CASE NOTES

THE JURISDICTIONAL SCOPE OF THE *ALIEN TORT CLAIMS ACT*: THERE IS STILL SOME LIFE IN THE OLD ACT!

Sosa v Alvarez-Machain and United States of America v Alvarez-Machain (US Supreme Court, Nos 03-339 and 03-485, 29 June 2004)

Alien Tort Claims Act – Subject matter jurisdiction – Cause of action – Sufficiently defined cause of action – International litigation – International corporate responsibility – Federal common law – Congressional guidance

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1. INTRODUCTION AND BACKGROUND TO THE ALIEN TORTS CLAIMS ACT

Based on a request from the US Department of Justice, the US Supreme Court (the Court) heard *Sosa v Alvarez-Machain et al* (the *Alvarez Case*)[1] on 30 March 2004 and handed down its decision on 29 June 2004[2]. Finally after 215 years the Court decided to determine the scope of the *Alien Tort Claims Act*[3] (the ATCA). The ATCA is a significant piece of legislation that, inter alia, exposed corporations to a significant liability for breaches of international law. Accordingly, many large corporations had a vested interest in the outcome of this appeal. The appellant wanted to remove the act's capacity to bring an action for compensation in the US courts for breaches of international law.

The question before the Court was whether Dr Humberto Alvarez-Machain's claim that at the instigation of the US Government his unlawful abduction from Mexico and arbitrary arrest gave rise to a right of compensation under the ATCA against either Mr Jose Francisco Sosa (Mr Alvarez-Machain's abductor) or the US government. By way of legal principle, the Court had to decide if the ATCA created a right in common law for the federal courts to recognise a cause of action in the US district courts for non-Americans, wherever resident, to recover for a tort

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1 *Sosa v Alvarez-Machain & Ors and US v Alvarez-Machain*, 542 US (2004).

2 For further information as to why the US Supreme Court decided to consider a question concerning the ATCA for the first time in 215 years and Australia's involvement in the case refer to P Little, "Is this the Beginning of the End of the *Alien Tort Claims Act* and how is Australia Involved?" (2004) 23 ARELJ 4.

3 *Alien Tort Claims Act* (US) 28 USC §1350.

committed against him or her, "…in violation of *the law of nations* or a treaty of the United States" (emphasis added); even where the tort was committed by a non-resident non-American outside America[4].

The ATCA allows, inter alia, those who have suffered from a breach of international human rights law outside America to sue for compensation in US courts. The ATCA, a federal law dating back to 1789, states that "…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[5]" (emphasis added). Victims who are unable to obtain retribution in their own countries use the ATCA to sue for international human rights abuses in US federal courts[6].

While the ATCA was initially used to sue foreign governmental officials for egregious breaches of international human rights law, victims and lawyers realised in the 1990s the act could also apply to corporations. As a result, a number of multinational corporations, including Texaco[7], Dow Chemical[8], Union Carbide[9], Talisman[10], Shell[11], Rio Tinto[12] and Unocal[13] have been sued under ATCA for murder, torture, toxic harm, genocide, enslavement, and rape associated with their work in various countries including Ecuador, India, the Sudan, Nigeria, Bougainville and Burma. To date none of these cases have been successful. While the *Alvarez Case* does not involve corporations, the case was arguably instigated by the large UN multi-nation corporations to test the jurisdictional boundaries of the ATCA.

2. THE FACTS IN THE *ALVAREZ CASE*

In 1985, an agent of the Drug Enforcement Agent (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico. He was tortured and then murdered. Based on eyewitness testimony the DEA believed Dr 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.

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4 The case also dealt with issues of *Federal Tort Claims Act (*28 USC §1346). I have not covered these issues as they are not relevant to the question of jurisdiction of the ATCA.

5 28 USC §1350.

6 For a greater understanding of the ATCA refer to P Little, "What are the Consequences of the *Alien Tort Claims Act* (US) on Mining and Petroleum Corporations Operating in Third World States in the Asian Pacific Region?" (2003) 22 ARELJ 203-211 and P Little, "What are the Consequences of the *Alien Tort Claims Act* (US) on Mining and Petroleum Corporations Operating in Third World States in the Asian Pacific Region? Part II: Non-justiciability Issues" (2004) 23 ARELJ 62-80.

7 *Aguinda v Texaco*, 303 F 3d 470 (2d Cir 2002).

8 *Castro Alfaro v Dow Chemical*, 786 SW 2d 674 (1990), rehearing overruled, 33 Tex Sup J 453 (1990), *cert denied*, 498 US 1024 (1991).

9 *Bano v Union Carbide*, 273 F 3d 120 (2d Cir 2001).

10 *Presbyterian Church of Sudan v Talisman Energy, Inc*, 244 F Supp 2d 289 (SDNY 2003).

11 *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88 (2d Cir 2000), *cert denied*, 532 US 941 (2001).

12 *Sarei et al v Rio Tinto et al* (Case No: CV 00-11695 MMM) 221 F Supp 2d 1116 (CD Cal 2002).

13 *Doe v Unocal Corp*, 963 F Supp 880 (CD Cal 1997).

In 1990, a federal grand jury indicted Alvarez for torture and murder and California's district court issued an arrest warrant for Alvarez. The DEA first sought the assistance of the Mexican Government in getting Alvarez to the US but when that proved useless they hired some Mexican nationals, which included Mr Jose Francisco Sosa (Sosa) to seize Alvarez and bring him back to the US. They abducted Alvarez held him overnight in a motel and brought him by private plane to El Paso, Texas where he was arrested by US federal officers.

Alvarez's criminal trial started in 1992 and ended at the close of the government's case, when the district court granted Alvarez's motion for acquittal. In 1993, he returned to Mexico and began civil action there. He sued Sosa and a DEA operative (Mr Antonio Garate-Bustamante), five unnamed Mexicans, the US and four DEA agents. Alvarez also sought damages, inter alia, from Sosa under the ATCA for a violation of the law of nations[14]. The US district court awarded summary judgment and $25,000 in damages to Alvarez on the ATCA claim[15]. The US 9th Circuit affirmed the ATCA judgment[16]. A divided en banc court came to the same conclusion. The case was then appealed to the Court.

3. THE POSITION BEFORE THE COURT'S DECISION

Before the decision in the *Alvarez Case*, a tort must violate a norm of customary international law[17] for it to be actionable under the ATCA's "law of nations" provision[18]. As the Restatement (Third) of Foreign Relations Law (the *Restatement*) explains, "…*customary international law* results from a general and consistent practice of states followed by them from a sense of legal obligation" or opinio juris[19] (emphasis added).

To determine the content of "customary international law", the Court has previously held that courts should look to the "…customs and usages of civilized nations and …to the works of jurists and commentators."[20] In addition, parties to a claim can prove state practice by reference to official documents and other indications of governmental action.[21]

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14 In addition, he also sought damages from US under the *Federal Tort Claims Act* (FTCA) alleging false arrest. This Case Note is focusing only on the ATCA claim.

15 However, the district court granted the motion to dismiss the FTCA.

16 But reversed the dismissal of the FTCA claim.

17 While extended treatment of the meaning and application of the "treaty of the United States" provision is beyond the scope of this Case Note, a brief word on the topic is in order. Courts are traditionally hostile to private plaintiffs seeking to enforce treaty rights unless the treaty is "self-executing", meaning that it expressly or impliedly provides a right of action.

18 *Kadic v Karadzic*, 70 F 3d 232, 239 (2d Cir 1995); *Filartiga v Pena-Irala*, 630 F 2d 876, 884 (2d Cir 1980); *Forti v Suarez-Mason*, 694 F Supp 707, 709 (ND Cal 1988).

19 *Restatement (Third) of Foreign Relations Law* § 102(2) and cmt c (1987).

20 *The Paquete Habana*, 175 US 677, 700 (1900). According to the International Court of Justice activities of states in the international arena may give rise to binding law. However, not all acts (or omissions) that can give rise to customary law and there are certain conditions, which must be fulfilled before practice crystallises into law. These elements of customary law come from *North Sea Continental Shelf Cases,* the *Lotus Case* (1927 PCIJ Ser A No 10), the *Anglo-Norwegian Fisheries Case* (1951) ICJ Rep 116, and *Nicaragua v USA* (1986) ICJ Rep 14. Only the elements necessary to discuss the ATCA have been identified in this article.

21 *Restatement*, op cit n 19, §§ 103.

To determine if a norm is a customary international norm is a difficult task[22]. As a starting point, judges in US courts referred to the *Restatement* for guidance.[23] The *Restatement* constitutes the opinion of the American Law Institute as to the content of international law,[24] and therefore is writing of qualified scholars that courts may regard as evidence of customary international law.[25] The *Restatement* itself, however, acknowledges its list of customary human rights norms is not exhaustive when it was written and new norms may become customary over time [26].

(A) THE "SPECIFIC, UNIVERSAL AND OBLIGATORY" REQUIREMENT

Many courts will also require customary international norm to be specific or definable, universal and obligatory.[27] That is, the norm must be "…characterized by *universal consensus* in the international community as to its binding status and its *content*"[28](emphasis added). This "…evinces the *willingness* of nations *to be bound* by the *particular* legal principle, and so can justify the court's exercise of jurisdiction over the tort claim"[29] (emphasis added). The universal and obligatory standards are simply a reformulation of the *Restatement*'s conclusion that a customary international norm results from a consistent practice of states that act in that way because of a sense of legal obligation. According to the International Court of Justice, it is "…sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule"[30].

As an evidentiary point, to determine if a norm is "specific" or "definable" adequate evidence needs to exist for a court to determine whether an act violates the norm.[31] Demonstrating consensus regarding a norm's exact parameters will be difficult.[32] A plaintiff, however, need not show that sufficient criteria exist regarding every aspect of the norm. Rather, the plaintiff can meet the definability requirement by demonstrating universal consensus among states that the specific conduct the plaintiff's alleges violates international law, even if some ambiguity remains regarding other aspects of the norm.[33] Specificity or definability is not always a prerequisite for the

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22 Apart from the *Restatement*, plaintiffs can submit expert testimony or affidavits as part of their evidence that a given norm has achieved customary status. It takes considerable volume and variety of relevant sources.

23 *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 781 (DC Cir 1984).

24 *Restatement*, op cit n 19, at 3.

25 Ibid, § 103.

26 Ibid, § 702.

27 *In re Estate of Ferdinand Marcos Human* Rights *Liti*, 25 F 3d 1467, 1475 (9th Cir 1994); *Tel-Oren,* op cit n 23, at 781(Edwards, J, concurring); *Beanal v Freeport-McMoRan, Inc*, 969 F Supp 362, 370, 383 (ED La 1997), *aff'd* No 98-30235, 1999 US App LEXIS 31356 (5th Cir Nov 29, 1999); *Forti* op cit n 18, at 709.

28 *Forti*, op cit n 18, at 712.

29 Ibid at 1540, modified in part, 694 F Supp 707 (ND Cal 1988).

30 *Nicaragua v US,* 1986 ICJ 14, 98 (June 27); *Restatement*, op cit n 19, § 102.

31 *Xuncax v Gramajo*, 886 F Supp 162, 184 (D Mass 1995).

32 *Forti,* op cit n 18, at 712.

33 *Xuncax*, op cit n 31, at 187.

recognition of an international norm to be customary[34] but it is for the ATCA.[35] Accordingly, while the required norm needs to be specific in order to be justiciable, it is not a high threshold.

(B) THE CHANGING NATURE OF CUSTOMARY INTERNATIONAL LAW

As customary international law is based upon state practice, it changes over time.[36] The ATCA requires courts to apply current customary international law and not to apply the international law as at 1789[37]. Until the Court's decision, the following actions have customary international law status:

- Torture;
- Crimes against humanity[38];
- War crimes[39];
- Genocide[40];
- Disappearance[41];
- Summary execution[42];
- Arbitrary detention[43];
- Forced labour[44]; and
- Cruel, inhuman and degrading treatment.[45]

These actions however, are not necessarily the only norms actionable under ATCA. Certain long-established customary international norms simply have not yet been raised by plaintiffs or recognised by US courts.[46]

As the content of the customary international law or "law of nations" evolves over time, the scope of torts actionable under the ATCA necessarily changes but only very slowly.

However, those actions previously recognised as customary international law under the ATCA, needs to be reconsidered. Recognisable customary international laws that constitute the "law of nations" have been narrowed considerably.

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34 *Restatement*, op cit n 19, § 102(2).
35 *Eastman Kodak Co v Kavlin*, 978 F Supp 1078, 1092-94 (SD Fla 1997).
36 *The Paquete Habana* op cit n 20 at 694 (1900); *Restatement*, op cit n 19, § 702 cmt a and reporters' note 1.
37 The time of ATCA's enactment.
38 *Quinn v Robinson***,** 783 F 2d 776, 799 (9th Cir 1986).
39 *Kadic,* op cit n 18, at 242-43.
40 Ibid*,* at 241-42.
41 *Forti,* op cit n 18, at 711.
42 *In re Estate of Ferdinand Marcos*, op cit n 27, at 1475.
43 *Xuncax,* op cit n 31, at 189.
44 *Doe v Unocal*, 963 F Supp 880, 892 (CD Cal 1997).
45 *Xuncax*, op cit n 31, at 187.
46 Infra, Section IV B 4 c 1, arguing that cultural genocide, raised for the first time in *Beanal*, is a longstanding customary norm.

4. THE US SUPREME COURT'S DECISION

In his appeal, Sosa argued that the ATCA should not provide a cause of action. The statute does no more than vest federal courts with the jurisdiction; it neither creates nor authorises the courts to recognise a right of action without further congressional intent. According to Sosa, the ATCA only grants jurisdiction to bring the case into the US but there needs to be some existing US statute or common law principle that provides for the cause of action, and there is none.

Alvarez, the respondent, held a contrary view and further argued that the prohibition of arbitrary arrest attained the status of a binding customary international law[47]. The 9th Circuit had earlier found that, "…the unilateral, nonconsensual extraterritorial arrest and detention of Alvarez was arbitrary and in violation of the law of nations under the [ATCA]"[48].

However, the Court disagreed. It held that "…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 cum common law claims understood in 1789 should be taken as authority to recognise the right of action by Alvarez here"*[49].

The Court rejected Alvarez's argument and reversed the 9th Circuit's decision[50] because Alvarez cited little authority that arbitrary arrest was so broadly accepted that it has the status of a binding customary international norm today. It reasoned further that such a principle also does not have the specificity required. Accordingly, Alvarez was not entitled to recover damages from Sosa because the right of action asserted by Alvarez does not exist under the ATCA[51].

The Court analysed the brief legislative background to the creation of the ATCA and concluded that "…Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative minds 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

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47 Alvarez's arrest was arbitrary because there was no applicable law that authorised it.

48 *United States v Alvarez-Machain,* 331 F 3d 604 (9th Cir 2003) at 639.

49 The *Alvarez Case*, op cit n 1, Souter J at 17. Souter J delivered the majority opinion of the Court, which included O'Connor, Kennedy, Ginsburg, Stevens and Breyer JJ. Rehnquist CJ, Scalia and Thomas JJ dissented.

50 The Court agreed unanimously that the ATCA was a jurisdictional statute but at the time it did provide a cause of action for that modest number of international law violations thought to carry personal liability at the time. However, three judges (Rehnquist CJ and Scalia and Thomas JJ) believe that ability to provide for a cause of action for a modest number of international law violations was removed by subsequent developments. Accordingly, the ability of the federal courts to provide a limited category of a cause of action was decided 6:3.

51 Alvarez also failed the facts as well. The majority found that a period of arbitration detention was only for less than 24 hours and therefore was not a violation of a customary international law even if one was recognised.

been contemplated"[52]. It notes from Blackstone that "…offences against the laws [of nations] are principally incident to whole states or nations"[53].

Accordingly, it is then necessary to determine the standard required for assessing the existence of a cause of action (ie. development of a common law).

5. THE COURT'S REQUIRED STANDARD OF A CAUSE OF ACTION UNDER THE ATCA

The Court obviously had to examine and decide the legislative intent at the time the ATCA was passed in 1789. This was not easy because there were very little records kept at the time of any parliamentary speeches or explanation why the legislation was introduced. The Court had to examine the brief number of cases that applied the act between 1789 and 1980. It concluded that normally a jurisdictional statute, like the ATCA, creates no new causes of action. Notwithstanding, the Court accepted that the ATCA provides for causes of action albeit in a limited way. There was a reasonable inference from history and practice that the ATCA was intended to have practical effect the moment it became law, and the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time[54].

Accordingly, the Court concluded that federal courts should not recognise private claims under federal common law for violations of any international law norm *unless* it is accepted by the civilised world and defined with the specificity comparable to the features required in the 18th century[55]. On the surface this does not sound too different to the test established by 9th Circuit in *Forti v Suarez-Mason*[56]. However, the method used to satisfy this test is different.

The Court supports Edwards J's approach in *Tel-Oren* where he said, "the limits of section 1350's reach" is defined by "a handful of heinous actions – each of which violates definable, universal and obligatory norms"[57]. Accordingly, the norm needs to be:

(a) Clearly definable[58];

(b) Universally accepted; and

(c) Obligatory in nature[59].

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52 The *Alvarez Case*, op cit n 1, Souter J at 25.

53 Ibid.

54 Ie, offences against ambassadors, violations of safe conducts and piracy.

55 The *Alvarez Case*, op cit n 1, Souter J at 30 and 31. Scalia J dissented at this point. He argued two developments subsequent to the passing of the ATCA should preclude the federal courts from recognising any further international norms as judicially enforceable today.

56 *Forti* op cit n 18.

57 *Tel-Oren* above n 23 at 781 (Edwards J). This was later supported in *In re Estate of Marcos,* op cit n 27, at 1475.

58 Here are some laws which are so egregious that they do not require a high level of specificity; for example as Kaufman J said, "For the purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generic, an enemy of all mankind" *Filartiga,* op cit n 20, at 890.

59 Refer to Section 3(A) above for greater explanation.

While this test is generally consistent with the reasoning of many of the courts and judges who faced the issue before reaching the Court[60], it is applied more narrowly. That is, the level of evidence required is more detailed. In the future, it will be more difficult to satisfy those requirements.

When assessing the veracity of the existence of a norm of international laws, the Court recognised that, "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations; and, as evidence of these, to the work of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works 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"[61].

However, the Court goes further and says that a court *must* take into account the practical consequences of making that cause available to litigants in the federal courts. Apart from some comments by way of footnote, as though by way of insignificance, the Court does not give any clear indication what it means here. However, in the footnote, the Court suggests two possible limitations to be applied when determining whether a norm is sufficiently definite to support a cause of action. They are that:

(a) Exhaustion principle would apply. The exhaustion principle requires the claimant to exhaust any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals before commencing a claim in the US; and

(b) The courts take into account the policy of case-specific deference to the political branches (ie non-justiciability issues)[62]. Where applicable, the Court suggests "… federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"[63]. It is unclear how the executive branch's consideration directly impacts on the specificity of a norm. It has more to do with overall policy considerations that overrule the existence of a recognisable norm rather than whether it is specifically defined. Unless, there is some sort of balancing process where the specificity is proportional to the extent to which the recognition of a norm will impact on the US' foreign policy, there is little direct application except when determining the universality aspect of a potential norm.

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60 *Filartiga:* "[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind". In *Tel-Oren*, the court suggested the limits of ATCA reach be defined by "…a handful of heinous actions – each of which violates definable, universal and obligatory norms". In re Estate of Marcos Human Rights Litigation – "Actionable violations of international law must be of a norm that is specific, universal and obligatory".

61 *The Paquete Habana,* op cit n 20, at 700.

62 I wrote on this point in this journal last year. For an extensive analysis of these non-justiciability factors refer to P Little, "What are the Consequences of the *Alien Tort Claims Act* (US) on Mining and Petroleum Corporations Operating in Third World States in the Asian Pacific Region?" (2003) 22 ARELJ 203-211.

63 The *Alvarez Case*, op cit n 1, Souter J at 38 (refer to footnote 21).

Breyer J, in a separate judgment, supported the majority's inclusion of the above limitations but went further[64]. His Honour would like to include doctrine of international comity as an aspect that should be considered by the court before recognising the norm[65]. The doctrine of international comity[66] is defined as, "…the recognition which one nation allows within its territory to the legislative, executive or judicial acts or another nation" [67]. In practical terms it means courts sometimes take into account the laws or interests of a foreign state and decline to exercise the jurisdiction it otherwise has. Unlike the other non-justiciability doctrines, international comity is a discretionary doctrine. It is not a rule of law but is one of practice, convenience and expediency.

Courts adjudicating ATCA cases are often reluctant to make discretionary findings, especially given the number of plaintiffs, the nature of the claims and the impact on the states.

Determination of the "Law of Nations" in the *Alvarez Case*

Alvarez argued his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (the Declaration) [68] and the International Covenant of Civil and Political Rights (the Covenant)[69]. However, the Court decided these two well-known international agreements "…have little utility under the standard set out in this opinion"[70]. It is understood the Declaration does not of its own force impose obligations as a matter of international law and the Covenant does not apply as the US 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 was not successful in arguing that the Declaration and the Covenant established the relevant and applicable rule of international law.

Next Alvarez argued the prohibition of arbitrary arrest has attained the status of binding customary international law. The first difficulty is accurately identifying the prohibitive norm. Alvarez defined "arbitrary" detention as officially sanctioned action exceeding positive authorisation to detain under the domestic law of some government[71]. Not surprisingly, the Court found the proposed norm too broad and it practical implications "breathtaking". This rule, according to the Court, would support a cause of action in federal court for any arrest, anywhere in the world, unauthorised by the law of the jurisdiction in which it took place[72].

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64 The *Alvarez Case*, op cit n 1, Breyer J was the only judge who made this point.

65 For a proper explanation of the doctrine of international comity refer to P Little, "What are the consequences of the *Alien Tort Claims Act* (US) on Mining and Petroleum Corporations Operating in Third World States in the Asian Pacific Region? Part II: Non-justiciability Issues" (2003) 23 ARELJ 62-80.

66 It is sometimes called, "comity of nations".

67 *Hilton v Guyot*, 159 US 113 at 164 (1895).

68 The *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (1948).

69 Article 9 provides that "…no one shall be subjected to arbitrary arrest or detention", that "… no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law", and "…anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The *International Covenant of Civil and Political Rights*, Dec 19, 1996, 999 UNTS 171.

70 The *Alvarez Case*, op cit n 1, Souter J at 40.

71 Ibid, at 42.

72 Ibid, at 43.

However, it can be argued the *Restatement* supports Alvarez's argument as it says in its discussion of customary international human rights law that a, "…state violates international human rights of state policy, it practice, encourages, or condones … prolonged arbitrary detention"[73]. However, the implications of the Restatement are clear. That is, any principle against arbitrary detention that the civilised world accepts as binding international customary law requires a factual basis beyond relatively brief detention in excess of positive authority[74].

Accordingly, the Court concluded the proposed norm proffered by Alvarez does not have the specificity required.

Finally, it was noted that Alvarez's detention was for less than a day followed by the transfer of custody to lawful authorities where he obtained a prompt arraignment. This, according to the Court, would not violate any norm of customary international law anyway.

6. THE COURT'S JUDICIAL CAUTIONS WHEN CONSIDERING A CLAIM

It is interesting to note that the majority of the Court began its analysis of the appropriate test by listing five reasons why a court should be cautious when considering a claim under the ATCA[75]. The message contained in the caution is very clear. The Court is straying into an area it does not want to go and sees the questions of this case really one for the legislature. It is clearly flag-posting the current American government to deal with the problem. These five cautionary points are also warnings to the lower courts that have recognised the applicable customary international law.

According to the Court:

1. The prevailing conception of the common law has changed since 1789. When the ATCA was enacted, the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute"[76]. Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.
2. There has been a change in the role of the US Federal Courts in making the common law[77]. Although the court assumes competence to make judicial rules of decisions of particular importance to foreign relations, such as the act of state doctrines[78], the general practice has been to look for legislative guidance before exercising innovative authority over substantive law[79].

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73 Ibid.
74 Ibid.
75 In a separate judgment, Scalia J clearly agrees with the majority on this point. The need for congressional guidance when exercising jurisdiction is so important, that Scalia J believes the courts should not rule in this area at all.
76 The *Alvarez Case*, op cit n 1, Souter J at 31.
77 *Erie R Co v Tompkins*, 304 US 64 (1938).
78 *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 427 (1964).
79 The *Alvarez Case*, op cit n 1, Souter J at 32.

3. The Court in previous decisions has always said that a decision to create a private right of action is one better left to the legislative judgment in the great majority of cases.

4. There is a real possibility of collateral consequences from making international rules privately actionable. Such actions may have potential implications for the foreign relations of the US and courts should particularly be wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs[80].

5. It has no congressional mandate to seek out and define new and debatable violations of the law of nations. While the *Torture Victim Protection Act 1991* (the TVPA) provides authority that "…establishes an unambiguous and modern basis for" federal claims of torture and extrajudicial killing, that affirmative authority is confined to specific subject matter and the specific comments about the ATCA when passing the TVPA are also given limited consideration. Congress did not comment directly on the ATCA. It should be noted, the Senate expressly declined to give the Federal courts the task of interpreting and applying international human rights law, as when its ratification of The Covenant declared that the substantive provisions of the document were not self-executing.

7. CONCLUSION

After 215 years the Court finally determined that the ATCA grants a cause of action. However, the class of international laws that give rise to a cause of action is significantly reduced. While the Court supported, in principle, the test applied by the 9th Circuit to determine when a law can be classified as a "law of nations", the requirements to satisfy that test is more demanding. As a result, less customary international law norms will be recognised as "laws of nations". Regretfully, the Court only stated that the arguments put forward by Alvarez were inadequate. It did not explain what was missing or what is required to satisfy the test.

What is known is that if a plaintiff wishes to argue a norm of customary international law is a law recognised in the ATCA, he or she needs to provide considerable more precise evidence. It is clear that the requisite evidence to prove a customary international law as recognised by the ICJ is inappropriate. At this stage, it is uncertain what type of evidence will have more probative value than others. The Court is moving away from internationally accepted principles and is developing a test which is unique to its domestic judicial system.

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[80] The *Alvarez Case*, op cit n 1, Souter J at 33 and he quotes Bork J in *Tel-Oren v Libyan Arab Republic* when Bork expresses doubt that the ATCA should be read to require "…our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens".

The Court has also sent a clear signal to the US government to deal with the issues raised in this appeal. It would not be surprising that early in 2005 the US government will announce a congressional review of the ATCA with the objective of changing the act.

JURISDICTIONAL FACT IN QUEENSLAND MINING LAW

De Lacey v Juunyjuwarra People ([2004] QCA 297)

Mining law – Native title – Jurisdiction – Jurisdictional fact

Matt Black*

INTRODUCTION

The recent Queensland Court of Appeal decision in *De Lacey v Juunyjuwarra People*[1] (*De Lacey*) involved an appeal by the State of Queensland against a decision of the Land and Resources Tribunal. Allowing the appeal, the Court of Appeal identified the non-extinguishment of native title as a condition precedent to the Tribunal's jurisdiction in the grant of certain exploration permits. The Court held that it was beyond the Tribunal's power to determine a condition precedent to its own jurisdiction in a way that had legal effect and that the Tribunal should generally not attempt to make such a determination.

This case note first briefly examines the nature of the Land and Resources Tribunal. It then sets out the facts and decision in *De Lacey*. Next, three key determinations of the Court of Appeal are identified and discussed: the Court's identification of non-extinguishment of native title as a condition precedent, the decision that the Tribunal lacked power to determine the condition precedent in a way that has legal effect and when it might be appropriate for the Tribunal to consider a condition precedent to its jurisdiction.

The article argues that there are a number of practical difficulties that arise as a consequence of *De Lacey* and that the decision stands in contrast to the approach taken in other courts. Finally, it is concluded that *De Lacey* appears to suggest an important role for the issue of jurisdictional fact in Queensland resources law and perhaps Queensland courts and tribunals generally.

THE NATURE OF THE TRIBUNAL

The distinction between an administrative tribunal on the one hand and a court of law on the other is not always an easy one to make. Professor Campbell has considered the question of what is a court of law[2], noting that the name given to a body is not determinative and that as Mahoney JA

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* Research Officer, Land and Resources Tribunal. Opinions expressed are those of the author and do not necessarily reflect those of the Tribunal or its members.

1 [2004] QCA 297.

2 E Campbell, "What are Courts of Law?" (1998) 17(1) UTasLR 19.