Obstacles on Federal Litigation as Remedy for Victims of Jeju Massacre

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Abstract

Each of these three defenses such as Sovereign Immunity, Extraterritoriality and Political Question Doctrine could be expected to be raised in any attempt to sue the United States over the Jeju massacre, and each of them could be expected to be the basis for an order of the court dismissing the suit. Moreover, if the court regarded the suit as frivolous, the plaintiff and its attorneys could be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure.

Key words :
Obstacles on Federal Litigation, Remedy for Victims of Jeju Massacre, Sovereign Immunity, Extraterritoriality, Political Question Doctrine.

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Introduction

Under the terms of its retainer agreement, the Firm has been retained to determine whether a viable cause of action may be initiated establishing U.S. culpability for crimes against humanity, war crimes, and other violations of International Humanitarian Law, and to provide the client with all options available under domestic and international law.

Because the United States has not entered into many international agreements which would subject it to having its liability adjudicated by any international body a key question is whether the United States can be made liable in its own courts for violations of international law in its own courts, utilizing the Alien Tort Claims Act, a jurisdictional statute providing the federal courts with jurisdiction for violations of the law of nations in the federal courts of the United States.

As will be seen from the discussion below, the federal courts of the United States have substantially closed their doors to suits against the United States, employing three separate doctrines to do so, each of which will be discussed in turn: sovereign immunity, extraterritoriality, and political question doctrine.

Statement of Facts

According to The Jeju 4-3 Incident Investigation Report at p. 50 of the English translation the disturbance occurred on March 1, 1947, and developed on April 3, 1948 and as a following armed conflict and suppression until September 21, 1954.

"The Petition for a Joint South Korea and United States Jeju 4.3 Incident Task Force " summarizes the Incident as follows: The April 3rd [1948} Grand Massacre [known as Jeje 4.3 encompassed the mass killing of some 30,000 Jeju residents, the torture, rape and prolonged detention of many more, the destruction of at least 40,000 homes and the burning of numerous villages., ...[T]he mass killing and destruction by South Korean military, paramilitary, and police [took place] under United States authority and oversight.

Initially, the commander of USAMGIK, the United States military force occupying Jeju, attempted to negotiate a peaceful resolution with the armed guerillas on Jeju. When this failed, military governor Howard Dean ordered the transfer of three additional battalions numbering seventeen-hundred soldiers each to Jeju from the Korean mainland.

To prevent sympathizers with the guerillas from joining the islanders, General Dean ordered a naval blockade of the island." Article in Wikipedia, "The Jeju Uprising" The Republic of Korea sent the Fourteenth regiment of the Korean Constabulary to Jeju. However, not wanting to murder the people of Jeju, the regiment mutninied.

Newly elected president Syngman Rhee then declared martial law on the island of Jeju.

The guerillas launched a last offensive against ROK police, but were beaten back by ROK forces and forced to retreat to the island'[s interior mountains.

What followed was the string of atrocities in which whole villages were put to death by ROK forces, aided by right-wing forces of the National Youth Association put entire villages on Jeju to death, a "campaign of eradication.,"

This campaign was supported by the United States Army Military Government in Korea (USMAGIK) which oversaw all South Korean military and police operations in Korea, including on Jeju Article in Wikipedia, "The Jeju Uprising" .

According to the Investigation Report, cited in The Petition. U.S. military leaders gave direct orders that initiated early Jeju 4.3 events. This was followed by close U.S. oversight over the South Korean military suppression operations, including an order to kill anyone within five kilometers of the coastline, From August 1948, the U.S. military held continuous operational control over the South Korean police, according to the " Executive Agreement on Interim Military and Security Matters During the Transitional Period" between the South Korean president and the U.S. military commander. The U. S. military also supplied weapons, aircrafts, and other resources.

Martial law was imposed on the Island, and long sentences and even death sentences were imposed by courts martial without trial.

Human Rights and Reparative Justice

By the end of the period characterizing the Jeju 4-3 Incident, it is estimated that the population of the islands had been reduced from three-hundred thousand by a tenth. This massacre of approximately thirty-thousand persons which was devastating to the population of Jeju has never been acknowledged by the United States, although

the entire period was one in which the US military had the authority to command all South Korean military and paramilitary forces by agreement with the South Korean government.

Discussion

The Alien Torts Claims Act, 28 U.S.C.. § 1350, was passed in 1789 as part of the jurisdictional statute which recognized the jurisdiction of the federal courts to redress violations of the law of nations. It read: [t]he 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.

However, it was not until modern times that the statute was successfully invoked to bring before the court a former foreign government actor on charges of bringing about the torture in his home country of citizens of that country.

Filartiga v. Pena-Irala . Filartega is analyzed byJudge Harry Edwards in of the three concurring opinions dismissing the case of Tel-Oren v. Libyan Arab Republic , 726 F.2d 774, cert. denied 470 U.S. 1009.(D.C. Cir. 1984); Judge Harry Edwards' opinion would rely on Filartega to set the outer boundaries of a tort claim under 28 U.S.C. § 1350, but that the law did not establish jurisdiction over non-state actors, as it did for state actors.

Judge Bork, concurring in the dismissal, held that to assert a cause of action under the law of nations, the plaintiff would have to show a specific basis under the law of nations for permitting the suit to proceed. Judge Bork would have limited the Alien Tort Claims Act to the three torts recognized by Blackstone at the time of its enactment, piracy, violation of the right of safe passage, and infringement on the rights of ambassadors.

Judge Robb would have dismissed Tel-Oren as a non-justiciable political question.

It is notable that Filartega found that the law of nations had created a cause of action for torture, as a violation of the law of nations. At least in the Second Circuit, a recognition of a right to be free from torture would be recognized as cognizable under the law of nations.

The United States Supreme Court explained in Sosa v. Alvarez-Machain, that Congress had intended, in enacting the Alien Tort Claims Statute, 28 U.S.C. § 1350, to enact a jurisdictional statute, applying the law of nations to the common law of nations. No new causes of action were created by the statute, but as principles of common law came to be universally recognized as torts under the law of nations, they could be heard in U.S. courts under this jurisdictional statute. See Vietnam Ass'n for Agent Orange Victims v. Dow Chem. Co. ,(claims of violation of international law by manufacture of herbicides for use in wartime did not meet criteria for violation of universally accepted principles of international law.

Arguably, the Nuremberg trials of major German war criminals under the London Charter of the International Military Tribunal) and the inclusion in the United Nations Universal Declaration of Human Rights of a norm against arbitrary killing, arbitrary arrest and imprisonment and from inhumane or degrading treatment or punishment establish a universally recognized addition to the law of nations under which the slaying of thirty-thousand Jeju residents, the vast majority civilian non-combatants, could be be found to be a violation of the law of nations. And see In re Estate of Ferdinand E. Marcos Human Rights

Litigation (Aliien Tort Claims Act gives rise to liabiliity for torture and murder of Philippine citizen by agents of Marcos regime. Doe v. Rafael Saravia (assassination of archbishop of El Salvador violated proihibitions of extrajudicial punishment and crimes against humanity). But see Escarria -Montano v. United States , cause of action cognizable under Alien Tort Claims Act for extrajudicial killing but subject to dismissal because 'Federal Tort Claims Act requires for both Alien Tort Claims Act and Torture Victims Protection Act tthat exhaustion of administrative remedy for subject matter jurisdiction.

Exhaustion

A suit naming the United States as a defendant could only be brought to the extent that the United States has waived its sovereign immunity. That waiver, or partial waiver, is set out in the Federal Tort Claims Act. For a suit to be brought against the United States which is not subject to dismissal for violating its sovereign immunity, the suit must pass the test of the Federal Tort Claims Act. This act requires that the party bringing suit must have

first exhausted its administrative remedy by filing a notice of claim, and not have the claim adjusted within six months.

However, the exhaustion of a claim administratively must have been satisfied within the period in which a private claim in the jurisdiction could be brought against a private party. The acts sued on in a claim by the people of Jeju would be based on acts which occurred close to seventy years ago, and therefore could not be within any conceivable statute of limitations. If a claim were filed against an individual, under the Westfall Act, the Attorney General or his designee would be required to certify whether the acts were done by the individual within the scope of their duties to the United States.

Once this certification is made, the United States would be substituted for the individual, and the provisions of the Federal Tort Claims Act discussed above would come into play. Because the FTCA requires a suit to be brought within the time a private litigant could sue another private litigant under the laws of the state where suit is brought, any attempt to bring suit so many years after the fact would be time-barred.

Thus, in Saleh v. Bush , plaintiffs brought suit against high-ranking U.S. officials asserting a violation of the law of nations by planning and commencing a war of aggression against Iraq.

The Ninth Circuit Court of Appeals did not reach the question of whether aggression had been added to the violations of international law. The Court held that under the Westfall Act, the United States could be substituted for individual defendants sued for acts carried out in the course of their employment, once the Attorney General or his or her designee has certified that the action was in the course of the official's employment, so that the United States was the only proper defendant in the case. The Court then dismissed the action against the United States for failure to exhaust its administrative remedy. Clearly, if the United States itself were named the only defendant, the limitation on its partial waiver of sovereign immunity would lead to the immediate dismissal of the claim against it.

Sovereign Immunity

As discussed above, the sovereign immunity of the United States is brought into play whenever the United States is named a party to a civil suit.

Only to the extent of the Federal Tort Claims Act has there been a partial waiver of this sovereign immunity, and a district court would apply the doctrine of sovereign immunity to bar a suit which did not satisfy the requirements of the Federal Tort Claims Act, including its limitations on the time for bringing suit.

Extraterritoriality

In re Iraq and Afghanistan Detainees Litigation , addressed claims by former detainees of the United States in Iraq and Afghanistan who alleged that they had been subject to torture. The district court analyzed the assertion of the plaintiffs that they were entitled to bring an action based on an implied right to enforce violations of the United States Constitution Fifth and Eighth Amendments. The court found that the Fifth and Eighth Amendments did not apply to injuries to individuals who were nonresident aliens injured extraterritorially while detained by the U.S. military in foreign countries where the United States was engaged in wars. The court held that these rights did not have extraterritorial application. The court relied on two earlier U.S. Supreme Court cases as compelling the conclusion that constitutional rights are not implicated when nonresident aliens are injured while detained by the military in foreign countries (citing Johnson v. Eisentrager, and United States v.

V erdugo-Urquidez , Johnson v. Eisentrager , supra , involved a petition by twenty-one German nationals who had been convicted of violations of the law of nations and who petitioned for writs of habeas corpus. The Court wrote: Even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

United States v. Verdugo-Urquidez, supra, involved a civil suit brought by a Mexican national who had been kidnaped on the Mexican side of the U.S. order by Drug Enforcement Administration agents. The United States Supreme Court held that

the kidnapping was not subject to redress under United States law because the Fourth Amendment to the Constitution did not confer rights outside U.S. territory. While the claim if the Iraq and Afghanistan torture victims who were found not to have a remedy, and the United States Supreme Court cases which were found to dictate their result were measured against the applicability of the Unites States Constitution, tthe same constraints could be expected to be applied in the case of claimants under international law who had never been inside the United States and were complaining of their treatment under international law by the United States armed forces.

Since the island of Jeju was under the complete control of the United States military for an extended period of time, the dicta in U nited States Institute for International Development v. Open Society Institute , 591 U.S, – (2020) may help to overcome the Extraterritoriality doctrine. However, no reported case has applied the limit to extraterritoriality doctrine noted by the U.S. Supreme Court in United States Institute for International Development v. Open Society Institute , id.

Political Question Doctrine

An early case of the United States Supreme Court invoking the political question doctrine was Oetjen v. Central Leather Co. In that case, the recognition of a government of Mexico as the de facto, and later de jure, government of the country by the legislative and executive branches of the United States government ("the political branches") was held to be binding on the judicial branch. Because the act of a government on its own territory was recognized as part of its sovereignty, the transaction in which certain articles were recognized as the property of the Mexican government could not be brought into question in an American court.

Bancoult v. McNamara considered the claims of indigenous people of the Chagos Archipelago in order to depopulate the island so that it could be used for a U.S. naval base The court found yet another route to dismissal of the claim.

The district court first dismissed the suit against the individual defendants under the Westfall Act (see discussion in Saleh v. Bush).

The Court of Appeals affirmed the dismissal of the principle claim on the ground that under the political question doctrine, the judgments concerning foreign policy and national security were not subject to second guessing by the judiciary, and were committed to the political branches of government.

Because the claims of the people of Jeju would bring into question the sovereignty of the government which was recognized by the United States military authority in Korea at the time of its acts, and that military authority spoke with the voice of the executive branch of the United States, these claims would be disallowed by a United States court.

This use of the "political question" doctrine to avoid deciding the merits of cases in which the court would be brought into conflict with the political branches of government, the legislative and executive, is characteristic of the United States courts in dealing with such potential conflicts.

Each of these three defenses could be expected to be raised in any attempt to sue the United States over the Jeju massacre, and each of them could be expected to be the basis for an order of the court dismissing the suit.

Moreover, if the court regarded the suit as frivolous, the plaintiff and its attorneys could be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure.

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