

**DO DEA FIELD AGENTS HAVE THE POWER
TO UNILATERALLY EXECUTE A
TRANS-BORDER ABDUCTION?:
THE NINTH CIRCUIT’S TAKE ON
*ALVAREZ-MACHAIN V. UNITED STATES***

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Do United States Drug Enforcement Agency (DEA) agents have the power to unilaterally abduct a criminal suspect from a friendly nation without that country’s consent? To what extent does the Executive branch have to authorize such operations so that the conduct of the federal agents ceases to be a tortious false arrest and becomes a proper procedure where negotiations for extradition have been ineffective? The surreptitious abduction of Doctor Humberto Alvarez-Machain, a Mexican citizen and gynecologist, implicated theses issues. In *Alvarez-*

Machain v. United States,¹ the Ninth Circuit considered whether the conduct of several DEA field agents, which resulted in the kidnapping of Alvarez, fixes liability on the United States under the Federal Tort Claims Act (FTCA) and the Alien Tort Claims Act (ATCA). While liability may arise under both the FTCA and the ATCA, the variation of the statutes' histories and sparse case law requires careful attention to international legal principles as well as established State law.

Alvarez holds that such unilateral action on the part of DEA agents may subject the United States to tort liability under both the ATCA and the FTCA.² The holding thus goes far to ensure the involvement of the Executive in the planning and execution of trans-border arrests. As such, it ensures that the balance between political conflicts and effective law enforcement will be judged by those in the best position to do so.³ However, in the eyes of others, the holding will hamstring the United States from enforcing the law and bringing to justice those who are responsible for crimes having an operable effect in the United States.⁴

The U.S. Supreme Court, in *Sosa v. Alvarez-Machain*, has since overturned the Ninth Circuit's decision and held that neither the FTCA nor the ATCA provided a remedy for Alvarez.⁵

1. 331 F.3d 604 (9th Cir. 2003) [hereinafter *Alvarez-Machain VII*], *cert. granted sub nom.* *Sosa v. Alvarez-Machain*, 124 S.Ct. 807 (2003).

2. *Id.* at 641.

3. *Id.* at 631.

Congress surely knows how and when to expand the reach of its laws beyond our borders. There is little doubt that Congress has the authority to do so; there is also little doubt that it has not done so here. Thus, although we recognize that the kidnapping and murder of DEA agents abroad necessitates the exercise of extraterritorial criminal jurisdiction, absent a clear directive, we cannot conclude that Congress has given the DEA unlimited enforcement powers abroad.

Id.

4. The four dissenting Judges in *Alvarez-Machain VII* were particularly concerned with the implications of the decision to hold the United States liable for allowing a "foreign-national criminal" to sue the United States for damages on the efficacy of the global war on terrorism. *Id.* at 645 (O'Scannlain, J., dissenting).. "In [allowing Alvarez to sue the United States for damages] . . . the majority has left the door open for the objects of our international war on terrorism to do the same." *Id.*

5. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2746 (2004).

However, the Ninth Circuit's analysis provides a clear indication of how the United States should proceed in the future, and suggests that the decision to execute a trans-national abduction should lie with officials capable of evaluating the effects of unilateral action.

This Note analyzes the rationale of the Ninth Circuit's majority opinion in *Alvarez* in finding that unilateral action of DEA agents may subject the United States to liability under the ATCA and the FTCA, and the dissent's analysis that fixing liability under those acts is not supported by the traditional use of those statutes. Part I of this Note recites the facts and lengthy and complex procedural posture of the decision. Part II examines the rights protected by the ATCA and the FTCA, and the liability that may be imposed pursuant to those acts. Lastly, Part III argues that the majority of the Ninth Circuit panel correctly applied the law of ATCA and the FTCA and that, in doing so, they have rejected arbitrary decisions to invade friendly nations to arrest suspected criminals in place of the seasoned judgment of the Executive branch.

I. CASE RECITATION

A. *Facts*

1. *DEA Agent Camarena and DEA Informant Zavala's abduction and murder.*

During 1984, the DEA successfully executed a series of raids of marijuana fields operated by a Guadalajarian drug cartel located in Mexico, resulting in a record seizure of marijuana with a wholesale value of approximately five billion dollars.⁶ The raids were executed, in part, by DEA agent Enrique Camarena

6. Paul Lieberman, *Agents Say Mexico Officials Stymied Raid*, L.A. TIMES, May 23, 1990, at A7. During the raids, the agents found fields:

beyond the imagination of even the most veteran drug investigators: acres of desert turned into pot-growing oases through use of deep underground wells, about 9,000 workers who had been kept under armed guard to tend the fields, and mounds of harvested marijuana stretching along a road for a quarter mile.

Id.

and DEA informant Alfredo Zavala Avelar (Zavala), who assisted the DEA by scouting for marijuana fields.⁷ Camarena, described as a “narc’s narc,” was raised in poverty, and his knowledge of Spanish “street language” enabled him to move from circle to circle and blend easily with racketeers of the drug underworld.⁸ However, the DEA’s successes prompted retaliation by the cartel,⁹ resulting in the kidnapping and torturing of DEA agent Camarena and informant Zavala.¹⁰ On February 7, 1985, Camarena and Zavala were kidnapped within hours of each other.¹¹ One month later, the beaten and partially decomposed bodies of Camarena and Zavala were discovered by Mexican police near a ranch approximately sixty miles east of Guadalajara.¹² An autopsy of the bodies indicated that Zavala had been buried alive, while agent Camarena had been badly beaten and tortured.¹³

Camarena’s torturers recorded his interrogation, presumably to be played to high ranking Mexican officials so they could ascertain whether the DEA had knowledge of the Mexican government’s involvement.¹⁴ During the summer of 1990, the interrogation tape, which included Camarena’s pleadings for help and requests for medical attention, was

7. Henry Weinstein, *Opening Volleys In Camarena Case*, L.A. TIMES, May 16, 1990, at A3.

8. H.G. Reza, *Murdered U.S. Agent Eulogized as ‘Martyr and Hero’*, L.A. TIMES, Mar. 10, 1985, part I, at 3.

9. See Weinstein, *supra* note 7 (asserting that U.S. tourists John Walker and Alberto Radelat were killed after being mistaken for DEA agents when they “stumbled into a restaurant meeting of Guadalajara drug traffickers one week before Camarena was slain.”).

10. Weinstein, *supra* note 7.

11. Marjorie Miller & Juan M. Vasquez, *DEA Agent, Pilot’s Bodies Positively Identified*, L.A. TIMES, Mar. 8, 1985, part I, at 3.

12. *United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (C.D. Cal. 1990), *aff’d sub nom.* *United States v. Alvariz-Machain*, 946 F.2d 1466 (9th Cir. 1991); Weinstein, *supra* note 7; Miller & Vasquez, *supra* note 11.

13. Miller & Vasquez, *supra* note 11.

14. Henry Weinstein, *Camarena Jury Hears Recording*, L.A. TIMES, June 9, 1990, at B1; see also Weinstein, *supra* note 7 (referencing Assistant U.S. Attorney John L. Carlton’s remarks that “members of the federal security directorate, . . . [Mexico’s] equivalent of the Federal Bureau of Investigation, were on the payroll of the drug traffickers”).

played for the jury during the trial of his accused murderers.¹⁵ During the trial in the Central District of California, the United States alleged that Humberto Alvarez-Machain (Alvarez),¹⁶ an obstetrician practicing in Guadalajara, Mexico,¹⁷ was present during Camarena's interrogation and administered a drug "to revive the agent when he passed out while being interrogated by his captors."¹⁸

2. *Alvarez's Abduction.*

Camarena's murder provoked an angry response by the United States,¹⁹ and served as a rally for U.S. drug enforcement agents.²⁰ On January, 30, 1985, a federal grand jury indicted twenty-two people in connection with the murders of Camarena and Zavala, including Alvarez.²¹ Ultimately, Alvarez was forcibly abducted and delivered to the United States by "associates" of DEA informant Antonio Garate Bustamante (Garate).²²

The United States had unsuccessfully negotiated with the Mexican government for the return of Alvarez prior to his abduction.²³ The first attempt at negotiation was initiated on December 13, 1989 by DEA agents Hector Berrellez and Bill Waters in response to a request by the Mexican government to deport Isaac Naredo Moreno (Naredo), who was wanted in Mexico in connection with the theft of large sums of cash from

15. Weinstein, *supra* note 14.

16. Humberto Alvarez-Machain was one of twenty-two persons indicted for "crimes in connection with the Camarena and Zavala torture/murders." *Caro-Quintero*, 745 F. Supp. at 602.

17. *Id.*

18. *Physician in Camarena Case Pleads Not Guilty*, L.A. TIMES, Apr. 11, 1990, at B2.

19. *U.S. Vows to Find Killers*, N.Y. TIMES, Mar. 8, 1985, at A3 ("We will follow these terrorists wherever they flee, and we will expand our efforts until they and all of their conspirators are brought to justice.")

20. Weinstein, *supra* note 7 (stating "[h]is murder has become a rallying point for U.S. law enforcement engaged in the self-described war against drugs, and the DEA's dogged crusade to avenge the death of one of its own").

21. *Caro-Quintero*, 745 F. Supp. at 602.

22. *Id.* at 601, 603.

23. *Id.* at 602-03.

Mexican politicians.²⁴ The request for Naredo was initiated by Mexican Federal Judicial Police Commandante Jorge Castillo del Rey (Castillo).²⁵ Castillo initiated the request through DEA informant Garate, who arranged a meeting with Berrellez and Waters.²⁶ During their meeting, Berrellez agreed with Castillo to extradite Naredo from the United States if Mexico would deliver Alvarez to the United States after the Christmas holiday.²⁷ However, “[o]n January 7, 1990, Garate advised Berrellez that the Mexican officials required \$50,000 in advance to cover the expense of transporting [Alvarez] to the United States.”²⁸ The DEA refused to “front any money for the operation,” and the planned exchange never occurred.²⁹

A second attempt to extradite Alvarez came on January 25, 1990 when Castillo renewed his request through Garate for the exchange of Naredo for Alvarez.³⁰ However, at that time, substantial publicity of Camarena’s murder had caused considerable tension between the United States and the Mexican government.³¹ As a result, DEA agent Berrellez

24. *Id.* at 602.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.* at 602–03 (stating this tension “resulted from the airing of the NBC mini-series based upon the Camarena murder and ensuing investigation”); *see also* Larry Rohter, *Mexicans React Furiously to an NBC Drug Series*, N.Y. TIMES, Jan. 18, 1990, at A13.

The broadcast last week by NBC of a three-part dramatic mini-series called “Drug Wars: The Camarena Story” offended the Mexican Government by depicting widespread official corruption in the battle against drugs here. Mexico’s state-owned television network responded on Sunday with a program charging that the American drug agent who was the hero of the NBC series was actually the “accomplice and partner” of leading Mexican cocaine traffickers It is not clear whether the dispute will move beyond the present war of words and damage day-to-day relations and cooperation on drug issues between the two governments. In the Mexican Congress, ire over the NBC series has led to calls for the expulsion of the D.E.A. from Mexico.

Id.

declined the request,³² and no agreement was made with the Mexican government regarding the extradition of Alvarez.³³

B. Procedural Posture

1. Alvarez's Criminal Trial

Following his abduction, Alvarez was indicted on January 31, 1990 for "conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity, conspiracy to kidnap a federal agent, kidnap of a federal agent, felony-murder, and accessory after the fact."³⁴ Alvarez challenged the indictment against him claiming violation of due process, violation of the United States extradition treaty with Mexico, and violations of the United Nations' (U.N.) and Organization of American States' (O.A.S.) charters.³⁵ The District Court dismissed his due process claim but did not reach the U.N. and O.A.S. charter violation claims because "of its holding with regard to the extradition treaty."³⁶ The court also found that it did not have jurisdiction because the United States violated the extradition treaty between itself and Mexico.³⁷ Instead of acting in accordance with that treaty, the agents acted "unilaterally, without the participation or consent of the Mexican Government, and the Mexican government ha[d] registered an official protest to [the] actions."³⁸ As such, the court ordered the United States to immediately return Alvarez

32. See *Caro-Quintero*, 745 F.Supp. at 603 (testifying "that he cancelled the meeting because he feared that the meeting was a 'set-up' by the Mexicans").

33. *Id.*

34. *Id.* at 601 n.1 (citations omitted).

35. *Id.* at 601.

36. *Id.* at 606, 614.

37. *Id.*; Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059. "Extradition treaties by their nature are deemed self-executing" and therefore "limit the means by which a state may obtain jurisdiction over an individual located in the territory of the other contracting state." *Caro-Quintero*, 745 F. Supp. at 607, 610 (analyzing the Supreme Court's conclusions in *United States v. Rauscher*, 119 U.S. 407 (1886)). "Where an extradition treaty is in place, an individual 'can only be taken under a very limited form of procedure.'" *Id.* (citing *Rauscher*, 119 U.S. at 421).

38. *Caro-Quintero*, 745 F. Supp. at 601, 614.

to Mexico,³⁹ and the Ninth Circuit affirmed in a per curiam opinion.⁴⁰ The government appealed, and the Supreme Court granted certiorari in 1992.⁴¹

On June 15, 1992, the Supreme Court reversed the district court's finding that the United States lacked jurisdiction and remanded the case for further proceedings.⁴² Writing for the majority, Chief Justice Rehnquist noted that the treaty merely provided a mechanism for extradition and the "procedures to be followed when the Treaty is invoked."⁴³ Additionally, Chief Justice Rehnquist noted that the treaty "does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution."⁴⁴ Therefore, Chief Justice Rehnquist concluded that "to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice."⁴⁵

Alvarez then stood trial in United States District Court in November 1992,⁴⁶ but was acquitted of all charges on December 14, 1992.⁴⁷ While he admitted to being in the home where Camarena was tortured and murdered,⁴⁸ he steadfastly denied administering drugs to prolong Camarena's life during the torture.⁴⁹ United States District Judge Rafeedie criticized the

39. *Id.* at 614.

40. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466 (9th Cir. 1991) [hereinafter *Alvarez-Machain I*], *cert. granted*, 502 U.S. 1024 (1992).

41. *United States v. Alvarez-Machain*, 502 U.S. 1024, 1024 (1992) [hereinafter *Alvarez-Machain II*], *rev'd*, 504 U.S. 655 (1992).

42. *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992) [hereinafter *Alvarez-Machain III*], *remanded to* 971 F.2d 310 (9th Cir. 1992).

43. *Id.* at 664–65.

44. *Id.* at 664.

45. *Id.* at 668–69.

46. Brief in Opposition to Petition for Writ of Certiorari at 5, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

47. *Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1996) [hereinafter *Alvarez-Machain IV*]; Lou Cannon, *U.S. Judge Acquits Mexican In DEA Agent's '85 Killing*, WASH. POST, Dec. 15, 1992, at A1.

48. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1048 (9th Cir. 2001) [hereinafter *Alvarez-Machain VI*], *reh'g en banc granted*, 284 F.3d 1039 (9th Cir. 2002); Cannon, *supra* note 47.

49. Cannon, *supra* note 47.

government for trying the case on “flimsy evidence” that was “whole cloth, the wildest speculation,”⁵⁰ and chastised the government for withholding “potentially exculpatory evidence from the defense, [and] failing to take him promptly before a magistrate after he reached United States territory under arrest.”⁵¹ Following his acquittal, Alvarez returned to Mexico.⁵²

2. *Alvarez's Civil Action*

On July 9, 1993, Alvarez filed several actions against the United States and the individuals involved with his abduction.⁵³ He filed an administrative claim under the Alien Tort Claims Act⁵⁴ (ATCA), various tort and constitutional claims against the United States and several DEA agents, and a claim under the Torture Victim Protection Act⁵⁵ (TVPA) against three DEA agents individually.⁵⁶ Alvarez was able to assert a private right

50. *Id.* (quoting United States District Judge Rafeedie).

51. *Alvarez-Machain IV*, 107 F.3d at 699.

52. *Alvarez-Machain VI*, 266 F.3d at 1049.

53. *Id.*

54. See 28 U.S.C. § 1350 (2000) (“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.”).

55. See 28 U.S.C. § 1350 note § 2 (providing expressly for the “Torture Victim Protection Act”).

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Id.

56. *Alvarez-Machain IV*, 107 F.3d at 699. United States District Judge Davies substituted the United States as defendant for DEA agents Berrellez, Waters, Gruden, and Lawn pursuant to 28 U.S.C. § 2679, and Alvarez stipulated to the substitution of the United States for Garate. *Alvarez-Machain v. United States*, No. CV 93-4072, 1999 U.S. Dist. LEXIS 23304, at *4-5 & n.1 (C.D. Cal. Mar. 18, 1999) [hereinafter *Alvarez-Machain V*]. Sosa's motion for substitution, though certified by the Attorney General that Sosa was acting within the scope of his employment, was denied. *Id.* at *17. After a brief analysis of Sosa's role in the operation, the court concluded that “under the Ninth Circuit's ‘control’ test, or even the broader test of Logue and the Second Restatement of Agency, Defendant Sosa was not an employee.” *Id.* As such, defendant Sosa remained

of action under the TVPA because the Torture Victims Protection Act was codified in 1991 in the notes to 28 U.S.C. § 1350, but was not added to the express language of the statute.⁵⁷

In his civil action, Alvarez alleged constitutional violations arising out of conduct occurring both in the United States and Mexico.⁵⁸ The District court dismissed the constitutional claims arising out of misconduct in Mexico, and the Ninth Circuit affirmed, recognizing that the Supreme Court held that he was not denied due process in his criminal trial.⁵⁹

Alvarez's tort claims included: "(1) kidnapping, (2) torture, (3) cruel and inhuman and degrading treatment or punishment, (4) arbitrary detention, (5) assault and battery, (6) false imprisonment, (7) intentional infliction of emotional distress, (8) false arrest, (9) negligent employment, (10) negligent infliction of emotional distress, and (11) various constitutional torts."⁶⁰ "The [District Court] refused to dismiss the tort claims as barred by the statute of limitations, and denied the motion based upon the defense of qualified immunity asserted by defendants accused of wrongful conduct within the United States,"⁶¹ but dismissed Alvarez's claims under the TVPA because it held that the conduct pertinent to the complaint occurred prior to the

the only individual defendant. *Id.* at *4 n.1.

57. Due to controversy regarding whether the Alien Tort Claim Act would support a private right of action for torture, Congress explicitly added such a right. S. REP. NO. 102-249, at 4-5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

Judge Robert H. Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit grant by Congress of a private right of action for lawsuits which affect foreign relations.

The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

Id.

58. *Alvarez-Machain IV*, 107 F.3d at 699.

59. *Id.* at 702.

60. *Alvarez-Machain VI*, 266 F.3d 1045, 1049 (9th Cir. 2001), *reh'g en banc granted*, 284 F.3d 1039 (9th Cir. 2002).

61. *Alvarez-Machain IV*, 107 F.3d at 698.

effective date of the TVPA.⁶² The Ninth Circuit affirmed the District Court's denial of the statute of limitations and qualified immunity defenses, but reversed the District Court's finding that the TVPA was inapplicable.⁶³ In fact, the Ninth Circuit held that liability under the TVPA could exist even if the conduct of the DEA agents occurred prior to its codification.⁶⁴

The District Court granted Alvarez's claims against Sosa for kidnapping and arbitrary detention under the ATCA, but held that he could only recover for unlawful detention while in Mexico and not in the United States.⁶⁵ The court then applied United States law to determine damages, and ultimately awarded Alvarez a total of \$25,000.⁶⁶

Both parties appealed, and the Ninth Circuit affirmed Sosa's liability under the ATCA and the award of damages against him.⁶⁷ However, the court reversed the dismissal of Alvarez's FTCA claims against the United States and remanded for a determination of liability.⁶⁸

The Ninth Circuit granted a rehearing and affirmed their prior holding.⁶⁹ The Supreme Court granted certiorari on December 1, 2003,⁷⁰ and overturned the Ninth Circuit by finding that Alvarez did not have a claim under the ATCA or under the FTCA.⁷¹

II. ANALYSIS

While Alvarez's case presented numerous issues involving the viability of his tort claims, the liability under the ATCA of private individuals acting in conjunction with the United States

62. *Id.* at 700.

63. *Id.* at 698.

64. *Id.* at 702-04.

65. *Alvarez-Machain VI*, 266 F.3d at 1049.

66. *Id.*

67. *Id.* at 1064.

68. *Id.*

69. *Alvarez-Machain VII*, 331 F.3d 604, 641 (9th Cir. 2003), *cert. granted sub nom. Sosa v. Alvarez-Machain*, 124 S.Ct. 807 (2003).

70. *United States v. Alvarez-Machain*, 124 S. Ct. 821, 821 (2003) [hereinafter *Alvarez-Machain VIII*], *rev'd sub nom. Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

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

government and the United States' liability under the FTCA for the acts of the DEA agents are complex issues of international law. As such, this Note explores the contours of the ATCA and the FTCA implicated in a trans-border abduction initiated by DEA agents and private individuals acting in conjunction with them.

A. *The Alien Tort Claims Act.*

The ATCA provides: "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."⁷² The plain language of the statute protects a person against an infringement against "the law of nations."⁷³ On its face, the statute does not purport to create a private right of action, but rather, it grants the United States federal courts jurisdiction to hear cases involving a violation of a "law of nations," and it has been so applied.⁷⁴ Because the phrase "law of nations" is not expressly defined in the statute, the plaintiff must show that the infringement of his rights rises to the level of a violation of the "law of nations." As such, Alvarez had to show that his claims of arbitrary detention and kidnapping were actionable under the ATCA.

Sosa argued that his conduct was not actionable under the ATCA because it did not rise to the level of the infringement of so-called *jus cogens* norms—rights embodied by the international community, nonderogable, and superceding of any conflicting international agreement or law.⁷⁵

72. 28 U.S.C. § 1350 (2000). The ATCA was enacted as a part of the First Judiciary Act of 1789. *Alvarez-Machain VII*, 331 F.3d at 611. The court noted that the Act "received little attention until 1980, when the Second Circuit, in a comprehensive analysis of the statute, held that the ATCA provided subject matter jurisdiction over an action brought by Paraguayan citizens for torture. . . ." *Id.* (footnote omitted).

73. 28 U.S.C. § 1350.

74. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2nd Cir. 1980); Russell G. Donaldson, Annotation, *Construction & Application Of Alien Tort Statute (28 USCS § 1350), Providing For Federal Jurisdiction Over Alien's Action For Tort Committed In Violation Of Law Of Nations Or Treaty Of The United States*, 116 A.L.R. FED. 387, at B § 12 (1993).

75. *Alvarez-Machain VI*, 266 F.3d 1045, 1050 (9th Cir. 2001) (quoting the definition of "*jus cogens*" norms from the RESTATEMENT (THIRD) OF FOREIGN RELATIONS

While certain specific conduct is actionable under the ATCA *per se*,⁷⁶ other bases for violations include violations of United States treaties or require a showing of the deprivation of a *jus cogens* right.⁷⁷ However, the appellate court found that finding tortious conduct to be violative of a *jus cogens* norm is not an element of an ATCA claim.⁷⁸ Therefore, the court found that Alvarez had stated valid claims of kidnapping and arbitrary detention under the ATCA,⁷⁹ obviating the question of whether such conduct is a *jus cogens* norm. Therefore, the court

LAW § 102 cmt. k (1987)), *reh'g en banc granted*, 284 F.3d 1039 (9th Cir. 2002).

76. Donaldson, *supra* note 74 at § 2(a).

Claims that defendants tortiously committed “official murder” or performed summary executions without due process of law have been held to state a cause of action under 28 U.S.C.A. § 1350 as alleging a tort committed “in violation of the law of nations,” as have claims of causing the utter disappearance or torture of persons by officials acting under color of governmental authority.

...

Tortious conduct expressly determined by the courts not to constitute a violation of international law so as to fall within the ambit of 28 U.S.C.A. § 1350 has included cruel, inhuman, or degrading treatment short of actual torture, kidnapping, censorship or denial of free speech, libel, negligence resulting in death or personal injury, the deliberate exportation of dangerous pollutant materials, and violations of the admiralty standard of “seaworthiness”.

Id. (internal citations omitted).

77. *Id.*

78. *Alvarez-Machain VI*, 266 F.3d at 1050.

79. *Id.* The court side-stepped the issue of whether a trans-border kidnapping would be a violation of a *jus cogens* norm, and instead relied on *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1993) (holding that arbitrary arrest and detention was actionable under the ATCA). The *Alvarez-Machain* court then expressly stated that “[w]e have recognized that the ‘law of nations,’ the antecedent to customary international law, and *jus cogens* are related but distinct concepts.” *Alvarez-Machain VI*, 266 F.3d at 1050. There appears to be no disagreement among the circuit courts that *jus cogens* norms and the “laws of nations” are distinct concepts. *See, e.g.*, *Sampson v. Fed. Republic of Germany & Claims Conference*, Article 2 Fund, 250 F.3d 1145, 1150 (7th Cir. 2001); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-16 (9th Cir. 1991). In its brief, the United States asserted that the Second Circuit’s description in *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2nd Cir. 2003), would limit actions under the ATCA to require a violation of *jus cogens* norms, but the court never expressly states that as a matter of law. Brief of Petitioner at 46, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); *see also* *Kadic v. Karadzic*, 70 F.3d 232, 238-44 (2nd Cir. 1995) (discussing alleged violations of the “laws of nations” without discussing *jus cogens* norms).

concluded it had jurisdiction over Alvarez's ATCA claims.⁸⁰

In his dissenting opinion, Judge O'Scannlain based his analysis on the conceptual foundation laid by the Ninth Circuit in *In re Estate of Ferdinand Marcos, Human Rights Litigation*,⁸¹ that the "law of nations" must be "a norm that is specific, universal, and obligatory."⁸² As Judge O'Scannlain observed, "in determining whether a norm is 'universal,' the United States is to be counted as a part of the universe."⁸³ As such, Judge O'Scannlain contrived an element to ATCA claims: they must be a violation of United States "federal common law."⁸⁴ Hence, Judge O'Scannlain concluded that "[t]he United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws."⁸⁵

In essence, Judge O'Scannlain concluded that because the United States has reserved the right to kidnap a foreign citizen without the consent of the foreign government, a trans-border abduction is not a violation of federal law, and hence, not a violation of the "law of nations." However, while it is true that the United States has reserved the right to execute a trans-

80. *Alvarez-Machain VI*, 266 F.3d at 1049. However, the Supreme Court, in holding that Alvarez ATCA claim lacked the requisite specificity to succeed, concluded that "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." *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761-62, 2769 (2004).

81. 25 F.3d 1467 (9th Cir. 1994).

82. *Id.* at 1475.

83. *Alvarez-Machain VII*, 331 F.3d 604, 650 (9th Cir. 2003), *cert. granted sub nom.* *Sosa v. Alvarez-Machain*, 124 S.Ct. 807 (2003).

84. *See id.* at 649-650 (noting that "[t]he ACA's conformity with Article III rests on the incorporation of the law of nations as federal common law").

85. *Id.* at 653 (footnote omitted). Judge O'Scannlain also cited to *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) as an additional example of U.S. action to abduct General Noriega pursuant to a federal grand jury indictment, without authorization from the Panamanian government, and in violation of the United States' extradition treaty with the Panamanian government. *Alvarez-Machain VII*, 331 F.3d at 652-53. However, Noriega's abduction was hardly arbitrary; Noriega's seizure was executed pursuant to President Bush's order on December 20, 1989 for a U.S. military invasion of Panama to, among other purposes, "seize General Noriega to face federal drug charges in the United States." *United States v. Noriega*, 746 F. Supp. 1506, 1511 (S.D.Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

border abduction, it has not reserved the right to execute an *arbitrary* trans-border abduction.⁸⁶

Indeed, as the majority noted, the United States has in the past conducted foreign arrest operations when necessary, as it did in *United States v. Chen*⁸⁷ in 1993.⁸⁸ However, as the majority succinctly noted, “this case is not *Chen*.”⁸⁹ The operation at issue in *Chen* did not involve an abduction from a foreign country, but rather international waters, and consisted “solely of observing and recording events,” while also being explicitly authorized by the Attorney General and the Immigration and Naturalization Service (INS).⁹⁰ As such, the *Chen* operation could hardly be labeled arbitrary. As concurring Judge Fisher further explained, “the decision to sneak into a friendly nation and abduct one of it [sic] citizens, in violation of international law, was not for the DEA to make. That decision belonged to the Attorney General and other members of the Cabinet.”⁹¹ Had the Attorney General authorized the capture of Alvarez, rather than individual DEA field agents, Judge O’Scannlain’s point that Alvarez’s abduction was not a violation of the “law of nations” would have been well founded in light of *Chen* and *Noriega*.

Therefore, even though the United States has reserved the right to abduct a foreign citizen notwithstanding an extradition

86. Judge O’Scannlain’s indignation, insofar as he felt the majority concluded that the United States could never exercise its power to execute a trans-border abduction, was misplaced. The majority clearly noted that it was the arbitrary nature of the abduction that implicated the ATCA under these facts. *Alvarez-Machain VII*, 331 F.3d at 629. As such the majority did not foreclose the ability of the United States to procure a foreign national by proper means. *Id.*

We are not suggesting that Congress lacks the power to enact laws authorizing extraterritorial law enforcement powers. Nor do we question the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise. Rather, we are simply saying that we cannot impute such an intent where it is not expressed, and Congress has expressed no such intent here.

Id.

87. 2 F.3d 330 (9th Cir. 1993).

88. *Alvarez-Machain VII*, 331 F.3d at 627.

89. *Id.*

90. *Id.* at 627–28.

91. *Id.* at 645.

treaty, the DEA's unilateral decision was an arbitrary detention under the "law of nations" and actionable under the ATCA.

B. The Federal Tort Claims Act.

The Federal Tort Claims Act⁹² provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."⁹³ The FTCA "acts as a waiver of the United States' sovereign immunity for certain torts committed by its employees."⁹⁴ However, the FTCA is merely a mechanism for recovery against the United States, and does not create a private right of action.⁹⁵ As such, a plaintiff seeking recovery under the FTCA must plead a cause of action recognized in the forum where the events giving rise to the claim occurred.⁹⁶ Therefore, Alvarez's claims against the United States for kidnapping and arbitrary detention rested upon the State law principles of where the relevant events occurred. Because the "event," defined broadly, includes both the creation and the execution of the abduction scheme, it had "occurred" in both the United States, where the DEA agents initiated his abduction, and Mexico, where the plan was executed.⁹⁷ The place of occurrence is especially relevant in

92. The Federal Employees Liability Reform and Tort Compensation Act includes 28 U.S.C. §§ 1346(b), 2671–80, and was enacted in November 18, 1988 for the express purpose to "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564 (1988).

93. 28 U.S.C. § 2674 (2000).

94. Alvarez-Machain VI, 266 F.3d 1045, 1054 (9th Cir. 2001), *reh'g en banc granted*, 284 F.3d 1039 (9th Cir. 2002).

95. P. H. Vartanian, Annotation, *Federal Tort Claims Act*, 1 A.L.R.2d 222 at § 16 (1948) ("A claim or suit under the Federal Tort Claims Act can be based only upon an act or wrong which, under the law of the place of its commission, gives rise to a cause of action.").

96. *Id.*

97. See *Richards v. United States*, 369 U.S. 1, 10 (1962) ("We conclude that Congress has, in the Tort Claims Act, enacted a rule which requires federal courts, in multistate tort actions, to look in the first instance to the law of the place where the acts

such instances, as a claim arising exclusively in a foreign country is not actionable under the FTCA.⁹⁸ This is commonly identified as the Foreign Activities Exception.⁹⁹

The Foreign Activities Exception is rooted in the express language of the FTCA itself: “The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (k) [a]ny claim arising in a foreign country.”¹⁰⁰ As the court recognized, the statutory “exception is more than a choice of law provision: it delineates the scope of the United States’ waiver of sovereign immunity.”¹⁰¹ As such, to state a valid claim under the FTCA, Alvarez would have to show that the acts occurring within the United States are actionable under state law.

The Supreme Court addressed this specific issue in *Richards v. United States*.¹⁰² In *Richards*, the Supreme Court considered whether the law of the forum where the act or omission occurred or “the place where the negligence had its operative effect” should control.¹⁰³ Writing for the majority, Chief Justice Warren concluded that a reading of the statute as a whole and its legislative history “requires application of the whole law of the State where the act or omission occurred.”¹⁰⁴ Noting the Court’s decision in *Richards*, the Ninth Circuit applied the “headquarters doctrine” created in *Richards*, and held that Alvarez could maintain a claim for the acts that occurred in the United States, even though the “operative effect” of the acts took place in Mexico.¹⁰⁵

of negligence took place.”).

98. 28 U.S.C. § 2680(k) (2000). However, the Supreme Court, in finding that the Foreign Activities Exception barred Alvarez’s FTCA claim, held that the Foreign Activities Exception “bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004).

99. *Alvarez-Machain VI*, 266 F.3d at 1054.

100. 28 U.S.C. § 2680.

101. *Alvarez-Machain VI*, 266 F.3d at 1054 (quoting *Smith v. United States*, 507 U.S. 197, 201 (1993)).

102. 369 U.S. 1 (1962).

103. *Id.* at 5.

104. *Id.* at 11.

105. *Alvarez-Machain VI*, 266 F.3d at 1054. The Supreme Court directly rejected the Ninth Circuit’s analysis, and concluded that the headquarters doctrine should have

Looking to California law, the majority concluded that the DEA's conduct satisfied the elements for false arrest.¹⁰⁶ The court noted that both parties agreed that California law applied, and then concluded that, because Alvarez's court-issued arrest warrant was valid only in the United States, it did not have jurisdiction to issue a warrant to abduct Alvarez from Mexico.¹⁰⁷ The court concluded then that the arrest was arbitrary because it was made without proper authority.¹⁰⁸

In doing so, the Ninth Circuit reversed the decision of the district court. Looking to California law, the district court defined false arrest as "an arrest conducted without lawful authority."¹⁰⁹ The district court had reasoned that, even if the arrest warrant issued in the United States were invalid, the arrest, if made in California, would still be valid if the arrest warrant were regular upon its face, if the arrest were made without malice, and "in the reasonable belief that the person arrested is the one referred to in the warrant."¹¹⁰ The court had also added that California gives a private citizen the authority to make an arrest, "pursuant to a valid felony warrant and indictment."¹¹¹ Therefore the district court had concluded that because the arrest "did not occur 'without lawful authority,' [the plaintiff fail[ed] to satisfy an element of the tort."¹¹²

The Ninth Circuit, however, rejected both prongs of analysis. First, the circuit court dismissed outright the assertion that an analogy to the power of a private citizen could justify the arrest because California law makes "the law of citizen arrests an inappropriate instrument for determining FTCA liability."¹¹³

no part in applying the Foreign Activities Exception. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004).

106. *Alvarez-Machain VII*, 331 F.3d 604, 641 (9th Cir. 2003), *cert. granted sub nom.* *Sosa v. Alvarez-Machain*, 124 S.Ct. 807 (2003).

107. *Id.* at 640-41.

108. *Id.* at 641.

109. *Alvarez-Machain V*, No. CV 93-4072, 1999 U.S. Dist. LEXIS 23304, at *42 (citing *Scotfield v. Critical Air Med.*, 52 Cal. Rptr.2d 915 (1996)).

110. *Id.* at *43-44 (quoting CAL. CIVIL CODE § 43.55 (West 1999)).

111. *Id.* at *43.

112. *Id.* at *48.

113. *Alvarez-Machain VII*, 331 F.3d 604, 641 (9th Cir. 2001) (quoting *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir. 1985)), *cert. granted sub nom.* *Sosa v. Alvarez-*

Lastly, the circuit court held that because the district court had no jurisdiction to issue Alvarez's arrest warrant, the DEA agent's arrest thereunder was "false" under California law and therefore actionable under the FTCA.¹¹⁴

III. CONCLUSION

The Ninth Circuit noted that, in a time of global terrorism, the ability of the United States to bring to justice those who are responsible for terrorist acts should not be hobbled by anxiety over excessive tort liability for the violation of a fugitive's civil rights.¹¹⁵ Nevertheless, cooperation with foreign nations in a fugitive's apprehension remains among the most effective of our law enforcement weapons. The pedigree of *Chen* and its successors teach us that such measures may be effectively employed. While the United States has not foreclosed the possibility that a trans-national abduction may ultimately be necessary for justice to be served, resorting to such procedures should remain in the hands of those who are most capable of assessing the benefits and consequences of unilateral action. Unfortunately, the action of the DEA field agents, without official executive sanction, departed wildly from our standards of proper extradition.

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Machain, 124 S.Ct. 807 (2003).

114. *Id.*

115. *Id.* at 608.

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