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THE SUPREME COURT MEETS INTERNATIONAL LAW: WHAT'S THE SEQUEL TO *SOSA V. ALVAREZ-MACHAIN*?

Gary Clyde Hufbauer[†]

Thank you very much Rex Zedalis and special thanks to the organizers of this conference. The conference is spectacular in its content and gracious in its setting. The conference brochure reveals that conservative speakers in this event have two features in common – they probably didn't go to Yale Law School and they didn't clerk for Justice Blackmun. I didn't go to Yale at all and I didn't clerk for anyone – so I'll try to fulfill my typecast as panel conservative.

Much has already been said about the Alien Tort Statute (ATS, the label usually applied by conservatives), also known as the Alien Tort Claims Act (ATCA, the label usually applied by liberals). Let me briefly recite the background and then comment on the *Sosa v. Alvarez-Machain* case.¹ The ATS, part of the Judiciary Act of 1789, is a very short statute: "The 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."² The known historical antecedents were two assaults against foreign ambassadors on U.S. soil. In 1789, the Law of Nations was restricted to safe conduct, rights of ambassadors, issues of prize, and prohibitions against piracy. Prohibitions on slave trading did not enter the Law of Nations until the late 1800s; well after the statute was enacted. Between 1789 and 1980, the Alien Tort Statute was invoked only 21 times, but since then it has been invoked about 40 times. The early invocations were against state actors, not private actors, and only two pre-1980 courts upheld jurisdiction.

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1. 124 S. Ct. 2739 (2004).
2. 28 U.S.C. §1350 (2000).

In 1980, the landmark *Filartiga v. Pena-Irala*³ case was decided. A father and daughter were the plaintiffs; their son and brother had been tortured and killed by the Inspector General of Police in Paraguay, Pena-Irala. Pena-Irala was then living in Florida, and thus could be sued in the United States. The Second Circuit upheld subject matter jurisdiction and famously pronounced that the ATS created a cause of action when a foreigner sued for any tort committed in violation of international law. The court elastically defined the "Law of Nations,"⁴ the original phrase, in light of evolving jurisprudence as contemporaneously defined or interpreted. The holding in *Filartiga* was later codified (and I would say restrained) in the Torture Victim Protection Act of 1991 (TVPA), which appears in the statute books as a subsection of the Alien Tort Statute.⁵

Those who believe in the philosopher-king model of federal jurisprudence may be caricatured as follows: "let the federal courts create new rights and let Congress codify or rectify." For these believers, the sequence of events after the filing of *Filartiga* is rather satisfying. Judicial conservatives, like myself, are disturbed not by the holding in the *Filartiga* case but rather by the pronouncements of its judicial progeny. Subsequent to *Filartiga*, about ten ATS cases have been brought against individual state actor defendants, police officials like Pena-Irela, military officers, and the like, while about thirty ATS cases have been brought against private actor defendants, mainly corporations. Thus far no ATS damages have been awarded against corporate private actor defendants, but corporate pockets hold the big money. Corporations are thus the target for tort guns in class action ATS suits.

In my view, the most troubling pronouncements have been uttered in the Second and Ninth Circuits. As Professor Dickinson observed in the first panel of this conference, the connection between state action and corporate liability in many of these cases moving through the courts is much lower internationally, at least according to some of the statements that the courts have made, than it would be domestically.⁶ The weaker connection is a cause for celebration by judicial liberals.

As a conservative, what features of evolving ATS jurisprudence do I particularly regret? First and foremost, of course, is the elastic definition of causes of action susceptible to ATS claims under the characterization as

3. 630 F.2d 876 (2d Cir. 1980).

4. *Id.*

5. Torture Victim Protection Act of 1991, H.R. 2092, 102d Cong. § 2 (1992).

6. Laura A. Dickinson, *Accountability of State and Non-State Actors for Human Rights Abuses in the "War on Terror,"* 12 *Tulsa J. Comp. & Int'l. L.* 53 (2004) (remarks in this issue).

violations of the Law of Nations.⁷ The possibility of growing subject matter jurisdiction is the most worrisome dimension of ATS litigation. This question was addressed but not resolved by the *Sosa* court. More on this important matter follows later in my discussion of the *Sosa* case.

The *Sosa* court did not address other important and troubling features of ATS jurisprudence. To start, corporations may be held to account for “aiding and abetting” liability for acts committed by a foreign state. The Ninth Circuit has invoked this judicial doctrine. That court has stated that if the corporation should have known that its conduct provided encouragement to the state actor, it could be held liable. Constructive knowledge – “should have known” – is a limitation that able tort lawyers can easily stretch. Related to “aiding and abetting” liability is “under color of law” corporate liability. This can arise when the firm is a joint-actor with the state and can thus be blamed for implementing state directives (e.g., clearing land or confiscating private property). “Color of law” liability in ATS cases is a direct descendant of civil rights litigation and is often claimed in ATS oil and mining cases. Again, in a jury trial, the corporate defendant is at a tremendous disadvantage once the class action plaintiffs’ attorney has recited the misdeeds of a country such as Venezuela, Angola, or Kazakhstan.

Another troubling aspect of ATS jurisprudence is the choice of law for establishing the elements and evidence for liability. A successful tort claim requires proof of many elements, and the requisite elements and evidence vary significantly, depending on the law of the forum. It is much easier to win an asbestos claim in Mississippi than Virginia. In ATS litigation, lower federal courts have unfortunately adopted a mix and match approach to the choice of law (some choosing standards from the law of the foreign forum, some from U.S. law, some from international law, and some from all three). Unchecked, this flexible approach will certainly encourage forum shopping as plaintiffs seek the most friendly federal courts.

A useful judicial filter for ATS claims would require a foreign plaintiff to first exhaust his remedies in the country where the alleged tort occurred before filing in U.S. federal court. Indeed, the Torture Victim Protection Act⁸ requires an exhaustion of local remedies as a prelude to bringing a TVPA action, while

7. Violations of U.S. treaties clearly constitute a basis for ATS claims when the treaty has both been ratified by the U.S. Senate and has been accorded the force of domestic law. The contentious treaty issue, in the ATS context, is whether a treaty that has not been ratified (such as the Kyoto Protocol), or an international declaration or treaty that the United States has signed but not accorded the force of domestic law (such as the U.N. Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights) can nevertheless serve as evidence that its norms have become part of the Law of Nations.

8. H.R. 2092.

ATS courts seldom impose that requirement. An exhaustion test would not bar a U.S. federal court from hearing the claim *ab initio* when the courts in the relevant foreign country are hopelessly corrupt or incompetent. However, not all courts abroad are the functional equivalent of Burmese or Somalian courts.

Finally, there is the question of statute of limitations. A time limit is critical to avoid clogging the federal courts with historical claims based on ancient episodes of war crime, genocide, slavery, and forced labor. The Alien Tort Statute itself does not have a statute of limitations. The Ninth Circuit has borrowed the TVPA's ten year statute of limitations for ATS cases. However, a ten year statute of limitations has not been accepted by other circuit courts, and the nuances of application, tolling circumstances, etc., remain to be explored.

Nicholas Mitrokostas and I contend that if these various issues are not resolved in a narrow way, preferably by Congress, ATS litigation could not only put a dark cloud over U.S. investment and trade in much of the world but also set the United States on a course for judicial imperialism.⁹ That monograph, and a companion journal article,¹⁰ were written before the *Sosa* case was decided. That brings us to the holding and guidance provided in that landmark decision.

Sosa was a traditional state-actor individual defendant case, not a private-actor corporate case. The state actor was Sosa, a Mexican agent of the U.S. Drug Enforcement Agency (DEA). At the behest of the DEA, Sosa abducted Alvarez-Machain, a Mexican doctor who was accused of complicity with Mexican drug lords in torturing and killing a U.S. DEA agent. After a criminal trial in U.S. federal court, Alvarez-Machain was acquitted. Subsequently, after an earlier and unsuccessful round of civil litigation, Alvarez-Machain brought this ATS case.

Justice Souter, writing for the *Sosa* court, found no subject matter jurisdiction: temporary abduction is not a violation of the Law of Nations. Along the way, *Sosa* did some, but I would say very little, to clarify the multiple questions raised by the gathering cloud of ATS litigation. The decision was not, I think, a victory for either ATCA liberals or ATS conservatives. Dean Harold Koh thinks it was a victory for liberals, notably for the transnational law school. I think liberals would have a reason for dancing in the streets only if their side had actually won the case, or if Justice Souter had been less insistent on the standards for ATS subject matter jurisdiction in future cases.

Sosa is often cited for its instruction to future ATS courts on subject matter jurisdiction. Justice Souter writes: "we are persuaded that federal courts should not recognize private claims under federal common law for violations of any

9. GARY CLYDE HUFBAUER & NICHOLAS MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (Policy Analyses in International Economics 70, 2003).

10. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245 (2004).

international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when . . . [the ATS] was enacted.”¹¹ In other words, new causes of action must measure up to the universal recognition accorded to the Law of Nations governing ambassadors, safe conduct, piracy and prize at the end of the 18th century, slave trading in the 19th century, and torture in the 20th century. Justice Souter prefaced the passage just cited with the observation: “judicial power should be exercised [to create subject matter jurisdiction] on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”¹²

Justice Souter opens the possibility for an exhaustion of remedies analysis, referring to the amicus curiae brief submitted by the European Commission.¹³ Note 21 does not require exhaustion; it just says that an exhaustion of remedies analysis may be part of future litigation.¹⁴ Note 21 also mentions “Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.” The *Sosa* court specifically did not address the vicarious liability theories that are at play in the big corporate cases (aiding and abetting, acting under color of law). Nor did it address the choice of law question or the statute of limitations.

In my remaining time, let me comment on other aspects of the *Sosa* decision. For me, the central question is this: Will Justice Souter’s opinion effectively curb the common law expansion of ATS claims? Alternatively, will the decision prompt Congress to enact a statute, akin to the Torture Victim Protection Act, that defines genocide, war crimes, slavery, forced labor, and a limited number of other violations, as amenable to ATS claims, while excluding all other potential torts?¹⁵

Judge Robert Bork is highly skeptical that the *Sosa* decision will curb future ATS claims in any meaningful way. In the *Wall Street Journal*, here is what Judge Bork wrote:

American individuals and businesses are now without guidance as to what law may apply to them. They are routinely sued on such exotic theories as causing air pollution or refusing to engage in collective bargaining in foreign countries. No one knows what actions some courts may hold to be violations of the law of nations.¹⁶

11. *Sosa*, 124 S. Ct. at 2739.

12. *Id.* at 2764.

13. *Id.* at 2766 n.21.

14. *Id.*

15. See generally *id.* at 2772.

16. Robert H. Bork, *Judicial Imperialism*, WALL ST. J., July 12, 2004, at A16.

In the *Tel-Oren v. Libyan Arab Republic* case,¹⁷ decided in 1984, Judge Bork's concurring opinion would have restricted ATS subject matter jurisdiction, insofar as Law of Nations claims are concerned, to the four violations known in 1789. ATS subject matter jurisdiction for any new Law of Nations claims would first have to be enacted by Congress. Judge Bork's reasoning has not been followed by other courts. In the wake of *Sosa*, it became a dead letter – unless revived by Congress.

Quentin Riegel of the National Association of Manufacturers and Bill Reinsch of the National Foreign Trade Council, two organizations very active in ATS litigation, offered a somewhat less pessimistic appraisal of *Sosa* than Judge Bork.¹⁸ The court specifically held that the U.N. Universal Declaration of Human Rights and other U.N. covenants do not create a cause of action since they are not incorporated in U.S. law, either directly or via enforceable treaty obligations.¹⁹ Probably based on this holding, Reinsch said that the message of the ruling is that lower federal courts should narrowly construe the ATS, but he voiced skepticism that the lower courts would actually follow that instruction. Reinsch is mindful of multiple cases in which plaintiffs' counsel quickly slide from reciting traditional violations such as genocide and slavery into "other norms" for which they claim equivalent international recognition.

Justice Scalia, joined by the Chief Justice and Justice Thomas, took little comfort in the standards articulated by Justice Souter. Their "concurring" view (the word "concurring" is in quotation marks because it reads more like a dissent) authored by Justice Scalia, took its inspiration from the famous *Erie* case.²⁰ Justice Scalia pointed out that *Erie* ended the evolution of federal common law torts (with limited exceptions derived from federal statutes).²¹ By the same breath, according to Justice Scalia, *Erie* extinguished the power of the federal courts to discover new torts under an evolving concept of the Law of Nations. Let me read a few words from Justice Scalia:

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained. . . . It would be bad enough if there were some assurance that future conversions of perceived

17. 726 F.2d 774, 798-822 (D.C. Cir. 1984) (Bork, J., concurring).

18. *Inside U.S. Trade*, July 2, 2004, at 8 (on file with author).

19. *Sosa*, 124 S. Ct. at 2739.

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

21. *Id.*

international norms into American law would be approved by this Court itself. . . . But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions.²²

Justice Scalia's "concurrence," penned in his trademark style, was of course the minority view.

In the immediate future, "vigilant doorkeeping," to use the words of Justice Souter, will critically depend on the circuit courts, especially the Second, Ninth, and D.C. Circuits. In the Ninth circuit, the leading case – already back and forth between the district and circuit courts a couple of times – is the *Doe v. Unocal Corp.* case.²³ *Unocal* is a big corporate case, and will probably be the first where courts decide whether a deep corporate pocket is open to class action ATS plaintiffs.²⁴ In the Second Circuit, the leading cases are a collection of South African apartheid-era claims brought by celebrated tort lawyers Ed Fagan and Michael Hausfeld.²⁵ The defendants are more than 50 blue chip corporations. The damages claimed are very large, over 100 billion dollars. In the D.C. Circuit, the leading case is *Ibrahim v. Ibrahim*,²⁶ which alleges ATS claims arising from the Iraq occupation.

The *Unocal* case alleges that the corporation aided and abetted forced labor, among other torts. I think that would suffice to bring the action within the permissible ambit described by Justice Souter.²⁷ The other two cases enunciate claims that far less clearly belong to the classic domain of violations against the Law of Nations; moreover, the Supreme Court went out of its way to pour cold water on the pending South African cases.²⁸

In any event, the test of how *Sosa* actually affects the course of ATS jurisprudence will be how many pending cases survive a motion to dismiss. In the world of tort litigation, if an ATS case goes to trial, many of the corporate defendants will abandon hope and seek a settlement. Tort trials are by jury, not judges, and juries are notoriously sympathetic to impoverished plaintiffs and notoriously hostile to rich corporate defendants. Moreover, the adverse publicity can be terrible for the corporation, the pre-trial depositions can be brutal, and the

22. *Sosa*, 124 S. Ct. at 2776 (Scalia, J., dissenting).

23. See Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

24. Subsequent to this conference, *Unocal* settled out of court for an undisclosed sum.

25. See, e.g., Jon Robins, *Apartheid Haunts Business: REPARATIONS: A US Lawyer Wants to Call Foreign Companies to Account for Human Rights Abuses in South Africa's Unhappy Past*, FIN. TIMES, Sept. 13, 2004, at 14. The cases have been consolidated in the Southern District of New York; see *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (J.P.M.L. 2002).

26. 124 S. Ct. 1495 (2004).

27. As mentioned, the case was settled out of court.

28. *Sosa*, 124 S. Ct. at n.21 (citing foreign policy concerns that would require the lower courts to take a hard and skeptical look at the South African cases).

potential damages, given the realities of class action suits with punitive damage claims, can bankrupt even large firms. Like the past two decades of asbestos litigation, where very few cases have been litigated all the way through circuit court appeals, yet more than 200 billion dollars of damage awards have been paid, the next two decades of ATS litigation could witness huge settlements in the aftermath of a few path breaking awards.²⁹ Certainly that's the goal of the celebrity tort lawyers.

What about Congress? Nicholas Mitrokostas and I have urged Congressional legislation modeled after the TVPA. The new statute should identify and limit causes of action and spell out the other legal elements of an ATS claim mentioned in my opening review. Right now I'm skeptical of tort reform for the ATS or anything else. The last Congress witnessed a series of tort reform defeats.³⁰ It takes 60 Senate votes to cut off debate and end a filibuster. Either for lack of a simple majority, or the requisite 60 votes, tort reform was defeated for medical malpractice, interstate class action claims, obstetrical and gynecological claims, asbestos litigation, and legal fees in tobacco cases. The reform proposals were defeated largely because tort litigation delivers huge financial rewards to the plaintiffs' bar. It seems improbable, in the wake of *Sosa*, that ATS legislative reform will fly in the halls of Congress where so many other reforms have crashed.

My forecast is that ATS awards and settlements will cumulate over the next decade. Countervailing forces will not get themselves organized until large judgments have been awarded against corporate defendants. Invoking the metaphor that Dean Harold Koh employed in his masterful opening address, I think future awards will embody "bad American exceptionalism" to a greater extent than "good American exceptionalism."³¹ U.S. federal courts will adjudicate issues where the events took place abroad, where foreign law should govern the cause of action, where the plaintiffs are aliens, where the defendants are often foreign-based multinational firms, and where U.S. damage awards are at odds with what foreign courts might have rendered. This picture contains the outlines of judicial imperialism.

In the meantime, large firms will limit their trade and investment involvement in countries with deplorable scores on the human rights scale or miserable environmental conditions. Corporations will be more cautious about

29. See HUFBAUER & MITROKOSTAS, *supra* note 9. See Michelle J. White, *Asbestos and the Future of Mass Torts*, NAT'L BUREAU ECON. RESEARCH No. w10308, Feb. 2004, available at <http://www.nber.org/papers/w10308> (last visited Nov. 21, 2004) (providing a summary of the asbestos saga).

30. See Murray Shailagh, *Conservative Appeal: Trial Lawyers Lobby Discovers Unlikely Friends*, WALL ST. J., July 8, 2004, at A1.

31. Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA COMP. & INT'L L. J. 1 (2004) (remarks in this issue).

investing in, and trading with, the two most populated countries in the world: China and India. They will become wary of many other nations in Africa, the Middle East, and Central and South Asia. In recent decades, corporations have invented the office of Chief Environmental Officers. In the wake of the *Sosa* decision, large multinational firms may now invent the office of Chief Human Rights Officer to monitor and curtail their global activities.

If post-*Sosa* changes in government and corporate behavior actually improve living and environmental conditions among the least-favored countries, I will withdraw my criticism and applaud judicial activism. If, on the other hand, an abundance of corporate caution in the wake of huge damage awards simply prompts firms to limit their commercial contacts with the very poorest and most misgoverned nations, that will be a sad setback for the aspirations of millions of people.

