



20th August 2009

INTERNAL MEMORANDUM

Research Notes: Fonseka/Gotabaya Legal Action

Following Approaches to Jurisdiction Dismissed

1) FSIA-based

- FSIA does not explicitly apply to individual foreign officials
- FSIA protects neither former officials nor officials operating outside the "scope of their lawful authority"

2) Dual Citizenship (*Kawakita v. United States*, 343 U.S. 717 (1952)) v. sovereign immunity (FSIA)

- despite GR's status in SL, *Kamakita* precedent asserts dual citizens may not therefore violate U.S. laws (ATCA, TVPA, etc.)

Consensus in US ATCA/TVPA case law:

- 1) Jus Cogens norms and international customary law are part of US common law
- 2) Torture prohibition is part of international customary law and a jus cogens norm
- 3) Official Acts of Torture are violations of the Law of Nations
- 4) Doctrine of Military Command Responsibility is recognized
- 5) Tort Exceptions to Sovereign Immunity are met, sovereign immunity may be implicitly waived
- 6) Post-Alvarez-Machaine, ATCA establishes jurisdiction; TVPA establishes cause of action

Case Law: Recognizing Torture as prohibited by Customary International Law:

- *SIDERMAN de BLAKE v. REPUBLIC OF ARGENTINA*
- *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)
- *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)
- U.S. signed the UN Torture Convention in 04/1988
- other (TBD)

Case Law: Recognizing Military Command Responsibility:

- *In re Yamashita*, 327 U.S. 1, 14-16, 66 S.Ct. 340, 347-48, 90 L.Ed.499 (1946)
- *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (1987)
- *HILAO v. MARCOS*, 103 F.3d 767
- *Xuncax v. Gramajo*, 886 F.Supp. 162, 192 (D.Mass.1995)
- *Paul v. Avril*, 901 F.Supp. 330, 335 (S.D.Fla.1994)
- *CABELLO V. FERMAMDEZ-LARIOS*, 402 F.3d 1148 (2005)
- *ARCE v. GARCIA*, 434 F.3d 1254 (2006) : El Salvador equivalent of Sri Lankan case, but former head of state, main issue was statute of limitations
- other (TBD)

Law Review Articles

- Sornarajah, Problems in Applying the Restrictive Theory of Sovereign Immunity, 31 Int'l and Comp. L. Q. 661, 685 (1982).
- Riesenfeld, Sovereign Immunity in Perspective, 19 Vanderbilt J. Transnat'l L. 1, 18 (1986).
- Note, Jurisdiction Over Foreign Governments: A Comprehensive Review of the Foreign Sovereign Immunities Act, 19 Vanderbilt J. Transnat'l L. 119, 179 (1986).
- Note, Sovereign Immunity, 18 Harv. Int'l. L.J. 429 (1977).
- Trooboff, Foreign State Immunity: Emerging Consensus on Principles, 200 R.C.A.D.I. 235, 255-71 (1986).