



Small Group: Alien Tort Statute After Sosa

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Notes and Questions on Sosa

1. Defining the Actionable Claims. After *Sosa*, can we list the customary human rights norms that are actionable under the ATS? At a minimum, the court says, plaintiffs must rely on a norm of customary law defined with a specificity comparable to the 18th century paradigms the Supreme Court had recognized, but were those “paradigms” better defined than 21st-century human rights norms? Consider *United States v. Smith*, 18 U.S. 153, 162 (1820), in which the Supreme Court noted that there was some uncertainty about the international definition of piracy but found, based largely on the works of scholars, that acts of robbery on the high seas were within the core meaning of piracy and affirmed a death sentence on that basis. In at least one post-*Sosa* case, defendants have argued that unratified treaties and UN declarations and resolutions are “illegitimate” services of actionable customary norms. Does *Sosa* support this argument?

2. The “Specific, Universal, and Obligatory” Standard. Does *Sosa* alter the standard of proof for establishing the content of customary international law? What degree of uncertainty about the definition of a norm is acceptable after *Sosa*? The Supreme Court noted that its decision was “generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.” citing *Filartiga*, *Marcos* and Judge Edwards’ opinion in *Tel-Oren*. Plaintiffs in post-*Sosa* cases have argued that this part of the Court’s opinion clearly signals that the “specific, universal and obligatory” standard recognized in many pre-*Sosa* cases still applies and that most of the norms recognized before *Sosa* remain actionable in the post-*Sosa* world (e.g. torture, extra-judicial killings, disappearances, genocide, crimes against humanity, war crimes and slavery). Is this a fair reading of *Sosa*? Justice Souter’s opinion indicates that the door is “ajar” to new claims under the ATS

subject to “vigilant doorkeeping.” To what extent did the majority endorse the pre-Sosa case law? How would you interpret the meaning of “ajar”? See Beth Stephens, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004-2005).

3. A Two-Tiered Test for ATS Claims? Defendants in post-Sosa cases have argued that there is a two-tier test that any ATS claim must meet. First, the plaintiff must show that the norm s/he relies on is supported by the same evidence of uniformity and definiteness as the 18th century paradigms. Second, it has been argued, requires the evaluation of whether the “practical consequences” set forth in Sosa warrant the creation of a cause of action in that particular case or category of cases, e.g., see *Mujica v. Occidental Petroleum*, 381 F.Supp. 2d 1164, 1181-82 (C.D. Cal. 2005) (appeal pending). Is this analysis required by Sosa? Is it consistent with Sosa? Plaintiffs contend that once they have alleged a “specific, universal and obligatory” customary norm with specificity comparable to the 18th century paradigms, the Sosa test is satisfied. Some defendants have argued that courts must consider the “practical consequences” of every ATS claims in the particular circumstances of each case. Which of these views is more consistent with Sosa?

4. Cause of Action. The Supreme Court in Sosa rejected the idea that the ATS itself created a cause of action. Indeed, the Court termed this argument “frivolous,” citing Professor William Castro. William R. Castro, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479-80 (1986). However, the Court went on to find that Congress intended that the federal courts hear and decide at least some claims based on the “law of nations” without further Congressional action. Does it matter that the Court has found that the ATS creates no causes of action? Where does the claim for relief come from in ATS cases after Sosa? See, e.g., William R. Castro, *The New Federal Common Law of Tort Remedies for Violations of International Law*, RUTGERS L. REV. (2006) (forthcoming). What does Sosa say about the status of federal common law

in ATS cases? Which issues in an ATS case are governed by federal common law? Are international customary law or general principles of law relevant to a federal common law analysis under the ATS? Should they be dispositive? Must a plaintiff prove, as some defendants suggest, that all rules applied in an ATS case satisfy the Sosa test? Is this contention consistent with the court's discussion of federal common law? What happens if international norms conflict with or are in advance of the status quo in U.S. law? These issues are considered in the following case study on the corporate human rights cases

5. Private Actors. Most of the defendants in ATS actions have been former foreign government officials. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Arce v. Garcia*, 400 F.3d 1340 (11th Cir. 2005) In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *supra*, the Second Circuit held that the ATS actions could be brought against non-state actors, in that case the Bosnian-Serb president, for certain violations of international law. Footnote 20 of Justice Souter's majority opinion reads: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)." Was this a reference to whether a particular international claim requires state action? Did the Court have corporations in mind?

6. Justice Breyer's Concurrence. In his concurring opinion, Justice Breyer noted the connection between universal criminal jurisdiction and civil tort recovery for similar harms.

Today international law will sometimes reflect not only substantive agreement as to certain universally condemned behavior but also

procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. See Restatement § 404, and Comment a;The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well. *Sosa*, 542 U.S. at 762-63.

Should ATS jurisdiction be restricted by the scope of universal jurisdiction in criminal cases?

7. Extraterritoriality. In amicus briefs filed in the *Doe v. Unocal* and *Apartheid* cases after *Sosa*, the United States argued that the ATS should not apply to human rights claims that occurred in the territory of other states. The argument is based on the general presumption against extraterritoriality regarding all statutes and the contention that the Founders would not have wanted the federal courts to hear cases that might create international conflict at a time of national weakness. Is this argument plausible after *Sosa*?

8. Expert Declarations. Expert declarations by international law scholars have been a feature of ATS cases since *Filartiga*. In *Filartiga*, the Second Circuit relied on such expert declarations in finding that torture violated the law of nations. 630 F.2d at 880 n. 4. After *Sosa*, what issues should be the subjects of scholarly declarations? It is appropriate for scholars to express expert opinions on the meaning of *Sosa* or the

manner in which international law is received in the American legal system? Should scholars be permitted to opine about which international norms meet the Sosa test? See *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 171 (2d Cir. 2003) (“[A]lthough scholars may provide accurate descriptions of the actual customs and practices and legal obligations of States, only the courts may determine whether these customs and practices give rise to a rule of customary international law.”)

9. Transborder Abduction Claims. Dr. Alvarez did not appeal the en banc Ninth Circuit decision that he lacked standing to assert a claim based on the invasion of Mexico’s sovereignty. Do you think the Supreme Court would have sustained that claim? Is transborder abduction precluded as basis for an ATS claim after Sosa? Suppose a potential client comes to you and tells you that he was the victim of a CIA rendition program. He was taken by U.S. agents from his home country to a foreign country where he was held for more than a year and was mistreated by his captors. After a year of detention and mistreatment, U.S. agents then returned him to his country. Do you think he has a claim for arbitrary arrest or detention? Any other claims? How do you think the Supreme Court would decide these claims after Sosa? What other facts would you like to know before you give your opinion?

10. Case Selection. Was the Sosa case a good case to bring under the ATS? What cases would you bring after Sosa if you were trying to develop a strategy for the use of the ATS to advance the cause of human rights? Was it a strategic error to bring an ATS case on behalf of Dr. Alvarez? How important do you think it is to have a sympathetic plaintiff like Dolly Filartiga or Elizabeth Demissie when bringing ATS claims?

11. ATS and Treaty Claims. The Sosa decision, and virtually all ATS decisions to date concern the “law of nations” clause of the ATS. The ATS also applies to treaty violations. Why haven’t more ATS claims been pursued under the treaty clause of

the statute? See *Jogi v. Voces*, 425 F.3d 367 (7th Cir. 2005) (enforcing the Vienna Convention on Consular Relations under the ATS) (discussed in Module 2).

12. Actions Against the United States Government and Its Officers: Westfall Act. Generally, the United States is immune from suit in the courts of the United States. The Federal Torts Claims Act (FTCA) waives sovereign immunity in suits “for ¼ personal injury caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his official office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1) (2000). Thus, if a human rights violation takes the form of a tort (e.g. false arrest) the FTCA may be available as a remedy.

There are many statutory exceptions and limitations to overcome in FTCA actions. For example, “intentional torts” are actionable only if the federal official is a law enforcement officer. Another of the FTCA’s limitations is a bar on suits for claims “arising in a foreign country,” 28 U.S.C. § 2680(k). As a matter of statutory construction, the Supreme Court unanimously interpreted this exception to bar claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. The Court thereby rejected the so-called “headquarters doctrine,” under which various circuit courts had found the foreign country exception inapplicable to torts planned and directed by government agents in the United States. *Sosa*, 542 U.S. at 712.

Further, when individual employees of the United States are sued for acts in their official capacity, the Westfall Act allows the United States to substitute itself as a defendant under the FTCA, unless the plaintiff is making a claim under the U.S. Constitution or under a federal statute providing an express claim for relief.

In *Sosa*, Dr. Alvarez named several federal officials involved in his kidnapping as defendants. The United States substituted itself as a defendant under the Westfall Act, thus transforming plaintiff's ATS claims against these defendants into a claim under the FTCA. See *Alvarez v. United States*, 331 F.3d 604, 631 (9th Cir. 2003) (en banc). The Ninth Circuit in *Alvarez* determined that the ATS was not the kind of statute that provided for an exception to substitution under the Westfall Act. *Id.* at 631. The Ninth Circuit ruled that individual federal officers and the United States can only be sued for torts in violation of the law of nations under the FTCA and not under the ATS.

13. **Actions Against State and Local Officials.** One unexplored area for the development of ATS jurisprudence is the potential to sue state and local officials or even private parties, where international law applies to non-state actors (e.g. slavery-like practices, trafficking). Significantly, the sovereign immunity obstacle presented by the Westfall Act would not apply in these cases because the officials sued would not be federal officials. In *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998), an elderly Mexican man sued Los Angeles Police Department (LAPD) officers for causing him to be wrongfully detained for two months. In *Martinez*, the Ninth Circuit accepted the application of the ATS to LAPD officers but, as was the case in *Sosa*, took a narrow view of the scope of the arbitrary arrest norm in that case. What other opportunities exist for ATS litigation against state or local defendants in the United States? Do you think it would be a good strategy for U.S. civil rights lawyers to add ATS claims to their federal law claims in prisoners rights or police abuse cases? What would such claims be and, if anything, would such claims raise additional questions? For example, are ATS claims subject to the same defenses and immunities that apply in civil rights actions brought under 42 U.S.C. § 1983? (e.g. qualified immunity, Eleventh Amendment immunity).

14. **Advantages and Disadvantages of ATS Litigation.** For a summary of ATS case law and a discussion of the advantages and disadvantages of ATS litigation see

Sandra Coliver, Jennie Green & Paul Hoffman, Holding Human Rights Violators Accountable By Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies, 19 EMORY INT'L L. REV. 169 (2005). The authors of this article list seven benefits of ATS cases: (1) ensuring that the U.S. does not remain a safe haven for human rights abusers; (2) holding individual perpetrators accountable for human rights abuses; (3) providing victims with some sense of official acknowledgment and reparation; (4) contributing to the development of international human rights law; (5) building a human rights constituency in the United States; (6) creating a climate of deterrence; (7) encouraging similar efforts in other countries. What disadvantages do you see in ATS litigation as a human rights enforcement strategy? Could similar cases be brought in the domestic courts of your homeland?