

War Legacies Project

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FAQs about the Vietnamese lawsuit against Dow, Monsanto and the other producers of Agent Orange

- 1. Who are the main parties in the lawsuit (plaintiff and defendant)?**

Plaintiffs: the Vietnamese victims/survivors of AO represented by the Vietnam Associations of Victims of Agent Orange /Dioxin (VAVA). The Vietnamese government **is not** a plaintiff in the lawsuit.

Defendants: 37 US chemical manufacturers, the major ones being Dow Chemical and Monsanto.
- 2. How long has this lawsuit been going on?** The Vietnamese lawsuit was filed in the US District Court Eastern District of New York in January 2004. The case was dismissed on March 10, 2005. The appeal to the Second Circuit Court was filed in September 2005.
- 3. Why are the Vietnamese suing?**

The Vietnamese plaintiffs ask for compensatory damages; punitive damages; injunctive and declaratory relief (i.e., environmental clean-up of dioxin hotspots) More specifically, they are suing for:

 - a) acknowledgement they have been wronged instead of ongoing evading of responsibility by US manufacturers and the US government.
 - b) urgent medical assistance including diagnosis, treatment and physical rehabilitation; technology and skills to monitor and prevent AO-related diseases and birth defects
 - c) economic assistance to make up for loss of livelihood due to health and environmental destruction
 - d) social care to facilitate adjustment or reintegration to the community
- 4. How much money are the Vietnamese asking for?** At this point in the lawsuit the lawyers for the plaintiffs have not requested a specific amount to be awarded in the event they case is decided in their favor. This process will occur much later when the lawsuit progresses to the trial stage.
- 5. Why are the Vietnamese suing the chemical companies and not the US government?**

The US government has sovereign immunity, which means you can not sue the US government for money damages in US courts unless it consents to jurisdiction: it has not consented to jurisdiction in suits for money damages concerning acts that occur overseas.
- 6. Why can't the Vietnamese sue using US liability law--why must you sue under the Alien Tort Claims Act?** The Vietnamese did bring claims under general liability and negligence against the chemical companies under NY State Law. However, these claims were dismissed due to the 'government contractor' defense'. In other words, the companies were found to enjoy the same sovereign immunity as the US government. In addition, US Civil law does not apply in a war zone. During war, many acts that would otherwise be considered criminal are condoned (e.g. killing people and destroying their property). Acts that are outside the bounds established by international treaties and internationally recognized norms that apply

to warfare are called war crimes. The ATCA allows foreigners to sue private parties who commit or aid and abet war crimes for money damages.

7. **What is the ATCA?** The ATCA is one of our oldest laws, written in 1789 to prevent private grievances from escalating into causes for war. It enables foreign nationals to sue private parties for violations of universally accepted and specific norms of international law in US courts. The US Supreme court upheld this interpretation of the ATCA in 2004 in *Sosa v. Alvarez-Machain*, a case which a Mexican doctor sued a US Drug Enforcement Agency Agent who kidnapped him and brought him to the US from Mexico to stand trial for the murder of an undercover DEA Agent in Mexico.
8. **What is the definition of a violation of universally accepted and specific norms of international law? How were such norms of international law violated in the case of Agent Orange and other herbicides used during the Viet Nam war?** There are rules prohibiting the use of chemical weapons and poisons in war and prohibiting “wanton devastation and destruction not justified by military necessity” or indiscriminate targeting of civilians. In the case of Agent Orange the lawyers for the plaintiffs argue that the chemical companies violated the international norms prohibiting poison and targeting of civilians by supplying over 21 million gallons of herbicides which they knew to contain excessive and avoidable amounts of dioxin and which they knew would be sprayed over vast, populated areas in southern Vietnam over extended periods of time.
9. **Why not argue the case in the World Court?** The Vietnamese government can choose to sue the US government in the World Court. However, at this time when both governments are working hard to establish better relations, the Vietnamese government has decided to keep the lawsuit between private parties, i.e., the chemical companies and the victims. The Vietnamese government is also using diplomatic channels to raise the issue of Agent Orange with the US government. Nor would suing in the world court be a guarantee that in the event the World Court rules on the side of Vietnamese government that the US government would follow the court’s orders. The US lost a case against Nicaragua for supporting the Contras and has refused to pay. Moreover, as a result of the Nicaragua case, the US has withdrawn from the jurisdiction of the World Court, so they can not be sued there again without giving consent. (On the WEB List only)
10. **Why is the case being heard in front of the Appellate court? What will the court be asked to decide about?** The lawsuit filed by the Vietnamese plaintiffs against the chemical companies was dismissed by Judge Jack Weinstein in March 2005, the lawyers for the plaintiffs filed an appeal to a higher court (the Second Circuit Appeals Court) to ask them to reinstate the case. The Second Circuit Appeals Court will be asked to decide whether or not the case has merit enough to be considered for a trial in the US court system. In other words they are deciding whether or not the Vietnamese have a legitimate case and can have their ‘day in court’.
11. **Why was the case dismissed by Judge Weinstein?** There were several areas that Judge Weinstein ruled against the plaintiffs. For one, although international law prohibits the use of poison in war, Judge Weinstein did not find that these herbicides were used as a poison or a chemical weapon as defined by international law at the time of their use. He stated that there was no intent to poison the land or people of Vietnam, even if that was the practical outcome of the herbicide operation. He also dismissed the plaintiffs’ regular negligence and products

liability claims under NY State law because government contractors enjoy the same immunity as the US government in a US court of law, unless the contractor's actions constitute war crimes. A detailed analysis of the dismissal can be found at: <http://www.warlegacies.org/Lawsuit.htm>

- 12. What role will American veterans (victims of Agent Orange) be playing in this hearing?** There are two separate hearings on June 18. The Appellate court is determining whether the 16 cases filed by US veterans against the chemical companies that were also dismissed by Judge Jack Weinstein in 2005 should be reinstated. Judge Weinstein dismissed the lawsuits of the US veterans, which asserted claims of negligence and product liability under US domestic law, on the basis that the sovereign immunity enjoyed by the US government extends to the chemical companies because they acted in their capacities as government contractors. Lawyers for the US veterans will argue that the chemical companies were asked to produce herbicides by the government, not herbicides contaminated with dioxin.

The US veterans case will be heard at 10 am. The Vietnamese oral argument to reinstate their case will be heard by the same panel of judges at 1 pm. A decision regarding the 'contractor defense' in the US veteran's case will also pertain to the NY State civil lawsuit filed by the Vietnamese plaintiffs. But not to their case filed under ATCA.

- 13. Why will lawyers for the Justice Department appear at this hearing?** The US government feels that the outcome of this case may have important ramifications on the way it wages war. The Justice Department is afraid that if the chemical companies are subjected to liability for their actions, other military contractors will be much more hesitant to manufacture and supply weapons of war to the government, or will drastically raise their prices.

- 14. Who is the Judge that will hear the case? And when will they make a decision?**

Unlike a hearing in the lower court, these hearings will be before a panel of three judges. They lawyers will not know who they are arguing the case in front of until the Friday before. A decision in a court of appeals can take anywhere from 3 to 6 months.

- 15. What, exactly, do lawyers for the plaintiffs (Vietnamese and U.S. veterans) hope to gain on June 18?** If the Vietnamese plaintiffs win the appeal it does not mean that they win the case. It simply means that the case will be reinstated, the appellate court will send the case back to the lower court and order Judge Weinstein to allow the case to proceed to a trial, most likely with a jury.

- 16. What if the plaintiffs lose the June 18, 2007 appeal?** The lawyers will have the option to ask the Appellate court to reconsider and have the case heard by the full panel of twenty judges. If the reconsideration also fails, the lawyers have the option to bring the case to the US Supreme court for a hearing. However, the US Supreme court could refuse to take the case.

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