

SOSA v. ALVAREZ-MACHAIN

UNITED STATES SUPREME COURT
542 U.S. 692, 124 SCt 2739, 159 L.Ed.2d 718 (2004)

Author's Note: In 1992, the US Supreme Court determined that the US could prosecute Alvarez-Machain [textbook §5.3]. He had been kidnaped from Mexico, by a Sosa and others, to stand trial in the US. Alvarez-Machain was acquitted.

The US Supreme Court revisited this famous scenario, after Alvarez-Machain brought a civil suit against the Sosa and the US, based on his prior kidnaping. The US was dismissed from this case, because the statute under which it was sued did not apply.

You obtained peripheral exposure to this statute in the §1.2 *Flores* case, on whether the sources of International Law authorized a suit by Peruvian plaintiffs against a US corporation. The settlement in the §11.4 *Unocal* case precluded that case from going to trial, on the question of whether a US corporation could be sued under the ATS for its oil pipeline activities in Myanmar. This was the US Supreme Court's first analysis of the Alien Tort Statute (ATS).

The ATS has been interpreted to authorize a suit in the US, between two aliens, for conduct occurring outside of the US. The essential question for the court in this instance was whether the ATS was: (a) merely a "jurisdictional" statute, the application of which required subsequent enabling legislation; (b) a "substantive" grant of power, independently authorizing US courts to hear and determine cases arising under the ATS; or (c) a hybrid of both.

Court's Opinion:

Justice SOUTER delivered the opinion of the Court.

The two issues are whether respondent Alvarez-Machain's allegation that the Drug Enforcement Administration instigated his abduction from Mexico for criminal trial in the United States supports a claim against the Government under the Federal Tort Claims Act (FTCA or Act), and whether he may recover under the Alien Tort Statute (ATS). . . .

I

We have considered the underlying facts before, *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). In 1985, an agent of the Drug Enforcement Administration (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture. . . . The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted

Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.

. . . The [criminal] case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal.

In 1993, . . . Alvarez began the civil action before us here. He sued Sosa, [a] Mexican citizen and DEA operative Antonio Garate-Bustamante, five unnamed Mexican civilians, the United States, and four DEA agents. So far as it matters here, Alvarez sought damages from the United States under the FTCA, alleging false arrest, and from Sosa under the ATS, for a violation of the law of nations. The former statute authorizes suit [against the US] "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." The latter provides in its entirety that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [28 United States Code] § 1350.

The District Court granted the Government's motion to dismiss the FTCA claim, but awarded summary judgment and \$25,000 in damages to Alvarez on the ATS claim. A three-judge panel of the Ninth Circuit then affirmed the [trial court's] ATS judgment. . . .

A divided en banc court [eleven-judge panel held] . . . "that [the ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations" . . . [because of] the "clear and universally recognized norm prohibiting arbitrary arrest and detention," to support the conclusion that Alvarez's arrest amounted to a tort in violation of international law. . . .

We granted certiorari in these companion cases to clarify the scope of . . . the ATS. We now reverse. . . .

II

[Here, the plaintiff hoped to draw the US back into this case, after its dismissal by the trial court. Alvarez-Machain was unsuccessful, because the statute under which the US was sued did not apply outside of the country.]

. . .

III

Alvarez has also brought an action under the ATS against petitioner, Sosa, who argues (as does the United States supporting him) that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law . . . claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.

A

Judge Friendly called the ATS a "legal Lohengrin," "no one seems to know whence it came," and for over 170 years after its enactment it provided jurisdiction in only one case [before Friendly's 1980 case opinion]. The first Congress passed it as part of the Judiciary Act of 1789. . . .¹⁰

The parties and *amici* here advance radically different historical interpretations of this terse provision. Alvarez says that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of [all of] international law. We think that reading is implausible. . . . The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature . . . It is unsurprising, then, that an authority on the historical origins of the ATS has written that "section 1350 clearly does not create a statutory cause of action," and that the contrary suggestion is "simply frivolous." In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. *Sosa* would have [us determine that] . . . the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. We think history and practice give the edge to this latter position.

[A]1

"When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other . . . or "that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other"

The law of nations included a second, more pedestrian element, however, that [unlike the first application] did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated "in mercantile questions, such as bills of exchange and the like; in all marine causes . . . [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. And it was the law of nations in this sense that our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from "ancient usage among civilized

¹⁰ The statute has been slightly modified on a number of occasions since its original enactment. It now reads in its entirety: "The 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." 28 U.S.C. § 1350.

nations, beginning centuries ago, and gradually ripening into a rule of international law. . . ." *The Paquete Habana* [textbook §1.2].

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. It was 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 minds of the men who drafted the ATS with its reference to tort.

[A]2

Before there was any ATS, a distinctly American preoccupation with these hybrid international norms had taken shape owing to the distribution of political power from independence through the period of confederation. The Continental Congress . . . recommended that the States "authorise suits . . . for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." ("Whoever offends . . . a public minister . . . should be punished . . . , and . . . the state should, at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister"). . . .

Appreciation of the Continental Congress's incapacity to deal with this class of cases [in the absence of federal law prior to the initial 1789 Judiciary Act] was intensified by the so-called Marbois incident of May 1784, in which a French adventurer, Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia. Congress called again for state legislation addressing such matters, and concern over the inadequate vindication of the law of nations persisted through the time of the constitutional convention. During the Convention itself, in fact, a New York City constable produced a reprise of the Marbois affair and Secretary Jay reported to Congress on the Dutch Ambassador's protest, with the explanation that "the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."¹¹

The Congress could only pass resolutions, one approving the state-court proceedings, [and] another directing the Secretary of Foreign Affairs to apologize and to "explain to Mr. De Marbois the difficulties that may arise . . . from the nature of a federal union," and to explain to the representative of Louis XVI that "many allowances are to be made for" the young Nation.

The Framers responded [in 1789] by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls" .

¹¹ The French minister plenipotentiary lodged a formal protest with the Continental Congress, and threatened to leave Pennsylvania "unless the decision on Longchamps Case should give them full satisfaction." Longchamps was prosecuted for a criminal violation of the law of nations in state court.

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. . . and the First Congress followed through . . . [by enacting the] Judiciary Act [which] reinforced this Court's original jurisdiction over suits brought by diplomats, . . . and, of course, included the ATS, § 9.

[A]3

. . . There is no record of congressional discussion about private actions [such as this one against defendant Sosa] that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] there is no record even of debate on the section. . . . But despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.

Still, the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect. . . . It would have been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action [by passing more specific enabling legislation]. There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors; violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated. But the common law appears to have understood only those three of the hybrid variety as definite and actionable. . . . As Blackstone had put it, "offences against this law [of nations] are principally incident to whole states or nations," and not individuals seeking relief in court.

[A]4

. . .
Then there was the 1795 opinion of Attorney General William Bradford, who was asked whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone. Bradford was uncertain, but he made it clear that a federal court was open for the prosecution of a tort action growing out of the episode:

But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

. . .

B

...

In sum, although the ATS is a jurisdictional statute creating no *new* causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law [italics added]. The jurisdictional grant 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 international law violations with a potential for personal liability at the time.

IV

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by [any] another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm 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. This requirement is fatal to Alvarez's claim. . . .

A

A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms.

...

Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. . . .

Fourth, . . . [there is good] reason for a high bar to new private causes of action for violating international law. . . . Yet modern international law is . . . apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the

field have not affirmatively encouraged greater judicial creativity. It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat. 73, providing authority that "establish[es] an unambiguous and modern basis for" federal claims of torture and extrajudicial killing. But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing [see textbook §8.3 regarding this US reservation].

B

. . . All Members of the Court agree that § 1350 is only jurisdictional. We also agree, or at least Justice SCALIA[‘s concurring opinion] does not dispute, that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority. . . .

Whereas Justice SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. . . . For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, *e.g.*, *Sabbatino*, 376 U.S., at 423, 84 S.Ct. 923 ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana* ("International law 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"); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (recognizing that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

. . .

C

We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and for this case it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical

paradigms familiar when § 1350 was enacted. . . . And the determination whether a norm is sufficiently definite to support a cause of action²⁰ 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.

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . . *The Paquete Habana*, 175 U.S., at 700, 20 S.Ct. 290.

To begin with, Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration), G.A. Res. 217A (III), U.N. Doc. A/810 (1948). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1996, 999 U.N.T.S. 171,²² to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. See Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in *The International Protection of Human Rights* (quoting Eleanor Roosevelt calling the Declaration " 'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations' " and " 'not a treaty or international agreement . . . impos[ing various] legal obligations' "). And . . . the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.

. . .

Alvarez . . . cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a [§1350 ATS] federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took

²⁰ A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (C.A.2 1995) [textbook §1.4 case] (sufficient consensus in 1995 that genocide by private actors violates international law).

²² Article nine provides that "[n]o one shall be subjected to arbitrary arrest or detention," that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law," and that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." 999 U.N.T. S., at 175-176.

place, and would create a cause of action for any seizure of an alien . . . and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. . . .

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.³⁰ It is enough to hold 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.

The judgment of the Court of Appeals is

Reversed.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring in part and concurring in the judgment.

There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. Accordingly, . . . I cannot join it because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.

. . .
In Benthamite terms, creating a federal command (federal common law) out of "international norms," and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.

. . .
We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again.

. . . But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.

³⁰ Alvarez also cites a finding by a United Nations working group that his detention was arbitrary under the Declaration, the Covenant, and customary international law. See Report of the United Nations Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1994/27, pp. 139-140 (Dec. 17, 1993). That finding is not addressed, however, to our demanding standard of definition, which must be met to raise even the possibility of a private cause of action. If Alvarez wishes to seek compensation on the basis of the working group's finding, he must address his request to Congress.

American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced.

Notes and Questions

1. Every court, whether domestic or international, must have the jurisdiction to hear the case brought to it by the plaintiff. The US Supreme Court had to have the power to hear the case filed by Alvarez-Machain, even if the court ruled against him—as it did in this case. What was the specific basis for Alvarez-Machain claiming that he was entitled to a remedy after his arrest and acquittal?

2. There were two basic ways in which the court could characterize the Alien Tort Statute. What were they? Did the court unreservedly characterize the statute one way or the other? See Justice Scalia's opinion, in which he criticizes the majority for not making the path clear.

3. You studied the notion of a “private cause of action” at several points before this chapter; *e.g.*, the §7.2 *Medellin* case (whether a foreign arrestee has a private claim arising under the Vienna Convention on Consular Relations). What does this term mean, and why is it so important in this case? Note that the court distinguishes the Alien Tort Statute and the Torture Victims Protection Act on this point. Why?

4. What was the difference between a “jurisdictional” and a “substantive” statute seized upon by the parties and the respective judicial opinions in *Sosa*? What did the Supreme Court actually decide?

5. In the *Filartega* case referred to by the Supreme Court, one of the most respected judges in modern times virtually gave birth to the two decades of case law that Justice Scalia complains about. Since then, a number of lower federal courts had assumed that the ATS was a substantive statute, broadly authorizing suits in the US for torture by any public official, for torture occurring anywhere in the world, even when no US citizen was involved (where a Paraguayan policeman tortured a Paraguayan citizen in Paraguay—and was living in the US when served with process).

6. The court refers to a “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 minds of the men who drafted the ATS with its reference to tort.” What violations did the court have in mind?

7. Note that the majority of the court suggests that judicial branch might ultimately *expand* claims fall within ATS, as the nation and its jurisprudence grew. This articulation spawned Scalia's criticism, that he would not add to the court's opinion, but he would subtract: “its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms” and would hope to preclude “unelected federal judges [who] have been usurping this lawmaking power by converting what they regard as norms of international law into American law.”

8. Having studied the *Unocal* case in §11.4, would the Supreme Court's opinion in *Sosa* make corporations more concerned about their potential liability under the ATS, for human rights violations in other countries?

9. Further research might begin with some of the authorities cited by the court in this opinion: W. Casto, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (Columbia, SC: Univ. So, Carol Press, 1995); K. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985) (discussing foreign affairs implications of the Judiciary Act); and O. Sweeney, *A Tort only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L.REV. 445 (1995) (arguing that "tort" refers to the law of prize). See also J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, XVI FLA. J. INT'L L. 249 (2004) (delving into the rich history the court did not include, regarding whether the ATS created a substantive claim).