AN ANALYSIS OF THE LEGAL LIABILITY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND ITS CHEMICAL CORPORATIONS FOR THE EFFECTS OF AGENT ORANGE SPRAYED DURING THE VIETNAM WAR

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Deadline for submission: 5/15/2010
Number of words: 19,539

04/05/2010

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<table>
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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>TCDD</td>
<td>tetrachlorodibenzo-p-dioxin</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>DRV</td>
<td>Democratic Republic of Vietnam</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>NLF</td>
<td>National Liberation Front</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ACTA</td>
<td>Alien Tort Claims Act</td>
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<tr>
<td>VAVA</td>
<td>Vietnam Association of Victims of Agent Orange/dioxin</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>ICRC</td>
<td>International Committee of Red Cross</td>
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Chapter 1: Introduction

1.1 Introduction

It has been now a long time nearly forty years since the Vietnam war ended in 1975 but the devastation and suffering are now profoundly felt, in the land and in the minds and bodies of the affected population in Vietnam - my home country

In achieving the purpose of destroying food and military cover to those deemed to be “the enemy,” the U.S. defoliated the forests of Vietnam with the deadly chemicals Agent Orange, White, Blue, Pink, Green and Purple. Agent Orange, which was contaminated with trace amounts of TCDD dioxin – the most toxic chemical known to science – disabled and sickened soldiers, civilians and several generations of their offspring on two continents.

During the period from 1962 to 1971, the United States military sprayed millions of chemical defoliants over a large area of land in Vietnam. The substance known as Agent Orange accounted for a significant portion of the total amount sprayed. Agent Orange have caused many health problem not only to Vietnamese people in affected
areas but also those such as American, Australian, New Zealand, South Korean veterans exposed during the war and the afterward generations. According to Vietnamese Ministry of Foreign Affairs, 4.8 million Vietnamese people were exposed to Agent Orange, resulting in 400,000 deaths and disabilities, and 500,000 children born with birth defects. The most affected zones are the mountainous area along Truong Son (Long Mountains) and the border between Vietnam and Cambodia. The affected residents are living in sub-standard conditions with many genetic diseases. After nearly 35 years, the use of Agent Orange still has an effect on the citizens of Vietnam, poisoning their food chain and creating concern about its effect on human beings. This chemical has been reported to cause serious skin diseases as well as a vast variety of cancers in the lungs, larynx, and prostate. Children in the areas where Agent Orange was used have been affected and have multiple health problems including cleft palate, mental disabilities, hernias, and extra fingers and toes.

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1 Ministry of Foreign Affairs of Vietnam
(http://www.mofa.gov.vn/vi/tt_baochi/nr041126171753/ns050118101044)

2 Health Agent Orange blights Vietnam (http://news.bbc.co.uk/2/hi/health/227467.stm)
The damage to the plant life of South Vietnam caused by the spraying of Agent Orange is still visible today. The most severe damage occurred in the mangrove forests (tropical trees and shrubs) of coastal areas where spraying left barren, badly eroded coastlines. The number of coastal birds declined dramatically, and with the disappearance of the web of water channels beneath the mangrove trees, fish were deprived of important breeding grounds. It is estimated that full recovery of the man-grove forests to their former state will take at least 100 years.³

The contaminant TCDD is not easily or quickly broken down in soil, and there is concern that herbicide residues might inhibit the growth of crops and other plants. These by-products, which can be toxic, could then be passed to humans through the food chain.

According to a report by the Hatfield Group (a Canada-based company conducting research the long-term environmental effects of Agent Orange in Vietnam) in the areas that were sprayed by Agent Orange during the war, the measured levels of dioxin do not pose a threat to health. However, many of the former US military bases in Vietnam where

³ Agent Orange - Ecological effects (http://www.scienceclarified.com/A-Al/Agent-Orange.html)
the herbicides were stored and loaded onto airplanes still have high level of dioxins in the soil. These 'Dioxin Hotspots' still pose a health threat to the surrounding communities. Though the legacy of Agent Orange remains a contentious issue among the Vietnam War veterans and the full scientific understanding of Agent Orange on human health has not been reached, it is now quite clear that there is a causal relationship between Agent Orange and some diseases. So what would be remedies for those who suffered from Agent Orange?

Since the 1980s, in the United States several lawsuits have been filed against the companies which produced Agent Orange, among them Dow Chemical, Monsanto, and Diamond Shamrock. U.S. veterans obtained a $180 million settlement in 1984. Also in 1984, Australian, Canadian and New Zealand veteran plaintiffs received compensation under out-of-court settlement which was reached on the condition that the defendant did not have to admit any liability. Notably in South Korea, on January 26, 2006, The Seoul High Court issued a combined ruling on two cases (2002Na32662, 2002Na32686) that Dow Chemical Company and Monsanto Company, the US manufacturers of the defoliant known as Agent Orange, pay 63 billion won (about US$62 million) in medical compensation to Korean veterans of Vietnam War and their families. This ruling marks the first time that a Korean court has awarded reparations to the Korean veterans by recognizing a casual relationship between the defoliant and some of the illnesses of the plaintiffs which Agent Orange has been known to cause.

However, so far no Vietnamese victims have received compensation and the lawsuit filed by the Vietnamese victims of Agent Orange against the chemical companies producing was rejected by all U.S. courts (the United States District Court for the Eastern District of New York, the Court of Appeals and the US Supreme Court). Does this mean that the Vietnamese victims of Agent Orange can not enjoy the justice they deserve? If the answer is yes, they can. The next question is on what legal grounds and what is the legal liability for the US government and its chemical companies involved in the use of Agent Orange during the war? This thesis is trying to address that question.

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5 United States Department of Veteran Affairs (http://www.vba.va.gov/bln/21/Benefits/Herbicide/AOno2.htm)
6 Information available at www.korealaw.com/node/35
1.2 Research Question

Until recently, the US government has not addressed the effects of Agent Orange in Vietnam. Since 2002, a number of joint scientific projects between Vietnam and the US have been initiated to study the impact of Agent Orange on human health and environment. In 2005, both sides agreed to establish the Joint Advisory Committee on Agent Orange made up of representatives of Vietnamese and US government agencies to explore areas of scientific cooperation, technical assistance and environmental remediation of dioxin. Remarkably, following the meeting between President Bush and President Nguyen Minh Triet of Vietnam, the two governments issued a joint statement which includes a sentence “The US and Vietnam agreed that further joint effort to address the environmental contamination near former dioxin storage facilities would make valuable contribution to the continued development of bilateral relationships” 7. Some Members of Congress were also of the view that the US has a “moral obligations” toward Vietnamese people to help address the health and environmental problem generated by Agent Orange during the Vietnam War. In April 2008, Senator John McCain said “I believe it remains irritant, and perhaps more than that, for some of the people of Vietnam. I think we need to continue to address the issue both in the compensation for the victims as well as cleanup of areas which are clearly contaminated.”8

However, to date, the largest group of Agent Orange victims – the Vietnamese victims – has not received any compensation or assistance under any form, except small amounts of Government welfare payments and assistance from charity organizations. One major effort by a group of Vietnamese victims to bring a law suit against the chemical companies has so far not yielded any positive results. The decision to dismiss the case by a District Court was appealed to the Second Circuit Court of Appeal in New York, but the ruling is no change. The blight of the war for these victims hence continues.

Legal questions:

7 “Joint Statement Between the Socialist Republic of Vietnam and the United States of America” on 17 November 2006

The controversy over the use of herbicides, and Agent Orange in particular, has raged over the years since their use in Vietnam. The political and scientific debate has to date mostly surrounded the effects of Agent Orange on American veterans. But little attention is paid to the damaging effects on Vietnam and its people. Particularly, while the Vietnam War itself has generated a huge amount of literature on its military, political and legal aspects, surprisingly little has been written on the legality of the military use of herbicides in Vietnam. In the four comprehensive volumes of *The Vietnam War and International Law*, for example, the use of herbicides, and Agent Orange, are only sporadically mentioned and dealt with.

The paper is thus going fill this gap by examining the following issues:

- Whether and how the use of herbicides during the Vietnam War violated international law of armed conflict. It will be argued that herbicide use constituted a violation of the principles and rules of international conventional and customary law regulating the conduct of warfare concerning means and methods of warfare and the protection of victims of war.

- If so, what would be the possible legal consequences or remedies for such violation?

- Finally, whether there is any legal basis for holding a corporation liable for a violation of international law as far as the accused US chemical corporations are concerned?

### 1.3 Purpose and Structure of the thesis

Since the Agent Orange is a very contentious issue in the history of relationship between the US and Vietnam, any practical solution should take into account both legal and political aspects of the problem. That is not the aim of this paper; rather it is

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exploring all possible legal solutions by analyzing relevant aspects of international law in this regard.

This paper shall be divided into five chapters. Chapter 1 is an introduction that briefly describe the background situation and the rationale for choosing this topic. The methodology and sources of law are also included this chapter. Chapter 2 examines the question of whether and how the use of herbicides during the Vietnam War violated international law of armed conflict. It will be argued that herbicide use constituted a violation of the principles and rules of international conventional and customary law regulating the conduct of warfare concerning means and methods of warfare and the protection of victims of war; and such violation amount to war crime and crime against humanity. Chapter 3 will address the issue of redress for violation with focus on state’s responsibility. Chapter 4 will deal with corporate civil liability for the violation of international law. And finally, Chapter 5 is conclusion.

1.4 Previous studies:

A number of books, journals, and articles have been published on the use of Agent Orange and its effects on human health and environment, the public international law, humanitarian laws in conflicts, the responsibility and liability of states… And with those previous studies and some other sources of information, I will use them as far as possible in my thesis to describe and analyze the legal grounds for holding US government and its chemical companies involved accountable for the use of Agent Orange during the Vietnam War.

1.5 Methodology and Sources

In my research thesis, I am going to describe situation background through a descriptive method and then to take the traditional legal method to analyze the problem. The examination of international law will be conducted on the basis of the texts of law and in light of the Statue of the International Court of Justice (ICJ) at Article 38 (1) and the Vienna Convention on the Law of Treaties. Then the examination of legal liability will be taken by looking at the development and practice of international law in this regard. Accordingly, the sources of law relied on in this thesis are international customary law as part of international humanitarian law, international treaties
conventions, case law, and judicial decisions. In addition, some other source of information and critical points of view from academic work could also be utilized.
Chapter 2: The Use of Herbicides during the Vietnam War and International Law of Armed Conflict

2.1 The use of herbicides during the Vietnam War

The evidence of using poisons to kill plants can be found back to as early as year 300 B.C., when the Romans salted the croplands of Carthage to make the soil barren.\(^\text{11}\) The use of poison in the form of more sophisticated chemicals continued in modern times and gained strength during and after the Second World War. The British seem to have been the first to employ herbicides at a limited tactical level in Malaysia during the late 1940s and 1950s.\(^\text{12}\) The US army became interested in herbicides shortly after entry into World War II but it was not until its involvement in Vietnam that herbicides were employed on a significant scale in combat.\(^\text{13}\) The US used herbicides either to defoliate vegetation, thus removing natural cover that might conceal the enemy, or destroy food crops.\(^\text{14}\) Hence by the time of the increased involvement of the U.S. in Vietnam, herbicides had been developed and included in the U.S.’s chemical arsenal.

The decision to start the spraying of herbicides in Vietnam, which eventually became the first full-scale military use of herbicides, was foreshadowed by a series of events that began in April 1961, when Walt W. Rostow, President J.F.Kennedy’s foreign affairs advisor, proposed holding a meeting to consider ‘gearing up’ the Vietnam operation.\(^\text{15}\) Subsequent meetings resulted in proposals to use ‘modern technological area-denial techniques to control the roads and trails along Vietnam’s border’.\(^\text{16}\) By July of the same year, specific proposals had been made, including the use of defoliants, and the first


\(^\text{12}\) Almqvist and Wiksell, *The Problem of Chemical and Biological Warfare volume I* (1971) - Stockholm International Peace Research Institute, 162.

\(^\text{13}\) *Ibid*

\(^\text{14}\) *Ibid*, 163.


\(^\text{16}\) *Ibid*, 11.
batch of herbicides had arrived in Saigon for test missions, which initially were
carried out by the South Vietnamese Air Force.\textsuperscript{17}

In December 1961, President Kenedy authorized the Department of Defense to
commence operational trials of herbicides in certain areas of South Vietnam. With the
acceptance of the South Vietnamese Government, a test programme known as \textit{Operation
Ranch Hand} began its missions, and grew into the largest defoliation operation, lasting
for a decade until 1971.\textsuperscript{18} The Operation was responsible for the spraying of about 95%
of all herbicides dispersed during the war, with the rest being sprayed by helicopters and
ground equipment.\textsuperscript{19}

Operation Ranch Hand served two purposes: (i) to defoliate jungle terrain to
deprive enemy forces of cover, thus improving visibility and preventing ambush, and (ii)
to destroy crops to deny the enemy of food sources. In addition, herbicides were used to
clear vegetation surrounding bases and other military installations.\textsuperscript{20} To achieve these
objectives, nearly 20,000 sorties of Ranch Hand fixed wing aircrafts, mainly C-123, were
run from 1961-1971, averaging almost 11 sorties per day. The operation of Ranch Hand
saw a steady increase coinciding with the rise in American military build-up and the
intensity of the war, peaking in 1968-69, then slowly declined.\textsuperscript{21} According to Stellman
\textit{et al.}, some 2.6 million hectares of land were sprayed with herbicides, with most areas
being sprayed more than once and nearly 300,000 hectares treated ten times or more.\textsuperscript{22}
Their estimates also show that ‘at least 2.1 million but perhaps as many as 4.8 million
people’ would have been sprayed on with herbicides.\textsuperscript{23} The total amount of herbicides
used in Vietnam varies according to different sources, ranging between 67 million and 73

\textsuperscript{17}Ibid., 167.

\textsuperscript{18}Almqvist and Wiksell, \textit{supra} note 2, 164.

\textsuperscript{19}Jeanne Meager Stellman, Steven D. Stellman, Richard Christian, Tracy Weber and Carrie Tomasallo,
681}, 681-2.

\textsuperscript{20}E.R. Zumwalt, Jr., \textit{Report to the Secretary of the Department of Veterans Affairs on the Association
Between Adverse Health Effects and Exposure to Agent Orange} (1990), 4.

\textsuperscript{21}Ibid, \textit{supra} note 18, Figure 5.

\textsuperscript{22}Ibid, table 2.

\textsuperscript{23}Ibid, 685.
million litres,\textsuperscript{24} or even up to 80 million litres, according to most recent figures.\textsuperscript{25} The major herbicides employed included Agent Purple, Agent Orange, Agent Blue and Agent White, code-named according to the colour strips on the barrels containing them. Agent Orange, the most controversial herbicide of all, accounted for about 60\% of all herbicides used during the war. Up to 85\% of all Agent Orange was used for forest defoliation, with the rest being used for crop destruction and vegetation clearance around base perimeters.\textsuperscript{26}

There was some concern within the US Government at that time regarding possible damage to human health and ecology system. In August 1970, a number of US senators opposed to the herbicide operations in Vietnam by proposing a pair of amendments to the 1971 military appropriations bill, basing their case on the long term dangers of herbicides and on the inconclusiveness of the evidence about its overall military benefits. US Ambassador to South Vietnam and the Commander of US forces in Vietnam, Creighton Abrams, had cabled Washington recommending that the chemical crop-destruction should be stopped immediately.

Agent Orange is a 50:50 mixture of two n-butyl esters of 2,4-D and 2,4,5-T.\textsuperscript{27} This chemical mixture kills plants by disrupting their basis growth processes, and is particularly effective in killing a range of broadleaf plants that are often found in the jungles of Vietnam.\textsuperscript{28} The problem with Agent Orange, also the reason for the whole controversy over its use, is that it is always contaminated with a certain amount of a dioxin known as TCDD, which has been described as ‘perhaps the most toxic molecule ever synthesized by man’.\textsuperscript{29} This is compounded by the fact that unlike civilian applications the Agent Orange used in Vietnam are sprayed in undiluted form, which means it is sprayed in concentrations 6 to 25 times higher than the normal suggested rate.\textsuperscript{30} The research done by Stellman \textit{et al.} reveals that as much as 366 kilograms of

\begin{itemize}
  \item Stellman \textit{et al.}, supra note 18, 681.
  \item Young, supra 14, 14.
  \item Ibid, 10.
  \item Carol Van Strum, \textit{A Bitter Fog: Herbicides and Human Rights} (1980), 12-3.
  \item Peter H. Schuck, \textit{Agent Orange on Trial: Mass Toxic Disasters in the Courts} (1986), 18.
  \item Zumwalt, supra note 19, 4.
\end{itemize}
TCDD were dispersed with the herbicides sprayed in Vietnam. This figure is astounding given that a daily inhalation of 0.18 picograms of TCDD by a 70 kg man would have the potential of causing cancerous diseases. TCDD is believed to have ‘significant potential to cause birth defects’ and to cause certain cancerous diseases such as non-Hodgkin’s lymphoma and soft-tissue sarcomas. And since TCDD is very persistent in human tissue and the environment, even decades after the use of Agent Orange, many Vietnamese still have elevated blood levels of dioxin. Moreover, apart from the millions of people believed to be directly exposed to herbicides, there are hundreds of thousands of second and third generations of victims of herbicides.

2.2 International law of armed conflict and the war in Vietnam

There has been a heated debate concerning the legality of Vietnam War which is better known to most Vietnamese as the ‘anti-American resistance war for national liberation’. Both sides of the debate have been making strong cases for the view they support. In examining the legality of the use of herbicides during the war, it may be tempting to dig into this debate and to argue that the American war effort in Vietnam was illegal, and that therefore all acts conducted by the American military, including herbicide use, must be deemed illegal. However, such an approach would not be useful. In fact, the International Military Tribunal at Nuremberg rejected some prosecutors’ argument that every act by the German military was of criminal nature because the war itself was an act of aggression. The Tribunal stated that while the wars waged were criminal, ‘it does not follow that every act by the German occupation forces against

31 Stellman et al., supra note 18, 684.


(Note: 1 picogram = 10^{-12} x 1 gram)


person or property is a crime'. Therefore, it is necessary and indeed more desirable to ‘move out of metaphysics and into the narrow question of whether some methods of conducting war are illegal’.

In answering this question, it is first of all essential to identify the normative framework of the inquiry. In other words, the law applicable to the conduct of the war needs to be worked out. This part will make this determination. It will first examine how the Vietnam War should be characterized as this is the first necessary step for an inquiry into the applicable law. The part will then identify the different sources of law applied during the war and briefly discuss the interactions among these sources.

2.2.1 Does the Law of War Apply in The Vietnam War?

Vietnam had been colonized by the French since the middle of the nineteenth century. The end of the Second World War with Japan having been defeated led to the Declaration of Independence and the birth of the Democratic Republic of Vietnam, led by Ho Chi Minh. The French never recognized this new government when they returned at the end of World War II, giving rise to the decade-long war that only ended after the Dien Bien Phu battle and the signing of the Geneva Accords in 1954.

The Accords are outcomes of the Geneva Conference convened by Britain, the Soviet Union, the United States, France and China, with the participation of the Laos, Cambodia, the Democratic Republic of Vietnam (DRV) and the State of Vietnam. The Accords relating to Vietnam established a ‘provisional demarcation line’ at the 17th


39 The State of Vietnam was created under French protection to compete with the DRV, but could never become an effective alternative to the DRV Government.

parallel for the regrouping of the armies of the two sides.\footnote{Article 1, \textit{Agreement on the Cessation of Hostilities in Vietnam}.} The Conference agreed that this line was ‘provisional and should not in any way be interpreted as constituting a political or territorial boundary’.\footnote{Paragraph 6, \textit{Final Declaration of the Geneva Conference}.} The Final Declaration also provided that the political problems in Vietnam shall be settled ‘on the basis of respect for the principles of independence, unity and territorial integrity’ (para. 7). Hence the view of the DRV and its supporters that Vietnam had been and remained one state, and that American intervention in Vietnam is therefore an act of aggression and thus illegal.\footnote{See Quincy Wright, ‘Legal Aspects of the Vietnam Situation’ (1966) \textit{60 American Journal of International Law} 750, 750-9 for a detailed discussion of this point. See also John H. Messing, ‘American Action in Vietnam: Justifiable in International Law?’ (1967) \textit{19 Stanford Law Review} 1307 for a point-by-point critical review of the Department of State Legal Adviser’s Memorandum of Law.} The U.S. and its supporters, on the contrary, argue that the demarcation line fixed by the Geneva Accords created two independent states, North Vietnam and South Vietnam, and that the ‘infiltration of thousands of armed men’ by North Vietnam into the South constituted an ‘armed attack’, an ‘external aggression’.\footnote{\textit{The Legality of United States Participation in Defense of Vietnam}, Memorandum of Law, Office of the Legal Adviser, Department of State, March 4, 1966, reprinted in Richard A. Falk (ed), supra note 34, Vol. 1 (1968) 583, section I.A.} This view, combined with the contention that the U.S. exercised the right to collective self-defense in protection of South Vietnam, it is argued, justified the U.S. actions in Vietnam.\footnote{Ibid, section I.B-E.} But no matter who is right or wrong the war in Vietnam since U.S. intervention arguably is a conflict of an international character. This characterization of the conflict thus triggers the application of the international laws of war. The absence of a formal declaration of war, which traditionally would be an obstacle, does not prevent such application of law since ‘[t]he rules of international law concerning the conduct of hostilities in an international armed conflict apply regardless of any declaration of war.\footnote{\textit{The Legality of United States Participation in Defense of Vietnam}, supra note 43, section I.G.} In addition, in the view of the International Committee of the Red Cross

\begin{quote}
[t]he hostilities raging at the present time in Viet-Nam – both North and South of the 17\textsuperscript{th} parallel – have assumed such proportions recently that there can be no
doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied.\footnote{47 Letter of the International Committee of the Red Cross addressed to the Governments of the Democratic Republic of Vietnam, the Republic of Vietnam, the United States and the National Liberation Front of South Vietnam on 11 June 1965, cited in Lawrence C. Petrowski, ‘Law and the Conduct of the Vietnam War’ (1968) in Falk, supra note 7, Vol. 2 (1969), 439.} Hence, the war in Vietnam is an international conflict to which the rules of international law of armed conflicts should apply.

2.2.2 What Are the Sources of Law Applicable to the War in Vietnam?

In addition to the rules of international law which govern resort to force (jus ad bellum), there is another body of international law which seeks to govern the conduct of hostilities when the decision to resort to force has been taken and fighting has started (jus in bello). The terms ‘law of war’ or ‘law of armed conflict’ or ‘international humanitarian law’, despite having different connotations,\footnote{48 See, eg, Jean Pictet, \textit{Humanitarian Law and the Protection of War Victims} (1975), 11-26 and Adam Roberts and Richard Guelff, \textit{Documents on the Law of War} (3\textsuperscript{rd} ed, 2000), 1-2 for a brief discussion of these terms.} have been and will be used interchangeably to refer to the set of principles covering the treatment of prisoner, civilians in occupied territory, sick and wounded personnel, prohibited methods of warfare and human rights in situations of conflict.\footnote{49 Malcom N. Shaw, \textit{International law} (Sixth edition - 2008), 1167.}

The efforts to regulate the conduct of warfare date as far back as the time of Sun Tzu, even though nothing in his writings indicates that the limitations on the conduct of hostilities he had prescribed formed legal or moral obligations for parties to an armed conflict.\footnote{50 T.L.H. McCormack, ‘From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime’ in T.L.H. McCormack and G.J.Simpson (eds), \textit{The Law of War Crimes: National and International Approaches} (1997) 31, 33. For an account of the historical roots and developments of the law of war, see also Geoffrey Best, ‘The Restraint of War in Historical and Philosophical Perspective’ in Astrid J.M. Delissen and Gerard J. Tanja (eds) \textit{Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven} (1991), 3.} Over the centuries, however, these kinds of limitations and regulations has developed into a body of law that imposes on belligerents limits on how they conduct hostilities. Until the Hague Conferences of 1899 and 1907, when the international community first agreed to the codification of international laws of war, these rules have served to regulate the conduct of warfare. The emergence of an increasingly large amount of international treaties had not? put an end to customs. They have, on the contrary,
existed side by side, complementing each other in the common effort to reduce to the extent possible the ravages of war and the sufferings that ensue.

2.2.2.1 Customary Law of War

Historically, the law of war was made up solely of customs. Customary international law can be described as ‘evidence of a general practice accepted as law’. This body of law is unwritten and, unlike treaties, is binding upon all states, with the exception of the ‘persistent objector’ principle. As suggested by Art.38 (1)(b) of the ICJ Statute, quoted above, state practice and opinio juris are the two components of customary law. As the International Court of Justice stated in the Continental Shelf case: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States.” According to Michael Akehurst, state practice can include acts and claims, statements in abstracto, national laws and judgments as well as omissions or abstention from a certain act. Opinio juris, on the other hand, can be ascertained, like what the ICJ did in the Military and Paramilitary Activities case, by looking at inter alia statements by states and resolutions of the United Nations.

Having its roots in different civilizations, customary law of war developed primarily in the European and Atlantic worlds. However, as Geoffrey Best indicated, this has not hindered its expansion to other regions and other racial, religious and national groups. He also points out that by the eighteenth century, the customs of war were well embedded in the tradition of the militaries and were respected by the officers and soldiers because of their religious and moral beliefs, despite the absence of signed treaties among states. The fundamental general principles of customary law of war from which all other principles and rules derive are the principle of military necessity, the principle of

51 Article 38(1)(b) of the Statute of the International Court of Justice.

52 International Court of Justice, Continental Shelf case (Libyan Arab Jamahiriya v. Malta), Judgment, 3 June 1985, ICJ Reports 1985, pp. 29–30, § 27.


humanity and the ‘somewhat romantic’ but now outdated principle of chivalry.\textsuperscript{56} These principles require belligerents to strike a balance between the need to use force to achieve legitimate military goals and the need to alleviate human suffering caused by that use of force. This balancing act compels parties to a conflict to abide by the rules of distinction and proportionality, both of which, widely recognized as customary law, will be examined in more detail in the next part.

\textbf{2.2.2.2 Conventional Law of War}

In addition to customary law, treaties are an important source of international law in general and the law of war in particular. A treaty is ‘an international agreement concluded between States’, and as such must be observed by the parties to it. It is important to point out, however, that unlike customary law, which is binding on all states, treaties do not ‘create either obligations or rights for a third State without its consent’.\textsuperscript{57} Hence, treaties apply only to the States that have ratified them. This means that different treaties of international humanitarian law apply in different armed conflicts depending on which treaties the States involved have ratified.

As indicated earlier, the first major effort to codify international law of war was made at the 1899 Hague Conference which resulted in the adoption of what some consider as the fundamentals of the modern laws of war – the Hague Regulations Respecting the Laws and Customs of War on Land.\textsuperscript{58} The 1907 Hague Conference reviewed the 1899 regulations and adopted other conventions regulating primarily the means and methods of warfare.\textsuperscript{59} The ‘law of the Hague’, as this set of rules has become known as, prohibits, for instance, the use of expanding, or ‘dum-dum’ bullets, the discharge of projectiles and explosives from balloons and the use of poison or poisoned weapons. In addition, one of the important contributions of the Hague Conventions to the law of war is the inclusion of the Martens clause, named after the Russian jurist and delegate at the 1899 Hague Conference. The clause appears in the preamble of Hague Convention (IV) Respecting the Laws and Customs of War on Land, and reads

\textsuperscript{56} McDougal and Feliciano, supra note 35, 522.

\textsuperscript{57} See 1969 Vienna Convention on the Law of Treaties, Articles 2(1)(a), 26 and 34-6.


Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the populations and the belligerents remain under the protection and the rule of the principles of international law, as they result from the usages established among civilized peoples, from the laws of humanity, and the requirements of the public conscience.

This clause has since appeared, albeit in varying forms, in other treaties on the subject, reflecting the reality that states are unable to agree on provisions covering all circumstances and the view that matters should not ‘be left to the arbitrary judgment of the military commanders’. As the U.S. Military Tribunal in the Krupp case indicated, the Martens clause provided the ‘legal yardstick to be applied if and when the specific provisions … do not cover specific circumstances’. Additionally, as the codification of law always omit some matters, the Martens clause helps avoid a situation in which the customary rule is undermined by it not being included in the codified law.

Horrified by the devastating effects of World War II, states have also agreed on a set of rules to provide better protection to the victims of war. The Diplomatic Conference held in Geneva in 1949 thus adopted four Conventions aimed at ameliorating the condition of the wounded and sick soldiers in war on land (Convention I) and in war at sea (Convention II), regulating the treatment of prisoners of war (Convention III) and the protection of the civilian population in time of war (Convention IV). This ‘law of Geneva’ segment of the law of war, albeit essential to the protection of victims of war, is not particularly relevant to the subject of this paper. The focus hence will be on the Hague Regulations.

2.2.2.3. The Relationship between Customary Law and Treaties

The discussion of the Martens clause above signaled a relationship between conventional and customary law. As Anton et al. contend, treaties may ‘crystallize’ into customary rules, making them binding on both parties and non-parties of the treaty. For


62 Ibid.

63 Donald Anton, Penelope Mathew and Wayne Morgan, International Law: Cases and Materials (2005), 212.
example, according to the Nuremberg trials, the Hague Conventions have by 1939 had been recognized by all civilized nations, hence attained a customary status. And, as will be argued below, the 1925 Geneva Gas Protocol has ‘crystallized’ into customary law. Importantly, the emergence of a treaty norm does not in any way nullify the existence of a customary rule. As the ICJ stated in the *Military and Paramilitary* case

… even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.

In other words, treaty rules and the rules of customary law exist side by side and complement each other. Where treaty rules cannot be found, the rules of customary law are the guidelines for the examination of the legality of the conduct of hostilities.

### 2.2.3 The Problem of Guerilla Warfare in the Vietnam War

While the characterization of a conflict as international usually is sufficient for triggering the application of the law of war in its entirety as outlined above, the war in Vietnam raises a significant problem in its application. Unlike traditional conventional warfare where the combat zones and the combatants can be clearly identified, a proportion of the war in Vietnam was conducted by guerillas. They mingle with the people, like ‘fish in the sea’, to borrow Mao Zedong’s words, and use stealth as their weapon. Because they are not members of the armed forces of the state, the law of war traditionally did not apply to them. Consequently, they could be shot as war criminals.

Efforts to regulate the conduct of guerillas have primarily focused on the question of whether guerillas should be granted the status of prisoner of war if and when they are captured, and whether the law of war would apply to them, both in terms of rights and of obligations. Thus the Hague Regulations of 1907 provides that the law of war would apply to members of militias and volunteer corps if they are ‘commanded by a person responsible for his subordinates’, ‘[have] a fixed distinctive sign recognizable at a distance’, ‘[carry] arms openly’ and [conduct] their operations in accordance with the

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64 See Roberts and Guelff, supra note 47, 178.

65 *Military and Paramilitary Case*, para.178.

66 Petrowski, supra note 46, 479.
laws and customs of war’. Similarly, Geneva Convention III secures the treatment as
prisoners of war for members of militias and organized resistance movements if they
meet the above criteria. But these are very harsh conditions the compliance with which
would be suicidal given the reliance of guerillas on hit-and-run attacks and clandestine
operations.

Failure to abide by these rules by the irregular forces in Vietnam has been used to
argue that the U.S. military did not have the obligation to comply with the law of war in
its ‘counter-insurgency’ efforts. As an American official stated: ‘… It’s a rough and
brutal war. The Viet Cong has never heard of the Marquis of Queensbury or Geneva
Conventions, and we can’t afford to lose just because we have heard of them’. However, the law of treaties, while allowing parties to a multilateral treaty to suspend the
operation of the treaty if another party has committed a material breach, does not allow
such derogations in regards of ‘provisions relating to the protection of the human person
contained in treaties of humanitarian character’. Therefore, even in face of alleged
violations by the Vietnamese guerillas of the law of war, the U.S. is barred from refusing
to apply such law, particularly their provisions of ‘humanitarian character’. As Richard
Falk sharply argues, ‘the violations by the other side do not vindicate our own, unless
committed in specific reprisal’, and as a leader of ‘Western civilization’ and the most
‘advanced’ nation in the world, the U.S. should be compelled to respect the highest
standards of the laws and customs of war.

Even if one does not accept this argument, there are other reasons why the U.S.
has to comply with the law of armed conflicts in its conduct of the war in Vietnam, and in
its use of herbicides in particular. It is an undisputed fact that there are different groups of
combatants in Vietnam, including the forces of the National Liberation Front (NLF) –
often referred to as Viet Cong, and regular forces belonging to the DRV’s People’s Army
of Vietnam. Henri Meyrowitz identified four separate confrontations in the conflict:
Saigon Government v. NLF, U.S v. NLF, Saigon Government v. DRV and U.S. v. DRV.

67 See Article 1, Hague Regulations Respecting the Laws and Customs of War on Land 1907 and Article 4, Geneva Convention Relative to the Treatment of Prisoners of War 1949.

68 See Petrowski, supra note 46, 480.

69 Quoted in Petrowski, supra note 46, 487.

70 See Pictet, supra note 47, 21-2.

71 See Petrowski, supra note 46, 485.
The U.S – DRV conflict was characterized by American bombings of targets in North Vietnam and also clashes in the South.\textsuperscript{72} In 1967, the U.S. State Department recognized that both the U.S. and the DRV regular military units to the conflict and these units have engaged in major clashes during the 1965-67 period. It also alleged that DRV’s regular forces constituted at least 45% of the enemy Main Force.\textsuperscript{73} Therefore, even if it can be argued that the guerilla war in Vietnam waives the U.S.’s obligations under the law of armed conflicts towards the NLF’s forces, America still owe duties under the law of war towards the regular forces of the DRV. Moreover, since the NLF also has a large Main Force that is engaged in the hostilities apart from guerilla forces,\textsuperscript{74} and these forces are not alleged of failing the conditions set out in the Hague Regulations quoted above,\textsuperscript{75} nothing can justify derogation from the U.S.’s obligations under conventional and customary law of war. This is particularly relevant to the examination of the use of Agent Orange during the war since it is probably impossible to prove that Agent Orange was only sprayed where NLF guerilla forces, which are allegedly not legal combatants, were present.

In conclusion of this this part, no matter how one sees the conflict in Vietnam, it is a conflict of an international character. Such characterization triggers the application of the international law of armed conflict, which is composed of both treaties and customary rules. The fact that the conflict is, to a certain extent, a guerilla war does not prevent the application of law, and in particular does not waive the obligations of the United States under the law of war.

2.3 The use of herbicides and violations of the law of armed conflict

The legal framework set out in the preceding part will now be used to examine the legality of the use of herbicides during the war in Vietnam. The argument will be fourfold. The use of herbicides violated (i) the rules prohibiting chemical warfare, (ii) the

\textsuperscript{72} Henri Meyrowitz, ‘The Law of War in the Vietnamese Conflict’ in Falk (ed), 525-533.


\textsuperscript{74} According to the U.S. State Department, Viet Cong main force had a strength of 64,000 men in 1967, and this figure represented only a fraction of the total strength. See State Department Working Paper, supra note 71, 1204.

\textsuperscript{75} Meyrowitz, supra note 71, 541.
prohibition on poison and weapons causing unnecessary suffering, (iii) the principle of distinction, and (iv) the principle of proportionality.

2.3.1 Prohibition on Chemical Warfare

In the wake of World War I during which some 1.3 million casualties were caused by the use of toxic chemicals, states members of the League of Nations saw the need to develop a chemical disarmament treaty. Efforts to that end resulted in the adoption of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (hereinafter referred to as the Geneva Protocol).\(^{76}\) Coming out of an essentially arms control effort, the Geneva Protocol is considered as part of international humanitarian law primarily because the chief purpose of the Geneva Protocol – to prohibit the use of toxic chemicals – coincides with the aims of international humanitarian law, in particular the law of the Hague.\(^{77}\) In the Geneva Protocol,\(^{78}\) the parties recognized the cruelty of the use of toxic chemicals as a method of warfare and that ‘the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties’. The Protocol declared ‘[t]hat the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition’ against use of asphyxiating, poisonous or other gases. But the scope of the Protocol is a subject of dispute among states. It is asserted, for example, that the Protocol does not proscribe the use of anti-plant chemicals because these chemicals are used domestically in peacetime and because the drafters were not aware of the existence of anti-plant chemicals. This view, however, cannot be supported. As Baxter and Buergenthal convincingly argue, nothing in the Protocol’s drafting history shows the intention to exclude anti-plant chemicals. The travaux preparatoires also reveal that had the drafters known about anti-plant chemicals, they would have included them.\(^{79}\) While no consensus exists regarding the scope of the Geneva Protocol, it is arguable that the Protocol does prohibit the use in warfare of anti-plant chemicals, or herbicides.


\(^{77}\) See ibid, 73, 77.

\(^{78}\) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, reprinted in Roberts and Guelff, supra note 47, 158-9.

This is not to suggest that American use of herbicides in Vietnam is a violation of the Geneva Protocol, the simple reason being that the U.S. was not a party to the Protocol by the time of the Vietnam war. The argument, however, is that the prohibition of herbicides, and toxic chemicals in general, as enshrined in the Geneva Protocol had become a customary rule, and as such, did apply to the U.S.’s herbicides use. A customary prohibition on chemical warfare was largely recognized already during the negotiations of the Geneva Protocol. Hans Blix, when examining the travaux preparatoires of the Protocol, ‘gained the impression that the majority of delegates felt they were largely confirming an existing prohibition’. State practice and opinio juris subsequent to the enactment of the Geneva Protocol support this view. Indeed, since the adoption of the Geneva Protocol, states, including and particularly the U.S., have largely refrained from the use of chemical weapons in armed conflicts, including during World War II, despite their ability to use such weapons. The employment of these weapons by the Italians in Ethiopia and the Japanese in China in no way proves a contrary state practice because, for the ICJ has noted that ‘instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule’. This consistent practice is accompanied by recognition that a rule of law existed that prohibited the use of chemical weapons. Such recognition can be found in declarations and policies of states, and also in denials of use or accusation that other states’ allegations against oneself are slanders, for ‘allegations of [legal weapons] use … could not in themselves bear a slanderous connotation’. The opinio juris element is additionally supplemented by Resolution 2162 B (XXI) adopted in 1966 by the UN General Assembly, with no negative vote and only four abstentions. The resolution ‘calls for strict observance by all States of the principles and objectives’ of the Geneva Protocol and ‘condemns all actions contrary to those objectives’.

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81 SIPRI, ibid, 108-9.

82 Military and Paramilitary case, para.186.

83 See SIPRI, supra note 79, 106.

84 UN General Assembly Resolution Res. 2162 B (XXI) (5 December 1966).
The discussion so far has not taken into account the case of the ‘persistent objector’. While customary international law applies to all states, they can still ‘opt out’ by resisting the emerging rule, and as such be a ‘persistent objector’. The ‘persistent objector’ principle is widely recognized, but rarely claimed, except in the Asylum and Fisheries cases.\(^5\) In the Asylum Case,\(^6\) the ICJ rejected the claim that a customary rule should be applied against Peru on the grounds that Peru has refrained from ratifying two conventions which were claimed to have become customary law. A similar argument can be made to exclude the U.S. from the application of the prohibition on the use of chemical weapons since it has likewise not ratified the Geneva Protocol. However attention must be paid to the formulation of the ICJ’s statement, though only in passing, that Peru ‘far from having its attitude adhered to … has refrain[ed] from ratifying’ the conventions. This is arguably a two-tiered requirement – to show an attitude against and not to ratify a treaty – a state must meet to be accepted as a persistent objector. The U.S., in the case of the Geneva Protocol, cannot be said to have satisfied this. True, it has not ratified the Protocol. Yet, its attitude towards a ban on the use of chemical weapons is not total rejection. Indeed, the U.S. signed and ratified the Treaty of Washington of 1922 which included such a ban, though the Treaty never entered into force. It also signed the Geneva Protocol and refrained from using chemical weapons during World War II in spite of their military significance. President Roosevelt, in 1943, even declared that use of such weapons was ‘outlawed by the general opinion of civilized mankind’.\(^7\) The U.S. cannot therefore be accepted as a persistent objector to the prohibition as enshrined in the Geneva Protocol. Furthermore, the persistent objector principle was accepted in both the Asylum and Fisheries cases in relation to regional customs. But as Georges Abi-Saab argues, the principle can only be a ‘transient phenomena’ when it comes to general international law like humanitarian law.\(^8\)

The conclusion to be drawn from the preceding discussion is that the Geneva Protocol prohibiting the use of chemical weapons has crystallized into customary law and


\(^6\) Asylum Case (Colombia v Peru) [1950] ICJ Reports 266, 278.

\(^7\) See SIPRI, supra note 79, 113-4.

is therefore binding on the U.S.. The use of herbicides in the war in Vietnam is a clear violation of this customary prohibition.

2.3.2 Prohibition on the Use of Herbicides under the Hague Regulations

The limitations on the use of weapons in warfare are governed by the principle that the only legitimate object in war is to weaken the military force of the enemy; and that to that end it is sufficient to make the largest number of men hors de combat by injuring them by means that do not uselessly aggravate their sufferings or render their death inevitable. This principle can be found in the text of Article 22 of the Hague Regulations which reads: ‘The right of belligerents to adopt means of injuring the enemy is not unlimited’, and is put into more details in Article 23. It is useful to quote the parts of this article relevant to our present purpose:

Article 23

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

(a) To employ poison or poisoned weapons;

…

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

Each of these two provisions will be examined in turn.

2.3.2.1 Prohibition on the Use of Poison or Poisoned Weapons

The prohibition against the employment of poison or poisoned weapons dates far back in the history of warfare. Indeed, their use is regarded as perfidious and cruel, and for that reason found its prohibition explicitly in the 1863 Instructions for the Government of Armies of the United States in the Field, better known as the Lieber Code, Article 70 of which provides that ‘[t]he use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare’. A similar prohibition is found in the Hague Regulations as quoted above. Article 23(a) is quite straightforward and seems to apply without difficulty to the use of herbicides. It is, however, not that simple. The Hague Regulations does not include a definition of ‘poison or poisoned weapon’. The

89 Greenspan, supra note 57, 353.

argument has therefore been made that herbicides are not poison, are not designed and intended for use against humans, and do not fall under the scope of the prohibition since herbicides were unknown at the time.\footnote{See \textit{VAVA v Dow et al.}, 58-60, 182-7.} This argument cannot stand for a number of reasons. Firstly, while herbicides in their civilian use are not poison, the same cannot be said of their use in war in Vietnam. As indicated in Part II, Agent Orange, the main defoliant used in Vietnam, was contaminated with dioxin, a substance generally seen as the most toxic substance synthesized by man. Arguably, the fact that Agent Orange contains poison – dioxin – does not make it a poison because of its low levels of dioxin. It is the way Agent Orange was used that essentially transforms it into a poison. It was pointed out earlier that Agent Orange was sprayed in its undiluted form – 6 to 25 times more concentrated than normal suggested rate – which means its dioxin concentration is as many times higher than its civilian use. Moreover, many areas in Vietnam were sprayed more than ten times with Agent Orange. This multiplies the level of toxicity of Agent Orange use in Vietnam, and makes it difficult to assert that Agent Orange is not a poison.

Secondly, the fact that herbicides are designed and intended for use to clear vegetation does not \textit{prima facie} exclude it from being used against humans. Looking back one can find that the poison gas used in Nazi concentration camps to kill Jews, Zyklon B, had its legitimate civilian use as a pesticide. Again, it is the way in which the chemical is used that is decisive in ascertaining its legality. Obviously, the use of Zyklon B by the Nazis was intended to kill humans. The same cannot be said with ease with regard to Agent Orange. The fundamental question that needs to be answered is whether Agent Orange was used with the intention to kill or injure humans. It turns on the difficult problem of intent, which deserves some consideration before we proceed.

Every student of law is all too familiar with the notions of \textit{actus reus} and \textit{mens rea}, the two elements of a crime. Also familiar to them is the difficulty in ascertaining the \textit{mens rea}, the mental element, or the intention to commit the offense with the knowledge that the act is a crime. The same problem is posed to the process of evaluating whether or not an international crime has been committed. One may look to the debate on the crime of genocide for some guidance. The 1948 Genocide Convention defines the crime of genocide as ‘acts committed with intent to destroy, in whole or in part, a national,
ethnical, racial, or religious group'. Here, the requirement to prove certain intent of the perpetrator would not be too much of a problem in extreme cases like the Nazis’ killing of Jews during World War II since there was clear evidence found in their Final Solution and its plans and in their anti-Semitic propaganda. But in most cases, proving intent is problematic. As Kuper points out, ‘[g]overnments hardly declare and document genocidal plans in the manner of the Nazis’. He sees the intent requirement as a possibly easy way out for perpetrators of genocide. This, however, is only one way to look at intent. Absent the clear ‘Nazi-style’ intent, Jean-Paul Sartre, for instance, suggests ‘studying the facts objectively, to discover implicit in them such a genocidal intention’. This view is shared by the International Criminal Tribunal for Rwanda (ICTR). In the Akayesu case, relying on the jurisprudence of the International Criminal Tribunal for former Yugoslavia (ICTY), the ICTR said that absent a confession by the accused, intention can be ‘inferred from a number of presumptions of facts’, including the scale and general nature of the atrocities, the general political doctrine of the perpetrators and the repetition of discriminatory and destructive acts. To the same effect, Robert Gellately and Ben Kiernan succinctly argue that intent can also be found through acts of destruction that are not the specific goal but are predictable outcomes or by-products of a policy, which could have been avoided by a change in that

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92 Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) reads:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.


policy. Deliberate pursuit of any policy in the knowledge that it would lead to destruction of a human group thus constitutes genocidal intent.97

What can be drawn from this discussion is that when the intent of an act cannot be found in government statements or in obvious propaganda, it can be ascertained by looking at the design of the act and the way it was carried out. While some, most prominently Sartre, have examined American actions in Vietnam and discerned a genocidal intent, it will only be argued here that the U.S. used Agent Orange as a not merely anti-plant but also anti-personnel weapon. Obviously, the U.S. never conceded that Agent Orange was used to injure people. But herbicides were sprayed in a manner that showed intent to cause injuries to humans. As indicated above, Agent Orange was sprayed in its concentrated form for many times over certain areas, with the aim of defoliating the jungle. A ‘by-product’ of this process is the injuries it caused to people exposed to it. Using Gellately and Kiernan’s standards, the question that arises is whether the U.S. had the knowledge that the use of Agent Orange the way it was could injure people. Evidence shows that it had. In his book, Agent Orange on Trial, Peter Schuck reveals that already in 1952, Monsanto, one of the largest providers of Agent Orange to the U.S. army, informed army officials that 2,4,5-T was contaminated by a toxic substance. In 1963, the army’s review of toxicity studies on 2,4,5-T found some increased risk of chloracne and respiratory irritations, which is heightened when high concentrations is applied. Also in 1963 the President’s Science Advisory Committee reported to the Joint Chief of Staff on the possible health dangers of herbicide use.98 Study of documents in the U.S. National Archives also indicates that military officials knew in 1967 of the potential long-term health risks of frequent spraying.99 The Department of Defense and Department of State were allegedly informed in 1969 of a scientific research that showed that 2,4,5-T caused birth defects in mice, but chose to keep it secret.100 Evidence can also be found in military practice. The U.S. army


98 Schuck, supra note 28, 17.


considered Agent Orange to be ‘relatively non-toxic’,\textsuperscript{101} but would not, in principle, let its troops into sprayed areas six weeks after the spray,\textsuperscript{102} obviously for fear of its toxic effect. The Australian army’s ‘Instructions for Spraying Herbicides’ also indicated that ‘systemic poisoning with fatal results’ can be caused by ‘continued absorption, inhalation or swallowing of the spray’.\textsuperscript{103} But probably the clearest evidence of the U.S. prior knowledge of Agent Orange’s health effects is found in a letter to U.S. Senator Thomas Daschle from Dr. James Clary, an Air Force scientist. It deserves quotation here:

> When we (military scientists) initiated the herbicide program in the 1960’s, we were aware of the potential for damage due to dioxin contamination in the herbicide. We were even aware that the ‘military’ formulation had a higher dioxin concentration than the ‘civilian’ version, due to the lower cost and speed of manufacture. However, because the material was to be used on the ‘enemy’, none of us were overly concerned.\textsuperscript{104}

It is thus clear that the U.S. army had full knowledge of the potential harm Agent Orange can cause to human health. Nevertheless, it deliberately continued with the spraying of the herbicide, and this clearly constitutes intent to use Agent Orange as an anti-personnel weapon. This leads us to the conclusion that even though Agent Orange was designed and intended primarily for defoliation, it was also used as a poison against humans, and therefore is a violation of Article 23(a) of the Hague Regulations.

Thirdly, the assertion that herbicides were unknown to the drafters of the Hague Regulations and that they could not, as a result, have intended to include herbicides under the scope of Article 23(a), cannot be supported. The fact that herbicides did not exist at the time of the Hague Conferences does not mean it is excluded from the scope of the Regulations. Indeed, the ICJ dealt with the matter of modern weaponry in the \textit{Legality of the Threat or Use of Nuclear Weapons} Advisory Opinion. Having been criticized for

\textsuperscript{101} Department of the Army Training Circular, \textit{Employment of Riot Control Agents, Flame, Smoke, Antiplant Agents, and Personel Detectors in Counterguerrilla Operations} (TC 3-16 April 1969), reprinted in Wilcox, supra note 6, 186.

\textsuperscript{102} Wilcox, supra note 6, 39.

\textsuperscript{103} Ibid, 62-3.

\textsuperscript{104} See Senator Thomas Daschle’s Statement before the U.S. Senate’s Session on ‘Agent Orange: Ten Years of Struggle’ on November 21, 1989, available from the Library of Congress website at http://thomas.loc.gov/cgi-bin/query/F?r101:8.:temp/~r101tFvHLx:e0.
various reasons, the opinion is, however, correct in this respect. The Court was of the view that international humanitarian law applies to ‘all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future’. In addition, the Martens clause, whose significance was discussed in Part III, provides ‘an affirmation that the principles and rules of humanitarian law apply to new weapons.’

2.3.2.2 Prohibition on the Use of Weapons that Cause Unnecessary Suffering

Having argued that the use of Agent Orange constituted a violation of the Hague Regulations’ proscription of poison, we now turn to examining its compatibility with Article 23(e) which prohibits the use of weapons that is ‘calculated to cause unnecessary suffering’. It must be noted here that this is the text of the 1907 Hague Regulations. In the 1899 text, the phrase ‘calculated to cause’ was instead ‘of a nature to cause’, which according to the ICRC, is the correct translation from the authentic French text. This means a lower standard of proof of intent is required to find a violation. Hence, the level of intent proved above is arguably more than sufficient to satisfy this requirement. What then is meant by ‘unnecessary suffering’? The Regulations did not provide any definition. Nor did it list specific weapons that could cause ‘unnecessary suffering’. Guidance can, however, be found elsewhere. It is widely acknowledged that the sole legitimate aim of warfare is to weaken the enemy by disabling the largest number of its military forces. Therefore, as stated in the 1868 Declaration of St. Petersburg, ‘this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable’. Even though this does not provide much clarification to the concept of ‘unnecessary suffering’, it would suffice for our present

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106 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 226, para.86.

107 Ibid, para.87.


109 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, reprinted in Roberts and Guelff, supra note 47, 54.

110 For a discussion of efforts to create standards necessary for the review of weapons that could cause unnecessary suffering, and for references to this subject, see Donna Marie Verchio, ‘Just Say No! The
purpose. Agent Orange as was used in Vietnam caused, among others, cancerous diseases and birth defects. Its health effects is not limited to the individual but are passed on to his/her offspring. Probably no rational person would agree that injuring the children of an enemy combatant is necessary in war. Hence the conclusion that Agent Orange is a weapon that ‘uselessly aggravate’ its victims’ sufferings, and as such violate Article 23(e) of the Hague Regulations.

2.3.3 The Use of Herbicides and the Principle of Distinction

One of the fundamental principles of the law of war is the principle of distinction. The principle, which has found general acceptance as a customary rule since the second half of the 19th century, provides that a distinction must always be made between military and non-military targets and between combatants and non-combatants, and non-combatants must not be made the target of attack unrelated to military operations. Or in the words of the General Counsel of the U.S. Department of Defense, ‘a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that civilians are spared as much as possible’. Consequently, states must ‘never use weapons that are incapable of distinguishing between civilian and military targets’. Therefore, as Judge Higgins of the ICJ points out, ‘a weapon will be unlawful per se if it is incapable of being targeted at a military objective only, even if collateral harm occurs.’

Are then herbicides, as they were used in Vietnam, a weapon capable of distinguishing between civilian and military targets? For the purpose of discussion, it is assumed that the jungle and the environment more generally are legitimate military


115 Legality of the Threat or Use of Nuclear Weapons, para. 78.

targets, although this assertion is much disputed.\textsuperscript{117} Even with such an assumption, the answer to this question is in the negative. It is widely acknowledged that the spreading effects of persistent chemicals, like dioxin contained in Agent Orange, are very difficult to control.\textsuperscript{118} They contaminate the soil and the water sources and might spread hundreds of kilometers away from the area of use, affecting people indiscriminately.\textsuperscript{119} Moreover, herbicides when sprayed from aircrafts can be drifted far away from the target area. This was first reported by the Ranch Hand pilots themselves.\textsuperscript{120} The U.S. Mission in Saigon acknowledged this problem and estimated that herbicides were drifted ‘up to 10 kilometers and more’.\textsuperscript{121} But American biologists have observed damage caused by herbicide spray some 30 miles away from the target area.\textsuperscript{122} This ensured indiscriminate effects on the civilian population who are either directly sprayed upon or absorb the toxic chemicals through inhalation or through use of contaminated water or plants.

\textbf{2.3.4 The Use of Herbicides was Disproportionate}

Clearly, compliance with the principle of distinction does not provide guarantee for the safety of civilians. In fact, if civilians are found near a legitimate military target, civilian casualties are hardly avoidable. There is a customary requirement in the law of war that the casualties suffered by civilians must not be disproportionate to the anticipated military advantage gained by the attack.\textsuperscript{123} This principle of proportionality

\begin{itemize}
\item \textsuperscript{117} See, eg, Richard A. Falk, ‘Environmental Warfare and Ecocide’ (1974) 173 \textit{Bulletin of Peace Proposals} 1, and Arthur H. Westing, ‘Proscription of Ecocide: Arms Control and the Environment’ (1974) 30 \textit{Bulletin of Atomic Scientists} 24, both reprinted in Richard A. Falk, supra note 7, Vol. 4, 283. It is important to note that though destruction of the environment was not prohibited in treaty form at the time of the Vietnam War, 1977 Protocol I additional to the 1949 Geneva Conventions includes such a prohibition in Article 55, which reads

\begin{itemize}
\item Article 55 – Protection of the natural environment
\begin{itemize}
\item 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods and means of warfare which are intended or may be expected to cause such damage to the natural environment …
\end{itemize}
\end{itemize}

\item \textsuperscript{118} \textit{Chemical and Bacteriological (Biological) Weapons and the Effects of their Possible Use}, Report of the Secretary-General, UN Doc. A/7575/Rev.1; S/9292/Rev.1 (1969), para.30.

\item \textsuperscript{119} Ibid.

\item \textsuperscript{120} Jock McCulloch, \textit{The Politics of Agent Orange: The Australian Experience} (1984), 20.

\item \textsuperscript{121} See Sutton, supra note 100.

\item \textsuperscript{122} See Lewallen, supra note 101, 66.

\item \textsuperscript{123} Judith Gail Gardam, ‘Proportionality and Force in International Law’ (1993) 87 \textit{American Journal of International Law} 391, 400.
\end{itemize}
also applies in relation to combatants, the essence of which, in Pictet’s words, is that ‘belligerents shall not inflict on their adversaries harm out of proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy’.¹²⁴ Thus the use of poison and weapons that cause unnecessary suffering can be considered to be disproportionate to the military object. Since attention has been paid to these aspects in previous sections, we will only focus here on the principle of proportionality in relation to the civilian population.

How, then, is the principle of proportionality to be understood? Judge Higgins says that ‘even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack’.¹²⁵ A committee set up by the ICTY also emphasized the need to ‘ensure that the losses to the civilian population and the damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated’.¹²⁶ These are only two formulations of the principle which as other similar wordings are ‘couched in very vague terms’ and cannot provide any standard for evaluation of certain conducts of warfare.¹²⁷ However, no matter how the principle is formulated, it can still be used in evaluating certain important cases. Robert McNamara, former U.S. Secretary of Defense, for one, is of the view that the bombings of Japanese cities during World War II, which destroyed 50-70% of those cities, are clearly disproportionate.¹²⁸ The nuclear bombs dropped on Nagasaki, and arguably on Hiroshima, fall in the same category.¹²⁹ And as will be argued here, the use of herbicides in Vietnam inflicted harm out of proportion to the military advantage gained.

It is important to first examine how proportionality can be construed. Bernard Brown suggests that one needs to look at different interpretations of ‘military advantage’ because they are decisive in evaluating the conformity of an action with the principle of proportionality.

¹²⁴ Pictet, supra note 48, 31.
¹²⁵ Judge Higgins, supra note 117, para.20.
¹²⁷ Cassese, supra note 89, 165.
¹²⁸ The Fog of War: Eleven Lessons from the Life of Robert S. McNamara, Documentary produced and directed by Errol Morris.
proportionality. He agrees with Tom Farer that this can be done by looking at military advantage on a case-by-case or cumulative basis. Farer, however, not only looked at military advantage, but referred to ‘the relation between value destruction and military advantage’. He suggests that proportionality is to be assessed by examining this relationship, and that

instances of value destruction that appear grossly disproportionate when viewed from a narrowly tactical perspective may seem militarily essential and hence proportional when examined in light of broad strategic alternatives.

Based on this distinction, Farer goes on to argue that in counter-insurgency efforts, some actions can be seen as disproportionate because the casualties caused to civilians may exceed the injury inflicted on the insurgents. But the same actions, if carried out relentlessly over a period of time will increase the casualties of insurgents and reduce their efficacy, and hence be proportionate. A similar line of argument is made by Judith Gardam in direct relation to the use of herbicides in Vietnam. She asserts that ‘each defoliating mission achieved little in itself but resulted in civilian casualties and widespread damage to civilian objects’, but ‘if the military advantage of the cumulative effect of these attacks in the long term was the criterion, then the overall civilian losses and damage to civilian objects may not have been excessive’. Gardam is correct in the first part of her argument. But she, like Farer and Brown, only looks at the cumulative military advantage brought about by an action or series of actions, yet forgets to examine the cumulative or long-term ‘value destruction’ caused by the same actions. This is particularly important when assessing the use of herbicides in Vietnam.

The long-term cumulative effects of herbicides have been alluded to before. Obviously, they, especially Agent Orange, have caused fatal diseases to millions of civilians exposed to them. They have also destroyed vast areas of plantation, some of

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131 Ibid.


133 Ibid.

134 Ibid, 16-7.

which even to date have not been able to redevelop. They have contaminated, and remain persistent in the water and the soil. And as the American Herbicide Assessment Commission observed, ‘it may take many decades for most of the damaged hardwood forests to recover’, and that herbicide use ‘has caused extensive and perhaps lasting damage to vegetation’.

It may be tempting to say that despite all this, the military advantage gained by the defoliation missions combined would make the destructions proportionate. Such an assertion, however, can find little support. The chief official of the British Advisory Mission to Vietnam reportedly said at a meeting with Kennedy in 1963 that the defoliation brought ‘dubious’ military advantages. Along the same line, L. Craig Johnstone, head of the Pacification Studies Group for the Military Assistance Command in Vietnam between 1965 and 1970, contends that herbicide spray had only ‘limited utility’, only created ‘at most a logistical inconvenience’, and revealed that captured Viet Cong documents showed only their concern for the health effects of herbicides, not any strategic concern. There were even complaints from the South Vietnamese army that the defoliation made their own troops more vulnerable to ambush from which there was no shelter. Indeed, one may expect that William Buckingham’s comprehensive book, *Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia 1961-1971*, which is seen as an official history of the operation, will provide evidence of the effectiveness of the operation, at least of how the spraying resulted in decreased Viet Cong attacks or other incidents. However, nothing can be found there to prove the military advantage gained by the operation. As Koppes noted

[c]uriously for a war in which the Pentagon had statistics for everything, from kill ratios to bars of soap distributed, there seems to be little solid data on

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139 McCulloch, supra note 119, 20.
herbicides' effectiveness in military operations ... If they exist Buckingham does not reveal them.\textsuperscript{140}

It would be difficult to understand why Buckingham would not reveal the data, had they been available, if they could show how effective the whole operation was. Hence, available evidence does not support the contention that the military advantages gained from the defoliation operation can outweigh the damage caused.

2.4 The use of herbicides during the Vietnam War amounts to war crime and crime against humanity

As shown above, the use of herbicides by the US military during the Vietnam war clearly a violation of the international humanitarian law, so the next task is to determine that whether such violation is characterized as war crime or crime against humanity:

2.4.1 War Crime

War crime is defined as serious violations the rules of customary and treaty law pertaining the humanitarian law. The concept of war crimes is divided into two principal categories: ‘The Grave Breaches System’ and ‘Violations of the Laws or Customs of War’.

Article 2 of the ICTY Statute provides that: The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

\textsuperscript{140} Koppes, supra note 136, 134.
Article 3 of the Statute of the ICTY provides for jurisdiction for violation of the laws or customs of war. Such violations include:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property

Since civilians affected by the use of herbicides in Vietnam are not ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’ 141, it is obvious that the grave breach of the Geneva Convention is irrelevant in this case.

Turning to Article 3 of the Statue, it can be seen that the legal base for Article 3 is the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto, which mainly governs the means and methods of warfare.

Following the Tadic Jurisdiction Decision, the Trial Chamber confined the discussion of the scope of Article 3 of the Statute to the question of whether the relevant norms form part of customary international law and whether they entail individual criminal responsibility. In rejecting application of the principle of legality the defence argued, The Trial Chamber explained that the residual character of Article 3 of the Statute should be understood as covering serious violations of international humanitarian law which at the time of their alleged commission were customary in nature and entailed individual criminal responsibility.

The Trial Chamber also held that this interpretation of Article 3 of the Statute is in line with international customary law in force at the time of the alleged offences. According to contemporary customary law, violations of the laws or customs of war encompass "war crimes". This term covers not only violations of "Hague law", but all violations of

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141 See the definition of protected persons, Article 4 of the Fourth Geneva Convention
"customary norms of humanitarian law entailing individual criminal responsibility"142. In other words, there are criminal offence for individuals who are responsible for the commission of war crime (in addition to state responsibility).

The Trial Chamber found support for this conclusion in the commentary of the International Law Commission to Article 20 of its 1994 Draft Statute of an International Criminal Court143, Article 85(5) of Additional Protocol I, Article 20 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind144, and finally in Article 8 of the Statute of the International Criminal Court.145

In sum, although the Statue of ICTY is designed to deal with the conflict in the Former Yugoslavia, the interpretation and application of Article 3 of the Statue goes far beyond the context itself to reflect international customary law.

As indicated earlier, the use of herbicides is a violation of the prohibitions of ‘the use of poison or poisonous weapons‘ and ‘use of weapons that cause unnecessary suffering’. Thus, there is a ground to believe that such an act is a violation of Article 3 (a) of the ICTY. By the same way, the use of herbicides which inflicted damage on the surrounding environment (forest, villages…) above the threshold of the principle of proportionality can bee seen a violation of Article 3(b). It is now sufficient to hold that use of herbicides during the Vietnam War as a violation of international customary law is war crime under international humanitarian law

**2.4.2 Crime against humanity**

Crimes against humanity is are universally prohibited under international humanitarian law. Norms governing crimes against humanity have reached the level of *jus cogens* and


143 U.N. Doc. A/49/10

144 U.N. Doc. A/51/10

States’ obligation to prosecute, punish or extradite the individuals responsible for crimes against humanity is *erga omnes* in nature.  

The legal basis for the inclusion of crimes against humanity in the Statutes of the ad hoc tribunals were the Nuremberg Charter, Judgement of the Nuremberg Tribunal and the Control Council Law No. 10 for Germany. Article 6 (c) of the Charter of the International Military Tribunal, Nuremberg (1945) defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

Article 5 of the ICTY Statute states: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

Unlike war crimes, crimes against humanity do not require a nexus to any armed conflict. In the Tadic Jurisdiction Decision, both the Trial Chamber and the Appeals Chamber held that under customary international law, crimes against humanity did not require a connection to armed conflict.

For an act to be considered as constituting crimes against humanity, it has to meet: the requirement of attack being directed against any civilian population; the requirement of mens rea (mental element); and the acts. We now should examine whether the use of herbicides during the Vietnam War fulfill such requirements.


148 Article 5 of the Charter of the International Military Tribunal for the Far East in Tokyo is also in similar terms, added rape, imprisonment and torture to inhumane acts
The requirement of ‘being directed against civilian population’:

The US government argued that the primary purpose was to destroy the cover used by the enemy forces. However on the contrary, as shown above, with its prior knowledge that a herbicide with level of dioxin that is above the standard could have harmful effect on human health and environment, the US still used such herbicides not merely to achieve its stated objective but to inflict harmful and indiscriminate damage on civilian population in violation of the principles of distinction and proportionality of the international humanitarian law. Therefore, it can be consider as ‘attack directed against civilian population’.

Even the view that the jungle and the environment are legitimate military targets seem to be loosing its ground when examining the international law concerning the protection of environment in times of war, in particular the Article 55 of the Protocol Additional I to the Geneva Conventions of 12 August 1949.

Article 55(1) provides that:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health and survival of the population.

This Article is understood to impose obligation on states not to use methods of warfare that may result in causing prohibited “widespread, long-term and severe damage to the natural environment”. Article 55(2) further stipulates the protection by prohibiting attacks against the natural environment by way of reprisals.

Because the Protocol was adopted in 1977 after the Vietnam War, it is impossible to say that the used of herbicide is a violation of Article 55 of the Protocol. Thus, it is important to examine whether it is to be part of customary international law. The emerging practices by states show it has reached that status as a number of State has expressly
prohibited such damage to the environment in the military manuals (Argentina, Australia, Canada, Germany Kenya, New Zealand, Russia, Togo, United Kingdom, United States) and legislations (Australia, Azerbaijan, Belarus, Canada, Congo, Croatia, Germany, Netherlands, New Zealand, United Kingdom)

Before the ICJ in the *Nuclear Weapons Cases*, States argued that they considered Articles 55 to be customary, and that any party to a conflict must observe them, or must avoid using methods or means of warfare that would destroy or could have disastrous effects on the environment\textsuperscript{149}. The United States also stated that “US practice does not involve methods of warfare that would constitute widespread, long-term and severe damage to the environment.”\textsuperscript{150}

In the *Nuclear Weapons* case, the United Kingdom and the United States both argued against the customary status of the Article 55 and the Court itself appeared to consider the rule not being of customary law.\textsuperscript{151} Furthermore, the Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that Article 55 of Additional Protocol I “may… reflect current customary law”.\textsuperscript{152}

France, United Kingdom and United States have persistently objected to the rule forming customary law as they apply to nuclear weapons. They have each indicated through military manuals or reservations to the Protocol upon ratification that the rule apply to them only in regards to conventional weapons, but not nuclear weapons.\textsuperscript{153} It seems most likely therefore that the position of the ICRC in the Study on Customary International Humanitarian Law is the correct approach. It concluded that in light of such statements and practice, Article 55 is of customary nature only in regards to conventional weapons, but not nuclear weapons.\textsuperscript{154}

\textsuperscript{149} See Henckaerts & Doswald-Beck, 152.

\textsuperscript{150} United States, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region. See Henckaerts & Doswald-Beck, Customary International Humanitarian Law Volume 1, Rules, at 153.

\textsuperscript{151} See Henckaerts & Doswald-Beck, supra note 149 153-154.

\textsuperscript{152} Ibid., 154.

\textsuperscript{153} Ibid., 154

\textsuperscript{154} Ibid., 154 -145.
In the *Tadic* trial decision, the phrase ‘directed against civilian population’ was interpreted as meaning that ‘that the acts must occur on a widespread or systematic basis, that there must be some form of governmental, organizational policy to commit these acts and that the perpetrator must know of the context within which his actions are take’\(^{155}\).

With regard to the notion of ‘widespread or systematic attack’, the issue of whether these two concepts must be present at the same time or whether either of them is sufficient is dealt in the Tadic case. The trial expressly stated that ‘either one of these is sufficient to exclude isolated or random acts’\(^{156}\).

Proof of policy, plan or design is generally considered to be a necessary element to establish for crimes against humanity.\(^{157}\) This requirement is also met by looking at the way herbicide was sprayed as indicated above (in high concentration not to defoliate as originally declared but to cause injury to human).

The requirement of ‘mens rea’ (mental element): By the same way of using above analysis, the requirement is also met easily.

Lastly, the requirement of the acts: The last requirement of crimes against humanity is that there must be an act constituting a crime against humanity. These acts are enumerated, in the same way, in Articles 3 and 5 of the ICTR and the ICTY Statutes:

‘(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts’\(^{158}\). While some offences like murder are very clear and easy to apply, while some others are vague such as ‘other humane acts’ and needed to clarify by basing on the practice of the ad hoc tribunals. In order to define the concept of ‘other inhumane acts’ not to violate the principle of *nullum crimen sine lege*, the Tribunal in Tadic case relied on the definition made in Article 18 (k) of the 1996 ILC Draft Code which states: ‘other inhumane acts which severely damage physical or mental integrity, health or

\(^{155}\) This was reaffirmed in the decision of the Appeals Chamber of 15 July 1999, para. 248, 124 ILR, pp. 61, 164.

\(^{156}\) See Tadic case, sect. VI.D.2.ii.a.

\(^{157}\) Yusuf, supra note 145, p.250

\(^{158}\) Art. 7 (1) of the ICC Statute.
human dignity, such as mutilation and severe bodily harm”. Along this line, therefore, it should be concluded now that the use of herbicides constitutes crime against humanity should fall under the category of ‘other inhumane acts’, particularly when used at such extreme toxic level and at such intensity as the Agent Orange in Vietnam.

159 Trial Chamber, Tadic Case, Judgement, para. 729.
Chapter 3: Redress

Since the use of herbicides by the US military during the Vietnam war is clearly a violation of customary international law as indicated above, the US government should provide redress for the acts committed against Vietnamese civilian people. Redress could be compensation to the victims by the US government. Alternatively, compensation could also be sought by Vietnamese government on behalf of its people who were the victims of agent orange sprayed by the US military. In addition, government and military personnel should also be prosecuted for their culpability in the herbicides operation although such an option seems quite impossible given the current state of affairs between the US and Vietnam.

3.1 Individual criminal liability

Precedents of such prosecution has quite a long history. The Nuremberg and Tokyo Tribunals are the first international tribunals charging individual military officers, their commanding officers, and the German and Japanese Governments for committing war crimes and crimes against humanity. At Nuremberg, there was a defence contention that individuals could not be held responsible for the acts of states. However, that argument was rejected in the Judgement of Nuremberg Tribunal by stating that “international law imposes duties and liabilities upon individuals as well as states” as “crime against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international can be enforced.”160 The Charter of Tokyo Tribunal set out individual responsibility with regard to certain crimes.161 The United Nations General Assembly in 1946 reaffirmed that the principles of international law set forth in the Charter of the International Military Tribunal and the Charter of the International Military Tribunal for the Far East were customary international law recognized by United Nations Members generally. 162

According to Oppenheim: "the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals, whether members of their armed forces or not. To that extent no innovation was implied in the

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161 Article 5
162 Resolution 95 (I) of 11 December 1946,
Charter annexed to the Agreement of 8 August 1945, for the punishment of the Major War Criminals of the European Axis inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity ..."163

The principle of individual responsibility has also been confirmed with regard to grave breaches of the four 1949 Geneva Red Cross Convention and 1977 Additional Protocols I and II dealing with armed conflicts. Under those conventions, High Contracting Parties undertake to enact legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of a series of grave breaches.164

Since it has been established the use of herbicides in Vietnam by US military amounts war crime and crimes against humanity, it should follow that individual US officers and soldiers involved in such acts clearly can and should be punished for their crimes.

Furthermore, it is important to note that US military and governmental officers are also liable for the use of herbicides during the Vietnam War sprayed by those soldiers and officers under their command. The doctrine of command responsibility means that military leader or someone acting as such is responsible for the conduct of those under his command or authority and over whom he has effective control given that he not only should but indeed is obliged to know what they are doing and to adopt the necessary and reasonable measures within his power to prevent or suppress the commission of unlawful acts; this obligation, plus the fact that the superior knows or had reason to know that the crime was going to be or had been committed and that there exists a superior–subordinate relationship, are the three constituent elements of command responsibility.165

The principles underlying the doctrine had, however, emerged a long time ago. Around the 6th century BC, Sun Tzu wrote in “The Art of War” that it was a commander's duty to ensure that his subordinates conducted themselves in a civilised manner during an armed conflict. During the American Civil War, in order to ensure accountability the “Lieber


164 See article 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention and article 146 of the Fourth Geneva Convention.

Code imposed criminal responsibility on commanders for ordering or encouraging soldiers to wound or kill already disabled enemies”. The first international trial where a commander was charged on the basis of responsibility for an omission was In Re Yamashita before the United States Military Commission. General Yamashita was in command of the 14th Area Army of Japan in the Philippines, where his troops committed atrocities against hundreds of civilians. Yamashita was charged with 'unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes'. In the High Command Case, the United States Military Tribunal argued that in order for a commander to be criminally liable for the actions of his subordinates "there must be a personal dereliction" which "can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part," based upon "a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.” The principle was most clearly articulated in several of the Nuremberg trials and in the post-war trial of US Colonel Medina for the 1969 My Lai massacre in Viet Nam.

It is important to note that the all the prosecutions applied pre-existing customary norms. It is also important to note that mid-level US military officials who were involved in or responsible for the use of herbicides may not escape criminal liability by arguing a "superior orders" defence, as such a claim may only be considered in mitigation of any punishment that is actually imposed.

But we are now facing with the question of which court have jurisdiction (forum conveniens) to try US soldiers and officers who committed crimes relating to the use of herbicides in Vietnam. According to article 146 of the Fourth Geneva Convention, a Contracting Party to the Conventions is under an additional obligation to "search for persons alleged to have committed, or to have ordered to be committed, ... grave

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breaches" and to "bring such persons, regardless of their nationality, before its own courts."170 This obligation may also be applied to States that are not parties to the Geneva Conventions to the extent that it now reflects customary international law applicable at least to all international armed conflicts.

Generally, international law, states are allowed to exercise jurisdiction on the basis of territoriality171, active personality or nationality172, passive nationality173, universality.

Under the principle of territoriality, Vietnam can be a location to persecute, but such option has difficulty because given the current state of affairs between US and Vietnam, Vietnamese judicial authority may be reluctant to prosecute US soldiers and officers, or institute proceeding against individual that might eventually involve US organs. Under active nationality principle, the United States can be also location to conduct criminal prosecutions. However, the point here is whether of the US has the will to do so. I don't think that is the case.

As it was shown above that the use of herbicides by US military during the Vietnam war amounted to war crimes and crimes against humanity, one might think that International Criminal Court (ICC) might be a forum to try American military personnel involve in...

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170 Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

171 This principle reflects one aspects of national sovereignty.

172 This principle has two forms: (i) courts have jurisdiction over certain criminal offences committed by their national abroad, and (ii) jurisdiction over crimes committed by nationals abroad is subordinated to crime punishable under the law of the territorial state – the reason is the desire of the state of nationality not to extradite its nationals to the state where crimes has been perpetrated.

173 State may exercise jurisdiction over crimes committed abroad against their nationals.
such crimes as the Article 5 of The Rome Statute of the International Criminal Court (which established the ICC) states that:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

However, the Court can only exercise its jurisdiction under limited circumstances:\n
• where the person accused of committing a crime is a national of a state party (or where the person's state has accepted the jurisdiction of the court);
• where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the court); or
• where a situation is referred to the court by the UN Security Council.

Since both Vietnam and US are not State party to the Rome Statute, the only way that the case falls within the Court’s jurisdiction is that it should be referred by the UN Security Council. In that case the US as permanent member will of course veto any resolution authorising the surrender of US military personnel to the Court. Thus it is impossible for ICC to have jurisdiction in the case of herbicides.

Other national courts of countries other than the US and Vietnam may also be available to hear criminal proceedings under the principle of universal jurisdiction. This principle allows each and every state jurisdiction to prosecute those committing heinous crimes such as war crime, crime against humanity. The basis for this is that crimes are regarded as particularly offensive to the international community as a whole. While international law permits the exercise of universal jurisdiction, enabling national legislation is necessary for trials to be conducted. Some countries have adopted, usually with limitations, a principle permitting jurisdiction over acts of non-nationals.\n
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174 Article 12, 13 of the Rome Statute of International Criminal Court

It is important to mention here the notion of ‘supremacy and complementarity’ in the theory of international criminal law. The notion means that wherever national courts have established adequate procedural mechanisms to safeguard the rights of both the victims and the defendants, national prosecutions for human rights and humanitarian law violations may often be preferable to prosecutions before international tribunals.

In some cases the egregious nature or massive scale of the violations may suggest that only a prosecution by an international tribunal would appropriately reflect the injury that the crimes inflicted on the global community. This is particularly true with respect to proceedings against senior political or military leaders who were accused of having committed or having ordered the commission of crimes on a massive scale in violation of *jus cogens* norms like war crime and crime against humanity. As matters of universal concern that may be tried in any forum, massive criminal violations of peremptory norms of customary international law are the concern of the international community as a whole and should, in these most extreme cases, be addressed in international criminal proceedings.

By way of custom, crimes against humanity and war crimes are not subject to any statute of limitations. They may not be extinguished by the passage of time. Indeed, in 1953, a United Nations report on international jurisdiction over crimes (A/2645)\(^\text{176}\) stated that a concept of a statute of limitations does not exist in present international law. In the Barbie prosecution, the French Court of Cassation similarly held that customary international law did not recognize a statute of limitations for crimes against humanity. Additionally, treaty law confirms that the international community will not bar claims for egregious violations of international law, such as war crimes or crimes against humanity, under statute of limitations concerns.

### 3.2 State responsibility and liability to pay compensation

Traditionally, a State as sovereign entity can do whatever it wants within its jurisdiction such as changing a law or making a new one (but today human rights and environmental law have led to some exceptions). But in addition to that internal autocracy, each and every state has external responsibility to fulfill its international legal duties since responsibility for such duties is a criteria for a State to be qualified as a legal person of

\(^{176}\text{UN Doc. A/2645 (20 August 1953)}\)
the international law. For a State can not create international law in the same way it does to municipal law, it can not renounce its international duties unilaterally at discretion, but is and remain legally bound by them.\textsuperscript{177} Since international delinquency is defined as neglect of an international legal duty, the violated State can, through reprisals, compel the deliquent to comply with international duties.

According to Oppenheim, there are two kinds of State responsibility, one is named “original” and the other “vicarious”. Under a theory of "original liability", it is clear that a Government and its officials could be held liable for violations of international law for acts performed by a Government and "actions of the lower agents or private individuals as are performed at the Government's command or with its authorization".\textsuperscript{178} A State that is originally liable for a violation of international law has committed an act of "international delinquency". An "international delinquency" consists of "any injury to another State committed by the Head or Government of a State in violation of an international legal duty. Equivalent to acts of the Head and Government are acts of officials or other individuals commanded or authorized by the Head or Government".\textsuperscript{179} The responsible State is then liable "to pay compensation for injurious acts of its officials which, although unauthorized, fall within the normal scope of their duties".\textsuperscript{180} Therefore, a State was considered liable for commission of an injury to an individual alien within its territory if an agent of the State caused wrongful injury to that individual. Thus, the United States is liable for the actions of its military and any of its agents, including the private individuals who ran and profited from the use of herbicides at the request of the US military.

Under the “vicarious” responsibility, States are responsible for acts other than their own. The rationale behind it is that since international law is a law between States and individuals are only objects of international law (not subjects as State), therefore international law makes every State responsible for “certain acts of their agents, of their subjects, and even of such aliens as are for the time living within their territory".\textsuperscript{181}

\textsuperscript{177} Oppenheim, \textit{International Law: a Treatise}, section 140

\textsuperscript{178} Ibid, section 150

\textsuperscript{179} Ibid, section 152

\textsuperscript{180} Ibid., section 150

\textsuperscript{181} Ibid., section 140
Under customary international law, States are liable for failing to act to prevent harm to aliens. Article 3 of the Hague Convention No. IV of 1907, which reflected customary international law by the Second World War, reads as follows:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This principle of responsibility and compensation has been described as an extension of the principle of *respondeat superior* to the law of nations, making States liable for the acts of their military forces. Accordingly, each State has a duty to prevent, investigate, and punish gross human rights violations and violations of fundamental freedoms. The US Government, therefore, is independently liable for failing to prevent harm to the victims of herbicides and to punish the offenders.

Some may argue that because conventional international law is deemed to regulate relationships between States, rather than relationships between individuals and States, no claim may be made against state by individual victims of the use of herbicides. This argument, however, seems to have lost its ground since by the early 20th century, it was recognized by international law that when a State injured the nationals of another State, it inflicted injury upon that foreign State and was therefore liable for damages to make whole the injured individuals.

Furthermore, with the development of international human rights law, it is also recognized by international law that individuals are also "subjects of rights conferred and duties imposed by international law." Mr. Theo van Boven (the Special Rapporteur of the Sub-Commission on the right to reparation for victims of gross violations of human rights and humanitarian law) wrote in his report that “all victims of serious violations of international law have a right to fair and adequate reparations, which shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations”. Reparations, as defined in international law, mean all measures

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182 Frits Kalshoven, article 3 of the Convention (IV) concerning the Laws and Custom of War on Land, signed at The Hague, 18 October 1907, in "Remembering what we have tried to forget", ASCENT, 1997, pp. 16-30

183 Oppenheim, supra note 168, sects. 1, 7.

184 UN document (E/CN.4/Sub.2/1996/17, para. 7)
expected to be taken by a State which has violated international law, including payment of monetary compensation to victims, punishment of wrongdoers, apology or atonement, assurances of non-repetition, and other forms of satisfaction\textsuperscript{185}.

Mr. van Boven concluded that statutes of limitations for the consideration of compensation claims shall not run during periods during which no effective remedies exist\textsuperscript{186}. He also noted that under the current state of international law, civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations in any event\textsuperscript{187}. The internationally accepted principle that there are no statute of limitations barriers to the prosecution and compensation of serious violations of human rights and humanitarian.

State responsibility can only be engaged for breaches of an international obligation, whether customary or deriving from treaty. Responsibility claims were traditionally brought directly between State at international level before international court or tribunal. Thus, theoretically, Vietnam is legally capable to bring its claim against the United States before the International Court of Justice. But it requires a consent by the US as a party to the dispute in question which I believe is never the case. International claims could also be enforced in national courts however whether they are successful relies on the legal approach of national legal system to international law as well as the rule immunity.

### 3.2.1. Individual compensation

Many people around the world have repeatedly expressed their view that the US Government should recognize the nature and the extent of the violations of international law by using herbicides during the Vietnam War; acknowledge its responsibility for such acts; and compensate for individual victims. As noted above, several sources of international law, including: the Hague Convention No. IV of 1907; the Paris Peace Conference of 1919 (Treaty of Versailles); the Charter of the Tokyo War Crimes Tribunal; and customary international law demonstrate the obligation of States to pay compensation for breaches of international law. In addition, as Theo van Boven noted in his study, a State's responsibility for breaches of international obligations implies a

\textsuperscript{185} Ian Brownlie, supra note 167, p.460

\textsuperscript{186} Supra note 178, para 9

\textsuperscript{187} Ibid
similar and corresponding right on the part of individuals to compensation for such breaches. The Treaty of Versailles, for example, provided that individuals could bring claims for damages against Germany.

Article 3 of the Hague Convention 1907 provides individual persons with a right to claim compensation for damages they suffered as a result of acts in violation of the Regulations. Although this language is not expressed in article 3, "the drafting history of the article leaves no room for doubt that this was precisely its purpose." Notably, while the term "reparation" may take the form of restitution, indemnity, monetary compensation or satisfaction, "Article 3 specifically and employs the term 'compensation,'" which, by definition, means "payment of a sum of money to make good the damage ..." Thus, "[t]he use of this term instead of the more general 'reparation' may be seen as yet another indication that ... the drafters of the article had in mind the case of individual persons, victims of the laws of war, who wish to bring a claim for the injury or damage they suffered."

In addition, in the Chorzów Factory case, the Permanent Court of International Justice (PCIJ) held that if the situation prior to an act in violation of international law could not be restored (e.g. property returned), compensation must be paid. Since restoration of the victims of herbicides to their status prior to this violation is clearly impossible, compensation must be paid. Other PCIJ decisions similarly confirm the existence in international law of rights including compensation for private individuals.

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188 Frits Kalshoven, supra note 173

189 Ibid.,


191 Ibid., p. 12.

192 Ibid.,

193 Chorzów Factory (Merits), Permanent Court of International Justice (PCIJ), Judgement No. 13, Series A, No. 8-17, 1927, p. 29.

In short, the individual victims of herbicides sprayed by the US military during the Vietnam War clearly have a right to adequate compensation for the damage they have endured.

3.2.2 Corporate liability and civil suits for compensation

It is clear that with the violation of international law of armed conflict, the US government has legal responsibility toward the Vietnamese victims. However, all the possible options of remedy drawn above seem to be theoretical until there are legal institutions that are able and willing to address these claims. So the only avenue left for the Vietnamese victims of Agent Orange is to bring civil suits against the involved US chemical corporations before judicial tribunals for compensation under the Alien Tort Claims Act (ATCA). But before examining that lawsuit by the Vietnamese victims against US chemical corporations, it is important to explore the possibility of holding corporation liable for violations of humanitarian law which will be dealt with in next chapter.
Chapter 4: Corporate civil liability for violation of international humanitarian law

So does corporate civil liability exist in international law? It is more interesting when it come together with violation of international humanitarian law. Since corporate liability is quite a broad topic, I just want to address some aspects of the concept relating to the case of herbicides, namely, the legal bases of corporate civil liability; the issue of complicity in the establishment of corporate civil liability for a violation of international humanitarian law.

4.1 Corporate obligations under international law

The first question is whether, under international law, non-state actor can be held accountable for violations of international humanitarian law and, if so, whether there is an duty to make reparation.

Traditionally, only States are the subjects of international law. In other words, international law imposes duties and responsibilities on States only, not individual nor corporations. However, the fact is that today non-state actors play greater role in the international arena, for example armed groups and multinational companies, the position of this type of entity international law needs to be adjusted. The great development of international human rights law after the Second World War showed that international law is not only covering interaction among states but also those among states and individuals.

Many international human rights document would seem to indicate that international law can confer duties on non-state actors. Some scholars interpret the use of the expression “every individual and every organ of society” in the preamble of the Universal Declaration of Human Rights includes legal persons, and hence companies, and that the Universal Declaration therefore applies to them. Cited in Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy, Versoix, 2002, p. 58.

... Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples”
Declaration of Human Rights as meaning that the drafters intended the provisions of the
Declaration to be applicable to all non-state actors, including to corporation. Similarly,
the International Covenants on Civil and Political Rights and on Economic, Social and
Cultural Rights, which are binding treaties, contain in the first paragraph of their common
Article 5 wording that clearly places “groups” under the obligation not to “engage in
any activity or perform any act aimed at the destruction of any of the rights and
freedoms” recognized in the Covenants.

In the same way, international criminal law and international humanitarian law since the
Second World War has showed that international law applies not only to states but also to
non-state entities and, in particular, to individuals.198 the establishment of the
International Criminal Tribunals for the former Yugoslavia and for Rwanda by the UN
Security Council and the adoption of the Rome Statute establishing the International
Criminal Court (ICC) has confirmed this trend. Article 3 common to the four Geneva
Conventions and the provisions of Additional Protocol II apply directly and automatically
to all parties to a conflict, including armed groups, provided that the conditions for their
application are met. Thus it is not conceptually problematic that international law applies
to non-state actors, including corporations and that they have duties and responsibilities.
Moreover, the obligations on corporations are set forth explicitly in a number of
international conventions and treaties. Article 1 of is the International Convention on the
Suppression and Punishment of the Crime of Apartheid refers to “organizations,
institutions and individuals committing the crime of apartheid”.199 The Basel Convention
on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
stipulates that the Parties shall prohibit “all persons” from transporting or disposing of
hazardous waste unless authorized or allowed to do so. Finally, provision is made for the
liability of legal persons in Article 10 of the United Nations Convention against
Transnational Organized Crime 200 adopted by the General Assembly in 2000. It is

197 “Nothing in the present Covenant may be interpreted as implying for any State, group or person any
right to engage in any activity or to perform any act aimed at the destruction of any of the rights or
freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present
Covenant.”
198 See above
199 Article 1, para. 2: “The States Parties to the present Convention declare criminal those organizations
institutions and individuals committing the crime of apartheid.”
200 A/RES/55/25.
evident that an act of corporation in some contexts can commit a crime or a civil wrong under international law.

In addition, there are a number of ‘‘soft law’’ instruments that deal exclusively with the responsibility of transnational corporations in respect of human rights. The Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, drawn up in 1976 and revised in 2000, emphasizes the duty of enterprises to respect the human rights of those affected by their activities. Finally, the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, adopted by the former UN Sub-Commission on the promotion and Protection of Human Rights at its 55th session in 2003, are particularly pertinent since it stipulates that companies ‘‘shall not engage in nor benefit from’’ violations of international humanitarian law. Admittedly, these Norms and Responsibilities have not yet been followed up by the UN Human Rights Council, but there are ongoing efforts at the United Nations to clarify the extent of corporate responsibility for human rights. It can therefore be shown that there is a growing consensus that legal persons in principle can be considered to have obligations under international law.

Corporate obligation to make reparation under international law

However, we are now facing another problem that virtually none of the above instruments provides for a mechanism for enforcing obligation for non-state entities to make reparation; it is the states’ discretion to choose how to apply the rules.

While it is possible to say that corporations do have a duty under international law to make reparation for damage resulting from breaches of their international obligations, it is more problematic to assert that this duty is implemented by a mechanism established by international law. Nonetheless, a number of recent international texts which refer explicitly to the duty to make reparation do seem to support the claim that such mechanisms ought to be established. One example is the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights,


stipulating that “transnational corporations … shall provide … reparation to those … that have been adversely affected by failures [by the corporations] to comply” with the norms in question.203

According to Basic Principles and Guidelines on the Right to a Remedy and Reparation204, states are obliged to provide victims with “effective access to justice”, irrespective of who may ultimately be responsible for the violation,205 and to enforce “judgments for reparation against individuals or entities liable for the harm suffered”.206 These entities may include corporations.

Last but not least, Article 75 of the Rome Statute provides, in a section dealing with reparations to victims, that the “court may order reparations” to be paid by individual defendants. Accepting such reparations as essentially civil in nature. According to the Rules of Procedure and Evidence, the Court may award reparations taking into account the scope and extent of any damage, loss or injury; awards for reparations must be made directly against a convicted person.207 Although such awards for reparations are made in the context of criminal proceedings, it follows from the above that they require the same elements as an award for compensation in a civil suit. The person against whom an award for damages is made must have committed a wrongful act and that act must have given rise to the damage. The debate that took place during negotiation of the Rome Statute illustrates the delegations’ differing points of view concerning the nature of the duty to make reparation. Some delegations perceived reparations as a way for victims to bring a civil claim via the Court against the person responsible for the crimes, while others saw reparations as an additional sanction pronounced by the Court. The former interpretation carried the day, that is, reparations are awarded on an individual basis except where the

203 Ibid., para. 18

204 A/RES/60/147 (The Principles provide for mechanisms that allow victims of gross violations of international human rights law and serious violations of international humanitarian law to obtain reparation)

205 Ibid., Principles 1 and 3.

206 Ibid., Principles 17

207 Articles 97 and 98 of the Rules of Procedure and Evidence.
Court deems the award of reparations on a collective basis or a combination of the two to be more appropriate.\(^{208}\)

Although as imposed by international law this duty to make reparation applies only to individuals convicted of a crime, there is nothing to indicate that such a duty could not be imposed on a legal person. In fact, a proposal that the Court should have jurisdiction over legal persons was made by France, but it was withdrawn because of the conceptual debate as to whether legal persons can incur criminal liability.\(^{209}\) If that proposal had been accepted, and if the Court had been given jurisdiction over legal persons, the obligation to make reparation under Article 75 would have applied to them \textit{ipso facto}. The Rome Statute can be considered as expressing the states’ \textit{opinio juris} in a number of areas\(^ {210}\), given the large number of signatures and ratifications it has received.

### 4.2 Imputability of a violation of international humanitarian law to a corporation

A corporation can therefore in principle have obligations under international law. But before a corporation can be held liable, a violation of the law must be attributable to it. That is one of three requirement for the establishment of civil liability: a wrong, damage and causal relationship between the two. A violation of international humanitarian law which constitutes a wrong can derive from the corporation’s actions or the actions of the others. Accordingly, there are two kinds of civil liabilities: liability for its own actions\(^ {211}\) and secondary liability which include vicarious and complicity (aiding and betting) liabilities. Since US chemical corporations have been accused of violation of international humanitarian law and the violation in question were actually committed by the US government, it is therefore pertinent to see whether the provision of herbicides by US chemical corporations falls within the framework of aiding and abetting liability.


\(^{211}\) When corporation committed a violation of international law

\(^{212}\) See above
Complicity (aiding and abetting) liability

Complicity is in fact a criminal law concept. There are two fundamental elements in aiding and abetting concept: the conduct of the person who aids and abets (actus reus) and the person's mental state (mens rea). As the actus reus is defined ICTY Trial Chamber Judgment in Furundzija as providing "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," this element is virtually unquestionable in international criminal law. Controversial here is the actus reus element, whether the aider and abettor need merely have knowledge that her actions will facilitate the commission of the crime, or whether she must harbor a purpose to facilitate the crime. The knowledge standard was applied in several post-World War II cases. Again in the Zyklon B case mentioned above, the prosecutors before the British military court:

did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.

In the Einsatzgruppen case, the American military court also used a knowledge test, not a purpose test, to convict defendant. Based on those cases, the ICTY Trial Chamber in Furundzija adopted a knowledge test: "The mens rea required is the knowledge that these acts assist in the commission of the offence."

US law articulates the types of conducts that constitute a joint and several liability for tort. Such liability comes up when a person ‘orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or (b) conducts an activity with the aid of another and is negligent in employing him, or (c)

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213 Furundzija, Case No. IT-95-17/1-T, p 191, 236.
215 André Klip et al., Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia, Intersentia Publisher 2002
216 Trial of Otto Ohlendorf and Others (Einsatzgruppen)
217 Supra note 212, p 249.
permits the other to act upon his premises or with his instrumentalities. Knowing or having reason to know that the other is acting or will act tortiously.’’

With regard to complicity between companies and governments, the theory of ‘‘joint action’’ can be applied basing on the joint action test. In Doe v. Unocal Corp, in deciding that Unocal is liable for grave breaches of human right by Myanmar military under ATCA\textsuperscript{218}, the Court held that that there was an agreement between the Unocal and Burmese government with a view to achieving a common design on violating human rights.\textsuperscript{219} However, the appellants challenged not the joint action theory per se but only its applicability in this case.

In the second-instance judgment in the case\textsuperscript{220}, the Court of Appeals for the Ninth Circuit The Court of Appeals argued in support of the use of international criminal law standards in a civil case in domestic law: (i) international human rights law has been developed largely in the context of criminal prosecutions rather than civil proceedings; (ii) the distinction between a crime and a tort is of little help in ascertaining the standards of international human rights law because what is a crime in one jurisdiction is often a tort in another; and (iii) the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law\textsuperscript{221}

\textit{Talisman}, a Canadian oil company, was sued for collaborating with the Sudanese government in violations of human rights and war crimes committed in the context of the international armed conflict taking place in Sudan\textsuperscript{222}. Talisman questioned the employment of the aiding and abetting standard by the Court by arguing that this theory did not apply to a civil claim under the ATCA. The Court ruled that this argument was unfounded:

\begin{itemize}
\item \textsuperscript{218} Doe v. Unocal Corp., 110F. Supp. 2d. 1294 (C.D. Cal. 2000), US Federal District Court, judgment of 31 August 2000.
\item \textsuperscript{219} Eric Mongelard, “Corporate civil liability for violations of International humanitarian law, International Review of the Red Cross, ”, Volume 88 Number 863 September 2006, p 679.
\item \textsuperscript{220} Doe v. Unocal Corp., U.S. Court of Appeals for the Ninth Circuit, Judgment of 18 September 2002.
\item \textsuperscript{221} Eric, supra note 218, p. 680
\item \textsuperscript{222} Presbyterian Church of Sudan v. Talisman Energy, 244 f. Supp. 2d 289, US District Court for the Southern District of New York, 19 March 2003, p 320.
\end{itemize}
Talisman’s contention is incorrect. Its analysis misapprehends the fundamental nature of the ATCA. The ATCA provides a cause of action in tort for breaches of international law. In order to determine whether a cause of action exists under the ATCA, courts must look to international law. Thus, whether or not aiding and abetting and complicity are recognized with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law.\(^{223}\)

The theory of aiding and abetting seems therefore to be applicable in civil claims for violations of international humanitarian law, at least in the United States under the ATCA.

Given the fact is that:

(i) the US herbicide manufactures knew the amount of dioxin contained in the herbicide is much above the level necessary to defoliate food crops, thus hazardous to human beings (causing birth defects, cancer and death);

(ii) The US herbicide manufactures knew the use to which their product would be put in Viet Nam and that that the product they supplied to the government would be used for military operations in Viet Nam.

Thus, it is theoretically sufficient to conclude that the accused US chemical corporations liable for the violation of international humanitarian law during the Vietnam War. It is also important to note that ATCA contains no statute of limitation which would bar the claims by plaintiff.

4.3 VAVA v. Dow et al

Under the Alien Tort Claims Act (ATCA), United States courts are granted with jurisdiction to hear civil actions for torts committed in violation of the law of nations or United States treaty law. In *Falartiga v. Pena-Irala*\(^{224}\) (1980) concerning an action of torture by a Paraguayan police officer against a Paraguayan national, this provision is interpreted by the Court that the US federal courts have jurisdiction to hear any civil case based on a violation of international law, no matter of where the violation took place. Furthermore, restrictions upon *Falartiga* doctrine have also been manifested. For example in *Siderman v. Argetina*, it has been held that ATCA does not constitute an


\(^{224}\) *Falartiga v. Pena-Irala*, 630, F.2d 876 (2d Cir.1980)
exception to the principle of sovereign immunity so that the US government can not be a defendants in any case.

On January 30, 2004 Vietnam Association for the Victims of Agent Orange/Dioxin (VAVA) and several individuals who were ill or had suffered illnesses due to exposure to agent orange filed a lawsuit against 37 chemical manufacturers who produced agent orange for the US government for use in Vietnam, including Dow, Monsanto, Hercules, Diamond Shamrock. The primary claim was that the use of agent orange violated the Hague Regulations of 1907 which prohibited the use of poison or poisoned weapons in war.

The case was assigned to Judge Jack Weinstein. Judge Weinstein was the judge who had heard cases filed by the United States veterans of the war in the early 1980's who had sued for damages due to their own injuries as a result of their exposure to agent orange. A multi-district litigation order required all cases involving Agent Orange be assigned to Judge Weinstein.

The original US veteran’s cases were settled in the late 1980's with out-of-court payment of USD 180 million made to US veterans. In the mid 1990's another group of US veterans sued again and their case was still pending at the time the case for the Vietnamese was filed in 2004. Thereafter the cases of the US veterans and the Vietnamese victims were virtually consolidated. That is, the motions to dismiss the cases filed by the defendants were heard on the same day. The decision of Judge Weinstein to dismiss both cases occurred at about the same time. The appeals of the cases were heard on the same day and the decisions affirming the dismissals were issued on the same day, February 22, 2008.

Both Judge Weinstein and the Court of Appeals rejected the arguments of the plaintiffs that agent orange which was laced with dioxin was a poisoned weapon which violated the Hague Regulations. Both decisions held that these agents were mere herbicides which were aimed a plants not people, and no rule of international law in existence during the war prohibited the use of herbicides. By refusing to recognize that the presence of dioxin fundamentally shifted these chemicals from anti-plant agents to poisonous weapons, both Judge Weinstein and the court of appeals were able to justify ruling against the Vietnamese victims. Also, after the case had been filed the US Supreme Court had
decided a case called *Sosa v Alvarez-Machain*. In *Alvarez-Machain* \(^{225}\), in its first opinion on this law, the Supreme Court held that it conferred jurisdiction on the district courts for violation of international law, but specified that such jurisdiction was limited to violations of international law norms that did not have less definite content than the paradigm familiar when the law was passed in 1789. This would appear to include serious violations of international humanitarian law such as torture, genocide, slavery, crimes against humanity, war crimes, and other acts of a similar level of “badness”. By doing so the Court more narrowly interpreted the Alien Tort Statute. Both courts used the opinion in Sosa to support their rulings that the use of these weapons did not violate any treaty or universally recognized customary international law.

The case of the US veterans was also dismissed on the grounds that the chemical companies were protected from suit under the government contractor defense. This defense extends the shield of immunity which the state has under "sovereign immunity" to contractors who provide products to the government as long as they disclose to the government information about the dangers of the product. The US veterans claimed the chemical companies did not disclose what they knew about the dangers of dioxin to the government. The Vietnamese plaintiffs relied on the arguments made by the US veterans to support their domestic law claims so that the loss in front of Judge Weinstein and the court of appeals by the US veterans applied to the Vietnamese plaintiffs as well.

\(^{225}\) *Sosa v. Alvarez-Machain et al.*, 542 US Supreme Court, 29 June 2004
Chapter 5 : Conclusion

The war in Vietnam ended exactly over thirty five years ago, but its consequences is still being felt today and will continue for years to come. For those who were affected by Agent Orange, the effects are seen not only in themselves, in the deadly diseases they have to carry and fight against, but also in their children and their children’s children. No one knows when this is going to end. Ironically though, while those who sprayed or took part in the spraying of Agent Orange have received a great deal of attention and assistance, particularly financial, the victims of Agent Orange, those Vietnamese veterans and civilians who were directly sprayed on or affected by it are not even recognized as having been affected. This paper has sought to clarify the responsibilities under international humanitarian law of the United States, its agents and the corporations that provided the toxic herbicides, and has also explored the legal difficulties in obtaining redress for the harm done. It is an attempt to draw more attention to the plight of the Vietnamese victims of Agent Orange. It has examined the legality of the use of Agent Orange and other herbicide in Vietnam. The present report concludes that military herbicide use in Vietnam was a breach of international law of armed conflicts. It is a violation of customary prohibition of chemical warfare as expressed in the 1925 Geneva Protocol, of the Hague proscription of the use of poison and weapons that cause unnecessary suffering, as well as of the customary principles of distinction and proportionality. This finding is extremely important as it demonstrate that decisions by Judge Weinstein and the Court of Appeals that these agents were mere herbicides which were aimed a plants not people, and no rule of international law in existence during the war prohibited the use of herbicides and that the use of these weapons did not violate any treaty or universally recognized customary international law is something unpersuasive. Thus, those who caused the sufferings for the through their illegal acts should have the responsibility to help ease such misery. Sadly, the failure to acknowledge such finding thirty five years after the end of the Vietnam war will only prolong suffering and misery for the Vietnamese victims.

By violating international law of armed conflict, the US government is under legal responsibility to prosecute those committed and involved the crimes and compensate for
the victims and that US chemical corporations which provided herbicide for US military use in the Vietnam war could be held accountable for aiding and abetting. Legal responsibility do exist but so difficult to enforce for the case in study given the nature of world politics and the current state of international law.

It is the only hope that the call of conscience will urge the US Government to take necessary steps to help alleviate the suffering of the Vietnamese victims, which in turn contributes to the closing of a traumatic history and striving toward a better future between the two countries.
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