

Recent Developments in Transnational Human Rights Litigation: A Postscript to *Torture as Tort*

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Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation marked the first in-depth inquiry by non-US scholars into transnational human rights litigation. In this article, the author canvasses a range of new developments in the field since its publication in 2001. Of special note are five transnational human rights claims, decided after September 11, that were brought in Canadian and British courts. The author mines these cases for insights into other important developments involving the American *Alien Tort Statute* (Part I); corporate complicity in human rights abuses (Part II); the expansion of common law jurisdiction to include the *jus cogens* crime of torture (Part III); state immunity from prosecution (Part IV); and the increasing availability of compensation and other remedies (Part V). This article is a vital update for transnational human rights scholars.

Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation (La torture en tant que délit civil : Points de vue comparatifs sur le développement du contentieux transnational sur les délits civils) représente la première enquête approfondie effectuée par des spécialistes non américains, concernant le contentieux transnational en matière de droits de la personne. Dans cet article l'auteur analyse une série de nouveaux développements intervenus dans ce domaine depuis la publication de l'ouvrage en 2001. En particulier, on note cinq plaintes transnationales relatives aux droits de la personne qui ont fait l'objet d'une décision de justice après le 11-Septembre et ont été présentées aux tribunaux canadiens et britanniques. L'auteur creuse ces affaires pour en tirer une meilleure compréhension des autres développements importants concernant le *Alien Tort Statute* américain [loi sur le droit des délits civils étrangers] (Partie I) ; la complicité des grandes Sociétés sur le plan des violations des droits de la personne (Partie II) ; l'extension de la compétence du droit commun, afin d'y inclure le crime de torture *jus cogens* (Partie III) ; l'immunité de l'État à l'encontre de toute poursuite (Partie IV) ; et la possibilité croissante d'indemnisation et d'autres recours (Partie V). Cet article constitue une mise à jour vitale destinée aux spécialistes transnationaux des droits de la personne.

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“I would use of international law the words which Galileo used of the earth: ‘But it does move.’”—Lord Denning¹

PUBLISHED IN 2001, *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation (Torture as Tort)* was the first in-depth analysis by non-US scholars of transnational human rights litigation. At the time, this litigation was largely restricted to the United States.² In broad terms, these are civil proceedings in the courts of one state for violations of international norms protecting the human person that occurred in another. In the two decades since the seminal case of *Filártiga v. Peña-Irala (Filártiga)*,³ dozens of claims have been brought in US federal courts⁴ under a unique legislative framework consisting of the *Alien Tort Statute (ATS)*,⁵ the *Torture Victim Protection Act*

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1. *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] Q.B. 529 at 554 (C.A.) [*Trendtex*].
 2. Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) [*Torture as Tort*]. Another notable contribution was the Human Rights Committee of ILA British Branch, *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad* (2001) 6 E.H.R.L.R. 129 [ILA Report]. See also François Larocque & Mark C. Power, Book Review of *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* by Craig Scott, ed. (2003) 41 Osgoode Hall L.J. 147.
 3. 630 F.2d 876 (2d Cir. 1980) [*Filártiga*].
 4. See Michael Swan, “International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines” in *Torture as Tort*, *supra* note 2 at 65.
 5. The *Alien Tort Statute of 1789*, 28 U.S.C. § 1350 [ATS] is sometimes referred to as the *Alien Tort Claims Act*, or by its numbered section of the United States Code, but here it will be referred to as the *ATS*.

(TVPA),⁶ and certain amendments to the *Foreign Sovereign Immunities Act* (FSIA).⁷ Pursuant to these statutes, actions have been filed against a variety of foreign defendants, including sovereign states,⁸ heads of state,⁹ state officials,¹⁰ political organizations,¹¹ and multinational corporations¹² in relation to a variety of international wrongs, including torture,¹³ terrorism,¹⁴ genocide,¹⁵ war crimes,¹⁶ and extrajudicial killing.¹⁷ Transnational human rights claims have also been brought at common law in state courts.¹⁸ The transnational character of such proceedings—that is, the plurality of actors, localities, and norms involved in any given case—raises important and interlocked issues about jurisdiction, immunity, characterization, and choice of law, as well as issues of international relations policy and politics. *Torture as Tort* looked at these and other questions in order to determine, among other things, whether US-style transnational human rights litigation could (or indeed should) be replicated elsewhere.

At the time of the book's publication, however, the prospects for transnational human rights litigation in countries such as Canada or the United Kingdom (UK) were, more than anything else, little more than an interesting academic possibility. Both jurisdictions had known only one case each in which foreign plaintiffs had sought to obtain a civil remedy for extraterritorial human rights violations. The English case is *Al-Adsani v. Kuwait* (*Al-Adsani* (1996)),¹⁹ where

6. *Torture Victim Protection Act of 1991*, 28 U.S.C. § 1350 notes [*TVPA*].

7. 28 U.S.C. §§ 1605-1607.

8. See e.g. *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992).

9. See e.g. *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D. N.Y. 1994).

10. See e.g. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

11. See e.g. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) [*Tel-Oren*].

12. See e.g. *Aquinda v. Texaco*, 945 F. Supp. 625 (S.D. N.Y. 1996).

13. See e.g. *Filártiga*, *supra* note 3.

14. See e.g. *Tel-Oren*, *supra* note 11.

15. See e.g. *Kadič v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) [*Kadič*].

16. See e.g. *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985) [*Handel*].

17. See e.g. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) [*Forti*].

18. See e.g. *Alomang v. Freeport-McMoran Inc.*, 718 So. 2d 971 (La. C.A. 1998).

19. (1996), 107 I.L.R. 536 (C.A.) [*Al-Adsani* (1996)]. See the discussion of *Al-Adsani* (1996) in Wendy Adams, "In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?" in *Torture as Tort*, *supra* note 2, 247; Graham Virgo, "Characterisation, Choice of

a Kuwaiti national sued his country in the UK for torture that allegedly occurred in Kuwait. The Court of Appeal held the claim to be barred by the *State Immunity Act 1978*²⁰ since the statute did not contain an exception for torture. As will be seen below, this was not the last word on the *Al-Adsani* litigation. The Canadian case is *Arone v. Canada (A.G.)*,²¹ a failed attempt by a Somali family to sue the Canadian government for the torture and killing of a relative by Canadian peacekeepers in Somalia. When *Torture as Tort* was published, it seemed unlikely that transnational human rights litigation would thrive outside the United States.

Things have changed since 2001. The terrorist attacks in New York and Washington, D.C. in September of that year—four months after the book's publication—and the events that followed have dramatically polarized the transnational and human rights landscape and discourse. Soon after September 11 (9/11), an “Axis of Evil” was singled out, a “Coalition of the Willing” was formed, and the “War on Terror” was declared. After the Taliban was ousted from power in Afghanistan, dozens of “enemy combatants” were shuttled to detention facilities in Guantanamo Bay, where many still remain. The Bush administration then turned its attention to Saddam Hussein’s “weapons of mass destruction” and, later, to the liberation of the Iraqi people. Without Security Council approval, and to the international community’s “shock and awe,” armed forces led by the United States and UK marched into Baghdad. Iconic scenes of toppled bronze statues were soon overshadowed by grizzly photographs of US soldiers subjecting Iraqi detainees to cruel, inhumane, and degrading treatment in the Abu Ghraib prison. In the United States, concerns about the straining of civil liberties in the name of homeland security, under

Law and Human Rights” in *Torture as Tort*, *supra* note 2, 325; and Muthucumaraswamy Sornarajah, “Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal System of the Home State” in *Torture as Tort*, *supra* note 3, 491.

20. *State Immunity Act 1978* (U.K.), 1978, c. 33.

21. 6 July 1999, unreported (Ont. Gen. Div.). See the discussion of *Arone* in Craig Scott, “Introduction to *Torture as Tort: From Sudan to Canada to Somalia*” in *Torture as Tort*, *supra* note 2, 3 [Scott, *Introduction*]; John Terry, “Taking *Filártiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad” in *Torture as Tort*, *supra* note 2, 109; and Chanaka Wickremasinghe & Guglielmo Verdirame, “Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations” in *Torture as Tort*, *supra* note 2, 465.

the aegis of the *USA Patriot Act*,²² were substantiated when US officials detained and “extraordinarily rendered” Canadian Maher Arar to Syria, where he was jailed and tortured for a year.²³ Amidst reports of internationally wrongful conduct by US officials and mystifying support for the legality of torture from high-profile academics,²⁴ US courts have continued to entertain claims against foreign defendants for extraterritorial human rights violations under the ATS and TVPA. Indeed, as will be further discussed in the next part, in 2004 the United States Supreme Court upheld the applicability of the ATS to such violations, albeit with important constraints.

Another important development was the establishment of the International Criminal Court (ICC) on 1 July 2002. The complementarity principle on which the court is based will condition the way judges, lawyers, and scholars think about transnational human rights litigation. The jurisdiction of the ICC is complementary to the criminal jurisdiction of national courts; it may only exercise its powers if national courts are unwilling or unable to carry out criminal investigations and prosecutions.²⁵ The subsidiary nature of the ICC’s jurisdiction rests on two rationales. The first is to avoid inundating the ICC with cases from all over the world. States should have the first opportunity to prosecute international criminals, given that it is their duty to do so.²⁶ Second,

22. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

23. The Arar Commission published its final report in September 2006. Arar Commission, *Report on the Events Relating to Maher Arar* (18 September 2006), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/index.html>. For a detailed timeline of the Arar affair, see “CBC News In Depth: Maher Arar” *CBC News* (26 January 2007), online: <<http://www.cbc.ca/news/background/arar/>>.

24. See e.g. Alan Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002). But see Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House” (2005) 105 *Colum. L. Rev.* 1681. See also François Larocque, “Opening Statement: The choice of torture” *The Lawyers Weekly* 23:1 (2 May 2003).

25. Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 348-61. See also Antonio Cassese, Paolo Gaeta & John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) at c. 18.1.

26. For example, the preamble to the treaty establishing the ICC includes the words, “[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crime.” *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 [*Rome Statute*].

the ICC's complementary jurisdiction is respectful of each state's sovereignty. The ICC will not usurp the jurisdiction of a state that is willing and able to conduct a proper and fair trial under one of the usual jurisdictional grounds (*e.g.* territoriality, nationality, or universality). In short, complementarity is about deference to a state's power and duty to place its national laws and judicial system at the service of the international community by prosecuting and punishing acts that threaten world public order. From a transnational perspective, it is conceivable that the complementarity of national and international criminal jurisdiction might eventually be brought to bear in the civil sphere as well. The new era of international criminal justice under the banner of the ICC promises to alleviate important lacunae in law enforcement by not only addressing the international public interest in punishing and deterring war crimes and genocide, but also by making provision to address the private interests of the victims of those wrongs. By importing certain features of civil procedure, such as permitting the participation of victims in the proceedings²⁷ and allowing for the compensation of victims upon sentencing,²⁸ the ICC represents an ambitious experiment that may yield a fuller, more complete form of international justice.

It is also significant that five new transnational human rights claims have been brought, since 2001, in Canadian and British courts.²⁹ All five claims have been initiated at common law—which is not surprising, given the absence of legislation like the ATS in Canada or the UK—and all five claims relate to extraterritorial torture. This is significant for two reasons. First, the cases show that, given its openness to a range of normative sources and persuasive authority, the common law is aptly suited for the task of countenancing both private interests and public international standards.³⁰ Plaintiffs bring civil claims in

27. *Ibid.*, Article 68(3).

28. *Ibid.*, Article 75(2).

29. The Canadian cases are *Bouzari v. Islamic Republic of Iran*, [2002] O.J. No. 1624 (QL) (O.S.C.J.) [*Bouzari*], *aff'd* (2004), 71 O.R. (3d) 675 (C.A.) [*Bouzari* (2004)], leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 410; *Saleh v. United Arab Emirates* (2003), 15 C.C.L.T. (3d) 231 (O.S.C.J.) [*Saleh*]; and *Arar v. Syrian Arab Republic and Jordan*, [2005] 137 A.C.W.S. (3d) 823 (O.S.C.J.) [*Arar*]. The UK cases are *Mitchell et al. v. Al-Dali et al.*, Case No. A2 2004/0489 [*Mitchell*]; *Jones v. Saudi Arabia*, Case No. A2 2003/2155 [*Jones*]. Both appeals were decided together: [2005] 2 W.L.R. 808 (H.C.J.), *rev'd* [2006] 2 W.L.R. 1424 (H.L.).

30. See Mayo Moran, "An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law" in *Torture as Tort*, *supra* note 2, 661; Oliver Gerstenberg, "Private Law, Constitutionalism and the Limits of the Judicial Role" in *Torture as Tort*, *supra* note 2, 687.

common law courts for violations of international law because these courts can administer both bodies of law.³¹ Accordingly, jurisdictional issues aside, British and Canadian courts did not doubt that torture was actionable in tort because of its direct incorporation into domestic law as customary international law.³²

Second, these claims in Anglo-American courts cannot be conceptually divorced from the historical and categorical prohibition of torture at common law.³³ From its early beginnings, the common law rejected torture as being contrary to right reason, humanity, and fundamental justice. According to Lord Bingham, the absolute condemnation of torture and the inadmissibility of statements obtained under torture “is more aptly categorized as a constitutional principle than as a rule of evidence.”³⁴ In addition to being a fundamental tenet of the common law, the torture prohibition is generally regarded as a peremptory norm of international law from which no derogation is possible.³⁵ This dual consecration of the torture prohibition is not new, but is increasingly recognized by courts.³⁶

It is with this context in mind that this article undertakes to present and discuss the most salient legal developments in transnational human rights litigation since the publication of *Torture as Tort* in 2001. For the sake of

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31. At least since the 18th century, there has been little doubt that “the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.” See William Blackstone, *Commentaries on the Laws of England*, 1769, Book IV (London: Cavendish Publishing, 2001) at 67. The principles governing the relationship between customary international law and Canadian common law were recently affirmed by the Supreme Court of Canada in *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 39 [*Hape*]. See also Craig Scott, *Remarks: The Alien Tort Claims Act under Attack. Proceedings of the 98th Annual Meeting of the American Society of International Law, Washington, D.C., 2004* (Washington, D.C.: American Society of International Law, 2004) at 58 [Scott, *Remarks*].
32. See the discussion of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [*Sosa*], below, at notes 48-51 and accompanying text.
33. The House of Lords recently insisted on this point when it ruled that evidence obtained under torture in a foreign country, with or without the complicity of British authorities, could never be admissible in English courts. See *A.(F.C.) v. Secretary of State for the Home Department*, [2005] UKHL 71, [2006] 2 AC 221 (H.L.) [*A(FC)*].
34. *Ibid.* at para. 12.
35. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Art. 53 [*Vienna Convention*].
36. See e.g. *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3 [*Suresh*]; *Sosa*, *supra* note 32; and *A(FC)*, *supra* note 33.

convenience, the discussion is developed thematically rather than chronologically. The most important developments involve the ATS (Part I); corporate complicity (Part II); common law jurisdiction (Part III); state immunity (Part IV); and compensation and other remedies (Part V).

I. THE ALIEN TORT STATUTE

In 2004, nearly twenty five years after *Filártiga*, the US Supreme Court in *Sosa v. Alvarez-Machain*³⁷ (*Sosa*) finally did what it had hitherto avoided: it gave its opinion regarding the scope and purpose of the ATS.³⁸ The legislation was enacted by the First Congress in 1789 and remained dormant for nearly two centuries until its reanimation in the *Filártiga* litigation.³⁹ The provision that defines the powers of the district courts is now codified at 28 U.S.C. §1350, and it 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.”⁴⁰ Between the time of its enactment in 1789 and 1980, US federal courts asserted jurisdiction under the statute in only three instances.⁴¹

In the decades prior to the landmark decision in *Sosa*, legal scholars responded to judicial comments concerning §1350’s nebulous origins and scoured the historical record in the hope of finding direct evidence of what the first generation of US legislators had in mind.⁴² None was found. What emerged instead was a richer understanding of the legal, political, and

37. *Sosa*, *supra* note 32.

38. The Court had previously discussed the ATS in *Amerada Hess Shipping Corp. v. Republic of Argentina*, 488 U.S. 428 (1989), but only briefly and with a view to establishing its inapplicability in transnational human rights claims against sovereign states.

39. Historically, the ATS was the fourth clause of *An Act to Establish the Judicial Courts of the United States*, c. 20, § 9, 1 Stat. 73 (1789), which established the courts of the new federal republic and delineated their respective jurisdictions.

40. *ATS*, *supra* note 5.

41. *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (both admiralty cases); and *Adra v. Clift*, 195 F. Supp. 857 (D.C. Md. 1961) (child custody dispute involving fraudulent passports).

42. Prior to *Filártiga*, Judge Friendly compared the ATS to “a kind of legal Lohengrin” in *ITT v. Vencap*, 519 F.2d 1001 at 1015 (2d Cir. 1975). Judge Bork noted in *Tel-Oren*, *supra* note 11 at 812, that “historical research has not yet disclosed what section 1350 was intended to accomplish.”

philosophical context in which the ATS was enacted, albeit with no clear consensus on the best account. On the basis of this scholarship, some speculated that §1350 was passed to prevent denials of justice to aliens living in the United States by facilitating their access to federal courts, thus reducing the risk of reprisals from foreign powers.⁴³ Others theorized that the ATS was more specifically aimed at ensuring swift and proper redress for injured foreign ambassadors and diplomatic personnel, again with a view of avoiding foreign reprisals.⁴⁴ Others took the more optimistic view that §1350 was the founding generation's means of ensuring that international law would be applied and enforced in the new republic, not solely out of some Hobbesian concern for national security, but chiefly as a matter of national honour and duty in fulfilling the responsibilities of statehood.⁴⁵

Quite apart from scholarly debate over its origins and purpose, the specific scope of the ATS needed clarification. By 2004, some disagreement still lingered on a key issue of interpretation of the ATS: whether it provided plaintiffs with a private cause of action. Judge Bork of the D.C. Circuit read the ATS exclusively as a jurisdictional grant, which would require plaintiffs to invoke an explicit, legislated cause of action when seeking a remedy in federal courts.⁴⁶ By contrast, every other judicial circuit that considered the issue held the ATS to confer a cause of action and to grant jurisdiction.⁴⁷ That said, not all circuits that have addressed the ATS have considered the issue; at best, those circuits have implicitly assumed that the ATS had this double function.

In *Sosa*, the Supreme Court went some way toward resolving the historical and substantive uncertainties surrounding the ATS.⁴⁸ In 1990, the federal Drug

43. See e.g. Kenneth C. Randall, "Federal Jurisdiction over International Law Claims: Inquiries into the ATS" (1985) 18 N.Y.U. J. Int'l L. & Pol. 1; William R. Casto, "The Federal Courts Protective Jurisdiction over Torts Committed in Violation of the Law of Nations" (1986) 18 Conn. L. R. 467.

44. Judge Bork championed this theory in *Tel-Oren*, *supra* note 11 at 813-16.

45. Anne-Marie Burley, "The ATS and the Judiciary of 1789: A Badge of Honor" (1989) 83 A.J.I.L. 461.

46. *Tel-Oren*, *supra* note 11 at 801.

47. See e.g. *Handel*, *supra* note 16; *Hilao v. Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) [*Hilao*]; *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); and *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

48. *Sosa*, *supra* note 32.

Enforcement Administration (DEA) hired a group of Mexican mercenaries to apprehend another Mexican national (Alvarez-Machain) believed to have taken part in a DEA agent's torture and murder in the 1980s. The mercenaries kidnapped Alvarez-Machain in Mexico and flew him to the United States, where he was arrested and taken into custody by federal agents. After he was acquitted of the criminal charges against him, Alvarez-Machain brought a civil action in federal courts against the United States, several DEA agents, and the Mexican mercenaries, which included one Jose Francisco Sosa. While the claims against the United States and DEA agents were brought under the *Federal Tort Claims Act*,⁴⁹ the claim against Sosa rested on the ATS. Alvarez-Machain invoked several causes of action but the central one for our purposes was for the human rights tort of arbitrary detention.

The Supreme Court unanimously accepted that the ATS granted the federal courts jurisdiction to hear a limited category of claims defined by the law of nations and recognized at common law.⁵⁰ Referring to the perceived necessity in 1789 to make some elements of the law of nations actionable for the benefit of foreigners, Justice Souter explained for the court: "The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect."⁵¹ In short, the statute provided jurisdiction while the common law provided the cause of action. The Court recalled that it was as axiomatic in the eighteenth century as it is today that the law of nations forms part of the law of the land.⁵² As such, the First Congress would not have created a separate federal cause of action for "torts in violation of the law of nations," as "the law of nations" was considered to be part and parcel of the common law.⁵³

The judges disagreed, however, on the present scope of the ATS. All nine justices agreed that the First Congress probably "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations,"⁵⁴ which, at the time, would have included the archetypal international

49. *Federal Tort Claims Act of 1946*, 28 U.S.C. § 1346 (2007).

50. *Ibid.* at 712.

51. *Ibid.* at 719.

52. Blackstone, *supra* note 31 at 67.

53. *ATS*, *supra* note 5.

54. *Sosa*, *supra* note 32 at 720.

offences of piracy, violations of safe conducts, and offences against ambassadors. These international norms were enforceable at common law.⁵⁵ But the judges parted ways on the question of whether contemporary federal courts have the power to recognize further actionable violations of international law beyond the historical paradigms. Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) held that the court's holding in *Erie Railroad Co. v. Tomkins*—that “there is no federal common law”⁵⁶—precluded that possibility. For its part, the majority held that while the federal common law had been reduced to specialized enclaves, there still existed a residual judicial discretion to recognize new actionable international human rights violations as part of the common law. The majority stated: “For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. ... It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.”⁵⁷

The Court cautioned, however, that federal judges must be slow to recognize new international causes of action for at least five reasons. First, courts must be mindful of the changed understanding of the common law since the time of the enactment of the ATS. Second, the power of federal courts to create new common law rules has also changed since the eighteenth century. Third, the unknown collateral consequences of creating a new international cause of action counsel prudence. Fourth, courts must consider the foreign relations consequences of finding extraterritorial wrongs to be actionable under the ATS, since entertaining such suits can interfere with the conduct of foreign relations by the executive. Finally, courts have no clear legislated mandate to seek out and define new and debatable violations of the law of nations.⁵⁸ Despite these concerns, the Supreme Court held that the doors of the common law were still open to the judicial incorporation of new actionable international norms, “subject to vigilant doorkeeping” by federal courts.⁵⁹

Without explicitly defining the criteria for new causes of action, the Court indicated, “that federal courts should not recognize private claims under federal

55. Blackstone, *supra* note 31 at 67.

56. 304 U.S. 64 (1938) at 78.

57. *Sosa*, *supra* note 32 at 729-30.

58. *Ibid.* at 722-28.

59. *Ibid.* at 729.

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, i.e., piracy, assault upon ambassadors and passport violations.”⁶⁰ The majority did not go on to give examples of violations that would satisfy the threshold test, though it did cite with apparent approval the standard developed by lower courts: that “actionable violations of international law must be of a norm that is specific, universal, and obligatory.”⁶¹ Invoking this standard, lower courts had asserted jurisdiction under the ATS in claims for torture, genocide, war crimes, extrajudicial killing, and slavery.⁶² While arbitrary detention was held to be actionable by lower courts in other instances,⁶³ the Supreme Court held in *Sosa* that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”⁶⁴

In the wake of *Sosa*, federal courts and scholars have been trying to understand when an international norm will be actionable under the ATS.⁶⁵ As recent developments show, however, the *Sosa* standard has proved generally unhelpful and has produced peculiar results in the ATS jurisprudence.

60. *Ibid.* at 732.

61. *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 at 1475 (9th Cir. 1994) [*Marcos Estate*].

62. See *Filartiga*, *supra* note 3 (torture); *Handel*, *supra* note 16 (war crimes); *Kadič*, *supra* note 15 (genocide); *Forti*, *supra* note 17 (extrajudicial killing); and *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (forced labour).

63. See *e.g.* *Forti*, *ibid.*; *Eastman Kodak Co. v. Kavlin SA*, 978 F. Supp. 1078 (S.D. Fla. 1997) [*Eastman Kodak*].

64. *Sosa*, *supra* note 32 at 738. Note, however, that a post-*Sosa* decision has found “prolonged” arbitrary detention to be actionable under §1350. See *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) [*Liu Qi*].

65. See *e.g.* Beth Stephens, “*Sosa v. Alvarez-Machain*: the door is still ajar for human rights litigation in U.S. Courts” (2004) 70 Brooklyn L. Rev. 533; François Larocque, “ATS Survives the Supreme Court” (2004) 63 Camb. L. J. 532; Zachary S. Kahn, “How Far is the ‘Door Ajar’: Whether Rape as Torture is Actionable under the ATS after *Sosa*” (2006) 12 Cardozo J. L. & Gender 685; Carolyn A. D’Amore, “*Sosa v. Alvarez-Machain* and the ATS: How Wide Has the Door to Human Rights Litigation Been Left Open?” (2006) 39 Akron L. Rev. 593; and Igor Fuks, “*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability” (2006) 106 Colum. L. Rev. 112.

The first case to follow *Sosa* was *In re South African Apartheid Litigation*,⁶⁶ a class action filed by South African nationals against a group of multinational corporations for having aided, conspired with, and benefited from apartheid. Justice Sprizzo declined to broaden the scope of the ATS to include private liability for aiding and abetting violations of international law. He stated: “[The ATS] presently does not provide for aider and abetter liability, and this Court will not write it into the statute. In refusing to do so, this Court finds this approach to be heedful of the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations of that statute.”⁶⁷ Corporate complicity in human rights violations forms the basis of claims that will be discussed in the following part.

Two further cases suffice to illustrate the post-*Sosa* malaise experienced by federal courts charged with the task of ascertaining whether an alleged international wrong is actionable at common law through the ATS. The first is *Aldana v. Del Monte (Aldana)*,⁶⁸ involving proceedings against the Del Monte corporation regarding alleged human rights abuses in Guatemala. Specifically, the plaintiffs claimed that corporate officials directly ordered the kidnapping, detention, and torture of trade union representatives. This conduct, the plaintiffs alleged, amounted to violations of the international rights to be free from torture, arbitrary detention, cruel, inhumane, and degrading treatment, and the right to associate and organize. The Southern District Court of Florida dismissed the claims in 2003 because of the poor evidentiary record and the plaintiffs’ failure to show that the alleged misconduct amounted to violations of international law.⁶⁹ On appeal, the Eleventh Circuit affirmed and reversed the decision in part, upholding the claims for torture, but dismissing the claims in relation to the right to associate and organize, and the right to be free from cruel, inhumane, and degrading treatment. With respect to this last holding, the court held that the international prohibition against cruel, inhumane, and degrading treatment did not possess the normative specificity that *Sosa* requires to be actionable under

66. 346 F. Supp.2d 538 at 550 (S.D.N.Y. 2004) [*South African Apartheid Litigation*].

67. *Ibid.* at 550.

68. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 at 1247 (11th Cir. 2005) [*Aldana* (2005)]. Dismissed in U.S. Dist. LEXIS 77020 (S.D. Fla. 2007) on *forum non conveniens* grounds.

69. *Aldana v. Fresh Del Monte Produce, N.A. Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla 2003).

the ATS. The court acknowledged that its holding was contrary to at least two pre-*Sosa* district court decisions on that point.⁷⁰ Surprisingly, the Eleventh Circuit distinguished those cases on the basis of their reliance on the *International Covenant on Civil and Political Rights* (ICCPR), which the *Sosa* court found did not “create obligations enforceable in the federal courts.”⁷¹

The grounds invoked by the Eleventh Circuit in distinguishing the relevant precedents from the case before it are more than a little suspect. While both the *Mehinovic* and *Cabello* decisions cited the ICCPR as evidence of the well-established and well-defined nature of the international norms at issue in those claims, neither case turned solely on the ICCPR.⁷² It was disingenuous and arguably an error of law to focus primarily, as the *Aldana* decision did, on a single feature of the pre-*Sosa* precedents instead of engaging with their merits in light of the *Sosa* standard.

The decision in *Aldana* not to recognize cruel, inhumane, and degrading treatment as actionable under the ATS is symptomatic of the post-*Sosa* malaise. While the *Sosa* standard admittedly leaves much to be desired in terms of clarity, it generally endorses the stringent threshold established in *Filártiga* and its progeny, namely that the reach of the ATS ought to be limited to “a handful of heinous actions—each of which violates definable, universal and obligatory norms.”⁷³ That being so, it is difficult to imagine another international norm as “definable, universal and obligatory” as the prohibition against cruel, inhumane, and degrading treatment, particularly in light of that norm’s connection to the prohibition against torture in the *Convention against Torture*.⁷⁴ Nevertheless, in

70. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 at 1347 (N.D. Ga. 2002); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 at 1361 (S.D. Fla. 2001), affirmed on different grounds by 402 F.3d 1148 at 1161 (11th Cir. 2005).

71. *Sosa*, *supra* note 32 at 735.

72. In both cases, the courts looked to a variety of international legal sources to assess the validity of the plaintiffs’ claims, including customary international law and a number of multilateral treaties.

73. *Sosa*, *supra* note 32 at 732, quoting Judge Edwards’s concurrence in *Tel-Oren*, *supra* note 11 at 781. The court also referred to the decisions in *Filártiga*, *supra* note 3 at 888 and *Marcos Estate*, *supra* note 61 at 1475, holding that actionable violations of international law must be of a norm that is “specific, universal, and obligatory.”

74. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted 10 December 1984, GA Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51 (1985), 1465 U.N.T.S. 85 (entered into force 26 June 1987) [*Convention Against Torture*].

2006 a majority of the Court of Appeals for the Eleventh Circuit, sitting *en banc*, upheld the 2005 decision and denied a rehearing of the case on this point.⁷⁵ Judge Barkett dissented in strong terms, citing scores of weighty authorities—case law, multilateral treaties, resolutions, and doctrinal writing—evinced the well-established and well-defined nature of the prohibition against cruel, inhumane, and degrading treatment.⁷⁶ Judge Barkett took the view that the majority misapprehended the *Sosa* standard:

Had the panel followed the required *Sosa* analysis, it would have seen that *the specific content requirement of Sosa is not one of categorical specificity*—it does not require defining every possible instance of cruel, inhuman, or degrading treatment or punishment, but rather compels a determination of whether the facts alleged in a particular situation sit within the universal prohibition against cruel, inhuman, or degrading treatment or punishment.⁷⁷

Judge Barkett's dissent represents an earnest attempt to distill the *Sosa* standard into a workable approach, something the majority of the court and the 2005 panel failed to do. That being said, holding that *Sosa* requires something less than “categorical specificity” in defining the content of an actionable international norm does not provide much additional guidance. Indeed, determining “whether the facts alleged in a particular situation sit within [a given] universal prohibition” is not the same as comparatively assessing the specificity of the norm at issue to the eighteenth century paradigms of piracy, assault against ambassadors, and violations of safe conduct, which is clearly the task invited by the *Sosa* standard. In any event, the dissent in *Aldana* strikingly highlights *Sosa*'s shortcomings.

Another case that illustrates the judicial difficulties in giving meaningful effect to the test articulated in *Sosa* is *Kiobel v. Royal Dutch Petroleum (Kiobel)*, where Nigerian plaintiffs sued Royal Dutch Petroleum (RDP) in relation to alleged environmental and human rights abuses stemming from the corporation's activities in the Niger delta.⁷⁸ The complaint listed seven counts of international human rights breaches on the part of RDP: (1) extrajudicial killing; (2) crimes against humanity; (3) torture and cruel, inhumane, and degrading treatment;

75. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006).

76. *Ibid.* at 1284-89.

77. *Ibid.* at 1288 [emphasis added].

78. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp.2d 45 (S.D. N.Y. 2006) [*Kiobel*].

(4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. The defendant moved to strike the claims, arguing that they fell short of the standard set in *Sosa*. Before discussing the effect of the Supreme Court's decision on the plaintiffs' claims, Judge Wood reminded herself that, before *Sosa*, the controlling precedent in her circuit was *Filártiga*, which sets "a high bar for holding that a rule occupies the status of well-settled international law such that a district court may exercise jurisdiction under the ATS."⁷⁹ Judge Wood formulated the *Filártiga* threshold as follows: "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."⁸⁰

Turning to the state of the law post-*Sosa*, she found the Supreme Court's decision in *Sosa* confusing and concluded that it "provided little guidance concerning which acts give rise to an ATS claim."⁸¹ Justice Wood then proceeded to highlight its ambiguities by comparing the decision to *Filártiga*. She confined *Sosa* to its own facts and resorted to the more familiar *Filártiga* standard as if it were still the controlling precedent.⁸² It was perhaps not unreasonable to proceed in this manner given *Filártiga's* venerable vintage and *Sosa's* chronic ambiguity, but it is nevertheless an odd way to treat a Supreme Court decision.

The court went on to determine the actionability of the plaintiffs' claims by looking to Second Circuit precedents for guidance—primarily *Talisman* (2003)⁸³ and *Wiwa*⁸⁴—and paying occasional lip service to *Sosa*. Ultimately, the court upheld the claims in relation to crimes against humanity, torture, and arbitrary detention as being sufficiently well-defined at international law to ground an ATS action, but dismissed the claims for extrajudicial killing, forced exile, and property destruction, as well as for violations of the rights to life, liberty, security, and association, for failing to meet that standard.

79. *Ibid.* at 460.

80. *Ibid.* (quoting *Filártiga*).

81. *Ibid.* at 462.

82. *Ibid.* at 463.

83. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 at paras. 320-21 (S.D. N.Y. 2003) [*Talisman* (2003)].

84. *Wiwa v. Royal Dutch Petroleum Co.*, (S.D. N.Y. 2002) LEXIS 3293 [*Wiwa*].

The decisions in *Aldana* and *Kiobel* are illustrations of the dissatisfaction *Sosa* has produced. As the court in *South African Apartheid Litigation*⁸⁵ commented:

While it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule that limited the [ATS] to those violations of international law clearly recognized at the time of its enactment, the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time.⁸⁶

That approach, the court continued, “relegated to the lower courts the task of grappling with and determining what offences against international law fit within that narrow class of offences.”⁸⁷ As *Aldana* and *Kiobel* show, it is a task that is proving more difficult than perhaps the Supreme Court itself had anticipated, and it will likely require meaningful assistance from the Supreme Court sooner rather than later.

The final ATS development is the decision of the Ninth Circuit Court of Appeals in *Sarei v. Rio Tinto*,⁸⁸ which apparently is the only judicial circuit to approve of *Sosa*. In that case, residents of the island of Bougainville in Papua New Guinea sued Rio Tinto, a multinational mining group, for its alleged participation in violations of the laws of war, crimes against humanity, and racial discrimination, and for violations of the *United Nations Convention on the Law of the Sea*. The Ninth Circuit commented on the decision in *Sosa*, finding that the Supreme Court had “adopted a view of [ATS] jurisdiction that is generally consistent with the Ninth Circuit law.”⁸⁹ Indeed, as mentioned above, the majority in *Sosa* cited with apparent approval the standard utilized by the Ninth Circuit in *In re Estate of Marcos Human Rights Litigation*,⁹⁰ to wit, that “actionable violations of international law must be of a norm that is specific, universal, and obligatory.”⁹¹

85. *South African Apartheid Litigation*, *supra* note 66.

86. *Ibid.* at 547.

87. *Ibid.*

88. *Sarei v. Rio Tinto PLC*, 487 F.3d 1193 (9th Cir. 2007) [*Sarei*].

89. *Ibid.* at 1202.

90. *Marcos Estate*, *supra* note 61.

91. *Sarei*, *supra* note 88 at 1202. See also Justice Scalia’s dissent in *Sosa*, *supra* note 32 at 742, noting that “the verbal formula ... applied [by the Ninth Circuit to determine whether ATCA jurisdiction applies] is the same verbal formula that the Court explicitly endorses.”

In the court's view, "the settled principles of law that governed the district court's analysis therefore remain sound post-*Sosa*."⁹² Pursuant to the Ninth Circuit standard, the court went on to uphold each of the plaintiffs' claims.

Though much more could be said about this aspect of the *Sarei* decision, the most noteworthy and detailed portion of its analysis related to whether the ATS contains an exhaustion of local remedies requirement. In a footnote, the majority in *Sosa* suggested that the ATS may implicitly include such a requirement, but ultimately declined to settle the issue.⁹³ Courts in the Ninth Circuit have long determined the justiciability of ATS claims without requiring the exhaustion of local remedies.⁹⁴ While the issue has been raised in other judicial districts over the years, no court has taken a firm position.⁹⁵

The defendant Rio Tinto and *amicus curiae* (which notably included International Court of Justice Judge Stephen M. Schwebel) argued that the TVPA's exhaustion provision⁹⁶ ought to be extended to the ATS. Such a result would be consistent with the exhaustion requirement at international law for human rights claims, as well as with the general policy of judicial restraint that animates the prudential doctrines of comity, act of state,⁹⁷ and political questions. The majority in *Sarei* declined to do so chiefly for two reasons. First, the TVPA's legislative history did not conclusively disclose Congress's intention on this point. Second, the majority felt that the international principle of exhaustion—a procedural rule premised on respect for state sovereignty—did not necessarily compel US courts to limit the jurisdiction they possess under

92. *Sarei, ibid.* at 1202.

93. *Sosa, supra* note 32 at 733, n. 20 (stating only that the Court would consider the requirement in an appropriate case).

94. See e.g. *Alperin v. Vatican Bank*, 410 F.3d 532 at 544-58 (9th Cir. 2005); *Marcos Estate, supra* note 61 at 1474-76.

95. See e.g. *Enahoro v. Abubakar*, 408 F.3d 877 at 889-90 (7th Cir. 2005); *Talisman* (2003), *supra* note 83 at 343-44.

96. *TVPA, supra* note 6.

97. The act of state doctrine, a kind of choice of law analogue to state immunity doctrine, is a well-established doctrine in the United States but an infrequently invoked and hazily delineated doctrine in non-US common law courts. For a discussion of act of state doctrine in Canadian and UK courts and its relationship to the invocation of immunity by state officials in foreign courts, see Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law" in *Torture as Tort, supra* note 2, 343.

the ATS.⁹⁸ Accordingly, the majority concluded that it would be inappropriate, given the lack of direction from Congress and the Supreme Court, to introduce an exhaustion requirement into the Ninth Circuit's existing ATS jurisprudence where none had been required before.⁹⁹ Judge Bybee dissented, stating that he would have applied the TVPA's exhaustion requirement to the ATS on grounds of comity and respect for foreign legal processes: "In my view, international law requires exhaustion of local remedies as a condition to bringing an international cause of action in a foreign tribunal. Even if international law did not so require exhaustion, I would, as an exercise in discretion, require it as a matter of our domestic law."¹⁰⁰

That states may determine the admissibility of foreign claims in their courts is indisputable. Given that ATS claims are based in international customary law and that the ATS, like all statutes, ought to be construed consistently with international law, it could be argued that ATS claims should be conditioned by some version of the exhaustion principle. It may equally be argued, on the other hand, that little would be gained by requiring the exhaustion of local remedies in ATS cases, since the international rule's policy is largely addressed by other domestic prudential doctrines such as act of state, political questions, and *forum non conveniens*. Indeed, both the exhaustion requirement at international law and *forum non conveniens* at domestic law aim to strike a balance between preventing denials of justice and ensuring that claims be determined by the most appropriate decider. Hopefully, the Supreme Court will follow through on its intimation that it would consider the propriety of an ATS exhaustion requirement in an appropriate case and provide guidance on this important issue.

II. CORPORATE COMPLICITY

The issue of corporate liability for extraterritorial human rights violations receives very limited treatment in *Torture as Tort*¹⁰¹ and, because of space constraints,

98. *Sarei*, *supra* note 88 at 1220 (stating that the exhaustion limitation required by international law is not dispositive of a US court's discretion to impose exhaustion as part of the ATS).

99. *Ibid.* at 1223.

100. *Ibid.* at 1224-25.

101. See Sornarajah, *supra* note 19. The topic is also broached in Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harm" in *Torture as Tort*, *supra* note 2, 45 [Scott,

this article cannot fill that lacuna by surveying nearly ten years of complex legal proceedings. Fortunately, others have undertaken this work.¹⁰² Accordingly, what follows is a cursory review of the broad issues, key cases, and recent developments on this issue.

The 1995 decision in *Kadič v. Karadžić*¹⁰³ marked the beginning of the second generation of litigation under the ATS, broadening the class of potential defendants to include non-state actors. The Second Circuit found the statute to confer jurisdiction in proceedings against non-state actors where international law itself defines the human rights norm at issue to be applicable to private persons; examples include genocide and war crimes. In addition, and more importantly for purposes of the present discussion, the court held that private persons might also be found liable for international wrongs that require an element of state action, such as torture or summary execution, when such crimes are perpetrated in concert or with the support of state actors.¹⁰⁴ As a threshold issue, the establishment of subject-matter jurisdiction in ATS claims against private parties *qua* state actors requires that plaintiffs show that the defendant acted under the colour of law. State action is found where a private party conspires, aids and abets, or otherwise acts in complicity with a state actor. In 1997, on the basis of the ruling in *Kadič*, the federal court for the Central District of California allowed a claim to proceed against Unocal in ATS proceedings related to that corporation's alleged involvement in gross human rights violations in Myanmar.¹⁰⁵ Since that judgment, corporate complicity in extraterritorial human rights violations—and the substantive criteria by which it ought to be established under the ATS—has become one of the most contentious and explosive issues in transnational human rights litigation.

Translating Torture]; Upendra Baxi, "Geographies of Injustice: Human Rights at the Altar of Convenience" in *Torture as Tort*, *supra* note 2, 197; and Robert Wai, "The Commercial Activity Exception to State Immunity and the Boundaries of Contemporary International Legalism" in *Torture as Tort*, *supra* note 2, 213.

102. For a comprehensive overview of the topic, see Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart, 2004). Updates of this book are available on the publisher's website: <<http://www.hartpub.co.uk>>. See also Craig Forcese, "ATCA's Achilles Heel: Corporate Complicity, International Law and the *Alien Tort Claims Act*" (2001) 26 *Yale J. Int'l L.* 487.

103. *Kadič*, *supra* note 15.

104. *Ibid.* at 239-245.

105. *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) [*Unocal*].

Although the Supreme Court in *Sosa* did not discuss the issue of corporate liability (it merely raised the question in a footnote¹⁰⁶), federal courts have overwhelmingly agreed that private entities such as multinational corporations are capable of violating international law and incurring civil liability under the ATS.¹⁰⁷ The main issue in corporate transnational human rights proceedings, as with all ATS lawsuits, is whether a given claim activates the subject-matter jurisdiction of federal courts. Is the alleged human rights violation one that corporations can, *de jure*, commit, and does the corresponding international norm possess the required specificity to be actionable under the ATS? Clearly, not every international norm meets the *Sosa* standard. For instance, courts have generally found international norms prohibiting environmental damage and pollution to fall outside the scope of the ATS.¹⁰⁸ Claims alleging corporate involvement in torture, extrajudicial killing, forced labour, and genocide, by contrast, have been allowed to proceed.¹⁰⁹

However, as mentioned above, where the alleged human rights violations are defined at international law as requiring an element of state action—as is the case for torture and extrajudicial killing, for example—ATS jurisdiction will only be established if plaintiffs can adduce evidence showing that the corporation conspired or collaborated with state authorities. To this end, the *Kadić* court pointed to “the ‘colour of law’ jurisprudence of 42 U.S.C. §1983 [as] a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction” under the ATS.¹¹⁰ US courts have developed several different context-specific tests to determine whether a private party can be deemed to have acted under the colour of law within the meaning of

106. *Sosa*, *supra* note 32 at 732, n. 21.

107. See *e.g.* *Kadić*, *supra* note 15; *Unocal*, *supra* note 105; *Eastman Kodak*, *supra* note 63; *Aguinda v. Texaco*, 303 F. (3d) 470 (2nd Cir. 2002); and *Talisman* (2003), *supra* note 83. But see *South African Apartheid Litigation*, *supra* note 66.

108. See *e.g.* *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362 (E.D. La. 1997) [*Beanal*]. See also *Flores v. Southern Peru Copper*, 343 F.3d 140 (2nd Cir. 2003). See also *Aguinda v. Texaco*, 303 F.3d 470 (2nd Cir. 2002) [*Aguinda* (2002)].

109. See *e.g.* *Unocal*, *supra* note 105; *Talisman* (2003), *supra* note 83.

110. Section 1983 is the cornerstone of US civil liberties jurisprudence, creating a cause of action against any person acting under the colour of authority of the federal government or that of the several states and who deprives another person of their constitutional rights. See *Kadić*, *supra* note 15 at 245.

§1983.¹¹¹ From these, the “joint action test” has received the widest application in ATS proceedings.¹¹² In *Wiwa v. Royal Dutch Petroleum*,¹¹³ the court agreed that “the relevant test in this case is the ‘joint action’ test, under which private actors are considered state actors if they are wilful participants in joint action with the State or its agents.”¹¹⁴ In addition to the willingness of private actors to act jointly with the state, the joint action test also takes into account the nature and quality of the cooperation itself. In *Wiwa*, the court relied on the reasoning in *Unocal*, which held that “[w]here there is a ‘substantial degree of cooperative action’ between the state and private actors in effecting the deprivation of rights, state action is present.”¹¹⁵ The court was satisfied that the alleged relationship between the corporation and Nigeria, if proven, would constitute “wilful participation” and “substantial cooperative action” within the meaning of the joint action test.

In 2002, some courts began applying international criminal standards of complicity to ATS cases in addition to, or in lieu of, the domestic standards suggested in *Kadić*.¹¹⁶ The first extension of international criminal law principles to corporate complicity was *Unocal*. The court found that decisions by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda were “especially helpful” for ascertaining the international law standard for aiding and abetting as it pertains to the ATS.¹¹⁷ With particular reference to the *Furundzija*¹¹⁸ and *Tadić*¹¹⁹ cases,

111. Forcese, *supra* note 102 at 504.

112. See *e.g.* *Kadić*, *supra* note 15 at 245; *Beanal*, *supra* note 108, 374-80; *Talisman* (2003), *supra* note 83 at 328.

113. *Wiwa*, *supra* note 84. In that case, the plaintiffs alleged that Royal Dutch-Shell and Nigeria coordinated the campaign to suppress the Ogoni people, that the corporation provided the Nigerian military with boats and helicopters to facilitate attacks on Ogoni villages, and that the corporation bribed witnesses to falsify their testimony against Saro-Wiwa and paid the military to respond violently to Ogoni complaints concerning oil spills.

114. *Ibid.* at 40.

115. *Ibid.* at 40-42.

116. See *e.g.* *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322 at 1355 (N.D. Ga. 2002); *Barrueto v. Larios*, 205 F.2d 1325 at 1333 (S.D. Fla. 2002); and *Doe v. Unocal* (2002), No. 00-56603 at 45 (9th Cir. 2002) [*Unocal II*].

117. *Unocal II*, *ibid.*

118. *Prosecutor v. Furundzija*, ICTY IT-95-17/1-T, Judgment (10 December 1998) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Furundzija*].

and the discussion therein surrounding the constitutive *actus reus* and *mens rea* of aiding and abetting, the court devised a “modified *Furundzija* standard” for ATS purposes. As a result, corporate complicity is actionable in the Ninth Circuit under the ATS if a corporation is shown to have provided “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”¹²⁰ Judge Reinhardt, dissenting, would have applied “traditional civil tort principles embodied in federal common law” to determine the issue of corporate complicity.¹²¹ When resolving ancillary issues raised by federal grants of jurisdiction, he argued, courts have traditionally turned to the federal common law. In his opinion, the benefit of the common law’s vast experience is lost when federal courts apply, as did the majority, “undeveloped principle[s] of international law promulgated by a recently-constituted ad hoc international tribunal.”¹²²

Though the practice of referring to international criminal concepts of complicity and aider and abetter liability is gaining judicial approval,¹²³ Judge Reinhardt’s dissent in *Unocal*, the decision in *Re South African Apartheid Litigation*, and the continuing practice of resorting to §1983 jurisprudence indicate that the question awaits clarification from Congress or the Supreme Court. Guidance would also be welcome regarding the relevant factors to be considered in motions to dismiss ATS claims on the basis of *forum non conveniens*,

119. *Prosecutor v. Tadić*, ICTY IT-94-a-A, 38 ILM 1518 (1999).

120. *Unocal II*, *supra* note 116 at 48-49. The court in *Talisman* also derived substantive standards of complicity from ICTY case law, arriving at a standard similar to the *Unocal II* test. In that case, the court was satisfied that the standard would be met if the facts alleged were proven at trial, namely, that “Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations; ... [that] Talisman worked with Sudan to carry out acts of ‘ethnic cleansing’; that Talisman encouraged Sudan to do so; and that Talisman provided material support to Sudan, knowing that such support would be used in carrying out such unlawful acts.” See *Talisman* (2003), *supra* note 83 at 90-91.

121. *Talisman* (2003), *ibid.* at 90.

122. *Ibid.* at 97.

123. See *e.g. Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp.2d 331 (S.D.N.Y. 2005) [*Talisman* (2005)]; *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993); and *Liu Qi*, *supra* note 64. See also Forcese, *supra* note 102; Andrew Ridenour, “Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violations of the Law of Nations under the Alien Tort Claims Act” (2001) 9 Tul. J. Int’l & Comp. L. 581.

an issue that often arises in transnational human rights litigation involving corporations.¹²⁴ While some cases disclose fair and reasonable applications of traditional principles,¹²⁵ others are disappointingly parochial in focus.¹²⁶

All the cases discussed above, some of which are ongoing, allege the perpetration or complicit participation of multinational corporations in grave human rights abuses.¹²⁷ Indeed, more than any other type of claim brought under the ATS, the corporate complicity cases have yielded a considerable body of judicial and doctrinal reflection on the procedural and substantive contours of this statute. However, to my knowledge, not a single decision on the merits has yet been rendered against a corporate defendant in relation to allegations of extraterritorial human rights violations. While the sizeable settlement obtained in 2004 by Burmese plaintiffs in the *Unocal* litigation heartened human rights advocates, the 2006 dismissal of the claims against Canadian oil company Talisman was a sobering reminder of the challenges that await plaintiffs in ATS proceedings against corporations.

Talisman Energy is the largest Canadian oil producer, with operations on four continents.¹²⁸ In 1998, acting through a consortium of oil companies, Talisman acquired vast land concessions in Sudan, of which 11 million acres were under its exclusive control. In 2001, the Presbyterian Church of Sudan, Nuer Community Development Services (a non-profit organization providing support for Sudanese refugees living in the United States and abroad), and several citizens of Sudan filed a class action in the Southern District of New York against Talisman and the Republic of Sudan for grave human rights violations. The plaintiffs alleged that Talisman assisted the Sudanese military in ensuring the security of its oil fields and facilities. Specifically, they alleged that

124. See the critical discussion of the use of this doctrine in Baxi, *supra* note 101.

125. See *e.g.* *Aguinda v. Texaco* (2001), 142 F. Supp. 2d 534 (S.D.N.Y.); *aff'd* in *Aguinda* (2002), *supra* note 108.

126. See *e.g.* *Talisman* (2003), *supra* note 83 (particularly the analysis of Canada as a possible forum).

127. *Aldana* (2005), *supra* note 68; *Sarei*, *supra* note 88; and *Kiobel*, *supra* note 78. See also *Wiwa v. Royal Dutch Petroleum*, 2006 U.S. Dist. LEXIS 65601 (S.D.N.Y. 2006); *Bowoto v. Chevron Corp.*, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. 2006); *Saleh v. Titan Corporation*, 436 F. Supp. 2d 55 (D.D.C. 2006); *Almog v. Arab Bank PLC*, 2007 U.S. Dist. LEXIS 5826 (E.D.N.Y. 2007); and *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

128. For a good summary of the facts and procedural history, see *Talisman* (2003), *supra* note 83.

the corporation participated in the planning of security operations, which included forced displacements, detention, and genocide of non-Muslim Sudanese living in or near the Talisman oil fields. According to the plaintiffs, Presbyterian churches were burned and thousands of villages were destroyed. Talisman is further alleged to have facilitated the atrocities by allowing the Sudanese military to use its infrastructure, such as roads and landing strips, to launch raids against the local population. The plaintiffs sued under the ATS and TVPA, seeking declaratory and injunctive relief in addition to compensatory and punitive damages.¹²⁹

In 2003, Talisman's motion to dismiss the claim was rejected on all counts.¹³⁰ The district court held that the alleged corporate violations of international law were cognizable under the ATS; that personal jurisdiction flowed from the presence of Talisman's subsidiary Fortuna in the state of New York; that all plaintiffs had standing to bring the claim; that neither Sudan nor Canada were more appropriate fora; that dismissal was not warranted under doctrines of comity, act of state, or political questions; that all necessary parties were involved; and that equitable relief was appropriate. However, in 2006, after a series of favourable outcomes for the plaintiffs, the district court granted Talisman's motion to dismiss the lawsuit on the grounds that the plaintiffs had failed to show sufficient evidence that the oil company performed any act that could be construed as substantial assistance to the government of Sudan in committing acts of genocide, crimes against humanity, and war crimes.¹³¹

The most noteworthy Canadian development with respect to corporate complicity is a lawsuit filed in the Superior Court of Quebec in early July 2008. The municipal council of a small village situated on the West Bank sued a Montreal corporation and its director for their role in the development of dense residential housing in the area.¹³² In so doing, the plaintiffs allege, the corporation and its director are "aiding, abetting, assisting and conspiring with the State of Israel in

129. Responding to mounting pressure from shareholders and human rights groups, Talisman disposed of its oil interests in Sudan in 2002 and 2003. See "Talisman Pulls Out of Sudan" *BBC News* (10 March 2003), online: <<http://news.bbc.co.uk/2/hi/business/2835713.stm>>.

130. *Talisman* (2003), *supra* note 83.

131. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (E.D.N.Y. 2006) [*Talisman* (2006)].

132. See Sean Gordon, "Palestinian Villagers Sue Montreal Firm" *The Toronto Star* (11 July 2008), online: <<http://www.thestar.com/article/458375>>.

carrying out an illegal purpose,” namely, the creation of illegal settlements in occupied territory, which constitutes a war crime at international and Canadian law.¹³³ The plaintiffs allege that the defendants’ actions constitute breaches of the Fourth Geneva Convention and the *Rome Statute of the International Criminal Court*, as well as Canada’s *Geneva Conventions Act*¹³⁴ and *Crimes Against Humanity and War Crimes Act*.¹³⁵ The plaintiffs have requested declaratory relief in the form of a permanent injunction against the corporation from participating in the construction, sale, and marketing of settlement housing in the area, and punitive damages under the *Quebec Charter of Human Rights*.¹³⁶ While it is still very early in the proceedings, this case potentially raises groundbreaking issues in Canada with regard to justiciability, jurisdiction, and state immunity.

III. COMMON LAW JURISDICTION

As mentioned above, since 2001, a total of five new transnational human rights claims have been decided in Canada and the UK.¹³⁷ While four of the five cases ultimately turned on immunity issues, the prior question of jurisdiction *simpliciter* has proven problematic. At common law, jurisdiction over foreign parties and events exists if plaintiffs can show a “real and substantial connection” between the parties, the claim, and the forum.¹³⁸ The rationale of the real and substantial connection test is to prevent courts from entertaining claims that do not materially involve the interests of the forum and, out of comity, to refrain from interfering in matters that arise within the jurisdiction of another state. In applying the test, courts look at a series of connecting factors, which are essentially territorial in nature, including the domicile of the parties, the location of the evidence and witnesses, and the place the injury occurred. Clearly, as the Human Rights Committee of the International

133. *Bil’in (Village Council) et al. v. Green Park International Inc. et al.*, Motion Introducing a Suit, Court No. 500-17-044030-081, filed 7 July 2008, at para. 9 (pleadings on file with author).

134. R.S.C. 1985 c. G-3; *ibid.* at paras. 16, 24.

135. S.C. 2000 c. 24; *ibid.* at paras. 18-20, 24.

136. *Ibid.*, para. 39.

137. *Supra* note 29.

138. *Spiliada Maritime Corp. v. Cansulex* (1986), [1987] 1 A.C. 460 (H.L.); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; and *Hunt v. T & N plc*, [1993] 4 S.C.R. 289. See also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, which represents a choice of law analogue to these jurisdictional cases.

Law Association British Branch observed, when applying these factors to civil claims for extraterritorial torture, “the forum with which the action has its closest and most real connection is the forum in which the acts complained of ... took place. The relevant witnesses will (usually) be there; the relevant documents (if any) will be there; and the governing law will almost certainly (applying English [and Canadian] choice of law rules) be the law of the foreign forum.”¹³⁹

In *Bouzari v. Iran (Bouzari)*, Justice Swinton applied that test, albeit rather cursorily, and stated that “[i]f one were to apply Canadian conflicts rules with respect to jurisdiction in the normal fashion, the logical conclusion would be that there is no real and substantial connection between the wrongdoing that gave rise to the litigation and Ontario, and, therefore, Ontario courts have no jurisdiction.”¹⁴⁰ However, Justice Swinton pointed to two factors that made her doubt the fairness of declining jurisdiction on the basis of traditional standards, namely, that Bouzari was suing for the *jus cogens* crime of torture and that he could not reasonably expect to obtain a remedy in Iran. “Given this reality,” she concluded, “I do not feel it appropriate to decide this case on conflicts rules alone. It may be that the Canadian courts will modify the rules on jurisdiction ... where an action for damages for torture is brought with respect to events outside the forum.”¹⁴¹

As it happened, four weeks after this *Bouzari* decision, the Ontario Court of Appeal released a series of five judgments, the so-called *Muscutt* Quintet, clarifying the general principles and factors that govern the assumption of jurisdiction in inter-provincial and transnational tort claims.¹⁴² However, the cases did not deal with extraterritorial torture or comparable serious personal harms and therefore did not address the aptness of territoriality-based principles of jurisdiction in a context directly relevant to transnational human rights claims. In the leading decision, *Muscutt v. Courcelles*, Justice Sharpe identified eight “factors emerging from the case law that are relevant in assessing whether a court should

139. ILA Report, *supra* note 2 at 146.

140. *Bouzari*, *supra* note 29 at para. 16.

141. *Ibid.* at para. 17.

142. *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) [*Muscutt*]; *Lemmex v. Sunflight Holidays* (2002), 60 O.R. (3d) 54 (C.A.); *Leufkens v. Alba Tours International* (2002), 60 O.R. (3d) 84 (C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.); and *Sinclair v. Cracker Barrel Old Country Store* (2002), 60 O.R. (3d) 76 (C.A.).

assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere.”¹⁴³ They are:

- the connection between the forum and the plaintiff’s claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is provincial or international in nature; and
- comity and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere.¹⁴⁴

Sharpe J.A. emphasized that no one factor is determinative, but found rather that “all relevant factors should be considered and weighed together” in determining whether a real and substantial connection between the parties, the proceedings, and the forum exists.¹⁴⁵

The *Muscutt* factors were subsequently applied in two claims arising from extraterritorial torture: *Saleh v. United Arab Emirates (Saleh)* and the appellate decision in *Bouzari*.¹⁴⁶ In *Saleh*, where a Canadian citizen sued the United Arab Emirates (UAE) in relation to his alleged detention and torture in that country, Justice Chadwick applied the *Muscutt* factors and found no real and substantial connection between the proceedings and Ontario. While he recognized the unfairness to the defendant in not assuming jurisdiction given the latter’s inability to sue (or even return) to the UAE, the extraterritorial nature of the claim and a thin evidentiary record ultimately militated against the assertion of jurisdiction. In the court’s view, “the injuries suffered by the plaintiff occurred in [the UAE] and the majority of the damage suffered by the plaintiff occurred in the same location. The evidence with reference to his pain and suffering and loss of income in Canada is extremely sparse. As such, this Court should not exercise jurisdiction.”¹⁴⁷ Because the reasons for judgment in *Saleh* are so brief, they provide very little discussion of the claim itself. The court made no mention of

143. *Muscutt*, *ibid.* at 45-52.

144. *Ibid.*

145. *Ibid.* at 45.

146. *Saleh*, *supra* note 29; *Bouzari (2004)*, *supra* note 29.

147. *Saleh*, *supra* note 29 at para. 24.

peremptory norms, human rights, or international obligations. Instead, it applied the eight *Muscutt* factors rather mechanically and concluded that it had no jurisdiction on the basis of the insufficiency of the evidentiary record and the tenuous territorial connections between the events and Ontario.

Though more thoughtful, the Court of Appeal's decision in *Bouzari* also failed to reconcile the real and substantial connection test with the particular nature of civil proceedings for extraterritorial torture. Goudge J.A. struggled with the test's unwieldiness in transnational human rights cases, recognizing that the straight application of the *Muscutt* factors "would probably yield the conclusion that there is no real and substantial connection to Ontario."¹⁴⁸ Indeed, *Bouzari*'s claim involved foreign parties and extraterritorial events with no territorial link to Ontario other than his own presence in the forum and his ongoing physical and psychological suffering. Though it was not necessary to apply the test,¹⁴⁹ Goudge J.A. echoed Justice Swinton's concerns:

[There] are several circumstances that make the presumptive conclusion of no jurisdiction troubling. First, the action is based on torture by a foreign state, which is a violation of both international human rights and peremptory norms of public international law. As the perpetrator, Iran has eliminated itself as a possible forum, although it otherwise would be the most logical jurisdiction. This would seem to diminish significantly the importance of any unfairness to the defendant due to its lack of connection to Ontario.

Second, if Ontario does not take jurisdiction, the appellant will be left without a place to sue. Given that the appellant is now connected to Ontario by his citizenship, the requirement of fairness that underpins the real and substantial connection test would seem to be of elevated importance if the alternative is that the appellant cannot bring this action anywhere.¹⁵⁰

Clearly, traditional rules of jurisdiction cannot easily accommodate transnational human rights claims where private parties seek redress for extraterritorial violations of public international norms. New categories need to be fashioned to address the particularities of these claims, namely, the nearly inevitable lack

148. *Bouzari* (2004), *supra* note 29 at para. 32.

149. *Ibid.* at para. 38 (Justice Goudge stated: "However, given the conclusion I have reached on the issue of state immunity, it is unnecessary to finally determine how the real and substantial connection test would apply here. That is best left for a case in which the issue must be resolved").

150. *Ibid.* at paras. 36-37.

of territorial connection with the forum, the international public interest in enforcing peremptory norms, and the imperative of avoiding denials of justice.¹⁵¹

One possibility is the recognition of universal civil jurisdiction for violations of human rights that have achieved the status of peremptory norms.¹⁵² In 2004, such a model of universal jurisdiction received an important endorsement by the European Commission in the context of the *Sosa* appeal. The Commission, which at the time represented fifteen states, filed a brief and argued generally in support of ATS-style universal civil jurisdiction over a limited set of offences, as long as it is exercised consistently with international law and the ends of justice. The Commission argued that, “to the extent recognized, [universal civil jurisdiction] should apply only to a narrow category of conduct and should be exercised only when the claimant would otherwise be subject to a denial of justice.”¹⁵³

European support for a cautious, justice-oriented principle of universal civil jurisdiction is not surprising given Europe’s leading role in the ongoing work of the Hague Conference on Private International Law, where universal civil jurisdiction remains firmly on the agenda. In its 2001 *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, the Conference explicitly recognized the right of states to assert universal civil jurisdiction over certain violations of international law in draft article 18(3):

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151. On the interaction of existing categories and the forging of hybrid categories sensitive to the transnational human rights context, see the discussion of limitation periods in the final section of Scott, *Introduction*, *supra* note 21. See also the discussion of multiple characterizations in the final section of Scott, *Translating Torture*, *supra* note 101.
152. See Anne C. McConville, “Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction’s Relationship to *Ex Juris Service*, *Forum Non Conveniens* and the Presumption of Territoriality” in *Torture as Tort*, *supra* note 2, 157.
153. *Sosa*, *supra* note 32 [Brief of *Amicus Curiae* the European Commission in Support of Neither Party, 2004 WL 177036 at 26-27]. See the discussion of the reasoning in the Commission *amicus* brief in Scott, *Remarks*, *supra* note 31. See also the section “Effective access to justice as an emerging human rights premise” in Craig Scott, “Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights” in Asbjørn Eide, Catarina Krause & Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 2d ed. (The Hague: Kluwer Law International, 2001) 563 at 592-94, especially the interpretation of House of Lords jurisprudence as implicitly treating foreign courts and English courts as “a fused judicial system (fused by the transnational litigation context)” for purposes of ensuring effective access to judicial remedies in at least one of the national court systems.

18(3) Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action claiming damages in respect of conduct which constitutes—

[a] genocide, a crime against humanity or a war crime;] [or]

[b) a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that claim is for civil compensatory damages for death or serious bodily injury arising from that crime.

Sub-paragraph b) only applies if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]¹⁵⁴

It is noted that the jurisdiction provided under sub-paragraph (b) is in line with the European Commission's submissions in *Sosa*, that universal jurisdiction should be exercised in respect of violations of peremptory norms of international law where, in the circumstances, the claimant faces the prospect of being denied justice. It would appear that no such requirement is proposed with regard to genocide, crimes against humanity, and war crimes. The draft provision is evidence of the growing acceptance within the international community of some version of universal civil jurisdiction.¹⁵⁵

Further support for universal civil jurisdiction can perhaps also be inferred from provisions in certain countries for obtaining monetary damages in criminal proceedings. Indeed, in many civil law legal systems, victims are allowed to join criminal prosecutions as civil parties and seek damages as part of the court's sentencing process.¹⁵⁶ In his concurrent opinion in *Sosa*, Justice Breyer explained the significance of consensus on universal jurisdiction as an

154. See Permanent Bureau & Co-reporters, "Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001" (Interim Text prepared by the Permanent Bureau and the Co-reporters from the Hague Conference on Private International Law, The Hague, 22 June 2001), online: <http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf>.

155. Note a certain parallelism between the permissive framing of draft article 18(3)—"[n]othing ... shall prevent..."—and a savings-clause in the *Convention against Torture*, *supra* note 74, Art. 14(2). See the discussion of the zone of judicial initiative that Art. 14(2) may open up in Scott, *Remarks*, *supra* note 31.

156. Beth Van Schaack, "In Defence of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention" (2001) 42 *Harv. Int'l L. J.* 141 at 143.

appropriate avenue for the prosecution of universally condemned behaviour, including torture:

The fact this procedural consensus exists suggests that recognition of universal jurisdiction in respect of a limited set of norms is consistent with principles of international comity. ... That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented and to recover damages in the criminal proceedings itself. Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.¹⁵⁷

In the absence of legislation equivalent to the ATS, common law courts are left with outmoded territorially-based jurisdictional standards. While there are signs of growing consensus about the desirability of some universal civil principle, common law courts have yet to assert jurisdiction on this basis.

Another way of approaching the question of common law jurisdiction over transnational human rights proceedings is to ask whether plaintiffs may point to an available cause of action for extraterritorial human rights violations. Put differently, there is a debate as to whether violations of public international norms protecting the human person entail the recognition of a private right to seek redress at common law. This issue is relevant to the general topic of *Torture as Tort*, as transnational human rights litigation is largely conditioned by the manner and extent to which international law is understood to interact with domestic law. Indeed, if plaintiffs and lawyers bring civil claims with respect to breaches of international law in domestic courts, it is because they assume that domestic courts can properly administer that law and grant appropriate remedies for its violations.

In common law jurisdictions such as the United Kingdom, the United States, and Canada, it is a well-established principle that customary international norms are incorporated into the common law and that national courts may ascertain, interpret, and apply those norms in appropriate cases.¹⁵⁸ Since the

157. *Sosa*, *supra* note 32 at 762-63.

158. *Hape*, *supra* note 31 at para. 39; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 41-44; Hersch Lauterpacht, "Is International Law Part of the Law of England?" in Elihu Lauterpacht, ed., *International Law: Being The Collected Papers of Hersch Lauterpacht*, Vol. 2 (Cambridge: Cambridge University Press,

eighteenth century, common law courts have generally adhered to Blackstone's view that "the law of nations (wherever any question arises which is properly the object of it's [*sic*] jurisdiction) is here adopted in it's [*sic*] full extent by the common law, and is held to be part of the law of the land."¹⁵⁹

But what effect do customary international norms have once they are incorporated into the law of the land? Are they automatically binding, in the sense that they can form the rule of decision of the court? Do incorporated customary international norms give rise to enforceable rights at common law? Some customary norms are given automatic effect at domestic law; for instance, before the enactment of state immunity legislation, national courts ascertained and directly applied the customary rules of state immunity as a matter of course.¹⁶⁰ But in other contexts, such as criminal law, the direct applicability of customary norms remained largely undetermined. Clarification on this front came in 2006, when the House of Lords rendered its decision in *R. v. Jones*.¹⁶¹ In that case, a group of peace activists sought a declaration that the British government had committed the international crime of aggression when it took part in the invasion of Iraq. The customary crime of aggression, it was argued, was enforceable in domestic courts by virtue of its incorporation into the common law. The Law Lords upheld the general principle of incorporation, but held that if common law judges once enjoyed the power to create new offences, it was no longer appropriate to do so. Ultimately, the court held that customary international crimes were not directly triable in domestic courts pursuant to the policy that the power to define criminal offences rests solely with Parliament.¹⁶² The Federal Court of Australia had reached a similar conclusion in *Tompson v. Nulyarimma*,¹⁶³ where individuals sought to enforce the international prohibition against genocide in domestic courts in relation to the government's treatment of the Aboriginal population. This debate, of

1975) 537; and Gibran van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 137-70. See also François Larocque & Martin Kreuzer, "L'incorporation de la coutume internationale en common law canadienne" (2007) 45 Can. Y. Int'l L. [forthcoming in 2008].

159. Blackstone, *supra* note 31 at 67.

160. See e.g. *Trendtex*, *supra* note 1.

161. *R. v. Jones*, [2006] UKHL 16, [2007] 1 AC 136 (H.L.) [*Jones*].

162. *Ibid.* at paras. 10, 30-31, 65-66.

163. See *Nulyarimma v. Thompson* (1999), 120 I.L.R. 353 (Fed. Ct. Australia).

course, could not have gone very far in Canada, where common law criminal offences do not exist.¹⁶⁴

What effect does *R. v. Jones* have on transnational human rights litigation? Do the policy reasons of democratic accountability and legitimacy, which counsel against the direct enforcement of international crimes in domestic courts, apply *mutatis mutandis* to the recognition of internationally derived torts through the common law? The House of Lords said nothing of the propriety of enforcing international norms through domestic civil actions, though Lord Hoffman was careful to confine his conclusions to the criminal law.¹⁶⁵ Lord Bingham perplexingly cited *Sosa* as an example of an instance where an international norm was not domestically enforced.¹⁶⁶ In *Sosa*, it will be recalled, the US Supreme Court found that the prohibition against arbitrary detention lacked sufficient definite content at international law to be actionable under the ATS. It is unclear how Lord Bingham felt that *Sosa* was on point: *Sosa* is not authority for the proposition that international norms may not give rise to enforceable rights in domestic courts *per se*, but is rather a decision about the specific requirements of the ATS, a statute with no equivalent in the UK.

In any case, *R. v. Jones* appears to have reignited a debate, which had seemingly been extinguished by Lord Denning in *Trendtex*,¹⁶⁷ between two competing views regarding the manner in which customary norms are received into the common law. Under one concept—incorporation—customary norms are adopted into the common law and directly applicable as such by domestic courts. Blackstone and Lord Mansfield are frequently cited as authorities for incorporation.¹⁶⁸ Under the other view, transformation, customary norms have no direct effect in domestic courts without some prior overt and formal act of assent by Parliament. The classic authority for transformation remains *R. v. Keyn*,¹⁶⁹ where the court queried whether it could exercise its criminal jurisdiction in relation to a crime committed by a foreigner on a foreign ship situated in

164. *Criminal Code*, R.S.C. 1985 c. C-46, s. 9. (effectively eliminating common law offences, but creating an exception for contempt of court).

165. *Jones*, *supra* note 161 at para. 62.

166. *Ibid.* at para. 23.

167. *Trendtex*, *supra* note 1 at 554.

168. Shaheed Fatima, *Using international Law in Domestic Courts* (Oxford: Hart, 2005) at 405.

169. *R. v. Keyn* (1876), 2 Ex. D. 63.

English territorial waters. Since English law provided no guidance on these issues, Chief Justice Cockburn reviewed the international law on the matter, but declined to give effect to any international rule without sufficient evidence that the examined principles “have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage.”¹⁷⁰ Chief Justice Cockburn then went on to clarify his view of Parliament’s role:

In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the [international] law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature.¹⁷¹

In Chief Justice Cockburn’s view, then, international norms have no domestic effect if they have not been transformed into domestic law by statute. A century later in *Trendtex* Lord Denning rejected transformation, holding that the Court of Appeal could apply the newly developed customary norm of restrictive immunity without waiting for Parliament to intervene. “As between the two schools,” Lord Denning stated, “I now believe the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognize a change in the rules of international law. . . . International law does change, and the courts have applied the changes without the aid of any Act of Parliament.”¹⁷²

Though the Court of Appeal’s decision in *Trendtex* apparently signalled the death of transformation, the House of Lords decision in *R. v. Jones* resuscitated it for international crimes. While other international norms may well be directly incorporated into and applied at common law, customary international crimes must receive the transformative assent of Parliament. In short, despite Lord Millet’s view to the contrary in *Pinochet (No. 3)*,¹⁷³ it is now firmly established that customary international crimes are not directly triable in English courts.

170. *Ibid.* at 202.

171. *Ibid.* at 203.

172. *Trendtex*, *supra* note 1 at 554.

173. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R 827 at 911-12 [*Pinochet (No. 3)*].

It remains to be seen whether and to what extent courts outside the United States will be receptive to the direct enforcement of international norms through the common law. In *R. v. Hape*, a case on the extraterritorial application of the *Charter*, the Supreme Court of Canada affirmed the continued relevance of the doctrine of incorporation in Canada and instructed courts to “look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and *the development of the common law*.”¹⁷⁴ It may be that, on the basis of their inherent jurisdiction, Canadian and English courts are able to recognize new causes of action for torture on the theory that the “prohibitive rules of customary law” are incorporated into the common law. But looking back at the few Canadian and English transnational human rights proceedings on record, it is striking to note how little judicial discussion this issue has received. One wonders whether the *Bouzari* and *Al-Adsani* courts simply assumed it to be within their purview to enforce international norms through their civil jurisdiction. Reference to the principle of incorporation in the courts’ reasons for judgment supports this hypothesis, though it is impossible to draw definitive conclusions in the absence of explicit reasoning on this point. One possible explanation, of course, is that the courts did not feel compelled to say much on the civil actionability of the international crime of torture in light of their decisions that the claims were barred in any event by state immunity.

IV. STATE IMMUNITY

Just as it challenges jurisdiction *simpliciter*, transnational human rights litigation also challenges established conceptions of state immunity.¹⁷⁵ The recognized exceptions to state immunity do not provide ready-made solutions for claims alleging gross breaches of peremptory norms of international law, such as torture, genocide, slavery, and extrajudicial killing.¹⁷⁶ Indeed, the commercial activity

174. *Hape*, *supra* note 31 at para. 39 [emphasis added].

175. See Wai, *supra* note 101; Adams, *supra* note 19. See also François Larocque, “*Bouzari v. Iran: Testing the Limits of State Immunity in Canadian Courts*” (2003) 41 Can. Y.B. Int’l L. 343 [Larocque, *Bouzari*]; Andrea Bianchi, “Denying State Immunity to Violators of Human Rights” (1994) 46 Austrian J. Pub. Int’l L. 195.

176. Ian Brownlie, “Principles of Public International Law” in Roswell B. Perkins *et al.*, eds., *Restatement of the Law: The Foreign Relations Law of the United States*, vol.1 (St. Paul: American Law Institute Publishers, 1987) at 537.

exception arose in response to increased international trade and the need to ensure fairness and stability in commercial transactions.¹⁷⁷ The local tort exception, for its part, was designed to enforce the sovereign interest of the forum state in proceedings concerning death or personal injury occurring on its territory.¹⁷⁸ But lawsuits for extraterritorial human rights violations differ substantially from commercial litigation or claims arising from receiving-state motor vehicle accidents involving diplomatic personnel, the typical scenario envisaged by the local tort exception. While one type of claim concerns the interests of private parties, the other involves the vital interests of the entire community of nations.¹⁷⁹

As defined by article 53 of the *Vienna Convention on the Law of Treaties*, peremptory norms of international law are rules from which no derogation is allowed.¹⁸⁰ In the vertical international legal order, peremptory norms embody the highest and most fundamental values. They represent categorical limits on state prerogative, effectively invalidating contrary acts, and, as such, operate substantially like a constitution.¹⁸¹ While the prohibitions on slavery, torture, extrajudicial killing, war crimes, and genocide are generally regarded as peremptory norms, the rule of state immunity is not. Accordingly, complex questions arise when peremptory norms and state immunity collide. What are the international legal ramifications of granting immunity to a state that allegedly practices torture? Does a forum state engage its own international responsibility by granting immunity to an alleged torturer state? Is the grant of immunity tantamount to some form of complicity in or recognition of the breach?¹⁸²

177. Peter D. Troobof, "Foreign State Immunity: Emerging Consensus on Principles" (1986) 200 R.C. 245 at 266-67.

178. Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) at 309.

179. Alexander Orakhelashvili, "State Immunity and International Public Order" (2002) 45 Ger. Yearbook Int'l L. 227.

180. *Vienna Convention*, *supra* note 35. See also Adams, *supra* note 19 at 272.

181. *Furundzija*, *supra* note 118 at para 155; Orakhelashvili, *supra* note 179.

182. Jordan J. Paust, "Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine" (1983) 23 Va. J. Int'l L. 191. See also the International Law Commission's Articles on State Responsibility, which provide that "[n]o State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law]." James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), Art. 41(2).

Equally unsettling are the questions that arise when one attempts to apply classic immunity analysis to transnational human rights claims. What weight, if any, should the *jus cogens* status of the torture or genocide prohibitions have when defining those acts for immunity purposes? Can torture or genocide ever be characterized as being acts *jure imperii*? As Judges Higgins, Kooijmans, and Buergenthal pointed out in their Joint Separate Opinion in the *Arrest Warrant* case of 2002:

It is now increasingly claimed in the literature ... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform ... This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts.¹⁸³

The view that state immunity at international law must be countenanced in a manner consistent with the peremptoriness of the torture prohibition has not yet become part of the mainstream, though there are signs of impending change. Lingering resistance can largely be attributed to strict constructions of national immunity statutes in common law jurisdictions where judges, rightly or wrongly, refrain from exercising their historical purview in this field.¹⁸⁴

This can be seen in the European Court of Human Rights decision in *Al-Adsani v. United Kingdom (Al-Adsani (2001))*.¹⁸⁵ After exhausting his legal options in the United Kingdom,¹⁸⁶ Al-Adsani took his claim to Strasbourg and alleged that by upholding Kuwait's immunity, the British *State Immunity Act 1978* prevented his access to justice, a right guaranteed under the *European Human Rights Convention*.¹⁸⁷ The seventeen-judge Grand Chamber divided nine-to-eight on that issue. While the majority recognized that the *jus cogens* nature of the torture prohibition entailed the removal of immunity of individuals in criminal trials, it observed that no similar rule of international law had emerged for states in the context of civil proceedings.¹⁸⁸ The eight-judge

183. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. Rep. 1 at 85. Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans [internal references omitted].

184. Larocque, *Bouzari*, *supra* note 175 at 374-84.

185. [2001] 34 E.H.R.R. 273 [*Al-Adsani (2001)*].

186. *Ibid.*

187. 16 May 1972, Eur. T.S. 74, Art. 6.

188. *Al-Adsani (2001)*, *supra* note 185 at 66.

minority strongly disagreed with this distinction between criminal and civil proceedings:

It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere.¹⁸⁹

Given the stark disagreement in Strasbourg, it is likely that the normative hierarchy debate will resurface.

However that may be, the European Court's decision in *Al-Adsani* was followed by the Ontario Superior Court of Justice in *Bouzari*, where an Iranian national sued his government for torture in Tehran. Much like in *Al-Adsani* (2001), both the motions judge and the Court of Appeal for Ontario held the claims in *Bouzari* to be barred by the Canadian *State Immunity Act* (SIA),¹⁹⁰ which contains no exceptions for human rights violations. Nor could one be created as a matter of common law, since, according to the Court of Appeal, the Canadian statute must be taken as a complete code.¹⁹¹ The courts further adopted the European Court's view in *Al-Adsani* (2001) that neither customary international law nor treaty law required the denial of immunity in civil claims for extraterritorial torture. Of particular interest was the courts' reading of Article 14 of the *Convention Against Torture*, which provides that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."¹⁹² Based on the evidence before them, the motions judge and the Court of Appeal accepted the orthodox reading of Article 14 that requires states to compensate individuals only if they were tortured in their own territory.¹⁹³

189. *Ibid.* (joint dissenting opinion of Judges Rozakis and Calfisch, joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić, at §4). Judges Ferrari, Bravo, and Loucaides each issued separate dissenting reasons along similar lines.

190. R.S.C. 1985, c. S-18 [SIA].

191. *Bouzari* (2004), *supra* note 29 at para. 57.

192. *Convention Against Torture*, *supra* note 74 at Art. 14.

193. *Bouzari*, *supra* note 29 at para. 54; *Bouzari* (2004), *supra* note 29 at 692-93. See Andrew Byrnes, "Civil Remedies for Torture Committed Abroad: An Obligation under the Convention Against Torture?" in *Torture as Tort*, *supra* note 2, 537; Peter Burns and Sean

The correctness of this interpretation of Article 14 has recently been cast into doubt. In May 2005, upon hearing Canada's report that the *Bouzari* case had been dismissed, the Committee Against Torture—the body that monitors state compliance with the *Convention Against Torture*—expressed concerns about the absence in Canada “of effective measures to provide civil compensation to victims of torture *in all cases*,”¹⁹⁴ that is, including cases against states and not just individual defendants. The Committee then recommended that Canada “review its position under Article 14 of the Convention to ensure provision of compensation through its civil jurisdiction to *all victims of torture*.”¹⁹⁵ The use of the words “all victims of torture” in the Committee's report is noteworthy and appears to imply that both Canadian and foreign victims of torture are contemplated. Accordingly, and perhaps most importantly, the ultimate implication of the Committee's recommendation appears to be that Article 14 is intended to target both domestic and extraterritorial torture. While the Committee Against Torture's interpretation of the *Convention Against Torture* is not binding, it is highly persuasive authority that could properly be invoked by a court of law. It remains to be seen whether future courts will feel empowered by the Committee's recommendations or whether they will wait for Parliament to amend the SIA.¹⁹⁶

On the basis of the rulings in *Bouzari*, the Ontario Superior Court of Justice also dismissed claims against Syria and Jordan for torture. In *Arar v. Syrian Arab Republic*,¹⁹⁷ Justice Echlin held that the SIA contained no exception for extraterritorial torture, and that none could be read in on a *Charter* remedy basis. On another front, the court took the view that, on the face of the pleadings,

McBurney, “Impunity and the United Nations Convention Against Torture: A Shadow Play Without an Ending?” in *Torture as Tort*, *supra* note 2, 275.

194. OHCHR, 33rd Sess., 658th Mtg., UN Doc. CAT/C/SR.658 (2005) at para. 4(g) [emphasis added].

195. *Ibid.*, at para. 5(f) [emphasis added].

196. At the time of writing, Canadian and British parliaments are studying private members' bills that would create causes of action for terrorism and torture, respectively, and correspondingly amend the SIA in both countries to deny immunity in such proceedings. In Canada, see Bill S-225, *An Act to amend the State Immunity Act and the Criminal Code (detering terrorism by providing a civil right of action against perpetrators and sponsors of terrorism)*, 2nd Sess., 39th Parl., 2008. In the United Kingdom, see Bill 49, *Torture (Damages) Bill* [HL], 2007-2008 Sess., 2008 (2nd reading 16 May 2008).

197. *Arar*, *supra* note 29.

the case disclosed insufficient allegations of Canada's complicity in the torture to engage Arar's *Charter* rights.¹⁹⁸

In addition to Bouzari, Arar, and Saleh, two other Canadians have recently been tortured abroad. In 2003, Zahra Kazemi, a Montreal-based photojournalist was arrested in Tehran while taking pictures of a student protest. She was brutally tortured and died in Iranian custody after her arrest. Diplomatic attempts by the Canadian government and Kazemi's relatives to repatriate her body or obtain a semblance of justice have thus far been unsuccessful.¹⁹⁹ In 2006, the estate of Zahra Kazemi brought proceedings in the Superior Court of Quebec requesting \$17 million in damages against the Islamic Republic of Iran and an order for the repatriation of Kazemi's remains. In addition to the Republic of Iran, the Kazemi action names the head of state, Ayatollah Ali Khamenei, the Chief Public Prosecutor of Tehran, and the former Deputy Chief of Intelligence as co-defendants.²⁰⁰ State immunity will predictably be the most contentious aspect of this litigation.

The other case is that of William Sampson, a Vancouver man who, along with five other British men, was arrested in Saudi Arabia in 2000 and accused of bombings in that country. He was jailed for nearly three years during which time he was regularly tortured.²⁰¹ While Sampson has not sought redress in Canadian courts, he and two of his British co-detainees (Mitchell and Walker) sought to initiate proceedings against Saudi officials in the UK with respect to the torture they suffered. Their attempts to sue were stopped short, as they were denied leave to effectuate service *ex juris* on grounds of state immunity.²⁰²

During the same period, another British citizen, Ronald Jones, was detained and tortured by Saudi officials in circumstances unconnected with Sampson, Mitchell, and Walker. Upon his return to England, he commenced proceedings for torture against the Kingdom of Saudi Arabia. In 2003, Master Whitaker of the Queen's Court set aside service of Jones's claim against Saudi

198. *Ibid.* at paras. 16-18.

199. For details of the Kazemi affair, see "CBC News In Depth: Zahra Kazemi" *CBC News* (27 November 2007), online: <<http://www.cbc.ca/news/background/kazemi/>> (pleadings).

200. *Estate of the Late Zahara Kazemi et al. v. Islamic Republic of Iran et al.*, Motion to Institute Proceedings, Court No. 500-17-031760-062, online: <<http://www.zibakazemi.org/suitqc.pdf>>.

201. For more details of the Sampson affair, see "In-depth: The William Sampson Story" *CBC News* (14 June 2006), online: <<http://www.cbc.ca/news/background/sampson/>>.

202. *Mitchell*, *supra* note 29.

Arabia on the basis that the kingdom was immune under the *State Immunity Act 1978*.²⁰³ The appeal from that decision was heard in conjunction with the Sampson, Mitchell, and Walker appeal in 2004. The Court of Appeal dismissed the Jones claim against Saudi Arabia, but allowed the appeal of the other claimants. With regard to Saudi Arabia, the Court of Appeal in essence followed its own ruling in *Al-Adsani* (1996)²⁰⁴ and that of the majority of the European Court of Human Rights in *Al-Adsani* (2001),²⁰⁵ holding that international law did not yet recognize an exception to state immunity for torture and that, in any event, the *State Immunity Act 1978* did not apply.

While the Court of Appeal felt bound by its previous ruling in *Al-Adsani* (1996), where it held that the *jus cogens* status of torture did not diminish the immunity of foreign states, it did not show the same attachment to its 1997 decision in *Propend*,²⁰⁶ where it held that state officials benefit from the same immunity as the state itself for acts performed in the normal course of duty. Following the House of Lords' lead in *Pinochet (No. 3)*, the court recognized that torture was prohibited by a peremptory norm of international law and did not "fall within the scope of the official duties of a state official."²⁰⁷ Lord Denning, recanting the position he had taken in *Pinochet (No. 3)*, stated: "[o]nce the conclusion is reached that torture cannot be treated as the exercise of a state function so as to attract immunity *ratione materiae* in criminal proceedings against individuals, it seems to me that it cannot logically be so treated in civil proceedings against individuals."²⁰⁸ In short, the court ruled that, given the special status of the torture prohibition and the limited subject-matter immunity of state officials at international law, it could "no longer be appropriate to give blanket effect to a foreign state's claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of

203. *Jones*, *supra* note 29.

204. *Al-Adsani* (1996), *supra* note 19.

205. *Al-Adsani* (2001), *supra* note 185.

206. *Propend Finance v. Sing* (1997), 111 I.L.R. 611 (C.A.).

207. *Jones*, *supra* note 29 at para. 125.

208. *Ibid.* at para. 127. Compare with his dictum in *Pinochet (No. 3)*, *supra* note 173 at 281, which reads: "[w]ere these civil proceedings in which damages were claimed in respect of acts committed by Senator Pinochet in the government of Chile, Chile could argue that it was itself indirectly impleaded. That argument does not run where the proceedings are criminal and where the issue is Senator Pinochet's personal responsibility, not that of Chile."

systematic torture.”²⁰⁹ The court remanded the plaintiffs’ application for leave to serve outside the jurisdiction to the Queen’s Court for further consideration. Before discussing the House of Lords decision in the *Jones* and *Mitchell* cases,²¹⁰ other developments in the law of state immunity will be canvassed.

A notable development was the removal of Iraq and Libya from the US list of designated “state sponsors of terrorism” in 2004 and 2006, respectively.²¹¹ Accordingly, Iraq and Libya are no longer in the same league as Cuba, Iran, North Korea, Syria, and Sudan, the remaining designated “state sponsors of terrorism” that have no immunity in US courts when sued by US citizens for acts of torture, extrajudicial killing, and terrorism pursuant to §1607(a)(7) of the FSIA.²¹²

Other important immunity-related developments occurred outside the common law world. In 2000, the Hellenic Supreme Court (Areios Pagos) heard a civil action arising from the Nazi occupation of Greece during the Second World War.²¹³ The court held that Germany’s violations of peremptory norms amounted to an implied waiver of its immunity, an argument that had not been well received in US cases because the waiver exception to immunity ultimately hinges upon acceptance by the foreign state that it is amenable to the lawsuit.²¹⁴ The lower court decision was reversed in 2002 by a six-to-five majority of the Greek Special Supreme Court (Anotato Eidiko Dikasterio), holding that the military activities of foreign states are protected by state immunity, “regardless of whether the acts constitute a violation of *jus cogens* or not.”²¹⁵ Moreover, in *Ferrini v. Germany*, an Italian civil claim in relation to forced deportation and slave labour during the Second World War, the Italian Corte di Cassazione

209. *Jones*, *ibid.* at para. 126.

210. See notes 199-220 and accompanying text.

211. Iraq was removed from the list in 2004 by Presidential Determination (69 Fed. Reg. 18810 (2004) (to be codified at 22 C.F.R. part 126)), and its designation was officially rescinded later that year (69 Fed. Reg. 61702 (2004)). Moreover, by Presidential Determination dated 12 May 2006, George W. Bush certified the rescission of Libya’s designation as a State sponsor of terrorism (see 71 Fed. Reg. 31907 (2006)), in keeping with his administration’s policy to restore diplomatic relations with that country.

212. Swan, *supra* note 4 at 71, note 23.

213. *Prefecture of Voiotia v. Federal Republic of Germany*, 4 May 2000, case 11/2000, Areios Pagos (Hellenic Supreme Court), summarized at (2001) 95 A.J.I.L. 198.

214. *Prinz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

215. Andrea Gattini, “To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals’ Claims for War Damages?” (2003) 1 J.I.C.J. 348 at 361. As the author points out, however, the comments of the Special Court on this issue are *obiter dicta*. See *ibid.*

ruled that Germany was not entitled to claim immunity for violations of peremptory norms on the basis of the same normative hierarchy argument that failed in *Al-Adansi*, *Bouzari*, and *Jones*.²¹⁶

Also in 2004, the United Nations General Assembly adopted the *United Nations Convention on the Jurisdictional Immunities of States and their Property (UN Convention)* and opened it for signature.²¹⁷ Aside from the *European Convention on State Immunity*, it is the only multilateral treaty on state immunity. Pursuant to Article 30, the *UN Convention* will come into force on the 30th day following the deposit of the 30th instrument of ratification.²¹⁸ It remains to be seen whether it will be more successful than the European Convention, to which only eight states have adhered since its adoption in 1972. Neither treaty allows exceptions for human rights violations, but Norway claims that the *UN Convention's* silence does not preclude such an exception from developing at international law.²¹⁹ It is unknown what impact the *UN Convention* will have on international thinking, particularly with respect to whether international law permits or requires states to assume jurisdiction over foreign states in circumstances implicating serious human rights violations. As will be seen below, the House of Lords used the *UN Convention's* silence on human rights to uphold the immunity of Saudi Arabia in a civil proceeding for torture.²²⁰

Finally, in *Jones*,²²¹ the House of Lords reversed the Court of Appeal decision²²² that dismissed the claim against Saudi Arabia as barred by the *State Immunity Act 1978*, but upheld the claim against the named officials. In his

216. Andrea Gattini, "War Crimes and State Immunity in the *Ferrini* Decision" (2005) 3 J.I.C.J. 224.

217. GA Res. 59/38, UN GAOR, 59th Sess., Supp. No. 49, UN Doc. A/59/49, Vol. 1 (2005) 486.

218. At the time of writing, of the twenty-eight states that have signed the convention, only four have completed the ratification process: Austria, Norway, Portugal, and Romania. The United Nations Treaty Collection, online: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty38.asp>>.

219. Upon ratifying the *UN Convention* in March 2006, Norway filed its understanding "that the Convention is without prejudice to any future international development in the protection of human rights." *United Nations Covenant on Jurisdictional Immunities of States and their Property, Norway: Ratification*, C.N.280.2006.TREATIES-2 (Depositary Notification), online: <<http://treaties.un.org/doc/Treaties/2005/05/20050531%2003-50%20PM/Related%20Documents/CN.280.2006-Eng.pdf>>.

220. See notes 221-23, below, and accompanying text.

221. *Jones*, *supra* note 161.

222. (2004), [2005] Q.B. 699 (C.A.).

leading speech, Lord Bingham criticized the Court of Appeal for distinguishing between the immunity of the state and that of its officials, holding that a state may claim immunity for any act of its agents, regardless of the legality of those acts. The fact that the impugned conduct contravened a well-established peremptory norm of international law was, in his view, of no consequence. Lord Bingham then went on to dismantle and distinguish the authorities that support the proposition that *jus cogens* violations such as torture do not attract immunity at international law.²²³ The strong minority in *Al-Adsani* (2001), the holding in *Pinochet* (No. 3), Justice Breyer's concurrence in *Sosa*, Judge Cassese's dicta in *Furundzija*, the Corte di Cassazione's decision in *Ferrini*, and the Committee against Torture's recommendations to Canada—all of which have been discussed above—were each held to be inapplicable. Lord Hoffman agreed with Lord Bingham and held, further, that whatever substantive effect peremptory prohibitions may have at international law, they do not entail the assumption of civil jurisdiction, or otherwise affect the procedural rules by which English courts determine their jurisdiction.²²⁴ In short, the Law Lords agreed with the Court of Appeal in *Bouzari* (2004) that both international and national law still accorded states and their agents full immunity in civil lawsuits for torture.

One of the most surprising aspects of the decision in *Jones* is the House of Lords' parochial treatment of some of the relevant international and foreign authorities. This was most striking in its dismissal of the Committee Against Torture's recommendations that Canada review its position under Article 14 to ensure the compensation of torture victims in all cases. Lord Bingham noted that the Committee was "not an exclusively legal and not an adjudicative body" and that "whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight."²²⁵ Lord Hoffman was more severe in his appraisal of the Committee's work: "Quite why Canada was singled out for this treatment is unclear, but as interpretation of article 14 or a statement of international law, I regard it as having no value."²²⁶ These are startling comments from two judicial members of the British Institute of International and Comparative Law.

223. *Jones*, *supra* note 161 at paras. 17-28 (per Lord Bingham).

224. *Ibid.* at paras. 44-46 (per Lord Hoffman).

225. *Ibid.* at para. 23 (per Lord Bingham).

226. *Ibid.* at para. 57 (per Lord Hoffman).

While reports and recommendations from treaty monitoring bodies are not usually binding, they are nevertheless persuasive authority and courts may properly invoke them in framing treaty obligations. For instance, in *Suresh*, the Supreme Court of Canada relied on a 2000 report from the Committee Against Torture to support its reading of the *Convention Against Torture* in that case.²²⁷ Some commentators argue that, through their reports and recommendations, treaty-monitoring bodies have a measurable impact on the development of international law as a whole. According to van Ert, the reports, statements, and recommendations of treaty-monitoring bodies serve not only “to ensure compliance with their respective instruments,” but also “to elucidate and develop the content of the international obligations they enforce.”²²⁸ “In this sense,” he adds, “the treaty-monitoring bodies may not only apply international law but also develop it.”²²⁹ Of course, the power to recommend and the ultimate weight of the recommendations depend very much on the mandate of the monitoring body as defined in the treaty itself. By the terms of the *Committee Against Torture*, state parties are obligated to report to the Committee Against Torture, which is composed of “experts of . . . recognized competence in the field of human rights.”²³⁰ The *Convention Against Torture* empowers the Committee to make “such comments or suggestions on the report as it considers appropriate.”²³¹ To state, as Lord Hoffman did, that the Committee’s recommendations have “no value” is more than a little cynical. His Lordship’s characterization undermines the institutional framework established by the *Convention Against Torture*, to which Canada and the UK have subscribed.

The House of Lords’ treatment of the *Ferrini* decision also deserves comment. In *Jones*, both Lord Bingham and Lord Hoffman took the view that the case was wrongly decided and that, in any event, “one swallow does not make a rule of international law.”²³² Lord Hoffman had been impressed by a thoughtful commentary of the decision premised on Dworkin’s model of the judicial task.²³³

227. *Suresh*, *supra* note 36 at para. 73.

228. van Ert, *supra* note 158 at 45.

229. *Ibid.*

230. *Convention Against Torture*, *supra* note 74, Art. 17.

231. *Ibid.*, Art. 19.

232. *Jones*, *supra* note 161 at para. 22 (per Lord Bingham).

233. See Pasquale De Sena & Francesca De Vittor, “State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case” (2005) 16 E.J.I.L. 89.

As summarized by Lord Hoffman, the authors of the case note argued “that the *Ferrini* case should be seen ... as giving priority to the values embodied in the prohibition of torture over the values and policies of the rules of state immunity.”²³⁴ While His Lordship agreed that this manner of ordering competing principles is a basic technique of adjudication in domestic law, he denied that it could be also applied in cases involving international law. He stated that “[i]t is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.”²³⁵

With respect, Lord Hoffman misapprehends the historical role international law has accorded national courts in contributing to its development. National courts are powerful participants in the international legal order, shaping and directing the future path of the law alongside the governments and legislatures of the states they serve. For his part, Westlake understood the international function of national courts to flow from the unity of customary law and the common law. The international law that is received into the common law, he wrote, is that “which at the time exists between States, without prejudice to the right and duty of the courts to assist in developing its acknowledged principles in the same manner in which they assist in developing the principles of the common law.”²³⁶ In contemporary international legal terms, the creative function of national courts can be seen in the bottom-up incorporation of the so-called “general principles of law recognized by civilized nations.”²³⁷ According to Franck, national courts are “the principal progenitors of third-party international law;” they are “profoundly and quite properly involved in the process of international law-making, for international law is part of the law of all civilized states, just as, reciprocally, the ‘general principles of law recognized by civilized States’ has been incorporated, by Article 38 of the Statute of the World Court, in the international *corpus juris*.”²³⁸ To be sure, as Lord Bingham himself acknowledges, Lord Denning’s

234. *Jones*, *supra* note 161 at para. 63 (per Lord Hoffman).

235. *Ibid.*

236. John Westlake, “Is International Law a Part of the Law of England?” (1906) 22 Law Q. Rev. 14 at 26.

237. *Statute of the International Court of Justice*, Art. 38(1)(c).

238. Thomas M. Franck, *The Structure of Impartiality: Examining the Riddle of One Law in a Fragmented World* (New York: Macmillan, 1968) at 223.

adoption of the restrictive rule of state immunity in *Trendtex*²³⁹ and the Privy Council's earlier decision to the same effect in *Philippine Admiral*²⁴⁰ were key factors in helping that principle gain international acceptance in the common law world.²⁴¹ To say, as Lord Hoffman did, that "it is not for a national court to 'develop' international law," effectively amounts to a repudiation of the creative function that international law extends to national courts, and which English courts have traditionally exercised with prudent wisdom. If national courts were instrumental in establishing the restrictive rule of immunity in the twentieth century, it is difficult to understand why they could not participate in the further development of that rule in the twenty-first century with regard to violations of peremptory norms of international law protecting the human person.

Finally, the House of Lords' characterization of the *UN Convention* requires brief commentary. Lord Bingham properly observed that the Convention did not contain a human rights exception and that, in any event, the UK had not ratified it. He went on to say that "despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or *jus cogens* exception is wholly inimical to the claimants' contention."²⁴² The Convention is clearly the latest authoritative statement on the law of state immunity, but cannot accurately be portrayed as a perfect reflection of contemporary international thinking. It is no more than an expression of compromise; such is the nature of the international treaty-making process. But as Lord Bingham correctly noted, the International Law Commission working group debated the inclusion of a human rights exception to state immunity in 1999.²⁴³ The fact that no consensus was reached is surely significant, but the debate inversely reveals that a growing number of judges, scholars, and governments support the recognition of a human rights exception to state immunity. While it may be, as the House of Lords held, that international law does yet recognize an exception to the rule of state immunity in transnational human rights proceedings for torture, that state of affairs is not likely to endure.

239. *Trendtex*, *supra* note 1.

240. *Phillipine Admiral v. Wallem Shipping* (1975), [1977] A.C. 373 (P.C.).

241. *Jones*, *supra* note 161 at para. 8 (per Lord Bingham).

242. *Ibid.* at para. 26 (per Lord Bingham).

243. *Ibid.*

V. COMPENSATION AND OTHER REMEDIES

As one delves deeply into the procedural details and preliminary questions that arise in transnational human rights litigation, it is easy to lose sight of the goal such lawsuits seek to achieve: obtaining some form of legal remedy for victims of grave human rights violations. Transnational human rights litigation is aimed particularly at compensation, but trials are not the only available process, nor is financial compensation the only available type of reparation. International and domestic law recognize other remedies that may be applicable to human rights victims, such as restitution, rehabilitation, satisfaction, and guarantees of non-repetition.²⁴⁴ All of these remedies, including financial compensation, may be obtained through non-adversarial public processes such as diplomatic channels or commissions of inquiry.

The case of Maher Arar is a good example. As mentioned above,²⁴⁵ in 2003, Arar, a Canadian national, was detained and tortured for one year in Jordan and Syria after being arrested and deported by US officials while in transit at New York's JFK International Airport. In 2004, the government of Canada ordered a judicial inquiry into the role of Canadian officials in Arar's ordeal. Justice Dennis O'Connor of the Ontario Court of Appeal was appointed commissioner under the *Inquiries Act* and granted extensive investigative powers.²⁴⁶ In 2006, Justice O'Connor released his report clearing Arar of any wrongdoing and finding no evidence that he constituted a threat to national security. While there was no direct evidence that the Royal Canadian Mounted Police or Canadian Security Intelligence Service participated in his deportation, Justice O'Connor found evidence suggesting that US officials acted on the basis of information about Arar given to them by Canadian law enforcement and security services. Justice O'Connor also found many shortcomings in Canada's approach to securing Arar's release from Syrian custody.²⁴⁷ In 2007, on the basis

244. Commission on Human Rights, *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33*, UN (HR, 56th Sess., Item 11(d)), UN Doc. E/CN.4/2000/62 (18 January 2000).

245. *Supra* note 23.

246. *Inquiries Act*, R.S.C. 1985, c. I-11.

247. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006).

of the recommendations contained in Justice O'Connor's report, Arar obtained a formal apology from the Canadian government and a CDN \$11 million compensatory award. This result is to be contrasted with Arar's failed litigation in relation to the same events. His lawsuit against US state officials in the Eastern District Court of New York²⁴⁸ and his claim against Syria in the Ontario Superior Court of Justice have both been dismissed.²⁴⁹

The combined effect of the *Arar* outcome, the *Unocal* settlement, and the variegated results in enforcing ATS and FSIA judgments suggests that transnational human rights litigation's greatest value does not lie in the hope of compensatory awards at the end of costly trials, but rather in the publicity such trials generate and their ability to bring about positive results for victims of human rights abuse.

VI. CONCLUSION

The developments in transnational human rights litigation since 2001 are wide-ranging and far-reaching. Accordingly, the future is unclear. Litigation under the ATS will continue to develop cautiously, having now had the (relative) benefit of the US Supreme Court's endorsement and direction. The normative specificity requirements spelled out in *Sosa*, it can be surmised, will lead to fuller arguments on and greater judicial scrutiny of international legal sources, particularly with regard to customary and preemptory norms. On this issue, both the bench and bar will continue to rely on sound legal scholarship to assist them in identifying the international norms that give rise to a cause of action at common law.

Some of the common objections against transnational human rights litigation have been deflated by the *Sosa* decision. It is sometimes claimed that human rights are too significant for the political identity of nationally defined communities or too politically charged to be enforced by foreign states' judiciaries.²⁵⁰ In the same vein, it is also argued that the judicialization of international human rights defeats the effectiveness of the political process and

248. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), aff'd (2008) 532 F.3d 157 (2d. Cir. 2008).

249. *Arar*, *supra* note 29 and accompanying text.

250. See Jan Klabbers, "Doing the Right Thing? Foreign Tort Law and Human Rights" in *Torture as Tort*, *supra* note 2, 553.

unnecessarily risks straining foreign relations.²⁵¹ In upholding the ATS's applicability, the majority in *Sosa* addressed the politically charged nature of transnational human rights claims as follows:

It is one thing for American courts to enforce constitutional limits on our own state and federal governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in [transnational human rights] cases.²⁵²

In the court's view, human rights have been transformed into law by the community of nations and find expression in the common law. Accordingly, determinations as to whether that law has been breached properly lie with the judiciary. Transnational human rights litigation is premised on the principle that Chief Justice Coke invoked in *Dr. Bonham's Case*²⁵³ and that Chief Justice Marshall defended in *Marbury v. Madison*, namely, that "it is emphatically the province and duty of the judicial department to say what the law is."²⁵⁴ That is not to say, however, that courts should not refrain from exercising their jurisdiction in claims where political questions are inextricable from the legal ones. On this connection, the *Sosa* court stated that determinations regarding the actionability of an international norm at common law necessarily require that due consideration be given to both the judicial policy of case-specific deference to the opinion of the political branches and the practical ramifications of making the civil remedy available.²⁵⁵ Likewise, upon remanding *Mitchell et. al* to the Queen's Court for reconsideration, the Court of Appeal stated the following:

[The] fact that a civil claim was being brought against an official or agent of a foreign state in respect of conduct in that state, and the sensitivity of any adjudication by the

251. See e.g. Curtis A. Bradley, "The Cost of International Human Rights Litigation" (2001) 2 Chicago J. Int'l L. 457; Curtis A. Bradley & Jack L. Goldsmith, "The Current Illegitimacy of International Human Rights Litigation" (1997) 66 Fordham L. Rev. 319.

252. *Sosa*, *supra* note 32 at 727.

253. *Dr. Bonham's Case*, (1610) 8 Co. Rep. 107 a, 77 E.R. 638 (C.P.).

254. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 at 177 (1803).

255. *Sosa*, *supra* note 32 at 733. See also *Jones*, *supra* note 29 at para. 81, which notes that the political sensitivity of adjudication should rightly feature as an important factor in any decision whether or not to exercise jurisdiction.

courts of another state upon such an issue, would rightly feature as important factors in any decision whether or not to exercise any such jurisdiction. Even in a case where service can be effected within the jurisdiction, the English court has a general power to decline or stay the exercise of its jurisdiction on grounds that it is an inappropriate forum.²⁵⁶

Along with state immunity, doctrines of justiciability such as *forum non conveniens* and act of state will continue to condition future developments in transnational human rights litigation and will properly do so as long as they take full account of the evolving interaction between international human rights law and doctrines that serve to shield states and other actors from accountability.

256. *Jones, ibid.* at para. 81.