Private Enforcement of International Human Rights Laws: Could a Small Church Group Successfully Combat Slavery in the Sudan?

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State-to-state enforcement is the paradigmatic method of punishing a state's violations of public international law. However, in the face of international political complexities, private citizens must sometimes undertake the heavy task of ensuring international legal protection for themselves. The recent situation in Sudan is one such example. Because of the need for Sudan's help in the war against terrorism, the United States is temporarily unable to pursue the usual means of enforcing anti-slavery mandates against Sudan's Khartoum government. A group of private citizens has thus decided to make an attempt at reparation by striking at a private entity that it sees as central to the evils it has endured—a Canadian oil company. Might this type of private enforcement prove successful on a large scale in combating entrenched human rights violators, untouchable by traditional government action? To what extent should private citizens be enforcers of international law? Were they envisioned as such under the UN Charter, the Universal Declaration of Human Rights ("UDHR"), and other such documents?

This development will illustrate how private enforcement—though perhaps nontraditional—may be one of the most successful methods of ensuring compliance with human rights laws, especially in the midst of international political pressures. And though it may seem a functionally dangerous practice to invite large-scale private litigation in politically tenuous times, private enforcement of international rights norms has long been contemplated by the Alien Tort Claims Act ("ATCA"), and more recently, the Torture Victims Protection Act ("TVPA"). Although the UN Charter and the UDHR do not provide private causes of action, more recently adopted instruments, such as the TVPA, reflect the modern need for greater flexibility in methods of international legal enforcement. In the Sudan, private enforcement may be the only way for private citizens subjected to slavery to achieve

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any sort of remuneration, at least as long as the United States continues to need the assistance of the Sudanese government.

Secretary of State Colin Powell has said that “[t]here is perhaps no greater tragedy on the face of the earth today than the tragedy that is unfolding in the Sudan.” Sudan, Africa’s largest state, is one of only two nations in the world currently recognized as engaged in the practice of traditional slavery. The United Nations Children’s Fund (“UNICEF”) estimates that Sudan has between ten and fourteen thousand slaves, while groups active in redemption efforts estimate that the number approximates one hundred thousand. In fact, “the accusation is made that slave-trading is done by government-backed, armed militias” while the government looks the other way, to compensate the militias for fighting in the nation’s fifty-year civil war. Allegations also abound regarding Sudanese involvement in non-traditional slave activities, such as forced prostitution and forced labor. Traditional slavery is clearly in violation of international law, and some theoreticians reason that these non-traditional practices may also be categorized as violations of the international law of human rights. However, slavery is an extremely profitable enterprise; one estimate puts the profit from human trafficking as high as $7 billion worldwide. And when a foreign government gains astronomically from the institution of slavery—be it directly or indirectly—and simultaneously denies its very presence, perhaps out of reputational concerns, it will likely be difficult for the international community to institute formal anti-slavery measures.

However, the international community has certainly tried to halt the practice of slavery in the Sudan. During the past five years, the United States government has worked in conjunction with the United Nations to stop the atrocities in the Sudan and to help the Islamic Khartoum government reach a peace agreement with the rebel Sudan People’s Liberation Movement/Army (“SPLM/A”). In 1997, the UN extended the mandate of the Special Rapporteur of the Commission on Human Rights to monitor the situation in the Sudan and to report to the General Assembly

on the human rights situation in the Sudan. And in September 2001, President Bush appointed former Senator John Danforth as special envoy to the Sudan to promote peace and discuss the preservation of human rights in the area.

Perhaps most significantly, Congress initiated legislation in 1999 known as the Sudan Peace Act, which, if enacted, would impose economic sanctions on Sudan for continued human rights violations and which would prohibit "the facilitation ... of the exportation ... of goods, technology, or services from Sudan ... [and] the performance by any United States person of any contract ... in support of an industrial, commercial ... or governmental project in Sudan." This provision would be particularly detrimental to foreign oil companies invested in Sudan, from which the Khartoum government receives approximately $2 million per day. The concern is that the demand for oil promotes the interests of those involved in the slave trade; the UN's most recent draft resolution on human rights, for example, indicates that the utilization of oil in Sudan has led to "coercive displacements" of individuals living in oil-rich areas (by which it means the introduction of these individuals into the slave trade). Sudanese officials have opposed similar regulations in the past on the ground that they compromise Sudan's national sovereignty; in short, the government maintains that Sudan "[has] every right to utilize the natural resources of its country." Some, however, have remained determined to limit foreign investments in the nation, especially investments that lead to oil exploration and production.

An additional provision to the Sudan Peace Act, added by the House, would have limited the operation of foreign oil companies in Sudan to an even greater extent—namely, it would forbid any company that is doing business with Sudan from participating in US capital markets. This version of the bill passed the House of Representatives with a 422 to 2 majority, and a joint Senate–House conference

8. S 1453, 106th Cong, 2d Sess § 2 (1999) (Engrossed Amendment as Agreed to by House), available at <http://thomas.loc.gov/home/c106query.html> (visited Sept 14, 2002). Different versions of the Sudan Peace Act were passed by the House of Representatives and the Senate prior to September 11th. The bill was then tabled, in response to a request issued by President Bush. In November, after two months' delay, it was reopened for consideration in the House.
10. Id.
13. Id. See also Hentoff, Sudan: Our Terrorist Comrade, Village Voice at 34 (cited in note 9).
committee was to be called to debate the inclusion of the capital markets provision.\textsuperscript{14} It appeared that strong measures were finally being taken to strike at the heart of slavery and mistreatment in Sudan. That was before September 11th.

According to US officials, in the aftermath of the World Trade Center attacks, "Sudan responded cooperatively 'across the board' to U.S. requests for specific information [regarding terrorism] and actions, making an 'implicit' offer of access to military bases and overflight rights, and providing names and locations of individuals in the Al Qaeda network, as well as access to Sudan's banking system."\textsuperscript{15} Because of Khartoum's cooperation, the US officially made Sudan part of the international "coalition against terrorism," and on September 20th, President Bush officially requested that Congress put aside any further work on the Sudan Peace Act.\textsuperscript{16} Although Bush stated in November that "the actions and policies of the Government of Sudan continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," he requested a postponement of Congressional deliberations, leaving little incentive for US or foreign companies invested in Sudan to suspend oil production.\textsuperscript{17}

As a result of the current dearth of formal governmental regulation against foreign oil investments in the Sudan, private groups have begun to seek their own source of justice. On November 8, 2001, a group of private Sudanese citizens brought a $1 billion class action lawsuit in the Southern District of New York against Talisman Energy, a Canadian oil company.\textsuperscript{18} Initiated pursuant to the ATCA, the lawsuit charges the company with violating international laws against slavery, torture, and the treatment of civilians during conflict. The lawsuit has been brought on behalf of "anyone suffering injuries and losses because of Talisman in or within 50 miles of the company's concession area in the Sudan."\textsuperscript{19} The potential for such a suit is incredible. If it succeeds, the allegedly illegal recruitment activities undertaken by the Khartoum government—which were primarily aimed at gaining the support of foreign oil money—will lose all effectiveness. By striking at the profit center currently


\textsuperscript{17} President George W. Bush, Continuation of National Emergency with Sudan: Message from the President of the United States 3 (Nov 5, 2001) available online at <http://www.ustreas.gov/offices/enforcement/ofac/presdocs/sudan01.pdf> (visited on Sept 16, 2002).

\textsuperscript{18} See The Presbyterian Church of Sudan v Talisman Energy, Inc, No 01 CV 9882 (AGS) (SDNY filed Nov 8, 2001).

fueling the practice of slavery in the area, private citizens may achieve what public institutions have not yet been able to—an end to the slave trade in Sudan.

Private groups have long sought to effect political change or ensure redress for violations of international law in the absence of adequate state-level judicial or enforcement mechanisms, particularly in the human rights arena. One theorist summarizes: "Given the apparent unwillingness of common law countries [like the United States] to initiate criminal prosecutions on the basis of universal jurisdiction, civil suits have become an important vehicle for victims of human rights abuses to enforce international law and obtain legal redress." There are several federal statutes in the US that explicitly contemplate private enforcement of international human rights laws including: the ATCA, the TVPA, the Anti-Terrorism Act of 1990, and the Foreign Sovereign Immunities Act ("FSIA"). The Presbyterian Church of Sudan filed suit pursuant to the ATCA, the most frequently invoked federal statute authorizing private enforcement of international human rights.

Filartiga v. Pena-Irala, a case that also relied on the ATCA, was brought over two decades ago in the Court of Appeals for the Second Circuit. The facts in Filartiga were very similar to the facts in the Talisman case; a number of private non-US citizens brought suit against a private person (in Filartiga, a government official), alleging that the torture perpetrated by that individual violated international law. In its amicus curiae brief, the United States government stated that torture, which is largely analogous to slavery, is unlawful under many multilateral treaties as well as under customary international law. The government further stated that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.... Private enforcement is entirely appropriate." More recent cases initiated under the ATCA have been brought against private corporations. Similarly, private suits against foreign corporations have been brought under the TVPA since its inception in 1994.

Thus, it appears that at least where there is statutory authority to privately enforce international law, both the US court system and the US government are amenable to allowing such enforcement. Van Schaack embraces the idea as well, citing

25. Id at 604.
a lack of other “effective and accessible” vehicles for human rights enforcement than state action. However, there is no other case that raises an issue with economic ramifications as strong as the *Talisman* case. Although the Sudan is not one of the world’s primary oil producers, it is a significant player. Further, the defendant in this case is not an ex-government official from Paraguay; it is a large Canadian corporation with strong commercial ties to the US. If the proposed class action is permitted to continue, it may have vast and wide-ranging effects on foreign relations and international commerce, much more than any private enforcement suit that our court system has faced in recent history.

Perhaps in contemplation of similar cases with similar effects, “delegations from forty-five countries are in the process of drafting the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (“the Hague Convention”) under the auspices of the Hague Conference on Private International Law.” The proposed Convention, if successful, would seek to bolster international enforcement via greater compliance with judgments among signatories, while imposing stricter limitations on the exercise of certain bases of personal jurisdiction in those states. In other words, it “will create the foundation for an extensive enforcement regime that will enable plaintiffs litigating in Contracting States to seek enforcement of their civil judgments in any Contracting State in which the defendant holds assets,” and it will also “regulate the exercise of jurisdiction by national courts in a way that affects cases seeking civil reparations for violations of human rights norms. ... [C]ases seeking civil damages brought on the basis of extraterritorial jurisdiction may be foreclosed in the courts of states that ratify the proposed Convention.” For example, van Schaack states that an individual victimized in Country A that flees to Country B, such that she could normally file suit in B’s courts, would be prohibited from seeking civil reparations in B if both A and B were parties to the Convention, even if the potential defendant maintained significant contacts in Country B. Instead, the individual would need to return to Country A and file suit there. These are exactly the facts of the *Talisman* case. But how can we expect these individuals to return to a country where they were oppressed as slaves in order to bring suit against an entity they believe to be instrumental in their oppression? One can easily see the conundrum—this Convention might significantly restrict plaintiffs’ abilities to file multi-billion dollar suits against private organizations in an attempt to make an end-run around state governments. Thus, a key avenue for private enforcement of human rights violations may effectively be closed.

There have been no resolutions made in this area to date; thus far, individual enforcement remains a viable mechanism for punishing human rights offenders. Many

27. Id at 141.
28. Id at 171.
argue that it is, in fact, a necessary enforcement mechanism. In short, because "[i]nstitutions based on the U.N. Charter, international multilateral treaties, or regional agreements typically address state responsibility and norm compliance but do not assign liability to individual defendants, generate enforceable remedies, or provide victims with a judicial forum in which to bear witness and confront their abusers," private enforcement of international norms in domestic courts allows a serious hole in international law to be filled.\textsuperscript{29}

But while some theorists argue that private enforcement of international human rights laws is perfectly justifiable—in fact, explicitly legal under domestic law, if not international treaty—the issue will continue to be hotly debated. Others reason that, functionally, private enforcement will prove an aberration in the realm of international law. In the Sudan, for example, multi-billion dollar suits such as \textit{Talisman} may be successful in driving out oil investors, and may thus cut down significantly on the local slave trade. However, they might be equally effective in driving the newly destitute Khartoum government into the arms of terrorists in efforts to receive funding. Considerations such as these have led the international community to reexamine its willingness to accept more liberal conceptions of private enforcement, as evidenced by the Hague Convention. Whether this will be more harmful to the cause of human rights enforcement, or will instead increase the stability of international commerce, remains to be seen.

\textsuperscript{29} Id at 161.