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THE U.S. SUPREME COURT AND THE *ALVAREZ-MACHAIN* CASES: RECASTING INTERNATIONAL LAW

SHERRI BURR*

I first began speaking and writing about the *Alvarez-Machain* cases in 1999.¹ As someone who taught public international law, I became interested in the 1990 kidnapping of Dr. Humberto Alvarez-Machain from his office in Guadalajara, Mexico. Dr. Alvarez-Machain's capture was arranged by agents of the U.S. Drug Enforcement Administration (D.E.A.). These agents hired Mexican nationals to transport him to El Paso, Texas, where he was transferred to U.S. officials to stand trial for participating in the alleged torture and killing of D.E.A. agent Enrique Camarena. As the case made its way up to the U.S. Supreme Court, it possessed potential to impact the fragile international legal system that formulates customary law based on a process of claims and counterclaims.

In 1992 when the original *Alvarez-Machain* case reached the U.S. Supreme Court, Kenneth Starr was the first Bush Administration's Solicitor General. Starr argued that the Federal Government had the right to kidnap foreigners and prosecute them in the United States for crimes committed abroad. Additionally, Starr contended that the extradition treaty between the United States and Mexico was merely a "tool" that does not limit the Government's freedom to use other means to pursue "narco-traffickers."²

The U.S. Supreme Court agreed. In his majority decision, Chief Justice Rehnquist declared that Dr. Alvarez-Machain's kidnapping did not deprive U.S. courts of jurisdiction because the U.S.-Mexico extradition treaty was silent on the issue of kidnapping.³ Rehnquist maintained that since the treaty did not forbid kidnapping, it was permissible.⁴

This decision was greeted with laughter, among other reactions. Professor Tom Franck of New York University contends there is a "laughter test" in international law.⁵ If a nation puts forth a justification for an action before the world community and the response is laughter, then the action is illegal. Over the years, as I discussed the case in my classes and with colleagues, students and professors alike routinely laughed.

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Burr received her A.B. (Politics) from Mount Holyoke College, her M.P.A. (International Relations) from Princeton's Woodrow Wilson School of Public and International Affairs, and her J.D. from Yale Law School. She is the author of numerous law review articles and the following three books: *Art Law: Cases and Materials* (William S. Hein & Co. 2004) with DuBoff and Murray; *Entertainment Law: Cases and Materials in Film, Television, and Music* (ThomsonWest 2004) with Henslee; and *Entertainment Law in a Nutshell* (ThomsonWest 2004). Her article on Protecting Business Secrets in National and International Commerce, published in the peer-reviewed Science Communications, was considered ground-breaking for its empirical data analysis of the importance of trade secrets to the business community. An internationally renowned lecturer, Burr has spoken at universities in Barbados, Canada, Chile, France, Greece, Japan, Mexico, Spain, South Africa, and throughout the United States.

1. Throughout the year 2000, I gave speeches in Mexico at ITESM in Chihuahua, in San Juan at the University of Puerto Rico, in South Africa at the University of the Western Cape, in Spain at the University of Granada Law School, and in the United States at the University of Denver and at Yale Law School.

2. Linda Greenhouse, *Justices Hear Case on Right of U.S. to Kidnap Foreigners*, N.Y. TIMES, Apr.22, 1992, at D22.

3. United States v. Alvarez-Machain, 504 U.S. 655, 666 (1992).

4. *Id.* at 670.

5. Sherri Burr, *From Noriega to Pinochet: Is There an International Moral and Legal Right to Kidnap Individuals Accused of Gross Human Rights Violations?*, 29 DEN. J. INT'L L. & POLICY 101, 102 n.9 (Spring 2001).

Among the other responses that greeted the decision was alarm. I was among those expressing apprehension. The U.S. Supreme Court's decision represented a dangerous precedent, both for the international community and for U.S. citizens.⁶ Since customary international law develops through a process of claims and counterclaims, other countries could counterclaim the right to kidnap U.S. citizens as a tool to fight an important social issue.

Indeed, when we fast-forward to 2004, we find that there have been over 100 kidnappings in the Iraq and Persian Gulf areas by groups seeking to influence U. S. policy. Some of these kidnappings have had dire endings as U.S. citizens have been killed and beheaded. While none of these terrorists have cited the *Alvarez-Machain* case as a justification for their actions, the case was covered by the news media throughout the world and it became well known that the U.S. Government believes kidnapping is an appropriate tool to reach its goals.

After the U.S. Supreme Court declared that Dr. Alvarez-Machain could be tried, the district court judge dismissed the charges, stating they were based on the "wildest speculation."⁷ The district judge granted Dr. Alvarez-Machain's motion for a judgment of acquittal on the ground that the government had failed to present sufficient evidence to support a guilty verdict.⁸

Dr. Alvarez-Machain returned to Mexico and began the civil action against the U.S. Government that led to another U.S. Supreme Court decision during the summer of 2004. The doctor sued José Francisco Sosa, Antonio Garate-Bustamante, five unnamed Mexican citizens, the United States government, and four D.E.A. agents. Dr. Alvarez-Machain sought damages against the United States for false arrest under the Federal Tort Claims Act (F.T.C.A).⁹ He sued Sosa and other individuals for participating in his kidnapping under the Alien Tort Statute (A.T.S.).¹⁰

The F.T.C.A. permits individuals to sue the U.S. Government for personal injury caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment. Pursuant to the A.T.S., U.S. district courts are given 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. Here, the District Court dismissed the F.T.C.A. claim, and awarded summary judgment and \$25,000 in damages on the A.T.S. claim.¹¹ The Ninth Circuit affirmed the A.T.S. judgment, but reversed the dismissal of the F.T.C.A. claim.¹² Sitting *en banc*, the full Ninth Circuit affirmed.¹³ The Ninth Circuit cited a "clear and universally recognized norm prohibiting arbitrary arrest and detention" to support

6. *Id.*; See also Sherri L. Burr, *DE NORIEGA A PINOCHET: ¿Hay un derecho internacional, moral o jurídico, al secuestro de individuos acusados de graves violaciones de los derechos humanos?*, 3ª REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE GRANADA, 3ª época, Num. 5 (2002).

7. *Alvarez-Machain v. United States*, 331 F.3d 604, 610 (9th Cir. 2003).

8. *Id.*

9. *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2747 (2004).

10. *Id.*

11. *Alvarez-Machain v. United States*, No. CV 93-4072, 1999 U.S. Dist. LEXIS 23304, at *78 (C.D. Cal. June 29, 2004).

12. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1064 (9th Cir. 2001).

13. *Alvarez-Machain v. United States*, 331 F.3d 604, 643 (9th Cir. 2003).

its conclusion that Dr. Alvarez-Machain's arrest amounted to a tort in violation of international law.¹⁴

Reversing the Ninth Circuit's *en banc* decision in 2004, the U.S. Supreme Court ruled that Dr. Alvarez-Machain was not entitled to a remedy under either the F.T.C.A. or the A.T.S.¹⁵ The U.S. Supreme Court has been consistent in its actions towards the doctor. The U.S. Government not only had the right to kidnap him, but also could refuse to pay him any remedies.

F.T.C.A. CLAIMS AGAINST THE U.S. GOVERNMENT

While the F.T.C.A. does waive the Government's immunity from suit in certain situations, it does not waive governmental immunity of the United States for claims arising in a foreign country. This is known as the "Foreign Country Exception."¹⁶

In its decision, the Ninth Circuit proclaimed a headquarters exception to the "Foreign Country Exception." For an act to be deemed headquartered in the United States, U.S. employees and officials must have caused damage while in a foreign country, or caused actions to take place within the foreign country.¹⁷ This would seem to apply to Dr. Alvarez-Machain's situation because employees of the U.S. Government planned his abduction from Mexico. Furthermore, he incurred damage in Mexico that was caused by people operating in the United States.

The U.S. Supreme Court, however, dismissed the headquarters exception because it postulated that it would become easy to assert that the negligent activity that injured a plaintiff abroad was the consequence of faulty training, selection or supervision within the United States. It speculated that just about anything could be repackaged as a headquarters claim.¹⁸

Instead, the U.S. Supreme Court said Dr. Alvarez-Machain's claim arose from harm proximately caused by acts in Mexico, although the planning took place in California.¹⁹ In other words, how do you define the kidnapping of Dr. Alvarez-Machain? Did it take place in Mexico where he was initially abducted, or did it begin and end in the United States where it was initially planned and to where he was eventually transferred?

This gives rise to an interesting debate between the Ninth Circuit, which said the tort was headquartered in California (where the planning and direction took place), and the U.S. Supreme Court, which said the crime took place in Mexico (on foreign soil). As the highest judicial body, the U.S. Supreme Court had the final say on the matter.

The U.S. Supreme Court also noted that when the F.T.C.A. was passed, the general rule was that a cause of action arising in another jurisdiction which was barred in that jurisdiction was also banned in the United States.²⁰ The F.T.C.A. employed the principle *lex loci delicti*: the law of the place where the injury

14. *Id.* at 620.

15. *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2754 (2004).

16. 28 U.S.C. § 2680(k) (1994).

17. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1054 (9th Cir. 2001).

18. *Sosa*, 124 S.Ct. at 2749.

19. *Id.* at 2750.

20. *Id.*

occurred. In this case, Mexican law should apply. However, the court concluded that “current flexibility in choice of law methodology gives no assurance against applying foreign substantive law if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign harm.”²¹ Moreover, the court opined that the headquarters doctrine would result in a substantial number of cases applying the exact foreign law the foreign country exception was meant to avoid.²² In other words, the Government would become liable under a foreign country’s laws.

A.T.S. CLAIMS AGAINST JOSÉ FRANCISCO SOSA AND OTHER INDIVIDUALS

Adopted into the Judiciary Act of 1789, the Alien Tort Statute is one of the country’s oldest laws. The A.T.S. states simply 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 laws of nations or a treaty of the United States.”²³

In dismissing Dr. Alvarez-Machain’s claims under the A.T.S., the U.S. Supreme Court said that the act must be interpreted according to historical precedent. In other words, application of the A.T.S. must be limited to the founding fathers’ perceptions of international law when they drafted the statute.²⁴

For the U.S. Supreme Court, the A.T.S. 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. Only a modest number of international law violations had the potential for personal liability at the time the statute was written. The U.S. Supreme Court cited three specific offenses that were prevalent under the law of nations at the time: (1) violations of safe conducts, (2) infringement of the rights of ambassadors; and (3) piracy.²⁵ The U.S. Supreme Court said that this narrow set of infractions of the law of nations was on the minds of the men who drafted the A.T.S.²⁶ Because of this, the court reasoned the A.T.S. applies only to these types of violations.²⁷

Thus, under this interpretation, claims based on present-day law of nations must rest on “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms recognized.”²⁸ The U.S. Supreme Court would thus narrowly limit federal courts’ recognition of private claims under federal common law exclusively to violations of international norms accepted in 1789.

What is astonishing about this outcome is that the U.S. Supreme Court has never limited its own application of laws to their historical paradigm. In *Bush v. Gore*, for example, the U.S. Supreme Court used the Fourteenth Amendment to stop the recount of votes in the Florida presidential election.²⁹ The Fourteenth Amendment

21. *Id.* at 2753.

22. *Id.*

23. 28 U.S.C. § 1350 (1994).

24. *Sosa*, 124 S.Ct. at 2754.

25. *Id.* at 2756.

26. *Id.*

27. *Id.* at 2761.

28. *Id.* at 2761-62.

29. *Bush v. Gore*, 531 U.S. 98, 104-106 (2000).

was enacted to guarantee equal rights to newly freed slaves. Had the U.S. Supreme Court limited the Fourteenth Amendment to its nineteenth century paradigm, it would not have been able to apply it to a twenty-first century problem, i.e., modern methods of counting votes. Indeed, if it had, it would have used the Fourteenth Amendment to demand a full recount of all the votes to insure that each person be given a voice in selecting the U.S. President.

In conclusion, the U.S. Supreme Court has embarked on incongruous interpretations of international law. By limiting the A.T.S. to its historical paradigm, the U.S. Supreme Court fails to accord international law the opportunity to grow and develop into a vibrant body of norms. At the same time, the Court has shown its own inconsistency by restraining some laws to their historical paradigm but failing to restrict others.

