SUPREME COURT OF THE UNITED STATES

Nos. 03–339 and 03–485

JOSE FRANCISCO SOSA, PETITIONER
03–339 *v.*
HUMBERTO ALVAREZ-MACHAIN ET AL.

UNITED STATES, PETITIONER
03–485 *v.*
HUMBERTO ALVAREZ-MACHAIN ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 29, 2004]

JUSTICE BREYER, concurring in part and concurring in the judgment.

I join JUSTICE GINSBURG's concurrence and join the Court's opinion in respect to the Alien Tort Statute (ATS) claim. The Court says that to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy. *Ante,* at 38. The norm must extend liability to the type of perpetrator (*e.g.,* a private actor) the plaintiff seeks to sue. *Ante*, at 38, n. 20. And Congress can make clear that courts should not recognize any such norm, through a direct or indirect command or by occupying the field. See *ante*, at 37. The Court also suggests that principles of exhaustion might apply, and that courts should give "serious weight" to the Executive Branch's view of the impact on foreign policy that permitting an ATS suit will likely have in a given case or type of case. *Ante*, at 38–39, n. 21. I believe all of these condi-

tions are important.

I would add one further consideration. Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help assure that "the potentially conflicting laws of different nations" will "work together in harmony," a matter of increasing importance in an ever more interdependent world. *F. Hoffmann-La Roche Ltd.* v. *Empagran S. A.*, *ante*, at _ (slip. op., at 8); cf. *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804). Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote. See *ante*, 20–23.

These comity concerns normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national—where, say, an American assaults a foreign diplomat and the diplomat brings suit in an American court. See Restatement (Third) of Foreign Relations Law of the United States §§402(1), (2) (1986) (hereinafter Restatement) (describing traditional bases of territorial and nationality jurisdiction). They do arise, however, when foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm.

Since different courts in different nations will not necessarily apply even similar substantive laws similarly, workable harmony, in practice, depends upon more than substantive uniformity among the laws of those nations. That is to say, substantive uniformity does not *automatically* mean that universal jurisdiction is appropriate.

Thus, in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him. See, *e.g.*, *United States* v. *Smith*, 5 Wheat. 153, 162 (1820) (referring to "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity").

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. See Restatement §404, and Comment *a;* International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000). That subset includes torture, genocide, crimes against humanity, and war crimes. See *id.*, at 5–8; see also, *e.g.*, *Prosecutor* v. *Furundzija*, Case No. IT–95–17/1–T, ¶¶155–156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998); *Attorney Gen. of Israel* v. *Eichmann*, 36 I. L. R. 277 (Sup. Ct. Israel 1962).

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement §404, Comment *b*. That is because the

criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Brief for European Commission as *Amicus Curiae* 21, n. 48 (citing 3 Y. Donzallaz, La Convention de Lugano du 16 septembre 1998 concernant la competence judiciaire et l'execution des decisions en matiere civile et commerciale, ¶¶5203–5272 (1998); EC Council Regulation Art. 5, §4, 44/2001, 2001 O. J. (L 12/1) (Jan. 16, 2001)). Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.

Taking these matters into account, as I believe courts should, I can find no similar procedural consensus supporting the exercise of jurisdiction in this case. That lack of consensus provides additional support for the Court's conclusion that the ATS does not recognize the claim at issue here—where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another.