

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2004

Remarks on the Alien Tort Claims Act and Transitional Justice

Eric A. Posner

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Eric Posner, "Remarks on the Alien Tort Claims Act and Transitional Justice," 98 American Society of International Law Proceedings 56 (2004).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

has proven itself capable of opening its courts to the victims of human rights offenses, but doing so in measured, judicious, and above all clear terms. We should have faith in its ability to do so in the future as well.

REMARKS BY ERIC A. POSNER*

The term transitional justice refers to the moral and political ideals that guide the regime transition of a state, usually from authoritarianism to democracy. Transitional justice measures, including trials, truth commissions, reparations, and purges, have played important roles in transitions in the wake of World War II (Germany and Japan), in Southern Europe in the 1970s (Greece and Portugal, though not Spain), in Latin America in the 1980s (especially Argentina), often in eastern Europe in the late 1980s and early 1990s (the Czech Republic, Hungary, Poland), and in other places as well, such as South Africa.*

Even when transitional justice measures are not adopted, they are almost always debated, so their possibility shapes the politics of the transition. Every transitional government faces a dilemma. On the one hand, there are strong moral and political reasons to do backward-looking substantive justice. The leaders and officials of the old regime, and collaborators and spies among the public, are still at large. Many of them have amassed great wealth and retain power over institutions and resources, as well as influence in bureaucracies, including the military. The public seeks justice or vengeance for the misery it has undergone during decades of authoritarian rule. These reasons present a strong case for transitional justice measures, including trials, reparations, and purges.

On the other hand, there are strong moral and political reasons *not* to do justice—to draw a line between the past and the present, as is often said. Initially, one must understand that the transition is almost always made possible because of a deal between the old regime and its opponents. The old regime yields power peacefully in return for certain immunities. But it is not just a matter of words. The old regime almost always retains power—say, in the military or industry—and it can use that power to make life difficult for the new regime if it reneges on the deal. Every transitional government understands that it cannot satisfy all the calls for revenge or justice without risking resistance, perhaps instability, and maybe a coup.

A further point is that the transitional justice measures—trials, truth commissions, reparations, and so forth—are immensely expensive and disruptive; they unsettle property rights, burden the budget, use up scarce resources, and interfere with the establishment of market institutions. Finally, many people feel moral queasiness about punishing the perpetrators of the old regime and their many supporters. Václav Havel has been eloquent on this topic: in a totalitarian society, nearly everyone is complicit in the maintenance of the regime. Not everyone can be punished, and the selection of some to be punished while others are not will inevitably seem morally arbitrary.

All transitional states weigh the moral and political reasons for and against transitional justice measures. Most compromise. They engage in some backward-looking justice—often through trials, but also using reparations and purges—but they also issue amnesties or simply abandon transitional justice measures when the price is too high.

In Germany and Japan, the United States initially prosecuted war criminals and human rights abusers quite vigorously and executed a great number of them, but U.S. authorities eventually decided that members of the old regime were necessary for running the new democracy. Industrialists were needed to revive the economy; experienced judges and bureaucrats were needed; even military officials were needed in the face of the Soviet threat. Eventually, amnesties were issued.

* Kirkland & Ellis Professor of Law, University of Chicago Law School. Thanks to Bill Martin for research assistance.

* For a discussion, see Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).

In Argentina the Alfonsín government sought to prosecute the leaders of the old regime for human rights violations and even conducted a major trial, but the effort to exert judicial process over soldiers eventually failed because the soldiers refused to appear for trial. A rebellion was barely avoided, and Alfonsín's successor issued pardons. Out of this delicate compromise emerged the current democratic system.

In Chile, the Pinochet regime yielded power over the day-to-day running of the country but retained power in the military. Periodic efforts to prosecute Pinochet and his followers were cut short after they provoked civil instability.

In the Philippines, Aquino's government initially prosecuted military officials from the Marcos regime but the soldiers resisted and there were many attempts at coups. To solidify military support for her administration as well as against various insurrections, she cut back on the prosecutions.

In the former East Germany, initial enthusiasm for the prosecution of old regime leaders and minor wrongdoers like border guards gave way as the moral, political, and legal complexities of the litigation became clear.

Numerous Alien Tort Claims Act cases have arisen from regime transitions, all of them involving victims of the old regime suing officials and soldiers who tortured them or killed or tortured their families. There have been several cases from the Philippines and a few from Argentina, Haiti, Chile, Guatemala, South Africa, and the former Yugoslavia.

Is it a good thing for an American court to take jurisdiction over these disputes and award damages to successful plaintiffs?

One possibility is that it does not matter. The defendants will never pay the damages; the victory is symbolic. As a practical matter, the plaintiffs get a kind of vindication, and the defendants will not be able to keep assets in the United States. We might wonder whether this is a good use of judicial resources—imagine if every victim of every human rights abuse brought a case against his persecutor in U.S. courts—but I prefer to consider a world in which these cases do matter because there is a possibility that the awards will be paid, either by the defendant or by his government or by a corporation with assets in the United States.

The problem is that judgment of an American court unilaterally, without any careful consideration of the transitional bargain, interferes with the delicate negotiations that led to the transfer of power. The ATCA is a crude blunderbuss of a weapon for advancing human rights. The old regime officials know that if they give up power, they and their supporters are vulnerable to ATCA litigation in the United States; the liberal opponents who seek a transition have no way of assuring them that they will be immune. They can offer the old regime leaders only immunity under domestic law wherever they are—Argentina, Hungary, the Philippines—but not immunity under American law.

If the officials of the old regime cannot be immunized, either in the initial bargain leading to the transition or as a part of normal politics after the transition, they will be reluctant to give up power in the first place and to refrain from political opposition later. The ATCA deprives democratic leaders of a valuable tool—amnesty or immunity—for managing the transition to democracy. As a result, the transition is less likely to occur, or if it does, to occur well. This is why, in response to ATCA litigation in New York, the Justice Minister of South Africa sent a letter to the judge, saying that the government

. . . believes that the issue of reparations is an issue which affects South Africans [sic] and should be dealt with by South Africans, if necessary, in South African courts. . . . We do not believe that the goodwill which exists in South Africa and the partnerships which have developed to deal with the past should be jeopardised by the litigation in New York.¹

¹ Letter from Minister Penuell M. Maduna to Judge John E. Sprizzo, Exh. 1 (Sept. 11, 2003) (quoted in the Brief for the United States in *Sosa v. Alvarez-Machain*, No. 03-339, at 26 n.9, available at <<http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0339.resp.pdf>>).

This does not mean that the ATCA has no conceivable benefits. It is imaginable that it could deter human rights abuses in existing regimes. But this argument overlooks the exceptional nature of regime transition. Even in purely domestic law, we do not relentlessly enforce the law when it interferes with pragmatic compromises to enduring political problems. Our own transitions—think of the Civil War—have usually involved pardons and amnesty. In any event, American citizens made the decision; they did not have to worry about the British hearing lawsuits brought by former slaves against former slaveholders. There is real value in allowing citizens of a country to determine their own response to the past. The ATCA, as recently interpreted by the federal courts, is a lamentable example of American unilateralism and insensitivity to the needs and local conditions of the foreign countries in which we intervene.

None of what I have said is an argument that the United States should take no interest in human rights abuses in countries that have undergone a transition to democracy. My claim is only that the Alien Tort Claims Act is not a good tool for helping these countries.² There are many better ways.

Transitional governments face numerous problems. Their main political problem is maintaining and enhancing public support for democratic institutions. The old guard must be either suppressed or conciliated; the general public must be persuaded that democracy is preferable to the old system. Police, soldiers, and bureaucrats must be retrained. In the former communist countries, inefficient state enterprises must be liquidated. Courts must be expanded and professionalized. All this takes money and expertise; the major democracies can supply both, as well as moral and political support, including, if necessary, military assistance if the old guard attempts a coup, as happened in the Philippines.

One of the benefits of this approach is that if this form of help works, as it often appears to, at some point after institutions have stabilized, the state may be able to revisit the past. Once the general public enjoys the benefits of market democracy, political support for the old guard will decline and efforts to address human rights abuses are less likely to lead to political instability. To some extent, this has happened in countries like Argentina and Chile.

REMARKS BY CRAIG SCOTT*

My comments are intended to approach the *Sosa v. Alvarez-Machain* case at a somewhat abstract level, as may befit my status as northern outsider and my limited expertise in the arcane world of the ATCA. I argue that lawsuits in the domestic courts of the United States and other states that use the private-law category of tort to seek legal justice for public international law human rights violations will continue to produce both profound political conflict and unsatisfactory juridical analysis as long as quite stark dichotomies between “international law” and “national law,” on the one hand, and “public law” and “private law,” on the other, continue to structure both legal theory and legal doctrine—and, perhaps most important, the practical legal imagination.¹

² For an argument that courts enforcing the ATCA should respect amnesties when they are “just” but not otherwise, see Jennifer Lewellyn, *Just Amnesty and Private International Law*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION* 567 (Craig Scott ed. 2001). I see no reason to think that courts, rather than the executive branch, should make this judgment.

* Associate Dean (Research and Graduate Studies), Osgoode Hall Law School of York University, Toronto.

¹ *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION* (Craig Scott ed. 2001). See especially Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in *TORTURE AS TORT* at 45, 52, referring to a strand of legal thought that “speak[s] of international law, public and private, in conjoined terms often using the term ‘transnational law’ to describe principles that are neither purely national nor international and which apply to private and public law relationships. What results, in effect, is law that is *neither* national nor international nor public or private at the same time as being *both* national and international, as well as public and private.” A metaphor of the relationship between international and national law as well as private and public law (e.g., between “torture” and “tort”) as “*a process of mutual translation*” is explored as one way to imagine ‘transnational law’; *id.* at 61 (emphasis in original).