February 8, 2005

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

Kenneth Anderson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re:

"AGENT ORANGE" PRODUCT LIABILITY LITIGATION

MDL 381

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

Plaintiffs,

- against -

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

04 CV 0400 (JBW)

REPLY DECLARATION OF KENNETH HOWARD ANDERSON JR.

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

Defendants.

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I, Kenneth Howard Anderson Jr., declare as follows:

Introduction

1. My name is Kenneth Howard Anderson Jr. In a Declaration of November 2, 2004 ("Opening Anderson Decl."), I set out my opinions on certain questions of international law in the above-captioned case. As follow-up to my earlier opinion, I have been asked to review and comment on the Memoranda of Law In Opposition to Defendants' Motion to (1) Dismiss on Justiciability Grounds, Etc., and (2) Dismiss All Claims For Failure to State a Claim Under the Law of Nations (collectively, "Plaintiffs' Briefs"), the Opinions of Professors Jordan Paust and George Fletcher, and the amicus brief filed on behalf of the Center for Constitutional Rights, *et al.*, as those materials purport to address issues of international law. The following sets out my opinion on the most fundamental misstatements of international law made in these submissions.

(1) The Prohibition on "Poison" and "Poisoned Weapons"

2. My primary focus in this section is on the prohibition on poisoning under the 1907 Hague Regulations, rather than that on poisonous gases under the 1925

Geneva Protocol. First, Plaintiffs emphasize the earlier prohibition in their briefs and, second, Professor Fletcher concedes that "[I]f the only legal prohibition relevant to the case were the Geneva Protocol of 1925, the defense would have a strong position." Op. of Prof. George P. Fletcher, at 47 (hereinafter "Fletcher Op."). As discussed at length in my Opening Declaration, however, the use of herbicides, in fact, falls outside the prohibitions of the 1925 Geneva Protocol.

The Scope and Generality of the Prohibition

3. Plaintiffs' Memorandum of Law on the Law of Nations extensively argues that customary international law, as embodied in the language of the 1907 Hague Regulations 23(a), prohibits the use of poison or poisoned weapons. Since that general proposition is both plain and uncontested, it is difficult to see how that advances the discussion. Plaintiffs further assert, however, that herbicides such as Agent Orange fall within the customary law prohibition on poison. On that matter, their international law claims exhibit serious deficiencies.

4. Plaintiffs' lengthy walk through historical basics of the law of war establishes that the prohibition on the use of poison and poisoned weapons is indeed ancient; that it is exemplified in certain cases of historical origin – the dipping of arrows in poison, for example, or the poisoning of wells; that there are also modern paradigms of the prohibition – for example, poisoned bullets; and, indeed, that the prohibition against "poison" and "poisoned weapons" was customary during the Vietnam War and remains customary international law today. What Plaintiffs fail to establish is the scope of the prohibition on poison and poisoned weapons, the contours of that prohibition, and particularly whether it can encompass a prohibition on herbicides in general, or Agent Orange in particular.

5. Precisely because the prohibition on poison and poisoned weapons set forth Hague Regulations 23(a) is so ancient, it is also necessarily at such a level of generality that – with the exception of a handful of historically accepted paradigmatic cases – what it actually prohibits is unclear, especially with respect to modern war-making technology. Despite many pages of background material, Plaintiffs are unable to provide any test for, or boundaries of, the rule – they cannot tell us what poison is, or how to determine what comes within and what falls outside the prohibition. This is, in fact, unsurprising. According to Thomas and Thomas, "[f]ew writers of international law, in discussing the rule against the use of poison in warfare, define the meaning of poison for the purpose of interpreting the rule" and, in

fact, "an exact and legalistic definition as to what constitutes poison is not possible."[1]

6. The antiquity and generality of the prohibition on poison have two profound consequences in the evolution of the laws of war. First, the customary law prohibition is jealously preserved in the law of war even in the face of changing technology. This is because the very existence of a widely accepted, historically-grounded ban on *any* kind of activity in war is precious, as it serves by power of example to show that behavior in war *can* be controlled even across centuries of armed conflict. But the price of the survival of a ban across so many centuries and so many technological changes is that it can only be expressed in very general terms that lack the contours specific to the technology of any particular generation of warfare. Those of us whose scholarly preoccupation is both the extension and preservation of a law of war that can be bequeathed across centuries look with concern upon efforts (such as Plaintiffs') to apply a prohibition of historical generality – a prohibition whose virtue is its generality and long term power of example – to an inappropriately narrow and contentious case in order to suit their own interests without concern for the damage that this may do to the long term survival of the norm.[2]

7. The second significant consequence is that while the general prohibition on poison and poisoned weapons continues at this level of hortatory generality, other more specific treaties have emerged as the international law vehicle to apply the general rule to particular weapons to accommodate the evolution of warfare. In other words, while the very general, historical prohibition on poison serves to ground the evolution of specific new norms on specific weapons, it is these specific treaties that actually govern the weapons in question, not the general rule. This explains why, for example, states negotiated the 1925 Geneva Protocol after the gas warfare in the First World War, clearly demonstrating that they did not believe that the general prohibition on poison applied to such cases. It is not the case that the ban on poison has not evolved – on the contrary, it has evolved with impressive maturity, most recently in the great achievement of the 1993 Chemical Weapons Convention. But the prohibition has evolved by holding onto the historical norm as inspiration and aspiration, while (especially where there is controversy over new technology, as is the case with herbicides) proceeding

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1 Ann Van Wynen Thomas and A.J. Thomas, Jr., Legal Limits on the Use of Chemical and Biological Weapons 50 (1970).

2 See e.g., Amicus Brief of Prof. David John Scheffer, 11 ("[B]lurring the clarity of these [war] crimes or extending them beyond the international consensus of their meaning, or applying current standards to actions decades earlier all risk undermining the progress made with such difficulty in the prosecution of atrocity crimes.")

by specific instrument and customary law rules of greater specificity than simply a ban on poison as such.

8. It *might* perhaps have happened differently – one can imagine an international law jurisprudence in which the prohibition on poison grew to apply to new weapons, such as chemical warfare, by a gradual shifting in states' shared understanding of the meaning of "poison or poisoned weapons" in the Hague Regulations. But this is not how the evolution of international law *in fact* took place – the theory offered by Plaintiffs gives no persuasive reason why parties would have bothered to negotiate, draft and sign a wholly separate 1925 Geneva Protocol, for example, if all the limitations sought in that agreement could have been achieved by a simple customary law understanding of the meaning of poison and poisoned weapons. There was, in fact, a good reason why states-parties went for the approach they did during the 20th century – it was to preserve the aspirational value of the ancient rule, on the one hand, while providing clear, detailed rules for new technologies, especially where there was controversy, on the other.

9. Understanding the development of the rules on poison and chemical weapons demonstrates why the general and ancient rule still stands with such dignity and yet is unavailable for the specific purposes for which Plaintiffs attempt to use it. The general prohibition bears the weight of centuries by being notably vague on precisely the kinds of details which Plaintiffs mistakenly seek to ascribe to it.

10. The understanding I have outlined of the Hague Regulations 23(a) is the same given by one of the most distinguished commentators on the law of war, Frits Kalshoven, in a treatise published by and under the imprimatur of the International Committee of the Red Cross. "Although not without all relevance even to contemporary warfare," says Kalshoven, the prohibition on the use of poison or poisoned weapons embodied in Article 23(a) "nonetheless is of mainly historical interest."[3] And the reason why it is of mainly historical interest? Because, consistent with the path of the law of war's development in this area, the law has evolved through specific instruments and therefore, Kalshoven concludes, of "greater remaining importance is the Geneva Gas Protocol of 1925."[4]

11. A similar understanding of Hague Regulations 23(a) was given by the ICJ in its advisory opinion on the legality of using nuclear weapons, which Plaintiffs heroically (but vainly) cite as support of their position. In fact, however, the view of the ICJ is brutally simple: although the Court recognized the historical

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[3] Frits Kalshoven and Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law 42 (ICRC 2001).

[4] Id.

and aspirational value of the ban on poison, it also acknowledged the prohibition's generality and the fact that poison is not defined at all, let alone with the specificity necessary to determine whether or not particular modern weapons are covered by the rule. The ICJ acknowledges that many differing interpretations exist on the scope of Hague Regulations 23(a),[5] but further notes a perfectly logical reason for this, which is that the notable tendency of 20th century international law has been to ban weapons by specific treaty, rather than by recourse to vague generalities historically found in customary law.[6]

12. A key factor in this trend toward dealing with specific weapons by specific treaty was the widespread use of chemical gas weapons by leading states in the First World War. In essence, state practice – a critical component in the evolution of customary international law – declared that whatever scope the prohibition of Hague Regulations 23(a) had prior to the Great War, the rule thereafter could no longer be said to cover chemical gases intended to be lethal or severely damaging to human beings. One may take the view that state practice of the First World War constituted so massive a violation of the Hague Regulations 23(a) rule as to rewrite it, or one may alternatively take the view – as leading states did – that in fact the rule never encompassed these new technologies, even poison gases and liquids aimed deliberately at killing or severely damaging human beings.[7] Either way, the result is the same.

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5 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, para. 55 (observing that "the Regulations annexed to the Hague Convention IV do not define what is to be understood by 'poison or poisoned weapons' and that different interpretations exist on the issue"). Available at http://www.icj-cij.org/icjwww/idecisions.htm.

6 Id., at para. 57 ("The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments.").

7 In fact, Professor Fletcher cites a German academic, Professor Gerhard Werle, opining that the idea that the prohibition against poison does not apply to poison gas would seem "at first blush to be remote because munitions based on poison entail toxic damage to the body … The ban against poison in [Hague Regulations] 23(a) codified customary international law, but *this ban could not take a stand on modern weapons like 'gas weapons' because these weapons were not known at the time*." Fletcher Op., 48. Plaintiffs also rely heavily on conclusions of the SIPRI study, yet even a former Project Leader of SIPRI's Biological and Chemical Warfare Project, Dr. Jean Pascal Zanders, has noted how thoroughly – contrary to Plaintiffs' claims – States and their negotiators before, during, and after the First World War distinguished between gas weapons and traditionally prohibited "poisons" under the Hague Regulations. See Jean Pascal Zanders, International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy, 8 J. Conflict & Security L. 391, 407 (2003) ("The delegates at the First Hague Conference in 1899 made no direct association between poison and poison gas … After the First World War, many German and Allied experts and public figures supported the distinction between poisoned and chemical weapons."). See also Cyrus Bernstein, War Law Notes: The Law of Chemical Warfare, 10 George Washington Law Review 889, 907 (1942) ("United States never considered those provisions as applicable to chemical warfare"); Major Joseph Burns Kelly, Gas Warfare in International Law, 9 Mil. L. Rev. 1, 43-44 (1960) ("No general rule laid down in ... the Hague

Hague Regulations 23(a) was limited, in the wake of the First World War, to its historically paradigmatic cases, on the one hand, and its aspirational value, on the other – and neither of these help Plaintiffs.[8]

13. On the relevance of the prohibition on poison to modern chemical warfare, Thomas and Thomas conclude that:

> *The Hague interdiction of poison has been subject to so many differences of opinion among legal authorities in relation to chemical-biological agents that it becomes impossible to point with any certainty to its relevance as to any prohibitory effect in the chemical-biological field* …. [D]isputes exist as to whether certain agents are poison so as to fall within this rule; whether agents would be encompassed if not in existence prior to 1907; and whether the rule was intended to apply to chemical-biological weapons in any event. *This divergent thought makes these pre-World War I conventional principles of extremely limited utility as legal fetters on the use of chemical-biological agents in war.*[9]

14. As Plaintiffs cannot find a specific prohibition in international law on the use of herbicides or Agent Orange, they have attempted to deduce such a result from an ancient and general prohibition. Yet Plaintiffs' theory cannot explain the First World War, state practice and *opinio juris* following that war, the necessity of the 1925 Geneva Protocol or, for that matter, the existence of the Chemical Weapons Convention. Nor can it explain how Hague Regulations 23(a) could apply to chemicals not aimed at or intended to harm humans, when it does not even cover chemical weapons intended to be lethal to human beings. Plaintiffs simply cannot deduce a specific prohibition on the use of

Convention IV of 1907 can be said to prohibit, by analogy, gas warfare"); U.S. Rules of Land Warfare, War Department Basic Field Manual FM 27-10, para. 25 (1940) ("practice of recent years has been to regard the prohibition against the use of poison as not applicable to the use of toxic gas.").

[8] In the event that Plaintiffs cannot rely on Hague Regulations 23(a), their attempt to bring the use of herbicides within Hague Regulations 23(e), which prohibits weapons "calculated to cause unnecessary suffering," is also flawed. As stated in my Opening Declaration at paras. 46-48, Plaintiffs seem unaware that this prohibition has been historically limited to weapons which cause additional, and unnecessary, injury to a combatant *already* rendered *hors de combat* by some other means. It is not a broad prohibition intended to apply to excessive force, collateral damage or to more general notions captured by the requirements of military necessity. By its express terms, it is also limited to weapons " *calculated* to cause" superfluous injury or unnecessary suffering, which is clearly inapposite to this case as even Plaintiffs don't allege that was Agent Orange's purpose. Finally, the prohibition is "too vague to produce by itself a great many practical results," which is why Professor Fletcher concedes (as he must) that the norm would not be actionable under the ATS. Kalshoven and Zegveld, supra note 3, at 41.

[9] Thomas and Thomas, supra note 1, at 57.

herbicides or Agent Orange from a general prohibition that has not evolved with the times but rather is limited to certain paradigmatic cases.[10]

Plaintiffs Confuse Common Law Reasoning With Customary International Law

15. The way in which Plaintiffs, their experts and *amici* address the scope of Hague Regulations 23(a) underscores a broader problem with their general approach to determining the content of international law. Plaintiffs seem to be under the mistaken impression that treaties and other international agreements can be treated largely as though they were statutes within the U.S. domestic legal system, and that customary international law (presumably because it is not codified) can be treated as though it were another body of domestic common law. We should not forget that not all nations whom international law seeks to bind have a common law tradition, and, for a variety of reasons, this dependence on U.S.- and common law-centric forms of reasoning and interpretation produces results under what purports to be "international law" that are unrecognizable to international law scholars and practitioners.[11]

16. In the present case, one manifestation of this mistakenly common law approach is found in Plaintiffs' immense over-reliance on analogical

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[10] Professor Fletcher claims that while Defendants demonstrate the requirement of intentionality with respect to poisoned weapons, they somehow doom their case by not addressing the issue of "poison" alone. I find no authority in international law that places such special weight on the distinction between "poison" and "poisoned weapons"; rather, commentators almost uniformly treat it as an emendation designed to ensure that methods of delivery are included as well as poison itself. This is not the same as the distinction, which was historically very sharply drawn, between conventional poisons and poisoned weapons, and chemical gas weapons used in the First World War. For example, "[a]fter investigating the first German chemical attacks near Ypres in April 1915, Dr. J.S. Haldane never referred to 'poison' in his report dated 27 April 1915 to Earl Kitchener, Secretary of State for War. He wrote about 'asphyxiating gas', 'irritant gas', 'gas', and so on. The XIVth Report by the Commission of Inquiry on the Violation of the Rules of the Rights of Nations, and of the Laws and Customs of War transmitted to the Belgian Minister of Justice, M. Carton de Wiart, on 24 April 1915, similarly referred only to asphyxiating gases and the Declaration (IV, 2) and not to the 1907 Hague Convention." Jean Pascal Zanders, International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy, 8 J. Conflict & Security L. 391, 408 (2003).

[11] Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38(1), 59 Stat. 1031 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (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) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"). See generally, Curtis Bradley and Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 838-842 (1996-1997) (acknowledging the "questionable pedigree" of recent U.S. cases espousing a new version of customary international law that replaces the traditional view of international law with one that is "less tied to state practice.").

reasoning. Lacking any grounds to specify the contemporary content of the ancient prohibition on poisons and poisoned weapons, Plaintiffs automatically rely on analogies – Agent Orange is like this kind of ancient poison, it resembles such poisons in its deployment and use, therefore, Agent Orange is just another form of poison and is banned by the ancient prohibition. However persuasive – or not – such reasoning might be in a common law setting, this case involves the determination of the content of international law – an exercise which necessarily requires using the methods, content, sources, and hierarchies of authority of international law, *not* those of the common law. However persuasive an analogy might or might not seem, customary international law is not established through the use of analogies – it is established by evidence of what has been accepted as law through state practice and *opinio juris*.[12]

17. A second manifestation of Plaintiffs' mistaken common law approach is their reliance on the background materials to treaties, such as the 1925 Geneva Protocol, as a primary means of ascertaining their meaning. For example, Plaintiffs place a great deal of emphasis on a few statements by members of delegations to the 1925 Geneva Protocol negotiations, speculating as to the possible future development of new anti-plant technologies. Plaintiffs claim that, given this reference, the Protocol should be construed to encompass such technologies. However, international *trauvaux preparatoires* cannot be used in the same way that legislative history is often used within U.S. domestic jurisprudence. Background materials in treaty drafting do *not* provide an authoritative guide to, or primary means of, treaty interpretation – they may only be used as a *supplementary* means of interpretation in certain circumstances.[13] Treaties among states parties are far more like contracts than

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[12] In certain limited cases, for example the 1925 Geneva Protocol, treaties will direct consideration of analogous substances, but that is not the approach generally adopted under customary international law.

[13] Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, art. 31, 1155 U.N.T.S. 331 (*entry into force* 27 January 1980) ("(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between *all the parties* in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. (3) There shall be taken into account, together with the context: (a) any *subsequent* agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any *subsequent* practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. (4) A special meaning shall be given to a term if it is established that the parties so intended.")(emphasis added); art. 32 ("Recourse may be had to *supplementary* means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order *to confirm* the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning

legislation – because states are jealous of their sovereign rights, treaties are strictly construed, and the idea of common law courts fashioning terms to fill in what some might regard as "gaps" is not only unfamiliar but is actually antithetical to the process of international law-making by treaty.[14]

Intent and *Mens Rea* With Respect to Poison

18. Even if we were to accept that the prohibition on poison included the use of herbicides in general, or Agent Orange in particular, which it clearly did not, what *mens rea* would be required to turn the mere use of such material into a war crime? Would it require a specific intent to poison, for example, or would it be enough to have a general intent with some level of knowledge of poisonous effects? Would recklessness or negligence be sufficient?

19. The 1907 Hague Regulations do not specify a *mens rea* requirement for the prohibition on poison. This is hardly surprising given that codification of war crimes, with formal elements, and so on, is very much a process of the late 20th century; even Nuremberg proceeded (and ended) with many of those fundamental issues unresolved. It was not something contemplated by the 1907 Hague Regulations, which view the laws of war in terms of traditional state-to-state obligations, rather than the modern approach which focuses on criminal liability of individuals. Furthermore, it is not as if courts have heard prosecutions for violations on the customary law ban on poisoning in war that have resulted in courts determining what standard of intent applies. Such prosecutions, in the period of modern law of war dating from the 19th century, have not occurred, as Professor Fletcher himself notes when quoting Knut Dörmann, writing under the imprimatur of the International Committee of the Red Cross, saying that "[t]here seems to be no case law on the mental element of this crime [of employing poison] to date." Fletcher Op., at 52 n.44.

20. Given this, Professor Fletcher and Professor Paust have attempted to try to find the appropriate *mens rea* by means which, if this were a common law inquiry, might be thought exemplary, but which, in the context of determining customary international law, are alien to international law and therefore unpersuasive. Professor Fletcher reaches to the Rome Statute establishing the International Criminal Court and the Model Penal Code promulgated by the

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ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.")(emphasis added).

[14] The consent-based nature of international law is clearly established by the judgment of the Permanent Court of International Justice (the precursor to the current International Court of Justice) in the Lotus case, where the Court held that rules of international law binding upon states emanate "from their own free will," so consequently "restrictions upon the independence of States cannot therefore be presumed." The Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, 18 (Sept. 17).

American Law Institute to come up with a standard of purpose, knowledge, recklessness or negligence. Fletcher Op., 51-53. Professor Paust reaches to his own scholarly writings and two pre-Sosa ATS cases to come up with a standard of wantonness, reckless disregard or even criminal negligence. Op. of Prof. Jordan J. Paust, 26 (hereinafter "Paust Op."). Neither proposal provides any guidance about the *mens rea* requirement for poisoning during the Vietnam War.

21. Professor Fletcher's reliance on the Rome Statute as evidence of international law binding on the U.S. in the 1960s is utterly flawed – the U.S. is not a party to the treaty, which in any event was only drafted in the late 1990s. The Rome Statute can serve as a point of comparison in some limited circumstances – Defendants have cited it, for example, to show that international law *today*, even by leading states *other* than the United States, does not support the claim of corporate liability, let alone thirty years ago. But despite explicitly stating that the Rome Statute "does not apply retroactively to actions committed in the 1970s," Fletcher Op., 42, Professor Fletcher proceeds as though it did. [15] Professor Fletcher relies upon the Rome Statute (a brand new Statute) to establish a *mens rea* standard for poisoning, Fletcher Op., 52, without even considering whether this standard reflected customary international law as it existed in the 1960s and 1970s. Were that not enough, he also fails to note that the United States is not a party to the treaty, having taken the radical step of "un-signing" the treaty in order not to be bound by it. [16]

22. Furthermore, Professor Fletcher acknowledges that the Rome Statute does not create a particular *mens rea* requirement for poison, so he instead relies on the default *mens rea* provided by the Rome Statute's general elements of crime,

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[15] As I noted in my Opening Declaration, international law does not generally permit retroactive application of laws. See Peter Malanczuk, Akehurst's Modern Introduction to International Law 155 (7th rev. ed. 1997) (referring to the "general principle that laws should not be applied retroactively"); Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, art. 28, 1155 U.N.T.S. 331 (*entry into force* 27 January 1980) (treaties "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"); Rome Statute of the International Criminal Court, opened for signature 17 July 1998, art. 22(1), 2187 U.N.T.S. 90 (*entry into force* 1 July 2002) (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").

[16] It would be truly remarkable for a U.S. court to cite as authority of international law a treaty which the executive has taken such pains not to be bound by and, further, to de-legitimate as contrary to the U.S. view of international law and contrary U.S. security interests. It would also be contrary to acts of the legislative branch, including the enactment of the American Servicemen's Protection Act, which provides for the possible use of force, including armed military force, to protect U.S. military personnel from being taken under the jurisdiction of the ICC.

which includes intention and knowledge.[17] Fletcher Op., 52. But Professor Fletcher ignores the fact that the United States delegation to the Rome Statute proposed (a) that poison be defined as a "substance *specifically designed* to cause death through the toxic properties of poison chemicals or agents"[18] and (b) that the prohibition only apply where an accused "intentionally attacked an adversary in that armed conflict with poison" and that, "at the time of the attack, the accused was aware of the nature of the weapon he was using and its prohibited status under the circumstances."[19] Thus, Professor Fletcher's reliance on the Rome Statute – which was negotiated more than 30 years after the Vietnam War and which has been expressly rejected by the United States – cannot provide evidence of the requisite *mens rea* for poisoning in this case.

23. As for Professor Fletcher's reliance on the Model Penal Code, Fletcher Op., 51-2, there is absolutely no basis for thinking that the *mens rea* standard for a particular rule of international law can be found by looking at general *mens rea* requirements under the domestic model code of a single nation. This approach (which, again, is antithetical to the foundation of international law

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[17] Professor Fletcher's conclusion that poisoning does not require specific intent because where such intent was required, the drafters of the Rome Statute clearly and unambiguously provided for it by using words such as "intentionally" or "willfully" (Fletcher Op., 52-53), reveals a lack of appreciation for the drafting history of the Statute: see Johan D. Van der Vyver, The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law, 12 U. Miami Int'l & Comp. L. Rev. 57, 111-13 (2004) (rejecting the assertion that war crimes listed with these qualifiers require specific intent while all others require general intent, and concluding instead that these words are "redundantly repeated in the definition of the war crimes concerned and that this redundancy is entirely attributable to definitions being taken from existing treaties in force and the drafters' resolve to retain that language as far as possible"). Professor Fletcher also mistakenly concludes that the default requirement of intent *and* knowledge (which he mistakenly states as being intent *or* knowledge) is broadly defined (Fletcher Op., 52) – in fact, the *mens rea* requirement is very strict, requiring an act and its consequences being intended or else foreseen *as a certainty*: see id., at 62-72; Donald K. Piragoff, Article 30: Mental element, in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 527, 533-34 (Otto Triffterer, ed. 1999).

[18] See Proposal submitted by the United States of America, Draft Elements of Crimes, Preparatory Commission for the International Criminal Court, New York, 4 February 1999, 4, para. 19, PCNICC/199/DP.4 ("Poison means any substance specifically designed to cause death through the toxic properties of toxic chemicals or agents which would be released as a result of the employment of munitions or devices. It does not include riot control agents designed to cause temporary incapacitation. It includes asphyxiating gases as well as any other analogous liquid, material or device.").

[19] See Addendum, Proposal submitted by the United States of America, Draft Elements of Crimes, Preparatory Commission for the International Criminal Court, New York, 4 February 1999, 14, PCNICC/1999/DP.4/add.2 ("Elements [of Article 8.2(b)(xvii): War crime of employing poison]: 1. That the act took place in the course of international armed conflict. 2. That the accused intentionally attacked an adversary in that armed conflict with poison. 3. That, at the time of the attack, the accused was aware of the nature of the weapon he was using and its prohibited status under the circumstances.").

making) is also contrary to the requirement in Sosa that courts look to international, not domestic, law to determine the existence and contours of an international law norm.[20]

24. Professor Paust's proposal fares no better. He relies on a treatise that he authored and two pre-Sosa cases involving the ATS as the basis for a *mens rea* standard of "wanton, reckless disregard or even criminal negligence" for "causing" the poisoning of food, water or human beings. Paust Op., 26. These sources provide no support for a *mens rea* requirement of less than specific intent for the prohibition on poison. First, *none* actually discuss the *mens rea* for poisoning – in fact, none address the law on poisoning at all. As for the cases, Kadic dealt with allegations of genocide, rape, and torture, while Gramajo concerned allegations of summary executions, disappearances, torture and arbitrary detention; Paust's own work is limited to consideration of command responsibility.[21] Second, both cases cited deal primarily with allegations involving much higher *mens rea* standards, such as "directing," "personally planning," or "ordering" war crimes. Finally, the only area in which a lower *mens rea* requirement is suggested is in the context of command responsibility, which has no application in this case. Defendants in this case were not commanders, military or civilian, and the U.S. government could hardly be considered a subordinate whose actions Defendants had the ability to control, prevent or punish. Thus, these cases and articles cited provide no basis for suggesting a *mens rea* requirement of wanton recklessness or negligence for the prohibition on poisoning.

25. Not only are these supposed *mens rea* standards suggested by Professors Fletcher and Paust not derived from customary international law, but it is clear that they are inconsistent with the history of the prohibition on poison. Professor Fletcher identifies the prohibition on poison as deriving from the rules against treachery and perfidy – poison is "dishonorable because it is secret, duplicitous, and perfidious" and poison is "treachery because it kills secretly."[22] Fletcher Op., 36, 39. The treacherous nature of poisoning is evident in all of the paradigmatic historical cases of poisoning, including poisoning wells, throwing poisoned candy across enemy lines and dipping

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[20] Sosa, 124 S. Ct. 2739, 2759 (noting that the "ATS was meant to underwrite litigation of a narrow set of common law actions *derived from the law of nations*…")(emphasis added).

[21] Kadic v, Karadzic, 70 F.3d 232 (2d Cir. 1995); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Paust, Bassiouni, et al., International Criminal Law: Cases and Materials 46-70 (2nd ed. 2000).

[22] Professor Fletcher also urges that the ban on poison has an adjunct historical justification, viz., a ban on "starvation and devastation implicit in destroying the food and water supply of [sic] enemy." Fletcher Op., 42. I address that strand of thought below.

arrows into poison.[23] But the very notion of treachery and perfidy requires a deliberate intention to deceive – one cannot be negligently duplicitous, recklessly treacherous, or unintentionally perfidious.[24] That is why the archetypal cases of poisoning require a *specific intent to poison*, rather than any of the reduced *mens rea* requirements urged by Professors Fletcher and Paust.

26. A specific intent *mens rea* requirement for poisoning is also substantiated by numerous international law sources, which I referred to in my Opening Declaration.[25] These include an advisory opinion of the ICJ, which held that Hague Regulations 23(a) did not apply to nuclear weapons because the poisoning effect of radiation is only a secondary or incidental effect of the weapon, as well as strong statements by leading military powers (the United States and United Kingdom) that the prohibition requires a specific intent to

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[23] The original grounding of the prohibition on poisoning in the rule against treachery is further illustrated by the former U.S. position that certain acts of poisoning, such as placing dead animals in the water to contaminate the water supply, were permissible provided the contamination was evident or notice to the enemy was given. See U.S. Rules of Land Warfare, War Department Basic Field Manual FM 27-10, para. 28 (1940). This qualification of permitting poisoning that was evident or accompanied by notice was ultimately eliminated because giving effective notice was not practicable during times of war. See U.S. Department of the Army, International Law, 27-161-2, 41 (1962).

[24] The intentionality requirement of treachery and perfidy is evident in legal definitions of the terms because both are based on deliberate acts of betrayal. For example, Article 37(1) of 1977 Additional Protocol I defines perfidy as "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, *with intent to betray that confidence*, shall constituted perfidy" and provides examples of perfidy, including "feigning an intent to negotiate under a flag of truce," "feigning of an incapacitation," "feigning civilian, non-combatant status" and "feigning of protected status." (The United States accepts this Article as a statement of customary international law: see Michael J. Matheson, Session One: The United States Position on Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l Pol'y 419, 424-25 (1987) ("We support the principle [referring to Article 37] that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy, and that internationally recognized protective emblems, such as the red cross, not be improperly used.")). In its Commentaries on the Protocol, the ICRC describes the mental element of perfidy as "the *intentional and conscious deception* of the adversary." ICRC Commentaries, Art 37, para. 1500. Similarly, the U.S. Army Field Manual describes forbidden acts of treachery and perfidy in the following way: "It would be an improper practice to secure an advantage of the enemy by *deliberate lying or misleading conduct* which involves a breach of faith, or when there is a moral obligation to speak the truth. For example, it is improper to feign surrender so as to secure an advantage over the opposing belligerent thereby. So similarly, to broadcast to the enemy that an armistice had been agreed upon when such is not the case would be treacherous." U.S. Dept. of The Army Field Manual: The Law of Land Warfare (FM 27-10), para. 50 (1956). These instances are distinguished from ruses, surprise attacks and ambushes, which are permitted by the laws of war.

[25] See Opening Anderson Decl., paras. 38-45.

poison or use poisonous weapons and does not apply in cases where the weapon created toxic byproducts or where the poison was a secondary or incidental effect.[26] More generally, it is clear that many weapons with poisonous byproducts – such as incendiary weapons – have never been thought to fall within the prohibition on poison. I have also urged attention to highly respected scholarly commentary concluding that a specific intent to poison, or a specific intent found through the design of a weapon intended to poison, such as poisoned bullets, counts as evidence that specific rather than merely general intent is required.[27] All of these international sources explicitly address the prohibition on poison and find a requirement for specific intent.

Plaintiffs' Reliance on the DOD Memoranda and the SIPRI Study

27. Plaintiffs place considerable emphasis on a 1945 Department of Defense General Counsel memorandum on the proposed use of herbicides in the closing days of the Second World War. Pls.' Mem. In Opp'n to Defs.' Mot.

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[26] 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, para. 55 ("The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose *prime, or even exclusive, effect is to poison or asphyxiate*"); 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 (Hague Regulations 23(a) 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"*); 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 (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.*").

[27] Stephan Oeter, Means and Methods of Combat, in The Handbook of Humanitarian Law in Armed Conflicts 149 (Dieter Fleck, ed. 1995) ("[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'."). Professor Fletcher is critical of citation by both Professor Reisman and myself of Stephen Oeter as an expert source. Fletcher Op. at 49-50. Stephen Oeter was writing, however, in Dieter Fleck's Handbook of Humanitarian Law in Armed Conflicts which, as Sir Adam Roberts notes, is the "English version of the German [military] manual, with extensive commentary." Adam Roberts, The Law of War and Environmental Damage, in The Environmental Consequences of War 47, 54, n.16 (Jay E. Austin & Carl E. Bruch, eds., 2000). Thus, this volume is considered the authoritative commentary on the military manual of a leading NATO military power.

To Dismiss All Claims for Failure to State Claim Under Law of Nations, 81-84, 149, 170. They argue that because the memorandum *explicitly* concludes that the use of herbicides that are, or are believed to be, "harmless to man," are legal, the memorandum thus also *implicitly* concludes that the use of herbicides not "harmless to man" are illegal. However, an answer to one inquiry does not give an answer to the other. The 1945 memorandum addressed only the narrow and specific issue of whether a herbicide which was assumed to be harmless to humans would be prohibited *per se*; the memo concluded that such use was not so prohibited. The memo cannot be assumed to have addressed the separate and further question of whether a herbicide assumed to be harmful to humans might also be prohibited *per se*. In fact, the memorandum closes with the following: "[s]hould further experimentation disclose that [the herbicides in question] are toxic to human beings, I will be pleased to express my opinion on the facts which may be presented for consideration."[28] Furthermore, when the United States and other states did address this issue, they concluded that the prohibition on poison did *not* apply to weapons or materials having an incidental or secondary poisoning effect.[29]

28. Plaintiffs' international law brief is also noteworthy for its extraordinary reliance on a single source, a 1975 study by the research and advocacy nongovernmental organization, the Stockholm International Peace Research Institute (SIPRI), which Plaintiffs cite at least 79 times. I am among SIPRI's many admirers worldwide as a research and advocacy organization. It has been a crucial political and activist actor in important disarmament campaigns over decades, including campaigns against chemical and biological weapons. Moreover, its empirical research, attempting to chart the scope and flow of weapons of many kinds, is crucial to researchers, activists, and others seeking to identify who has weapons of what kind and how many.

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[28] Major General Myron C. Cramer, Judge Advocate General, Memorandum for the Secretary of War: Destruction of Crops by Chemicals, SPJGW 1945/154 (March 1945), reprinted in United States: Department of Defense Position With Regard to Destruction of Crops Through Chemical Agents, 10 I.L.M.1300, 1305 (1971).

[29] See, e.g., U.S. Department of the Army, International Law, 27-161-2, 43 (1962) (prohibition on poison does not reach use of nuclear weapons where radiation is simply a side effect of the blast, but it might reach uses of nuclear weapons where radiation was the only intended effect of the blast); 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 26; 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, supra note 26; Walter Krutzsch and Ralf Trapp, A Commentary on the Chemical Weapons Convention 8, n.5 (1994) (Herbicides were excluded from the Chemical Weapons Convention: "Herbicides 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.").

29. That said, SIPRI is what it is – a political advocacy organization, albeit one that is organized around considerable research. However impressive and reliable its information-gathering may be, SIPRI's studies on the law of disarmament, arms control and chemical and biological weapons simply cannot be read – as Plaintiffs would have this Court do – as disinterested, scholarly treatises on these subjects. See Pls.' Mem. In Opp'n to Defs.' Mot. to Dismiss All Claims for Failure to State Claim Under Law of Nations, 16 n.2. On the contrary, it is an archetypal example of advocacy presented as scholarship.[30] Produced in the early 1970's at the height of international indignation against the Vietnam War, and against the U.S. for its use of herbicides, the SIPRI study is massively researched, well written, fascinatingly detailed – and quite plainly a lawyer's brief. It cannot, in my view, possibly be called "scholarship" within the meaning of the hierarchy of international law sources on international law, if for no other reason than that it is inconceivable that SIPRI, given its advocacy charter and political orientation, could have reached a different conclusion, no matter what evidence of international law was in front of it. In sum, Plaintiffs' brief is supported, not by scholarship and genuine treatises, but by an astounding number of citations to what is in effect an advocate's manifesto dressed up as scholarship.

(2) Military Necessity and Crop Destruction

30. Professor Fletcher claims strongly and repeatedly – and his assertion is echoed by Plaintiffs in their international law brief – that Professor Reisman and I argue that military necessity can prevail over *per se* prohibitions of the laws of war. He says, for example, that Professor Reisman and I take the position that the "principle of necessity prevails over the strict prohibitions of the written law … Whatever serves the greater good becomes legal – regardless of the prior judgment by contracting parties that the weapon should be strictly prohibited … the rule of necessity eliminates all the specific, black-letter prohibitions in the Hague and Geneva Conventions." Fletcher Op., 54-55.

31. Professor Fletcher has simply created a straw man, as no reasonable person could read my Opening Declaration (or Professor Reisman's) in the manner he suggests. On the contrary, a central theme of my Opening Declaration is that *even if* a weapon is *not* prohibited *per se* by laws such as the prohibition on poison or poisoned weapons, or the prohibitions of the 1925 Geneva Protocol, its use would not necessarily be lawful. It might *still* be the case that the actual uses of the weapon would fail the test of proportionality – military necessity versus harm caused – and thus violate international law. Of course, military necessity cannot justify the use of a weapon that is *per se* prohibited by the laws of war, but then, no one besides Plaintiffs and Plaintiffs' expert

[30] See Opening Anderson Decl., paras. 29-32 (citing Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003)).

ever suggested that it did. Instead, my Opening Declaration demonstrates that the use of Agent Orange was neither *per se* prohibited nor in violation of the laws of military necessity and proportionality.

32. Straw-man arguments aside, what are we to make of Plaintiffs' arguments concerning crop destruction? Professor Paust comes to the conclusion that "[w]hether or not all herbicides were illegal per se, the destruction or poisoning of food, crops, or water that noncombatants might use was prohibited per se." Paust Op., 27. This conclusion, however, collapses together at least three separate issues, each with a separate legal test – the poisoning of crops; the destruction of crops where it is not known whether they were intended solely for enemy consumption; and the destruction of crops whose destination is reasonably believed to be dual use, i.e., partly for enemy combatant consumption and partly for civilian consumption.

33. With respect to poisoning of crops, it is only illegal *per se* if it comes within the prohibition on poison stated in Hague Regulations 23(a). Yet, as demonstrated above, the prohibition on poison was never intended to apply to herbicides in general or Agent Orange in particular.

34. With respect to the destruction of crops where it was not known whether they were destined solely for combatant consumption, customary international law during the Vietnam War era did not prohibit such crop destruction *per se*, but instead permitted it provided it was justified by military necessity and proportionality.[31] This fact is clearly acknowledged by Plaintiffs' own expert, then-Captain Jordan J. Paust, in an article published in 1972, where he observed that these "same rules of war [of military necessity] are applicable to crop destruction by chemical defoliation or other means. Legality would hinge upon a conclusion of military necessity as opposed to something merely of a military benefit … Military necessity also plays an important role in the legality of the use of chemicals to destroy food."[32] (It is also noteworthy that Professor Paust did not mention the prohibition on poison once in his contemporaneous analysis of the legality of crop destruction in Vietnam.)

35. It is true that the laws on the destruction of civilian objects, including crops, have become stricter since the end of the Vietnam War. 1977 Protocol I put in place an innovative regime for ensuring civilian access to objects indispensable for civilian survival, as well as much stricter rules today

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[31] This would typically occur in situations where the destruction of crops was collateral to some other military objective. For example, destruction of crops might be justified by military necessity if enemy troops were hiding in the crops and the military benefit of destruction outweighed the potential civilian harm caused.

[32] Captain Jordan J. Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 Mil. L. Rev. 99, 156, n. 223 (1972).

regarding the protection of civilian objects generally. But those rules were not in force during the Vietnam War, were clearly acknowledged to be a departure from the existing customary international law during that period, and are not binding on the United States because it has refused (to this day) to ratify the Protocol. Furthermore, the purpose of these new rules is to prevent starvation of civilians during wartime, which is inapplicable here because the Amended Complaint does not allege starvation or related deprivations.

36. With respect to destruction of crops reasonably believed to be intended for both civilian and enemy combatant use, the test during the Vietnam War (as well as today, given that the U.S. has not accepted 1977 Protocol I) is what has already been described as the proportionality test – that is, military necessity set against the cost to civilians. If the use of herbicides was not prohibited by Hague Regulations 23(a) or the 1925 Geneva Protocol, then they are subject to exactly the same tests as any other means or method of warfare, whether bullets, artillery shells, incendiaries, fuel air explosives, or any other of the myriad and distressing means of killing and destroying the enemy. As the U.S. Army Field Manual says, the "measure of permissible devastation is found in the strict necessities of war." FM 27-10, at para. 56 (1956).

37. Finally, although Plaintiffs challenge the view that military necessity is non-justiciable, Defendants' view is supported not only by the Government in its Statement of Interest[33] but also by Plaintiffs' own expert. Professor Fletcher acknowledges that it would be difficult to base a claim under the Alien Tort Statute on violations that depend on modifiers such as "disproportionate" or "unnecessary" and that an "inquiry [in]to the 'necessity of war' undermines the black-letter specificity of the norm and makes it problematic to draw an analogy to the three Blackstonian paradigms" required by Sosa. Fletcher Op., 26, 34. I could not agree more with Professor Fletcher on this particular point. Proportionality is not susceptible of the specificity required for justiciability under Blackstonian concepts; this is a recognition not only of the inability to draw it under the ATS given Sosa, but also the inability to draw it under judicial review generally, as a matter of international law (which explains the lack of case law on pure cases of military necessity).

38. Rules on lawful and unlawful collateral damage – of which the destruction, whether by chemicals or any other means, of dual use crops is an instance – *are* about proportionality and the balancing of military necessity and civilian harm. Were that not the case, then either collateral damage would *always* be unlawful, no matter how minimal its extent in relation to military advantage; or it would *always* be lawful, no matter how great its extent in relation to military advantage. It is plain that neither of these is the case, and proportionality *is* the rule.

[33] See Statement of Interest of the United States, 34-35.

(3) The lack of precedent for international corporate liability

39. Reading the Plaintiffs' briefs and expert opinions on corporate liability, I am struck by three things. First, Plaintiffs and their experts base their argument for corporate liability almost exclusively on U.S. case law, despite Sosa requiring courts to look to at whether international law extends liability to corporations – which it clearly does not. Second, Plaintiffs rely heavily on academic work describing what certain academics think international law ought to be, rather than descriptive academic commentary about what international law actually is.[34] Third, sources on which Plaintiffs and their experts rely make crucial errors in interpreting international law, which, when exposed, make clear that international law does not recognize corporate liability.

40. *First.* Sosa requires courts to look not only at whether certain conduct is prohibited under international law, but also to determine whether "*international law* extends the scope of liability … to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa, 124 S. Ct. at 2766 n.20 (emphasis added). Plaintiffs, on the contrary, rely almost exclusively on U.S. case law to establish a precedent for corporate liability under international law.[35] However, U.S. cases do not themselves create international law and the cases cited do not provide good evidence of international law because many of them either rely primarily on other U.S. case law, rather than international law as such, or else misinterpret international law. There are no international law precedents as such in favor of Plaintiffs' argument.

41. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions, which include decisions of national courts, may be referred to as "*subsidiary* means for the determination of the rules of [international] law." The word subsidiary is used to signify that the primary sources of international law remain treaties, custom and general principles. Something is not international law just because U.S. courts say it is, just as something would not be international law just because English courts or

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[34] See Opening Anderson Decl., paras. 29-31.

[35] Plaintiffs' experts criticize me, as well as Professor Reisman, for failing to deal sufficiently with U.S. case law interpreting the law of nations in other ATS cases, and in particular for failing to explain Sosa to this Court. Naturally I have views on the meaning of Sosa and would be happy to offer them to the Court, and I agree with Plaintiffs' experts that there is some overlap between international law and the U.S. domestic requirements of the ATS. I was asked to render an expert opinion on whether certain conduct was prohibited under international law, which is of course the first step in determining whether a claim can be brought under the ATS. I have done so by consulting international law sources recognized under, and according to the hierarchy established by, international law itself. If that makes me an "international law purist," in Professor Fletcher's words, then I make no apology for that fact.

Russian courts say it is. Decisions of national courts can and do play a role in establishing customary international law, but only to the extent they reflect general and consistent state practice, particularly as evidenced in treaties to which states have affirmatively committed themselves. Yet on the issue of corporate liability under international law, a handful of U.S. courts stand alone. Their decisions are contrary to all international precedents and they are entirely unsupported by state practice, *opinio juris*, or treaty law.

42. *Second.* Despite express warnings from higher U.S. courts for over a hundred years - cases ranging from The Paquete Habana to Flores - Plaintiffs and their experts rely on academic work that can only be characterized as describing what they believe international law ought to be, rather than what international law actually is.[36] Plaintiffs' primary expert on international corporate liability, Professor Paust, cites extensively to his previous works to support his conclusion that international law recognizes corporate liability, with approximately one third of his citations on the issue being to himself.[37] Professor Paust's articles, read as academic interpretation of how one might imagine a regime of corporate liability, are of considerable importance within the give-and-take of academic international law; I am among their admirers. Yet these articles are clear examples of precisely the type of work Flores warned courts *not* to accept as evidence of international law because they represent *lex ferenda* (what the law ought to be) dressed up as *lex lata* (what the law is).

[36] See e.g., The Paquete Habana, 175 U.S. 677, 700 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or juricial [sic] decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is* .")(emphasis added); Flores, 343 F.3d at 157-58, n.26.

[37] The few genuinely international law sources cited by Professor Paust seem to me highly inapposite. For example, I cannot comprehend why Professor Paust cites the International Court of Justice's decision in Barcelona Traction Light and Power Company, Ltd, (Belgium v. Spain), 1970 I.C.J. 3, for the principle that corporations have an important role in international law. Paust Op., 4. That case arose out of bankruptcy proceedings for a Canadian company (Barcelona Traction) in Spain. Belgium filed the case on behalf of its citizens who were shareholders in Barcelona Traction for damage they allegedly suffered as a result of acts contrary to international law committed towards the company by Spain. Not only could the corporation itself have never bought this claim, because it had no standing under international law - the case was not (and could not have been) brought against the corporation because it did not have international legal obligations or international legal personality. The only decision reached by the Court was that the state of Belgium also did not have standing to bring the case – it certainly did not address the issue of corporate responsibility under international law.

43. Other scholars cited by Plaintiffs, such as Professor Steven Ratner, approach the nascent development of international corporate liability more honestly by giving explicitly aspirational accounts of how corporations should be held liable, without pretending that these are descriptive accounts of how they can actually be held liable under current international law.[38] Professor Ratner's aspirational account is intellectually imaginative and possibly even persuasive as an account of how the law *should* evolve – but its intellectual persuasiveness lies in no small part in the fact that it does not claim that such a regime exists today, let alone thirty or more years ago.

44. Nor can the question of time and the law-in-force be elided. U.S. cases cited by Plaintiffs are all cases dealing with the law today or relatively recently, long past the period of the Vietnam War. For example, both Kadic and Talisman dealt with conduct allegedly occurring in the 1990s.

45. *Third*. Plaintiffs base their conclusion in favor of international corporate liability almost entirely upon academic sources, and Professor Paust's articles in particular, that are questionable in context of litigation rather than the academy. These academic sources are in turn supported, if at all, merely by U.S. decisions which operate (as noted earlier in this Reply Declaration) on the dubious assumption that customary international law is merely a variety of traditional common law reasoning. As also noted earlier, such national court case law falls at the bottom rung in the hierarchy of sources of international law. In addition, and most unfortunately, these cases oftentimes simply get international law wrong.

46. Consider, for example, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003), a case revered within this U.S.-centric body of case law finding international corporate liability. Talisman is cited principally for the proposition that any non-state actor, including a corporation, could be liable under international law. Yet, significantly, it did so based primarily on another case, Kadic, 70 F.3d 232, 239 (2d Cir. 1995); that case held *only*, however, that an *individual* could be held liable under international law. But Kadic does not create a precedent for liability of all varieties of non-state actors, including all juridical persons, under international law. The Talisman court, however, seemed to see its great leap forward as nothing more than an uncontroversial instance of U.S. common law reasoning

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[38] Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443 (2001) (suggesting a theory of corporate responsibility given that international law generally places duties on states, and only recently on individuals, but has not yet extended liability to corporations); see also Note, Corporate Liability for Violations of International Human Rights Law, 114 Harv. L. Rev. 2025 (2001) (acknowledging that "international law is virtually silent with respect to corporate liability for violations of human rights. International law has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations.").

applied to international law – a mistake as breathtaking in its hubris as in its ignorance of how international law is actually made.

47. Taken together, these interlinked bits of U.S. case law and academic commentary on which Plaintiffs rely all participate in a dangerously parochial process of self-amplification. A small but crucial mistake appears in one case, perhaps nothing more than an imprecision of wording. That imprecision is seized upon in another case and in academic commentary and inflated. That inflation is cited by another case and in more commentary. The result is a busy cottage industry at work on what is merely a laboriously constructed house of cards, self-referential case law and commentary that spirals upwards in a positive feedback loop, self-congratulatory, and closed off to the outside world of international law. It may be a self-satisfying exercise to those engaged in it; seen from the outside, however, it bears little relationship to international law.

48. Looking beyond Plaintiffs' misuse of sources in reaching its conclusions about corporate liability, what then are we to make of the substance of Plaintiffs' arguments? The main reasoning of the Plaintiffs and the U.S. cases on corporate liability can be summed up as follows: (1) International law imposes criminal liability on individuals for certain violations of international law; (2) individuals and corporations are both non-state actors, so there is no reason to differentiate between the liability of individuals and corporations; (3) international law therefore imposes liability on corporations for certain violations of international law. But this argument is flawed because international law *does* differentiate between individuals and corporations and it does *not* treat all non-state actors alike. In an effort to force the conclusion, Plaintiffs have impermissibly run together unlike categories.

49. International criminal law imposes obligations only on individuals, not corporations.[39] This is evident from the jurisdiction of the International Military Tribunals in Nuremburg and Japan, as well as the International Criminal Tribunal for the Former Yugoslavia and Rwanda and the International Criminal Court, which are all limited to violations by individuals. In fact, even under today's law, a proposal to extend international liability to corporations was expressly rejected in negotiations over the Rome Statute for the International Criminal Court. At least for the time being, the concept of corporate liability has been knowingly and intentionally rejected by states-parties fully aware of the kinds of arguments made by numerous activists and

[39] See Amicus Brief of Prof. David John Scheffer, 9 ("[C]orporate civil liability for atrocity crimes [is] a theory that is only beginning to be considered by the courts and was certainly not accepted as customary international law during the 1960s. Despite the rapid development and prominence of individual criminal responsibility during the last ten years, following the creation and jurisprudence of international hybrid tribunals, criminal liability concerning natural persons has not been extended to civil liability for corporate behavior.").

academics in favor of such liability. The result is that none of the international criminal law cases holding *individuals* liable cited by Plaintiffs support the conclusion that international law recognizes *corporate* liability. As I discussed at length in my Opening Declaration, international law clearly distinguishes between individuals and corporations, and individual criminal liability thus does not provide a precedent for corporate liability.

50. In an effort to move beyond individual criminal responsibility, Plaintiffs cite the ability of the International Military Tribunal of Nuremburg to declare certain organizations criminal, but this does not create a precedent for corporate liability. Article 9 of the IMT provided that: "At the trial of any individual member of any group or organization," the Tribunal could declare the group or organization to be a "criminal organization." Article 10 then provided that members of such a criminal organization could be tried before national courts, and the "criminal nature of the group or organization is considered proved and shall not be questioned." The argument that this provision provides a precedent for corporate liability is mistaken on several levels.

51. Declarations that an organization was criminal could only occur in the context of a criminal trial of an individual member. The Tribunal did not have the power to hear prosecutions of, or civil claims against, criminal organizations. Further, the only organizations declared criminal by the Tribunal were political "quasi-state" organizations, such as the SS and the Nazi party, not commercial or juridical entities. Finally, the possibility of declaring organizations criminal has not been adopted in the statute of any subsequent international court or tribunal, so it hardly counts as something on which there is general and consistent state practice or universal acceptance. All of this is discussed at length in my Opening Declaration, but Plaintiffs have failed to address those arguments head-on.

52. Plaintiffs then shift to a different claim, this time arguing that even if international law does not recognize direct corporate liability, international law somehow mysteriously permits "indirect" corporate liability because it recognizes, in narrow circumstances, the concept of aiding and abetting liability. Unquestionably, the Nuremberg cases established that *individuals* may be held liable for aiding and abetting certain international crimes, though there were few cases on the issue until the advent of the recent international criminal tribunals for the former Yugoslavia and Rwanda. But the existence of these cases is not sufficient to show what Plaintiffs *must* show – that *corporations*, and not just the individuals who were worked for or owned them, may be held liable. Furthermore, it is not clear that the concept of aiding and abetting, which developed in the *criminal* sphere, can be applied in a *civil* context. Once again, Plaintiffs seek to extrapolate a norm that has been developed *only* in the context of *individual criminal* responsibility to *corporate civil* liability, in defiance of the overwhelming evidence to the contrary.

53. Plaintiffs then shift to a different and quite extraordinary claim that international law somehow imposes obligations on corporations because, it is said, there is no doctrine of corporate immunity under international law. The brief by amicus Center for Constitutional Rights in particular makes this argument, claiming that Defendants misconceive the issue because if there is no affirmative doctrine of corporate immunity, then corporations may be held liable. Br. Amici Curiae, 24-26. The claim is surprising since one would hardly expect something that is not, in fact, a subject of international law at all nevertheless to be the object of specific doctrines of international law, such as corporate immunity. One might have thought that if it was not a subject of international law, then international law would have little, if anything, to say about it.

54. It is Plaintiffs, not Defendants, who have the burden of proving so novel a proposition as that international law imposes obligations on corporations; they cannot shift that burden onto Defendants by claiming that Defendants must prove the existence of an affirmative immunity doctrine when the evidence is plain that corporations are not subjects of international law in the first place. International law has never recognized corporate liability, and Plaintiffs and their experts have not pointed to a single international or non-U.S. case that has held otherwise. This means that there is no general and consistent state practice – to the contrary, there is much evidence for the exact opposite – in favor of holding corporations liable for international law violations in the first place, which is what Plaintiffs have the burden of proving.

55. Finally, it should be noted that all of these analogies to individual criminal liability suffer from a further problem, noted in my Opening Declaration, that they are *criminal* cases. International law does not even have the concept of the *civil* liability of any private party, even individuals, except in the narrowest of circumstances.[40] Inconvenient as it is for Plaintiffs, the existence of a body of narrow criminal law involving individuals does not alter the fact that what they seek is something that does not exist at present, let alone during the Vietnam War – viz., the concept of international tort law. Perhaps the world would be a better place if such international law existed, and perhaps it will come into being. But if so great a change does come about, it will happen the way in which international law is principally made, through state practice. And if so, it will, almost inevitably, be treaty law negotiated, and widely consented to, by states – not by the piecemeal actions of U.S. courts urged to make it up as they go along.

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[40] For example, the statute of the ICC makes reference at Article 75 to a quasi-criminal, quasi-civil concept of restitution by individuals in war crimes circumstances, but that is a novel provision in a late-1990s treaty which has, moreover, been rejected by the United States. The 1907 Hague Regulations make passing reference to state compensation for violations of the laws of war – apparently in the context of monetary restitution in war as an alternative to what might otherwise trigger the far more dangerous and bloody remedy of reprisal – but this is entirely about states.

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

Executed on February 8, 2005 in Washington, D.C.

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