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05-1953-cv

Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: June 18, 2007)

Decided: February 22, 2008)

Docket No. 05-1953-cv

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, PHAN THI PHI PHI, NGUYEN VAN QUY, Individually and as parent and natural guardian of NGUYEN QUANG TRUNG, THUY NGUYEN THI NGA, His children, DUONG QUYNH HOA, Individually and as administratrix of the estate of her deceased child, HUYNH TRUNG SON, On behalf of themselves and others similarly situated, NGUYEN THANG LOI, TONG THI TU, NGUYEN LONG VAN, NGUYEN THI THOI, NGUYEN MINH CHAU, NGUYEN THI NHAM, LE THI VINH, NGUYEN THI HOA, Individually and as parent and natural guardian of VO THANH TUAN ANH, Her child, VO THANH HAI, NGUYEN THI THU, Individually and as parent and natural guardian of NGUYEN SON LINH and NGUYEN SON TRA, Her children, DANG THI HONG NHUT, NGUYEN DINH THANH, NGUYEN MUOI, HO THI LE, Individually and as administratrix of the estate of her deceased husband HO XUAN BAT, HO KAN HAI, Individually and as parent and natural guardian of NGUYEN VAN HOANG, Her child, and VU THI LOAN,

Plaintiffs-Appellants,

-v.-

DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL CO., HERCULES, INC., OCCIDENTAL CHEMICAL CORPORATION, THOMPSON HAYWARD CHEMICAL CO., HARCROS CHEMICALS, INC., UNIROYAL CHEMICAL CO, INC., UNIROYAL, INC., UNIROYAL CHEMICAL HOLDING COMPANY, UNIROYAL CHEMICAL ACQUISITION CORPORATION, C.D.U. HOLDING, INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICAL COMPANY, also known as DIAMOND SHAMROCK REFINING & MARKETING CO., also known as OCCIDENTAL ELECTRO CHEMICAL CORP., also known as MAXUS ENERGY CORP., also known as OCCIDENTAL CHEMICAL CORP., also known as DIAMOND SHAMROCK, DIAMOND SHAMROCK CHEMICAL, also known as DIAMOND SHAMROCK REFINING & MARKETING CO., also known as OCCIDENTAL ELECTRO CHEMICAL CORP., also known as MAXUS ENERGY CORP., also known as OCCIDENTAL CHEMICAL CORP., also known as DIAMOND SHAMROCK, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER

1 CHEMICALS & PLASTICS CORP., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE &
2 NUTRITION CO., THOMPSON CHEMICAL CORPORATION, also known as THOMPSON CHEMICAL
3 CORP., RIVERDALE CHEMICAL COMPANY,

4 Defendants-Appellees,

5 PHARMACIA CORP., formerly known as MONSANTO CO., ULTRAMAR DIAMOND SHAMROCK
6 CORPORATION, MAXUS ENERGY CORP., DIAMOND ALKALI COMPANY, ANSUL INCORPORATED,
7 AMERICAN HOME PRODUCTS CORPORATION, formerly known as AMERICAN HOME PRODUCTS,
8 WYETH, INC., HOFFMAN-TAFF CHEMICALS, INC., ELEMENTIS CHEMICALS, INC., UNITED STATES
9 RUBBER COMPANY, INC., SYNTEX AGRIBUSINESS, INC., ABC CHEMICAL COMPANIES 1-50,
10 SYNTEX LABORATORIES, INC., VALERO ENERGY CORPORATION, doing business as VALERO
11 MARKETING AND SUPPLY COMPANY,

12 Defendants.
13

14 Before: MINER, SACK, and HALL, Circuit Judges.

15 Appeal from a judgment entered in the United States District Court for the Eastern
16 District of New York (Weinstein, J.) in an action brought by Vietnamese nationals for injuries
17 allegedly sustained by their exposure to Agent Orange and other herbicides manufactured by
18 defendants-appellees and deployed by the United States government during the Vietnam War, to
19 the extent that the judgment: (1) dismisses for failure to state a claim claims pleaded under the
20 Alien Tort Statute; (2) grants summary judgment to defendants-appellants as to claims arising
21 under domestic tort law; and (3) denies the claim for injunctive relief.

22 Judgment affirmed.

JONATHAN C. MOORE, Moore & Goodman LLP, New York, NY (William H. Goodman and David Milton, Moore & Goodman LLP, New York, NY, Constantine P. Kokkoris, Esq., New York, NY, Frank Davis and Johnny Norris, Davis & Norris LLP, Birmingham, AL, Robert Roden, Shelby Roden LLC, Birmingham, AL, Jonathan Cartee and R. Stan Morris, Cartee & Morris LLC, Birmingham, AL, and Kathleen Melez, Esq., Los Angeles, CA, on the brief), for Plaintiffs-Appellants.

SETH P. WAXMAN, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC (Paul R.Q. Wolfson and Leondra R. Kruger, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC, Joseph R. Guerra and Maria T. DiGiulian, Sidley Austin LLP, Washington, DC, Richard P. Bress and Matthew K. Roskoski, Latham & Watkins LLP, Washington, DC, James E. Tyrrell Jr., Latham & Watkins, Newark, NJ, and John C. Sabetta and Andrew T. Hahn, Seyfarth Shaw LLP, New York, NY, on the brief), for Defendants-Appellees Monsanto Co., Monsanto Chemical Co., and Pharmacia Corp.

Andrew L. Frey, Charles A. Rothfeld, and Lauren R. Goldman, Mayer Brown Rowe & Maw LLP, New York, NY, James L. Stengel, Laurie Strauch Weiss, and Adam Zimmerman, Orrick, Herrington & Sutcliffe LLP, New York, NY, and Steve Brock and James V. Aiosa, Rivkin Radler LLP, Uniondale, NY, for Defendant-Appellant Dow Chemical Co.

William A. Krohley and William C. Heck, Kelley Drye & Warren LLP, New York, NY, for Defendant-Appellee Hercules, Inc.

Michael M. Gordon, McKee Nelson, New York, NY, for Defendants-Appellants Occidental Chemical Corp., as successor to Diamond Shamrock Chemicals Co.; Maxus Energy Corp.; Tierra Solutions, Inc., f/k/a Chemical Land Holdings, Inc.; and Valero Energy Corp., as successor to Ultramar Diamond Shamrock Corp.

1 Lawrence D'Aloise, Clark, Gagliardi & Miller,
2 White Plains, NY, for Defendants-Appellants
3 Harcros Chemicals, Inc., T-H Agriculture &
4 Nutrition Co., Thompson Chemical Corp., and
5 Thompson Hayward Chemical Co.

6 Myron Kalish, New York, NY, for Defendants-
7 Appellees C.D.U. Holding, Inc., Uniroyal Chemical
8 Acquisition, Uniroyal Chemical Co., Inc., Uniroyal
9 Chemical Holding Co., and Uniroyal, Inc.

10 Anne E. Cohen and Anthea E. Roberts, Debevoise
11 & Plimpton LLP, New York, NY, for Defendants-
12 Appellees Hooker Chemical Entities.

13 Steven H. Hoeft, McDermott Will & Emery LLP,
14 Chicago, IL, and Chryssa V. Valletta, McDermott
15 Will & Emery LLP, New York, NY, for Defendant-
16 Appellant Riverdale Chemical Co.

17 Jeffrey Sedgwick, Acting Assistant Attorney
18 General, Benton J. Campbell, United States
19 Attorney for the Eastern District of New York,
20 Brooklyn, NY, Mark B. Stern, Sharon Swingle,
21 Attorneys, Appellate Staff Civil Division, U.S.
22 Department of Justice, John B. Bellinger III, Legal
23 Advisor, Department of State, Daniel J. Dell'Orto,
24 Principal Deputy General Counsel, Department of
25 Defense, for Amicus Curiae the United States of
26 America.

27 Paul R. Friedman, John Townsend Rich, William F.
28 Sheehan, Goodwin Procter LLP, Washington, DC,
29 Robin S. Conrad, Amar D. Sarwal, National
30 Chamber Litigation Center, Inc., Washington, DC,
31 for Amicus Curiae the Chamber of Commerce of
32 the United States of America.

33 Daniel J. Popeo, Paul D. Kamenar, David Price,
34 Washington Legal Foundation, Washington, DC,
35 for Amicus Curiae Washington Legal Foundation.

1 MINER, Circuit Judge:

2 This appeal challenges the District Court's dismissal of an action brought by a purported
3 class of Vietnamese nationals ("Plaintiffs") on behalf of themselves and all others similarly
4 situated for injuries allegedly sustained by their exposure to Agent Orange and other herbicides
5 manufactured by defendants-appellees United States companies (collectively, "Defendants") and
6 deployed by the United States military during the Vietnam War. Plaintiffs brought this action
7 seeking relief under the Alien Tort Statute, 28 U.S.C. § 1350, which grants the district courts
8 jurisdiction over any civil action by an alien claiming damages for a tort committed in violation
9 of international law or a treaty of the United States. In their Complaint, Plaintiffs alleged that
10 the United States government violated international law by spraying toxic herbicides in areas of
11 South Vietnam from 1962 to 1970 and that Defendants either aided and abetted the
12 government's violations by supplying it with Agent Orange or that they were directly liable in
13 their corporate capacities. Plaintiffs also asserted claims grounded in domestic tort law. In
14 connection with their alleged injuries, Plaintiffs sought money damages as well as injunctive
15 relief in the form of environmental abatement, clean-up, and disgorgement of profits.

16 Defendants moved to dismiss the Complaint for failure to state a claim upon which relief
17 could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In their motion,
18 Defendants contended that the Complaint failed to state a claim under the Alien Tort Statute
19 because it did not allege a violation of any well-defined and universally-accepted rule of
20 international law as required by Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). Defendants also
21 argued that Plaintiffs lacked standing to bring suit, that their claims under the Alien Tort Statute
22 were nonjusticiable under the political question doctrine, and that all of their claims were barred

1 by the government-contractor defense. In addition, Defendants moved for partial summary
2 judgment pursuant to Federal Rule of Civil Procedure 56 to dismiss all claims as barred by the
3 applicable statute of limitations. In the course of the proceedings below, the United States
4 government submitted a Statement of Interest supporting Defendants' position with respect to
5 the issues of international law and on the questions of justiciability and the government-
6 contractor defense.

7 The District Court made several rulings that were favorable to Plaintiffs, but it ultimately
8 determined that Plaintiffs had failed to allege a violation of international law because Agent
9 Orange was used to protect United States troops against ambush and not as a weapon of war
10 against human populations. The District Court also determined that Plaintiffs' domestic tort law
11 claims were barred by the government-contractor defense, which the court previously had found
12 to bar similar claims brought by United States veterans against some of the same defendants
13 named as defendants-appellees in the companion appeal decided herewith. Accordingly, the
14 court denied Plaintiffs' claims for relief under both international and domestic law and granted
15 Defendants' motion dismissing the Complaint. Because we agree with the conclusions reached
16 by the District Court in this case, we affirm the judgment for the reasons set forth in this
17 Opinion.

18 **BACKGROUND**

19 I. United States Authorization of Herbicide Use in Vietnam

20 Early in the Vietnam conflict, the United States government began exploring the
21 possibility of using herbicides to deprive enemy forces infiltrating South Vietnam of the benefit
22 of vegetation that provided them with cover and sustenance. In late 1961, the United States

1 Department of State and the Department of Defense recommended to President Kennedy that the
2 military initiate a defoliation program. President Kennedy soon accepted that recommendation
3 and, in November 1961, approved the launch of military herbicide operations in Vietnam.
4 Operation Trail Dust, as the entire herbicide operation was called, included the United States Air
5 Force Program known as Operation Ranch Hand, which commenced its defoliation spray
6 missions in September 1962; missions targeting crops that sustained enemy forces commenced
7 in November of that same year.

8 Herbicides were effective in meeting important United States and allied military
9 objectives in Vietnam. As Assistant Secretary of Defense William Lemos explained: “[O]ne of
10 the most difficult problems of military operations in South Vietnam is the inability to observe the
11 enemy in the dense forest and jungle.” After summarizing the military’s herbicide operations,
12 Admiral Lemos then concluded: “The result is that our forces have been better able to
13 accomplish their mission with significantly reduced U.S. and Vietnamese casualties.” Another
14 Assistant Secretary later explained that the “use of . . . herbicides [in Vietnam] was appropriate
15 and had one purpose — to [s]ave the lives of Americans and our allies.” The record in this case
16 reveals that the policy of the Department of Defense at that time was to “carefully select[]” crop
17 destruction targets “so as to attack only those crops known to be grown by or from the [Viet
18 Cong] or [North Vietnamese Army],” and the Department “ha[d] issued instructions to the Joint
19 Chiefs of Staff to reemphasize the already existing policy that [chemical herbicides] be utilized
20 only in areas remote from population.” Admiral Lemos also stressed that the military had
21 instituted policies intended to ensure that the herbicides were applied only to targets of military
22 significance.

1 The herbicide program nevertheless was controversial, as decision-makers recognized it
2 would be from the outset. But despite concerns that Communist propaganda would characterize
3 the program as a form of germ or chemical warfare, policymakers persisted in the decision to use
4 herbicides in light of their substantial military benefits. They also consistently concluded that
5 the military's use of herbicides in Vietnam was permissible under existing treaties and
6 customary international law. Secretary of State Dean Rusk advised President Kennedy in 1961
7 that "the use of defoliant does not violate any rule of international law concerning the conduct of
8 chemical warfare and is an accepted tactic of war." In 1969, the United States faced a move in
9 the United Nations General Assembly to resolve whether the 1925 Geneva Protocol, see Geneva
10 Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases and of
11 Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into
12 force Feb. 8, 1928, for the United States, Apr. 10, 1975) (the "1925 Geneva Protocol"), banned
13 at least some herbicide use in warfare. The United States delegation rejected that interpretation,
14 claiming that "[c]hemical herbicides . . . which were unknown in 1925, could not be included"
15 within the scope of the prohibitions. Thus, the United States voted against the resolution. In
16 1970, when President Nixon transmitted the 1925 Geneva Protocol to the Senate for ratification,
17 Secretary of State William Pierce Rogers reiterated that "[i]t is the United States' understanding
18 of the Protocol that it does not prohibit the use in war of . . . chemical herbicides." And in 1975,
19 when President Ford issued Executive Order 11,850 renouncing, "as a matter of national policy,
20 first use of herbicides in war," his accompanying remarks confirmed the consistent position of
21 the United States that "the [1925 Geneva] protocol does not cover . . . chemical herbicides."

22 Congress was well aware of the herbicide program, and while it denied funds for certain

1 military initiatives in Southeast Asia of which it disapproved, it never denied funding for
2 herbicides. Instead, it affirmatively ratified herbicide use by appropriating funds specifically for
3 herbicide procurement, and attempts by members of Congress to terminate or constrain the
4 herbicide program failed by wide margins. See S. Rep. No. 91-1016, at 85-87 (1970). During
5 the Senate debate over the Military Procurement Authorization Act of 1971, United States
6 Senators Gaylord Nelson and Charles Goodell introduced an amendment to prohibit the
7 expenditure of funds for any military application of anti-plant chemicals or for the transfer of
8 anti-plant chemicals for use by other countries. The full Senate rejected this measure by a vote
9 of 62-22. Another amendment sought to prohibit the expenditure of funds for the use of
10 chemicals for crop destruction, and that amendment was rejected by a vote of 48-33. Thus,
11 while keenly aware of arguments against the military use of herbicides in Vietnam, Congress
12 continued to appropriate the funds necessary to sustain the program. See 116 Cong. Rec.
13 30,036-30,227 (1970).

14 Congress likewise was aware of the controversy over the legality of the use by the United
15 States of herbicides in Vietnam. Indeed, a congressional report observed that, although it was
16 highly desirable that the United States adhere to the 1925 Geneva Protocol, such adherence
17 could be difficult to attain if it would require acceptance of the view that the use of herbicides
18 would violate international law, a position the United States had consistently rejected. See
19 REPORT OF THE SUBCOMM. ON NATIONAL SECURITY, 91ST CONG., CHEMICAL-BIOLOGICAL
20 WARFARE: U.S. POLICIES & INTERNATIONAL EFFECT 5-6, 9 (Comm. Print 1970). Even after the
21 United States terminated the use of herbicides, the government continued to maintain that the
22 1925 Geneva Protocol did not prohibit the use of herbicides in war. When President Nixon

1 submitted the Protocol to the Senate for its advice and consent, Secretary of State Rogers
2 explained to the Senate that the United States had decided not to enter a reservation that would
3 preserve its ability to use herbicides, precisely because the United States' position remained that
4 the Protocol did not prohibit "the use in war of . . . chemical herbicides," Letter of Submittal
5 from Secretary of State William P. Rogers to the President (Aug. 11, 1970). See The Geneva
6 Protocol of 1925: Hearings Before the Sen. Comm. on Foreign Relations, 92d Cong. 6–7
7 (1972).

8 II. Post-War Adjustments with Vietnam

9 The Paris Peace Accords of January 1973 ended the United States' participation in the
10 Vietnam War. After the fall of Saigon in 1975, the United States severed relations with Vietnam
11 and imposed a trade embargo prohibiting most commercial transactions between United States
12 nationals and Vietnamese nationals. See 31 C.F.R. § 500.201. President Clinton partially lifted
13 the trade embargo in February 1994, and he fully lifted it in March 1995. On January 28, 1995,
14 the United States and Vietnam agreed to a settlement of certain outstanding claims between the
15 countries. This 1995 Agreement covers all claims against either nation arising out of "the
16 nationalization, expropriation, or taking of, or other measures directed against, properties, rights,
17 and interests" of the parties and their citizens during and after the war. Significantly, the 1995
18 Agreement makes no provision for reparations or restitution to settle claims arising out of the use
19 by the United States of herbicides, including Agent Orange.

1 The United States and Vietnam continue to discuss issues arising out of the war in the
2 context of their current diplomatic, economic, trade, aid, and security relationships.² A 2002
3 Memorandum of Understanding provides for scientists representing both governments to work
4 together to determine the effects, if any, of Agent Orange on people and ecosystems, along with
5 methods and costs of treatment and environmental remediation. But, to date, the United States
6 never has agreed that it has a legal duty to provide funds or assistance to remediate harms
7 allegedly caused by Agent Orange.

8 III. Procurement of Agent Orange

9 The facts relevant to the manufacture and procurement of Agent Orange are the principal
10 focus of the appeals in the veterans' cases (especially with regard to the government-contractor
11 defense) and are set forth in this Court's opinion resolving the veterans' claims before this Court.
12 With respect to the instant appeals by Vietnamese nationals, a brief summary of the facts

1 ² News of the Vietnamese President's visit to the United States in June 2007 confirmed
2 that the United States and Vietnam currently are engaged in diplomatic efforts regarding the
3 Agent Orange issue:

4 In the build-up to the hearing, a Vietnamese delegation is touring the United
5 States screening documentaries of disfigurement and other health problems
6 caused by dioxin, a small compound within the 'agent orange' herbicide that is
7 one of the most toxic compounds known In the past year, the two countries
8 have set a new tone in dealing with cleaning up toxins from former U.S. air bases
9 where they were stored in barrels marked with an orange stripe. Government
10 agencies and non-government organizations have plans to start clean-up in the
11 central city of Danang this year. In late May, [President] Bush signed a bill that
12 provides \$3 million toward health and environment issues stemming from dioxin.

13 Grant McCool, Vietnam Leader Visits U.S. for Trade, Other Issues Weigh, Boston Globe, June
14 14, 2007.

1 surrounding the veterans' appeals and additional relevant facts underlying the Vietnamese
2 nationals' claims follows.

3 The herbicidal properties of the components of Agent Orange, 2,4-dichloropheno-
4 xyacetic acid (2,4-D) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), were identified in
5 research conducted by the United States military during the 1940s. In the 1950s, the military
6 conducted field tests to demonstrate the feasibility of dispensing those substances from aircraft;
7 these dissemination trials, and work on aerial spray systems, laid the groundwork for the
8 defoliation systems used in Vietnam. In 1961, the Advanced Research Projects Agency of the
9 Department of Defense evaluated the feasibility of defoliating tropical vegetation in Vietnam and
10 recommended that appropriate formulations of 2,4-D and 2,4,5-T be exploited for immediate use.
11 In January 1962, the United States Air Force began the operational phase of the defoliation
12 program in South Vietnam, using a substance code-named Agent Purple. Later in 1962, a
13 research team concluded that a 50/50 mixture of 2,4-D and 2,4,5-T was most effective — that
14 formulation became known as Agent Orange. See In re "Agent Orange" Prod. Liab. Litig., 304
15 F. Supp. 2d 404, 424–31 (E.D.N.Y. 2004).

16 Formal specifications for 2,4-D and 2,4,5-T were prepared and promulgated by the
17 military. These specifications established the design and specific characteristics of the mixture
18 of 2,4-D and 2,4,5-T that the government had requested. The same specifications also were later
19 used as the basis for the military's procurement of Agent Orange. The government supplied
20 manufacturers with copies of these specifications and incorporated them into the manufacturers'
21 Agent Orange contracts. The government also strictly prescribed the markings that were to be
22 placed on the drums of herbicides manufactured by the Defendants. The names of the various

1 “Agents” (Agent Orange, Agent Purple, etc.) refer to the three-inch color-coded band that the
2 government required on the outside of the drums containing the relevant herbicide. Aside from
3 that colored band, the government generally prohibited the manufacturers from including any
4 language, markings, or identification on the drums. Id.

5 In 1966, the government became concerned that the pace of production of Agent Orange
6 was insufficient to meet its projected needs and decided instead to compel production from the
7 manufacturers. In so doing, the government acted under the authority of the Defense Production
8 Act of 1950 (“DPA”), 50 U.S.C. App. §§ 2061–2168 (1951 & Supp. 1983). Section 101 of the
9 DPA authorized the President to “require that performance under contracts or orders
10 . . . which he deems necessary or appropriate to promote the national defense shall take priority
11 over performance under any other contract or order, and, for the purpose of assuring such
12 priority, to require acceptance and performance of such contracts or orders in preference to other
13 contracts or orders.” Id. § 2071. The President thereafter delegated that authority to the
14 Secretary of Commerce. 18 Fed. Reg. 6503 (1953). In March 1967, the United States
15 Department of Commerce, expressly invoking Section 101 of the DPA, directed Defendants to
16 accelerate the delivery of existing orders for the defoliant Agent Orange. This directive
17 essentially commandeered all of the Defendants’ capacity to produce Agent Orange. In re
18 “Agent Orange” Prod. Liab. Litig., 304 F. Supp. 2d at 424–26.

19 IV. End of the Herbicide Program

20 In June 1966, a government study on the long-term health effects of pesticides, including
21 2,4,5-T (known as the Bionetics Study), uncovered evidence of teratogenicity (birth defects) in
22 mice. The completed Bionetics Study was delivered to the National Cancer Institute (NCI), a

1 component of the National Institutes of Health, in September 1968, although NCI personnel
2 previously had received progress reports concerning the possible teratogenicity of 2,4,5-T. The
3 government undertook further extensive analyses of the Bionetics Study's data in early 1969, but
4 it did not restrict the ongoing herbicide program in Vietnam. However, upon the public release
5 of the Study in October 1969, the government restricted the use of 2,4,5-T both in the United
6 States (on food crops and around the home) and in Vietnam, limiting its use to areas remote from
7 human populations. On April 15, 1970, the Department of Defense suspended military use of
8 Agent Orange upon evidence of the toxicity of the dioxin component. Subsequently, herbicide
9 spraying for defoliation using Agent White continued a short while, and crop destruction using
10 Agents White and Blue continued through 1970. In January 1971, the last spray mission took
11 place.

12 V. Nature of the Complaint & Proceedings Below

13 Plaintiffs in the instant action include individual Vietnamese nationals residing in both
14 North and South Vietnam, as well as the Vietnamese Association for Victims of Agent Orange
15 ("VAVAO"), a Vietnamese non-profit, non-governmental organization representing persons who
16 were exposed to Agent Orange and other herbicides during the war and whose purpose is to
17 protect the interests of its members and to raise funds for their care and treatment. Plaintiffs
18 brought this action on behalf of themselves and all others similarly situated who sustained
19 injuries as a result of their exposure to dioxin. As the District Court enumerated in extensive
20 detail below, Plaintiffs' alleged injuries included, among other things, miscarriages, birth
21 defects, breast cancer, ovarian tumors, lung cancer, Hodgkins' Disease, and prostate tumors.

1 Plaintiffs alleged in their September 14, 2004 Amended Complaint that the United States
2 military's use of Agent Orange violated international, domestic, and Vietnamese law and that
3 Defendants either aided and abetted these violations or committed independent violations by
4 fulfilling the military's demand for herbicides. With respect to their claims arising under
5 international law, Plaintiffs alleged that Defendants' actions constituted torts that were
6 cognizable under the Alien Tort Statute ("ATS"),³ 28 U.S.C. § 1350, and included war crimes,
7 genocide, crimes against humanity, and torture. With respect to their claims arising under
8 domestic and Vietnamese tort law, Plaintiffs alleged that Defendants were liable for assault and
9 battery, intentional infliction of emotional distress, negligent infliction of emotional distress,
10 negligence, wrongful death, and unjust enrichment under the laws of the United States, Vietnam,
11 and the State of New York, and for strict product liability under the laws of the United States and
12 the State of New York. Plaintiffs also sought equitable relief under theories of public nuisance
13 and unjust enrichment. In their prayer for relief, Plaintiffs sought compensatory and punitive
14 damages as well as injunctive relief directing Defendants to provide environmental remediation
15 of the allegedly contaminated areas in Vietnam and to disgorge profits gained from their
16 production and supply of herbicide.

17 On November 2, 2004, Defendants filed several dispositive motions. They first moved
18 under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Complaint for failure

1 ³ While our Court has over time referred variously to 28 U.S.C. § 1350 as the Alien Tort
2 Statute, see, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980), the Alien Tort Act,
3 see, e.g., Kadic v. Karadzic, 70 F.3d 153, 156 (2d Cir. 1998) and the Alien Tort Claims Act, see,
4 e.g., Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007), because the
5 Supreme Court has opted in Sosa to refer to § 1350 as the Alien Tort Statute, we think it is
6 preferable to follow that designation.

1 to state a claim under the ATS. They further moved under Rule 56 for partial summary
2 judgment dismissing all claims as time-barred. With respect to several threshold issues that
3 applied to all international and domestic law claims, Defendants argued that Plaintiffs lacked
4 standing to bring this action and that Plaintiffs had raised claims that were nonjusticiable under
5 the political question doctrine, were time-barred, and were precluded by the government-
6 contractor defense. On the merits, Defendants contended that Plaintiffs failed to allege a
7 violation of international law under the ATS that would meet the standard set forth in Sosa v.
8 Alvarez-Machain, 542 U.S. 692 (2004). Defendants also asserted that any award of injunctive
9 relief requiring remediation of the land in Vietnam would be impracticable. On January 12,
10 2005, the United States government filed a Statement of Interest supporting Defendants' motion
11 to dismiss the claims under the ATS as nonjusticiable, as barred by the government-contractor
12 defense, and as insufficient to meet the Sosa standard.

13 At a hearing before the District Court, the parties agreed that the court could consider the
14 motion under Rule 12(b)(6) as a motion for summary judgment against all of the domestic law
15 claims but not against the international law claims. They also agreed that the extensive record
16 assembled by both parties in the related veterans' cases could be relied upon by the court on the
17 summary judgment motions. On March 10, 2005, the District Court issued an opinion and order,
18 which was amended on March 28, 2005. In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d
19 7 (E.D.N.Y. 2005). In its order, the District Court rejected Defendants' contentions and found in
20 Plaintiffs' favor on a number of issues. Initially, although the court cited rulings denying
21 associational standing to pursue damages claims, it held that VAVAO had standing because it
22 also sought injunctive relief. Id. at 49–50. The court next rejected Defendants' position that

1 Plaintiffs' claims were nonjusticiable, id. at 64–78, and it further determined that Plaintiffs' ATS
2 claims were not subject to any statutes of limitation, id. at 59–64, or the government-contractor
3 defense, id. at 85–99. Moreover, the court concluded that corporations could be liable in a civil
4 action brought under the ATS for a violation of international law and that a claim for aiding and
5 abetting liability was cognizable under the statute. Id. at 52–59.

6 Nevertheless, the District Court ultimately determined that none of Plaintiffs' claims
7 could proceed. With respect to the ATS claims, the court concluded that Plaintiffs had failed to
8 state a cause of action because neither the military's use of Agent Orange nor Defendants'
9 agreement to supply it to the military violated a well-defined and universally-accepted
10 international norm prohibiting the use of herbicides in war. See id. at 105–38 The court
11 concluded that Plaintiffs' domestic and Vietnamese law claims were barred by the
12 government-contractor defense for the same reasons as set forth in the companion case brought
13 by the U.S. veterans, Isaacson v. Dow Chem. Co., 304 F. Supp. 2d 404 (E.D.N.Y. 2004). See In
14 re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d at 15–17. The court also denied Plaintiffs'
15 claims for injunctive relief, concluding that implementing such relief would be “wholly
16 impracticable” and “could compromise Vietnam’s sovereignty.” See id. at 45–46. Final
17 judgment dismissing the Complaint was entered on March 25, 2005, and this timely appeal by
18 Plaintiffs followed.

19 ANALYSIS

20 Plaintiffs limit the scope of their appeal to three primary claims. They first contend that
21 the District Court erred by dismissing their ATS claims, arguing that Defendants violated
22 customary international law norms prohibiting the use of “poisoned weapons” and the infliction

1 of unnecessary suffering.⁴ Plaintiffs further argue that the court erred by dismissing their state
2 law claims pursuant to the government-contractor defense without conducting further discovery
3 with respect to Agents White and Blue, and incorporate by reference the same substantive
4 contentions raised in the veterans' appeals. Finally, Plaintiffs assert that the court prematurely
5 dismissed their claims for injunctive relief without the benefit of adequate discovery.

6 For their part, Defendants contend that Plaintiffs failed to state a cognizable claim under
7 the ATS because the wartime use of herbicides solely for defoliation purposes did not violate
8 international law and that prudential considerations counsel against the recognition of Plaintiffs'
9 claims. Defendants also argue that the ATS claims present nonjusticiable political questions
10 because those claims require an inquiry into executive and legislative judgments relating to the
11 prosecution of a war. In addition, Defendants assert that there is no basis in international law for
12 either corporate liability or civil aiding and abetting liability, and they argue that Plaintiffs' ATS
13 claims are barred by both the government-contractor defense and the statute of limitations.
14 Defendants argue that Plaintiffs' state law claims are preempted by the federal foreign affairs
15 power and the government-contractor defense, and they incorporate by reference the same
16 contentions raised in the veterans' cases. Defendants also argue that the District Court properly
17 denied injunctive relief because it would be impracticable for the court to supervise remediation
18 of 5.5 million acres of distant foreign land. Finally, Defendants argue that the District Court
19 acted within its discretion in denying additional discovery on Plaintiffs' claims relating to Agent
20 White and Agent Blue, because these claims fail for the same reasons as the claims based on

1 ⁴ Plaintiffs do not appear to advance on appeal their international law claims grounded in
2 genocide, crimes against humanity, and torture. Nor do they appear to press any tort claims
3 under Vietnamese law.

1 Agent Orange and because Plaintiffs had essentially abandoned these claims in the District

2 Court. I. Standard of Review

3 We “review a district court’s grant of a motion to dismiss under Rule 12(b)(6) de novo.”
4 E & L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 28 (2d Cir. 2006). “For the purposes
5 of such review, this Court must accept as true all allegations in the complaint and draw all
6 reasonable inferences in favor of the non-moving party.” Gorman v. Consol. Edison Corp., 488
7 F.3d 586, 591–92 (2d Cir. 2007) (quoting Taylor v. Vt. Dep’t of Educ., 313 F.3d 768, 776 (2d
8 Cir. 2002)). We also “review de novo [a] district court’s grant of summary judgment, construing
9 the facts in the light most favorable to the non-moving party.” Gorman, 488 F.3d at 595 (citing
10 Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 162 (2d Cir. 2006)).
11 “Summary judgment is appropriate only where ‘there is no genuine issue as to any material fact
12 and . . . the moving party is entitled to a judgment as a matter of law.’” Gorman, 488 F.3d at 595
13 (quoting Fed. R. Civ. P. 56(c)). Finally, we review denials of leave to conduct discovery and of
14 injunctive relief for abuse of discretion, which may consist of a ruling based upon an erroneous
15 view of the law or a clearly erroneous assessment of the evidence. See Bano v. Union Carbide
16 Corp., 361 F.3d 696, 716 (2d Cir. 2004); Paddington Partners v. Bouchard, 34 F.3d 1132, 1137
17 (2d Cir. 1994). See generally Zervos v. Verizon New York, Inc., 252 F.3d 163, 169–71 & n.5
18 (2d Cir. 2001) (explaining that “[a] district court ‘abuses’ or ‘exceeds’ the discretion accorded to
19 it when (1) its decision rests on an error of law (such as application of the wrong legal principle)
20 or a clearly erroneous factual finding or (2) its decision — though not necessarily the product of
21 a legal error or a clearly erroneous factual finding — cannot be located within the range of
22 permissible decisions”).

1 II. Plaintiffs' International Law Claims

2 A. Alien Tort Statute and the Sosa Rule

3 The ATS provides that “[t]he district courts shall have original jurisdiction of any civil
4 action by an alien for a tort only, committed in violation of the law of nations or a treaty of the
5 United States.” 28 U.S.C. § 1350. The ATS confers federal subject matter jurisdiction when
6 three independent conditions are satisfied: (1) an alien sues, (2) for a tort, (3) committed in
7 violation of the law of nations or a treaty ratified by the United States. See Filartiga v. Pena-
8 Irala, 630 F.2d 876, 887–88 (2d Cir. 1980). The Supreme Court has clarified that the ATS,
9 which originally was enacted as part of the Judiciary Act of 1789, was jurisdictional in that it
10 “gave the district courts cognizance of certain [then existing] causes of action.” Sosa, 542 U.S.
11 at 713–14 (internal quotation marks and citation omitted). The Court was clear that the ATS did
12 not create a statutory cause of action, but the Court just as clearly rejected the notion that “the
13 ATS was stillborn because there could be no claim for relief without a further statute expressly
14 authorizing adoption of causes of action.” Id. at 714.

15 In the broader context, the law of nations has become synonymous with the term
16 “customary international law,” which describes the body of rules that nations in the international
17 community “universally abide by, or accede to, out of a sense of legal obligation and mutual
18 concern.” Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003). In ascertaining
19 whether a rule constitutes a norm of customary international law, courts have traditionally
20 consulted “the works of jurists, writing professedly on public law; or by the general usage and
21 practice of nations; or by judicial decisions recognizing and enforcing that law.” Filartiga, 630

1 F.2d at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)). Sources of
2 international law generally include:

- 3 (a) international conventions, whether general or particular, establishing rules
- 4 expressly recognized by the contesting states;
- 5 (b) international custom, as evidence of a general practice accepted as law;
- 6 (c) the general principles of law recognized by civilized nations;
- 7 (d) . . . judicial decisions and the teachings of the most highly qualified publicists
- 8 of the various nations, as subsidiary means for the determination of the rules of
- 9 law.

10 Filartiga, 630 F.2d at 881 n.8 (citing Statute of the International Court of Justice, art. 38(1), June
11 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945)); United States
12 v. Yousef, 327 F.3d 56, 100–01 (2d Cir. 2003) (same; also noting that scholarly works are not
13 included among the authoritative sources of customary international law); see also Restatement
14 (Third) of the Foreign Relations Law of the United States § 102 (1987). While not exhaustive,
15 the list of principles that may be said to have “ripened into universally accepted norms of
16 international law,” Kadic v. Karadzic, 70 F.3d 232, 243 n.8 (1995), includes the proscriptions
17 against piracy, slave trade, attacks on or hijacking of aircraft, genocide, and war crimes, see
18 Restatement (Third) of the Foreign Relations Law of the United States § 404 (1987). With
19 respect to other types of violations, because customary international law “is created by the
20 general customs and practices of nations and therefore does not stem from any single, definitive,
21 readily-identifiable source,” we have advised district courts to exercise “extraordinary care and
22 restraint” in deciding whether an offense will violate a customary norm. Flores, 414 F.3d at 248.

23 In Sosa, the Supreme Court further cautioned courts to be careful in deciding whether an
24 alleged violation of the law of nations could support an ATS claim. Mindful of the legislative

1 history, albeit sparse, of the ATS, the Court limited the types of claims that could be recognized
2 under the statute to those bearing the same character as the claims originally contemplated by
3 Congress at the time of drafting — tort claims alleging violations of the law of nations of the sort
4 that would have been recognized within the common law at the time of its enactment. 542 U.S.
5 at 713–14. In the Court’s view, “the statute was intended as jurisdictional in the sense of
6 addressing the power of the courts to entertain cases concerned with a certain subject,” *id.* at
7 714, and “[t]he jurisdictional grant is best read as having been enacted on the understanding that
8 the common law would provide a cause of action for the modest number of international law
9 violations with a potential for personal liability at the time,” *id.* at 724. In particular, *Sosa* held
10 that “courts should require any claim based on the present-day law of nations to rest on a norm
11 of international character accepted by the civilized world and defined with a specificity
12 comparable to the features of the 18th-century paradigms” that informed the legislation. *Id.* at
13 725. Moreover, these “paradigms” encompassed only “those torts corresponding to Blackstone’s
14 three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and
15 piracy.” *Id.* at 724. Although the Court did not circumscribe ATS claims to include only these
16 offenses, it concluded that any claim must reflect the same degree of “definite content and
17 acceptance among civilized nations” as these historical antecedents. *Id.* at 732. Whether an
18 alleged norm of international law can form the basis of an ATS claim will depend upon whether
19 it is (1) defined with a specificity comparable to these familiar paradigms; and (2) based upon a
20 norm of international character accepted by the civilized world. *Id.* at 725, 738.⁵ We

1 ⁵ The plaintiff in *Sosa* was a Mexican national who had been abducted, held overnight,
2 and transported to the United States to face prosecution on charges of the murder and torture of
3 an agent of the federal Drug Enforcement Administration. 542 U.S. at 697–98. Defendant *Sosa*

1 accordingly begin our evaluation of Plaintiffs' ATS claims by considering whether they have
2 alleged the violation of an international norm that is sufficiently clear in nature to support subject
3 matter jurisdiction under the ATS.

4 B. Plaintiffs' Sources of Customary International Law

5 In support of their argument that the deployment of Agent Orange violated customary
6 norms prohibiting use of "poisoned weapons" and the infliction of unnecessary suffering,
7 Plaintiffs cite to a number of both domestic and international law sources. Primarily, they rely
8 upon the 1907 Hague Regulations, Annex to the 1907 Hague Convention (IV) Respecting the
9 Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539 (the "1907
10 Hague Regulations"); the 1925 Geneva Protocol; and the 1949 Fourth Geneva Convention, The
11 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August
12 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the "Fourth Geneva Convention"), as well as other
13 sources derived from these documents. The 1907 Hague Regulations, which the United States
14 ratified in 1909, address the range of military operations executed on land and set forth the rules

1 was a Mexican national who allegedly had participated in the abduction. After being acquitted
2 on the charges against him, the plaintiff brought an action under the ATS against Sosa, and
3 others alleging that his abduction constituted tortious conduct under the ATS. See id. at 698–99.
4 On appeal, the Supreme Court considered whether the law of nations included "a general
5 prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive
6 authorization to detain under the domestic law of some government, regardless of the
7 circumstances." Id. at 736. Applying the standard set forth in its opinion, the Court considered
8 several sources of international law and ultimately held that "a single illegal detention of less
9 than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment,
10 violates no norm of customary international law so well defined as to support the creation of a
11 federal remedy [under § 1350]." Id. at 738. Noting that the plaintiff's claim advanced "an
12 aspiration that exceeds any binding customary rule having the specificity we require," the Court
13 concluded that "[c]reating a private cause of action to further that aspiration would go beyond
14 any residual common law discretion we think it appropriate to exercise." Id. at 738.

1 for conducting hostilities, including the permissible and impermissible means and methods of
2 war, including poisonous weapons and the prohibition of materials calculated to cause
3 unnecessary suffering. The 1907 Hague Regulations also form the basis of much of the language
4 in the national military law handbooks of leading international states, including those of the
5 United States. See U.S. DEP'T OF THE ARMY, FIELD MANUAL: THE LAW OF LAND WARFARE
6 (FM-27-10) 1956 (following the Hague Regulations article by article). By contrast, the Fourth
7 Geneva Convention, which the United States ratified in 1955, principally addresses the treatment
8 of noncombatants in the hands of enemy forces. As such, it is less relevant than the 1907 Hague
9 Regulations. Nevertheless, the parties do not dispute that these treaties, with the exception of the
10 1925 Geneva Protocol, were in force with respect to the United States during the time frame
11 alleged in the Complaint and that they have achieved the status of customary international law.

12 The United States did not ratify the 1925 Geneva Protocol until 1975. Accordingly, the
13 Protocol cannot be said to have constituted "a treaty of the United States," 28 U.S.C. § 1350,
14 during the period relevant to this appeal. Even at the time of ratification, the United States and
15 other states reserved the right to respond in kind to a belligerent's first use of poisonous weapons
16 and further limited the treaty obligation to apply only against other treaty parties. The Protocol
17 provides: "[T]he use in war of asphyxiating, poisonous or other gases, and of all analogous
18 liquids, materials or devices, has been justly condemned by the general opinion of the civilized
19 world" and "shall be universally accepted as part of International Law, binding alike the
20 conscience and the practice of nations." Given the nature and scope of the reservations to
21 ratification, however, it would be an impermissible stretch to find that the 1925 Geneva Protocol
22 had acquired the status of binding customary international law during the Vietnam conflict.

1 In support of their argument that they have stated a claim cognizable under the ATS for a
2 violation of the proscription against the use of poisonous weapons, Plaintiffs cite to the March
3 1945 letter opinion of Major General Myron C. Cramer, Judge Advocate General (“Cramer
4 Opinion”), issued during the Second World War in response to a request from the Secretary of
5 War. In particular, Plaintiffs point to the opinion’s conclusion that

6 the use of chemical agents . . . to destroy cultivations [sic] or retard their growth,
7 would not violate any rule of international law prohibiting poison gas; upon
8 condition, however, that such chemicals do not produce poisonous effects upon
9 enemy personnel, either from direct contact, or indirectly from ingestion of plants
10 and vegetables which have been exposed thereto. [W]hether [such herbicides] are
11 toxic to such a degree as to poison an individual’s system, is a question of fact
12 which should be definitely ascertained.

13 In addition, Plaintiffs cite to the April 5, 1971 letter opinion of J. Fred Buzhardt (“Buzhardt
14 Opinion”) from the Office of General Counsel for the Department of Defense, in response to a
15 request from Senator J.W. Fulbright, Chairman of the Senate Foreign Relations Committee.
16 That opinion relates to the application of Articles 23(a) and (e) of the Hague Regulations of 1907
17 — which were incorporated into the Department of the Army Field Manual — to the destruction
18 of crops through chemical agents during the Vietnam War:

19 [N]either the Hague Regulations nor the rules of customary international law
20 applicable to the conduct of war and to the weapons of war prohibit the use of
21 antiplant chemicals for defoliation or the destruction of crops, provided that their
22 use against crops does not cause such crops as food to be poisoned nor cause
23 human beings to be poisoned by direct contact, and such use must not cause
24 unnecessary destruction of enemy property.

25 In further support of their claim that the use of herbicides as “poison” violated
26 international law, Plaintiffs rely on the opinions of their experts, Professors George P. Fletcher
27 and Jordan Paust, as well as the works of other international law scholars, who generally contend
28 that the use of chemical or biological warfare violates international law.

1 In support of their claim that Defendants violated the prohibition against unnecessary
2 suffering, Plaintiffs argue that the use of any material object that may have collateral
3 consequences and is not necessary for military purposes is universally prohibited. In short, they
4 contend that the use of Agent Orange was disproportionate to military necessity because it
5 caused unnecessary human suffering. In particular, Plaintiffs assert that Articles 146 and 147 of
6 the Fourth Geneva Convention prohibit “extensive destruction and appropriation of property, not
7 justified by military necessity and carried out unlawfully and wantonly” if committed against
8 protected persons or property. In addition, they argue that Article 50 of that Convention lists as
9 a “grave breach[]” the act of “willfully causing great suffering or serious injury to body or
10 health.” Plaintiffs further contend that the 1945 Nuremberg Charter and the 1951 Nuremberg
11 Principles prohibit “war crimes” — namely, violations of the laws and customs of war, including
12 “murder, ill-treatment or deportation to slave labor or for any other purpose of civilian
13 population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on
14 the seas, killing of hostages, plunder of public or private property, wanton destruction of cities,
15 towns or villages, or devastation not justified by military necessity.”

16 C. Whether Plaintiffs’ Claims Are Based on a Universally-Accepted International
17 Norm

18 1. Application of Sosa to Plaintiffs’ International Law Claims

19 The sources of international law relied on by Plaintiffs do not support a universally-
20 accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of
21 specificity required by Sosa. Although the herbicide campaign may have been controversial, the
22 record before us supports the conclusion that Agent Orange was used as a defoliant and not as a
23 poison designed for or targeting human populations. Inasmuch as Agent Orange was intended

1 for defoliation and for destruction of crops only, its use did not violate the international norms
2 relied upon here, since those norms would not necessarily prohibit the deployment of materials
3 that are only secondarily, and not intentionally, harmful to humans. In this respect, it is
4 significant that Plaintiffs nowhere allege that the government intended to harm human beings
5 through its use of Agent Orange. In their Amended Complaint, Plaintiffs recognize that “[t]he
6 stated purpose of the [herbicide] spraying was twofold: (a) to defoliate forests and mangroves to
7 destroy the vegetative cover used by the [Democratic Republic of Vietnam] and [National
8 Liberation Front] troops for concealment, and (b) to destroy crops to deprive them of food.” In
9 addition, Plaintiffs acknowledge that the herbicide defoliation campaign “heavily targeted,”
10 among other things, vegetative cover adjacent to U.S. military bases and surrounding areas,
11 making it all the more implausible that the government intended to use the herbicide as a
12 poisonous weapon during war.

13 There is lack of a consensus in the international community with respect to whether the
14 proscription against poison would apply to defoliants that had possible unintended toxic side
15 effects, as opposed to chemicals intended to kill combatants. The prohibition on the use of
16 “poison or poisoned weapons” in Article 23(a) of the 1907 Hague Regulations is certainly
17 categorical, see 36 Stat. 2277, 2301, but its scope is nevertheless undefined and has remained so
18 for a century. As the International Court of Justice (“ICJ”) has acknowledged in an authoritative
19 interpretation of Article 23(a), that provision nowhere defines the critical term “poison,” and
20 “different interpretations exist on the issue.” *Legality of the Threat or Use of Nuclear Weapons*,
21 *Advisory Opinion No. 95*, 1996 I.C.J. 226, 248, 255 (July 8, 1996) (“*Nuclear Weapons Advisory*
22 *Opinion*”). Indeed, Plaintiffs’ own expert conceded that “[t]he concept of ‘poison’ is not

1 defined.” Plaintiffs themselves concede that the authorities “go[] both ways” as to whether the
2 use of herbicides in war, “particularly to destroy crops not intended for use by enemy forces, did
3 violate established norms of international law prior to 1975.”

4 Plaintiffs ignore language from the Cramer Opinion that would permit the use of Agent
5 Orange under the circumstances in which it was in fact used. Notably, that Opinion recognizes
6 that “[a] distinction exists between the employment of poisonous and deleterious gases against
7 enemy human beings, and the use of chemical agents to destroy property, such as natural
8 vegetation, crop cultivations, and the like.” Moreover, the Cramer Opinion concludes that “[t]he
9 proposed target of destruction, enemy crop cultivations, is a legitimate one, inasmuch as a
10 belligerent is entitled to deprive the enemy of food and water, and to destroy his sources of
11 supply whether in depots, in transit on land, or growing in his fields.” The Buzhardt Opinion, as
12 it relates to permissible uses of herbicides, notes that “General Cramer’s opinion clearly
13 encompasses the activities that have taken place in Vietnam and reflects the same position which
14 we have taken” in evaluating the legality of the destruction of crops through chemical agents and
15 the application of the 1925 Geneva Protocol and the 1907 Hague Convention.

16 According to the Buzhardt Opinion, the prohibition of poisonous weapons “does not
17 effect any prohibition on the use of other weapons and, in particular, it does not prohibit the use
18 of chemical herbicides for depriving the enemy of food and water.” That Opinion interprets the
19 1956 Army Field Manual relied upon by Plaintiffs to permit “measures being taken . . . to
20 destroy, through chemical or bacterial agents harmless to man, crops intended solely for
21 consumption by the armed forces (if that fact can be determined)” but it draws a distinction
22 between herbicides that are intended to destroy crops belonging to enemy soldiers and crops

1 belonging to non-combatants. The Opinion further states as follows: “The thrust of the phrase
2 ‘harmless to man’ . . . draws attention to Article 23(e) of the Hague Regulations of 1907,
3 wherein combatants are forbidden to employ weapons ‘calculated to cause unnecessary
4 suffering.’”

5 In a further narrowing of the circumstances under which crop destruction is
6 impermissible, the Buzhardt Opinion states:

7 Where it cannot be determined whether crops were intended solely for
8 consumption by the enemy’s armed forces, crop destruction would be lawful if a
9 reasonable inquiry indicated that the intended destruction is justified by military
10 necessity under the principles of Hague Regulation Article 23(g), and that the
11 devastation occasioned is not disproportionate to the military advantage gained.

12 The Opinion concludes that the decision to refrain from using herbicides is a matter of United
13 States policy and “is not compelled by the 1907 Hague Regulations, the Geneva Protocol of
14 1925 or the rules of customary international law.” Accordingly, neither the Cramer Opinion nor
15 the Buzhardt Opinion recognizes a universally-accepted prohibition on the use of herbicides.

16 Plaintiffs’ reliance upon the trials at Nuremberg is inapposite for the same reasons. As
17 the District Court correctly noted, the individuals who were found guilty in those criminal
18 proceedings were found to have supplied poisonous Zyklon B gas in World War II concentration
19 camps when “the accused knew that the gas was to be used for the purpose of killing human
20 beings.” In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d at 94. Because Agent Orange
21 was “not used as [a] means of directly attacking enemy troops,” it was not prohibited by Article
22 23(e)’s proscription of the calculated use of lethal substances against human beings and its use is
23 distinguishable from the context in which Zyklon B gas was used in World War II.

1 Other sources of United States policy lend additional support to that conclusion. In 1961,
2 the Secretary of State wrote to President Kennedy to recommend the use of herbicides in
3 Vietnam because “successful plant-killing ops in [Vietnam], carefully coordinated with and
4 incidental to larger ops, can be of substantial assistance in the control and defeat of the
5 [Vietcong],” and “[t]he use of defoliant does not violate any rule of international law concerning
6 the conduct of chemical warfare and is an accepted tactic of war.” In 1969, the United States
7 objected to a proposed United Nations resolution that would have “ma[d]e a clear affirmation
8 that the prohibition contained in the Geneva Protocol applied to the use in war of all chemical,
9 bacteriological and biological agents (including tear gas and other harassing agents) which
10 presently existed or which might be developed in the future.” The following year, after the
11 United States ceased its use of Agent Orange upon a study revealing its deleterious effects on
12 humans, the Secretary of State wrote a letter to President Nixon recommending that the President
13 transmit to the Senate for advice and consent the ratification of the 1925 Geneva Protocol. In his
14 letter, the Secretary stated that “[i]t is the United States’ understanding of the Protocol that it
15 does not prohibit the use in war of riot-control agents and chemical herbicides.” When President
16 Ford ratified the Geneva Protocol in 1975, he clarified that “[a]lthough it is our position that the
17 [P]rotocol does not cover riot control agents and chemical herbicides, I have decided that the
18 United States shall renounce their use in war as a matter of national policy.” Moreover, in
19 ratifying the 1925 Geneva Protocol in 1975, the Senate made clear its understanding that the
20 United States’ prior use of herbicides in Vietnam had not violated that treaty and that the
21 government intended the Protocol to be only prospective in effect. See Prohibition of Chemical
22 and Biological Weapons: Hearing on S. Res. 48 Before the Senate Comm. on Foreign Relations,

1 93d Cong. 3 (1974) (statement of Senator Humphrey reassuring the Executive Branch that
2 Congress's adoption of the 1925 Geneva Protocol "would in no way reflect on our past practice
3 with regard to chemical agents. The manner in which herbicides and riot control agents were
4 used in Vietnam was fully in accordance with the U.S. [sic] prevailing interpretation of the
5 protocol"). Although Plaintiffs rely on the 1907 Hague Regulations instead of the 1925 Geneva
6 Protocol, it is significant that several nations used poisonous gases during World War I and the
7 contracting parties to the Geneva Protocol found it necessary to adopt such a resolution despite
8 the 1907 Hague Regulations that were in effect.

9 Plaintiffs' claims that the use of Agent Orange violated the norm of proportionality and
10 caused unnecessary suffering rely upon international agreements requiring intentionality that
11 Plaintiffs cannot establish. Article 23(e) prohibits the use of "arms, projectiles, or material
12 calculated to cause unnecessary suffering." Article 6 of the Nuremberg Charter proscribes
13 "wanton destruction of cities, towns or villages, or devastation not justified by military
14 necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the
15 European Axis Powers, Charter of the Int'l Military Tribunal, Aug. 8, 1945, pt. II, art. 6, 59 stat.
16 1544, 1574, 82 U.N.T.S. 279 ("Nuremburg Charter"). Article 147 of the Fourth Geneva
17 Convention defines "grave breaches" as "willfully causing great suffering or serious injury to
18 body or health," as well as "extensive destruction and appropriation of property, not justified by
19 military necessity and carried out unlawfully and wantonly." These norms are all simply too
20 indefinite to satisfy Sosa's specificity requirement. As Plaintiffs' expert opined, "norms that
21 depend on modifiers such as 'disproportionate' or 'unnecessary' . . . invite a case-by-case
22 balancing of competing interests . . . [and] black-letter rules become vague and easily

1 manipulated. They lose the definite and specific content that Sosa seems to demand for recovery
2 under the ATS.” Defendants cite to the Final Report of the International Criminal Tribunal for
3 the former Yugoslavia (the “ICTY”) Prosecutor on the NATO bombing in Kosovo:

4 The main problem with the principle of proportionality is not whether or not it
5 exists but what it means and how it is to be applied. It is relatively simple to state
6 that there must be an acceptable relation between the legitimate destructive effect
7 and undesirable collateral effects It is much easier to formulate the principle
8 of proportionality in general terms than it is to apply it to a particular set of
9 circumstances because the comparison is often between unlike quantities and
10 values.

11 Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing
12 Campaign Against the Federal Republic of Yugoslavia ¶ 48 (June 8, 2000), reprinted in 39
13 I.L.M. 1257, 1271 (2000). The principle of proportionality implicates the element of intent, e.g.,
14 “calculated to cause unnecessary suffering,” “wanton destruction,” “willfully causing great
15 suffering,” and “carried out unlawfully and wantonly.” See 1907 Hague Regulations, art. 23(e).
16 Because Plaintiffs do not allege, nor could they on this record prove, the required mens rea, they
17 fail to make out a cognizable basis for their ATS claim. The purpose behind spraying Agent
18 Orange was only to destroy crops and “to [s]ave the lives of Americans and those of our allies,”
19 and not to injure human populations.

20 Plaintiffs have, at best, alleged a customary international norm proscribing the purposeful
21 use of poison as a weapon against human beings that is inapplicable in this case. We hold that
22 Plaintiffs’ claim that “defendants manufactur[ed] and suppl[ied] a[n] herbicide laced with
23 poison” and used as a defoliant fails to satisfy the standard set forth by the Supreme Court in
24 Sosa for recognition of a tort in violation of international law and is, therefore, not cognizable
25 under the ATS. See, e.g., Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003)

1 (dismissing cross-border abduction claim, holding: “Because a human rights norm recognizing
2 an individual’s right to be free from transborder abductions has not reached a status of
3 international accord sufficient to render it ‘obligatory’ or ‘universal,’ it cannot qualify as an
4 actionable norm under the [ATS]. This is a case where aspiration has not yet ripened into
5 obligation.”), rev’d sub nom Sosa, 542 U.S. at 692; Flores, 343 F.3d at 160 (holding that “the
6 asserted ‘right to life’ and ‘right to health’ are insufficiently definite to constitute rules of
7 customary international law. . . . [I]n order to state a claim under the [ATS], we have required
8 that a plaintiff allege a violation of a ‘clear and unambiguous’ rule of customary international
9 law”); Beanal v. Freeport-McMoran, 197 F.3d 161, 167 (5th Cir. 1999) (stating that customary
10 international law cannot be established by reference to “abstract rights and liberties devoid of
11 articulable or discernable standards and regulations”). Because we cannot find that Plaintiffs
12 have grounded their claims arising under international law in a norm that was universally
13 accepted at the time of the events giving rise to the injuries alleged, the courts are without
14 jurisdiction under the ATS to consider them. See Sosa, 542 U.S. at 725 (“[C]ourts should
15 require any claim based on the present-day law of nations to rest on a norm of international
16 character accepted by the civilized world and defined with a specificity comparable to the
17 features of the 18th-century paradigms we have recognized.”).

18 Defendants have argued that “civil aiding-and-abetting liability” may not be imposed on
19 corporate entities for violations of the law of war and that, in any event, prudential
20 considerations should preclude adjudication of Plaintiffs’ claims. Because Plaintiffs’ claims fail
21 to assert a violation of international law norms that are universally accepted and as specific as
22 the paradigmatic norms identified in Sosa, thereby resulting in a failure to establish a cognizable

1 cause of action that gives rise to jurisdiction under the ATS, we need not address these
2 secondary arguments.⁶

3 III. Plaintiffs' Claims Arising under Domestic Law

4 Plaintiffs argue that the District Court erred in dismissing their state law claims based on
5 the government-contractor defense without discovery on Agents White and Blue, and Plaintiffs
6 incorporate by reference the arguments of appellants United States veterans in the companion
7 case decided herewith. With regard to discovery, Plaintiffs were granted access to the discovery
8 conducted in the companion case brought by the veterans, and the record below shows that
9 additional discovery was conducted on Agents White and Blue. Nevertheless, as set forth in the
10 companion case decided herewith, the government contractor defense operates as a complete bar
11 to Plaintiffs' state law claims. See In re Agent Orange Prod. Liab. Litig., Nos. 05-1760-cv et al.,
12 ____ F.3d ____ (2d Cir. Nov. ____, 2007).

13 IV. Plaintiffs' Claims for Injunctive Relief

14 The District Court found that the extraterritorial injunction Plaintiffs sought raised
15 concerns over Vietnam's sovereignty and was rendered "wholly impracticable" by the
16 difficulties involved in enforcing an order of abatement and remediation of vast areas of land
17 over which it had no jurisdiction. In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d at 46.
18 Plaintiffs claim that they have adequately alleged an irreparable injury that no legal remedy can

1 ⁶ After the filing of briefs and oral argument in this appeal, this Court addressed in a
2 different case whether a district court had subject matter jurisdiction over ATS claims alleging
3 that domestic and foreign corporations aided and abetted the government of apartheid South
4 Africa in committing various violations of customary international law. See Khulumani v.
5 Barclay Nat'l Bank, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam) (holding that "in this Circuit,
6 a plaintiff may plead a theory of aiding and abetting liability under the [ATS]").

1 address. Plaintiffs further claim that any determination regarding the practicalities of enforcing
2 an injunction is premature at this stage in the litigation without further evidentiary developments
3 to guide the District Court in fashioning a remedy. The facts relied on by the District Court,
4 however, in denying the requested injunctive relief — notably Vietnam’s sovereignty and the
5 court’s lack of jurisdiction over the relevant territory — are readily apparent, and Plaintiffs offer
6 no argument as to how further development of the record might guide the District Court in
7 fashioning a manageable and enforceable injunctive remedy. In any event, we find no abuse of
8 discretion in the district court’s decision to deny injunctive relief for substantially the same
9 reasons given by the District Court.

10 **CONCLUSION**

11 Because of our disposition on the issues of law in this case, we need not address any of
12 the parties’ other contentions on appeal. In accordance with the foregoing, we affirm the
judgment of the District Court.

