RECORD NO. 06-6234

In The

United States Court of Appeals

For The Sixth Circuit

ANA PATRICIA CHAVEZ; CECILIA SANTOS; JOSE FRANCISCO CALDERON; ERLINDA FRANCO; DANIEL ALVARADO,

Plaintiffs – Appellees,

v.

NICOLAS CARRANZA,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
AT MEMPHIS

PAGE-PROOF BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF EL SALVADOR IN SUPPORT OF APPELLANT

John C. Kiyonaga
ATTORNEY AT LAW
526 King Street, Suite 213
Alexandria, Virginia 22314
(703) 739-0009

Counsel for Amicus Curiae Republic of El Salvador

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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I. REQUEST FOR LEAVE TO PRESENT ORAL ARGUMENT

The Republic of El Salvador respectfully requests leave to present oral argument.

II. STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Government of the Republic of El Salvador seeks to have this Court reverse the decision of the United States District Court for the Western District of Tennessee (the "trial court"). The decision of the trial court to allow the claims of Appellees derogates El Salvador's Law of General Amnesty for the Consolidation of Peace, Legislative Decree No. 486, March 20, 1993 ("Amnesty Law"). The Amnesty Law specifically precludes the claims at bar by granting absolute civil and criminal immunity to Appellant Nicolas Carranza, a former colonel in the Salvadoran armed forces accused of committing abuses during that country's civil war. The Trial Court's decision transgresses thereby the sovereignty of El Salvador and the will of its people.

III. ARGUMENT

INTRODUCTION

The Amnesty Law was a principal, if not the pivotal, requirement of the peace accords which put an end to El Salvador's civil war of the years from 1980 until 1992. The peace accords culminated in the Agreement of Chapultepec of January 16, 1992. Chapter VI, Section 1, of the agreement, "Political Participation of the FMLN," as translated from the Spanish in which the agreement is written, requires:

"the adoption of legislative or other measures as are necessary to guarantee to ex-combatants of the FMLN [the guerilla forces opposing the government of El Salvador] the full exercise of their civil and political rights in order that they be legally reintegrated into the civil, political and institutional life of the country.

This provision led to the passage of the Amnesty Law which, as translated from Spanish, reads in part:

" In Consideration:

I. That the process of consolidation of peace underway in our country demands the creation of confidence in all of society, toward the end of achieving the reconciliation and reunification of the Salvadoran family by means of legal measures for immediate effect which guarantee to all inhabitants of the republic the full development of their activities in an atmosphere of harmony, respect and confidence for all the social sectors...

IV. That in order to impel and achieve national reconciliation it is appropriate to convey the grace of full, absolute and unconditional amnesty to all persons who have in any manner participated in crimes occurring prior to January 1, 1992, be they political or common in nature...

The United States Department of State estimates that the war cost El Salvador some 70,000 killed. The State Department also recognizes that the amnesty granted by the law was neither unilateral nor a simple concession to the Salvadoran armed forces and their confederates. It was instead the product of a painfully negotiated compromise between all the combatants, which compromise was actively promoted by the United Nations and brokered by the governments of several nations to include the United States. The terms of the compromise, that is

to say the Amnesty Law, were sought and agreed to by all the combatants for the purpose of protecting all the combatants as a prerequisite to the national healing necessary for an enduring peace. The casualty figure and the characterization of the amnesty are drawn, respectively, from two publications of the State Department to be referenced further herein, *Fifteenth Anniversary of the Peace Accords*, Press Statement, January 16, 2007 ("Anniversary Message"), and *El Salvador Called Example to World for Healing Wounds of War*, Bureau of International Information Programs, USINFO, January 22, 2007 ("Example to World"). *Amicus* requests the Court take judicial notice of both publications pursuant to Fed. R. Evid. 201.

1. The Trial Court Erred in Refusing to Grant Full Faith and Credit to El Salvador's Amnesty Law.

It was undisputed at trial that El Salvador's Amnesty Law provides absolute civil and criminal immunity for crimes committed during that country's civil war and that the allegations against Appellant fell within the class of crimes covered by the law. *Chavez v. Carranza*, 2005 U.S. Dist. LEXIS 44427, *9 ("*Carranza I*"). Nonetheless, the trial court refused to recognize immunity for Appellant Carranza in the instant suit under the Alien Tort Claims Act, 28 U.S.C. Sec. 1350 ("ATCA"), and the Torture Victims Protection Act, Note to 28 U.S.C. Sec. 1350 ("TVPA"), for the reason that the Amnesty Law, in the trial court's opinion, does not address claims outside of El Salvador. *Chavez v. Carranza*, 2006 U.S. Dist.

LEXIS 63257, *15 ("*Carranza II*"). The trial court erred for the following reasons:

a. The trial court's adjudication of the instant claims violates El Salvador's sovereignty.

The trial court's refusal to grant full faith and credit to El Salvador's Amnesty Law constitutes an unwarranted intrusion into the sovereign affairs of another nation. The Supreme Court in 2004 dealt with Foreign Trade Antitrust Improvements Act and Sherman Act claims that included foreign conduct with strictly foreign repercussions. The Court cited the *Restatement (Third) of Foreign Relations Law of the United States* Secs. 403(1) and (2) in *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155, 164 (2004), for the principle that limits the "unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections to another State." Consequently, the Court ruled that the application of our antitrust laws to other nations that have their own regulatory schemes when there is no domestic harm "creates a serious risk of interference with a foreign nation[]..." 542 U.S. at 165.

The Supreme Court noted in *Hoffmann* [quoting a petitioner's pleading] that United States courts should not provide a venue "to any foreign suitor... unhappy with its own sovereign's provisions for private anti-trust enforcement..." 542 U.S. at 166. This describes perfectly the plaintiffs at bar, only in the context of anti-trust instead of tort.

Sec. 403 closes by stating that "a state should defer to the other state if that state's interest is clearly greater." As the locus of the alleged conduct at bar, the locus of the effects of that conduct, the place of residence of most of the litigants, and the progenitor of a justified expectation of amnesty, El Salvador's interest is clearly the greater under the factors set forth in Sec. 403(2). El Salvador's interest is most clearly illustrated by appreciating what the Amnesty Law has wrought. The State Department's Anniversary Message describes El Salvador's progression over the 15 years since the peace accords.

> "In this time, El Salvador's transformation has been impressive. With U.S. and U.N. support, the former insurgents are a well established political party. El Salvador is a vibrant and free democracy, and its expanding economy and increasing trade are translating into increased living standards for all Salvadorans. El Salvador's example demonstrates that war torn countries can transition to successful post conflictive societies.

The trial court's decision undermines the very vehicle of El Salvador's transformation. *Hoffmann* decries an incursion of American anti-trust regulation that diminishes other countries' anti-trust regulation as "legal imperialism." 542 U.S. at 169. How would the Supreme Court describe an incursion that jeopardizes another country's peace?

The criticality of the amnesty to El Salvador's peace is acknowledged in the State Department's "Example to the World" statement quoting the United States

government representative tasked at the time with ensuring the success of the peace negotiations.

> "That immunity, said [the United States *charge d'affaires* charged with ensuring the success of the peace negotiations, Peter] Romero, 'helped get the country beyond its civil strife and violence and moved it forward'... [I]n light of more recent conflicts where people have argued that it's more important to seek justice than it is to move the country ahead... Romero said his experience from El Salvador 'is that you need to get all the parties to agree' to a peace agreement, and 'one of the key ingredients' for achieving that end is 'if combatants know they will not be prosecuted subsequently for human rights abuses.' Granting such amnesty, said Romero, is not a 'perfect' solution, but does help move a country forward.

Importantly, the Supreme Court in *Hoffmann* premised its concerns for the sovereignty of the subject foreign nations on the effect of the claims before it on prospective grants of amnesty by those nations. " [A] decision permitting independently injured foreign plaintiffs to pursue [these claims in a US court]... would undermine foreign nations' own antitrust enforcement policies diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty..." 542 U.S. at 169.

The grant of amnesty to Appellant and all combatants of the civil war by El Salvador's Amnesty Law is not a possibility, it is already a fact. The disincentive referenced in *Hoffmann* to seeking amnesty through cooperation with authorities is certainly no more corrosive of a sovereign's interests than is impugning a statute that laid to rest a bloody civil war.

It bears emphasis that *Hoffmann's* refusal to contravene a foreign amnesty, even a prospective one, mentions no requirement that the amnesty be formulated with the intent of affecting controversies or cases in other countries. The trial court's reliance on such a requirement as a precondition to honoring El Salvador's Amnesty Law is misguided, particularly since such intent in a foreign amnesty would be a nullity. One sovereign cannot legislate the affairs of another. The trial court improvidently looks to *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) to support its reliance on such a requirement. *Sarei* has been overturned, *Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007), albeit the appellate opinion has been withdrawn and awaits substitution, *Sarei v. Rio Tinto*, 499 F.3d 923 (9th Cir. 2007).

b. The Supreme Court's latest ruling on the Alien Tort Claims Act calls for a dismissal of the instant claims.

Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) calls for "great caution" in applying the Alien Tort Claims Act. In overturning an award under the statute, the Supreme Court opined that ATCA was meant to apply only to a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs..." *Id.* at 715. Courts should consider ATCA claims, mindful "that the door is still ajar [for such claims, but is] subject to vigilant doorkeeping." *Id.* at 729.

The trial court can hardly be said to have exercised caution in allowing the instant claims when it overbore the statute of a sovereign power after having refused to hear expert testimony on the effect of the Amnesty Law and having identified no basis for its conclusion that the statute "does not prohibit legal claims brought outside of El Salvador." *Carranza II*, *15, *16, n. 3.

The trial court does not justify its derogation of the Amnesty Law by concluding that both ATCA and TVPA evince a clear congressional intent to "provide a means for victims of the law of nations to seek redress." *Carranza I*, *16. Neither ATCA nor TVPA specifically mentions or contemplates the circumstance of a countervailing foreign law of amnesty.

By the trial court's logic, every foreign law at variance with an American law would simply constitute a nullity in any American court. Choice of law, however, is not nearly so simplistic. *Sosa* describes a "flexible balancing analysis to inform choice of law" and quotes from the *Restatement (Second) of Conflict of Laws*, Sec. 146 a default rule for tort cases that " 'in an action for personal injury, the local law of the state where the injury occurs determines the rights and liabilities of the parties, unless... some other state has a more significant relationship... to the occurrence and the parties.' " 542 U.S. at 709. The United States can hardly be said to have a more significant relationship to the allegations at bar than does El Salvador.

Further, the trial court neglects *Sosa's* requirement that courts considering ATCA cases exercise "a policy of case specific deference to the political branches." 542 U.S. at n. 21. ATCA cases (and TVPA cases) implicate foreign policy, an area committed to the "executive and the legislative – 'the political' departments of the government.' " *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Courts are specifically discouraged from intruding into foreign policy matters already subject to undertakings by either of the political branches. *See Mujica v. Occidental*, 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005), *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019, 1031 (W.D. Wash. 2005), and *Iwanowa v. Ford*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999), in all of which courts declined to adjudicate "political questions" implicating foreign policy.

The executive branch of the United States Government was heavily invested in the negotiation of the peace accords and the Amnesty Law that constitutes their bulwark. The United States provided $270,000,000 per year to El Salvador as incentive to implement the peace accords. The Department of State acknowledged this in its "Example to World" statement describing the "distinctly critical" role of the United States government in the formulation of the peace accords and the Amnesty Law as related by the former American *charge d'affaires*:

> "Former U.S. diplomat Peter Romero, who was *charge d'affaires* at the U.S. Embassy in El Salvador during the Salvadoran peace negotiations, told *USINFO* January 19 that the peace accords and their implementation in El Salvador represented 'multilateralism at its best.'
>
> " 'A four-nation group dubbed 'the Friends of El Salvador' -- Colombia, Venezuela, Spain, and Mexico – plus the United States and the United Nations worked to bring about a comprehensive peace agreement and to ensure its implementation', Romero said.
>
> "Romero said he was dispatched to serve as the U.S. 'unofficial' representative to the peace negotiations; with the United States playing an 'understated' but 'distinctly critical role' for helping to ensure that the Salvadoran government and the FMLN kept to their commitments made in the peace accords. Romero said the United States provided about $270 million per year and other incentives to El Salvador to bring about implementation of the accords.

Remarkably, *Sosa* proffers circumstances similar to those at bar as illustrative of the very cases auguring judicial restraint in accepting ATCA claims. *Sosa* references *In re: South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002) which entails ATCA claims by South Africans against foreign corporations that allegedly abetted the apartheid regime. The governments of the United States and of South Africa both interceded with the *South African* court to caution that the suit was inimical to the policy of South Africa's post-apartheid government of reconciliation between former combatants. Citing deference to the view of the executive branch and to the interests of South Africa, *Sosa* calls for caution in accepting the claims. 542 U.S at n. 21. The impact of the claims at bar on the interests of El Salvador should be no less worthy of consideration.

c. Comity precludes adjudication of the instant claims.

The trial court describes, not incorrectly, the principle of comity as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other... [but] one of practice, convenience and expediency." *Carranza I*, *11 [*quoting Comportex v. Phila. Chewing Gum*, 453 F.2d 435, 440 (3d Cir. 1971)].

The trial court apparently does not consider that the Amnesty Law was an undertaking of the United Nations, born of the peace negotiations sponsored by the UN as the State Department acknowledges in its "Example to the World" statement. Certainly, practice and expediency call for deference to an undertaking of the world's preeminent body of international regulation.

IV. CONCLUSION

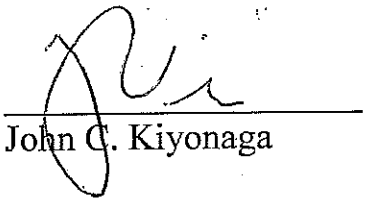
The political stability currently enjoyed by El Salvador stands as an example of reconciliation to all the strife torn nations of the world. Factions that less than 20 years ago waged a bloody civil war against each other, today address their differences through the institutions of a robust democracy. This remarkable transition was made possible by the Amnesty Law, a statute that signifies the will of all the combating factions and the people of El Salvador as a whole to reconcile and move forward as a nation rather than wallow in destructive recriminations. Appellees' claims undermine this reconciliation and the stability it has created.

El Salvador and the Salvadorans deserve the future that the Amnesty Law has made possible. It is not for the trial court, or any foreign court or entity, to jeopardize that future.

The decision of the trial court to allow Appellees' claims violates the sovereignty of El Salvador and offends the Supreme Court's proscriptions on the action at bar and the principles of comity. It should be reversed.

Respectfully submitted,

Republic of El Salvador
By Counsel



John C. Kiyonaga

526 King Street, Ste. 213
Alexandria, VA 22314
(703) 739-0009

Counsel for Republic of El Salvador

V. CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of April, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit, via UPS Next Day Air, the required copy of this Page-Proof Brief of Amicus Curiae, and further certify that I served, via UPS Next Day Air, one copy of said brief to the following:

Robert M. Fargarson, Esq.
Fargarson & Brooke
65 Union Ave., 9th Fl.
Memphis, TN 38103

Counsel for Appellant

David R. Esquivel, Esq.
Bass, Berry & Sims PLC
315 David Deaderick Street, Suite 2700
Nashville, TN 37238-3001

Matthew J. Eisenbrandt, Esq.
Center for Justice & Accountability
870 Market St., Ste. 684
San Francisco, CA 94102

Carolyn Patty Blum, Esq.
Center for Justice & Accountability
291 W. 12th St.
New York, NY 10014

Counsel for Appellees

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

THE LEX GROUP VA
1108 East Main Street, Suite 1400
Richmond, Virginia 23219
(804) 644-4419