LITIGATING HUMAN RIGHTS ABUSES IN UNITED STATES COURTS: RECENT DEVELOPMENTS

Elizabeth F. Defeis[*]

During the last quarter of a century, litigation in United States courts to address human rights abuses that occur beyond the shores of the United States has increased dramatically. Although lawsuits have been successful, recovery at least in monetary terms has been meager. In addition, there has developed a concentrated strategy to limit access to United States courts for purposes of addressing human rights violations committed abroad.

What can be done to strengthen the rule of law and provide a forum for addressing human rights abuses? Clearly, an amendment to the Foreign Sovereign Immunities Act to permit suits against state actors accused of human rights abuses would be the most effective mechanism. However, apart from this, several other options remain, including suit pursuant to the Alien Tort Claim Act, the Torture Victim Protection Act, and the Antiterrorism and Effective Death Penalty Act of 1996. These comments provide an overview of the legislative mechanism available to address human rights abuses.

The most utilized legislative device for reaching human rights abuses is the Alien Tort Claims Act.[1] In 1789, the First Congress of the United States in 1789 drafted legislation that was to have a profound impact on international law and human rights. The Alien Tort Claims Act (ATCA), enacted as part of the First Judiciary Act that district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. Despite its importance today, the legislative history of ATCA remains unclear. Some scholars, judges, and the Bush administration have urged that the act should be construed narrowly. They argue that the Act was designed solely to address piracy or violations of diplomatic immunity and does not confer a private right of action. However, there is scant empirical evidence to support either a narrow or a broad reading of the statute.

For almost 200 years, the ATCA lay dormant. In 1980, however, a decision by the Second Circuit Court of Appeals in *Filartiga v. Penna-Irala*[2]

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* Elizabeth F. Defeis is a Professor of Law, Seton Hall University School of Law. Professor Defeis would like to thank her research assistant, Jill Dawson, J.D. Candidate, Class of 2005.

1. 28 U.S.C. § 1350 (2003).

2. 630 F.2d 876 (2d Cir. 1980).

reviewed the statute and concluded that it provided a basis for domestic litigation to address human rights abuses committed abroad.

The facts of the case are well known. In 1979 Dolly Filartiga filed suit in the federal district court of the Eastern District of New York alleging that Americo Pena-Irala a police official in Paraguay had tortured and murdered her brother in Paraguay for the political activities of his family. The lawsuit was brought under the Alien Tort Claims Act. The district court dismissed the action on jurisdictional grounds, holding that the term "law of nations," as employed in ATCA, excludes the law that governs a state's treatment of its own citizens. The plaintiff appealed the district court's ruling to the Court of Appeals for the Second Circuit.

In a groundbreaking ruling, the Second Circuit reversed the district court and held that the lawsuit could proceed. After reviewing United Nations resolutions, numerous international, regional, and national sources of law, the Second Circuit held that torture was firmly prohibited by international law. It stated: "In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations. This violation can occur regardless of the nationality of the parties."[3]

Accordingly, the Court of Appeals held that "whenever an alleged torturer is found and served with process by an alien within our borders, the Alien Tort Claims Act provides federal jurisdiction."[4] When the case was remanded, Pena-Irala defaulted and the district court entered a judgment in favor of the Filartiga family and awarded $10 million in damages. Efforts to collect the judgment have been unsuccessful.

Since 1980, victims of human rights abuses have filed an increasing number of lawsuits seeking civil remedies for injuries that occur outside the United States. The plaintiffs are from countries such as Argentina, Bosnia, Burma, Chile, China, El Salvador, Ethiopia, Guatemala, Haiti, Indonesia, Nigeria, Paraguay, and the Philippines and defendants include companies such as Coca-Cola for activities in Columbia, Chevron Corporation in Nigeria, and Exxon Mobile Corporation on behalf of Indonesian villagers. These cases allege numerous violations of international law, including arbitrary detention, forced disappearance, torture, extra judicial killing, genocide, war crimes, and crimes against humanity. Several of the lawsuits have resulted in substantial damage awards.

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3. *Id.* at 878.
4. *Id.*

Cases involving the ATCA are pending in the federal courts at the appellate and district court levels and in December 2003 the Supreme Court granted certiorari in *Sosa v. Alvarez-Machain*,[5] a case that might well resolve the jurisdictional issues arising under the ATCA.

The *Sosa* case involved the kidnapping of a Mexican Doctor, Humberto Alvarez-Machain by Mexican officials in Mexico at the behest of the US Drug Enforcement Administration. He was then taken to Texas for trial for the torture and murder of a DEA Agent. In his first appeal to the US Supreme Court, Alvarez-Machain challenged the jurisdiction of the District Court on the grounds that the kidnapping violated the terms of the extradition treaty between Mexico and the United States and also that it violated international law. The Supreme Court rejected the jurisdictional challenge and noted that although the kidnapping might well have violated international law it did not violate the terms of the extradition treaty.[6] Alvarez-Machain was then tried and acquitted in the Texas Court. He subsequently brought two lawsuits, one against the United States and federal agents for false arrest and the other against his Mexican kidnapper, Jose Francisco Sosa under the ATCA. The District Court awarded him a judgment of $25,000 against Sosa and the award was upheld by the Ninth Circuit Court of Appeals. The United States Government filed a brief urging the Supreme Court to grant Certiorari arguing that the Ninth Circuit's broad reading of the ATCA was "fraught with foreign policy implications and the potential for interference with the exercise of constitutional responsibilities by the political branches."[7] The Government requested the Court decide, "Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdictions granting provision that does not establish private rights of action."[8]

Pending in the federal appellate court is the case of *Doe v. UNOCAL*.[9] Over ten years ago, the Burmese military cleared out entire villages to make way for oil pipelines. Several human rights groups alleged that the villagers that were displaced were forced to work against their will, and were raped or tortured if they refused. However, rather than suing the Burmese government in Burma, the victims sued in the United States, under the Alien Tort Claims Act. The suit alleged that UNOCAL, an American oil company, was responsible for hiring the Burmese military to provide security during the construction of the Yadana pipeline project. A federal trial court dismissed the case on the

5. Sosa v. Alvarez-Machain, 73 U.S.L.W. 3370 (U.S. Dec. 1, 2003).

6. Sosa v. Alvarez-Machain, 519 U.S. 1006, *cert. denied* (1996).

7. Linda Greenhouse, *Reviewing Foreigners' Use of Federal Courts*, N.Y. TIMES, Dec. 2003, at A29.

8. *Id.*

9. 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

ground that there was not a close enough nexus between the oil company and the abuses. However, a three-judge panel of the Ninth Circuit held that UNOCAL could be found liable if the company aided and abetted the Burmese military in committing human rights abuses. This standard was a more lenient standard of proof than that offered by the trial court, which required that the villagers prove that the company actually directed the abuses. In February 2003, the Ninth Circuit court of appeals in San Francisco decided to rehear the appeal before the full eleven-judge Court.

The government filed a brief in the case on behalf of UNOCAL, stating that if the case were allowed to go to trial, it would interfere with American foreign policy, and may disrupt the war on terrorism. As argued in the *Sosa* case, the government argues that the ATCA merely confers subject matter jurisdiction and does not imply a private right of action. Rather, they argue that the act should be limited to the narrow class of cases involving piracy or diplomatic immunity.

Indeed, in virtually all the pending ATCA cases, the government has filed briefs putting forward this position. For example, the United States filed a Statement of Interest in a case now pending in the United States District Court for the Southern District of New York. *In re South African Apartheid Litigation,*[10] was brought by victims of apartheid in South Africa seeking compensation for human rights abuses suffered under the apartheid regime. Both the present government of South Africa and the United States have intervened urging the court to dismiss the suit. The United States noted that the Government has a substantial interest in the proper interpretation and application of the ATCA because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the Nation's foreign policy. It noted further that "the government of South Africa has, on several occasions and at the highest levels, made clear that these cases do not belong in United States courts and they threaten to disrupt and contradict its own laws, policies, and processes aimed at dealing with the aftermath of Apartheid as an institution."[11] Presumably, the case will not be decided until the Supreme Court renders its decision in the *Sosa* case. In a further effort to limit liability of United States companies doing business abroad, in May 2003, President Bush signed Executive Order 13303 which limits the applicability of the ATCA and immunizes oil companies operating in Iraq from the execution of any judgment against Iraqi petroleum products. However, the order does not apply to other activities in Iraq.

Although the Alien Tort Claims Act has been the principal mechanism for litigating violations of human rights in United State courts, its reach is limited.

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10. *In re* S. Afr. Apartheid Litigation, 238 F. Supp. 2d 1379 (S.D.N.Y. 2003).

11. *Id.*

The act applies to lawsuits filed by foreign nationals but not United State nationals and does not provide jurisdiction for lawsuits against foreign governments. In response to these jurisdictional limitations, Congress passed the Torture Victim Protection Act (TVPA)[12] and an amendment to the Foreign Sovereign Immunities Act (FSIA).[13]

The Torture Victim Protection Act supplements the remedies available under ATCA. It establishes civil liability for acts of torture and extra judicial killing committed abroad. According to the Senate report accompanying the TVPA, torture violates standards of conduct accepted by virtually every nation, and prohibition of such actions has attained the status of customary international law. The TVPA was not intended to replace ATCA, rather, it was designed to work in conjunction with that statute.

The TVPA differs from ATCA in several respects. Unlike ATCA, the TVPA is not limited to plaintiffs who are foreign nationals but allows United States citizens to sue for damages as well. However, the TVPA allows only civil actions for torture or extra judicial killing. ATCA contains no such restriction. The TVPA also contains two additional restrictions. First, a plaintiff must exhaust adequate and available remedies in the place in which the conduct giving rise to the claim occurred. Second, no action shall be maintained unless it is commenced within ten years after the cause of action arose. This provision may be tolled, however, for good cause.

In 1994, in the implementing legislation for the Convention Against Torture, the federal criminal code was amended to provide that any United States national or person physically located within the United States could be held criminally liable for torture that he or she commits against anyone anywhere.[14] However, no criminal action has been brought under the law notwithstanding the presence of torturers within the United States (many of whom have been defendants in ATCA suits) and despite the fact that under the Torture Convention the United States is obliged to prosecute or extradite any torturers within its territorial jurisdiction.

Although the Alien Tort Claims Act and the Torture Victim Protection Act authorize civil actions against public officials and private individuals, they do not provide jurisdiction for actions against foreign governments. The Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction over a foreign state in United States courts. Under the FSIA, a foreign state is presumed to be immune from suit unless one or more of the codified exceptions to immunity apply. These exceptions include cases of waiver, commercial activity, and certain claims in tort and property.

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12. 28 U.S.C. § 1350 (2003).
13. *Id.* § 1602.
14. *Id.* § 1350.

Shortly after the passage of the FSIA, the United States Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*,[15] held explicitly that the FSIA was the sole basis for obtaining jurisdiction over a foreign government in the courts of the United States. The Court ruled that even if the case involves a violation of an international law, the cause of action must fit within one of the specific exceptions of the FSIA in order for the Federal courts to have jurisdiction.

In order to circumvent the unambiguous language of the *Amerada Hess* case to allow suits against the foreign governments for alleged human rights abuses, several creative arguments have been developed over the years. Some have been based upon a *jus cogens* exceptions to immunity. For example, In *Princz v. Federal Republic of Germany,*[16] an American citizen who survived the Holocaust sued the Federal Republic of Germany to recover money damages for injuries he suffered, and slave labor he performed, while a prisoner in Nazi concentration camps. The Plaintiff argued that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating *jus cogens* norms of the law of nations. It argued that a foreign state that violates these fundamental requirements of international law thereby waives its right to be treated as a sovereign. The court, however rejected this argument and held that an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. However, there was a strongly worded dissent by Judge Patricia Wald. She argued that Germany implicitly waived its immunity by engaging in atrocities in this case. Reminding the court that American law incorporates international law, Judge Wald concluded that as a matter of proper statutory construction, the only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret the act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.

Earlier, the Ninth Circuit had also rejected the *jus cogens* argument. The 1992 case of *Siderman de Blake v. Republic of Argentina,*[17] involved allegations of official torture against the government of Argentina. The plaintiffs argued that *jus cogens* norms enjoy the highest status within international law, and thus prevail over and invalidate other rules of international law in conflict with them. Since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. The Ninth Circuit agreed that official torture is a violation of the *jus cogens* principle of international law. However, it found no implied waiver of the FSIA. The court noted that the FSIA contains no exception to immunity

15. 488 U.S. 428 (1989).

16. 813 F. Supp. 22 (D.D.C. 1992), *cert. denied,* 513 U.S. 1121 (1995).

17. 965 F.2d 699 (9th Cir. 1985).

based on *jus cogens*. It held that if violations of *jus cogens* committed outside the United States are to be exceptions to the immunity, Congress must make them so.

Several other lower court cases have been based on the *jus cogens* exception to the immunity. However, all were dismissed for lack of jurisdiction. Thus, it seems clear that absent congressional action, the FSIA cannot be implemented to sue foreign government for human rights abuses no matter how egregious. Congress did however act in a limited instance to compensate victims of terrorism, and enacted the Antiterrorism and Effective Death Penalty Act of 1996. This Act amended section 1605 of the FSIA by adding a new subsection, which created a new exception to foreign sovereign immunity. Under this section United States nationals may bring suit against foreign sovereigns for personal injury resulting from torture, extra judicial killing, air sabotage, hostage taking or provision of material support or services for such an act, if the foreign state is designated as a state sponsor of terrorism.[18]

This amendment to the FSIA followed the original drafting pattern used in the FSIA, and simply added an additional exception to the original five exceptions. Although very broad, this exception has several limitations on its applicability. The amendment will apply only if the foreign state is designated as a state sponsor of terrorism by the State Department. Even if a state is so designated, courts will deny jurisdiction if the victim was not a national of the United States or if a plaintiff cannot show that the offending state was afforded a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.

In 1997 the amendment itself was amended to accommodate the victims of the Lockerbie tragedy. An American citizen sued under the Act claiming damages on behalf of his wife, a UK citizen who died in the crash. Although the sponsors of the law claimed that the exception was meant to apply if either the victim *or* the survivor is an American citizen, the language of the statute required both the victim *and* the survivor to be American citizens. An amendment to the amendment adopting the either/or language and allowing the case to go forward was passed on April 24, 1997.[19]

In the last five years, judgments under the Act have brought verdicts of hundreds of millions of dollars and more than $200 million have been paid from frozen assets and from the United States, which has a right to recover from those assets. A consolidated suit against Osama bin Laden, Al Queda, Afghanistan and the Taliban, Iraq and Sadam Hussein based upon the September 11th attacks was brought in the Southern District of New York. The Court dismissed the claim against Saddam Hussein. However, the court ruled that the survivors of

18. 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1601-11 (2003).

19. *Lawyers Solve Lockerbie Case Glitch Just in Time*, NAT'L L.J., May 19, 1997, at A08.

persons who were killed in the World Trade Center terrorist attack had presented enough evidence, "albeit barely," to be awarded $104 million in damages against the state of Iraq, Osama bin Laden, and his terrorist network.[20]

The court, addressed what it described as several "novel" issues concerning the Foreign Sovereign Immunities Act and civil recovery under the Antiterrorism Act, the so-called Flatlow Amendment. The two cases joined under *Smith v. The Islamic Emirate of Afghanistan*[21] sought to show through the opinions of experts, including former CIA Director James Woolsey Jr., that Iraq helped train Al Qaeda terrorists, and provided them with safehouses and forged documents.

A default judgment in favor of the families of the victims was granted and in accordance with the statute and an inquest was held. The court decided that the attack on the World Trade Center met the definition of "international terrorism" in the Antiterrorism Act, and then turned to the standard of proof required against the Iraqi defendants under the FSIA, which states that, "[n]o judgment by default shall be entered by a court of the United States . . . against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."[22]

Without a Second Circuit case expressly defining the meaning of the phrase "evidence satisfactory to the court," the court noted that other courts hold conflicting views about the appropriate standard. While some courts have required "clear and convincing evidence," the court applied a more relaxed standard, which it said is "a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff." The court then addressed that section of the Foreign Sovereign Immunities Act known as the Flatlow Amendment, which withdraws sovereign immunity for cases of state-sponsored terrorism. It noted that the amendment, while providing a cause of action against foreign officials or employees whose state has sponsored acts of terror "does not expressly provide a cause of action against the foreign state itself." Nevertheless, the court held that the Flatlow Amendment provides a cause of action against a foreign state. In turning to the issue of whether the World Trade Center attack was perpetrated by Al Qaeda with the aid of material support from Iraq, the court viewed the testimony of experts and concluded: "Although these experts provided few actual facts of any material support that Iraq actually provided material support, their opinions, coupled with their qualifications as experts on this issue, provide a sufficient basis for a reasonable jury to draw inferences which could lead to the conclusion that Iraq provided material support to Al Qaeda."[23]

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20. Smith v. The Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 232 (S.D.N.Y. 2003).
21. *Id.*
22. 28 U.S.C. § 1608(e) (2003).
23. The Islamic Emirate of Afghanistan, 262 F. Supp. 2d at 232.

The decision represents only the first chapter in litigation seeking to hold foreign states responsible for the events of September 11th.

One concern facing lawyers representing the families of those who died in the World Trade Center attack is collecting damages. President George W. Bush has decided that most of the $1.8 billion in frozen Iraqi assets in the United States should go toward rebuilding Iraq, with about $300 million of that money set aside for prisoners of the regime who were used as human shields. However, the plaintiffs are seeking to collect from the billions of dollars allegedly stolen by the Hussein family and other Iraqi officials.

An amendment to the FSIA similar to the 1996 Anti-terrorism Act addressing the concerns regarding the scope of the FSIA to cover *jus cogens* violations as well as gross human rights violations is warranted. Such an exception would be a narrow one and would apply only to the most grave human rights abusers. Although several legislative proposals have been introduced to amend the FSIA to add an exception for immunity in cases of human rights violations they have not been acted upon.

Similarly, while the ATCA has been effectively used to address human rights abuses committed abroad, serious questions have been raised concerning whether the act itself is merely a jurisdictional statute or whether it confers a private right of action. In addition, national security and foreign relations concerns have raised questions implicating the political question doctrine and separation of powers issues. These concerns, coupled with the ever-expanding scope of the ACTA and the desirability of addressing human rights abuses should be the starting point for critical analysis in this area.