

Corporations and Transnational Human Rights Litigation by Sarah Joseph, (updated October 2004)

On 29 June 2004, the US Supreme Court delivered its decision in *Sosa v Alvarez-Machain*. [1] The Court considered the substantive meaning and effect of the *Alien Tort Claims Act* [ATCA] for the first time. [2] The petitioner in this case, *Sosa*, had argued that the Supreme Court should adopt an interpretation which would deprive ATCA of much if not all of its contemporary relevance. Ultimately, the decision has largely reaffirmed the pre-existing law on ATCA. The purpose of this update is to summarise this decision, and comment upon its ramifications for the material in the book, particularly Chapter 2. The purpose is not to provide a wide-ranging critique of the decision.

Background

Sosa v Alvarez-Machain concerned the abduction of one Dr Humberto Alvarez-Machain in Mexico. Dr Alvarez was held for one day in Mexico by his captors (including US federal agents and one Jose Francisco Sosa) before being brought across the border into the US. Alvarez faced trial in the US for the torture and murder of a US federal agent in Mexico; he was acquitted. After his acquittal, Alvarez sued the US government and Sosa for various alleged wrongs, including alleged violations of the ATCA. The Court of Appeals for the Ninth Circuit found that Alvarez had suffered a 'violation' of his rights under the 'law of nations', and therefore could claim relief under ATCA. [3] The relevant violation concerned his arbitrary detention in Mexico before being transported across the border. This period of detention lasted for less than one day. The 'arbitrariness' of this detention ceased once Alvarez was brought into the US, as his arrest and detention within the US had been authorized under US law. [4] *Sosa* successfully sought certiorari to appeal the Ninth Circuit decision. [5] He challenged the characterisation of Alvarez's detention as a breach of the law of nations. Furthermore, *Sosa* attacked the ATCA itself by arguing that ATCA does not provide for private causes of action. Thus, *Sosa* disputed the prevailing interpretation of ATCA, which has held sway since the Second Circuit's seminal 1980 decision in *Filartiga v Pēoa-Irala*, [6] which had breathed life into the ancient statute. *Sosa* submitted many arguments to justify that narrow interpretation of ATCA. [7] Had these arguments been accepted, ATCA would be redundant, and the carpet would have been pulled from many pending human rights cases in the US.

Given the wide-ranging potential ramifications of the decision, numerous amici briefs were filed in favour of both parties, raising further arguments in favour, or against, the continuing viability of ATCA, which will not be elaborated upon here. The petitioner was supported (and therefore ATCA was attacked) in briefs from, for example, the US government, the National Foreign Trade Council, the Washington Foundation, and the governments of Australia, Switzerland and the United Kingdom. The respondent was supported (and therefore ATCA was supported) in briefs from, for example, a large array of national and international non-governmental organisations, as well as national and international scholars. [8]

The majority decision

Souter J delivered the opinion of the court. His interpretation of ATCA was joined by O'Connor, Kennedy, Ginsburg, Stevens, and Breyer JJ. As detailed below, Scalia J disagreed with the majority's ATCA interpretation, and was joined in this respect by Rehnquist CJ and Thomas J.

Souter J agreed that ATCA was in fact jurisdictional. By its own terms, it merely:

gave the district courts 'recognizanc[e] of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law'. [9] However, Souter J did not believe that ATCA required a further statute to give it life. That is, another statute was not needed to provide a relevant cause of action for the purposes of ATCA. Otherwise, ATCA would have been 'stillborn' as plainly no relevant statute was enacted at the time. [10] Rather, Souter J decided that the common law at the time of ATCA recognised causes of action for breaches of the law of nations. [11] Such causes of action were confined in 1789 to only three offences: violation of safe conducts, infringements of the rights of ambassadors, and piracy. [12] Of course, the law of nations has grown enormously since 1789, for example by including international human rights law norms.

The question arises: does the common law of 2004 sustain causes of actions under ATCA based on contemporary interpretations of the law of nations, rather than the considerably narrower interpretations of 1789? In order to answer this question, Souter J first noted that 'the prevailing conception of the common law has changed since 1789'. [13] Common law is now recognised as being 'made or created' rather than 'found or discovered' by judges. [14] That is, the fiction that common law rules are somehow embedded in the law, merely awaiting discovery or uncovering by judges has been dispensed with. This conception of common law accepts the fact that judge-made law is in fact made by the judges; judges play a proactive rather than an exploratory role in the generation of common law. [15] In pursuance of this 'legislative' theory of common law, [16] the Supreme Court in *Erie R. Co v Tompkins* went so far as to deny the existence of a federal 'general' common law, [17] giving rise to the birth of a new type of federal common law. [18] Souter J and the Scalia minority disagreed over the qualities of post-*Erie* federal common law.

Given the legislative conception of common law, Souter J accepted that the judiciary should exercise 'restraint' in 'applying internationally generated norm' as part of the common law under the jurisdiction conferred by ATCA. [19] In particular, 'a decision to create a private right of action [by for example extending ATCA jurisdiction beyond the three causes of action recognised in 1789] is one better left to legislative judgment in the great majority of cases': 'the general practice has been to look for legislative guidance before exercising innovative authority over substantive law'. [20] Causes of action based on international law necessarily involve exercises of considerable judicial discretion, given the vague definition of customary international law. [21] No congressional mandate, beyond the enactment of the *Torture Victim Protection Act* in 1991 [TVPA], [22] has been given to federal courts 'to seek out and define new and debatable violations of the law of nations'. [23] Despite all of these arguments in favour of the exercise of caution in extending ATCA jurisdiction beyond the three 1789 causes of action, Souter J proceeded to endorse just that. Souter J found that federal courts are permitted, post-*Erie*, to 'derive some substantive law in a common law way'. [24] Furthermore, the recognition of 'the law of nations' within the common law has spanned over two centuries. [25] It would therefore 'take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals'. [26]

Therefore, Souter J decided that the First Congress, in enacting ATCA, intended that federal courts would 'properly identify some international norms as enforceable in the exercise of [ATCA] jurisdiction'. [27] Further:

We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. [28]

However, Souter J went on to stress that courts should adopt a narrow definition of the law of nations. In particular, a norm cannot be recognised as part of the law of nations unless it is 'specific' or 'definable', 'obligatory' and 'universal'. [29] Thus, the Supreme Court has endorsed the 'law of nations' test outlined in *Forti v Suarez-Mason*. [30] However, it is unclear whether the Supreme Court has adopted the *Forti* test to the exclusion of other potential approaches to the definition of 'the law of nations'. It may be that this test was cited in *Sosa* because it is the test generally adopted within the Ninth Circuit, the Circuit from which the *Sosa* case came. As noted in the Book, some courts within the Second Circuit have adopted a different approach. [31] Certainly, Souter J implicitly endorses the *Filartiga* equation of 'the law of nations' with 'customary international law', insofar as those norms are adequately 'definable', [32] because he spends considerable time discussing whether the violation at issue, a short period of arbitrary detention, constitutes a violation of customary international law. Souter J found, after citing a number of international and domestic sources, that a period of arbitrary detention for a period of less than 24 hours was not a violation of customary international law, so the Ninth Circuit decision in favour of Alvarez was reversed. [33]

The Scalia opinion

Scalia J agreed with the Court on the outcome: that is that the facts did not give rise to a violation of ATCA. However, he parted company with Souter J on the issue of whether modern federal courts were permitted, at common law, to recognise causes of actions based on contemporary understandings of law of nations. He felt that, in general, *Erie* slammed the door shut on the creation of new causes of action by judges except in a few discrete and defined areas, such as admiralty law. [34] Those exceptions did not include the authority to create private causes of action based on the law of nations. Scalia J's opinion goes on to delve into the policy reasons underlying this interpretation, which are beyond the scope of this update. It will suffice, in order for readers to sample the flavour of the judgment, to add the following quotes from the decision:

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 [since *Filartiga*], 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 [of Souter J for the Court] approves that process in principle ... [35]

American law - the law made by the people's democratically elected representatives - does not recognize a category of activity that is so universally disapproved by other nations that it is automatically here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced. [36]

Ramifications of *Sosa* for ATCA cases against Corporations

The *Sosa* decision confirms that ATCA provides a basis for civil suits in federal courts based upon violations of the law of nations. The source of those causes of action is federal common law, rather than ATCA itself. However, ATCA provides the authority for judges to recognise causes of action based on contemporary interpretations of the law of nations. Those causes of action extend to wholly extraterritorial events.

The most substantial effect that *Sosa* may have on ATCA litigation is that it may narrow the test for 'the law of nations', given Souter J's frequent pleas throughout the judgment for caution in the interpretation thereof, and the fact that the Supreme Court reversed the Ninth Circuit's characterisation of Alvarez's arrest and detention as a violation of the law of nations. It certainly seems that ATCA decisions based on cursory conclusions that a particular human right is a breach of the law of nations are more vulnerable to challenge for lack of apparent 'caution'. [37] It may also be that courts within the Second Circuit have improperly digressed from the *Forti* test for 'the law of nations' in cases such as *Wiwa v Royal Dutch Petroleum*. [38] However, as noted, it is not clear that the court has adopted the *Forti* test to the exclusion of other home-grown tests. Certainly, the Supreme Court seems to endorse the equating of 'customary international law' with 'the law of nations', though it may be that certain elements of custom are not sufficiently 'definable' to be actionable under ATCA.

Souter J did refer to the danger that ATCA litigation could improperly intrude into the foreign relations domain of the US government. [39] Again, he counselled that lower courts should exercise 'great caution' in cases that 'raise risks of adverse foreign policy consequences'. [40] He targeted the 'South African apartheid litigation' as litigation that could, and possibly should, fail on that basis. [41]

Of course, the *Sosa* decision did not concern an ATCA action against a corporation. Souter J however referred to the existence of ATCA actions against corporations and also the existence of 'private actor abuses' without disapproval. [42]

Finally, one may note two miscellaneous statements by Souter J that could impact on human rights litigation. First, Souter J noted the argument that ATCA plaintiffs should exhaust domestic remedies in the forum in which the alleged abuses occurred before seeking a remedy in the US. [43] His Honour perhaps exhibited tacit support for such a requirement in stating that the Court 'would certainly consider this [domestic remedies] requirement in an appropriate case'. [44] Second, Souter J exhibited scepticism that 28 USC §1331 granted federal courts power to develop common law in a similar manner to ATCA. [45] If this scepticism eventually translates into the ratio of a case, plaintiffs would be unable to base causes of action on customary international law via §1331. [46]

Conclusion

The *Sosa* decision may herald more conservative decision-making in ATCA cases. For example, *Sosa* may temper the enthusiasm with which some courts have been willing to classify alleged violations as breaches of the law of nations. It may encourage a greater willingness amongst courts to dismiss cases due to doctrines of abstention such as political question, act of state, and comity. It may prompt the adoption of a requirement to exhaust domestic remedies in a relevant foreign forum.

On the other hand, it may be that *Sosa* simply authorises 'business as usual' in ongoing ATCA cases. After all, the Supreme Court adopted the same test as the Ninth Circuit for determination of 'the law of nations': it merely came to a different

conclusion on the application of that test. Therefore, the narrowing effect of *Sosa* may be to simply deny that short-term arbitrary detention is a breach of the law of nations. Otherwise, as wryly noted by Scalia J, it may be that the Supreme Court has merely 'wag[ged] a finger at the lower courts for going too far', and then 'invite[d] them to try again'. [47] Given that the Supreme Court reviews only a 'tiny fraction' of lower court decisions, the lower federal courts may in reality be free to resist the implicit constraints of Souter J's decision. [48]

[1] 124 S. Ct 2739 (2004)

[2] *The Supreme Court did consider an ATCA case in Argentine Republic v Amerada Hess Shipping Corp* 488 US 428 (S Ct 1989), where it decided that ATCA did not remove sovereign immunity (see Book, p. 39).

[3] *Alvarez-Machain v US* 331 F 3d 604 (9th Cir 2003) 621-22

[4] *Alvarez-Machain v US* 331 F 3d 604 (9th Cir 2003) 618-620

[5] *Sosa v Alvarez-Machain* 2003 US LEXIS 8572 (S Ct 2003)

[6] 630 F 2d 876 (2d Cir 1980); see Book, pp. 21-22.

[7] See Reply Brief of the Petitioner, filed 23 March 2004, available via <http://sdshh.com/Alvarez/SosaMeritRply.pdf> (accessed 6 September 2004).

[8] See, for a list of amici, <http://sdshh.com/Alvarez/briefs.html> (accessed 6 September 2004).

[9] 124 S. Ct 2739 (2004), 2755.

[10] *Id.*, 2755

[11] *Id.*, 2755-2762

[12] *Id.*, 2756

[13] *Id.*, 2762

[14] *Id.*, 2762.

[15] See, regarding the comparable position in Anglo-Australian law, Justice Michael McHugh, 'The Law-Making Function of the Judicial Process *Æ Part I*' (1988) 62 *Australian Law Journal* 15.

[16] 124 S. Ct 2739 (2004), 2762, quoting *The Common Law* (Howe, ed, 1963).

[17] 304 US 64 (S Ct, 1938), 78-79.

[18] 124 S. Ct 2739 (2004), 2771 per Scalia J.

[19] *Id.*, 2762 per Souter J.

[20] *Id.*, 2762

[21] *Id.*, 2762

[22] See Book, pp. 61-63, on the TVPA.

[23] 124 S. Ct 2739 (2004), 2763

[24] *Id.*, 2764. In support, Souter J cited the post-*Erie* case of *Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (S Ct, 1964), where the Supreme Court developed the common law doctrine of 'act of state'.

[25] *Id.*, 2764. Souter J cited the *Paquete Habana* 175 US 677, 686, *The Nereide* 9 Cranch 388, 423 (1815, Marshall CJ), and *Texas Industries v Radcliff Materials* 451 US 630, 641 (S Ct, 1981).

[26] 124 S. Ct 2739 (2004), 2764-5.

[27] *Id.*, 2765

[28] *Id.*, 2765

[29] *Id.*, 2766

[30] *Forti v Suarez-Mason* 672 F Supp 1531 (ND Cal 1987) 1539-40. Souter J does not however cite *Forti*. Rather, he cites Edwards J in *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir, 1984) and *In re Estate of Marcos Human Rights Litigation* 25 F 3d 1467, 1475 (CA9 1994).

[31] See Book, p. 31

[32] 124 S. Ct 2739 (2004), 2769. See also Book, p. 24.

[33] 124 S. Ct 2739 (2004), 2766-9. Breyer J in a separate opinion found that 'arbitrary arrest, outside the United States, of a citizen of one foreign country by another' does not breach the law of nations (*id.*, at 2783).

[34] *Id.*, 2771

[35] *Id.*, 2776

[36] *Id.*, 2776

[37] See Book, p. 24.

[38] No 96 Civ 8386, 2002 US Dist LEXIS 3293 (SDNY Feb 22, 2002), 36. See Book, p. 30-31.

[39] 124 S. Ct 2739 (2004), 2766 (note 21).

[40] *Id.*, 2763. See generally, Book, pp 39-47

[41] 124 S. Ct 2739 (2004), 2766 (note 21); see also Breyer J at 2782. See Book, pp. 50-53.

[42] *Id.*, 2766 (note 20); see also Breyer J in separate opinion at 2782. See generally, Book, p. 48-49. Souter J did not use the term 'private actor abuse'.

[43] See Book, pp. 62-63, on how this requirement operates under the TVPA.

[44] 124 S. Ct 2739 (2004), 2766 (note 21).

[45] *Id.*, 2765 (note 19)

[46] See Book, pp 77-78., on \hat{U} 1331.

[47] 124 S. Ct 2739 (2004), 2776.

[48] *Id.*, 2776.