Time limitation under the United States Alien Tort Claims Act

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Victims of international law violations may bring civil actions for damages against the perpetrators under the United States Alien Tort Claims Act[1] (hereafter ATCA). Lawsuits instituted pursuant to the ATCA may include claims based on violations of international humanitarian law[2] but such claims are completely independent of prosecutions for war crimes or crimes against humanity that might arise from the same factual circumstances. Actions under the ATCA are not aimed at imposing penal sanctions but seek payment of monetary compensation by the defendant for the damage suffered by the victim.

Many difficult and complex problems are encountered when seeking damages under the ATCA. Problem areas include establishing that the circumstances fall within the scope of the ATCA and obtaining the evidence to prove that the defendant was responsible for the violation. Even if a plaintiff is successful in court, the execution of the resulting decision is rarely achieved as defendants are usually not resident in the United States and do not have assets located in a place where the judgment can be enforced.[3]

Additionally, a requirement of utmost importance is the need to file the action within the limitations period that applies to the ATCA. However, for some time this requirement posed additional problems due to inconsistent case law as to what limitations period did apply. For example, in *Forti, et al.* v. *Suarez-Mason*[4] (hereafter *Forti*), the Federal District Court for the Northern District of California adopted the one-year Californian statute of limitations for personal injury actions. In contrast, i*n Estate of Winston Cabello* v. *Fernandez-Lorios*,[5] the Federal District Court for the Southern District of Florida applied the ten-year period contained in the Torture

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Victim Protection Act of 1991[6] (hereafter TVPA). The United States Court of Appeals decision in *Wesley Papa, et al.* v. *United States and the U.S. Immigration & Naturalization Service*[7] (hereafter *Papa*) appears to provide an approach that should lead to more harmony in future decisions on this issue. The purpose of the present article is to examine this aspect of the *Papa* decision.

The Alien Tort Claims Act

The ATCA is an important mechanism through which damages for violations of international law may be sought in civil proceedings in the United States. An action brought under this statute must be filed by a foreign national and may be brought in respect of a violation committed anywhere in the world. The ATCA provides:

> "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."[8]

1 28 U.S.C. § 1350 (1982). Unless stated otherwise, cited legislation is that of United States federal jurisdiction.

2 A good illustration of a violation of international humanitarian law held to be within the scope of the ATCA is found in *Kadic* v. *Karadzic*, 70 F.3d 232 (2nd Cir. 1995) (holding that the former Bosnian Serb leader may be liable under the ATCA for genocide, war crimes and crimes against humanity in his private capacity). See also *Iwanowa* v. *Ford Motor Company and Ford Werke A.G.*, 67 F. Supp. 2d 424, p. 440 (D.C.N.J.) (holding that enslavement and deportation of civilian populations during World War II constitute a crime against humanity and as such is within the scope of the ATCA); *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, p. 1180 (D.C. Cir. 1994) (acknowledging that forced labour of civilians during World War II violated international law); and *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, p. 715 (9th Cir. 1992) (finding that "the universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts... are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*" and as such they come within the ATCA).

3 See, for example, note 11 below.

4 672 F. Supp. 1531, p. 1549 (District Court, Northern District of California, 1987).

5 157 F. Supp. 2d 1345, p. 1363 (District Court, Southern District of Florida, 2000).

6 28 U.S.C § 1350.

7 281 F.3d 1004 (Court of Appeals, 9th Circuit, 2002). The decision in *Papa* was reaffirmed recently in the consolidated cases of *Deutsch* v. *Turner Corporation*, *et al.* and *In re World War II Era Japanese Forced Labour Litigation*, 317 F.3d 1005, p. 1028, n. 18 (Court of Appeals, 9th Circuit, 2003).

8 The current version of the ATCA came into force in 1982. It was originally adopted as part of the Judiciary Act of 1789. Although the statute as now formulated consists of a text different from the 1789 statute to reflect changes in judicial structure and procedural modifications, there has been little substantive change between the two versions, which are separated in time by almost two hundred years. See Pryor, K.L., "Does the Torture Victim Protection Act signal the demise of the Alien Tort Claims Act?", *Virginia Journal of*

In the first 191 years of its existence, the ATCA lay dormant to a large extent.[9] It was only after the 1980 landmark case of *Filártiga* v. *Peña-Irala*[10] (hereafter *Filártiga*) that there commenced an unprecedented resort to the ATCA by foreign victims of human rights violations.[11] However, many of the post-*Filártiga* cases have been denied federal jurisdiction, and the incumbent United States administration has currently made it clear that it opposes much of the *Filártiga*-based case law in favour of plaintiffs.[12] Nonetheless, there have been notable examples of success that should continue to generate interest in the ATCA as an important form of redress for violations of international law, including international humanitarian law.[13]

In addition to the ATCA, the TVPA was passed by the United States legislature specifically in respect of damages for torture and extrajudicial

International Law, Vol. 29, 1989, p. 970. The original version provided: "And be it further enacted, that the district courts (c)... shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States.", Judiciary Act of 1789, Chapter 20, § 9, 1 Stat. 73, 77 (1789).

9 It was asserted 21 times during this period and only in two cases did a federal court accept jurisdiction over the claims brought pursuant to the ATCA. Randall, K.C., "Federal jurisdiction over international law claims: inquiries into the Alien Tort Statute", *New York Journal of International Law and Politics*, Vol. 18, 1985, p. 4 and Pryor, K.L., *op. cit.* (note 8), p. 974. One of the most frequent reasons for denial of asserted jurisdiction under the ATCA has been that the alleged conduct was insufficient to constitute a violation of international law as required by the statute. See Pryor, K.L., *op.cit.* (note 8), p. 989.

10 630 F.2d 876 (Court of Appeals, 2nd Circuit, 1980).

11 The Court of Appeals in *Filártiga* held that the ATCA provided jurisdiction for a tort claim to be brought by two Paraguayan nationals against a former Paraguayan chief of police in respect of the torture to death of a family member in Paraguay. In finding jurisdiction, the court found that:

> "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."

Filártiga v. *Peña-Irala*, *Ibid.* p. 878. On remand, the defendant took no further part in the proceedings and a default judgment of over USD 10.4 million was awarded against the defendant; 577 F. Supp. 860, p. 866. As is frequently the case with ATCA judgments, no enforcement of this award has been made. See Human Rights Watch, "Defend the Alien Tort Claims Act", 29 July 2003, available at: <www.hrw.org/campaigns/atca>.

12 For example, in an *amicus* brief filed before the Federal Court of Appeals for the Ninth Circuit on 8 May 2003 in *John Doe I, et al.* v. *Unocal Corporation*, *et al.*, Nos. 00-56603 and 00-56628, an appeal from the District Court for the Central District of California, the Department of Justice asserts that the ATCA "cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law" and seeks a much more restricted construction of the ATCA than adopted in *Filártiga*; see brief pp. 4-5, reprinted at <www.uscib.org/docs/unocal_us_amicus.pdf>. Such a position does not appear to have been taken by previous administrations.

13 See, for example, the decisions in *Kadic* v. *Karadzic*, *op. cit.* (note 2) and *Hilao* v. *Estate of Ferdinand Marcos*, 103 F.3d 767 (Court of Appeals, 9th Circuit, 1996) (relating to torture and other abuses by the former President of the Philippines).

killing.[14] An examination of the practical differences between the ATCA and the TVPA is beyond the scope of this article. For present purposes, it is important simply to note that the TVPA has an express ten-year statute of limitations period, whereas the ATCA contains no limitations period.

Papa v. *United States*

The relevant facts of *Papa* are as follows: Mauricio *Papa*, a Brazilian national, died in 1991 while in the custody of the Immigration and Naturalization Service. His family filed suit in 1999 on various grounds, including claims based on the ATCA, which the District Court for the Central District of California dismissed. One reason for the dismissal of those claims was that they were statute-barred under the law of California.[15] Apparently, the lower court applied a one-year limitations period under the Californian statute of limitations for death caused by a tort.[16] The Court of Appeals rejected the District Court's adoption of the California statute of limitations and held that the proper statute of limitations period to be adopted was found in the TVPA. In applying the latter period, the ATCA claims were found to be timely. The Court of Appeals stated the federal law governing the adoption of a statute of limitations as follows:

> "The ATCA specifies no statute of limitations. In such situations, courts apply the limitations periods provided by the jurisdiction in which they sit unless 'a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking'."[17]

14 Section 2 of the TVPA states:

"(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(...)

(c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."

15 *Papa, op. cit.* (note 7), p. 1013.

16 See Stern, P.J., "Ninth Circuit finds 10-year statute of limitations applies to Alien Tort Claims Act", April 2002, available at: <www.mofo.com/news/general>.

17 *Papa, op. cit.* (note 7), pp. 1011-1012, quoting *North Star Steel Co.* v. *Thomas*, 515 U.S: 29, 35, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995).

On this basis, the Court held:

> "The TVPA, like the ATCA, furthers the protection of human rights and helps 'carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights'. Moreover, it employs a similar mechanism for carrying out these goals: civil actions. The provisions of the TVPA were added to the ATCA, further indicating the close relationship between the two statutes. All these factors point towards borrowing the TVPA's statute of limitations for the ATCA."[18]

The decision in *Papa* should serve as a basis to harmonize the limitations period to be used in ATCA actions and has the poterntial to bring to an end the inconsistent decisions as to the applicable time period. If *Papa* gains general acceptance by other federal courts of appeal, plaintiffs and defendants will be able to determine with greater accuracy when their unfiled ATCA claim will become time-barred.

Of benefit particularly for plaintiffs is the length of the period chosen by the Court of Appeals. Ten years is considerably longer than the municipal statutory limitations periods that some courts have applied to the ATCA.[19] The longer period adopted gives plaintiffs much needed time to prepare their case, especially when they reside in a distant country from which their departure is difficult, do not understand English (the language in which the case needs to be filed), fear retaliation for bringing the claim. Further, evidence would usually have to be collected in the jurisdiction in which the defendant might have political, military or other influence to interfere further with the rights of the victim.[20] Concerns of this type were hinted at by the Court in *Papa* when it stated that:

> "... the realities of litigating claims brought under the ATCA, and the federal interest in providing a remedy, also point towards adopting a uniform — and a generous — statute of limitations. The nature of the violations suffered by

18 *Papa, op. cit.* (note 7), p. 1012, quoting Pub. L. No. 102-256, 106 Stat. 73 (1992). It should be mentioned that in cases decided prior to 1991, courts did not have the benefit of utilizing the requisite "closer analogy" of the TVPA because it did not then exist.

19 For example, in *Forti, op. cit.* (note 4), p. 1549, the court adopted California's one-year statute of limitations for personal injury actions.

20 See: Collingsworth, T., "The key human rights challenge: developing enforcement mechanisms" in *Harvard Human Rights Journal*, Vol. 15, 2002, p. 202, where Collingsworth states that in *Doe* v. *Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1999), "the plaintiff's lawyers were not able to travel to Burma to interview witnesses because they could not get visas. Even if they could have travelled to Burma, they would have risked arrest or physical harm."

those the ATCA, like the TVPA, was designed to protect will tend to preclude filings in United States courts within a short time."[21]

Having said this, it is of interest to survey briefly rules as to time limitation in the sphere of international law to which no reference was made in *Papa*. It may validly be asked, if the basis of the claim under the ATCA is a violation of international law, why the limitations period should not also be governed by international law.[22]

Under international law, no limitations period exists for the prosecution of war crimes and crimes against humanity.[23] The recognition by States of the gravity of these crimes and the need for their punishment and prevention in the future have led to the formulation of this principle. In the context of civil actions under the ATCA, the violations in respect of which claims under that statute are based might also amount to war crimes and crimes against humanity.[24] On this basis — and together with the absence of an express limitations period in the ATCA — it could be argued that no limitations period should apply to ATCA claims that overlap with such crimes.

However, the case law demonstrates that United States courts have not entertained seriously a view that any claim under the ATCA is free from a limitations period. That the threat of civil litigation must come to an end at some stage is a long-established rule of public policy and a practical necessity.[25] In this regard, international law recognizes that in matters of a non-criminal nature the limitation of actions is a general principle of international law.[26] This notion finds expression in international law through the principle of extinctive prescription, sometimes known as *laches*.

21 *Papa, op. cit.* (note 7), p. 1012.

22 See generally, Stern, P.J., *op. cit.* (note 16).

23 See, for example, Article 1 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 25 November 1968, entered into force on 11 November 1970; Article 1 of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, 25 January 1974, entered into force on 27 June 2003; and Article 29 of the Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002. Despite the absence of the United States as a signatory to these instruments, they appear to evidence a rule of customary international law that statutory limitations periods are not applicable to war crimes and crimes against humanity. As regards recent State practice, it is noteworthy that on 21 August 2003, Argentina's Senate unanimously approved a bill to eliminate Argentina's statute of limitations concerning war crimes and crimes against humanity. Noted in American Society of International Law, *International Law in Brief,* 26 August 2003.

24 See note 2 above.

25 See, for example, the legal maxim *interest republica ut sit fines litium* (it concerns the interest of the State that there be an end to lawsuits).

26 For example, as far back as 1925, the Institute of International Law studied the subject of limitation of

No standard definition of extinctive prescription exists in international law. The International Court of Justice referred to it in the following manner (though not by name):

"The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[27]

actions and concluded that: "Practical considerations of order, of stability and of peace, long accepted in arbitral jurisprudence, should include the limitations of actions for obligations between states among the general principles of law recognized by civilized nations, which international tribunals are called upon to apply." Institute of International Law, "Limitations of actions in public international law", reprinted in *American Journal of International Law*, Vol. 19, 1925, p. 760. In this context, reference should be made to the mechanisms established for individuals to complain against States under three important United Nations human rights treaties in respect of which no express time limit within which to make a complaint is provided. Nonetheless, there are provisions in these treaties whereby communications may be inadmissible for unreasonable delay in submission if they are considered to be an "abuse of right". See Article 3 of the 1966 Optional Protocol to the International Covenant on Civil and Political Rights, 18 December 1966; Article 4 of the 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999; and Article 22(2) of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984. Under the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, 21 December 1965, exceptional circumstances aside, a communication of a violation of the Convention must be submitted within six months after all available domestic remedies have been exhausted pursuant to Rule 91(f) of the Rules of Procedure of the Committee on the Elimination of Racial Discrimination. Outside the UN human rights treaty system, the Eleventh Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, enables States or individuals to apply to the European Court of Human Rights. However, this application must be filed within six months from the date when the relevant final decision was taken.

27 International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru* v. *Australia) (Preliminary Objections)*, Judgment of 26 June 1992, ICJ Reports 1992 p. 240, para. 32. Extinctive prescription applies not just to inter-State disputes but also to claims by individuals against a State brought through means of diplomatic espousal. The principle is flexible and leaves much discretion with the adjudicator as to how it should be applied. Concerns as to the respondent's inability to collect sufficient evidence supporting a claim — evidence that may be lost or destroyed during the time that has elapsed — underlie the principle. Additionally, issues such as whether the delay was attributable to the claimant or whether it was beyond the claimant's control are also considered. Under the principle of extinctive prescription, the length of time after which a claim is deemed time-barred may be much longer than ten years. For example, in the Italian-Venezuelan Commission of 1903, the *Tagliaferro* decision allowed the presentation of a claim after a delay of 31 years, apparently because of notification of the claim to authorities of the respondent State immediately after the event in dispute; decision reprinted in Ralston, J.H., *Venezuelan Arbitrations of 1903*, Government Printing Office, Washington, 1904, p. 764. Similarly, see the *Giacopini* decision, where for similar reasons the same Commission accepted a claim that was 32 years old;

In the United States, resort to international law to determine the limitations period under the ATCA was rejected in the *Forti* decision.[28] This decision appears to imply that the case-by-case approach as is required by the principle of extinctive prescription "would be tantamount to permitting the federal claim to be brought at any time. Such a rule has repeatedly been rejected by the United States Supreme Court as 'utterly repugnant to the genius of our laws'."[29] This is an inaccurate if not unjustified assessment of the principle. On the contrary, under international law the claimants cannot bring a claim any time they please. The risk always exists that extinctive prescription will be pleaded and may operate to render an entire claim inadmissible. In any case the principle is based on notions of equity and fairness, which are intended to ensure that the respondents are protected from any injustice that may result from the delayed filing of the claim.

One valid criticism of the flexibility inherent in the principle of extinctive prescription is that it leaves claimants and respondents uncertain as to whether a claim is time-barred until a tribunal uses its discretion to determine that issue. This criticism is to some extent offset by the benefits of the system in providing justice to claimants, in allowing them to file a delayed claim in justifying circumstances, and also protecting respondents from the adverse consequences of the delay.

Regardless of the uncertainties that might be involved with adopting international law rules on time limitation, considerations of fairness and equity also permeate the 10-year statutory limitations period as it applies to the ATCA. Such considerations, admittedly for the benefit of plaintiffs, arise under US federal principles of equitable tolling. Under these principles, the running of time under a given statute of limitation is deemed to have stopped for a period during which certain circumstances are present.

decision reprinted in Ralston, J., *Ibid*., p. 765. Indeed, there have been international law cases where circumstances have demanded that delayed claims be disallowed for a period of delay much shorter than 10 years. See, for example, the Davis decision where the British-Venezuelan Commission of 1903 rejected the case for a delay in notice of two years; decision also reprinted in Ralston, J. *Ibid*., p. 406. See generally, King, B.E., "Prescription of claims in international law", *British Year Book of International Law*, Vol. 15, 1934, p. 82; Ibrahim, A.R., "The doctrine of Laches in international law", *Virginia Law Review*, Vol. 83, 1997, p. 647; and Weeramantry, J.R., "Extinctive prescription and delay in the presentation of international claims", forthcoming article.

28 *Forti, op. cit.* (note 4), p. 1547.

29 *Ibid*., quoting *Wilson* v. *Garcia*, 471 U.S.C. 261, p. 271, 105 S.Ct. 1938, p. 1944.

In *Forti*, the court observed that equitable tolling occurred

> "(1) where defendant's wrongful conduct prevented the plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim."[30]

Such criteria offer a degree of discretion to a court and inject equitable notions into its analysis not uncommon in the application of time limitation principles as found in international law.

In conclusion, while the decision in *Papa* did not refer to any principles of international law when it determined what time limitation period should apply to the ATCA, equitable tolling rules under United States federal law afford a flexibility that has some similarities with the system of time limitation as it operates in international law. The tolling rules, coupled with the adoption of a ten-year limitations period in *Papa*, appear to give plaintiffs a reasonable opportunity to file timely claims. However, whether plaintiffs may file outside of the ten-year period for understandable and legitimate reasons will depend on the discretion of the court. It will be of interest to see how courts use that discretion in applying the tolling rules in light of the limitations period of ten years as adopted in *Papa* and also in view of the restrictive approach to the ATCA strongly advocated by the present United States administration.

30 *Ibid*., p. 1549.

Women facing war

by Charlotte Lindsey

The ICRC study *Women facing war* is an extensive reference document on the impact of armed conflict on the lives of women. Taking as its premise the needs of women, e.g. physical safety, access to health care, food and shelter, in situations of armed conflict, the study explores the problems faced by women in wartime and the coping mechanisms that they employ. A thorough analysis of international humanitarian law, and to a lesser extent human rights and refugee law, was carried out as a means to assess the protection afforded to women through these bodies of response to the needs of women as victims of armed conflict.

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