Environmental Health in International and EU Law
Current Challenges and Legal Responses
Edited by
Stefania Negri

Environmental Health
in International and EU Law
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CONTENTS

Foreword, Maria Neira XIII

Introduction, Stefania Negri XV

Part I: Environmental Health at the Intersection of Ethical, Human and Economic Values

1. [Human] Values and Ethics in Environmental Health Discourse and Decision-Making: The Complex Stakeholder Controversy and the Possibility of “Win-Win” Outcomes
   Anja Matwijkiw and Bronik Matwijkiw
   1. Introduction: Shareholder and Non-Shareholder Stakeholders 3
   2. Rights Stricto Sensu: Meta-Freedom to (Ab)use One’s Power to Eliminate Values 10
   3. Fairness through Broadness: Rights- and Stakeholder-Inclusion 12
   4. Conclusion: Towards a Comprehensive Justice Project 19

2. A Human Rights Approach to Environmental Health
   Stefania Negri
   1. Introduction 25
   2. The Right to Health and Its Environmental Dimensions 26
   3. The Right to a Healthy Environment: Moving Towards Legal Recognition of a Universal Right Vital to Protect Global Public Health 32
   4. Environmental Health Litigation and the Added Value of a Human Rights Approach 35

3. The Environmental Health Spillovers of Foreign Direct Investment in International Investment Arbitration
   Valentina Vadi
   1. Introduction 43
   2. The Conceptual and Normative Scope of Environmental Health 44
   3. International Investment Law and Arbitration 46
   4. Arbitrating Disputes with Environmental Health Elements 47
   5. Reconciling Environmental Health with Investor Rights 52
   6. Conclusions 57
Case Study

4. The Dispute on Brazilian Measures Affecting Imports of Retreaded Tyres at the WTO: An Exemplary Intersection of Trade, Health and Environment

Xavier Fernández-Pons

1. Introduction 59
2. The Brazilian Measures at Issue and the Different Claims Against Them 60
3. Analysis of the WTO Adjudicative Bodies Reports 62
   3.1. The Measures Are Inconsistent with Basic Principles of the GATT 1994 62
   3.2. The Import Ban Is Necessary to Protect Human, Animal or Plant Life or Health 63
   3.3. The Exemptions to the Import Ban Result in Arbitrary or Unjustifiable Discriminations 65
4. The Sweet Defeat of the Brazilian Government and the Implementation of the Adopted Reports 68
5. Concluding Remarks 70

Part II: Environmental Health at the Intersection of Energy, Climate Change, and Atmospheric Pollution

5. Protecting Human Health in a Green Energy Context: Regulatory Scenarios between International and EU Law

Francesco Buonomenna

1. Introduction 75
2. Developments in the Environment-Energy Relationship 76
3. Energy and Health 79
4. The Limits of Renewable Energy on Health Protection 81

6. Between the Potential to Reduce Global Warming and to Cause Irreversible Damage to Human Health and the Environment: The Role of International Law in Marine Geoengineering

Mar Campins Eritja

1. Introduction 83
2. Marine Geoengineering in the Fight against Climate Change 83
   2.2. Marine Geoengineering: At What Cost? 86
3. The International Legal Framework in the Field of Geoengineering 88
   3.1. International Law Principles Governing Marine Geoengineering 88
   3.2. The Current Conventional Framework Applicable to Marine Geoengineering 93
4. Some Final Remarks on the Status Quo and Future Prospects 96
7. The Revised EU Air Quality Policy and Public Health

Samvel Varvastian

1. Introduction 101
2. The Long-term Air Quality Objective and the Need for Policy Review 103
3. The Current Regulatory Framework 104
  3.1. The Ambient Air Quality Directives 105
  3.2. The National Emissions Ceilings Directive 107
  3.3. Emissions Standards for Major Sources of Pollution 108
4. Revised Policy, Old Problems 111
5. Concluding Remarks 113

8. Intergenerational Equity in Times of Climate Change Legal Action: Moving towards a Greater Protection of Human Health?

Angeliki Papantoniou

1. Introduction 115
2. Intergenerational Equity’s Theoretical Foundations 116
3. Intergenerational Equity in International Case Law 120
4. Minors Oposa and Early National Case Law 122
5. Climate Change National Litigation and Intergenerational Equity 124
6. Children, Youth and Intergenerational Equity in Climate Change National Case-Law 127
7. Conclusion 134


Vitulia Ivone

1. Public Health Protection According to the Italian Constitution 135
2. The Constitutional Right to a Healthy Environment 137
3. The Protection of Human Health from Electromagnetic Fields: The Role of the Precautionary Principle 139
  3.1. The Principle of Sustainable Development and the Principle of Sustainable Integration 142
4. The Italian Legislation on Electromagnetic Pollution and the Problematic Knots of Environmental Law 143
5. Electromagnetic Fields, Mobile Phones and Risks for Health: The Role of the World Health Organization 145
6. Lessons to be Learned from a Recent Report from the US National Toxicology Program 148
10. ILVA: A Case of Shared Responsibilities for the Protection of the Environment and Public Health

Grazia Scocca

1. Introduction 151
2. A Brief History of ILVA 152
3. The Environmental Impact of ILVA 153
4. The Impact of ILVA on Public Health 154
5. “Ambiente Svenduto”, the Affair Brought before the Italian Judiciary 155
6. ILVA and the EU Jurisdiction 157
7. The ILVA Case before the European Court of Human Rights 159
8. Conclusion 162

Part III: Environmental Health at the Intersection of Pollution of Water and Soil and Food Safety

11. Public Health Risks Posed by Waste Pollution and Chemical Exposure and Legal Responses in International and EU Law

Teresa Russo

1. Introductory Remarks on Waste Pollution and Chemical Exposure as Major Public Health Hazards 167
2. The Global Concern for Waste and Chemical Pollution as Emerged at UN Conferences 169
3. The Regulatory Regime Set Out by the Basel, Rotterdam and Stockholm Conventions 172
4. The EU Legal Framework Regulating Waste Disposal and Chemicals 176
   4.1. … and Implementing the Three Global Conventions 178


Anna Oriolo

1. Introduction 185
   2.2. Improving Health through WASH: The WHO’s Longstanding Role 188
   2.3. From Non-Binding Guidelines to Legal Obligations for International WBDs Management: The WHO-UNECE Protocol on Water and Health 190
3. The EU (Drinking) Water Policy 193
   3.1. Protection and Sustainable Use of Water in European Countries 193
3.3. The EU Commission Proposal for Modernizing the 20-Year Old European Drinking Water Directive 196

4. Conclusions: Globalizing the (Pan-)European Approach toward a Harmonized International Water and Health Regulation 199

13. From Sea to Plate: Pollution of the Marine Environment and Food Safety in International and EU Law

Gabriela A. Oanta

1. Introduction 201
2. The International Law Response to Pollution of the Marine Environment and Its Potential Consequences for Human Food Safety 203
   2.1. The Work of the United Nations 203
   2.2. IMO’s Work to Prevent Pollution of the Marine Environment and Its Potential Impact on Peoples’ Food Health 205
   2.3. The Role of the Codex Alimentarius Commission as an Expression of Cooperation between WHO and FAO in the Field of Food Safety 207
3. The Legal Response of the European Union to Pollution of the Marine Environment and Its Potential Consequences for Human Food Safety 210
4. Final Considerations 213

14. The Contribution of International Organizations to Food Security and Safety through a Healthy Environment

Pia Acconci

1. Introductory Remarks 215
2. The Activities of International Organizations for Food Safety through a Healthy Environment 216
3. The Activities of International Organizations for Food Security through a Healthy Environment 220
4. International Organizations as Coordinators and Facilitators, particularly of Multi-stakeholder and Multi-sectoral Partnerships and Platforms 225
5. Conclusion 227

15. Environmental Impact Assessment: Environmental Health and Food Safety

M. Asunción Torres López

1. Introduction: The Environmental Impact Assessment Technique in the European Union and the Need to Treat It to Preserve Environmental Health 231
2. Environmental Health and Its Protection through the Environmental Impact Assessment Technique in EU Law 234
3. Environmental Health and Health Impact Assessment 236
4. Environmental Health and Food Safety 238
Case Studies

16. Mercury Pollution and Its Impact on Human Health: The Minamata Case
Felicia Velardo
1. Mercury Pollution and Its Impact on Human Health 243
2. The Minamata Disease 245
3. The Minamata Convention on Mercury 247
4. European Measures against Mercury Pollution and Implementation of the Minamata Convention 252
5. Concluding Remarks 254

17. EU’s Re-approval of Glyphosate: The Role of Science and the Competence of Member States
Daniela Corona
1. Introduction 257
2. The EU Authorisation Procedure of Plant Protection Products 257
3. The Renewal of the Authorisation of Glyphosate 261
4. Concluding Remarks 264

Part IV: New Challenges in Environmental Health: Pathogen Sharing, Biodiversity and Antimicrobial Resistance

18. Biodiversity, Pathogen Sharing and International Law
Stephanie Switzer, Elisa Morgera, Elsa Tsioumani and Gian Luca Burci
1. Introduction 271
2. Section Two-Legal Background 274
   2.1. The Nagoya Protocol 275
   2.2. The Pandemic Influenza Preparedness Framework 276
   2.3. The Relationship between the PIP Framework and the Nagoya Protocol 279
3. Section Three 282
4. Section Four-Translations 286
5. Section Five-Concluding Reflections 289

19. EU Biodiversity Law and Its Health Impacts
Riccardo Pavoni and Dario Piselli
1. Introduction 291
2. Biodiversity and Health in the Context of EU Law and Policy 294
3. EU Biodiversity Law and Its Health Impacts 297
   3.2. Health as a Potential Ground for Derogations in the Habitats and Birds Directives 301
3.3. The Invasive Alien Species Regulation: Leveraging Health and Biodiversity Synergies 303
4. The Precautionary Principle and the Linkage between Health and Biodiversity 306
5. Conclusion 309

Case Study
20. Regulating Antimicrobials in Livestock Animals: Experiences from Ten Countries
Steven J. Hoffman, Marie Evélin Danik and Prativa Baral
1. Introduction 311
   1.1. France 312
   1.2. Denmark 314
   1.3. Australia 316
   1.4. Canada 317
   1.5. United States of America 319
   1.6. Russia 320
   1.7. Japan 322
   1.8. Brazil 322
   1.9. China 324
   1.10. India 324
2. Discussion 326
   2.1. Veterinary Medicine 326
      2.1.1. Regulating Sales 326
      2.1.2. Capping Veterinarians’ Profits 327
      2.1.3. Creating Financial Incentives for Judicious Use 327
      2.1.4. Establishing Rigorous Monitoring Systems 327
   2.2. Agricultural Production 328
      2.2.1. General Bans 328
      2.2.2. Specific Bans 329
      2.2.3. Control Systems and Penalties 329
   2.3. Trade of Agricultural Products 330
      2.3.1. Coordinating Regulations to Increase Market Competitiveness 330
      2.3.2. Creating Separate Standards for the Domestic Market 330
      2.3.3. Industry-led Momentum 330
3. Conclusion 331

Part V: Environmental Health in Case of Disasters and Conflicts
21. Natural Disasters, Environment and Health: The Role Played by International Law and European Union Law in this Field
Maria Isabel Torres Cazorla
1. Natural Disasters, Environment and Health: International Organizations at the Crossroads 335
1.1. The Work of the WHO in This Field
1.1.1. Grade 1 Emergencies
1.1.2. Grade 2 Emergencies
1.1.3. Grade 3 Emergencies
1.2. The European Union Civil Protection Mechanism: An Effective Way?
2. Environment, Security and Health: The Need to Coordinate Efforts in the International, Regional and National Spheres
3. The Answer to Be Given to “Complex Emergencies”: A Very Long Way to Go
4. Tentative Conclusions

Case Studies

22. The Environmental and Health Impacts of Chemical Spraying: Can Law Protect Victims? The Case of Agent Orange
Anne Dang-Xuan Nguyen and Amandine Orsini
1. Introduction
2. Claims
   2.1. Sanitary Impacts Constitutive of Crime Against Humanity and War Crime
      2.1.1. Physical and Health Impacts During and After the Conflict
      2.1.2. Crime Against Humanity and War Crimes
   2.2. Environmental Destruction
   2.3. State and Corporate Responsibility
3. Social and Legal Obstacles
   3.1. Agent Orange, “Just” an Herbicide
   3.2. State Immunity and Applicability of Laws
   3.3. Proofs as Burdens
   3.4. “I will never be able to marry”, or the Social Costs of Victimhood
   3.5. Politicization of the Agent Orange Trials
4. Conclusion

23. Chronicle of a Death Foretold: The Long-Term Health Impacts on the Victims of Widespread Lead Poisoning at UN-Run Camps in Kosovo
Agostina Latino
1. Introduction
2. A Chronology of the Facts and a Critical Consideration Thereof
4. Concluding Remarks on the UN Failure to Implement the Recommendations of the Human Rights Advisory Panel, Notwithstanding the Latest Discomforting Developments
Part V

Environmental Health in Case of Disasters and Conflicts
Chapter 22

The Environmental and Health Impacts of Chemical Spraying: Can Law Protect Victims? The Case of Agent Orange

Anne Dang-Xuan Nguyen* and Amandine Orsini**

1. Introduction

What are the legal instruments allowing victims of chemical spraying to claim justice for the tort they have suffered? What may they sue for? Is it possible, besides the physical torts, to sue for the environmental destruction related to the wide scale use of these chemicals? In this chapter, we suggest elements of answers to these questions by analysing the case of Agent orange (AO) spraying during the Vietnam war. Indeed, the United States (US) Army used various types of herbicides to deprive the Vietnamese National Liberation Front (NLF) militias of forest cover and crops during 10 years (1961-1971), as part of mission Ranch Hand. The Rainbow Herbicides were manufactured at the request of the US government, by different companies, including Monsanto, Dow Chemical or Shamrock. Among these herbicides AO, named due to the orange band marking its containers, was massively sprayed in order to destroy the triple canopy jungle in South Vietnam. To comply with military demands, companies sped up AO production, thus disrespecting production norms. Such negligence led to AO dioxin-TCDD contamination. Jeanne Stellman estimates that 221kg of TCDD has been spilled over the Vietnamese territory, while 80g in potable water supply would be enough to eradicate an 8 million inhabitants’ city.1 Shortly after the beginning of AO sprayings, doctors in Vietnam started to identify the surge of rare diseases and birth defects among their patients.2 Dioxin-TCDD is a

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known carcinogen and teratogen. As such, it causes rare forms of cancers, stillbirths, birth defects (both physical and mental) and orphan diseases related to genome mutation, which the US government has repeatedly denied throughout the years.

After the war, several legal cases emerged to claim compensation for the endured damages, either introduced by US veterans exposed to AO, or by Vietnamese citizens and their sick children. Based on the case of AO, we will attempt to understand what victims of chemical products may file a lawsuit for. In a second part, we will oversee the reasons why asking for (war-related) chemical products’ environmental and health damages is difficult.

Table 1 below shows the different trials filed against AO manufacturers throughout the decades. Besides, we also consider two consultative legal opinions. Tribunals of opinion have played an important role, but have obvious limitations due to their nature. To this day, transitional justice has not formally occurred between Vietnam and the United States, since no court has been recognized by either party of the war. The rulings that interest us here abide by existing laws and hence are useful tools for future trials, even though they are non-binding. Besides, they have their own restrictions. As tribunals of opinion, their aim is also to raise political awareness over a perceived injustice. Their interpretation of law calls for another interpretation of existing instruments (International peoples’ tribunal of conscience in support of the Vietnamese victims of Agent orange, later on IPTC) or for the creation of new laws (the Monsanto Tribunal). The IPTC was settled by the International association of democratic lawyers and aimed to define the reparation victims could claim, both toward the US government and the companies, thus ignoring the issues of immunity. A proceed of the ruling was nonetheless symbolically sent to the White House. The Monsanto Tribunal, held in 2016 by international jurists and civil society organisations stated Monsanto could be sued for ecocide for its deeds in Vietnam, if only ecocide was written as a crime of international law. Finally, their highly symbolic and partisan charge may discredit further attempts to obtain justice through regular courts.

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4 André Bouny, Agent orange: apocalypse Việt Nam (Éditions Demi-Lune 2010).

5 Summary of the advisory opinion of the International Monsanto Tribunal (International Monsanto Tribunal).
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| 1978-1985  | Paul Reutershan v. Monsanto et al. Then, Agent Orange Victims International (AOVI) v Monsanto et al. 15'000 plaintiffs from the United States, Australia and New Zealand | Mass tort action                                                                                | Jurisdiction: New York Eastern District Court  
Judge: Jack B. Weinstein  
Ruling: Out of court settlement, $180 M of granted by Monsanto et al. (goodwill based)  
No ruling, hence no precedent<sup>6</sup> |
| 1986-2013  | Korean Association for Victims of Agent Orange (KAOVA) v Korean branches of Monsanto et al.                      | Mass tort class action                                                                          | Jurisdiction: Korean Supreme Court  
Ruling: Recognition of chloracne as caused by AO exposure. Condemnation of Korean branches of Monsanto and other companies. Compensation to 39 Korean Vietnam War Veterans for diseases suffered following exposure to herbicides. $41M in compensation. |
| 2004-2008  | Vietnamese Association for Victims of Agent Orange/Dioxin (VAVA) v Dow et al.                                    | Violations of international law and war crime (war crime, crime against humanity, genocide)  
Negligent and international tort under the common law for products' liability  
Civil conspiracy, public nuisance and unjust enrichment, causing personal injuries, wrongful death and birth defects | Jurisdiction: New York Eastern District Court (Alien Tort Claim Act)  
Judge: Jack B. Weinstein, US Court of Appeals for the Second Circuit, Supreme Court  
Ruling: Rejected. The jury of the Supreme Court considered Monsanto produced a defoliant, which aim was to harm the forest cover, and not human beings<sup>7</sup>. |
| 2015-       | Trần Tổ Nga and daughters v Monsanto et al.                                                                      | Motive: Health damages caused by tort committed in the manufacturing and                         | Jurisdiction: Evry High Court (France)  
Status: Ongoing                                                                   |

<sup>6</sup> Peter Sills, <i>Toxic War: The Story of Agent Orange</i> (Vanderbilt University Press 2014).  
<sup>7</sup> Jack B Weinstein, Memorandum, order and judgement 2005, 233.
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| 2009 | *International Association of Democratic Lawyers* 27 victims of AO (*Vietnamese, American, Korean*) v. *Monsanto et al.*  Subsequently the “IPTC case” | War crimes Crimes against humanity Violation of the right to life | Body: The International peoples’ tribunal of conscience in support of the Vietnamese victims of AO AO is a poisonous weapon. Thus, the US violated the laws of war and committed war crimes in Vietnam. The manufacturing companies are complicit of war crimes. The American government is guilty of crime against humanity for it did not discriminate civilians from combatants, inflicted unnecessary sufferings over several generations, thus violating the Geneva Conventions and its 1977 Protocol. Violation of the right to life.

2016 | Legal opinion Is Monsanto guilty of complicity of war crime? Could the past action of Monsanto be considered as ecocide? Subsequently the “Monsanto tribunal” | Complicity of war crimes Ecocide | The dais deems that there is not enough proof to rule Monsanto as a complicit of war crime for the production of AO. Moreover, Monsanto, as a legal person, cannot be held liable for war crimes (Rome Statute), for which the court called in favour of extending the liability to legal persons. If ecocide was considered a crime under international law, Monsanto would be guilty of such a crime.

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8 Sandra Orus and Dounia Belua, Ordonnance 2015 [14/04980].

9 Bouny (n 4); *Judgement of the International peoples’ tribunal of conscience in support of the Vietnamese victims of Agent orange* 32 (International peoples’ tribunal of conscience in support of the Vietnamese victims of Agent orange).

10 *Summary of the advisory opinion of the International Monsanto Tribunal* (n 5).
2. Claims

By crossing over the different trials, we can identify three main types of claims made by plaintiffs. We analyse them one by one in this part.

2.1. Sanitary Impacts Constitutive of Crime Against Humanity and War Crime

2.1.1. Physical and Health Impacts During and After the Conflict

Among the claims of the various trials, inflicted physical and health impacts have been the most important ones. In the KAOVA v Monsanto et al. lawsuit (the only litigation that led to a compensation), it was the motive retained by the Korean Supreme Court, asking for veterans who were exposed to AO to be compensated for their chloracne outbreaks (the Seoul District court first accepted 11 diseases, but the decision was overturned). Immediate health impacts such as headaches, fatigue, severe skin rashes, were declared in the VAVA v Dow et al. case as well as the ongoing Evry litigation with no compensation however.

In the KAOVA v Monsanto et al. trial, chloracne was perceived by the court as a direct result of dioxin-TCDD exposition as demonstrated by several scientific studies. Scientifically-evidenced harm of chemical products is likely to be accounted for, although this success is to be nuanced; a positive relation between chloracne and AO has been recognized by courts only after the results of dioxin trials. Moreover, this link is not necessarily straightforward: after more than 30 years of trials, only a minority of plaintiffs could convincingly attest of one precise affliction in front of a lawcourt and be compensated. Meanwhile, the harm done by dioxin exposure may appear years after exposure, thus complicating the provision of evidence regarding physical harm.

For instance, in the AOVI v Monsanto case, Paul Reutershan, the first person to file a complaint against Monsanto, did so by linking his rare form of cancer to AO exposure, claiming compensation for health damages appearing after the war. The class action that ensued, as a mass tort claim, was based on a wide array of health impacts, ranging from personal injury to cancers. The wives and children of servicemen

13 Orus and Belua Ordonnance (n 8).
14 Sills (n 6).
15 Guichard (n 11).
were also mentioned, for miscarriages, birth defects or still births. None of the accusations were retained, for the trial was settled out of court. Judge Weinstein concluded there was not enough proof to link AO/dioxin exposure to health ailments in servicemen and their children.\footnote{Sills (n 6).} Up until now, activists in the US are still accused of pointing out “old age and lifestyle diseases” as dioxin-related.\footnote{Interview with Paul Cox, ‘US Veteran, Member of Vietnam Veterans for Peace’ (Berkeley, United States of America, 30 July 2017).} The same judge ruled the 2004 \textit{VAVA v Dow et al.} case, where post-conflict, post-exposition afflictions were underlined by Vietnamese victims. Providing testimonies and proofs on skin diseases and extreme fatigue, they also provided accounts of rare forms of diseases (mostly cancers), asking companies producing AO to be held accountable for these diseases.\footnote{Kokkoris Preliminary statement (n 12).} Scientific proofs brought to Weinstein led the judge to rule out the evidences brought by Vietnamese victims for lack of statistical evidence, especially years after the war.\footnote{Jack B Weinstein Memorandum, order and judgement (n 7).}

Afflictions related to the long-term toxicity of some chemical products are difficult to sue against, as the causal links are difficult to prove. In the \textit{Evry} lawsuit, the plaintiff mentioned a list of health issues she deems related to her exposure to chemicals.\footnote{Orus and Belua Ordonnance (n 8).} These issues either appeared shortly afterward, affected her daughters, or broke out decades after her exposure (from chloracne to rare forms of anaemia).\footnote{Arnaud Vaulerin, ‘Tran To Nga, une vie empoisonnée’ \textit{Libération.fr} (24 October 2018) <www.liberation.fr/planete/2018/10/24/tran-to nga-une-vie-empoisonnee_1687642> accessed 13 January 2019.} The burden of proof to attest the link between AO and diseases is both financially and scientifically heavy, because of the lack of complete knowledge on AO and on its historical use.

While official jurisdictions were careful in the consideration of health impacts occurring after the war, opinion tribunals, such as the Monsanto Tribunal or the IPTC, considered the damages suffered by victims during and after the war as violations of international law as a matter of principle but without leading to effective condemnations.

Another important trend observed is that health impacts have been coupled with international humanitarian law as AO was used during an international conflict.

\section*{2.1.2. Crime Against Humanity and War Crimes}

According to the proceeds of the Nuremberg trial and the 1998 Rome Statute, the conscious, systematic, inhumane and widespread attacks against civilians for in war
constitute crimes against humanity. In several trials, the use of AO was considered as such by the plaintiffs. For those of 2004 VAVA v. Dow et al., sprayings caused at least physical and mental harm that could be considered as torture and wilful atrocities against civilians, recalling the Nuremberg rulings and the 1907 Hague Conventions. 22 This was however rejected altogether by the dais. Crime against humanity was tackled by IPTC, which judges ruled spraying herbicides as an inhumane treatment of civilians according to the Nuremberg Principles, considering the pain, anguish and suffering they have caused and will cause “over generations”. 23 Chemical warfare for the indiscriminate, superfluous suffering it inflicted, was hence recognized by the jury as a crime against humanity. However, no effective court has yet recognized this wider interpretation of laws.

Furthermore, according to the Rome Statute, using poisonous weapons, asphyxiating gases and analogue products, as well as not distinguishing civilians from combatants, is constitutive of war crimes. Victims of chemical attacks may hence sue with these legal tools, if the defendant is also a party to the Statute. In the case of AO victims, only the Geneva conventions and the Hague Treaties of 1907, domestic laws (Vietnamese and Americans) as well as international customary laws could be relevant.

Through the various trials, one of the most disputed elements was to attest that AO is a chemical weapon and not a simple licit herbicide as affirmed by defendants. In the 2004 VAVA v Dow et al. case, plaintiffs attempted to prove that the US government was guilty of war crimes, and the companies responsible of complicity to these crimes, by proving that AO could be considered as a weapon forbidden by the Geneva conventions, the Hague conventions and customary law. According to Price, chemical weapons, by their nature and effect, would already be forbidden. 24 Besides the unnecessary suffering, poisonous gases and liquids do not allow distinction between military and civil targets as provided by the Geneva Conventions, even though the areas sprayed were marked as strictly controlled by NFL militia. First, the insurrecional character of the Vietnam war meant that guerrillas hid in densely populated civil areas. It was hence impossible to distinguish combatants from civilians, nor was it possible to distinguish their crops. Second, because of droplet drifts, herbicides particles unavoidably fell on civilian areas. 25 Third, because the ongoing pollution, in times of peace, mostly affects civilians.

War crimes accusation appeared in Dow et al. trial in 2004 26, 27 but were never recognized. Beside this case, plaintiffs did not point at war crimes. In the 1978–1985

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22 Kokkoris Preliminary statement (n 12).
23 1976 Judgment of the International peoples’ tribunal of conscience in support of the Vietnamese victims of Agent orange (n 9).
25 Sills (n 6).
26 Weinstein Memorandum, order and judgement (n 7).
27 Kokkoris Preliminary statement (n 12).
class action, many US veterans did not want to sue their state (some of whom out of patriotism), nor to condemn it for war crimes. They mostly needed to cover the health fees engendered by their service. In the case of VAVA, the demography of plaintiffs (Vietnamese people, including former NLF militants), as well as the support network behind them (Vietnamese government, Vietnamese NGOs, Vietnamese Friendship associations), explains the content of the accusations. Later on, the qualification of AO as an illegal, chemical weapon was adopted by the IPTC (Judgement of the IPTC in support of the Vietnamese victims of AO 2009) as well as by the Monsanto Tribunal. Again, the aim of these tribunals explains the strengths of their rulings compared to official courts, but their reasoning could be used in other trials against perpetrators of chemical attacks.

2.2. Environmental Destruction

Before sanitary damages were linked to AO sprayings by doctors, activists and plaintiffs, the extensive environmental destruction stirred indignation from the public. A 1969 report from a study conducted by two US scientists already pointed out irreversible environmental damages on Vietnamese ecosystems. These are the only damages officially recognised by the US and cooperative clearing operations are currently undertaken by the US and Vietnamese governments. A first site has been cleared (the Da Nang airbase), and two others are currently in progress (Bien Hoa and Phu Cat airbases). Still, many civilians living around contaminated areas are at risk of water and food borne contamination, and the defoliation has had disastrous consequences on the biodiversity.

During the sprayings, up to 10% of the current Vietnamese territory had been affected by herbicide pollution. Currently, there are several “AO hotspots”, where the concentration of dioxin is high because of herbicide drums’ storage. The defoliated areas included triple canopy jungles and mangroves, which are essential to protect from coastline erosion. Therefore, herbicides sprayings could be qualified as environmental destruction. While operation Ranch Hand undoubtedly shaped the way states currently deal with environmental protection during wars, it happened at a time no laws existed to prevent irremediable ecosystem damages. The 1977 Additional Protocol to the Geneva Conventions limits the permitted damages to the environment during interna-

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28 Sills (n 6).
29 Summary of the advisory opinion of the International Monsanto Tribunal (n 5).
tional conflicts. The 2002 Rome Statute of the International Criminal Court (ICC) considers attacks that intentionally inflict disproportional, widespread and long-term damages to the environment as war crimes. In addition, Galston, who coined the term “ecocide”, did so by attesting the destruction in Vietnam.\textsuperscript{32} A few years later, and as a response to the use of AO during the Vietnam war, the United Nations (UN) pushed forward and adopted the Convention on the Prohibition of Military or any other hostile use of environmental modification techniques, known as the ENMOD convention. For Vietnamese victims of AO, these treaties were adopted too late, since the sprayings stopped five to six years before. These laws cannot be summoned retroactively in trials, but can be for other cases later on (for instance, against the use of depleted uranium around the city of Fallujah or the use of defoliants by the Israeli Defence force on the Gaza strip), if states involved are parties to the treaties.

Moreover, not much more is provided by written international law in terms of the use of herbicides. The 1969 UN General Assembly (UNGA) banned the use of herbicides and riot control agents in times of war through resolution 2603. This instrument has however not reached consensus, due to abstentions (36) and the negative vote of 3 UNGA member states. It was precisely discussed and voted during the Vietnam War and hence labelled “partisan” by the US administration.\textsuperscript{33} Dean Kokkoris, the lawyer of the Vietnamese victims of AO in the 2004-2008 lawsuit called upon resolution 2603, but it was ruled non-binding, heavily polarized due to the Cold War context and not applicable to private actors.\textsuperscript{34}

Looking at tribunals of opinion, the Monsanto tribunal jury stated that if ecocide could be considered as a crime, Monsanto would be guilty of committing it. Nothing now prevents victims to sue for pollution or ecocide to establish a precedent. Nevertheless, in the state of existing law, ecocide is still not a crime one may sue for.

\section*{2.3. State and Corporate Responsibility}

When the \textit{AOVI v Monsanto et al.} case started, Paul Reutershan aimed at suing the US government. However, Washington D.C made use of its state immunity and could, as such, only be sued by a court it recognized capable of doing so. Companies could not benefit from this immunity and corporate responsibility could be called upon.

In the 2004 \textit{VAVA v Dow et al.} trial, the plaintiffs demanded that the complicity of companies, their negligence and unjust enrichment be compensated. Based upon the extensive damages declared by the victims in the various trials, the claims for immediate damages were retained.

\textsuperscript{32}Zierler (n 30).
\textsuperscript{33}Sills (n 6); Zierler (n 30).
\textsuperscript{34}Weinstein Memorandum, order and judgement (n 7).
If plaintiffs could prove that the perpetrators knew about the toxicity of the chemical products, then the US could be ruled guilty of a breach of international law (the Geneva conventions), and the companies could then be held accountable for providing toxic products to their clients. However, this point has never been recognized by any effective court, although lawyers of victims such as Peter Sills affirm there was no way chemical manufacturers were oblivious of the consequences of dioxin exposure. This line of argumentation has been repeated in all trials up until now. It is however difficult to find tangible cases and similarities, due to the different legislations under which AO trials were ruled. Also, only the \textit{KAOVA v Monsanto et al.} case led to compensation for damages, based upon studies conducted in the US.\textsuperscript{35}

Overall, barriers exist to the recognition of these different claims. We look at these barriers in the next part.

### 3. Social and Legal Obstacles

#### 3.1. Agent Orange, “Just” an Herbicide

First, AO is not considered as a chemical weapon but as an herbicide. This has been a recurrent argument to dismiss claims for compensation by victims of sprayings. AO has indeed been presented as an herbicide from the beginning of the Vietnam war\textsuperscript{36} and has been reiterated as such by the American jurisdiction,\textsuperscript{37} being therefore considered licit. Although one is dealing with the particular case of AO, technicalities of weapons’ systems have often been used to dodge accusations of weapons’ ban violation. AO, white phosphorus, depleted uranium ammunitions used during the 2\textsuperscript{nd} Gulf War happen to be accidentally chemical. As stated by Richard Price, the issue with weapon-specific jurisdiction is the escape clauses it creates. According to him, a strict interpretation of the founding texts of international humanitarian law would provide protection against indiscriminate attacks causing superfluous and unnecessary suffering caused by some weapons. In case specific weapons are banned, it is a matter of time before military innovation makes a convention obsolete.\textsuperscript{38}

While not leading to a formal judicial verdict, the different trials led to the construction of arguments disqualifying AO as a chemical weapon, for its purpose was to harm plants, not human beings. Moreover, chemical companies and the US government have defended their actions by stating their ignorance about the toxicity of the herbicide. Although the lawyers of the plaintiffs insist that manufacturers were aware

\textsuperscript{35} Guichard (n 11).

\textsuperscript{36} Zierler (n 30).

\textsuperscript{37} Weinstein Memorandum, order and judgement (n 7).

\textsuperscript{38} Price (n 24).
of the hazards, the proofs are insufficient to establish their knowledge of hazards and their intention to harm human beings. 39

AO is a specific case but resembles depleted uranium, as it affected human beings while mainly targeting the environment or infrastructures. The full range of consequences over people’s health unfolds years after, thus making the link between diseases and their primary cause difficult to prove, and hence to rule. Other types of chemical products, those with immediate and more visible effects, will not face the same difficulties undergone by those suing for AO related afflictions. Looking at different cases in which long-term poisoning was recognized (such as asbestos), a fair share of activism was necessary 40 to have long term health ailments recognized. Civil society support is positive for victims (provision of a support network, legal counseling as well as increased transnational visibility of the trial) but it can discredit attempts to obtain justice by apparently tainting lawsuits with partisanship.

3.2. State Immunity and Applicability of Laws

In any case, because the use of chemical weapons is a war crime, only states and individuals may be sued for it, not companies. The former may benefit from de facto or de jure immunities, which has made suing the US for their use of chemical weapons impossible up to now. While state apparatus takes the decision to conduct wars and to utilize contested weapons, it is difficult to sue them due to their sovereign immunity.

In the case of AO, the US government invoked its sovereign immunity. According to this clause, it may only stand in a lawsuit if it consented to 41. This has prevented the plaintiffs to sue the government, and hence led them to sue the manufacturing companies. Moreover, by the time of the sprayings, the US had not yet ratified the Geneva Gas Conventions (they only did in 1972) 42 and the 1993 Chemical Weapons Convention did not exist at this time. While AO sprayings contributed to the adoption of ENMOD or of the UNGA 2603 resolution, these instruments were available too late or did not gain unanimous support to be accounted as customary laws by US courts. 43

Since the US neither recognizes the International Court of Justice, nor the ICC, the only way victims could sue for their plight was by doing so in the US (AOVI v Monsanto et al.), or by using extra-territorial competences of national courts. This

39 Sills (n 6).
42 Zierler (n 30).
43 Weinstein Memorandum, order and judgement (n 7).
was the case of the *VAVA v Dow*: the plaintiffs used the Alien Tort Claim Act, which allows foreigners to sue an American physical or moral person if they committed infraction against them. \(^{44}\) In the *Evry* trial, Tran To Nga, a French national, invoked the competence of French magistrates to settle international law related cases if a French citizen is involved in the dispute. \(^{45}\) In the case of *KAOVA v Monsanto et al.*, the Korean veterans sued the Korean wings of the multinationals under Korean law, because they struggled doing so on the American territory. \(^{46}\)

Immunities put a limit on what plaintiffs may sue for. Since private companies may not be sued for war crimes (only having legal personhood) according to the Rome Statute, this limits the range of laws applicable. In all the cases detailed in Table 1, it was not be possible to sue and condemn private individuals for war crime or crime against humanity, \(^{47}\) although they could be charged as accomplices.

### 3.3. Proofs as Burdens

In order to be able to sue manufacturers, plaintiffs in AO litigations need to bring proof backing their claims. With time passing by, attesting that a victim has been sprayed, and thereafter suffered diseases is financially costly, if not impossible due to the social situation of victims. It is difficult to prove that the US government intended to harm people by spraying herbicides. Several maps provided by the US government are available but proving exposure has been tricky, considering the drifts during the spraying (up to 100 km away) and the mobility of soldiers in and out of spraying areas. \(^{48}\) Adding to this, accounting for the link between parental exposure and birth defects is subject to an ongoing controversy. All in all, the burden of proof on victims is heavy. In the *Evry* trial for instance, the evidence requested included documents attesting the plaintiff’s presence in sprayed areas, proving the non-combatant status of the plaintiff, as well as certifying health afflictions (some of which occurred as she was an inmate in South-Vietnamese jails and were solved ever since). The provision of these documents was requested by the defendants and has lengthened the judicial procedure, even though the jury ruled some of the demands unreasonable. \(^{49}\)


\(^{46}\) Guichard (n 11).

\(^{47}\) *Summary of the advisory opinion of the International Monsanto Tribunal* (n 5).

\(^{48}\) Sills (n 6).

\(^{49}\) Interview with Tô Nga Trần, ‘Plaintiff of Nga Tran v. Monsanto et al., former Vietnamese war correspondent’ (Ho-Chi-Minh-City, Vietnam, 4 July 2016).
Moreover, the financial cost to obtain a certificate linking health ailments and exposure is costly. At $1000 per sample of blood and fat tissues, many victims do not have the capacity to pay for these screenings, nor to remunerate lawyers and translators. Most lawsuits listed were made possible through heavy civil society involvement (Vietnam Agent Orange Responsibility and Relief took care of the plaintiffs while they were in the US), including fundraising (Tran To Nga used fundraising platforms to pay for translation fees) and voluntary works by lawyers.

The AO case is particular, owning to its span of action and blurred notion of intention. The intention to harm is more obvious in the use of other types of weapons (white phosphorus obviously causes burns, for instance). Again, its consequences bear similarities with uranium exposure out of nuclear tests or depleted uranium munitions. While suffering crippling health conditions, neither French military staff working on test sites nor American soldiers serving in Iraq managed to gain recognition of the link between their condition and their exposure to hazardous substances.

Moreover, these difficulties could only be faced if victims survived from the war and war-related afflictions. AO does not harm instantly in a tangible way. After the Vietnam war, survivors of AO sprayings found themselves sick, or repetitively gave birth to ill children, thus contributing to their pauperization and isolation. Among them, a minority of victims could find the social resources to sue companies, and many died during the legal procedure, for instance during the VAVA v Dow et al. lawsuit and the KA OVA v. Monsanto case in Korea (out of which only 39 veterans were compensated). The burden of proof therefore weighs on mostly marginalized victims, who cannot bring all evidence pieces to their own trials.

3.4. “I will never be able to marry”, or the Social Costs of Victimhood

The social burden has often been underlined either by victims or researchers working on AO. “I will never be able to marry” was the complaint of a teenage girl, with several sick siblings. Their parents had served during the war in heavily sprayed areas and were beneficiaries of Vietnamese state support programs. This expresses the social cost of victimhood, which deters witnesses and victims from speaking about their plights.

50 Bruno Barrillot, Les irradiés de la république: les victimes des essais nucléaires français prennent la parole (Grip 2003).
52 Michio Umegaki, Lynn Thiesmeyer and Atsushi Watabe (eds), Human Insecurity in East Asia (United Nations University Press 2009).
53 Wilcox (n 2).
54 Guichard (n 11).
55 Interview with Public Health Official, Covered Identity (Hanoi, Vietnam, 26 April 2018).
Affecting gonads, dioxin exposure causes birth defects and congenital health ailments. In traditional societies such as rural Vietnam, marriage and childbirth are important milestones. Because of their exposure to herbicides during the war or afterward, while living and/or working in polluted areas, some parents gave birth to sick children. In order to save the marital prospects for their healthy family members, and to avoid the social stigma of having heavily handicapped children, some chose not to declare their afflictions, while knowing it may be related to dioxin exposure. Suing, in this case, would mean accepting and embodying one’s status of victim, bringing suspicions on one’s children and grand-children to bear healthy offspring. Moreover, some believe being affected by heavy health ailments or giving birth to sick children is due to their karma. Wishing to avoid social exclusion, some do not accept or request social benefits they would be entitled to, let alone suing to gain justice on the international level.

3.5. Politicization of the Agent Orange Trials

Last but not least AO, as a remnant of war issue, is politically charged both in Vietnam and in the US, which complicates attempts of victims to claim justice without being instrumentalized by either party to the Vietnam war. As a war-remnant issue, dioxin pollution has been the subject of difficult negotiations between the US and Vietnam and is still one of the most crucial points on the bilateral agenda. As a Cold War issue, it bears an important partisan dimension up to now, and is conditioned by US-Vietnam relations. Since the normalization and reestablishment of diplomatic ties between Washington and Hanoi, and while much progress had been done on the issue, dioxin pollution remains a sensitive issue.

The different trials have had a toll on the political exchanges between the two countries. Currently, the question of AO sanitary liability is not welcomed in an agenda packed with defence agreements deemed crucial by both partners, besides the different trade agreements linking them together. As a result, AO has become a heavily controlled issue in Vietnam, and Hanoi keeps a tight surveillance on research centres and hospitals alike. While VAVA is an NGO catering for victims, it remains intimately linked to the Vietnamese government, thus restricting Vietnamese victims’ ability to sue. The only lawsuit involving Vietnamese citizens was made possible by the creation of VAVA, which leadership is composed by former Vietnamese high officials. For the Vietnamese victims, there is hence no other way to claim justice than going through their government, which is supportive toward them on the national scale, but does not have the leverage to do so on the international level. Trials such as this of Evry are hence encouraged, but not too eagerly, by the Vietnamese government. The access to courts by Vietnamese victims is hence compromised by the political agenda on defence and trade.

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4. Conclusion

This chapter has analysed the different claims and results of all litigations related to the use of Agent orange, an herbicide, during the Vietnamese war. Claims have included issues of sanitary impacts, environmental degradation, and state and corporate responsibility. Overall, very few of these claims have been recognised as valid: AO has been considered as an herbicide, not a chemical weapon, states have benefited from immunity, the practical costs of scientific evidence impeded plaintiffs to fully inform their cases, social costs have been high and the AO issue is full of broader political tensions. For these reasons, AO victims have struggled to effectively file lawsuits to claim for justice.

The AO case enables us to draw some more general observations with regard to the possibility that victims of chemical products can have to make their voice heard in case of environmental and health impacts. Recent cases such as the glyphosate case could benefit from a parallel with AO. For instance, French civil society actors supporting the Evry trial have claimed taking example on AO as a “dystopian case” to push for a ban on endocrine disruptors. 57 First, tribunals of opinions, and this is also part of their role, are more favourable for new claims to be heard. They could be considered as first steps towards stronger litigations. Second, the costs of litigation should be considered and plaintiffs could be helped overcoming these costs. In particular, social repercussions are a new type of costs identified by our study that would be highly relevant when environmental and health issues impact marginalised populations. Third, the political dimension of environmental and health litigations should not be underestimated. Ideally litigations should be preserved from political struggles or at least these struggles be made clearer.

57 Interview with Jean-Louis Roumegas, ‘Former French MP, Green Party’ (Montpellier, France, 27 February 2018).