Religion and the Alien Tort Statute

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I. INTRODUCTION

The Alien Tort Statute, 28 U.S.C. § 1350, stands as one of the most unique laws of the United States. It provides that 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.” It has been referred to in the past by Judge Henry Friendly as a “kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.” The legal “Lohengrin” of the Alien Tort Statute has been extended by courts to provide jurisdiction over tort claims covering the violations of a number of norms of international law – for example, the prohibition against torture, the prohibition against genocide, war crimes, crimes against humanity, the prohibition against

1 Attorney, Engles, Ketcham, Olson & Keith, P.C., Omaha, Nebraska; J.D., Certificate in International and Comparative Law, Saint Louis University, 2008; B.A., Grinnell College, 2005. The author would like to thank Katherine Stevens of the Creighton University School of Law, who invited me to present this essay. He would also like to thank his parents, Dennis and Salud Marzen of Dougherty, Iowa, and his younger brother Christopher and Ryan for their kind, unending support, encouragement, and sacrifices to help make this essay possible. The author remains solely responsible for all in this essay and for any errors which occur. The author can be reached at marzen@alumni.grinnell.edu.


3 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2nd Cir. 1975).

4 Filartiga v. Peña-Irala, 630 F.2d 876, 884 (“Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the work of jurists, we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens”).

5 Kadic v. Karadzic, 70 F.3d 232, 242 (2nd Cir. 1995).

6 Id. at 243.

7 Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007).
racial discrimination\textsuperscript{8}, and terrorism.\textsuperscript{9} However, not all torts have been found by courts to be actionable under the Alien Tort Statute, including fraud\textsuperscript{10}, conversion\textsuperscript{11}, conspiracy to murder\textsuperscript{12}, and the “right to life” and “right to health.”\textsuperscript{13}

With the advent of an increased number of cases filed involving the Alien Tort Statute, cases involving the topic of religion generally are likely to become more common. In this brief essay, following a brief introduction of the Alien Tort Statute, I summarize and examine several developments concerning religion and the Alien Tort Statute, most prominently the recent injection of the Alien Tort Statute into the crisis in the United States concerning sexual abuse by Roman Catholic priests.

First, I examine the notable law review articles written by Lucien Dhooge concerning international instruments which include a prohibition of discrimination against religion,\textsuperscript{14} and discuss the fact that there is not an international convention or treaty which contains provisions today concerning a prohibition of discrimination against religion which would be actionable under the Alien Tort Statute. Second, I briefly examine a recent case involving alleged religious

\textsuperscript{8} Id. at 1209. (“Acts of racial discrimination are violations of jus cogens norms”).


\textsuperscript{10} Arndt v. UBS AG, 342 F.Supp.2d 132 (E.D.N.Y. 2006)

\textsuperscript{11} Bigio v. Coca-Cola Co., 448 F.3d 176 (2nd Cir. 2006)

\textsuperscript{12} Rzayeva v. U.S., 492 F.Supp.2d 60 (D. Conn. 2007)

\textsuperscript{13} Flores v. Southern Peru Copper Co., 406 F.3d 65 (2nd Cir. 2003)

harassment against a group of detainees at the U.S. Naval Base at Guantanamo Bay, Cuba and their claims under the Alien Tort Statute.\textsuperscript{15}

Finally, I examine the recent claims brought in the United States District Court for the Central District of California in the \textit{Juan Doe I v. Cardinal Roger Mahony, et. al.} case.\textsuperscript{16} The claims concerning the crisis involving sexual abuse by Roman Catholic priests, an area which, until recently, had not yet involved an Alien Tort Statute claim. I contend that while this area may see more claims involving the Alien Tort Statute in the near future, such claims are likely to be unsuccessful as they may be unable to identify a norm of international law which would be recognized to constitute an actionable norm under the Alien Tort Statute.

\section*{II. INTERNATIONAL TREATIES AND CONVENTION CONCERNING A PROHIBITION OF DISCRIMINATION AGAINST RELIGION}

In a 2006 law review article, Professor Lucien Dhooge outlined a number of international instruments which include a prohibition of discrimination against religion.\textsuperscript{17} He discussed a number of international documents, including the following main conventions and treaties:

\begin{itemize}
  \item \textit{International Covenant on Civil and Political Rights}: This document requires each state, in Article 2(1), to undertake “to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,
\end{itemize}

\begin{footnotes}


\item[17] Dhooge, supra note 14, at 481.
\end{footnotes}
without distinction of any kind, such as … religion.”¹⁸ However, Dhooge states that the provisions in this covenant are not obligatory, and thus not actionable, under the Alien Tort Statute, due to their non-self-executing nature.¹⁹

B. *International Convention on Economic, Social, and Cultural Rights:* The Convention states in Article 2(2) that states are to “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to … religion.”²⁰ Just as is the case with the ICCPR, Dhooge notes that this provision has not been ratified by the U.S., and is thus not actionable under the Alien Tort Statute.²¹

C. *Geneva Convention IV and Protocol II:* Geneva Convention IV, in Article 27, provides that all protected persons under the Convention are entitled to “respect” for their religious practices and convictions,²² and Protocol II extends this protection to victims of a non-international armed conflict.²³ Dhooge remarks that both of these conventions lack the requisite degree of specificity to be actionable under the Alien Tort Statute.²⁴

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¹⁹ Id. at 482.


²¹ Id.


²⁴ Id.
Overall, there is likely not a current international convention or treaty to date that contains protection from religious discrimination which would be actionable under the Alien Tort Statute. As Dhooge concludes, “unlike racial discrimination, discrimination on the basis of religious beliefs or practices has not been deemed to be _jus cogens._”\(^{25}\)

### III. _RASUAL V. MYERS AND ALLEGED DISCRIMINATION AGAINST RELIGION_

Despite the fact that there is not a current international convention or treaty to date that contains protection from religious discrimination which would be actionable under the Alien Tort Statute, Plaintiffs have still not hesitated to bring forth claims of religious discrimination under the Alien Tort Statute.

In _Rasul v. Myers_, the Plaintiffs, four citizens of the United Kingdom, claimed they were in Afghanistan in 2001 to provide humanitarian relief.\(^{26}\) They were captured by the Northern Alliance in 2001 and then were placed in United States custody and taken for incarceration at Guantanamo Bay, Cuba.\(^{27}\)

The Plaintiffs alleged that they were tortured systematically and repeatedly while incarcerated at Guantanamo by being “beaten, shackled in painful stress positions, threatened by dogs, subjected to extreme temperatures and deprived of adequate sleep, food, sanitation, medical care and communication.”\(^{28}\) In addition, they claimed harassment and discrimination while practicing their religion, “including forced shaving of their beards, banning or interrupting

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\(^{25}\) _Id._ at 486.

\(^{26}\) Rasul, _supra_ note 15, at 650.

\(^{27}\) _Id._

\(^{28}\) _Id._
their prayers, denying them copies of the Koran and prayer mats and throwing a copy of the
Koran in a toilet bucket."\textsuperscript{29}

The United States Court of Appeals upheld the federal district court’s dismissal of the
claims under the Alien Tort Statute concerning religious discrimination.\textsuperscript{30} The district court had
concluded that pursuant to the Westfall Act, \textsuperscript{31} “the plaintiffs’ claims were cognizable only under
the FTCA (Federal Tort Claims Act) because the defendants’ alleged conduct occurred within th
scope of their office/employment"\textsuperscript{32} and that the court lacked subject matter jurisdiction because
the plaintiffs failed to exhaust administrative remedies under the FTCA.\textsuperscript{33}

While resting their dismissal of the Plaintiffs’ claims concerning religious discrimination
under jurisdictional grounds, it is likely that because there is not a current international
convention or treaty to date that contains protection from religious discrimination which would
be actionable under the Alien Tort Statute, that such claims could be dismissed under this ground
as well.

\textbf{IV. THE ALIEN TORT STATUTE AND THE CRISIS OF SEXUAL ABUSE WITHIN
THE ROMAN CATHOLIC CHURCH}

Cases involving religion and the Alien Tort Statute have not only addressed allegations of
religious discrimination – they have extended into the realm of the crisis concerning sexual abuse
within the Roman Catholic Church. Last year, in April 2010, a 25-year old Mexican man filed

\textsuperscript{29} Id.

\textsuperscript{30} Id. at 661.

\textsuperscript{31} Id. at 651.

\textsuperscript{32} Id.

\textsuperscript{33} Id.
suit in the United States District Court for the Central District of California, alleging that Cardinal Roger Mahony, the Archdiocese of Los Angeles, Cardinal Roberto Rivera Carrera of Mexico City, and the Diocese of Tehuacan conspired to hide a priest’s longstanding history of child sexual abuse for violations committed both in the United States and abroad in Mexico.\textsuperscript{34}

The Complaint contained the following allegations:

“88. Upon information and belief, Defendants, in concert with each other and with the intent to conceal and defraud, conspired and came to a meeting of the minds whereby they would misrepresent, conceal or fail to disclose information relating to the sexual misconduct of Fr. Aguilar [Father Nicholas Aguilar Rivera]. Defendants also conspired and came to the meeting of the minds to violate international law and norms by failing to report his abuse to law enforcement immediately, by allowing Fr. Aguilar to flee the United States, by allowing Fr. Aguilar to secretly live and work within the Diocese of Tehuacan and by obstructing justice.

89. By so concealing, failing to report, allowing Aguilar to flee and live secretly and obstructing justice, Defendants committed at least one act in furtherance of the conspiracy.

90. Defendants’ acts described herein violate international law and norms in that Defendants conspired with one or more other person to commit acts injuries to the public health, to public morals, or to pervert or obstruct justice …”\textsuperscript{35}


\textsuperscript{35} Complaint, Juan Doe I. v. Cardinal Roger Mahony, et. al., \textit{supra} note 16, at ¶¶ 88-90.
This case is the first known to date to plead violations of the Alien Tort Statute for alleged sexual violations committed abroad by members of the clergy. As the above allegations indicate, the Plaintiffs generally plead a theory of conspiracy against the Defendants that they conspired to conceal a known history of sexual abuse of Fr. Aguilar and failed to report this history to law enforcement immediately.

Upon examination of prior caselaw involving the Alien Tort Statute, the Plaintiffs’ claim is likely to fail for two reasons. First, there is precedent which holds that pleading conspiracy to commit murder as an offense to universal human values is not actionable under the Alien Tort Statute as a violation of the “law of nations.” If conspiracy to commit murder is not actionable under the Alien Tort Statute, conspiracy to conceal a known history of sexual abuse would not be actionable as well.

In addition, the recent case of Kiobel v. Royal Dutch Petroleum Co. would also support a holding that the Archdiocese of Los Angeles and Diocese of Tehuacan would not incur any liability under the Alien Tort Statute. In Kiobel, the Plaintiffs, residents of Nigeria, brought claims against Dutch, British, and Nigerian corporations engaged in oil exploration and production and alleged that they aided and abetted the government of Nigeria in committing violations of the law of nations. These claims included: 1) extrajudicial killing; 2) crimes against humanity; 3) torture or cruel, inhuman and degrading treatment; 4) arbitrary arrest and

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36 Los Angeles Times, supra note 34.

37 Rzayeva, supra note 12, at 86-87. (“In this case, even though Plaintiffs allege that Defendants’ violation of Plaintiffs’ civil rights and their conspiracy to commit murder offended universal human values, the Complaint does not allege either a violation of a treaty or a violation of customary international law.”)

38 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010).

39 Id. at 117.
detention; 5) violation of the rights to life, liberty, security, and association; 6) forced exile; and
7) property destruction.\footnote{Id. at 123.}

The Second Circuit dismissed the claims on the basis that although while customary international law has imposed individual liability for a limited number of international law (which include war crimes, crimes against humanity, genocide, and torture), “international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.”\footnote{Id. at 120.} The Court reasoned that it did not view the absence of corporate liability under customary international law as blanket “immunity” for corporations, but rather a “recognition that the States of the world, in their relations with one another … have determined that moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her “hostis humani generis, an enemy of all mankind.”\footnote{Id. at 149.}

Thus, since the Archdiocese of Los Angeles and Diocese of Tehuacan are corporations, liability would not be incurred under the statute. Claims in the area of clergy sexual abuse involving the Alien Tort Statute are likely to be unsuccessful in the future as it is likely Plaintiffs will be unable to identify a norm of international law in this area which would be sufficiently specific, universal and obligatory to constitute an actionable norm under the Alien Tort Statute.

\textbf{V. CONCLUSION}

\footnote{Id. at 123.}
\footnote{Id. at 120.}
\footnote{Id. at 149.}
Although the Plaintiffs in the *Juan Doe I v. Cardinal Roger Mahoney, et. al.* case will likely not successfully plead their claim of conspiracy under the Alien Tort Statute, cases involving religion and the Alien Tort Statute are not likely to cease. The legal “Lohengrin” which Judge Friendly refers to is not likely to fall to the realm of operas, but into an era in which the statute remains utilized to bring to light many of the modern day violations of the law of nations, including perhaps violations concerning religious discrimination in the future, in a complex and ever-changing, globalized world.