

SOSA V ALVAREZ-MACHAIN AND THE ALIEN TORT CLAIMS ACT

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*Since the seminal case of *Filartiga v Pena-Irala* in 1980, the controversial Alien Tort Claims Act has regularly been invoked in United States federal courts to sue foreign perpetrators of international human rights violations. In *Sosa v Alvarez-Machain*, decided in 2004, the United States Supreme Court for the first time ruled on the Act's proper application. This article, after first identifying three different approaches taken towards the Act by federal courts over the last 25 years, examines the Supreme Court decision. While welcoming the Court's affirmation of the Act as a mechanism for addressing certain international law violations, it critiques the Court's conservative and problematic test to determine the extent of the international law violations falling within the Act's ambit, and highlights many ambiguities in the decision with which lower courts will have to grapple.*

I INTRODUCTION

It is said that the international legal community "is beset today with talk of accountability."¹ Indeed, individual accountability in the wake of human rights abuses has recently taken on greater significance due to the increase in mechanisms used to tackle impunity and vindicate victims' rights. The creation of the International Criminal Court and the ad hoc International Criminal Tribunals, among many other bodies, reflects efforts taken by the international community to bring perpetrators of human rights atrocities to justice. But less prominent mechanisms also exist to serve as alternatives to criminal justice when, for various reasons, criminal trials are not possible. Truth commissions, such as those established in East Timor and Sierra Leone, are one example. Civil suits are another. It is this latter category, and in particular the operation of the Alien Tort Claims Act

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¹ Jason S Abrams and Steven R Ratner *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, New York, 1997) 3.

(ATCA)² and its interpretation by the United States Supreme Court in *Sosa v Alvarez-Machain*,³ which forms the subject of this article.

Since 1980, plaintiffs have invoked the ATCA in United States federal courts to sue perpetrators of such international human rights violations as torture,⁴ disappearances,⁵ summary execution,⁶ genocide,⁷ cruel, inhuman, and degrading treatment,⁸ arbitrary detention,⁹ and crimes against humanity.¹⁰ However, the ATCA has been inconsistently interpreted by the courts and its operation has been controversial. Thus the claim by Humberto Alvarez-Machain (Alvarez) of an arbitrary arrest and detention at the hands of Jose Francisco Sosa (Sosa) provided the Supreme Court with the perfect opportunity to end the debate by definitively clarifying the ATCA's scope. The Court, instead, gave an opinion that has been likened to Santa Claus, as it "brought something for everyone."¹¹ Neither fully endorsing one position nor another, it left the ultimate question as to which violations of international law fall within the ATCA's ambit unclear and raised more questions than it answered.

Part II of this article traces the circumstances giving rise to Alvarez's claim. Part III provides a brief background to the ATCA. Part IV analyses how the ATCA has been interpreted by United States federal courts over the past twenty five years, identifying three distinct standards against which plaintiffs' claims have been assessed. Possible reasons for these varying standards are also canvassed. Part V looks at the approaches of the District Court and Courts of Appeal to Alvarez's claim. The decision of the Supreme Court and a detailed dissection of it constitute Parts VI and VII. The article concludes by looking at the implications of the decision.

2 Alien Tort Claims Act 28 USC § 1350. The Alien Tort Claims Act is known as the ATCA, ATS and sometimes simply § 1350.

3 *Sosa v Alvarez-Machain* (2004) 124 S Ct 2739.

4 *Filartiga v Pena-Irala* (1980) 630 F 2d 876 (2d Cir) [*Filartiga*].

5 *Forti v Suarez-Mason* (1987) 672 F Supp 1531 (ND Cal).

6 *Estate of Rodriguez v Drummond Co Ltd* (2003) 256 F Supp 2d 1250 (ND Ala).

7 *Kadic v Karadzic* (1995) 70 F 3d 232 (2d Cir).

8 *Paul v Avril* (1994) 901 F Supp 330 (SD Fla).

9 *Hilao v Estate of Marcos* (1996) 103 F 3d 767 (9th Cir).

10 *Kadic v Karadzic*, above n 7.

11 Eugene Kontorovich "Implementing *Sosa v Alvarez-Machain*: What Piracy Reveals about the Limits of the Alien Tort Statute" (2004) 80 Notre Dame L Rev 111, 118.

II ALVAREZ'S STORY

In 1990 a federal grand jury indicted Alvarez, a Mexican citizen and resident, for his alleged participation in the kidnapping and murder in Mexico of Enrique Camarena-Salazar, a United States Drug Enforcement Administration Special Agent. It was believed Alvarez, a medical doctor, had administered drugs to Camarena to prolong his life so that he could be further tortured and interrogated by his captors.¹² A warrant was issued for Alvarez's arrest by the District Court for the Central District of California.¹³ The Drug Enforcement Administration, after failing to secure custody of Alvarez through negotiations with the Mexican government, arrived at a plan to have him seized by Mexican civilians and brought to the United States to stand trial.¹⁴ Sosa and others abducted Alvarez from his office, detained him overnight, and then flew him across the border to Texas, where he was formally arrested by federal agents.¹⁵

Alvarez moved to dismiss the indictment by claiming that federal courts lacked jurisdiction to try him due to a violation of the United States-Mexico extradition treaty. Alvarez's case went to the Supreme Court. There, writing for the majority, Rehnquist CJ rejected his claim. Despite acknowledging that his abduction "may [have] be[en] in violation of general international law principles",¹⁶ the Chief Justice denied it breached the extradition treaty. Accordingly, Alvarez's forcible abduction did not prohibit a trial.¹⁷

At his subsequent trial, the District Court granted Alvarez's motion for acquittal.¹⁸ According to the Judge, the prosecution's case was "the wildest speculation."¹⁹ Once back in Mexico, Alvarez brought, amongst other things, a civil action against Sosa seeking damages for violations of the law of nations under the ATCA.

III FILARTIGA AND THE RISE OF THE ALIEN TORT CLAIMS ACT

The ATCA, originally enacted by the First Congress in 1789, now grants district courts "original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations

¹² "Physician in Camarena Case Pleads Not Guilty" (11 April 1990) *Los Angeles Times* Los Angeles B2.

¹³ *Alvarez-Machain v United States* (2003) 331 F 3d 604, 609 (9th Cir en banc) McKeown J.

¹⁴ *Alvarez-Machain v United States*, above n 13, 609 McKeown J.

¹⁵ *Alvarez-Machain v United States*, above n 13, 609 McKeown J.

¹⁶ *United States v Alvarez-Machain* (1992) 504 US 655, 670 Rehnquist CJ. Note that Stevens J, who was joined by Blackmun and O'Connor JJ in his dissent, expressed no doubt as to the illegality of the abduction under international law.

¹⁷ *United States v Alvarez-Machain*, above n 16, 670 Rehnquist CJ.

¹⁸ The United States Government was unable to appeal this judgment of acquittal.

¹⁹ *Alvarez-Machain v United States*, above n 13, 610 McKeown J.

or a treaty of the United States."²⁰ Although there is no legislative history to inform our interpretation of the statute as first enacted, speculation as to its true purpose and scope has abounded²¹ since the seminal case of *Filartiga v Pena-Irala*.²² *Filartiga* saw the Second Circuit rescue the ATCA from almost two hundred years of near-obscurity.²³ The statute was invoked to support a Paraguayan family's claim against a former Paraguayan Inspector General of Police who was now illegally residing in New York. They alleged that the latter had tortured the family's son to death in Paraguay in 1976.²⁴ The District Court dismissed the case for want of jurisdiction on the basis that a State's treatment of its own nationals did not implicate international law.²⁵ The Court of Appeals reversed this decision and reinstated the case. In finding official torture to violate "established norms of the international law of human rights",²⁶ Kaufman J held that the federal courts had jurisdiction to hear the case under the ATCA as it was "undeniably an action by an alien, for a tort only, committed in violation of the law of nations."²⁷ On remand, the family was awarded ten million dollars in punitive damages.²⁸

In addition to providing federal jurisdiction, the Second Circuit in dicta implied that the ATCA created a private cause of action. Finding that international law formed part of the federal common

20 As originally enacted, it read: "the district courts shall have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act 20, § 9, 1 Stat 73, 77 (1789).

21 See for example Anne-Marie Burley "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor" (1989) 83 Am J Int'l L 461; Anthony D'Amato "The Alien Tort Statute and the Founding of the Constitution" (1988) 82 Am J Int'l L 62; William Dodge "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'" (1996) 19 Hastings Int'l & Comp L Rev 221; Ralph G Steinhardt "The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and its Discontents: A Reality Check" (2004) 16 St Thomas L Rev 585, 588-589.

22 *Filartiga*, above n 4.

23 In the 190 years between its enactment and the decision in *Filartiga*, the ATCA had been invoked only 21 times. See Natalie L Bridgeman "Human Rights Litigation under the ATCA as a Proxy for Environmental Claims" (2003) 6 Yale HR & Dev LJ 1, 4-5.

24 *Filartiga*, above n 4, 878-879 Kaufman J.

25 *Filartiga*, above n 4, 880 Kaufman J.

26 *Filartiga*, above n 4, 880 Kaufman J.

27 *Filartiga*, above n 4, 887 Kaufman J.

28 However, this sum was never received: John Haberstroh "The Alien Tort Claims Act & *Doe v Unocal*: A *Paquete Habana* Approach to the Rescue" (2004) 32 Denv J Int'l L & Pol'y 231, 248.

law,²⁹ Kaufman J stated that the ATCA should be construed "as opening the federal courts for adjudication of the rights already recognised by international law."³⁰

Since *Filartiga*, United States federal courts have entertained many actions brought under the ATCA by aliens alleging international human rights abuses. The courts, with little judicial dissent, have followed *Filartiga* in finding that the ATCA provides both subject matter jurisdiction and a cause of action for serious violations of international law. What little judicial dissent there is has been led by Bork and Randolph JJ, who, while acknowledging that the Act confers federal jurisdiction, have denied that it also provides a plaintiff with a right of action.³¹ Notwithstanding their vociferous opposition, not a single Federal Court has endorsed their restrictive interpretation of the statute.³² The same level of judicial consensus, however, has not been reached in respect of the standards to be applied in determining which torts in violation of international law are actionable under the ATCA. These standards are the subject of Part IV.

IV THE VARIOUS STANDARDS

A *Filartiga*: The Customary International Law Standard

The Second Circuit in *Filartiga* recognised that the "law of nations" or "international law"³³ had to be interpreted "not as it was in 1789 but as it has evolved and exists among the nations of the

29 *Filartiga*, above n 4, 886 Kaufman J.

30 *Filartiga*, above n 4, 887 Kaufman J.

31 See *Tel-Oren v Libyan Arab Republic* (1984) 726 F 2d 774, 801-823 (DC Cir) Bork J concurring; *Al Odah v United States* (2003) 321 F 3d 1134, 1146-1149 (DC Cir) Randolph J concurring. The reasoning in *Filartiga* has also been challenged by certain scholars, pro-business groups, and the Bush Administration. For a scholarly critique, see Curtis A Bradley and Jack L Goldsmith "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harv L Rev 815; Curtis A Bradley "The Alien Tort Statute and Article III" (2002) 42 Va J Int'l L 587.

32 Brief of Amici Curiae, National and Foreign Legal Scholars in Support of Respondents, *Sosa v Alvarez-Machain* (2004) WL 419427, 11. Note too the support of Congress for the *Filartiga* approach when enacting the Torture Victim Protection Act (1991) 28 USC § 1350 [TVPA], an Act which creates a federal cause of action for victims of torture or extrajudicial killings perpetrated by foreign nationals acting under actual or apparent authority or colour of law. The House Report on the TVPA stated that it would "enhance the remedy *already available* under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy to US citizens At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute 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." H R Rep (1992) 102-367(I) USCCAN 84, 86 (emphasis added).

33 The terms "law of nations" and "international law" are generally thought synonymous and are used interchangeably in the *Filartiga* decision. However, for an interesting account of how Jeremy Bentham may have modified the meaning of "law of nations" in coining the term "international law", see M W Janis "Jeremy Bentham and the Fashioning of 'International Law'" (1984) 78 Am J Int'l L 405.

world today."³⁴ In arriving at a method to ascertain whether a norm of international law exists, the Court turned, inter alia, to the Supreme Court decision in *The Paquete Habana*.³⁵ That case stated that where there is no treaty and no executive or legislative act or judicial decision, "resort must be had to the customs and usages of civilised nations³⁶ and, as evidence of these, to the works of jurists and commentators."³⁷ The Second Circuit recognised that any rule must command the "general assent of civilized nations" and that this was a stringent requirement.³⁸ To support its approach, the Court invoked article 38 of the Statute of the International Court of Justice (ICJ).³⁹ Finally, relying on the precedent of *United States v Smith*,⁴⁰ the Court drew attention to the need for the norm to be "sufficiently determinate in meaning."⁴¹

While the Second Circuit invoked primarily national court decisions in formulating the test to identify customary international law, its approach is consistent with both international case law and literature on the matter,⁴² which confirms that widespread practice and judicial opinion is sufficient to create customary international law.⁴³

It should be noted that the United States Government, as *amicus curiae*, supported the Second Circuit's conclusion that violations of customary international law are sufficient to found claims

34 *Filartiga*, above n 4, 881 Kaufman J.

35 *The Paquete Habana* (1900) 175 US 677.

36 Note the technical meaning of "custom" at international law: "A *custom* is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right." Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9 ed, Longman, London, 1992) 27 (footnote added).

37 *The Paquete Habana*, above n 35, 700 Gray J (footnote added).

38 *Filartiga*, above n 4, 881 Kaufman J (emphasis added).

39 *Filartiga*, above n 4, 881 Kaufman J. The articulation of article 38(1)(b) of the Statute of the ICJ makes it clear that there are two parts to international custom: general practice of states and judicial opinion.

40 *United States v Smith* (1820) 18 US 153.

41 *Filartiga*, above n 4, 880 Kaufman J.

42 See the North Sea Continental Shelf jurisprudence, where, in the context of whether a treaty provision had become customary law, the ICJ looked for "extensive and virtually uniform" practice and judicial opinion: *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* (Judgment) [1969] ICJ Rep 3, 43 para 74 Judgment of the Court.

43 See for example Jennings and Watts (eds), above n 36, 25-31; Jordan J Paust "The History, Nature, and Reach of the Alien Tort Claims Act" (2004) 16 Fla J Int'l L 249, 259-260; Malcolm N Shaw *International Law* (5 ed, Cambridge University Press, Cambridge, 2003) 73; American Law Institute *Restatement of the Law of Foreign Relations* (3 ed, St Paul, Minnesota, 1987) § 102(2).

under the ATCA.⁴⁴ This customary international law standard has also been endorsed by many commentators,⁴⁵ and by Congress itself.⁴⁶

B The Universal, Obligatory and Definable Standard

While the "general assent" test for determining customary international law has been used by some courts,⁴⁷ not all courts have followed this approach. Instead, they have introduced an ambiguous "universal" requirement. In *Kadic v Karadzic*, for example, the Second Circuit, after initially endorsing *Filartiga*, stated that only "if ... the defendant's alleged conduct violates 'well established, universally recognised norms of international law', does federal jurisdiction exist under the Alien Tort Act."⁴⁸

The additional requirement of "universal recognition" is a gloss on the *Filartiga* approach. Kaufman J in *Filartiga* never stipulated that universal recognition was a requirement for the existence of a customary international law norm, nor did he stipulate that only norms of customary international law with universal recognition were actionable under the ATCA. Kaufman J simply stated that the norm in question, the prohibition of torture, happened to be a "well established, universally recognised" norm.⁴⁹

What the Second Circuit in *Karadzic* intended by this "universal recognition" requirement is unclear. A distinction can be made, for example, between *recognition* of a norm and *observance* of that norm. Conceivably, a norm of customary international law could be universally recognised, but not universally observed. Such a situation could occur when a State is a legitimate persistent

44 The Government, commenting on the scope of the ATCA, stated: "The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law." Memorandum for the United States as Amicus Curiae, *Filartiga v Pena-Irala*, (1980) WL 340146, 22.

45 In support of the proposition that the ATCA, interpreted in accordance with the ordinary meaning of its words, embraces violations of customary international law, see William S Dodge "Which Torts in Violation of the Law of Nations?" (2001) 24 *Hastings Int'l & Comp L Rev* 351, 352 ["Which Torts in Violation of the Law of Nations?"]; Paust, above n 43, 256; Joshua Ratner "Back to the Future: Why a Return to the Approach of the *Filartiga* Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act" (2002) 35 *Colum J L & Soc Probs* 83, 123. However, Professor Joseph Sweeney has argued that the ordinary meaning of the words in 1789 would have referred to wrongs committed by American captors in violation of the law of prize: Joseph Modeste Sweeney "A Tort Only in Violation of the Law of Nations" (1995) 18 *Hastings Int'l & Comp L Rev* 445, 476.

46 See above n 32.

47 See for example *Doe I v Islamic Salvation Front* (1998) 993 F Supp 3, 10 (DC Cir) Sporkin J; *Estate of Rodriguez v Drummond Co Ltd*, above n 6, 1263 Bowdre J.

48 *Kadic v Karadzic*, above n 7, 238-239 Newman CJ.

49 *Filartiga*, above n 4, 888 Kaufman J.

objector to a customary norm. That State may deny the norm's applicability to itself as it has never observed it, but it might come to recognise that such a norm exists and that other States are bound by it. If this narrow meaning of "recognition" is what the Second Circuit intended, then it has not deviated greatly from *Filartiga*. If, on the other hand, the Second Circuit intended "recognition" to mean "observance", then it has done one of two things: it has either erroneously imported a universal observance requirement into the test to determine customary international law, or it has purposely narrowed the ambit of allowable claims under the ATCA by restricting them to violations of a subset of customary norms which are universally observed. Whether done deliberately or in error, the consequence is the same: the threshold has been raised and the precedent of *Filartiga* departed from. Further, it means that an action cannot be brought under the ATCA for a violation of any international norm to which the United States does not subscribe.

In *Flores v Southern Peru Copper Corporation*, the Second Circuit expressly endorsed the universal observance interpretation,⁵⁰ and departed from *Filartiga*'s customary international law standard. Applying this new standard raises significant questions. What happens when some States willingly and repeatedly breach norms of customary international law by which they are bound? Since there is no longer universal "abidance", does the norm cease to exist for ATCA purposes? Moreover, what happens in situations where there is a legitimate persistent objector to a norm? Just one objector taints the universal observance requirement, but would the *Flores* Court refuse to apply the ATCA in such a situation?

The additional universal requirement, which has been interpreted as meaning universal observance, raises significant issues and, furthermore, is not the apposite test to determine customary international law.

C The Jus Cogens Standard

A third standard has emerged which sets the requirement for an actionable claim under the ATCA at violation of *jus cogens*, or peremptory norms.⁵¹ This standard was first articulated by the District Court in *Xuncax v Gramajo*.⁵² While initially endorsing *Filartiga*, the Court then stated that

50 "[C]ustomary international law is composed only of those rules that States universally *abide* by." *Flores v Southern Peru Copper Corporation* (2003) 343 F 3d 140, 154 (2d Cir) Cabranes J (emphasis added) [*Flores*].

51 Article 53 of the Vienna Convention on the Law of Treaties 1969 defines a *jus cogens* norm as one "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, 344.

52 *Xuncax v Gramajo* (1995) 886 F Supp 162 (Mass). Note however that Edwards J in his concurring opinion in *Tel-Oren*, as far back as 1984, had speculated that the ATCA's scope would be limited to a "handful of heinous actions" and suggested that Kaufman J's characterisation of the torturer as an enemy of mankind was not fortuitous: *Tel-Oren v Libyan Arab Republic*, above n 31, 781 Edwards J concurring.

the kind of wrongs which the ATCA addressed were "those perpetrated by *hostis humani generis* (enemies of all humankind) in contravention of *jus cogens*."⁵³ The Court then cited the "universal, definable and obligatory" standard set out in *Forti v Suarez-Mason*,⁵⁴ and concluded that such a standard required that the prohibition against the act in question must be "non-derogable and therefore binding at all times upon all actors."⁵⁵ This "non-derogable" requirement is the essence of a *jus cogens* norm. The notion that only violations of *jus cogens* norms are actionable under the ATCA has been supported by a number of District Courts decisions.⁵⁶ Confusingly, this standard has often been applied even when the Court, at the same time, has endorsed the view that an actionable claim need only be in violation of the law of nations.⁵⁷ As Professor Dodge has noted, there is little justification for limiting jurisdiction under the ATCA to *jus cogens* norms; it is a "judicially imposed" limitation.⁵⁸

D Reasons for the Diverse Standards

We can only speculate as to why courts have applied these diverse standards. Professor Paust suggests the "universal" requirement adopted by some courts is simply a "mistaken mantra".⁵⁹ The implication is that some courts erroneously believe that customary international law requires universal consensus. This may well explain some of the decisions. Indeed, one Judge who presided over the case of *Karadzic* has admitted that "international human rights law is not a major, or even a minor, component of the business of federal courts: it is a minuscule part of what we do."⁶⁰ It is no wonder then that there may be some confusion. However, we should not underestimate Federal Judges. Some Judges have likely set a high standard for fear of overreaching and not wishing to adjudicate cases having foreign policy implications. Isolationists may reject the ATCA on ideological grounds,⁶¹ being opposed to the introduction of international law into domestic courts, and therefore set the highest possible standard. Pressure applied by business groups is also a factor,

53 *Xuncax v Gramajo*, above n 52, 183 Woodlock J.

54 *Forti v Suarez-Mason*, above n 5.

55 *Xuncax v Gramajo*, above n 52, 184 Woodlock J.

56 See for example *Beanal v Freeport* (1997) 969 F Supp 362 (ED Lou); *Doe I v Unocal* (1997) 963 F Supp 880 (CD Cal); *National Coalition Government of the Union of Burma v Unocal* (1997) 176 FRD 329 (CD Cal); *Doe I v Unocal* (2000) 110 F Supp 2d 1294 (CD Cal).

57 See for example *Beanal v Freeport*, above n 56, 370 Duval J; *Doe I v Unocal*, above n 56, 890 Paez J.

58 "Which Torts in Violation of the Law of Nations?", above n 45, 357-358.

59 Paust, above n 43, 259.

60 Hon John M Walker Jr "Domestic Adjudication of International Human Rights Violations under the Alien Tort Statute" (1997) 41 St Louis U L J 539, 539.

61 Benedict Kingsbury "The International Legal Order" in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 271, 278.

as large multinational corporations are increasingly being sued for their alleged complicity in human rights violations abroad⁶² and are finding themselves having to settle out of court.⁶³ Finally, some fear that the ATCA will obstruct the efforts of the United States and its allies in combating terrorism. While such an argument against the ATCA is hardly an attractive one, as its underlying premise can only be that certain governmental measures to combat terrorism are contrary to international law, this fear was nevertheless articulated in apocalyptic prose by the minority in the Court of Appeals before which Alvarez appeared.⁶⁴

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 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.

Whatever the underlying reasons, the uncertainty created by the divergent standards needed to be addressed. The stage was set for clarification when Alvarez's claim came before the Supreme Court. However, before examining this decision the lower court decisions leading to it will be considered.

V ALVAREZ'S CLAIM IN THE COURTS

The District Court, applying a "specific, universal, and obligatory" standard and rejecting the notion that only violations of *jus cogens* could trigger actionable claims, found that Alvarez's state-sponsored transborder abduction and prolonged arbitrary detention were both torts in violation of the law of nations and therefore actionable under the ATCA.⁶⁵ Damages of \$25,000 were awarded.⁶⁶

On appeal, a three judge panel of the Ninth Circuit affirmed the judgment against Sosa.⁶⁷ The Court of Appeals agreed that Alvarez's seizure violated the international customary legal norm against arbitrary detention.⁶⁸ As for the state-sponsored transborder abduction, however, the Court

62 Steinhardt, above n 21, 602-604.

63 See Part VIII Concluding Remarks; Lisa Girion "Unocal to Settle Rights Claims" (14 December 2004) *Los Angeles Times* Los Angeles A1.

64 *Alvarez-Machain v United States*, above n 13, 645 O'Scannlain J dissenting.

65 *Alvarez-Machain v United States* (1999) US Dist Lexis 23304 56, 64-65 and 787 (CD Cal) Wilson J.

66 *Alvarez-Machain v United States*, above n 65, 78 Wilson J.

67 *Alvarez-Machain v United States* (2001) 266 F 3d 1045 (9th Cir).

68 *Alvarez-Machain v United States*, above n 67, 1052 Goodwin J.

held that Alvarez had no standing to sue on the basis that Mexican sovereignty had been breached.⁶⁹ Rather, his kidnapping "violated his rights to freedom of movement, to remain in his country, and to security in his person, which are part of the 'law of nations'."⁷⁰ As in the District Court, the applicable standard for actionable norms was held to be one of specificity and universality.⁷¹

The Ninth Circuit considered the matter en banc in June 2003. Although a 6-5 majority of the Court affirmed the judgment against Sosa, the basis of the decision was different. While agreeing that Alvarez lacked standing "to assert Mexico's interests in its territorial sovereignty,"⁷² perhaps by way of concession to the Supreme Court, the Court rejected the argument that the rights to personal liberty and security and freedom of residence and movement supported a right to be free from transborder abductions. Since the ATCA requires violations of the law of nations which are "specific, universal and obligatory", such "general prohibitions", said the Court, were "insufficient to support Alvarez's claim that there is an international norm against transborder abduction."⁷³ However, the Ninth Circuit affirmed, citing *Martinez*⁷⁴ and *Marcos*,⁷⁵ that there was a clear and universally recognised norm prohibiting arbitrary arrest and detention.⁷⁶ Further, it found that this norm contained no "temporal element".⁷⁷ To determine arbitrariness, the Court looked at the lawfulness of the arrest and detention. Finding that the arrest warrant issued by the District Court did not authorise Alvarez's extraterritorial arrest and that the Drug Enforcement Administration had no extraterritorial enforcement authority, the Court concluded that his arrest and detention were unlawful and therefore arbitrary.⁷⁸ Alvarez was thus able to establish a tort in violation of the law of nations actionable under the ATCA.

VI THE UNITED STATES SUPREME COURT DECISION

Until the *Sosa v Alvarez-Machain* case, the Supreme Court – having previously declined petitions for certiorari review of decisions under the ATCA – had not ruled on the ATCA's proper scope. However the growing controversy surrounding the statute, the bitterly divided en banc Ninth

⁶⁹ *Alvarez-Machain v United States*, above n 67, 1050 Goodwin J.

⁷⁰ *Alvarez-Machain v United States*, above n 67, 1052 Goodwin J.

⁷¹ *Alvarez-Machain v United States*, above n 67, 1050 Goodwin J.

⁷² *Alvarez-Machain v United States*, above n 13, 616 McKeown J.

⁷³ *Alvarez-Machain v United States*, above n 13, 619 McKeown J.

⁷⁴ *Martinez v City of Los Angeles* (1998) 141 F 3d 1373 (9th Cir).

⁷⁵ *Hilao v Estate of Marcos*, above n 9.

⁷⁶ *Alvarez-Machain v United States*, above n 13, 620 McKeown J.

⁷⁷ *Alvarez-Machain v United States*, above n 13, 622 McKeown J.

⁷⁸ *Alvarez-Machain v United States*, above n 13, 623 and 631 McKeown J.

Circuit, and the Bush Administration's attacks on the ATCA⁷⁹ were likely factors in the Court's decision to review this ruling.⁸⁰

A On Jurisdiction and a Cause of Action

Souter J, writing for the majority, commenced by refuting Alvarez's argument that the ATCA created a new cause of action and calling his interpretation "implausible".⁸¹ As enacted in 1789, the ATCA "gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mould substantive law."⁸² Further, the Court found it significant that the ATCA was placed in § 9 of the Judiciary Act, an Act "exclusively concerned with federal-court jurisdiction."⁸³ On this basis, the Court held that the ATCA was "strictly jurisdictional" in nature.⁸⁴

Although "strictly jurisdictional", the statute was not necessarily "stillborn".⁸⁵ After reviewing the history surrounding the ATCA, the Court concluded that the First Congress would not have vested the federal courts with jurisdiction only to leave the ATCA "lying fallow indefinitely".⁸⁶ Rather, the Court endorsed the view of the amicus curiae professors of federal jurisdiction and legal history: "federal courts could entertain claims once the jurisdictional grant was on the books, because the torts in violation of the law of nations would have been recognised within the common law of the time."⁸⁷

The Court, citing Blackstone, then identified three offences against the law of nations recognised by the common law in 1789: violation of safe conducts; infringement of the rights of ambassadors; and piracy. It was:⁸⁸

79 See Part VII The Supreme Court's Test: An Analysis. While the Carter and Clinton administrations had largely supported ATCA litigation, the Bush Administration has opposed the justiciability of ATCA claims in six cases. See Lorelle Londis "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence" (2005) 57 Me L Rev 141, 187-190.

80 Beth Stephens "The Door is Still Ajar' for Human Rights Litigation in US Courts" (2004-2005) 70 Brook L Rev 533, 540.

81 *Sosa v Alvarez-Machain*, above n 3, 2755 Souter J for the majority.

82 *Sosa v Alvarez-Machain*, above n 3, 2755 Souter J for the majority.

83 *Sosa v Alvarez-Machain*, above n 3, 2755 Souter J for the majority.

84 *Sosa v Alvarez-Machain*, above n 3, 2755 Souter J for the majority.

85 *Sosa v Alvarez-Machain*, above n 3, 2755 Souter J for the majority.

86 *Sosa v Alvarez-Machain*, above n 3, 2759 Souter J for the majority.

87 *Sosa v Alvarez-Machain*, above n 3, 2755 Souter J for the majority.

88 *Sosa v Alvarez-Machain*, above n 3, 2756 Souter J for the majority.

This narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on [the] minds of the men who drafted the ATS with its reference to tort.

While all the Justices agreed on the foregoing, opinions diverged on whether federal courts today could recognise causes of action based on new norms of customary international law. Scalia J in his partial concurrence, joined by Rehnquist CJ and Thomas J, argued that after *Erie Railroad Co v Tompkins*, where it was held that the federal courts have no authority to derive "general" common law,⁸⁹ federal courts could not create new common law causes of action for violations of customary international law.⁹⁰ The majority disagreed, finding that "no development in the two centuries from the enactment of § 1350 ... has categorically precluded federal courts from recognising a claim under the law of nations as an element of common law."⁹¹ However, noting the "substantial element of discretionary judgment" that judges must inevitably exercise in "creating" new customary international law,⁹² the Court warned of "good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action."⁹³

Such "judicial caution" was necessary, said the Court, since the general practice of federal courts "has been to look for legislative guidance before exercising innovative authority over substantive law."⁹⁴ Moreover, the decision to create a cause of action "is one better left to legislative judgment in the great majority of cases" and federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations."⁹⁵ Finally, the Court stressed the "risks of

89 *Erie Railroad Company v Tompkins* (1938) 304 US 64 [*Erie*]. Pre-*Erie*, international law was understood to be part of the general common law, which was binding on both federal and state courts. The Court in *Erie*, however, denied the existence of a general common law, holding that all law was grounded in either the federal or state government. While the orthodox position post-*Erie* has been that customary international law is an enclave of federal common law, this has been challenged recently by Professors Bradley and Goldsmith, who argue that, absent some federal common law making authority, federal courts cannot apply customary international law. Souter J follows the orthodox position; Scalia J endorses the so-called "revisionist" position. See generally Bradley and Goldsmith, above n 31; Harold Hongju Koh "Is International Law Really State Law?" (1998) 111 Harv L Rev 1824; William S Dodge "Bridging *Erie*: Customary International Law in the US Legal System After *Sosa v Alvarez-Machain*" (2004) 12 Tulsa J Comp & Int'l L 87.

90 *Sosa v Alvarez-Machain*, above n 3, 2774 Scalia J concurring.

91 *Sosa v Alvarez-Machain*, above n 3, 2761 Souter J for the majority.

92 The Court stressed that while the common law was once thought to be a "transcendental body of law" waiting to be "discovered", the modern understanding was that "the law is not so much found or discovered as it is either made or created": *Sosa v Alvarez-Machain*, above n 3, 2762 Souter J for the majority.

93 *Sosa v Alvarez-Machain*, above n 3, 2761 Souter J for the majority.

94 *Sosa v Alvarez-Machain*, above n 3, 2762 Souter J for the majority.

95 *Sosa v Alvarez-Machain*, above n 3, 2762-2763 Souter J for the majority.

adverse foreign policy consequences" if remedies were given for violations of new international law norms.⁹⁶

B On Which Violations of International Law are Actionable

In view of the above considerations, the Court concluded that federal courts "should not recognise 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."⁹⁷ As an example of the specificity required of a norm, the Court referred to the definition of piracy found in *United States v Smith*.⁹⁸ Further, this determination of specificity "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."⁹⁹

The Court then asserted that this standard was "generally consistent" with *Filartiga*.¹⁰⁰ The Court also approved Edwards J's decision in *Tel-Oren v Libyan Arab Republic* which had suggested that the limits of the ATCA's reach were defined by "a handful of heinous actions – each of which violates definable, universal and obligatory norms."¹⁰¹ However, the Court, underlining the severity of its proposed test, hinted that not even all heinous acts may be actionable, as although some policies "are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offences."¹⁰²

Finally, in an innocuously positioned but potentially far-reaching footnote, the Court raised two further possible limitations on ATCA claims.¹⁰³ First, in appropriate cases, the Court would "certainly consider" the requirement that before coming to a United States federal court any plaintiff would need to have first exhausted all his or her available domestic remedies.¹⁰⁴ Secondly, the

96 *Sosa v Alvarez-Machain*, above n 3, 2763 Souter J for the majority.

97 The "historical paradigms" alluded to are the offences mentioned earlier: violation of safe conducts; infringement of the rights of ambassadors; and piracy: *Sosa v Alvarez-Machain*, above n 3, 2765 Souter J for the majority.

98 *United States v Smith*, above n 40. This was also the example of specificity given by the Second Circuit in *Filartiga*, above n 4.

99 *Sosa v Alvarez-Machain*, above n 3, 2766 Souter J for the majority.

100 *Sosa v Alvarez-Machain*, above n 3, 2765-2766 Souter J for the majority.

101 *Sosa v Alvarez-Machain*, above n 3, 2766 Souter J for the majority.

102 *Sosa v Alvarez-Machain*, above n 3, 2769 Souter J for the majority.

103 Breyer J in his partially concurring opinion stated that, in his view, these further limitations were important: *Sosa v Alvarez-Machain*, above n 3, 2782 Breyer J partially concurring.

104 *Sosa v Alvarez-Machain*, above n 3, fn 21 Souter J for the majority.

Court mentioned a policy of "case-specific deference to the political branches".¹⁰⁵ As an example, it adverted to pending class actions in United States federal courts seeking damages from corporations allegedly having participated in the former South African apartheid regime. The Court noted that the United States Government had agreed with the South African Government that such cases could interfere with the functioning of the South African Truth and Reconciliation Commission. In such situations, said the Court, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."¹⁰⁶

C Applying the Standard to Alvarez's Claim

Having determined the ATCA's proper ambit, the Court turned to Alvarez's claim. Not having been adequately briefed on the cross-border aspect of Alvarez's abduction,¹⁰⁷ the Court simply considered his claim of an unlawful, and therefore arbitrary, arrest and detention. It found that the international norm invoked by Alvarez was insufficient to found an action under the ATCA. A number of factors underpinned this conclusion.

First, the Court regarded the inclusion of the prohibition on arbitrary detention in the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) as having "moral authority", but "little utility under the standard set out in this opinion."¹⁰⁸ According to the Court, the UDHR was merely aspirational, and the ICCPR, not being a self-executing treaty in the US, could not create obligations enforceable in the federal courts.¹⁰⁹

The Court then examined other sources of customary international law. Characterising what happened to Alvarez as a "relatively brief detention in excess of positive authority",¹¹⁰ the Court found insufficient authority to support the notion that such a broad rule, as defined in this way, could be characterised as a binding customary norm.¹¹¹ National constitutions recognising a prohibition on arbitrary detention were at too "high [a] level of generality."¹¹² Previous federal court decisions recognising such a norm simply reflected "a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today."¹¹³

¹⁰⁵ *Sosa v Alvarez-Machain*, above n 3, fn 21 Souter J for the majority.

¹⁰⁶ *Sosa v Alvarez-Machain*, above n 3, fn 21 Souter J for the majority.

¹⁰⁷ See *Sosa v Alvarez-Machain*, above n 3, fn 24 Souter J for the majority.

¹⁰⁸ *Sosa v Alvarez-Machain*, above n 3, 2767 Souter J for the majority.

¹⁰⁹ *Sosa v Alvarez-Machain*, above n 3, 2767 Souter J for the majority.

¹¹⁰ *Sosa v Alvarez-Machain*, above n 3, 2769 Souter J for the majority.

¹¹¹ *Sosa v Alvarez-Machain*, above n 3, 2768 Souter J for the majority.

¹¹² *Sosa v Alvarez-Machain*, above n 3, fn 27 Souter J for the majority.

¹¹³ *Sosa v Alvarez-Machain*, above n 3, fn 27 Souter J for the majority.

Furthermore the ICJ decision in *United States v Iran* invoked by Alvarez dealt with a detention "far longer and harsher" than Alvarez's.¹¹⁴ After dismissing the sources raised by Alvarez, the Court invoked the Restatement (Third) of Foreign Relations Law¹¹⁵ to support its conclusion that Alvarez's claim could not be characterised as a norm of customary international law of sufficient specificity to found an ATCA claim.¹¹⁶

In addition to its source-based analysis, the Court stressed the "breathtaking" and prohibitive consequences of permitting a claim based on such a broad rule. Allowing such a claim would allow future actions in federal courts "for any arrest, anywhere in the world, unauthorised by the law of the jurisdiction in which it took place."¹¹⁷

VII THE SUPREME COURT'S TEST: AN ANALYSIS

The Supreme Court's historically based test to determine which violations of international law are actionable under the ATCA has, in the Court's own words, left the door "ajar[,] subject to vigilant doorkeeping, ... to a narrow class of international norms today."¹¹⁸ Scalia J rejected the majority's view that courts have federal law-making powers at common law enabling them to create private causes of action for violations of new customary international law. Despite this, the fact that his partial concurrence only received minority support means that the argument that plaintiffs must point to additional statutory authority before they can bring a claim under the ATCA, an argument common among defendants in prior ATCA litigation and one which Sosa himself ran,¹¹⁹ is no longer viable. The focus in future litigation will instead be on whether the norms of international law allegedly violated fall within the Supreme Court's proposed test. Therefore, it is important to try and delineate this test's boundaries.

A Customary International Law Standard?

Dean Koh, noting the Supreme Court's favourable references to *Filartiga* in its decision, has inquired whether the Supreme Court's test might not actually be the same as that adopted by the Second Circuit in 1980.¹²⁰ While the Court at one point asserts that its approach is "generally consistent" with *Filartiga* and the decisions of many other courts having dealt with ATCA

114 *Sosa v Alvarez-Machain*, above n 3, fn 27 Souter J for the majority.

115 A "state violates [customary] international law if, as a matter of *state policy*, it practices, encourages, or condones ... *prolonged* arbitrary detention": American Law Institute, above n 43, § 702 (emphasis added).

116 *Sosa v Alvarez-Machain*, above n 3, 2768-2769 Souter J for the majority.

117 *Sosa v Alvarez-Machain*, above n 3, 2768 Souter J for the majority.

118 *Sosa v Alvarez-Machain*, above n 3, 2764 Souter J for the majority.

119 See Brief of Petitioner *Sosa v Alvarez-Machain* (2004) WL 162761, 12.

120 Harold Hongju Koh "The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law" (2004) 12 *Tulsa J Comp & Int L* 1, 13.

litigation,¹²¹ this statement of the Court is misleading and typifies the ambiguity which pervades the decision. As Part IV shows, the standards that federal courts have applied in ATCA cases have been anything but uniform, with three distinct standards emerging. Collating the previous ATCA jurisprudence without distinction into one basket and preaching consistency with it is unhelpful. It provides little elucidation as to which of the three standards the Court is following and does not help us to answer Koh's question.

It is only when the Court cites from the previous jurisprudence that its position becomes somewhat clearer. It starts by selectively quoting from *Filartiga*, endorsing Kaufman J's comparison of the torturer to "the pirate and slave trader" and his description of the torturer as "*hostis humani generis*, an enemy of all mankind."¹²² The Court then cites with approval the standard of a "handful of heinous actions ... [violating] specific, universal, and obligatory norms", found in *Tel-Oren*.¹²³ There is little doubt that the result of this conflation is far from the customary international law standard advocated in *Filartiga*. To answer Koh's question, then, the Supreme Court has undoubtedly taken a position different to that of Kaufman J. This being the case, the question becomes: just how different? Which norms of international law, if violated, will now give rise to legitimate claims under the ATCA?

B Jus Cogens Standard?

Perpetrators of offences *jus cogens* are often said to be "common enemies of all mankind".¹²⁴ Further, it is widely accepted that acts of piracy, torture and slave trading contravene peremptory norms.¹²⁵ That the Supreme Court singles out this language from *Filartiga*, at first glance, could suggest that the Court is propounding a *jus cogens* standard. That such a standard may be on the minds of the majority is also consistent with its endorsement of the "universal" requirement, as rules

121 *Sosa v Alvarez-Machain*, above n 3, 2765-2766 Souter J for the majority.

122 *Sosa v Alvarez-Machain*, above n 3, 2766 Souter J for the majority.

123 *Sosa v Alvarez-Machain*, above n 3, 2766 Souter J for the majority.

124 See for example *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198 (HL) Lord Browne-Wilkinson [*Ex Parte Pinochet (No 3)*]: "International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.'"

125 For the prohibition of slave trading and piracy as rules of *jus cogens* see International Law Commission "Report of the International Law Commission to the General Assembly" (1966) 2 Yearbook of the ILC 248; Ian Brownlie *Principles of Public International Law* (4 ed, Oxford University Press, Oxford, 1990) 513. Brownlie categorizes the prohibitions of slave trading and piracy among "the least controversial examples" of rules of *jus cogens*. For the prohibition of torture as a rule of *jus cogens* see *Prosecutor v Furundžija (Judgment)* (10 December 1998) IT-95-17/1-T para 153 (Trial Chamber, ICTY); *Ex Parte Pinochet (No 3)*, above n 124, 198 Lord Browne-Wilkinson, 247 Lord Hope, 253-254 Lord Hutton, 290 Lord Phillips.

of *jus cogens* permit of no derogation.¹²⁶ Finally, there is also precedent for such a standard, as is shown in Part IV.

However, there are good reasons militating against such an interpretation of the Supreme Court's test. First, the Court accepts that the three common law offences recognised in 1789 – piracy, violation of safe conducts and infringement of the rights of ambassadors – are still actionable under the ATCA. Piracy aside, neither of the latter offences reaches the standard of a peremptory norm. It would be illogical to admit only of *jus cogens* violations today while accepting that two of the three original offences for which the ATCA was enacted do not themselves reach this standard. Secondly, offences against rules of *jus cogens* give rise to universal jurisdiction.¹²⁷ While Breyer J in his concurring judgment opined that to come within the ATCA's scope, the international norm in question must fall within the universal criminal jurisdiction of states,¹²⁸ no other Justices recognised this limitation. It follows that the majority must have contemplated that some international norms falling within its test might not be peremptory norms. Finally, the Court, rather bizarrely, states that some actions for which the perpetrators may be branded "enemies of the human race" may not meet the Court's standard, as they may not "cross that line with the certainty afforded by Blackstone's three common law offences."¹²⁹ This statement makes it clear that the Court is not simply proposing a *jus cogens* standard. A significant element of most peremptory norms is that their violation "shocks the conscience of humanity."¹³⁰ By dismissing egregiousness in favour of a certain level of specificity, the Court appears to have something else in mind. It is, indeed, this level of specificity which lies at the heart of the Supreme Court test.

C *Specificity Requirements*

Determining sufficient specificity, according to the Court, requires two considerations. The norm must have a specificity of content comparable to the historical paradigms familiar when the

126 See above n 51.

127 See *Prosecutor v Furundžija*, above n 125, 156: "[o]ne of the characteristics of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction." See also *Ex Parte Pinochet (No 3)*, above n 124. But note Bassiouni's argument that: "States' practice evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from universally recognised and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations": M Cherif Bassiouni (ed) *International Criminal Law* (2 ed, Transnational Publishers, New York, 1999) 39-40.

128 *Sosa v Alvarez-Machain*, above n 3, 2782-2783 Breyer J partially concurring.

129 *Sosa v Alvarez-Machain*, above n 3, 2769 Souter J for the majority.

130 See Bassiouni, above n 127, 42.

ATCA was enacted. Secondly, whether the norm is sufficiently definite will "inevitably ... involve an element of judgment about the practical consequences" of allowing the claim.¹³¹

1 Comparison to the 18th century paradigms

The first consideration is vague and problematic. As one commentator has queried, how is one to compare the degree of specificity of a modern international norm to another norm as it existed more than two centuries ago in a different substantive area of law?¹³² The Court gives little guidance on how to undertake this difficult comparison, simply giving as a benchmark the specificity of the definition of piracy found in *United States v Smith*.¹³³ Considering the Court's stress on the caution federal courts should exercise in considering whether a claim based on customary international law should give rise to an action under the ATCA, this is an odd example. As Professor Stephens has noted, many of the violations of international norms recognised in the federal courts before the *Sosa v Alvarez-Machain* decision rested on clearer consensus and precision than the piracy definition given in *United States v Smith*.¹³⁴

In *United States v Smith*, faced with a challenge to the constitutionality of a statute punishing "the crime of piracy, as defined by the law of nations",¹³⁵ Story J had to inquire whether the law of nations defined piracy "with reasonable certainty".¹³⁶ Although concluding that "all writers concur ... that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy",¹³⁷ he also noted that there existed a "diversity of definitions, in other respects."¹³⁸ Indeed, there was so much diversity that Livingston J dissented in the case, stating: "Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain that they do not all agree."¹³⁹ Even the core definition of piracy given by Story J is, on closer inspection, remarkably broad. What are the bounds of "forcible depredations"? Story J exposes the breadth of his definition in the case of *United States v Brig Malek Adhel*:¹⁴⁰

131 *Sosa v Alvarez-Machain*, above n 3, 2766 Souter J for the majority.

132 Laurence H Tribe "The Supreme Court, 2003 Term Leading Cases" (2004) 118 Harv L Rev 446, 454-455.

133 *United States v Smith*, above n 40.

134 Stephens, above n 80, 553.

135 *United States v Smith*, above n 40, 157 Story J.

136 *United States v Smith*, above n 40, 160 Story J.

137 *United States v Smith*, above n 40, 161 Story J.

138 *United States v Smith*, above n 40, 161 Story J.

139 *United States v Smith*, above n 40, 181 Livingston J dissenting.

140 *United States v Brig Malek Adhel* (1844) 43 US 210, 232 Story J.

A pirate is deemed ... *hostis humani generis*. [This is b]ecause he commits hostilities upon the subjects and property of any or all nations. ... If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate.

Thus it appears that any unlawful hostility on the high seas, even absent actual robbery, fits within Story J's piracy definition. This definition is far from precise. Measured against this degree of specificity, it is difficult to comprehend why Alvarez's claim of an arbitrary detention was held to be insufficiently specific. It is little wonder one commentator has criticised the Supreme Court for having "misapplied its own evidentiary standard."¹⁴¹

There are two further problems with the approach the Supreme Court took to determine whether Alvarez's arrest and detention violated a sufficiently specific international norm. First, the euphemistic characterization of Alvarez's arrest and detention as a "relatively brief detention in excess of positive authority" served to mask what was really at stake: Alvarez had been arrested and detained *contrary to law*. If it could have been established, even at a "high level of generality",¹⁴² that the prohibition of arbitrary detention is a part of customary international law,¹⁴³ then the real issue which the Supreme Court should have addressed was whether arrests and detentions carried out contrary to law have been considered "arbitrary" in court decisions around the world. The Court, however, neglected to look at such decisions. The only decisions it examined were United States federal court decisions, which were brushed away with the finding that such courts had been too assertive in the exercise of their discretion, and one ICJ decision, which dealt with arbitrary detentions only in passing.

Secondly, in undertaking this determination of customary international law content, the Supreme Court failed to take into account the importance of multilateral treaties as evidence of customary international law.¹⁴⁴ The Court dismissed the relevance of the ICCPR on the basis that it was not a

141 Ralph G Steinhardt "Laying One Bankrupt Critique to Rest: *Sosa v Alvarez-Machain* and the Future of International Human Rights Litigation in US Courts" (2004) 57 Vand L Rev 2241, 2246 ["Laying One Bankrupt Critique to Rest"].

142 *Sosa v Alvarez-Machain*, above n 3, fn 27 Souter J for the majority.

143 For a comprehensive comparative analysis of the extent of acceptance of different human rights universally, see M Cherif Bassiouni "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1993) 3 Duke J Comp & Int'l L 235.

144 For the proposition that multilateral treaties can be used in determining customary international law see Jennings and Watts (eds), above n 36, 28; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 97 para 183: "[The Court] can and must take [the relevant treaties] into account in ascertaining the content of customary international law."

self-executing treaty and was therefore unenforceable in federal courts.¹⁴⁵ However, as Professor Steinhardt rightly notes, such reasoning has not prevented lower courts in previous ATCA cases from using the ICCPR to ascertain customary international law, and nothing in the Supreme Court's decision suggests that these courts were wrong in doing so. On the contrary, the Court cites some of these decisions with approval.¹⁴⁶ This omission takes on even greater significance when we consider the explicit wording in article 9(1) of that Covenant which unequivocally supports Alvarez's claim: "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure *as are established by law*."¹⁴⁷

The Supreme Court has set a standard which is vague and, with reference to the definition of piracy in *United States v Smith*, perhaps unwittingly broad. Furthermore, the Court's application of its own test was lacking in rigour, setting a poor example for, and giving little guidance to, courts which will have to apply this standard in future ATCA cases.

2 Consideration of "practical consequences"

In addition to a comparison with the 18th century paradigms, the Court said that determining sufficient specificity requires consideration of the "practical consequences" of allowing the claim. On this basis, the Court partly rejected the specificity of Alvarez's claim, stating that its recognition would set a precedent allowing claims in federal courts for any arrests "anywhere in the world, unauthorised by the law of the jurisdiction in which [they] took place."¹⁴⁸ The Court is thus invoking a policy-based "floodgates" argument.

While it is true that the more broadly a norm is formulated the more potential plaintiffs there will be, in this author's view it is injudicious to use a policy-based analysis as part of the determination of specificity. A customary norm either exists with certain specificity or it does not. This degree of specificity is not contingent on the particular consequences of its recognition. It is based on an examination of the practice and judicial opinion of States. As one commentator correctly notes, by its very definition a rule of customary international law "comes into existence long before any Judge has the opportunity to ascertain and apply it in a particular dispute."¹⁴⁹ If

145 *Sosa v Alvarez-Machain*, above n 3, 2767 Souter J for the majority.

146 "Laying One Bankrupt Critique to Rest", above n 141, 2283.

147 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 9(1) (emphasis added).

148 *Sosa v Alvarez-Machain*, above n 3, 2768 Souter J for the majority.

149 Lucky Vidmar "The Alien Tort Statute: Analysis of *Sosa v Alvarez-Machain*" (2004) 33 Colo Law 111, 114. See further Louis Henkin "International Law as Law in the United States" (1984) 82 Mich L Rev 1555, 1562: "In principle, the courts interpret law that exists independently of them, law that is 'legislated' through the political actions of the governments of the world's States."

"practical consequences" are construed as the number of potential plaintiffs who may bring claims in United States federal courts, and such consequences can influence the specificity required of a norm, then there no longer exists certainty in the law. Depending on the amount of conflict in the world, what federal courts recognise as actionable norms might change. Policy-based justifications for refusing to recognise an international norm are distinct from any determination of definiteness with which the international community recognises, or does not recognise, such a norm. This distinction should have been made clear.

Further, the Court's conclusion that plaintiffs from all over the world might flock to federal courts due to their unlawful arrests in any country does not necessarily follow from the Court's earlier statements on ATCA admissibility criteria. Referring to the brief given by the European Commission as *amicus curiae*, the Court stated its willingness "in an appropriate case" to allow only those claimants who have "exhausted any remedies available in [their] domestic legal system, and perhaps in other fora such as international claims tribunals."¹⁵⁰ In many States, such unlawful arrests and detentions will be able to be dealt with satisfactorily by the courts of that State, and there would be no need for those wrongly detained to bring actions in United States federal courts. The floodgates argument does not withstand scrutiny if such an admissibility criterion is applied.

Whether the meaning of "practical consequences" is limited to floodgates concerns is unclear. One of the reasons advanced by the Court for exercising a restrained discretion in determining norms of customary international law was the risk of "adverse foreign policy consequences".¹⁵¹ It is likely that such concerns may also influence the courts in determining sufficient specificity. In the same way that the number of potential plaintiffs should not impact on a court's determination of the specificity of a norm, nor should foreign policy concerns. Any foreign policy concerns a court may have should be dealt with under the appropriate mechanism, such as the political question or act of State doctrines.¹⁵²

D Exhaustion of Domestic Remedies and Political Branch Deference

The final element of the Supreme Court's test comprised the two potential limitations on ATCA claims which were briefly raised in a footnote. The first concerns the requirement of exhaustion of

150 *Sosa v Alvarez-Machain*, above n 3, fn 21 Souter J for the majority.

151 *Sosa v Alvarez-Machain*, above n 3, 2763 Souter J for the majority.

152 For an analysis of the political question and act of state doctrines and their applicability to ATCA claims, see Beth Stephens "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation" (2004) 17 *Harv Hum Rts J* 169, 192-196 ["Upsetting Checks and Balances"]; Brian C Free "Awaiting *Doe v Exxon Mobil Corp*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation" (2003) 12 *Pac Rim L & Pol'y J* 467, 485-497.

domestic remedies. The second concerns the policy of "case-specific deference to the political branches."¹⁵³

1 Exhaustion of local remedies limitation

The requirement that plaintiffs exhaust their local remedies before bringing ATCA claims is a rule derived from international law.¹⁵⁴ It is also found in the Torture Victim Protection Act of 1991 (TVPA), an Act creating a federal cause of action for victims of torture or extrajudicial killings perpetrated by foreign nationals acting under actual or apparent authority or colour of law.¹⁵⁵ The rationale behind the doctrine is to provide the State where the violation occurred the "opportunity of redressing the wrong alleged."¹⁵⁶ The rule has "a considerable degree of elasticity",¹⁵⁷ and is inapplicable "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile."¹⁵⁸

The exhaustion of local remedies requirement was put into the TVPA for several reasons. While recognising the need to provide torture victims with a forum for civil redress, especially in view of the likely weak judicial protections available in States where such human rights abuses were commonly occurring,¹⁵⁹ Congress was also aware of the need to mitigate any unnecessary burdens on United States federal courts, and the need to encourage the development of meaningful remedies in other countries. In addition, Congress recognised that local courts would often be better placed to hear such allegations.¹⁶⁰

153 *Sosa v Alvarez-Machain*, above n 3, fn 21 Souter J for the majority.

154 See *Elettronica Sicula SpA (ELSI) Case (United States v Italy)* (Judgment) [1989] ICJ Rep 15, 42 para 50, where the exhaustion of local remedies was called an "important principle of customary international law."

155 Torture Victim Protection Act, above n 32, s 2(b): "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."

156 *Finnish Shipowners Arbitration (Finland v United Kingdom)* (1934) 3 RIAA 1479, 1500 Bagge, Single Arbitrator.

157 "The requirement of exhaustion of local remedies is not a purely technical or rigid rule ... [international tribunals] have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it": *Norwegian Loans Case (France v Norway)* (Judgment) [1957] ICJ Rep 9, 39 Lauterpacht J.

158 *Xuncax v Gramajo*, above n 52, 178 Woodlock J. The same holds true for individuals bringing communications to the Human Rights Committee under the First Optional Protocol to the ICCPR. See Anne F Bayefsky "How to Complain About Human Rights Treaty Violations" <<http://www.bayefsky.com>> (last accessed 24 April 2006).

159 H R Rep (1992) 102-367(I) USCCAN 84, 85.

160 H R Rep (1992) 102-367(I) USCCAN 84, 87.

The reasons for including a local remedies requirement in the TVPA apply equally to the ATCA. Provided courts apply the rule flexibly and are sensitive to difficulties faced by victims bringing claims in countries with questionable human rights records, then this author finds no fault with imposing such a limitation on ATCA claims. The problem is more with the way in which the Supreme Court equivocated in stating whether this was indeed a limitation on claims or not. The Court's position is unclear and creates uncertainty on a fundamental issue. An example of this resulting uncertainty is found in the post-*Sosa v Alvarez-Machain* decision of *Enahoro v Abubakar*.¹⁶¹

Enahoro saw seven Nigerian plaintiffs bringing suit against a Nigerian General and former Head of State, Abubakar, for alleged torture and extrajudicial killings in the 1990s.¹⁶² The plaintiffs brought their claim under the ATCA, with no reference to the TVPA.¹⁶³ One issue confronting the Seventh Circuit was whether such a claim was possible, or whether, seeing as the claim involved torture and extrajudicial killing, it was necessary for the plaintiffs to bring their claim under the TVPA.¹⁶⁴ The issue was crucial because Abubakar had argued that the plaintiffs' case should be dismissed on the basis that the exhaustion requirement of the TVPA had not been fulfilled.¹⁶⁵

The majority held that the TVPA would be meaningless if it did not "occupy the field", as no one "would plead a cause of action under the Act and subject himself to its [exhaustion] requirements if he could simply plead under international law."¹⁶⁶ As the plaintiffs had not pled under the TVPA and there was nothing to indicate that they had exhausted their remedies, the majority remanded the case to the District Court for a determination of whether the plaintiffs should be able to amend their claim, and whether, in any event, the exhaustion requirement in the TVPA defeated it.¹⁶⁷

One Judge partly dissented. Relying on canons of statutory interpretation, the TVPA's legislative history and precedent,¹⁶⁸ Cudahy J found that the TVPA did not preclude aliens' ability to bring claims for torture and extrajudicial killing under the ATCA, and therefore that the plaintiffs had no

161 *Enahoro v Abubakar* (2005) WL 1243178 (7th Cir).

162 *Enahoro v Abubakar*, above n 161, 1 Evans J.

163 *Enahoro v Abubakar*, above n 161, 6 Evans J.

164 *Enahoro v Abubakar*, above n 161, 6 Evans J.

165 *Enahoro v Abubakar*, above n 161, 6 Evans J.

166 *Enahoro v Abubakar*, above n 161, 7 Evans J.

167 *Enahoro v Abubakar*, above n 161, 8 Evans J.

168 There is extensive federal case law holding that the TVPA does not restrict the scope of the ATCA: see *Enahoro v Abubakar*, above n 161, 10 Cudahy J dissenting in part.

need to resort to the TVPA.¹⁶⁹ This finding meant Cudahy J had to squarely confront the issue of whether the ATCA included the exhaustion of domestic remedies requirement to which the Supreme Court in *Sosa v Alvarez-Machain* had equivocally referred.

Cudahy J commenced his inquiry by providing reasons why recognising an implicit exhaustion requirement in the ATCA would be a good idea. In addition to bringing the ATCA into harmony with the provisions of the TVPA and tenets of international law, Cudahy J thought that Congress, through the TVPA scheme, had shown its desire to have exhaustion requirements in customary international law reflected in domestic law generally. Moreover, equity and consistency recommended an exhaustion requirement in the ATCA, since "otherwise American victims of torture would be bound by an exhaustion requirement under the TVPA and foreign plaintiffs could avoid such strictures by pleading under the ATCA."¹⁷⁰ However, despite these reasons, Cudahy J found the question to be "far from settled", as while the Supreme Court's decision in *Sosa v Alvarez-Machain* was "suggestive, [it] offers little guidance".¹⁷¹ After noting that the Second Circuit and several District Courts had rejected the idea of incorporating an exhaustion requirement into the ATCA,¹⁷² Cudahy J concluded that "it is far from clear that, purely as a matter of United States jurisprudence, the ATCA contains any exhaustion requirement at all."¹⁷³

Unfortunately, the debate over exhaustion of remedies does not end there. There is also the burden of proof question. Cudahy J criticised the majority for placing the evidentiary burden of showing whether domestic remedies had been exhausted on the plaintiffs. Citing *Hilao v Estate of Marcos*¹⁷⁴ and the *Case of Velasquez Rodriguez*,¹⁷⁵ Cudahy J concluded that "under both the TVPA and public international law, it is the *respondent or defendant's* burden to demonstrate that plaintiffs had adequate legal remedies which they did not pursue in the country where the alleged abuses occurred."¹⁷⁶ Accordingly, it is only when the defendant is able to show that local remedies have

169 *Enahoro v Abubakar*, above n 161, 11 Cudahy J dissenting in part.

170 *Enahoro v Abubakar*, above n 161, 11 Cudahy J dissenting in part.

171 *Enahoro v Abubakar*, above n 161, 11 Cudahy J dissenting in part.

172 Cudahy J raised, inter alia, the examples of *Kadic v Karadzic*, above n 7, 241-244 Newman CJ; *Doe v Rafael Saravia* (2004) 348 F Supp 2d 1112, 1157 (ED Cal) Wanger J: "Plaintiffs asserting claims under the ATCA are not required to exhaust their remedies in the state in which the alleged violations of customary international law occurred"; *Sarei v Rio Tinto PLC* (2002) 221 F Supp 2d 1116, 1133 (CD Cal) Morrow J: "The court is not persuaded that Congress' decision to include an exhaustion of remedies provision in the TVPA indicates that a parallel requirement must be read into the ATCA."

173 *Enahoro v Abubakar*, above n 161, 11 Cudahy J dissenting in part.

174 *Hilao v Estate of Marcos*, above n 9.

175 *Case of Velasquez Rodriguez v Honduras (Case of Velasquez Rodriguez)* (Judgment) (29 July 1988) Inter-American Court of Human Rights.

176 *Enahoro v Abubakar*, above n 161, 11 Cudahy J dissenting in part.

not been exhausted that "the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."¹⁷⁷

While under the TVPA and jurisprudence pertaining to the American Convention on Human Rights this may be the correct position, it is by no means a universally accepted position. For example, in bringing a communication to the Human Rights Committee under the Optional Protocol to the ICCPR, it is for the author to "go beyond a certain threshold of evidence to substantiate why he or she believes that local remedies are not effective."¹⁷⁸ Similarly, at the interstate level, Lauterpacht J has held that "[a]s a rule, it is for the plaintiff state to prove that there are no effective remedies to which recourse can be had."¹⁷⁹ In short, there is no uniformity at international law in respect of who has the initial evidentiary burden, and the extent of this burden.

The Supreme Court, by not taking a firm stance on whether the ATCA has an implicit exhaustion of domestic remedies requirement, has created a host of difficult fundamental questions with which lower courts will have to grapple, further adding to the uncertainty surrounding the ATCA.

2 *Political branch deference*

The Supreme Court's reference to a policy of "case-specific deference to the political branches" has great significance in view of the Bush Administration's attempts to derail ATCA litigation. The Administration has argued that such litigation "may implicate and inflame international tensions or disagreements over highly sensitive matters in several different respects",¹⁸⁰ and that the courts, by adjudicating such matters, are unconstitutionally interfering in matters entrusted to the political branches.¹⁸¹ It is noteworthy that this position is diametrically opposed to that of the Carter and Clinton Administrations.¹⁸² In *Filartiga*, the Carter Administration argued that where there has been a violation of a customary international human rights law norm:¹⁸³

177 *Enahoro v Abubakar*, above n 161, 11 Cudahy J dissenting in part.

178 See Bayefsky, above n 158.

179 *Norwegian Loans Case (France v Norway)*, above n 157, 39 Lauterpacht J.

180 See Brief for the United States as Respondent Supporting Petitioner, *Sosa v Alvarez-Machain* (2004) WL 182581, 42-3.

181 See Brief for the United States as Respondent Supporting Petitioner, above n 180, 7-8. The Bush Administration has also argued that the ATCA is a grant of jurisdiction only and that sources of customary international law "do not remotely provide a basis for inferring a cause of action." This argument, however, is no longer viable after the Supreme Court's decision in *Sosa v Alvarez-Machain*.

182 See Free, above n 152, 474-475.

183 Memorandum for the United States as Amicus Curiae, *Filartiga v Pena-Irala*, above n 44, 22-23. The Bush Administration argument that ATCA litigation is detrimental to US foreign policy interests has also been contradicted by US Foreign Service diplomats. In their amici curiae brief in *Sosa v Alvarez-Machain*, they

[T]here is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognise a private cause of action in these circumstances might seriously damage the credibility of our own nation's commitment to the protection of human rights.

As for the argument that federal courts are unconstitutionally interfering in political branch matters in hearing ATCA claims, Brennan J, writing for the Supreme Court in *Baker v Carr*, has cautioned that it would be erroneous "to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁸⁴ Indeed, unquestioning deference to the Executive Branch's views on foreign policy matters would render the Court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others!"¹⁸⁵ Commentators too have argued that courts are constitutionally obliged to review executive opinions on foreign policy matters and, where appropriate, to decline to follow them.¹⁸⁶

To what extent federal courts should follow the views of the Executive Branch was left unclear after *Sosa v Alvarez-Machain*. The only pointer was the Court's reference to the pending class actions against corporations supporting the South African apartheid regime, which would likely interfere with the South African Truth and Reconciliation Commission's policy of avoiding victors' justice. In such cases, said the Court, there is a "strong argument" that federal courts should give "serious weight" to the Executive's view on the likely foreign policy implications.¹⁸⁷ Just which characteristics of these apartheid cases support the view that "serious weight" should be given to the opinion of the Executive Branch is not specified.¹⁸⁸ Further, the Court was silent on the doctrine under which the courts should evaluate such opinions.¹⁸⁹

Against this uncertainty, perhaps the only guidance lower courts can take is that there needs to be a specific and precarious international situation identified by the Executive Branch before its

noted that eliminating or curtailing ATCA lawsuits was "not justified by concerns over any overall negative impacts that the statute has on foreign policy. On the contrary, eviscerating ATCA could undermine US foreign policy objectives." Brief of Amici Curiae, Career Foreign Service Diplomats in Support of Respondent, *Sosa v Alvarez-Machain* (2004) WL 419428, 9.

184 *Baker v Carr* (1962) 369 US 186, 211 Brennan J for the Court.

185 *First National City Bank v Banco Nacional de Cuba* (1972) 406 US 759, 773 Douglas J concurring. It is notable that the decision in *Sosa v Alvarez-Machain* was issued the day after the Supreme Court's decisions in *Rasul v Bush* and *Hamdi v Rumsfeld*, where Bush Administration claims that the Executive required untrammelled discretion in responding to the exigencies of the war against terror were rejected: see Stephens, above n 80, fn 160.

186 See Free, above n 152, 480-484; Londis, above n 79, 185-192; "Upsetting Checks and Balances", above n 152, 191-202.

187 *Sosa v Alvarez-Machain*, above n 3, fn 21 Souter J for the majority.

188 Stephens, above n 80, 561.

189 Stephens, above n 80, 561.

views might warrant "serious weight", whatever "serious weight" might mean. A general anti-ATCA stance, such as the one taken by the Bush Administration, will be insufficient to derail an ATCA suit. In view of the fluctuating general support the ATCA has received from successive governments, excessive deference to the government of the day would lead to judicial inconsistency.¹⁹⁰

Finally, even where there exist specific international situations identified by the Executive which might caution against recognition of ATCA claims, courts should not unquestioningly accept the basis of the Executive's view. As Professor Stephens has argued, recent foreign policy predictions about the impact of ATCA litigation "appear far more subjective than factual, more designed to protect powerful defendants than to protect United States foreign policy."¹⁹¹ Thus, the precedent of *Sarei v Rio Tinto PLC* should not be followed.¹⁹² In that case, faced with a State Department Statement of Interest which warned of the adverse impact on United States foreign policy and the Bougainville peace process if the ATCA claim in issue were heard, the District Court stated that it:¹⁹³

... must accept the statement of foreign policy provided by the executive branch as conclusive of its view of that subject; it may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning.

Such blanket acceptance of Executive opinion is dangerous. Due – as one commentator has put it – to the "highly politicized, extreme positions taken by the Executive Branch under the leadership of President Bush,"¹⁹⁴ a more nuanced evaluation is required. Thus, the position taken by the DC Circuit in *Washington Post Co v US Department of State* is more apposite: "whatever weight the opinion of the Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence."¹⁹⁵

VIII CONCLUDING REMARKS

The ATCA plays a small yet vital role in the burgeoning international movement towards accountability for gross violations of human rights. As well as exposing perpetrators of such abuses,

190 See Free, above n 152, 484.

191 "Upsetting Checks and Balances", above n 152, 202.

192 *Sarei v Rio Tinto PLC*, above n 172.

193 *Sarei v Rio Tinto PLC*, above n 172, 1181-1182 Morrow J.

194 Stephens, above n 80, 567.

195 *Washington Post Co v US Department of State* (1988) 840 F 2d 26, 36-37 (DC Cir) Robinson J for the Court.

it can provide redress to victims,¹⁹⁶ and can aid in the development, clarification and dissemination of human rights norms. The Supreme Court's decision in *Sosa v Alvarez-Machain*, to the extent that it affirms the ATCA as a mechanism for addressing violations of certain specific human rights norms, is therefore to be welcomed. The Court was unequivocal in leaving the "door ajar" to a small number of meritorious claims.¹⁹⁷ This aspect of the judgment has already had flow-on effects. In December 2004, Unocal, a United States corporation caught up in an ATCA suit for its involvement in a pipeline project in Burma resulting in alleged human rights abuses, decided to settle out of court.¹⁹⁸ As the first settlement of its kind,¹⁹⁹ not only does it indicate the ATCA's continued potential as a tool to address the most serious human rights violations, but it signals the growing influence of the ATCA on corporate behaviour abroad. As one commentator has put it: "Nobody can treat these [corporate] cases as a joke anymore."²⁰⁰

At the same time, due to the explosion of ATCA litigation post-*Filartiga*, the Court in *Sosa v Alvarez-Machain* was evidently keen to limit the number of ATCA claims coming before federal courts. By belabouring the cautionary approach that courts should adopt when confronted with ATCA claims, the decision was calculated to have a somewhat chilling effect on future litigation. However, an examination of the record reveals that such emphasis on judicial restraint is unwarranted. To date, no successful ATCA suits have been based on norms not firmly entrenched at international law, with courts having acted very responsibly as gatekeepers, consistently rejecting claims failing to invoke well-established norms.²⁰¹

196 While enforcement of damage awards has been elusive in ATCA litigation, a damage award, even if unenforced, "as a medium of social meaning marks a 'spiritual victory' over an oppressor, recognises concrete damage to individuals, and is symbolic of a plaintiff's loss": Beth Van Schaack "With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change" (2004) 57 Vand L Rev 2305, 2322.

197 *Sosa v Alvarez-Machain*, above n 3, 2764 Souter J for the majority.

198 See John R Crook (ed) "Tentative Settlement of ATCA Human Rights Suit against Unocal" (2005) 99 Am J Int'l L 497.

199 To date, no ATCA case has resulted in a corporate defendant being held liable, and only the Unocal case has resulted in an out-of-court settlement: see Sarah H Cleveland "The Alien Tort Statute, Civil Society, and Corporate Responsibility" (2004) 56 Rutgers L Rev 971, 981-983.

200 Girion, above n 63, citing Elliot Schrage, Senior Fellow at the Council on Foreign Relations.

201 ATCA claims have been rejected on the basis that the norm invoked is insufficiently established, for, inter alia: negligence resulting in personal injury or death (*Jones v Petty Ray Geophysical Geosource* (1989) 722 F Supp 343 (SD Tex)); fraud (*Hamid v Price Waterhouse* (1995) 51 F 3d 1411 (9th Cir)); environmental harms (*Beanal v Freeport-McMoran* (1999) 197 F 3d 161 (5th Cir); *Flores*, above n 50; *Sarei v Rio Tinto PLC*, above n 172); commercial torts (*De Wit v KLM Royal Dutch Airlines* (1983) 570 F Supp 613 (SD NY)); censorship (*Guinto v Marcos* (1986) 654 F Supp 276 (SD Cal)); and conversion (*Cohen v Hartman* (1981) 634 F 2d 318 (5th Cir)).

The Court, in attempting to strike this balance between restricting the number of plaintiffs coming to United States federal courts and simultaneously leaving the door narrowly open for the most meritorious, proposed a historically-based test with a number of qualifications. Unfortunately, its test is anything but clear. Its blurry margins, contrary to the intent of the Court, might well invite just as many plaintiffs as previously. The lack of guidelines is problematic for lawyers and Judges alike. How is one to compare the specificity of modern human rights norms to the norms of the eighteenth century? Can plaintiffs bring a claim if they have not already done so in their home countries? And how seriously should Executive opinions be construed? The Supreme Court has given pitiful guidance as to how to determine where to redraw the line. Therefore, the decision is certain to engender various judicial interpretations and may result in worthy plaintiffs being denied a rightful remedy. Moreover, it gives Judges who are uncomfortable with the introduction of international law into domestic courts ample opportunity to reject worthy claims on bases which will be very difficult to challenge. Most watchers were expecting the Supreme Court to hand down a decision that would quell the uncertainty surrounding the ATCA. Instead, it has handed down a decision that will be keenly debated for some time to come.