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Essays

*81 THE PAQUETE HABANA SAILS ON: INTERNATIONAL LAW IN U.S. COURTS AFTER SOSA

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In ordering a blockade of Cuba, days before Congress declared war on Spain, President William McKinley issued a Proclamation setting out the rules of prize to be applied during the impending conflict. [FN1] He decreed that enemy vessels found on the high seas could be taken according to the rules set out in "the law of nations." [FN2] When The Paquete Habana, a Cuban coastal fishing smack, was later seized, the courts were required to interpret that phrase, and the U.S. Supreme Court determined that such vessels were immune from capture according to common customs and usages among what we now call "the international community." "International law," wrote Justice Gray, "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." [FN3]

President McKinley's Proclamation was neither the first nor the only formal executive or legislative enactment to incorporate express reference to the law of nations, leaving it to the judicial branch to determine the scope and meaning of the term, although most have lost their relevance as the detailed codification of the laws has progressed. Yet, it is extraordinary that the Alien Tort Statute ("ATS"), [FN4] which establishes the jurisdiction of the federal courts over certain suits in tort alleging violation of the law of nations, utterly evaded the critical scrutiny of the Supreme Court for more than 200 years after its enactment as the first Judiciary Act. Meanwhile, over the last *82 quarter-century, starting with Filartiga v. Peña-Irala, [FN5] the venerable statute has been deployed as the basis of a thriving body of human rights jurisprudence, permitting U.S. judges to give effect within their courtrooms to some of the most fundamental commitments made by nations to one another in the years following World War Two.

In the months since the Court first addressed the meaning of the ATS, in Sosa v. Alvarez-Machain, [FN6] the received wisdom has quickly concluded that the decision erects an impediment to activists' continuing use of international human rights law as the law of decision in real cases involving abused victims as plaintiffs, and the accused perpetrators of outrages against them as defendants.

I respectfully dissent. I think Justice Souter's opinion for the Court is not the death knell for creative uses of the ATS in defense of human rights, but rather it provides a practical roadmap for the way ahead. It is an "internationalist" opinion, placing its author firmly in the tradition of The Paquete Habana, [FN7] and on the side of those Justices who believe that judicial, legislative, and administrative acts of other nations and of world institutions may bear on the proper interpretation of our own law. Justice Souter persuasively demolished the radical view, embraced by Justice Scalia and others, that international law is not normative and thus, by its nature, is categorically different from the other elements of American jurisprudence. The Court's decision in Sosa is, in short, a modern day illustration of Thomas Jefferson's vision that the United States would always act in accordance with "a decent respect to the opinions of mankind." [FN8]

*83 The decision, indeed, is likely for at least two reasons to generate more, not less, effective en-

forcement of human rights norms in the courts of our country. It will reduce or even eliminate the “flavor-of-the-month” attractiveness of the ATS for certain plaintiffs' counsel, who make headlines but whose predominant interest has not been the promotion of international human rights law, and thereby will chase away cases that never had much chance of success in a courtroom anyway. And perhaps, not coincidentally, it will “out” the shrill,

inated the "headquarters doctrine." This applies to situations in which the results of a government decision may be felt abroad, but the decision itself was taken at "headquarters" and it is, therefore, not unfair to subject the United States to suit just as if the allegedly offending policy had been carried out at home.

Seven Justices declined to endorse the headquarters doctrine, and the Court unanimously refused to extend it to the situation at bar, in which any common law tort action would be governed by the substantive laws of the foreign situs of the offense, here Mexico. [FN19] The Court, therefore, concluded that 28 U.S.C. § 2680(k) bars "all claims based on ***86** any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." [FN20]

But on the ATS side against the individual defendants, the issue--the only issue arguably precluding the exercise of federal subject-matter jurisdiction over the suit--was whether the detention and abduction of Dr. Alvarez, if they occurred as the plaintiff alleged, were or were not acts "in violation of the law of nations." [FN21] Presumably, if they were not, then they might still have been actionable before state courts or before tribunals in the places where those acts were allegedly perpetrated.

I must confess that I have never been able to understand how opponents of this lawsuit, including those in the Bush Administration, managed to persuade people who should know better that the question before the Court was whether the ATS "provides a private right of action." I may be missing subtleties that more sophisticated minds can perceive, but, in my reading of it, there is no ambiguity in the statutory text. It confers jurisdiction on the federal courts over a certain class of tort cases which have certain characteristics that it is the burden of plaintiffs to establish (just as it is always the burden of plaintiffs to demonstrate that the court before which they have brought their claims has the competence to adjudicate them). The question of a cause of action is answered in the ATS itself: if we know a suit to be one "for a tort only," it simply makes no sense to look further for "a private right of action."

The burden that the plaintiff in Sosa had to carry was to demonstrate not that the ATS (or that international law more generally) created a private cause of action for him or for persons situated similarly to him, but that the facts alleged in the complaint, if he were able to prove that they were true, would describe a violation of international law. That is a heavy and difficult burden, but it is rather a ***87** different one from the one assigned to him by the Administration, and by the press in its coverage of this case. It is precisely the burden successfully borne by each of the plaintiffs who, up until the time of the Sosa decision, had managed to persuade judges around the country to award them damages for abuses dealt them by human rights violators over whom the relevant courts had personal jurisdiction.

I simply do not understand the arguments of those who proclaim that because the ATS does not create a private right to sue--that is, it does not permit a plaintiff to bring a defendant before the courts on the basis of allegations that would not be actionable absent the statute--there is some flaw in the reasoning of judges who have awarded substantial damages to victims of torture, extrajudicial killings, disappearances, and other deprivations of human rights. The ATS was not the source of the private rights of action for those plaintiffs, whose cases lay in tort. To come within the ATS, a cause of action must already exist, and it must be characterized by three things: it must be in tort only, the plaintiff must be an alien, and the challenged act by the defendant must allegedly violate the law of nations. [FN22] Some claims will qualify as sounding in tort only, and others will not. Some prospective plaintiffs will satisfy the statutory prerequisite of alienage, and others will not. Some tortious acts may fairly be characterized to have violated international law, and others may not.

There is nothing surprising or radical here. The ATS sought to channel certain tort actions into the federal courts, presumably because the Founders

were concerned about the parochialism of the State courts and wanted to reassure other nations that their fledgling democracy would take its international obligations seriously. International law was seen as simply too important to leave to the scattered and haphazard mercy of organs of the States. ***88** One may suppose that they wanted to concentrate in the federal courts of the new Republic litigation that might require a determination of the content of the law of nations to accomplish two purposes that we know inspired other statutory enactments: avoiding the embarrassment that could befall the new country from inconsistent decisions involving international law, and promoting the image of the United States as acting, through each of its departments, as a full member of the community of nations. Indeed, one of the failures of the Confederation was precisely its inability to speak with one voice, as one sovereign, taking its place in the pantheon of the world's sovereign nations. It was very important to the new Republic to be taken seriously as a worthy coequal to the great empires and the princely powers.

The limitation of the ATS to tort cases may well have been an effort to exclude from this special category reserved for federal jurisdiction issues essentially contractual, and hence presumably commercial, in character. The State courts could competently handle those, and even if they on occasion did their job poorly, that was no reflection on the character of the country. The requirement that the plaintiff be an alien too may have been meant to reassure the world that the United States considered its international obligations to be so important that it would reserve the application of international law to its independent national judiciary, appointed for life and, by constitutional design at least, above the local political fray. If your citizens come here, the first Congress was saying to other nations, they may be assured of effective and fair treatment, at least where their rights protected by international law are concerned.

Despite the clarity of the issue presented to the Supreme Court by the Sosa case--can Dr. Alvarez prove that his eighteen-hour detention by U.S. officials in Mexico, acting outside any claim of legal right to be asserted in that country, was a violation of international law?--the public ***89** debate was sidetracked into irrelevant discussions about the origins of private causes of action. The Court, however, was not fooled, and it stuck to its constitutional mission.

II.

Justice Souter realized that the debate was being framed improperly. He hardly tarried at all on the question of the provenance of private litigation under the ATS, and instead unpacked the words of the ATS to determine when its jurisdictional prerequisites can be said to be satisfied. In a portion of the judgment in which he was writing for a unanimous Court, he concluded that "the ATS is a jurisdictional statute creating no new causes of action." [FN23]

The question then became the identification of those torts whose commission can be said to entail a violation of international law. Even those judges and scholars most restrictive in their reading of the 1789 Act--such as Judge Bork in his separate opinion in Tel-Oren v. Libyan Arab Republic [FN24]--agreed that at the time of its enactment, the ATS would have directed cases into federal courts alleging violations of safe conducts, interference with diplomatically protected persons, and piracy. If that list was meant to be static, however, then every case interpreting § 1350 in the modern era since Filartiga, and finding such wrongful acts as torture within its aegis, has been was wrongly decided.

Writing in this section for himself and five other Justices (with Rehnquist, C.J., and Scalia and Thomas, JJ., the sole dissenters), Justice Souter rejected that conception of the ATS and of international law generally. Rather, he found that a plaintiff has a heavy burden to carry to demonstrate that actionable conduct of individuals does in fact violate the law of nations. For this and other reasons, "great ***90** caution" is to be exercised by the courts "in adapting the law of nations to private rights." [FN25] Yet the entrance to the courthouse

is not closed: it "is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." [FN26] Moreover, even during a period of active and highly-publicized use of the ATS to enforce international human rights norms in U.S. courts, the legislature has been silent: "nothing Congress has done is a reason for us to shut the door to the law of nations entirely." [FN27]

This, said the majority of the Court, is nothing novel. It is a doctrine grounded in such venerable decisions as The Nereide, [FN28] The Paquete Habana, [FN29] and Banco Nacional de Cuba v. Sabbatino. [FN30] The judiciary is entitled to determine the content of the law of nations and has done so, if not routinely, at least regularly throughout the history of the Republic. Justice Souter cited with approval the determination that the torturer is, like the pirate and the slave trader, "hostis humani generis," and surely his torts are actionable in the courts of the United States when he may be found subject to their personal jurisdiction. [FN31] He went on to affirm the criteria that the courts must apply in distinguishing between international law as it is and as its promoters may wish it to be.

The Ninth Circuit in the Marcos litigation had required ATS plaintiffs to show that the norm on which they rely is "specific, universal, and obligatory," and Justice Souter implied that these were the kinds of tests that all courts should apply to the claim that a given norm of international ***91** law has reached the level of conferring rights or imposing obligations on individuals. [FN32] The arbitrary detention and other offenses of which Dr. Alvarez complained were found to have failed those tests: there is no firm, international consensus on an enforceable right to be free from temporary restraint by law enforcement officers acting extraterritorially, especially where, as here, their conduct was arguably justified under either statutory or common law principles. [FN33]

There is, of course, room to disagree with this conclusion on the facts of this case or to speculate on whether more prolonged detention, or more abusive behavior by the officers, might have produced a different result. Presumably, even on Justice Souter's analysis, Dr. Alvarez would have had a viable cause of action had he been tortured before he was spirited onto American soil or had he been deprived of food or sleep. The importance of the decision lies in the resounding affirmance of the propositions that international human rights are the legally enforceable rights of individuals and that the conduct of individuals may be found to be actionable violations of those rights. The Bush Administration had openly called upon the Court to reject those propositions and with them the tradition dating back to Chief Justice Marshall that international law is part of our law, with its interpretation consigned to the judicial power.

III.

The real issue, as Justice Souter found, is not whether the Statute creates a private right of action. [FN34] It surely does not. The real issue is that the Statute's detractors do not ***92** concede that international law has anything at all to do with individual rights. And yet it does; and yet it must. If human rights are legal rights, then there must be some correlative obligation, and there must be some forum in which a holder of those rights may be heard to make her claim that they have been violated. This is reflected in a number of sources of international law. The International Covenant on Civil and Political Rights, for example, speaks in the vocabulary of real, enforceable rights: I have a right not to be tortured, and you, as someone acting under color of state authority, have a duty not to torture me. [FN35] The prohibition of state-sanctioned torture is now accepted as a norm of customary law, even a norm of the level of jus cogens, permitting no derogation in any circumstances. The prohibition against torture, in other words, has achieved the specificity, universality, and obligatory character that justify the deployment of the ATS as a jurisdiction-vesting statute in cases alleging violation of that prohibition by someone over whom the court has personal authority.

According to a fundamental tenet of our system of constitutionalism and separation of powers, in the words of Chief Justice Marshall in Marbury v. Madison, [FN36] "[i]t is emphatically the province and duty of the judicial department to say what the law is." [FN37] "The law"--here, the body of law--includes principles of the law of nations. It follows that, in some cases, judges must define the contents of international law. They often do this without controversy, whether interpreting treaties or determining who is the owner of the wreck of a Spanish galleon found centuries later off the coast of Florida. It is maddeningly difficult, in other cases, to determine the contents of international law with precision. There is no legislature, no authoritative tribunal, and nothing akin to the ***93** Congressional Record. Finding the law may involve some hard intellectual work, and both lawyers and judges may sometimes get it wrong. But we already have in place mechanisms, including the courts of appeals, designed to minimize the instances of judicial error. By and large, that system works. So why are those who profess an originalist orientation to the legal system so reluctant to trust the tools bequeathed to us by the drafters of the Constitution and finely honed by our experience over centuries?

The ATS requires that judges do exactly what judges are paid to do. They must say what the law is, and they must determine whether this plaintiff has a legal right which this defendant violated. In Filartiga and other cases, judges found that there is such a right to be free from torture, concluding that the torturer, properly before a court with personal jurisdiction over him, is liable to his victim just like any other tortfeasor. No floodgates have been opened by this holding. Filartiga does not stand for the proposition that all a plaintiff must do is allege a violation of some supposed tenet of the international law of human rights championed by a small cadre of liberal academics. A plaintiff must prove not only that she is the holder of a legal right, but that this defendant has violated it, causing compensable injury. [FN38] In international cases, where pitfalls for a plaintiff lie in the Foreign Sovereign Immunities Act and doctrines such as act of state, political question as articulated in Baker v. Carr [FN39] and its progeny, comity, equitable abstention, and forum non conveniens, there is simply no basis to think that the doors of the courthouse have been thrown open to any foreigner with an imagined political or other grievance against those in power in his country.

***94** Sosa now makes this clear. The ATS is not the "awakening monster" that its detractors profess to have feared. [FN40]

IV.

The presence or absence of private rights of action is not the answer to the ATS conundrum. Yet, no less than Justice Scalia reflected this error most neatly during oral argument in Sosa v. Alvarez-Machain, he told the lawyers representing Dr. Alvarez, "The problem I have with your proposal is that it leaves it up to the courts to decide what the law of nations is." [FN41] This, he was clearly implying, would take judges into areas outside their constitutional mandate and perhaps their substantive competence.

But this is exactly what judges are meant to do: they say what the law is. The Court has now concluded that the kidnapping of Dr. Alvarez in Mexico and his detention there were not violations of international law, and so be it: he has lost his case, for the simple reason that he was unable to bear the burden of establishing the bases for the subject matter jurisdiction of the federal courts under § 1350.

Justice Scalia is surely entitled to his view that international law has nothing to say to American judges, but that is a profoundly radical proposition which one can hardly imagine any of the drafters of the Constitution entertaining for a moment. He is right, however, in reminding us that the terms of our debate over the ATS at bottom reflect something more important than a single piece of legislation, however venerable. We are talking about whether this country is to live up to its Founders' vision that it would take its place as a sovereign among ***95** other sovereigns, governed by the same law, subject to the same requirements as other members of the greater community of nations.

Nor is Justice Scalia alone. It is no exaggeration to state that certain elements of the business community worked themselves into a hysterical lather about the ATS in the months and years prior to the Sosa decision. Much of this was prompted by a concern substantively unrelated to the gruesome murder of the DEA agent Enrique Camarena. The real bone of contention for these commentators was that human rights activists had begun to use the ATS in support of lawsuits against business enterprises, including UNOCAL and others, accused of participating in systematic human rights abuses in joint ventures with Third World governments. Those cases threatened to subject overseas activities of American businesses to judicial review. Sosa was, in their view, the beachhead: if the Sosa Court failed to declare the ATS dead on arrival in the new century, they solemnly declared, then the very economic future of this country would be at risk.

My account is no rhetorical straw person. In their publication for the Institute for International Economics entitled "Awakening Monster: The Alien Tort Statute of 1789," Gary Clyde Hufbauer and Nicholas K. Mitrokostas describe various "nightmare scenarios" in which plaintiffs' lawyers run wild, extorting massive settlements of ATS suits against private companies that are virtually bankrupted, resulting in the wholesale abandonment of foreign investment by American capitalists, the collapse of the world trading system, and widespread deterioration in standards of living, starvation, and general misery. [FN42] The Statute, they claim, "could potentially have a greater impact on the international trade and investment of the United States" than virtually any other development in our ***96** Nation's history. [FN43] And all of this as a result of a law enacted in 1789 and undiscovered until 1980, which to this date has been successfully pleaded as the basis for federal jurisdiction in only a few dozen cases, including only a few against an American corporation.

To be sure, the authors of this monograph do concede that no actual case demonstrates the potential for the dire consequences against which they are warning the world: "so far no [ATS] suit against a corporate defendant has been adjudicated in the plaintiffs' favor." [FN44] Yet this does not deter them from linking the Filartiga interpretation of the Statute--now endorsed and affirmed by the U.S. Supreme Court--from the impending demise of Western civilization as we know it. Their preferred remedy is not limited to a restricted judicial interpretation of the Statute: they call on Congress to take action to revise the law itself and, thus, to chase those latter-day Barbarians, plaintiffs' personal injury lawyers, from the gates. [FN45]

It is likely, although sadly not certain, that this kind of rhetorical excess will be abated in light of the Sosa decision. In the past few months, human rights groups in Washington have not been hearing regular cries for the circling of legislative wagons. [FN46] The more restrained ***97** attitude of the business community to Sosa may also reflect relief over settlement of Doe v. UNOCAL, which was announced in December 2004. [FN47] The terms of that settlement are confidential, and UNOCAL, of course, continues to deny liability, but substantial amounts of money are said to have changed hands without the need for a judge or jury determining the level of the oil company's involvement in human rights abuses in Burma.

There is, of course, another possible explanation. Businesses and business organizations may well be coming to realize that they can live with the ATS as interpreted in Sosa, which does no more than suggest that they may be liable for certain torts that they commit or in whose commission they actively participate abroad. It is hard to see why corporations, already used to (if never happy about) liability for the wrongdoing of joint venture partners, should be entitled to immunity from suit for acts of their business associates that are especially egregious, indeed, that violate fundamental norms of international law.

This would not be the first time that champions of American business predicted catastrophe if certain provisions were interpreted a certain way. Once upon a time there were some who sol-

emnly and knowledgeably wrote that permitting members of racial minorities judicial recourse for employment discrimination against them would be sand in the gears of the national economy and would spell the end for American competitiveness. Now that view seems impossibly quaint, and we know with hindsight that our response as a nation was the correct one. We determined that it is wrong to discriminate on the basis of such criteria as race, and we resolved (even if we have decades later not yet quite managed) to stop doing it. Race discrimination lawsuits are commonly seen now as ***98** reminders of the commitment that we all make to important principles of equality of opportunity and treatment. While defendants still bemoan the cost and the frequency of cases that are filed without merit, or for improper reasons, everyone accepts that this is part of the cost of doing business. Few would revert to the days before Title VII. And life goes on.

V.

So it will be with respect to Sosa. As we have seen, the decision underscores a fundamental proposition of law that human rights advocates have been urging for decades, which is that international law is part of the law of the United States. It also endorses two other critical building blocks of the law of human rights: that international law has normative content for individuals and that the contents of international law may change over time.

Whatever may have been the state of the law in 1789 or even in 1939, international law legitimately concerns itself with the conduct of natural and legal persons in our contemporary world. We see this in the context of international trade and investment, in regimes regulating the environment, intellectual property, and technology, and in dozens of other areas that define life in our new century. That individuals are both the subjects and objects of the international law of human rights should be a no more startling proposition than this.

The United States has been a consistent and vocal supporter of this development in the international legal regime since World War Two. Americans drafted the blueprints for the trials at Nuremberg and Tokyo. Americans were in the forefront in the emergence of the United Nations and were the principal authors of the Universal Declaration of Human Rights. Americans, both in government and out, have been leaders in promoting the ***99** rule of law around the world, and our statute books are filled with examples of efforts to have human rights occupy a central station in our national foreign policy. Until recently, in short, the United States has championed the proposition that international human rights law is law and not, to use the evocative words of Judge Eugene Nickerson in the Filartiga case on remand, "mere benevolent yearnings never to be given effect." [FN48] That entails as a consequence that this body of law contains commands and prohibitions and that violations of those rules can subject their perpetrators to sanctions.

That the meaning of the law changes even though the canonical instruments that are its basis do not is something every American knows. The flexibility of our law, and its ability to adapt to changing times without the need to discard our founding documents, is the eternal testament to the genius of the Founders of our country.

The same constitutional text that accommodated slave-masters, for example, has been found to authorize Congress to forbid racial discrimination in hiring, housing, and education. So when our national Founders gave the federal courts jurisdiction over tort suits brought by aliens alleging violations of international law, they provided a federal forum for victims of human rights abuses two centuries later. They may not have known that, but those same people were equally unaware of many consequences of their words that we now take for granted.

VI.

How will the impact of Sosa be felt in the courtrooms of this country? The case has already begun to plough channels that will lead to the gradual and deliberate ***100** development of the law

of human rights. The first steps in that direction require the clearing of the cluttered field.

It is highly unusual for the Supreme Court, in rendering a decision in a case before it, to opine on another case raising related issues that has not progressed beyond the federal trial courts. Yet, in oral argument, and in Justice Souter's decision, there is extensive discussion of In re South African Apartheid Litigation, [FN49] which is invoked as the kind of litigation that should not be permitted to go forward under the ATS. [FN50] Putting aside for a moment the question whether the High Court should be expressing a view on the ultimate disposition of a case in the very early stages of its development, and as to which the Court most assuredly did not have the views of both sides, the criticism of this lawsuit can be seen not as limiting the Court's interpretation of the ATS, but as explaining the methodology that the Court was endorsing for the identification of international legal principles whose violation might form the basis for federal jurisdiction under the Statute.

Justice Souter suggested that the Apartheid case should be considered for dismissal as raising political questions or under a concept of equitable abstention (or, as he put it, "case-specific deference to the political branches"). [FN51] This part of his decision does not display the rigor of much of the rest, and one might surmise that, in his haste to align himself with those who feared that anything less than the Administration's position would remove all limits on the use of the ATS, he deviated from his own analysis of the proper use of the Statute.

The Sosa decision was announced by the Court on June 29, 2004. Precisely five months later, Judge John E. Sprizzo of the U.S. District Court for the Southern District ***101** of New York (to whom the case had been sent by the Judicial Panel on Multidistrict Litigation) granted the defendants' motions to dismiss the Apartheid litigation. [FN52]

Judge Sprizzo, ironically, was truer to Justice Souter's teachings than the Justice himself had been in his discussion of the New York case. The district judge distilled from Sosa four considerations for the courts to take into account in determining whether a tortious act may be said to have been "committed in violation of the law of nations." [FN53] In his view, Sosa directs trial courts, before accepting assertions of federal jurisdiction under 28 U.S.C. § 1350:

> 1) to determine that the claim is grounded in a "norm of international character accepted by the civilized world and defined with a specificity comparable to" the prohibitions on piracy and molestation of diplomats; [FN54]

2) in the light of received wisdom limiting the federal common law, to be cautious in general about overindulgence in innovation; [FN55]

3) to consider the "collateral consequences" of "creating private rights of action from international norms; [FN56] and

4) to take into account the foreign relations consequences of their decisions, which will presumably be brought to their attention by the political branches (whether on their own initiative or on request). [FN57] ***102** These last three strike me as betraying an effort to pad the list. It can reasonably be argued that Judge Sprizzo's four tests really devolve into only two: (1) is there international consensus that a norm is sufficiently definite and specific to be the basis for the assertion that an existing right has been violated? and (2) is there a reason founded in constitutional separation-of-powers doctrine for the courts to abstain from adjudicating the matter before them? But, however many the Sosa tests may be in number, Judge Sprizzo found that the Apartheid litigation failed them all.

At the end of the day, the district court found a misfit between the ATS and the international condemnation of apartheid. The international community, including the United Nations General Assembly on countless occasions and the International Court of Justice inter alia in the Namibia case, [FN58] indeed condemned the South African re-

gime of forced racial separation, but it never went so far as to agree on the level of complicity or involvement that would be necessary to impute liability "in tort only" to private actors in the South African economy. It was not ExxonMobil, for example, or Barclays Bank that committed "torts in violation of the law of nations": it was the Government of South Africa, and others acting under color of its law. While there can surely be joint-venturer liability for human rights abuses, as was determined in UNOCAL, it does not follow that anyone who benefit from the economic or political system in whose name torts are committed is jointly liable for the torts themselves. There is insufficient evidence, in other words, of international consensus that aiding and abetting apartheid, as opposed to maintaining the apartheid regime, established an actionable right of individuals that has been violated.

***103** The analysis that disposed of the Apartheid litigation, in other words, was the standard judicial approach to motions to dismiss for failure to state a claim. These defendants, the court concluded, were not accused of acts that, even if proved, would constitute actionable wrongs under governing law. One need not agree with Judge Sprizzo's conclusions to accept my theory: I am defending not his resolution of the case, but the way he went about finding it. [FN59]

Applying the equitable abstention test leads to the same result. The post-apartheid government of South Africa made as clear as it could that it did not welcome what it perceived as an intrusion into its internal affairs by the American judiciary. These views were communicated to the court both directly and through the executive branch of the U.S. Government, which indicated forcefully its belief that any judicial intervention had the potential to provoke a serious problem for the conduct of U.S. foreign affairs.

It is unlikely that the Apartheid litigation will be the last ATS case angrily rejected by the courts as somehow overreaching. Yet, one should not read Judge Sprizzo's opinion as an impediment to the larger cause of the promotion of internationally-protected human rights as part of the law of our land. Indeed, that the judge grounded his opinion firmly in Sosa is an indication that the opposite is the case. Human rights advocates persuaded the High Court to maintain the Filartiga line of cases and to keep the doors of the courthouse resolutely open to victims of tortious human rights abuses whose perpetrators are present on our ***104** soil. The Apartheid decision is not a barrier to that progress.

VII.

Sosa reaffirms a great jurisprudential tradition under which the law of nations is part of our law and not just a revocable political commitment to cooperate with the world's other sovereign powers. It is in the mainstream of historic American thought, reflecting the significance accorded by the Founders to the participation of the new Republic as a coequal member of the community of nations. It represents the repudiation of the radical, isolationist position advocated by this Administration and articulated in the dissent by Justice Scalia.

Justice Souter noted that, in light of the line of cases from The Nereide through The Paquete Habana, unquestioned until most recently, "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." [FN60] And therein lies the victory for the architects, engineers, and developers of ATS jurisprudence: human rights law is, after all, applicable to disputes of which the courts of this country may be seized, and it does speak to the legally-enforceable rights of individuals. Human rights law, in short, is law, and its violation may subject perpetrators to sanctions imposed with all of the authority of the U.S. judiciary.

This is the first time in its history that the Supreme Court has endorsed the normative content of international human rights law. If that is not a victory for the advocates and defenders of that law, as well as for those who rely on its assurances as shields against the spears of abusers, then I am

afraid I must not know victory when I see it.

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[FN1]. Presidential Proclamation, 30 Stat. 1769 (Apr. 22, 1898).

[FN2]. Id.

[FN3]. The Paquete Habana, 175 U.S. 677, 700 (1900).

[FN4]. 28 U.S.C. § 1350 (2003).

[FN5]. 630 F.2d 876, 890 (2d Cir. 1980).

[FN6]. 124 S. Ct. 2739, 2755-65 (2004).

[FN7]. 175 U.S. 677, 700 (1900).

[FN8]. The Declaration of Independence para. 1 (U.S. 1776).

[FN9]. Sosa, 124 S. Ct. at 2746-48.

[FN10]. 28 U.S.C. § 1350.

[FN11]. Id.

[FN12]. Id.

[FN13]. United States v. Alvarez-Machain, 504 U.S. 655, 668-69 (1992).

[FN14]. Id. at 667.

[FN15]. For the present author's critique of the Supreme Court's first Alvarez decision, see Steven M. Schneebaum, The Supreme Court Sanctions Transborder Kidnapping in United States v. Alvarez-Machain: Does International Law Still Matter? 18 Brook. J. Int'l L. 303, 303-311 (1992).

[FN16]. Alvarez, 504 U.S. at 679 (Stevens, J., dissenting). Justice Stevens borrowed the term from Justice Story's historic decision in The Apollon, 22 U.S. 362, 370-71 (1824).

[FN17]. See id. at 670-88 (Stevens, J., dissenting). In his dissent, Justice Stevens went on to tax his Brethren with "disregarding the Rule of Law that this Court has a duty to uphold." Id. at 686.

[FN18]. 28 U.S.C. § 2680(k) (2004).

[FN19]. Justice Ginsburg wrote separately, for herself and Justice Breyer, concurring in the judgment but suggesting that she was not ready to discard the headquarters doctrine wholesale. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2776-82 (2004) (Ginsburg, J., concurring).

[FN20]. Id. at 2754.

[FN21]. 28 U.S.C. § 1350.

[FN22]. Id.

[FN23]. Sosa, 124 S. Ct. at 2761.

[FN24]. 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring).

[FN25]. Sosa, 124 S. Ct. at 2744.

[FN26]. Id. at 2764.

[FN27]. Id. at 2765.

[FN28]. 13 U.S. 388, 423 (1815) ("[T]he court is bound by the law of nations, which is a part of the law of the land.").

[FN29]. 175 U.S. 677, 700 (1900).

[FN30]. 376 U.S. 398, 423 (1964) ("United States courts apply international law as a part of our own in appropriate circumstances.").

[FN31]. Sosa, 124 S. Ct. at 2766.

[FN32]. Id. (citing In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

[FN33]. Id. at 2768.

[FN34]. Sosa, 124 S. Ct. at 2762-63.

[FN35]. International Convention on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[FN36]. 5 U.S. 137 (1803).

[FN37]. Id. at 177.

[FN38]. Id.

[FN39]. 369 U.S. 186 (1962).

[FN40]. Gary C. Hufbauer & Nicholas K. Mitrokostas, Awakening Monster: The Alien Tort Statue of 1789 vii (Institute for International Economics, 2003).

[FN41]. See Sosa v. Alvarez-Machain oral arguments before the U.S. Supreme Court, available at http://www.oyez.org/oyez/resource/case/1713/resources.

[FN42]. Hufbauer & Mitrokostas, supra note 40, at vii.

[FN43]. Id. Both of the authors appear to be lawyers.

[FN44]. Id.

[FN45]. It is interesting to note that one of the elements of their preferred legislative "fix" to the ATS "problem" is a provision giving Federal judges exclusive jurisdiction over not only human rights cases, but over "all tort suits brought by aliens for wrongs that occurred abroad." Id. at 56. Of course, the ATS does not confer jurisdiction over foreign torts upon State courts, and there is absolutely no historical record of inconsistent State decisions in ATS or any human rights cases. So what the authors of the monograph seek to do is to deprive State courts of general jurisdiction of the power to hear transitory tort cases, which they have possessed for the entire history of our country, lest (Heaven forbid!) a State court judge someday actually base a decision on international law.

[FN46]. It could be, however, that those who would expel international law from American jurisprudence have simply shifted their focus from the ATS to other attentions. The pending bill to prohibit the citation of foreign law by U.S. courts--an idea that takes second place to no other for parochialism--now has cosponsors.

[FN47]. Edward Allen and Doug Cameron, Unocal pays out in Burma abuse case, Fin. Times, Dec. 14, 2004, available at http://news.ft.com/cms/s/22eae4e6-4d77-11d9-b3be-00000e2511c8,ft_acl =,s01=2.html.

[FN48]. Filartiga v. Pena-Irala, 577 F. Supp. 860, 863 (D.C.N.Y. 1984).

[FN49]. 238 F. Supp. 2d 1379 (S.D.N.Y. 2002).

[FN50]. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004).

[FN51]. Id.

[FN52]. See generally In re S. African Apartheid Litig. v. Citigroup, Inc., 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

[FN53]. 28 U.S.C. § 1350.

[FN54]. In re S. African Apartheid Litig., 346 F. Supp. 2d at 547 (citing Sosa, 124 S. Ct. at 2761-62).

[FN55]. Id.

[FN56]. Id.

[FN57]. Id. at 548.

[FN58]. Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16.

[FN59]. Had Judge Joyce Hens Green taken this straightforward and analytically sound approach when the Tel-Oren case was before her, human rights advocates might have been spared Judge Bork's concurring opinion in the D.C. Circuit, which may well have been responsible for all of the

misunderstandings concerning the need to find an ATS "cause of action" somewhere other than the law of tort. See Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, aff'd, 726 F.2d 774 (D.C. Cir. 1984). I argued for this position in print over two decades ago. Steven M. Schneebaum, The Enforceability of Customary Norms of Public International Law, 8 Brook. J. Int'l Law 289 (1982).

[FN60]. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764-65 (2004).

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