At Issue

International Law

Should U.S. courts decide international human rights violations?

The right of aliens to sue in U.S. courts for human rights violations occuring in a foreign country was first recognized in a 1980 decision by the 2nd Circuit. *Filartiga v. Pena*, 630 F.2d 876.

This right recently was affirmed in a 9th Circuit decision that upheld jurisdiction in five consolidated suits filed against the late dictator of the Philippines, Ferdinand E. Marcos, for human rights violations during his regime. *Trajano v. Marcos*, 86-2448.

Steven Schneebaum of Washington, D.C.'s Patton, Boggs & Blow, who wrote an amicus brief in *Trajano* for the International Human Rights Law Group, applauds the decision for limiting the act-of-state defense and extending the rule of law.

In response, Marcos' defense team—four lawyers from the Washington, D.C., firm of Anderson, Hibey, Nauheim & Blair—argues that *Trajano* violates settled principles of comity and sovereign immunity.

Yes: Freedom From Torture Is a Legal Right

BY STEVEN R. SCHNEEBAUM

In a recent decision, the 9th U.S. Circuit Court of Appeals held that Ferdinand Marcos may be liable to those whose torture and disappearance he allegedly ordered while president of the Philippines.

The decision—a brief analysis of the "act-of-state" doctrine—is a victory for those who advocate applying international human rights to cases in U.S. courts. Traditionally, as a matter of comity and not of obligation, courts will not review the sovereign acts of other nations.

Although application of the act-of-state doctrine in the United States has continued since the days of Chief Justice Marshall, it has never been codified by Congress.

Shortly after former President and Mrs. Marcos came to the United States, the Aquino government brought a civil RICO suit against them, alleging that they had transported fraudulently obtained assets into this country. It sought to enjoin them from disposing of those funds pending trial.

Sitting en banc, the 9th Circuit rejected application of the act-of-state doctrine, holding that the district court had jurisdiction both to consider the underlying lawsuit and to preserve the status quo by enjoining the transfer of assets.

It considered and rejected two rationales of the doctrine: the constitutional obligation to keep the judiciary from becoming embroiled in foreign policy, and the concern that the United States would be embarrassed internationally by conflicts between the two coequal branches of government.

The Circuit noted that "act of state" applies equally to dictators and democratically elected rulers, but will not protect the misdeeds of a deposed leader whose successor denies that the acts in question were acts of state.

"The doctrine is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader."

The Marcoses were accused of theft, extortion and fraud—hardly activities that come within any theory underlying the doctrine. Since the plaintiff was the successor government, there was no danger that hearing the case would embarrass this country's foreign interests.

The 9th Circuit remanded the case, while acknowledging the practical difficulties of bringing the case to trial. The court found that the Philippines had shown a significant likelihood of success on the merits.

Violations of Law

The court deferred resolution of *Trajano v. Marcos* until the RICO suit was decided. *Trajano* is the consolidated appeal of five cases, alleging that Marcos and others tortured, abducted, imprisoned, and killed the plaintiffs and their decedents, in violation of international and municipal law.

In the district courts, these actions were dismissed, because an "act of state" was felt to be a complete defense. Reversing the dismissal, the 9th Circuit relied almost exclusively on its holding in the RICO case. Yet *Trajano* is a significant expansion: It is the first decision of an appellate court suggesting that U.S. courts can review the mistreatment by a foreign leader of his own subjects.

In 1789, Congress gave the district courts jurisdiction over tort suits by aliens claiming violations of international law.

In 1980, the 2nd Circuit held that official torture is such a violation. But even the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 876, in which Paraguayan citizens were able to sue a former Paraguayan official in U.S. courts, was brought against an individual accused of committing torture with his own hands.

Trajano marks a milestone in the legal recognition by our courts of international human rights law and the right to be free from torture.

Victims will find the doors of this country's courts open to them in appropriate cases, since by invoking rights under international law they will be claiming protection under the laws of the United States as well.

The *Trajano case* is a major step toward recognition of the principle enunciated by Judge Eugene Nickerson in the *Filartiga* case on remand: "Plainly international 'law' does not consist of mere benevolent yearnings never to be given effect."

The normative nature of human rights law has been soundly endorsed by the 9th Circuit. It is a decision to be applauded. ■

No: U.S. Courts Shouldn't Meddle in Foreign Policy

BY RICHARD A. HIBEY, TIMOTHY A. BROAS, GORDON A. COFFEE and THOMAS P. STEINDLER

The international law of human rights confers rights upon individuals against certain classes of injury inflicted by states, including the state of the individual's citizenship.

This reflects a fundamental change in international law, which traditionally governed the relations of one state to another.

While international law has evolved to establish *rights* for individuals, *obligations* continue to be imposed only upon states. Individuals can bring claims for human rights violations only if these violations are the result of official state action.

If a claim is brought against the offending state itself, the Foreign Sovereign Immunities Act of 1976 (FSIA, 28 U.S.C. 1330 et seq.) will prevent jurisdiction.

And the Supreme Court recently ruled that the FSIA, not the Alien Tort Statute, is the exclusive jurisdictional legislation governing tort claims against foreign governments. *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989).

Anomalously, the FSIA does not govern suits against foreign officials, even when they are sued in their official capacity as agents of the state.

When individuals are named as defendants, a number of legal doctrines prevent our courts from hearing these suits.

The threshold issue is whether the Alien Tort Statute actually establishes a right for an alien to sue another alien for human rights violations occurring abroad.

Congress' intent in passing the statute is famously unclear. We have argued in the Marcos cases that the statute was narrowly intended to ensure jurisdiction for suits by foreign dignitaries for assaults by U.S. citizens.

Others have disagreed. Congress has the power to clarify its intent, however, and a bill currently pending before Congress—the Torture Victim Protection Act—would clearly establish jurisdiction in human rights cases.

But even if the Alien Tort Statute was clarified by Congress, other well established legal doctrines bar adjudication.

Traditional Immunity

In the case of Marcos, the former head of state of the Philippines, jurisdiction is blocked by the immunity traditionally granted heads of state under international law.

Because Marcos must be sued in his official capacity in order to successfully allege a violation of international law, there is no doubt that the immunity applies—unless a court were to find that, unlike U.S. presidents or even the diplomats who reported to Marcos, Marcos is no longer entitled to the immunity following his departure from office.

The act-of-state doctrine, which derives historically from the same source as the immunity of foreign sovereigns, is a related doctrine that bars adjudication.

In order to establish a violation of international law, an act of state—official torture in these cases—is required.

The *Filartiga* court, along with cases and commentators following it, has tried to paper-over this dilemma by lifting a principle out of domestic U.S. jurisprudence—that the state-action requirement is satisfied for constitutional purposes when an official is acting "under color of law."

They treat this as though it were a settled principle of customary international law.

It is not, and the effort to force the development of an entirely new order by judicial fiat illustrates the gap between the current state of international law and those who would like to see it changed to accommodate human rights claims.

In fundamental ways, these jurisdictional and abstention doctrines, taken together, reflect a profound concern about whether it is appropriate to use our national courts to hear claims in which redress is in many ways a political rather than a legal issue.

While political resolutions may be less than satisfactory, the deep rooted traditions of this nation's jurisprudence suggest that it may be more appropriate for resolution of these matters to rest within the legal and political institutions that are a part of societies that have been witness to these events. ■