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U.S. contracting party (the military) clearly views that the preponderance of the evidence found during investigations establishes that CACI and Titan employees did not live up to their contractual obligations to act lawfully. The Fay Report recommended that information regarding the two PMI employees described above, as well as four others, be “forwarded to the Army General Counsel for determination of whether [the contractor employee] should be referred to the Department of Justice for prosecution.”¹⁷ In addition, the Fay Report states “this information should be forwarded to the KO for appropriate contractual action.”¹⁸ Plaintiffs read the judicial decisions to mean that the defense is not available to a contractor who defaults on any material term in the contract, which includes the contract term that requires contractors to conform their conduct to all relevant laws.

In conclusion, the precise contours of the judicially created government contractor defense remain unclear. We anticipate that the human rights litigation filed against CACI and Titan may result in further shaping the doctrine.

THE AGENT ORANGE CASE

Vietnam Ass’n for Victims of Agent Orange/Dioxin v. Dow Chemical Co.

by *Anthea Roberts**

INTRODUCTION

In March, Federal District Court Judge Jack B. Weinstein dismissed war crime and other international law claims asserted by Vietnamese nationals against American chemical companies that were based on the defendants’ sale to the U.S. government of herbicides used during the Vietnam War (*Vietnam Ass’n for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*).¹ The decision squarely deals with the liability of private contractors that supply war materiel to governments and is one of the first to consider the applicability of the government contractor defense to international law claims brought under the Alien Tort Statute (ATS).

AGENT ORANGE CASE BACKGROUND

Various chemical herbicides, referred to collectively as “Agent Orange,” were used by the United States and South Vietnamese militaries during the Vietnam War, primarily to strip jungle foliage in order to prevent ambushes by enemy troops. Toward the end of the war, in 1970, the United States suspended use of the herbicides after studies suggested dioxin, a manufacturing by-product, could cause health problems in exposed populations.

Beginning in 1978, individual suits and class actions were brought on behalf of U.S. veterans who were exposed to Agent Orange in Vietnam against chemical companies that supplied the U.S. government with Agent Orange. These lawsuits were consolidated in the Eastern District of New York, where a \$180 million class settlement was approved by Judge Weinstein in 1984.²

¹⁷ *Id.*

¹⁸ *Id.*

* Debevoise & Plimpton LLP. This material was prepared by the author and Anne E. Cohen, who served as counsel for a defendant in the *Agent Orange* case.

¹ *Vietnam Ass’n for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, 2005 WL 729177 (E.D.N.Y. March 28, 2005).

² In *Re “Agent Orange” Product Liability Litigation*, 597 F.Supp. 740 (E.D.N.Y. 1984).

Vietnam Ass'n was filed in January 2004 on behalf of a putative class of Vietnamese nationals, including members of the Viet Cong, claiming violations of international law under the ATS as well as traditional tort theories. Plaintiffs alleged that, by spraying herbicides in Vietnam in the 1960s and early 1970s, the U.S. government committed genocide, torture, crimes against humanity, and war crimes. No claim could be brought against the United States because of sovereign immunity; instead, the action was brought against the companies that manufactured Agent Orange and its chemical components, claiming that they aided and abetted these violations of international law by selling the product with knowledge of its intended use.

In March 2005, Judge Weinstein dismissed the case, ruling that “there is no basis for any of the claims of plaintiffs under the domestic law of any nation or state or under any form of international law.”³ The lengthy opinion—234 typed pages—is certain to play a significant role in any analysis of the potential liability of private contractors supplying war materiel or engaging in wartime operations.

ALIEN TORT STATUTE BACKGROUND

The ATS gives federal courts original jurisdiction over civil actions brought by foreign citizens for torts “committed in violation of the law of nations or a treaty of the United States.” Enacted in 1789, the ATS lay largely dormant for nearly 200 years until the watershed case of *Filartiga v. Pena-Irala*,⁴ in which the U.S. Court of Appeals for the Second Circuit upheld a claim by a Paraguayan citizen against a former Paraguayan official for torture. Since then, the ATS has served as the basis for a host of claims against individuals and corporate entities based on violations of purported international norms, ranging from war crimes, genocide, and use of slave labor to breach of fiduciary duty, misappropriation of funds, and environmental pollution. These claims have been before federal trial and appellate courts, but, until June 2004, the modern use of the ATS had not been addressed by the U.S. Supreme Court.

In *Sosa v. Alvarez-Machain*,⁵ the Supreme Court undertook its first systematic interpretation of the ATS. The Court held that, while the statute is purely jurisdictional and, therefore, does not create any causes of action, federal common law authorizes causes of action for certain, narrowly defined violations of international law. In doing so, the Court also urged the need for vigilant gate-keeping, cautioning lower federal courts not to recognize causes of action under federal common law for “violations of any international law norm with less definite content and acceptance among civilized nations” than the causes of action recognized when the ATS was enacted (Blackstone’s trilogy of offenses against ambassadors, violations of safe conduct, and piracy). Although not articulating a precise standard, the Supreme Court endorsed formulations used in previous cases—specifically, that, like torture, the norms need to be “specific, universal, and obligatory”—as being “generally consistent” with the approach it would now require.

In addition to the high threshold test for establishing an actionable violation, the Court identified various prudential factors that argue for judicial caution in recognizing common law causes of action for violations of international law. The Court directed federal courts to be “particularly wary of impinging on the discretion of the Legislative and Executive

³ 2005 WL 729177.

⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980).

⁵ *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

Branches in managing foreign affairs,” indicating that case-specific deference to the political branches might be appropriate where the executive branch had made its views known. The Court also said that courts applying the ATS would have to look to international law to determine if the scope of liability for a given norm extended to non-state actors, such as individuals and corporations.

ARGUMENTS IN THE AGENT ORANGE CASE

Plaintiffs argued that chemical herbicides were per se prohibited weapons (meaning that all military uses of Agent Orange were prohibited) under customary international law and a number of treaties, including the prohibition on asphyxiating, poisonous, and other gases in the 1925 Geneva Protocol and the prohibition on poison and poisoned weapons in Article 23 of the Annex to 1907 Hague Convention IV. Even if not all uses of Agent Orange were prohibited, plaintiffs also argued that the specific uses of chemical herbicides in Vietnam violated the laws of war because they offended the international norms of military necessity and proportionality, which require military advantage to be weighed against harm caused to civilians and civilian objects. By supplying Agent Orange to the U.S. government, plaintiffs claimed that defendants were complicit in, or aided and abetted, these war crimes.

Defendants sought to dismiss the claims on several bases. First, the case was nonjusticiable because it encroached upon the president’s power to wage war and conduct foreign relations. Second, the use of Agent Orange was not prohibited by any norms during the Vietnam War, let alone by a norm with the definiteness and universality required to be actionable under the ATS. Third, the defendants could not be liable under the ATS because international law does not yet, and did not in the 1960s and 1970s, recognize corporate liability. Fourth, even if the use of Agent Orange were a violation of international law, defendants were protected by the government contractor defense or the defense of superior orders. Finally, the actions were time-barred under the ten-year statute of limitations generally applied in ATS cases.

In addition to receiving briefings from the parties, the Court also accepted briefs and oral arguments from the Center for Constitutional Rights (in support of plaintiffs) and the U.S. Department of Justice (DOJ) (in support of defendants). Particularly noteworthy, given the prudential factors listed in *Sosa*, were the arguments of the DOJ that the case was nonjusticiable because it infringed core executive powers, that the use of Agent Orange did not violate international law, and that defendants should be protected by the government contractor defense.

CLAIMS FOUND JUSTICIABLE AND NOT TIME-BARRED

Judge Weinstein rejected defendants’ argument that plaintiffs’ claims were nonjusticiable because they addressed military and diplomatic matters constitutionally committed to the political branches and that court intervention could substantially interfere with U.S. foreign policy. According to Judge Weinstein, that a “case may call for an assessment of the President’s actions during wartime is no reason for a court to abstain,” as “[p]residential powers are limited even in wartime.” Furthermore, he wrote, it was no defense that the herbicides were sprayed on the order of the President because “[a]uthorization by the head of government does not provide carte blanche for a private defendant to harm individuals in violation of international law.” The Court’s ruling was sweeping—Judge Weinstein articulated no limits on the power of courts to hear cases arising out of wartime operations,

and, on this score, the decision is likely to be a point of contention in claims involving U.S. government contractors in Iraq and Afghanistan.

All parties accepted, either explicitly or implicitly, and Judge Weinstein agreed, that international law could not be applied retroactively. The legality of the use of Agent Orange had to be assessed against the treaties and customary international law in force during the Vietnam War. However, it is noteworthy that Judge Weinstein departed from the 10-year statute of limitations for ATS claims usually adopted by U.S. courts (the ATS itself contains no statute of limitations, so this period is generally borrowed from the related Torture Victims Protection Act). Instead, he came to the provisional conclusion, subject to reconsideration, that *no* statute of limitations could be applied to war crimes and other violations of international law. This, too, is likely to raise substantial debate as the Court did not consider whether a rule against statute of limitations would apply only to jus cogens violations, or to all violations of international law. Coupling a wide approach to justiciability with no statute of limitations for all violations of international law could leave the door open for claims arising from wrongs long past. Indeed, German firms have recently been sued for atrocities committed more than a century ago in what is now Namibia, acting in concert with Imperial Germany.

USE OF AGENT ORANGE NOT A VIOLATION OF INTERNATIONAL LAW

On the core issue of whether the use of Agent Orange violated international law and was actionable under the ATS, Judge Weinstein completely rejected plaintiffs' claim. He held that the 1907 Hague Regulations, which prohibit the use of poison and poisoned weapons, did not apply because "poison" was not a defined concept, different interpretations of the term exist, and, in any event, the prohibition was not generally thought to apply to the use of lethal gas weapons used against people in World War I, let alone to herbicides aimed at plants. As for the 1925 Geneva Protocol prohibiting the use of asphyxiating, poisonous, and other gases, the United States did not ratify it until 1975 (after the Vietnam War and spraying had ended), and any customary norm evidenced by this treaty would only have covered the types of gases used in World War I, such as mustard gas, intended to have an immediate disabling effect on people as opposed to herbicides, designed to strip leaves from plants, with potential unintended effects on people.

On the question of proportionality, Judge Weinstein noted that while the concepts of military necessity and proportionality were well accepted under international law, they were difficult to apply in practice because such calculations are inherently imprecise and subjective. Prosecutorial discretion ensures that these norms, standing alone, are rarely prosecuted before international criminal tribunals, partly because of their imprecision. Judge Weinstein found this important because the Supreme Court, in *Sosa*, noted that courts should be particularly cautious about creating private rights of action that would permit enforcement of norms without the check imposed by prosecutorial discretion. On the facts, he found that plaintiffs could not show that "the military in the field—or the executive and legislative branches at home—violated proportionality norms when using herbicides in the Vietnam War."

CORPORATE LIABILITY UNDER INTERNATIONAL LAW AND THE ATS

Although the general principle that corporations might be civilly or criminally liable is well established under U.S. law, the existence of corporate liability under international law and the ATS is hotly contested. Originally, international law imposed rights and obligations

almost exclusively on states, but later expanded to include individual rights (through international human rights law) and individual obligations (through international criminal law). However, corporations have argued that, to date, there has been no general recognition of *corporate* liability under international law. In *Sosa*, the Supreme Court footnoted the question of corporate liability, stating that courts hearing claims under the ATS would need to consider not only whether a given norm was recognized by international law, but whether “international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁶

Defendants argued that the failure of international law to recognize the concept of corporate (as opposed to state or individual) liability required dismissal of the ATS claims. Judge Weinstein agreed that there was “substantial support” for the proposition that corporations cannot be held liable under international law. Indeed, he noted that during negotiations for the newly created International Criminal Court, the possibility of extending liability to corporations was considered, but expressly rejected by the negotiating states.

Nevertheless, the Court held that corporations could be held liable under international law and the ATS, noting that “limitations on criminal liability of corporations do not necessarily apply to civil liability of corporations.” The Court reasoned that “limiting civil liability to individuals while exonerating the corporation makes little sense in today’s world.” Judge Weinstein said that many vital activities are conducted by corporations, and the individuals who act on their behalf are often gone or deceased before they or the corporation can be brought to justice. He acknowledged that the legal effect of outsourcing to private contractors, particularly in times of war, is unclear, but, nonetheless, held that corporations ought not be immune from civil legal actions based on international law. And, even if international law standing on its own did not recognize corporate liability, corporations could still be sued under the ATS because, as federal common law claims, they were subject to the “bedrock tenet of American law that corporations can be held liable for their torts.”

GOVERNMENT CONTRACTOR DEFENSE INAPPLICABLE TO INTERNATIONAL LAW CLAIMS

Judge Weinstein also rejected defendants’ argument that the government contractor defense, as articulated in *Boyle*, applied to the Vietnam plaintiffs’ claims under the ATS. By contrast, in companion cases involving U.S. veterans, the judge recognized the defense and dismissed those lawsuits. The Court rationalized these different results on the ground that the government contractor defense preempted state law claims in order to support the policies underlying the discretionary function exception in the Federal Tort Claims Act. This principle, the Court said, had no bearing as to ATS claims, which were under federal and international law. Yet, as the DOJ argued, many of the same policy justifications for the government contractor defense also applied to international law claims, including preventing an end-run around sovereign immunity and increasing costs of military supplies.

A primary driver behind the Court’s refusal to recognize the government contractor defense in this context appears to be the spectre of the Zyklon B case from the Nuremberg war crimes tribunal, in which two businessmen were found guilty and sentenced to death for supplying Zyklon B to Nazi concentration camps with knowledge that it was being used to kill human beings.⁷ Although cautioning that “[n]o one, of course, suggests that the use of

⁶ *Id.*, at n. 20.

⁷ See *Zyklon B Case (Trial of Bruco Tesch and Two Others)*, 1–5 *Law Reports of Trials of War Criminals* 92–102.

herbicides in Vietnam is remotely comparable to the genocidal use of Zyklon B," Judge Weinstein invoked Nuremberg repeatedly in rejecting the concept that *Boyle* might shield a contractor from liability under international law principles for supplying war materiel to the government. He stated that the Nuremberg cases make clear that "commands from the state and higher authorities within the state cannot justify a person's commission of, or knowing participation in, an international crime."

Judge Weinstein held the government contractor defense to be peculiar to U.S. law, and thus inapplicable to violations of human rights and international law, although he did find the plaintiffs' domestic law claims to be so barred. There are perhaps inconsistencies in this position and other portions of the decision, in particular, the holding that ATS claims, as part of federal common law, could be enlarged by other federal common law principles (such as corporate liability).

Although not an exact equivalent of the government contractor defense, international law does recognize "superior orders" as a defense or mitigating factor where someone has been ordered by a military or government official to do an act, in situations where the actor did not know that the act was illegal, and where the act was not manifestly illegal. (Manifest illegality means that the unlawfulness of the conduct was flagrantly clear, sometimes described as "unlawfulness piercing the eye and revolting the heart.") The defense would not apply to the supply of Zyklon B, where it was known that it was being used to exterminate civilians, because that is manifestly unlawful, but it might apply to the supply of Agent Orange where many states (including the United States) believed that using herbicides did not violate international law. As with his provisional decision on the statute of limitations, Judge Weinstein did not, however, draw distinctions between illegal and manifestly illegal conduct. Rather, he found that the government contractor defense and defense of superior orders could not be applied to *any* violations of international law.

CONCLUSION

The Agent Orange case provides an important precedent for all government contractors during times of war, particularly for corporations supplying war materiel that may be used in violation of the laws of war. While holding that there was no violation of international law in this case, Judge Weinstein took a broad approach to justiciability, recognized corporate liability under international law and the ATS, and rejected outright any defense for contractors based on the argument that they were following government orders. Whether right or wrong, his decision is sure to provide fertile ground for debate in future cases about the liability of private contractors in wartime situations.

¹ Charles Allen's remarks are available in the audio transcripts of the Proceedings.