

March 2004

Corporate America and the Need for Public Trials

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Recommended Citation

Kerrigan, Robert G. (2004) "Corporate America and the Need for Public Trials," *Florida Journal of International Law*: Vol. 16: Iss. 1, Article 18.

Available at: <https://scholarship.law.ufl.edu/fjil/vol16/iss1/18>

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*Robert G. Kerrigan**

When I was in Cuba not too long ago — which was a wonderful experience — Castro said that in the United States everybody is a specialist in something. I am not really sure what specialization I can bring to this prestigious group other than the day to day trials and tribulations of talking to people who have been victims of human rights abuses in other countries, particularly in Latin America, listening to their story, and trying to achieve some resolution that brings closure for them. I will explain what statutes we have in the United States that allow us to bring these actions. They are called the Torture Victim Protection Act and the Alien Tort Claims Act. In short, they allow a person who is in the United States, regardless of where they came from, to bring an action against any person who has acted under color of law in a nation that has inflicted upon them crimes against humanity, generally referred to as human rights violations, including genocide, war crimes, extrajudicial killings, slavery, and torture. It does not include things such as violation of environmental laws and confiscation of property. These statutes are limited to these egregious, well-respected and well-known crimes against humanity. I will talk briefly about some cases that I have personally been involved in, and some that are scheduled. One is scheduled for trial coming up in June, and then I will speak to several cases that are now pending that have survived motions to dismiss and will go on. I will conclude with the brief observation that we are on a collision course; as the imminent legal scholar, George Costanza from *Seinfeld* said, “These are worlds colliding.” Indeed, we have worlds colliding in this country between corporate America and the rights of people who have been victims of horrendous human rights violations perpetrated with the aiding, abetting, counseling, and procuring of the U.S. corporations. They do not want these cases heard in the United States. They do not want them tried. They will do what they can do to avoid it. We will talk about what they are doing right now to try to completely gut the right of citizens to bring these claims. If I could leave you with one thought and none other, it would be this:

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that as you go back, think about the possibility someday of having in your countries a similar statute that allows citizens of your country or residents of your country to bring an action against any person that comes onto the soil of your country who committed a human rights violation in any other country. If we get that uniformly done throughout the Americas, the perpetrators of these crimes would not be able to avoid the law by jumping from city to city and state to state. We have a lot of them in Florida right now.

I would make a quick comment to Michael Gordon this morning who certainly did not speak in glowing terms about trial lawyers and what essentially is a lottery system in litigation. We litigators do operate on a contingency fee; however, collecting against these criminals has not proven too successful. Most of these cases are handled on a pro bono basis. The cases against the corporations are another matter; we will talk about them. We really want to move from a contingency fee system to the corporate America system where you get stock options even if your clients lose money, but we are not there yet. For those of you who want to know what we trial lawyers think of ourselves, I will tell you. We are not short of arrogance at all. But we tend to think of ourselves as the wolves following the elk herd. We only attack the weak, and by doing so, we enhance the integrity of the herd. That is our view of our function in society. In terms of the gamesmanship that Gordon referred to, we do not see it as a Monopoly game where luck controls. We see ourselves as the Russian Kasparov playing Deep Blue. We see ourselves pitted against the tremendous resources of corporate America, in every way taking on the machine as individuals. That is how we see ourselves as trial lawyers. I have this experience, traveling in Central and South America that United States lawyers are revered. I mean, we are bashed pretty well in this country, but in every other place people are really astounded that a single lawyer can take on a giant corporation, a most powerful entity, and achieve justice for their clients.

The idea of alternative dispute resolution is good and I favor it. But there are some cases, some issues that cry out for public trials. If we are to have accountability in a world where we stress the rule of law, we have to have public trials. We recently tried a case involving murdered church women in El Salvador and, regrettably, in that case some testimony was just startling and upsetting to anybody who heard the trial. But unfortunately the culpability of the U.S. government was interwoven throughout the trial. Ambassador Corr, who became famous for the Iran Contra activities himself, having taken the Fifth Amendment before the U.S. Congress, came to our trial. Ambassador

Corr said he read in the New York Times about our trial and decided to show up and testify, which he did. He said that these generals that had presided over murder and torture and everything else were really not all that bad. Then they produced pictures of the generals shaking hands with Ronald Reagan and former Vice President Bush and we lost that trial. The second trial brought by the victims was successful and these generals were found guilty. This is a money judgment against these generals that we will likely never collect. But these victims had an opportunity to have their story heard in a public trial in the United States by someone who is living in the United States, protected by U.S. laws.

Let me just briefly cover the truly controversial cases. Many of you who do this work are familiar with this so I will just cover briefly. The Unocal case involves claims by people who were victims of torture, rape, and forced labor. Unocal had hired outside consultants to conduct a risk assessment. The consultants expressly warned Unocal that the government of Burma was going to use systematic forced labor for virtually all construction costs. They had a former attaché from the United States who told them, based on three years of service in Burma, that they could expect imprisonments, executions, forced labor and the like. The allegations in the case are that the defendant, Unocal, hired specific military battalions to perform security services, clear the pipeline route, and build infrastructure, knowingly permitted battalions to force villagers at gunpoint to work the project, and made threats to human rights groups that any threats to the pipeline would bring more soldiers and more forced labor. The Ninth Circuit has held that that claim can go forward.

Not so with Exxon Mobil. This case is John Doe vs. Exxon Mobil, alleging that the company, just like Unocal, hired the Indonesian military to provide security for its national gas facilities in Aceh, Indonesia. Exxon Mobil did so knowing that these troops, like those responsible for the massacres in East Timor, would likely engage in massive human rights violations against the local population. The allegations include that the government of Indonesia was required to designate one or more specific battalions to provide security for the company, that Exxon paid a regular fee to security forces, that they continue to do so despite the mounting evidence of atrocities committed by these forces, and that Exxon provided the security forces they hired with equipment, including earth moving equipment that was used to create mass graves. However, the State Department in a letter to the judge has said that to allow this case to go forward would interfere with

the nation's war on terrorism. That letter is under advisement by the judge at this time. That is a standard tactic that we are going to see more and more by the State Department to attempt to stop these cases from going forward. Now keep in mind, despite what has been said, these are not minor torts. We are talking about crimes against humanity which these companies are alleged to have aided, abetted, counseled, or procured the commission of.

The Coca-Cola case in Colombia that you may know about is similar. I am involved in that case. Paramilitaries were brought in to explain to people that a unionization of the plant was not a good idea. To forcefully demonstrate that point they executed a union leader in the plant and then they went around and they asked everybody, "do you still want to be in the union?" All of that took place in Colombia. There is a similar case with Drummond Company of Alabama. There are similar allegations against Del Monte for the use of torture and the eradication of leadership in Guatemala. As they say, it is not a pretty picture.

Now the current emphasis by the corporations, led by the distinguished group of citizens at the U.S. Chamber of Commerce and the International Chamber of Commerce, is to try to amend or completely gut the effect of the TPPA and the Alien Tort Claims Act against corporations. We have had this act since 1789 — as I now have learned, since before the French constitution — which is a long time. Now the corporations hope to remove it, or to attack it in the Supreme Court by saying corporations are not people; therefore, if a corporation does violate human rights, they should have complete immunity for their conduct. Another angle is working on the State Department. That has already been accomplished to some extent because of the letters that have gone out into the court saying "you can't do this. You're going to interfere with our war on terrorism."

This is a big battle. I wish the corporate people were here that were involved in these cases. I would like for them just to stand up and tell you that their corporations did not do any of these things. That would be interesting. You know when we are going to find out what really happened? In a public trial. We are not going to find out in some other system that has everybody silenced. We need public trials and for those of you going back to your countries and talking about the adversary system, where we confront people and we have tough questions, I have to say that it works pretty well in this country. The truth wins out, despite the overwhelming power of corporate interests in the United States, which will, if they can, shut down any effort to implement this

legislation or to implement redress under this legislation. I am very concerned about that in light of the current environment that we are in.

Are there problems in our tort system? Absolutely. But we are at this point in this country, which is pretty obvious now, where we have got an economy that is in bad shape. We have got mass torts every place. Lawyers are suing major corporations for all kind of mass torts involving thousands of people. Environmental problems are pervasive in almost every major community where there is industrial activity. We have got a revelation regarding investment bankers and all their conflicts of interest. So what we have in this country is real downward pressure on the economy and so the corporations are telling us that they need help. They need all the help they can get if they are going to pull out of where they are. So they test the rule of law now to see if they are going to be successful in avoiding accountability under the pretense that it is going to enhance their economic contributions to the country.

