Hastings International and Comparative Law Review

Volume 28
Number 1 *Fall 2004*

Article 4

1-1-2004

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The Alien Tort Statue (ATS) was part of the Judiciary Act passed by the First Congress in 1789.[1] In its current form, the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] In *Filartiga v. Peña-Irala*, the Second Circuit held that the ATS conferred subject matter jurisdiction over an alien's claim of torture under color of state authority.[3] Over the next 24 years, the federal courts became an important forum for redressing violations of fundamental human rights as *Filartiga*'s ruling was adopted by other courts and extended to other violations.[4]

The growth of alien tort litigation did not go unchallenged, however. In his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, Judge Bork argued that for ATS plaintiffs to bring their claims in federal court they needed not just a grant of jurisdiction but an express cause of action.[5] Judge Bork's position would have eliminated the ATS as a mechanism for enforcing human rights because Congress had not created any statutory causes of action for ATS suits.[6]

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1. An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789).

2. 28 U.S.C. § 1350.

3. 630 F.2d 876, 878 (2d Cir. 1980).

4. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) (torture); Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (genocide and war crimes); Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (torture); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (summary execution and cruel, inhuman or degrading treatment); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988) (causing disappearance).

5. 726 F.2d 774, 801-08 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). Other courts rejected this argument, holding that the ATS both conferred jurisdiction and granted a cause of action. *See, e.g.*, *Abebe-Jira*, 72 F.3d at 847-48; *Kadic*, 70 F.3d at 236; *Hilao*, 25 F.3d at 1475.

6. In response to *Tel-Oren*, Congress passed the Torture Victim Protection Act, Pub. L. No. 256, 106 Stat. 73 (1992), which creates an express cause of action, but only for torture and extrajudicial killing.

Despite lower court pleas for clarification,[7] the Justices did not take a case involving the interpretation of the ATS until *Sosa v. Alvarez-Machain*.[8] At the behest of the U.S. Drug Enforcement Administration (DEA), a group of Mexicans including Sosa abducted Alvarez, a Mexican doctor, and brought him to the United States to be tried for alleged involvement in the torture and murder of a DEA agent. Alvarez moved to dismiss the indictment because of the government's conduct, but the Supreme Court held that his abduction did not affect the jurisdiction of the district court.[9] At trial, however, the district court granted Alvarez's motion for a judgment of acquittal after the close of the government's case. Alvarez then sued the United States under the Federal Tort Claims Act and his Mexican abductors under the ATS. The district court awarded $25,000 in damages against Sosa, which the Ninth Circuit affirmed, holding that Alvarez's arrest violated the customary international law norm against arbitrary arrest and detention.[10]

Before the Supreme Court, Sosa (supported by the United States as *amicus curiae*) raised a variation of Judge Bork's argument in *Tel-Oren*—that the ATS is purely jurisdictional and that no suits may be brought under this provision unless Congress enacts further legislation granting an express cause of action. A group of professors of federal jurisdiction and legal history filed an amicus brief challenging this argument on historical grounds. The brief argued that the First Congress intended to provide a federal forum for alien tort suits, understood such suits to be cognizable at common law without the need for further congressional action, and meant for the district courts to have jurisdiction over all torts in violation of the law of nations, not just those that occurred within the territory of the United States or those that were recognized in 1789.

Writing for the Court, Justice Souter found that "history and practice give the edge to" the position advanced by the professors of federal jurisdiction and legal history.[11] In a part of the opinion joined by all nine Justices, he held that while the ATS itself is purely jurisdictional, the statute "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of

7. *See, e.g.*, *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring).

8. 124 S. Ct. 2739 (2004). In Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), the Court held that the ATS was not an exception to the Foreign Sovereign Immunities Act (FSIA), but the decision involved the interpretation of the FSIA not the ATS.

9. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

10. Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (en banc).

11. *Sosa*, 124 S. Ct. at 2755.

international law violations with a potential for personal liability."[12] Justice Souter went on to hold that courts exercising jurisdiction under the ATS could recognize new claims "based on the present-day law of nations" so long as they rested on "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[13] It therefore appears that the history of the ATS discussed in the amicus brief and the sources cited therein will continue to be relevant to its future interpretation, which is why the *Hastings International and Comparative Law Review* has chosen to publish this brief.[14]

The amici joining the brief were Vikram Amar, William R. Casto, Sarah H. Cleveland, Drew S. Days, III, William S. Dodge, David M. Golove, Robert W. Gordon, Stewart Jay, John V. Orth, Judith Resnik, and Anne-Marie Slaughter. The brief was written by William S. Dodge, with substantial input from several of the amici. Nicholas W. van Aelstyn, Heller Ehrman White & McAuliffe LLP, San Francisco served as counsel of record.

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12. *Id.* at 2761.

13. *Id.* at 2761-62. *See also id.* at 2765 ("[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."). Those paradigms are violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 2761.

With respect to Alvarez's claims, the Court held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 2769.

14. The *Hastings International and Comparative Law Review* has twice before published briefs relating to the ATS. *See Alien Tort Claims Act and Torture Victim Protection Act: Brief of* Amici Curiae *in the United States Supreme Court in* Karadžić v. Kadic, 20 HASTINGS INT'L & COMP. L. REV. 683 (1997); David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in* Trajano v. Marcos, 12 HASTINGS INT'L & COMP. L. REV. 1 (1988).

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