

**Private Law Remedies
for Extraterritorial Human Rights Violations**

Inauguraldissertation
zur Erlangung der Doktorwürde
der Fakultät für Rechtswissenschaft
der Universität Bremen

vorgelegt von
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Kolloquium am: 30. Januar 2006

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Introduction

The rise of privately enforceable rights in national courts based on substantive international law is an undeniable global phenomenon. Private rights are one response to the necessity of legal institutions to cope with globalisation. Moreover, the existence of privately enforceable rights is one more piece of evidence that the state-centred international system has undergone fundamental and irreversible change in the last 50 years. Privately enforceable rights and corresponding private duties based in substantive international law and enforceable in domestic courts are also evidence that monist theories of international law are empirically more correct than dualist theories. Finally, privately enforceable human rights undermine the claims of realism to primacy in international relations theory. Realism posits that international relations are fundamentally based on power politics and are zero sum. The rise of trading blocs, privatisation, and individual human rights all demonstrate the des-integration of the state due to globalisation and localisation and tend to invalidate the realists. For all these reasons, the issue of private law rights under international law is a timely topic.

Our examination centres on one aspect of this complex of problems: the availability and limits of private law remedies to human rights violations – largely, torts. This thesis presents a comparative inquiry into those rights and duties based on international law recognized in national legal orders. Happily, and perhaps surprisingly, tort law can contribute to the defense of human rights. But that possibility is qualified by numerous serious limitations: procedurally, litigants usually invoke universal jurisdiction in cases of human rights violations heard in first world courts. Jurisdiction to adjudicate is usually accepted without problem. But precisely because certain violations of human rights are of universal concern there are numerous jurisdictional limitations on substantive rights while very real are not insurmountable. That is the principal contradiction of international tort law: the theoretical availability of universal rights, contradicted by the practical unavailability of relief, theoretically due to jurisdictional limitations, practically due to judgement proof defendants. The practical and procedural limitations are not however so great as to extinguish or obviate all human rights claims in private law.

Limits of the Inquiry

The thesis limits its inquiry to a few countries. Principally, the United States, and secondarily Britain, France, Belgium, and Germany. The law of Senegal, a former French colony, is also examined briefly as is Israeli and Greek law. All countries examined permit some form of extraterritorial human rights enforcement including private law enforcement. In practice, most countries examined

permit private law enforcement for human rights violations. Numerous countries could not be examined due to limits on space and language. For example, Spain offers generous extraterritorial human rights protection but is not examined. Extraterritorial jurisdiction in Eastern Europe was not examined. The thesis limits itself to a discussion of private law rights, principally under international law, though complementary remedies in domestic law such as the TVPA (Torture Victim Protection Act) are considered secondarily.

Interest of the Inquiry

A technological revolution has resulted in a smaller world. Global communication is instant and inexpensive. Transportation is also increasingly inexpensive. The result is a world that is more and more closely integrated economically. This process is described as globalisation.

Globalisation requires instruments of governance. The telecom and transportation revolutions allow, even necessitate, the creation of subnational and super-national governance. The devolution of state power by privatisation, decentralisation, and the sublimation of state power to transnational and global governing bodies (EU, WTO, NAFTA, MERCOSUR, etc.). This twin phenomena, globalisation and devolution, explains why private remedies are of increasing importance.

Research Objectives

The objectives of this work are as follows:

1. To determine whether extraterritorial jurisdiction in U.S. law is consistent with U.S. international obligations. I conclude that the ATS (Alien Tort Statute) and TVPA are not at all idiosyncratic.
2. To determine whether and how private law remedies can reduce violations of international human rights laws. I conclude that private law can and does play an important supplementary role in the defence of human rights.
3. To determine how European and U.S. laws can influence each other to improve protection of human rights globally. I note that both EU and U.S. laws permit extraterritorial defence of human rights in their domestic private law but that they use different instruments to do so. The U.S. appears to rely primarily on private law remedies and secondarily on criminal prosecution. The EU in contrast relies primarily on criminal law (public law) first but does accord private law a secondary role in defence of human rights. The normative conclusion is obvious: the U.S. and the EU can each learn from the other.

Problématique

The guiding star of this work is simple: Most human rights abuse occurs in the third world. Some human rights abuse in the third world is profitable and

benefits the first world. How can the first world remedy this injustice? How can the first world improve the defence of human rights in the third world? These questions guide the research but do not limit it. Answering these questions leads us to discover some other interesting ideas regarding, for example, the proper relation between natural and positive law.

Method

Materialism, that is empirical examination of facts as they are in the real world, is the ontological foundation of this thesis. By examining the existing laws we determine their lacunes and can propose remedies. Philosophical idealism is rejected as a method of inquiry since verification of ideal propositions is at best purely formal and at worst impossible or even irrelevant.

Existing Literature

The method applied, a practical inquiry, is geared not to surveying and synthesizing existing literature but rather to determine existing protection and how that protection can best be extended. Thus I cannot claim to have a comprehensive overview of all literature – that would be impossible. However, the pragmatic approach has resulted in a thorough survey of most English language cases and commentary in this field. As well, it has resulted in a solid examination of leading cases in French law and as basic knowledge of leading German cases and of French and German language commentary. All major U.S. law reviews, all leading U.S. cases, most leading European cases, and many European secondary sources are surveyed indirectly for they are they frame the inquiry and drive the research to its goal.

As can be imagined, a comparative study of private law protection of human rights could be endless. To the best of my knowledge there is no comprehensive comparative study of private law defence of human rights. Most inquiries are limited to the national level. This is likely because a comprehensive comparative inquiry into private law defence of human rights would be enormous. For these reasons hopefully the limitations on my brief survey are forgivable.

Outline

The thesis is structured quite simply. First, it examines the law of the United States, then transnational corporate law, then the law of Europe. This approach allows a smooth transition from U.S. law to European law. It also permits the development and testing of hypotheses and results in a solid comparative study.

Chapter I presents a general outline of the Alien Torts Statute (ATS also known as the Alien Tort Claims Act or ATCA). The ATS grants plaintiffs private causes of action for torts in violation of the law of nations as does the Torture Victims' Protection Act. Private law remedies for violations of international law such as the U.S. Alien Tort Claims Act and Torture Victims' Protection Act are controversial solutions to real world problems. Though unorthodox, private law remedies are consistent with international law and are one remedy to violations of human rights. This chapter explains their jurisdictional foundation and procedural obstacles in U.S. law. While private law rights of action in tort are consistent with U.S. international obligations and can operate as one remedy to human rights violations securing these rights depends on overcoming a number of jurisdictional and procedural obstacles in U.S. law.

In Chapter I Foucault's analysis of power and knowledge is brought to bear to explain the historical ubiquity of torture in feudal and prefeudal society contrasted by its rapid and total disapprobation, if not outright disappearance, in industrial society. Simply put, development and torture are inversely correlated and Foucault helps us understand why. The theoretical foundation of the thesis on materialism and monism is made here.

In Chapter II we examine a recent joined case before the U.S. Supreme Court. There, Aristotle and Hobbes are brought to bear to show why the U.S. Supreme Court has needlessly limited itself in limiting the application of the ATS to *de lege lata* and not extending it to *de lege ferenda*. This case thus also illustrates a growing polarisation and crisis in U.S. legal thought. Aristotle shows us how to both adequately diagnose and prescribe remedies to the current crisis in U.S. legal thought. Holism, materialism, and monism are ideas common to Aristotle and Foucault, which provide a theoretical framework consistently taken throughout the thesis. Monism, holism, materialism, cognitivism, and nominalism are the essence of the author's coherent theoretical position. Usually nominalism and holism are cast as necessarily mutually exclusive, just as positivism and natural law are cast not as contradictory. In fact neither of those dualisms are accurate. Thus, the thesis proves a secondary point: numerous enthymemes in contemporary legal theory are erroneous – a point expressly demonstrated in chapter two and implicit throughout the thesis.

Chapters III and IV address corporate human rights law. Common to both is one problem: exploitative profit. The problems facing business in the third world – illegality, child labor, and political instability – often hinder economic development but present companies the opportunity to make short term profit by behaving irresponsibly and unethically. These chapters attempt to address and answer that problem.

Chapter III explores the liabilities of a parent corporation for the tortious acts of its overseas subsidiaries and explores the doctrinal confusion inherent in current tests for piercing the corporate veil. The issue here is how to impute corporate liability to a corporate main office (usually in the first world) for the tortious acts of subsidiaries and/or contractors in the third world. Economically this is an example of the problem of internalising externalities. Juridically incoherence in the definition of when a company can be held liable for wrongful acts of subsidiaries is resolved by a comprehensive historical examination of the development of tort law. Chapter III concludes that corporations can be held vicariously liable for the torts of their overseas subsidiaries based on theories of agency such as *respondeat superior*. It examines European law briefly and notes that the legal system there follow similar rules. It concludes that the role of corporate governance in the globalising world presents challenges and opportunities for the corporation as legal person having rights and duties under international law: prudent corporate counsel will note these practical trends and theoretical explanations in order to capitalize on opportunities and avoid pitfalls of liability.

Chapter IV keeps the focus on international corporate law and looks at the corporate social responsibility movement. Corporate social responsibility (CSR) is an attempt to encourage corporations to act altruistically out of enlightened self interest. The corporate social responsibility movement proposes that companies should “self regulate” and adopt codes of conduct and general guidelines to help companies make ethical decisions. „Soft law“ examples of codes of good conduct and labelling schemes are examined here. The corporate social responsibility movement is examined critically because corporations have every incentive to present themselves as responsible while profiting from irresponsibility. Because exploitation is profitable market based remedies alone are inadequate to remedy corporate abuse of human rights in the third world.

Chapter IV also considers – and rejects – the idea that the corporate social responsibility movement be comparable to the medieval “*lex mercatoria*”. A number of factual differences show why comparing *lex mercatoria* with international human rights law is a false analogy. Yet, though corporations will not make unprofitable decisions, some modest law reforms can make unethical and unfair trading unprofitable. Reforms which are founded on the self interest of shareholders are more likely to succeed than those founded on altruism because altruists are unfortunately a minority. The modest reforms to encourage shareholder activism will ensure that the corporation performs in the interest of its owners and not its managers. These modest reforms do not go far enough to end the problems of malnutrition, inadequate medicine, and labor and resource

exploitation, but they are achievable and will, if adopted, improve the lot of the third world and so are worth pursuing.

Having examined U.S. law and corporation law the thesis next turns to European law in Chapter V. The inquiry into European law is intended to determine whether the U.S. position on extraterritorial human rights law knows parallels in the laws of other developed countries. In fact it does. However the accent changes. The main protection of human rights law overseas in the U.S. is found in private law due to limited state resources available to prosecutors. That is, human rights are, *de facto*, a secondary concern of the public prosecutor in the U.S. This chapter shows that the U.S. and Europe are mirrors of each other in the extraterritorial enforcement of international human rights law. All countries examined enforce international human rights extraterritorially, at least in theory, relying on either criminal or civil law. Yet in Europe the accent is placed on criminal prosecution, with ancillary civil remedies whereas in the U.S. the accent is placed on civil remedies with ancillary criminal remedies. Both the U.S. and Europe have something to learn about human rights. But in all events: enforceable individual rights under international law are here to stay. Transitioning from British to French, Belgian and German law the hypothesis of transatlantic continuity on these issues holds. Cases litigated before these countries demonstrate the theoretical existence, qualified by procedural and practical difficulties, of universal jurisdiction for torts in violations of the law of nations, in one form or another.

Chapter V is the final chapter and concludes that the common law countries are the most receptive to private law claims in tort, that such claims while unusual can be raised in the Francophone countries, and that Germany seems least receptive to such claims. Among the latin countries Spanish law is unexamined just as among the Germanic countries all of Scandinavia Austria, and Switzerland are not examined. The laws of former socialist countries (principally the USSR and the PRC) are also not examined. Unfortunately, to develop a truly representative cross section of both the continental civil law and the common law would have demanded study of at least another dozen countries. It is thus hoped that this work may inspire further research among specialists in the law of those countries who have at least a reading knowledge of those languages which this author is unfamiliar.

Chapter I
The Torture Victim's Protection Act,
the Alien Tort Claims Act,
and Foucault's Archaeology of Knowledge *

Abstract:

Private law Remedies for violations of international law such as the U.S. Alien Tort Claims Act and Torture Victim's Protection Act are controversial solutions to real world problems. Private law remedies are however limited by procedural obstacles both in international law and domestic law. Though unorthodox, private law remedies are consistent with international law and are one remedy to violations of human rights. This paper describes these substantive rights with particular reference to U.S. law as well as the procedural limitations under both U.S. and international law.

* This article appeared under this title in 67 Albany Law Review 501 (2003).

INTRODUCTION

To understand the basis for any governmental action criminalizing torture, sanctioning torture, or allowing civil recovery for acts of torture, one must not only understand the legal issues involved, but also the societal and historical events which gave rise to those legal remedies. Modern international society condemns torture – as it rightly should – because the international body politic has implicitly rejected the theory underlying torture and has accepted the very logical and reasonable, as well as moral reasons for rejecting the practice of torture. Because of this need to understand both the legal realities, which result from the rejection of torture as a viable method of governmental action, and the historical backdrop thereto, my comments will first discuss the law pertaining to torture, followed by a brief look at the philosophy, history and theory of medieval torture, and then conclude with a discussion of contemporary events that implicate or directly involve the modern practice of torture.

I. THE ATCA AND THE TVPA

There are two statutes in American law with which I hope you are familiar: the Alien Tort Claims Act (“ATCA”)¹ and the Torture Victim Protection Act of 1991 (“TVPA”).² The TVPA and ATCA are two wonderful American laws. These laws grant persons, not even necessarily United States citizens, a cause of action in tort in the United States for torts that violate international law – such as torture. When I think of the ATCA and the TVPA, I can only imagine that Attorney General Ashcroft is throwing his hands in the air in frustration because until September 11th, the United States could afford to say, we don’t torture, we don’t torture, we don’t torture. Since facing the reality of domestic terrorism, the United States is asking itself, should it torture, should it torture, and it should not. These laws illustrate the political difficulties of whether or not the international community – especially the United States – will in fact respect what is the *jus cogens* norm³ – namely, the norm against torture as a

1 28 U.S.C. § 1350 (2000).

2 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)) [hereinafter TVPA].

3 *Jus cogens*, from the Latin meaning “compelling law”. See Black’s Law Dictionary 864 (7th ed. 1999) (defining *jus cogens* as “[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another”).

non-derogable international law.⁴

The ATCA and the TVPA create a private right of action in the United States both for United States nationals under the TVPA and for foreign nationals under the ATCA. The ATCA is a jurisdictional statute.⁵ It was enacted as a part of the first judiciary act of the United States in 1789. The ATCA provides that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶

The legislative history of the ATCA is unknown. The statute itself remained relatively dormant until *Filartiga v. Pena-Irala*. In *Filartiga*, an alien, Filartiga, successfully sued Pena-Irala, a non-citizen living in the United States, in a United States court, for torturing Filartiga’s son to death in Paraguay.⁷ The plaintiff succeeded on his claim, despite defendant’s deportation to Paraguay prior to trial, because the court determined that torture is a violation of the law of nations, and thus was a valid basis for an ATCA claim.⁸ The court noted that although the ATCA traces its origins to the Judiciary Act of 1789, the evolution of international law since that time requires courts to interpret and apply current international law to ATCA claims.⁹ *Filartiga* was the first modern case to litigate the ATCA.

As earlier mentioned, the ATCA is merely a jurisdictional statute allowing U.S. courts to litigate claims for torts in violation of jus gentium (public international law).¹⁰ Any criticism of partiality can be easily deflected since the ATCA grants only aliens a cause of action against either aliens or citizens.

Since *Filartiga* several other cases have also litigated ATCA claims¹¹ The

4 *Jus cogens* norms are owed by states towards each other and, possibly, towards individuals. For a thoughtful discussion on the ideas of *jus cogens*, see Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 153-54 (2002).

5 *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

6 28 U.S.C. § 1350 (2000).

7 *Filartiga*, 630 F.2d at 878.

8 *Id.* at 884-85.

9 *Id.* at 881, 884.

10 28 U.S.C. § 1350 (2000).

11 *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (citing *Filartiga* to support its decision that international law is evolving, and thus the scope of the ATCA also changes); *Abdullahi v. Pfizer, Inc.*, 2003 WL 22317923, *3 (2d Cir. 2003) (suggesting that a proper issue on appeal would have

Supreme Court has directly addressed the ATCA in at least twice in recent years.¹² The Supreme Court does not question the legality of the ATCA under international law, instead rejecting plaintiffs' claims because of the defendants' sovereign immunity.¹³

Not only has the Supreme Court *not* outright rejected the use of the ATCA to litigate claims before the American courts, Congress has expressed its approval of the use of the ATCA by enacting the TVPA. The TVPA extends to United States citizens a remedy for torture and extrajudicial killing that had previously been available only to aliens.¹⁴ While the TVPA is not jurisdictional like the ATCA, it creates a substantive cause of action in tort.¹⁵ "Private" torture, however, may be recognized as a violation of the TVPA where the torture occurred under "color of law".¹⁶ Like the ATCA, the TVPA requires exhaustion of local remedies.¹⁷ Additionally, the TVPA subjects claims to a ten-year statute of limitations.¹⁸ This ten-year statute of limitations was also applied to the ATCA,¹⁹ although the ATCA is silent as to any limitation.

been whether the alleged conduct violated customary international law); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 143, 172 (2d Cir. 2003) (dismissing for lack of subject matter jurisdiction the ATCA claim against a mining company whose Peruvian operations caused severe lung disease as a result of pollution); *Alvarez-Machain v. United States*, 331 F.3d 604, 608 (9th Cir. 2003) (holding that an arbitrary arrest and detention of a Mexican national in Mexico at the direction of Drug Enforcement Agency was a violation of the law of nations under the ATCA).

12 *See Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (finding that the Saudi government's wrongful arrest and torture of Nelson did not fall within the commercial activity exception of the ATCA, a necessary condition for the court to exercise jurisdiction over the action); *Argentine Republic*, 488 U.S. at 434, 439 (ruling that since the tort was committed by a foreign state rather than by an individual, the ATCA claim was unavailable).

13 *Nelson*, 507 U.S. at 363; *Argentine Republic*, 488 U.S. at 439.

14 TVPA § 2(a) specifically uses the word "individual" where the ATCA had used the word "alien".

15 The title to section two of the TVPA is "Establishment of Civil Action".

16 TVPA § 2(a); *see Kadic v. Karadzic*, 70 F.3d 232, 243-4(2d Cir. 1995). Whether a corporation can be liable under the TVPA is contentious. The TVPA uses only the term "individual" which argues against a finding that corporations may be liable for torture, but the overall purpose of the statute is to remedy torturous wrongdoings, irrespective of which individual is torturing.

17 TVPA §2(b).

18 TVPA § 2(c).

19 *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002).

A. Obstacles to Succeeding Under the ATCA/TVPA

There are eight distinct domestic obstacles to using these private remedies against those who violate the law of nations; all of these obstacles result from current interpretation of United States law.²⁰ The more pertinent and relevant discussion focuses on how to meet and overcome these various obstacles.

1. Jurisdictional Requirements

Personal jurisdiction and subject matter jurisdiction present the first obstacle to finding liability under the ATCA. For example, in the case of *An v. Chun*,²¹ Young-Kae An sued General Doo-Whan Chun, General Tae Woo Roh, and several other military leaders of Korea, alleging that they tortured his father to death.²² The case, though factually similar to *Filartiga*, was dismissed due to a lack of personal jurisdiction over the defendants.²³ Though defendants did occasionally visit the United States, their visits as government employees were not sufficient to trigger general jurisdiction.²⁴ One defendant did visit the U.S. at least once on vacation but that was not considered a sufficient “minimum contact” for specific jurisdiction.²⁵

What might appear to be a debilitating jurisdictional obstacle need not always block a foreign plaintiff from successfully obtaining jurisdiction over a defendant in the United States. *An* should be contrasted with *Wiwa v. Royal Dutch Petroleum Co.*,²⁶ where New York found it had jurisdiction over a fo-

20 For a comprehensive discussion of the inter-relation of international law and the ATCA/TVPA see Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1 (2002).

21 No. 96-35971, 1998 WL 31494 (9th Cir. Jan. 28, 1998), *cert. denied*, 525 U.S. 816 (1998).

22 *Id.* at *1.

23 *Id.*

24 The case specifically states:

Where service is made under § 1608 of the FSIA, the relevant area in delineating contacts is the entire United States, not merely the forum state. Appellees have not engaged in the necessary activity in the United States to confer either general or specific personal jurisdiction. They do not own property or conduct business anywhere in the United States. Their visits to this country have been almost entirely official visits on behalf of the Korean government, which do not confer general jurisdiction, and were unrelated to the cause of action in this case.

Id.

25 *Id.* at n.12.

26 226 F.3d 88 (2d Cir. 2000).

reign petroleum company, despite the availability of an arguably more convenient forum in England.²⁷

2. Exhaustion

Exhaustion presents the second obstacle to a plaintiff's ATCA/TVPA claim. Plaintiffs making claims under the TVPA – and possibly also under the ATCA – must have first exhausted their local remedies.²⁸ In practice, however, the realities of lawless regimes indicate that the requirement of exhaustion of those local remedies will not be problematic for litigants.²⁹ This obstacle is more theoretical than practical.

3. Comity

Comity is a third obstacle that a plaintiff is likely to face.³⁰ International comity has been defined as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”³¹ Comity is a discretionary doctrine, often invoked by the forum jurisdiction upon its concluding that principles of fairness or judicial economy indicate that a foreign court would be a more appropriate forum for the cause of action.³²

4. Forum non conveniens

Forum non conveniens is a discretionary jurisdictional defense.³³ A precondition for a finding of *forum non conveniens* is the existence of a foreign forum with jurisdiction to adjudicate.³⁴ If such a forum exists and would not refuse the suit for discretionary reasons, the court must then balance the interests “any public interests at stake”³⁵ with the interests of the plaintiff and defendant.³⁶

27 *Id.* at 92.

28 TVPA § 2(b).

29 Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1037-39 (2001).

30 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409-10 (1964) (finding that the privilege of suit has been denied to governments that are at war with the United States, but that merely unfriendly relations would not be a sufficient reason to deny the privilege of bringing suit in the United States).

31 *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

32 *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453-54 (2d Cir. 2001).

33 *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-100 (2d Cir. 2000) (articulating that the court may permissibly dismiss a claim under this doctrine, regardless of the fact that the court's jurisdiction was proper).

34 *Id.* at 100.

35 *Id.*

Ordinarily the plaintiff's choice of forum will be respected,³⁷ but compelling circumstances can cause a court to reject plaintiff's claim because of inconvenience either to the court, to the defendant, or to both. Essentially, the inquiry of the court is whether the choice of forum by the plaintiff is oppressive to the defendant.³⁸ If not, and if there are no compelling issues of judicial economy, the plaintiff's choice of forum will be respected. Thus I would argue *forum non conveniens* is a more objectively predictable obstacle than comity.

In *Wiwa*, an Anglo-Dutch company was sued in the United States for a tort in Nigeria; the *forum non conveniens* objection was accepted at trial, but rejected on appeal.³⁹ The appellate court considered the substantive English law and balanced the interests of the United Kingdom, the United States, Nigeria, the plaintiffs, and the defendants in determining whether to sustain the defendants' *forum non conveniens* objection.⁴⁰ Before sustaining the objection, the trial court first had to find it had jurisdiction over the matter; to support its finding of jurisdiction, the trial court pointed to the fact that the defendants were listed on the New York Stock Exchange, and that they organized ancillary activities in the United States.⁴¹

In terms of *forum non conveniens*, the Court of Appeals pointed out that although such a determination is generally at the discretion of the trial court, the trial court had failed to adequately consider two interests: (1) the fact that two of the plaintiffs were United States residents, and (2) the policy interest, implicit in federal statutory law, to provide foreigners with a forum for adjudicating claims of violations of the law of nations.⁴² In other words, the United States' commitment to the rule of law is so important that when balancing competing interests, it may tip the balance in favor of adjudication in the United States.

5. Act of State Doctrine

Plaintiffs seeking recovery in United States' courts should consider whether the act of state doctrine will be applied by the court to "preclude[] the courts of [the United States] from inquiring into the validity of the public acts [of] a

36 *Id.*

37 *Id.* at 101.

38 *Id.* at 102.

39 *Wiwa*, 226 F.3d at 106-108.

40 *Id.*

41 *Id.* at 93.

42 *Id.* at 100, 106.

recognized foreign sovereign power committed within its own territory.”⁴³ Historically, the act of state doctrine was based on notions of comity.⁴⁴ As such, it was and possibly still is a discretionary remedy. However, recently the act of state doctrine has been viewed as grounded in notions of separation of powers,⁴⁵ which might indicate it is not discretionary. The act of state doctrine evinces a desire to avoid embarrassing foreign powers or risk causing hostile confrontation with foreign powers. In substantive terms, the act of state doctrine arises where the relief sought or the defense interposed requires a court in the United States to declare invalid the official act of a foreign sovereign performed in its own territory.⁴⁶ In determining the applicability of this doctrine, the court should also consider whether the foreign sovereign acted in the public interest.⁴⁷ A mere commercial act is less likely than a sovereign act to be designated an “act of state”.⁴⁸

The act of state doctrine is no shield for illegal activity. An act by a state official in violation of the state’s laws, or the law of nations, is not an “act of state”,⁴⁹ either *a priori*, because the acts are illegal, or *a fortiori*, if the act of state doctrine is interpreted as a discretionary outgrowth of comity. Furthermore, because the use of the doctrine represents a refusal of the court’s usual duty to adjudicate cases before it, judicial review of the application of the act of state doctrine is not deferential.⁵⁰

43 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

44 *Doe v. Unocal Corp.* 963 F. Supp. 880, 892 (C.D. Cal. 1997).

45 *See id.* (suggesting that the courts’ use of the doctrine may improperly encroach upon the powers of the other branches of United States government).

46 *Banco Nacional de Cuba*, 376 U.S. at 401.

47 *Doe*, 963 F. Supp. at 893.

48 *Maria Gavouneli & Ilias Bantekas, International Decision: Prefecture of Voiotia v. Federal Republic of Germany*, 95 AM. J. INT’L L. 198 (2001). ““The distinction between acts *jure imperii* and *jure gestionis* is effected on the basis of the law of the forum and using as a basic criterion the nature of the act carried out by the foreign state, i.e., whether it involves the exercise of a sovereign power.”” *Id.* (quoting *Prefecture of Voiotia v. Federal Republic of Germany*, Case No.11/2000 (Areios Pagos (Sup. Ct. of Greece)), May 4, 2000).

49 *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980).

50 In discussing the standard of the review, the court stated:

Although the standard of review of a district court’s decision to abstain is often described as an abuse-of-discretion standard, we have noted that in the abstention area that standard of review is somewhat more rigorous. Because we are considering an exception to a court’s normal duty to adjudicate a controversy properly before it, the district court’s discretion must be exercised within the narrow and specific limits

6. Political Question Doctrine

As a part of domestic United States law, the political question doctrine may also present a significant challenge to the plaintiff. For example, in *Kadic v. Karadzic*,⁵¹ Radovan Karadzic, purported head of state of the Republic of Srpska, resisted trial in the United States based on head of state immunity; he also argued that his presence in the United States was incidental to his political functions,⁵² and that the trial was thus political rather than legal. In other words, Karadzic invoked the “political question” doctrine as his last defense against standing trial in the United States.⁵³

There were two central issues in *Karadzic*: (1) presuming Karadzic was the head of a *de facto* state, under what circumstances may such a foreign head of state be sued in the United States,⁵⁴ and (2) whether the executive or legislative branch – rather than the judiciary – should determine if the claims presented in the action were “political”, as Karadzic argued.⁵⁵ The court found that Karadzic’s presence within the United States was a valid basis for jurisdiction.⁵⁶ Even if Srpska was a *de facto* state, the court carefully pointed out that it was not yet so recognized. Therefore, Karadzic had no head-of-state immunity by virtue of his position within a recognized government, friendly to the United States.⁵⁷

Though Srpska was not recognized as a state, it had several attributes of statehood (territory, population, functioning government)⁵⁸ and may even have had some *de facto* recognition. Despite these factual and legal questions,

prescribed by the particular abstention doctrine involved Thus, . . . there is little or no discretion to abstain in a case which does not meet traditional abstention requirements.

Bigio v. Coca-Cola Co., 239 F.3d 440, 451-52 (2d Cir. 2000) (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998)).

51 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

52 *Id.* at 245-47.

53 *Id.* at 249.

54 *Id.* at 247-48.

55 *Id.* at 248-50.

56 *Id.* at 247-48 (holding that the narrow circumstances expressly providing immunity from suit by the Headquarters Agreement were not applicable here as Karadzic was neither served within the Headquarters District nor was he a designated representative of any member of the United Nations).

57 *Kadic*, 70 F.3d at 248.

58 *Id.* at 245.

neither political question nor sovereign immunity was found in *Kadic*.⁵⁹

7. Immunity

While the political question doctrine itself does not present an insurmountable obstacle to plaintiff, the related issue of immunity may present the plaintiff's most serious obstacle. The historical basis of sovereign immunity was in principles of "grace and comity", not the Constitution.⁶⁰

The issue of sovereign immunity encompasses two distinct types of immunity: (1) immunity of the state itself – sovereign immunity, and (2) immunity of the state's agents – official immunity. Ministers and heads of state enjoy absolute immunity during their terms of office.⁶¹ Though official immunity is a valid defense against an ATCA/TVPA claim where the act committed by the official was illegal under the law of the state,⁶² trying former heads of state can still present a challenge.⁶³ However, official immunity did not prevent the United States from successfully trying Manuel Noriega, the former dictator of Panama, for drug trafficking,⁶⁴ perhaps in part because the United States never recognized the legitimacy of the Noriega government.

Suits against foreign *states* themselves are generally barred by sovereign

59 *Id.* at 250 ("In a 'Statement of Interest,' signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the [current] litigation").

60 *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149 n.3 (7th Cir. 2001) (implying that comity was one justification for the grant of immunity to Germany).

61 *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2000 I.C.J. 121, 18 (Feb. 14), http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_jjudgment_20020214.PDF.

62 *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (concluding that "Paraguay's renunciation of torture . . . does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority").

63 In 1998, Spain unsuccessfully attempted to extradite former Chilean dictator, Senator Pinochet, from the United Kingdom to try him for acts committed by him or under his direction in violation of international law during his tenure in office. *Regina v. Bartle & the Comm'r of Police for the Metropolis–Ex Parte Pinochet*, 38 I.L.M. 581, 583-85 (1999).

64 *United States v. Noriega*, 117 F.3d 1206, 1209 (11th Cir. 1997). The *Noriega* court articulated the idea that in assessing an immunity claim, the court must look to the Executive Branch for guidance as to whether or not immunity is appropriate. *Id.* at 1212.

immunity, unless that state has waived such immunity.⁶⁵ In *Sampson v. Federal Republic of Germany*, the court held Germany to be immune under the Foreign Sovereign Immunity Act (FSIA) when sued for compensation by an individual, Sampson, who had been interned in a concentration camp and forced to work during World War II.⁶⁶ Sampson, a *pro se* litigant, argued for an implied waiver of immunity for acts in violation of *jus cogens*. However, the court held that there is no implied waiver of immunity under the FSIA for acts in violation of *jus cogens*.⁶⁷

The general rule both within the United States and internationally is that the state is immune for its sovereign acts, but not for its commercial acts.⁶⁸ For example, when a Liberian (neutral) vessel was attacked by the Argentine Air Force outside the zone of exclusion during the Falklands War, Argentina was immune from liability under the ATCA for the resulting property damage because the action did not amount to a commercial act.⁶⁹

The exceptions to the FSIA provide the only means of obtaining jurisdiction in the United States over a foreign sovereign.⁷⁰ The general rule of the FSIA is that foreign states are immune from suit in the United States.⁷¹ There are several exceptions to the general grant of immunity, which can be categorized as either based on waivers of immunity or on the commission of commercial acts.⁷²

The FSIA permits suit against a state where the state has waived its immunity.⁷³ Waiver may be implied, but implied waivers are strictly construed.⁷⁴

65 *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149 (7th Cir. 2001).

66 *Id.* at 1156.

67 *Id.* For a discussion of the legal issues in related cases, see Scott A. Richman, Comment, *Siderman De Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?* 19 BROOK. J. INT'L L. 967, 994-96 (1993) (arguing that the FSIA should be interpreted to exempt from protection those acts committed in violation of *jus cogens* norms because no act of Congress can be construed to violate international law, and granting immunity for violations of *jus cogens* norms would be tantamount to a violation of international law).

68 *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-87 (1983).

69 *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 441, 443 (1989).

70 *Id.* at 443.

71 28 U.S.C. § 1604 (2000).

72 *See* 28 U.S.C. §§ 1605, 1607 (2000) (providing the exclusive means of circumventing the general grant of immunity).

73 *Id.* at § 1605(a)(1).

For example, in determining the *Sampson* case, where there was no implied waiver of immunity under the FSIA just because the actions taken were in violation of *jus cogens*,⁷⁵ the court held that declarations by Germany of her desire to compensate compulsory laborers were not sufficient to waive Germany's sovereign immunity.⁷⁶ Clearly, direct evidence of intent to waive must be presented to successfully argue that a state has impliedly waived her immunity.

The FSIA also provides for liability for purely commercial acts.⁷⁷ Though claims are permitted where a tortious act either occurred in the United States or has a direct effect in the United States,⁷⁸ mere financial effects may not be sufficient to support a finding of "direct effects" under the FSIA.⁷⁹

As to the procedure of arguing the applicability of FSIA immunity, the initial burden of proof is on the defendant state to demonstrate that it is immune,⁸⁰ but it is the plaintiff's burden of production to demonstrate that one of the exceptions to the general rule of immunity applies.⁸¹

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) amended the FSIA to permit claims against states which are considered by the United States to be sponsors of state terrorism.⁸² It creates a privately enforceable cause of action in tort in cases of extra-judicial killing and aircraft hijacking.⁸³ Thus, "foreign states that have been designated as state sponsors of

74 *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1150 (7th Cir. 2001).

75 *Id.* at 1156.

76 *Id.* at 1151.

77 28 U.S.C. § 1605(a)(2) (2000).

78 *Id.* at § 1605(a)(2).

79 *See, e.g., Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984) (holding that the economic losses suffered by the Mission Aviation Fellowship because of the destruction of their plane did not constitute "direct effects" for the purposes of the FSIA).

80 *Doe v. Unocal Corp.*, 963 F. Supp. 880, 886 (C.D. Cal. 1997).

81 *Id.*

82 Pub. L. No. 104-132, 110 Stat. 1241, 1241-43 (1996) (codified in part at 28 U.S.C. § 1605 (a)(7)). For a critique of the AEDPA, and a discussion of its retroactive applicability, see: Robin C. Trueworthy, Note, *Retroactive Application of the Anti-Terrorism and Effective Death Penalty Act of 1996 to Pending Cases: Rewriting a Poorly Written Congressional Statute*, 75 WASH. U. L.Q. 1707 (1997). The Supreme Court resolved this issue, to some extent, in *Lindh v. Murphy*, where the Court ruled that Congressional intent supported the finding that the AEDPA did not apply to pending non-capital cases. 521 U.S. 320, 322-23, 326-27 (1997).

83 28 U.S.C. § 1605(a)(7) (2000).

terrorism are denied immunity from damage actions for personal injury or death resulting from aircraft sabotage.”⁸⁴ The victim (or the claimant) must be a United States national⁸⁵ and the tort must have occurred in the territory of a so-designated foreign state.⁸⁶

An obvious use of the AEDPA is against hijackers. For example, the relatives of the victims of the Lockerbie disaster⁸⁷ used the AEDPA to sue the government of Libya.⁸⁸ However, the AEDPA may be a violation of international law because of the international law doctrine of sovereign equality.⁸⁹ Sovereign equality holds that one state may not impose its will upon another sovereign.⁹⁰

8. Burdens of Proof

The last issue a plaintiff must consider relates to the different burdens of proof applicable in this area of law. These burdens are used to resolve doubtful cases and thus have great practical importance. A brief list of relevant burdens of proof under the various claims and defenses follows:

(A) The plaintiff is held to have presumptively exhausted all local remedies; therefore, the burden of proof is on the defendant to show that plaintiff has not in fact exhausted all local remedies.⁹¹

(B) The defendant must prove any immunity asserted.⁹² Though state

84 Rein v. Socialist People’s Libyan Arab Jamahiriya, 162 F.3d 748, 754 (2d Cir. 1998).

85 28 U.S.C. § 1605 (a)(7)(B)(ii) (2000).

86 *Id.* at § 1605 (a)(7)(B)(i).

87 See The Pan Am 103 Crash Website, at <http://www.geocities.com/CapitolHill/5260/headpage.html> (last updated Mar. 19, 2003) (describing the details of the horrific explosion of Pan Am flight 103, which exploded over Scotland, killing all 259 people aboard and eleven people on the ground).

88 Rein v. Socialist People’s Libyan Arab Jamahiriya, 162 F.3d 748, 753 (2d Cir. 1998).

89 See William P. Hoyer, *Fighting Fire With . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT’L L. 105, 139 (2002) (suggesting “[t]he doctrine [of sovereign equality] could be used to characterize the [AEDPA] as an unlawful attempt by one state to abrogate unilaterally the immunity of another sovereign state without that state’s express or implied consent”).

90 See S.S. Lotus (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 8, 4, 32 (Sept. 7) (rejecting France’s contention that the Turkish criminal proceedings against Lt. Demons, the officer on watch on the *Lotus* during the collision with the *Boz-Kourt*, violated international law principles of sovereign equality).

91 Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1357-58 (S.D. Fla. 2003).

92 Doe v. Unocal Corp., 963 F. Supp. 880, 886 (C.D. Cal. 1997).

defendants are presumed immune under the FSIA, they bear the burden of proving that none of the FSIA exceptions to sovereign immunity apply.⁹³

(C) The plaintiff bears the burden of proving that both subject matter and personal jurisdiction exist.⁹⁴

(D) The party asserting the applicability of the act of state doctrine must also bear the burden of proof as to its applicability.⁹⁵ Thus, these burdens of proof reduce, to some extent, the impact of the procedural obstacles plaintiff faces in prosecuting a private law action.

II. FOUCAULT – A METHODOLOGICAL FRAMEWORK TO UNDERSTAND TORTURE

Law can only be understood within the presumptions upon which it is founded. These first presumptions are the province of philosophy. Understanding and changing those presumptions is the most effective way to effect systematic change. Thus I would like to direct your attention to a methodology which might permit you to pose and perhaps even answer fundamental questions. I will attempt to analyze torture from the perspective of Michel Foucault. Foucault was a brilliant and prolific French scholar who died in 1984, at the age of 57. Foucault is one of the best contemporary theorists. His work, although cut off in the middle, is nonetheless voluminous. I would like to try to undertake a brief inquest into torture using Foucault's methodology, as I think his method reveals where the efforts at resistance against power would be most effective.

Foucault's life work was an attempt, I think successful, to construct an archaeology of power and knowledge.⁹⁶ Foucault saw power and knowledge as intimately related: he would refer to them occasionally as power-knowledge,⁹⁷ perhaps in emulation of the continuous theory of space-time. The center of

93 *Id.*

94 *See* *An v. Chun*, No. 96-35971, 1998 WL 31494, at *1 (9th Cir. Jan. 28, 1998); *Sinaltrainal*, 256 F. Supp. 2d at 1352 (explaining the requirement that the complaint allege a basis for subject matter jurisdiction).

95 *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

96 *See* MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE* (A.M. Sheridan Smith trans., Pantheon Books 1972) (1969); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972–1977* (Colin Gordon ed., Colin Gordon et al. trans. 1980) [hereinafter *POWER/KNOWLEDGE*].

97 *See* MICHEL FOUCAULT, *LANGUAGE, COUNTER-MEMORY, & PRACTICE: SELECTED ESSAYS & INTERVIEWS 199-217* (Donald F. Bouchard, ed. 1977) (discussing the interrelation of knowledge and power, often in tandem with the work of Gilles Deleuze) [hereinafter *LANGUAGE, COUNTER-MEMORY, PRACTICE*].

Foucault's study of power-knowledge, however, was the body.⁹⁸ He was focusing his attention on power-knowledge, and the body as both vector and victim of power was the center of this focus.

Foucault's perspective on power is interesting because it is an attempt to radically re-situate discourse about power in order to influence the exercise of power; it does this in two ways. First, he places the center of the study of power upon the body. Second, Foucault insisted that we look at power not as a raw, undifferentiated, instantaneous, mechanical manifestation of the state, but as a continuous social relationship not only occurring over time but also impacting all ranks in society.⁹⁹

Foucault once said, « Nous avons tous du fascisme dans la tête. Mais nous avons tous pouvoir sur le corps. »¹⁰⁰ I would translate this as, “We all have a little fascism in our head. But we all have power over our bodies.” This reflects his ontology, his conception of power. Power is knowledge, and the mind and body are one. Foucault was working toward liberation of the physical body by pointing out the malleability of the assumptions and foundations of the body politic.¹⁰¹ Foucault, in my opinion, was not at all a dualist; he saw the body and mind as an integral whole.¹⁰²

Foucault wanted us to change our perspective on power from a dualistic, mechanistic, rationalist, instrumentalist view – the view that allows power to be easily exercised – to a more monist and materialist perspective. However, he does not center his discourse on monism versus dualism, or materialism versus philosophical idealism, since that would simply recreate the very intellectual mechanism from which he was struggling to help us escape. Instead Foucault focuses on power in all varieties of intricate, organic, and even intimate relationships – with multiple subtle implications and nuances that mani-

98 See generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1979) [hereinafter *DISCIPLINE & PUNISH*].

99 See LANGUAGE, COUNTER-MEMORY & PRACTICE, *supra* note 98, at 205-17 (delineating the various intersections of power, where it lodges and who it commands, with Gilles Deleuze).

100 See MICHEL FOUCAULT, *Preface* to GILLES DELEUZE & FELIX GUATARRI, *ANTI-OEDIPUS: CAPITALISM & SCHIZOPHRENIA*, at xiii (Robert Hurley et al. trans. 1983).

101 See generally *DISCIPLINE & PUNISH*, *supra* note 99.

102 See *id.* at 30 (writing most famously, regarding the uses of the “soul” as a tool of power, that “the soul [is] the illusion of theologians. A ‘soul’ inhabits him [the condemned subject of power] and brings him to existence, which is itself a factor in the mastery that power exercises over the body. The soul is the effect and instrument of a political anatomy; the soul is the prison of the body”).

fest pervasively throughout a society.

Likewise, he invites us to reconstruct our focus on power in a similar manner. He would not just want us to look at torture as a fist smashing a face. Rather, he would want us to understand why *this* face, why *this* fist: *who* is directing the fist? *Why?*¹⁰³ He would ask, who is applying power, when, where, and how? He would look not only at the rough visible aspects of power – which had already been thoroughly analyzed before Foucault but almost always within a dualist rationalist perspective – but also at the social implications, consequences, and causes thereof. Foucault’s perspective gives us a better understanding of the outcomes of power – and also allows us to escape from mechanistic dualism.

A genealogy of torture using Foucault’s methodology enables us to escape both dualism and philosophical idealism, and forces us to place contemporary events in their historic context and reveals much about our own preconceptions. For example, this methodology would allow us to evaluate whether electrocution is torture, cruel and unusual; whether rape is torture;¹⁰⁴ and whether non-state actors can torture. I don’t propose to answer any of those questions here, but I do think these are some of the places where battle-lines could and should be drawn.

III. THE USE OF TORTURE: A SHAMEFUL CHAPTER IN THE HISTORY OF EUROPEAN SOCIETY

A brief look at the history of torture in Europe is necessary to fully understand what it is that modern society purports to reject. When one looks at medieval Europe and the types of torturous acts committed during that era, what we expect to see, perhaps unconsciously or semi-consciously, is the Inquisition. When we think of the Inquisition, we usually envision arbitrary, capricious violence, terrible violence, grounded thoroughly in death. But was it really so? Actually, when we look at the history of torture we discover that torture was used along gradations of seriousness,¹⁰⁵ from the mere threat of being tortured,

103 See POWER/KNOWLEDGE, *supra* note 97, at 1972-77 (giving a comprehensive overview about the types of questions to be asked about the nature of power in Western society).

104 Many thanks to South African scholar and activist Ms. Bonita Meyersfeld, J.S.D. candidate, Yale, for raising this interesting argument. Her article, *Reconceptualizing Domestic Violence in International Law* appears in this volume of the Albany Law Review.

105 Contemporary law still recognizes these gradations of torture. See *In re J-E-*, 23 I&N

to branding, to bodily injury, to greater bodily injury, to bodily injury which would induce death. When we look at the history of torture, we discover it was not, in fact, an undifferentiated, raw, irrational fist. Rather, it was an *operational* exercise crude but defined power.

How did this rational instrument of state-church power disappear? If torture was commonplace in medieval Europe, even as recently as the 1600s, by the late 1800s it was effectively abolished. When an instrument of church-state power exists for hundreds if not thousands of years and suddenly disappears – practically overnight – it really is remarkable. This type of change was the fulcrum which Foucault attempted to point out: that an entire society can rapidly change its methods of distributing power.¹⁰⁶ Marx would agree with Foucault that social practice is malleable and would point out its evolution is based on changes in productive forces which in turn are reflected in changes to relations of production.¹⁰⁷ The history of torture bears that out; it is clear that the social practice was malleable, and it changed rapidly as a consequence of changes in productive forces.

The disappearance of torture is one mark of the transition from the feudal mode of production to the industrial mode of production. Justice in feudal society is very much by word of mouth. Modern society, in contrast, has both the technical means and economic surplus to literally *afford* to be less cruel; or more exactly, to be cruel in highly-refined and subtle ways.¹⁰⁸ If we look at industrial societies, they fairly uniformly reject torture. And if we look at feudal societies, even contemporary feudal societies, they fairly consistently use torture.¹⁰⁹ The reason why feudal societies use such a rough instrument, such blunt, violent instrument is because they simply don't have other instrumentalities of power, whereas modern society can afford both economically

Dec. 291, 295, 314 (Mar. 22, 2002), 2002 WL 481156 (BIA).

106 See DISCIPLINE & PUNISH, *supra* note 99 (outlining the shift from state power manifest on the body of the condemned to the internalized self-regulation depended upon by the modern state).

107 DAVID MCLELLAN, KARL MARX: HIS LIFE AND THOUGHT 308-309 (1973).

108 For example, the United States has the largest prison population on earth, both in absolute terms and per capita. See Frank M. Conaway, *Seal All the Cracks in Our Justice System*, BALT. SUN, Dec. 5, 2001, at 17A, 2001 WL 6177176.

109 For an excellent discussion on the history of torture, see Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. Rev. 275, 275-89 (1994) (tracing the history of torture from ancient Greece and Rome through the first half of the 20th century).

and in terms of actuating power, to distribute power in ways that appear more subtle.

There are still remnants of such rough instruments – for instance, police brutality. Police often kill people who don't need to be killed, particularly in the United States, but people tend to look the other way.¹¹⁰ When we study the differences of power between an industrial system of production and a feudal system of production, we see that though the instrumentalities of the feudal system are generally less refined and rougher, modern, industrial society still experiences similar problems.

A. *A Theory of Torture*

The theory of torture presents the interesting question of whether or not acts of torture were consistent with the purported religious and societal bases of those acts. While there was a theoretical explanation and justification, to fully understand those ideas, one needs to assume the mindset of zealous medieval prelates, who would say, generally, well, what does it matter that we tortured you to death, for we have saved your immortal soul.¹¹¹ The system was designed to deter dissent by punishing it, and its practice was what I call a mixture of the interrogatory phase and the punitive phase.

The system was the result of an ontological dualism which sees the spirit as divine and immortal, and the body as corrupt and wicked. It was not merely operational, i.e., following certain procedures with a fair degree of predictability; it was also rational in the sense that if one accepted the presumptions, one would be compelled to the same conclusion. And thus the system was capable of rationalizing burning people to death and just about anything else.

While rehabilitation did not figure at all in medieval concepts of criminality, punishment and deterrence were central concepts to medieval penology.

110 See generally, Amnesty International, United States of America: Police Brutality and Excessive Force in the New York City Police Department, at <http://web.amnesty.org/library/print/ENGAMR510361996> (June 1996)

(reporting on incidents of police brutality – some involving shootings, some leading to the suspect's death – and the lack of criminal convictions of the officers involved therein); see also Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 *FORDHAM URB. L.J.* 639, 641-43 (2003) (categorizing the problem of police brutality as one that is “largely ignored”).

111 See KAREN FARRINGTON, *HAMLIN HISTORY OF PUNISHMENT AND TORTURE* 48-9, 51 (1996) (describing how the Inquisitors were ordered to investigate allegations of heresy and to torture those accused to extract confessions).

Imprisonment as a punishment was highly exceptional; as such, the idea of repentance also did not figure prominently as in medieval times as we tend to think today. After being punished, generally corporally, one said one's penance and was then forgiven. If prison was not the main form of medieval punishment, what was? Medieval punishment was just that – medieval. Branding was one common punishment, so that others would know that the criminal was a thief; neither maiming nor lashings were unusual. Such punishments required fewer resources and carried lower information costs than imprisoning criminals. Despite the natural revulsion most of us have to these forms of punishment, they were not necessarily more cruel than current punishment.¹¹²

Punishment in the industrial mode is also distinguishable from punishment in the feudal system by the fact that industrial societies at least *claim* to not inflict violent, cruel and barbaric punishments, but claim, rather, to seek to reform and rehabilitate the “sick” criminal. Though this rehabilitative function has not been taken very seriously in the United States since about 1980, most of the rest of the industrialized world does take the rehabilitative function of penal law very seriously – with the possible exception of the ex-apartheid regime of South Africa.

B. Four Reasons Why Torture Disappeared

If the existence of torture is in itself a phenomenon, its disappearance is even more intriguing. Torture disappeared for four main reasons. The first reason is that since people who were tortured would lie, it was an ineffective method of obtaining information. Second, not only do victims lie, they also die. And when they die, the victim is no longer providing the police or the government with information.

The third reason I posit that torture has, for the most part, been eradicated, and why today it is a *jus cogens* norm, is because the victims of torture are wonderful martyrs. These martyrs generate great sympathy. One such victim was Stephen Biko,¹¹³ a South African activist who opposed the police state and the apartheid regime of South Africa.¹¹⁴ The police denied having killed him while he was in prison, yet via the Truth and Reconciliation Committee, it was

112 If you had the choice of being put in stocks, or whipped, or wasting away in jail for months or even years, which would you choose?

113 See *Stephen Bantu Biko*, at <http://www.sahistory.org.za/pages/people/biko,s.htm>. (last visited Oct. 29, 2003) (documenting Biko's relationship to the South African anti-apartheid movement and his death as a symbol of martyrdom).

114 See *id.*

revealed that he was killed by the police while in prison.¹¹⁵ He became a wonderful martyr. A final reason for the disappearance is that just as it creates martyrs, these martyrs motivate not only the victims' families, but also their friends, distant relatives, and people they never met to resist the system that is trying to oppress.

In understanding the history of torture, its theoretical underpinnings as well as the four main reasons for its disappearance, one has an even greater appreciation for the level of social change contemporary society has achieved in this area of human rights. Yet, despite how far we have come, clearly there is work left to be done.

IV. CONTEMPORARY EVENTS

The United States foreign policy elite do nothing to discourage the tendency of the American people to have very naïve and uninformed views of United States foreign policy. And yet just a cursory examination of a few contemporary events demonstrates that for all the anti-torture rhetoric apparent in American statutory and case law, there are serious questions as to the commitment of the United States' government to securing the basic human right of all persons to live free of torture. The actions of the United States' government must be assessed in the context of the international *jus cogens* norm against torture.

Currently, in my opinion, the United States is moving from a *categorical* rejection of torture in all forms to a *qualified* rejection of torture. The TVPA clearly defines torture as any form of coercion, including mental coercion.¹¹⁶ Yet recently reported incidents allow one to speculate that the United States itself is engaging in torture. There is a facility in Afghanistan called "Hotel California" and two Afghan prisoners, apparently under exclusive United

115 See Cyrille Hugon, *In South Africa, 20 Years After Steven [sic] Biko's death, the Truth Commission Grapples with the Meaning of Justice*, at <http://www.columbia.edu/cu.sipa/PUBS/SLANT/SPRING97/hugon.html> (last visited Oct. 29, 2003) (reporting that those who originally denied responsibility for Biko's death were willing to admit "culpable homicide" in exchange for a pardon).

116 See TVPA § 3(b)(1) (defining torture as intentionally inflicting severe pain or suffering, whether mental or physical); see also 8 C.F.R. § 208.18(a)(1) (2003). An example of mental coercion would be leaving the lights on twenty-four hours a day, seven days week. I believe solitary confinement would probably qualify as well because if you keep somebody in a cell and don't expose them to humans for long periods of time, it will make them go insane.

States control, died from blunt force trauma while in custody at that facility.¹¹⁷ From this, one can fairly infer that the detained prisoners, who were presumably being interrogated, were tortured. The detention facilities run by the United States in Guantanamo Bay, Cuba, present another example of this type of situation. It was reported in August, 2002, that a senior Taliban official died after being subjected to severe torture while in custody at that facility;¹¹⁸ another recent report from the detention facility stated that the United States plans to construct a “death chamber” on the base.¹¹⁹

Recently, the Board of Immigration Appeals (BIA) tried to reduce the United States’ obligations under the Convention against Torture.¹²⁰ Though in this particular instance, the court intervened to overturn the BIA’s decision,¹²¹ a decision clearly in contravention to the Convention, it may be indicative of a future trend. If the United States gradually begins to accept small or insignificant amounts of torture, it will likely generate even more enemies. To justify this progression, the United States may draw on foreign case law. In looking at the European Court of Human Rights, one finds cases which arguably support finding exceptions to international law’s absolute prohibition of torture.¹²²

117 *Prisoners ‘Killed’ at US Base*, BBC NEWS, Mar. 6, 2003, at http://news.bbc.co.uk/1/hi/world/south_asia/2825575.stm; *Welcome to CIA’s Hotel California*, SYDNEY MORNING HERALD, Mar. 4, 2003, at <http://www.smh.com.au/articles/2003/03/04/1046540174835.html>

118 *Report: Zaeef Tortured to Death in Guantanamo*, Aug. 1, 2002, at <http://www.arabia.com/news/article/english/0,11827,257053,00.html>; *US Plans for Executions at Guantanamo*, June 11, 2003, at <http://www.buzzle.com/editorials/6-11-2003-41568.asp>.

119 *US Plans for Executions at Guantanamo*, GUARDIAN NEWSPAPERS, June 11, 2003, at <http://www.buzzle.com/editorials/6-11-2003-41568.asp>.

120 *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003) (finding the Board’s reversal of a stay of deportation erroneous because of the high likelihood that plaintiff would be detained and raped upon being deported to her home country); Convention against torture and other cruel, inhuman or degrading treatment or punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100–20, 1465.

121 *Id.* at 480.

122 In a famous decision, *Ireland v. United Kingdom*, a majority of judges found that hooding detainees – except during interrogation – making them stand continuously against a wall spread-eagle, subjecting them to continuous monotonous noise, depriving them of sleep, and restricting them to a diet of bread and water to extract information and confessions did not constitute torture under Article 3 of the European Convention of Human Rights. 2 Eur. H.R. Rep. 25, 59-60, 107 (ser. A, No. 25) (1978). This ruling should be construed to imply that these acts were not torture under customary international law, or the Convention against torture.

Perhaps equally disturbing is the United States' willingness to extradite prisoners held in the United States or those locations under United States' control to countries that do torture.¹²³ Because the norm against torture is a *jus cogens* norm, extradition of a person to a country that tortures is itself a violation of the Convention against torture.¹²⁴ No state is required to remedy a violation of a *jus cogens* norm, but every state is obligated to obey it.¹²⁵ The administration's willingness to extradite prisoners to countries that torture illustrates its flagrant disrespect for and clear operation outside of international law norms.¹²⁶

Acts of aggression committed by the United States in violation of international law also raise the question whether the United States is committed to the rule of law in international affairs. From an international law perspective, it is relatively clear that the war waged by the United States against Iraq constituted a criminal act.¹²⁷ United Nations Resolution 1441 did not, on its own terms, authorize the use of force against Iraq;¹²⁸ force was nonetheless used. The Nuremberg trials determined that planning, plotting and executing wars of

123 Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1, 2002 WL 15844256.

124 Convention against torture and other cruel, inhuman or degrading treatment or punishment, Dec. 10, 1984, art.3, S. TREATY DOC. NO. 100-20, 1465.

125 Scott A. Richman, *Siderman De Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?* 19 BROOK. J. INT'L L. 967, 985 (1993).

126 The administration has also openly admitted its willingness to assassinate. See Eric Krol, *Bush Talked of Assassinating Hussein; Senator Says President Might Repeal 27-Year Ban on Killing Foreign Leaders*, CHI. DAILY HERALD, Feb. 25, 2003, at 1, 2003 WL 14952499. However, assassination would obviously constitute an improper intervention in the domestic affairs of another state, and thus would be internationally problematic.

127 Oliver Burkeman and Julia Borger, *War Critics Astonished as U.S. Hawk Admits Invasion was Illegal*, GUARDIAN NEWSPAPERS, Nov. 20, 2003, <http://www.guardian.co.uk/Iraq/story/0,2763,1089158.00.html> (reporting statements recently made by Richard Perle, former defense policy board advisor to the Bush administration, which indicate the position that compliance with international law would have prevented the U.S. attack on Iraq). In spite of Bush's declarations that the U.S. was acting under UN Resolution 1441, or in the alternative, acting in self-defense, UN Secretary Kofi Annan is reported as arguing that a ruling was required to determine if the United States and its allies were under imminent threat; the Bush administration never sought such a ruling. *Id.*

128 See U.N. SCOR, 4644th mtg., U.N. Doc. S/Res/1441 (2002), at <http://www.un.org/Docs/scres/2002/sc2002.htm>.

aggression constitutes a crime against peace.¹²⁹ It is at least arguable that since Iraq holds a vast amount of the world's oil supply,¹³⁰ the war waged by the United States against Iraq amounts to a war of aggression, motivated by the United States' desire to reduce the price of oil by controlling its production. One can ask themselves whether the Bush administration's acts should be characterized as crimes against the peace.

Violations of an individual's rights under international law provide yet another example of United States' lawlessness. In the case of Robert LaGrand, LaGrand, a German national, was awaiting execution in the United States on the charge of capital murder. Prior to execution of the death sentence, the International Court of Justice ruled that the United States could not execute him as Texas had violated his right under the Vienna Convention to access the German consulate.¹³¹ The United States chose to ignore the Court's ruling against it, and summarily executed LaGrand. As a result, his execution was illegal as a flagrant violation of international law.

These instances do not stand alone. The United States has also either conferred with or signed treaties which it later refused to effectuate or to enforce; two excellent examples of this are the United States' respect – or lack thereof – for the International Criminal Court¹³² and the Kyoto protocol.¹³³

129 EUGENE DAVIDSON, *THE TRIALS OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG* 19 (1966).

130 See Energy Information Administration, U.S. Dept. of Energy, *Country Analysis Briefs: Iraq*, Aug. 2003, at <http://www.eia.doe.gov/emeu/cabs/iraq.html> (estimating that Iraq holds more than 112 billion barrels of oil, and offering that such a number might be a gross underestimate because so little of the country has been explored for oil).

131 Press Release, International Court of Justice, LaGrand Case (Germany v. United States of America), at http://www.icj-cji.org/icjwww/ipresscom/ipress2001/ipresscom2001-16_20010627.htm (June 27, 2001).

132 See International Criminal Court, at <http://www.icc-cpi.int/php/stateparties/allregions.php> (last visited Nov. 2, 2003) (indicating that despite the ratification of the Rome Statute by ninetytwo countries, including most of the EU, the United States has not ratified the statute which empowers the International Criminal Court).

133 United Nations Framework Convention on Climate Change: Status Ratification, at <http://unfccc.int/resource/conv/ratlist.pdf> (last modified Feb. 17, 2003); see Clary-Meuser Research Network, *U.S. Pulls Out of Kyoto Protocol*, at

V. CONCLUSION

In our collective youth, we all had a tendency to see the world in simplistic terms; the “heroes” always defeated the “villains”. However, as adults, we know these simplistic descriptions of reality are almost never accurate. This discussion attempts to present a complex yet accurate description of the objective reality of this area of law, with the hope that it might have some humanizing influence on American foreign policy. It is our collective responsibility, as members of an increasingly global society, to look in the mirror and, with candor, see our own errors and mistakes. Then we must take the courageous next step and begin the arduous process of correcting those mistakes. The law, with all its faults and flaws, may be the best way to do that.

<http://www.mapcruzin.com/news/news032901a.htm> (Mar. 28, 2001) (explaining that President Bush pulled out of the protocol because of the high cost of United States’ involvement).

CHAPTER II
ALVAREZ-MACHAIN V. UNITED STATES AND ALVAREZ-
MACHAIN V. SOSA:
THE BROODING OMNIPRESENCE OF NATURAL LAW *

Abstract:

The U.S. Supreme Court recently ruled that the Alien Tort Claims Act shall be interpreted strictly. In doing so however the court opens questions without explicit addressing other as yet unanswered questions where the circuits diverge. In determining that the Alien Tort Claims Act is purely procedural and does not create an additional claim under U.S. but rather gives individual claimants directly enforceable rights under international law before U.S. courts the court notes some points raised by Blackstone. Here we examine the issues presented by the Justice Department. The author argues that these issues were miscast preventing the court from reaching the merits on some still unanswered points of law. Finally, the author points us to further intriguing passages of both Coke and Blackstone which may help future courts to understand the significance of the Alien Tort Claims Act.

* This Article was published in 13 *Williamette Journal of International Law and Dispute Resolution* 216 (2004).

I. INTRODUCTION

A criminal combination kidnaps and tortures a DEA agent in Mexico. A physician, Dr. Alvarez, is suspected of having worked as an agent of the criminal combination. Namely, he is believed to have acted to keep the captive DEA agent alive so that the agent can be tortured further. Consequently, the United States procures the kidnapping of Dr. Alvarez. Let us presume that the kidnapping only involved a brief detention and little violence. Clearly, the kidnapping is in violation of international law, and Mexico has a right to a remedy against the United States. Does Dr. Alvarez have a right to compensation in tort from the United States?

Such, in sum, are the facts of the cases of *Alvarez-Machain v. United States*,¹ and *Alvarez-Machain v. Sosa*,² which address some of the difficult issues in universal jurisdiction before U.S. courts. Based on a painstaking textual and historical analysis, the Supreme Court reached an intellectually honest and logically defensible conclusion to the substantive law: in limited cases the Alien Tort Statute (ATS)³ provides a remedy before U.S. courts for tortious violations of international law – possibly only for cases of violations of *jus cogens*⁴ norms, but at least for such heinous violations of international

1 96 F.3d 1246 (9th Cir. 1996).

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

3 28 U.S.C. § 1350 (2000) reads in whole: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The ATS is also referred to as the Alien Tort Claims Act (ATCA).

4 “A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.” BLACK’S LAW DICTIONARY 712 (7th ed. 1999).

A *jus cogens* norm is a special type of customary international law. A *jus cogens* norm “is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332, 8 I.L.M. 679). Most famously, *jus cogens* norms supported the prosecutions in the Nuremberg trials. *See id.* “The universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts . . . – are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.” *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149 (7th Cir. 2001). Note, however, that while *jus cogens* and customary international law are related, they differ in one important respect. Customary international

law.⁵ The Supreme Court in *Sosa* reached a principled and prudential decision of restrained judicial activism.⁶ The Court explicitly stated the international laws which could be the basis of a claim under the ATS must be clearly determined existing norms or *de lege lata*⁷ and not emerging norms of international law⁸ or *de lege ferenda*.⁹

Unfortunately, the Court did not use these Latin terms of international law. The Court did however, specifically uphold the decision of *Filartiga v. Pena Irala*:¹⁰ International law for the Alien Tort Statute must not be understood as frozen in time in 1789, when the ATS was enacted, but rather as evolving over time. If the Court's neo-formalist result was a perfect example of judicious equipoise; balancing implicitly the conflict between presidential power and individual liberty, and a minor victory for human rights, it was built on the quicksand of a false dichotomy between natural law and positivism – a dichotomy which has needlessly bedevilled legal scholarship in the last century.

In Part I, the Introduction outlines the issues presented, the issues the Court decided, the unsettled issues which caused the *Sosa* Court to grant certiorari, and the issues the U.S. Justice Department and the Court ignored. Part II consists of a practical legal analysis of the exact issues the U.S. Justice Department and its agent *Sosa* presented to the Supreme Court in *Sosa*. Part II includes both a comparative law analysis, examining other common law jurisdictions, and a historical analysis based on the writings of Blackstone and Coke to help determine the meaning torts in violation of the law of nations. Finally, in

law, like international law defined by treaties and other international agreements, rests on the consent of states. In contrast, a state is bound by *jus cogens* norms even if it does not consent to their application.

Id. at 1150 (quoting Committee of U.S. Citizens Living in Nicaragua v. Reagan (“CUSCLUN”), 859 F.2d 929, 940 (D.C. Cir. 1988)).

5 See *Sosa*, 124 S.Ct. 2739.

6 *Sosa*, 124 S. Ct. at 2744 (“A decision to create a private right of action is better left to legislative judgment in most cases.”).

7 See BLACK’S DICTIONARY 459 (9th ed. 2004).

8 *Sosa*, 124 S.Ct. at 2765 (“[W]e are persuaded 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.”). See also *U.S. v. Smith*, 18 U.S. 153, 163-180 (1820) (illustrating the specificity with which the law of nations defined piracy).

9 See BLACK’S DICTIONARY 459 (9th ed. 2004).

10 *Sosa*, 124 S.Ct. at 2761-62.

Part III, I present a theoretical synthesis of the implications of the false dichotomy of positivism and natural law by looking at Aristotle and Hobbes. Aristotle and Hobbes both show that the supposed dichotomy of natural law and positivism does not in fact exist. Consequently, the presumption that the Court in *Sosa* makes is wrong. The court presumes that it cannot engage in a holist analysis of the common law and international law to develop synergies between them in the interest of justice. Thus, the Court concludes it must limit the future interpretations of the ATS to existing positive law (*de lege lata*) and cut off any normative application of international law (*de lege ferende*). However, since the main premise of the Court, that natural law does not exist, or is inevitably vague, inchoate, prescientific, or otherwise flawed, is wrong, the consequence of that premise, that the court cannot teleologically interpret normative content into the ATS, is not only no longer inevitable, it is downright questionable. The Court thus continues to follow a failed heuristic that has plagued it since *Erie*, which was also wrongly decided. The failure of the Court to understand that positive law and natural law complement each other as parts of a unified theory of justice is due to the Court's ignorance of Aristotle. A proper understanding of Aristotle's theory of justice and of his theory of teleological interpretation would enable the Court to do exactly what it claims it cannot: Lead the World in the defense of Human Rights.

A. *The Issues Presented to the Supreme Court in Sosa*

The Justice Department presented the following questions to the Supreme Court:¹¹ (1) Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute applying to acts perpetrated against a U.S. official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country? That is, in plain language, whether the U.S. executive may exercise jurisdiction to enforce overseas, in violation of the law of nations and in violation of the law of foreign states. (2) Whether the Alien Tort Statute creates a private cause of action allowing aliens redress for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action. (3) Whether the actions the ATS authorized are limited to suits for violations of *jus cogens* norms of international law. (4) Whether Dr. Alvarez' abduction constitutes a tort in violation of the law of nations actionable under the ATS.

11 *Sosa*, 124 S.Ct. at 2739.

Both cases reached the Supreme Court because of split decisions in the circuit courts over some of these issues, which are very well summarized in *Flores v. Southern Peru Copper Corp.*¹² The Court was also asked to decide whether the Federal Tort Claims Act would bar an action for false arrest due to the fact that the FTCA bars “[a]ny claim arising in a foreign country. . . .”¹³ This paper does not address that issue but briefly discusses the remaining four.

To a certain extent, the Justice Department miscast the issues before the Court. This may be due to a basic misunderstanding or ignorance of principles of international law and the history of the common law vis-à-vis international law. Common law lawyers often misunderstand international law because the sources of law, their hierarchization, and the methods used to derive and apply them are not the same in international law and the common law. In fact, international law resembles the national legal structure of pre-codification civilian legal systems. This means *stare decisis* is not a rule of international law,¹⁴ and case law has no binding precedential value, but may be persuasive evidence of the law. Conversely, general principles of law, a key element of civilian legal systems and international law, are not a source of law in the common law.¹⁵ Scholarly writings in international law are a source of law;¹⁶

12 343 F.3d 140, 151-52 (2d Cir. 2003). The court in *Flores* points out that both the ninth and eleventh circuits, following *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), recognize the ATS as granting a private cause of action, citing *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) and *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). The court further states that the D.C. Circuit criticized *Filartiga* in concurring opinions in *Tel-Oren v. Libyan Arab Republic* and *Al Odah v. United States*, 1146 (D.C.Cir. 2003), rejecting *Filartiga*'s holding that the ATS creates a private cause of action, citing *Al Odah*, 321 F.3d at 1146-47 and *Tel-Oren*, 726 F.2d at 811, 826, resulting in a split of authority at the appellate level.

13 28 U.S.C. § 2680(k) (2004).

14 See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (1986) (noting the “traditional view that there is no *stare decisis* in international law”).

15 Blackstone analyzes the common law as consisting of written law (statutes) and unwritten law (the common law). See 1 WILLIAM BLACKSTONE, COMMENTARIES *69 [hereinafter COMMENTARIES]. Common law is customary law, whether local or national. Blackstone specifically considers the maxims of law, which, in civil law, are expressions of general principles of law, as a possible source of the common law. *Id.* However, he rejects the maxims as a source of law, arguing that they are but expressions of custom and that maxims are vague and inchoate and must be proven via inquiry into custom. *Id.* These maxims of law, however, persist in the common law in equity and it may be argued that maxims are in fact expressions of general principles of law, as is the case in the civil legal systems. Examples of such maxims include: *sic*

however, in the common law, legal scholarship is at best merely persuasive. Finally, concepts proper to international law do not necessarily have corresponding concepts in domestic law and vice versa.¹⁷

B. *The unsettled issues which caused the Sosa Court to grant certiorari*

Though some issues in *Sosa* were miscast by the Justice Department, there were important issues undecided prior to *Sosa*: First, what substantive law applies under the ATS? Second, does the ATS only remedy violations of *jus cogens*?

1. *What Substantive Law is to be Applied?*

Prior to *Sosa*, it was not determined whether the ATS itself created a new independent cause of action under U.S. law, in addition to permitting claims under

utero tuo ut alienum non laedes. See *Bassett v. Company*, 43 N.H. 569, 577 (1862); *Swett v. Cutts*, 50 N.H. 439, 442 (1870). *Pacta quae contra leges et constitutiones, vel contra bonos mores sunt nullam vim habere indubitati Juris est* – “Good morals” While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. In contrast, a state is bound by *jus cogens* norms even if it does not consent to their application.—contracts against the constitution or good morals are void. Austin’s *Adm’x v. Winston’s Ex’x*, 11 Va. 33, 36 (1806). Because the common law, as opposed to statutory law, is induced from specific cases and not deduced from general principles, the simpler and better view is Blackstone’s. Maxims and general principles continue to haunt the common law due to methodological incomprehension of the role of general principles as deductive instruments in a system of written law (*i.e.*, the European civilian legal system). Thus in *The Harrisburg*, the U.S. Supreme Court quite correctly links the ideas of “natural equity and the general principles of law.” 119 U.S. 199, 206 (1886). Blackstone appears to be the source of the split on the role of maxims and, by extension, general principles of law in the common law and civil law. One could accuse Blackstone of misapprehending the role of general principles in legal deduction. This may be because he assigns the role of general principles to ecclesiastical courts, where the general principles atrophied. See COMMENTARIES at 83.

16 *United States v. Smith*, 18 U.S. 153, 160-61 (1820) (stating that international law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law”); *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 295 (E.D.Pa. 1963). See *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filartiga*, 630 F.2d at 880. See also *State of the Netherlands v. Federal Reserve Bank*, 201 F.2d 455, 461 (2d Cir. 1953).

17 See, e.g., Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under The Nafta Regime*, 27 YALE J. INT’L L. 141, 159 (2002).

international law to be heard before U.S. courts or instead, whether it merely permitted U.S. courts to take jurisdiction as to tortious violations of international law. The Supreme Court rightly took the second view. However, the Justice Department attempted to argue, unconvincingly, that the ATS did not contain any substantive element at all, whether under national or international law. That argument, which the court rejected, seems spurious, as a plain text reading of the statute and a consideration of its history reveal. This was not the only unanswered question compelling the Supreme Court to hear the *Sosa* case. Another issue, still explicitly unresolved, is whether the ATS only applies to *jus cogens* norms, or in the better view, whether it also applies to ordinary rules of international law.

2. *Does the ATS Only Apply to Violations of Jus Cogens?*

The Supreme Court did not directly answer whether the ATS only applies to violations of *jus cogens*. The Court does imply, however, that *jus cogens* claims will be heard and that they may also be the only claims it hears.

Although the Supreme Court reached proper results on the merits, the Justice Department miscast the issues; consequently, the court missed an opportunity to dispel more confusion. Worse, because the issues were not properly presented, the court unknowingly choked on a false dichotomy of “natural law versus positivism.” I discuss the issues as presented and the proper presentation to rectify some of the misunderstandings. In the first half of the paper, “Practical Analysis,” I examine the issues presented to the court. In the second half, “Theoretical Synthesis,” I look at the theoretical framework within which the court determined its answers to these questions.

II. PRACTICAL ANALYSIS: THE ISSUES THE JUSTICE DEPARTMENT AND ITS AGENT SOSA PRESENTED

- A. *“Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.”*¹⁸

The Government’s brief in *Sosa* miscasts the legal issues in a desire to compel its desired outcome. It states the issue as: “Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.”¹⁹ The issue ignores the fact that the arrest was illegal under international law as an invasion of Mexico’s sovereignty. Nor does the government consider the legality of abduction under international law. Finally, the government does not present the issue in terms of its jurisdiction to enforce.

The government could have presented the issue as whether the U.S. executive branch may constitutionally exercise jurisdiction to enforce, through its police power, overseas in violation of the law of nations and the law of foreign states. Perhaps surprisingly, the honest quick answer to this question is “yes.”²⁰

The government’s temerity here was unnecessary; ironically, miscasting the issue deprived the Court of a chance to affirm the self-help rights of the United

18 Brief for Respondent at 1, *United States v. Alvarez-Machain*, 504 U.S. 669 (1992) (No. 03-485). *See also* Brief for Petitioner at 1, *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (No. 03-485). The Supreme Court joined two cases, *United States v. Alvarez Machain* and *Sosa v. Alvarez Machain*. The former case was briefed both at the petition phase and on the merits. Ignoring the briefs at the petition phase we must still look both at the brief on the merits and the reply briefs. This analysis of the questions presented is based on the questions presented by the Justice Department in its brief on the merits in *U.S. v. Alvarez-Machain* as that brief seemed to best represent the numerous complex issues in the cases and the confusion in the government’s positions. In its reply brief in *U.S. v. Alvarez-Machain*, the U.S. Department of Justice (DOJ) argued: I. The drug enforcement administration’s arrest of respondent was authorized, and II. The federal tort claims act exception for claims arising in a foreign country bars Respondent’s lawsuit.

19 Brief for Petitioner at 1, *Sosa* (No. 03-485).

20 *See Ker v. Illinois*, 119 U.S. 436, 439-40 (1886).

States under international law with regard to fugitives. The power of the executive to conduct foreign policy, within the limits of the Constitution, is exclusive and nearly, in the Hobbesian sense, despotic.²¹ Thus, an exercise of jurisdiction to enforce overseas is constitutionally permissible, though such exercise is illegal under customary international law. Yet, the constitutionally permissible exercise of jurisdiction to enforce overseas, if illegal under international law, may also be illegal in national law for, absent contrary statute, customary international law is a part of the common law.²² To reiterate, international law prohibits abduction of any person by a state. Customary international law is one element of the common law. However, as to conflicts between the constitution and ordinary laws, whether customary (and here is where international law enters the pictures) or statutory, the constitution shall control.

1. *Customary International Law Prohibits Abduction by one State of any Person in another State Absent Consent of that State*

Under international law it is clear that the United States, as the cause of Alvarez-Machain's kidnapping, acted contrary to well-established principles of international law. Specifically, the U.S.-instigated kidnapping violated at least the principles of sovereign equality of nations,²³ the principle of non-intervention,²⁴ and perhaps, also a norm against arbitrary arrest and detention.²⁵

21 See, e.g., *United States v. Messina*, 566 F.Supp. 740, 744 (E.D.N.Y. 1983) (“[T]he broad authority of the executive in matters bearing on foreign affairs is not absolute when constitutional interests are implicated.”). Thus, conversely, when a constitutional interest is not implicated, the Executive’s authority on foreign affairs is absolute. [P]olitical matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive. But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 461 (1963) (White, J., dissenting).

22 Customary law, however, may be overridden by statute.

23 See *West v. Multibanco Comermex*, 807 F.2d 820, 824 (9th Cir. 1987); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See also U.N. CHARTER art. 2, para. 1; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. II, 28 I.L.M. 493, 500; United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, 9 I.L.M. 1292, 1296-97; S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7).

24 See *Quinn v. Robinson*, 783 F.2d 776, 795, n.14 (9th Cir. 1986). See also *United*

The U.S. abduction of Alvarez-Machain was illegal under international law and likely under Mexican law as well. Mexico strenuously protested the illegal but possibly constitutional act.²⁶ The illegality of an unconsented exercise of jurisdiction to enforce on foreign territory under international law as an invasion of another state's sovereignty is obvious. However, that entails the less obvious conclusion that – barring contrary statute – unconsented extraterritorial abduction is also illegal in U.S. common law because customary international law is a part of the common law. Essentially, the President requires Congress' permission to legally violate international law, at least as to the unlawful exercise of jurisdiction to enforce – here, abduction.

2. *Customary International Law as Part of the Common Law: The Kidnapping of Alvarez-Machain was Illegal under Common Law*

The *Sosa* Court addressed this issue, the role of international law in the common law, only indirectly in its discussion of federal common law post-*Erie*. However, due to the confusion *Erie R.R. Co. v. Tompkins* generated,²⁷ that issue persists and was in no way settled or even directly addressed by the *Sosa* court.

At least prior to the destruction of the World Trade Center, it was well-settled²⁸ that customary international law was a part of the common law in the United States²⁹ and the basis of claims for violations of the ATS.³⁰ If

Nations Declaration on Intervention, Jan. 14, 1996, 5 I.L.M. 374, 375-76; *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3) 1 A.C. 147, 154 (House of Lords, 2000); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 107 (June 27).

25 *See* Universal Declaration of Human Rights, art. IX, G.A. Res. 217A, U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 175-76. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432-33 (1987).

26 Brief for the United Mexican States at 937, *United States v. Alvarez-Machain*, 504 U.S. 669 (1992) (No. 91-712), *in* 31 I.L.M. 934 (July 1992).

27 304 U.S. 64 (1938).

28 *See, e.g.*, *Xuncax v. Gramajo*, 886 F.Supp. 162, 193 (D.Mass. 1995) (“[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law.”).

29 *See The Paquete Habana*, 175 U.S. at 700 (1900) (stating that “international law is a part of our law”). *See also* *Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1474 (9th Cir. 1994) (stating that previous courts did not hold that “international law is not part of federal common law if there are no contradictory federal statutes”); *Filartiga*, 630 F.2d at 885 (“[T]he law

customary international law is part of the common law, then absent contrary statute the United States also violated its own domestic law in abducting Alvarez-Machain.

Professors Curtis A. Bradley and Jack L. Goldsmith recently questioned this well-settled fact that customary international law is an integral part of the common law, arguing erroneously that the idea of customary international law as a part of U.S. common law is a modern position.³¹ Thus, a discussion of history and comparative law is necessary to demonstrate what should be obvious: customary international law is a part of the common law.

a. Comparative Law: Customary International Law is an Integral Part of the Common Law in Britain, Canada, and Australia

Legal history reveals the obvious fact that common law, based on customary law, includes customary international law. Furthermore, looking at the practice of other common law jurisdictions confirms this fact. Customary international law is an integral part of the common law of England³² and a part of Canadian national common law as well.³³ In Canada, treaties require an enabling act to

of nations . . . has always been part of the federal common law.”).

30 The Second Circuit stated that § 1350 provides jurisdiction and gave aliens, in this instance Muslim and Croat citizens of Bosnia-Herzegovina, a cause of action against the leader of the Bosnia Serbs for violations of “the law of nations” and treaties. *Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir.1995); see *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir.2000). The Ninth Circuit also held that § 1350 gave a district court jurisdiction over the estate of the former Philippine President Marcos, although all plaintiffs and defendants were Philippine nationals and although the torts, alleged to violate international law, occurred entirely in the Philippines. *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d 493, 499 (9th Cir.1992); see also *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1473 (9th Cir.1994); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir.1998). The Eleventh Circuit also held that § 1350 not only confers jurisdiction, but also gives federal courts the power to “fashion domestic common law remedies to give effect to violations of customary international law.” *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

31 See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

32 See *In re McKerr (AP) (Northern Ireland)* 2 All E.R. 409, 538 (House of Lords 2004) (“[C]ustomary international law forms part of the common law of England.”). See also *The Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom*, [2003] C.P. Rep. 28 Q.B.D. (Admin. Ct.).

33 See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2000] 2 F.C. 592

operate domestically;³⁴ however, customary international law is part of the common law and requires no enabling act – it is directly effective.³⁵ This is also the case in Britain, Australia,³⁶ the United States, and likely all other common law jurisdictions. This is understandable, as Canada, like the United States and other former British dominions, received British common law.³⁷ So the idea of customary international law as one element of the common law is hardly idiosyncratic. To gain insight into the meaning of the ATS and to answer whether this is a “modern position,” I briefly examine legal history.

b. Legal History: Customary International Law has been Part of the Common Law for Centuries

The Court in *Sosa* correctly looks at legal history, including the works of learned scholars such as Blackstone, to determine the content of the ATS.³⁸ Its analysis of Blackstone, though cursory, cannot be called superficial. However, it could have also gone further. Accordingly, let us extend this analysis and also consider the writings of Coke. Both Coke and Blackstone regarded customary international law as an integral part of the common law – namely, as another element of customary law.

i. What Blackstone can tell us about the Alien Tort Statute

Understanding the ATS requires serious examination of Blackstone. As the leading legal commentator at the time the ATS was drafted, he was almost certainly known by the authors of the ATS. Blackstone tells us exactly what “the law of nations” (*jus gentium*) is:

T[he] law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world^a ; in order to decide all disputes, to regulate all ceremonies and civilities, and

(Federal Court of Appeals, 2000) (“While principles of customary international law may be recognized and applied in Canadian courts as part of the domestic law, this is true only in so far as those principles do not conflict with domestic law.”).

34 See *R. v. Bonadie*, [1996] 109 C.C.C. 3d 356.

35 See *id.*

36 *Langer v. Commonwealth* [No 3] (1996) 186 CLR 302, 309.

37 *Beaver-Delta Machinery Corp. v. Lumberland Building Materials Ltd.*, [1985] F.C. 894 (“[P]ronouncements of the English courts do not constitute binding authority for us but they may be regarded as persuasively illustrative of common law principles developing in England, aboriginal home of the common law which has been received in Canada.”).

38 *Sosa*, 124 S.Ct. at 2757-62.

to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, *and the individuals belonging to each . . .*³⁹

What was true when Blackstone wrote remains, *mutatis mutandis*,⁴⁰ true today: the law of the nations generally regulates only state conduct vis-à-vis other states but, exceptionally, governs individual conduct as well. This is because “offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are *principally* incident to whole states or nations.”⁴¹

Even more importantly, Blackstone notes that *customary international law is an integral part of the common law* – a perfectly logical position, since the common law is but customary law:

I[n] arbitrary states this law [i.e. the law of nations], wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of it’s jurisdiction) is here adopted in it’s full extent by the common law, and is held to be a part of the law of the land.⁴² And those acts parliament, which have from time to time been made to

39 William Blackstone, *Commentaries on the Law of England*, in PUBLIC WRONGS, BOOK IV OXFORD 66 (R. Burn, LL.D. ed., 1978) (emphasis added).

40 “All necessary changes having been made.” BLACK’S DICTIONARY 1044 (8th ed. 2004).

41 Blackstone, *supra* note 40, at 68 (emphasis added).

42 It is worth noting that by “law of the land,” Blackstone is referring to the *Lex Non Scripta* or common law, namely the British Constitution. Article 39 of the Magna Charta and Article VI, Clause 2 of the U.S. Constitution speaks of “the law of the land” as a standard for determining constitutionality. Much of U.S. Fourth and Fourteenth Amendment jurisprudence in fact belongs in Article VI. Blackstone is repeating, in my opinion rightly, the idea of the unwritten constitution. Furthermore this *Lex Non Scripta*, which the colonists fought a revolution for, was received at independence and explicitly incorporated into the *Lex Scripta*, or written law, of the U.S. Constitution. A comparison of Article VI of the U.S. Const. and Article 39 of the Magna Charta helps reveal this.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

enforce this universal law, or to facilitate the execution of it's (sic) decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom.⁴³

Thus, it is in no way a “modern” or idiosyncratic view that customary international law is an integral part of the common law.

This is still true today: International customary law is a part of the common law. Statutory law is presumed consistent with customary international law interpreted, where possible without doing violence to the terms of the statute, consistently with international law. Statutory law can however displace the common law, including customary international law.

Customary international law is a part of “the law of the land.” These exact words, guaranteed by the Magna Charta, are also guaranteed word for word under the U.S. Constitution.⁴⁴ This is unsurprising since American colonists fought for the same rights as Englishmen, namely those constitutional elements of *lex non scripta* such as habeas corpus, trial by jury, and most famously, taxation only with consent. Because of this, one could argue customary international law is constitutional and clearly customary international law is a part of the law of the land, even post-*Erie*.

A reading of Blackstone makes the significance of the ATS term “law of nations” blindingly clear. Blackstone even gives insight into which torts could also be violations of the law of nations: “In all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law,”⁴⁵ *i.e.*, the law of nations. Again, this explains why the framers of the ATS explicitly wanted to vest jurisdiction in the federal courts: these claims were otherwise exclusively international and could not be handled by the states as the federal government has exclusive foreign policy power.

Blackstone also discusses international criminal law, which may be used to adduce more “torts in violation of the law of nations” since each corresponding common law crime implied a corresponding common law intentional tort.⁴⁶

“No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” MAGNA CHARTA art. 39.

43 Blackstone, *supra* note 40, at 67.

44 *Id.*

45 *Id.*

46 For specific examples of this general principle, see *Craft v. Rice*, 671 S.W.2d 247, 250 (Ky. 1984) (finding where statutory criminal law prohibits harassment, a correspond-

Blackstone enumerates: “T[he] principal offence against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors [sic]; and, 3. Piracy.”⁴⁷

ii. *What Coke can tell us about the Alien Tort Statute*

Blackstone is not alone in clarifying the role of customary international law in the common law. Earlier, Coke also regarded the law of nations, or *jus gentium*, as a part of the common law.⁴⁸ Coke influenced Blackstone’s definition of piracy; particularly the idea of the pirate as *hostes humani generis*⁴⁹ and liable by implication to universal jurisdiction. Blackstone goes so far as to quote Coke.⁵⁰ Coke also clarifies, as does Blackstone, that the definition of a tort still means an injury against one’s rights, *i.e.*, a non-consensual relation.⁵¹ Piracies, per Coke, are subject to forfeiture.⁵² Coke also gives us further insight into the meaning of the ATS:

[W]here divers did in the reign of the late Queen Elizabeth commit Piracy and Robbery upon the High Sea, of divers Merchants of Venice in amity with the said Queen, and after the Pirates, being not known, obtained a pardon granted at the Coronation of King James, whereby the King pardoned them all

ing private right of tort exists); *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528, 548 (3d Cir. 1979) (showing historically, the tort of conspiracy corresponded to crime of conspiracy); *Buck v. Oliff*, 1990 WL 751239 *2 (Va. Cir. Ct. 1990) (holding that the civil torts of assault and battery find a corresponding wrong in the criminal offense of malicious wounding). *But see* *Direct Lbr. Co. v. West Plywood Co.* [1962] S.C.R. 646, *affirming* [1962] 37 W.W.R. 177 (holding that not all breaches of statutory criminal law create a corresponding tort action). This apparent conflict can be resolved by recognizing the distinction between common law crimes and statutory crimes where common law crimes, barring contrary statute, necessarily implies common law torts and statutory crimes possibly imply with corresponding statutory torts.

47 Blackstone, *supra* note 40, at 68.

48 Mortimer Sellers, *Ethics and Authority in International Law*, 12 EMORY INT’L L. REV. 1597, 1600 (1998) (book review).

49 “Enemies of the human race.” BLACK’S DICTIONARY 755 (8th ed. 2004). *See, e.g.*, *U.S. v. Smith*, 18 U.S. 153 (1820).

50 Blackstone, *supra* note 40, at 68.

51 EDWARD COKE, ON MAGNA CARTA 14 (“The law is called *rectum*, because it discovereth that which is tort, crooked or wrong, for as right signifieth law, so tort, crooked or wrong signifieth injurie, and injuria est contra jus, against right.”).

52 EDWARD COKE, THIRD INSTITUTE ON THE LAWS OF ENGLAND 111 (1681).

felonies (*inter alia*) first, that before this Statute, Piracy or Robbery on the High Sea was no felony whereof the Common Law took any knowledge, for that it could not be tried, being out of all Towns and Counties, but was only punishable by the Civil Law, as by the Preamble it appeareth; the attainder by which Law brought no forfeiture of lands, or corruption of blood. Secondly, that this Statute did not alter the offence, or make the offence felony, but leaveth the offence as it was before this Act, viz a felony only by the Civil law, but giveth a mean of triall by the Common law, and inflicteth such pains of death as if they had been attained of any felony etc.⁵³

Here, we see Parliament expressly transposing a claim in the Admiralty courts (*i.e.*, under international law)⁵⁴ into the common law courts to avoid procedural injustice. This is exactly what the ATS seeks! However, while the anti-piracy statute Coke examined does provide for forfeiture, that forfeiture might have been granted not to the victim of the crime, but to the sovereign. Moreover, Coke states the claim against the pirate in Admiralty (*i.e.*, the international court) was “only punishable by the Civil law.” One could argue, wrongly, that the definition of “Civil law” equals what is meant today – a claim not in crime, but in tort. I believe, however, what is meant here by “Civil law” is the Admiralty courts: International law in its sources and structures mirrors civilian legal systems and civil law concepts continue to hold influence in the common law in Admiralty and Equity courts. Alternatively, the reference to “Civil law” may mean not ecclesiastic courts, but royal courts.

Whatever conclusion these points lead to, this much is clear: Coke’s analysis of this statute explains why Congress wanted to enact the ATS. Congress meant to transfer a claim from Admiralty, and possibly from state courts, to the civil courts to avoid procedural difficulties and irregularities leading to a lack of remedy for substantive injustice. Lest critics underrate the importance of Coke, even today the U.S. Supreme Court still cites his writings, among others, as persuasive evidence of the law.⁵⁵

53 *Id.* at 112.

54 *See Sosa*, 124 S. Ct. at 2756 (“The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation.”).

55 *See, e.g., California v. Sierra Club*, 451 U.S. 287, 300 n.3 (1981).

3. *The Government's Abduction, while Illegal under International Law may have been Legal under National Law if a statute had displaced the customary law. In all events, the Government's Abduction was Constitutional.*

The abduction of Alvarez-Machain was clearly a violation of international law.⁵⁶ That does not mean, however, the U.S. government does not have the constitutional power to breach international law.⁵⁷ Constitutionally, it is clear that although U.S. law should be interpreted consistently with international law, U.S. law can conflict with international law and nevertheless be constitutional.⁵⁸ It is also clear that customary international law is a part of the common law,⁵⁹ but federal statute may overrule it. So it is possible that U.S.

56 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987) (“A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”). See also *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812); *The Apollon*, 22 U.S. 362, 370-71 (1824); *In re Eichmann*, DIGEST OF INTERNATIONAL LAW §§ 208-14 (1961).

57 See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (“Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.”).

58 See *Murray v. Charming Betsy*, 6 U.S. 64, 118 (holding that while it is permissible for U.S. law to conflict with customary international law, where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with “the law of nations” is preferred). See also *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003).

59 The easiest but most superficial view is simply that customary international law is part of federal common law. See *Filartiga*, 630 F.2d at 885; *Al Odah*, 321 F.3d at 1146. That view, while roughly accurate, requires refinement because of the question of the role of customary international law in federal common law post-Erie:

After Erie brought an end to “general federal common law,” federal common law has been mostly interstitial or generated by the need for uniformity throughout the States. [F]ederal common law of customary international law is justified by neither consideration. Congress, when it ratifies treaties, often does so with reservations in order to avoid altering domestic law. Yet treating customary international law as federal law would alter domestic law because of the Supremacy Clause. *Al Odah*, 321 F.3d at 1148 (citation omitted).

The issue is carefully outlined, but remains unanswered, as noted in *Sampson v. Federal Republic of Germany*:

Several early Supreme Court decisions explain that customary international law is part of the law of the United States. During the nineteenth century, however, this apparently meant that customary international law was included in the general common law

actions, while clearly a violation of international law, are not necessarily a violation of U.S. domestic law. That would depend on whether any U.S. statutes in question operate to abrogate the common law. If any federal statute abrogated the common law on extraterritorial abduction then the actions were legal and constitutional. But constitutional power is not exercised in a vacuum. All states are subject to the command of international law: No state may exempt themselves from international laws which are also *jus cogens* through persistent objection thereto.⁶⁰ Thus, the United States has the power to abduct,⁶¹ but lacks a legal right to do so. Indeed, when it does so, it will incur the wrath of its allies and risk worsening an already isolated global position.⁶²

recognized in *Swift v. Tyson*. The general common law, unlike the federal common law of today, did not fall under the Supremacy Clause of the United States Constitution. Thus, the exact meaning of these early pronouncements on the domestic role of customary international law became less certain after the Supreme Court's rejection of a general common law in *Erie R.R. Co. v. Tompkins*. One view of customary international law holds that, post-Erie, it is federal common law. Another leading view is that customary international law is "like common law." Under this theory, customary international law is federal law that can arguably supersede prior federal statutes.

250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (citations omitted).

Thus, a massive lurking issue briefed by neither party before the Court was the status of customary international law as a part of the common law after *Erie*. The *Sosa* Court addresses this issue, but not decisively. In all events, the holding of *The Paquete Habana* states:

[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

175 U.S. at 700.

This law does not appear to have been expressly overruled. See *Ahmed v. Goldberg*, Nos. CIV.00-0005, CIV.A.99-0046, 2001 WL 1843390 at *7 (D. N. Mar. I. May 11, 2001) ("[s]ince any treaty or other international agreement of the United States, and any applicable rule of customary international law, is federal law (§ 111), it supersedes inconsistent State law or policy whether adopted earlier or later."); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV.L.REV. 1824, 1835 (1998).

60 *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). *C.f.*, *Gisbert v. U.S. Atty. Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993), *op. amended*, 997 F.2d 1122 (5th Cir. 1993) (declining to decide whether *jus cogens* supersedes domestic law).

61 *U.S. v. Noriega*, 117 F.3d 1206, 1222 (11th Cir. 1997).

62 See, e.g., Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35

Legally, other states will be entitled to the self-help remedies of retorsion⁶³ and reprisals.⁶⁴ Thus, the U.S. executive violates international law at its own peril and the peril of the republic. Federal law enforcement officers have constitutional power to enforce U.S. law overseas.⁶⁵ They do not, however, have the legal right to do so when such exercise of jurisdiction to enforce also constitutes a violation of international or foreign laws. The act may be legal in the domestic laws of the United States, but it would nevertheless be illegal under international law.

*B. Is the Alien Tort Statute solely a grant of jurisdiction, or does it provide a cause of action for aliens who are victimized by tortious violations of international law?*⁶⁶

Again, the Justice Department miscast the issue, for although the ATS is

ARIZ. ST. L.J. 939 (2003) (“Choosing to wrongfully detain an individual may weaken the U.S. position in the international community and lead to acts of retorsion or reprisal, even war.”).

63 *Marks v. U.S.*, 28 Ct. Cl. 147 (1893) (stating that retorsions are retaliatory acts short of war). *See also* George K. Walker, *The Lawfulness of Operation Enduring Freedom’s Self-Defense Responses*, 37 VAL. U. L. REV. 489, 534 (2003) (stating that “[r]etorsions are unfriendly but lawful acts,” such as mobilizing reserves or recalling ambassadors).

64 The power of reprisal is explicitly recognized in the U.S. Constitution. “[Congress shall have the power] to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art I, § 3, cl. 11. *See also* Michael J. Kelly, *Time Warp To 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT’L L. & POL’Y 1, 7 (2003) (“While acts that constitute reprisals would normally be illegal, they become legal because of the aggressor’s previous illegal act. Moreover, reprisals contain a distinctly punitive purpose and are frequently viewed as justified sanctions.”).

65 *American Baptist Churches in the U.S.A. v. Meese*, 712 F.Supp. 756, 771 (N.D.Cal. 1989) (“Congress is not constitutionally bound to abide by precepts of international law, and may therefore promulgate valid legislation that conflicts with or preempts customary international law.”). *See, e.g.* *U.S. v. Yunis*, 681 F.Supp. 909, 916-17 (D.D.C. 1988) (stating that the permissible actions of law enforcement officers acting overseas are, however, subject to the U.S. constitution).

66 *See* Brief of United States Department of Justice, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339). *See also* Brief of Amici Curiae Corporate Social Responsibility at *i, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339) (posing the issue of “Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action”).

“merely” jurisdictional, it grants jurisdiction for substantive claims in violation of the law of nations.⁶⁷ This is facially apparent by reading the plain language of the statute. This was also the conclusion the Supreme Court in *Sosa* reached.⁶⁸ Some of the U.S. Courts of Appeals had at least implied that the ATS created a supplementary cause of action in addition to the substantive international cause of action. However, the better view, taken by the majority of the circuit courts and affirmed by the Supreme Court in *Sosa*,⁶⁹ is that the ATS is a purely jurisdictional statute and does not itself create any new independent cause of action.⁷⁰ The Court reached this result through a textual⁷¹ and historical⁷² analysis of the ATS. It also considered a systemic analysis, placing the ATS in the context of the judiciary act – a jurisdictional law – to reach the logical conclusion that the act does not create an independent cause of action under U.S. law.⁷³ On the basis of this solid black letter analysis, the Court concluded that the statute permits the transposition of tortious violations of international law into U.S. law.⁷⁴

Although the ATS does not create an independent cause of action under U.S. law, this does not mean no remedy exists for a private person when their rights under international law are violated. Rather, it means that the international law is the basis of the substantive claim.⁷⁵

67 “[T]he state has no inherent right to enforce its criminal laws or restrictions imposed under those laws outside the United States. Only with the permission of the foreign country in question may the law enforcement officers of one country exercise powers in another one.” *Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432(1), (2) (1987)) (citations omitted).

68 *Sosa*, 124 S. Ct. at 2759.

69 *Id.* at 2754.

70 *See, e.g., Goldstar v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). *But see In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (rejecting the argument that the ATS is merely jurisdictional).

71 *Sosa*, 124 S.Ct. at 2755.

72 *Id.* at 2756-58.

73 *Id.* at 2755 (“The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature.”).

74 *Id.* at 2758.

75 *See Alvarez-Machain*, 331 F.3d at 631-32.

The district court . . . reasoned that “it is international law, not the ATCA,” that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself. This reading is consistent with

As well as the ATS claim, there may be an independent, implied private cause of action for violation of *jus cogens* norms and constitutional torts as a possible remedy for international human rights violations.⁷⁶ The Court in *Sosa*, however, continued the trend of limiting *Bivens* claims for constitutional torts.⁷⁷

A substantive claim for a “violation of the law of nations or a treaty of the United States”⁷⁸ litigated before U.S. courts should be considered “derived” from international law.⁷⁹ *Sosa* addressed a split of authority on this issue between U.S. Courts of Appeals. The Court’s plain meaning interpretation yielded the conclusion that the ATS does not grant an independent cause of action, but rather provides U.S. federal courts the jurisdiction to hear claims

the Supreme Court’s reasoning in *U.S. v. Smith*. . . . The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. . . . Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute.

Id. (citation omitted).

76 See *Hawkins v. Comparet-Cassani*, 33 F.Supp. 1244, 1255 (C.D. Cal. 1999) (“Federal courts may, however, imply a private right of action for violations of *jus cogens* norms of international law.”). See also *White v. Paulsen*, 997 F.Supp. 1380, 1383 (E.D. Wash. 1998). The Supreme Court recognizes that private rights of action may be implied for violations of federal constitutional rights for which no express statutory right of action exists. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1999) (holding that the right to sue federal agents for damages could be judicially implied from the Fourth Amendment’s prohibition against unconstitutional searches and seizures). Judicial authority to recognize implied remedies for violations of constitutional rights applies equally to violations of *jus cogens* norms such as those prohibiting genocide, torture, and slavery. See *White*, 997 F.Supp. at 1383; *Benas v. Baca*, No. CV-00-11507, 2001 WL 485168, at *3 (C.D. Cal. Apr. 23, 2001).

77 *Sosa*, 124 S.Ct. at 2772 (Scalia, J., concurring in part and concurring in the judgment) (“*Bivens* is ‘a relic of the heady days in which this Court assumed common-law powers to create causes of action.’”). See also *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (“While *Bivens* stands, the ground supporting it has eroded. For the past 25 years, ‘we have consistently refused to extend *Bivens* liability to any new context.’”).

78 28 U.S.C. § 1350 (2000).

79 See *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (“[I]n order to state a claim under the ATCA, a plaintiff must allege either a violation of a United States treaty or of a rule of customary international law, as derived from those universally adopted customs and practices that States consider to be legally obligatory and of mutual concern.”).

for violations of international law which are also torts injuring aliens. The ATS states 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.”⁸⁰ The illegality to be remedied under the ATS is violation of *international* law or the law of nations, *i.e.*, *jus gentium*.⁸¹ The ATS does *not* envision ordinary torts which injure aliens, which would be “private law,” but rather tortious violations of international law.⁸²

Also, attempts to infer the limits and meaning of the ATS from the Torture Victim Protection Act of 1991 (TVPA) are problematic at best: Congress enacted the TVPA hundreds of years after the ATS. Furthermore, the ATS and TVPA differ in that the ATS addresses *international* law.⁸³ In contrast, the TVPA is a creation of *American* law, not international law. International law may be persuasive evidence of the content of the TVPA, but it is *not* the source of the claim.⁸⁴ This distinction is clouded by the fact that customary international law grows out of state practice. If all states recognized claims like the TVPA, then an independent cause of action would exist based on international law for the same set of facts that may be remedied in U.S. law under the TVPA.

It is better to look at the ATS in its own terms to understand its meaning. The only two law sources explicitly mentioned in the ATS were the law of nations, not U.S. law, and treaties of the United States,⁸⁵ both of which are sources of international law, custom, and treaty. The evidentiary role of the TVPA in interpreting the ATS should be seen only in negative terms; the Supreme Court regards the TVPA as evidence that Congress did not dis-

80 28 U.S.C. § 1350 (emphasis added).

81 28 U.S.C. § 1350.

82 28 U.S.C. § 1350.

83 28 U.S.C. § 1350.

84 *See Al Odah*, 321 F.3d at 1146 (Randolph, J., concurring).

The House Report on the torture victim bill did state that § 1350 “should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law.” But the statement of one congressional committee is by no means a statement of “Congress,” as some have supposed; the wish expressed in the committee’s statement is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum.

See id. (citation omitted).

85 *Sosa*, 124 S. Ct. at 2754-61.

approve of use of the ATS.⁸⁶ However, the Court goes further by raising a rather unpersuasive argument that Congress must somehow explicitly authorize the Court to enforce laws it has enacted.⁸⁷ It would certainly be more logical to presume that all laws enacted are also meant to be enforced, unless Congress explicitly stated a law was merely an “enabling act” or similar preparatory legislation. It would be a strange interpretation of separation of powers for the Court to simply refuse to adjudicate the laws Congress enacted.

The doctrine of *expressio unius*⁸⁸ reinforces the plain meaning interpretation.⁸⁹ Logical arguments also support the interpretation that the substantive aspects of the ATS are based in international law and not in domestic law. What purpose would be served by creating two causes of action, one based in domestic substantive law and the other in international law within one legislative act, particularly since both causes of action would be almost exactly co-extensive? Why would the ATS authors want to “mirror” all international law claims with equivalent domestic claims? There seems to be no sensible reason to do so. Thus, a *reductio ad absurdum*⁹⁰ argument also leads to the logical

86 See *id.* at 2765 (“Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.”).

87 See *id.* at 2763.

It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat. 73, providing authority that “establish[es] an unambiguous and modern basis for” federal claims of torture and extrajudicial killing. But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 “should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” Congress as a body has done nothing to promote such suits.

Id. (citations omitted).

The argument is well-taken until the last clause. Congress does not need to authorize the adjudication and enforcement of the laws that it enacts. What action was the court looking for beyond the retention of § 1350 and enactment of the Torture Victim Protection Act?

88 “A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S DICTIONARY 620 (8th. ed. 2004).

89 *Tucker v. Alexandroff*, 183 U.S. 424, 436 (1902) (holding that “general principles applicable to the construction of written instruments” apply to the construction of treaties).

90 “In logic, disproof of an argument showing that it leads to a ridiculous conclusion.” BLACK’S DICTIONARY 1305 (8th. ed. 2004).

conclusion that the ATS is purely procedural, but vests in U.S. courts the power to remedy violations of *international* law. The substantive component of the ATS is found in *international* law, while the procedural aspects are found in *U.S. law*.

Statutes, like treaties,⁹¹ are to be interpreted not in isolation,⁹² but rather in light of the Constitution,⁹³ congressional intent, international law, and other statutes with the goal of giving full effect to all of their provisions. Statutes are to be interpreted wherever possible to be consistent with treaties and the U.S. constitution.⁹⁴ There is very little evidence of legislative intent as to the scope and purpose of the ATS.⁹⁵ The Supreme Court in *Sosa* did however, do the best job possible to analyze what little historical evidence it could find.⁹⁶ Interpreting the ATS as creating an independent substantive cause of action in

91 *Maximov v. U.S.*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963) (stating that treaty interpretation seeks to “give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties”). *See also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988) (stating that when interpreting a treaty, we “begin with the text of the treaty and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages”).

92 *See Branch v. Smith*, 538 U.S. 254, 281 (2003) (“[C]ourts do not interpret statutes in isolation.”).

93 *See, e.g., In re Cross*, 662 P.2d 828, 834 (1983) (“[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so.” (quoting *State ex rel. Morgan v. Kinnear*, 494 P.2d 1362 (1972))).

94 *See, e.g., Airline Pilots Ass’n, Int’l, AFL-CIO v. Taca Int’l Airlines, S.A.*, 748 F.2d 965, 969 (5th Cir. 1984) (citing *United States v. Lee Yen Tai*, 185 U.S. 213 (1902)) (“It is axiomatic that statutes and treaties are to be interpreted, to the maximum extent possible, so as to be consistent and harmonious.”); *Ali v. Ashcroft*, 213 F.R.D. 390, 405 (W.D. Wash. 2003) (“While Petitioners may not directly invoke rights under non-self-executing treaties, or challenge statutes when Congress has clearly abrogated international law, they certainly may argue that the Court should adopt the statutory interpretation that is consistent with international law.” (citing *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001))).

95 *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 148 (2d Cir. 2003) (“The intended purpose and scope of the ATCA never have been definitively established by legal historians or by the Supreme Court, and the ATCA lacks a legislative history that could provide courts with guidance as to its intended meaning.”).

96 *See Sosa*, 124 S.Ct. at 2758 (“Given the poverty of drafting history, modern commentators have necessarily concentrated on the text.”).

addition to claims under international law would not be inconsistent with U.S. treaties or the constitution, but such an interpretation would contradict maxims of statutory construction such as “plain meaning” interpretation and *expressio unius est exclusio alterius*.

Statutes are also to be interpreted according to their plain meaning.⁹⁷ The ATS does not explicitly state creation of an independent cause of action, but rather explicitly uses the terms “committed in violation of the law of nations or a treaty of the United States.”⁹⁸ No more, no less. Had Congress wished to create an independent cause of action under domestic U.S. legislation or domestic common law, it would have said so, as it did in the Torture Victim Protection Act⁹⁹.

The ATS opens U.S. courts to alien litigants to redress substantive violations of international law to overcome the key limitation of international law: the absence of enforcement mechanisms. International courts and tribunals are only partial answers to the problem of unenforced international laws because international tribunals are themselves limited by the second main problem of international law: the absence of a single sovereign. International law is also limited because, as a general rule it addresses itself principally to nations and not individuals.¹⁰⁰ An independent cause of action would not need to be created to grant individuals, as opposed to states, remedies for certain violations of international law.¹⁰¹

This conundrum leads to another question: whether a claim for a violation

97 See *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000) (“When a statute is unambiguous, resort to legislative history and policy considerations is improper.”).

98 28 U.S.C. §1350 (2000).

99 See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

100 See *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F.Supp. 885, 903 (D. Tex. 1980) (“There is a general consensus . . . that [the law of nations] deals primarily with the relationship among nations rather than among individuals.”).

101 See *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (“The court of appeals . . . recogniz[ed] the emergence of a universal consensus that international law affords substantive rights to individuals and places limits on a state’s treatment of its citizens.” (citing *Filartiga*, 630 F.2d at 880-87)). These well-defined, but limited exceptions include, *inter alia*, torture, acts of genocide, war crimes, piracy, and slavery. See *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (“Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.” (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1986))).

of international law injuring only a state would nonetheless also create a right to a remedy in the United States? Unfortunately, the better answer is “no.” The issue of when and whether an international norm applies to individuals is not without controversy.¹⁰² This controversy, however, is due to a lack of understanding of international law or perhaps skepticism at the proof of international custom.¹⁰³ Such proof necessarily calls before the court texts from foreign legal systems, which are often, but not always, in foreign languages.¹⁰⁴ With a proper understanding of the general rule that international law governs only relations among states *inter se*,¹⁰⁵ but does exceptionally recognize rights and

102 See *Naoum v. Attorney General of U.S.*, 300 F.Supp.2d 521, 527 (N.D. Ohio 2004).

Whether or not customary international law may be used by individuals to assert rights against state or private actors is a somewhat unsettled proposition. The Sixth Circuit, in *Buell v. Mitchell*, held that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it [is] their constitutional role to determine the extent of this country’s international obligations and how best to carry them out. However, in *Buell*, the Sixth Circuit expressly limited its holding to the context of the case stating that it took ‘no position on the question of the role of federal courts to apply customary international law as federal law in other contexts, a subject of recent lively academic debate.

Id.

103 See, e.g., *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 162-63 (2d Cir. 2003) (“A treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles.”). See also *U.S. v. Yousef*, 327 F.3d 56, 102 n.35 (2d Cir. 2003).

104 See, e.g., *Eastern Airlines, Inc. v. Floyd*, 449 U.S. 530, 536-40 (1991). The Supreme Court, though methodical in its textual analysis reaches the right result, but its reasoning is incorrect. The Court’s decision was based on the mistaken notion that the sources of law and their hierarchization in France are the same as in the United States. That is simply not the case; both the sources of law and their hierarchical relationships are different in French and U.S. law. *Eastern Airlines* is a perfect example of how courts should try to determine foreign law via a methodical textual analysis, but the glaring error of the Court shows us why other courts are reluctant to attempt to interpret foreign law. *But see Rudetsky v. O’Dowd*, 660 F.Supp. 341, 348 (D. N.Y. 1987) (finding the absence of language barrier factor in favor of determining and applying British law in U.S. court); *Stanley v. Bertram-Trojan, Inc.*, No. 89 CIV.8160, 1991 WL 221116, at *3 (S.D. N.Y. 1991) (finding a similar absence of language barrier factor in favor of determining and applying Bahama’s law in U.S. court).

105 *Inter se* references “a right or a duty owed between the parties, rather than to others.” BLACK’S DICTIONARY 839 (8th ed. 2004). See *U.S. v. Al-Hamdi*, 356 F.3d 564, 575

duties of individuals, delimiting the exceptions becomes possible.

The problem of determining whether a claim for a violation of international law creates an individual right becomes manageable by understanding that the sources and methods of common law and European continental civilian law are in fact similar. International law generally does not create individual rights because the rights it creates are held by states, which then mediate the complaints of individuals. Normally, individuals can only complain of a violation of international law through the intermediary of their state.¹⁰⁶ Violations of the rights of non-intervention and sovereign equality are not within the limited, but well-recognized, exceptions where individuals have directly enforceable claims under international law. Consequently, U.S. law may only recognize a novel individual claim for a violation of international law by relying on the flimsy argument that the ATS only imports international substantive law and not international procedural law and the question of who has a right to a remedy is a procedural, not substantive question. Such an argument is flimsy because it is against common sense. The international claim does not recognize a private cause of action, so why would it do so under the ATS? Furthermore, the argument relies on formalist distinctions between “substance” and “procedure,” which have been shown to be manipulable and thus untenable. In all events, for political reasons, the Supreme Court in *Sosa* wished to limit ATS. Thus, it is unlikely that the circuit courts would adopt this line of argument.

C. *“If it is proper to imply or create a cause of action under the ATS, whether those actions should be limited to suits for violations of international legal norms to which the United States has assented.”*¹⁰⁷

The issue is again somewhat miscast because it ignores the category of norms

(4th Cir. 2004) (“Even where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that any rights arising from such provisions are, under international law, those of the [*sic*] states and . . . individual rights are only derivative through the states.” (quoting *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.1990))). What is generally true of treaties, however, does admit exceptions and is not true of custom; if Congress finds a customary international law repugnant, it can legislate against it.

106 See *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (“[I]t is traditionally held that any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.” (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. e (1965))).

107 Brief of Petitioner, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (No. 03-339).

erga omnes.¹⁰⁸ There are international obligations of all states *inter se* which are not derogable. Those are laws *jus cogens*. However, obligations of all states to the international system as a whole also exist:¹⁰⁹ Those are norms *erga omnes*.¹¹⁰

The distinction¹¹¹ may seem unimportant; one might be able to subsume

108 See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and Their Impact on the Liability of Multi-national Corporations*, 20 BERKELEY J. INT'L. L. 91, 153 (2002) (stating that *erga omnes* obligations are a consequence of general principles of international law); *The Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (stating that norms *erga omnes* are non-derogable duties owed by all states to the international community and that all states have an interest in the protection of an *erga omnes* norm).

109 *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (“In the words of the International Court of Justice, these norms, which include ‘principles and rules concerning the basic rights of the human person,’ are the concern of all states; ‘they are obligations *erga omnes*.’” (citing *Barcelona Traction*, 1970 I.C.J. at 32 (1970))).

110 The concept of *erga omnes* norms appears first clearly in *Barcelona Traction*. There, the International Court of Justice stated:
[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* . . . Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.
Barcelona Traction, 1970 I.C.J. at 32 (citation omitted).

111 See Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria For Peremptory Norms*, 11 GEO. INT'L ENVTL. L. REV. 101, 106 (1998) (“The relationship among the different kinds of ‘community obligations’ (jus cogens, erga omnes obligations, international crime) is still an open issue.”); Jochen Abr. Frowein, *Obligations Erga Omnes*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 757 (1997) (“Although the notions jus cogens and obligations erga omnes refer to different legal consequences, they are related to each other in important aspects. A rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States must be seen to have a legal interest.”).

erga omnes norms into *jus cogens*.¹¹² U.S. law may no longer recognize the distinction between *jus cogens* norms and *erga omnes* norms,¹¹³ but the distinction still persists internationally. *Jus cogens* norms are those rules of international law which no state may violate.¹¹⁴ They are duties owed to other states and individuals.¹¹⁵ Norms *erga omnes* are those norms which no state may violate because they are duties owed to the international community as a whole.¹¹⁶ The distinction may be relevant for the determination of whether a state may exercise universal jurisdiction. At any rate, the Supreme Court in *Sosa* does not address the distinction between *jus cogens* and *erga omnes*. In fact, neither term even appears in the Supreme Court's decision! Elsewhere, U.S. courts have held that although no state may violate *jus cogens* norms,¹¹⁷ neither is any state obligated to remedy violations of such norms,¹¹⁸ although states are under a duty to extradite or punish international criminals in their

112 For an example of a U.S. court, probably erroneously, subsuming *jus cogens* into *erga omnes* and thus confusing two distinct legal concepts, see *Siderman de Blake*, 965 F.2d at 715.

113 See *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1184 (D.C. Cir. 1994) (Wald, J., dissenting) (stating, in my opinion erroneously, that *erga omnes* norms and *jus cogens* norms are one and the same).

114 Vienna Convention on the Law of Treaties, May 23, 1969, art. 64, U.N. Doc. A/CONF.39/27, at 289 (1969), 1155 U.T.S. 331, reprinted in 8 I.L.M. 679 (1969) (stating that a *jus cogens* norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

115 See *Tachiona v. Mugabe*, 234 F.Supp.2d 401, 426 (S.D.N.Y. 2002). See also Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 524 (1994); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 154 (2002).

116 See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 306 (S.D.N.Y. 2003) (“Violations of *jus cogens* norms constitute violations of obligations owed to all (*erga omnes*)” (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS 702 § cmt. o (1987))). See also *Barcelona Traction*, 1970 I.C.J. at 32.

117 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

118 See *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001) (“[*Jus cogens* norms do not require Congress (or any government) to create jurisdiction.”).

territory.¹¹⁹

1. *Plain Meaning Argument – The ATS facially does not distinguish between jus cogens norms and other rules of international law*

Regardless of the contours of the distinction between norms *erga omnes* and norms *jus cogens*, a distinction in all events not directly addressed by the court in *Sosa*, clarifying the distinction between *erga omnes* norms and *jus cogens* norms is not necessary to determine whether only *jus cogens* rules can be the basis of an ATS claim. A plain meaning interpretation of the ATS disposes of that question. The ATS does not facially distinguish between violations of *jus cogens* and ordinary international law. The text of the ATS only distinguishes customary norms from other customary norms based on whether they are torts. The implication from the text is that no criminal remedy may be imposed.

2. *Historical Argument – At the time of drafting of the ATS international law did not distinguish between jus cogens norms and ordinary rules of international law.*

Not only does a plain meaning argument lead to the conclusion that the ATS does not distinguish between *jus cogens* violations and other violations of international law, a historical argument leads to the same conclusion. The concept of norms *erga omnes* or *jus cogens* basically dates from the 20th Century, long after enactment of the ATS. *Erga omnes* appears to date from the International Court of Justice (ICJ) decision in *Barcelona Traction*.¹²⁰ The concept of *jus cogens* appears first in the Vienna Convention on Treaties in the 1960s,¹²¹ a treaty to which the United States is not a signatory. Nonetheless, the concept has since become a part of customary international law, recognized by the United States due to the U.S. government's non-objection to the

119 The duty to extradite or punish criminals is known by the maxim "*aut dedere, aut judicare*." In its origins, like *jus cogens*, *aut dedere* was a principle incorporated into extradition treaties. Has it since, however, grown through widespread usage into customary international law? The better view, in the interest of the rule of law, is yes. For an argument in favor of the customary status of the general principle *aut dedere, aut judicare*, see M. Cherif Bassiouni & Edward M. Wise, *AUT DEDERE, AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995). For an example of *aut dedere* in a U.S. treaty, see The Montreal Convention, May 10, 1984 (current version at 18 U.S.C. § 32 (2004)).

120 See *Barcelona Traction*, 1970 I.C.J. 3.

121 Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 53, 1155 U.N.T.S. 331.

custom.¹²²

Whatever the origins, contours, and impact of the concepts of *jus cogens* and *erga omnes* in customary international law, the fact is the concept of non-derogable norms binding all states, without exception under any circumstances (whether called *erga omnes* or *jus cogens*), was not a part of international law in 1789. So the ATS in 1789 would have remedied any violation of international law, at least where there was a private cause of action (the case of piracy for example,¹²³ but also the case of injuries to diplomatic personnel.)¹²⁴

3. *Systemic Argument – The hermetic separation of the international legal system into a “public-state” and “private-individual” sphere did not exist at the time of the drafting of the ATS, is increasingly ignored today, and provides no argument that the ATS address only jus cogens violations.*

Some argue, correctly, that the hermetic division of the legal system into separate private and public legal orders, likely a result of continental pandectism and codification, was in fact a development of the mid-19th century and not at all a feature of law in 1789.¹²⁵ That is an argument in favor of continuing the contemporary trend of ignoring this division.

On the other hand, one could argue that the ATS’s substantive content does evolve with international law.¹²⁶ However, the creation of concepts of *jus cogens* norms and norms *erga omnes* enhances and does not reduce the protection of persons under law. Thus, it would be entirely backwards to argue that the development of norms so fundamental that no state under any circumstance may violate them somehow justifies permitting states to violate other norms with impunity. It is a strange argument indeed that the creation of norms

122 *Id.*

123 *See* United States v. Smith, 18 U.S. 153 (1820) (holding individuals liable for acts of piracy in violation of law of nations).

124 *See* Respublica v. DeLongchamps, 1 U.S. 111 (1784) (holding individuals liable in tort for assault on French consular official).

125 *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984).

126 *See id.* at 816.

The substantive rules of international law may evolve and perhaps courts may apply those new rules, but that does not solve the problem of the existence of a cause of action. If plaintiffs were explicitly provided with a cause of action by the law of nations, as it is currently understood, this court might – subject to considerations of justiciability – be required by section 1350 to entertain their claims. But, as discussed below, international law today does not provide plaintiffs with a cause of action.

Id.

intended to protect individuals against the worst breaches of international law somehow denudes the rest of international law (and by extension the ATS) of substantive protections of lesser breaches of international law. The ATS clearly applies both to claims for violation of *jus cogens* and for claims of ordinary violations of international law.

4. *Individual Rights under International Law*

This shows that the relevant issue is whether international law recognizes an individually enforceable right, in which case, the ATS would grant a remedy. International law in principle addresses only states. Exceptionally, though increasingly,¹²⁷ international law does recognize individual rights and duties, not only as to violations of *jus cogens* but also for violations of ordinary international law.¹²⁸ Further, whether international law grants rights and duties to individuals does not necessarily turn on whether the right in question is a *jus cogens* norm.

a. *Abduction*

Presently, international law, does not recognize a right of an individual to make a claim against a state for violating the integrity of another state. Thus, the remedy for the violation of international law, the violation of Mexican sovereignty, can be invoked only by the Mexican government and not by Alvarez-Machain. Therefore, in the cases of *Israel v. Eichmann*,¹²⁹ *Argoud*,¹³⁰

127 See, e.g., *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 439-440 (D.N.J., 1999) (expanding the interpretation of slavery to include forced labor as a subset thereof; it reached this result by relying on international conventions, tribunals, and U.S. case law).

128 See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* 1 App. Cas. 147, 154 (2000) (“During the course of the century the treatment by a state of its own citizens, at least in certain areas of fundamental importance, has ceased to be regarded as a matter of internal affairs. The violation of a norm of *jus cogens* certainly is not so regarded.”).

129 *Attorney General of Israel v. Eichmann*, 36 I.L.R. 18 (District Ct. 1961) (Isr.).

130 *In re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964) (Fr.). Thus, *Eichmann* is not the only case where a national was kidnapped in a foreign state by a prosecuting state but had no remedy because the remedy was held by the state where he was kidnapped from. See also Brigette Belton Homrig, Comment, *Abduction as an Alternative to Extradition – A Dangerous Method to Obtain Jurisdiction over Criminal Defendants*, 28 WAKE FOREST L. REV. 671 (1993). On this point, although abduction is unpleasant, assassination is abominable.

and *United States v. Noriega*,¹³¹ though the abductions were illegal under international law, the abductee had no remedy because the injured states did not object. Though Alvarez-Machain has no international law remedy for abduction, the distinction is not whether the injury is a violation of *jus cogens*. The principles of sovereign equality¹³² and non-intervention are likely themselves *jus cogens* norms!¹³³ The distinction is whether international law recognizes a right inhering in an individual and not merely mediated by the state of which the individual is a citizen.¹³⁴ Certain violations of *jus cogens*, such as slavery, piracy, and torture committed by state actors, also create a directly enforceable private cause of action under international law.¹³⁵ And these norms are indeed also *jus cogens*. However, there are international rules which are directly enforceable by individuals, yet which are not *jus cogens*.¹³⁶

131 117 F.3d 1206, 1222 (11th Cir. 1997).

132 See generally Henry J. Richardson, *Failed States, Self-Determination, And Preventive Diplomacy: Colonialist Nostalgia And Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1 (1996); David Wippman, *Treaty-Based Intervention: Who can say No?*, 62 U. CHI. L. REV. 607, 619 (1995); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n. (1987).

133 See Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT'L LEGAL THEORY 1, 2-4 (2001) (arguing the principle of non-intervention is a *jus cogens* norm); Jeremy Levitt, *The Responsibility to Protect: A Beaver Without a Dam?*, 25 MICH. J. INT'L L. 153, 159 (2003) (reviewing INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT) (asserting the principle of non-intervention is a *jus cogens* norm).

134 See *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) (“[W]here a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that ‘any rights arising from such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.’”). That is the general rule, but there are a growing number of exceptions to that general rule.

135 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1987) (“Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”).

Although international law generally governs the relationship between nations, and thus a violation thereof almost always requires state action, it has been recognized that a handful of particularly egregious acts – genocide, war crimes, piracy, and slavery – by purely private actors can violate international law. As of now, however, only the acts mentioned above have been found to result in private individuals being held liable under international law.

Doe v. The Gap, Inc., No. CV-01-0031, 2001 WL 1842389, at *22 (D. N. Mar. I. Nov. 26, 2001)

136 See *The Paquete Habana*, 175 U.S. at 708 (during time of war, fishing vessels are

b. *State Action*

The question whether the ATS only provides remedies for violations of *jus cogens* appears to arise due to miscasting the ATS in terms of “state action” when dealing with non-state actors. Historically, however, non-state actors, whether pirates or mobs, could be held liable as individuals for their torts against other individuals in violation of the law of nations. So the state action requirement, a result of the unsuccessful attempt in the 1800s to render international law the exclusive province of states, is really misplaced in ATS cases. There is, logically speaking, no “state action” requirement under international law. Unfortunately, this confusion was neither addressed nor resolved in *Sosa*.

Courts that erroneously impose a “state action” requirement on the ATS,¹³⁷ a requirement which figures nowhere in that statute, usually do so operating from assumptions of, and analogies to, U.S. civil rights laws¹³⁸ (which are wholly inappropriate to norms of *international law*), or on the principle that international law as a general rule only grants rights and duties to states¹³⁹ (a

protected from capture by the law of nations); *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (engaging in sabotage makes enemy aliens liable for violations of the laws of war); *United States v. Arjona*, 120 U.S. 479, 488 (1887) (counterfeiting foreign government securities violates the law of nations).

137 *See, e.g.*, *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000).

138 Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 888 n.29 (1999).

Courts apply “color of law” jurisprudence derived from a domestic civil rights statute, 42 U.S.C. § 1983 (1994), to test for state action in [ATS] claims. The cases deciding whether private action may be fairly ascribed to the state “have not been a model of consistency.” Application of § 1983 in corporate [ATS] litigation has been similarly inconsistent. Compare *Unocal*, 963 F. Supp. at 890-91 (finding state action in the absence of any allegations that the corporate defendant actually committed human rights abuses), with *Freeport-McMoRan*, 969 F. Supp. at 374-80 (finding no state action although the corporate defendant allegedly committed human rights abuses and a “close” business relationship existed between the corporation and the foreign host-government).

Id. (citations omitted).

139 *See, e.g.*, *Aldana v. Fresh Del Monte Produce, Inc.* 305 F. Supp.2d 1285, 1301 (S.D. Fla. 2003). The court in *Aldana* stated:

While international law does not require state action for certain violations such as genocide and piracy, Plaintiffs have conceded that there must be state action for the claims asserted in their Third Amended Complaint. Mere conclusory allegations regarding state action cannot satisfy a plaintiff’s burden under the ATCA.

principle with many exceptions). They seem to be operating under an implicit and erroneous presumption that international law only grants direct rights and duties to individuals in cases of *jus cogens* violations.¹⁴⁰ This is in spite of the fact that no requirement of “state action” or “color of law” appears anywhere in the text of the ATS, or the TVPA for that matter. In actuality, under international law no requirement of “state action” to find violations of international law exists.¹⁴¹ International law does not look at “state action” to determine whether a right exists or was violated.

Despite confusion stemming from inappropriate attempts to transpose U.S. domestic law into international law, or simply misunderstanding of international law, some courts do reach the correct results for the proper reasons.¹⁴² This might be because states are responsible to the international community not only to govern their own behavior, but also that of their subjects. So illegal private action could, under international law, rightly be attributed to the non-feasance or misfeasance of a state.

Id. (citations omitted).

140 *See, e.g.,* *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV.8386 (KMW), 2002 WL 319887, at *12 (S.D.N.Y. Feb. 28, 2002). To add to the confusion: though it seems clear the court is thinking in terms of *jus cogens* – namely that for *jus cogens* violations, no showing of state action is required – the court does not seem to clearly state, perhaps because of uncertainty as to which provisions of law are *jus cogens* and how to hierarchize *jus cogens* norms.

141 Some courts get the issue right despite the confusion. For example, in *Tel-Oren v. Libyan Arab Republic*, Judge Edwards, correctly, did not impose a state action requirement on international law. He held that piracy, the slave trade, and “a handful of other private acts” are violations of international law by private actors. 726 F.2d 774, 794 (1984) (Edwards, J., concurring). Judge Bork also noted that international law prohibited private acts such as piracy and interference with ambassadors. *Id.* at 813-15 (Bork, J., concurring).

142 *See e.g.,* *Kadic*, 70 F.3d at 239.

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. In *The Brig Malek Adhel*, the Supreme Court observed that pirates were “*hostis human generis*” (an enemy of all mankind) in part because they acted “without . . . any pretense of public authority.” Later examples are prohibitions against the slave trade and certain war crimes. *Id.* (citations omitted).

D. “Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATS.”¹⁴³

As already stated, it is quite clear that the abduction itself was a violation of international law. This is not because the abduction was particularly violent, but simply because Mexico is a sovereign state. Any abduction, no matter how violent, would violate Mexico’s sovereignty and be illegal under international law. Again, the issue is miscast perhaps by failing to understand basic principles of international law and projecting U.S. concepts onto international law which are not actually found in that body of law. The U.S. government appears to be arguing that if the abduction was not particularly violent, there would be no violation of international law. That is the wrong issue. The violence of the abduction goes to whether the abduction constituted torture, which is a separate claim from the claim of abduction. Thus, the issue as cast confused not only international and domestic law, but also the facts at bar. At any rate, the United States cannot successfully argue that it did not cause Alvarez-Machain to be kidnapped because of the principle “*qui facit per alium facit per se*.”¹⁴⁴ The abduction, whether direct or indirect, was instigated by the United States and is an example of the exercise of jurisdiction to enforce.¹⁴⁵

However, merely because the abduction was a violation of international law does not necessarily mean that Alvarez-Machain has a right to a remedy. Again, the question seems miscast. International law only exceptionally grants individuals remedies. There were, however, always exceptions to this rule, and there are an increasing number of such exceptions. As stated, the abduction of Alvarez-Machain, while constitutional and perhaps legal in U.S. law, was nonetheless illegal under international law. However, the remedy for this abduction is not Alvarez-Machain’s, but Mexico’s. The issue is not whether Alvarez-Machain has a right to a remedy for abduction under international law; he does not. Alvarez-Machain’s sole remedy under international law for

143 Brief for Petitioner at 1, *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (No. 03-339).

144 *United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) (citing *United States v. Gooding*, 25 U.S. 460 (1827), *cert. denied*, 385 U.S. 1002 (1967)).

145 See *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003). *But see* *United States v. Noriega*, 117 F.3d 1206, 1222 (11th Cir. 1997); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987).

the abduction would be to ask his state, Mexico, to intervene on his behalf.¹⁴⁶ But abduction is not Alvarez-Machain's only claim. He is also making a claim for a remedy of torture. The issue then is whether Alvarez-Machain has a remedy for torture (and thus implicitly whether there was torture). If Alvarez-Machain's captors tortured him, then he would have a right to a remedy under international law, regardless of whether torture is a norm *jus cogens* – though it is. Thus, the fourth issue is actually two issues, and must be recast by the Court.

III. THEORETICAL SYNTHESIS: THE NATURAL LAW/POSITIVISM DICHOTOMY IN *SOSA*

Not only are the issues as presented to the Court miscast and confused, the theoretical framework within which the Court analyzes these issues is incomplete. In determining the questions presented, the Supreme Court in *Sosa* considers legal history – the opinion of Blackstone, as well as legislative evidence circa 1789 and legal theory. The Court notes that the dominant legal theory in 1789 was natural law (*jus naturale*), but that the dominant contemporary legal theory is positivism; this influences the Court's analysis.¹⁴⁷ The Court is unwilling to empower the circuit courts to “discover justice” in some vague *nous*.¹⁴⁸ Instead, the Court wishes to limit the action of the circuits by requiring the circuits to exercise their function prudentially and judiciously. Thus, it is perhaps unsurprising that the Court favors the dominant contem-

146 Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 421 n.195 (1996) (enumerating cases where lack of effective government precluded objection to abduction).

147 See *Sosa*, 124 S. Ct. at 2744.

[T]he prevailing conception of the common law has changed since 1790. When §1350 was enacted, the accepted conception was that the common law was found or discovered, but now it is understood, in most cases where a court is asked to state or formulate a common law principle in a new context, as made or created. Hence, a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.

Id.

148 (*Nous* νοῦς), the Greek word for cognition, is used here as an abbreviation for inductive synthesis or deductive analysis coupled with the presumption that such synthesis or analysis is a reflection of an eidetic world of pure thought existing somehow independently of the material world. The adjective is noetic; a related noun form is noesis. Eidos, (εἶδος), the ancient Greek word for form, is the root of the English word *eidetic*.

porary trend to positivism.

However, by doing so the Court falls victim to a false dichotomy. It presumes, as has most of legal discourse since Justice Holmes, that positivism and natural law are antithetical. However, this is not at all the case. To show that positivism and natural law are compatible, even complementary, we look to Aristotle's thorough and penetrating analysis of justice. To show that Aristotle is not alone in seeing positivism and natural law as complementing each other, we then look at Hobbes. After exposing the theoretical framework which the modern courts have consistently ignored since Holmes, we then look at how this false dichotomy has led U.S. law down a constitutional dead end since the Court's decision in *Erie*.

A. The False Dichotomy of Positivism and Natural Law

The opposition of positivism to natural law is a false dichotomy. This basic fact, though easily proven, remains the greatest stumbling block in contemporary legal philosophy. This proposition, simple on its face, is on closer examination rendered complex by the multiple meanings of natural law. Further, both positivism and natural law can be regarded as either descriptive theories of what law is, prescriptive theories of what law ought to be, or even how legal science ought to be done. Because of this multiplicity of meanings it is all too easy to "lose the forest for the trees." However, we can maintain a holistic view of the law by considering a classical thinker, Aristotle, and a more modern thinker, Hobbes.

1. Aristotle

Aristotle believed that there was a natural world (*physis*), inevitable and unchanging.¹⁴⁹ This physical world could not be otherwise than it is. He also believed there was a man-made world, the artificial (*tekhne*), which could be other than it is.¹⁵⁰ This ontology only appears to be dualistic: each of these "different" worlds is a complementary part of a whole which is greater than either alone. This ontology, dialectical opposition of competing principles synthesized into a whole greater than either alone, is reflected in Aristotle's theory

149 ARISTOTLE, *Physics* 192b:7-8 (R.P. Hardie & R.K. Gaye trans.), in 1 THE COMPLETE WORKS OF ARISTOTLE 329 (Jonathan Barnes ed., rev. Oxford trans., Princeton Univ. Press 1984) ("Of things that exist, some exist by nature, some from other causes.").

150 ARISTOTLE, *On the Universe* 392a:31-5 (E.S. Forster trans.), in 1 THE COMPLETE WORKS OF ARISTOTLE 628 (Jonathan Barnes ed., rev. Oxford trans., Princeton Univ. Press 1984).

of justice. For Aristotle, some laws were natural – they could not be otherwise.¹⁵¹ Yet other laws were conventional, *i.e.*, positive.¹⁵² Aristotle correctly recognized that while some acts would be illegal in all societies, for example unprovoked murder, others would only be wrongful in certain societies. Aristotle even recognized that the narrow and common view that justice must either be natural or positive is erroneous: “Further, this last-mentioned Just is of two kinds, natural and conventional; the former being that which has everywhere the same force and does not depend upon being received or not; the latter being that which originally may be this way or that indifferently but not after enactment.”¹⁵³

Failure to understand that these two different types of justice are mutually complementary and are reconciled through dialectical synthesis is the source of the false dichotomy. This blind spot in modern thought was a result of Cartesian scepticism which, along with nominalism and atomism, saw the world only in terms of constituent elements and not in terms of the whole which arises therefrom¹⁵⁴.

Aristotle’s ontology, which sees nature (*physis*) and art (*tekhne*) as complementary parts of a greater whole, is reflected in his treatment of justice in the particular (*i.e.*, justice not in the abstract but as a specific relation). Aristotle saw particular justice as of two types, natural and positive.¹⁵⁵ Natural justice applied to nature; those things which could not be otherwise (thus correspond-

151 See ARISTOTLE, *NICOMACHEAN ETHICS OF ARISTOTLE* 117 (D.P. Chase trans., Ernest Rhys ed., J. M. Dent & Sons Ltd., 1911) (1920) (“Nay, we may go further, and say that it is practically plain what among things which can be otherwise does exist by nature, and what does not but is dependent upon enactment and conventional, even granting that both are alike subject to be changed.”).

152 See *id.* (“Further, this last-mentioned Just is of two kinds, natural and conventional; the former being that which has everywhere the same force and does not depend upon being received or not; the latter being that which originally may be this way or that indifferently but not after enactment.”).

153 *Id.*

154 See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 2 (“[M]urder cannot be hid long; a man’s son may, but at the length truth will out.”).

155 *Id.* at 105

Now of Particular Justice, and the Just involved in it, one species is that which is concerned in the distributions of honour, or wealth, or such other things as are to be shared among the members of the social community (because in these one man is compared with another may have either an equal or an unequal share), and the other is that which is Corrective in the various transactions between man and man.

Id.

ing to *physis*). Positive justice applied as a result of human convention and was man made (thus corresponding to *tekhne*). Those laws which were positive were the result of social justice, which Aristotle called proportional justice, described as a geometric relation between two unlike things mediated by a positive common element.¹⁵⁶ This mean, a variable, could be otherwise. Thus in the communist society of Sparta, equality of property was the mean determinant of social justice. Although citizens were unequal in other rights and duties, their commonality of property was seen as a factor that bound them together and also prevented the state from becoming decadent.¹⁵⁷ In contrast, the mean element in liberal Athens was excellence.¹⁵⁸ Thus, persons of different ability would have different shares in social wealth according to their virtues.¹⁵⁹

As to social justice, *i.e.*, the proportion of shares of social wealth distributed to each individual, which Aristotle called distributive justice, Aristotle was clear – it was determined by positive law and would vary from society to

156 *See id.* at 108.

157 *See* THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH, POLITICS, Book II, Ch. V, 1263b-1264a (Benjamin Jowett ed., Oxford Univ. Press 1966).

The state, as I was saying, is a plurality which should be united and made into a community by education; and it is strange that the author of a system of education which he thinks will make the state virtuous, should expect to improve his citizens by regulations of this sort, and not by philosophy or by customs and laws, like those which prevail at Sparta and Crete respecting common meals, whereby the legislator has made property common

Id.

158 Alexander Hamilton described Athens as a commercial republic. *See* THE FEDERALIST NO. 23 (Alexander Hamilton) (“Athens, unlike Sparta, was a bustling city-state where trade, commerce and the arts flourished.”). *See also* Eugene R. Milhizer, *Justification and Excuse: What they Were, What they Are, and What they Ought to Be*, 78 ST. JOHN’S L. REV. 725, 743 (2004).

159 *See* THE COMPLETE WORKS OF ARISTOTLE, THE REVISED OXFORD TRANSLATION 1785 (Jonathan Barnes ed., Princeton University Press (1984).

[I]f they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints-when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be “according to merit”; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence.

Id.

society.¹⁶⁰ Aristotle even points out the conventional nature of the value of money as indicated by its name “nomos,” which is nearly the same word in Greek as the name for the concept of law.¹⁶¹

Distributive justice in Aristotle’s thought, in my opinion, corresponds to positive justice, since different societies chose to share out their wealth according to different measures. But there is also an invariant, natural justice which for Aristotle inevitably results from nature. This, in my opinion, corresponds to his concept of arithmetic justice. Arithmetic justice, that is justice in transactions, exists where each party to a transaction receives an equal benefit for an equal burden.¹⁶² Thus, for example, where a person trades shoes for shirts they should receive the same amount of shirts whether in Athens or Sparta.

For Aristotle, in sum, there is a positive justice as to those things which could be otherwise, for example, traffic ordinances. And there is a natural justice as to those things which are determined by human nature, such as parricide. We can already see that the dichotomy of natural and positive justice, that justice must be either positivist or naturalist, is false. As to those invariables, those things which cannot be otherwise, there is a natural justice. But to those

160 See ARISTOTLE, *NICOMACHEAN ETHICS OF ARISTOTLE* 107 (D.P. Chase trans., Ernest Rhys ed., J. M. Dent & Sons Ltd., 1911) (1920) (“[F]or all agree that the Just in distributions ought to be according to some rate: but what that rate is to be, all do not agree; the democrats are for freedom, oligarchs for wealth, others for nobleness of birth, and the aristocratic party for virtue.”).

161 See *id.* at 113 (“[M]oney has come to be, by general agreement, a representative of Demand: and the account of its Greek name [nomisma] is this, that it is what it is not naturally but by custom or law ([nomos]), and it rests with us to change its value, or make it wholly useless.”).

162 *Id.* at 108-11.

And the remaining one is the Corrective . . . [T]he Just which arises in transactions between men is an equal in a certain sense, and the Unjust an unequal, only not in the way of that proportion but of arithmetical. Because it makes no difference whether a robbery, for instance, is committed by a good man on a bad or by a bad man on a good, nor whether a good or a bad man has committed adultery: the law looks only to the difference created by the injury. . . . [T]his Unjust, being unequal, the judge endeavours to reduce to equality again, because really when the one party has been wounded and the other has struck him, or the one kills and the other dies, the suffering and the doing are divided into unequal shares; well, the judge tries to restore equality by penalty, thereby taking from the gain. . . . So then the Just we have been speaking of is a mean between loss and gain arising in involuntary transactions that is, it is the having the same after the transaction as one had before it took place.

Id.

things which are variable, which depend on climate, geography or culture, there is a positive justice which could be otherwise but is conventionally so in this particular society.

2. *Hobbes*

Aristotle is not alone in showing us that the supposed dichotomy of natural law versus positivism is a false one. According to Hobbes, there is such a thing as natural law, which he calls *jus naturale*, but it is the law of the jungle – the right of self preservation.¹⁶³ Hobbes distinguishes between natural law and natural justice. Natural law is the law of the strongest, while natural justice is the use of reason to derive commands of positive law, the first of which are directly related to natural law, such as the right to self-defense.¹⁶⁴

Again, we can see that Hobbes, like Aristotle, provides a plausible explanation of how positive and natural law co-exist. Hobbes' natural law, the law of the jungle, is in fact identical to some accounts of positive law, notably "the bad man theory."¹⁶⁵ Accordingly, people obey law, ultimately, because of the fear of sanction. When we understand "natural law" as meaning "the law of the jungle," we see that the distinction between positivism and naturalism simply disappears.

163 See THOMAS HOBBS, *LEVIATHAN* 91 (Richard Tuck ed., Cambridge University Press) (1996).

The right of nature, which writers commonly call *Jus Naturale*, is the liberty each man hath to use his own power as he will himself[], for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing which, in his own Judgement and reason, he[] shall conceive to be the aptest means thereunto.

Id.

164 See *id.*

A law of nature, (*Lex Naturalis*.) is a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same: and to omit, that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because *RIGHT*, consisteth in liberty to do, or to forbear; whereas *LAW*, determineth, and bindeth to one of them: so that *Law* and *Right*, differ as much, as *Obligation*, and *Liberty*; which in one and the same matter are inconsistent.

Id.

165 Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997) (Reprint of address Justice Holmes of the Supreme Judicial Court of Massachusetts delivered at the dedication of the new hall of the Boston University School of Law on Jan. 8, 1897).

Of course, Hobbes' view of natural law is not the only one. His is a descriptive view of natural law and does not argue that the law of the jungle should be the human law. Indeed, *Leviathan* is an argument for an "artificial man" – the state – which will replace the natural law of the jungle with a conventional (positive) law. Where Hobbes and Aristotle diverge, however, is that Hobbes postulates the possible existence of a "state of nature," of persons outside of a state. For Aristotle such would be a physical impossibility. Aristotle recognizes, correctly, that man (he was a sexist) is a social animal and could not live in isolation without debasing himself. For Aristotle, the individual is not self-sufficient – as proven by example in newborn humans. This postulated state of nature is, however, central to the American concept of democracy. Its falsehood explains the failure of the American constitutional order, as reflected in recurring constitutional crises shored up by ever more desperate constitutional fiats issued by nine elderly, unelected, learned judges, most of whom are white men, and all of whom are wealthy.

Hobbes' "state of nature," his "war of all against all,"¹⁶⁶ is in fact impossible because individuals, even adult individuals, are not self-sufficient.¹⁶⁷ *Homo sapiens* is a social animal¹⁶⁸ and consequently, "the state of nature" is impossible. Still, if natural law is identical to the law of the jungle, then we can avoid the false dichotomy which opposes naturalism and positivism a second way. However, Aristotle's explanation is at once more elegant and has greater explanatory power and correspondence to material reality, and thus, to a mate-

166 See THOMAS HOBBS, *LEVIATHAN* 88-89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of time is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary. All other time is peace.

Id.

167 See THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH, *POLITICS*, Book I, 1253a (Benjamin Jowett ed., Oxford Univ. Press 1966) ("The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole.").

168 See *id.* at 1252b ("[M]an is by nature a political animal."); *id.* at 1253a ("A social instinct is implanted in all men by nature.").

rialist scientist, is the better answer.

How does this understanding of the relationship of positivism and natural law affect our understanding of legal science? First of all, it obviates a majority of the discourse of U.S. legal theory in the last century. Since Holmes, at least, U.S. law has taken the position that there is a “positive” law capable of scientific exposition and analysis and that “natural” law is ambiguous at best, a charade at worst. That view has been shown to be false. Positivism, despite its claim to scientificity, is an amoral theory. But law is an inherently normative discipline. Legal science is a master science, for it determines which science is to be studied and to what degree.

We can also see the enduring relevance of natural law in the greatest failure of the last two millennia in the collapse of fascism. Fascism proved the normative folly of divorcing law and morality. Consequently, natural law thinking pervades the German constitution to this day and rightly so, for the consequences of an amoral law were 15 million dead Germans and over 20 million dead Russians. Yet the failure of peoples who have not yet endured fascist tyranny to appreciate the moral character of law is perhaps understandable. Given the life and death stakes, however, such an error is unforgivable.

This failure of positivism to adequately describe reality can also be seen in the post-war Nuremburg judgments. There is no doubt that the crimes of the accused at the Nuremburg and Tokyo tribunals were not crimes under any positive law in 1939. Consequently, the only plausible argument was that the accused were guilty of violating laws unwritten in the law books but inscribed on every human heart. The natural law elements of the Nuremburg tribunals emerge, usually reluctantly. This reluctance to defend the moral virtue of natural law is due to either the multiple meanings of natural law (“the law of reason,” “the law of nature,” and “the law of God”), the perceived unscientific character of natural law, or both. As evidenced in our brief exposition of Aristotle, scientificity and naturalism go well together.

A final legal development, which should conclusively prove the enduring character of naturalist theories of law, is the idea of “*jus cogens*.” *Jus cogens* norms, those rules of international law¹⁶⁹ that are non-derogable, are basically

169 The Court in *Sosa* also reiterates the U.S. view on the sources of international law found in *The Paquete Habana*:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor,

a post-war phenomenon. Again, it is unclear how to justify the punishment of individuals by another state for unwritten laws unless those unwritten laws were somehow binding and universally enforceable. While universal jurisdiction could be traced to piracy, the idea that there are universal laws which can be violated by no one is the essence of natural law thinking.

In the post-war era, it does not take much insight to realize that there was a quiet, and absolutely necessary, revival of natural law as a healthy reaction to the excesses of national socialism. U.S. legal theory would do well here to consider the lead taken by European and international legal scholarship and grapple further with Aristotle on natural law and positivism.

B. The Implications of Re-Cognizing the False Dichotomy of “Naturalism v. Positivism”

All this may seem like abstract philosophy with no legal significance. However, to make this more practical, contrast the determination whether law is “discovered” “out there,” *i.e.*, a naturalist view, with the view that law is legislated positively by a legislator. For the naturalist, the common law has a “brooding omnipresence” and is discoverable by reason.¹⁷⁰ But the idea that law is either positive or natural, a dichotomy which has dominated the last century of legal reasoning with the emergence of the dominance of positivism,¹⁷¹ is, as

research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Sosa, 124 S.Ct. at 2766-67 (quoting *The Paquete Habana*, 175 U.S. at 700).

170 See *Sosa*, 124 S.Ct. at 2760.

[I]n the late 18th century . . . positive law was frequently relied upon to reinforce and give standard expression to the “brooding omnipresence” of the common law then thought discoverable by reason. As Blackstone clarified the relation between positive law and the law of nations, “those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.”

Id.

171 See *id.* at 2762.

When § 1350 was enacted, the accepted conception was of the common law as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.” Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general

has been explained, a false dichotomy.

This fact has important implications for legal practice. If the positivist/naturalist dichotomy is, or at least can be, a false dichotomy, then that puts into question decisions such as *Erie Railroad Co. v. Tompkins*,¹⁷² which abrogated the existence of a general federal common law.¹⁷³ *Erie* presumes the positivist/naturalist dichotomy and accords it a decisive role in decision-making.¹⁷⁴ The positivist decisions of the early 20th century were justified by the idea that a positive legal science was possible and it was, moreover, desirable as a naturalist legal science would be at best superstition, at worst charlatanism. But a naturalism based not on the view of natural law as the will of God, but rather as the deliberative result of logic (Cicero's right reason in accord with nature – the deist approach taken by the founding fathers), or a harsher view of natural law as inevitable in human nature or the world (the nasty and brutish view taken by Hobbes – natural law as the law of the jungle, positive law as attempts to tame it), shows us that science and two of the three main variants of natural law are perfectly compatible. But most importantly, when we situate positivism and naturalism within the schema of justice described by Aristotle, we see that natural law and positive law are complementary, and we cannot understand justice with either alone. Roughly simplified, positive law corresponds to social justice and natural law corresponds to justice in the particular, *i.e.*, individual transactions among physical persons.

Because *Erie* was based on a false dichotomy, it was wrongly decided. That reopens the possibility, and necessity, of federal common law received by the United States as a successor state to the British Crown. So the recognition of naturalism, whether in Aristotle, Cicero, Hobbes, Coke, Blackstone or any of the other great legal minds, and its application to modern legal thought, should be obvious. Yet “natural law” is regarded as superstitious nonsense and unscientific charlatanism?

understanding that the law is not so much found or discovered as it is either made or created.

Id. (citations omitted).

172 304 U.S. 64 (1938).

173 *See Sosa*, 124 S.Ct. at 2762 (“*Erie R. Co. v. Tompkins* . . . was the watershed in which we denied the existence of any federal ‘general’ common law . . . which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly.”).

174 *See id.* at 2771 (Scalia, J., concurring in part and concurring in the judgment) (“Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it.”).

Recognizing naturalism explicitly as described and advocated in this article would reopen vast tracts of legal terrain to argument. This is, however, no argument in a legal system which is increasingly regarded as illegitimate due to its isolation from democratic impulses and its own historical roots. The truth will out.¹⁷⁵

C. *Examining the ATS in Light of the False Dichotomy*

The Court in *Sosa v. Alvarez-Machain* implies that the Alien Tort Statute may only be applicable to those norms which violate *jus cogens*,¹⁷⁶ but that is where the Court trips over the false dichotomy. On the one hand, the Court justifies a static view of positive law embodied in *Erie* due to the rejection of naturalism by Holmes and his successors. On the other hand, it justifies its decision to limit the application of the ATS by relying on a natural law concept, *jus cogens*! That is a contradiction: You simply cannot have it both ways.

The Court does recognize that international law is a part of the common law, but it also ignores a major problem – after *Erie* there is no general common law.¹⁷⁷ Yet international law is a part of the common law and all foreign policy competences in the U.S. constitution are vested in the federal government. So, if we accept the *Erie* decision, the only coherent solution would be to regard customary international law as part of a (supposedly non-existent) federal common law. Or preferably, we can recognize the logical facts: the United States is a successor state to the British government. It did not speci-

175 See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 2 (“[M]urder cannot be hid long; a man’s son may, but at the length truth will out.”).

176 See *id.* at 2765-66.

This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.

Id. (citations omitted).

177 See *id.* at 2771 (Scalia, J., concurring in part and concurring in the judgment).

Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The general rule as formulated in *Texas Industries* is that “[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.” This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute.

Id. (citations omitted).

fically abrogate the common law. Quite the opposite, the formula of Magna Charta, “the law of the land,” is explicitly used in the U.S. Constitution, which, moreover, specifically guarantees elements of the common law and states that the enumeration of some rights does not imply the exclusion of other rights¹⁷⁸. *In dubitas, pro libertas*¹⁷⁹ is the logic of the U.S. Constitution, at least as written by the founders. As the revolution was fought, in part, to preserve the civil rights of the colonists as British subjects under the unwritten British Constitution, it would be a peculiar thing to deny the applicability at the federal level of the common law which guaranteed their liberties. The states could not always guarantee the liberties of the citizen under the common law because some powers, notably foreign policy, were reserved to the federal government. Thus, whether there is a general federal common law,¹⁸⁰ there is certainly a customary international law applied by the federal government as common law.

IV. CONCLUSION

The seemingly basic questions presented in *Sosa* in fact lead to complex issues of legal history, comparative law, and legal theory. Superficially, the Court’s decision appears well reasoned. However, an in depth analysis reveals that the Court’s decision is predicated on an erroneous presumption. Consequently, no synopsis of the case can be satisfying; the Court’s work here is incomplete.

Although a conclusion is not possible in the sense of a climactic resolution of dramatic tension, it is possible to summarize the basis of the author’s critique of the Court in order to cast light on paths for future research. *Sosa* is important not because it reaches conclusive answers. Rather, it reaches inconclusive answers, particularly when we recognize it is founded on several false propositions: that law must be either positive or natural and that natural law can, should, and has been rejected. *Sosa* reveals a certain bankruptcy in the courts’ thinking, a certain impasse that U.S. political and constitutional thought finds itself in, which also is due, incidentally, to a false presumption of the existence of a mythical “state of nature” and “social contract.” Though no

178 U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

179 “When in doubt, freedom.” (author’s translation).

180 Notwithstanding the expedient, if not opportunist, decisions of the court, there is a general federal common law, as the United States is a successor state to the British crown, having fought a revolution to guarantee the common law liberties of its citizens.

conclusion is possible, a summary may help highlight how these issues should be resolved.

A. *Aristotle and Hobbes*

Legal theory for the last 150 years has been trapped in positivist discourse due to the multiple meanings associated with the concept “natural law.” Positivists, correctly, associate one line of natural law theory with pre-scientific religious thinking, and rightly reject it as unscientific superstitious nonsense. But that is like throwing out the baby with the bathwater. A scientific natural law theory based not on religious faith or superstition but rather on empirical observation is not only possible, Aristotle actually employed it over 2000 years ago. The idea that positivism and natural law are mutually exclusive propositions, which predicated the decision in *Sosa*, and *Erie* for that matter, is a false dichotomy. Aristotle, though describing positive law and natural law and assigning each a different role in a just state, never conceived of the two as being in conflict.

The dichotomy can also be escaped, albeit rather nastily and brutishly, as Hobbes does. He subsumes positive law into natural law by defining the law of nature as the law of the jungle – survival of the strongest. He then complements his *jus naturale* with the idea of a conventional *lex naturalis* which arises therefrom through contractual agreement. Thus, for Hobbes the ideas of fairness which we usually associate with natural law are in fact associated with the positive law. For Hobbes it is natural law, not positive law, which is cruel and indifferent! However Hobbes’ conventional law is not in conflict with his natural law; rather, it flows therefrom.

Hobbes is of course completely wrong about the idea of a social contract. There never was, nor ever could be, a “state of nature.” His law of the jungle ignores the basic truth Aristotle presents – man is a social animal unable to meet all his needs alone (so much for individualism). Thus, one escapes the false dichotomy with much less baggage simply by looking to Aristotle.¹⁸¹ Still, since social contract theory is the foundational stone of the U.S. republic I thought it might be easier for the reader to digest these hard truths by looking at someone a little less brilliant who does not reject the erroneous and unrealistic individualistic presumptions which characterize thinking in the United States. Rejecting social contract reasoning because it is factually untrue gives us the means to resolve the constitutional crisis because we can a) ask the right

181 Aristotle, was also the source of the idea of courts of equity, of cause-in-fact, efficient causality, and of a few other ideas such as botany, grammar and logic.

questions – what type of social organization leads to the good life and b) stop asking false questions (e.g., how to integrate black persons into a non-existing social contract to which they were never a party even in myth). Both Aristotle and Hobbes compel us to conclude that there is no dichotomy of positive law as opposed to natural law. Simply figuring out that conclusion would be one step forward in American constitutionalism.

B. Sosa and Machain

Unfortunately, the Court in *Sosa* appears to be blissfully ignorant of Aristotle and reaches a decision predicated on a false dichotomy. It makes this mistake because it is trying to escape the theoretical problem of pre-scientific thinking which does exist in some schools of natural law thinking. The result however is that the Court denies itself the power of normativity. Thus, the Court jumps from the frying pan (pre-scientific law) into the fire (the normative vacuum of positivism) and does not vindicate the rights of those wrongfully injured, even though the proper role of the court is as the last peaceful resort for those wrongfully injured.

Once we recognize that the dichotomy of natural law and positive law that underlies the Court's reasoning is a false one, we escape from the mistaken presumption of the Court. Instead of cutting ourselves off from all naturalist thinking (people like Cicero, Aquinas, Aristotle) to avoid the superstitious, we avoid pre-scientific thinking through methodic empiricism. That allows us to do exactly what the Court believes it cannot – we can ask ourselves what substantive content of international law can be deduced from the totality of our empirical experiences and understanding. This is the function of the judge: to determine, *a posteriori*,¹⁸² the law to be applied to this particular person. In contrast, the legislator's role is to determine objective rules of law *a priori*¹⁸³ that are valid for all persons. By abdicating normativity due to the false dichotomy of positivism vs. natural law, the right wing of the Court cripples its role in democracy exactly at the time when the left wing of the Court, via legal realism, overreaches its role and acts as super-legislator! That, of course, is the most grave but least visible, and least violent, of the multiple crises currently facing the Republic. Judicial self-abnegation through positivism, *i.e.*, denying the normative role of law in the sense of law as moral force, cripples the body politic just as much as judicial overreaching. Both wings of the Court undermine the role of the Court in democracy. One by overreaching, the other by

182 “From what comes after.” BLACK’S DICTIONARY 105 (8th ed. 2004).

183 “From what is before.” BLACK’S DICTIONARY 111 (8th ed. 2004).

under-achieving. Were America not facing several converging economic and political crises, this might be tolerable. But in a time of crisis the Court's misapprehension of its role exacerbates dangerous trends that threaten the health of the Republic.

Chapter III

U.S. Corporate Liability For Torts of (foreign) Subsidiaries *

Abstract:

This paper explores the liabilities of a parent corporation for the tortious acts of its overseas subsidiaries and explores the doctrinal confusion inherent in current tests for piercing the corporate veil. It explains these apparent incoherencies through a comprehensive theory of the historical development of tort law. It concludes that corporations can be held vicariously liable for the torts of their overseas subsidiaries based on theories of agency such as respondeat superior. It examines European law briefly and notes that the legal system there follow similar rules. It concludes that the role of corporate governance in the globalising world presents challenges and opportunities for the corporation as legal person having rights and duties under international law: prudent corporate counsel will note these practical trends and theoretical explanations in order to capitalize on opportunities and avoid pitfalls of liability.

* This article appeared under this title in 23 Corporate Counsel Review 15 (2004).

Introduction

Can a U.S. corporation be liable for the acts of its third world subsidiary or its third world sub-contractor? A cursory examination might yield the wrong impression: It is true that U.S. law is generally presumed to have no extra-territorial effect.¹ Thus, U.S. corporations overseas are not ordinarily bound by U.S. labor or environmental law standards.² Further, procedural obstacles such as forum non conveniens³ or even the existence of subject matter jurisdiction also often block transnational litigation. But a lawyer who contented themselves with a superficial analysis might be one day be surprised unpleasantly: Though U.S. laws are presumed to have no extraterritorial effect, that presumption can be overcome by specific evidence of congressional intent to the contrary.⁴ U.S. corporations can be directly liable for some wrongful acts abroad which are illegal under U.S. law⁵ such as violations of securities and exchange commission rules⁶ and the the Sherman Anti-trust Act.⁷ Furthermore, U.S. corporations can have the liability of their subsidiaries imputed to them via principles of agency such as respondeat superior. And of course some torts will themselves be transnational. The quick answer “no liability” is not always the correct answer. Corporate liability for subsidiaries is not merely esoteric or theoretical: globalisation, NAFTA⁸ and the resulting outsourcing of jobs to

1 See, e.g. *United States v. Yousef*, 327 F.3d 56, 86 (2003).

2 David Emerick, Mark Gibney, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 Temp. Int'l & Comp. L.J. 123, 123-124 (1996).

3 For an examination of the forum non-conveniens doctrine in the context of torts of first world parent corporations committed by their third world subsidiaries see: Malcolm J. Rogge, *Towards Transnational Corporate Accountability in The Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 Texas International Law Journal 299 (Spring 2001).

4 See, e.g. *United States v. Yousef*, 327 F.3d 56, 86 (2003).

5 One example of a U.S. law which specifically does apply to overseas conduct is the Foreign Corrupt Practices Act which illegalizes the most egregious instances of bribery overseas. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95 -213, 91 Stat. 1494 (1977) (codified at 15 U.S.C. s 78dd-1).

6 *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), cert. denied, 423 U.S. 1018 (1975)

7 *Hartford Fire Ins. Co. v. California*, 125 L. Ed. 2d 612 (1993).

8 Critics of free trade decry the fact that inefficient jobs are eliminated through competition. However the fact is that on the balance NAFTA has overall created more jobs for both Mexico and the United States.

Mexico make head-office liability for branch-plants a very real legal issue.⁹

This article attempts to outline the pitfalls for U.S. corporations doing business in the third world through subsidiaries and subcontractors. A U.S. corporation can be attacked for its subsidiaries' acts on several theories. These include (in decreasing likelihood of success): theories based on actual or constructive fraud,¹⁰ theories of agency (principal and agent, master and servant, respondeat superior¹¹), joint and several liability,¹² strict liability,¹³ imputed negligence¹⁴ (vicarious liability¹⁵) – under a theory of respondeat superior or under a theory of vicarious liability and finally and most confusingly by "piercing the corporate veil".¹⁶ Though "piercing the corporate veil" is the most frequent attack it is also the most doctrinally confused and thus the least likely to succeed – but mainly because it is generally not well plead by plaintiffs. In fact, most claims made by victims of torts fail to inculcate parent corporations not because the courts are reluctant to compensate defendants, nor because courts are concerned about over-compensating defendants: judges regularly find cause to reduce the damages awarded by juries in cases of corporate liability for subsidiary's torts and just as regularly pierce corporate veils, particularly in cases of personal injury. When attacks on corporations fail this is usually because plaintiff's lawyers misunderstand or misapply the various theories of

9 For a general discussion of maquila operations in Mexico see, Daniel I. Basurto Gonzalez, Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 Saint Mary's Law Journal 659 (1991).

10 See, e.g., *Green v Equitable Powder Mfg. Co.* (1951, DC Ark) 95 F Supp 127, 121. (Liability of a subsidiary for the tort of another subsidiary in the corporate group: defective product - dynamite).

11 See, e.g., *Ex parte Union Camp Corporation (Re: Joel Cobb v. Union Camp Corporation)* 2001 Ala. LEXIS 197,*;816 So. 2d 1039 (Sup. Ct. Ala. 2001).

12 See, e.g., *Real Estate Investors Four, v. American Design Group Inc.*, 2001 Mo. App. LEXIS 566,*;46 S.W.3d 51 (Mo. App. 2001)

13 See, e.g., *Charles Lennon vs. Dacomed Corporation, Alan Podis, M.D., Miriam Hospital, Limagyn Technologies, Inc., Formerly Known as Urohealth Systems, Inc., and National Union Fire Insurance Company*, 2003 R.I. Super. LEXIS 48,*;CCH Prod. Liab. Rep. P16,572 (R.I. App. 2003).

14 See, e.g., *Edward A. Swan, Sr. v. New Orleans Terminal Company*, 745 So. 2d 52;1999 La. App. LEXIS 1549 (La. Ct. App. 1999).

15 See, e.g., *Pappalardo v. Richfield Hospitality Services*, 790 So. 2d 1226;2001 Fla. App. LEXIS 11092;26 Fla. L. Weekly D 1927 (Fla. App. 2001).

16 See, e.g., *Sandra Jean Hersey v. Lonrho, Inc.*, 73 Conn. App. 78;807 A.2d 1009;2002 Conn. App. LEXIS 520 (Conn. App. 2002).

liability.

Any defence based on an opponent making a mistake is necessarily weak. The consequences of liability can be disastrous to the corporation. So corporate counsel interested in defending their clients – and in real reform to the expensive and inefficient tort system¹⁷ – should carefully consider the various theories presented here so as to properly advise their clients as to what the law permits, what the law might tolerate, and what the law will not tolerate. Prudent lawyers counsel clients against committing acts in "the grey zone". Given the number and strength of potential attacks on corporate defendants this advice is all the more pertinent: personal injuries in the United States can, even after judicial rectification, still mount in the hundreds of thousands of dollars and exceed the company's insurance coverage. Factual complexity and legal ambiguity explain why companies that think they can outsource their problems should not blithely assume they escape liability by resorting to legal formalism.

A. Practical Scenarios

There are two core scenarios of liability this paper addresses. The first case is the liability of a first world parent company for its third world subsidiary. The second case is the liability of the first world company for subcontracting (outsourcing). In both cases the parent company or its directors, officers, employees and even shareholders could be held liable for tortious acts of their subsidiary or even sub-contractor. Such negligence may either be imputed or direct. Theoretically, liability could be chained: a subsidiary could be held liable by respondeat superior for the negligent act or injury to its employee – and this negligence could in turn be imputed via agency to the U.S. parent corporation. That theory is basically sound in substance, but would obviously meet with serious procedural obstacles, notably forum non-conveniens¹⁸ and possibly also jurisdictional questions.¹⁹ These jurisdictional obstacles are not

17 See, e.g., Stephen D. Sugarman, *Doing Away With Tort Law* 73 Cal. L. Rev. 555 (1985).

18 The most famous case of a corporate parent accused of the tortious act of its subsidiary is *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* 634 F. Supp. 842 (S.D.N.Y. 1986). Ultimately the case was heard not in the U.S. but in India on the basis of forum non conveniens.

19 See, e.g., *Lauritzen v. Larsen* 345 U.S. 571; 73 S. Ct. 921; 97 L. Ed. 1254; 1953 U.S. LEXIS 2533 (U.S. S. Ct. 1953)

discussed here as they are addressed by the author elsewhere.²⁰ These procedural obstacles while serious are not insurmountable. Here however we confine our analysis to substantive law.

Both respondeat superior and strict products liability are examples of imputed torts. The law is willing to impose liability in cases of employee torts committed in the scope of employment.²¹ This is because, though the employer may not have been actually negligent they are in the position to control the employee's behavior. Similarly, the law imposes strict liability for defectively designed or manufactured products on any merchant in the stream of commerce.²² The merchant held liable for the defective product they sold may not have been in fact negligent: a distributor of a product does not necessarily have the expertise required to recognize hidden design or manufacturing defects in a product. However the merchant is in a position to know who actually is negligent and thus to seek indemnisation – unlike the tort victim who may not be able to identify the negligent tortfeasor due to “conspiracies of silence”. Again, reasons of information and control explain why negligence is imputed.

Imputed negligence for acts of a corporate subsidiary or subcontractor is similar to strict products liability and respondeat superior: The law is willing to extract wrongful profits from any company in the stream of commerce²³ profit-

20 See, Eric Allen Engle, *Extraterritorial Jurisdiction: Can Rico Protect Human Rights? A Computer Analysis of a Semi-Determinate Legal Question*. 3 J. High Tech. L. 1 (2004).

21 "Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment (see, *Riviello v Waldron*, 47 NY2d 297, 302)."

N. X., v. Cabrini Medical Center, 97 N.Y.2d 247;765 N.E.2d 844;739 N.Y.S.2d 348;2002 N.Y. LEXIS 184, *7 (N.Y. App. Div. 2002).

22 See, e.g., *Daniel M. Williams, v. Rep Corporation*, 302 F.3d 660;2002 U.S. App. LEXIS 17275, *4;CCH Prod. Liab. Rep. P16,399 (7th. Cir 2002).

23 A typical example of the willingness of the court to ignore legal formalisms in the interest of rendering substantive justice in cases of personal injuries is seen in *Petrocco v. At&T Teletype, Inc.*, 273 N.J. Super. 613, 642 A.2d 1072 (Law Div. 1994):

"To allow the defendant to hide behind the exclusive remedy provision in this situation would effectively allow a manufacturer who had already put defective products into the stream of commerce to shield itself from injuries those products may later cause by virtue of subsequently entering into a business transaction with someone other than the injured party. The exclusive remedy provision of the Workers' Compensation Act was not intended to immunize a third-party manufacturer in such a situation.

ing from labor law violations and externalisation of costs via piercing the corporate veil.²⁴ Where does the court draw the line? What are the limits of liability? To understand these questions a brief historical exposition is necessary.

B. Historical Perspective

How are we to understand these strange tendencies in the law? By contextualising the positive law through legal theory and history we can understand apparently contradictory tendencies in the law. The history of modern negligence law is marked by the progressive abandonment of the enlightenment principle of the rational, free moral agent as the definitive legal subject. This person supposedly was or could be free to negotiate any and all transactions with other actors who were also presumed to be freely bargaining individuals. This theory of the individual legal subject was radically different from feudalism. It did however correspond somewhat to the yeoman society of the late feudalism and even early capitalism. But that model of the legal subject obviously no longer corresponds to the reality of late capitalism, with its nameless, faceless and all-powerful corporations and continental governments. Legal scholarship has not been blind to these facts: the law has recognized that the enlightenment homo economicus was in fact never an accurate description and that the reality of industrial relations of mass production meant that the enlightenment archetype of the free citizen, even if true at a certain time or at least among some sectors of late feudal Europe was soon amalgamated and crushed into alienable and alienated consumer-producers with very little real freedom of negotiation. This can be seen most notably in products liability and also in compulsory insurance systems.

In tort law this historical fact played itself out in the gradual rejection of enlightenment legal doctrines and their replacement by an understanding of the individual as just about inevitably socially constrained. This redefinition of the role of the individual in society led to the rise of a variety of strict liability regimes which no longer look to fault as the primary basis of liability. Legal formalism with its precision and rigidity has been rejected in favor of ambiguous contextual balancing tests.²⁵ Consequently, for example, manufac-

24 See, e.g., *Delfina Kaczorowska, v. National Envelope Corporation - East* 342 N.J. Super. 580;777 A.2d 941;2001 N.J. Super. LEXIS 307, *20 (N.J. Sup. Ct. 2001).

25 “The precise legal relationship between the parties has not played a particularly significant role in the cases imposing strict liability”
Garcia v. Halsett, 3 Cal. App. 3d 319, 325; 82 Cal. Rptr. 420, 423 (Cal. App. 1970).

turers of defectively designed or produced merchandise – including the licensors and franchisors thereof – can be held strictly liable at any point in the stream of commerce – even outside the U.S. – without showing negligence.²⁶ This is in fact a reappearance of negligence per se – a legal formalism which supposedly had been abandoned. Similarly, employers have over time been increasingly held liable for the torts of their employees (for example, the abandonment of the fellow servant rule, wherein the tort of a fellow servant as to another co-worker would not be imputed to the employer).

Regardless of doctrinal inconsistencies one fact is certain: Industrial society just about guarantees a large number of grave accidents due to mechanisation. Long hours, low pay and dangerous machinery translates into death and disfigurement at the workplace. But, since capitalist society was richer than feudal society some of the riches produced were used to improve work-place safety. The irony of capitalist production is industrial society, with its greater dangers and risks to machine workers than feudal society recognizes the need for social stability and thus admits some limited reforms to maintain the system qua system.

The decline of the individual as atomistic legal subject is combined with a loosening of the concept of causation. Causality is less strictly regarded today. This is most clearly seen in cases of toxic torts: there probabalistic proofs are allowed. Thus, where two tortfeasors exclusively produce a given product which caused the damage each would be responsible according to their market share. Similarly, the rejection of the "all or nothing rule" (any negligence on the part of the plaintiff no matter how slight operated as a total bar to the plaintiff's claim) in cases of contributory negligence in favor of "comparative negligence" (a plaintiff X% negligent would only recover 100% minus X% of their damages) is another example of the decline of formalism and greater tolerance of systemic uncertainty in the interest of a more exact result in the specific case at bar.

These are far from the only examples where the rationalist categorical enlightenment view of the law has been implicitly rejected. Legal uncertainty has also increased through the pervasive adoption of interest balancing tests and the rejection of bright line tests. Another example of the departure from the principle of individual responsibility for definite acts – appropriate in a

26 *Kasel v. Remington Arms Company, Inc.*, Defendant and Respondent (Cal. App. 1972) 101 Cal.Rptr. 314, 24 Cal.App.3d 711. (U.S. manufacturer held liable for Mexican subcontractor/franchisee's defectively manufactured product – ammunition).

feudal society, and impossible in an industrialized world – as is the rise of social insurance generally. Insurance is clearly the more economical remedy to the problem of externalities because it avoids the transaction costs and uncertainties of trial and windfall judgements.

In light of these facts the litany of complaints from industry as to the injustice and anti-economic action of tort regulation is easier to understand. However, corporations struggling for tort reform should recognize that their arguments will be taken more seriously as they focus on general compulsory insurance as a cheaper way to protect against wrongs than the "crap-shoot" of jury trials. When corporations argue that no one should be responsible for the accidents which are just about inevitable in industrial society they lose credibility. In contrast it is true that as a regulatory system tort law is expensive. It is also true that punitive damages encourage frivolous litigation and result in windfall gains to plaintiffs. A compulsory insurance system, like those found in most all European countries, would avoid windfall benefits to tort victims via punitive damages and could be combined with a scheme of fines in case of wrongful conduct thus reducing not only litigation burdens but also tax burdens and perhaps even be nearly self financing.

Having sketched the theoretical questions and reform proposals, this article now turns to the liability of a parent company for acts of its subsidiary or for acts of its sub-contractors particularly where the sub-contractor or subsidiary is overseas. Potential defendants are shareholders, directors, officers and employees of the parent company. The tortious act is committed by the subsidiary/subcontractor or its employee.

I. IMPUTED LIABILITY

Part of the confusion in the field of imputed or direct liability of a corporation for the acts of its subsidiary is due to a confusion of direct and imputed liability. By keying on this distinction we can avoid a confusion. A shorthand description may help: in a case of imputed liability there is only one tort with two or more tortfeasors. In cases of direct liability there is only one tortfeasor – the parent corporation.

The rationale of imputed liability is that the tortious act of one person (legal or natural) will be attributed to another person (legal or natural) because of the control exercised by the one over the other. The legal theories of imputed liability are respondeat superior and agency. However we shall see that agency principles also appear in the issue of piercing the corporate veil. But piercing

the corporate veil is not a form of imputed liability! This type of doctrinal confusion is inherent in the current structure of veil-piercing. We now examine the various legal theories to expose this confusion, its sources, and possible solutions.

A. Respondeat Superior

Arguments based on respondeat superior seek to impute liability to the parent the company for the act of its employee. They include “chaining” arguments wherein the employees wrongful act is attributed to the employer corporation (generally a subsidiary) which in turn is imputed to the parent company under any of the various theories.

Briefly, to be liable for the act of the employee the plaintiff must prove²⁷ that the employee acted within the scope of their employ at the time of the injury. Employers are not liable for the acts of the employee which are independent, self-serving acts and in no way facilitate or promote the employer's business.²⁸ Thus acts of abuse by supervisors of employees motivated by subjective negative emotions of the employee are not within the scope of employment and will not be imputed to the employer.²⁹ However, the scope of employment not by formal description but by actual practice and custom.³⁰ Thus conduct may be determined to be within the scope of employment due to implicit authorization³¹ and can even including employees’ acts which conflict with commands of the employer³² where those acts further the purposes of the employer.³³ Thus employers can be liable under a theory of respondeat superior for the acts of security personnel in their employ.³⁴

B. Liability based on a Theory of Agency

A second form of imputed liability relies on principles of agency: namely that the principal exercised such a degree of control over the act of the agent that the court can fairly impute the agent’s wrongful act to the principal.

27 *Veranda Beach Club Ltd. Partnership v Western Sur. Co.* (CA1 Mass) 936 F2d 1364, 1373; 33 Fed Rules Evid Serv 809, 20 FR Serv 3d 409 (1st. Cir. 1991).

28 *Favorito v Pannell* (CA1 RI) 27 F3d 716, 720; (1st. Cir. 1994).

29 *Mason v Kenyon Zero Storage*, 71 Wash App 5, 856 P2d 410 (Wash. App., 1993).

30 *Wilson v Joma*, 537 A2d 187 (S. Ct. Del. 1988).

31 *Deuchar v Foland Ranch*, 410 NW2d 177 (S.Ct., S.Dak.1987).

32 *In re Albano*, 143 BR 323 (Bankr. D. Conn. 1992).

33 *Aliota v Graham* 984 F2d 1350 (3d Cir. 1993), cert. Den. (US) 126 L Ed 2d 37, 114 S. Ct. 68.

34 *Giant Food, Inc. v Scherry*, 51 Md App 586, 444 A2d 483, 29 ALR4th 134 (1982).

Arguing that the subsidiary corporation is acting as the agent of the parent corporation is probably the strongest argument the plaintiff can make. In most cases where this argument is made and where there are grave personal injuries the court is willing to impute negligence to the parent company – especially where the subsidiary is thinly capitalized or appears to have been formed precisely to avoid liability. In contrast, courts are extremely reluctant to pierce the corporate veil in cases of purely pecuniary losses, namely where the creditors of a bankrupt corporation seek to reach the personal assets of the shareholders of the corporation.³⁵ This is for the obvious reason that general financial liability of shareholders for all debts of a corporation would discourage investment in stocks with deleterious economic consequences.³⁶ In contrast, courts are willing to pierce the corporate veil in cases of negligence resulting in personal injury. There negligence is imputed to the principal for the act of the agent.³⁷ This imputation of negligence from one actor in a corporate group to another is based on the same rationale which justifies the imputed negligence of the master for their servant: the principal directed the agent to undertake the wrongful act or at least delegated them the necessary power to do the wrongful act. Thus both the agent and principal are jointly and severally liable for the act's wrongful consequences. However we shall also see that agency principles underlie one theory of piercing the corporate veil – and thus can also be the basis of a form of direct liability. Naturally the result is doctrinal confusion.

II. DIRECT LIABILITY

A. Joint and Several Liability

Where the parent corporation and its subsidiary together commit a tort they can of course be held jointly and severally liable under the ordinary rules of tort law. In such a case the corporate form is not ignored: each corporation is jointly and severally liable for the wrongful act.

35 *Daniel L. Schilling, vs. Emerald Green International*, 2001 Minn. App. LEXIS 1041 (Minn. Ct. App. 2001) (Corporate veil not pierced: shareholder not held personally liable for debt of company). But see: *NEROX POWER SYSTEMS, et al. v. M-B CONTRACTING COMPANY et al.* 54 P.3d 791; 2002 Alas. LEXIS 140 (S. Ct. Alaska, 2002) (Corporate veil pierced: Majority shareholder of corporation held personally liable for debts of pierced corporation).

36 See, e.g. *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973).

37 *Leming v. Oilfields Trucking Co.*, 44 Cal. 2d 343, 282 P.2d 23, 51 A.L.R.2d 107 (Cal. S. Ct. 1955).

B. Fraud

The fraudulent acts of a parent corporation whether effected through or independantly of the subsidiary corporation are of course an independent basis of liability and thus can be the foundation of direct liability. However, just as principles of agency can be the basis for piercing the corporate veil so also can the corporate veil be pierced under a theory of fraud. Since the substantive fraud is relatively simple doctrinally we reserve discussion of the theory of fraud as a basis for piercing the corporate veil for later in the paper just as the discussion of the agency theory of veil piercing is also discussed infra.

C. Piercing the Corporate Veil – Theories of Veil Piercing

Piercing the corporate veil is an exceptional remedy³⁸ equitable in nature.³⁹ Courts are reluctant to ignore the corporate form because that would discourage investment in corporations. and thus must meet the usual procedural requirements of any equity case. Whether the corporate veil should be pierced is a question of fact.⁴⁰

Direct liability may also be imposed on the corporation by decision of the court. Essentially, the court chooses to disregard the separate legal existence of the subsidiary effectively voiding its legal existence. As a result, the parent company is directly liable for the acts of the subsidiary. This legal operation is known by the term “piercing the corporate veil”. However the doctrine of corporate veil piercing is extremely confused both in theory and in practice. Part of this confusion results from the fact that several different legal questions are all subsumed in the question whether the veil should be pierced. For example, the separate existence of the subsidiary may be ignored as to taxation questions, as to the debts of the corporation (which then are passed on to the shareholders!) or as to the torts and contracts of the subsidiary. In fact, several different questions are all subsumed under the heading "piercing the corporate veil." Namely: who is liable? Directors? Officers? Employees? Shareholders? Of course a descending scale of liability from those who exercise the most de facto control over the company (directors and officers) to those who exercise the least de facto authority (employees and shareholders) would be logical as a

38 *Carbonella & Desarbo, Inc. v. Dealer's Quest, Inc. et al.* 2003 Conn. Super. LEXIS 1539, 11* (2003) (Superior Court, Connecticut, unreported) (Court should not pierce corporate veil only under exceptional circumstances)

39 *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998).

40 *Litchfield Asset Management Corp. v. Howell*, 70 Conn. App. 133, 148, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002).

functional determinant of whether to ignore the corporate fiction. Such, along with the question whether the injury is bodily or merely proprietary, may even be a rough guide to actual court practice. However the law does not – officially – take that perspective. Veil piercing also does not consciously address the questions: to whom is liability owed (customers, employees, shareholders), and what duty is owed? (A duty under contract, or tort?). Thus the multiple tests and doctrinal confusion appear to be the result of a failure to frame the question systematically. Since a systematic formal approach has not been taken up by the courts this article does not propose one – it would have no legal authority on which to stand. However such a systemization of this field of law would be desirable to dispell the needless confusions in law which result in legal uncertainty, increased transaction costs, and anomalous and unequal decisions. Here we will be looking at two questions: The liability of a corporation for the torts of its subsidiary with particular regard to the liability of the parent corporation to the employees of the (overseas) subsidiary.

This much is clear: Parent corporations generally have no duty to control the acts of their subsidiaries.⁴¹ However, this general rule can be overcome by piercing the corporate veil and treating the two entities as one.⁴² There are several different theories which can be the basis of an argument that the corporations existence should be ignored which we now examine.

1. *The Alter Ego Theory*⁴³

The alter-ego theory imposes direct liability on the parent on the theory that the two enterprises are in fact one.⁴⁴ The alter ego theory of piercing does not require a showing of fraud.⁴⁵

41 *Abdel-Fattah v. Pepsico, Inc.*, 948 S.W.2d 381 (Tex. App. Houston 14th Dist. 1997).

42 *Abdel-Fattah v. Pepsico, Inc.*, 948 S.W.2d 381 (Tex. App. Houston 14th Dist. 1997).
Mid-Missouri Telephone Co. v. Alma Telephone Co., 18 S.W.3d 578 (Mo. Ct. App. W.D. 2000).

43 *Fisser v International Bank* 282 F.2d 231 (2d. Cir., 1960).

44 *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031 (7th Cir. 2000).

45 *Milgo Electronic Corp. v United Business Communications*, 623 F.2d 645, cert den (1980) 449 US 1066, 66 L Ed 2d 610, 101 S Ct 794.

2. *The Identity Theory*⁴⁶

Under the identity theory the unity of interest and ownership of the parent and subsidiary is so great that the subsidiary company is considered to legally have never existed or to have ceased to exist.⁴⁷ The person seeking to deny the corporate existence of the subsidiary must:

“show that there was such a unity of interest and ownership that the independence of the corporation had in effect ceased or had never begun, [such that] an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.”⁴⁸

3. *The Instrumentality Theory*⁴⁹

Under the instrumentality theory the corporate veil is pierced where the dominant corporation essentially so dominated the subsidiary corporation that the latter became a mere instrument of its will. The test for piercing the corporate veil raises factors balanced in other tests for veil piercing. It has been summarized by the court as follows:

"The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."⁵⁰

Like all piercing cases, this is a theory of direct liability, not imputed liability, for the law simply does not recognize the existence of the dominated company. Thus liability could not be imputed.

46 *Divco-Wayne Sales Financial Corp. v Martin Vehicle Sales*, 45 Ill App 2d 192, 195 NE2d 287 (Ill. App. 1963).

47 *Hersey v. Lonrho, Inc.*, 73 Conn. App. 78, 87, 807 A.2d 1009 (Conn. App. 2002).

48 *Saphir v. Neustadt*, 177 Conn. 191, 210; 413 A.2d 843 (1979).

49 See, e.g., *Brown v Margrande Compania Naviera, S.A.* (Dist. Ct. Va. 1968).

50 *Tomasso v. Armor Construction & Paving, Inc.*, 187 Conn. 544, 447 A.2d 406 (1982).

4. *Fraud as the Basis for Piercing the Corporate Veil*

Corporations can also be held liable for the acts of their subsidiaries where the corporation is engaging in fraud, or where the subsidiary is used to perpetrate a fraud.⁵¹ Again, this can create confusion since some corporate irregularities sufficient to justify piercing the corporate veil are also fraudulent and thus an independent basis of liability. A claim of fraud may thus be either one element in determining whether to pierce the corporate veil or an independent basis for a cause of action or both. Again, this is a fact-intensive practical inquiry which will vary from case to case: Thus the level of fraud which must be shown to justify corporate veil piercing will also vary from case to case.⁵²

5. *Piercing the Corporate Veil under a Theory of Agency*⁵³

One court holds that to pierce the corporate veil on a theory of agency "the corporation must be a sham and exist for no other purpose than as a vehicle for fraud."⁵⁴ In contrast however, the Delaware Chancery court disagrees and states that "Under the agency theory, the issue of liability rests on the amount of control the parent corporation exercises over the actions of the subsidiary."⁵⁵ Thus, under the agency theory, "The parent corporation will be held liable for the activities of the subsidiary only if the parent dominates those activities."⁵⁶ This apparent split between "dominance" and "sham" (i.e. sole purpose vs. multiple purposes) is one example of the doctrinal confusion resulting from not carefully distinguishing direct liability from imputed liability. If the corporate veil is pierced, then there is no subsidiary so liability must be direct. If however liability is imputed for the parent corporation on a theory that the subsidiary corporation acted as its agent then the legal existence of the subsidiary corporation is still recognized and thus liability is imputed on a theory of agency. In the second case there is in fact no piercing of the corporate veil.

Multiple theories and practical overlap due to similar fact patterns explain the confusion in imputed and direct liability of corporate parents vis-à-vis subsidiariness. This confusion is exacerbated by courts' ignorance of the differences in the tests. The courts themselves acknowledge the confusion:

51 *Consolidated Sun Ray, Inc. v Oppenstein* 335 F2d 801 (Mo. Ct. App. 1964).

52 Corrigan & Schirott, *Piercing the Corporate Veil: Dispelling the Mists of Metaphor*, 17 Tr Law Guide 121.

53 See, e.g. *New York Trust Co. v Carpenter* (Ohio, Ct. App.) 250 F 668.

54 *Wallace v. Wood*, 752 A.2d 1175, 1184 (Del. Ch., 1999).

55 *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 658 F. Supp. 1061, 1084 (D. Del. 1978).

56 *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 658 F. Supp. 1061, 1084 (D. Del. 1978).

"In many instances, the courts profess to apply one such theory but in fact rely upon evidence or authorities proper to another. An example is *Advance Coating Technology v. LEP Chemical* (S.D.N.Y. 1992) 142 F.R.D. 91, where the court says it is addressing the plaintiffs' alter ego argument but then proceeds to rely upon what seems to be agency principles."⁵⁷

Again, the different rules can be decoded first by asking whether the liability to be imposed is direct (liability for the act of the parent corporation itself) or imputed (vicarious liability imposed on one actor for the act of another due to the control of the second actor by the first). Confusion can also be dispelled by recognizing that each of these theories ultimately relies on a fact intensive investigation of practical realities of the case at bar. Thus it is not surprising that courts often resort to balancing tests to resolve conflicting factors. Because of theoretical confusion and practical factual overlap the only way out of the morass – short of legislative reform (the corporate veil doctrine is judge-made law) – seems through the use of multi-factor interest balancing tests.

6. *Balancing Tests*

Despite the doctrinal confusion and multiple theories of veil piercing, one element may be common to the tests (agency, instrumentality, alter-ego, identity): balancing of competing factors and interests to determine whether the corporate veil may be pierced. Courts do in fact – consciously⁵⁸ or not – use multi-factor balancing tests to determine whether to pierce the corporate veil. Balancing tests are the hallmark of contemporary legal decision making: they consider several different factors in their context: No one fact in isolation will result in a court choosing to disregard the corporate fiction. Instead, courts must look to the totality of circumstances to determine whether the corporations should be considered joined.⁵⁹ Having determined relevant factors to be considered courts must then assign different “weights” to each of the interests

57 *Sonora Diamond Corp., v. The Superior Court of Tuolumne County*, 2000 Cal. App. LEXIS 695,*21;83 Cal. App. 4th 523; 99 Cal. Rptr. 2d 824;2000 Cal. Daily Op. Service 7375 (Cal. App., 2000).

58 See, e.g., *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994) (courts balance eight factors:

(1) undercapitalization, (2) absence of corporate records, (3) fraudulent representations, (4) use of the corporation to promote fraud, (5) payments made by the corporation, (6) commingling of funds and business, (7) failure to observe corporate formalities, and (8) shareholder acts ignoring, controlling or manipulating the corporate form.

59 *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707 (Tex. App. Austin 2000).

and compare them (i.e. “balancing” the competing interests of all parties – not just plaintiff and defendant) to make the decision.

Factors to be considered in determining the balance of interests in piercing the corporate veil include:

- Stock ownership⁶⁰ – the fact that the parent owns a majority or even all the stock of the subsidiary alone is not sufficient to warrant holding the parent corporation liable for the contracts or torts of the subsidiary.
- Interlocking boards of directors and/or officers and employees. While common employees, officers, or shareholders may be evidence of no factual separation of corporate interests these are alone insufficient and there are cases where despite such factors no liability was found.⁶¹ If the two companies have overlapping boards of directors and/or officers and employees the moving party must nevertheless show that in fact the domination and control of the subsidiary by the parent was complete: interlocking boards of directors and officers and stock ownership are alone insufficient to justify disregarding the separate legal existence of the subsidiary. They are however one factor to be considered.⁶²
- Commingling of funds,⁶³ or other financial irregularities such as one-sided contracts which favor one of the companies at the expense of the other,⁶⁴ (e.g. sale of goods at or below costs). Common tax returns, common addresses, parent’s use of subsidiary’s property as if it were its own.⁶⁵ All of these factors can be evidence of fraud and/or abuse of the law. Where the practical effect of such legal gymnastics results in substantive injustice to victims of negligent torts the court will disregard the corporate separation.
- Whether the companies hold themselves out as separate entities to third parties.
- Undercapitalization: One critical factor in determining whether the court will disregard the corporate fiction is the under-capitalization of the

60 *Martin v Development Co. of America* 240 (Ariz. Ct. App. 1917).

61 *Davis v John R. Thompson Co.* 239 Ill App 469 (1926).

62 *Townley v. Emerson Elec. Co.*, 178 Misc. 2d 740, 681 N.Y.S.2d 741 (Sup. Ct. 1998).

63 Absent fraud, commingling, failure to observe corporate formalities and/or inadequate capitalization corporate veil would not be pierced. *In re Audre, Inc.*, 216 B.R. 19 (Bankr. 9th Cir. 1997).

64 *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707 (Tex. App. Austin 2000).

65 *American Fuel Corp. v. Utah Energy Development Co., Inc.*, 122 F.3d 130 (2d Cir. 1997).

subsidiary.⁶⁶ This is all the more true where undercapitalization is a deliberate corporate policy designed precisely to evade responsibility for wrongs of the corporate group.⁶⁷

All these questions can only be answered by looking to the actual facts to determine the actual degree of control exercised by the parent over the subsidiary.⁶⁸

Thus the doctrinal confusion may be clarified not only by dogmatically distinguishing direct and imputed liability from each other and by properly recognizing and distinguishing the various theories of veil piercing (agency, instrumentality, alter-ego, identity) from each other but also by acknowledging the common factors underlying each of these tests. By evaluating the problem in toto using a balancing test the advocate may have a better practical grasp on how to properly advise her clients.

7. Reverse Piercing the Corporate Veil

To add to the confusion noted there is also a theory of “reverse piercing” of the corporate veil. Thankfully, this is in fact quite simple. In “reverse piercing” the debts or wrongful acts of individuals (shareholders, or directors or even officers and employees) are attributed to the company rather than the usual piercing situation where the acts of the company are attributed to its shareholders.⁶⁹ Further, the same rules in traditional veil piercing apply to reverse veil-piercing⁷⁰ Since reverse veil-piercing usually involves seeking to reach corporate assets for debts rather than torts we do not address it further here.

D. Independent Contractors/Subcontractors

We have just analyzed the liability of corporate parent and subsidiary. Can the corporation avoid liability by resorting to sub-contractors? Not necessarily.

66 See, for example, *Henderson v Rounds & Porter Lumber Co.* (DC Ark) 99 F Supp 376; *Fish v East* 114 F2d 177 (Colo. Ct. App. 1940).

67 This often happens in taxi-cab companies which are artificially split into several companies. See, e.g. *Wallace v Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla 15, 61 P2d 645 (Sup. Ct. Okla. 1936).

68 *Scandinavian Satellite System, AS v. Prime TV Ltd.*, 291 F.3d 839 (D.C. Cir. 2002).

69 *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 321 (S.D. N.Y. 1999); *San-Dar Associates v. MDO Development Corp.*, N.Y.L.J., July 22, 1997, at 22, col. 4 (Sup. Ct., Bronx County 1997); *State of New York v. Easton*, 169 Misc. 2d 282, 288-289 (Sup. Ct., Albany County 1995).

70 *Securities Investor Protection Corp.*, supra, at 321; *San-Dar Associates*, supra; *State of New York v. Easton*, supra, at 288-90.

Liability for the act of a supposed independent contractor will be imputed to the contracting party where both the sub-contractor and the contractor have the same offices, and where all finances of both companies are handled by one of them and where losses of the subsidiary are accounted to and paid by the parent.⁷¹ Whether a franchisee is an independent contractor or an agent of the franchisor is a question of fact.⁷² Thus where franchisor does not completely dominate and control franchisee it was no error of law to find that the franchisee was an independent contractor and not an agent thus barring vicarious liability.⁷³ Again, a fact intensive inquiry similar to the questions examined in piercing the corporate veil will be undertaken to determine whether it is equitable to hold the contracting party liable for the torts of their subcontractor.

E. RICO

In theory, systematic abuses of labor in a foreign subsidiary or by a foreign sub-contractor might lead to liability under the Racketeering Influenced and Corrupt Organizations Act. However there are numerous procedural obstacles which limit in practice the application of RICO.⁷⁴ The author has addressed this topic extensively elsewhere, so other than noting that RICO could be a basis of liability of the parent company for the subsidiary or subcontractor the reader is referred to the literature.⁷⁵

71 Joseph R. Foard Co. v Maryland 219 F 827 (Ct. App. Md. 1914).

72 Kuchta v. Allied Builders Corp. 21 Cal.App.3d 541, 547, 98 Cal.Rptr. 588 (1971).

73 Cislaw v Southland Corp. 4 Cal App 4th 1284, 6 Cal Rptr 2d 386, 92 CDOS 2631, 92 Daily Journal DAR 4136 (1992, Cal. App.).

74 See, e.g., PT UNITED CAN COMPANY LTD. v.CROWN CORK & SEAL COMPANY, 138 F.3d 65 (U.S. Ct. App. 2d Cir., 1998). (Indonesian corporation brought suit against minority shareholder, a Pennsylvania corporation, and individual employees of shareholder, alleging breach of contract, breach of fiduciary duty, and violations of Racketeer Influenced and Corrupt Organizations Act – claim dismissed against individual defendants for lack of personal jurisdiction and dismissed claims against minority shareholder on forum non conveniens grounds).

75 See, e.g. Eric Engle, *Extraterritorial Jurisdiction: Can Rico Protect Human Rights? A Computer Analysis of a Semi-Determinate Legal Question*. 3 J. High Tech. L. 1 (2004).

III. Piercing the Corporate Veil in the EU: Liability of a Parent Company in the EU for the Tortious Act of a Subsidiary⁷⁶

Is the situation in the European Union similar to that in America? Essentially, yes: corporate forms can be ignored where domination and control of a corporation is complete but will ordinarily be respected. However one possible theory that may meet more success in Europe than the United States is that the company that exploits the labour of the third world worker not only violates international human rights law but also obtains thereby an unfair competitive advantage. Thus where a corporate subsidiary employs slave labour, or perhaps even child labour in contravention of the ILO provisions, or where it pays women workers less than men doing the same work we could fairly say that there is a tort. This tort however benefits the parent company in Europe, and is a detriment to its competitors which do not employ slave labour, child labour, or underpaid women's labour. Thus the tort also would constitute an unfair competitive advantage under Article 81 of the EC Treaty. Article 81 states that:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may *affect trade* between Member States and which have as their object or *effect* the prevention, restriction or *distortion of competition* within the common market (emphasis added).

Clearly, an agreement between a parent company and a third world subsidiary or subcontractor to profit from slave labour, child labour, or unequal women's pay would affect trade within the Union and distort competition by favouring the predatory exploitative company at the expense of companies which obey international law. The company's only argument would be that Article 1 § 3 permits an exception in cases where such an agreement "*contributes to improving the production or distribution of goods* or to promoting technical or economic progress, *while allowing consumers a fair share* of the resulting benefit". However this argument would likely fail because the consumer does not in fact have a fair share of the benefit from an anti-competitive agreement or operation which is based on labour exploitation for they are in fact profiting therefrom. Further, slave labour and sweatshops are hardly "economic pro-

⁷⁶ This analysis is based on an unpublished lecture by Prof. Olivier De Schutter, Université Catholique de Louvain given at the European University Institute, Florence 17-28 June 2002. The author wishes to thank Prof. De Schutter for his creative insights and the EUI for its research facilities.

gress” or improvements in the production or distribution of goods. Thus, if the agreement or enterprise is found to be anti-competitive as profiting from slave labour, illegal child labour, or the underpaid illegal labour of women then the exception would be unlikely to apply.

As to imputed liability in Europe as in America the torts of a wholly owned subsidiary may be imputed to the parent company. To impute the tort to the parent company the court must first “pierce the corporate veil” and look at the ownership and control of the subsidiary by the parent.⁷⁷ The easiest case is the wholly owned subsidiary with unity of management in both parent and subsidiary. A case which would be almost as easy would be that of the parent company with a wholly owned subsidiary that however has a different board of directors. As the independence of the subsidiary grows, the likelihood of proving actual control decreases, and with it the likelihood of being able to impute legal responsibility to the parent company for the acts of a subsidiary. Ownership and control is of course reflected in stock ownership. It would be unlikely that the ECJ would impute control of a subsidiary to a parent company which owns the largest bloc of stock in a subsidiary but which bloc is a minority share of all shares.

The most difficult case is of, again, the independent subcontractor. In such a case there is no ownership or control (at least theoretically...) but there is a contract. Knowing that freedom of contract is a general principle of law it would be very difficult to show that the contract should be ignored. However fraudulent contracts do exist. It could be argued that where the European company knew or should have known that the contract it obtained was so favorable due to exploitative labor practices that that would constitute an unfair trading advantage. That does nothing to compensate the unfair labour practices in the third world but it would discourage EU companies from profiting thereby.

Once the corporate veil is pierced, obtaining jurisdiction under COM 44/2001 would be relatively easy. Thus, at least in theory, it would be possible to impute tort liability to a parent company either for a tort committed by a wholly owned subsidiary. Alternatively, a company might be fined for violations of human rights which also constitute anti-competitive behaviour. Thus, briefly, similar principles of law can be found in Europe to impose liability on corporations for the acts of their subsidiary in the third world.

77 See, *Stora Kopparbergs Bergslags AB* C-286/98 (16 November 2000).

Conclusion: The Transnational Corporate Group in International Law

Transnational corporate groups are increasingly influential⁷⁸ in world politics.⁷⁹ Some have gone so far as to propose that corporations are or should be subjects of international law.⁸⁰ In fact, corporations,⁸¹ like other non-state actors,⁸² do have directly applicable duties and rights under international law.⁸³ Corporations may have duties under the UN Declaration on the Elimination of

78 “Economic globalisation has been accompanied by a marked increase in the influence of international financial markets and transnational institutions, including corporations, in determining national policies and priorities.” Dinah Shelton, *Protecting Human Rights in a Globalized World* 25 B. C. Int. Comp. L. Rev. 273, 276. (2002) available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/06_TXT.htm

supra note 34.

79 *See Id.* at 104.

80 Daniel Thürer, *Modernes Völkerrecht Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung* 60 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht at 557, 587 (2000).

81 The preamble to the Universal Declaration of Human Rights provides that 'every individual and every organ of society shall shall strive ...to promote respect for these rights and freedoms and... to secure their *universal* and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction ' human rights. Corporations are creations of the state and thus are addressees of this norm because of that and also because the preamble states “universal”observance i.e. observance by all actors in all times and places. *UDHR*, Preamble available at:

http://www.hrcr.org/docs/universal_decl.html

82 "International law is increasingly regulating non-state behavior directly." Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. Int'l. Comp. L.Rev. 273, 301-302 (2002) available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/06_TXT.htm

supra note 34.

83 Para. 42 of General Comment No. 14, *The right to the highest attainable standard of health* (Article 12), 4 July 2000, U.N. Doc: E/C.12/1999/5, CESCR, states: “While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities regarding the realisation of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.” Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.5,+CESCR+General+comment+12.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.5,+CESCR+General+comment+12.En?OpenDocument) and at: <http://www.fao.org/Legal/rtf/cesce-e.htm>

All Forms of Racial Discrimination,⁸⁴ the UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief,⁸⁵ the Rio Declaration on the Environment and Development⁸⁶ and other international conventions. These conventions state explicitly or implicitly that “private actors have both negative and positive duties in respect of socio-economic rights.”⁸⁷ and recognise the limited international legal personality of multinational corporations⁸⁸ Implying that human rights can be enforced against corporations.⁸⁹ Thus to that extent corporations⁹⁰ may⁹¹ be said to have

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- 84 Adopted on 20 November 1963 by U.N. General Assembly Resolution 1904 (XVIII). Article 2(1) states that, “No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.” CERD, Art. 2(1), *available at*: http://www.unesco.org/human_rights/dcb.htm
- 85 "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs." Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of Resolution 36/55 1981 United Nations *available at*: <http://www.church-of-the-lukumi.org/Resolution%2036-02.htm>
- 86 Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, U.N. Doc. A/CONF.151/ 26 (Vol. I) *available at*: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>
- 87 Danwood Mzikenge Chirwa, *Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution*, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape (2002) *available at*: http://www.communitylawcentre.org.za/ser/docs_2002/Researchseries1.doc
- 88 Article 2 of the Charter of Economic Rights and Duties of States states that: "multinationals are not to interfere with the internal affairs of a host country." This implicitly recognises the (limited) international legal personality of multinational corporations. Charter of Economic Rights and Duties of States, adopted 12/12/1974 A/RES/3281 (XXIX).
- 89 Claire Moore Dickerson *supra* note 122 at 1458 (noting that individuals have rights under international law in cases of violations of *jus cogens*).
- 90 "Every individual' includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 Brooklyn Journal of International Law, 1, 25 (1999).
- 91 Of course the majority view is that transnational corporations do not enjoy any form of legal personality. However that view is criticised for the practical reason that if transnational corporations have no international legal personality then they would escape international human rights obligations. International Council on Human Rights

limited international legal personality.⁹² Corporations do not however have a constitutive power in the formation of international law. Yet corporations, and international financial institutions such as the world bank⁹³ can contribute to the formation of customary international law⁹⁴ by aiding in the process of elaborating norms⁹⁵ even if sometimes only as observers⁹⁶ and commentators.

Just as we have seen the law evolve from an enlightenment principle of individual responsibility for definite acts to socially contextualized diffuse

Policy, *Whither the State of Human Rights Protection? (New ways to hold non-state actors accountable)* (1998) available at:

http://www.humanrights.ch/bildungarbeit/seminare/pdf/000303_danailov_clapham.pdf

92 Robert McCorquodale, *Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations within the International Human Rights Fence*, 1 *Human Rights & Human Welfare* 21, 27 (2001) available at:

<http://www.du.edu/gsis/hrhw/volumes/2001/1-4/mccorquodale-addo.pdf>

93 “At the World Bank, NGOs or groups of individuals may request an Inspection Panel to investigate claims of injury arising out of an act or omission of the Bank resulting from its failure to follow operational policies and procedures with respect to the design, appraisal, and/or implementation of a Bank project organisations apply the law.” Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty* 25 *B. C. Int. Comp. L. Rev.* 235, 244. Available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/04_TXT.htm.

94 However non-state actors do play a marginal role in the formation of customary international law. “Looking at the activities of individuals, and more specifically NGOs, one finds evidence of an influence both in the formation and the application of international law, albeit one that is qualitatively and quantitatively less than that of states and international organisations.” Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty* 25 *B. C. Int. Comp. L. Rev.* 235, 244 (2002). Available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/04_TXT.htm,
supra note 1.

95 For example, in the North American Agreement on Environmental Cooperation, Sept. 8–14, 1993, arts. 14–15, 32 *I.L.M.* 1482 (1993) [hereinafter NAAEC] permits private parties to petition the NAAEC Secretariat where those petitions are aimed at “enforcement rather than at harassing industry.” The Secretariat may request a government to respond to the allegations, and in cases where two of the three states’ representatives agree, prepare a factual record and release it to the public. NAAEC arts. 14(2), 15.

96 Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty* 25 *B. C. Int. Comp. L. Rev.* 235, 244 (2002). Available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/04_TXT.htm

responsibility with relaxed causation requirements so also are we seeing the rise of a transnational corporate governance. Corporate counsel can regard these facts with incomprehension, fear and distrust. Alternatively, they can understand the underlying long-term cyclical movements and flow with them. By developing rational responsible forms of transnational corporate governance corporate counsel can help their clients to pursue enlightened self interest, to improve the good-will of their clients by showing their company to be a “good neighbor” and even improve the voice of the corporation as a contributor to international law.

Chapter IV
Corporate Social Responsibility (CSR):
Market Based Remedies
for International Human Rights Violations? *

Abstract:

The article examine market based remedies to corporate abuse of human rights. It concludes that while market based remedies alone are inadequate to remedy corporate abuse of human rights in the third world such measures may help shield corporation officers and employees. Further such measures are a step in the right direction. Various market based incentives and disincentives to corporate action are discussed and some reforms are proposed which show that corporate self interest and human rights are not necessarily anti-thetical concepts. The paper concludes however that international human rights law is not an example of a modern “lex mercatoria” precisely because non-market remedies in tort and crime also exist to prevent and remedy abuse of human rights.

* This article appeared under this title in 40 Willamette Law Review 103 (2004).

Introduction

The problem of poverty presents the opportunity of labour exploitation. Opportunities to profit¹ out of the misery of others occur in a variety of domains,² including flowers,³ textiles,⁴ oil,⁵ and diamonds.⁶ Multinational companies can make a killing on their investments – literally.⁷ Often, as in the case of conflict diamonds, the source of the commodity resulting from exploitation cannot be traced.⁸

Not only are labour exploitation patterns recurrent in a several industries, human rights violations occur throughout the third world in places as diverse

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- 1 Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 Cath. U. L. Rev. 881, 881 (1999) (Global capital is highly mobile and follows profit, not human need).
 - 2 Comment, *Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025 to 114 Harv. L. Rev. 2025, 2025 (2001).
 - 3 “The International Labour Organisation (ILO) calculates the number of working children in the world to be in the ‘hundreds of millions.’” Nicole J. Krug, *Exploiting Child Labour: Corporate Responsibility and the Role of Corporate Codes of Conduct*, 14 N.Y.L. Sch. J. Hum. Rts. 651, 651-652 (1998).
 - 4 See, e.g., Deborah J. Karet, *Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?*, 48 Buff. L. Rev. 1047, 1061-69 (2000); See also, “Clean Clothes Campaign” at: <http://www.cleanclothes.org/>.
 - 5 The most famous examples are Unocal in Burma and Shell and Mobil in Nigeria. Kenneth Rodman, *Nonstate Actors and Human Rights Sanctions: A Challenge to the State Centric Model?*, 12 Ethics and International Affairs” 19, at 33-34 and 37 respectively (1988). It is worth noting that “no Western oil company was willing to abandon its access to crude because of political risk in the west. ...Second, these pressures did not deter new energy investments. ... while most MNCs stayed away from Nigeria, oil companies increased their investments.” Rodman at 37.
 - 6 Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 Hastings Int'l & Comp. L. Rev. 327, 327-330 (2001); International Council on Human Rights Policy “Beyond Voluntarism”, 128; 145-146 at http://www.cleanclothes.org/ftp/beyond_voluntarism.pdf (2002).
 - 7 “When the Ogoni Nine were sentenced to death, Shell was asked by NGOs such as Amnesty International to use its influence to win clemency. Shells response was... “It is not for a commercial organisation to interfere with the legal processes of a sovereign state.”, Rodman *supra* note 506 at 35.
 - 8 Blaine Harden, *Africa's Gems: Warfare's Best Friend*, N.Y. Times, Apr. 6, 2000, at A1. See Amman, *supra* note X at 330.

as Saipan,⁹ Ecuador,¹⁰ Papua New Guinea,¹¹ Indonesia,¹² Myanmar (former Burma), and Nigeria¹³ and often implicate first world multinational corporations.¹⁴

The violations of human rights are just as wide ranging. Indentured servitude,¹⁵ child labour¹⁶ and slave labour¹⁷ are typical violations, though atypically even charges of murder or genocide are alleged. Quite simply the fact is consumers want cheap goods – and third world labour generally and child and slave labour in particular are cheap. Companies exploit third world labour¹⁸ because exploitation is profitable.¹⁹

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- 9 Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalisation*, 35 U.C. Davis L. Rev. 705, 762 (2002); *First-Ever Lawsuits Filed Charging Sweatshop Conspiracy Between Major U.S. Clothing Designers, Retailers, Foreign Textile Producers*, Sweatshop Watch, <http://www.sweatshopwatch.org/swatch/marianas/lawsuit.html>; William Branigin, "Top Clothing Retailers Labeled Labour Abusers Sweatshops Allegedly Run On U.S. Territory", Wash. Post, Jan. 14, 1999.
- 10 *Jota v. Texaco, Inc.*, 157 F.3d 153, 155-56 (2d Cir. 1998).
- 11 Elizabeth Amon, *Coming to America: Alien Tort Claims Act Provides a Legal Forum for the World*, Nat'l L.J., Oct. 23, 2000, at A1.
- 12 *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999)
- 13 Jason Hoppin, *Chevron Hit with Human Rights Claim*, Nat'l L.J., Apr. 24, 2000, at B1; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000).
- 14 Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations*, 3 (1999); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997) (trial) *Doe v. Unocal Corp.*, 2000 U.S. Dist. LEXIS 13327. (9th Cir., 2002) (appeal currently being re-heard *en banc*).
- 15 Kimberly Gregalis Granatino, *Corporate Responsibility Now: Profit at the Expense of Human Rights With Exemption From Liability?* 23 Suffolk Transnat'l L. Rev. 191, 226 (1999). (Describing poor quality working conditions in the third world).
- 16 Nicole J. Krug, *Exploiting Child Labour: Corporate Responsibility and the Role of Corporate Codes of Conduct* 14 N.Y.L. Sch. J. Hum. Rts. 651, 651 (1998), *supra* note 564.
- 17 Maria Ellinikos, *American Mncs Continue to Profit from the Use of Forced And Slave Labour Begging The Question: Should America Take A Cue from Germany?*, 35 Colum. J.L. & Soc. Probs. 1, 1 (2001).
- 18 Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labour Rights through Private Initiatives*, 30 Law & Pol'y Int'l Bus. 111, 112-113 (1998) (Outsourcing to take advantage of cheap unregulated third world labour).
- 19 Krug *supra* note 564 at 658.

These facts and the instability of local governments²⁰ often put corporations doing business in the third world into questionable positions. Usually these ethical problems are resolved quickly – by looking to whether profit is hindered or aided.²¹ While we may expect a corporation to behave ethically where it costs nothing, when behaving ethically will reduce profits we should realistically expect the corporation to maximise its profits.²² This is partly because if the company does not do so it will become less competitive against other businesses which do not renounce exploitative profits. The fact that competition, whether among corporations or states, can lead to sub-optimal outcomes explains why law rightly imposes limits on market transactions.

In this article we will explore market forces which may contribute to controlling corporate behaviour and the internal regulatory structure of the corporation. We will particularly look at non-binding regulation of the corporation *via* codes of conduct and guidelines established by the company itself, Industry,²³ pressure groups, the state or by international organisations²⁴ such as the International Labour Organisation (ILO)²⁵ and the Organisation for Economic Co-operation and Development (OECD).²⁶ The corporate social responsibility

20 “[Shell’s] general manager explained the irrelevance of human right of the economic opportunities in blunt terms: “For a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that.” Rodman *supra* note 506 at 35.

21 David P. Forsythe *The Political Economy of Human Rights: Transnational Corporations* ISA-Chicago (February, 2001).

22 Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations have no Incentive to Define Human Right*, 11 Minn. J. Global Trade 101, 117 (2002).

23 Thus, "The World Diamond Congress, meeting in 2000 in Antwerp, proposed the creation of an international diamond council made up of producers, manufacturers, traders, governments, and international organisations to oversee a new system to verify the provenance of rough diamonds." This is one more example of non-state actors taking over the role of states! Namely proposing new international norms, the very core of the distinction between “object” and “subject” of international law. Dinah Shelton, *Protecting Human Rights In A Globalized World*, 25 B.C. Int'l. Comp. L.Rev. 273, 314 (2002) *available at*:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/06_TXT.htm

supra note 34.

24 Erin Elizabeth Macek, *supra* note 583 at 107-109.

25 Tripartite Declaration of Principles Concerning Multinational Enterprises and Special Policy, 17 Int'l Legal Materials 422 (1978), *at*:

<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>

26 E.g. OECD, *Guidelines on Multinational Enterprises*; United Nations *Global Compact*. See: Michael Anderson, *Transnational Corporations and Environmental*

movement seeks to directly or indirectly influence or control corporate behaviour through a combination of 1) marketplace activism (influence over or *via* capital structure and sales of the corporation), 2) internal self regulation (codes of conduct), and 3) shareholder activism. Accordingly, our inquiry will examine i) indirect influence *via* market forces affecting capital and sales and ii) direct control or influence *via* a) the corporation's internal organisation first through codes of conduct then b) through shareholder activism.

Individually the soft law norms explored here are generally not very effective. However in concert with other regimes they can encourage improved human rights protection. Thus, though the state still plays a key role at the center of the spectrum of international legal entities, it is increasingly supplanted by sub-state and supra-state normative regimes.

A. The International Legal Personality of Non-State Actors

1. Multinational Corporations

Multinational corporations (MNCs) are increasingly influential on the world stage²⁷ and are only one of several non-state actors challenging the role of the state in international law. MNCs are extremely influential in world politics.²⁸ They are loyal only to profit and engage in business activity on several continents. Multinational corporations undermine the hermetic model of Westphalian sovereignty which saw states as isolated from each other and as the principle object of loyalty of their subjects. Capital mobility also undermines the state as primary and ultimate object of power and loyalty on the international stage because it defies the power of the state to regulate its own currency and interest rates.²⁹ It is hardly surprising that some have gone so far as to ask

Damage: Is Tort Law the Answer? Washburn Law Journal Volume 41, No. 3 (Spring 2002) <http://washburnlaw.edu/wlj/41-3/articles/ande.pdf>, *supra* note 38.

27 “Economic globalisation has been accompanied by a marked increase in the influence of international financial markets and transnational institutions, including corporations, in determining national policies and priorities.” Dinah Shelton, *Protecting Human Rights in a Globalized World* 25 B. C. Int. Comp. L. Rev. 273, 276. (2002) Available at: http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/06_TXT.htm, *supra* note 34.

28 *See id.* at 104.

29 *See* Hans Corell, *supra* note 24 at 8.

whether multinationals are or should be subjects of *jus gentium*.³⁰ In fact, corporations,³¹ like other non-state actors,³² do have directly applicable duties and rights under international law.³³ Thus to that extent corporations³⁴ may³⁵ be said to have limited international legal.³⁶

30 Daniel Thürer, *Modernes Völkerrecht Ein System Im Wandel und Wachstum - Gerechtigkeitsgedanke als Kraft der Veränderung* 60 Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht at 557, 587 (2000).

31 The preamble to the Universal Declaration of Human Rights provides that 'every individual and every organ of society shall shall strive ...to promote respect for these rights and freedoms and... to secure their *universal* and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction ' human rights. Corporations are creations of the state and thus are addressees of this norm because of that and also because the preamble states "universal"observance i.e. observance by all actors in all times and places. *UDHR*, Preamble available at:

http://www.hrcr.org/docs/universal_decl.html !!!***!!!XXX YYY

32 "International law is increasingly regulating non-state behavior directly." Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. Int'l. Comp. L.Rev. 273, 301-302 (2002) available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/06_TXT.htm

supra note 34.

33 Para. 42 of General Comment No. 14, *The right to the highest attainable standard of health* (Article 12), 4 July 2000, U.N. Doc: E/C.12/1999/5, CESCR, states: "While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities regarding the realisation of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities." Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.5,+CESCR+General+comment+12.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.5,+CESCR+General+comment+12.En?OpenDocument) and at: <http://www.fao.org/Legal/rtf/cescr-e.htm>, supra note 210.

34 "'Every individual' includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."

Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 Brooklyn Journal of International Law, 1, 25 (1999).

35 Of course the majority view is that transnational corporations do not enjoy any form of legal personality. However that view is criticised for the practical reason that if transnational corporations have no international legal personality then they would escape international human rights obligations.

2. *Individuals*

Individuals, also increasingly have human rights and duties both under national law and international treaties. Evidence of the limited international legal personality of non-state actors includes the UN Declaration on the Elimination of All Forms of Racial Discrimination,³⁷ the UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief,³⁸ the Rio Declaration on the Environment and Development³⁹ *inter alia*. These conventions state explicitly or implicitly that “private actors have both negative and positive duties in respect of socio-economic rights.”⁴⁰ and recog-

International Council on Human Rights Policy, *Whither the State of Human Rights Protection? (New ways to hold non-state actors accountable)* (1998) available at: http://www.humanrights.ch/bildungarbeit/seminare/pdf/000303_danailov_clapham.pdf

36 Robert McCorquodale, *Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations within the International Human Rights Fence*, 1 Human Rights & Human Welfare 21, 27 (2001) available at: <http://www.du.edu/gsis/hrhw/volumes/2001/1-4/mccorquodale-addo.pdf>

37 Adopted on 20 November 1963 by U.N. General Assembly Resolution 1904 (XVIII). Article 2(1) states that, “No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.” CERD, Art. 2(1), available at: http://www.unesco.org/human_rights/dcb.htm supra note 203.

38 "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs." Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of Resolution 36/55 1981 United Nations available at: <http://www.church-of-the-lukumi.org/Resolution%2036-02.htm>

39 Rio Declaration On Environment And Development, Rio de Janeiro, 3-14 June 1992 U.N. Doc. A/CONF.151/26 (Vol. I) available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

40 Danwood Mzikenge Chirwa, *Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution*, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape (2002) available at: www.communitylawcentre.org.za/ser/docs_2002/Researchseries1.doc

nise the limited international legal personality of multinational corporations.⁴¹ Thus human rights can be enforced against corporations.⁴²

3. *Limits on the International Legal Personality of Non-State Actors*

There are however limits on the international legal personality of non-state actors. Although corporations certainly have great *de facto* influence in international relations they do not have a constitutive power in the formation of international law. Non-state actors such as individuals, corporations, and the world bank⁴³ can however contribute to the formation of customary international law⁴⁴ by aiding in the process of elaborating norms⁴⁵ even if sometimes only as observers.⁴⁶

41 Article 2 of the Charter of Economic Rights and Duties of States states that: "multinationals are not to interfere with the internal affairs of a host country." This implicitly recognises the (limited) international legal personality of multinational corporations. Charter of Economic Rights and Duties of States, adopted 12/12/1974 A/RES/3281 (XXIX).

42 Claire Moore Dickerson *supra* note 169 at 1458 (noting that individuals have rights under international law in cases of violations of *jus cogens*).

43 "At the World Bank, NGOs or groups of individuals may request an Inspection Panel to investigate claims of injury arising out of an act or omission of the Bank resulting from its failure to follow operational policies and procedures with respect to the design, appraisal, and/or implementation of a Bank project organisations apply the law." Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention Of State Sovereignty* 25 B. C. Int. Comp. L. Rev. 235, 244. Available at: http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/04_TXT.htm, *supra* note 1.

44 However non-state actors do play a marginal role in the formation of customary international law. "Looking at the activities of individuals, and more specifically NGOs, one finds evidence of an influence both in the formation and the application of international law, albeit one that is qualitatively and quantitatively less than that of states and international organisations." Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty* 25 B. C. Int. Comp. L. Rev. 235, 244 (2002). Available at: http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/04_TXT.htm, *supra* note 1.

45 For example, in the North American Agreement on Environmental Cooperation, Sept. 8–14, 1993, arts. 14–15, 32 I.L.M. 1482 (1993) [hereinafter NAAEC] permits private parties to petition the NAAEC Secretariat where those petitions are aimed at "enforcement rather than at harassing industry." The Secretariat may request a government to respond to the allegations, and in cases where two of the three states'

4. Conclusion

As ordinary as directly enforceable rights and duties held by non-state actors under international law may seem today, that is a radical⁴⁷ departure from the Westphalian system. The increasingly common imputation of rights and duties to non-state actors under international law is partly because of the integration of world trade and capital mobility, i.e. globalisation.⁴⁸ This shift of rights and duties from states to non-state and super-state actors defines one aspect of the transformation of the Westphalian state system.

B. Market Based Remedies

Market forces encourage corporations to exploit third world labour. Is there any way to harness those same forces to encourage corporations to work for better labour standards in the third world? The answer to this question is a qualified “yes”: market forces alone will probably not suffice to improve human rights. But when market forces are linked to legal regimes they may encourage improved working conditions for third world labour. We reach this conclusion by examining incentives and disincentives for corporate action both in capital and consumer markets.

1. Disincentives for Unethical Action

To control behaviour in capitalism law seeks to make the undesirable unprofitable and the desirable profitable. We thus examine disincentives and incentives in capital markets and sales in order to determine where pressure can be successfully brought to influence corporate behaviour.

When we look at capital markets it is noteworthy that churches, pensions, universities and foundations oppose human rights abuse in principle and have funds which they invest in companies. Corporate behaviour can thus be influ-

representatives agree, prepare a factual record and release it to the public. NAAEC arts. 14(2), 15.

46 Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention Of State Sovereignty* 25 B. C. Int. Comp. L. Rev. 235, 244 (2002). Available at:

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/04_TXT.htm

47 John King Gamble, Teresa A. Bailey, Jared S. Hawk, Erin E. McCurdy, *supra* note 41 at 33 (2001) (Argues that the second half of the 20th century was propitious for human rights).

48 See Elisa Westfield, *supra* note 36 at 1108.

enced by threatening to disinvest these funds.⁴⁹ The change in corporate behaviour is induced indirectly by the threat that investors will disinvest and that institutional lenders will make loans contingent on the corporation changing its behaviour to better respect human rights or even stop lending entirely. Activists can thus seek to reduce the credit rating of corporations by demonstrating their poor human rights records.⁵⁰ Bankers are prudent and may be more reluctant to invest in companies which tolerate or even encourage human rights abuses because the violation of human rights generates political instability, increases the risk of war (with attendant property destruction) and risks nationalisation of the investment.⁵¹

As to their sales, corporations which violate or tolerate violation of human rights risk not only capital flight as individual and institutional investors (usually in equities and debt instruments respectively) disinvest. Corporations which violate human rights also risk consumer boycott⁵² protests⁵³ or being denied local or national procurement contracts.⁵⁴ It may be counterintuitive, but market based remedies may have some effect at changing corporate behaviour – a business with no capital and no sales has no future.

2. *Incentives to Act Ethically*

Not only are negative disincentives possible to discourage human rights abuse, there are positive incentives as well to encourage companies to behave ethically. In capital markets, there is a segment of investors more interested in investing ethically than in maximising the profitability of investments. Ethical investment funds exist to serve this market.⁵⁵ One possible reform proposes to create an ethical stock index.⁵⁶ As to consumer markets, Just as there are ethical investors so are there ethical consumers. Some consumers prefer ethically

49 *Id.* at 21.

50 “It is generally agreed that the most damaging source of external economic pressure on Pretoria was the private credit boycott.” *Id.* at 23.

51 John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. Pa. J. Lab. & Emp. L. 463, 472 (2000).

52 Rodman *supra* note 506 at 20; John Christopher Anderson, *supra* note 590 at 472.

53 John Anderson, *supra* note 587 at 472.

54 *Id.*, at 34.

55 See, e.g., Mary O'Hara *Counting the cost of social responsibility* The Guardian, (July 27, 2002).

56 See, e.g., Social Investment Organisation, *Socially Responsible Stock Index Launched in Canada*, at (October, 2002) at: <http://www.socialinvestment.ca/Forfeb00.pdf>

manufactured goods and are willing to pay higher prices for them.⁵⁷ Product labelling is thus another practical remedy to encourage companies to act ethically by making it profitable to do so. Labelling consists of affixing a mark to a product so that the user knows that the product was manufactured or produced according to certain norms of labour. For example “Rugmark” indicates that luxurious rugs from the Indian subcontinent were not produced with child labour.⁵⁸ Similarly the FIFA mark indicates that child labour has not been used in the manufacture of soccer balls.⁵⁹

Thus there are some market based incentives and disincentives both in the capital and consumer markets which should encourage corporations to act ethically. Though market based remedies alone will probably not solve the problem of human rights, in combination with binding measures they may help to improve the standard of living of all humans. What legal remedies are there to discourage corporate misfeasance and encourage good corporate citizenship?

C. Corporate Governance

Market based remedies will probably not alone solve the problem of human rights. However if we look at the internal structure of the corporation we may be able to discover other ways to discourage corporate misfeasance and encourage good corporate citizenship. One way to change corporate behaviour is through the internal governance structures of the corporation. This line of attack would argue that if you want the corporations behaviour to change, take control of the corporation. Corporate behaviour can be changed by non-binding codes of conduct, shareholder resolutions, and proxy contests. Corporate governance may also be influenced by changing securities regulation laws and by including, either voluntarily or mandatorily, a section in the corporations annual report addressing the corporation’s human rights obligations and actions.

1. Non-Binding Codes of Conduct

A code of conduct is an internal or external guide generally adopted by the corporation as a guide to its managers and employees. The corporate social

57 John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. Pa. J. Lab. & Emp. L. 463, 472 (2000) *supra* note 590.

58 Lance Compa, Tashia Hinchliffe-Darricarrere *Enforcing International Labour Rights through Corporate Codes of Conduct*, 33 Colum. J. Transnat'l L. 663, 673 (1995).

59 Liubicic *supra* note 580 at 130.

responsibility movement seeks to persuade corporations to internalise human rights standards by inciting the corporation to adopt voluntary non-binding codes of good conduct.⁶⁰ Essentially the hope is, that by establishing standards the corporation will be encouraged to meet them. Codes of conduct may be created by a corporation itself, an industry, national administrative organs or international organisations.

a. Advantages of Codes of Conduct

Codes of conduct may seem only to be a propaganda exercise. However, even where not obeyed, and only existing on paper, codes can be used to embarrass and shame the corporation and even as evidence of action *ultra vires* if the corporation violates its own code or bylaws. Further such violations may be presented as evidence against the corporation in the event of lawsuits against the company. If a corporation has, on paper, stated that it will obey human rights, even in a voluntary and non-binding code of conduct, when it does not do so it will have greater difficulty defending itself credibly in court.⁶¹

b. Disadvantages of Codes of Conduct

While codes of conduct are thus not completely useless, believing that corporate self regulation alone will prevent human rights abuses in the name of profits requires either naiveté or disingenuity. Corporate social responsibility is usually nothing other than a public relations exercise, at best intended to improve the image of the corporation and at worst to whitewash corporate exploitation and delay the establishment of binding legal norms.⁶² Corporate social responsibility is not always merely a smokescreen however. Sometimes, as in the case of generic drugs used to hinder HIV, pressuring corporations to act

60 For a summary of the opposing viewpoints see Bennet Freedman, *Human Rights and Corporate Responsibility*, 171 American Forum for Global Education 4, available at <http://www.globaled.org/issues/171.pdf> (2001-2002).

61 For example, Unocal has a code of good conduct - which came back to haunt that company when it was sued for human rights violations. Unocal's code is available at http://www.unocal.com/responsibility/code_of_conduct/

62 R. Howitt, *Explanatory Statement to the Motion for Resolution adopted by the Committee on Development and Cooperation of the European Parliament on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct* (A 4-0508/98) (17 December 1998) (Describing labour abuse in the third world, noting that some companies which abuse third world labour have non-binding codes of good conduct which they ignore).

ethically works – although such victories are clearly the exception:⁶³ empirical studies have shown that codes of conduct generally do not influence corporate behaviour.⁶⁴ For example, the non-binding and voluntary Sullivan Code of Conduct⁶⁵ in South Africa touted⁶⁶ during apartheid era South Africa and the MacBride principles in Eire⁶⁷ had only limited and uncertain impact on their target.⁶⁸ Empirical studies have also shown that there is a weak correlation or no correlation at all between profitability and social responsibility⁶⁹ – though no study has shown that social responsibility decreases profit.⁷⁰

For these reasons codes of conduct should be viewed with scepticism. Corporations will not regulate themselves into competitive disadvantage. Codes of conduct are not however the only corporate governance remedy for human rights violations. The shareholder activism model seeks to influence corporate behaviour by influencing the corporation or its shareholders to renounce profitable exploitation.

2. *Shareholder Activism through Shareholder Proposals*

The principle legal vehicle of shareholder activism is shareholder's proposals (also known as shareholder resolutions) which are introduced into proxy statements and placed before the shareholders for approval or disapproval.⁷¹ Share-

63 “Initially, the multinationals ignored developing- country workers, they paid bribes, and they charged the same high price for HIV/AIDS drugs worldwide. Then, at least as regards working conditions and anti-HIV/AIDS drugs, the multinationals changed their behavior when confronted by collective outrage emanating from a community far broader than the corporate world. This community pressure is new, and it did force the multinationals' management to take into account constituencies beyond the shareholders.” Claire Moore Dickerson *supra* note 169 at 1441.

64 Erin Elizabeth Macek, *supra* note 583 at 117 (2002).

65 Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GW Int'l L. Rev. 401, 428 (2002).

66 For a more laudatory view of Sullivan see: Henry J. Richardson, *Reverend Leon Sullivan's Principles, Race, and International Law: A Comment* 15 Temp. Int'l & Comp. L.J. 55, 80 (2001).

67 MacBride Principles, *available at*, <http://www1.umn.edu/humanrts/links/macbride.html>

68 Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 22 Berkeley Jnl. Int'l. Law 45, 80 (2002).

69 *Id.*

70 *Id.*

71 The shareholder's resolution in the U.S. is based on SEC Rule 14a-8 SEC, 17 C.F.R. § 240.14a-8.

holder proposals seek to induce corporate change from within by proposing and implementing resolutions which will prohibit the company from abusing human rights.⁷² A shareholder proposal is a “recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders.”⁷³ Shareholder resolutions can be used to amend a corporations bylaws,⁷⁴ and to propose action for the corporation to take or forego. Shareholder resolutions can be used like a plebiscite recommending policies to management or like a referendum presenting actions which management must undertake. Ideally, a shareholder resolution will influence management to change its practice and even may result in the selection of at least one member of the corporate board of directors who will represent the interests of the activists.

Shareholder resolutions and proxy contests to cause, for example, disinvestment can sometimes (but not always)⁷⁵ generate results. Rodman demonstrates this fact and documents in detail the exact intricacies of bank and corporate disinvestment in South Africa – which led and did not follow governmental initiatives.⁷⁶ He then compares that practice with failed activism in Burma/Myanmar and Nigeria. Successful shareholder resolutions to cause corporate change are the exception. Other empirical studies have also concluded that, like codes of conduct, shareholder activism is generally not very effective at encouraging corporate social responsibility.⁷⁷

72 See, e.g., *Medical Committee for Human Rights v. SEC*, 139 U. S. App. D. C. 226, 229, 432 F.2d 659, 662 (1970) (shareholder proposal to stop sale of napalm in part because of use in Vietnam)

73 SEC Rule 14a-8 available at: <http://www.law.uc.edu/CCL/34ActRls/rule14a-8.html>

74 E.g., *California Public Employees' Retirement System v. Coulter*, 2002 Del. Ch. LEXIS 144*.

75 “Disinvestment, however, had only a minor impact on the South African economy. Almost all the departing firms sold their equity stakes... and maintained an ongoing licensing relationship... The new firms were no longer bound by their former parent’s obligations such as the Sullivan principles.” *Id.*, 28.

76 *Id.* at 23-29.

77 Roberta Romano, *Less is More: Making Shareholder Activism a Valuable Mechanism of Corporate Governance*, Center for Research on Pensions and Welfare Policies, Working Paper 12/01 p. 125 (2001) available at: http://cerp.unito.it/Pubblicazioni/archivio/WP_CeRP/wp_12.pdf

Another remedy against the corporation which violates the principles of human rights is to seek revocation of its corporate charter⁷⁸ – in the common law via the writ of *quo warranto*⁷⁹ or via a proxy contest in which the insurgent activists present a resolution for adoption or rejection by other shareholders (and note here that the activists would have to be shareholders to wage the proxy contest). At least under U.S. law, shareholders must be provided with a list of shareholders or the corporation must mail the proxy for them.⁸⁰ If the shareholders win the proxy contest their costs will be reimbursed.⁸¹ If the resolution is adopted by a majority of the shareholders then the management has to implement it. Finally, it is worth pointing out that writing binding ethical norms into the corporation's structure could be used as an anti-takeover strategy. Socially conscious clauses inserted into the articles of incorporation of a company could be used as a "poison pill"⁸² to make the corporation less attractive to hostile takeover.

Of course corporate governance remedies do face a serious practical difficulty: shareholders and directors have a common cause to enjoy the (ill-gotten) profits of labour exploitation. So corporate governance as a remedy to exploitation alone will not solve the problem of labour exploitation in the third world.

3. *Prohibition of Deceptive Trade Practices*

Another potential remedy of corporate misconduct is to sue the offending corporation for deceptive trade practices when it pretends not to exploit labour.⁸³ Both the EU and the US have statutes against deceptive trade practices. For example, in *Kasky v. Nike*⁸⁴ a shareholder activist sued Nike for deceptive trading practices, essentially alleging that Nike was pretending not to exploit third world labour. Securities regulation also punishes fraudulent statements and deceptive omissions. For example, the U.S. Securities and Exchange

78 Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 *Hastings Int'l & Comp. L. Rev.* 327 (2001).

79 Ralph Steinhardt, *Litigating Corporate Responsibility* Global Dimensions at: <http://www.globaldimensions.net/articles/cr/steinhardt.html> (2001).

80 S.E.C. Rule 14a-7.

81 S.E.C. Rule 14a-8.

82 For the issue of poison pills in the context of shareholder activism see, e.g., *International Bhd. of Teamsters Gen. Fund. v. Fleming Companies, Inc.* No. CIV-96-1650-A, 1997 U.S. Dist. Lexis 2980 (W.D. Okla. Jan. 24 1997).

83 *Kasky V. Nike*, 2002 Cal. LEXIS 259; 27 Cal. 4th 939 (2002).

84 *Id.*

Commission makes false statements in proxy statements⁸⁵ and in stock sales⁸⁶ punishable either in tort or by criminal prosecution. Any award resulting from such a suit however would go to the first world plaintiffs and not to the third world worker – but it would still deter the first world company from violating human rights.

4. *Reform Proposals*

Some reforms have been proposed to increase corporate respect for human rights in the fields of taxation, securities regulation, and annual reporting requirements of the corporation. These are:

a. Taxation

Reforms to encourage respect of human rights could include preferential tax treatment⁸⁷ or investment credits⁸⁸ for ethical companies and penalties for companies which act unethically which already exist in some jurisdictions and are even a potential source of revenues for the state.

b. Securities Regulations

Reform proposals also look to national securities regulation for relief. For example, the U.S. Securities and Exchange Commission (SEC) requires companies to make some information regarding their human rights practices available to shareholders.⁸⁹ Proposals have been made to strengthen disclosure requirements, for example by increasing the amount of non-financial information about the company which must be disclosed in the annual report or proxys.⁹⁰ That is hardly radical: U.S. Supreme Court Justice Brandeis advocated increasing non-financial disclosure requirements.⁹¹ Further, full disclo-

85 SEC Rule 14a-9.

86 SEC Rule 10b-5.

87 See Howitt, *supra* note 601 (Preferential tax status for socially beneficial companies in Australia).

88 *Id.* (Supplementary export credits for socially responsible Swedish companies).

89 See, Jane Lampman "Human rights groups gain 'disclosure' victory on Wall", *Christian Science Monitor*, at <http://www.csmonitor.com/durable/2001/05/17/fp14s1-csm.shtml> (May 17, 2001).

90 Note, *Should The SEC Expand Nonfinancial Disclosure Requirements?*, 115 Harv. L. Rev. 1433, 1455 (2002). There is controversy as to whether SEC disclosure requirements are obligatory.

91 Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency* 112 Harv. L. Rev. 1197, 1311 (1999) (arguing that SEC has the power

sure will increase economic information to investors⁹² which makes good economic sense, because it reduces transaction costs by enabling buyers and sellers to make correct decisions based on complete information. Most efforts before the SEC have focused not on financial disclosure but – and with some success – on shareholders’ rights to propose resolutions for adoption by the company.⁹³

c. Annual Reporting Requirements / Social Audits

In addition to reforms of the tax system and securities disclosure requirements another law reform would be to require corporations to perform an annual social audit along with the ordinary annual report to outline the companies human rights policy and record.⁹⁴ Social audits could be included in a companies annual report at little cost and would provide investors valuable information about the moral practices of the company: A company which acts unethically outside of U.S. territory is likelier to behave unethically at home and one which respects human rights is more likely to be a secure long term investment.

In sum, there are a variety of market incentives which can be introduced into national law to discourage unethical corporate behaviour. Such laws, coupled with universal jurisdiction,⁹⁵ would be an effective method of improving business practices and possibly profitability as well.

and that it is economical to require full disclosure, quoting Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.") *id.* at 1212).

92 *Id.*

93 Jim Schiro, CEO, Pricewaterhouse-Coopers, "United States Securities & Exchange Commission Hearing on Auditor Independence", *available at* <http://www.sec.gov/rules/extra/admin3.htm> (September 20, 2000) (Today, unlike ten years ago, investors want to know intangible assets of companies).

94 Commission of the European Communities, *Green Paper – Promoting a European Framework for Corporate Social Responsibility* (COM (2001) 366 Final, 18/7/2001) (Increasing use of social and environmental checklists by financial institutions to evaluate loans to and investments; Social responsibility can have financial advantages).

95 See, e.g. Larry D. Newman, *Rico and the Russian Mafia: Toward a New Universal Principle under International Law*, Excerpt from: 9 *Ind. Int'l & Comp. L. Rev.* 225, 225 (1998). Also note that transnational crime is yet another challenge to the Westphalian order.

C. Lex Mercatoria

We have seen that the regulation of corporations either under civil or criminal theories is far from perfect. However we have also noted that there are several market incentives that can be taken advantage of in practice. This has led some to suggest that we are witnessing the rise of a new *lex mercatoria* (Steinhardt,⁹⁶ Gessner).⁹⁷

Unfortunately attempts to analogise corporate liability for violations of human Rights law to medieval *lex mercatoria* are ill founded. This is because the analogy is factually incorrect, theoretically inapposite, and not practically workable.

Medieval *lex mercatoria* featured specialised courts which served the interests of merchants (not consumers).⁹⁸ It was fundamentally a private law of contract and arbitration. This is very different from contemporary human rights law. While there has been a revolution in human rights since 1945⁹⁹ as a result of the transformation of the Westphalian state system it cannot realistically be compared to *lex mercatoria*. *Lex mercatoria* concerned only private parties, was binding and was a result of voluntary agreement. None of that is true of contemporary human rights law. Though the corporate social responsibility movement proposes codes of conduct to govern private behavior but these codes are voluntary non-binding. The human rights system also features binding norms, however those norms are imposed by states or international organisations not due to voluntary agreement. For these reasons the analogy between contemporary human rights law and *lex mercatoria* is inexact. Further corporations are not the leading force of protection of human rights. We need only

96 Ralph G. Steinhardt, *Litigating Corporate Responsibility*, Global Dimensions (2001) at:

<http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm>,
supra note 618.

97 See, e.g. Volkmar Gessner & Ali Budak, *Emerging Legal Certainty: Empirical Studies on the Globalisation of Law* (1998). However Prof. Gessner does not go so far as to say that the emerging global private law regime necessarily protects human rights.

98 See Professor Chinkin's critique of the theory that modern human rights law be analagous to *lex mercatoria* in *Corporate Responsibility and Human Rights*, Global Dimensions seminar at the United Nations New York 1st June 2001 at <http://www.globaldimensions.net/articles/cr/summary.html#lex>

99 Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 Fordham Int'l L.J. 1963, 1984 (1996) (Argues that second half of XXth century witnessed a second human rights revolution).

look at the facts in *Doe v. Unocal*¹⁰⁰ or *Wiwa v. Royal Dutch Shell*¹⁰¹ to recognise that corporations can and do profit from exploiting third world labour. To expect them to do otherwise in the absence of state sanction is naive or disingenuous.

Not only is the analogy between *lex mercatoria* and the corporate social responsibility movement factually incorrect it is also theoretically inapt. Market mechanisms based on alienable property rights cannot logically be the foundation of a system of protection of inalienable human rights.

Another practical objection to the comparison of modern human rights and medieval *lex mercatoria* is that human rights guarantees are not necessary to maintain a functioning market. Since market rights are neither in theory nor in practice the cause of human rights, attempts to ground, model or analogise human rights and market rights are inapt. There is a correlation between economic development and human rights but human rights arise out of economic development, not market transactions. It is all too easy to imagine fascist dictatorships with nicely functioning markets. The correlation between human rights and market rights is weak or even non-existent.

Though human rights and property rights may coexist they are not necessarily mutually reinforcing. After all it is the property right of first world corporations which impels them to violate the human rights of workers and consumers in the third world.

For all of these reasons the analogy between modern human rights law and medieval *lex mercatoria* is inapt. There are some market remedies available to human rights law. But those must be seen as the carrot in a carrot and stick approach which will require active state sanctions in order to function. *Lex mercatoria* in contrast concerned voluntary transactions between private persons.

Conclusion

Codes of conduct alone are not the best way to prevent human rights abuse in the third world because voluntary codes of good conduct can be used as camouflage to delay, confuse and conceal real reform, and because expecting corporations to self regulate is realistic only when it links ethical conduct and profitability. However codes of good conduct, in combination with binding rules – either in civil or criminal law – can be used to promote higher standards

100 *Doe v. Unocal Corp.*, 2000 U.S. Dist. LEXIS 13327 (9th Cir., 2002).

101 226 F.3d 88, 2000 U.S. App. LEXIS 23274.

while the binding rules will guaranty at least minimum standards.¹⁰² The corporate social responsibility movement is not necessarily merely a smokescreen but alone will not prevent human rights abuses because such abuses are profitable. To some limited extent investor, consumer, and corporate self interest can be harnessed to serve human rights, for example *via* shareholder activism.¹⁰³ Codes of good conduct and labelling schemes are just one of several efforts to link profitability and social responsibility.¹⁰⁴ Combined with the international law instruments discussed in the first part of the thesis they may be a way to encourage higher standards while the positive law guarantees at least bare minimum standards. Here, as in human rights conventions, “hard” law guarantee minimum standards minima and voluntary codes (or conventions) encourage higher standards. The fact that the corporation has long since escaped regulation within the Westphalian model explains why that model is transforming into a “spectrum” of actors and a system of global governance. Corporate social responsibility and shareholder activism will increasingly feature as one element of this new system.

102 EU, *supra* note 558.

103 Prof. Ralph Steinhardt distinguishes between a market based regime, domestic regulation, international regulation, and civil liability. Ralph Steinhardt, *Litigating Corporate Responsibility*, Global Dimensions (June, 2001) at: <http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm>, *supra* note 618.

104 Liubicic, *supra* note 580 at 117.

Chapter V

Alien Torts in Europe?

Human Rights and Tort in European Law

Abstract:

Human rights are universally recognized. Their enforcement, however, often requires the action of particular states. This paper examines private law remedies in tort in several Member states of the European Union to remedy human rights violations occurring outside the European Union. It concludes that the laws examined are examples of universal jurisdiction and rights and duties of private persons under international law, which are two key elements of the post-Westphalian state system.

This Chapter appeared as Discussion Paper 1/2005 of the Center for European Law and Policy (ZERP) at the University of Bremen.

I wish to thank all persons at the ZERP for the opportunity to present these ideas here. I particularly wish to thank Dr. Josef Falke for his painstaking and tireless revision of my work and Mrs. Antje Kautz for her patience and meticulous editing.

Part I: Private Law Protection of Human Rights in various Member States of the European Union

Introduction

One of the principle remedies in U.S. law for violations of human rights is the private law of torts. In fact, torts appear in practice to be the almost exclusive remedy to extraterritorial torts which violate human rights in U.S. law.¹ This is not to say that there is no possibility of penal sanction for human rights violations in U.S. law. Indeed, there is a torture statute in U.S. federal criminal law.² However, that statute is rarely if ever invoked. Similarly, as in Britain, a federal statute outlaws hostage taking under a theory of universal jurisdiction.³ Again, that statute is only rarely invoked.⁴

In Europe, in contrast, the principal remedy for violations of basic human right is penal law. But though penal law is the principal remedy for human rights violations in Europe tort also plays a role as a remedy for human rights violations both overseas and in Europe. Various national laws and even, to a lesser extent, European and international law offer limited but significant secondary private law remedies. Thus, in terms of remedies, European and American law are each others' mirrors. However, both legal systems, though using different legal methods, are ultimately seeking to deter and punish similar fact patterns. This raises the question whether human rights violations are best seen as torts, crimes, or both. In fact, the two systems of control can and should be mutually reinforcing and complementary. This is because tort

* **All URLs in footnotes were last visited February 1, 2005.**

1 “[T]here are no significant criminal cases for torture and crimes against humanity in the United States despite the legality of such prosecutions. Pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” Beth van Schaack, *In Defence of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int’l. L. J. 141, 148-149 (Winter, 2001).

2 The statute states: “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” 18 U.S.C. § 2340a (1994).

3 The Hostage Taking Act, 18 U.S.C. § 1203 (1994). (Universal jurisdiction over individuals who, “whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act”).

4 See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (jurisdiction over accused hijacker proper under Hostage-Taking Act).

remedies have certain advantages over penal remedies: one of tort's principal strengths is that it preserves the limited resources of the state's prosecutor. Tort remedies also allow complaints to be made even where such complaints are – generally for economic reasons – politically unpopular. At the same time, however, some wrongful acts deserve not merely economic sanction but also deprivation of liberty. Thus there clearly is a place for criminal law in the regulation of the most extreme violations of human rights. Both penal and civil law have advantages and disadvantages as remedies and should operate in conjunction as complements to each other. Both U.S. and European law would be improved by a careful consideration of each others' legal remedies. Such a comparison would also improve the state of human rights globally. If ever there were a sense and purpose of comparative law and global governance that is it.

The normative recommendation of this work is that both Europe and America should extend and expand their protection of victims of tortuous violation of basic human rights wherever violations of those rights occur. Many victims of violations of fundamental human rights live in the third world. Many third world countries suffer from corrupt governments and overburdened courts. The economic and political inequalities between, say, poor peasants on the one hand and wealthy multinational companies and/or governments on the other explain why, practically speaking, there is often no remedy for basic violations of human rights in the third world. Even if there were no corruption in any third world country the fact that systematic violations of human rights can be very profitable explains why such rights must be protected in the first world. After all, it is the first world which profits from unfair and in fact predatory labour practices in the third world. While the U.S. and Europe are already making efforts in the direction of global human rights governance the tempo of global governance in the interest of human rights will be increased as each of the transatlantic partners perceives the benefits of objective comparative legal analysis on legal policy making.

Our analysis of remedies in tort for individuals in European law will first consider the law of the Member States then European law. This is because: 1) The principal remedies are in fact in national law, though complementary remedies do exist at the EU as well. 2) The principle of subsidiarity places primacy on the laws of the Member States. 3) The law of the European Union incorporates the general principles of law of the Member States into its own general principles. After we conclude our consideration of the laws of the Member States we will then consider the European Convention on Human Rights.

I. The Common Law: Tort Remedies to Human Rights Violations in Britain

Our analysis begins with the common law where we use Britain as the example. This methodological approach might at first appear erroneous: There are few common law jurisdictions in the EU. Of countries in the EU only Britain, Ireland, Malta and perhaps Cyprus can claim to be common law jurisdictions. We begin with British law because judicial review of domestic laws against the European Convention on Human Rights (ECHR) via the British Human Rights Act will almost certainly result in the importation of constitutional law doctrines from the U.S. to the U.K.; where they may in turn find themselves drawn on for interpreting community law.

Just as U.S. law draws on British and other common law jurisdictions as persuasive evidence of the common law, so also do British courts draw on U.S. as persuasive evidence of British common law. This can be seen clearly just by examining the *Pinochet* cases. For example, in the final *Pinochet* decision on the merits⁵, the House of Lords cited literally a half dozen U.S. cases as persuasive evidence of British law or of how British law should be interpreted.⁶ The original *Pinochet* case was even more generous in its citation of U.S. authority. It is not merely the raw quantity of cases that are cited by the British courts that explain the importance of U.S. law for Europe, however. It is also the fact that many legal concepts exist in both British and U.S. law and that these doctrines are the same or so nearly similar as to explain the extensive citation of U.S. cases by British courts and lawyers. Similarly, U.S. courts also cite British cases as persuasive evidence of what the law is or how it should be

5 *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3)* (24 March, 1999) 1 A.C. 147 (House of Lords, 2000) (hereafter *Pinochet 3*).

6 The cases cited by the court were: *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S. Ct. 683; *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F.2d 571; *Jimenez v. Aristeguieta* (1962) 311 F.2d 547; *Lafontant v. Aristide* (1994) 844 F. Supp. 128; *Princz v. Federal Republic of Germany* (1994) 26 F.3d 1166; *Saltany v. Reagan* (1988) 702 F. Supp. 319; *Sampson v. Federal Republic of Germany* (1997) 975 F. Supp. 1108; *Schooner Exchange v. M'Faddon* (1812) 11 U.S. (7 Cranch) 116; *Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d 699; and *United States of America v. Noriega* (1990) 746 F. Supp. 1506; (1997) 117 F.3d 1206. This is not considering cases cited by the litigants nor U.S. cases cited in the other *Pinochet* cases!

interpreted.⁷ This should be hardly surprising as the common law is one legal system with common sources and methods of finding and interpreting law.

A. Common Law Doctrines Common to both British and U.S. Law in Transnational Law

1. Immunity

The British State Immunity Act⁸ and the U.S. Foreign Sovereign Immunities Act, are one example where even U.S. and British legislation run in parallel. In fact, in *Pinochet 3*, the House of Lords cited an interpretation of the U.S. Foreign Sovereign Immunities act (enacted in 1976) as evidence of the correct interpretation of the British State Immunity Act of 1978.⁹ The House of Lords, like the U.S. courts, noted the bifurcation of immunity into commercial acts (*acto jure gestiones*) and sovereign acts (*acto jure imperii*) which is of course also the position of international law.¹⁰ There are also parallels between the Hostage Taking Acts in U.S. and British law. These are far from the only statutory similarities. These similarities track similarities in customary law, constitutional law, sources of law and legal methods and doctrines. Let us examine some doctrines of law that illustrate that the British and American law parallel each other as they are common law jurisdictions.

2. Act of State Doctrine

The Act of State doctrine is essentially the same in British law as in American. "[C]ourts will not sit in judgment on the act of a foreign sovereign performed within the territories of that sovereign"¹¹ – which is in fact just about word for word the same formulation found in U.S. law. The House of Lords in *Pinochet 3* again cites U.S. authority in its elucidation of the meaning of the Act of State doctrine, noting that though the two doctrines are distinct in English law, in

7 See, e.g. *Lawrence v. Texas* 539 U.S. 558 (June 26, 2003), available at: <<http://a257.g.akamaitech.net/7/257/2422/26jun20031200/www.supremecourtus.gov/opinions/02pdf/02-102.pdf> and at: <http://supct.law.cornell.edu/supct/html/02-102.ZS.html>>.

8 UK State Immunities Act, 20th July 1978, available at: <<http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04038.html>>.

9 *Pinochet 3*, at 161.

10 *Id.* The court again cites U.S. case law, namely *Saudi Arabia v. Nelson*, 88 I.L.R. 189.

11 *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1.

U.S. law they have not always been treated as separate from each other.¹² More significantly, the House of Lords in *Pinochet 3* also cites to *Filartiga v. Pena-Irala*¹³ as evidence to justify its rejection of the notion that the Act of State doctrine bars proceedings against an individual for acts of torture.¹⁴ This citation of U.S. authority as persuasive evidence of British law is hardly idiosyncratic: Citation to U.S. cases occurs extensively in the initial vacated *Pinochet* decision.¹⁵ That decision was vacated not due to any substantive error but rather due to a procedural error of form: Lord Hoffman's did not disclose his wife's ties to Amnesty International. Substantively, as to the Act of State doctrine in English law, Lord Slynn of Hadley noted that "the position is much the same as it was in the earlier statements of the United States courts".¹⁶

3. Comity

Comity exists in British law just as it does in American law. Again, its meaning is nearly exactly the same: The rules of comity are "the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to each other".¹⁷ In the context of jurisdiction, "[t]he rules of comity require that the United Kingdom does not assert or assist in the assertion of jurisdiction over the internal acts of a foreign state".¹⁸

12 *Pinochet 3*, at 159, citing *Kirkpatrick & Co. Inc. v. Environmental Tectonics Corporation International* (1990) 110 S. Ct. 701; 493 U.S. 400, 405.

13 *Filartiga v. Pena-Irala*, 630 F.2d 876; 1980 U.S. App. LEXIS 16111 (2d. Cir., 1980) (hereafter *Filartiga*). The House of Lords also cites *Hilao v. Estate of Marcos* (1994) 25 F.3d 1467 and *Liu v. Republic of China* (1989) 892 F.2d 1419 for the proposition that the Act of State doctrine will not bar proceedings against individuals for acts of torture and that neither doctrine bars inquiry into conduct that violates fundamental human rights.

14 *Pinochet 3*, at 159, citing *Kuwait Airways Corporation v. Iraqi Airways Co.* (unreported), 29 July 1998; *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A.* [1983] 2 *Lloyd's Rep.* 171 and *Letelier v. Republic of Chile* (1980) 488 F. Supp. 665. Again, note that the British court is citing U.S. law as authority for the legal position of the common law.

15 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, 1 A.C. 61, 85 (House of Lords, 25 Nov. 1998 – judgement vacated for rehearing) (hereafter *Pinochet 1*).

16 *Id.*

17 *Buck v. The Attorney General* [1965] 1 Ch. 745, [1965] 1 All ER 882 at 770.

18 *Pinochet 3*, at 172, citing *I Congreso del Partido* [1983] 1 A.C. 244; *Buck v. Attorney-General* [1965] Ch. 745.

4. *Forum non conveniens*

Forum non conveniens in British law is, again, very similar to comity in U.S. law. In discussing *forum non conveniens* in British law the House of Lords has stated:

“Where a plaintiff sues a defendant as of right in the English court and the defendant applies to stay the proceedings on grounds of *forum non conveniens*, the principles to be applied by the English court in deciding that application in any case not governed by Article 2 of the Brussels Convention are not in doubt. They derive from the judgment of Lord Kinneer in *Sim v. Robinow* (1892) 19 R. 665 at 668 where he said: ‘the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.’”¹⁹

However, though the court looks to the interest of the plaintiff and defendant as well as the ends of justice it does not, unlike U.S. courts, consider public interest or public policy.²⁰ Thus, while both the U.S. and British courts engage in a balancing of several different factors to determine whether the forum is inconvenient, the number of factors in the British formulation of *forum non conveniens* is more limited than is the case in the U.S.

5. *International Law and the Common Law*

Just as in the U.S., customary international law is an integral part of British common law. In the final *Pinochet* decision on the merits of extradition the House of Lords held: “The English courts are open to the concept of consulting customary international law, as it has evolved over time, as a basis for the common law.”²¹ However, though customary international law is a part of the common law Britain, like the U.S. and other common law jurisdictions,²² is a

19 *Lubbe and Others and Cape Plc. and Related Appeals* [2000] UKHL 41; [2000] 4 All ER 268; [2000] WLR 1545 (20th July, 2000), available at: <<http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2000/41.html&query=%22forum+non+conveniens%22&method=all>>.

20 *Id.*

21 *Pinochet 3*, at 161, citing *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B.529, 551-554, 576-579; *I Congreso del Partido* [1983] 1 A.C. 244, 261 and *Littrell v. United States of America* (No. 2) [1995] 1 W.L.R. 82.

22 “While Australia, as a common-law country, operates the general dualist approach to the domestic effect of international agreements, it does not appear from the judgments of the High Court that Australian law replicates that rule with anything quite like the constitutional rigour with which it is embodied in article 26 section 6 of the

dualist legal system as to treaty law. That is, treaties must be incorporated into domestic law via an enabling act and are not presumed to have direct domestic effect until Parliament (or Congress) passes legislation giving the treaty such effect.²³ The two legal systems are very similar, at times congruent, and mutually referencing in their evolution not only as to their sources of law, hierarchisation of norms, but also as to their inferential and interpretive methods, even as to positive statute law. Thus U.S. law has a certain indirect relevance to Europe.

B. Extraterritorial Human Rights Protection in Domestic British Law: The Pinochet Cases

Pinochet, former dictator of Chile, was accused by prosecutors in Spain of committing murder and conspiracy to murder as well as of conspiring to commit acts of torture.²⁴ The result of the case may seem unsatisfactory: Pinochet was ultimately allowed to retire in comfort due to ill health.²⁵ However, the legal issues determined in the case present some hopeful indicators for the future of human rights.

The issue to be decided in *Pinochet* was whether Pinochet could be extradited for crimes he was accused which took place in Chile, Spain and in other countries or whether Pinochet enjoyed immunity as a head of state and thus could not be extradited. Thus the central issue in *Pinochet*, the extent of the immunity of a former head of state, was essentially the same issue seen in

Constitution”, *Kavanagh v. Governor of Mountjoy Prison* [2002] IESC 11 (Supreme Ct. Eire, 01 March 2002), para 25.

23 “Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.” Lord Oliver of Aylmerton in *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry (the 'International Tin Council case')* [1990] 2 AC 418, 500.

24 *Pinochet I*, at, 85 (House of Lords, 25 Nov. 1998 – judgement vacated for rehearing).

25 *R. v Secretary of State for the Home Department, ex parte The Kingdom of Belgium; R. v Secretary of State for the Home Department, ex parte Amnesty International Limited and others*, Queen's Bench Division (Crown Office List) CO/236/2000, CO/238/2000, (Transcript: Smith Bernal) (15 February 2000).

*Congo v. Belgium*²⁶ and Ariel Sharon's case. The House of Lords ruled that it is clearly²⁷ the case that a former head of state is immune for official acts during his term of office even after that office has expired.²⁸ Similarly it is almost as clear that any criminal acts undertaken for the personal benefit of the head of state are not subject to immunity. The court had no difficulty concluding that "[a] former head of state cannot have immunity for acts of murder committed outside his own territory".²⁹

The difficult factual question in *Pinochet* is whether the acts of torture undertaken by Pinochet's government were official acts of the state or rather were personal acts of Pinochet. Pinochet did not personally torture or murder – rather he ordered his subordinates to do so for him. Were his motives sadistic? Such motives, if present, would be evidence of an act undertaken for personal benefit and thus not subject to immunity. This question was considered in the initial court decision. That decision was, however, vacated due to a procedural impropriety – Lord Hoffmann ought to have excused himself, or at least disclose the fact that he³⁰ and his spouse did charitable work for one branch of Amnesty International. The question was not as to any improper bias on the part of Lord Hoffmann³¹ but rather as to any appearance of impropriety. The court rightly vacated the original judgment because it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”³²

The difficult legal issue in *Pinochet* was whether a head of state can be liable for acts of torture (and, by extension, other acts in violation of *jus cogens*) after the expiry of his or her term of office. The court reasoned that: the prohibition of torture internationally is *jus cogens*; that any act in violation

26 Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), ICJ 14/II/2002, 2000 I.C.J. 121, 18 (Feb. 14), available at: http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_toc.htm.

27 “The immunity of an existing head of state for acts performed in his governmental capacity is well recognised.” *Pinochet 3*, at 173.

28 “A former head of state only has immunity with regard to his acts as a head of state but not with regard to acts which fall outside his role as head of state.” *Id.*, at 154.

29 *Id.*

30 *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet* [2000] 1 A.C. 119 (House of Lords, 1999) (hereafter *Pinochet 2*), at 129.

31 *Id.*, at 132 and 146.

32 *Id.*, at 135 citing *Rex v. Sussex Justices, Ex parte McCarthy* [1924], 1 K.B. 256, 259.

of *jus cogens* cannot be immunized³³; and that as a consequence no act of torture can be immunized. The court reaches this conclusion because: “Certain crimes are deemed so odious that no reticence in involving the United Kingdom in the internal disputes of foreign states would be shown in relation to them.”³⁴ The court thus rejected the argument that head of state immunity would prevent prosecution (and thus extradition) for perfectly logical reasons because international law does not command a state to accord immunity to a former head of state for acts which are prohibited under international law, *a fortiori* where such crimes result in individual liability.³⁵ Simply put: “Neither a former head of state nor a current head of state can have immunity from criminal proceedings in respect of acts which constitute crimes under international law.”³⁶ Any other view would be illogical and frustrate the purpose of the Convention Against Torture (CAT). As we shall see, however, this holding may be in conflict with the case of *Congo v. Belgium* which was later decided by the International Court of Justice (ICJ) (*infra*).

Could Pinochet have argued that he should not be extradited on the grounds of comity? Probably not. This is because of the international maxim “*aut dedere aut adjudicare*” – states must either extradite or prosecute those who commit international crimes.³⁷ This maxim of international customary law has direct effect in Britain since customary international law is part of the common law.³⁸ Further, immunity should be distinguished from comity. Comity, whether in British or U.S. law, is a courtesy extended by one state to another in mutual respect and may be withdrawn unilaterally. In contrast, while American courts regard head of state immunity of *de facto* states as a privilege extended and not a right (*e.g.*, *Kadic v. Karadzic. Karadzic*);³⁹ other courts appear to consider state immunity as a corollary to sovereign equality and the head of state and diplomatic immunities as emanations thereof, and thus a duty. The importance of the distinction can be seen in *Congo v. Belgium* and *Pinochet 3*. In *Congo v. Belgium*, the ICJ seems to think that the principle of immunity

33 “International law recognises crimes against humanity and the Torture Convention says that no circumstances can be invoked as justification for torture. Therefore it cannot be a part of the function of a head of state under international law to commit those crimes.” *Pinochet 3*, at 154.

34 *Id.*, at 155.

35 *Id.*

36 *Id.*, at 160.

37 *Pinochet 3*, at 154.

38 *Pinochet 3*, at 154.

39 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

arises out of the principle of sovereign equality and thus may be non-derogable. In contrast, in *Pinochet 3*, the rule of non-intervention, which also arises out of the sovereign equality of states was not regarded as a *jus cogens* rule because the duty of non-intervention increasingly admits of exceptions.⁴⁰ That is a logical contradiction.

The view of the court in *Pinochet 3* is the better view because it reflects actual state practice and serves the goal of protecting human rights, a good common to all persons. States are legal fictions created by people to provide the citizen with, in Aristotle's words, the means to the good life.⁴¹ Thus where we see a conflict between a legal fiction and an actual reprehensible act we should be willing to construct the interpretation of the legal fiction as a function of the end that it serves – which is another argument that in fact the norm against torture should be hierarchically superior to the norm of sovereign equality. All states are subject to the norm against torture and thus their sovereign equality is respected even when that sovereignty is limited by universal obligations of all states to each other and/or the international system.

In *Pinochet 3* the court determined that if there were any customary international law against conspiracy to commit torture then Pinochet could be criminally liable for his acts prior to becoming Chile's head of state. The court also ruled that Pinochet could be held liable for actions committed after Chile's accession to the Convention Against Torture in 1984 despite the fact that Chile had granted amnesty to all state criminals.⁴² So the difficult issue is whether he could also be liable for acts of torture committed while head of state. Of course, to determine the extradition issue the court did not actually need to answer this question: having found extraditable crimes prior to and after the term

40 “[D]uring the course of the century the treatment by a state of its own citizens, at least in certain areas of fundamental importance, has ceased to be regarded as a matter of internal affairs. The violation of a norm of *jus cogens* certainly is not so regarded.” *Pinochet 3*, at 186.

41 Aristotle, *Politics*, Book I, Part II, Para. 9: “When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life. And therefore, if the earlier forms of society are natural, so is the state, for it is the end of them, and the nature of a thing is its end. For what each thing is when fully developed, we call its nature, whether we are speaking of a man, a horse, or a family. Besides, the final cause and end of a thing is the best, and to be self-sufficing is the end and the best.” *available at*: <http://classics.mit.edu/Aristotle/politics.mb.txt> (translation by Benjamin Jowett).

42 *Pinochet 3*, at 158.

of office of Pinochet he would be able to be extradited. The logic of the court, however, would compel a conclusion that Pinochet should even be liable for those crimes committed during his tenure as head of state because “International law recognizes crimes against humanity and the Torture Convention says that no circumstances can be invoked as justification for torture. Therefore it cannot be a part of the function of a head of state under international law to commit those crimes.”⁴³ The court considers it “inconceivable” that the Torture Convention would somehow exempt those who order mass murder from liability.⁴⁴ The court notes that the universal jurisdiction against torturers is consistent with international law stating that: “Article 8(4) [of the Convention Against Torture] combined with Article 5 amounts to an acknowledgment that offences of torture committed in one state can be regarded as having taken place in the state of which the victim is a national.”⁴⁵

The court in *Pinochet 3* ultimately ruled that Pinochet would enjoy immunity for acts prior to Chile’s signature of the convention against torture. This is not, however, because the court determined the difficult factual issue – whether the acts of torture were official or personal acts. Nor did the court determine the difficult legal issue – whether the norm against torture is hierarchically superior to the norm of sovereign equality. Instead the court determined that it did not need to answer these questions because in any event the conspiracy, torture, and murders were not at the time of their occurrence violations of British law and thus did not meet the standard of double actionability and thus were not extraditable offences. However, the court also states:

“Crimes against humanity are crimes not against a state but against individuals and are triable anywhere. Until recently there were almost no international tribunals so international crimes could be tried only before a national court. Even in 1946 the concept of territoriality of jurisdiction for crimes against humanity was not really in issue.”⁴⁶

In further justification of its decision, the court notes that Chilean domestic law has outlawed torture and that Chile has acceded to the Convention Against Torture and thus that the case is not one of a state forcing its laws on another but of punishing behaviour which is universally accepted as abhorrent and

43 *Id.*, at 154.

44 *Id.*

45 *Id.*

46 *Id.*, at 157.

criminal.⁴⁷ Though the great majority of the claims against Pinochet would not have been punishable offences in Britain some were and thus, in theory, Pinochet was liable to extradition. In fact, however, he was not due to his advanced age and supposed infirmity.

What are we to make of this decision? The legal conclusions in *Pinochet 3* are, perhaps surprisingly, very favourable to human rights despite the fact that Pinochet remains unpunished. Practically speaking though, Pinochet's case, like that of *Congo v. Belgium* or *France v. Khaddafi*⁴⁸ or Sharon's cases⁴⁹ or Habré's case,⁵⁰ is evidence of the great reluctance of states to subject the leaders of other states to personal liability for crimes against the law of nations. However, the efforts made by the dissenting Lords in *Pinochet 1* to distinguish the "special jurisdiction" of international criminal tribunals as somehow "exceptional" and thus limit human rights claims to international tribunals ring hollow. Lord Slynn in *Pinochet 1* states:

"There is thus no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or head of state or other official or diplomatic immunity when charges are brought before international tribunals.

...

It has to be said, however, at this stage of the development of international law that some of those statements read as aspirations, as embryonic. It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justifiable in national courts on the basis of the universality of jurisdiction. Nor is there any *jus cogens* in respect of such breaches of international law which require that a claim of state or head of state immunity, itself a well-established principle of international law, should

47 *Id.*, at 159.

48 Arrêt du 13 mars 2001, no 1414, relatif aux poursuites engagées contre le colonel Kadhafi (hereafter Kadhafi).

49 *Sharon, Ariel, Yaron, Amos et Autres*, Arrêt de la Cour d'Appel de Bruxelles, 26/6/2002 available at: <<http://www.sabra-shatila.be/documents/arrest020626.pdf>>; Belgium Supreme Court, 22 February 2001; Cour de Cassation, Arrêt de 12 Février, 2003 unofficial English translation available at: <<http://www.indictsharon.net/12feb2003detrans.pdf>>; Procureur contre Ariel Sharon et Consorts, Cour de Cassation, Arrêt de 24/9/2003, available at: <http://www.coeicl.de/dokumente/sharon_judgement_240903_juris_cass_a1.pdf>.

50 Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000); Arrêt n° 14 du 20-3-2001 Pénal (Cour de Cassation, 2001).

be overridden.

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another. It is significant that in respect of serious breaches of “intransgressible principles of international customary law” when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide Convention provides only for jurisdiction before an international tribunal or the courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in very specific terms but limits its jurisdiction to future acts.”⁵¹

But this ignores one question and several facts: from where do international tribunals derive their legitimacy? It also ignores that the norms against genocide, torture and similar international crimes are themselves *jus cogens*. Thus we are faced with a conflict between the norms of non-intervention and sovereign equality – both of which increasingly admit of exceptions on the one hand, and the norms against genocide, war crimes and torture on the other. Hierarchically each of these norms may at first appear equivalent because they are all *jus cogens*. However, practically it is clear that the doctrine of sovereign equality and immunity increasingly admits exceptions and thus logically is not in fact *jus cogens*. In contrast, the norms against genocide, war crimes, and torture appear to admit of no exception. Finally, morally, there is no contest: international crimes are reprehensible, as are the artificial legal constructs which shield them.

In fact international criminal tribunals’ jurisdictional power has always been justified not on historical practice but on the fact that the crimes adjudicated are so grievous as to be obviously universally reprehensible and thus universally punishable. That is of course a *jus naturale* argument, though no one wants to admit it.⁵² Asserting that international criminal tribunals somehow are exceptional and not expressive of valid rules of international law (why?) is not only legally questionable it also renders the legitimacy of international criminal tribunals even more questionable giving rise to accusations that such tribu-

51 *Pinochet I*.

52 “Where... neither treaty nor customary international law is available or applicable, the appeal to higher legal norms must be phrased as an appeal to natural law; and of course the conceptual and jurisprudential boundaries between customary *jus cogens* norms and natural law norms are notoriously vague.” Eric Posner, *Transitional Justice As Ordinary Justice*, Harv. L. Rev. 117 HVL 761, 794 (January, 2004).

nals are nothing other than “victors’ justice”.

Synthesis

For all its similarities to U.S. law Britain appears, on first glance, to offer fewer remedies for extra-territorial violations of human rights. We have just seen, however, that there are at least criminal law remedies in British domestic law for overseas violations of *jus cogens* norms. But there seems to be no equivalent to the Alien Tort Statute⁵³ or Torture Victims Protection Act⁵⁴ in British law. Does this mean that alien tort claims cannot be litigated in the U.K.? Hardly. There are three ways an alien tort claim could be litigated: first, by relying on customary international law; second, by relying on the ordinary rules of domestic British tort law; third, based on the Human Rights Act and ECHR. The arguments based on the ECHR are considered in the next chapter. We will look at the first two arguments in detail here as they are remedies within national law.

1. Arguments for Torts in the Common Law Based on Crimes in Customary International Law

As to the argument on customary international law it runs as follows: International law recognizes the existence of crimes and torts with appurtenant individual liability. Customary international law is an integral part of the common law. While customary international law – like custom generally in the common law – can be overruled by statute it also requires no enabling act to be enforced. International custom does, however, require the ordinary elements of custom: practice over a long period of time and *opinio juris*. For every common law crime there is a corresponding common law intentional tort. Thus, all crimes under customary international law entail corresponding torts in common law.

To argue that the above logic is invalid because international law supposedly only binds states ignores long standing state practice. Even in classical international law piracy⁵⁵ and slave trading were crimes and torts in violation of the law of nations. International law also recognizes individual tort liability in the case of capture of enemy ships during time of war, i.e. the “prize” jurisdiction

53 28 U.S.C. § 1350.

54 Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73.

55 *In re Piracy Jure Gentium* [1934] A.C. 586.

of admiralty courts.⁵⁶ In contemporary international law a host of further crimes against peace, war crimes, genocidal acts and torture have been added to the list of acts which inculcate individuals in tort and crime.⁵⁷

The clear trend in the last half century has been toward recognition of rights and duties held directly by individuals arising out of international law. Torts and crimes in violation of the law of nations almost always benefit from universal jurisdiction, even universal jurisdiction *in absentia*, which explains the advantage of this theory for plaintiffs.

Returning then to the argument that international crimes imply corresponding common law torts we can see the logic of this argument through two syllogisms:

SYLLOGISM 1:

Major premise:

There are a number of internationally recognized crimes which are customary international law.

Minor premise:

Just as in U.S. law, customary international law is an integral part of British common law.

Conclusion:

Thus, customary international crimes such as piracy, slave trading, and now the various war crimes and crimes against humanity are an integral part of the common law.

The logic of the above syllogism seems fairly compelling. Each of the premises is true, the syllogism is well formed so the conclusion seems inescapable. Let us now consider a second syllogism. The first major premise of the second syllogism is the conclusion of the first syllogism:

SYLLOGISM 2:

Major premise:

Customary international crimes such as piracy, slave trading, and now the vari-

56 William Blackstone, *Commentaries on the Laws of England*, 67 (facsimile of 1st ed. 1765-1769, Univ. of Chi. ed., 1979).

57 Eugene Davidson, *The Trials of the Germans: An Account of the Twenty Two Defendants Before the International Tribunal at Nuremberg*, 19 (1966).

ous war crimes and crimes against humanity are an integral part of the common law.

Minor premise:

For each common law crime there is a corresponding common law intentional tort.

Conclusion:

Thus, international crimes have corresponding common law intentional torts.

This argument may seem somewhat surprising unless we understand that customary international law is an integral part of the common law. Once we recognize that proposition, the implications lead to the conclusion there exists a corresponding tort for each of the customary crimes under international law – and thus one can make a claim in torts such as torture in the common law even without an Alien Tort Statute.

The deductive argument, that international crimes imply corresponding common law torts, can also be proven inductively. The inductive arguments look to the practice of other states – which is of course one element of customary international law. Several other nations also allow private law domestic actions for crimes against international law. The best and most well known examples are the Alien Tort Statute⁵⁸ and Torture Victim Protection Act.⁵⁹ We shall later see that in French Civil law as well as in Belgium and Senegal that one may combine tort claims with criminal claims via the *action civile*. Just as in the common law, customary international law in French civil law is an integral part of French law. Thus, even without an alien tort statute it is in theory possible to bring a tort claim for a violation of the law of nations in French law and those countries which are influenced by French law such as Belgium, Senegal, and literally dozens of other countries. In arguing that international torts exist or that international crimes give rise to corresponding common law torts, the Alien Tort Statute, as well as the writings of Blackstone and Coke, are persuasive evidence of the common law, and also as evidence of customary international practice in support of the existence of “torts in violation of the law of nations”. Substantively, no one can argue against allowing tort compensation in terms of transactional justice: The purpose of justice is to right wrongs and law serves justice.

58 28 U.S.C. § 1350 (2000).

59 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000) [hereinafter TVPA].

As to jurisdiction, it is logical to presume that if universal jurisdiction exists as to the substantive crime which is the basis of the intentional tort claim then it would logically also exist as to the corresponding common law tort. If the law permits the greater punishments of imprisonment or execution it also permits a lesser punishment of restitution.

2. Human Rights Protection through the Ordinary Common Law Tort Regime

Tort claims of individuals for wrongs committed overseas can of course also be brought as ordinary torts under British law. Customary common law torts such as wrongful imprisonment, battery, conversion, or action on the case could be applied to extra-territorial human rights violations, subject, however, to the ordinary rules of conflicts of law and without the benefit of universal jurisdiction which would exist in the case of crimes against humanity, war crimes, crimes against peace, piracy and slave trading.

In sum, human rights violations can be remedied in domestic British law through torts in violation of the law of nations, ordinary domestic torts and the Human Rights Act which essentially enables ECHR claims to be made in British courts. Remedies under the ordinary domestic tort regime are conditioned, as in the United States, by jurisdiction, immunity, and a number of domestic prudential concepts.

II. Tort Remedies to Human Rights Violations in Civil Code Countries

A. France

Our examination of civil law countries is divided into two parts: Francophone and German civil law countries. We consider French civil law first among civil law countries because French law has had a marked influence on the construction of the European Communities and Union. To this must be added the extensive influence of the French civil code throughout the world. The French legal system is, like the British, a model for that of many other countries, notably in Africa but also in Québec.

The French legal system is also on its own terms sufficiently interesting to merit extensive consideration. As we have seen, American and British common law presume that treaties are not self executing and require ratification to have domestic effect. This is not the case in France. France is a monist re-

gime.⁶⁰ Treaties, like international law generally in French law,⁶¹ are an integral part of French law. Treaties are thus presumed to be self executing and require no parliamentary enabling act to have domestic effect. In fact, treaty law is hierarchically superior to French domestic law.⁶² French treaties do require ratification, however.⁶³ Further, though self executing, they do not necessarily have “*effet direct*” (direct effect). That is, though we may presume that a French treaty generally creates individually enforceable rights and duties that presumption can be overcome.⁶⁴ In order to be directly enforceable by an individual a treaty in French law must at least be sufficiently precise (neither ambiguous nor vague) to permit objective decision⁶⁵ and must also not require on its own terms the necessity of creating domestic measures of enforcement.⁶⁶ The most conservative view also argues that the intention of the parties must have been to create directly enforceable rights on the part of individuals,⁶⁷ though one can argue that such is presumptively the case of all legal instruments.

Our discussion of French law will proceed from the most theoretical abstraction and move with greater refinement to actual legal practice. Such a method is chosen as it reflects the deductive reasoning so characteristic of French law, which reasons from general principles of law embodied in statutes to individual cases rulings which, in theory, only concern the actual parties to

60 « Une claire option moniste paraît a priori résulter du texte de l'article 55 de la Constitution du 4 octobre 1958, lequel déclare que ‘les traités ou accords régulièrement ratifiés ou approuvés ont dès leur publication une autorité supérieure à celle des lois’ ». (“A clear monist option appears to result a priori from Art. 55 of the French Constitution of October 4, 1958 which declares that ‘treaties or agreements regularly ratified or approved have on publication an authority superior to that of laws’”). Pierre-Marie Dupuy, *Droit International Public*, Paris 2002: Éditions Dalloz, page 404 (author’s translation).

61 « le 14° alinéa du Préambule de la Constitution du 27 octobre 1946 auquel on sait que le Préambule de la Constitution de 1958 fait un renvoi exprès, proclame l’attachement de la République « aux règles du droit public international » (“Line 14 of the preamble of the constitution of October 27, 1946, to which the preamble of the constitution of 1958 makes direct reference, declares the attachment of the republic ‘to the rules of public international law’”). *Id.* at 408 (author’s translation).

62 Constitution Française de 1958.

63 Pierre-Marie Dupuy, *Droit International Public*, Paris 2002: Éditions Dalloz, page 404.

64 *Id.*, at 398.

65 *Id.*

66 *Id.*

67 *Id.*

the case.

1. Customary Law

Though it is true that French treaties are self executing and thus require no parliamentary enabling act to have domestic effect, and as such are an integral part of French law⁶⁸, that is true only of ordinary legislation. The situation is less clear as to customary international law.⁶⁹ In all events, however, if customary international law is to be given direct effect within the French domestic legal order then the custom must be sufficiently clear so that it can be applied objectively.⁷⁰ That fact can obviate some disputes but not all. What of the case where customary law is in fact perfectly clear, say as to the *jus cogens* norm prohibiting torture? There the situation is more complex. The French courts of general jurisdiction (*Tribunaux de Grand Instance*, *Cours d'Appel*, and *Cour de Cassation*) recognize the superiority of customary international law to French legislation.⁷¹ For example, where French domestic law would hold a foreign head of state liable for crimes, the international custom of immunity for heads of state during their term of office prevented suit of the foreign head of state.⁷² In contrast, disconcertingly,⁷³ the administrative courts, including the French constitutional court (*Conseil Constitutionnel*)⁷⁴ do not consider

68 Constitution Francaise de 1958, Art. 55.

69 Moncef Kdhir, *Juge Francais et Droit International non Ecrit*, 6 *Revue du Droit Public*, Novembre-Décembre 2003, 1581, 1582 (hereafter Kdhir).

70 Pierre-Marie Dupuy, *Droit International Public*, Paris2002: Éditions Dalloz, page 398.

71 « Les juridictions judiciaires ne manifestent aucune réticence à invoquer la coutume internationale à l'appui de leurs décisions. Dans un arrêt rendu le 6 avril 1826, la Cour de cassation se référait déjà à la 'coutume devenue une maxime incontestable du droit des gens' ou de 'règle absolue du droit international'. » Kdhir, at 1584.

72 'la coutume internationale s'oppose à ce que les chefs d'État en exercice puissent, en l'absence de dispositions internationales communes s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un État étranger' (Author's translation: international custom prevents making the head of state in office an object of the criminal jurisdiction of a foreign state, at least absent general international dispositions [to the contrary]) *Kadhaffi*. This is but one example where the cross-currents of the "war on terrorism" and human rights lead to the surprising result of mutually reinforcing each other and extending the reach of extraterritorial jurisdiction for torts.

73 Kdhir, at 1585-1586.

74 « La jurisprudence du Conseil constitutionnel accorde peu de place au droit international non écrit. » *Id.* at, 1582.

customary international law when interpreting administrative acts.⁷⁵ This is also true of the general principles of international law which, in French administrative courts, do not over-ride French administrative acts.⁷⁶ However, the fact is French courts of general jurisdiction take the opposite view both to custom and to general principles of law. French courts of general jurisdiction regard general principles of international law as hierarchically superior to and an integral part of French domestic law.⁷⁷ Thus in the case of *Barbie (Argoud)*⁷⁸ the *Cour d'Appel de Lyon* recognized that the crimes alleged were not merely crimes against French law but also against international law⁷⁹ and thus actionable in France. The court in *Argoud* also recognized the primacy of the general principles of international law as a part of international law.⁸⁰ While the split between the executive and legislature on this point seems problematic, claims for torts in violation of the law of nations would be ordinarily brought before a court of general jurisdiction (*Tribunal de Grand Instance*) which regards not only treaty law but also customary law as an integral part of the French domestic legal order. Consequently, French courts could recognize the possibility of an *action civile* in conjunction with a case prosecuting a crime under customary international law. Accordingly, we now turn our attention to the *action civile* in French law.

2. Statute Law

a) *A Hybrid of Tort and Crime: Action Civile*

In principle and practice victims of crime in France have the right to compensation in tort through an *action civile*.⁸¹ One very interesting point of the *action civile* is that it can be initiated by the victim of the crime.⁸² Historically the common law also permitted private persons to initiate prosecutions of crimes

75 « ni l'article 55 de la Constitution ni aucune autre disposition de valeur constitutionnelle ne prescrit ni n'implique que le juge administratif fasse prévaloir la coutume internationale sur la loi en cas de conflit entre ces deux normes. » *Id.* at 1584.

76 *Id.*, at 1593.

77 *Id.*

78 Cass. Crim., 4 juin 1964, *Argoud*, Bull, p. 410.

79 *Kdhir*, at 1585.

80 *Id.*

81 Stefan Gewaltig, *Die action civile im französischen Strafverfahren*, Frankfurt am Main 1990: Peter Lang, page 6 (hereafter Gewaltig).

82 Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 542, 669 (1990).

in order to conserve very limited judicial resources. That is no longer the case in the U.S. However, the same conduct may give rise to a proceeding in tort or in criminal law. Nevertheless, U.S. common law does not offer a procedure similar to the *action civile* even in the civil law jurisdiction of Louisiana⁸³ – though the Racketeering Influenced and Corrupt Organizations Act (RICO)⁸⁴ does permit a combination of civil and criminal claims in cases combating organized crime.

In the *action civile* criminal and tort procedures are combined. That combination offers a certain judicial economy by reducing the number of court proceedings. Article 2 of the French Penal Code⁸⁵ provides that:

“all who have personally suffered a damage directly caused by the crime have a right to reparation of that damage by a civil cause of action. [‘action civile’].

Renunciation of the civil cause of action in no way suspends or stops the public prosecution, subject to the exceptions provided for in line 3 of article 6.”⁸⁶

Article 418, paragraph 2 “On the constitution and effects of the civil party” of the French Code of Criminal Procedure further states that:

“All persons who, in conformity with Article 2, claim to have been injured by a wrong can, if they have not yet done so, move to be considered a civil party in the case. No lawyer is required to make this motion before the court. The civil party can, in support of their cause of action, ask for damages corresponding to the damages which they have suffered.”⁸⁷

83 “In France, by virtue of the procedure of *la partie civile*, the civil action may be brought along with the penal proceedings but such is not the case in Louisiana or the United States.” William E. Crawford, *Louisiana Civil Law Treatise: Tort Law*, § 3.1. (2000).

84 18 U.S.C. § 1962

85 Ordonnance n° 58-1296 du 23 décembre 1958 art. 1, Journal Officiel du 24 décembre 1958 en vigueur le 2 mars 1959. *available at*: <http://lexinter.net/PROCPEN/titre_preliminaire.htm>.

86 Author’s translation. The original text reads: « L’*action civile* en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction. La renonciation à l’*action civile* ne peut arrêter ni suspendre l’exercice de l’action publique, sous réserve des cas visés à l’alinéa 3 de l’article 6. » Ordonnance n° 58-1296 du 23 décembre 1958 art. 1 Journal Officiel du 24 décembre 1958 en vigueur le 2 mars 1959. *available at*: <http://lexinter.net/PROCPEN/titre_preliminaire.htm>.

87 Article 418, French Code of Criminal Procedure (author’s translation). The original text states: « Toute personne qui, conformément à l’article 2, prétend avoir été lésée par un délit, peut, si elle ne l’a déjà fait, se constituer partie civile à l’audience même. Le ministère d’un avocat n’est pas obligatoire. La partie civile peut, à l’appui de sa

Thus all persons who are directly injured through the criminal act have the right to compensation for the damages resulting there from.⁸⁸ However, the claim for damages must be made at trial, and may not be first made on appeal.⁸⁹ Interestingly, civil parties are disqualified from being witnesses in the criminal action.⁹⁰

An *action civile* is not only of interest before French courts. The resulting compensation from damages to *parties civiles* may be enforced anywhere the defendant's assets can be found – even before common law courts, where familiar procedures for recognition and enforcement of foreign judgments are well established.⁹¹

The *action civile* is further evidence for the proposition that criminal liability generally creates tort liability. The *action civile* exists in at least French, Belgian, and Senegalese civil law and almost certainly in other jurisdictions which model their domestic law on French law. It is the author's hypothesis that a further examination of other civil law jurisdictions would reveal the *action civile*, or a homologue, exists in most civilian jurisdictions. A similar cause of action, the *Adhäsionsverfahren*, also exists in German civil law, though it is apparently less often resorted to. Civilian legal systems recognize 1) the actionability of international crimes in domestic proceedings and 2) the possibility that an injured plaintiff may sue the defendant criminal tortfeasor. This empirical evidence proves that in the Alien Tort Statute/Alien Tort Claims Act; is not idiosyncratic.

b) *Article 689 French Code of Criminal Procedure*
(*Code de Procédure Pénale*)

Article 689 of the French Code of Criminal Procedure (*Code du Procédure Pénale*), provides that:

“[t]he authors or accomplices of offences committed outside the territory of the Republic can be sued in the French courts and judged by them ... when-

constitution, demander des dommages-intérêts correspondant au préjudice qui lui a été causé. », available at:

http://lexinter.net/PROCPEN/constitution_de_partie_civile_tc.htm.

88 Art. 2 Code de Procédure Pénale (C.P.P.); Gewaltig, at 8.

89 Crim. 5.3.1964, J.C.P. 1964.II.13689; Crim. 25.10.1966, J.C.P. 1966, 1, page 9.

90 Article 422 French Code of Criminal Procedure, available at:

<http://lexinter.net/PROCPEN/constitution_de_partie_civile_tc.htm>.

91 See, e.g., *Raulin v. Fischer* [1911] 2 K.B. 93 (Eng.).

ever an international convention grants jurisdiction to the French courts.”⁹² Thus, if the suspect is in France then Universal jurisdiction exists for the wrongs listed in these conventions. According to Stern, Art. 689 applies to conventions that, according to their terms, are not self-executing such as Art. 5 of the Torture Convention.⁹³

3. Case Law

We have already discussed briefly the case of Klaus Barbie (*Argoud*)⁹⁴ and also *France v. Khaddafy*.⁹⁵ Here we will look in greater detail at two claims litigated in France due to genocide in Rwanda where the plaintiffs made motions as *parties civiles* for an *action civile*.

a) *In Re Munyeshyaka*⁹⁶

W. Munyeshyaka, a Rwandan national, was charged in France with crimes against humanity and genocide. The aggrieved parties also made a claim for compensation in tort via the *action civile*. The lower court ruled that there was no jurisdiction in this case because the acts were committed outside of France and the victims and perpetrators were not French nationals. The French *Cour de Cassation* partially affirmed and remanded the case on the basis that while there was no universal jurisdiction as to genocide there would be universal jurisdiction for torture under Article 689-2 of the Code of Penal Procedure.

This decision might seem odd at first: after all, genocide is clearly a crime under international law. What was the courts reasoning in *Munyeshyaka*?

The court notes that the crimes of genocide and complicity thereto are defined in Art. 211-1 of the French Code of Criminal Procedure and by the Convention Against Torture. However, in domestic French law the crime of genocide requires action in concert to execute a plan. In contrast, the crime of

92 Brigitte Stern, *Universal Jurisdiction over Crimes Against Humanity under French Law- Grave Breaches of the Geneva Conventions of 1949-Genocide-Torture-Human Rights Violations in Bosnia and Rwanda*, 93 Am. J. Int'l. L. 525, 528 (April, 1999) (translation by Brigitte Stern; hereafter Stern).

93 *Id.*

94 Cass. Crim., 4 juin 1964, *Argoud*, Bull, p. 410.

95 *Kadhaffi*.

96 *In Re Munyeshyaka* 1998 Bull. crim., No. 2, at 3., Cour de Cassation, Arrêt de 6 janvier 1998 (n° de pourvoi: 96-82491) available at: <<http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRAX1998X01X06X00002X000>>

torture (a crime codified in Art. 222 of the French Penal Code) requires no such concert of action or plan. Further, the Genocide Convention of 1948 does not contain in its own terms any rule of universal jurisdiction. It merely authorizes state parties to adjudicate genocidal acts on their own territory or to constitute international tribunals to adjudicate such claims. The court thus implies that 1) there may have been no concerted plan of action of the Rwandan genocide; 2) even if there were, the French courts would not have jurisdiction to adjudicate such a claim under international law absent some positive act of the French legislator.

The court also considered claims of violations of international humanitarian law under the Geneva Convention. According to §§ 1 and 2 of Article 112-2, French Code of Criminal Procedure,⁹⁷ criminal principals and accomplices to serious violations of the Geneva Convention of 12 August 1949, those who violate the laws and customs of warfare, and those who commit crimes against humanity can, if found in France, be judged before French courts and that as a result claims against the defendant on the basis of torture would be able to be litigated in France even where victim and perpetrator were not French nationals provided the perpetrator be present in France. Having determined that on the basis of the facts and allegations that the complaint on the basis of genocide was ill founded, but that a claim against torture would be well founded the court partially annulled the earlier proceedings and remanded the case to the lower court for determination.

b) *In Re Javor*⁹⁸

The case of *Procureur v. Javor*⁹⁹ involved a criminal prosecution of *Javor* for torture of the Yugoslavian claimants who also brought tort claims using the *action civile*. The court noted that according to Art. 689-1 and Art. 689-2 of the French Code of Criminal Procedure all persons who, outside of French territory, have committed acts of torture as defined in the CAT, can be prosecuted and judged by France if found in France. In *Javor*, however, there was no indication at all that the defendants were on French territory. Whether

97 Law of 22 May, 1996, n° 96-432.

98 *In Re Javor*, 1996 Bull. crim., No. 132, at 379. French Cour de cassation, Criminal Chamber, March 26, 1996. (Cour de Cassation (Chambre criminelle) Arrêt 26 mars 1996 (Javor) N°: 95-81527) *available at*:
<<http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX1996X03X06X00132X000>>

99 *Id.*

the accused is in France must be determined by the prosecutor not the victim. Since the defendant was not proven by the prosecutor to be in France claims on the basis of Art. 689-1 and Art. 689-2 could not succeed.

The court did recognize that “all persons who are victims of a crime in contravention of the New York Convention [Against Torture of 1984] have a right to bring a tort claim [lit. *action civile*] against the criminal tortfeasor”¹⁰⁰ and that “denial of this right constitutes denial of an equitable trial as guaranteed by the European Convention on Human Rights”.¹⁰¹ However, while true in theory in practice the defendant was not in France and thus no claim could be made on the basis of the CAT.

The claims under the CAT could not be heard because of jurisdiction. However, plaintiffs also made claims on the basis of the four Geneva conventions which entered into force for France on 28 December 1951. There the court noted that state parties agree to make the necessary legislative measures to suppress via adequate sanctions grave violations of the terms of those conventions. However, the court also noted: 1) the obligations of those conventions only bind states, and 2) the conventions are not directly applicable in domestic law, and implies the reason therefore is that that particular convention is only binding states. Explicitly, the court also notes that the rights guaranteed by the four conventions are too general and ambiguous to be directly applicable. Art. 689 of the French Code of Criminal Procedure defining allowable cases of universal jurisdiction in France did not apply to the case because the four Geneva conventions are not directly applicable. Thus plaintiff had no claim on the basis of the Geneva conventions.

Though no claim was possible in this case on the basis of the Geneva conventions the court did make clear that all treaties are nonetheless an integral part of French law implying that on other facts a claim based on the Geneva conventions might succeed. The court states:

“An international convention which is sufficiently precise and does not therefore require particular measures prior to its application is directly applicable. Such a convention [i.e. one sufficiently precise to require no enabling legislation to have effect in domestic law] creates rights which benefit individuals”.¹⁰²

As we know, treaties in French law are self executing though they may in

100 *Id.*

101 *Id.* (author’s translation).

102 *Id.* (author’s translation).

certain circumstance not grant directly enforceable rights to individuals.

It would be unwise to regard the French concept of “*effet direct*” as equivalent to *Drittwirkung* or “self execution”: the French court, though it does speak of “*effet direct*” does not use the term *Drittwirkung*. A functionalist analysis of *effet direct* looks not at the artificial theoretical constructs created by lawyers and judges but rather at the practical effects those constructs have. If we look at *effet direct* on its own terms and as a representative of the French legal system rather than trying to force it to fit foreign legal abstract concepts either from the common law (self executing treaties) or German law (*Drittwirkung*) we avoid doctrinal confusion since the overlap of these concepts is not perfect. Conceptual abstraction permits explanation of a variety of different cases – but complex concepts whether adapted, adopted or used as metaphors or analogies almost always create at least some confusion when transposed into international law or when subsumed into other similar foreign legal concepts. Those problems can be avoided simply by considering not the abstraction but the concrete cases to which the abstract concept refers. This is the advantage of empiric induction. It does not lead to sweeping (or overbroad) conclusions but does resolve problems as they arise.

In any event, the court in *Javor* does not speak in terms of “self executing treaties”. Rather it seems to assume that all treaties are self executing, but that some treaties cannot vest rights in individuals without enabling legislation simply because of their ambiguity.

Thus, the case against *Javor* was rejected not because there could be no claim under the Geneva conventions but rather because such a claim would have to be founded on some positive aspect of domestic French law.

The court in *Javor* does not address the issue whether the claim could have been made under customary law. Here there would be room for creative lawyering. If, as in *Javor*, there is no French domestic law on which to base the claim then the plaintiffs could argue that the facts constitute a violation of customary international law and that customary international law is an integral part of French domestic law. Just as in the common law, custom is an integral part of French law and the ordinary regime of *droit commun* could be applied to international torts, including those torts which are also violations of customary international law.

On this point, whether and how jurisdiction may be obtained for international torts and crimes in French law, Brigitte Stern notes that:

“These cases [*Javor* and *Munyeshyaka*] illustrate the reluctance of the French

courts to assert universal jurisdiction. This attitude is not a French exception, but is quite widespread. According to Kenneth Randall, '[t]he universality principle remains under-utilized in the struggle to eliminate the most heinous crimes of the modern world.' This explains why in France the cases brought against Pinochet did not rely on universal jurisdiction but on passive personality jurisdiction."¹⁰³

Just as we see that states are reluctant to lift the veil of immunity, so also are states hesitant to exercise universal jurisdiction. In fact, however, a compelling argument can be made that universal jurisdiction exists to all international crimes which are also violations of *jus cogens* first by looking at the fact that universal jurisdiction exists as to pirates and slave traders and also by looking at the teleology of the more modern international crimes which represent such heinous acts as to be of mutual concern of all nations and thus liable to universal jurisdiction. In any event, immunity and jurisdiction appear to be the two greatest limitations to liability, whether in crime or in torts, for severe violations of human rights.

B. Belgium

Belgium had offered universal jurisdiction *in absentia* without regard to the nationality of the victim or criminal, perhaps the most wide ranging exercise of jurisdiction over human rights in the world, certainly in Europe until 2003. However, the ICJ in *Congo v. Belgium* determined that one case prosecuted under this statute was a violation of the principle of immunity of acting ranking ministers and could not proceed. This fact, and enormous U.S. pressure, caused Belgium to modify its wide ranging law on universal jurisdiction in 2003.¹⁰⁴ The general interpretation is that the new legislation has severely curtailed Belgian extra-territorial jurisdiction. While it is true that now victims must be Belgian or legal residents of Belgium at the time of the crime as we will see the statute remains very extensive and in some areas has actually expanded its protections.

103 Stern, at 529.

104 Florian Hausweisner, *Belgium's Controversial War Crimes Law Amended*, 19 Int'l Enforcement L. Rep. 449 (November, 2003). See, Loi de 5 Août 2003 relative à la répression des infractions graves au droit international humanitaire, Title I, Belgian Penal Code of 5 August 2003, Art. 136 bis, available at: <<http://www.ulb.ac.be/droit/cdi/Codepenal2003.html>>.

1. *The New Legislation*

The new legislation entirely removes the old legislation and in its place modifies several sections of the Belgian Criminal Code. The principal new and modified sections of the Penal Code are summarized as follows:

* Art. 1^{bis} of the Penal Code appears to be a reaction to *Congo v. Belgium* and provides that “In conformity with international law, prosecutions are prohibited against: heads of state, heads of government, and foreign ministers of foreign affairs during their term of office as well as other persons recognized as enjoying immunity under international law.”¹⁰⁵ Note, however, that this limitation leaves open the possibility of suing those enjoying immunity after termination of their term of office.

* Art. 6 of the Belgian Penal Code was amended so that “all Belgians” now includes “all Belgians or any other person having their principal residence in Belgium”.

* Art. 10 of the Belgian Penal Code now provides that foreigners can be prosecuted in Belgium for violations of human rights protected in Book II, Title 1 of the Belgian Penal Code if the victim was a Belgian national or resident or a person who, since at least three years in effect resides in Belgium habitually and legally.¹⁰⁶

* Art. 12 of the Belgian Penal Code was extended so that not only international conventions but also international custom could be the basis of a claim.¹⁰⁷

* Art. 136 was newly created and extensively defines a wide range of criminal activities and is extremely generous to victims. Crimes against international law under Art. 136 includes, for example, apartheid, destruction of historic monuments, and forced resettlements.¹⁰⁸ Such crimes can be heard by Belgian courts and punished under Belgian law (Art. 43 quarter, § 1, a Belgian Penal Code).

We can conclude from this that while Belgium has limited the claimants to Belgian citizens and legal residents at the time of the crimes it has also broadened its protections to acts such as apartheid and forced resettlements. Further, claims may be made not only on the basis of international statute but also

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

on the basis of customary law. Thus, the new legislation stands on surer ground. Of course it would be desirable if the protections of the Belgian law were extended at least to the citizens of other EU Member States and if the inquiry was not whether the claimant was a legal resident of Belgium at the time of the crime but rather at the time of prosecution. That being said, if the jurisdictional limits can be overcome plaintiffs would be able to combine their actions with claims as *parties civiles*. We now look at the Belgian law on *action civile*.

2. *The Action Civile in Belgium*

Belgian civil law, like French civil law, recognizes the existence of an *action civile* for damages in cases of crimes. It is worth noting that accomplices may be held liable for acts of principals. Accomplice liability in Belgian law is very extensive: The plaintiff need not prove that the defendant accomplice intended to aid the criminal principal to achieve the criminal object.¹⁰⁹ Plaintiffs need not prove fraudulent intention of accomplices to defraud¹¹⁰ or criminal intent.¹¹¹ Further, all defendants, accomplices, and principals are liable jointly and severally for all damages resulting from the criminal tort, even absent any overt action or agreement to act in concert.¹¹²

109 «Pour être coauteur ou complice, il n'est pas nécessaire qu'il y ait eu intention criminelle tendant à porter préjudice à la masse» (Cass. 13 septembre 1989, Rev. dr. pén. 1990, 59). (Author's translation: To be an accomplice or co-author it is not necessary that there have been the criminal intent tending to cause injury. (hereafter: accomplice cause).

110 «Pour condamner en droit un accusé comme coauteur ou complice d'une faillite frauduleuse, il n'est pas requis que l'accusé ait agi dans l'intention frauduleuse de porter atteinte aux biens; il suffit qu'il soit établi que quelqu'un ait commis ce délit et que l'accusé y ait participé d'une des manières énumérées aux articles 66 et 67 du Code pénal (art. 489 du Code pénal)» (Cass. AR P. 93.0510.N, 22 mars 1994, Arr. Cass. 1994, 299). Author's translation: To legally sanction an accused as accomplice or co-author of fraudulent bankruptcy it is not necessary that the accused acted with a fraudulent intention to damage goods; it suffices that it be established that someone has committed this wrong and that the accused participated in one of the manners enumerated in articles 66 and 67 of the Penal Code.

111 *Id.*

112 «Toutes les personnes condamnées pour un même délit sont tenues dans leur propre chef d'indemniser la partie civile, quel que soit le degré de participation de chacune d'elles au délit commun, et même si entre les personnes condamnées il n'y avait ni accord préalable, ni unité d'action» (Cass. 22 décembre 1947, Arr. Cass. 1947, 425) ». Author's translation: All persons found guilty of one crime are held individually responsible to indemnify the civil party, whatever their degree of individual

Having examined the Belgian statutory law we can now examine the cases litigated under those laws and their predecessor law to suppress grave breaches of international humanitarian law.

3. *Case Law*

How have the statutes worked in practice? The Belgian criminal laws, though curtailed as to victims who may sue, have in fact been substantively extended as outlined above. Though Belgium has procedurally limited access to its courts Belgium could legally extend its protection not merely to residents at the time of the crime but also to those who have become Belgian residents since the crime and even to other residents and citizens of EU Member States. The earlier Belgian legislation was not illegal, but rather impractical; the courts were somewhat overwhelmed with claimants, and some claims were not meritorious. Most importantly, the Belgian legislation angered the United States and Israel. But these political problems do not go to the legality of the statute rather to its political practicality. With that thought we now look at some litigated Belgian cases.

a) *The Ariel Sharon Cases*

A claim in tort was brought in Belgium against the head of state of Israel, Ariel Sharon, as well as several other Israeli defendants for massacres of Palestinian civilians at the Sabra and Shatila refugee camps which occurred prior to Sharon's term of office as head of state. The case was initially determined inadmissible as to all defendants. However, on appeal that decision was partially reversed. The Belgian appeals court ruled that the case against Sharon would not be considered as he was an acting head of state entitled to immunity for all acts, even those occurring prior to his term of office. However, the other defendants did not enjoy immunity and the jurisdiction was valid.¹¹³ As to them the case was allowed to go forward even *in absentia*.¹¹⁴ The Belgian Supreme Court consequently affirmed this decision.¹¹⁵ However, in the interim

participation in the common crime, and even if among the condemned there was no agreement prior to the crime nor any unity of action.

113 *Sharon, Ariel, Yaron, Amos et Autres*, Arrêt de la Cour d'Appel de Bruxelles, 26/6/2002, available at: <<http://www.sabra-shatila.be/documents/arrest020626.pdf>>.

114 Alain Winants, *The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 *Leiden Journal of International Law*, 508 (October, 2003).

115 Cour de Cassation, Arrêt de 12 Fevrier, 2003. Unofficial English translation available at: <<http://www.indictsharon.net/12feb2003dectrans.pdf>>.

the ICJ at the case of *Congo v. Belgium* ruled that head of state immunity extended also to ranking ministers thus sowing confusion and injustice in the Belgian laws. This, and enormous pressure from the United States, caused Belgium to modify its law on universal jurisdiction. Consequently, in a second decision by the Belgian Supreme Court the case was dismissed in its entirety.¹¹⁶ Let us then look at *Congo v. Belgium* to see exactly how procedural issues blunted substantive justice.

b) *Belgium v. Congo*

The ICJ case *Congo v. Belgium* appears to have been crucial in the hobbling of the Belgian law. We examine that decision to understand its limits in order to see what might still be done to the Belgian legislation to make it more effective. We conclude that the Belgian legislation could at least offer a cause of action to persons who are Belgian citizens or residents or EU citizens or residents at the time of the lawsuit. We also conclude that jurisdiction *in absentia* remains a possibility though the issue of whether and when non-Belgian victims may bring a cause of action is actually more important. Finally we conclude that the decision of the ICJ is morally indefensible and suffers from flawed logic.

i. *Immunity*

The Belgian law of universal jurisdiction *in absentia*, as applied in a Belgian case, was adjudicated by the International Court of Justice and found incompatible with international law in the case *Congo v. Belgium*. In *Congo v. Belgium*¹¹⁷ the ICJ distinguishes between absolute and relative universal jurisdiction. In that case Abdulaye Yerodia Ndombasi, the Congolese minister of foreign affairs, was indicted by Belgium for war crimes during his term of office. During the court proceedings the term of the minister's office ended. The minister raised as a defence that at the time of indictment he enjoyed ministerial immunity. The defence was upheld. However, the court's determination that ministers enjoy immunity during their term of office appears to rest on fiat of the court and appears to have no authority of custom or treaty under-

116 *Procureur contre Ariel Sharon et Consorts*, Cour de Cassation, Arrêt de 24/9/2003, available at:

<http://www.coeicl.de/dokumente/sharon_judgement_240903_juris_cass_a1.pdf>.

117 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), ICJ 14/II/2002, available at: http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_toc.htm.

lying it. The court's finding that official acts which constitute war crimes, crimes against humanity, and crimes against the peace may, indeed must, enjoy immunity as to heads of state and ranking ministers is simply illogical and indefensible.

The international court did not rule against Belgium on the theory that the exercise of universal jurisdiction *in absentia* was invalid *per se*. A majority of the judges clearly think that universal jurisdiction *in absentia* can be valid¹¹⁸. Instead the ICJ in *Congo v. Belgium* ruled against Belgium on the basis of immunity. According to the ICJ, government Ministers are analogous to heads of state and thus are immune as to official acts during their term of office even after expiry of their term. One can rightly ask, however, where this analogy comes from, for it seems to be purely an invention of the court. *Congo v. Belgium* is a rather shocking decision actually; the crimes of which the former minister was accused were clearly in violation of *jus cogens* yet the court is arguing that they must be granted immunity. Applying this logic several prosecutions at the Nuremburg or Tokyo tribunals should have been rejected. Unsurprisingly, the decision is severely criticized. We will consider that decision and its critique in order to see the limits international law places on exercise of jurisdiction and the rules it imposes on immunity of government officials.

The ICJ decision reached the conclusion that it is a firmly established rule of international law that high ranking government official enjoy immunity as to their official acts both in civil and criminal cases arising out of customary international law – even in cases where those acts are violations of *jus cogens*!¹¹⁹ The ICJ attempted to defend the indefensible offering the trite and unsatisfying rhyme that ‘immunity’ does not mean ‘impunity’. The court notes that Ministers who are also international criminals can be prosecuted “(i) in their own country; (ii) in other states, if the state they represent waives immunity; (iii) after they cease holding office; and (iv) before an international court.”¹²⁰ Obviously in practice none of these prosecutions will ever happen so the argument rings hollow. For example, acts committed during the term of office, so long as they are official acts, will be immune to prosecution even after the termination of the term of office. Thus, only acts undertaken for per-

118 Alain Winants, *The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 *Leiden Journal of International Law*, 500 (October, 2003).

119 *Id.*, at 497.

120 *Id.*, at 498.

sonal benefit and not in the service of the state will no longer be immunized after expiration of the term of office.¹²¹ Winants rightly criticizes the ICJ's argument, calling potential prosecution "hypothetical" at best. He also criticizes the argument from analogy that a high ranking minister is like a head of state or diplomat which he also sees as a weak one. He also points out that the court ignores recent developments in international law.¹²² Thus, Winants states that the ruling of the ICJ on immunities is: "very doctrinal and narrow-minded" and is "likely... to lead to a *de facto* total impunity of high ranking office holders".¹²³ He points out rightly that some crimes can only be committed with the state as their instrumentality and reiterates Lord Steyn's argument in *Pinochet I*, that if immunity applies to official acts of state then "when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as Head of State".¹²⁴ It is simply absurd to offer immunity to mass murderers in the interests of "order". Winants concludes that: "It may well be that the Belgian approach is foolhardy, but in contrast to this the ruling of the ICJ is lacking in courage"¹²⁵ which seems to me a polite way to call someone a coward. Winants critique is in all events well founded. The ICJ has taken one step backward to excusing the worst acts of barbarism in the interest of elevating "order" above "justice". The ICJ's rationale is based on a flawed assumption of international law that order is the primary concern of international law since order is a precondition to justice. That presumption is false – ultimately, justice creates order and injustice creates disorder – and is increasingly rejected as sovereignty evolves from an absolute hermetic Westphalian conception to relativised and increasingly integrated view due to globalisation of communication, production, and trade.

ii. *Relative and Absolute Universal Jurisdiction*

If the court decision in *Congo v. Belgium* is basically substantively indefensible is there anything to be salvaged from the erroneous decision which ignores basic principles of morality and justice? The more interesting portion of *Congo v. Belgium* concerns a distinction made by several judges in their separate opinions between "absolute" and "relative" universal jurisdiction ("*compétence universelle*" and "*compétence universelle par défaut*"). Again,

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*, at 499.

125 *Id.*

the court seems to be struggling to invent new terms to cope with the new legal reality resulting from globalisation. The ideas of “absolute” and “relative” universal jurisdiction, though conceptually defensible, do not appear to have been a part of international discourse prior to *Congo v. Belgium*. That can be seen in the fact that the terms in French and English are different. “Universal jurisdiction by default” would be a better translation of “*compétence universelle par défaut*” than absolute jurisdiction. Similarly the term “*relativisé*” appears nowhere in the term “*compétence universelle*” which then would also translate as – universal jurisdiction!

According to the separate opinions of several judges in *Congo v. Belgium*, absolute universal jurisdiction (*compétence universelle par défaut*) is asserted when the state exercising jurisdiction to prescribe has no link to the act over which jurisdiction is asserted.¹²⁶ For example, where a defendant is not on the territory of the state and where the act did not occur on the territory of the state or involved any of its nationals there is a “*défaut*” (absence, default) of the defendant and any exercise of jurisdiction is universal in the widest sense of the term i.e. “absolute”. In contrast, where there is some connection between the act over which jurisdiction is exercised and the territory or nationals of the state exercising jurisdiction to proscribe we can speak of relative universal jurisdiction or “*compétence universelle*” – for there is no absent defendant or absent act.¹²⁷

The ICJ in *Congo v. Belgium* implies that relative universal jurisdiction is permissible under international law¹²⁸ and draws a distinction between absolute universal jurisdiction and relative universal jurisdiction.¹²⁹ It does not determine when or whether absolute universal jurisdiction is permissible, though the historic example of pirates indicates that in some instances absolute jurisdiction is admissible under international law. Pirates are *hostes humani generis*,¹³⁰ enemies of all mankind, and as such are subject to universal jurisdiction. War criminals, mass murderers and those who torture are also enemies of mankind and

126 Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on The Congo v. Belgium Case*, European Journal of International Law, 13 Eur. J. Int'l L. 853 available at: <<http://www.ejil.org/journal/curdevs/sr31-03.html#31-3>> (hereafter Cassese).

127 See, *Congo v. Belgium*, opinion of President Guillaume and opinion of Judge Higgins, Kooigmans and Buergenthal.

128 *Id.*

129 Cassese.

130 See, e.g., *U.S. v. Smith*, 18 U.S. 153; 5 L. Ed. 57; 1820 U.S. LEXIS 250; 5 Wheat. 153 (1820).

should also be subject to absolute universal jurisdiction.¹³¹ Relative universal jurisdiction is, however, a lesser infringement on another state's sovereignty than absolute universal jurisdiction. An exercise of relative jurisdiction would therefore be more likely to be seen as consistent with a state's international obligations.

Congo v. Belgium does not address the issue of the permissibility of absolute universal jurisdiction.¹³² However, state practice is increasingly admitting universal jurisdiction, including absolute universal jurisdiction.¹³³ Thus, reasoning *a maiore ad minus*, relative universal jurisdiction is probably valid under customary international law.

Absolute universal jurisdiction is somewhat controversial, particularly in criminal cases. Yet in some cases, for example piracy, and probably war crimes as well, absolute criminal jurisdiction is clearly permissible under international law. States may legally exercise their power to prescribe outside of their territory under: 1) a theory of passive personality, wherein a state can prosecute crimes against its nationals, 2) a theory of active personality, wherein it prosecutes its criminal nationals or 3) under the protective principle which permits a state to defend emanations of its sovereignty outside its own territory such as its currency against counterfeiters.¹³⁴ These are not the only theories under which jurisdiction to prescribe may be legally exercised. But these are the main theories. Absolute universal jurisdiction is less problematic in civil cases¹³⁵ because there is no question of the state exercising power over a life or liberty interest but merely over a property right.

In sum, the court in *Congo v. Belgium* admits at least that Ministerial immunity is not an absolute right and can be at least waived if not derogated from. Further the court did not rule that jurisdiction *in absentia* was *per se*

131 „Folterer, Mörder und Kriegsverbrecher sollten wie früher Piraten und Sklavenhändler als Feinde des Menschengeschlechts behandelt werden.“ (author's translation: “Those who torture and commit war crimes should, like the pirate and slave handler of yore, be handled as common enemies of all humanity”). Thomas Giegerich, „Extraterritorialer Menschenrechtsschutz durch U.S. Gerichte: Sachwalterschaft für die Internationale Gemeinschaft oder judizieller Imperialismus?“, in: Eckart Klein, Christoph Menke (eds.), *Menschheit und Menschenrechte: Probleme der Universalisierung und Institutionalisierung* (2001) p. 163. Also see: *Filartiga*.

132 Cassese.

133 *Id.*

134 *Id.*

135 *Id.*

illegal. Still, the argument that a Minister can be immune for acts which are violations of *jus cogens* due to immunity simply runs contrary to the trend of international law since Nuremberg. Consequently, it is possible that the customary practice of states will outpace the court which they created and that the authors of the majority opinions in *Congo v. Belgium* will one day feel embarrassed, if not ashamed, at their failure to protect the innocent victims of failed states. After all, it is the practice of states which makes international customary law, the ICJ merely confirms it. Legal decisions in international law are only persuasive evidence of customary international law.¹³⁶

C. Senegal – The Habré Cases

It might seem odd to look at the law of a developing country to determine how to protect human rights globally via private tort law. However, the third world is where most human rights abuses occur. Further Senegal, a former French colony, is an ACP.; Member and its legal system is modelled on that of France. Like France and Belgium, Senegal is a civil law country signatory to the New York Convention Against Torture of 1984 (CAT) offering its plaintiffs extraterritorial jurisdiction in a very limited number of cases and also offering victims of crimes the possibility of constituting themselves as parties to the case in *action civile*. A famous case against Chad's former dictator, Hissène Habré was litigated in Senegal which we now examine to see the extent and limits of extraterritorial jurisdiction in a developing third world country.

The relevant cases we will briefly examine are *Ministère Public et François*

136 “With respect to the International Court of Justice, Article 59 of the ICJ Statute expressly states that '[t]he decision[s] of the Court ha[ve] no binding force except between the parties and in respect of that particular case.' ICJ Statute, June 26, 1945, art. 59, 59 Stat. 1055, U.S.T.S. 993. With respect to the European Court of Human Rights, the Court is only empowered to ‘interpret[]’ and ‘appl[y]’ the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (‘European Convention’) – an instrument applicable only to its regional States parties-not to create new rules of customary international law. See European Convention art. 32 (stating that the Court's jurisdiction ‘extend[s] to all matters concerning the interpretation and application of the Convention’); see also ICJ Statute art. 38 (listing judicial decisions as ‘subsidiary,’ rather than primary, sources of customary international law). Accordingly, the international tribunal decisions cited by plaintiffs are not primary sources of customary international law. ...these decisions may constitute subsidiary or secondary sources”, *Flores v. Southern Peru Copper Corp.* 343 F.3d 140, 169-170, 62 Fed. R. Evid. Serv. 741, (2nd Cir., Aug 29, 2003) (also explaining that ECHR decisions are at most a secondary source of international law.

*Diouf v. Hissène Habré*¹³⁷ and *Souleymane Guengueng et autres v. Hissène Habré*¹³⁸. The aforementioned appellate decision determined that an *action civile* and criminal prosecution against former Chadien dictator Hissène Habré was not admissible in Senegalese domestic law because “Senegalese positive law does not at present include a cause of action for crimes against humanity”.¹³⁹ Art. 295-1 of the Senegalese Penal Code does provide for a cause of action for torture, thus meeting Senegal’s treaty obligations under Art. 4 of the Convention Against Torture. However, Art. 669 of the Senegalese Code of Criminal Procedure only admits universal jurisdiction under an express number of limited cases, namely for crimes and torts which threaten the security of the state (as opposed to the security of its citizens) and for counterfeiting.¹⁴⁰ The court notes the fact that a crime is universally punishable does not necessarily mean that a particular court has jurisdiction to punish,¹⁴¹ i.e. it reiterates that while states have a duty not to commit acts in violation of *jus cogens* they do not have a duty to remedy other state’s violations of *jus cogens*.¹⁴² The court in *Ministère Public et François Diouf v. Hissène Habré* interprets the extraterritorial jurisdiction enumerated in Art. 699 Code of Criminal Procedure as an exhaustive list of all possible jurisdiction. That is probably the better. Similarly, the court rejected the argument that the Convention Against Torture displaces Art. 699, again likely correctly.¹⁴³

In its own terms then the decision seems to conclude that Senegal does not recognize the jurisdiction of its own courts to punish crimes against customary international law absent a Senegalese statute transposing those crimes into domestic law as domestic crimes or through explicit mention in the Senegalese Penal Code as crimes over which extraterritorial jurisdiction may be exercised and possibly both. While the decision has been criticized as being the product of executive intervention,¹⁴⁴ there are some points for hope within its terms.

137 Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000).

138 Arrêt n° 14 du 20-3-2001 Pénal (Cour de Cassation, 2001).

139 Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000).

140 *Ministère Public Et François Diouf Contre Hissene Habré*, Arrêt n° 135 du 04-07-2000 / Accusation (Senegal: Cour d'appel de Dakar, 2000), Point 3°, decision on the merits (« sur le fond ») available at: <<http://www.hrw.org/french/themes/habre-decision.html>> (hereafter Habré).

141 *Id.*, Point 3°, decision on the merits (« sur le fond »).

142 *Sampson v. Federal Republic of Germany* (1997) 975 F.Supp. 1108.

143 *Id.*

144 Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissène Habré*, 16 Harv. Hum. Rts. J. 147 169-170 (Spring, 2003); Reed Brody, *The Prosecution Of*

Though a court in Senegal may not consider itself properly seized to adjudicate the case of Habré, because its statute on extraterritorial jurisdiction does not go far enough, the court does recognize the principle “*aut dedere, aut judicare*”.¹⁴⁵ The court also recognizes that Art. 27 of the Vienna Convention prohibits a state from interposing its domestic law to excuse its non-observance of a treaty obligation.¹⁴⁶ Consequently, in the face of an extradition request, the court implies that Senegal would be compelled to deliver Habré to a state which was willing to prosecute him.

Interestingly, the Senegalese appellate court (*Cour d'appel*) cites French law. It notes that, after France enacted Art. 221-1 of the French Penal Code, which criminalized torture it then enacted the Law of 16 December 1992, (entry into force, 1 March 1994), which introduced Art. 689 into the French Code of Criminal Procedure. Art. 689 permits universal jurisdiction over a number of crimes including torture. Thus, the Senegalese court seems to accept the decision of the French court – that the court requires the enactment of a special law granting jurisdiction over crimes of torture – as persuasive evidence as to Senegalese. The results are of course unfavourable for human rights but internal logic is not wholly absent from the court's argument.

This case was appealed to the Senegalese Supreme Court (*Cour de Cassation*) which affirmed the results of the Appellate court (*Cour d'appel*) for essentially the same reason, noting, however, that Habré was under house arrest and again implying that he could be extradited to another country if so accused.¹⁴⁷ Since these cases were litigated an action has been brought against Habré in Belgium.¹⁴⁸ This may be the best hope for justice in this case, so it may not yet be over.¹⁴⁹

Hissène Habré – An "African Pinochet", 35 N. Engl. L. Rev. 321, 331-332 (Winter, 2001).

145 *Habré*, Point 3°, decision on the merits (« sur le fond ») available at: <<http://www.hrw.org/french/themes/habre-decision.html>>.

146 *Id.*

147 *Souleymane Guengueng et Autres c. Hissène Habré*, Arrêt n° 14 du 20-3-2001 Pénal (Cour de Cassation, 2001), available at: <http://www.hrw.org/french/themes/habre-cour_de_cass.html>.

148 The complaint in the Belgian case is available at: <<http://www.hrw.org/french/press/2003/tchad0603.htm>>.

149 Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissène Habré*, 16 Harv. Hum. Rts. J. 147 170-171 (Spring, 2003).

D. Germany

The final European Member State whose law we shall examine is Germany. We are looking at German law last because the majority of civil law countries in Europe more closely follow French civil law. However, as German civil law has some basic differences – notably, a greater emphasis on case law and less emphasis on deduction of rules of law from general principles as well as less doctrinal influence on the substantive law it certainly merits investigation. German civil law is more recent and thus seen as more modern and has successfully been exported to countries throughout the Far East and Eastern Europe. Further, the German doctrine of *Drittwirkung* strongly influences the question of individual rights both with respect to the state and among private persons *inter se*. Since our discussion of third party effect (*Drittwirkung*) immediately follows this chapter it seems appropriate to close this chapter with a brief examination of German law. We will see, however, that though there are some differences between German and French civil law that they are more similar than different as to the question of whether and when individuals have directly enforceable rights before national courts for claims arising out of international law.

1. German Statute Law

a) *Adhäsionsverfahren*

The *Adhäsionsverfahren* is the German homologue to the *action civile*. Essentially, like the *action civile*, it permits the incorporation of tort claims in a criminal trial in order to avoid the risk of inconsistent judgments and for reasons of judicial economy.

According to § 403 para 1 line 1 Code of Criminal Procedure (StPO) injured parties can make claims for monetary compensation in criminal trials. The right to compensation is covered in § 823 para 2 German Civil Code (BGB) in connection with § 266 German Criminal Code (StGB). Thus, at least in theory, it would be possible to bring an *Adhäsionsverfahren* so that a criminal prosecution would also result in compensation to claimants. Such procedures are, however, in practice rare. There are several possible reasons for this: The plaintiff must know that they have the right; the plaintiff must take the initiative and ask for the application of the right; plaintiffs may prefer to go before the civil courts; the *Adhäsionsverfahren* is obscure and complicates the proceedings; and, finally, the penal judge may be uncomfortable determining the existence and extent of tort damages. Despite

these reservations, the *Adhäsionsverfahren*, like the *action civile* and Alien Tort Statute, is evidence of the general principle of law that ordinarily crimes imply corresponding torts which can be the basis of a claim under customary international law in those states where customary international law is an integral part of the domestic legal order – the case of France, Britain, and the United States.

b) § 7 German Criminal Code (StGB)

German law applies the passive personality extraterritorial jurisdiction in § 7 of the German Penal Code which states:

“(1) German penal law applies to acts which in foreign countries are directed against Germans when the act at the place where the action occurred is sanctioned by punishment or the place of the act is under no sovereign’s penal law.

(2) For other acts which occur in foreign countries German penal law applies when the deed at the place of the act is sanctioned by punishment or the place of the act is under no sovereign’s penal law and the actor

1. at that time was a German or since the occurrence of the act has acquired German nationality or
2. at the time of the act was a foreigner and is in Germany and, although the extradition law permits his extradition according he has not been extradited because no extradition request was placed or the extradition request was denied or the extradition is not executable.”¹⁵⁰

150 Author’s translation.

Thus, for example, where a German citizen sexually abuses a minor child citizen of Kazakhstan and then returns to Germany and such sexual abuse is punishable both under the law of Kazakhstan and in German law the criminal act may be punished in Germany despite the passage of the statute of limitations¹⁵¹ since (like RICO) § 7 StGB looks not at procedural aspects of foreign law but rather only to the substance of the law. It seems that Germany has a doctrine similar to British double actionability which requires that extraterritorial crime be punishable both in the domestic and foreign legal system.

2. *German Case Law*

a) *Malenkovic*

In the *Malenkovic*¹⁵² (Varvarin bridge) case the Yugoslavian survivors and relatives of a NATO air-strike against a bridge in Yugoslavia sued Germany in German courts for a violation of the Geneva conventions arguing that the bridge attacked was a civilian target. The facts of this case are thus very similar to those of *Bankovic*.¹⁵³ Unfortunately, the result was also similar: no liability was found.

The German trial court (1st Civil Chamber, Landgericht Bonn) determined that the case was admissible jurisdictionally as founded on § 18 Civil Process Ordinance (ZPO).¹⁵⁴ However, the substantive claim was determined to be without merit.¹⁵⁵ The plaintiff was required to pay the defendant's costs, which is the ordinary rule in Europe, unlike the U.S. On the merits, the court

151 BGH 3 StR 437/99 – Beschluss v. 08. März 2000 (LG Hannover).

152 *Malenkovic*, Beschluss v. 10 Oktober 2003 (LG Bonn), Az.: 1 O 361/02 *available at*:
<<http://www.uni-kassel.de/fb10/frieden/themen/NATO-Krieg/varvarin-urteil.html>>;
<http://www.justiz.nrw.de/RB/nrwe/lgs/bonn/lg_bonn/j2003/1_O_361_02urteil20031210.html>.

153 Vlastimir and Borka Bankovic and Others v Belgium et al., App. No. 52207/99, 12.12.2001, (2002) 41 ILM 517, *available at*:
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=bankovic&sessionId=709433&skin=hudoc-en>.
<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=6223&sessionId=709433&skin=hudoc-en&attachment=true>.

154 Beschluss v. 10 Oktober 2003 (LG Bonn), Az.: 1 O 361/02, *available at*:
<<http://www.uni-kassel.de/fb10/frieden/themen/NATO-Krieg/varvarin-urteil.html>>;
<http://www.justiz.nrw.de/RB/nrwe/lgs/bonn/lg_bonn/j2003/1_O_361_02urteil20031210.html>.

155 *Id.*

determined that the plaintiff had no cause of action either in German domestic law or in international law and rejected the argument that Art. 25 of the German Constitution (*Grundgesetz*) would allow a remedy under international law for even if Art. 25 applied the court determined that no violation of international law existed.

Though the court admits that torts in violation of the law of nations can exist it ascribes the right of remedy not to the individual injured but to their state relying on the rule that, generally, individuals have no legal personality in international law. This erroneous view merits a probing analysis in order to demonstrate why it is also a dangerous view.

It may have been true in 1940 that, aside from the exceptions of piracy and slave-trading, individuals had no directly enforceable rights under international law. Today, however, that principle admits of many more exceptions, and those exceptions are growing. As recently as 1970 torture may not have been banned under customary international law. Today it clearly is.

The court in *Malenkovic* attempts to explain away the many exceptions to the increasingly anachronistic and outdated rule by attributing the enforcement of individual rights under international law to states. The court even goes so far as to try to argue that individual rights arise not from custom – despite plenty of state practice to the contrary – and attempts, unpersuasively, to argue that individual rights arise under international law only out of conventions and treaties. The court at best is unintelligent, at worst dishonest. Obviously all rights are enforced by states! Taking the courts logic to its conclusion no individual anywhere has any right – for they must depend on the state for the defence of that right. And that reveals the danger of the courts reasoning: it elevates the state above the people who constitute it. If people do not have rights, except as mediated by states, then all freedoms are enjoyed only at the grace of the state. Any totalitarian would be pleased with the courts reasoning. However, the court exactly reverses the roles of the people who constitute the state in order to protect their rights. One can justifiably call the decision in *Malenkovic* reactionary. The same result could have been reached on other more defensible grounds. In any event, the *Declaration des Droits de l'Homme*, the Universal Declaration of Human Rights, and countless constitutions all echo one commonality: States do not create human rights. They recognize them. States, constituted by persons, are compelled to recognize human rights because they are inherent to the human condition. The fact that states do not always recognize human rights does not change the fact of their existence. It is exactly because human rights are of universal validity

that they can be enforced against outlaw and pariah regimes. Human rights are inherent to the human condition and thus inalienable, and states ignore this fact at their own peril: international law admits a right of self determination and to democracy. Essentially, though the court may not realize it, it is arguing that human rights are a mere creation of the state and can thus be destroyed at will, which is the essence of totalitarianism. The court thus elevates a legal fiction above reality. Further, if we examine the national and international instruments it is clear that human rights are not conceived by other states or the international system as anything other than an inherent and thus inalienable part of the human condition. Finally, the court's reasoning is tautological: all legal rights are enforced by states. So arguing that human rights are something other than inherent and inalienable (an argument which would please any fascist) because those rights are protected (or not) by states ignores the real question: whether, and why, per the court, human rights are alienable. The court does not answer that question because it cannot, at least not defensibly within a liberal legal order.

How does the court's flawed tautological argument play out? Legally speaking, the court's argument, which fundamentally opposes human rights, ignores the role of *jus cogens* and also natural law in shaping individual human rights in international law. As Justinian, Cicero,¹⁵⁶ Aquinas, and Aristotle¹⁵⁷ argue, immoral laws are not law at all but at most a perversion of the law. As we saw in the case of Eichmann, some conduct is so heinous as to escape the ordinary procedural safeguards of non-retroactivity because it is wrong in all places and at all times. The allegations in *Eichmann*, if true, were so heinous that any person should naturally have recoiled in horror. The court's argument, like so many erroneous positivist arguments of the last bloody century ignores

156 Aquinas's famous maxim is "Lex Mala, Lex Nulla" – a bad law is no law at all. Aquinas echoes earlier statements by Justinian and Cicero, for example: "What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly.... [T]herefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to Nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good." See, Cicero, "Laws" in: Clarence Morris, (ed.), *Great Legal Philosophers: Selected Readings in Jurisprudence* 51 (1997).

157 "If the written law tells against our case, clearly we must appeal to the universal law, and insist on its greater equity and justice." Richard McKeon, *The Basic Works of Aristotle*, "Rhetoric", page 1374 (1941). For Aristotle customary law and natural law appear to have been identical.

entirely the subordination of law to morality which must exist in any just legal order.

Returning to *Malenkovic*, the court acknowledged that the European Convention on Human Rights in Art. 5 (5) creates a directly enforceable individual right via Art. 34 ECHR. However, the court applies the same logic as *Bankovic*, that the ECHR does not apply, because the bombardment took place outside of the jurisdiction of any contracting state party and thus does not meet the jurisdictional requirement of Art. 1 ECHR.¹⁵⁸ Just as in *Bankovic*, this ignores that the planes flew from NATO basis under orders from state parties to the ECHR. The court thus presents us with a fine piece of formalism in the service of inhumanity.

Arguments by the plaintiffs were also made on the basis of the Hague convention on land warfare. The court rejects the argument that the Hague convention on land warfare only applies between state parties and any right of compensation therein is the right of the state and not the individual.¹⁵⁹ Similarly the court ruled that the Geneva Convention on Protection of Civilians in War and its optional protocol only applies to the relations of state parties and not to their citizens stating that while civilians “enjoy protection” under Art. 51 of that convention that does not give rise to a corresponding right legally enforceable by an individual. Even Art. 51’s provisions for liability do not create rights enforceable by individuals according to the court noting that the Convention and its Protocol do not establish any procedure for individuals to make claims.

The court also rejects plaintiff’s argument that the complainants right stems from the law of German state liability. The court admits that the individual may have guaranties in national law more extensive than those in international law, but in *Malenkovic* holds that such is not the case. The plaintiffs’ attempt to rely on the general liability principles of German tort law embodied in § 823

158 *Malenkovic*, citing ECHR case 12.12.2001, EuGRZ 2002, 133.

159 Art. 2-3 Hague Convention on Land Warfare, 18 October 1907 (Art. 2 HLKO). The court also refers the reader to the *Distomo* case, German Supreme Court (BGH), judgement of 26 June 2003, Az.: III ZR 245/98, published in NJW 2003, 3488 et seq., available at:

<<http://www.jurathek.de/showdocument.php3?session=0&ID=6052&referrer=446>>

(hereafter BGH, 26.6.2003). For more details see German Supreme Court decision of 13.6.1996, (BGH Az.: III ZR 40/95, in NJW 1996, 3208 f).

of the German Civil Code (BGB) also fails¹⁶⁰ because German state-liability for torts does not exist in the case of armed conflicts. Rather, such cases are governed by international humanitarian law¹⁶¹ and, essentially, the German court sees the state-liability regime as “suspended” in time of war leaving only the province of international law – which as we saw earlier the court believed, erroneously, did not directly give rights (or duties) to individuals. For similar reasons the court rejected the liability of the Civil Service.¹⁶²

What is surprising about the *Malenkovic* decision is not that liability was not found, but rather the reasons for which it was not found. Plaintiffs in both *Bankovic* and *Malenkovic* argued that the aircraft flew from bases in Europe and were directed to do so by European states. Consequently it could be logically argued that while the targets were not under jurisdiction for Art. 1 of the ECHR the tortfeasor was. The courts also completely ignore that sending the bombers was an exercise of jurisdiction – jurisdiction to enforce. Ignoring that, even if one accepted the courts’ decision as to Art. 1 ECHR that still leaves the fact that the plaintiffs may have had tort claims under customary international law. The court in *Malenkovic* essentially ignores any possibility that the plaintiffs might, as individuals, have rights against the tortfeasors, say for air-piracy or state terrorism. The court could of course have reached the same result merely by arguing that the actions of the pilots were *acto jure imperii* and that as such they were subject to immunity. Instead it takes a conservative, even reactionary, approach and ignores the trend toward recognizing that individuals do in fact have directly enforceable rights and duties under international law and the existence of customary international law to that effect. To add insult to injury the court requires the plaintiffs, who have lost their relatives to a possibly illegal aerial bombardment, to pay compensation of the defendants’ court costs.

b) *The Distomo Case*

In the *Distomo* case,¹⁶³ Greek plaintiffs sued the German government for compensation for a massacre of 300 Greek nationals in 1944. Though the case had

160 German Supreme Court decision of 13.6.1996, (BGH Az: III ZR 40/95, in NJW 1996, 3208 f).

161 BGH, 26.6.2003.

162 § 839 German Civil Code in connection with Art. 34 German Constitution.

163 BGH, 26.6.2003.

been heard by the highest Greek court (finding for plaintiff),¹⁶⁴ the German Supreme Court did not give *res judicata* effect to that decision for procedural reasons.¹⁶⁵ On the merits, the German Supreme Court (BGH) determined that the act, though illegal, was nonetheless subject to state immunity¹⁶⁶ because individuals in 1944 had no directly enforceable individual rights under international law, and thus a claim made now for an act in violation of international law in 1944 does not result in a right to compensation.¹⁶⁷ The court also argues that only states had directly enforceable rights under international law at the time of the crime.¹⁶⁸

The court also determined that the appeals court was correct in finding that the Federal Law for Compensation of Victims of national-socialist persecution¹⁶⁹ did not apply. The court did agree, however, that it could hear the claim as an ordinary tort claim. Though Art. 5 (2) of the London Convention¹⁷⁰ had held such claims in suspension until a final settlement of the peace the “two plus four treaty”¹⁷¹ operated in fact as the necessary final settlement of the war.¹⁷² However, once again, state immunity prevented any valid substantive claim.

The court also noted that there was no liability of the civil service under § 839 German Civil Code – just as in *Malenkovic*. This raises the issue of parallels and divergences between *Distomo* and *Malenkovic*.

Though *Malenkovic* was decided by the absence of jurisdiction and not by reason of state-immunity, *Distomo* and *Malenkovic* are parallel in that *Distomo* holds that in a war-zone ordinary rules of liability are largely suspended and that individuals do not generally have directly enforceable rights under international law. However, *Distomo* is a better decision because 1) the court in *Distomo* recognizes the evolution toward directly enforceable individual rights

164 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No 11/2000, Judgment of 4 May 2000, Greek Areopag. Note however that a later decision refused to enforce the judgment against German assets in Greece on the basis of internal Greek law rendering the decision essentially symbolic.

165 *Distomo*, BGH, NJW 2003, pp. 3488-3489.

166 *Id.*

167 *Id.*, at 3491.

168 *Id.*

169 *Bundesentschädigungsgesetz – BEG* of 18 September 1953 (BGBl. I p. 1387).

170 Published 4 July 1956, BGBl. II S. 864.

171 12 September 1990, BGBl. II S. 1318; in force since 15 March 1991, BGBl. II S. 585.

172 BGH, NJW 2003, 3488, at 3490.

and duties under international law, 2) the court in *Distomo* reaches the real issue: whether states are immune for violations of *jus cogens*, but limits its decision to the facts of the case, holding that states are currently immune for past violations of international law if the state would have been immune at the time of the violation of international law. Thus, the court in *Distomo*, unlike the court in *Malenkovic*, leaves room for evolution of the law either as to whether immunity would not apply to an Act of State in violation of *jus cogens* today. The court in *Distomo* also seems more open to the idea of the possibility of directly enforceable individual rights under international law than in *Malenkovic*, though holding that such rights do not in fact exist given the facts of the *Distomo* case.

We can also compare *Distomo* to *Sampson v. Germany*¹⁷³ at least on the facts and note that the parallel U.S. case reaches the same results for similar reasons: state immunity. It seems rather clear that immunity is, internationally, the greatest obstacle to remedies for individual claimants in cases of serious violations of international law. The second greatest obstacle, at least in Germany, is the persistence of the notion that international law only grants remedies to states. However, as was abundantly demonstrated in American, British, and Francophone law this is simply no longer no longer a valid view of international law. On this point Germany, or at least the court in *Malenkovic*, finds itself taking the minority view.

Synthesis: Private Law Protection of Human Rights before the EU Member States

As we have seen plaintiffs are not without remedies in the cases brought before domestic courts of the Member States of the European Union for extra-territorial violations of human rights law, including the possibility of making claims for compensation as *parties civiles* in an *action civile*. In theory this would also be possible in German law through the *Adhäsionsverfahren*. Though it is clear that the principal remedy for human rights violations in Europe is criminal prosecution and the principal remedy for human rights violations in U.S. law is tort, both systems do not exclusively rely on tort law or criminal law to punish, deter, and compensate victims of human rights violations even where those victims are not nationals of the forum jurisdiction. Tort law and criminal law should play complementary roles in preventing and remedying violations of human rights.

173 *Sampson v. Federal Republic of Germany* (1997) 975 F. Supp. 1108.

Part II: Private Law Protection of Human Rights under the European Convention on Human Rights

Introduction

What are the possibilities and limits of tort law as a remedy for violations of private rights of individuals under the European Convention on Human Rights (ECHR)? To ultimately answer that question we will first consider: some points of general interpretation and individual rights under the ECHR.

I. The European Convention on Human Rights (ECHR)

We can best approach understanding *Drittwirkung* and competing hierarchical categories using the functionalist method of looking at practical causes and effects empirically and inductively. With this method we can now attempt to analyse the scope of the rights guaranteed by the ECHR. We proceed in both cases by analysing the relevant treaty's terms and then looking at leading cases that attempt to interpret and apply the treaties. We conclude that opportunities do exist for the protection of human rights via tort law, even extraterritorially, within the ECHR.

A. The Terms of the European Convention on Human Rights

1. Article 1 ECHR

Art. 1 of the European Convention on Human Rights states:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Two notes are important here. First, the convention on its own terms expressly extends its protections to “everyone” “subject to the jurisdiction” of the contracting state¹⁷⁴ without regard to nationality.¹⁷⁵ This protection goes beyond the ordinary duty of states imposed by international law to respect the rights of

174 Karl Josef Partsch, *Die Rechte und Freiheiten der europäischen Menschenrechtskonvention*, Berlin 1966: Duncker & Humblot (hereafter Partsch), p. 60.

175 “[I]n becoming a Party to the Convention a state undertakes to secure Convention rights and freedoms ‘not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons’.” Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent jurisprudence of the European Court of Human Rights*, 14 *European Journal of International Law* 529, 548 (2003) (quoting *Austria v. Italy*, 4 YB ECHR (1961), 138-140) (hereafter Orakhelashvili).

foreign citizens.¹⁷⁶ The ECHR is not linked to citizenship for such would not serve the goals of the convention.¹⁷⁷ Furthermore, individuals may either be personally subject to the jurisdiction of the contracting state (*in personam* jurisdiction) or be subject to the jurisdiction of the contracting state by reason of personal property (*in rem* jurisdiction).¹⁷⁸ Merely having property subject to the jurisdiction of the court can subject the individual to its jurisdiction. This implies that the convention protects the fundamental rights of individuals rather than the interests of contracting states, as case law shows.¹⁷⁹ For example, in *Ireland v. UK*, the European Court of Human Rights stated that: “Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’.”¹⁸⁰ Similar reasoning also applies to the genocide convention.¹⁸¹

Though individuals may bring claims against other states, non-governmental organizations (NGOs) do not have standing to bring cases before the ECHR.¹⁸² The Strasbourg Court has held that:

“it is clear ... that it is not the applicant Union, as such, which is the victim of the alleged infringement of the right guaranteed by article 14 of the Convention. It is not the association itself, in fact which could be compelled to compulsory labour, but each of its members as individuals. It follows that, as regards the alleged violation of Article 4, the applicant Union cannot claim to be the victim of a violation of the Convention.”¹⁸³

NGOs often play a key “watchdog” role in protection of human rights – but they cannot play this role under the terms of the ECHR as it is today.

What of the “territoriality” of the conventions rights? The extension of the

176 Partsch, at 60.

177 *Id.*

178 *Id.*, at 60-61.

179 Orakhelashvili, at 529, citing *Austria v. Italy*, 4 YB ECHR (1961), 140.

180 *Id.*, citing *Ireland v. UK*, 58 ILR (1980) 188, at 291.

181 Advisory Opinion on Reservations, ICJ Reports (1951) at 23.

182 Marek Antoni Nowicki, *Non-Governmental Organisations (NGOs) before the European Commission of Human Rights*, in: Michele de Salvia/Mark E. Villiger (eds.), *The Birth of European Human Rights Law*, Baden-Baden 1998: Nomos, p. 82, citing *Union of Air Hostesses und Attendants und Others v. Greece*.

183 *Union of Air Hostesses und Attendants und Others v. Greece*. See also, e.g., Applications Nos. 9900/82, Dec. 4.5.83, D.R. 32, p. 261; 9939/82. Dec. 4.7.83, D.R. 34, p. 213; 11553/85 and 11658/85 (joined), Dec. 9.3.87, D.R. 51, p. 136.

protections of the convention to citizen and non-citizen alike is very favourable to human rights' protection of non-citizens, since a general climate of respect for the law is necessary for the protection of human rights. However, the limitation of those rights to those places "subject to the jurisdiction" of a contracting party is unfavourable to human rights protection globally. The convention's protections do not travel with the citizen of a contracting party when they leave the jurisdiction of a contracting state. Historically, however, until the industrial revolution law was essentially personal: thus Roman law would apply to Romans outside of the territory of the Empire. In the medieval era Christians, Moslems and Jews had different rights in one country. We can also still see vestiges of law based on the person and not territory. These are most evident in religious law, which in some states (notably those influenced by Islamic religion) is the governing positive law of family relations including the law of successions. The idea that the law follows the person is also reflected in the law of nationality of those states which, like Germany, determine nationality by descent according to the rule of *ius sanguine*. Historically this differential personalized treatment explained, for example, why Jewish persons could become moneylenders though that was forbidden to Christians. Unfortunately the human rights protections of the convention are not extended like the laws of the Roman Empire to the person of the citizens of a contracting state. Under Article 1, once a person is no longer subject to the jurisdiction of the contracting parties they no longer enjoy the legal protection of the convention.

On the other hand, the convention does protect the rights not only of citizens but also of all persons within the jurisdiction of a contracting party. Even transient persons enjoy the human rights protection of the convention. This is a very generous fact for that is not at all the case of the constitutional protections of the U.S. which are increasingly seen as not having application or having only reduced application to non-citizens.

As we will see in the cases of *Al-Adsani*, *Bankovic*, and *Loizidou*, the principal issue in any litigation for extra-territorial effect of the convention is simply whether the convention even applies at all. The non-applicability of the convention to extra-territorial conduct – even where such conduct is a violation of customary international law! – is a serious limitation of the convention. We now will look at the specific protections of the convention to see whether they can be the basis for individual claims in tort.

2. *Article 5 – Right to Liberty and Security*

Art. 5 states:

“(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

Art. 5 (5) is intended to assure the enforcement of the familiar rights of criminal procedure protected under Art. 5 (1) – 5 (4) before national courts. Art. 5 (5) thus serves a similar function with Art. 13 (*infra*).¹⁸⁴ The right to compensation for wrongful arrest is, however, subject to ordinary jurisdictional rules (a claimant must appear before the proper court) and must have exhausted his local remedies.¹⁸⁵ Art. 5 (5) essentially creates a private cause of action in tort to remedy abuse of human rights by the government. Thus, the ECHR in fact does guarantee its protections in part through tort.

3. *Article 3 – Freedom from Torture*

Art. 3 states clearly and succinctly in its entirety:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Art. 3 requires that remedies for torture must be given to ‘everyone’, not only victims whose torture involves the state accused of not providing the necessary remedy. On this basis one can argue for an extensive reading of Art. 3, particularly since torture is a violation of *jus cogens*, universally condemned, and liable to universal jurisdiction. One scholar thus argues that “Article 1 extends to everyone who is under the jurisdiction of the state when claiming that their rights guaranteed by the Convention, such as freedom from torture, have been violated, and it is not necessarily limited to situations where a victim is actually tortured within the jurisdiction of that state.”¹⁸⁶ The extradition or

184 A. H. Robertson J. G. Merrills, *Human Rights in Europe*, Manchester University Press: Manchester and New York (1993) p. 83.

185 *Wemhoff v. the Federal Republic of Germany*, judgment of 27 June 1968, Series A, No. 7.

186 *Orakhelashvili*, at 551.

forced repatriation¹⁸⁷ of a person from a state party to the ECHR to a state where that person will likely be tortured or subject to an inhuman punishment is a violation of Art. 3.¹⁸⁸ The responsibility of a state party can even be invoked for acts by terrorists who are not state sponsored or even for acts of non-contracting States.¹⁸⁹

4. *Article 6 – Right to a Fair Trial*

Art. 6 essentially guarantees usual rights of the accused to a fair and speedy trial seen in all developed countries before a neutral judge. However, Art. 6 of the ECHR does not contain any express provision as to what form of court proceeding is required. Thus, for example one of the parties to a proceeding does not necessarily have the right to be a witness in his cause.¹⁹⁰ However, unlike Art. 13, Art. 6 creates immediately enforceable rights in all persons subject to the jurisdiction of a state party.¹⁹¹ Thus, Art. 6 can be invoked before national courts where the convention has internal effect within the domestic legal order.¹⁹²

5. *Article 13 – Right to an Effective Remedy*

Art. 13 of the ECHR states:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

It can only be invoked in connection with some other right guaranteed under

187 Andrew Clapham, *Human Rights in the Private Sphere*, Oxford 1993: Clarendon, pp. 189-190 (hereafter Clapham).

188 Partsch, at 109.

189 *Id.*, at 189; see, e.g., *Mrs. W. v. Ireland*, Applic. 9360/81, 32 D. & R. 190 para. 14. (“The High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad”).

190 Wilhelm Braumüller, *Die Menschenrechte in der Praxis des Europarates*, Stuttgart 1972: Universitätsverlagsbuchhandlung, p. 47, citing: Komm. ZE, 1092/61: V, p. 210 (hereafter Braumüller).

191 P. van Dijk, C.J.H. van Hoof, *Theory and Practice Of the European Convention on Human Rights*, Deventer/Boston 1990: Kluwer Law and Taxation Publishers, p. 525, citing ECHR Judgment of 26 March 1987, A.116 (1987), p. 31 (hereafter van Dijk/van Hoof).

192 *Id.*

the ECHR.¹⁹³ What is meant by “effective remedy”? The ECHR has held that “an effective remedy under Art. 13 must mean a remedy that is as effective as it can be, having regard to the restricted scope for recourse inherent in any system for the protection of national security.”¹⁹⁴

As was already mentioned, Art. 13 does not provide a cause of action in its own terms but rather only in combination with some other article of the convention. However, once another right is invoked, if that right can be heard before a national court in a domestic proceeding, Art. 13 would allow a remedy against persons – even against persons acting in their official capacity!¹⁹⁵ One could argue, probably unsuccessfully, that Art. 13 implies a waiver of immunity of state officials. A criminal complaint linked to a claim for compensation in tort raises the issue of whether Art. 13 and Art. 6 para 1 can be invoked as a defence which does seem to be the case.¹⁹⁶

All these possible claims raise the question whether and when the ECHR has “direct effect”. The question for reasons already extensively discussed in the preceding chapter is actually ill put. The answer to this question will show why. Let us look at the legal facts: It is true that only a state party may be sued under the ECHR. Strictly speaking the ECHR has no direct third party effect.¹⁹⁷ However, as expressly noted by the Strasbourg court, the convention is relevant “even in the sphere of relations between individuals”.¹⁹⁸ This relevance arises through application of the ECHR within the domestic legal order of the contracting states by laws such as Britain’s Human Rights Act. Further, in monist states such as France where treaty law is part of the domestic legal order the ECHR does have direct effect.¹⁹⁹ So while it is possible to pose questions about “*Drittwirkung*” and/or “direct effect” these abstract analytical tools can really only yield confusing answers. However, by asking more specific concrete questions we can reach satisfactory answers

193 Braumüller, at 111 citing Komm. ZE, 3325/67: X, p. 528); van Dijk/van Hoof, at 521.

194 van Dijk/van Hoof, at 531, quoting ECHR Judgement of 26 mar 1987, pp. 30 and 32.

195 « L’article 13 propose aux etats contractants d’ouvrir la voie an droit de recours devant une instance nationale dans le cadre du droit interne, ‘alors meme que la violation aurait ete commise par des personnes agissant dans l’exercice de leurs fonctions officielles’. », Imre Békés, *L’Article 13* in: Michele de Salvia/Mark E. Villiger (eds.), *The Birth of European Human Rights Law*, Baden-Baden 1998 : Nomos, p. 25.

196 Braumüller, citing Komm. ZE, 1 794/63: IX, p. 178.

197 Clapham, at 298.

198 *Id.*

199 *Id.*

obviating the need for confused terminological hair-splitting.

As we can see, on its own terms, there are a few legal arguments under the ECHR that could be made for victims of torts in violation of human rights, most significantly perhaps Art. 5 (5) of the ECHR. How do these rights work out in the practice? To answer that question we look at case law.

B. Cases Litigated under the Convention

With a basic understanding of the texts which may be the basis for protection of human rights in tort we can now see how the ECHR applies those texts and whether this application ever results in extra-territorial effect of the ECHR. Sadly the results are disappointing. In just about all cases the ECHR is interpreted conservatively such and is not applied outside the territory of the contracting parties.

1. Bankovic

In *Bankovic*, survivors and relatives of civilian victims killed by a NATO air-bombardment of the Belgrade Radio-Television station complained of violations of Article 2 (right to life), Article 10 (freedom of information) and Article 13 (right to an effective remedy) of the European Convention of Human Rights. The claims were determined as inadmissible as the place bombarded was not within the Article 1 jurisdiction of the Convention.²⁰⁰

The court reasoned that, wherever decided, the act was performed outside the jurisdiction of the state-parties.²⁰¹ The court, bound by the Vienna Convention on treaties,²⁰² applied an “ordinary meaning”²⁰³ test to the phrase “within their jurisdiction in context of the object and purpose of the convention and subsequent practice.”²⁰⁴ The court quickly concluded that as to the ordinary meaning of “jurisdiction” in Article 1 of the ECHR, state jurisdictional competence is primarily territorial and that exceptions thereto are defined and limited

200 Orakhelashvili, at 530.

201 “The Court notes that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States.”, *Bankovic*, para. 54.

202 *Golder v. United Kingdom*, 21 February 1975, Publications ECHR, Series A no. 18, § 29), cited in *Bankovic*, para. 55.

203 Article 31 § 1 of the Vienna Convention 1969; *Johnston and others v. Ireland*, 18 December 1986, Publications ECHR, Series A no. 112, § 51 cited in *Bankovic*, para. 56.

204 Article 31 § 3 (b) of the Vienna Convention 1969 cited in *Bankovic*, para. 56.

by the territorial rights of other states.²⁰⁵ The court found that state practice²⁰⁶ and the *travaux préparatoires* of the convention²⁰⁷ supported this view. Though the court acknowledges that the ECHR is a “living instrument”²⁰⁸ it notes that the *travaux préparatoires* clearly indicate the intent of the contracting state parties.²⁰⁹

This decision has been sharply criticized. Orakhelashvili notes that the court in *Bankovic* was at the margin of its mandate and that a ruling would require the court to adjudicate and overrule legal principles and considerations external to the Convention.²¹⁰ Nonetheless he criticizes the decision because the court did not decide the case for those reasons but rather attempted to justify its decision within the terms of the convention itself,²¹¹ but ignored the duty of the court “to resolve any doubts in the light of the object and purpose of the treaty”.²¹² Orakhelashvili goes on to say that: “The general impression ...from *Bankovic* and *Al-Adsani* is that the European Court feels free to pick and choose between different methods of interpretation as if there were no

205 *Bankovic*, para. 59, citing Mann, “The Doctrine of Jurisdiction in International Law”, RdC, 1964, vol. 1; Mann, “The Doctrine of Jurisdiction in International Law, Twenty Years Later”, RdC, 1984, Vol. 1; Bernhardt, *Encyclopaedia of Public International Law*, 1997 ed., Vol. 3, pp. 55-59 “Jurisdiction of States” and 1995 ed., vol. 2, pp. 337-343 “Extra-territorial Effects of Administrative, Judicial and Legislative Acts”; Oppenheim *International Law*, 9th ed. 1992 (Jennings and Watts), Vol. 1, § 137; P.M. Dupuy, *Droit International Public*, 4th ed. 1998, p. 61; Brownlie, *Principles of International Law*, 5th ed. 1998, pp. 287, 301 and 312-314).

206 *Bankovic*, para. 62.

207 *Bankovic*, para. 63.

208 “It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court’s case-law. ... (for example, the *Soering* judgment *Soering*, ECHR, 7 July 1989, Publications ECHR, Series A no. 161; the *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Publication ECHR, Series A no. 45; *The X, Y and Z v. the United Kingdom* judgment of 22 April 1997, *Reports 1997-II*; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I)... The Court concluded in the latter *Loizidou*-judgment that former Articles 25 and 46 of the Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously”. *Bankovic*, para 64.

209 *Bankovic*, para 65.

210 Orakhelashvili, at 531.

211 *Id.*

212 *Id.*, at 530.

order or hierarchy between these methods.”²¹³

Orakhelashvili is correct. There is even a term for this type of decision making: it is called “legal realism”. To prove his charge, Orakhelashvili notes that: “...specific interpretive methods were misapplied... the Court has practically failed in the two cases to accord due importance to the nature of the European Convention as an instrument of public order establishing obligations of an objective nature, which go beyond the reciprocal commitments of individual contracting states. Furthermore, the Court also neglected the question of how certain provisions of the Convention are mirrored in general international law. Finally, the Court’s line of reasoning in both cases lacked the requisite degree of coherence when dealing with the previous jurisprudence of the Convention organs.”²¹⁴

In sum, the court’s decision if unprincipled was also inept. A more coherent and defensible decision could have been reached either on the basis of state immunity or on the international law concerns expressed by Orakhelashvili. We can see the flaw in the courts’ reasoning this way: suppose that a band of robbers and murders decided in Italy to conspire to kill a Serbian, then went to Serbia and killed the person, and returned to Italy to enjoy their plunder. Would the victim and survivors then be “subject to the jurisdiction” of the ECHR for their criminal conspiracy? Certainly. Further, the NATO aircraft, as aspects of the state, are by their very nature an exercise of jurisdiction, namely jurisdiction to enforce. Thus the convention should apply. The reasoning of the court in *Bankovic* is flawed.

2. *Al-Adsani*

A recent decision of the European Court of Human Rights (ECHR), *Al-Adsani v. United Kingdom*²¹⁵ is factually similar to *Saudi Arabia v. Nelson*²¹⁶. Al-Adsani, a British pilot in the Kuwaiti air force, was tortured by the Kuwaiti government, apparently for distributing salacious tapes of an important sheikh.²¹⁷ The plaintiff was not only beaten and threatened but was severely burned, ultimately requiring medical treatment in Britain.²¹⁸ The plaintiff based his claims on Art. 3 (freedom from torture) and Art. 6 (the right of access to a

213 *Id.*, at 537.

214 *Id.*

215 *Al-Adsani v. United Kingdom*, ECHR 21 November 2001.

216 *Saudi Arabia v. Nelson*, 88 I.L.R. 189.

217 *Id.*, para 10.

218 *Id.*, para 13.

court) of the ECHR. Art. 3 was determined to be inapplicable outside the jurisdiction of the contracting states.²¹⁹ Art. 6 was also complied with by the contracting state because of the immunity of foreign states. *Al-Adsani* was a case of the immunity of a state (as opposed to an individual)²²⁰ for officially sanctioned torture.²²¹ Again, state immunity shows itself to be a key problem in guaranteeing human rights. Citing *Nelson*²²² and *Amerada Hess*²²³ (among others) the ECHR found Kuwait to be immune.²²⁴ Like the case of *Sampson v. F.R.G.*,²²⁵ *Al-Adsani* relies on the tenuous distinction that while states may not violate their *jus cogens* obligations, those obligations do not require states to create remedies for their breach by other states.²²⁶ Thus a state can grant another state immunity for violation of *jus cogens*. The only other reading of that case would be that torture is not in fact a norm *erga omnes*²²⁷ or *jus cogens*²²⁸

219 Orakhelashvili, at 530 (2003).

220 *Id.*, 23-24.

221 *Id.*, para 3, paras 21-22.

222 *Saudi Arabia v. Nelson*, 88 I.L.R. 189.

223 *Argentine Republic v. Amerada Hess Shipping Corporation* (1989) 109 S. Ct. 683.

224 For a good analysis of *Al-Adsani* see: Markus Rau, *After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the Al-Adsani Case*, GLJ vol. 3 No. 6 - 1 June 2002.

225 *Sampson v. F.R.G.*, 250 F.3d 1145 (7th Cir., 2001).

226 *Al-Adsani v. United Kingdom*, ECHR 21 November 2001, para 23: “States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded.”

227 Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int’l L. 91, 153 (2002). *Erga omnes* obligations are a consequence of general principles of international law. They are non-derogable duties owed by all states to the international community. *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 32, para 33. All states have an interest in the protection of an *erga omnes* norm.

228 *Id.*, at 153 (2002). *Jus cogens* norms cannot be derogated from. All *jus cogens* norms are *erga omnes* but not all *erga omnes* norms are also *jus cogens* norms. *Jus cogens* norms are owed by states towards each other and, possibly, towards individuals. This explains why well every state has a remedy against violation of a norm *erga omnes*, no state must grant a remedy for a violation of *jus cogens*. *Erga omnes* norms are owed by states to the entire international community. *Id.* For an excellent discussion of *jus cogens* vs. *erga omnes* in the international criminal context see, Cherif Bassiouni, *International Crimes, Jus Cogens and Obligatio Erga Omnes, SOS-Attentats*, Conference Proceedings, 265-278 (2002) available at:

which, given the convention against torture and state practice, is not the case. Further, *Al-Adsani* cannot be read as carving out a “*de minimis*” defence to torture: The plaintiff was severely burned (unlike Nelson who suffered no permanent physical injury). This decision, like the decision in *Belgium v. Congo*, effectively denudes *jus cogens* and if applied to the war crimes of the last world war would have exonerated many of those convicted.

However, *Al-Adsani* does contain one hidden gem for those who wish to defend human rights. *Al-Adsani v. Gov’t of Kuwait*²²⁹ clearly states that for every crime there is a corresponding intentional tort in international law as well as domestically. Thus *Al-Adsani* leaves open two possibilities for plaintiffs. One is to argue from customary law that the common law, as French law, directly incorporates customary international law as part of the common law/ *droit commun*; that for every common law crime there is a corresponding tort; and thus, plaintiffs can sue under the ordinary tort regime while enjoying the jurisdictional benefits of universal jurisdiction as to violations of *jus cogens*. This does not, however, remove the defences of the state to immunity. But, logically, state immunity cannot be asserted in violation of *jus cogens*, because *jus cogens* norms are by definition non-derogable. Further, even if immunity for violations of *jus cogens* were not a logical impossibility, the immunity of the state must be distinguished from the immunity of the state’s agent. By suing not the state but its agent the issue of the state’s immunity is obviated. Then only the personal immunity of the defendant will be at issue. While ranking ministers and heads of state, according to the ICJ, do enjoy personal immunity for official acts during their term of office, this does not mean that lower ranking state officials have personal immunity. Further, personal immunities are limited to official acts after expiration of the officials’ term of office.

3. *Brumarescu and Loizidou: Extraterritoriality and Expropriation*

Not all cases that seek to apply the ECHR outside the territory of the EU fail. In two cases of expropriation of land outside the EU but within the jurisdiction of contracting states, jurisdiction was found. The cases of *Loizidu v. Turkey*²³⁰

<http://www.law.duke.edu/journals/lcp/articles/lcp59dFall1996p63.htm>.

59 *Law & Contemp. Probs.* 63 (Autumn 1996).

229 107 *I.L.R.* 536, 540 (Eng. C.A. 1996): “In international law, torture is a violation of a fundamental human right, it is a crime and a tort for which the victim should be compensated.”

230 *Loizidu v. Turkey*, ECHR 28/7/1998.

and *Brumarescu v. Romania*,²³¹ although judged by the European Court of Human Rights and thus possibly valid only in Europe, may be evidence of a right to compensation or restitution for nationalization's under international law.²³²

Though Romania is not a member of the EU it, like Turkey, is a signatory to the ECHR. Thus the application of the ECHR was not really problematic. However, as it acts as a companion case to the more controversial case of *Loizidou v. Turkey* we will look at it briefly. In *Brumarescu*, the Brumarescu's house was nationalized by the Romanian government in 1950.²³³ That nationalization was wrongful in the sense that by Romanian domestic law the Brumarescus should have been exempted from nationalization.²³⁴ The house was later sold in 1974 by the state to a third party. The house then passed by inheritance to the Mirescus. The European Court recognized the right of the Brumarescus to compensation.²³⁵

Loizidou v. Turkey more clearly raised the issue of what is meant by jurisdiction in Article 1 of the ECHR. Loizidu owned land on Cyprus – which was, however, seized when the Turkish government invaded and occupied northern Cyprus.²³⁶ Turkey then created a puppet government which, however, has been recognized *de jure* by no state other than Turkey. The court had no problem finding that northern Cyprus was subject to the jurisdiction of Turkey because of the Turkish military presence. This opens up the possibility of arguing that NATO occupied areas of Yugoslavia were subject to the jurisdiction of one or several of the state parties to the ECHR or its rarely invoked American counterpart.

Like *Brumarescu*, *Loizidu v. Turkey* also recognized a right to compensation for the seizure of the plaintiff's land.²³⁷ *Brumarescu* could, however, be limited by the fact that the nationalization was not in the public interest but

231 *Brumarescu v. Romania*, ECHR, 28/10/1999.

232 But see: *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398.

233 *Brumarescu v. Romania*, 28 October 1999, ECHR Application no. 28342/95 (Judgment: Merits) para. 12, available at: <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=32051&sessionId=709797&skin=hudoc-en&attachment=true>.

234 *Id.*, at para. 15.

235 *Id.*, at para. 22.

236 *Loizidou v. Turkey (preliminary objections)*, 23 March 1995, Publications ECHR, Series A no. 310, para. 11.

237 *Id.*, at para. 26-27 (ECHR 1998).

rather was in the interest of only private persons.²³⁸ Similarly *Loizidou* could be limited by the fact that Turkey had no legal right to invade Cyprus, and thereby violated the Charter of the United Nations.²³⁹ In fact, the emerging norm against nationalization is one more evidence of the limitation of state sovereignty. The historic definition of a state's sovereignty was ultimate and absolute authority over all persons and objects within its territory. This ultimate and absolute power is increasingly relativized in the contemporary international system.

4. *Tugar v. Italy*²⁴⁰

In *Tugar v. Italy* an Iraqi mine clearer operating in Iraq detonated a mine losing one leg as a result. The mines were sold by Italy. At the time Italy had no export licensing requirements on mines. It later enacted one but only after the sale of the mine in question. Tugar's complaint was based on Art. 2 and Art. 13 of the European Convention on Human Rights. His claim was determined to be inadmissible, however, due to Art. 1 which applies the convention to those acts "within the jurisdiction" of the contracting state parties. While the manufacture and even sale of the mines occurred in Italy, they were sent outside the territory of a state party to the convention and further ultimately deployed not by a contracting party but by Iraq. Essentially, Tugar's claim was that Italy negligently failed to prevent sale of arms to an outlaw state or government. Of course, the ECHR can apply outside the territory of the Contracting Parties:

"A measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee."²⁴¹

A point the court conceded to Tugar. However, Tugar's case was distinguished from the *Soering* decision²⁴², on the argument that the decision to extradite is

238 *Brumarescu v. Romania* (Application no. 28342/95), para. 13 (ECHR, 28 October 1999).

239 *Loizidou v. Turkey* (Article 50) (40/1993/435/514) para. 13 (ECHR, 28 July 1998).

240 *Tugar v. Italy*, Application No. 22869/93 (ECHR 18 October 1995) *available at* : <http://cmiskp.echr.coe.int/tpkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=2341&sessionId=710132&skin=hudoc-en&attachment=true>.

241 *Soering*, ECHR, 7 July 1989, Publications ECHR, Series A no. 161, p. 33, para 85.

242 *Id.*

an act of "jurisdiction"²⁴³ and that, in contrast, the injury to Tugar:

“can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible ‘indiscriminate’ use thereof in a third country, the latter’s action constituting the direct and decisive cause of the accident which the applicant suffered.”²⁴⁴

This distinction is of course very similar to that made in the common law of torts between cause in fact and proximate cause: in Tugar’s case, while there would be causation in fact, there would not be proximate causation.

The logic of the decision in *Tugar* does not seem flawed but the outcome is very dissatisfying. The struggle to suppress anti-personnel mines is very important since such mines kill long after the conflict that led to their deployment and the victims are often children. Further, Tugar was working for an NGO which offered mine clearing operations as a sub-contractor. The decision does not say whether there was a contract and if so with which state. Suppose Tugar had been employed as a directly or indirectly by an ECHR signatory. Suppose further, that an ECHR signatory was exercising actual control over the area that Tugar was working in. Those presuppositions would be good arguments for application of the ECHR to his case.

Conclusion

Our study has revealed that the laws of the Member States of the European Union are generally the most successful line of attack on extra-territorial human rights violations. Secondly, the ECHR may be able to be used to remedy human rights violations. We have seen that the principle remedy in European law is criminal prosecution, but that tort law can and does play a supplementary and/or secondary role as a legal remedy to violations of human rights outside the territory of the Member States. Our study has also revealed that the national laws both of the EU Member States and the United State could, consistent with international law, go further than they do in protecting human rights outside of Europe.

Protections at the supra-national are possible before the European Court of Human Rights. Such protections, however, are generally limited in their effect to Europe. Whether before courts of the Member States or before the European

243 Then why isn’t the decision in *Bankovic* to send bombing aircraft also an act of jurisdiction?

244 *Tugar v. Italy*, Application No. 22869/93 (ECHR 18 October 1995).

Court of Human Rights, creative lawyering could extend human rights protection to cases within the terms of existing treaties.

Throughout this study we have seen that the principle limitation on extra-territorial defence of human rights is immunity and jurisdiction. Both these obstacles, while serious, are not insurmountable. It seems relatively clear that the United States has gone further in the protection of human rights through private law just as it is equally clear that Europe has much more vigorously used criminal law to prosecute such offences. However, these offences are so heinous that ideally Europe and the United States will learn from each other and extend the protection of human rights. Just as Europe would do well to consider an Alien Tort Statute, so would the United States do well to consider the *action civile*. These are just the two most obvious examples. This work has tried to highlight other areas where good faith application of the law as it is can be used to extend the protection of human rights to all persons in the world. Hopefully it will contribute to that task.

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