., in declining to recognize a customary international law of the environment based merely upon such scholarship as Phillip Sands, ed., Principles of International Environmental Law I: Frameworks, Standards, and Implementation (1995) or the Rio Declaration on Environment and Development, June 13, 1992 (U.N. Doc. A/CONF.151/5rev.1 (1992):

“Beanal fails to show that these treaties and agreements enjoy universal acceptance in the international community. The sources of international law cited by Beanal and the amici merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts.” Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir.1999))

66. *The rule of proportionality and problems in its application.* The fundamental customary law rule at issue in each of these scenarios is proportionality. This is how properly to weigh the requirements of military necessity – what might be called the “importance of winning”⁸² – against collateral damage, particularly to civilians and civilian objects. This rule of proportionality is so ancient and deeply embedded in the laws of war that the Hague Regulations do not see the need to state the general proportionality rule as such. The US Army’s Law of Land Warfare, which generally follows the Hague Regulations, sets out the general rule that “loss of life and damage to property must not be out of proportion to the military advantage to be gained.”⁸³ This was the standard in force for US forces in the Vietnam War and is still the US military standard today.⁸⁴
67. Although there is general agreement about the existence of the rule of proportionality, there is no similar agreement about how the concept should be applied. The 1999 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, which considered allegations that NATO forces breached the proportionality rule in the Kosovo war, summarized the difficulties even under the law today:

⁸² The phrase is Michael Walzer’s and it captures an important, yet sometimes overlooked, fact about the moral structure undergirding the laws of war. Winning, Walzer says, *is* important, despite the fact that the law imposes rules on how winning may be achieved, and if you do not believe that it is important that your side win in war, then morally you cannot justify the violence and destruction entailed by fighting. See Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* 109-110 (1977).

⁸³ *US Field Manual* *supra* note 10, at 19, para. 41.

⁸⁴ 1977 Protocol I sets out a somewhat more elaborate standard which focuses directly on noncombatants; it prohibits attacks which “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” 1977 *Protocol I*, Art. 51(5)(b). This definition, in my view, has certain advantages of clarity and specificity in laying out a standard for acceptable collateral damage, at least with respect to civilians, and it has been widely accepted in the world. Although it informs my thinking, I have not used it directly here for two reasons. First, the United States has not ratified 1977 Protocol I, and therefore it is not bound by its formulations as a matter of treaty law. It has also objected to some articles as departing from existing customary international law. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 *Am. U. J. Int’l L. & Pol’y* 419, 424-27 (1987); see also Meron, *supra* note 16, 62-70. Second, the United States, among other countries, has also raised objections (in my view, correctly) to the wording, or at least to some interpretations, of this particular provision, viz., the phrase “concrete and direct.” The US objects to those terms being understood to mean advantages in the “tactical” situation prevailing at that moment only; the view of the United States seems to be that tactical situations can only be evaluated in relation to a larger strategic view. For a summation of states’ concerns on this matter in the drafting of 1977 Protocol I, see *ICRC Commentary*, *supra* note 77, Art. 57, at p. 685, paras. 2217-18.

“The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. ... It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.”⁸⁵

The proportionality calculation is therefore inherently open-ended, imprecise and subjective. Moreover, it is a calculation that must take place constantly up and down the chain of command, in strategic matters as well as tactical matters, in the general’s headquarters as well as in the mind of the junior officer on the move in the field.

68. By reason of this inherent subjectivity and imprecision, people with different backgrounds and in different circumstances can easily reach different but equally legitimate conclusions on exactly the same facts. As the Final Report notes, for example, it is “unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.”⁸⁶ Even from the standpoint of a reasonable military commander, commanders with the same training are likely to come to varying conclusions on the same facts. For this reason, the law of war has traditionally vested very great discretionary powers with commanders to make these determinations. A Department of Defense General Counsel letter correctly says that it is “universally recognized that the laws of war leave

⁸⁵ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 1999, § 48, available at <<http://www.un.org/icty/pressreal/nato061300.htm>> (hereinafter the “Final Report”). As will be discussed below, the US and other NATO allies objected strenuously even to the idea that a prosecutor could examine these charges and refused to supply the Committee with more than very general information in response to a letter requesting specific information concerning targeting. See *infra*, note 94.

⁸⁶ *Id.*, § 50.

much to the discretion of the military commander.”⁸⁷ Such discretion is a constant of the laws of war.

69. *Proportionality and criminal liability.* Because the calculation of proportionality lies in the hands of military commanders, the question of proportionality is generally satisfied by those commanders making a genuine attempt to determine both sides of this proportionality calculation and to weigh them against each other. Once a good faith attempt has been made to weigh these risks and benefits, it is recognized that this judgment of proportionality should be respected, absent some showing of truly extraordinary disregard for undertaking proportionality calculations *at all* – that is, disregard so egregious that it would have been palpable and obvious to anyone that it crosses the line into intentional depravity.
70. The reason for this deference to the commander’s discretion is that the body of law at issue is, with respect to individual liability, entirely criminal. The standards, therefore, of intent and culpability are those of the criminal law. But unlike ordinary criminal law, these standards are applied in circumstances of war and peace where the stakes are enormous, involving both immense forces of destruction and enormous political consequences. States have been profoundly unwilling to turn otherwise honorable soldiers into mass murderers by the second guessing of a court after the fact; state practice has required, instead, obvious intentional depravity, an utter indifference even to making a calculation of proportionality.
71. How seriously international law takes the discretion of commanders and, therefore, how egregious such conduct would have to be in order to fall outside the scope of that discretion, is illustrated tangentially in the Nuremberg Hostage Case decision. As part of a larger case concerning reprisals against hostages, the German commander was also accused of scorched earth tactics so destructive as to amount to disproportionate devastation not justified by military necessity. Because the court found no element of depravity in the destruction – no evidence of utterly egregious indifference to the calculation of proportionality – the court found no war crime on the basis of a lack of proportionality:

“There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect

⁸⁷ First Letter from J.Fred Buzhardt, General Counsel of U.S. Department of Defense, to Senate Foreign Relations Committee Chairman J.W. Fulbright, 1971, reprinted in “United States: Department of Defense Position With Regard to Destruction of Crops Through Chemical Agents,” 10 I.L.M. 1300, 1303 (1971).

can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal ...

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark *actually existed*. We are concerned with the question whether the defendant at the time of its occurrence acted *within the limits of honest judgment* on the basis of the conditions prevailing at the time . . . the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.”⁸⁸ (emphasis added)

72. The lesson of The Hostage Case, therefore, is that the court respected the judgment of the commander even in a case involving extreme scorched earth tactics, which involved devastation of an area approximately the size of Denmark and which left, according to the indictment, some 61,000 civilians starving and without shelter at the onset of winter in Scandinavia.⁸⁹ It was unwilling to substitute its own judgment so long as it appeared that an

⁸⁸ United States of America v. Wilhelm List, et. al., “The Hostage Case”, Case No. 7, 11 Law Reports of Trials of War Criminals, 1296-1297 (1949)

⁸⁹ “Scorched earth” here risks understating the enormity of the devastation. The German army in Finland in 1944, faced with a separate peace between Finland and the Soviet Union, retreated to deeper defensive positions in Norway. Believing itself to be pursued by a much larger Soviet army, as part of its retreat, it ordered a complete evacuation and total destruction of an area in Norway approximately the size of Denmark. See Howard S. Levie, Terrorism in War: The Law of War Crimes 339-40 (1993). The devastation was described in the US indictment at Nuremberg of the German commanders:

“[D]efendant Rendulic ... issued an order, to troops under his command and jurisdiction, for the complete destruction of all shelter and means of existence in, and the total evacuation of the entire civilian population of, the northern Norwegian province of Finnmark. During the months of October and November 1944, this order was effectively and ruthlessly carried out ... evacuated residents were made to witness the burning of their homes and possessions and the destruction of churches, public buildings, food supplies, barns, livestock, bridges, transport facilities, and natural resources of an area in which they and their families had lived for generations. Relatives and friends were separated, many of the evacuees became ill from cold and disease, hundreds died from exposure or perished at sea in the small boats and fishing smacks used in the evacuation, while still others were summarily shot for refusing to leave their homeland; in all, the thoroughness and brutality of this evacuation left some 61,000 men, women, and children homeless, starving, and destitute.” (Count 2, para. 9(a), Indictment in The Hostage Case, (United States of America v. Wilhelm List et. al.), *supra* note 88, 11 Law Reports of Trials of War Criminals 770(1948).)

Thus, despite the extreme devastation created by the German commanders, the Nuremberg court nonetheless – and indeed in summary fashion – acquitted the German commanders on this charge.

“honest” attempt, a good faith attempt, was undertaken in making that judgment. The court was not concerned to determine whether conditions of urgent military necessity “actually existed,” but only whether the commander concluded in good faith that they did. That condition satisfied, the court refused to substitute its own judgment.

73. The notion that proportionality decisions are generally protected as an exercise of discretion means, as noted above, that as a matter of international and military law, the issue of proportionality has been largely regarded as non-reviewable by courts, because it is not considered suitable for second-guessing by courts, international, military or otherwise. As Françoise Hampson, who is a member of the ICRC’s expert committee on customary international law, concludes:

“State practice recognizes that judgments about military necessity often require subjective evaluations with incomplete information on the battlefield and imperfect knowledge of where the failure to take action might lead. For this reason, *great discretion has always been attached to commanders' judgments*, especially those made under battlefield conditions. *Rarely, if ever, is the judgment of a field commander in battle -- balancing military necessity and advantage -- subject to legal challenge, let alone criminal sanction.*”⁹⁰

Thus, while proportionality indeed exists as a matter of international law, it is generally not reviewable by courts, except in cases so egregious that they go far beyond what the Amended Complaint alleges, to circumstances constituting intentional depravity. Not even the horrific scorched earth tactics of The Hostage Case qualify, given the commander’s good faith judgment.

⁹⁰ Françoise Hampson, Military Necessity, in Crimes of War, 251 (Roy Gutman and David Rieff gen. eds., Kenneth Anderson, legal ed., 1999). This conclusion is also supported by state practice, for example, the Austrian Military manual states that: “A direct military advantage is ... anticipated if the commander has an honest and reasonable expectation that the attack will make a relevant and proportionate contribution to the attainment of the purposes of the overall operations. *Deference must be paid to the judgments of responsible commanders, based on information available to them at the time, and taking into account the urgent and difficult circumstances under which such judgments must be made*”; and the Canadian military manual states that: “A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation.” (emphasis added) See Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, 165, 172-73 (2003) (citing both manuals and concluding that: “There is probably no doubt that a court will respect judgments that are made reasonably and in good faith on the basis of the requirements of international humanitarian law”).

74. Applying this standard to the circumstances alleged in the Amended Complaint, and as reiterated in Operation Ranch Hand, the extensive consultations and discussions by commanders of military benefits and expected civilian costs easily met, in my view, the international legal requirements for respecting commanders' discretion. These discussions took place from the President down to local commanders. They involved extensive legal, diplomatic, and military review of both the military benefits and the possible consequences to noncombatants. The requirements of international law would have been met, in my view, with far less discussion; much of the discussion that took place was motivated by reasons of political prudence, rather than legal necessity, and the extent and depth of discussion went well beyond the calculations of proportionality that the law required.

75. *State practice and the paucity of judicial authority on proportionality.* The non-reviewability of proportionality calculations as a matter of international and military law means, as a consequence, that there is a paucity of judicial authority on the subject. This is not surprising. State practice, as noted in part II, can take the form of state action and state inaction. Thus, a lack of prosecutions for disproportionality itself provides evidence of customary international law on the subject.⁹¹ I have followed this body of law for many years, discussing it repeatedly with military lawyers, human rights lawyers, and scholars, and I am not aware of any court martial or other legal case since the Second World War that directly turns on disproportionate devastation by a commander – meaning a case where the legal issue is disproportionality as a war crime as such.⁹² This is despite the fact that proportionality figures at the very center of every commander's legal responsibility under the law of war. Unsurprisingly, therefore, a leading scholar on proportionality has concluded:

“National and international judicial or arbitral decisions which might clarify the rule of proportionality and assist in determining its meaning within the context of [1977] Protocol I are relatively sparse, particularly if cases involving reprisals [such as the *Hostages* case] are disregarded. The rules of international law

⁹¹ See e.g., Thirlway, *supra* note 16

⁹² Even arguably the closest to a true proportionality case, *The Hostage Case* in fact was not centrally about proportionality of devastation; it was instead about the Second World War legal standard for reprisals against third party, innocent hostages for the activities of others engaged in resistance against the occupier; the proportionality of such reprisals was an important element of law under Second World War legal standards (all such reprisals against hostages are today prohibited by the 1949 Geneva Conventions). The allegation of disproportionate devastation – devastation of civilian property – was introduced tangentially and dismissed pretty much summarily. It is clear that a charge based on proportionality alone would not have been successful. See *supra* note 88, 89.

relating to combat have rarely been made the basis of war crime trial proceedings. For example, other than trials arising out of reprisal incidents, no such trials directly relevant to the proportionality issue are reported in the most comprehensive set of war crimes reports, the fifteen volume *Law Reports of Trials of War Criminals* published for the United Nations War Crimes Commission following the Second World War.”⁹³

76. The closest that I am able to come to a post-Second World War judicial view on the matter is the aforementioned analysis offered by the Final Report, asked to respond to claims of disproportionate attack in the 1999 Kosovo war by NATO forces. The Final Report, however, not only refused to find actions that could be prosecuted, it refused even to recommend any action for investigation by the Prosecutor. In addition, the very fact that the ICTY prosecutor had even investigated the proportionality of the bombings elicited fierce criticism by various NATO states, outraged that questions of proportionality should have been subject to even this level of review.⁹⁴ As noted in part II, state practice can take the form of state action and state inaction. Thus, these strong reactions are legally relevant because they reflect a deeply held view by states that proportionality calculations lie within a commander’s discretion and are generally not reviewable except in absolutely egregious cases.

77. The foregoing is not to suggest, however, that because determinations of proportionality are generally not reviewable by courts after the fact means that there is nothing in place by which to inform and temper judgments of

⁹³ Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 Mil. L. Rev. 91, 112 (1982).

⁹⁴ The sharp reaction of the US and other states to the ICTY prosecutor’s action is an example of state reactions that are a form of state practice; thus, it is of *legal*, and not merely *political*, interest that the United States and others objected so strongly even to the formation of a committee to offer a report to the ICTY prosecutor. See, e.g., Jonathan D. Tepperman, *Commentary: Embrace the Tribunal: Prosecuting War Criminals Is In Everyone’s Interests*, Los Angeles Times, Jan. 18, 2000, at B-7 (op-ed) (ICTY Prosecutor del Ponte “announced that she was investigating complaints . . . into the conduct of NATO’s pilots . . . No sooner had Del Ponte spoken than American officials fired back. The White House complained that ‘NATO undertook extraordinary efforts to minimize collateral damage’ and . . . ‘any inquiry into the conduct of its pilots would be completely unjustified’”); Rowan Scarborough, *U.S. denounces U.N. probe of NATO bombings; Says inquiry is ‘unjustified’*, Washington Times, Dec. 30, 1999, at A1 (“Former military officers also expressed shock that such an international investigation could result in indictments, saying bombing blunders against civilians at 20,000 feet are not a criminal matter.”) Not receiving cooperation from NATO, the *Final Report* relied on nongovernmental human rights monitors, submissions from the governments of the Federal Republic of Yugoslavia and the Russian Federation, academic submissions, and press reports for its factual claims. See *Final Report*, *supra* note 85 at part III, list of materials utilized.

proportionality. Rather, state practice and international law have concluded that the best means of ensuring that the proper balance is struck between the requirements of military necessity and collateral damage is by the actions and training of military commanders taken before the fact. It is understood, in my experience, that as a matter of both policy and state practice, proportionality is not a matter that can be effectively policed post hoc by courts; it is inherently too much a matter of discretion. What matters, instead, is a deep emphasis on the training and professional formation of military officers in order to make proportionality calculations a serious and integral part of military action. Proportionality judgments should be incorporated as an inescapable step in drawing up the rules of engagement *in advance* of military action.⁹⁵ These judgments of proportionality can be incorporated into the planning of forms of attack and defense, into preparations for what weapons will be taken to the battlefield, into logistical requirements, into the placement and movement of troops, and the proportionate circumstances of their use planned as with every other facet of war-planning; those judgments of proportionality that must unfold as battle unfolds will be undertaken because they are *already* incorporated under the rules of engagement into commanders' on-going responsibility. As the distinguished military historian Sir John Keegan has written, "the experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to notions of custom, honour, professional standards, and natural law' in making for battlefield decencies. ... There is no substitute for honour as a medium of enforcing decency on the battlefield, never has been and never will be."⁹⁶

78. Thus, as the paucity of cases addressing proportionality confirms, states believe that judgments of proportionality properly lie within a commander's discretion and cannot be effectively policed ex post facto by courts. It would be novel, at the very least, for a court to enter an area that neither civilian nor military courts across many nations, over a long period of time, have thought

⁹⁵ The International Committee of the Red Cross, in its training missions to militaries around the world to inculcate the laws of war, offers an example of what ante hoc training looks like. The ICRC Handbook on the Law of War for Armed Forces, for example, gives training lessons on the rule of proportionality. The Handbook restates the rule as saying that an "action is proportionate when it does not cause incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole military operation." The Handbook then seeks to operationalize this abstract principle by training military commanders in ways to incorporate it practically into military rules of engagement. So, for example, "guidance to subordinates," it says with reference to weighing up the costs and benefits of military operations, "shall be given in rules of engagement." Frederic de Mulinen, Handbook on the Law of War for Armed Forces 93 (ICRC 1987).

⁹⁶ John Keegan, If you won't, we won't, The Times Literary Supplement, Nov. 24, 1995(quoting Sir Adam Roberts).

appropriate to go, to make new international law in what is regarded as the essence of discretion.

79. *Herbicide use for purposes of defoliation to deny cover to enemy combatants.*

The use of herbicides under discussion here had the military purpose of defoliating jungle cover and thus making it more difficult for enemy combatants to find cover. The question is whether this use of defoliant herbicides violated any rule of customary law. It can be broken down into three sub-questions – first, was jungle cover a legitimate military target and what would be the benefits of its destruction; second, what were the collateral costs of military attacks on the jungle cover; and, third, was the US’s judgment that jungle cover could lawfully be attacked a good faith determination as a matter of law?

80. Was the jungle cover a legitimate military objective or target and what were the military benefits of targeting it? As a matter of law, both at the time of the Vietnam War and today, jungle cover was clearly a legitimate military target. The military benefit gained by depriving enemy combatants of the ability to conceal themselves is also axiomatic; the jungle that physically provides them with cover is a legitimate target and the benefit from removing it and prevent surprise attacks is obvious. Armies historically have undertaken many measures, ordinary and extraordinary, to remove cover that conceals enemies, from destruction of fields and forests by burning them, to the razing of buildings in which enemy combatants are concealed. Jungle cover is no different in this regard.⁹⁷ Indeed, that jungle cover itself, under circumstances where it is used for cover, may constitute a legitimate military target, is recognized by, *inter alia*, Protocol III of the 1980 Conventional Weapons Convention. It specifically provides, with respect to the use of incendiary devices, that forest cover may be made the object of attack when “such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.”⁹⁸

⁹⁷ Indeed, the US Field Manual takes note of the many varied ways in which not just civilian lives might be lost but property might be damaged or destroyed by legal operations in battle. “The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy’s army. ... Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire ...” See US Field Manual, *supra* note 10, at para. 56.

⁹⁸ UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, art. 2(4) (1980), reprinted in Roberts and Guelff, *supra* note 11 at 533, 534. (The U.S. is not a party to this Protocol III.) Indeed, according to

81. The second question, therefore, is what were the collateral costs of defoliation? There were undoubtedly costs to civilians in destroying the natural vegetation. Assuming for this discussion that the allegations made in the Amended Complaint are true, i.e. that the herbicide was in fact known to be harmful to human life, such costs would have to be weighed up against the benefits gained, insofar as the costs were known. However, such collateral damage is not in principle different than the collateral damage caused by other weapons of war, such as death and destruction by artillery, rockets, bombs or anything else. Causing collateral harm to civilians is not *per se* illegal; what is forbidden is causing collateral damage that is excessive in relation to the military advantages obtained. These, then, are the two sides of the proportionality calculation that military commanders must make. The level of diligence which they must exercise depends on the levels of benefit and damage which might ensue. A decision at the strategic level in a war, such as an entire campaign of aerial bombardment, entails greater consideration than, for example, a single mission with limited damage potential.
82. As stated above, this is a calculation that lies in the hands of military commanders and it is generally satisfied by showing that there was a genuine attempt to consider both sides of this proportionality calculation. It is clear from the Plaintiffs' Amended Complaint as well as Buckingham that commanders and their civilian superiors considered in a meaningful way the consequences of the means and methods of warfare they used – indeed, for prudential political reasons, they considered these matters to a far greater extent and depth than international law requires.⁹⁹ The consequence is that the judgment to use herbicides was protected within the commanders' discretion; and, as discussed earlier, it is not reviewable by courts on a post hoc basis. However, even if one were to assess proportionality, the decision to use herbicides to deny cover was amply justified within the legal standard that existed at the time of the Vietnam War. Indeed, it would still be justified as a legal matter today. The denial of cover is so basic to warfare that the

Detter's treatise, even under the law *today*, incendiary devices, as well as defoliants such as Agent Orange, benefit from a so-called "jungle exception." Citing to article 2(4) of Protocol III of the Conventional Weapons Convention, she concludes that a "State naturally covered by jungle vegetation will not have any protection under the Protocol against attacks, by for example, napalm weapons. Nor will any civilian target be protected for an attacker [who] cannot know whether or not the jungle conceals a 'military' or 'civilian' objective." Detter, *supra* note 42 at 226. If this is correct, then it would seem to apply even more to an herbicide such as Agent Orange. Indeed, Detter specifically goes on to draw the conclusion that under this Protocol III, "it would seem that it would not be illegal for a State to use a defoliant such as Agent Orange." *Id.*

⁹⁹ Among the many instances that recur throughout Buckingham, *supra* note 54, *see, e.g.*, the extensive discussions made up and down the chain of command in Ch. III "The Deployment of Spray Aircraft to South Vietnam and Initial Defoliation Operations" at 23-44.

level of civilian collateral damage would have to be, quite bluntly, considerably more than is alleged here.

83. *Use of herbicides for civilian crop destruction for the purpose of denying sustenance to enemy combatants.* The threshold issue is whether crops – which in this case were raised at least partly by civilians, and intended for consumption partly by civilians and partly by enemy combatants – constituted a legitimate military objective under the law in force during the Vietnam War. Put in the abstract, the question is whether a so-called “dual use” object, i.e. an object used by both civilians and the enemy military, can constitute a legitimate military target and under what circumstances.

84. The general customary law principle that a legitimate military target is any object – whether used by civilians or not – which in some way contributes to the military advantage of one side or the other has not been seriously questioned.¹⁰⁰ However, no definition of military objective was codified in the 1907 Hague Regulations, the 1929 Geneva Conventions, or the 1949 Geneva Conventions; although various diplomatic efforts proposing definitions were circulated as part of one draft convention or another, none gained general recognition.¹⁰¹ The result, according to the ICRC, was that, “during the Second World War and during several armed conflicts which have taken place since then, each belligerent determined what should be understood by such objectives as it pleased.”¹⁰² It was not until the wide adoption of 1977

¹⁰⁰ See, e.g., the discussion of legitimate military targets in the *ICRC Commentary*, *supra* note 77, art. 52, at para. 2003; see also Hamilton DeSaussure, *Military Objectives*, in *Crimes of War*, 253-55 (Roy Gutman and David Rieff, gen. eds, Kenneth Anderson, legal ed.1999)

¹⁰¹ See, e.g., Commission of Jurists, *1922 Hague Draft* article 24, *reprinted in* the *ICRC Commentary*, *supra* note 77, Art. 52, at p. 630-31, para. 1997. During the post-World War II period, various diplomatic efforts were made to establish a treaty definition of a legitimate military objective, but none were agreed on up to an including during the period of the Vietnam War. The most important effort to establish a general definition was the ICRC’s own 1956 *Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War*, which took a very expansive view of legitimate objectives, including “[p]ositions, installations or constructions ... stores of arms or military supplies ... [i]ndustries of fundamental importance for the conduct of the war ...”, *reprinted in* the *ICRC Commentary*, *supra* note 77, Art. 52,p. 632, para. 2002 n 3. Out of the many categories enumerated in the Annex, these are samples of those which easily encompass stands of crops – as military supplies; as installations or positions; and, in the context of guerrilla war in a non-industrialized setting, as essential industry. Particularly in a subsistence level guerrilla war, crops and food supplies are as essential war industries as oil refineries in industrialized societies, and they have been regarded that way across the history of warfare; this was, for example, the lesson of Sherman’s march to the sea.

¹⁰² *ICRC Commentary*, *supra* note 77 Art. 52, at p. 631, para. 2000.

Protocol I, following the Vietnam War, that rules more restrictively defining legitimate military objectives became predominant.¹⁰³

85. In these circumstances, it is evident that crops could constitute a legitimate military target, even if they were planted and tended at least partly by civilians, and even if they were destined at least partly for civilian consumption, provided that they also provided at least some material support for the military. Despite their “dual-use” status, the fact that they contributed materially to the sustenance of enemy combatants made them a legitimate military target without the need for a special proportionality calculation; as essential war materiel, they presumptively met the standard. State practice in the Second World War and afterwards up through 1977 Protocol I appears to have taken the view that fundamental categories of presumptive military targets such as those in the ICRC Draft Rules could be destroyed essentially as a matter of course, on the view that their importance to warfare was such that they would presumptively count as both legitimate military targets and by their nature trump in a proportionality calculation. Although some armed forces did take proportionality into account apparently as a matter of law, others did so on the basis that certain targets automatically or at least presumptively won in any proportionality calculation, while still others seem to have made the proportionality calculation as a matter of policy and not out of a sense of legal obligation (meaning that they lacked the necessary *opinio juris* to evidence customary international law).

86. However, even had the law during the Vietnam War era required a proportionality calculation of military benefits and civilian costs of the crop destruction, the destruction detailed in the Amended Complaint would clearly have been justified as a matter of international law. Food supplies are an essential war materiel, and crops have special importance in guerrilla wars waged by combatants who do not possess an industrial base, in subsistence level fighting where access to food is especially critical for sustaining combatants. There are indeed costs to civilians in the destruction of food supplies – sometimes severe – but given the level of scorched earth destruction not even questioned by the Nuremberg courts, the level of destruction in this case would not come close to overcoming the military

¹⁰³ See 1977 Protocol I, Art. 52(2). Still, even under the more restrictive view of 1977 Protocol I, article 52(2), dual-use crop destruction is permitted, provided that it does not lead to the extreme case of starvation of the civilian population prohibited by article 54. The United States, as noted, is not a party to 1977 Protocol I and is not bound by its definitions; however, the US has accepted the definition of a military objective as stated in Article 52(2) as binding customary law and has incorporated it into its military manuals. See Change No. 1 of The Law of Land Warfare, 15 July 1976, *supra* note 37; see also Meron, *supra* note 16, at 64. This was so by 1976, but not during the Vietnam War.

advantages gained. In any event, as already noted, the breadth and depth of discussions and debate over crop destruction tactics by US commanders and their civilian leaders shows a genuine effort to weigh the costs and benefits, with the result that those judgments would be protected as being within the commanders' discretion and not subject to ex post facto review by courts.

87. I conclude, with respect to both situations of herbicide use, therefore, that the discretion inherent in the application of the abstract legal principle of proportionality places it beyond the bounds of post hoc review, except in cases so egregious and depraved that they are devoid of making a good faith estimation of proportionality. That such a good faith judgment was made in each form of herbicide use is plain, even from the allegations of the Amended Complaint, as a matter of international law. And in any case, the actual military judgment under the proportionality standard is quite defensible. I see no basis for finding that the actions of the US military in using the herbicides, whether for defoliation or crop destruction, were not defensible as a matter of law.

V. No Corporate Liability in International Law

88. As a general proposition, international law imposes obligations solely upon states. The proposition is authoritatively stated in a leading treatise, Oppenheim's International Law:

“States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being, such as an alien or an ambassador.”¹⁰⁴

Even areas like international human rights law, which confer *rights* upon individuals, still only impose *obligations* on states.¹⁰⁵

¹⁰⁴ Sir Robert Jennings and Sir Arthur Watts, 1 Oppenheim's International Law 16 (9th ed., 1992).

¹⁰⁵ See, e.g., Restatement (Third), vol. 2, Part VII, Introductory Note at 144 (although international law “governs primarily relations between states ... Increasingly, international human rights agreements have created obligations and responsibilities *for states* in respect of all individuals subject to their jurisdiction”) (emphasis added); § 701 (“A *state* is obligated to respect the human rights of persons subject to its jurisdiction”) (emphasis added); and § 702 (defining customary international law of human rights in terms of state violations: “A *state violates* international law if, as a matter of *state policy*, it practices, encourages, or condones” certain behavior) (emphasis added). And this is notwithstanding the caution

89. The only real exception to this general rule is international criminal law, which imposes *obligations*, as opposed to rights, upon individuals. Although international criminal law (which includes the laws of war pertaining to war crimes and grave breaches, as well as genocide and crimes against humanity) imposes obligations on non-state actors, the only type of non-state actors on whom it imposes obligations are *natural* individuals. International law does not, in the context of international criminal law or elsewhere, impose obligations or liability on juridical actors or artificial persons such as corporations.
90. The gradual development of individual criminal liability in the post-war period (with the greatest leaps forward beginning in the 1990s, well after the Vietnam War) does not create a precedent for corporate liability, for at least two reasons. The first is that even international criminal law is addressed only to natural individuals, and not to artificial persons such as corporations. Second, international criminal law is addressed to criminal liability rather than civil liability. For both of these reasons, *individual criminal* liability provides no precedent for *corporate civil* liability.
91. *Individual versus corporate liability.* Of the five international criminal tribunals established beginning with Nuremberg, none has provided for corporate criminal primary or secondary liability. The Charter of the Nuremberg Tribunal established procedures for the trial of persons who, “whether as individuals or as members of organizations”, committed certain crimes.¹⁰⁶ While several German businessmen and industrialists were tried at Nuremberg, those trials were exclusively of individuals as directors and officers of companies, and the record contains no suggestion that corporations could themselves incur criminal liability.¹⁰⁷ Likewise, the International

earlier raised about the Restatement (Third) being overly permissive in the development of human rights law as custom. See supra note 29.

¹⁰⁶ Nuremberg Charter (Charter of the International Military Tribunal), 8 August 1945, art. 6, U.N.T.S. vol. 82, 279

¹⁰⁷ See, e.g., United States v. Krupp (“The Krupp Case”), 9 Trials of War Criminals 1327 et seq.; United States v. Flick (“The Flick Case”), 6 Trials of War Criminals 1187 et. seq.; United States v. Krauch (“The Farben Case”), 8 Trials of War Criminals 1081 et. seq.. Confusion sometimes arises over the fact that the Nuremberg Tribunal was able to impose *individual* criminal liability based solely on membership in entities such as the SS and the Nazi party. Even leaving aside that the SS was an institution of the German state and that the Nazi Party was fully integrated into the totalitarian state – and thus neither were “private” actors in the sense of a private business corporation – the Nuremberg trials imposed no liability on the entities as such, but instead imposed liability on individuals for their membership. Indeed, the tribunal stated that: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be

Military Tribunal in Tokyo only permitted individuals to be prosecuted.¹⁰⁸ This position had not changed by the Vietnam War.

92. Indeed, this position has not changed in contemporary, post-Vietnam War international law. Even today, international law recognizes no form of corporate liability. The ICTY, for example, has jurisdiction *only* over natural persons; Article 6 of its Charter provides that it shall “have jurisdiction over natural persons pursuant to the provisions of the present Statute.”¹⁰⁹ Likewise, Article 5 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) provides that the ICTR shall “have jurisdiction over natural persons pursuant to the provisions of the present Statute.”¹¹⁰ And Article 25(1) of the Rome Statute of the International Criminal Court (ICC) provides that the court shall have jurisdiction only over natural persons.¹¹¹ The proposal was indeed put forward in negotiations to include juridical persons in the jurisdiction of the ICC, but it was consciously rejected because, in part, there are “not yet universally recognized common standards for [private entity] liability.”¹¹²

93. *Criminal versus civil liability.* Although international law in narrow circumstances does provide for individual criminal liability, it does not generally provide for civil liability – not even for *individuals, let alone for corporations*. In modern times, the only exception to this general rule is a novel provision of the Rome Statute of the ICC which came into effect in 2002. Article 75 of the Rome Statute provides, in a section dealing with reparations to victims, that the “court may order reparations” to be paid by individual defendants. Accepting such reparations as essentially civil in nature, Article 75 was recognized to be innovative and departure from past practice.¹¹³ Thus, civil liability of non-state actors – individual and corporate

enforced.” International Military Tribunal for the Trial of Major War Criminals, Judgment of 1 October 1946, reprinted in 41 Am. J. Int’l L. 172, 221 (1947).

¹⁰⁸ Charter of the International Military Tribunal for the Far East (Tokyo Charter), January 19, 1946, as amended April 26, 1946, art. 5, T.I.A.S. No. 1589 (“The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses...”)

¹⁰⁹ Statute of the International Tribunal for the Former Yugoslavia, Security Council Resolution 827, 48 UN SCOR (3217th mtg), UN COD S/Res/827 (1993), 32 I.L.M. 1203.

¹¹⁰ Statute of the International Tribunal for Rwanda, Security Council Resolution 955, 49 UN SCOR (3452nd mtg), UN Doc S/Res/955 (1994), 33 I.L.M. 1598.

¹¹¹ Rome Statute of the International Criminal Court, adopted July 17, 1998, UN Doc A/Conf.183/9 (1998), at Article 25(1). The United States has not ratified the Rome Statute.

¹¹² See Kai Ambos, Article 25: Individual Criminal Responsibility, in, Commentary on the Rome Statute of the International Criminal Court 475, 477-78 (Otto Triffterer ed., 1999)

¹¹³ See David Donat-Cattin, Article 75: Reparations to Victims, in, Commentary on the Rome Statute of the International Criminal Court 965, 966 (Otto Triffterer ed., 1999).

– is not generally a part of international law today, and certainly did not exist at the time of the Vietnam War.

94. *No corporate liability in weapons conventions.* The absence of any precedent for corporate civil liability is reinforced with respect to weapons and armaments by the fact that the leading weapons treaties have imposed obligations only upon states, not juridical entities. The first modern weapons treaty, the St. Petersburg Declaration banning certain exploding bullets, is about use only and imposes obligations only on states, and that pattern is followed throughout the history of treaties governing the use of weapons as well as arms control. The 1925 Geneva Protocol, although it came about in the course of an interwar conference on disarmament and arms control, is solely about the use of certain weapons, not their production or sale by private actors, and it imposes obligations on states only.¹¹⁴ Neither the 1993 Chemical Weapons Convention¹¹⁵ nor the 1972 Biological Weapons Convention¹¹⁶ – treaties dealing comprehensively not just with use but also with production – impose obligations on corporate actors; they instead confine themselves to addressing state actors. The weapons treaty that would have been most likely to have addressed the issue, the 1997 Ottawa Convention Banning Landmines – which comprehensively prohibits all use, production, sale, stockpiling, and transfers of antipersonnel landmines – likewise imposes obligations only on states.¹¹⁷

95. While some would regard this failure of international law to impose obligations on corporations and juridical entities as a serious gap in the law, in my view, it actually performs a useful function. My experience in monitoring the laws of war and experience in international campaigns to ban such

¹¹⁴ 1925 Geneva Protocol, *supra* note 9 (defining obligations accepted by the “High Contracting Parties”)

¹¹⁵ Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction, 32 I.L.M. 800 (1993) *See, e.g.*, art. 1 (phrasing each obligation as “Each *State* Party to this convention undertakes ...” and “Each *State* Party undertakes...”)(emphasis added).

¹¹⁶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 U.N.T.S. 163 (entry into force 26 March 1975). *See e.g.*, art. 1 (phrasing each obligation as “Each *State* Party to this Convention undertakes ...”)(emphasis added).

¹¹⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (hereinafter the “Ottawa Convention”) *See e.g.*, art. 1 (phrasing each obligation as “Each *State* Party undertakes never under any circumstances to ...”)(emphasis added). Even the prohibitions on production, sales, and transfers, which of course might involve private corporations, are addressed to states, which then have treaty obligations to carry out the provisions through domestic legislation and regulation. The United States is not a party to the Ottawa Convention.

weapons as landmines has strongly taught me that, from the standpoint of controlling behavior in war and armed conflict, including the weapons used, it is better to place the burden directly on states (or, in the case of civil war, on the parties to a conflict). The executive branches of states are the only actors with the plenary regulatory power and machinery to make and enforce policy among private actors. It is superficially attractive to believe that accountability is maximized by allowing corporations to be pursued in such venues as courts for violations of the laws of war or of weapons treaties, but in my estimation that is not the case. The result, in my experience, tends to be fragmentation of responsibility. Accountability tends to be diluted as states allow courts to deal – more precisely, are happy to outsource the problem by letting courts deal – with such issues as though they were ultimately *about* corporations rather than about *state* policies and practices. States sometimes actually seem to feel that they are morally off the hook if legal action is directed against corporations. But the buck has to stop someplace if there is to be accountability, and it is frankly better, in my view, for it stop with states in order to have a single, visible actor to hold accountable, whether legally or politically.

96. *Claims of corporate aiding and abetting.* Since international criminal law neither allows nor, during the Vietnam War, allowed corporate primary *or secondary* liability – none in Nuremberg, Tokyo, ICTY, ICTR, or the ICC – there is likewise no basis for the Amended Complaint’s specific claims of aiding and abetting by the Defendants, all of which are corporations. Such claims are inapposite under international law. Nonetheless, it bears noting that even if accepted for purposes of argument that international criminal law standards for *individual* criminal liability in the matter of aiding and abetting applied, as they existed at the time of the Vietnam War, the claims of the Amended Complaint still would fail to establish a violation of international law. The international law precedents on aiding and abetting applicable during the time of the Vietnam War are those of Nuremberg and not of later tribunals such as the ICTY. However, international cases about aiding and abetting from that period are few and far between and it is questionable whether there were sufficient to create a general legal standard.
97. Given the limited case law on aiding and abetting, the most useful approach is to see whether this case fits within the framework of the Nuremberg cases. The main case dealing with a claim of aiding and abetting by a private (individual) supplier to a government is The Zyklon B Case, which was tried

by a British Military Tribunal.¹¹⁸ In Zyklon B, three defendants were charged with aiding and abetting the mass murder of civilians in Nazi death camps by supplying the camps with Zyklon B gas and gassing equipment and installations, which were then used in the gas chambers. The Judge Advocate laid out a three part standard for aiding and abetting by such private actors functioning as suppliers.¹¹⁹ To convict, the court would have to find that “the gas had been supplied” by the defendants and that the “accused knew that the gas was to be used for the purpose of killing human beings.”¹²⁰ In addition, speaking about the third defendant, the Judge Advocate said that the court would have to ask whether there was evidence that the defendant was “in a position either to influence the transfer of gas to Auschwitz or to prevent it” and, if there was not, then “no knowledge of the use to which the gas was being put could make him guilty.”¹²¹

98. The tribunal convicted two of the defendants but acquitted the third. The two defendants who were convicted were the senior executives in the firm; they claimed that they had no knowledge that the Zyklon B gas was being used for killing human beings in the camps, and claimed that they believed the gas was being used for delousing and hygiene. The Tribunal accepted extensive evidence that in fact the two defendants knew, from their travels and reports, what the gas was in fact used for, and convicted on the basis that they had actual knowledge and active participation in the crimes and were in a position to be able to refuse the business.¹²² The third defendant, who was a subordinate, was acquitted despite his actual knowledge of the crimes, because the court believed that he was not in a position to influence or prevent the use of the gas.

99. The only other case involving a corporate supplier was United States v Krauch (“The Farben Case”) where Krauch and the two other defendants, who were members of the eleven member board of Degesch, were charged on the basis that “[p]oison gases manufactured by Farben and supplied by Farben to officials of the SS, were used in the extermination of enslaved persons in

¹¹⁸ The Zyklon B Case (Trial of Bruno Tesch and Two Others), British Military Court, Hamburg, 1946, 1 Law Reports of Trials of War Criminals 93 et seq..

¹¹⁹ In British law, a “Judge Advocate is an impartial adviser” to the court, not an advocate in the American sense. Annex II, part VI, The Zyklon B Case, supra note 115 at 116.

¹²⁰ Zyklon B Case, supra note 115, at point 9, p. 101.

¹²¹ Zyklon B Case, supra note 115, at point 9, p. 102.

¹²² As, for example, executives of the Farben company did on occasions when they became aware that the company’s vaccines were being tested on involuntary subjects in concentration camps; they refused to continue supplying those doctors with doses. See United States v. Krauch et. al., (“The Farben Case,”), supra note 108, 8 Trials of War Criminals at 1171-72.

concentrations camps throughout Europe.”¹²³ The U.S. Military Tribunal hearing the case acquitted the defendants on the basis that the executive board, and the defendants who were members of that board, did not exercise “any persuasive influence on the management of policies of Degesch or any significant knowledge as to the uses to which its production was being put.”¹²⁴ The tribunal further held that “neither the volume of the production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put” given that Zyklon B was also used as an insecticide in the camps.¹²⁵

100. Apart from both being cases about private suppliers to governments, there is little useful comparison between the Zyklon B cases and the allegations of the Amended Complaint. The fact that the Zyklon B was a lethal gas fully intended, and actually known by the Nuremberg defendants to be destined, for use in exterminating human beings renders it inapposite as a precedent in international law to the current litigation.¹²⁶ Crucial to the Zyklon B cases – as with the other Nuremberg cases about complicity by private actors – is a level of intentional criminal depravity that has no comparison in this case. When the Zyklon B and other Nuremberg industrialist cases talk about complicity and participation, they do not mean complicity, participation, and knowledge of something that *might* arguably be a crime depending on the resolution of several complex and highly contestable questions about the technicalities of international law, fought over by scholars, debated by journalists and writers, and bandied about by lawyers. The Nuremberg cases, by contrast, are about the intentional killing of millions of civilians – leaving piles of dead bodies, deliberately massacred – where there could be no doubt that the actions were a violation of international law and the only question was how far culpability should be reach. That is not remotely the case here; the very existence of a criminal act is the central issue in the current litigation.

¹²³ Id., supra note 108, at 1168.

¹²⁴ Id., at 1169.

¹²⁵ Id., at 1169.

¹²⁶ Nor is the situation better with respect to other Nuremberg cases of aiding and abetting by private actors. Such cases as Krupp, Flick, and Farben deal in large part with the issues of slave labor. Slave labor actually on the factory floor, in circumstances of privation, torture, forced labor, and death, gives a wholly different meaning to the idea of active participation in a crime and actual knowledge of that crime, so much so that the participatory acts alleged by the Amended Complaint simply find no point of comparison. See supra note 108.

101. Based on the facts alleged in the Amended Complaint, the Defendants supplied a chemical herbicide to the US government for use in war as an agent to defoliate plants rather than to kill human beings. The Defendants could not have been expected to have the special knowledge to determine for themselves – against the publicly expressed legal views of the US government – whether or not its use was a per se violation of international law, and in any case there is no suggestion of actual knowledge that gave it reason to think that it even might be such a violation or, indeed, that such a category of violation might exist. In addition, the Defendants had no level of control over the decision whether or not to use herbicides, nor did they have any control over the actual uses of the herbicide by commanders in the field. Defendants, being private actors who simply supplied the materials, had no participation in or knowledge of the circumstances in which commanders must judge proportionality and military necessity. Indeed, it is hard to imagine how aiding and abetting liability could be found when the primary offense is based on a violation of the laws of proportionality, which turn on discretionary calculations about military necessity made by commanders in the field and which consequently lie beyond the knowledge and control of the supplier.
102. This case cannot be fitted within the Zyklon B mold. That the Defendants circumstances do not even begin to approach the level of knowledge and participation in an obvious, monstrous crime – a fact that figures at the heart of the Zyklon B and Nuremberg cases – and hence fail to state a claim under international law, is something of an understatement. These cases differ in kind, not just in degree.

VI. Genocide and Miscellaneous International Law Claims

103. I deal in summary fashion with Plaintiffs' claims of genocide, crimes against humanity, and torture because even the facts as alleged by Plaintiffs come nowhere close to meeting the thresholds for such violations. The prohibitions on genocide, crimes against humanity, and torture have all been recognized as part of customary international law. These violations represent the most serious crimes in international law; they are not charges to be made lightly. However, they *do* seem to me to be made lightly by the Amended Complaint.
104. It is simply absurd to suggest that the intent necessary for genocide – “to destroy, in whole or in part, a national, ethnical, racial or religious group, as

such”¹²⁷ – could be found even in the strong allegations of the Amended Complaint. Likewise, the use of herbicides against plants clearly was not an inhumane act (on a par with murder and torture) “committed *against [a] civilian population*” nor could it amount to “persecution[] on political, racial or religious grounds”.¹²⁸ Similarly, it cannot be reasonably alleged that herbicides were used in a manner “intentionally inflicted ... for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind”.¹²⁹

VII. Conclusion

105. My conclusions, as a matter of treaty and customary law, are as follows:

- (1) Agent Orange was plainly not a *per se* prohibited weapon under international law at the time of its use in Vietnam and likely would not be *per se* prohibited even today.
- (2) The particular uses to which the herbicide Agent Orange was allegedly put under the Amended Complaint did not constitute a violation of international law.
- (3) International law did not during the Vietnam period, and does not even today, recognize the liability of a corporate actor (as opposed to a State or individual).
- (4) The actions alleged under the Amended Complaint do not come close to meeting the definitions of genocide, crimes against humanity or torture.

¹²⁷ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Art. II.

¹²⁸ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany, No. 3, 50-55 (1946), Art. II(1)(c).

¹²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, U.N.G.A. Res. 39/46, *entry into force* June 26, 1987, Art. 1 reprinted in 23 ILM 1027 (1984) with changes 24 ILM 535 (1985).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2004 in Washington, D.C.
