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Sosa v. Alvarez-Machain - Restricting Access to US Courts Under the Federal Tort Claims Act and the Alien Tort Statute: Reversing the Trend

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SOSA V. ALVAREZ-MACHAIN—RESTRICTING ACCESS TO US COURTS UNDER THE FEDERAL TORT CLAIMS ACT AND THE ALIEN TORT STATUTE: REVERSING THE TREND

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I. INTRODUCTION

To function with adequate predictability and efficiency, the international community must maintain orderly relations among its members. This necessarily requires that members develop international norms of behavior and accept a certain loss of their otherwise exclusive sovereignty. Nowhere has the enforcement of international norms been more pronounced than in the area of human rights. International human rights norms directly challenge conventional notions of exclusive state sovereignty and unilateral action. The United States has long been a motive force behind the international human rights movement, opening its federal courts to redress human rights violations committed domestically or abroad. Specifically, federal courts have used the Federal Tort Claims Act (FTCA)[1] and the Alien Tort Statute (ATS)[2] to exercise jurisdiction over human rights violations and grant relief when warranted. In the aftermath of September 11, however, the United States has found itself in a dilemma: how to encourage the development of human rights jurisprudence around the world without making itself liable for alleged human rights violations committed pursuant to the war on terror. For nearly half a century the United States Supreme Court has willingly extended its jurisdiction to victims of human

1. The Federal Torts Claims Act, 28 U.S.C.A. §§ 1346, 2671 et seq. (West 2004) [hereinafter FTCA]. The Federal Torts Claims Act authorizes a suit "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C.A. § 1346(b)(1) (West 2004).

2. 28 U.S.C.A. § 1350 (West 2004) [hereinafter ATS]. The ATS provides in its entirety that "[t]he 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."

rights violations.[3] *Sosa v. Alvarez-Machain*, however, represents a departure from this long-standing practice and limits access to U.S. federal courts in human rights cases.

This casenote will examine the Supreme Court's decision in *Sosa* and the manner in which that decision defines the limits of the FTCA and the ATS. First, the casenote will review the background facts and procedural history of *Sosa,* including the decisions of the district and appellate courts. Second, it will consider the Court's treatment of FTCA claims when the alleged injury occurs in a foreign country, paying particular attention to the Court's rejection of the "headquarters doctrine" as a means of exercising jurisdiction over such claims and imposing liability on the United States and its employees. Third, it will describe the Court's refusal to expand the reach of the ATS beyond a limited and highly specific set of claims, most of which relate to violations of the law of nations, as that body of law was understood in 1789 when the ATS was adopted. Finally, the casenote will evaluate *Sosa* in light of post-9/11 domestic security and American foreign policy concerns and explore the potential effects of the *Sosa* decision beyond its immediate impact on the litigants.

II. FACTS AND HOLDING

In 1985, special agent Enrique Camarena-Salazar (Camarena), of the United States Drug Enforcement Agency (DEA), was abducted while on assignment in Mexico.[4] In a house in Guadalajara, his captors tortured him over the course of a two-day interrogation and then murdered him.[5] Eyewitness testimony led DEA officials to believe that Humberto Alvarez-Machain (Alvarez), a Mexican citizen and medical doctor, was present at the house and acted to prolong Camarena's life to draw out the interrogation and torture.[6]

In 1990, a federal grand jury indicted Alvarez for his role in the torture and murder of Camarena, and the United States District Court for the Central District of California issued a warrant for his arrest.[7] The United States requested the Mexican government's assistance in obtaining

3. *See, e.g.*, Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979), *overruled by* Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004); Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984), *overruled by* Smith v. United States, 507 U.S. 197 (1993); Couzado v. United States, 105 F.3d 1389 (11th Cir. 1997), *overruled by Sosa*, 124 S. Ct. 2739.

4. *See* Alvarez-Machain v. United States, 331 F.3d 604, 609 (9th Cir. 2003), *vacated by* 374 F.3d 1384 (2004).

5. *Sosa,* 124 S. Ct. at 2746.

6. *Id.*

7. *Alvarez-Machain*, 331 F.3d at 609.

custody of Alvarez but made no formal demand to extradite him.[8] Instead, DEA officials in Washington, D.C. approved the use of Mexican nationals, unaffiliated with either government, to seize Alvarez and bring him to the United States for trial.[9] On April 2, 1990, a group of Mexican nationals, including Jose Francisco Sosa (Sosa), kidnapped Alvarez and held him overnight in a motel.[10] The next day his captors smuggled him by private plane into the United States where federal officers arrested him.[11]

Alvarez filed a motion to dismiss.[12] He argued that his arrest violated the United States-Mexico Extradition Treaty thereby vitiating federal court jurisdiction over him.[13] The district court agreed, the Ninth Circuit affirmed, but the Supreme Court reversed and remanded for trial.[14] The Supreme Court applied the doctrine announced in *Ker v. Illinois*,[15] and held that forcible abduction of a person to bring them within the court's jurisdiction does not abrogate the court's authority to try them.[16] Tried in 1992, the case ended at the close of the government's case, when the district court granted Alvarez's motion for summary judgment for kidnapping and detention.[17] The district judge granted the motion on the ground that the government had adduced insufficient evidence to support a guilty verdict, concluding that "the case against Alvarez was based on 'suspicion and . . . hunches but . . . no proof,' and that the government's theories were 'whole cloth, the wildest speculation.'"[18]

Alvarez's original action filed in 1993 named Sosa, a number of other Mexican nationals, the United States, and individual DEA agents as defendants.[19] Later, the case was pared down, leaving only Sosa and the United States as defendants. At issue in this case was "Alvarez's damages claim for alleged false arrest by the United States under the FTCA and damages claim against Sosa under the ATS."[20] Alvarez claimed Sosa had violated the law of nations by participating in a transborder abduction not

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8. *Alvarez-Machain*, 331 F.3d at 609.

9. *Id.*

10. *Id.*

11. *Sosa*, 124 S. Ct. at 2746.

12. *Id.*

13. *See Alvarez-Machain*, 331 F.3d at 609.

14. *Id.* at 610.

15. 119 U.S. 436 (1886).

16. *See id.*

17. *Sosa*, 124 S. Ct. at 2746.

18. *Alvarez-Machain*, 331 F.3d at 610.

19. *Id.* at 609-10. "The DEA agent in charge of the Camarena murder investigation . . . hired Antonio Garate Bustamante . . . to contact Mexican nationals who could help apprehend Alvarez." Garate arranged for Sosa to participate in Alvarez's seizure and transborder abduction. *Id.*

20. *See Sosa*, 124 S. Ct. at 2747.

authorized by law.[21] The district court granted the government's motion for summary judgment and dismissed Alvarez's FTCA claim.[22] As to his ATS claim against Sosa, however, the district court entered summary judgment in favor of Alvarez and awarded him $25,000 in damages.[23]

The Ninth Circuit then reversed the dismissal of Alvarez's FTCA claims against the United States and affirmed the ATS judgment against Sosa, in essence giving Alvarez relief on both causes of action.[24] The defendants requested a rehearing with the Ninth Circuit, and a divided en banc court reaffirmed.[25] As to the FTCA claim, the court held that (1) the DEA lacked statutory authority to effect an extraterritorial arrest, and (2) the DEA could not avail itself of the law of citizen arrest to extend its authority beyond its territorial limits.[26] Thus, the United States was liable to Alvarez under California law for the tort of false arrest.[27]

As to the ATS claim, the court relied on its own precedent. It held that the Act provides federal courts with subject matter jurisdiction and creates a private right of action for an alleged violation of the law of nations.[28] "[S]ection 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action...."[29] The court acknowledged a "clear and universally recognized norm prohibiting arbitrary arrest and detention."[30] With only a United States court-issued warrant and no basis in law for its actions, the DEA—with Sosa's help—had illegally arrested and detained Alvarez.[31] Consequently, the United States had committed a tort under the law of nations.[32]

The United States Supreme Court granted certiorari in Alvarez's case

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21. *See Sosa,* 124 S. Ct. at 2747.

22. *Alvarez-Machain,* 331 F.3d at 611.

23. *Id.*

24. *See Alvarez-Machain,* 266 F.3d at 1064.

25. *Sosa,* 124 S. Ct. at 2747.

26. *Alvarez-Machain,* 331 F.3d at 641.

27. *Id.* at 640-41.

28. *See* Hilao v. Estate of Marcos *(In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467, 1475 (9th Cir. 1994) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (D.C. Cir. 1984) (emphasis removed).

29. *Id.*

30. *Alvarez-Machain,* 331 F.3d at 620-29 nn.16-17. "The Universal Declaration . . . provides that "[n]o one shall be subjected to arbitrary arrest, detention, or exile," Universal Declaration art. 9, and the ICCPR, which the United States has ratified, unequivocally obligates states parties to refrain from "'arbitrary arrest or detention.'" *Id.*

31. *Id.* at 631.

32. *Id.*

against the United States to clarify the scope of the FTCA and, in Alvarez's case against Sosa, to clarify the scope of the ATS.[33] The Court reversed the Ninth Circuit decision on both claims, holding: (1) the FTCA's waiver of governmental sovereign immunity does not extend to tort claims whose liability-causing injury takes place on foreign soil,[34] regardless of where the tortious act or omission giving rise to that injury occurred;[35] and (2) the ATS is a jurisdictional statute and does not create a statutory cause of action for aliens beyond those few international law violations recognized by the common law in 1789 when the ATS was enacted.[36] However, such causes of action may be recognized in the future provided they meet the same high level of specificity and universality as those understood to exist in the late 18th century.[37]

III. BACKGROUND

A. THE FTCA AND THE "HEADQUARTERS DOCTRINE"

The FTCA permits suit against the United States government and renders it liable in tort, as a private individual would be under similar circumstances.[38] The FTCA likewise authorizes federal district courts to adjudicate claims against the United States for injuries caused by a government employee acting within the scope of his office or employment.[39] There are, however, limitations on the FTCA's waiver of sovereign immunity, namely, the Act bars "any claim arising in a foreign country."[40]

To ensure that this "foreign country" exception did not immunize the United States government from U.S.-sponsored torts committed abroad, federal courts have applied what is known as the "headquarters doctrine,"[41] under which the United States is estopped from invoking the "foreign country" exception where the tort giving rise to the injury was planned or initiated by United States government officials located (i.e., headquartered) in the United States.

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33. *Sosa*, 124 S. Ct. at 2747.

34. *Id.*; 28 U.S.C. § 2680(k) (2000) (limiting the waiver of sovereign immunity as to "[a]ny claim arising in a foreign country").

35. *Sosa*, 124 S. Ct. at 2754.

36. *Id.*

37. *See id.* at 2761-62.

38. *See* 28 U.S.C. § 2674; 28 U.S.C. § 1346(b); *Sosa*, 124 S. Ct. at 2747; Richards v. United States, 369 U.S. 1, 6 (1962).

39. *Sosa*, 124 S. Ct. at 2747.

40. *Id.* at 2748 (citing 28 U.S.C. § 2680(k)).

41. *See, e.g.*, *Sami*, 617 F.2d at 762. *Beattie*, 756 F.2d at 91.

The headquarters doctrine was initially developed in *Richards v. United States*, which, ironically, did not involve a foreign injury.[42] At issue in *Richards* was which law a federal court should apply in an FTCA suit where a negligent act in one state injures someone in another state.[43] Petitioners, representing passengers killed in an airplane that took off from Oklahoma and crashed in Missouri, filed suit in the Northern District of Oklahoma against the United States.[44] They alleged that the Government, through the Civil Aviation Agency, had negligently failed to enforce the terms of various federal regulations, that would have prohibited certain maintenance practices of the airline in its overhaul depot in Tulsa, Oklahoma.[45]

The Supreme Court granted certiorari to resolve a three-fold conflict among the circuit courts and articulate a uniform rule that could be applied in FTCA cases.[46] The Court determined that under the FTCA, federal courts hearing multi-state tort actions must look first to the law of the place[47] where the negligent act occurred and not to the place where the negligent act had its operative effect.[48] In other words, the location of the tort, and not the injury, controlled the choice of law.

Following *Richards*, appellate courts applied the headquarters doctrine to prevent immunity of government officials whose acts or omissions in the United States caused injuries in foreign countries.[49] For example, in *Sami*

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42. *See* 369 U.S. at 10; Jamie Shapiro, *Aliens' Redress of Grievances Against the United States for International Human Rights Violations*, 10 SW. J. L. & TRADE AM. 195, 211-212 (2003-2004).

43. *Richards*, 369 U.S. at 2.

44. *Id.* at 3. (The airlines had already settled with each petitioner, paying the maximum amount recoverable under the Missouri Wrongful Death Act).

45. *Id.*

46. *See id.*; *see also* Voytas v. United States, 256 F.2d 786 (7th Cir. 1958) (holding that the reference in Section 1346(b) to "place where the act or omission occurred" directs application of only the internal law of that state); Landon v. United States, 197 F.2d 128 (2d Cir. 1952) (holding that a court must refer to the whole law of the state where the act or omission occurred); United States v. Marshall, 230 F.2d 183 (9th Cir. 1956) (holding that the internal law of the place where the negligence had its operative effect should control).

47. *Richards*, 369 U.S. at 10-11 (concluding that the "law of the place" included conflicts of law rules).

48. *Id.*

49. *See* Shapiro, *supra* note 42, at 211-13. *See also Couzado*, 105 F.3d 1389 (11th Cir. 1997) (holding that the foreign country exception to the FTCA did not bar suit against the United States where passengers and crew of a commercial airliner were arrested and incarcerated in Honduras because of cocaine placed on board by United States government agents as part of a sting operation); *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1255 (E.D.N.Y.) (1984) (Even though the injuries occurred in Vietnam, the United Stats could be held liable because decisions related to specifications and use of Agent Orange occurred with in the United States).

v. United States, the court applied the headquarters doctrine to plaintiff's claim that German officials wrongfully detained him based on a communiqué sent by a United States government official.[50] The court held that a FTCA claim arises in the United States if the negligent act or omission takes place in the United States, regardless of whether the act or omission has its operative effect in a foreign country.[51] Subject matter jurisdiction could also be predicated on allegations that a negligent failure to warn, instruct or train in the United States proximately caused damage or injury abroad.[52] The holdings in the cases building on *Richards* indicate that a claim is not barred by the foreign country exception where the tortious conduct occurs in the United States, but the injury is sustained in a foreign country.

The Supreme Court in *Sosa* rejected the circuit courts' post-*Richards* approach and consequently rejected the headquarters doctrine outright, thereby revitalizing the foreign country exception.[53] Adhering to policy considerations, it was unwilling to uphold the headquarters doctrine for fear it would overwhelm the purpose of the foreign country exception, which was to prevent federal courts from applying foreign law to tort claims brought against the United States and its employees.[54]

There is perhaps a larger political issue involved here. Since the attacks on September 11, 2001, the United States has taken military action abroad, exposing American soldiers and decision-makers to potential FTCA claims lodged by foreigners.[55] If the law continues to permit such claims,

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50. *See Sami*, 617 F.2d at 761-62.

51. *See id.* at 762.

52. *See, e.g., Beattie*, 756 F.2d 91 (where the court asserted jurisdiction over claims based on plaintiffs' allegations that the negligent selection, training, and supervision of air traffic controllers by officials in Washington, D.C. caused the airplane to crash in Antarctica). *But cf.* Eaglin v. United States Dep't of Army, 794 F.2d 981 (5th Cir. 1986) (where the court declined to assert jurisdiction under the FTCA where the alleged negligent failure to warn of hazardous weather conditions in West Germany during plaintiff's training in the United States was not the proximate cause of plaintiff's injury in that country).

53. *Sosa*, 124 S. Ct. at 2754.

54. *Id.* at 2749. ("[I]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States.") (citing *Beattie*, 756 F.2d at 119 (Scalia, J., dissenting)).

55. *Alvarez-Machain*, 331 F.3d at 645 (O'Scannlain, J., dissenting):

> We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our government for money damages. In so doing, and

the judicial and executive branches would surely collide, with disastrous results. This may or may not explain the Court's shift to a more restrictive approach to FTCA lawsuits, but it certainly provides the context in which that shift is made.

B. THE ATS: *FILÁRTIGA* AND ITS PROGENY

For two centuries, the ATS received little attention because litigants rarely used it. Since 1980, however, plaintiffs have invoked the ATS to redress serious human rights violations such as disappearance,[56] genocide, war crimes, crimes against humanity,[57] torture and murder,[58] and cruel, inhuman, and degrading treatment.[59] Federal courts have granted relief in such cases, holding that these "torts" transgress the law of nations, and thus trigger jurisdiction under the ATS.[60] It appears, however, that this trend has run its course. Indeed, the Supreme Court's decision in *Sosa* signals a retrenchment of judicial policy with respect to ATS claims. To understand the magnitude and significance of this change, one must first return to the case that started the general expansion of ATS jurisdiction: *Filártiga v. Peña-Irala*.[61]

In 1980, the Second Circuit allowed a Paraguayan family to sue a Paraguayan police official in federal district court in Brooklyn for a kidnapping and murder that occurred in Paraguay.[62] In *Filártiga*, Americo Peña-Irala, a Paraguayan police officer, tortured seventeen-year-old Joelito Filártiga to death.[63] The brutal incident occurred entirely within the territory of Paraguay.[64] Some years later, the Filártiga family, having relocated to New York, discovered Peña-Irala living in Brooklyn.[65] The Filártigas filed suit in federal court under the ATS.[66] The district court relied on Second Circuit precedent and took a hands-off approach.[67] It held that a state's treatment of its own citizen is not controlled by international

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despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.

56. *See* Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

57. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 508 U.S. 972 (1993).

58. *See In re* Estate of Marcos, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, Marcos-Manotoc v. Trajano, 508 U.S. 972 (1993).

59. *See* Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994).

60. *See* cases cited *supra* notes 50-53.

61. 630 F.2d 876 (2d Cir. 1980).

62. *See id.*

63. *Filártiga*, 630 F.2d at 878.

64. *Id.*

65. *Id.* at 878-79.

66. *Filártiga*, 630 F.2d at 879.

67. *Id.* at 880.

law.[68] The appellate court reversed.[69] It held instead that the phrase "the law of nations" in the ATS could be broadly interpreted as including international law.[70] The Court looked to both the executive branch and international law experts to determine the rules of international law.[71] The Court agreed with all the sources that a state violates binding international legal norms if it tortures its own citizens.[72]

From 1980 until the mid-1990s, courts applied the holding of *Filártiga*—that an alien may sue for violations of "universal, definable, and obligatory" international law norms—with little dissent.[73] After establishing that the ATS supported causes of action against foreign governmental officials, courts in the late 1990s issued a line of cases extending that rule to hold corporations accountable for their activities abroad. A number of multinational corporations have been sued under the ATS for murder, torture, toxic harm, genocide, enslavement, and rape associated with their projects in various countries including Ecuador, India, the Sudan, and Nigeria.[74]

In *Kadic v. Karadzic*, the Second Circuit further expanded the ATS's jurisdictional reach by holding private individuals and corporations acting on behalf of a state liable for violations of international legal norms.[75] Citizens of Bosnia-Herzegovina filed suit under the ATS against the leader of the de facto regime in that country for various atrocities including rape, forced prostitution, forced impregnation, torture, and summary execution at the hands of the Bosnian-Serb military.[76] The court of appeals reversed the district court and held that (1) some international norms applied equally to private actors and government officials, and (2) a private actor could be held liable for violating an international norm that requires state action when acting in complicity with a state actor.[77] *Kadic,* therefore, extended liability to private actors for violations of international norms under certain

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 884.

73. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); Beanal v. Freeport-McMoran, Inc, 197 F.3d 161 (5th Cir. 1999); Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998); *In re* Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); *Kadic*, 70 F.3d 232; Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996).

74. *See, e.g.*, Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa,* 226 F.3d 88.

75. *See Kadic*, 70 F.3d at 249-51.

76. *See id.* at 236-37.

77. *See Kadic*, 70 F.3d at 245.

circumstances.

However, in *Sosa*, the Court departed significantly from the post-*Richardson* and post-*Filártiga* decisions that broadened the scope of the FTCA and the ATS respectively. The *Sosa* court set forth a more constrained and limited interpretation of the statutes.

IV. THE COURT'S DECISION

The Supreme Court's opinion in *Sosa* reversed the Ninth Circuit's decision. The Court rejected the headquarters doctrine as an exception to the foreign country exception of the FTCA and limited the reach of the ATS to a select few causes of action.[78]

A. THE FTCA AND THE HEADQUARTERS DOCTRINE

The Court first considered the validity of the headquarters doctrine.[79] The Ninth Circuit found that Alvarez's arrest was false, and thus tortious, only to the extent it occurred in Mexico, outside the DEA's jurisdiction.[80] The foreign country exception, therefore, would seem to apply, operating to frustrate Alvarez's claim. The Ninth Circuit found, however, that although Alvarez's injury—the kidnapping—occurred in Mexico, DEA agents in the United States planned and orchestrated it.[81] The Ninth Circuit thus applied the headquarters doctrine and granted jurisdiction over Alvarez's claim.[82]

Because the Court believed that the headquarters doctrine would eradicate the foreign country exception to the FTCA, it rejected its application in cases potentially implicating the foreign country exception.[83]

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78. *Sosa,* 124 S. Ct. at 2754-55. Justice Souter wrote the majority opinion. Justice Scalia concurred in part and concurred in the judgment and filed an opinion, in which Chief Justice Rehnquist and Justice Thomas joined. Justice Ginsburg concurred in part and concurred in judgment and filed an opinion, in which Justice Breyer joined. Justice Breyer concurred in part and concurred in judgment and filed an opinion. *Id.*

79. *See id.* at 2747 (where the government raised a twofold defense to liability under the FTCA: (1) it argued that its arrest of Alvarez was not tortious, asserting that 21 U.S.C. § 878 authorized the DEA to arrest Alvarez in Mexico; and (2) it maintained that under the clear text of the FTCA, the Act's waiver of sovereign immunity does not extend to claims "arising in a foreign country" and that Alvarez's claim, therefore, fails for lack of subject matter jurisdiction. The Court applied the exception and decided on that ground.).

80. *See id.* at 2748.

81. *See id.*; *see also Alvarez-Machain*, 331 F.3d at 638 (where DEA officials in Los Angeles made the decision to kidnap Alvarez; DEA officials in Washington, D.C., approved the details of the operation, and DEA officials provided transportation particulars to the arrest team and obtained clearance for the landing in El Paso, Texas).

82. *See Sosa*, 124 S. Ct. at 2780.

83. *See id.* (citing *Beattie*, 756 F.2d at 119) (Scalia, J., dissenting) ("[I]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the

In support of its position, the Court first considered cases alleging harm resulting from action in a foreign country and planning in the United States.[84] The Court acknowledged the significance of proximate cause analysis in "headquarters" cases, but explained that a mere connection between domestic behavior and foreign harm was insufficient alone to bar application of the foreign country exception and extend the jurisdictional reach of the federal courts.[85]

Next, the Court looked to historical precedent and concluded that there was good reason to think that Congress understood a claim "arising in" a foreign country to be a claim for injury or harm occurring in that country.[86] The Court explained that state statutes existing at the time the FTCA was adopted used the phrase "arising in" to determine which state's limitations period applied in cases involving transjurisdictional facts.[87] History also demonstrated that courts likewise applied this interpretation to tort cases.[88] The Court stated that Congress, when it drafted the FTCA, would have been familiar with this standard interpretation of "arising in," and was well aware that when an injury occurs in a foreign country, the law of the alien nation, not that of the United States, would be applied.[89] Recognizing this, Congress attached the foreign country exception to the FTCA's general waiver of sovereign immunity.[90]

The Court then explained that choice of law analysis further supported the view that the foreign country exception intended "arising in" to refer to

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consequence or faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States.").

84. *See Sosa*, 124 S. Ct. at 2748-49.

85. *See id.* at 2750 (citing *Beattie*, 756 F.2d at 119 (Scalia, J., dissenting)) ("[I]n the ordinary case there may be *several* points along the chain of causality" pertinent to the enquiry. Here, for example, proximate cause may be attributed to both the DEA's actions in California and Sosa's actions in Mexico. The establishment of a legal cause of harm in California does not eliminate the conclusion that the claim is based on harm proximately caused by actions in Mexico.").

86. *See id.*

87. *See id.* (According to the Court, the general rule at that time was that "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will [also] be barred in the domestic courts.") (quoting Francis M. Dougherty, *Annotation, Validity , Construction, and Application, in Nonstatutory Personal Injury Actions, of State Statute Providing for Borrowing of Stature of Limitations of Another State*, 41 A.L.R. 4th 1025 (1985)).

88. *See id.* ("A commentator noted in 1962 that, for the purposes of these borrowing statutes, "[t]he courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred"; i.e., "the jurisdiction in which injury was received."" (quoting John W. Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 47 (1963))).

89. *See Sosa*, 124 S. Ct. at 2750.

90. *See id.*

the place of harm, and not to the place of tortious conduct.[91] "When the FTCA was passed, the dominant principle in choice of law analysis was *lex loci delecti,*" meaning that "courts generally applied the law of the place where the injury occurred."[92] Under this traditional rule, the presumptive choice would be to apply foreign law to determine the tortfeasor's liability to a plaintiff injured in a foreign country.[93] Applying foreign substantive law, however, was precisely what Congress intended the foreign country exception to avoid.[94] Although most courts adhere to the traditional approach to choice of law conflicts, even courts using a flexible balancing analysis to inform choice of law[95] usually default to the traditional approach.[96] In practice, the modern approach frequently leads to the same

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91. *See id.*

92. *See Sosa*, 124 S. Ct. at 2750 ("The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties." (quoting Richards, 369 U.S. at 11-12)); *see also Sosa*, 124 S. Ct. at 2750. ("place of wrong for torts involving bodily harm is '*the place where the harmful force takes effect upon the body*'" (quoting Restatement (First) of Conflict of Laws § 377, note 1 (1934))); § 379 ("the law of the place of wrong").

93. *See Sosa,* 124 S. Ct. at 2751 (quoting Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975)) (per curiam) (where the Court noted that "Texas would apply Cambodian law to wrongful-death action involving explosion in Cambodia of an artillery round manufactured in United States"); *see also id.* (quoting Thomas v. FMC Corp., 610 F. Supp. 912 (M.D. Ala. 1985)) (where the court applied "German law to determine American manufacturer's liability for negligently designing and manufacturing a Howitzer that killed decedent in Germany"); *id.* (quoting Quandt v. Beech Aircraft Corp., 317 F. Supp. 1009 (D. Del. 1970) (noting that "Italian law applies to allegations of negligent manufacture in Kansas that resulted in an airplane crash in Italy").

94. *See Sosa*, 124 S. Ct. at 2751-52. ("In 1942, the House Committee on the Judiciary considered an early draft of the FTCA that would have exempted all claims 'arising in a foreign country in behalf of an alien.'") (quoting H.R. 5373, 77th Cong., 2d Sess., § 303(12)).
The bill was then revised at the suggestion of the Attorney General to omit the last five words. In explaining the amendment to the House Committee, Assistant Attorney General Shea said that, "[c]laims arising in a foreign country have been exempted from this bill, H.R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country."
Sosa, 124 S. Ct. at 2751. *See also* 28 U.S.C. § 2680(k) (signaling Congress's "unwilling[ness] to subject the United States to liabilities depending upon the laws of foreign power").

95. *See* Gary J. Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren,* 36 CORNELL INT'L L.J. 125, 125 (2003) ("The traditional methodology of place of wrong . . . has receded in importance, and new approaches and concepts such as governmental interest analysis, most significant relationship, and better rule of law have taken over center stage.").

96. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969) (where tort liability is determined "by the local law of the state which . . . has the most significant relationship to the occurrence and the parties," taking into account "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered").

result as the traditional, and applies the law of the jurisdiction of injury.[97] The Court explained, therefore, that under both traditional and modern choice of law methodologies, the headquarters doctrine would require federal courts to apply foreign law to tort claims against the United States and its employees—exactly what the foreign country exception was meant to avoid.[98]

Finally, in response to the argument that federal courts could selectively apply the headquarters doctrine when a state's choice of law approach would *not* apply foreign law of place of harm, the Court stated that such a design would vary from state to state to such a degree as to frustrate the goals of uniform federal jurisdiction.[99] Thus, the Court was unwilling to recognize a scheme of federal jurisdiction allowing for selective application of the headquarters doctrine in cases that did not implicate foreign law. Based on the Court's analysis, application of the headquarters doctrine would violate either the choice of law rules or the legislative intent of Congress.[100] Declining to advance either outcome, the Court rejected the headquarters doctrine and held "that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[101]

B. DEFINING THE ATS

Having disposed of Alvarez's FTCA claim against the United States, the Court then addressed his ATS claim against Sosa.[102] Alvarez asserted that the ATS went beyond a jurisdictional grant and authorized a private right of action for an alleged violation of the law of nations, i.e., international law.[103] Although the Court concluded that the ATS was jurisdictional and provided no new causes of action,[104] it rejected Sosa's

97. *See Sosa*, 124 S. Ct. at 2753; *see, e.g.*, Dorman v. Emerson Elec. Co., 23 F.3d 1354 (8th Cir. 1994) (applying Canadian law where negligent saw design in Missouri caused injury in Canada); Bing v. Halstead, 495 F. Supp. 517 (S.D.N.Y. 1980) (applying Costa Rican law where letter written and mailed in Arizona caused mental distress in Costa Rica); McKinnon v. F.H. Morgan & Co., 750 A.2d 1026 (Vt. 2000) (applying Canadian law where a defective bicycle sold in Vermont caused injuries in Quebec).

98. *See Sosa*, 124 S. Ct. at 2753.

99. *See id.* at 2754 (where the Court refused to equate "arising in a foreign country" with "implicating foreign law," explained that to allow selective application on this basis would create jurisdictional variety from state to state benefiting or penalizing plaintiffs accordingly, and stated such jurisdictional inconsistency was too implausible to be what Congress intended).

100. *See id.* at 2752.

101. *Id.* at 2754.

102. *See Sosa*, 124 S. Ct. at 2754.

103. *Id.* at 2755.

104. *Id.* (relying on the ATS's placement within the Judiciary Act as support of its strictly jurisdictional nature).

counterargument that the statute did not recognize any cause of action absent further legislation from Congress.[105] Instead, the Court concluded that history sanctioned the ATS's jurisdictional authority to include the power to hear a limited category of claims.[106] The claims, the Court explained, were narrowly defined and embraced those international common law causes of action recognized and understood in 1789: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[107] The Court concluded that, based on the most reasonable inference from the historical materials, the jurisdictional grant is best read as being embedded with causes of action for the limited number of international law violations whose potential personal liability could implicate whole states or nations in the international arena.[108]

The next question was whether the First Congress vested district courts with the jurisdiction to hear private cases alleging violations of the law of nations. The Court once again consulted the historical record and determined that the First Congress did intend courts to have this authority.[109] Because the historical record is equivocal at best, the Court was unwilling to assume that Congress intended to expand the types of private causes of action beyond those torts corresponding to Blackstone's three primary offenses.[110] The Court recognized, however, that nothing in two centuries of case law expressly ruled that this suite of international law torts was exhaustive,[111] nor had Congress limited the ATS or civil common law power by any other statute. Still, the Court advised, any new causes of action had to have the same specificity and universality as the originals.[112] The Court, therefore, granted discretion to the federal courts to expand the category of recognized causes of action under the ATS, but tempered that discretion with a high threshold.[113] Any claim based on the present-day law of nations must be grounded on a "norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms."[114]

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105. *See id.* at 2754.

106. *See Sosa*, 124 S. Ct. at 2754-61 (relating to historical context outlining the genesis of the statute and the First Congress's motivation in adopting it).

107. *Id.* at 2754 (noted in 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

108. *See id.* at 2761.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See Sosa*, 124 S. Ct. at 2761.

113. *See id.*

114. *Id.* at 2761-62.

The Court then explained why judicial caution is necessary when considering whether to recognize a new private cause of action for an alleged international tort.[115] First, the notion of common law has changed since 1789.[116] In the modern view, common law is grounded in legislative action.[117]

Second, further distinguishing the lawmaking function of the legislature from the interpretive function of the judiciary, the Court reiterated its position articulated in *Erie R. Co. v. Tompkins*,[118] that there is no federal "general" common law.[119] The Court concluded that while it does not shrink from making judicial rules of decision that affect foreign relations,[120] the Court's general practice was to look for legislative guidance on the applicable substantive law before issuing new federal common law.[121]

Third, the Court acknowledged that the legislature is best equipped to create a private right of action.[122] A private right of action is a tremendous grant of power to individual citizens because it gives them direct access to the courts and a means of enforcing the terms of a statute.[123] Even in the domestic arena, when Congress enacts a statute that applies expressly to private conduct, the Court will not infer a private right of action if one is not provided by the statute.[124] The Court thought it wise to exercise this same caution when dealing with statutes governing international norms, because of their potential for collateral consequences.[125]

Finally, the Court determined that Congress had not given federal

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115. *Id.*

116. *See id.* (explaining that in the 18th century, the prevailing thought was that the common law was something that existed unto itself and only had to be discovered); *see also* Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (explaining that the common law "was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute").

117. *See Sosa*, 124 S. Ct. at 2762; ("[I]n substance the growth of the law is legislative . . . [because t]he very consideration which judges most rarely mention, and always with an apology, are the secret root from which the laws draws all the juices of life. I mean of course, considerations of what is expedient for the community concerned." (quoting THE COMMON LAW (Howe ed. 1963))).

118. 304 U.S. 64 (1938).

119. *Sosa*, 124 S. Ct. at 2762.

120. *See id.* (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) (creating the act of state doctrine).

121. *Id.* at 2762.

122. *See id.* at 2762-63.

123. *See Sosa*, 124 S. Ct. at 2763.

124. *See id.*

125. *See id.*

courts a mandate to seek out and define new violations of the law of nations.[126] Nor had Congress indicated that it would entertain judicial creativity in this field.[127] The passage of the Torture Victim Protection Act of 1991, which articulated a clear but limited private right of action for victims of torture, satisfied the Court that Congress's reluctance to grant such powers to the federal courts was not an oversight.[128]

The Court found that Alvarez failed to justify his contention that the prohibition of arbitrary arrest had attained the status of binding customary law such as to create a right of action under the ATS.[129] The Court relied on the reasoning of lower courts that have faced the issue over the last twenty years.[130] The Court indicated that in addition to assessing a claim for its specificity, universality, and obligatory nature, courts should also consider the ramifications of allowing these claims in federal courts.[131]

Three concurring opinions accompanied the *Sosa* decision. Justice Scalia issued a sharp condemnation of the Court's decision to grant discretion to the federal courts to consider new causes of action under the ATS.[132] Justice Scalia pointed out that the Court's decision in *Erie Railroad*—that all federal common law is made pursuant to Congressional authority conferred on federal courts—necessarily prohibits federal courts from declaring that additional international norms are judicially enforceable absent Congressional authorization.[133] Additionally, Justice Scalia

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126. *See id.*

127. *See id.*

128. *See id.* ("The Torture Victim Protection Act of 1991, 106 Stat. 73, provid[es] authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing" (quoting H.R. Rep. No. 102-367, pt. 1, p. 3 (1991)); *id.* ("The legislative history includes the remark that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law. Congress has done nothing to promote such suits.").

129. *See id.* at 2765. (Alvarez presented little authority citing nonbinding international agreements with moral authority but little utility under the opinion's set of standards. The Court stated, "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 § 1350 was enacted.") *Id.*

130. *See id.* at 2765-66 ("For purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind" (quoting *Filártiga*, 630 F.2d at 890)); *id.* (suggesting that the limits of section 1350's reach be defined by "a handful of heinous actions—each of which violates definable, universal, and obligatory norms" (quoting *Tel-Oren*, 726 F.2d at 781)); *id.* ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory." (quoting *In re Estate of Marcos*, 25 F.3d at 1475)).

131. *Sosa*, 124 S. Ct. at 2766.

132. *See id.* at 2772.

133. *Id.* at 2771; *see also* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to

criticized the fact that the Court reversed the Ninth Circuit's decision while endorsing the standards the Circuit court used to determine that Alvarez's claim reached the level of specificity, universality, and obligation rising to the level of "the law of nations."[134] Justice Scalia's concurrence expressed frustration with the formula the Court endorsed for determining which torts actually qualify as violations of the law of nations.[135]

Justice Ginsburg, joined by Justice Breyer, filed a concurring opinion that reached the same conclusion under an alternative theory.[136] Justice Breyer's concurrence stated that notions of international comity should inform the jurisdictional analysis under the ATS.[137] He suggested that the ATS should only reach claims where there is both "substantive agreement as to certain universally condemned behavior and procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior."[138]

V. ANALYSIS

The Supreme Court's decision in *Sosa* departs significantly from two lines of cases which, over the last few decades, have increased the United States' liability for torts and extended federal court access to alien tort plaintiffs making claims against private actors, including corporations.

By rejecting the headquarters doctrine, the Court cut the only line victims had to tether the United States, its officials, or employees to liability for tort violations orchestrated or financed in the United States but carried out in foreign countries. In a climate where the United States's executive branch is directing military action abroad, abrogation of the headquarters doctrine weakens any would-be plaintiff's chance to litigate his or her tort claim in federal court when the defendant is the United States government. The Court's decision thus functions as a useful shield in the government's unconventional war on terrorism.

The Court's opinion regarding ATS claims likewise benefits private defendants, including corporations, by confirming that the jurisdictional

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authority to formulate federal common law.").

134. *See Sosa*, 124 S. Ct. at 2775.

135. *See id.* at 2774-75. ("The Ninth Circuit brought us the judgment that the Court reverses today[,] . . . [b]ut the verbal formula it applied is the same verbal formula that the Court explicitly endorses.").

136. *See id.* at 2776. The Justices agreed with the Court that the foreign country exception barred Alvarez's claim under the FTCA but they would read the words "arising in" as they appear in 28 U.S.C. § 2680(k), to mean "place where the act or omission occurred," § 1346(b)(1), not "place of injury," *ante*, at 2752, 2754, and n. 9. *Id.* at 2777.

137. *Sosa*, 124 S. Ct. at 2782.

138. *Id.* at 2782-83.

nature of the ATS creates no new causes of action. Indeed, the Court in *Sosa* has reversed the trend established by the *Filártiga* line of cases that tended to expand private actors' liability for violations of international law. And although the majority's opinion in *Sosa* grants federal courts limited discretion to consider new causes of action under the ATS in certain circumstances, and thus does not preclude plaintiffs from using the ATS to bring suits in federal court alleging violations of international law, it places the bar almost out of reach. No new cause of action will likely arise except for those norms of international law accepted by the "civilized" world and defined with a specificity comparable to the three offenses recognized in the 18th century (injuries to ambassadors, interference with safe passage, and piracy). Given this small opening, it is likely that human rights activists will continue to file suits against corporations conducting business in foreign countries, alleging complicity in the abuses committed by foreign regimes against their own citizens. Still, it is just as likely that such suits will be dismissed for lack of jurisdiction.

One of the first cases to test this decision of the Court will be *Doe v. Unocal Corp.* currently pending before the Ninth Circuit.[139] In *Doe*, Burmese peasants filed suit against Unocal Corporation and others alleging that the company shared responsibility for human rights abuses, including forced labor, forced relocation, rape and torture, committed by the Burmese military regime in connection with a gas pipeline project.[140] Plaintiffs premise Unocal's liability on their agreement to participate in a joint venture to construct the pipeline and to provide money to the military to clear the pipeline route and provide security for the pipeline.[141] Plaintiffs contend that Unocal knew or should have known that the military regime of Burma had a history of abusing human rights in violation of customary international law.[142] The Ninth Circuit's decision on defendant's motion to dismiss will determine whether private multinational corporations may be held liable under the ATS for human rights abuses committed by the government that is "hosting" them.

Based on the Supreme Court's decision in *Sosa*, the Ninth Circuit has

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139. 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part* 2002 WL 31063976, (9th Cir. Dec. 3, 2001), *vacated* 2003 WL 359787 (9th Cir. Feb. 14, 2003).

140. *See Doe,* 963 F. Supp. at 885.

141. *See Doe,* 963 F. Supp. at 885.

142. *See id.* (where plaintiffs claimed that the military was using "violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the benefit of the pipeline[;]" plaintiffs also alleged that women and girls in the region were the target of rape and other sexual abuse by military officials, when left behind after male family members had been taken away to perform forced labor and when military officials were guarding the women during periods of forced labor).

discretion to consider whether forced labor and the other abuses that plaintiffs allege Unocal committed in complicity with the Burmese government creates a cause of action under the ATS. The Ninth Circuit may review whether those alleged violations are sufficiently "specific, universal, and obligatory" to rise to the level of customary international law. If the plaintiffs prevail, it will signal that federal courts are still willing to hear human rights violation suits against multinational corporations that do business or invest in other countries. Conversely, if the plaintiffs lose, corporations may be encouraged by the reduced risk of ATS liability to invest in countries whose controlling regimes have a penchant for committing human rights offenses.

One could argue that International human rights and worldwide accountability, as safeguarded in *Filártiga* and *Kadic* have become secondary to United States foreign policy objectives, including enhancing the profitability of U.S. corporations operating overseas. The United States has attempted to reaffirm its "superpower" status in the world by reverting to a traditional paradigm of exclusive sovereignty marked by isolationism and unilateral action. Regrettably, this "paradigm shift" has thrown human rights jurisprudence, at least as administered in United States federal courts, in reverse.

In 1789, accountability for transgressions committed in the international arena underpinned political thought and behavior. The same should be true today. In fact, increased globalization, made possible by advances in technology and the improved economic connectivity between nations, has only intensified the need for expanded international norms which can be enforced anywhere in the world, including courts of the United States. Unfortunately, however, the events of September 11, 2001, have caused the United States government to view global mobility as a threat to the security of the nation. As a result, the federal courts may no longer be as receptive to human rights cases as they once were. Like the other two branches of government, the judiciary is on a "war footing," which means, for the foreseeable future, that courts may well be inclined to sacrifice individual rights under the guise of defending the security interests of the United States.