SOSA v. ALVAREZ-MACHAIN: EXTRATERRITORIAL ABDUCTION AND THE RIGHTS OF INDIVIDUALS UNDER INTERNATIONAL LAW

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I. ABSTRACT ............................................ 254
II. INTRODUCTION ........................................ 254
III. EXTRATERRITORIAL ABDUCTION: THE TRADITIONAL FRAILTIES OF INTERNATIONAL LAW .................. 255
IV. ANALYSIS OF SOSA V. ALVAREZ-MACHAIN ....... 258
   A. Background ....................................... 258
      1. The Criminal Proceedings ..................... 258
      2. The Civil Proceedings ........................ 259
   B. Decision of the U.S. Court of Appeals for the Ninth Circuit .... 262
   C. Decision of the U.S. Supreme Court .......... 263
V. IS THERE AN INDIVIDUAL RIGHT TO BE FREE FROM EXTRATERRITORIAL ABDUCTION? ........... 266
   A. What Human Right Should be Analyzed? .......... 266
   B. Determining the Content of Customary International Law ... 267
   C. International Human Rights Law ............... 269
      1. The United Nations Framework ................ 269
      2. The International Covenant on Civil and Political Rights 271
      3. The European Convention on Human Rights ... 275
   D. The Approach of Domestic Courts ............... 277
   E. Resolving the Issue: Is There a Customary Norm? .... 280
   F. The Implications of a Breach of This Right .... 282
VI. THE RIGHT TO BE FREE FROM EXTRATERRITORIAL ABDUCTION AND SOSA V. ALVAREZ-MACHAIN .... 285
   A. Reconciling the Supreme Court's Decision with the Customary Norm ..................................... 285
   B. Understanding the Influencing Factors on the Supreme Court .............................................. 287
VII. CONCLUSION ............................................ 292
BIBLIOGRAPHY .............................................. 294
TABLE OF CASES .............................................. 299

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I. ABSTRACT

Although the growth of extradition treaties has assisted in the prosecution of suspects who are not present in the state seeking their prosecution, there will always be situations where extradition is not available or plausible. In such circumstances the prosecuting state may be tempted to undertake an abduction in order to facilitate the prosecution of the individual in their own jurisdiction. The objective of this paper is to examine the use of state-sponsored abductions in light of international human rights law. Although the United States Supreme Court recently held in Sosa v. Alvarez-Machain that an extraterritorial abduction does not violate the rights of individuals under international law, it is evident that this judgment misread the content of customary international law. Individuals have the right to be free from extraterritorial abduction and despite the Supreme Court’s decision, recognition of this right is necessary to ensure that the fate of abductees is not entirely dependant upon whether states are willing to advance claims on their behalf.

II. INTRODUCTION

The issue of extraterritorial abductions is fraught with important policy and legal considerations. While there may be a pressing need to achieve justice by interrogating or prosecuting a suspect, efforts to secure custody may compromise the rights of the individual and those of the state where the individual resides (the host-state). This paper acknowledges that in the absence of consent by the host-state an extraterritorial abduction, or rendition, breaches international law by violating the sovereignty of the state. However, it is contended that an examination of the issues surrounding extraterritorial abductions is not limited to the confines of state sovereignty and it is therefore important that a human rights dimension is added to the analysis. This paper will argue that state-sponsored abductions violate an individual’s right to be free from extraterritorial abduction and that this right exists independently of whether there is also a breach of a state’s territorial integrity.

Such a right for individuals to be free from extraterritorial abduction was not acknowledged in the recent case of Sosa v. Alvarez-Machain. The United States Supreme Court had to consider whether abductees could bring a civil claim under the Alien Tort Statute alleging a violation of the “law of nations.” While the Court held that Alvarez had no cause of action, the approach of the Supreme Court to customary international law regarding abductions was flawed, and the decision was substantially influenced by the current war on terrorism.

Although the Supreme Court’s decision not to bar all future suits alleging violations of international law will be declared a victory by human rights advocates, there is a risk that the aspect of the decision relating to extraterritorial abductions may be overlooked. It is important that the Court’s decision is not recognized as an accurate appraisal of customary international law and that domestic courts throughout the world endeavour to protect the rights of abductedees.

Section II of this paper will outline the international law regulating extraterritorial abduction and the importance of recognizing individual rights within this state-centric analysis. Section III will discuss the decision of the Supreme Court in *Sosa v. Alvarez-Machain* and will illustrate that the Court’s determination of the role of the Alien Tort Statute affected the analysis of customary international law. This decision is further criticized in section IV, which demonstrates that individuals have a customary international law right to be free from extraterritorial abduction and that the Supreme Court’s examination of this norm was inadequate. This section will also demonstrate that although individuals have the right not to be abducted by states, as yet there is no corresponding international right requiring states to refrain from prosecuting those seized in violation of their rights. Finally, section V will conclude that the Supreme Court’s analysis of customary international law cannot be reconciled with state practice and will outline how the political climate and ideological predispositions could have influenced the Court’s misreading of the content of customary international law.

It is only by recognizing the right of individuals to be free from extraterritorial abduction that international law will be able to protect individuals in circumstances where the host-state is complicit in the abduction or is unwilling to protest the abduction. International law has traditionally been ineffective in such situations as individuals have not been acknowledged as actors in international law and the abduction is subsequently only viewed as a violating the rights of the state. Widespread recognition of the right of individuals not to be subjected to state-sponsored abductions is therefore an important development and is consistent with the growth of international human rights law which ensures that individuals are no longer completely dependant on states to advance claims on their behalf.

### III. EXTRATERRITORIAL ABDUCTION: THE TRADITIONAL FRAILTIES OF INTERNATIONAL LAW

The term “extraterritorial abduction” refers to the situation when a state seeking the custody of a suspected criminal forcibly removes that individual from a foreign country in order to facilitate criminal prosecution. States are encouraged into undertaking extraterritorial measures by the fact that in many
jurisdictions the mere physical presence of a suspect is sufficient for a court to exercise jurisdiction without an inquiry into how the individual was detained.3

It is a fundamental principle of international law that states must not perform "acts of sovereignty" within the territory of another state.4 There is consequently widespread recognition that extraterritorial abductions breach international law by violating the sovereignty and the territorial integrity of the host-state.5 A breach of international law constitutes an international wrong, for which the state in question has a responsibility to remedy.6 For individuals who have been abducted, the key issue is whether the remedy for the breach of international law mandates that they be repatriated.

The traditional view of international law is that the rights of the individual are irrelevant to the issue of whether the abductee will be prosecuted by the abducting state or returned to the aggrieved state. Traditionally, the only aspect of extraterritorial abduction that invokes state responsibility is the violation of sovereignty, the remedy for which has typically been left to the vagaries on international diplomacy.7 While the host-state may demand the return of an abductee as a remedy for the violation of its sovereignty, making an individual reliant upon the initiatives taken by the host-state not only leads to inconsistency in the treatment of abductees but also unsatisfactorily relegates the importance of international human rights law. Focusing on the claim of the "injured" state ignores the possibility that an individual may possess a right under international law that has been breached independently from that of a state.

While a state may bring an international claim based on the breach of its sovereignty, the law of diplomatic protection provides a means for a state to protest the treatment of its nationals. A state may bring a claim against another

state based on diplomatic protection when its citizens have been unable to obtain satisfaction for injuries caused by a state’s breach of international law.\(^8\) While such an approach minimises the failings of the international legal system to recognize the rights of an abductee, it is a misconception to view diplomatic protection as an effective means to vindicate the individual’s rights. Although a precondition of diplomatic protection is that an individual is harmed by the act of a state, such an injury is viewed as an injury to the individual’s state of nationality rather than to the individual.\(^9\) So the claim is transformed into an inter-state matter and the state is seeking redress for the injury caused to itself rather than to the individual.\(^10\) As is the case for inter-state claims based on a violation of sovereignty, an act of diplomatic protection is not a private right so individuals are entirely dependent on their national state to espouse their claim.\(^11\)

Recourse to diplomatic protection in cases of extraterritorial abduction has been relegated in importance due to the development of modern human rights laws. Since World War II this movement has not only facilitated a growing recognition of human rights, but also led to the acceptance that many of these rights are not simply derived from the rights of a state.\(^12\) Individuals are increasingly viewed as distinct actors in international law, and an infringement of their rights by a state may give rise to a claim being brought before an international organization\(^13\) or provide the basis for a civil suit. The acknowledgment that the rights of individuals are not necessarily fused with those of the state is important in the field of extraterritorial abductions as it allows an individual to challenge his/her abduction regardless of whether a state also protests the abduction. Furthermore, it means that international law may be able to provide a remedy to individuals who are abducted and removed from the country with the collusion of the host-state.

In the absence of recognition of independent human rights, international law has traditionally been unable to protect an abductee where connivance on the part of the host-state means that there is no violation of the sovereignty of

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\(^8\) Mavrommatis Palestine Concessions (Greece v. U.K.) 1924 P.C.I.J. (ser. A) No. 2 at 5, 6 (Aug. 30), available at http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis/ (last visited 9/30/05).


\(^11\) AMERASINGHE, supra note 9, at 60.


\(^13\) For example, accession to the First Optional Protocol to the International Covenant on Civil and Political Rights allows individuals to bring claims against that particular state before the United Nations Human Rights Committee.
the state, or where the host-state is unwilling to advance a claim. However, as this paper will demonstrate, these frailties of the international legal system have, to an extent, been rectified by the development of an international norm providing individuals with the right not to be subjected to extraterritorial abduction.

IV. ANALYSIS OF SOSA V. ALVAREZ-MACHAIN

A. Background

1. The Criminal Proceedings

In 1985 a Drug Enforcement Administration (DEA) agent working in Mexico was kidnapped and tortured over two days before being murdered. A grand jury in the Central District of California issued a warrant in 1990 for the arrest of Alvarez, a doctor, who was alleged to have been involved in prolonging the life of the agent for the purpose of interrogation. After Mexico refused to extradite Alvarez, the DEA approved a plan to abduct him in order to bring him to the United States to face charges. The DEA hired Mexican nationals, including Sosa, to abduct Alvarez and detain him overnight before he was flown back to the United States where DEA officials arrested him.

Following Mexico's protestation of the violation of its sovereignty, the U.S. Court of Appeals for the Ninth Circuit ruled in 1991 that the abduction violated principles of international law protecting the territorial integrity of a state as well as the extradition treaty between Mexico and the United States. Consequently, the Court ruled that the appropriate remedy was to dismiss the proceedings and for Alvarez to be returned to Mexico. However, the Supreme Court subsequently reversed this unanimous decision by the Court of Appeals. Adhering to an earlier decision in United States v. Rauscher that a defendant may not be prosecuted in violation of an extradition treaty, the focus of the Court was on whether the United States-Mexico extradition treaty was breached by Alvarez's abduction. Chief Justice Rehnquist for the majority determined that the extradition treaty was only intended to provide a mechanism for obtaining the custody of an individual in specific circumstances and was never intended to stipulate the only means by which a state could gain custody of an individual. After concluding that the treaty did not expressly prohibit abductions, the majority held that general principles of international law

14. BASSIOUNI, supra note 3, at 256.
17. Id.
provided no basis for inferring an implied term into the treaty precluding the use of state-sponsored abductions.

Just as controversial as the Court's meager analysis of international law was the dismissal of the relevance of international law, with the Court declaring it a matter for the Executive to take into consideration. As well as a scathing dissent from Justice Stevens, that labeled the decision as showing a "shocking disdain" for international law, the decision received near universal criticism from academics. However, while the Supreme Court settled the issue of jurisdiction over Alvarez, he was acquitted in his subsequent trial, with the trial judge noting that the case against him involved the "wildest speculation."

After having indicated in 1992 that Alvarez's abduction could give rise to a civil remedy, the Supreme Court was given another opportunity to consider the facts of the Alvarez case in 2004 when Alvarez filed claims against those involved in his abduction. Alvarez brought a claim against the United States under the Federal Tort Claims Act (FTCA) and a suit against Sosa and other Mexicans involved in his abduction under the Alien Tort Statute (ATS).

2. The Civil Proceedings

a. The FTCA

Alvarez's FTCA suit against the United States Government was based on the assertion that the DEA had no authority to arrest Alvarez in Mexico and that the Government was accordingly liable for his false arrest. While the FTCA was intended to make the Government as liable for tortious actions as an individual, it provides the Government with immunity for "any claim arising in a foreign country." The Supreme Court reversed the decision of the Court of Appeals and held that this exception applied even when tortious acts in foreign states were planned within the United States. Consequently the United States Government had immunity against Alvarez's claim.

20. Id. at 668-69.
21. Id. at 669.
b. The ATS

This paper focuses on the Supreme Court's treatment of Alvarez’s claim under the ATS. The ATS provides 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 law of nations or a treaty of the United States." 29

The issue for the courts to determine would appear, on the reading of this statute, to be whether the individuals who abducted Alvarez violated the law of nations or a treaty of the United States. However, rather than closely examining the relevant facts, the court cases became a debate on the role of the ATS under federal law.

The ATS is contentious because of its potentially wide use and political implications. The ATS was enacted in 1789, but remained largely unused for the most part of two centuries. 30 However, it was revitalized by the U.S. Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala. 31 In that case the Court held that a Paraguayan national could sue a former Paraguayan official in the United States for acts of torture committed in Paraguay. The Court held that the prohibition against torture was a specific, universal and obligatory international norm, and consequently there was a breach of the law of nations. 32 The view that the ATS could provide a forum for redressing any tortious violations of the law of nations regardless of the nationality of the defendant or the place of the violation prompted a flurry of human rights litigation in the United States. 33 However, some courts in the United States have failed to endorse the approach established in Filartiga, 34 with many commentators also concerned about the effects that widespread ATS litigation could have on the foreign relations of the United States. 35

32. Id. at 878.
33. Cases that have been brought by foreigners under the ATS include alleging summary execution, arbitrary detention, causing disappearance, genocide, war crimes, forced labour and violation of environmental standards. Kontorovich, supra note 30, at 8.
34. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).


Sosa v. Alvarez-Machain therefore, provided the Supreme Court with an opportunity to determine whether the recent revival of the ATS can be justified as consistent with the intentions of the drafters in 1789. It is readily apparent that to allow suits to be brought for any breach of international law would make the court system unworkable and could involve United States courts determining matters of international law that may have no relevance to the United States. To limit this apparently open-ended jurisdiction, courts have read in a requirement that the aspect of international law invoked by a plaintiff must be a "well-established, universally recognized norm." The universal nature of the norm would therefore provide a sufficient link for United States courts to take an interest in providing a forum to hear claims based on the most serious violations of international law. Although the ATS recognizes violations of the "law of nations or a treaty of the United States," by requiring the rule to have universal acceptance courts have effectively limited the scope of the ATS as only applying to breaches of customary international law.

Despite this judicial limitation on the applicability of the ATS, there are still concerns as to whether the Filartiga line of cases is accurate in concluding that the ATS creates a private right of action for individuals. Academic commentary on the role of the ATS appears to be evenly divided into two broad camps: those who believe that the ATS provides subject-matter jurisdiction for breaches of universally recognized norms of international law, and those who believe that the ATS merely confers procedural jurisdiction on federal courts to hear claims but does not create a cause of action for individuals. This latter viewpoint would severely limit the success of future ATS suits, as it would require plaintiffs to show that a particular norm in international law explicitly provides for a civil remedy.

36. Filartiga, 630 F.2d at 878; In re Estate of Ferdinand E. Marcos Human Rights Litigation v. Marcos, 978 F.2d 493 (9th Cir. 1992); Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1992).
It was against this background of contention as to the appropriate function of the ATS that Alvarez brought his claim. Indeed, as it transpired, the majority of submissions, and indeed all the amici curiae briefs, focused on the role of the ATS in federal law rather than examining whether Alvarez’s extraterritorial abduction was prohibited by customary international law.

B. Decision of the U.S. Court of Appeals for the Ninth Circuit

The Ninth Circuit in Alvarez-Machain v. Sosa affirmed the Filartiga position that the ATS granted courts jurisdiction to hear claims for breaches of international norms that were “specific, universal, and obligatory.”\(^{41}\) However, the Court found it unnecessary to examine whether there was an international norm prohibiting states from abducting individuals in violation of another state’s sovereignty as “the right of a nation to invoke its territorial integrity does not translate into the right of an individual to invoke such interests in the name of the law of nations.”\(^{42}\) The Court was correct in its view that Alvarez did not have standing to bring his claim solely on the violation of Mexican sovereignty. Although there was a breach of customary international law, to allow a lawsuit to be successful on this basis would mean that any individual of the wronged state would be able to bring a civil claim. The primary aim of the law of torts is to return an injured individual to their position prior to the alleged wrongful act,\(^{43}\) but in this case the harm was caused to Mexico and granting damages to Alvarez would not vindicate this harm.

Although Alvarez could not assert a claim for damages based on the breach of Mexican sovereignty he did have valid arguments for claiming that his extraterritorial abduction breached customary international law, and that damages should accordingly be awarded under the ATS. This claim is based on his individual rights, rather than the claim associated with Mexican sovereignty. However, like the Supreme Court to follow, the Court of Appeals refuted this claim, stating, “our review of the international authorities and literature reveals no specific binding obligation, express or implied, on the part of the United States or its agents to refrain from trans-border kidnapping.”\(^{44}\) This aspect of the decision will be discussed further under the analysis of the Supreme Court decision.

However, the Court also held that although there was no international prohibition against extraterritorial abduction, there was a clear and universally

\(^{41}\) Alvarez-Machain, 331 F.3d at 612.
\(^{42}\) Id. at 617.
\(^{44}\) Alvarez-Machain, 331 F.3d at 619.
recognized norm against arbitrary arrest and detention.\textsuperscript{45} Indicating that the DEA lacked authorization for extraterritorial law enforcement, the Court held that Alvarez was arbitrarily detained from the time he was kidnapped until he was handed over to authorities in the United States.\textsuperscript{46} With the en banc Court split 6-4, Sosa appealed to the Supreme Court.

C. Decision of the U.S. Supreme Court

The Supreme Court reversed the decision of the Court of Appeals in a judgment designed to re-fashion future litigation under the ATS. The Supreme Court agreed with Sosa’s submissions that it is “frivolous” and “implausible” to believe that the ATS authorizes the creation of causes of action for torts in violation of international law.\textsuperscript{47} However, the Court then back-tracked from its determination that the ATS is only jurisdictional in nature by recognizing that when the statute was created in 1789 Congress would have intended claims to be able to heard for a narrow set of international law violations.\textsuperscript{48} The Court adhered to the view of Sir William Blackstone in Commentaries on the Laws of England that as of 1789 only international law norms prohibiting the violation of safe conduct, the infringement of the rights of ambassadors and piracy were part of the common law.\textsuperscript{49} Accordingly, the Court determined that the ATS can permit suits based on a “modest” number of international law violations.\textsuperscript{50}

Justice Souter for the majority indicated that to provide the basis for an ATS suit, not only must an international norm be “specific, universal, and obligatory,”\textsuperscript{51} but that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”\textsuperscript{52}

Beyond the need for specificity and universal acceptance of the norm, the Court did not establish any other conditions for when an international norm would be considered analogous to the stated eighteenth century offences. This was because Alvarez’s suit was dismissed as not invoking a precise enough

\begin{itemize}
  \item \textsuperscript{45} \textit{Id.} at 621.
  \item \textsuperscript{46} \textit{Id.} at 626.
  \item \textsuperscript{47} \textit{Alvarez-Machain}, 124 S.Ct. at 2755.
  \item \textsuperscript{48} \textit{Id.} at 2756.
  \item \textsuperscript{49} \textit{Id.}
  \item \textsuperscript{50} \textit{Id.} at 2761.
  \item \textsuperscript{51} \textit{Id.} at 2766. In his dissent, Justice Scalia criticized the approach of the majority as encouraging uncertainty as the requirement that a norm be “specific, universal, and obligatory” was exactly the same test that led the Ninth Circuit Court of Appeals to reach a contrary conclusion concerning Alvarez’s abduction. \textit{Id.} at 2775 (Scalia, J., dissenting).
  \item \textsuperscript{52} \textit{Alvarez-Machain}, 124 S.Ct. at 2744.
\end{itemize}
norm to found an ATS claim.\textsuperscript{53} However, the Court did stress for the purposes of future cases that “this requirement of clear definition is not meant to be the only principle limiting the availability of relief in federal courts for violations of customary international law, although it disposes of this case.”\textsuperscript{54}

While the majority limited the scope of future ATS claims, the decision not to rule out future claims under the ATS was vehemently criticized by the dissenting judges. Justice Scalia denounced the majority’s treatment of the ATS as a usurpation of Congress’ lawmakering authority and lamented that “this Court seems incapable of admitting that some matters—any matters—are none of its business.”\textsuperscript{55} The dissent stressed that the “law of nations” was originally understood to refer to the regulation of state-to-state practices, and that any redefinition of the term to restrain a state’s activities towards individuals is an “invention” by academics and human rights advocates.\textsuperscript{56} Such an approach pays scant regard to the importance that human rights now have in international law, and as this paper will make evident later, the notion that international law should be viewed as a static concept at a point in time in the eighteenth century is motivated by ideological convictions. International law is a mobile concept and its development is dependant on the recognition of shifting state practice. It is regrettable that the Supreme Court, and especially the dissenting judges, felt constrained to strictly interpret the reference to the “law of nations” in the circumstances when the ATS was originally enacted.

Alvarez’s arguments before the Supreme Court were based on the conclusion of the Court of Appeals that his abduction constituted an arbitrary arrest and detention as it was conducted without lawful authority.\textsuperscript{57} The Supreme Court did not find it necessary to examine whether the DEA had the authority to sanction an extraterritorial arrest, holding that “Alvarez cites little authority that a rule so broad [as prohibiting arbitrary detention] has the status of a binding customary norm today.”\textsuperscript{58} This paper will not only show that Alvarez was hindered by the decision that his extraterritorial abduction should be analyzed in light of the more general right to be free from arbitrary detention, but that the Court’s analysis of international law was inadequate and failed to recognize the existence of an individual right to be free from state-sponsored abduction.

After indicating that customary international law did not prohibit Alvarez’s abduction and subsequent detention, the Court concluded that “It is enough to

\begin{itemize}
  \item \textsuperscript{53} \textit{Id}. at 2769.
  \item \textsuperscript{54} \textit{Id}. at 2766.
  \item \textsuperscript{55} \textit{Id}. at 2776 (Scalia, J., dissenting).
  \item \textsuperscript{56} \textit{Id}.
  \item \textsuperscript{58} Alvarez-Machain, 124 S.Ct. at 2768.
\end{itemize}
hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." 59

Such a conclusion would appear to indicate that the Court was not examining the content of customary international law from the same perspective as judges and academics around the world. Rather, it was examining whether there is a customary international norm specific enough to provide the basis of a suit in domestic law. However, while the Court could simply dismiss a case by holding that the alleged norm is not specific enough to found a suit under the ATS, such an approach presupposes the existence of the norm at the international level. The first determination of the Court has to be whether the norm exists under customary international law, and, if it does, the Court then has to examine whether it is specific enough to be incorporated into law under the ATS. 60 The Supreme Court implicitly accepted such an approach by noting that the alleged norm prohibiting arbitrary detention was much too broad to have the status of binding customary law, 61 but that in any event it was also too broad to allow for a suit under the ATS. 62

This paper does not challenge the determination that the alleged norm should not be actionable under United States federal law. Rather, it is contended that the Court erred in its conclusion that customary international law is not invoked by the abduction and detention of Alvarez. The implications of the Supreme Court's decision in Sosa v. Alvarez-Machain may not be limited to restricting the possibility of future abductees being able to claim damages under the ATS. By concluding that there was no customary international law prohibition against the forcible abduction and detention of individuals the Court may also have limited the potential for individuals to have criminal proceedings dismissed based a violation of their rights.

59. Id. at 2769.
60. Kontorovich concurs with such an approach, indicating that a Court must first determine whether an alleged norm has the required recognition to be part of the law of nations, before moving on to consider whether it can be said to be part of a narrower subset of being defined with a specificity comparable to eighteenth century offences. Kontorovich, supra note 30 at 13, 26.
62. Id. at 2745.
V. IS THERE AN INDIVIDUAL RIGHT TO BE FREE FROM EXTRATERRITORIAL ABDUCTION?

A. What Human Right Should be Analyzed?

As the Court of Appeals determined that there is no international norm prohibiting extraterritorial abduction, Alvarez did not pursue this argument before the Supreme Court. Rather, it was argued that his abduction nevertheless violated a prohibition on arbitrary detention. The Supreme Court was therefore only tasked with determining whether there is international recognition of the prohibition of arbitrary detention. It did not examine the trans-border nature of his abduction. Such an approach is flawed.

It is artificial to completely separate the analysis of the issues, as the Court of Appeals and the Supreme Court in Sosa v. Alvarez-Machain did. The question should not be whether international law provides a general right to be free from arbitrary detention, but whether evidence of this general right may demonstrate the existence of a more specific right to be free from extraterritorial abduction. By only focusing on the alleged right to be free from arbitrary detention the Supreme Court was able to highlight the high degree of generality of conduct that any such right would have to prohibit: ranging from unauthorized and unlawful arrests by police officers to a temporary detention by officers who overstep their authority. Due to an inability to prove that there was uniform international practice regarding all these scenarios, the Court was able to dismiss the alleged right to be free from arbitrary detention, without even having to consider the transnational nature of the detention.

By only considering the duration of Alvarez's detention and not taking into account the fact that he was forcibly removed from Mexico to the United States, the Supreme Court's approach fails to take into account the very feature of extraterritorial abductions that makes them scandalous. The Court is effectively treating a transnational abductee in the same manner it would any other individual who had been detained unlawfully by a state. However, where an individual is unlawfully detained by a state within its borders for the purpose of initiating criminal proceedings, there are often many due process rights that domestic courts can invoke to censure the Executive and vindicate the breach of the individual's rights. But where an individual is detained on foreign soil and transferred to another country to face trial, courts have been all too willing to hold that the procedural protections afforded by domestic law do not apply

63. Id. at 2767.
64. Id. at 2768.
65. Id. at 2769.
if the individual is not in the country. In the absence of such procedural protections it is important that courts considering the human rights of individuals are able to take into account the fact that the individual has been forcibly removed from another state in order to face prosecution.

While the Court of Appeals dismissed Alvarez’s claim that there is an individual right prohibiting extraterritorial abduction, it did so on the basis that the United States had no obligation to refrain from abducting an individual. It was evident that the Court considered itself bound by the 1992 Supreme Court decision that Alvarez’s abduction was not explicitly prohibited by the United States-Mexico Extradition Treaty. Such a state-centric approach only upholds individual rights to the extent that they do not restrict the actions of states. As the Supreme Court focused solely on the possible existence of a right to be free from arbitrary detention, the issue of whether individuals have a right to be free from extraterritorial abductions was never satisfactorily examined by either Court.

B. Determining the Content of Customary International Law

International law recognizes that state sovereignty is the basis of inter-state relations, and tries to create a framework where states are only bound by what they consent to. However, over time it is possible for state practice to create a legally binding rule in the form of customary international law. Unlike treaties, which are only binding on parties to them, customary international law, once established, is universally binding. Customary international law will emerge if there is consistent state practice coupled with opinio juris, a belief that such conduct is legally required.

66. For a good analysis of the issues surrounding the extraterritorial effect of domestic rights see Frank Tuerkheimer, Globalization of US Law Enforcement: Does the Constitution Come Along?, 39 HOU.S. L. R. 307 (2002). Bassiouni notes that while the United States Constitution applies extraterritorially in respect to the conduct of the United States towards its citizens, the law is not settled as to the extent that the Constitution applies to conduct by the United States towards an alien in a foreign country. Bassiouni, supra note 3, at 280-85. See also Paust, supra note 12; Joan Fitzpatrick, Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond, 25 LOY. L.A. INT’L & COMP. L. REV. 457; Timothy D. Rudy, Did We ‘Treaty Away Ker-Frisbie?’, 26 ST. MARY’S L. J. 791 (1995).

67. Alvarez-Machain, 331 F.3d at 617.

68. See Ernest Young, Sorting Out the Debate Over Customary International Law, 42 VA. J. INT’L L. 365 (2002), for a good review of critiques on the compatibility of customary international law with traditional consent-based international law.

69. Although as will be discussed, a persistent objector to a customary rule while it is being formulated is not bound by the application of the rule.

The International Court of Justice (ICJ) has indicated that the state practice giving rise to customary international law must be "settled." While the degree of uniformity of the practice must be extensive there is no need for complete consistency before norms become binding. However, there is provision for states to be exempt from being bound by customary international law if they can be said to have been a persistent objector to a customary rule while it was being developed.

Although states may act in a uniform manner on an issue, there must also be evidence that such conduct occurred because it corresponded with a legal obligation or a legal right. This *opinio juris* requirement of customary international law can often be inferred from state practice, or may be proven by official statements or treaty-based law. While the obligations imposed on states by their accession to treaties will not necessarily crystallize into customary international law, this may occur if there is widespread participation and the treaty is of a norm-creating character. As the International Law Association stated, the creation of customary international law through multilateral treaties occurs because:

> [P]arties to the treaty, in relation to nonparties, or non-parties in relation to parties or between themselves, adopt a practice in line with that prescribed (or authorized) by the treaty, but which is in fact independent of it because of the general rule that treaties neither bind nor benefit third parties.

The right to be free from extraterritorial abduction, as evidenced through a prohibition against arbitrary detention, satisfies these requirements of customary international law. The Supreme Court's analysis in *Sosa v. Alvarez-Machain* of the effect that international instruments have on the formation of customary international law was superficial and led the Court to erroneously conclude that customary international law does not protect an individual from extraterritorial abduction. Rather than simply focusing on the general protection from arbitrary detention, it is arguable that the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights have cumulatively shaped state practice regarding the right of individuals not to be subjected to state-sponsored abductions.

74. ILA, *supra* note 70, at 32.
75. *North Sea Continental Shelf, supra* note 71, para. 72–73.
76. ILA, *supra* note 70, at 46.
C. International Human Rights Law

1. The United Nations Framework

Article 2(4) of the United Nations (UN) Charter requires states to refrain from the threat or use of force against the territorial integrity of any state. The UN Security Council has interpreted this obligation to include state-sanctioned abductions without the permission of the state where the abductee resides. After Israel abducted former Nazi Adolph Eichmann from Argentina, the Security Council condemned the action as a violation of Argentina's sovereignty. Such a prohibition only relates to a violation of state sovereignty and is not applicable where the host-state colludes with the abducting state. Furthermore, the Charter may be seen as only regulating inter-state conduct and therefore not providing individuals with any independent rights.

However, the international law prohibition on violating state sovereignty through the use extraterritorial abduction is relevant to the issue of whether individuals possess an international right to be free from abductions. In many cases the international denunciation of abductions also extends to the fact that states have had to resort to extra-legal means to obtain custody of suspected criminals. Consistent state practice of refraining from conducting extra-territorial abductions may be due to the norm protecting a state's territorial integrity, but such practice can also be used to found a norm protecting the rights of an individual in such situations. However, proving that states refrain from forcible abductions because of a concern for human rights remains an important impediment to proving the existence of an individual right to be free from transnational abductions.

One of the purposes of the UN is to promote and encourage respect for "fundamental freedoms" and to this end the Universal Declaration of Human Rights was adopted by the General Assembly to establish non-binding principles relating to human rights and individual freedoms. At the time it was not viewed as imposing legal obligations, but constant reaffirmation by the General Assembly, universal acceptance by states, and wide-ranging reference to the Declaration in numerous international and national instruments, has meant that many of its standards have become binding customary international law.

79. Costi, supra note 5, at 68.
80. U.N. CHARTER art. 1, para. 3.
82. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 701. After a thorough analysis of
Although some academics believe that the Declaration in its entirety represents customary international law,\(^{83}\) for the purposes of this paper it is only necessary to examine the contribution that specific rights contained in the Declaration have had towards a customary international norm prohibiting extraterritorial abduction.

Article 3 of the Universal Declaration provides that “everyone has the right to life, liberty and security of person,” while article 9 more specifically states, “no one shall be subjected to arbitrary arrest, detention or exile.” The United States submitted to the ICJ in the Case Concerning United States Diplomatic and Consular Staff in Tehran\(^4\) (The Hostages Case) that not only did every state have an obligation to observe the Universal Declaration, but that articles 3 and 9 were fundamental rights to which all individuals were entitled.\(^{85}\) The Court agreed, concluding that “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.”\(^{86}\) Given the substantial contribution that the Declaration has had in the creation of customary international human rights law, it is very significant that the ICJ indicated that individuals have a basic right not to be arbitrarily detained. The recognition that such a right is consistent with the framework of the UN may help to show that the \textit{opinio juris} for any customary norm prohibiting extraterritorial abduction can be found through the desire of states to uphold human rights and to act consistently with the principles of the UN.

In light of the link provided by the ICJ between human rights and the UN Charter it is implausible that the prohibition of arbitrary detention would not include situations when an individual is forcibly abducted from another state. As a transnational abduction violates not only the rights of the individual, but also the territorial sovereignty of a state, such abductions would undermine the


\(^{86}\) \textit{Iran}, 1980 I.C.J. at ¶ 91.
founding principles of the UN. Despite these indications of how the Universal Declaration of Human Rights would inform the content of customary international law, the Supreme Court in *Sosa v. Alvarez-Machain* did not conduct any such analysis. After noting that the Declaration does not by itself impose any obligations under international law, the Court failed to adequately examine the role that the Declaration has played in establishing human rights norms, and particularly the evidence that the right to be free from arbitrary detention under the Declaration has crystallized into customary international law. The neglect of the Declaration and the principles underpinning the UN Charter illustrate the extent to which the Court's analysis of customary international law was result-orientated.

2. *The International Covenant on Civil and Political Rights*

Article 9(1) of the ICCPR provides that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Analysis of this right not to be subjected to arbitrary detention must answer two questions: does it provide an individual with the right to be free from extra-territorial abduction? And if so, what is the status of this right in international law?

The United Nations Human Rights Committee, which is tasked with hearing ICCPR claims under the Optional Protocol, has had several opportunities to examine the relationship between Article 9(1) and state-sponsored abductions. In *Celiberti de Casariego v. Uruguay*, a claim was brought to the Committee on behalf of a Uruguayan national who had been detained by Uruguayan officials in Brazil and forcibly removed to Uruguay where she was charged with offences against that state. The Committee upheld the claim, concluding that the “act of abduction into Uruguayan territory” constituted an arbitrary arrest and detention. Importantly the Committee noted that simply because a state party is not acting within its borders will not preclude the application of the Covenant. The Committee reached similar conclusions in the cases of *Saldias de Lopez v. Uruguay* and *Almeida de Quinteros v.

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90. *Id.* para. 11.
91. *Id.* para. 10.1.
Uruguay. The United Nations Working Group on Arbitrary Detention has even examined the facts of Alvarez's treatment and held that the abduction of Alvarez was contrary to international law as well as in violation of Article 9(1) of the Covenant.

These decisions indicate that the Human Rights Committee has taken a very strong position in favor of protecting the rights of abductedees. As commentator Paul Mitchell notes, "the Committee reinforced the customary international law rule prohibiting forcible abduction and transplanted the rule into the human rights context, protecting individuals qua individuals." However, the decisions go further than simply recognizing the right of individuals to be free from forcible state-sponsored abductions. They also did not consider it relevant to examine whether the host-states had consented to the rendition of the individuals. Indeed in Giry v. Dominican Republic and Canon García v. Ecuador the Committee held that even in situations where the host-state agrees to the irregular rendition of an individual rather than extradition, the abduction of an individual would constitute arbitrary arrest and detention. This is a dramatic departure away from the traditional position under international law whereby consent or collusion on the part of the host-state would mean that there was no breach of the state's sovereignty and consequently no possible remedy for the individual. Rather, it recognizes a right of the individual, regardless of a violation of the state's sovereignty.

The ICJ has indicated that the ability of states to make reservations to a right contained in a convention weighs against the potentially norm-creating character of the convention, and the likelihood of the right being transposed into customary international law. It is therefore pertinent that article 4 of the ICCPR allows states to derogate from the prohibition on arbitrary detention in times of public emergency threatening the life of the nation. This may appear to undermine the contention that the prohibition on arbitrary detention is not limited to the ICCPR but also exists under customary international law. However, the Human Rights Committee has determined that while the right may be derogated from in emergencies, the right to be free from arbitrary arrest and detention is part of customary international law and accordingly a state may not...
reserve the possibility of contravening this right. The possibility of derogating from this right in specific circumstances was intended to provide a means whereby a state may have to resort to extreme measures when the legitimate control of the state is threatened. The narrow confines under which article 9 is inapplicable indicates the consensus of states regarding the importance of this right to individuals. This consensus is widespread, with 152 states currently party to the ICCPR, and another eight states being signatories.

While the decisions of the Human Rights Committee attempt to infer the existence of a customary norm prohibiting extraterritorial abduction, it is arguable that by themselves they do no more than emphasize the ICCPR prohibition on extraterritorial abduction. However, the extensive recognition of the rights contained in the Covenant, the fact that Covenant is most certainly of a norm-creating character, and the steadfast position of the Human Rights Committee regarding the prohibition of extraterritorial abduction is certainly a starting point towards showing that there is enough uniformity amongst states to substantiate a claim that the right to be free from extraterritorial abduction has crystallized as customary international law.

The Supreme Court did not seem particularly swayed by the rights afforded by the ICCPR. Although the ICCPR had not been ratified by the United States at the time of Alvarez’s abduction, it was in force when the Supreme Court had to consider his suit based on the violation of customary international law. The Court placed great weight on the Senate’s decision not to make the Covenant directly enforceable in domestic law, stating that “Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.” Such an assertion is to drastically misread the extent of the non-self-executing declaration and the relationship between the ICCPR and customary international law.

99. Office of the High Commissioner of Human Rights, General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant, para. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (November 4, 1994) [hereinafter Issues Relating to Reservations].

100. Id. para. 10.


103. Alvarez-Machain, 124 S.Ct. at 2763.
Under the Constitution of the United States a treaty is as much a part of domestic law as an Act passed by the legislature.\(^\text{104}\) However, by attaching a non-self-executing declaration to the ratified treaty the legislature can either remove the standing of any individual to bring a claim under the treaty, remove the right of any individual to rely on the treaty in any form, or deny the existence of a cause of action in the absence of other incorporating legislation.\(^\text{105}\) When the Senate ratified the ICCPR, a non-self-executing declaration was attached with the Senate Foreign Relations Committee accentuating that its “intent is to clarify that the Covenant will not create a private cause of action in US courts.”\(^\text{106}\)

In *Sosa v. Alvarez-Machain*, the Court used the legislative desire that causes of action should not be directly founded on the ICCPR to dismiss any relevance that the ICCPR may have in creating customary international law. The implication of this approach is that Justice Souter viewed the non-self-executing declaration as taking precedence over the content of customary international law. The ICJ has declared that there are “no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter ‘supervenes’ the former, so that the customary international law has no further existence of its own.”\(^\text{107}\) However, it appears that this is precisely the basis of the Supreme Court’s approach to examining the ICCPR: the Court used the fact that the prohibition on arbitrary detention under ICCPR was not directly enforceable in domestic law to undermine the applicability of the same right being enforceable through customary international law.\(^\text{108}\) The Court placed too much weight on the status of the ICCPR under United States law rather than examining international practice concerning such rights. Alvarez was not seeking to create a cause of action based on the ICCPR, but merely claiming that multilateral instruments such as the ICCPR directly inform the content of customary international law.

Furthermore, the extent to which the ICCPR is self-executing in the domestic law of the United States is irrelevant as the ATS incorporates the “law of nations.” The Court should have recognized the role that multilateral

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104. U.S. CONST. art. VI, cl. 2.
108. Indeed Sosa submitted that when the Court came to examine the content of customary international law it could not take into account any treaty or international instrument that the United States had not ratified as to do otherwise would compromise separation of powers principles. Brief of Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004) (No. 03-339).
conventions, such as the ICCPR, have in formulating customary international law and examined whether state practice and jurisprudence based on the rights under the Convention had developed into a binding international norm prohibiting abduction and arbitrary detention. Given the influence that the ICCPR has on the formation of customary international law and the fact that the United States is a party to the Convention, it is remarkable that the United States Supreme Court viewed itself as being prevented from "interpreting and applying" the ICCPR. The Court's refusal to give adequate weight to the rights contained within the ICCPR essentially negates the principle purpose of the Covenant, which is to protect individuals from their own government.

3. The European Convention on Human Rights

The European Convention on Human Rights (European Convention) is another international instrument that has been invoked to protect the rights of individuals who have been forcibly abducted from another state in order to face prosecution. Although the Convention has obvious geographical limitations as to the countries that it binds, it is yet another indication of a collective recognition of the right not to be subjected to arbitrary detention. Article 5(1) guarantees individuals the right to "liberty and security of person." Although the language of "arbitrary detention" contained in the ICCPR is not used, Article 5 requires all deprivations of liberty to be prescribed by law and to fall within the exhaustive list of possible justifications for detention. European institutions have had several opportunities to examine cases of extraterritorial abduction and these cases contribute to the understanding of the right to be free from state-sponsored abductions under customary international law.

In Bozano v. France, after a failed extradition application to transfer an individual from France to Italy, the individual was abducted by French policemen and was forcibly taken into Switzerland, where he was subsequently extradited to Italy. The European Court of Human Rights (ECHR) upheld the applicant's complaint, concluding that the transfer by French authorities was a disguised form of extradition designed to circumvent an earlier unfavorable decision. The refusal of the police to follow the domestic laws of France rendered the abduction unlawful and in breach of article 5(1) of the Covenant. Furthermore, the Court held that any measure depriving an individual of liberty must be compatible with the purposes of article 5, which is to protect an

112. Id. at 317.
individual from arbitrariness.113 This purposive approach meant that the Court was not solely limited to considering the legality of the detention, but could also take into account the entire context of the abduction, detention, the effect of the abduction on the applicant, and deliberateness with which French officials violated the law. The willingness of the Court to examine all the circumstances surrounding the abduction, rather than solely focusing on the legality of the detention as required by a literal reading of article 5(1), illustrates a recognition of the serious implications that an abduction may have on an individual’s interests.

The European Commission on Human Rights was more explicit in its condemnation of abductions being contrary to article 5(1) in Stocké v. Germany.114 The applicant alleged that he had been brought into Germany against his will by a private citizen in collusion with the German police. The claim was dismissed as unproven, although the Commission held that if German officials had arranged the abduction then “the Commission considers that such circumstances may render this person’s arrest and detention unlawful within the meaning of article 5(1) of the Convention.”115

Despite the indications that the European Convention provided individuals with a robust right not to be forcibly abducted by states, this right is not independent from the rights of the individual’s state. In both Illich Sanchez Ramirez v. France116 and Ocalan v. Turkey117 it was held that consent on the part of the host-state meant that there was no unlawful detention under article 5. The ECHR noted that because the European Convention contains no provisions on extradition procedure, all that is required for a rendition to be consistent with the Convention is a legal basis for the transfer (such as an arrest warrant issued by the state of origin) and co-operation on the part of the host-state.118 It is truly remarkable that an individual’s right to liberty under the Convention, a Convention created solely to protect individuals, is entirely dependant on whether a state complains that its sovereignty has been violated. While this aspect may undermine the significance given to an individual’s right to liberty, it is important to note that the ECHR held that the abduction of an individual in violation of a state’s sovereignty breaches the right to liberty under article 5(1).119 While not going as far as it could to uphold human rights, such a view reaffirms the international endorsement of the right to be free from forcible transnational abduction.

113. Id.
115. Id. at 852.
118. Id. at 273.
119. Id.
Although the European Court of Human Rights has been unequivocal that the arrest of an individual by authorities of one state in contravention of another state’s sovereignty involves not only state responsibility vis-à-vis the other state, but also violates an individual’s right to security under article 5(1), the Supreme Court in Sosa v. Alvarez-Machain was unmoved. Neither the European Covenant nor the decisions on the issue of abduction were even canvassed by the judgment for the majority. For the Court to conclude that there was no evidence to suggest the existence of customary rule prohibiting arbitrary detention without examining the substantial European jurisprudence on the matter is an oversight. The Court’s fixated analysis on the generality surrounding the alleged right to arbitrary detention ignores the more specific right that has been recognized under the ICCPR and the European Convention: that individuals have a right to be free from an extraterritorial abduction conducted in violation of the sovereignty of another state. Although the European Covenant does not create customary international law, when taken in conjunction with other international instruments and state practice it is apparent that there is a global repudiation of the use of extraterritorial abduction.

D. The Approach of Domestic Courts

Despite the evidence of an international consensus that individuals have a right to be free from being forcibly abducted and transferred to another state, there are occasions when domestic courts will proceed with the prosecution of the individual regardless of any breach of their rights. The often-followed decision by the United States Supreme Court in Ker v. Illinois held that courts could exercise jurisdiction over an individual regardless of the unlawful manner in which an individual may be made to appear before the Court. This principle stems from the Roman maxim “mala captus bene detentus”: improperly captured, properly detained. The doctrine has been rigorously enforced by courts in the United States, while at the same time being vociferously criticized by academics as endorsing the Executive’s violations of international law.

However, decisions that an individual should be prosecuted following an abduction are not necessarily inconsistent with the existence of a right to be free

120. Mitchell, supra note 5, at 429.
121. Alvarez-Machain, 124 S.Ct. at 2768.
123. Rudy, supra note 66, at 802.
125. See e.g. Jonathan Bush, How Did We Get Here? Foreign Abduction After Alvarez-Machain, 45 STAN. L. R. 939 (1993); Felice Morgenstern, Jurisdiction in Seizures Effected in Violation of International Law, 29 BRIT. Y.B. INT’L L. 265 (1952); Wilske, supra note 5.
from extraterritorial abduction. In such situations, the courts were not con-
cerned with the existence of a human right prohibiting transnational abductions,
but rather whether a breach of the alleged right would require proceedings to be
dismissed and the individual to be repatriated. Indeed, in many of these cases,
the courts avoided examining whether there is such a right by deeming it
irrelevant given that a breach of international law is a matter for the Executive
to remedy. The refusal of United States courts to decline jurisdiction over
transnational abductees is relevant to the scope of remedies available to
abductees rather than a rejection of the right to be free from extraterritorial
abduction. The existence of a customary norm protecting individuals from
extraterritorial abduction and a possible norm providing a remedy for a breach
of such a right are two separate issues.

Although courts have traditionally refused to examine the circumstances
of the arrest and detention of an abductee, there has been much progress in the
recognition of due process and human rights since the Ker v. Illinois decision
of 1886. The narrow conception of due process as only being concerned with
whether the accused has a fair trial now expands to situations where official pre-
trial misconduct can result in evidence being excluded. The U.S. Court of
Appeals for the Second Circuit in U.S. v. Toscanino recognized that the
exclusion of evidence was not an end in itself, but was a means to give effect to
the principles of due process and to ensure that the government should not be
able to benefit from its illegal conduct. The proceedings against Toscanino,
who was abducted and tortured while in custody, were dismissed. There, the
Court gave particular weight to the need to uphold constitutional norms, which
were influenced by international human rights law. However, the effect of
this case in advancing human rights law is minimal, as the decision has been
interpreted as only applying where the individual is treated inhumanely while
in custody.

The greatest challenge to the traditional view that courts should not
concern themselves with the means by which an abductee may be brought
before them comes from South Africa in State v. Ebrahim and from the
United Kingdom in Bennett v. Horseferry Road Magistrates’ Court and
another. In Ebrahim, the Court established a link between the sound

126. See Alvarez-Machain, 504 U.S. at 669 (holding that “the decision of whether respondent should
be returned to Mexico...is a matter for the Executive Branch”).
129. Mitchell, supra note 5, at 401.
130. Toscanino, 500 F.2d at 275.
133. THE ALL ENGLAND LAW REPORTS ANNUAL REVIEW 222 (BUTTERWORTH 1994) [hereinafter ALL
administration of justice and the fundamental principles of the promotion of human rights and friendly international relations.\textsuperscript{134} After an analysis of the influence of international human rights norms on domestic law the Court dismissed proceedings and Ebrahim was subsequently able to claim damages for his unlawful abduction and detention.\textsuperscript{135} In Bennett, the House of Lords determined that courts had the authority to examine the circumstances surrounding the abduction of Bennett to face charges in England and that to allow criminal proceedings to continue in such a situation would be an abuse of process. While the individual judgments illustrate a myriad of factors that each judge used when concluding an abuse of power by the Executive existed, Lord Griffiths indicated that the Law Lords have a responsibility “to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law.”\textsuperscript{136} Lord Lowry rejected the Supreme Court’s approach in Ker v. Illinois, holding that the question should not be whether a court has jurisdiction to try an individual, but whether such jurisdiction should be exercised in light of the violation of rights under international law.\textsuperscript{137}

Although the courts in Ebrahim and Bennett did not examine whether individuals had explicit right to be free from extraterritorial abduction, the highest courts in South Africa and the United Kingdom both used the general principles of international human rights law to conclude that the prosecution of an abductee would violate domestic standards of due process. However, the reluctance of many domestic courts (particularly in the United States) to recognize and apply international human rights law in such situations is concerning. The contention that courts need not concern themselves with the rights of the individual prior to trial is an archaic notion that has no place in a global community that is founded upon respect for human rights.\textsuperscript{138}

The approach of domestic courts to cases can influence the content of customary international law by shaping state practice and indicating the presence of a customary norm. However, the approach of domestic courts to cases concerning extraterritorial abduction is a neutral factor in the analysis of customary international human rights law on the topic. Although the vast majority of prosecutions stemming from the abduction of an individual have been upheld as valid, it is important to appreciate that such judicial decisions do not undermine the existence of an individual right to be free from extraterritorial abduction. The decisions merely indicate that if such a right exists it is unlikely

\textsuperscript{134} Ebrahim, 95 I.L.R. at 442.
\textsuperscript{135} Id. at 417.
\textsuperscript{137} ALL ENGLAND LAW REPORTS ANNUAL REVIEW, supra note 133, at 163.
\textsuperscript{138} See U.N. CHARTER pmbl. (declaring that its members are determined to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . ”).
that the remedy of a stay of prosecution has also entered into customary international law. Such a view has come about through the flawed belief that the judiciary has no role to play in providing a remedy to an individual subsequent to a violation of international law.\textsuperscript{139} Although there is some indication through South African and United Kingdom jurisprudence that the human rights of an abductee are becoming increasingly relevant before domestic courts, there is not enough uniform practice throughout the world to conclude that the approach of the judiciary in such cases either contributes to or contradicts the existence of a customary norm protecting an individual from extraterritorial abduction.

E. Resolving the Issue: Is There a Customary Norm?

State practice concerning the abduction of individuals in order to bring them before domestic courts will never be completely uniform. States are inherently self-interested and are reluctant to ascribe to a norm that may limit their ability to conduct self-help operations in the future.\textsuperscript{140} In the absence of an enforcement mechanism for international law, states may often decide that the benefits of breaching international law outweigh the costs. Therefore, it is important that state actions that appear to be contrary to an alleged customary norm are not automatically assumed to be evidence of the absence of the norm. Inconsistent state practice could instead illustrate that the state concerned is a persistent objector and that the state is not bound by the norm, or the state is breaching an international norm that is otherwise adhered to.

The relevant test for examining inconsistent state actions was offered by the ICJ in \textit{Nicaragua v. United States}, which emphasized that there is no need for state practice to be in rigorous conformity with the rule.\textsuperscript{141} The Court went on to comment that:

\begin{quote}
In order to deduce the existence of customary rules, the Court deems it 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, not as indications of the recognition of a new rule.\textsuperscript{142}
\end{quote}

\begin{footnotes}
\begin{enumerate}
\item[139.]
See Costi, \textit{supra} note 5, at 95–97 (discussing how the judiciary can invoke the international responsibility of the state by ignoring an infringement of international law).
\item[140.]
\item[141.]
\item[142.]
\textit{Id.}
\end{enumerate}
\end{footnotes}
It is evident that state-sponsored abductions are certainly not seen as the recognition of a new rule of international law, but are typically universally condemned as infringing customary international human rights law.

The abduction of Alvarez-Machain by the United States and the subsequent decision by the Supreme Court in 1992 received international condemnation. The Canadian government stated that it would not tolerate such abductions from its soil, while the Argentine President derided the court decision "a horror." As well as the abduction receiving widespread criticism from states, there was near universal criticism from non-governmental organizations, lawyers and academics. Furthermore the Inter-American Juridical Committee condemned the attitude of the United States Government as violating fundamental rules and principles of international law. Such criticism is comparable to that of Israel following the abduction of Eichmann, where disapproval by individual states was supported by a Security Council resolution decrying the breach of international law.

When the United States has conducted extraterritorial operations to seize suspected criminals, it has always attempted to tone down the implications that such conduct could have for international law. Following the abduction of Alvarez-Machain, a State Department Spokesman said that the Supreme Court decision did "not represent a 'green light' for future abductions," and that only in "extreme cases" would kidnapping be justified. Concern that foreign states might undertake extraterritorial law enforcement operations in the United States also led to a State Department lawyer resisting the contention that abductions were consistent with international law. The view that transnational abductions are inconsistent with customary international law is further supported by a 1989 memorandum to the Attorney General outlining the President’s authority to breach customary international law by ordering the abduction of an individual from a foreign country. By arguing that transnational abductions are the exception rather than the norm the United States is fulfilling the test established


146. CONSTITUTIONAL RIGHTS FOUNDATION, supra note 143.


in the Nicaragua case: the conduct is typically viewed as breaching a rule rather than creating a new rule.

While the international denunciation of forcible abductions will often focus on any breach of state sovereignty, there is sufficient state practice and *opinio juris* to suggest that a customary norm exists whereby the human rights of an individual require states to refrain from extraterritorial abduction. Cumulatively, the decisions by the Human Rights Committee and the European Court of Human Rights, the recognition of international human rights instruments, and the practice of states provide enough evidence of consistent state practice and *opinio juris* to establish a customary norm protecting individuals from extraterritorial abduction.

The right to be free from abduction exists independently of whether there is also a breach of the host-state's sovereignty. To make a breach of an individual's rights dependant on there first being a breach of state sovereignty is to effectively limit the scope of the right to being no more than a derivative of a state's right to territorial inviolability. If the prohibition of arbitrary detention is to be an effective human right it must also be available to protect an individual in situations where the host-state consents to their abduction. This approach is endorsed by Harry Blackmun, a dissenting Supreme Court Justice in *United States v. Alvarez-Machain*, who commented, "even with the consent of the foreign sovereign, kidnapping a foreign national flagrantly violates peremptory human rights norms."^149^ Such a view recognizes that the rights of an abducted individual will be affected in the same manner whether the host-state is complicit in the abduction or not.

**F. The Implications of a Breach of This Right**

When states breach international law there are legal consequences (which may include reparation, compensation, and/or apologies) that flow from the wrongful action.\(^{150}\) The Permanent Court of International Justice upheld the principles of state responsibility by stating that "the essential principle . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."\(^{151}\)

For an individual who has been forcibly removed to another jurisdiction to stand trial, the most desirable form of reparation would be for the criminal proceedings to be dismissed and to be repatriated. It is widely recognized that when an abduction breaches a state's sovereignty and the protesting state

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demands the return of the individual then the first duty on the abducting state is to return the individual. However, this remedy is one that is owed by one state to another and would not be applicable in the absence of a formal protest from the host-state. The issue of the responsibility of states towards individuals for breaches of international law is more uncertain, and for this reason was not incorporated by the International Law Commission’s Draft Articles on State Responsibility. Unlike international human rights conventions, which tend to explicitly require a state to provide an effective remedy to an individual whose rights have been breached, there is as yet no recognition of a binding requirement on states to provide individuals with a specific remedy when their human rights are breached.

Due to the uncertain content of international law regarding the remedies that states owe to individuals, the ability of abducted to have a remedy for a breach of their rights under customary international law is dependant on the extent of each state’s reception of international law into the domestic legal system. The status of international law in domestic law varies greatly, and each legal system will have a slightly different view as to whether domestic courts have a duty to allow individuals to enforce a right that exists at an international level. It is outside the scope of this paper to conduct an exhaustive inquiry into the trends relating to the status of international law in domestic legal systems, but it is pertinent to note that the failure of courts to uphold international law can invoke the international responsibility of the state. The conduct of domestic courts are regarded under international law as being attributable to the state, and so a judicial infringement of an individual’s international rights can make the state responsible for remedying the breach.

152. OPPENHEIM, supra note 4, at 295.; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 432; BASSIOUNI, supra note 3, at 290.
153. Bassiouni is of the opinion that no area of international law is “as riddled with confusion” as the topic of the enforceability of internationally protected human rights in domestic law. BASSIOUNI, supra note 3, at 291.
154. Daniel Bodansky & John R. Crook, Symposium: The ILC’s State Responsibility Articles: Introduction and Overview, 96 A.J.I.L. 773 at 790 (2002). However, art. 33(2) of the I.L.C. Draft Articles makes it clear that the Draft Articles should be read as not prejudicing any international responsibility of a state to a non-state actor. Draft Articles on Responsibility of States for Internationally Wrongful Acts, supra note 6, art. 33(2).
156. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 703.
However, domestic courts cannot be said to be violating an individual's rights simply by allowing the prosecution of an abductee. Therefore, the key issue is whether domestic courts are under an international obligation to remedy the Executive's breach of international law by refusing to prosecute an abductee. While it may be desirable for domestic courts to refuse to endorse a state's violation of its human rights obligations, there is no international obligation on domestic courts to decline jurisdiction over an abductee. The prevalence of the rule of "male captus bene detentus" throughout the world, while controversial, is clear evidence of the non-existence of any norm requiring states to decline the prosecution of abductees. It is therefore apparent that the existence in customary international law of an individual right to be free from extraterritorial abduction is not supplemented by any such norm requiring domestic courts to divest themselves of hearing the case.

While it may be premature to claim that there is a customary rule compelling courts to refuse to exercise jurisdiction over abductees, it is not accurate to claim that the violation of an individual's internationally guaranteed rights is irrelevant to a court's consideration whether or not to exercise jurisdiction. As evidenced by the decisions of Ebrahim and Bennett, where domestic courts declined to exercise jurisdiction, the human rights of an individual can be used in a domestic context. These two cases provide important examples whereby courts were able to use international legal principles to interpret the domestic expectations of due process. Such decisions should be applauded as not only giving effect to an individual's rights, but also acting as a deterrent to future violations of international law. Only by declining to exercise jurisdiction can domestic courts maintain the integrity of international human rights and encourage states to abide by their international legal obligations.

Unfortunately for the subjects of an extraterritorial abduction, given that international law does not mandate that domestic courts must refuse to exercise jurisdiction over abductees, there will be occasions when they are not provided with an effective domestic remedy. The only other traditional remedies, compensation and an apology, are unlikely to resolve the problem for abductees that they are now within the jurisdiction of a state that is determined to prosecute them. However, it would be a misconception to consequently view

158. Borelli, supra note 5, at 8.
159. It is notable that the ICTY in Prosecutor v. Dragan Nikolic, Case No. IT-94-2-PT, Sentencing Judgment – In Trial Chamber II, ¶ 30 (Oct. 9, 2002) determined that it could exercise jurisdiction over the defendant who had been forcibly abducted, but did so only after concluding that the Tribunal's duty to respect human rights was outweighed in this case by the fact that the defendant had been charged with a serious violation of international humanitarian law. Id. While departing from the traditional mala captus bene detentus rule, such a decision only acts as a deterrent to state abductions of minor criminals and indicates that the violation of the human rights of more serious offenders can be overlooked by a higher duty to prosecute serious human rights violations. Id.
the right to be free from extraterritorial abduction as little more than an "empty right." The right of individuals to be free from state-sponsored abductions, similar to much of international law, must derive a great deal of the force from its prescriptive nature rather than the presence of an enforcement mechanism. Not only does the right carry much moral force, but it can be viewed as an important step towards the formation of an individual right not to be prosecuted following the unlawful transfer from another state.160

VI. THE RIGHT TO BE FREE FROM EXTRATERRITORIAL ABDUCTION AND
SOSA V. ALVAREZ-MACHAIN

A. Reconciling the Supreme Court's Decision with the Customary Norm

While there will always be difficulties for an individual seeking a domestic remedy for a breach of their international rights, such difficulties were compounded in Sosa v. Alvarez-Machain by the refusal of the Supreme Court to recognize the existence of the individual right. The Court’s flawed analysis of customary international law not only means that individuals abducted by the United States will be unable to receive compensation for their treatment under the ATS, but more importantly, it reduces the possibility of an abductee having the prosecution against them dismissed. In the absence of a breach of sovereignty and an accompanying complaint by the host-state, the ability of an abductee to avoid prosecution depends upon the extent to which domestic courts will recognize the breach of their rights. Although United States courts have traditionally been reluctant to dismiss proceedings for a violation of international law, the Supreme Court’s reasoning in Sosa v. Alvarez-Machain should not be adopted uncritically by courts as the basis for denying the existence of an internationally accepted right of individuals to be free from extraterritorial abduction.

While the Supreme Court concluded that Alvarez could not cite sufficient evidence to support the contention that international law recognizes a norm prohibiting the use of arbitrary detention, the Court then retreated from this position slightly, holding that any “credible invocation” of a principle against arbitrary detention requires more than a relatively brief detention.161 The Court indicated that for any such claim to be successful the detention must be “prolonged,”162 and that the alleged norm was therefore not applicable to Alvarez who had been transferred into the custody of lawful authorities within

160. See Costi, supra note 5, at 95–99 (analyzing how the right to be free from extraterritorial abduction could lead to the development of a right against prosecution).
162. Id.
a day of being abducted.\textsuperscript{163} Such a concession by the Court is not an attempt to indicate that there are occasions where extraterritorial abductions may violate customary international law, but is an attempt by the Court to take into account the respected Restatement of the Foreign Relations Law of the United States (the Restatement).\textsuperscript{164}

The Restatement asserts that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."\textsuperscript{165} The Restatement acknowledges that many United States courts have recognized that any form of arbitrary detention is prohibited by customary international law,\textsuperscript{166} but does not provide any evidence as to why an arbitrary detention must be "prolonged." This distinction made by the Restatement has been labeled as "curious" and has been criticized as diverging from the right recognized by international treaties, state practice and domestic courts.\textsuperscript{167}

By taking the Restatement as being the definitive authority on the content of customary international law, the Supreme Court was able to dismiss the seriousness of Alvarez's detention by only concerning itself with the duration of Alvarez's detention. Although the irregular detention of individuals is concerning, it is the fact that individuals are being transferred between countries through an extra-legal process that is more disturbing. Rather than exclusively focusing on the length of time that an individual was arbitrarily detained, the interest of the Court should have been on what happened during that period. Not only will most abductions violate the domestic law of the host-state, but the removal of abductedees from the control of the host-state deprives abductedees of the ability to invoke the protection of procedural safeguards that would typically be available through any extradition process. Until abductedees are brought before a court to hear the charges against them, their fate is effectively in the hands of the abductors. Abductees are likely to be subjected to various forms of physical abuse, they might be drugged, they might not be brought before a judge in an expeditious manner, they might be interrogated in the absence of a lawyer, and they might also be unable to ascertain who has abducted them and why.\textsuperscript{168}

The Supreme Court's contention that if customary international law prohibits arbitrary detention it does so only to the extent that such detention is prolonged, is accordingly unsound. However, this position did allow the Court

\begin{footnotesize}
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\item 163. Id. at 2769.
\item 164. RESTATMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 702.
\item 165. Id.
\item 166. Id.
\item 168. Costi, supra note 5, at 68.
\end{itemize}
\end{footnotesize}
to dismiss any international precedent that supported Alvarez’s position. Although the ICJ had indicated in The Hostages Case that arbitrary detention violated fundamental principles of international law, the Supreme Court dismissed the attempt by Alvarez to invoke the same principles, holding that "the detention in that case was . . . far longer and harsher than Alvarez’s." If such a requirement for prolonged detention did exist it would provide little protection for individuals and could be viewed by states as permitting unlawful detentions as long as they were not lengthy. Only by focusing on the motives behind a state’s actions and the overall effect of the detention on the individual can human rights law effectively provide an individual with protection against wrongful state actions.

A human rights inquiry into extraterritorial abduction should be concerned with the deliberate attempt by a state to limit the procedural protection available to an individual. International human rights law recognizes the importance of procedural protections for individuals and this is the key reason why customary international law prohibits the use of state-sponsored abduction as a means to acquire the custody of a suspected criminal. The practice of states provides no evidence that this human rights norm is entirely dependent upon the length of time that an individual is denied access to the proper legal process.

The Supreme Court’s analysis would have been more convincing if it had attempted to argue that the United States was a persistent objector to the creation of an individual right to be free from extraterritorial abduction. The willingness with which the United States has used abduction as a means to acquire the custody of suspected criminals would certainly lend weight to an argument that it does not consider itself bound by any human rights norm that limits the ability to use abduction in order to seize a suspect. However, Justice Souter for the majority failed to accommodate the persistent objector rule, and rather than using examples such as the non-self-executing declaration to the ICCPR as evidence that the United States did not adhere to such norms, the Court used these examples to deny the existence of the norm.

B. Understanding the Influencing Factors on the Supreme Court

The Supreme Court’s flawed view of the substance of customary international law was influenced by a number of important factors that

170. Recent U.S. cases involving the use of extraterritorial abduction include United States v. Lira, 515 F.2d 68 (2d Cir. 1974); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Caro-Quintero, 745 F.Supp. 599 (D. Cal. 1990); United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995); United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998); Kansi v. United States, 11 F. Supp. 2d 42 (D.C. Cir. 1998); Tunis, 681 F.Supp. at 896; Noriega, 746 F.Supp. at 1506.
encouraged the Court to downplay the rights of an individual in Alvarez's situation. Understanding the backdrop to the decision will help to explain why the decision of the Supreme Court conflicts with international recognition of the individual right to be free from extraterritorial abduction.

The Court's examination of customary international law was almost certainly unduly influenced by the debate over the ATS. It is an indication that the facts of Alvarez's abduction were almost incidental to the issues before the Court that of the forty-nine pages in Sosa's submissions to the Court only two pages were dedicated to arguing that the respondent did not violate customary international law. Indeed Alvarez's own lawyer commented after the judgment that "we lost the battle in that case, but won the war on the ATS." Given that the 6-3 decision of the Court to not rule out the possibility of new claims being created in the future under the ATS, the Court was in a position where it needed to dismiss Alvarez's case to placate critics of the ATS. Not only was the bar set very high before any customary international law can become actionable under the ATS, but the judgment also indicates that there is a very high threshold before the Court will consider any norm to be considered customary international law. The Court was overly cautious in its examination of the whether Alvarez's abduction and detention violated international law for fear of opening the floodgates to litigation by foreigners. This need to reduce the number of cases being considered under the ATS has led to an artificially narrow reading of international law.

Ever since a decision of the Supreme Court in 1938 denied the existence of a federal common law, federal courts in the United States have been wary of creating new causes of action. Although the existence of common law would allow judges to ensure that the law can appropriately take into account developments in society, for many judges this dynamic feature of the law threatens to undermine the basis of democracy by allowing courts, rather than the legislature, to create new law. "Originalist" judges, for which Justice Scalia is the leading voice, are of the view that to give effect to the true role of the federal judiciary the law should be viewed as static and that "an

172. Respondent's Brief, supra note 57.
175. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
177. Id. at 282.
authoritative text should be understood as of the time that the text was written instead of some other time, like the present.\textsuperscript{178} It is in the framework of this ideological debate over judicial interpretation that the Supreme Court considered how the reference to the "law of nations" in the ATS should be interpreted.

To the consternation of Justice Scalia\textsuperscript{179} the majority indicated that the "law of nations" was a flexible concept that should be able to accommodate changes in international law.\textsuperscript{180} However, while conceding that the content of the law of nations should not be limited to the international norms existing in 1789, the Court then adopted an originalist position by maintaining that only those norms with a specificity comparable to the norms that existed when the ATS was enacted would be actionable.\textsuperscript{181}

However, the Court then proceeded to conflate the issues of whether the norm exists under international law and whether a cause of action should be provided. The majority decision urged "restraint in judicially applying internationally generated norms,"\textsuperscript{182} but it appears that such restraint was also applied to the recognition of international norms. The Court's reluctance to give appropriate weight to evidence of international custom was emphasized by repeatedly stressing, "the law is not so much found or discovered as it is either made or created."\textsuperscript{183} While this aversion to creating new law is understandable when the Court is being asked to create a cause of action, it has no place in any analysis of the substance of customary international law. Customary international law is not created through judicial recognition, but evolves over time through consistent state practice. The approach to interpreting international law is distinct from the process of applying domestic law.

It is evident that the Court was influenced by the debate over the appropriate role of judge-made law in the United States and that this issue unnecessarily affected its analysis of the content of customary international law. Justice Souter for the majority stated "we have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."\textsuperscript{184} The


\textsuperscript{179} Justice Scalia believed that the drafters of the ATS would be "terrified" at the possibility that a cause of action based on international law would be dependant on the discretion of judges. \textit{Alvarez-Machain}, 124 S.Ct. at 2775 (Scalia, J., dissenting).

\textsuperscript{180} \textit{Alvarez-Machain}, 124 S.Ct. at 2763.

\textsuperscript{181} \textit{Id.} at 2761.

\textsuperscript{182} \textit{Id.} at 2762.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.} at 2763.
traditional reluctance of federal courts to create new causes of action has therefore been transposed to a reluctance to "seek out" new customary international law. The basis for the theory of originalism is the concern that a judge who does not stick closely to the text of a statute and the associated historical context has too much subjectivity in determining the content of the law.\textsuperscript{185} Due to the unwritten nature of customary international law and the degree of discretion available to courts in recognizing norms based on state practice, the Supreme Court was accordingly wary of affirming a customary norm in the absence of Congressional approval.\textsuperscript{186} The need for a "congressional mandate"\textsuperscript{187} in order to affirm the existence of a customary norm indicates the reluctance of the Court to be bound by international law that the United States had not explicitly consented to. Such a stance is consistent with the notion of judicial minimalism in lawmaking, but is contrary to the principle that the existence of customary international law is not dependant on express state consent.\textsuperscript{188} It is outside the scope of this paper to comment on the resistance of federal courts to creating law in the United States, but it is pertinent to comment that in \textit{Sosa v. Alvarez-Machain} the Court’s desire for legislative guidance as to whether a cause of action should be created certainly influenced its determination to deny the existence of a customary right to be free from abduction and detention.

As well as being influenced by theories on the appropriate role of the ATS, the Supreme Court’s analysis of the legality of abducting and detaining an individual needs to be placed in the context of the current war on terrorism. The strong dissent in the Court of Appeals argued that by allowing Alvarez’s claim to succeed the majority had “needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security.”\textsuperscript{189} The fear of restricting the Executive’s conduct in foreign affairs certainly influenced the Supreme Court to relegate the importance of human rights in relation to national policy. The Court specifically noted that courts would have to be aware of any “collateral consequences” that a decision under the ATS may have on the Executive’s exercise of discretion in foreign affairs.\textsuperscript{190}

The Court was not only circumspect about unduly limiting the ability of the Executive to use extraterritorial abduction in the war on terrorism, but it also had to consider the implications of its own recent decisions. On the day prior to the judgment in \textit{Sosa v. Alvarez-Machain} being released, the Supreme Court

\textsuperscript{185.} Saphire, \textit{supra} note 176, at 285.  
\textsuperscript{186.} Indeed the Court indicated that it “would welcome any congressional guidance in exercising jurisdiction.” \textit{Alvarez-Machain}, 124 S.Ct. at 2765.  
\textsuperscript{187.} \textit{Id.} at 2763.  
\textsuperscript{188.} \textit{ILA, supra} note 70, at 38.  
\textsuperscript{189.} \textit{Alvarez-Machain}, 331 F.3d at 658–59 (O’Scannlain, J., dissenting).  
\textsuperscript{190.} \textit{Alvarez-Machain}, 124 S.Ct. at 2763.
released several high-profile decisions concerning the rights of those that the 
Executive had detained in the war on terror. When viewing these cases together 
it becomes apparent that any other decision by the Court in *Sosa v. Alvarez-
Machain* would have serious implications for the United States government.

In *Hamdi v. Rumsfeld*, the Court held that a United States citizen seeking 
to challenge his classification as an enemy combatant must receive notice of the 
basis for his classification and be granted a fair opportunity to rebut the 
government's assertions before a neutral decision maker.\(^1\) Justice O'Connor 
emphasized that "history and common sense teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse of others who do not present that sort of threat."\(^2\) The importance of individuals being able to challenge their detention was also emphasized in *Rasul v. Bush* where foreigners being held at Guantanamo Bay were granted the right to test the legality of their detention before federal courts.\(^3\) While these two decisions can be seen as upholding international law by limiting the right of a government to indefinitely detain individuals without access to courts, why then did the Court seemingly counter this the very next day by holding that there was no right under international law to be free from arbitrary detention?

A primary policy reason for the approach of the Supreme Court stems from the implications of allowing hundreds of individuals detained by the United States military to challenge their detention: domestic courts would be required to rule whether an individual's continued detention is justified or whether an individual is being arbitrarily detained. A conclusion that an individual's detention is unwarranted and arbitrary could therefore not only lead to that individual's release but also to the possibility of civil claims being initiated under the ATS. This concerned the minority in the Court of Appeals,\(^4\) and would have also influenced the Supreme Court's decision to read-down the status of international law on the issue of arbitrary detention of transnational abductees.

The decision in *Sosa v. Alvarez-Machain* has to be read in conjunction with these earlier decisions. Although the Court took a stand against the government by allowing Guantanamo detainees to challenge their detention, the decision in *Sosa v. Alvarez-Machain* duly limited the repercussions for the government. A decision that an arbitrary detention could lead to civil damages would have

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2. *Id.* at 2657.
4. Judge O'Scannlain noted that, "the majority has left the door open for the objects of our international war on terrorism to do the same [as Alvarez] . . . I believe that impermissibly encroaching upon the duties rightfully reserved to the political branches is of serious consequence, and unfortunately such encroachment establishes a very troubling precedent which we will regret." *Alvarez-Machain*, 331 F.3d at 645 (O'Scannlain, J., dissenting).
dramatically undermined the current Administration’s treatment of terrorist suspects and the Court may have been seen as encouraging the detainees to bring suits the day after allowing them to challenge their detentions. The importance of limiting the ability of individuals detained in the Government’s war on terrorism to file civil suits was underscored by the fact that the government required Yaser Hamdi to waive any right to sue the United States over his captivity before releasing him.195

The Supreme Court’s inadequate analysis of customary international law protecting individuals from state-sponsored abductions can only be understood in light of the cumulative effect that the aforementioned factors had on the Court. Concerns over judicial law-making, the need to limit the scope of the ATS, the desire not to restrict the Executive’s actions, and the possible implications that any contrary decision would have for the detainees of the United States in the war on terrorism compounded the Court’s reluctance to consider itself bound by an international norm that the United States had not expressly consented to be bound by. These considerations all contributed to the Court’s decision to read-down customary international law and not to recognize right of individuals not to be subjected to extraterritorial abduction.

VII. CONCLUSION

Over the last sixty years the international legal system has aimed to ensure peace and security through inter-state co-operation and by encouraging respect for human rights.196 Extradition procedures provide a means for respecting state boundaries and ensuring procedural safeguards for individuals, while also combating the impunity of offenders that occurs when a suspect resides outside a state that is seeking their protection. However, extradition is not a feasible option when the host-state is unwilling or unable to co-operate. In such situations states may resort to extra-legal methods in order to facilitate the prosecution of suspects. The abduction, detention and forcible transfer of individuals by state authorities challenges the foundation of the international legal system by disregarding principles of state sovereignty and human rights.

In the absence of consent by the host-state, any attempt by the prosecuting state to acquire custody of the suspect by conducting operations within the host-state’s territory violates international law. While such abductions are widely recognized as breaching international law protecting the territorial integrity of

they also breach the right of an individual to be free from extraterritorial abduction. The basis of this right stems from the absence of procedural protections available to an abductee and the deliberate attempt by the abducting state to disregard the procedural safeguards available to the individual under the domestic law of the host state. This individual right exists independently from a breach of a state's sovereignty and can therefore be invoked by an individual in situations when the host-state is complicit in the abduction. The right of individuals not to be subjected to state-sponsored abductions has clearly evolved through state practice under the United Nations Charter, the Universal Declaration of Human Rights, the ICCPR and the European Convention on Human Rights. These international instruments have helped to provide sufficiently uniform state practice and opinio juris for the right to become universally binding under customary international law.

Yet, when the United States Supreme Court in Sosa v. Alvarez-Machain recently had an opportunity to affirm the existence of this norm, it declared that there was scant evidence that the alleged norm was part of customary international law. This paper has demonstrated that the Court was motivated by a need to restrict future claims under the ATS, was hesitant to recognize the existence of a customary international law norm without legislative direction, was influenced by the reluctance of the United States to adhere to the norm, and was wary of the effect that any contrary decision could have on the ability of the Executive in the war on terrorism.

These considerations, which are irrelevant to determining the content of customary international law, prompted the Court to reach a conclusion that unnecessarily relegates the importance of human rights norms. The implication of denying the existence of an international right protecting individuals from being abducted and detained by states is that abductees would be dependant upon the willingness of a state to advance a claim on their behalf. Such an outcome is unappealing. The recognition of the right of individuals to be free from extraterritorial abduction is consistent with the development of human rights law over the last sixty years and the increasing recognition of individuals as distinct actors in the international legal system.

197. Restatement of the Foreign Relations Law of the United States § 432; Bassiouni, supra note 3, at 252; Oppenheim, supra note 4, at 295.
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