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Andrew B. Mohraz

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THE IMPACT OF THE U.S. SUPREME COURT'S DECISION IN *SOSA V. ALVAREZ-MACHAIN* (2004) ON THE ALIEN TORT STATUTE

Andrew B. Mohraz*

I. INTRODUCTION

ON June 29, 2004, the U.S. Supreme Court affirmed the use of a 200-year old statute permitting a foreigner to bring a tort claim in U.S. federal court for a violation of international law.¹ Under a law passed by the first Congress in 1789, the Alien Tort Statute (ATS), a Mexican doctor, Humberto Alvarez-Machain, filed suit in the United States against another Mexican national, Jose Francisco Sosa.² Alvarez-Machain alleged that Sosa's participation in a Drug Enforcement Administration (DEA) plan in 1985 to abduct Alvarez-Machain from Guadalajara and subsequently transport him to the United States to stand trial for murder constituted a violation of the law of nations, a key element in establishing jurisdiction in U.S. federal court under the ATS.³

While the Court rejected Alvarez-Machain's claim, holding that his detention for less than a day violated no international norm,⁴ the significance of the case lies in what the court chose not to hold. By refusing to limit or prohibit the use of the ATS, the Court has kept open the possibility that foreigners can use U.S. courts to bring selected claims against foreign governments, multinational corporations, and possibly even the U.S. government itself. In fact, a class action was filed against U.S. defense contractors for the abuses that occurred at the Abu Ghraib prison in Iraq in late 2003. The purpose of this note is to understand and explain the Court's ruling in *Sosa* and assess its implications for future litigation under the ATS.

* Andrew B. Mohraz is a 2006 J.D. graduate from the Dedman School of Law at Southern Methodist University. Prior to attending law school, the author obtained a B.A. in History from Northwestern University and a Master in Public Policy (M.P.P.) from the John F. Kennedy School of Government at Harvard University. He is now an associate at Holme Roberts & Owen LLP in Denver, Colorado.

1. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

2. *Id.*

3. See *infra* Part II.B (regarding discussion of the law of nations under ATS).

4. See *Sosa*, 542 U.S. at 692.

II. BACKGROUND TO THE ATS

A. LEGISLATIVE HISTORY BEHIND ATS

In 1789, the first Congress of the United States approved the addition of an obscure jurisdictional statute as part of the first Judiciary Act creating lower courts in the federal judiciary.⁵ Termed ATS, Congress provided that “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.”⁶ For almost two centuries this statute went largely unnoticed in federal jurisprudence.⁷ The statute, in fact, has only been used successfully in federal court approximately twenty times since its enactment.⁸

Though the lack of congressional record has made it difficult to ascertain specific reasons behind the ATS,⁹ national security appears to be a central reason for its passage. International legal scholar Anthony D’Amato argues “the overriding purpose was to maintain a rigorous neutrality in the face of the warring European powers.”¹⁰ According to D’Amato, a significant reason for war in the 18th-century was “the plight of individual citizens in foreign countries.”¹¹ By passing the ATS, Congress provided a vehicle that foreigners could use to seek justice here in the United States, thereby avoiding a potential international diplomatic dispute. Furthermore, by enacting the ATS, Congress preempted all cases involving foreigners from the purview of state courts. D’Amato emphasizes that state courts in the late 18th-century “were notoriously biased against foreigners.”¹²

B. THE LAW OF NATIONS REQUIREMENT UNDER THE ATS

In order to establish jurisdiction under the ATS, a plaintiff must satisfy three requirements. First, the plaintiff must be a foreigner, and not an American citizen.¹³ Second, the plaintiff must allege a tort claim.¹⁴ Third, the plaintiff must claim the defendant’s actions violated a U.S. treaty or the law of nations.¹⁵ It is the definition and scope of this third

5. Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, CATO SUP. CT. REV. 2003-2004, at 214, available at <http://www.cato.org/pubs/scr/docs/2004/oldpuzzles.pdf> (last visited Sept. 19, 2006).
6. 28 U.S.C. § 1350 (2004).
7. See *Sosa*, 542 U.S. at 712.
8. Julie Scelfo, *The Longer Arm of the Law*, NEWSWEEK (Web Exclusive), June 30, 2004, <http://www.msnbc.msn.com/id/5335664/site/newsweek/> (last visited Sept. 19, 2006).
9. See *Sosa*, 542 U.S. at 718 (regarding the lack of congressional record or debates pertaining to ATS).
10. Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62, 63 (1988).
11. *Id.* at 64.
12. *Id.* at 65.
13. 28 U.S.C. § 1350 (2004).
14. *Id.*
15. *Id.*

requirement that has confounded legal scholars and dominated discussion in ATS cases.

The U.S. Constitution makes a single reference to the law of nations. In article I, section 8—under what has been termed the define and punish clause—the founders granted Congress the power “to define and punish . . . [o]ffences against the [l]aw of [n]ations.”¹⁶ Interestingly, the founders never defined the law of nations in the Constitution, nor did they specifically mention the law of nations under article III, the provision governing the federal judiciary.¹⁷

Federal case law has shaped the scope and origin of the law of nations in the United States. First, the law of nations does, in fact, constitute federal law. In 1815, Chief Justice Marshall affirmed that absent congressional action, federal courts are “bound by the law of nations which is a part of the law of the land.”¹⁸ Second, the Supreme Court held in 1820 that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising [sic] and enforcing that law.”¹⁹ Subsequently, courts have relied upon these three categories—the work of jurists, usage of nations, and judicial opinions—to derive the law of nations.²⁰ Third, though the Court’s decision in *Erie R.R. Co. v. Tompkins* (1938) abolished the development and application of federal common law,²¹ ATS cases have nonetheless relied upon federal common law to derive the law of nations.²²

C. LANDMARK ATS CASE: *FILARTIGA V. PENA-IRALA* (1980)

The modern use of the ATS began in 1980 when the Court of Appeals for the Second Circuit held that a Paraguayan national could rely upon the ATS to bring a claim against a former Paraguayan police official for torture that occurred in Paraguay.²³ The plaintiffs, Joel Filartiga and his daughter, Dolly, filed a lawsuit against Americo Noberto Pena-Irala for the wrongful death of Filartiga’s seventeen-year old son, Joelito.²⁴ Filartiga claimed that while his family was living in Asuncion, Pena-Irala, then Inspector General of Police, kidnapped, tortured, and killed Joelito.²⁵

The court ruled that the Filartigas successfully established a violation under the law of nations by submitting “the affidavits of a number of distinguished international legal scholars, who stated unanimously that

16. U.S. CONST. art. I, § 8, cl. 10; *see also* Moller, *supra* note 5, at 223 n.58 (regarding interpretation of this clause as extending to civil remedies).

17. *See* Moller, *supra* note 5, at 223.

18. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

19. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900).

20. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

21. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

22. *See* *Filartiga*, 630 F.2d at 885.

23. *See id.* at 876.

24. *Id.* at 878.

25. *Id.*

the law of nations prohibits absolutely the use of torture as alleged in the complaint.”²⁶ Furthermore, the court did not confine its holding to the specific facts of its case. Rather, the Second Circuit held “whenever an alleged torturer is found and served with process by an alien within our borders, [§] 1350 provides federal jurisdiction.”²⁷

D. INCREASED ATS LITIGATION FOLLOWING *FILARTIGA*

Since 1980, three general types of lawsuits arising under ATS have been filed in federal court.²⁸ First, alien plaintiffs have used the ATS in the same way as *Filartiga*, namely for cases of torture, killing, or disappearance abroad by another alien. Included within this category are cases that plaintiffs have brought against oppressive dictators, including former dictator Ferdinand Marcos of the Philippines²⁹ and former leader of the Bosnian-Serb Republic, Radovan Karadzic.³⁰

Second, beginning in the mid-1990s, plaintiffs started bringing lawsuits against U.S. corporations and select foreign corporations for “participating in human rights abuses abroad.”³¹ Among those corporations targeted for such participation include Unocal, Chevron, Texaco, Union Carbide, Exxon Mobil, Gap Inc., Coca-Cola, and Del Monte.³²

Third, a much smaller group of cases include plaintiffs who have filed suit against U.S. government officials or organizations working at their behest. Lawsuits falling under this category include a case filed by a Somali immigrant against the Immigration and Naturalization Service for alleged abuse of political asylum seekers.³³ While the Supreme Court ruled against the Somali plaintiff in a 5-4 decision,³⁴ the case was litigated for over five years and further illustrates plaintiffs’ continued ability to use ATS in U.S. federal courts.

III. SUPREME COURT’S RULING IN *SOSA*

On the specific facts of Alvarez-Machain’s claim, the Court rejected that a federal court could hear his complaint because he failed to assert a violation of international law.³⁵ Justice Souter wrote: “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal

26. *Id.* at 879.

27. *Id.* at 878.

28. Marcia Coyle, *Justices Weigh Alien Tort Act*, NAT’L L.J., Mar. 29, 2004, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1080334938936> (last visited Sept. 19, 2006).

29. *In re Estate of Ferdinand Marcos*, Human Rights Litigation, 25 F.3d 1467, 1468 (9th Cir. 1994).

30. *Kadic v. Karadzic*, 70 F.3d 232, 234 (2d Cir. 1996).

31. Coyle, *supra* note 28.

32. *Id.*

33. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005).

34. *Id.*

35. *See Sosa*, 542 U.S. at 738.

remedy.”³⁶ But the Court’s reasoning about the purpose of the ATS and the scope of the law of nations requirement remain critical to understanding its implications on future ATS litigation.

A. THE PURPOSE OF THE ATS REMAINS JURISDICTIONAL ONLY

The Court reiterated that from its inception the ATS conveyed “a grant of jurisdiction, not power to mold substantive law.”³⁷ The importance of this distinction is that a plaintiff may not file suit based solely on the ATS. Rather, a plaintiff may use the ATS for procedural purposes to establish jurisdiction, but must pair it with a second federal law creating a substantive cause of action. In *Sosa*, Alvarez-Machain satisfied the substantive component of his claim by asserting that his abduction violated the Federal Tort Claims Act.³⁸

B. THE STANDARD FOR ESTABLISHING THE LAW OF NATIONS REQUIREMENT MUST COMPORT WITH 18TH-CENTURY STANDARDS

One of the most significant parts of the Court’s decision pertains to its discussion of the law of nations. The court outlined a standard for federal courts to use when reviewing the law of nations requirement under the ATS: “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”³⁹ In other words, the court limited the law of nations requirement to those specific causes of action that Congress intended in 1789.⁴⁰ As a result, federal courts can only consider ATS claims of “torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”⁴¹

The Court asserted five reasons for limiting torts under the law of nations, thus reasoning that federal courts should exercise judicial caution

36. *Id.*

37. *Id.* at 712-13. The court affirmed the jurisdictional nature of the ATS by focusing on the first Congress’ specific grant of cognizance of certain claims to district courts. Justice Souter derived the definition of cognizance from *The Federalist No. 81* where Alexander Hamilton interchangeably uses jurisdiction and cognizance.

38. See 28 U.S.C. § 1346(b)(1) (2004). Alvarez-Machain asserted that his abduction as part of the DEA’s plan constituted injury under § 1346(b)(1) by causing “the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” *Id.*

39. *Sosa*, 542 U.S. at 725.

40. Notably, the Court’s ruling overrules the standard regarding the law of nations set by the Second Circuit. In *Filartiga*, the Second Circuit reasoned that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” *Filartiga*, 630 F.2d. at 881.

41. *Sosa*, 542 U.S. at 724.

when reviewing individual claims under ATS.⁴² “First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms.”⁴³ Whereas legal scholars once accepted that the common law derived from “‘a transcendental body of law outside of any particular State,’”⁴⁴ the Court has subsequently rejected such thinking and accepted “a general understanding that the law is not so much found or discovered as it is either made or created.”⁴⁵

Second, following the Court’s watershed decision in *Erie*, where the Court “denied the existence of any federal ‘general’ common law,”⁴⁶ Justice Souter emphasized “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”⁴⁷ Third, the Court argued that Congress—not the judiciary—is the preferable avenue for creating a private right of action, particularly in a case with “possible collateral consequences of making international rules.”⁴⁸ Fourth, the Court highlighted its reluctance to intervene in a case with international consequences as it is “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁴⁹ Fifth, in building off of the first four reasons, the Court was able to identify “no congressional mandate to seek out and define new and debatable violations of the law of nations.”⁵⁰

C. THE IMPACT OF THE COURT’S DECISION ON FUTURE LITIGANTS

The Court made clear that the ATS will remain an available—though clearly limited—avenue for plaintiffs seeking redress for international law violations: “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”⁵¹ The Court supported this contention with two arguments. First, despite the Court’s abrupt turn regarding federal common law in *Erie*, that ruling “did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances” and, indeed, the Court “has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”⁵² Second, the Court reaffirmed “that the domestic law of the United States recognizes the law of nations” as it has done for

42. *Id.* at 725.

43. *Id.*

44. *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

45. *Id.*

46. *Id.* at 726 (quoting *Erie*, 304 U.S. at 78).

47. *Id.* at 726.

48. *Id.* at 727.

49. *Id.*

50. *Id.* at 728.

51. *Id.* at 729. *But see id.* at 746 (Scalia, J., concurring) (arguing directly against this proposition: “[t]he general common law was the old door. We do not close that door today, for the deed was done in *Erie*. . . . Federal common law is a new door.”).

52. *Id.* at 729.

over two centuries.⁵³

D. SOURCES FOR DETERMINING THE LAW OF NATIONS

The Court clearly identified the sources lower courts should use in assessing the law of nations requirement under ATS. First, lower courts should rely upon a treaty in which the United States is a party or a “controlling executive or legislative act or judicial decision.”⁵⁴ Second, absent one of these sources, “resort must be had to the customs and usages of civilized nations.”⁵⁵ In order to ascertain such customs and usages, courts should look “to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”⁵⁶ Furthermore, these works are not to be used as mere speculation but rather “for trustworthy evidence of what the law really is.”⁵⁷

IV. IMPLICATIONS FOR THE ATS FOLLOWING SOSA

A. GENERAL IMPACT: LIMITATION BUT NOT ABANDONMENT OF FUTURE ATS LITIGATION

Perhaps the clearest impact of the Supreme Court’s decision is that it failed to close the door on future use of the ATS. Hofstra University School of Law professor Julian Ku described the Court’s decision as straddling the fence of this controversial legal issue.⁵⁸ Ku contended that Souter’s opinion “makes all the right noises about the dangers of unrestrained federal court international lawmaking, but it didn’t take that final step that would have restricted it in any meaningful way.”⁵⁹ While the Supreme Court failed to close the door for future cases brought under ATS, the decision did further clarify the law of nations requirement and narrow the scope for future ATS cases.⁶⁰

B. EFFECT ON MULTINATIONAL CORPORATIONS

The business community largely interpreted the *Sosa* decision as an opportunity missed. Robin Conrad, a lawyer with the U.S. Chamber of Commerce responded to the Court’s ruling by stating: “We didn’t succeed in cutting these cases off at the pass. We’re back to square one.”⁶¹ Because the Court did not prohibit future use of the ATS, a main target of ATS litigation will continue “to be multinationals whose operations in-

53. *Id.*

54. *Id.* at 734 (quoting *The Paquete Habana*, 175 U.S. at 700).

55. *Id.* (quoting *The Paquete Habana*, 175 U.S. at 700).

56. *Id.* (quoting *The Paquete Habana*, 175 U.S. at 700).

57. *Id.* (quoting *The Paquete Habana*, 175 U.S. at 700).

58. See Jonathan H. Alder, *Sosa Justice*, NAT’L REV. ONLINE, July 21, 2004, <http://www.nationalreview.com/adler/adler200407210842.asp> (last visited Sept. 19, 2006).

59. *Id.*

60. See *supra* Part III.B (regarding the Court’s discussion of the law of nations).

61. Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A21.

volve investment and activity in countries whose ruling regime has a dubious human rights record.”⁶² Paul B. Stephan, a professor at the University of Virginia School of Law, expressed concern that a result of the decision is that “opportunistic attorneys can exploit this not really for human rights work but for old-fashioned holding up of corporations.”⁶³

Indeed, *Sosa* was not an ideal test case for the business community as the case did not “directly involve questions of corporate liability.”⁶⁴ A true test concerning the effect of the ATS on multinational corporations was set to arise with a decision by the en banc Court of Appeals for the Ninth Circuit. On July 17, 2003, the parties in *Doe v. Unocal* presented oral arguments regarding a decision by a Ninth Circuit panel “holding that a corporation may be held liable for alleged human rights violations such as genocide, forced labor and crimes against humanity committed in other countries by foreign governments, for providing ‘knowing practical assistance or encouragement’ to the regime.”⁶⁵ The *Unocal* case, however, settled in December 2004 before the Ninth Circuit panel could render its decision.⁶⁶

C. EFFECT ON U.S. NATIONAL SECURITY INTERESTS

With the recent rise of human rights related litigation, the ATS could directly implicate U.S. national security interests. Captain Mark E. Rosen, a retired officer in the U.S. Navy and a defense and homeland security analyst, argued the ATS “threatens US security operations, since the Department of Defense (DOD) relies heavily on contractors for essential combat support services in foreign theaters of operations.”⁶⁷ These key defense contractors—including Boeing, Raytheon, Lockheed Martin, Northrop-Grumman, and General Dynamics—are prime targets for potential plaintiffs, as they can be implicated in ATS litigation in the same way that multinational corporations in other industries have been.⁶⁸

The vulnerability of the Defense Department and its defense contractors crystallized in 2004 upon discovering the abuse of Iraqi prisoners at the Abu Ghraib prison located outside of Baghdad.⁶⁹ Shortly before the

62. Clifford Chance LLP, *Supreme Court Rules on Alien Tort Statute*, June 2004, at 3, available at http://www.cliffordchance.com/showimage/showimage.aspx?LangID=UK&binaryname=/Supreme_court_briefing_note.pdf (last visited Sept. 19, 2006).

63. Coyle, *supra* note 28.

64. Clifford Chance LLP, *supra* note 62, at 2.

65. *Id.* at 3.

66. See Case Details: *Doe v. Unocal Corp.*, Washington Legal Foundation Advocate for Freedom and Justice, <http://www.wlf.org/Litigating/casedetail.asp?detail=233> (last visited Sept. 19, 2006).

67. Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, Aug. 2003, at 3, available at <http://www.nftc.org/default/usa%20engage/ATS%20-%20An%20Emerging%20Threat%20to%20National%20Security.pdf> (last visited Sept. 19, 2006).

68. *Id.* at 28.

69. See, e.g., Seymour M. Hersh, *Annals of National Security: The Gray Zone*, THE NEW YORKER, May 15, 2004, available at http://www.newyorker.com/fact/content/?040524fa_fact (last visited Sept. 19, 2006).

Sosa ruling, a group of human rights lawyers filed a class action lawsuit on behalf of prisoners at Abu Ghraib.⁷⁰ The lawsuit targeted two defense contractors, Titan Corp. of California and CACI International Inc. of Virginia, and accused the companies of perpetrating a “scheme to torture, rape, and in some instances summarily execute plaintiffs” in order to satisfy and subsequently maintain lucrative contracts from the U.S. government.⁷¹ The prison abuses—documented through voluminous pictures and increasing prisoner testimony—would more than certainly satisfy the law of nations requirement as modified by the Supreme Court in *Sosa*.

D. PRESSURE BUILDS FOR CONGRESS TO REFORM ATS

Many critics of the ATS contend that Congress, and not the judiciary, is the appropriate mechanism for changing the statute. The U.S. business community perceived *Sosa* to be “an opportunity to achieve the kind of ‘tort reform’ that Congress has shown little interest in legislating.”⁷² Even the justices themselves considered that those parties opposed to the ATS ought to consult Congress regarding a change in or limitation upon the statute. During oral arguments in *Sosa* on March 30, 2004, Justice O’Connor’s questioning of Deputy Solicitor General Paul D. Clement offered insight into her own thinking about the ATS: “Has Congress been asked to take a look at the statute? . . . Let Congress have a look at this thing. I’m sure Congress would be interested in the views of the attorney general.”⁷³

V. CONCLUSION

Perhaps the sentiment expressed by Justice O’Connor during oral arguments in *Sosa*—that Congress should be the ultimate arbiter of the ATS—best explains the Court’s reasoning behind *Sosa* and provides ATS critics with the next avenue for changing the statute. The first Congress implemented the ATS as a vehicle for the federal government to handle international disputes. Since 1789, however, the international community has recognized the need for international cooperation regarding human rights enforcement and has moved to act on human rights violations through the United Nations.

The Court’s ruling in *Sosa* will continue to be debated within lower courts as they interpret the decision when reviewing ATS claims. Concurrently, the business community will continue to fight for a significant limitation or wholesale prohibition of the ATS, likely through Congress. But as long as the ATS remains a jurisdictional vehicle for potential plain-

70. See Farah Stockman, *Suit Alleges Abuse Linked to 2 Firms*, BOSTON GLOBE, June 10, 2004, at A23.

71. *Id.*

72. Coyle, *supra* note 28.

73. Linda Greenhouse, *Justices Hear Case About Foreigners’ Use of Federal Courts*, N.Y. TIMES, Mar. 31, 2004, at A16.

tiffs, the U.S. federal courts will be bound to interpret and uphold the law of nations as it applies under the ATS.