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SOSA V. ALVAREZ-MACHAIN, 124 S. CT. 2739 (2004)

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FACTS

In 1990, a federal grand jury indicted Humberto Alvarez-Machain for prolonging the life of a Drug Enforcement Agency (DEA) agent in Mexico, in order to further torture and interrogate him.[1] The DEA attempted to work with the Mexican government to bring Alvarez to the United States to stand trial.[2] However, when this proved unsuccessful, the agency approved a plan to hire Mexican nationals to seize and transport Alvarez across the Mexican border.[3] A group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and then brought him by private plane to Texas.[4] Once he was on American soil, federal officers arrested him.[5]

Alvarez moved to dismiss the indictment, claiming that his seizure was "outrageous governmental conduct" and that it violated the extratradition treaty between the United States and Mexico.[6] The United States District Court for the Central District of California agreed, and the Ninth Circuit Court of Appeals affirmed.[7] The Supreme Court, however, reversed, holding that Alvarez's "forcible seizure did not affect the jurisdiction of a federal court."[8] In 1992, the case was tried again, and after the federal government presented its case, the District Court granted Alvarez's motion for judgment of acquittal.[9]

A year later, Alvarez, who had since returned to Mexico, brought suit against Sosa; Antonia Grate-Bustamante, a Mexican citizen and DEA operative; five unnamed Mexican civilians; the United States; and four DEA agents.[10] Alvarez sued the United States government under the Federal Tort Claims Act (FTCA)[11], seeking damages for false arrest.[12] Additionally, he brought a claim under the Alien Tort Statute (ATS)[13] against Sosa for a violation of the law of nations.[14]

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1 Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* at 2747.
11 Federal Tort Claims Act, 28 U.S.C. § 1346 (2000).
12 *Sosa*, 124 S.Ct. at 2747.
13 Alien Tort Statute, 28 U.S.C. § 1350 (2000).
14 *Sosa*, 124 S. Ct. at 2747.

The Central District of California Court dismissed the FTCA claim but found for Alvarez on the ATS claim, awarding him summary judgment and $25,000 in damages.[15] The Ninth Circuit, first as a three-judge panel and then sitting en banc, affirmed the ATS judgment, but reversed the dismissal of the FTCA claim.[16] The Supreme Court granted certiorari in order to clarify the scope of both the FTCA and the ATS.[17]

HOLDING

Writing for the Court, Justice Souter held that under the foreign country exception[18] to the FTCA waiver of governmental immunity, the United States was not liable for an alien's arrest and transport to the United States by a foreign national.[19] The Supreme Court also determined that the foreign country exception bars all claims against the government based on any injury suffered in a foreign country.[20]

ANALYSIS

In its analysis of the FTCA, the Court examined several relevant provisions relating to the Act.[21] The FTCA grants federal district courts exclusive jurisdiction of civil actions or claims against the United States for money damages; injury or loss of property; or personal injury or death if any employee of the government causes a tort while acting within the scope of his office or employment. [22] According to the FTCA, the United States can be held liable for such acts if under the same circumstances, a private person would be liable to the claimant.[23] There are exceptions, however, to this rule.[24] Particularly applicable in this case is the "foreign country exception," which exempts the United States from liability for torts committed on foreign soil.[25] However, some Courts of Appeals have applied the concept of the

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15 *Id.*

16 *Id.*

17 *Id.*

18 Exceptions, 28 U.S.C. § 2680(k) (2000) (enumerating exceptions to 28 U.S.C. § 1346(b) of the Federal Tort Claims Act, specifically listing an exception to any tort committed on foreign soil).

19 *Sosa*, 124 S. Ct. at 2746.

20 *Id.*

21 *Id* at 2747.

22 28 U.S.C. § 1346(b)(1).

23 *Id.*

24 Exceptions, 28 U.S.C. § 2680 (2000).

25 *Id.* (citing 28 U.S.C. § 2680(k) (excepting application of § 1346(b) for any claim arising in a foreign country)).

"headquarters doctrine,"[26] which effectively counteracts the foreign country exception.[27] The headquarters doctrine provides that if acts or omissions occur in the United States that result in a tort being committed on foreign soil, the United States is not exempt from liability.[28]

The Court began by analyzing Alvarez's claim under the FTCA and the Ninth Circuit's application of the statute.[29] The Ninth Circuit had awarded Alvarez judgment, finding that the foreign country exception did not apply because it was only tortuous to the extent that it occurred in Mexico.[30] The Ninth Circuit employed the use of the headquarters doctrine to override the statutory provision that exempts the United States from liability for torts committed on foreign soil.[31] The Ninth Circuit reasoned that the United States could be held liable under the FTCA because although the abduction occurred in Mexico, it was planned and initiated in the United States by DEA agents.[32] The government sought reversal, arguing that the foreign country exception should in fact apply in this case.[33]

The Supreme Court disagreed with the Ninth Circuit's use of the headquarters doctrine for three main reasons.[34] First, the practical implications are far-reaching.[35] The Court posited that every tortious claim arising in a foreign country could be traced back to some negligent activity in the United States.[36] According to the Court, the exception has the potential to swallow the rule.[37] If the Court approved the exception, it could become a standard part of FTCA litigation falling under the foreign country exception.[38]

Second, the Court examined the chain of proximate causation leading up to the tortious act.[39] There must be a "plausible proximate nexus" between the acts occurring in the United States and the resulting harm in the foreign country.[40] However, the mere existence of a chain of causation does

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[26] *Sosa*, 124 S.Ct. at 2748 (citing Sami v. United States, 617 F.2d 755, 761 (D.C. Cir. 1979) (refusing to apply § 2608(k) where a communiqué sent from the United States by a federal law enforcement officer resulted in plaintiff's wrongful detention in Germany)).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* (citing 28 U.S.C. § 2680(k) (stating exceptions to the Federal Tort Claims Act include any claim arising in a foreign country)).

[32] *Id.* at 2748-49.

[33] *Id.* at 2749.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing Beattie v. United States, 756 F.2d 91, 119 (D.C. Cir. 1984)).

[39] *Id.*

[40] *Id.* (citing Eaglin v. United States, Dept. of Army, 794 F.2d 981, 983 (5th Cir. 1986)).

not necessarily mean the foreign country exception cannot be applied.[41] Here, the Court concluded that although the DEA agents in California could be viewed as part of the chain of causation, there were other causes as well.[42] Ultimately, the claim arose from harm proximately caused in Mexico.[43] The Court determined that the events in the United States were too attenuated to be the direct cause of the harm.[44]

Third, the Court determined that in drafting the foreign country exception, Congress intended for the language "arising in" a foreign country to bar application of the headquarters doctrine.[45] When the FTCA was enacted, the term "arising in" was in common usage.[46] The term generally referred to state borrowing statutes, which directed the courts to the applicable law for causes of action arising with transjurisdictional facts.[47] In 1962, there was a shift in thinking, and many courts held that a cause of action for tort arises in the jurisdiction "where the last act necessary to establish liability occurred," or "the jurisdiction in which the injury was received."[48] Furthermore, *lex loci delicti* (the law of the place where the tort was committed)[49] was the dominant conflict of laws principle applied in tort cases at the time the FTCA was passed.[50] Examining the legislative history surrounding the drafting of the FTCA, the Court determined that Congress wanted to prevent United States courts from applying this principle in cases involving foreign matters.[51]

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41 *Id.* at 2750.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* The Court explained that at the time the FTCA was passed, the general rule regarding borrowing statutes was that "a cause of action arising in another jurisdiction, which was barred by the laws of that jurisdiction, will [also] be barred in the domestic courts." *Id.* (citing 41 A.L.R. 4TH 1025, 1029, § 2 (1985), *available at* 1985 WL 287457). In general, if a cause of action in another jurisdiction was barred by the laws of that jurisdiction, it would be barred in the domestic courts. *Id.* Additionally, application of the statutes was generally restricted to situations in the State "*where [the] cause of action arose, or accrued, or originated.*" *Id.* (citing 75 A.L.R. 203, 211 (1931)) (emphasis in original).

48 *Id.* (citing Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L.REV. 33, 47). Although all courts do not uniformly agree on this principle, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1969) encourages the general shift towards using flexible balancing analysis to inform choice of law, where there is a default rule for tort cases rooted in the traditional approach. *Id.* at 2753. Under this Restatement, tort liability is determined "by the local law of the state which . . . has the most significant relationship to the occurrence and the parties," taking into account the place of the injury, where the conduct causing the injury occurred, and other factors, including the domicile, residence, and nationality of the parties *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969).

49 BLACK'S LAW DICTIONARY 923 (7th ed. 1999).

50 *Sosa*, 124 S. Ct. at 2750.

51 *Id.* at 2752.

There were additional reasons for rejecting the headquarters doctrine.[52] The Court postulated that its application in these circumstances would render the foreign country exception meaningless and would be contrary to the drafters' intentions.[53] Additionally, the current judicial system favors a greater flexibility in choice-of-law methodology, rejecting the traditional form of choice-of-law analysis.[54] Finally, there would be a great degree of variance in the application of the headquarters doctrine by the several states.[55] Thus, the Court reasoned that it was unlikely Congress intended such a possibility.[56] Combining these considerations with its other determinations, the Court found that the headquarters doctrine did not apply and that the foreign country exception to the FTCA was applicable in this case.[57]

The Court next considered Alvarez's claim against Sosa under the Alien Tort Statute, in which he argued that the ATS was intended both as a jurisdictional grant and as authority for the creation of a new cause of action for torts in violation of international law.[58] Sosa, supported by the United States, argued that the ATS vests only federal courts with jurisdiction.[59]

The Court found Alvarez's interpretation of the statute "implausible."[60] According to the Court, the ATS, as enacted in 1789, did not give the district courts the power to make substantive law but merely granted district courts original jurisdiction over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States.[61] The Court examined the placement of the ATS in § 9 of the Judiciary Act,[62]

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52 *Id.*

53 *Id.*

54 *Id.* at 2752-53 (citing Gary J. Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren*, 36 CORNELL INT'L L.J. 125, 125 (2003), claiming that the traditional approach to choice of substantive tort law has lost favor and stating "[t]he traditional methodology of place of wrong . . . has receded in importance, and new approaches and concepts such as governmental interest analysis, most significant relationship, and better rule of law have taken center stage").

55 *Id.* at 2754.

56 *Id.*

57 *Id.*

58 *Id.* at 2754-55. The framers of the Constitution drafted the ATS in response to the Continental Congress's inability to punish violations of the law of nations, vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls" and reinforcing the Court's original jurisdiction in such cases with the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79. *Id.* at 2756-57(citing U.S. Const., Art. III, § 2, 1 Stat. 80, ch. 20, § 13, § 11, § 9. *See generally* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U.J. INT'L L. & POL. 1, 15-21 (1985); W. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 27-53 (1995)).

59 *Id.* at 2754.

60 *Id.* at 2755.

61 *Id.* (citing 28 U.S.C. § 1350 (1948)).

62 Judiciary Act of 1789, ch. 20, 1 Stat. 79, §9(b) (1789).

as well as the text itself, and concluded that the drafters would have included a statutory cause of action if they had so desired.[63]

In determining the current state of the ATS, the Court considered two theories.[64] The first, proffered by Sosa, was that the ATS was ineffective because no statute expressly empowered courts to authorize a cause of action for a claim of relief.[65] Another theory, advanced by *Amici* professors of federal jurisdiction and legal history, maintained that once a jurisdictional grant was on the books, federal courts could hear the claim, because torts in violation of the law of nations would have been recognized within the common law of the time.[66] The Court favored this second interpretation, finding that "the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject."[67]

Although the Court conceded that the exact intent behind the framing of the ATS was unclear, certain propositions did provide historical support for its position.[68] First, the Court reasoned that Congress would not draft the ATS as having no immediate practical use.[69] Second, by looking to legislative history, the Court inferred that Congress intended the ATS to provide jurisdiction to only a small set of actions alleging violations of the law of nations, including offenses against ambassadors, violations of safe conduct, and individual actions arising out of piracy.[70] The Court found that these propositions were further reinforced by case law.[71]

The Court then addressed Sosa's objections regarding the application of the ATS.[72] Citing legislative history, Sosa argued that the ATS was not meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.[73] First, Sosa pointed to the Continental Congress's 1781 recommendation to state legislatures to pass laws authorizing such

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

64 *Id.*

65 *Id.*

66 *Id.* (citing Brief for Vikram Amar et al. as *Amici Curiae*).

67 *Id.*

68 *Id.* at 2758.

69 *Id.*

70 *Id.* at 2759.

71 *Id.* The Court considered the 1795 opinion of Attorney General William Bradford, which stated his view that in a situation regarding Americans committing tortious acts abroad, he was uncertain about the availability of criminal prosecution, but a federal court was open for the prosecution of a tort action. *Id. See also* Bolchos v. Darrel, 3 F. Cas. 810 (No. 1,607) (D.S.C. 1795) (assuming the ATS was a jurisdictional basis for the court's action regarding admiralty jurisdiction); Moxon v. The Fanny, 17 F. Cas. 942 (No. 9,895) (D. Pa. 1793) (finding a claim for both tort and property was not proper under the ATS).

72 *Sosa*, 124 S. Ct. at 2759.

73 *Id.*

suits.[74] The Court, however, disagreed, finding that the relationship between positive law and common law in the 18th century was complementary, as the common law was frequently reinforced by positive law.[75] Second, Sosa argued that there was no familiar set of legal actions for the exercise of jurisdiction under the ATS.[76] The Court rejected this objection as well.[77] Looking again to legislative history, the Court concluded that "Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation."[78]

The Court found that although the ATS does not create any new causes of action, it was meant to have practical effect when it became a law.[79] This effect was achieved through the common law, which provided a cause of action for the small number of international law violations that were potentially tortious.[80]

This finding, however, was conditioned by the Court's advocacy of judicial restraint with regard to any future ATS claims.[81] Before hearing individual claims that might implement the jurisdiction granted by § 1350 of the ATS,[82] courts should consider that common law has changed since 1789.[83] In courts today, there is a general understanding that law is legislatively made, not discovered.[84] The Court worried that in hearing such claims under the ATS, there is a potential danger that courts will intrude on international policy, which is not within the purview of the judicial branch.[85] Because the legislature is in a better position to monitor foreign policy and to create a private right of action and there has been a shift in the role federal courts play in making common law,[86] the Court advised the exercise of judicial caution in adapting the law of nations to private rights.[87]

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74 *Id.*

75 *Id.* at 2760.

76 *Id.* (citing Blackstone's treatise mentioning violations of the law of nations as occasions for criminal remedies in comparison to the ATS's mention of "tort").

77 *Id.*

78 *Id.* at 2761. The Court examined a 1781 Resolution of the Continental Congress recommending the States to vindicate rights under the law of nations and provide punishment for the violation of safe passage of ambassadors and other public officials. *Id.* at 2756 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-1137 (G. Hunt ed. 1912)). Additionally, the Court looked again to the 1795 Bradford opinion, *supra* note 71, at 2759).

79 *Id.*

80 *Id.*

81 *Id.* at 2761-62.

82 28 U.S.C. § 1350.

83 *Sosa*, 124 S. Ct. at 2762.

84 *Id.*

85 *Id.*

86 *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938)(establishing the principle that in diversity cases, federal courts must apply the law that would be applied by the courts of the state in which they sit; courts are not free to decide for themselves the right rule of consideration (*Erie*, 304 U.S. at 79).

87 *Sosa*, 124 S. Ct. at 2764.

In assessing Alvarez's claim, the Court determined that limited judicial recognition of claims regarding international laws violations should apply, provided the norm is not sufficiently definite to support a cause of action.[88] In other words, unless the international laws are very clear, United States courts should not make judicial determinations of claims made under the ATS.[89] Additionally, if a claim is heard, the determination should consider the practical effects that may result from making that cause available in the federal courts.[90]

Using these principles, the Court found that Alvarez's detention claim must be framed within the context of current international laws.[91] The Court found that if there is no treaty, controlling executive act or legislative act, or judicial decision, the court must then turn to the "customs and usages of civilized nations."[92] The Court examined Alvarez's first argument that, as defined under the Universal Declaration of Human Rights ("Declaration"),[93] his abduction by Sosa was an "arbitrary arrest."[94] The Court determined that the Declaration does not impose obligations as a matter of international law.[95] The Court also rejected Alvarez's claim against arbitrary arrest under Article Nine of the International Covenant on Civil and Political Rights.[96] Although the court noted that the Covenant does bind the United States as a matter of international law; the United States ratified the document with the understanding that it was not self-executing.[97] Thus, the Covenant could not create obligations enforceable in the federal courts.[98]

The Court unequivocally found that neither the Declaration nor the Covenant can establish the relevant rule of international law, despite Alvarez's claim that the prohibition of arbitrary arrest had attained the status of binding customary international law.[99] Because he cited little authority that such a broad rule is a binding customary norm, the Court accorded

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88 *Id.* at 2765-66.

89 *Id.* at 2766-67.

90 *Id.* at 2767.

91 *Id.*

92 *Id.* *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (finding that the works of jurists and commentators on the subject of international law are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is).

93 GAOR 217A (III), U.N. Doc. A/810 (1948).

94 *Sosa*, 124 S. Ct. at 2767.

95 *Id.* (citing *Humphrey, The UN Charter and the Universal Declaration of Human Rights, in* THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (E. Luard ed.1967)).

96 *Id.* (citing GAOR 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 99 U.N.T.S. 171 (1976)).

97 *Sosa*, 124 S. Ct. at 2767.

98 *Id.*

99 *Id.*

Alvarez's claim little weight.[100] Additionally, the Court postulated that adopting such a rule would affect federal court claims, especially claims pertaining to the Fourth Amendment and claims against state officers.[101]

Finally, the Court looked to the language of the Third Restatement of Foreign Relations Law,[102] which asserts that a state violates international law only if it "practices, encourages, or condones . . . prolonged arbitrary detention."[103] The Court found that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment," does not violate an international law and does not require a remedy in tort.[104]

CONCURRING OPINIONS

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, offered the first of three concurring opinions.[105] Justice Scalia agreed with most of the Court's opinion but found the reservation of power in the federal judiciary to create causes of action to enforce international laws unnecessary.[106] He distinguished his opinion based on the fact that after the Court concluded that the ATS did not create a new cause of action, it addressed the compelling reasons to maintain restraint in considering any new cause of action.[107] According to Justice Scalia, this bypasses the question of authority and "neglects the lesson of *Erie*" that because a court has a grant of jurisdiction does not mean it has law-making authority.[108] He opined that the employment of discretionary authority to enforce the law of nations effectively creates new federal common law.[109] Disagreeing with this principle, as it has already been answered with *Erie*, he posited that the Court's opinion invites the lower courts to create a cause of action that Congress has not.[110] According to him, such an action would encroach upon Congressional power.[111] Justice Scalia maintained that the federal judiciary does not and should not have the power to fill a judicial lawmaking rule.[112]

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100 *Id.* at 2767, 2768.
101 *Id.*
102 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).
103 *Sosa*, 124 S. Ct. at 2768.
104 *Id.*
105 *Id.*
106 *Id.* at 2770.
107 *Id.* at 2772.
108 *Id.*
109 *Id.* at 2773.
110 *Id.* at 2774.
111 *Id.*
112 *Id.* at 2769.

Justice Ginsburg, joined by Justice Breyer, concurred in part and concurred in the judgment.[113] However, Justice Ginsburg stipulated that she would have taken a different route in examining Alvarez's FTCA claim.[114] Although she agreed that the foreign country exception was applicable here, she would have read the § 2680(k) provision of the FTCA as signaling the "place where the act or omission occurred," not the "place of injury."[115] Furthermore, she distinguished the Ninth Circuit's interpretation of the FTCA as entangling questions of law with the potential liability of the United States for torts committed in other countries.[116] She would have construed the foreign country exception "in harmony with the FTCA's sovereign-immunity waiver...which refers to the place where the negligent or intentional act occurred."[117] According to Justice Ginsberg, the "last significant act or omission" rule applied under § 2680(k) would suppress any headquarters doctrine claim.[118] Since Mexico was the site of the last significant act in this case, Mexico would be the place where the tortious act arose and the United States would remain immune from liability.[119]

Justice Breyer also concurred in part and concurred in the judgment.[120] His special concern was "whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."[121] He reasoned that these concerns arise when foreign persons are injured abroad and bring suit in the United States under the ATS, asking the court to recognize that certain conduct violates international norms.[122] Furthermore, although there was procedural consensus among international courts regarding other matters, none exists to support the exercise of jurisdiction in this case.[123] According to Justice Breyer, this lack of consensus further supports the Court's conclusion that the ATS did not recognize Alvarez's claim.[124]

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113 *Id.* at 2776.
114 *Id.*
115 *Id.*
116 *Id.* at 2778.
117 *Id.*
118 *Id.* at 2781.
119 *Id.*
120 *Id.* at 2782.
121 *Id.*
122 *Id.*
123 *Id.* at 2783.
124 *Id.*

CONCLUSION

In evaluating the FTCA claim, the Court declared that the headquarters doctrine does not apply when establishing the potential liability of the United States for torts committed in a foreign country.[125] The Court found that the cause of action for a tort arises in the jurisdiction "in which the injury was received."[126] In rejecting the application of the headquarters doctrine, the Court noted the practical implications surrounding such a determination.[127] According to the Court, if the headquarters doctrine was applied, "every tortious claim arising in a foreign country could be traced back to some negligent activity in the United States."[128] While the Court cites examples of slip-and-fall cases or medical malpractice claims,[129] even more prevalent is the consideration of collateral damage resulting from the current War on Terror. The United States government could be potentially liable for any wrongful death or injury resulting from our actions around the world, especially regarding the civilian casualties in such places as Iraq and Afghanistan. It would not be difficult to prove that the planning stages and initial actions in the chain of proximate cause occurred in the United States. The judicial analysis in this case precludes such claims from arising from our actions in foreign countries.

Unlike the FTCA claim, however, the determination of the ATS claim did leave the door open to further exploration.[130] While the Court definitively concluded that the headquarters doctrine does negate the foreign country exception under the FTCA, it left some room for interpretation in its ATS analysis, specifically with respect to violations in situations where international law is well-settled.[131]

Under this analysis, the detention situation at Guantanamo Bay is of particular concern right now. Currently, over five hundred detainees are being held.[132] None of them has been accorded Prisoner of War (POW) status.[133] In a 2002 article, George H. Aldrich discussed the decision behind refusing POW status to the detainees.[134] According to Aldrich, President Bush determined that the position of the United States was that "the 1949

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[125] *Id.* at 2750.
[126] *Id.*
[127] *Id.* at 2749.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 2764.
[131] *Id.*
[132] Neil A. Lewis, *Scrutiny of Review Tribunals as War Crimes Trials Open*, N.Y. TIMES, Aug. 24, 2004, at A12.
[133] George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 892 (2002).
[134] *Id.*

Geneva Convention on the treatment of prisoners of war, to which both Afghanistan and the United States are parties, applies to the armed conflict in Afghanistan between the Taliban and the United States."[135] However, these provisions do not apply to the armed conflict in Afghanistan and elsewhere between Al Qaeda and the United States.[136] Furthermore, according to President Bush's expressed policies,[137] neither Taliban nor captured Al Qaeda personnel are entitled to POW status, though they are to be treated humanely and in a manner consistent with the general principles of the Convention.[138] However, neither President Bush nor his administration has published any justification or legal defense for these positions.[139]

By refusing to accord the detainees POW status, the United States is acting against several treaties to which it is a party, including the Third Geneva Convention and the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts ("Protocol").[140] The Protocol provides specific protections for persons who have taken part in hostilities.[141] According to Section II, article 45, part 1, "a person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war."[142] Furthermore, if there is any doubt as to whether the person is entitled to POW status, he shall be accorded such status until "such time as his status has been determined by a *competent tribunal*" (emphasis added).[143] This also holds true if a person is not granted POW status but is to be tried for an offense arising out of the hostilities; in such a situation, the Protocol states that "he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated."[144]

Unfortunately, there is doubt regarding the competency of the tribunals the United States government is slowly assembling.[145] According

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[135] *Id.* at 891.

[136] *Id.* at 892.

[137] Aldrich, *supra* note 133, at 891-892. On February 7, 2002, President Bush's Press Secretary announced that the President had decided that the 1949 Geneva Convention on the treatment of POW's would apply to the conflict in Afghanistan between the Taliban and the United States, but not to the conflict in Afghanistan and elsewhere between Al Qaeda and the United States; he also determined that neither captured Taliban personnel nor captured Qaeda personnel are entitled to POW status, though they are to be treated humanely and consistently with the general principles of the convention. *Id.*

[138] Aldrich, *supra* note 133, at 892.

[139] *Id.*

[140] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1978, Convention Relative to the Treatment of Prisoners of War, vol. I (1978) [hereinafter Protocol I].

[141] *Id.* at 143.

[142] *Id.* at 144.

[143] *Id.*

[144] *Id.*

[145] *US: Military Commissions Lack Fair Trial Protections*, Human Rights News, *at* http://hrw.org.english/docs/2004/08/19usdom925.htm (last visited Oct. 14, 2004).

to Human Rights Watch, the military commissions at the Guantanamo Bay trials "lack key fair trial protections," including general standards for admissibility of evidence, access to attorneys, and right of appeal to a civilian court.[146]

In *Sosa*, the Court left open the possibility that a claim could be brought under the ATS in an area of clear and established international law.[147] Regarding the current detention situation at Guantanamo Bay, the Geneva Conventions and the subsequent protocols provide clear guidelines for the treatment of combatants taken into custody during a hostile conflict.[148] The government's denial of POW status is not supported by any clear legal principle.[149] The Court determined that the door was not shut firmly by *Erie*, but that an opening exists when international law is clear.[150] The international law governing this situation is clear and established.[151] Furthermore, the United States is a signatory to the doctrine.[152] Recent revelations illustrate this fact, including the ruling by Judge Colleen Kollar-Kotelly which determined that the terror suspects must be allowed to meet with lawyers, rejecting the Bush administration's argument that the detainees are not entitled to lawyers.[153] In the aftermath of the War on Terror, it is not unlikely that future claims brought under the ATS will appear in U.S. courts.

Summary and Analysis Prepared By:
Jillian DiLaura

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146 *Id.*
147 *Sosa*, 124 S. Ct. at 2764.
148 Protocol I, at 143.
149 Aldrich, *supra* note 133 at 892.
150 *Sosa*, 124 S.Ct. at 2764. *See supra*, note 76.
151 Protocol I, at 143.
152 Protocol I, at 37.
153 *National Briefing Washington: Terror Suspects Must Be Allowed to Meet with Lawyers, Judge Says*, N.Y. TIMES, Oct. 21, 2004, at A20.