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Justices Weigh Alien Tort Act

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Washington-The nation's business community, feeling the sting of international human rights litigation, and the Bush administration will try to persuade the U.S. Supreme Court this week to eliminate tort liability under a 215-year-old statute.

The not-so-surprising alignment, presaged in recent cases in the lower courts, comes in *Sosa v. Alvarez-Machain*, No. 03-339, a challenge seeking to reverse more than 20 years of court interpretation of the Alien Tort Statute of 1789.

Under those rulings, the statute has permitted aliens to sue for damages in U.S. courts for injuries that violate international law.

Although *Sosa* itself has nothing to do with corporations, recent cases under the statute have targeted large companies for allegedly participating in or committing human rights abuses in their business activities abroad. The business community, which has filed a number of amicus briefs in *Sosa*, clearly sees the case as an opportunity to achieve the kind of "tort reform" that Congress has shown little interest in legislating.

The Bush administration too is attacking the modern application of the statute, arguing that it interferes with foreign relations, creates separation of powers problems and threatens the war on terrorism.

The 9th U.S. Circuit Court of Appeals, from which *Sosa* comes, and its sister circuits "have launched a misguided legal revolution," said Jose Francisco Sosa's high court counsel, Carter G. Phillips of Sidley Austin Brown & Wood.

If business and the administration succeed in the high court, the doors to federal courthouses largely will be closed to these types of suits-and that, argue human rights litigators, would not only be an incorrect reading of the statute and a flouting of the First Congress' intent but a tragedy for alien victims of rape, torture and other abuses.

The circuits' "remarkable uniformity of view" has made the Alien Tort Statute "a beacon to the world," said Humberto Alvarez-Machain's high court counsel, Paul L. Hoffman of Los Angeles' Schonbrun De-Simone Seplow Harris & Hoffman.

A FEW ATCA CASES

In re South African Apartheid Litigation, No. 02-MDL-1499 (S.D.N.Y. 2002): Suit involves allegations against numerous companies, including Bank of America Corp. and Citigroup Inc., for human rights violations committed by the former South African apartheid regime.

Arias v. DynCorp, No. 01-01908 (D.D.C. filed Sept. 11, 2001): Suit alleges medical injuries and lost crops and livestock because DynCorp, in connection with a U.S. government contract, sprayed toxic herbicides over an area in Ecuador where the plaintiffs lived in order to kill cocaine and heroin crops believed to be growing there.

Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Calif. 2000), aff'd in part, rev'd in part, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), reh'g en banc granted, vacated, 2003 WL 359787 (9th Cir. Feb. 14, 2003): Burmese citizens allege that Unocal Corp. is liable for rape, murder and other abuses by

The case also reveals a sharp split within the community of international law scholars over the role of federal courts in finding and applying international law.

And it has struck a chord with victims' organizations, including some of the surviving family members of the Sept. 11, 2001, terrorist attacks. In their amicus brief, the 9/11 families directly challenge the Bush administration's view of the way the statute undermines the war on terrorism.

"Many of the victims' families found this very offensive and we wanted to make sure the court was aware of it," said the brief's author, Penny M. Venetis of Rutgers Constitutional Law Clinic. "If anything, [the statute] provides the only remedy to certain individuals who have lost their loved ones to acts of terrorism."

A sleeping giant

The Alien Tort Statute, also known as the Alien Tort Claims Act (ATCA), originally appeared in Section 9 of the first Judiciary Act of 1789, which created the U.S. judicial court system. It provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The act was largely dormant until 1982, when the 2d Circuit decided *Filartiga v. Pena-Irala*, 630 F.2d 876, and provided what the Bush administration calls "the modern conception" of the act, "a far-reaching cause of action on behalf of aliens for violations of international law anywhere in the world."

Dolly Filartiga had fled Paraguay and sought political asylum in the United States in 1978. She discovered that Americo Norberto Pena-Irala, the inspector general of police in Ascension, Paraguay—who had tortured and murdered her brother—had also entered the United States.

Represented by lawyers at the Center for Constitutional Rights, she filed a civil suit under ATCA and against Pena, seeking compensatory and punitive damages for her brother's torture and wrongful death.

Her lawyers, Rhonda Copelon and Peter Weiss, argued that just as piracy was a violation of the law of nations when ATCA was enacted, torture was a crime against the law of nations in 1779. The 2d Circuit agreed and Filartiga subsequently won a \$10.4 million judgment. But by the time of the award, Pena had been deported.

The statute was "rediscovered" with the *Filartiga* case, said William S. Dodge of the University of California Hastings College of Law, who has joined an amicus brief of federal jurisdiction and legal history scholars supporting Alvarez-Machain.

"One thing that explains the absence of cases in the interim is the shifting nature of international law," said Dodge.

"I think it was certainly clear in 1789 that individuals could violate international law in some ways and could be held responsible either criminally or civilly or both for doing so," he said. "During the 19th century, international law came to be viewed more exclusively as regulating state-to-state interactions."

But it was after the Nuremberg trials that the idea of individual responsibility took hold once again, he added.

Dodge identifies three waves of alien tort litigation: first, the prototypical *Filartiga* case—torture, killing or disappearance abroad committed by one alien against another alien.

In that wave have been cases such as Carlos Mauricio's suit to hold Salvadoran generals responsible for his torture and Oscar Reyes' case against the Honduran security official who oversaw his torture.

The second wave of suits came in the mid-1990s, said Dodge, and were brought against U.S. corporations and some foreign corporations for participating in human rights abuses abroad. Unocal, Chevron, Texaco, Union Carbide, Exxon Mobil, Gap Inc., Coca-Cola, Del Monte and others have been sued for complicity in various alleged human rights violations.

The final wave—a much smaller group of cases—includes suits against U.S. government officials or those acting at

the Burmese military committed during the construction of a gas pipeline.

Doe v. Karadzic, *Kadic v. Karadzic*, 866 F. Supp. 734, 70 F.3d 232 (filed in 1994, judgment for the plaintiffs in 2000): Plaintiffs sued Radovan Karadzic, former Bosnian Serb president, for killings, torture and other human rights abuses.

their direction.

Rutgers' Venetis has such a case pending, brought on behalf of political asylum seekers detained by the Immigration and Naturalization Service. It charges that they were severely abused while in detention. "It is the only case that exists where U.S. officials are defendants and the abuse took place in the United States," she said.

Third-wave suit

The *Sosa* case also stems from the third wave. *Sosa* was one of a number of Mexican nationals working for the Drug Enforcement Administration when certain DEA officials authorized the kidnapping of Alvarez-Machain for alleged involvement in the torture and murder in Mexico of a DEA agent.

Alvarez-Machain was kidnapped from his office in Guadalajara in 1990 and taken to El Paso, Texas. He stood trial and was acquitted. Alvarez-Machain sued *Sosa* and others in 1993 under the ATCA, claiming an illegal arrest and detention.

His suit against the United States went forward under the Federal Tort Claims Act.

At trial, Alvarez-Machain won a \$25,000 judgment for emotional distress.

The award was affirmed by the 9th Circuit, which held that the defendants had violated his right under international law to be free of arbitrary arrest and detention.

In the high court, Phillips, counsel to *Sosa*, argues that ATCA is strictly jurisdictional in nature. The statute, he said, doesn't create a cause of action or contain any rights-creating language that would justify finding that Congress intended to create a private cause of action.

The federal circuits that have ruled otherwise, said Phillips, "haven't given this a whole lot of thought."

The 9th Circuit, he added, "is perfectly comfortable inferring causes of action from any statutory scheme. None of the courts of appeals has really analyzed this. This is sort of received learning. They picked up where everybody started. If you go back to square one, there's no way you can infer a cause of action."

The solicitor general agrees and argues in the government's brief that not only is the statute strictly jurisdiction but courts cannot infer a cause of action based on sources of customary international law. Doing that, he said, is "profoundly out of line with the separation of powers."

The Constitution assigns to the political branches, not the courts, responsibility for managing the nation's foreign affairs, he argues.

Hoffman, Alvarez-Machain's counsel, calls their arguments "absurd," explaining, "If you accept their argument, the First Congress in the Judiciary Act basically passed this thing that had no meaning then and no meaning now. So, for 215 years, we've had this statute on the books and it doesn't mean anything.

"Their argument is until Congress passed a cause of action, no one could do anything. That's absurd. You didn't even have a concept of a cause of action until 50 years later. The Founders understood the law of nations was part of common law."

Hoffman added that Phillips' argument that the federal circuits have not given the statute "a whole of thought" is a hard sell and "a little bit insulting." There has been remarkable uniformity, he said, among the judges who have interpreted the statute and they sit across the political spectrum.

"There's a certain sort of world view that at least some in the administration have that international law gets in the way of U.S. power and the courts should not get involved in that," said Hoffman. "There's just no way to reconcile the view the administration and *Sosa* are putting on ATCA with history and 200 years of cases where courts have affirmed time and again that it is an appropriate role for U.S. courts to interpret the law of nations."

But it is the open-ended nature of what some international law scholars consider to be a tort based on the law of nations that has disturbing implications, said Paul B. Stephan of the University of Virginia School of Law, who filed an amicus brief by another group of federal jurisdiction and international law scholars, but this time supporting

Sosa.

"The benign story is you trust the common law power of judges to figure this out," he said.

"The less benign story is opportunistic attorneys can exploit this not really for human rights work but for old-fashioned holding up of corporations," Stephan added. "I'm concerned about the deterrent effect on firms engaging in transactions that might be good transactions. This is just another cost."

The statute is jurisdictional, said jurisdiction scholar William Casto of Texas Tech University School of Law, but that means the courts then have to find the basis of the claim.

"I assume the government wants to take vigorous and aggressive action overseas in the war on terrorism, action that may violate international law," he said. "The government doesn't want lawsuits in the United States over vigorous conduct."

But ultimately, he said, it is Congress that determines the federal courts' jurisdiction.

"It shouldn't be the executive branch who will be regulated deciding whether it will be regulated," said Casto.

A decision is expected by July.

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