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## *Denying Justice to Victims of Human Rights Abuse*

by **Eric R. Biel, Senior Counsel, Human Rights First**

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On March 30, the U.S. Supreme Court will hear arguments about whether victims of terrible human rights abuses committed outside this country should be able to seek relief in U.S. courts. For a quarter century, our courts have consistently upheld the right to pursue such claims. Now the Bush administration seeks to gut the law used for this purpose.

The case before the Court, *Sosa v. Alvarez-Machain*, involves the claim by a Mexican doctor that his arrest and detention, and subsequent transfer against his will from Mexico to the United States, was a tort "committed in violation of the law of nations or a treaty of the United States." That language comes from the Alien Tort Claims Act (ATCA), part of the original Judiciary Act of 1789. The law grants federal district courts "original jurisdiction of any civil action by an alien for a tort only," where that constitutes a violation of "the law of nations."

The administration does not merely object to Dr. Alvarez-Machain's claim; it attacks use of the Act for any human rights violation, however heinous. If the Supreme Court agrees, victims who have no other legal recourse will no longer be able to use the law to try to hold their abusers accountable.

Prior administrations did not share the aversion of the current one to the use of the statute as a human rights tool. The Carter administration filed a memorandum in support of the plaintiffs in the landmark case of *Filartiga v. Pena-Irala*, where the Second Circuit Court of Appeals held in 1980 that the ATCA provided a remedy for torture "in violation of the law of nations."

When President George H.W. Bush signed the companion Torture Victim Protection Act into law in 1992, he expressed concern that U.S. courts might become engaged in "sensitive disputes" involving other countries, but added that "we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere."

The Clinton administration also weighed in strongly on the side of the ATCA and human rights, including in the lawsuit against self-proclaimed Bosnian Serb leader Radovan Karadzic, as well as in submissions to the U.N. Commission on Human Rights and the U.N. Committee Against Torture.

Yet the current Justice Department offers up legal and policy arguments that the courts have uniformly rejected over the past quarter century. It contends that the statute does not provide a legal "cause of action" for human rights violations and presents foreign policy problems for the U.S. government.

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That legal interpretation has been rejected by prominent scholars who note, among other things, that a Justice Department so often enamored with "textualist" approaches to interpreting statutes (and the Constitution itself) here goes to great lengths to ignore the plain language of the law.

The policy argument is refuted in a brief submitted to the Court by 28 former senior U.S. diplomats, who state that potential foreign policy concerns do not justify opposition to ATCA lawsuits: "on the contrary, eviscerating ATCA could undermine U.S. foreign policy objectives" by risking our leadership on human rights and respect for the rule of law.

What is behind this high-stakes battle over a once little-known law? The ATCA affords a civil remedy – meaning the possibility of damages, not prosecution – against human rights abusers who either come to this country or have other ties to the United States (such that the normal jurisdictional requirements of our courts can be satisfied).

Since the *Filartiga* decision 24 years ago, courts have consistently upheld the law's use for actions that violate international law, such as torture, summary execution, and disappearances. At the same time, they have thrown out claims based on other wrongs that do not breach internationally accepted legal standards.

The law has been used on behalf of victims of gross human rights abuses perpetrated by well-known figures, such as Karadzic and Ferdinand Marcos, as well as by lesser-known foreign officials. It offers a way to hold such officials accountable. And whether or not they have assets that can be seized, it offers the potential to at least keep the United States from being a safe haven for abusers. Those bringing ATCA claims typically are not seeking financial gain in any regard; their goal is justice, and to clarify the historical record of what happened to them or their relatives.

The law has been used effectively, but infrequently. ATCA cases are tough to win; the courts have proven quite able to distinguish legitimate claims from those that do not warrant relief. Since 1980, a total of eighteen perpetrators have been successfully sued, five since 2000. The statute is hardly producing a flood of litigation tying up the courts.

Meanwhile, the cases brought in recent years against companies for alleged complicity in gross human rights violations continue to move slowly. Roughly a third have been dismissed, while others – for example, those against Unocal for alleged complicity in human rights violations in Burma and Talisman Energy for similar conduct in Sudan – are still awaiting a trial on the merits. Not a single corporate case has yet reached a decision on the merits; no U.S. firm has yet paid a penny in damages under the statute.

Still, business groups cite potential large damage awards and rising legal fees in joining the Bush administration in the effort to rid themselves of the law for good. They have mounted an aggressive campaign, including filing two "friends of the court" briefs in the pending Supreme Court case arguing broadly that international human rights law should never apply to corporate conduct.

These business groups also assert that ATCA cases threaten overseas trade and investment. But it is highly unlikely that any U.S. court would find a company liable just for being present in a zone of abuse or for doing business with a repressive regime. Cases like the one against Unocal involve something much more: evidence of corporate complicity in the abuses.

The Bush administration's departure from precedent and its doctrinaire approach are not merely unpersuasive as a matter of law and policy but present a significant threat to U.S. leadership on human rights. Filartiga and its progeny have sent a clear message over the past quarter century: the United States will not turn its back on victims, nor be a safe haven for those who commit the worst forms of human rights abuses.

Absent another way to provide accountability – and based on its antagonism to the International Criminal Court there is no reason to believe that this administration would support stronger international legal standards – the ATCA affords victims the chance for some measure of justice. The Bush administration is wrong to seek to deny them their day in court.

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