

After Burma

Like the Massachusetts law, the Alien Tort Claims Act allows improper interference in U.S. foreign policy.

By Donald J. Kochan

Who speaks for the United States on the world stage? Clearly, the federal government has the main role. But can the states break in with their divergent views? The Supreme Court in June essentially said no. What about the power of private individuals to push around U.S. foreign policy? The justices haven't said, but these days other courts seem all too willing to let individuals direct the show.

Two months ago, the Supreme Court stood firm on the principle that the United States should have but one voice in diplomatic affairs. In *Crosby v. National Foreign Trade Council*, the Court said that a Massachusetts law barring state entities from contracting with companies that did business with Burma was invalid because it might impede the ability of the United States to speak with singularity on foreign policy. A federal law established a comprehensive system for dealing with Burma and gave the president great discretion. The Massachusetts law interfered with that discretion.

As a result of *Crosby*, the states now have no direct say in U.S.-Burma relations. But that which Massachusetts is prevented from doing is still being accomplished by foreign plaintiffs and U.S. academics under the guise of "customary international law." And these new players in our Burma policy are getting aid and comfort from the courts.

The ongoing case against the Unocal Corp., a California-based international oil company, is most instructive. In 1996, Unocal and others were sued in federal court by a class of Burmese refugees under the Alien Tort Claims Act. The plaintiffs in *Doe v. Unocal* allege that the company was complicit in human rights abuses committed by Burmese forces when it joined with the Burmese government to build a natural gas pipeline. In 1997, Judge Richard Paez (recently elevated to the U.S. Court of Appeals for the 9th Circuit) ruled that his court had jurisdiction to hear the Burmese claims, that private companies could be liable for violating the "law of nations," and that the case would not inappropriately interfere with the conduct of foreign policy by the elected branches of government.

After years of discovery, a hearing was held on July 10 to determine whether the defendants are nonetheless entitled to summary judgment. The new judge in the case, Ronald Lew, is expected to make a decision soon.

THE LITIGATING BEGINS

The statute driving the *Unocal* case, the Alien Tort Claims Act, was enacted in 1789. It provides federal district courts with jurisdiction over "any civil action by an alien" for torts "committed in violation



of the law of nations or a treaty of the United States." Very few cases were decided under the ATCA during its first 200 years, primarily because the "law of nations," as it was understood in 1789, was very limited.

A transformation began in 1980, when the 2nd Circuit held for the first time in *Filaritiga v. Pena-Irala* that the ATCA applies in the modern human rights context. The standards adopted in that case for ascertaining the law of nations allow courts to broadly adopt international principles as "laws." *Filaritiga* instructs that international law evolves and that the work of academics and others, not simply of elected officials, should be consulted to determine the scope of that law.

Since 1980, the ATCA has been used to bring claims based on a range of expansive concepts of international law, motivated largely by environmental, labor, and other human-rights movements, as well as by an academic community eager to add teeth to its vocation. These suits have met with varying success.

The third phase of ATCA litigation arrived in 1995, when the 2nd Circuit considered a case against Bosnian-Serb war criminal Radovan Karadzic. The decision in *Kadic v. Karadzic* expanded the field of potential ATCA defendants by holding that private individuals, not just sovereign states, can be liable for violating the law of nations. Two weeks ago, in a related case that went forward because of *Kadic*, a New York federal jury ordered Karadzic to pay \$745 million to a group of Bosnian and Croatian war victims.

Unocal represents yet another expansion of ATCA litigation. The precedents emanating from the 2nd Circuit have allowed such suits to move beyond repressive nations and justly condemned war criminals to companies that do business and invest overseas.

LOOSELY DEFINED

Like those before them, the plaintiffs in the *Unocal* case rely on a long list of principles from declarations, proclamations, conventions, resolutions, covenants, and similar documents produced by international organizations to prove that the wrongs alleged violate "customary international law." Both the sources of international law and the loose standards employed to analyze them create a prescription for unlimited legislation by adjudication.

Most of the "evidence" of international law presented in these ATCA cases was written with broad strokes, high hopes, and no formal elements of law. Most of these "laws" have never been passed by Congress. The few that have met some kind of congressional muster typically did with an understanding that becoming mere signatories to general international principles is distinct from creating enforceable rights, or were accepted only with significant reservations or other conditions.

Now these "laws" may be applied in the *Unocal* case in a manner that necessarily passes judgment on official state actions of Burma and on the legitimacy of those actions in the world community—just as

did the Massachusetts Burma law. A single trial court will be weighing the actions of a foreign government and determining how multinational corporations may or may not interact with that government.

Two rules—the act-of-state and political-question doctrines—apply to preclude the judiciary from hearing cases that might interfere with the conduct of U.S. foreign policy by the president or Congress. Based on the same reasoning that supported preemption of the state law in *Crosby*, these doctrines should bar *Unocal* and other ATCA cases like it.

Indeed, allowing a judge to use elusive and diffuse principles of human rights to discover applicable international law in *Unocal* is far more likely to "blunt the consequences of discretionary Presidential action" and "compromise his effectiveness" than the Massachusetts law struck down in *Crosby*. A judgment in *Unocal* might well "penalize some private action that the federal Act . . . may allow" and "may pull levers of influence that the federal Act does not reach."

Court findings that go to the legitimacy of the Burmese regime or its actions will not add one potentially conflicting state voice to this country's foreign policy, but a second, potentially conflicting federal voice. Certainly, this can only serve to undermine the president's ability to pursue a comprehensive Burma strategy.

GOOD HEART, BAD LAW

Few can deny the horrors committed by the Bosnian-Serb military forces, the Burmese rulers, and other repressive regimes. But in the rush to make the American courts the cure for the world's ills, bad law has been born. Judges are dabbling in the formation of foreign policy.

The *Unocal*-Burma situation is just one example. Several other corporations are litigating similar suits, and others are bound to become ensnared in the ATCA web. For example, Chevron and Royal Dutch/Shell are facing suits related to operations in Nigeria; Union-Carbide is facing a suit for its operations in India; and The Gap and Sears are fighting a suit over their operations in the Northern Marianas (nine other clothing makers settled last year).

Thus, ATCA suits do not merely threaten the foreign affairs powers of the elected branches or encourage judges to create law. As private companies increasingly become subject to such suits, they threaten to discourage the very overseas investment and development that helps expand individual liberty, human rights, and democracy abroad.

Congress has a choice: It can clarify the true limited scope of the ATCA or it can repeal the law. In the meantime, courts should rein in this new wave of litigation in accordance with democratic principles and jurisprudential restraint.

Fortunately, the ATCA revolution is in its infancy. The Supreme Court has never even interpreted the statute. Whether in the *Unocal* case or elsewhere, wiser heads can still prevail.

Donald J. Kochan, an associate with D.C.'s Crowell & Moring, has written extensively on the Alien Tort Claims Act. The firm is not counsel in any matter discussed in this article, and the views expressed are entirely the author's own.

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