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Sosa v. Alvarez-Machain: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism

by David C. Baluarte

ON JUNE 29, 2004, THE U.S. SUPREME COURT handed down its much awaited decision in *Sosa v. Alvarez-Machain*. This case was of tremendous importance to human rights activists, and the Court delivered their wishes by affirming the Alien Tort Claims Act (ATCA) as a vehicle for bringing international human rights cases in U.S. courts. It is important, however, to note not only what activists retained, but what they lost as well.

This decision marked the second time that the highest U.S. court denied Dr. Humberto Alvarez-Machain (Alvarez) legal relief for his 1990 forced abduction from Mexico by the U.S. Drug Enforcement Agency (DEA). In assessing the Court's reasoning for this disappointing end to Alvarez's search for justice, this article explores the two major components of the Court's opinion: one addressing the ATCA, and the other interpreting the Federal Tort Claims Act (FTCA). These two parts, when read together, appear to foreclose ATCA suits against the U.S. government and its agents for their activities abroad. While it is encouraging that the ATCA survived its first bout in the Supreme Court, *Sosa* also dashed hope for U.S. government accountability through ATCA/FTCA litigation. This affirmation of American exceptionalism must be understood as the setback that it is if activists are to formulate a successful strategy to confront this unfortunate trend in the future.

THE ATCA/FTCA STATUTORY FRAMEWORK

THE ATCA, PASSED BY THE FIRST CONGRESS as part of the Judiciary Act of 1789, provides 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." The Supreme Court said at the time of the ATCA's passage that the "law of nations" only encompassed a modest number of international law violations thought to carry personal liability: piracy, offenses against ambassadors, and violations of safe conducts.

The ATCA was largely ignored until 1980 when human rights lawyers applied it in *Filártiga v. Peña-Irala*. In *Filártiga*, two Paraguayan citizens sued Américo Norberto Peña-Irala, also a Paraguayan citizen, under the ATCA for the torture and murder of their family member, Joel Filártiga. The U.S. Court of Appeals for the Second Circuit ultimately awarded compensatory and punitive damages to the Filártigas.

The *Filártiga* decision sparked a flurry of litigation by human rights defenders eager to test the bounds of the revived statute. Significant questions arose as federal courts toiled with the meaning of the ATCA. Jurists disagreed about whether the ATCA provided solely subject matter jurisdiction or whether it also provided a cause of action. Further, the scope of that cause of action developed into a contentious issue as courts differed on their interpretations of what constituted a "violation of the law of nations."

It was not long after *Filártiga* that the first ATCA suit was filed against the United States. It soon became apparent, however, that courts would not find the necessary waiver of sovereign immunity

under the ATCA, and a suit of this nature has yet to succeed. It was in this context that the FTCA entered the ATCA debate.

Congress passed the FTCA in 1946 to provide the framework for liability of the U.S. government when its agents, acting within the scope of their employment, committed common law torts. In 1988, Congress amended the FTCA with the Federal Employees Liability Reform and Tort Compensation Act (Westfall Act). The primary purposes of the Westfall Act were to establish the process for substituting the United States for federal officials in common law tort suits, as well as to establish the exclusivity of the FTCA as a remedy in such suits.

When a federal officer is sued for a common law tort, the U.S. Attorney General (AG) determines whether he or she acted within the scope of his or her employment. If the AG certifies the officer, the United States substitutes itself as the defendant, and the plaintiff's exclusive remedy becomes the FTCA. Although the FTCA does provide a waiver of sovereign immunity, it includes a variety of limitations on government liability.

It is likely that the Supreme Court chose *Sosa* as its first ATCA case because the United States was party to the suit and the lower courts had interpreted the FTCA in a way that would compel government liability.

THE STORY OF DR. ALVAREZ-MACHAIN

IN 1990, A U.S. FEDERAL GRAND JURY indicted Alvarez for his alleged participation in the torture and murder of Enrique Camarena-Salazar (Camerana), a DEA agent, and a federal court issued a warrant for his arrest. The indictment accused Alvarez of providing medical treatment to prolong agent Camarena's life while members of a drug cartel interrogated him and tortured him to death. The United States was not successful in petitioning the Mexican government to deliver Alvarez to U.S. authorities pursuant to the existing extradition treaty, and therefore it resorted to covert tactics.

THE FORCED ABDUCTION

Although the alleged crimes occurred in Mexico, Alvarez resided in Mexico, and an extradition treaty existed between the United States and Mexico that provided detailed procedures and evidentiary requirements for extradition, the DEA contracted with Mexican nationals to abduct Alvarez and transfer him to the United States for trial. As planned, Jose Francisco Sosa (Sosa) and others kidnapped Alvarez from his home office in Guadalajara, held him overnight in a hotel, and flew him to El Paso, Texas, the next day, where he was arrested by federal agents.

Alvarez moved to dismiss the indictment, arguing that the existence of an extradition treaty between the U.S. and Mexico precluded the court's jurisdiction in a case where the defendant was forcibly abducted in violation of that treaty. The district court found merit in Alvarez's argument and the appeals court affirmed the judgment in his favor.

In what can only be described as tortured logic, the Supreme Court reversed the lower courts' rulings and found that because the extradition treaty did not explicitly prohibit forced abduction, that

right was reserved, giving U.S. courts jurisdiction over Alvarez. The United States ignored requests by the Mexican government to return Alvarez and proceeded with the trial. The case, however, was summarily dismissed for insufficiency of evidence against Alvarez.

THE CIVIL SUIT

Upon his return to Mexico in 1993, Alvarez filed a civil action against Sosa, five unnamed Mexicans, a Mexican DEA operative, four American DEA agents, and the United States. The complaint alleged that those defendants were liable for common law torts, constitutional torts, and torts in violation of the law of nations.

The district court dismissed all of the constitutional claims, relying on an established line of judicial precedent that prohibits

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extra-territorial application of the U.S. Constitution on the facts presented. The claims based on torts arising under common law and international law remained. The primary vehicles for those claims were the FTCA and the ATCA.

Another significant development at the district court level was that, pursuant to the Westfall Act, the United States was substituted for all of the DEA agents. This ruling divided the defendants and the claims into two distinct groups: the ATCA claims against Sosa and the FTCA claims against the United States.

The district court entered summary judgment for Alvarez on his ATCA claims against Sosa for state-sponsored, transborder abduction and arbitrary detention. The court then granted summary judgment for the United States on Alvarez's FTCA claims, finding that the apprehension was privileged and not illegal under the law of that jurisdiction.

Both parties appealed. Sosa claimed that the district court erred in finding a cause of action under the ATCA, and Alvarez challenged both the district court's decision to substitute the United States for the DEA officials and the dismissal of his FTCA claims.

A three-judge panel in the U.S. Court of Appeals for the Ninth Circuit upheld Sosa's liability under the ATCA and the

lower court's decision on party substitution, and reversed the dismissal of Alvarez's FTCA claims. The U.S. government and Sosa appealed the panel's ruling and the Ninth Circuit granted a rehearing by an *en banc* court of 11 judges.

On June 3, 2003, the *en banc* Court upheld the panel's decision on party substitution, the judgment against the United States under the FTCA, and the judgment against Sosa for arbitrary arrest and detention under the ATCA. The court then reversed the panel's finding that Sosa was liable for transborder abduction under the ATCA, holding that a violation of Mexican sovereignty was not individually enforceable.

Both Sosa and the U.S. government appealed the *en banc* court's decision, and the U.S. Supreme Court granted *certiorari* and set a hearing date for appeals on the two most controversial aspects of the Ninth Circuit decision.

THE SUPREME COURT RULING

ON MARCH 30, 2004, HUMAN RIGHTS LAWYERS gathered from around the country to hear the final arguments in this case, which had lasted over a decade and had become part of their very consciousness. While all were aware of Alvarez's personal plight, the principle concern was the future of the ATCA and human rights litigation in U.S. courts. The air was thick with tension as the high court heard arguments on 1) the propriety of the "headquarters doctrine" in relation to the FTCA's "foreign activities exception" and 2) the substance and scope of the ATCA.

THE END OF THE "HEADQUARTERS DOCTRINE"

In the first part of its decision, the Supreme Court held that the U.S. government was not liable under the FTCA for Alvarez's abduction.

The statutory language of the FTCA includes a "foreign activities exception," which bars claims arising from acts in a foreign country. The lower courts had applied the judge-made exception to this rule known as the "headquarters doctrine," which permitted liability for acts in a foreign country if federal agents in the United States played a significant role in planning the acts. The Supreme Court viewed the doctrine with skepticism because it was conceivable that any act, no matter how attenuated, could be traced back to the U.S. government and defeat the original purpose of the "foreign activities exception."

Ultimately, two considerations by the Court proved fatal to the "headquarters doctrine." First, the Court focused on the theory of proximate cause as the only legitimate way to connect planning in the United States to wrongful actions in a foreign country. The Court expressed concern with the inaccuracy of the proximate cause calculus, noting that a proximate cause is not necessarily the exclusive cause of any given harm. In *Sosa*, for example, it is difficult to know how much of the planning by U.S. officials actually shaped Sosa's activities in Mexico.

The Court then considered the fact that the acts themselves occurred on foreign soil. The language of the "foreign activities exception" prohibits claims "arising in a foreign country," compelling the Court to perform a textual analysis to identify the true intent of Congress. The Court focused on the phrase "arising in," and placed it in the context of traditional tort theory. The Court found that when the FTCA was drafted, it was commonly understood that the law that applied in tort cases was that of the place of the injury. Following this rationale, the Court held that Congress intended to bar all claims arising from an injury suffered in another country. Through this reasoning, the Court overruled the "head-

quarters doctrine” and dismissed all FTCA claims against the United States.

THE SUBSTANCE AND SCOPE OF THE ATCA

In the second part of its decision, the Supreme Court ruled that the ATCA did not support Alvarez’s claim that his arbitrary arrest and detention were violations of the law of nations.

The Court began by ruling that the ATCA was purely jurisdictional in nature and did not provide a statutory cause of action. The Court found that, although the ATCA provided jurisdiction to federal courts to hear violations of the law of nations, that body of law is incorporated into the federal common law, and it is therefore federal common law that provides the cause of action in ATCA suits.

The Court then explored the implications of this regime. It found a middle ground between Sosa’s extreme position that the ATCA’s failure to provide a cause of action made a claim under that statute impossible, and the appellate court’s view that such a cause of action could be established based on relatively liberal criteria. The Court held: “Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [the ATCA], we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted.” The “historical paradigms” the Court refers to are offenses against ambassadors, violations of safe conducts, and piracy. However, the Court did not provide a specific test to determine when a norm has attained sufficient “content and acceptance among civilized nations” to create a cause of action that can be vindicated under the ATCA. Instead, the Court urged federal courts to make such findings cautiously, giving five reasons for this strict approach.

First, the Court noted that when the ATCA was passed in 1789, courts believed that common law already existed, and it was their job to find it. Today we understand that courts make common law, and this shift could lead to vast disparities in what different courts interpret to be violations of the law of nations. Second, the Court looked back to the 1938 case *Erie Railroad Co. v. Tompkins*, in which the Supreme Court denied the existence of federal “general” common law and emphasized the importance of looking for legislative guidance before exercising the authority to create substantive law. The Court then gave three reasons why the judiciary should be cautious when treading in the territory of the political branches of government: it was the job of the legislature to define new causes of action, there was no congressional mandate granting that right to the judiciary in this context, and federal courts determining violations of the law of nations would interfere in the foreign affairs powers of the legislature and the executive. The Court found these five reasons to compel a cautious approach when establishing new causes of action under the law of nations.

The Court then applied this approach to Alvarez’s case and found that his claim of an international prohibition on arbitrary arrest and detention—based on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights—did not meet the new standard. The Court held that Alvarez’s contention that any arrest and detention without domestic legal authority constituted a violation of international customary law was too broad. Further, the Court found that his

arrest and detention of one day, followed by his swift transfer to a lawful authority, as a factual matter, was not a crime so severe as to enjoy universal protection.

Ultimately, the Court denied Alvarez relief for his hardship and injuries. Without the “headquarters doctrine,” Alvarez was unable to hold the United States or its agents liable for their actions under the FTCA. Similarly, because the Court was not compelled to establish a cause of action for arbitrary arrest and detention under the ATCA on the facts of his case, Sosa escaped without liability. This case represents an obstacle for other potential ATCA plaintiffs who aspire to file a claim against the United States or its agents for injuries suffered abroad. While there is certainly reason to celebrate that the ATCA survived, there are concerns regarding the legitimacy of a statute that holds human rights violators from other countries accountable while guaranteeing immunity for the United States and its agents.

CONCLUSION

THE UNITED STATES, LIKE MOST OTHER COUNTRIES around the world, is responsible for human rights abuses committed by its agents within its national territory. These abuses are dealt with, to a greater or lesser degree, in domestic fora. However, unlike most other countries, the United States exercises a great deal of geopolitical power, putting it in a position where it can and does commit human rights abuses on an international scale. Yet, the global reach of the United States has not been accompanied by global accountability. The U.S. government has repeatedly rejected judgments entered against it by international institutions, begging the question of how this international super-power can be checked.

Sosa represented the hope that ATCA/FTCA litigation could provide a means for that accountability. At the time of this writing, there were numerous human rights litigators crafting new arguments to circumvent Westfall substitution and identify another waiver of sovereign immunity under the ATCA. Notwithstanding their efforts, we must develop new strategies and focus our resources on other efforts to confront American exceptionalism under the ATCA.

Two important cases against ExxonMobile and Unocal, both U.S.-based private energy companies, were on hold in Washington, D.C. and California federal courts pending the Supreme Court’s decision in *Sosa*. These cases, regarding Exxon’s alleged human rights abuses in Indonesia and Unocal’s alleged abuses in Burma, are currently going forward. In addition, claims against the Titan Corporation for its complicity in torture carried out in its detention facilities in Iraq were recently filed in federal courts in Washington, D.C. and California. Although it was a great blow when the Court virtually foreclosed future litigation against the U.S. government for its activities abroad under the ATCA, the ability to sue U.S.-based corporations would certainly boost the statute’s legitimacy in the eyes of the international community.

Despite the exciting potential for future cases under the ATCA, we must acknowledge the inherent limitation placed on ATCA litigation against the United States by the Supreme Court’s decision in *Sosa*. The Court missed an opportunity to promote international norms that apply to all countries; but this cannot deter activists. Continued reporting, lobbying, and litigation are necessary to shed light on U.S. government activity and develop a consensus within the United States that American exceptionalism must end.

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