Domestic Courts and International Human Rights

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Domestic courts invariably rely on domestic norms. Thus, the use of international human rights by such courts is a product of the globalization of both modern constitutional law and international law. In this chapter we discuss two different types of the application of international human rights law by domestic courts. The main focus will be on the direct implementation of international human rights law when domestic courts rule on either criminal or civil cases on the basis of universal jurisdiction. But before discussing this, we begin by reviewing the more indirect use of international human rights law, where such courts use international human rights law as a source of interpretation when applying their own domestic standards.

THE USE OF INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC CASES

In this first approach, use, international human rights law is used as a means of interpreting various domestic legal provisions, but this does not constitute a direct application of international law in the domestic court’s jurisprudence. Cited international cases can have different degrees of influence. The least influential is when judges merely mention international human rights law; the next step is when they actually ‘follow’ such cases as some form of authority, and also ‘distinguish’ such law. With the exception of some rarely discussed uses of binding international law, the authority of cited international human rights law
is only persuasive in the process of judicial interpretation.\footnote{The rise of persuasive authority is the most important factor of ‘constitutional cross-fertilization,’ which can prove to be not only a useful tool for better judicial determinations, but which might eventually help lead to the construction of some kind of ‘global legal system.’ The European Convention on Human Rights of the Council of Europe and the Treaty of the European Union enjoy this persuasive authority among constitutional courts of the member States, even though they are keen to reserve the power of final interpretation of both documents for themselves. On the other hand, constitutional courts of the States participating in the human rights protection system of the Council of Europe and the European Union are, in at least nearly all circumstances, prepared to accept the authority or binding force of the Convention and the Treaty.}

On the use of external sources, one of the great difficulties is that precedent is a controversial issue under international law. Most international tribunals limit themselves to the particular dispute at hand. For example, Article 59 of the Statute of the International Court of Justice (ICJ) proclaims that ‘the decision of the Court has no binding force except between parties and in respect of that particular case.’ However, an important exception against the use of precedent can be found under the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), which rely quite heavily on their past decisions.\footnote{The application of international law discussed here does not treat such law as a binding source of interpretation. In other words, it considers it as an engagement without a presumption that it necessarily be followed. This engagement approach of constitutional interpretation supports the judicial recourse to international (and foreign) law and argues that this should be the appropriate posture to take also for those courts, including the US Supreme Court, which includes members who staunchly reject any use of external sources.}

The American Approach

The Supremacy Clause of the US Constitution (Article VI) expressly makes treaties supreme over the constitutions and laws of the several states, but leaves ambiguous their status at the federal level. The United States has not ratified the American Convention on Human Rights nor submitted to the jurisdiction of the Inter-American Court, and regional integration in North America has not proceeded to a stage comparable to that in Europe. This American exceptionalism – perhaps best represented in the opinions of Justice Antonin Scalia – rejects the use of international or foreign law. According to this position, American constitutionalism is based solely on domestic law and domestic standards, and international law is to play no role in the interpretation of this law. On this basis, scholars argue that there are two diverging conceptions of constitutionalism, namely a ‘European’ one and a different ‘American’ approach. In that view, ‘international constitutionalism’ is a genuinely European conception.\footnote{According to the argument espoused by Justice Scalia and other adherents, nations are...}
bound by international law only if it is legitimate. However, because international law is viewed as having no democratic legitimacy, what this then means is that the United States is not legally bound by it.

Yet around the advent of the new millennium, the Supreme Court’s manifest awareness of international human rights, as well as the law of other constitutional systems, was seemingly on the rise. The decisive steps were the Lawrence and the Roper cases. In Lawrence v Texas (2003) the Court struck down the criminal prohibition of sodomy, departing from its earlier decision in Bowers v Hardwick (1986). In the majority judgment, Justice Kennedy cited the decision of the European Court of Human Rights in Dudgeon v United Kingdom (1981) to illustrate ‘that the reasoning in Bowers has been rejected elsewhere.’ One commentator went as far as to state that the citation ‘suggests that constitutional courts are all engaged in a common interpretative enterprise.’

But as noted above, Justice Scalia’s dissent shows that there is no agreement on this within the Court. He first made it clear that the ‘Bowers majority opinion never relied on values we share with other civilization,’ and second emphasized that ‘[t]he Court’s discussion of … foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since this Court … should not impose foreign moods, fads or fashions on Americans.’

In Roper v Simmons (2005) the substantive issue changed to the constitutionality of the death penalty for juveniles, but what is more important, at least for present purposes, is the continuing debate on the migration of constitutional ideas. Writing for the majority in striking down such practices, Justice Kennedy reviewed a range of external sources and stated that ‘while not controlling our outcome … [foreign judgments] provide respected and significant confirmation for our own conclusions,’ going on to say in this general praise for the use of international and foreign law, ‘These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of reasons we honor the Constitution, then is, because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.’

Once again, however, Justice Scalia’s dissent in this case attacks the Court’s comparative approach by accusing the majority of holding the view ‘that American law should conform to the laws of the rest of the world’ – a view which ‘ought to be rejected out of hand.’

The future of the use of international law and foreign constitutional law at the US Supreme Court is very hard to predict, since two of the last four nominees during their confirmation hearings in the Senate rejected this approach. Then-nominee Judge Roberts, now Chief Justice, emphasized that it would be absurd to look to international and foreign law as binding authority,
although even the staunchest international constitutionalists do not advocate using foreign or international authority as binding precedent. Similarly, Justice Alito expressed his own concerns about the use of international and foreign law during his own confirmation proceedings. The prospects are not much better concerning the lower federal and state courts either. In 2011–12, many state legislatures discussed explicitly forbidding state courts (which in most instances would also bind federal courts operating in those jurisdictions) from making use of foreign and international law, and two states even passed such laws.

**The German Approach**

As opposed to the American approach, the ‘postwar juridical paradigm’ of rights protection – a common constitutional model found in a variety of liberal democracies – views judicially enforced constitutional rights as subjects of comparative constitutional interpretation. This ‘constitutionalist’ concept is of course in favour of the legitimacy and thus the abidingness of international law as a source of constitutional interpretation. This concept is characteristic of the German attitude towards international law, which makes the use of rules of international law much easier in Germany. According to Article 25 of the German Basic Law (Grundgesetz), the generally recognized rules of public international law are part of federal law, and have priority over national law. In disputed cases, the Federal Constitutional Court is entitled to interpret these rules. Article 100 (2) requires any court to obtain a decision from the Federal Constitutional Court whenever, in the normal course of litigation, its judges doubt whether a general rule of international law is part of federal law or whether it directly creates rights and duties for individual persons. In 1982, for instance, the Court added a further criterion for the examination of cases in which an accused is sentenced in his absence by relying on the minimum procedural requirements of public international law. In some other cases where the Court interprets procedural guarantees that are not spelled out in the Basic Law, such as the presumption of innocence, they deduce this right from the rule of law, but since it had no textual basis in the national constitution it cited the words of the European Convention on Human Rights and drew heavily on the case law of the Strasbourg organs in its jurisprudence. In another case in which four collaborators and agents of East Germany’s Ministry of State Security challenged the validity of their convictions for spying on the Federal Republic, their defense cited various provisions of international law and attempted to make the argument on the basis of this law that spying activities against West Germany carried out on East German territory could not be criminally punished in reunified Germany. In this case, the Court – based upon a legal opinion prepared by the Max Planck Institute of International Public Law in Heidelberg – held that the trial and conviction did not infringe a general rule of international law in violation of Article 25.
The Indian Approach

In India, unlike the US and Germany, international treaties are not self-executing, and their provisions do not automatically form part of the domestic law. In this regard, India follows the Anglo-Saxon tradition according to which customary international law is considered as a part of the law of the land as long as it is not inconsistent with national statutes. The Supreme Court has, however, in an innovative way sought to incorporate certain rights by interpreting the Constitution in accordance with international treaties. This happened with the right to adequate housing. Even though there is no domestic law creating an obligation on the State to house the homeless, the Supreme Court so interpreted Article 21 of the Constitution, which provides that no citizen shall be deprived of his life or personal liberty except according to procedure established by law, and it supported this interpretation by citing various international covenants.

In the case *Jolly George Varghese v Bank of Cochin* (1980), the Supreme Court posed the question from international law as to whether it is right to enforce a contractual liability by means of imprisonment in light of Article 11 of the International Covenant on Civil and Political Rights, which reads: ‘No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.’ The Court emphasized that India is a signatory to this Convention and Article 51(c) of the Constitution obligates the State to ‘foster respect for international law and treaty obligations in the dealings of organized people with another’; invoking the well-recognized rule of interpretation, ‘it is a principle generally recognized in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the State’s international obligations,’ it set aside the detention of the debtor.

In the case *Olega Tellis v Bombay Municipal Corp.* (1985) dealing with housing, the Court ruled: ‘Eviction of the petitioners from their dwellings would result in the deprivation of their livelihood. There is thus a close nexus between life and means of livelihood. And as such that which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life.’ In the *Chameli Singh v State of U.P.* (1996) judgment, it held that the right to life ‘would take within its sweep the right to … a reasonable accommodation to live in…’ In short, the Court has consistently upheld the view that the right to life guaranteed under Article 21 of the Indian Constitution includes such things as a right to shelter. In this view, it invoked Article 25(1) of the Universal Declaration of Human Rights and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

Beyond this, the Supreme Court has read into the law a right of privacy, even though, once again, there is no specific right in the domestic law. It has done this by invoking Article 17 of the International Covenant on Civil and Political Rights, which states that ‘1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection
of the law against such interference or attacks’ (*People’s Union for Civil Liberties v UOL* [1997]).

**UNIVERSAL JURISDICTION**

The direct application of international human rights law by domestic courts began after the Holocaust and the passage of the Universal Declaration of Human Rights. The Universal Declaration (along with the Genocide Convention) was a promise by governments that future genocides would not take place. Conceptually, this promise challenged the idea of unconditional sovereignty of the state with respect to governance within its own boundaries, a fundamental principle of international law since the Peace of Westphalia in 1648 and reflected in Article 2 (1) of the United Nation’s Charter. This emerging constitutionalization of international law, which can also be seen as ‘a modest beginning of a new international morality,’ on the one hand limits the jurisdiction of the State when it is not acting in accordance with international human rights law. On the other hand, another State (the so-called forum State) provides the possibility for foreign citizens to bring a cause of action before its own court in order to enforce international human rights norms. With this act the forum State replaces the legal protection rejected by another State, and at the same time offers the legal remedies provided by the emerging bodies of international human rights. At the same time, since the international mechanisms are still not fully adequate to address most international human rights abuses, most enforcement efforts take place in domestic legal systems.

The first step of this development occurred in the Nuremberg Trials with the recognition of the international law principle of universal jurisdiction in criminal cases, which authorizes, and in some circumstances even obligates, any nation in which ‘evildoers’ (*hostis humani generis*, enemies of all mankind) are found to employ the principle *aut dedere aut judicare* to either prosecute those accused or extradite them to another nation that will put them on trial. This concept of universal jurisdiction in criminal cases also gave rise to modern civil litigation based on the same legal principles, in some cases by aliens who were victims of human rights violations by foreign agents, in other instances in actions against foreign private actors and multinational corporations, and in some exceptional cases, even in jurisdiction over foreign states.

**Criminal Cases**

This approach of the implementation of international human rights by domestic courts is a consequence of the growing support around the world for ‘globalization’ of accountability for crimes carried out by high governmental officials, to revise the earlier tendencies towards de facto impunity for them. This necessarily challenges the principle of State sovereignty in relation to international
criminal law, which has long meant there is to be no interference in the domestic affairs of another sovereign State, leading to the doctrine of sovereign or State immunity and the Act of State doctrine, as well as territorial jurisdiction serving as the primary basis for criminal jurisdiction.

Universal jurisdiction in criminal law is a tool to end the impunity of individuals responsible for gross and serious violations of human rights in the form of national jurisdiction by States having neither territorial or active (the perpetrator) or passive (the victim) nationality, or protective (over crimes that are injurious to its national security) jurisdiction. As Theodor Meron states: ‘Indeed, the true meaning of universal jurisdiction is that international law permits any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim.’

Some claim that universal jurisdiction is associated with the presence of a suspect in the executing State, while others argue that universal jurisdiction allows all States to exercise jurisdiction. For instance, K.C. Randall argues that universal jurisdiction is truly ‘universal’ because any State may unilaterally launch an investigation, even in absentia. On the other hand, Luc Reydamss argues against in absentia proceedings on the grounds that the state does not have an objective or legal link with either the offense or the offender, and that this leads to an erosion in the concept of jurisdiction. According to the Princeton Principles on Universal Jurisdiction, a State can seek extradition of a suspect based on universal jurisdiction, but the actual exercise to adjudicate can only take place after the suspect is in custody. This means that the absence of a suspect is only allowed in pre-trial proceedings, but the suspect must be present for the actual trial.

Before listing some cases of the use of universal jurisdiction in criminal cases, let me begin with one of the most disappointing examples: the United States – which has no national legislation on universal jurisdiction – tried to bring Pol Pot, the leader of the Khmer Rouge regime in Cambodia, to justice in another State for crimes while in power between 1975 and 1979. This attempt failed. As initiatives to establish some form of accountability in Cambodia crystallized in 1997, the US considered arresting and extraditing Pol Pot to one of those States that had enacted universal jurisdiction provisions into their criminal codes, most notably Israel, Spain, and Canada. But all of these states declined the invitation, perhaps because none had any particular historic link with Cambodia, nor any national interest in this matter. But as a result of this, one of the worst dictators in all of history was never brought to justice.

The most prominent precedent for universal jurisdiction over genocide becoming customary international law was the Eichmann trial, which consisted of two decisions: the first being the District Court of Jerusalem on December 12 1961, and the second the decision by the Supreme Court of Israel on May 29 1962. Eichmann did not contest the basic facts of the charge; instead, he strongly challenged the jurisdiction of the Israeli domestic courts. First, he denied proper jurisdiction based on the grounds that his abduction and arrest
were illegal. The district court admitted that the method of bringing the suspect to Israel might be disputed as being a violation of international law, but argued that this dispute would be solved between the two States and would not affect the proceedings of the prosecution. The defense also made objections against jurisdiction, including the problem of the retroactive application of the law, but the courts rejected these objections and approved jurisdiction over the case on three different bases: one involved the passive personality principle due to the nationality of the Jewish victims; another was the protective jurisdiction of Israel, which was reflected in the (domestic) Nazis and Nazi Collaborators (Punishment) Law; and the third ground was universal jurisdiction.

On this latter point, both courts ruled that the crimes in question were not only crimes under the domestic law of Israel, but also represented a violation of international law. In the absence of an international criminal court, international law does not just restrict or deny the authority of a judicial organ of each State to try these crimes, but, at times, requires them to act because the jurisdiction to adjudicate certain crimes under international law is universal. The Israeli Supreme Court also held that it was justifiable to apply universal jurisdiction because the charge in this case was crimes against humanity. In response to the claim that universal jurisdiction could not be exercised before efforts had been made to extradite the suspect to the territorial State or the State of which the suspect was a national, both courts noted the fact that neither Argentina nor Germany had requested the extradition of Eichmann.

Another case of universal jurisdiction over genocide is the Demjanjuk case, in which US courts (lacking legislation prescribing universal jurisdiction for genocide at the national level) allowed the extradition of the suspect in 1986 to Israel based on the recognition of the State’s universal jurisdiction. Demjanjuk was suspected of killing tens of thousands of people, mostly Jews, by operating a gas chamber while he was working in a Nazi concentration camp in Poland during World War II.

Israel issued an arrest warrant against Demjanjuk in 1983 based on the same domestic law used in the case of Eichmann. Before the US courts, Demjanjuk raised similar objections as to the legality of Israeli jurisdiction; namely, that he was neither an Israeli national nor an Israeli resident and that the alleged crime was committed in the territory of Poland, not Israel, but also that the State of Israel did not exist at the time of the alleged commission of the crime. Both the District Court and the Court of Appeal recognized that Israel enjoyed universal jurisdiction under international law and accordingly gave permission for Demjanjuk’s extradition. Both courts held that international law allows any State to prosecute criminals who are common enemies to the human race (*hostis humani generis*), which means that any person who commits war crimes or crimes against humanity would be subject to universal jurisdiction. The courts also argued it would be possible to claim that Israel had jurisdiction based on protective jurisdiction and passive personality jurisdiction. However, the courts held that since Israel also had universal jurisdiction, there was no need to further investigate the other aspects of Israel’s jurisdiction. This means that, as opposed
to the Eichmann case, here the courts recognized Israeli jurisdiction solely on universal jurisdiction. Unlike the situation involving Eichmann, Israel did not have Demjanjuk in its custody. Therefore, the US courts acknowledged that universal jurisdiction has an active character, according to which the extradition of a subject can be requested from custodial States.

This active feature was also one of the characteristics of the most celebrated case in the 1990s, which drew much attention to universal jurisdiction. The case of Gen. Augusto Pinochet, the notorious former Chilean head of state, represented a joint effort to hold him legally accountable for crimes of state. As is generally known, General Pinochet, as a leader of the Chilean armed forces, organized a violent coup to overthrow the government of the democratically elected president, Salvador Allende, on September 11 1973. Some months later, Pinochet declared himself president of Chile. With a self-amnesty decree before his resignation in 1990 and a permanent position in the Chilean Senate afterwards, he assured for himself impunity for the gross human rights violations he had committed as head of the state.

The case first received international attention when Pinochet was arrested in the UK on October 16 1998, in accordance with the arrest warrant issued by a Spanish judge, Baltasar Garzón. While South American states, including Chile and Argentina, criticized the arrest as an act against State sovereignty through the violation of Pinochet’s immune status as ‘special envoy’ of the Chilean state, many European states supported the arrest on the basis of human rights, and such support triggered extradition requests from Switzerland, France, and Belgium. As some argue, the case offers more evidence of what is called ‘universality plus,’ meaning the exercise of universal jurisdiction when it is bolstered by other bases of jurisdiction to rely on. The proceedings in the French courts, as well as the original Spanish request for extradition – although it moved in the direction of universality – started with an explicit appeal to passive personality concerning French and Spanish victims of the Pinochet regime. Only the proceedings in Belgian courts were based solely on universality, deemed to be a sufficient ground for the exercise of jurisdiction.

The Spanish request for the extradition of Pinochet to face charges relating to genocide, terrorism, and torture was based both on the Spanish Criminal Procedure Act and the 1957 European Convention on Extradition. The first British response was a provisional warrant for Pinochet’s detention at a clinic where he was undergoing medical treatment issued by a London magistrate under the Extradition Act of 1989. This was followed by a second international arrest warrant issued by Spain that dealt with the additional enumerated crimes of torture and conspiracy to commit torture, detention of hostages, and conspiracy to commit murder. After Pinochet responded by seeking a writ of habeas corpus and leave for judicial review of his detention, the Divisional Court of the Queen’s Bench Division quashed both arrest warrants, partly by regarding Pinochet as immune during his period as a head of state and partly by refusing to regard extraterritorial claims to prosecute for a murder committed in Chile as
entitled to be treated as an ‘extradition crime.’ The Crown Prosecution Service appealed on behalf of Spain to the House of Lords. In the meantime, Spain expanded its extradition request once again to include genocide, torture, murder, and hostage-taking in Chile and elsewhere. A specially constituted Appellate Committee of the House of Lords upheld the extradition, but Pinochet’s counsel successfully filed a petition with the House of Lords contending that the verdict be set aside because of the undisclosed connections between that of the judges and Amnesty International. The judgment of a panel of seven Law Lords on March 24 1999 denied the claim of state immunity by a 6–1 majority and held Pinochet extraditable, but only for the commission of torture subsequent to September 29 1988, the date on which Britain enacted Section 134 of the Criminal Justice Act, making torture a crime in the United Kingdom regardless of where it was committed or the nationality of the perpetrator. Although this decision is a narrow response to the Spanish request, what it recognizes is that international crimes, to the extent that they are incorporated into domestic law, are not shielded from judicial prosecution by state immunity or by notions of the territoriality of criminal law.

Even though the British decision denied the Spanish request for all but the most marginal instances, and after keeping Pinochet under house arrest for 16 months the authorities allowed him to return home on grounds of ill health, it should still be viewed as groundbreaking because it was the first time that a former head of state was at least potentially being held legally accountable before an extraterritorial domestic court for alleged criminal activity of a political character during his period of rule. The proceeding against Pinochet in Europe had a catalytic effect in Chile as well. Numerous charges were pressed against him following his return to Chile in March 2000. In May of that year, a Chilean court ruled for the first time that Pinochet’s immunity as a senator for life was not a bar to his indictment in connection with certain crimes.

**Civil Litigation**

The United States has increasingly recognized claims based on extraterritorial jurisdiction, mostly by creating a legal space for human rights litigation. In the aforementioned extradition case of John Demjanjuk, US authorities assisted and recognized the requesting State’s assertion of universal jurisdiction over genocide, crimes against humanity, and war crimes. In the cases *United States v. Yunis*, *United States v. Yousef*, and *United States v. Rezaq*, the US itself exercised universal jurisdiction over international hijackers after apprehending them abroad and, in the case of *Rezaq*, even after a foreign conviction. But this United States practice lacks reciprocity, one of the most important principles of international law. The US government, which since Franklin Roosevelt’s leadership in setting up the United Nations and the Nuremberg Trials has promoted universal legal norms and the institutions to enforce them, has also refused to sign the Statute of ICC based on the grounds that this might lead to an international
tribunal or the courts of another country trying a United States agent for human rights violations. As Michael Ignatieff puts it: 'From Nuremberg onward, no country has invested more in the development of international jurisdiction for atrocity crimes and no country has worked harder to make sure that the law it seeks for others does not apply to itself.'

However, the United States enjoys a unique position in the world on the basis of its recognition of the principle of universal jurisdiction for civil litigation. In the past three decades, foreign nationals have brought hundreds of cases in US courts seeking to establish civil liability on the grounds of violating internationally recognized human rights. One group of these actions is based on the liability of private, non-state actors and corporations, while the other – the more exceptional suits – is directed against foreign states.

The principal basis for the approach of universal jurisdiction against non-state actors has been the Alien Tort Statute (ATS) of 1789 which, in Section 1350, provides in full: ‘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.’ Since 1992, the Torture Victim Protection Act (TVPA) has provided a second basis for suits in US courts regarding acts committed abroad when the alleged violations entail extrajudicial executions and torture. In contrast to the ATS, which provides jurisdiction only when the plaintiff is an alien, the TVPA provides a cause of action for both US nationals and aliens. Under these two laws, foreign government defendants can be sued. The third opportunity for civil litigation is provided by the Anti-Terrorism Act (ATA), which authorized civil suits of US nationals who are victims of international terrorism.

The Alien Tort Statute. Enacted as part of the Judiciary Act of 1789, soon after the ratification of the US Constitution, the ATS was intended to show the outside world, particularly European powers, that the newborn nation would not tolerate violations of the ‘Law of Nations,’ especially when victims were ambassadors or merchants. But the ATS remained virtually unnoticed and unused for nearly 200 years.

This dormant status of ATS ended when the Center for Constitutional Rights brought the *Filartiga* action. After a Paraguayan doctor and his daughter discovered that a former military leader of their country who had tortured their son/brother resided in New York, they brought an ATS action against him. The district court dismissed the case, ruling that the ATS did not provide the courts with jurisdiction over the claim, since the torture had occurred abroad. The Second Circuit Court of Appeals, in *Filartiga v. Pena-Irala* (1980), reversed the district court decision, finding that the prohibition against torture had risen to the level of the ‘Law of Nations.’ Therefore, the Court held that the ATS does provide for subject-matter jurisdiction even though the torture had occurred within another sovereign State’s border when a) a foreigner (alien) sues, b) for any tort, c) committed in violation of international law. The *Filartiga* court’s ruling was the subject of much debate. Some judges, such as Judge Robert H. Bork in *Tel-Oren v. Libyan Arab Republic* (1984), used an originalist interpretation by arguing that
the ATS enabled federal district courts to adjudicate violations of the Law of Nations, but only as that term was understood in 1789. However, over the course of the next two decades, most courts followed Filartiga and recognized the principle of universal jurisdiction, holding that non-citizens could bring ATS claims for violations of the law of the nations so long as the norm at issue was ‘specific, universal, and obligatory.’

The US Supreme Court first addressed the ATS in 2004 in the case of Sosa v. Alvarez-Machain. The Court held that the ATS is a jurisdictional statute only rather than a statute that created a cause of action, but also stated that, due to its incorporation of the Law of Nations, a cause of action already existed under the federal common law without the need to enact any other legislation. This means the Court accepted that jurisdiction under the ATS exists even for acts by another country’s foreign officials against that country’s own citizens. Most courts agree that Sosa did little to change the law in this area.

Since then, courts have found that norms such as crimes against humanity (including genocide), war crimes, and forced labor constitute violations of international law and are norms that give rise to ATS claims. One of the important post-Sosa decisions, using the Nuremberg Trials to find a customary norm for crimes against humanity, was the 2005 decision in Mujica v. Occidental Petroleum Corp. (2005), in which the plaintiffs’ claim arose from an attack on the town of Santo Domingo, Colombia, on December 13 1998. They alleged that Colombian military helicopters dropped cluster bombs on the town, destroying homes and killing 17 civilians, including six children, while wounding 25 others. Courts have also found war crimes to be actionable under the ATS, most notably in Presbyterian Church v. Talisman Energy II (2005) and in Sarei v. Rio Tinto (2006). Courts adjudicating ATS claims even before Sosa, starting as early as 1999 in the Iwanowa case, found also that forced labor is a violation of the Law of Nations and thus constitutes a cognizable claim under the ATS.

Another important possible direction of the ATS litigation involves the liability of non-state actors for human rights violations, although the US Supreme Court has not yet decided whether private, non-state actors can be liable under the ATS. Even though circuit courts are split over this issue, there are some decisions that have answered this question affirmatively. For instance, in the 1995 case of Kadic v. Karadzic, the Court found that non-state actors could be held liable for certain violations of the Law of Nations, such as genocide, war crimes, and crimes against humanity.

After the Kadic case, the number of lawsuits brought against corporations also increased, and this trend has continued over the next decade as well. The first decision, which addressed whether corporations can be held liable for violations of international law under the ATS, was the already cited 1999 case of Iwanowa v. Ford Motor Co., in which the district court rejected the defendant’s argument that private corporations were not bound by norms of international law and found that corporations could be liable under the ATS. In the 2003 Presbyterian Church v. Talisman Energy I case, the Court also rejected the defendant’s claim
that corporations are legally incapable of violating the Law of Nations by stating
that even though corporate entities, such as the Farben Corporation, were not put
on trial in Nuremberg, ‘the concept of corporate liability for *jus cogens* viola-
tions has its roots in the trials of German war criminals after World War II.’ In
2005, the district court in the case *In Re Agent Orange* similarly found that
corporations could be civilly liable for violating international law. Also in 2005
in the *Presbyterian Church II* case, the district court reaffirmed its earlier deci-
sions on corporate liability, stating that the *In Re Agent Orange* (2005) court
‘carefully treated the defendants’ objections to corporate liability before deci-
sively rejecting them, surveying the Nuremberg Trials.’ In the 2006 *Bowoto*
case, the district court also rejected Chevron’s argument that corporations could
not be held liable for human rights violations under international law.

Almost all of the cases concerning corporate liability also raised the question of
complicit liability for human rights violations, such as aiding and abetting. The first
significant case to adjudicate whether aiding and abetting claims could be brought
under the ATS was the 2000 district court case of *Bodner v. Banque Paribas* (2000),
where the Court ruled that such claims could be brought. In the 2003 Presbyterian
Church I case, the Court not only found that the industrialist cases of World War II
supported aiding and abetting liability, but relied on them in determining the stand-
ard for such liability as ‘knowing, substantial practical assistance.’ In the already
cited 2005 *In Re Agent Orange* case, the Court found that aiding and abetting liabil-
ity exists when corporations assist states that engage in human rights abuses, hold-
ing that the prohibition against aiding and abetting war crimes and other human
rights violations is recognized as customary international law.

*The Torture Victim Protection Act (TVAP).* This act permits claims by an
individual for torture or extrajudicial execution if committed ‘under actual or appar-
ent authority,’ or ‘under color of law’ of any foreign nation. The statute includes
a ten-year statute of limitations. TVAP cases are often filed in conjunction with
ATS claims, particularly on issues still left open by the ATS. For instance, in
*Cabello v. Fernández-Larios* (2005), the plaintiffs – decedents of Winston
Cabello, a Chilean economist who was executed by Chilean military officers in
1973 – filed an action in 1999 against an officer who participated in his execu-
tion. The plaintiffs included Cabello’s mother and two sisters, all US citizens, and
his brother, a Chilean citizen, as well as his estate, also considered as a ‘citizen’
of Chile. The complaint therefore contained TVAP claims for torture and extraju-
dicial killing on behalf of all of the plaintiffs and ATS claims for crimes against
humanity and cruel, inhuman, or degrading punishment on behalf of Cabello’s
estate and his brother, as non-citizen plaintiffs. The trial jury awarded the plain-
tiffs four million dollars in damages and the Eleventh Circuit upheld the verdict,
finding that the ten-year statute of limitations had not been tolled and that both
the ATS and the TVAP extended liability to those who conspired with or assisted
violations, as well as the direct perpetrators.

As we can see, the TVAP authorizes an individual who has been subjected to
torture to sue for damages and authorizes a suit for extrajudicial execution by either
the legal representative of the person killed or by ‘any person who may be a claim-
ant in an action for wrongful death.’ This means there is no requirement that the
individual or the representative be either a US citizen or an alien, or that the plain-
tiff or the acts have any connection to the US. The TVAP holds liable ‘an individual
who, under actual or apparent authority, or color of law, of any foreign nation
subjects an individual’ to either of the two specified violations: torture or extrajudici-
al execution. The TVAP has a ‘genuinely retroactive effect,’ meaning it can be
applied to violations committed before it was enacted in March 1992 if it does not
‘impair rights a party possessed when he acted, increase a party’s liability for past
conduct, or impose new duties with respect to transactions already completed.’

The Anti-Terrorism Act (ATA). This Act of 1992 provides jurisdiction and a
cause of action for claims by US nationals injured by an act of international ter-
rorism. In other words, this statute permits claims by US nationals injured by
criminal acts either outside the US or ‘transcending national boundaries,’ if the
act ‘appear[s] to be intended’ to intimidate or coerce civilians or a government.
The ATA excludes acts of war and suits against the US or foreign states and their
employees acting within their official capacity or under color of legal authority.

Many ATA cases have been filed against Palestinian organizations and
individuals. For instance, in Bilton v. Palestinian Interim Self-Government
Authority (2005), victims of a bombing in an Israeli settlement sued the
Palestinian Interim Self-Government Authority and the Palestinian Liberation
Organization. The court rejected the defendants’ claim to sovereign immunity
under the Foreign Sovereign Immunities Act (FSIA) because Palestine is not
recognized as a foreign state under FSIA, and rejected a political question
defense as well. The court also concluded that the bombing was not an act of
war, and allowed the action to proceed.

Another group of cases under the ATA targeted banks and other organizations
accused of funding Palestinian groups. In Linde v. Arab Bank (2005), US citizen
plaintiffs alleged that the bank’s activities in administering death benefits to fami-
lies of Palestinians who undertook suicide bombings made the bank liable under
the ATA. The district court found that the bank could be held liable under aiding
and abetting and civil conspiracy theories based on allegations that the bank knew
that the groups for which it provided services were engaged in terrorist activities.
There were also ATA claims arising out of the September 11 2001 terrorist actions.
In a case filed against a long list of individuals and organizations, plaintiffs
claimed that the defendants provided material support to Al Qaeda. The court
dismissed claims against several banks, holding that the ATA requires knowledge
that the defendant’s actions had contributed to the alleged terrorist acts.

JURISDICTION OVER STATES

The concept of state sovereign immunity based on the very idea of state sover-
eignty is a doctrine of international law which is applied in accordance with
national law in domestic courts. This means that although its requirements are
governed by international law, the law of the State before whose courts a claim
against another State is made determines the precise extent and manner of
application.  

Currently only eight countries – the United States, the United Kingdom,
Australia, Canada, Malaysia, Pakistan, South Africa, and Singapore – have
enacted legislation on state immunity adopting restrictive approaches, allowing
claims against another State before their own courts. Five countries – Kenya,
Ireland, New Zealand, Nigeria and Zimbabwe – have no legislation, but their
courts have accepted such practice as applicable.

The International Court of Justice (ICJ) does not appear to follow the restric-
tive approach of state immunity. In a case decided on February 3 2012, the ICJ
ruled that Germany has immunity from claims brought in foreign courts by
victims of the Nazi regime. The Court found that a 2008 decision by Italy’s
Supreme Court violated Germany’s sovereign rights by allowing an Italian
national to seek reparations in response to his deportation in 1944. Germany
appealed this decision to the ICJ in September 2011, arguing that allowing the
ruling to stand would violate state immunity and open the floodgates to new
claims. The Italian representatives alleged that the Italian court’s ruling was
necessary to secure compensation because all other avenues had failed. The ICJ
found that this ‘last resort’ notion was not a viable argument because redress in
international law is not based upon the availability of other manners of compen-
sation. This ruling by the ICJ is final and binding, effectively ending thousands
of reparations claims against Germany.

In fact, the only State that allows exceptions from the general rule of absolute
state immunity for certain acts contrary to international law is the United States.
The US Foreign Sovereign Immunities Act (FSIA) creates jurisdiction over for-
eign states, but only if the claim falls with a shortlist of enumerated exceptions
of immunity. One of these is provided by the State Sponsors of Terrorism excep-
tion, a 1996 amendment to FSIA permitting civil suits against a limited set of
foreign states for torture, extrajudicial killings, aircraft sabotage, or hostage-
taking, or the provision of ‘material support’ or resources for such an act. The
exception permits personal injury suits by US citizens when the defendant
government is on the US government’s list of ‘state sponsor(s) of terrorism.’
Currently there are four countries determined by the Secretary of State to have
repeatedly provided support for acts of international terrorism: Cuba, Iran,
Sudan, and Syria. Iraq, North Korea, and Libya were also on the list when the
exception was enacted in 1996, but have since been removed.

CONCLUSION AND FUTURE DIRECTIONS

Concerning the indirect use of international human rights law by national courts,
we can conclude that there are more and more judicial bodies in countries
‘engaging’ international law in this manner in their domestic proceedings. However, the future of the direct application of human rights law in terms of universal jurisdiction for both criminal and civil cases is uncertain.

The good news is that most universal jurisdiction criminal cases have been brought against the very types of defendants whom the international community has most clearly agreed should be prosecuted and punished, but whom their own State has not defended. Therefore, criticism arguing that universal jurisdiction disrupts international relations, provokes judicial chaos, and interferes with political solutions to mass atrocities seems to be unfounded. But this does not mean either that defenders of universal jurisdiction are necessarily correct in claiming that it serves as a crucial tool to bring justice to victims, to deter State or quasi-state officials from committing international crimes, or to establish a minimum international rule of law by substantially closing the ‘impunity gap’ regarding international crimes. All in all, we can conclude that universal jurisdiction is equally unlikely to result in the minimum international rule of law to which its supporters aspire or lead to the dangerous abyss that its detractors fear.

As we have also seen, universal jurisdiction raises concerns in civil litigation as well. The issue of private, corporate, and complicit liability under the ATS is unclear. The US Supreme Court’s long-awaited decision from April 17 2013 in *Kiobel v. Royal Dutch Petroleum* unanimously dismissed Esther Kiobel and her fellow plaintiffs’ claim of torture, killing and crimes against humanity, giving Shell a pass for the human rights abuses. The majority opinion of the Court, delivered by Chief Justice John G. Roberts, Jr., joined by Justices Alito, Kennedy, Scalia and Thomas, ruled that American courts should rarely – if ever – decide claims that foreigners have committed atrocities against foreigners in foreign lands. The five Justices who signed onto the majority opinion held that, as a general rule, the law does not apply extraterritorially, and is presumed to apply only to the United States and its territory, which means that the ATS cannot be the basis for a lawsuit in which all of the conduct challenged occurred in a foreign country where there was a functioning, legitimate government. The decision suggested that the presumption against applying the law outside the United States might possibly overcome ‘where the claims touch and concern the territory of the United States’. The Court explicitly avoided deciding whether any ATS case, under any circumstances, could be brought against a corporation, foreign or domestic. Thus, what the Court has not done is to completely wipe out the ATS, nor has it ruled that companies are absolved of human rights liability. The majority opinion relies on the following arguments: to avoid conflicts with other nations, to avoid juridical interference with diplomacy, to protect U.S. citizens from similarly being haled into foreign courts and to avoid trying to set up the United States as the ‘*custos morum* (moral custodian) of the whole world’. Justice Kennedy’s brief separate opinion said that the Court left open ‘a number of significant questions regarding the reach and interpretation’ of the 1789 law. As future cases arise, Kennedy argued, ‘the presumption against
extraterritorial application may require some further elaboration and explanation’. Justice Alito, in his separate opinion, joined by Justice Thomas, wrote that the Court should have gone further, and barred any ATS lawsuit unless it targeted ‘domestic conduct’ that would definitely violate a norm of international law that had ‘acceptance among civilized nations’. Justice Breyer’s separate opinion, which was joined by Justices Ginsburg, Kagan and Sotomayor, says that he would not have used the extraterritorial bar at all. This opinion argued that ATS cases should be allowed where the wrongdoing ‘occurs on American soil’ and the target of the lawsuit is ‘an American national’, and where the target’s wrongdoing ‘substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming safe harbour (free of civil as well as criminal liability) for torturer or other common enemy of mankind’.

The more general, but also still open, question regarding the use of human rights law by domestic courts is how far international law can be used as a source for the migration of ideas. The real question behind this is whether current international law is really able to serve the aims of transnational human right.

NOTES

1. This is the case also in countries such as Canada where the jurisprudence of the court led to rethinking the domestic interpretation of international law. See Knop (2010) about the judgment of the Canadian Supreme Court in Baker.
2. But even these courts refer very rarely on other courts’ decisions. For instance only 29 majority judgments of all 7319 decisions of the ECtHR made before October 30 2006 cited one or more decisions of foreign constitutional courts or international courts. (This proportion is higher in the separate opinions of the judges.) See Voeten (2010).
3. See Jackson (2010).
4. Cf. Rubensfeld (2003). Obviously also the different concepts of ‘international constitutionalism’ contributed to the very fact that while there were almost no international public law concerns expressed after the killing of Osama bin Laden in the US, in Germany several such concerns were published. See Ulrich (2011).
6. 539 US 558 (2003) at 598. As Glensy argues, Justice Scalia’s bemoaning the selective nature of comparative analysis can be equally applied to any context within a judicial decision, and therefore actually does not become a critique of comparative constitutionalism, but rather, of decisional rule itself. See Glensy (2010), 1239.
7. Elazar Barkan in his book singled out the restitution for the Jewish suffering during WWII, and especially the Swiss reimbursement and compensation initiative, as a defining moment that separated the past from the future on such matters, and started a potentially new international morality. See Barkan (2000), IX–XII.
11. Principle 1(2) and (3) reads as follows: ‘A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1), provided that it has established a prima facie case of the person’s guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the prosecution

12. Abducted by the Israeli secret police in 1960 from Argentina where he was hiding, the former high-ranking SS officer and head of the Gestapo's Department for Jewish Affairs was flown to Jerusalem, where he stood trial in an Israeli court for his pivotal role in both the design and the implementation of the Final Solution in accordance with Israeli law: the Nazis and Nazi Collaborators (Punishment) Law of 1950. This domestic law was modeled on the 1948 UN Genocide Convention, and was intended to prosecute such crimes committed against Jews. In other words, Israel exercised its jurisdiction over someone who was not an Israeli national or resident, for crimes committed outside its territory before the existence of the State of Israel.


16. About these civil litigations see Stephens et al. (2008).

17. See, e.g., In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

18. 542 U.S. 692 (2004). In the case the plaintiff, Mr Alvarez-Machain, brought a claim under the ATS against Mr Sosa after Mr Sosa had abducted him, held him overnight, brought him to the US, and handed him over to the US authorities, who tried him for murder. Mr Alvarez-Machain was acquitted, but the Supreme Court dismissed his ATS case on grounds that arbitrary detention of one night did not rise to the level of a violation of the Law of Nations and thus could not be the subject of a suit under the ATS.


20. About the State practices see ibid., 124–254.

21. This is the suggestion of Máximo Langer after analyzing the role of the political branches, specifically the executive and the legislature in five European states most frequently using universal jurisdiction – Germany, England, France, Belgium, and Spain. See Langer (2010).

22. Among the scholarly works see Ratner and Abrams (2001). At page 16 they state: ‘It remains unclear ... whether international law imposes criminal responsibility on groups and organizations.’ The Institute for International Economics in Washington, DC published a book, in which it calls the ATS litigation against corporations a ‘nightmare scenario’. They argue that the ATS litigation can cause severe collateral damage to trade and foreign direct investment both in the US and in target countries. The authors state that ATS conflicts with other jurisdictions of states and represents a judicial imperialism where US law serves as a supreme law for the world. Therefore they urge the US government towards narrowing the ATS. See Hufbauer and Mitrokostas (2003).

REFERENCES


