Flores v. Southern Peru Copper Corporation

UNITED STATES COURT OF APPEALS SECOND CIRCUIT
414 F.3d 233 (2003)

Author's Note: This case interprets the federal Alien Tort Claims Act or ATCA. (This moniker *should* have been "ATS," because whether this statute actually authorized individuals to bring "Claims" under the ATS was not authoritatively resolved until the following year in the US Supreme Court's *Sosa* opinion [§10.5]. Most of the *Flores* court's substantive analysis of the ATS has been deleted. This opinion therefore focuses on the court's *method* for ascertaining whether the sources in the International Court of Justice Statute reveal a viable customary rule to apply in this case. *Flores* is one of the rare instances where a *United States* court has applied Art. 38.1 of the ICJ Statute to determine the content of International Law.

The *Flores* court applied Article 38.1 of the I.C.J. Statute to the facts of this case. Its judges thereby found that the plaintiffs had failed to establish a viable claim arising under Customary International Law.

Court's Opinion:

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Plaintiffs in this case are residents of Ilo, Peru, and the representatives of deceased Ilo residents. They brought personal injury claims under the ATCA against Southern Peru Copper Corporation ("SPCC"), a United States company, alleging that pollution from SPCC's copper mining, refining, and smelting operations in and around Ilo caused plaintiffs' or their decedents' severe lung disease. The ATCA states that "[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." Plaintiffs claimed that defendant's conduct violates the "law of nations," commonly referred to as "international law" or, when limited to non-treaty law, as "customary international law." In particular, they asserted that defendant infringed upon their customary international law "right to life," "right to health," and right to "sustainable development."

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BACKGROUND

I. Statement of the Case

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SPCC's operations emit large quantities of sulfur dioxide and very fine particles of heavy metals into the local air and water. Plaintiffs claim that these emissions have caused their respiratory illnesses and that this "egregious and deadly" local pollution constitutes a customary international law offense because it violates the "right to life," "right to health," and right to

"sustainable development."[3]

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Discussion

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Questions regarding the purpose an scope of the ATCA [enacted in 1789] did not attract substantial judicial attention until ... first recognized by a federal appellate court as a viable basis for relief in *Filartega v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)....

In determining whether the plaintiffs had alleged a violation of the law of nations, the *Filartiga* Court first identified the appropriate sources of customary international law.... [I]t determined that, in considering whether a plaintiff has alleged a violation of customary international law, a ... principle to have "ripened ... into 'a settled rule of international law,' " ... must command " 'the general assent of civilized nations.'"

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B. The "Law of Nations"

1. Definition of "Law of Nations" or "Customary International Law" for Purposes of the ATCA

... The determination of what offenses violate customary international law, however, is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source.[22] All of these characteristics give the body of customary international law a "soft, indeterminate character," Louis Henkin, *International Law: Politics and Values* 29 (1995), that is subject to creative interpretation. Accordingly, in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.

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3. On appeal, plaintiffs only pursue their claims that defendant's conduct violates customary international law rights to life and health; they no longer base their argument on a right to "sustainable development." [The latter "right" is addressed in § 11.2 of this text.]

22. "Custom is the oldest and the original source of international law as well as of law in general," the substance of which "is to be found in the practice of states." 1 *Oppenheim's International Law 25-26* (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996). The practice of states, in turn, "embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic d[i]spatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere."

First, in order for a principle to become part of customary international law, ... the principle must be more than merely professed or aspirational.

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2. Sources and Evidence of Customary International Law

In determining whether a particular rule is a part of customary international law—*i.e.,* whether States universally abide by, or accede to, that rule out of a sense of legal obligation and mutual concern—courts must look to concrete evidence of the customs and practices of States. As we have recently stated, "we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States."

In *United States v. Yousef,* we explained why the usage and practice of States—as opposed to judicial decisions or the works of scholars—constitute the primary sources of customary international law. 327 F.3d at 99-103. In that case, we looked to the Statute of the International Court of Justice ("ICJ Statute")—to which the United States and all members of the United Nations are parties—as a guide for determining the proper sources of international law.

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Moreover, as noted above, customs or practices based on social and moral norms, rather than international legal obligation, are not appropriate sources of customary international law because they do not evidence any intention on the part of States, much less the community of States, to be legally bound.

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III. Plaintiffs Have Failed to Allege a Violation of Customary International Law

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A. The Rights to Life and Health Are Insufficiently Definite to Constitute Rules of Customary International Law

As an initial matter, we hold that the asserted "right to life" and "right to health" are insufficiently definite to constitute rules of customary international law. As noted above, ... we have required that a plaintiff allege a violation of a "clear and unambiguous" rule of customary international law....

Far from being "clear and unambiguous," the statements relied on by plaintiffs to define the rights to life and heath are vague and amorphous. For example, the statements that plaintiffs rely on to define the rights to life and health include the following:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family ...
>
> – Universal Declaration of Human Rights, Art. 25.
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> – International Covenant on Economic, Social, and Cultural Rights, Art. 12.

Human beings are ... entitled to a healthy and productive life in harmony with nature.

– Rio Declaration on Environment and Development ("Rio Declaration"), United Nations Conference on Environment and Development, Principle 1.

These principles are boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them.... The precept that "[h]uman beings are ... entitled to a healthy and productive life in harmony with nature," for example, utterly fails to specify what conduct would fall within or outside of the law. Similarly, the exhortation that all people are entitled to the "highest attainable standard of physical and mental health," proclaims only nebulous notions that are infinitely malleable.

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For the foregoing reasons, plaintiffs have failed to establish the existence of a customary international law "right to life" or "right to health."

B. Plaintiffs Have Not Submitted Evidence Sufficient to Establish that Customary International Law Prohibits *Intra*national Pollution

Although customary international law does not protect a right to life or right to health, plaintiffs' complaint may be construed to assert a claim under a more narrowly—defined customary international law rule [claiming that a State cannot pollute, or allow those under its control to pollute, even if the effect is felt only *within* its borders]....

In support of their claims, plaintiffs have submitted the following types of evidence: (i) treaties, conventions, and covenants; (ii) non-binding declarations of the United Nations General Assembly, (iii) other non-binding multinational declarations of principle; (iv) decisions of multinational tribunals, and (v) affidavits of international law scholars. We analyze each type of evidence submitted by the plaintiffs in turn.

1. Treaties, Conventions, and Covenants

Plaintiffs rely on numerous treaties, conventions, and covenants in support of their claims. Although these instruments are proper evidence of customary international law to the extent that they create legal obligations among the States parties to them, plaintiffs have not demonstrated that the particular instruments on which they rely establish a legal rule prohibiting intranational pollution.

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All treaties that have been ratified by at least two States provide *some* evidence of the custom and practice of nations. However, a treaty will only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles.

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2. Non-Binding General Assembly Declarations

Plaintiffs rely on several resolutions of the United Nations General Assembly in support of their assertion that defendant's conduct violated a rule of customary international law. These documents are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations.

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Our position is consistent with the recognition in *Filartiga* that the right to be free from torture embodied in the [U.N.'s 1948] Universal Declaration of Human Rights ... has attained the status of customary international law. ...

In considering the Universal Declaration's prohibition against torture, the *Filartiga* Court cited extensive evidence that States, in their domestic and international practices, repudiate official torture. In particular, it recognized that torture is prohibited under law by, *inter alia,* the constitutions of fifty-five States, and noted the conclusion expressed by the Executive Branch of our government—the political branch with principal responsibility for conducting the international relations of the United States—that "[t]here now exists an international consensus" against official torture that "virtually all governments acknowledge." ... Accordingly, although *Filartiga* did indeed cite the Universal Declaration, this non-binding General Assembly declaration was only relevant to *Filartiga*'s [1980, pre-U.N. Torture Convention] analysis insofar as it accurately described the actual customs and practices of States on the question of torture.

In the instant case, the General Assembly documents relied on by plaintiffs do not describe the actual customs and practices of States. Accordingly, they cannot support plaintiffs' claims.

3. Other Multinational Declarations of Principle

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Plaintiffs also rely on Principle 1 of the [1992] Rio Declaration, 31 I.L.M. 874, which sets forth broad, aspirational principles regarding environmental protection and sustainable development. The Rio Declaration includes no language indicating that the States joining in the Declaration intended to be legally bound by it.

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4. Decisions of Multinational Tribunals

Plaintiffs also rely on judicial decisions of international tribunals in support of their claims. ...

With respect to the European Court of Human Rights, the Court is only empowered to "interpret[ ]" and "appl[y]" the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms—an instrument applicable only to its regional States parties—not to create new [global] rules of customary international law. *See ... also* ICJ Statute art. 38 (listing judicial decisions as "subsidiary," rather than primary, sources of customary international law)....

5. Expert Affidavits Submitted by Plaintiffs

Plaintiffs submitted to the District Court several affidavits by international law scholars in support of their argument that strictly *intra* national pollution violates customary international law. After careful consideration, the District Court declined to afford evidentiary weight to these affidavits. It determined that the affidavits "are even less probative [than plaintiffs' documentary evidence] of the existence of universal norms, especially considering the vigorous academic debate over the content of international law."

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In its seminal decision in *Paquete Habana,* the Supreme Court designated "the works of jurists [*i.e.,* scholars] and commentators" as a possible source of customary international law. *Paquete Habana,* 175 U.S. at 700, 20 S.Ct. 290. However, the Court expressly stated that such works "are resorted to by judicial tribunals, *not for the speculations of their authors concerning what the law ought to be,* but for trustworthy evidence of what the law *really is.*" *Id.* (emphasis added).

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We have reviewed the [legal experts'] affidavits submitted by plaintiffs and agree with the District Court's conclusion that they are not competent evidence of customary international law.

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CONCLUSION

For the reasons stated above, we affirm the judgment of the District Court dismissing plaintiffs' complaint for ... failure to state a claim under the ATCA.