LegalTimes

WEEK OF SEPTEMBER 6, 2004 • VOL. XXVII, NO. 36

Coded Message

Lower courts must decipher Supreme Court ruling on resurrected Alien Tort Statute.

BY GREGORY G. GARRE

In the best-selling novel *The Da Vinci Code*, a hidden code is discovered in the centuries-old works of Leonardo da Vinci that reveals an astonishing historical find. This June, the Supreme Court announced a historical find worthy of its own Da Vinci Code. In interpreting a 215-year-old law known as the Alien Tort Statute (ATS), the Court discovered a "residual" lawmaking power in the judiciary to create private causes of actions for alleged violations of international-law norms.

After this remarkable discovery, the legal battle in this important area of law now shifts from whether the ATS creates a cause of action to how the federal courts should exercise that "residual" lawmaking authority.

OUT OF OBSCURITY

The ATS states simply 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 provision originated as part of the act passed by the very first Congress in 1789 to lay the foundation for the nation's federal courts. But the First Congress left no record as to the statute's objective, and the ATS lapsed into historical obscurity.

That changed in 1980 in a case called *Filartiga v. Pena-Irala.* The U.S. Court of Appeals for the 2nd Circuit held that the 1789 law supported a private damages action brought by Paraguayan nationals in New York against a Paraguayan government official for an alleged torture and killing that occurred in Paraguay. Since the *Filartiga* decision, ATS litigation has proliferated in federal courts, embroiling U.S. courts in a broad array of international controversies and incidents ranging from alleged war crimes to terrorist attacks to environmental abuses.

Earlier this year, the Supreme Court agreed in a case out of the 9th Circuit—*Sosa v. Alvarez-Machain*—to resolve the debate over whether the ATS supplies a statutory cause of action for alleged violations of international-law-based norms, or instead simply grants federal jurisdiction over a class of actions that must be independently authorized by statute or treaty. The Court's decision signals a new era in the Rip van Winkle life of the ATS.

At first blush, the Court's review of the text of the 1789 law produced a strikingly clear answer. The Court unanimously agreed that the ATS is "strictly jurisdictional" in nature, in that the statute authorized the federal courts to entertain suits alleging a tort in violation of the law of nations or a treaty. The Court thus soundly rejected the conclusion of the 9th Circuit and the position of the plaintiff in *Sosa* that the ATS actually supplies a statutory cause of action for alleged violations of international law.

But the Court—by a 6-3 majority—reached another, far more momentous conclusion. The Court held that, even though the ATS does not create a cause of action, the statute was enacted based on the understanding that courts would entertain "some common law claims derived from the law of nations." The Court thus declared a "residual common law discretion" on the part of the federal courts to define and enforce violations of the law of nations in suits invoking the jurisdiction of the federal courts under the ATS.

The *Sosa* decision establishes several important guideposts for lower courts asked to exercise this discretion.

'18TH-CENTURY PARADIGMS'

First, the Court stressed that it was recognizing only a narrow lawmaking role for courts in defining actionable offenses against the law of nations, stating that its decision would apply to "only a very limited set of claims." The Court did not identify any particular claim that it had in mind but instead

Points of View

instructed more generally that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of offenses against the law of nations—piracy, assaults against ambassadors, and violations of safe conducts.

By tethering the lawmaking authority of the federal courts to "18th-century paradigms," the Court has set an extremely high bar. At the time of the founding, piracy, assaults against ambassadors, and violations of safe conducts not only were singled out by Blackstone as the classic offenses against the law of nations, but also were specifically proscribed by the criminal law of both England and the United States. The offenses were so well known and universally condemned that Congress codified them as part of the nation's First Crimes Act. The detailed codification of those offenses in the federal criminal code gave them a specificity and definiteness lacking in the otherwise indeterminate body of customary international law.

Using the 18th-century paradigms as the base line, a federal court should not create a private cause of action in an ATS suit unless, at a minimum, the alleged violation of international law is not only universally condemned but also specifically proscribed by positive criminal law. Perhaps the one modern-day offense that comes closest to meeting that standard is torture. But fittingly, Congress already has created—in the Torture Victim Protection Act of 1991—a private damages action for international torture and extrajudicial killings, thus foreclosing judicial lawmaking in this area. Litigants and courts will be hard pressed to establish other offenses against the law of nations that meet the rigorous historical standard that the Court has set.

AUTHORITY OF CONGRESS

Second, the Court emphasized that, even though its decision recognized a common law role for the courts in ATS suits, the decision of whether to create a cause of action for an alleged violation of international law is one that ordinarily should be left to Congress. The Constitution, after all, explicitly commits to Congress, not the judiciary, the authority to "define and punish . . . offenses against the law of nations."

A court thus should see if the political branches have recognized—or refused to recognize—the asserted offense against the law of nations. For example, the Senate and the executive branch in ratifying a treaty or convention may express an understanding that the treaty is not self-executing or privately actionable (as they did in the case of the International Covenant on Civil and Political Rights). Such expressions of the political branches ought to be given conclusive weight.

IMPEDING FOREIGN POLICY

Third, the Supreme Court acknowledged the "potential implications for the foreign relations of the United States" of ATS litigation and admonished that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."

In ATS litigation, U.S. courts are called on to lay blame for international controversies. The entry of judgment in an ATS case—including the summary dismissal at a preliminary stage based on a threshold defense such as sovereign immunity—may create the impression to citizens of other countries that the U.S. government has taken sides in an international dispute. This may interfere with the efforts of the executive branch and Congress to calibrate an appropriate foreign policy concerning a particular dispute.

Lower courts should be particularly sensitive to those inter-branch concerns. Indeed, the Court suggested that it would be appropriate for courts to adopt a policy of "case-specific deference to the political branches," pointing to pending ATS litigation in New York against corporations that allegedly participated in or abetted the former apartheid regime in South Africa. In that litigation, both the government of South Africa and the United States have informed the court that the litigation is interfering with the decision of South Africa to redress the crimes of the apartheid regime through a policy of "confession and absolution" as opposed to a "victors' justice approach."

Applying those basic principles, the Supreme Court in *Sosa* held that the federal courts lacked discretion to create an international-law-based cause of action to cover the transborder arrest and detention at issue. A faithful application of the *Sosa* principles seems likely to result in the same result in the typical ATS case.

Nevertheless, while the Supreme Court has placed tight reins on the exercise of the federal courts' discretion to create causes of action for the enforcement of international law, experience teaches that the discovery of a new or forgotten judicial power is often marked by efforts to experiment with and, in some cases, abuse that power. Indeed, as a practical matter, lower courts that were willing to infer international-law-based causes of action from the pure jurisdictional language of the ATS before *Sosa* may only be emboldened by the Court's decision announcing that the federal courts possess an inherent lawmaking authority when it comes to policing the violation of customary international law norms the world over.

GUIDING THE COURTS

For that reason, now that the Supreme Court has provided its understanding of the ATS, Congress would do well to revisit this area of law and provide clear legislative guidelines for the federal courts in entertaining ATS litigation. For example, rather than waiting for the courts to resolve which limits apply, Congress could specify that any claims inferred by the courts in ATS suits are subject to the same limits that Congress itself already has placed on claims asserted pursuant to the Torture Victim Protection Act, such as a statute of limitations and a local-forum exhaustion requirement.

Congress also could specify whether U.S. law provides a damages remedy for ATS-style claims alleging wrongs that not only did not occur in the United States, but also have no connection to the United States. For example, the Federal Tort Claims Act, which acts as a waiver of sovereign immunity, expressly exempts any claim "arising in a foreign country." Applying a similar territorial limitation in ATS litigation not only would comport with the long-standing presumption against the extraterritorial application of U.S. law, but would

square with what some scholars believe to have been the original purpose of the ATS—to ensure that the federal courts were available to redress assaults on ambassadors occurring in this country, which, as the framers knew by experience, could create sticky diplomatic situations if left unremedied.

More fundamentally, in light of the Supreme Court's declaration that federal courts have discretionary power to create causes of action for violations of the law of nations, Congress must be prepared to exercise its constitutional authority to define and punish such offenses. Congress has a constitutional responsibility to help manage the nation's foreign affairs. Congress therefore should carefully monitor this area of law and, when necessary, promptly respond to judicial decisions that have misconstrued the law of nations or that may interfere with the nation's foreign policy.

The Supreme Court observed that it would "welcome any congressional guidance" on how courts should handle litigation "with such obvious potential to affect foreign relations." Given the importance of the interests at stake, all would benefit if Congress provided such guidance sooner rather than later.

Gregory G. Garre is a partner at D.C.'s Hogan & Hartson, where he heads the firm's Supreme Court and appellate practice. He is a former assistant to the solicitor general of the United States and worked on Sosa v. Alvarez-Machain *in the Supreme Court.*