

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

In re “AGENT ORANGE” PRODUCT LIABILITY LITIGATION	 MDL NO. 381
JOE ISAACSON and PHILLIS LISA ISAACSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, <i>et al.</i> , Defendants.	 Civ. No. 98-6383 (JBW)
DANIEL RAYMOND STEPHENSON, <i>et al.</i> , Plaintiffs, -against- DOW CHEMICAL COMPANY, <i>et al.</i> , Defendants.	 Civ. No. 99-3056 (JBW)

**BRIEF OF AMICUS CURIAE THE VIETNAM ASSOCIATION FOR VICTIMS OF
AGENT ORANGE/DIOXIN IN OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT BASED UPON THE GOVERNMENT CONTRACTOR DEFENSE**

Statement of Interest

Amicus, the Vietnam Association for Victims of Agent Orange/Dioxin, submits this Amicus Brief in support of the plaintiff veterans in this litigation. The Vietnam Association for Victims of Agent Orange is a Vietnamese not-for-profit, non-governmental organization whose membership consists of victims of exposure to herbicides, all of which contained dioxin, used during the war with the United States and whose purpose is to raise funds to pay for treatment and compensation of victims and to fund environmental restoration of contaminated areas.

The Vietnamese victims of dioxin are the people who lived and worked under the mangrove canopy, and along the rivers of Vietnam and in the countless hamlets and farming villages, that were directly sprayed over and over again with the toxic defoliating agents at issue in this case. The Vietnamese victims of dioxin are people and the children of the people who were sprayed with dioxin and ate food and drank water which was contaminated with dioxin and gave birth to children with unexplainable birth defects. The Vietnamese victims of dioxin are those thousands of people who have died prematurely of cancers and other diseases which have already been recognized and are soon to be recognized as related to exposure of dioxin.¹

As the intended victims of these dioxin containing defoliant, the Vietnamese victims of

¹Amicus refers the Court to the article published in Nature Magazine in April 2003 by noted researchers cited in Judgment in Agent Orange III, in which the authors estimate that more than 20,585 unique hamlets in the corrected data base representing at least 2.1 million but perhaps as many as 4.8 million people would have been present during the spraying. The authors estimated that as a result of looking at more data provided the estimates for the amount of dioxin sprayed in Vietnam almost doubled from what was previously believed. Jeanne Mager Stellman, Steven D. Stellman, Richard Christian, Tracy Weber and Carrie Tomasallo, The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam, 422 Nature 681

dioxin cannot help but share an interest with those veterans who were the unintended victims of the defoliation and crop destruction programs inflicted on Vietnam from 1961-1971.

Amicus is aware of the Court's decision granting summary judgment against the plaintiffs on the government contractor defense dated February 9, 2004, and staying judgment pending further discovery by the plaintiffs ("Judgment in Agent Orange III"). Amicus submits this abbreviated brief in the event the Court wishes to reconsider its application of the government contractor defense to this case.

Summary of the Argument

Amicus brings to this Court an argument not put forward by any Plaintiff or defendant thus far in the litigation.² The argument, simply stated, posits that the government contractor's defense is not available to these defendants because of the illegal nature of the enterprise in which the government was involved.

Amicus argues more particularly that the uses to which the defendants products were put in Vietnam, which were known to the defendants, were illegal under the laws of the United States, international treaties and customary international law at the time. Furthermore, the rules prohibiting the use of poison or poisoned arms in warfare had attained the status of *jus cogens*, or peremptory norms, from which no derogation is permitted. The illegality of the enterprise strips the contractors, who provided the herbicides to the government and profited thereby, of any

(2003).

²This is not surprising as the case has been brought as a products liability action and the issues have been examined purely through the lens of traditional tort principles. Your Amicus brings a body of law to the table which requires all of the actions of the government and the defendants to be examined through a different lens and for tort concepts to be re-interpreted in

defense based on their status as government contractors. That is, to the extent the government contractor's defense is presumed to be an extension of the government's sovereign immunity to the companies which provided the goods to the sovereign government, the defense is not available if the conduct of the government is engaged in is a violation of the law, such that the conduct in question would objectively be considered a war crime or violation of a peremptory norm. The purpose of the defense, i. e. to remove the fear that contractors will not provide the military needed equipment if there is no contractor defense, does not apply where the contractor has an affirmative duty to refuse to aid and abet the government in illegal conduct.

The Law Concerning the Conduct of War

The poisoning of food and water supplies in the course of war has been prohibited since ancient times, because of the traditional belief that it is treacherous to use poison in war, and the understanding that once unleashed, it is hard to control.³ Indeed, a British field manual for army officers, believed to have been compiled by Lord Thring, the official draftsman of the British government, and modeled on an American field manual written in the nineteenth century, states that: "The poisoning of water or food is a mode of warfare absolutely forbidden; ... The use of poisoned weapons and of weapons calculated to produce unnecessary pain or misery is prohibited, on the ground that, as the object of war is confined to disabling the enemy, the

light of the body of both US and international law regarding the customs and laws of war.

³"As to the poisoning of water and food, the best explanation of its prohibition is that it seems to have existed from very earliest times. It is quite certain that both Greeks and Romans thought that the poisoning of water and food was worthy only of barbarians. See Sir Henry S. Maine, International Law: A Series of Lectures Delivered Before the University of Cambridge, 1887, Lecture VII, reprinted in Avalon Project at Yale Law School.

infliction of any injury beyond that which is required to produce disability is needless cruelty.” Sir Henry S. Maine, International Law: A Series of Lectures Delivered Before the University of Cambridge, 1887, Lecture VII, reprinted in Avalon Project at Yale Law School. A similar prohibition has appeared in a more recent US Army field manual. Department of the Army, Field Manual 27-10, para. 37, The Law of Land Warfare (July 1956).

As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also known as a peremptory norm of international law, “is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679; see also Restatement (Third) of the Foreign Relations Law of the United States, § 102 (2). Courts ascertain customary international law “by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations. . .” United States v. Smith, 18 U.S. 153, 160-161 (1820); see also The Paquete Habana, 175 U.S. 677, 700 (1900); Filartiga v. Pena-Irala, 630F.2d 876, 880-881 (2nd Cir. 1980). The prohibition on poisoned arms in time of war is a peremptory norm.

The United States was a signatory to and ratified the Hague Conventions of 1907 on the Laws and Customs of War, which specifically prohibit the employment of poison or poisoned weapons or actions which cause the superfluous injury and destruction of property not demanded by the necessities of war. (Article 23).⁴ The Hague Convention as a ratified treaty is part of the

⁴Article 23:

substantive law of the United States pursuant to Article VI section 2 of the United States Constitution.

The United States was also a signatory to the 1925 Geneva Protocol for the Prohibition of the use in War of Asphyxiating, poisonous, or other gases, and of Bacteriological Methods of War.

This protocol states:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between

In addition to the prohibitions provided by special Conventions, it is especially forbidden: -

To employ poison or poisoned weapons;

To kill or wound treacherously individuals belonging to the hostile nation or army;

To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;

To declare that no quarter will be given;

To employ arms, projectiles, or material calculated to cause unnecessary suffering;

To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

themselves according to the terms of this declaration.

The seminal judicial decisions applying the laws of war were issued by the Military Tribunal at Nuremberg after the Second World War. Among the seven principles recognized by the Military Tribunal are the following:

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the International Law Commission of the United Nations, 1950.

The Military Tribunal held private industrialists liable for participation or cooperation in war crimes because the private companies they operated participated in and benefitted from the Nazi regime's slave labor practices. See United States v. Krupp, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1950). Although the industrialists invoked the necessity defense, they were found guilty because the Military Tribunal found that their will was not overpowered by the Third Reich, but instead coincided with the will of those from whom the alleged compulsion emanated." Id. at 1439. The Military Tribunal defined the necessity defense as follows: "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was not other

adequate means of escape; and that the remedy was not disproportionate to the evil.” Id. at 1436 (quoting 1 Wharton’s Criminal Law 177 (12th Ed. 1932).

The United States Decision To Spray a Substance Known to Be Poisonous over large Areas of Vietnam Violated the Laws and Customs of War

Despite being a signatory to and ratifying the Hague Conventions, and despite signing the 1925 Geneva Protocol, the United States military continued to produce and experiment with chemical and biological agents for use in war. A history regarding the use of the defoliating agents which were known very early on to contain dioxin, is set forth in the Judgment in Agent Orange III, and will not be repeated here. The purpose of the use of herbicides was twofold: (a) to defoliate forests and mangroves to deprive the enemy of cover and (b) to destroy crops to deprive them of food.

“The use of Agent Orange as a defoliant and herbicide in Vietnam was the largest chemical warfare operation in history, producing considerable ecological as well as public health damage.”⁵ Dioxin is a general term that describes a group of hundreds of chemicals that are highly persistent in the environment. The most toxic compound is 2,3,7,8-tetrachlorodibenzo-p-dioxin or TCDD. The toxicity of other dioxins and chemicals like PCBs that act like dioxin are measured in relation to TCDD. Dioxin is formed as an unintentional by-product of many industrial processes involving chlorine such as waste incineration, chemical and pesticide

⁵Arthur Galston, Eaton Professor Emeritus of Botany and professor emeritus at the Yale School of Forestry & Environmental Studies, quoted at “Yale Vietnam Conference 2002: The Ecological and Health Effects of the Vietnam War,” September 13-15, 2002, held at Yale Law School, sponsored by the Yale School of Nursing, in association with the Vietnam Veterans of America and the Yale School of Forestry and Environmental Studies, with a grant from the National Institute of Environmental Health Science.

manufacturing and pulp and paper bleaching. Dioxin was the primary toxic component of Agent Orange, was the basis for evacuations at Times Beach, Missouri and Seveso, Italy. Dioxins have been described as some of the most toxic chemicals known to science.

The spraying of herbicides in the Vietnam War was clearly considered by most of the international community to be a violation of international law. In 1969, the U.N. General Assembly approved Resolution No. 2603-A, restating that the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare prohibited the use of chemical or biological agents against plants in international armed conflicts. The resolution specifically declared as a violation of that treaty, the use of any chemical agents of warfare, whether gaseous, liquid or solid, which might be employed because of their direct toxic effects on man animals or plants. The United States did not accept this interpretation and voted against the resolution. The resolution was adopted, however, on December 16, 1969 by a vote of 80 to 3 with 36 abstentions. The resolution, driven by the recognition that these methods of warfare are inherently reprehensible **because their effects are often uncontrollable and unpredictable and may be injurious without distinction to combatants and non-combatants**, in pertinent part, stated:

Recognizing therefore, in the light of all the above circumstances, that the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments,

Mindful of the report of the Group of Experts, appointed by the Secretary-General of the United Nations under General Assembly resolution 2454 A (XXIII) of 20 December 1968, and entitled Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use,

Considering that this report and the foreword to it by the Secretary-General add

further urgency for an affirmation of these rules and for dispelling for the future, any uncertainty as to their scope and, by such affirmation, assure the effectiveness of the rules and enable all States to demonstrate their determination to comply with them,

Declares as contrary to the generally recognized rules of international law, as embodied in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, the use in international armed conflicts of:

- (a) 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;
- (b) Any biological agents of warfare—living organisms, whatever their nature, or infective material derived from them—which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.

It is clear from the reference to Henry Kissinger’s testimony in defendant’s moving papers that Dr. Kissinger understood that the use of the herbicides was not in compliance with “international obligations,” specifically referring to the 1925 Geneva Protocol. Affidavit of William A. Krohley in Support of Defendant’s Motion for Summary Judgment, at p. 53.

Putting aside the argument as to whether the plaintiffs would be able to prove causation of their illness because of their exposures to dioxin, there is no doubt that dioxins were considered to be poisons, and the spraying of these poisons on plants and people during the Vietnam war was prohibited under the Hague Convention, which is part of the laws of the United States, and under the Geneva Protocol of 1925.⁶ The spraying of crops and the

⁶Amicus vigorously contests the defendants contention, in their memorandum in support, that there is a lack of scientific evidence of causation. The quotes from Institute of Medicine (IOM) reports on pages 7 and 8 of defendants’ memorandum are taken out of context and are thus misleading.

Both the US National Institute for Occupational Safety (NIOSH) and the International Agency for Research on Cancer (IARC) assembled cohorts from multiple sites for chemical workers producing and using phenoxy herbicides and chlorophenols. The NIOHS established a Dioxin Registry in 1980. The results showed significant increases in mortality from soft tissue sarcoma, respiratory cancers, and all cancers with at least 1 year of exposure and a minimum of 20 years latency. Fingerhut MA, Halperin WE, Marlow DA et al. *Cancer mortality in workers exposed to 2,3,7,8-tetrachlorodibenzo-p-dioxin*. N. Engl. J. Med 1991; 324:212-18 and Steenland K, Piacitelli L, Deddens J et al. *Cancer, heart disease, and diabetes in workers exposed to 2,3,7,8-tetra-chlorodibenzo-p-dioxin*. J. Natl. Cancer Inst. 1999;91:779-86. The IARC study of 18,000 persons from 10 different countries showed six fold excess of soft tissue sarcomas with a latency of 10-19 years. Among sprayers the excess was nine fold. Saracci R, Kogevinas M, Bertazzi PA et al. *Cancer mortality in workers exposed to chlorophenoxy herbicides and chlorophenols*. Lancet 1991;338:1027-32.

The Institute of Medicine (IOM) of the National Academy of Sciences undertook a continuous evaluation of the emerging epidemiological and medical studies on the association of herbicides and dioxin and health outcome in exposed persons. The findings are periodically updated and have been summarized in 13 reports. The number of recognized disease associations are continuously increasing and listed based on sufficient or limited/suggestive evidence of association. There are numerous diseases currently on the list of diseases found to be associated with herbicide/dioxin exposure.

Notwithstanding the differences in exposure, Vietnamese victims show similar medical problems, spontaneous abortions, birth defects, neurological symptoms diabetes and malignancies providing further proof that exposure to herbicides/dioxin whether deliberate or accidental resulted and continues to result in serious medical illness. Quynh, HT, Dung BT, Thuy LBT, Hoa MT 1994, *First result on the transfer of 2,3,7,8-TCDD in nature and its persistence in human body in South Vietnam*, (In:Cau HD, Dai LC, Minh DQ, Thuy LB (Eds), *Herbicides in War*). *The long-term effects on Man and Nature*. 2nd International Symposium, Ha Noi (1993) 10-80 Committee, Hanoi Medical School ; Schechter A, Pavuk M, Constable JD, Dai le C, Papke O. *A follow-up: high level of dioxin contamination in Vietnamese from agent orange, three decades after the end of spraying*. J. Occup. Environ Med. 2002; 44(3):218-20 Le TN,

indiscriminate spraying of both combatant and non-combatant populations also violated customary international law which has attained *jus cogens* status.

It is almost thirty years after the War in Vietnam and in many places the land and water contain high levels of dioxin, and forests have not regenerated. The human consequences of the widespread spraying of these agents are being observed in the two generations that have been born into a country where “hot spots” with high levels of dioxin contamination continue to exist throughout the land and the water. The effects of the illegal use of these poisons have been felt by US veterans and their families, and they will be felt by generations to come in Vietnam.

There Is No Sovereign Immunity for The Government’s Illegal Use of These Agents. There is, therefore, no Viable Government Contractor’s Defense That the Defendant’s Can Claim

Based on That Immunity

In United States v Cruikshank, 431 F. Supp. 1355 (D. Hawaii 1977), plaintiff sued the government for intentional invasion of privacy when agents of the Central Intelligence Agency opened and photographed sealed first class letters mailed by plaintiff to colleagues in the Soviet Union. The court addressed the question of whether Sovereign immunity barred this claim. The court determined that it did not, and in so doing found that illegal activity of government employees did not shield the government from suit.⁷

Johansson A: *Impact of chemical warfare with agent orange on women’s reproductive lives in Vietnam: a pilot study*. *Reprod. Health Matters* 2001, 9(18):156-64.

⁷The thrust of the Government's first argument is that because the covert mail opening program was illegal, the CIA agents involved could not have been legally authorized to carry out

these activities. Consequently, as a matter of law, the agents were not "acting within the scope of (their) office or employment", as that phrase is used in Section 1346(b), and, thus, the complaint must be dismissed.

In response to and in rejecting this argument the Court stated:

One's immediate response to this argument is that it misconceives the obvious purpose of the phrase in Section 1346(b). The dichotomy between an act within and without the scope of an officer's employment was set up to prevent the United States from being liable for acts committed by its employees when they were not on duty; not to prevent liability for acts, albeit illegal ones, directly committed as a part of the employee's job. See generally United States v. Romitti, 363 F.2d 662 (9th Cir. 1966). Obviously, the agents who opened plaintiff's mail were not doing so on their own time; they were paid by the United States for that." Id. at 1357

The Government's second argument was that the decision to open plaintiff's mail illegally stemmed from a discretionary function of the CIA and, thus, the United States cannot be held liable for damages caused by the non-negligent execution of that decision. 28 U.S.C. s 2680(a) provides an exception to the general waiver of sovereign immunity contained in 28 U.S.C. s 1346(b). It states that Section 1346(b) does not apply to:

Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee

In addressing the governments second argument (see footnote 5) the court stated:

The precise issue presented in this motion to dismiss is whether or not Section 2680(a) should be construed so broadly that it protects a governmental decision to commit an illegal act. This Court would conclude that there was not.

The court stated clearly its rationale:

More importantly, if this country has learned nothing else in the past decade, it has learned that no man, nor any man acting on behalf of our government, is above the law. The Government should not have the "discretion" to commit illegal acts whenever it pleases. In this area, there should be no policy option. Nevertheless, if the Government's argument were accepted in this case, that would be the effect of this Court's decision. Although Congress has certainly given the CIA a broad mandate to do whatever is necessary to gather intelligence around the world, this Court refuses to accept the proposition that it can do anything. This Court therefore holds that Section 2680(a) does not preclude suits for damages caused by illegal acts committed by government officials. The Court further holds that there is no exception to this rule for the acts of the CIA. Id. at 1359

Contemporaneously with the court in Cruikshank, supra, this Court considered the very same issue in Birnbaum v United States, 436 F. Supp. 967 (EDNY 1977) aff'd 588 F.2d 319, (2d Cir. 1978). In very eloquent terms, the court stated:

There is no discretion under our system to conceive, plan and execute an illegal program. See, Hatahley v. United States, 351 U.S. 173, 191, 76 S.Ct. 745, 100 L.Ed. 1065 (1956); Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1261 (2d Cir. 1975); Avery v. United States, 434 F.Supp. 937 (D.Conn. 1977). As the Second Circuit succinctly put the matter: "a federal official cannot have discretion to behave unconstitutionally." Myers & Myers, Inc. v. United States Postal Service, 527 F.2d at 1261

of the Government, whether or not the discretion involved be abused.

Courts have also found no sovereign immunity to exist where the illegal conduct in question would come under the *ultra vires* doctrine.⁸

Regardless of which analysis one uses, there can be no question, that regardless of the motives, the conduct of U.S. government officials in ordering the massive spraying of these herbicides and defoliating agents on combatants, non-combatants and food supplies, violated the terms of the Hague Conventions of 1907, and the Geneva Protocol of 1925 or customary international law⁹ with respect to the rules and laws of war, and cannot be claimed to be within

⁸ Claims that illegal actions are outside the protection of Sovereign Immunity are also found in the *ultra vires* doctrine. The *ultra vires* doctrine allows suit against a federal officer only when the action of the officer can be regarded as so illegal that it is not within the officer's delegated powers. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90, 701-02, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); Painter v. Shalala 97 F.3d 1351, 1358 (10th Cir.1996); United States v. Yakima Tribal Court 806 F.2d 853, 859 (9th Cir.1986). The *ultra vires* doctrine is based on the theory that when an employee acts completely outside his or her governmental authority, the officer is not doing the business which the sovereign has empowered him or her to do or the officer is doing it in a way that the sovereign has forbidden. Larson, 337 U.S. at 689, 69 S.Ct. 1457. Thus, the *ultra vires* claim rests on "the officer's lack of delegated power.

⁹ As this Court stated in Beharry v Reno, 183 F.Supp 2d 584, (E.D.N.Y. 2002) rev'd on other grounds, Beharry v Ashcroft, 329 F.3d 51, (C.A. 2 2003):

the officer's delegated powers, or discretion to do so.

The use of these dioxin laden herbicides and defoliating agents are, furthermore, within the definition of war crimes and crimes against humanity as defined in the Nuremberg Principles.¹⁰

United States courts may not ignore the precepts of customary international law. See, e.g., Charming Betsy 6 U.S. at 118, 2 Cranch 64; The Paquete Habana, 175 U.S. 677, 694-700, 20 S.Ct. 290, 297-300, 44 L.Ed. 320, 326-29 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 423, 3 L.Ed. 769, 780 (1815); Filartiga, 630 F.2d at 881; Mojica, 970 F.Supp. at 146-52; Maria, 68 F.Supp.2d at 233-35. This concept has been most clearly embodied in admiralty cases, where domestic law may directly clash with customary international law. The Supreme Court has long recognized the principle that in admiralty United States courts are "bound by the law of nations, which is part of the law of the land." The Neriede, 13 U.S. at 423, 9 Cranch 388 (1815). See also The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (federal courts are to apply the law of nations as federal law). In general, customary international law has the same status as domestic legislation. Restatement (Third) of Foreign Relations Law § 701 cmt. e ("The United States is bound by the international customary law of human rights."); cf. Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1995) (finding violation of customary international human rights law in war atrocities in Bosnia conflict).

¹⁰

War crimes:

Thus, under any formulation of the law, there is no sovereign immunity for the use of these agents in Vietnam. Thus, there can be no sovereign immunity shield for the companies, the defendants, who supplied the product under the government's orders.

Indeed, the defense that the "government made me do it" is not available to these contractors. It is the same defense as "I was just following orders" which the Nuremberg Principles eschewed. The Nuremberg Principles recognize the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law, (Principle II), and that

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

(Principle VI)

the fact that the person acted pursuant to an order of his or her government of superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him, (Principle VI).

There is no question that these defendants had a moral choice. They were not on the battlefield, nor were they in a place where they could not have considered the implications of providing these chemicals with dioxin for the uses contemplated. They were not under such compulsion to act that they could not have determined that by providing these agents they would be violating the laws of the United States and customary international law as they related to the rules of war. They had not only the opportunity, but the duty to oppose the use of these products for the purposes contemplated in Vietnam. They could have sought injunctive relief in court to oppose providing these chemicals to the government or they could have simply refused. The defendants knew or should have known that under Principle VII of the Nuremberg Principles “ Complicity in the Commission of a ...war crime or crime against humanity is a crime under international law.”

Conclusion

It is unfortunate that defendants have concluded, as stated at the end of their memorandum of law, after all of these years, after the international controversy, the contamination, the health effects and the litigation spawned by their products, that a chemical warfare operation was justified in the name of battlefield efficiency. One would hope, for the sake of our generation and future generations around the world, that such a morally relativistic attitude never again plays any part in wartime decision making here, or in any other nation.

Your Amicus understands that no party to this litigation has raised these issues and this

court is not required to consider claims and defenses not made by the parties. It your amicus' contention that, no matter how much these defendants have already paid to the veterans as the unintended victims of the illegal spraying of these poisonous agents, they are not legally entitled to hide behind a shield called the "government contractor's defense."

Dated: New York, New York
February 13, 2003

Respectfully submitted,

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