

*Comment*

**HANDCUFFS OR PAPERS**

UNIVERSAL JURISDICTION FOR CRIMES OF *JUS COGENS*,  
OR IS THERE ANOTHER ROUTE?

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**I. INTRODUCTION**

The question of universal jurisdiction has always been one of intrigue to both lawyers and the general public. This article seeks to analyze the extent to which a common law jurisdiction will take jurisdiction over an individual who has acted in contradiction to peremptory norms and, if public law jurisdiction is not used, the scope of remedies available in private law. As shall be explained below, it is submitted that a system of total universal jurisdiction is inappropriate both on a practical basis, and also for reasons of international judicial tolerance. A better alternative would be to explore methods of serving private claims outside of the jurisdiction. This will involve a comparison between the law that has been applied in the United States, and that which

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applies in the United Kingdom (and to some extent the European Union). The purpose of this paper is by no means to belittle the use of international criminal jurisdiction; rather it is argued that there are practical difficulties in asserting universal criminal responsibility. When the assertion of jurisdiction is successful, that is all well and good; however, it will be explained below that due to these difficulties, it is well worth developing the use of private international law in bringing to justice perpetrators of crimes of *jus cogens*. In short, the use of private international law is the second best option, but often it is the only practicable option.

## II. HISTORY AND THEORY OF UNIVERSAL JURISDICTION: TWO SIDES OF A COIN

There is no clear judicial definition of universal jurisdiction. However, a useful one has been written by Roger O’Keefe: “prescriptive jurisdiction over offences committed by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state, or, in appropriate cases, to give rise to effects within its territory.”<sup>1</sup>

Universal jurisdiction is a surprisingly old concept that dates back to the 1600s when nations cooperated over opposition to piracy. Pirates were (and still are) considered to be *hostes humani generis*<sup>2</sup> and as such it was understood that all nations shall have total jurisdiction over pirates. This is given international force in Article 92(1) of the Convention on the Law of the Sea of 1982.<sup>3</sup> Arguably the most famous (relatively uncontroversial) recent successful application of universal jurisdiction was *Israel v. Eichmann*.<sup>4</sup> This case involved the trial of Nazi war criminal Adolf Eichmann—the author of the Final Solution. There was prima facie jurisdiction in favor of Israel, and certainly no territoriality link as the State of Israel only came into existence in 1948. Israel did assert jurisdiction partly on the basis that all countries have the right to try those suspected of being *hostes humani generis* (though a large part of the decision was based on something akin to the passive personality principle—Eichmann was charged with Crimes Against the Jewish People)<sup>5</sup> and Eichmann was later sentenced to death.

The passive personality principle dates back to the *Lotus* case.<sup>6</sup> That case involved a collision on the high seas between a French vessel and a Turkish vessel which resulted in several Turkish sailors losing their lives. The captains of both ships were charged (in Turkey) with involuntary manslaughter, though the French captain was charged under a statutory provision enacting a passive personality principle in cases where a defendant causes the death of Turkish citizens abroad and is arrested on Turkish sovereign territory. The question before the Permanent Court of International Justice<sup>7</sup>

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<sup>1</sup> Roger O’Keefe, *Universal Jurisdiction, Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 745 (2004).

<sup>2</sup> Enemies of all mankind.

<sup>3</sup> Convention on the Law of the Sea, art. 92(1), Dec. 10., 1982, 1833 U.N.T.S. 3, 433, 21 I.L.M. 1261, 1287 (subjecting ships flying the flag of one state to the exclusive jurisdiction of that state on the high seas), available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>4</sup> CrimA 336/61 *Israel v. Eichmann* [1962] IsrSC 16 2033, reprinted in 36 I.L.R. 277.

<sup>5</sup> Israel holds that it has the right to assert an extended passive personality principle over all Jews worldwide.

<sup>6</sup> S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927).

<sup>7</sup> Hereinafter PCIJ.

was not to what extent that provision was in conformity with international law, but rather whether international law allows proceedings to be instituted against the French captain *per se*, as Turkey could not point to a definitive provision of *international* law giving it jurisdiction, although Turkey argued that it was sufficient to rely on their own statute under international law. Turkey's argument was that Article 15 of the Treaty of Lausanne<sup>8</sup> permitted it to take jurisdiction where that assertion is not contrary to international law. The PCIJ clarified that although there is a rule of international law presuming that a state may not exercise jurisdiction outside its territory, especially in the sovereign territory of another state, this does not mean that a state is barred from exercising jurisdiction in its own territory regarding an act that has taken place abroad. On the contrary, a state may assert territorial jurisdiction in the absence of a rule of international law limiting the state's discretion to do so. As such, France's argument that each exercise of jurisdiction must rely on a permissive rule of international law is not correct.

However, regarding criminal jurisdiction, the PCIJ acknowledges the existence of two conflicting theories: that a state may enact legislation providing for extra-territorial jurisdiction in all cases where there is no rule of international law to the contrary; or that the exercise of such jurisdiction is limited to cases where international law permits it, the PCIJ giving the example of a crime against public safety. The PCIJ declined to definitively pronounce upon the passive personality principle because it held that even were the principle flawed, this would not prevent jurisdiction based on the fact that the act had produced effects on a Turkish vessel, which under international law is treated as Turkish sovereign territory. Therefore, Turkish jurisdiction to try the offense cannot be disputed, unless it can be shown that international law gave France exclusive jurisdiction over an act taking place in its territory, which was not shown. There was, however, a muted obiter dictum in favor of the principle stating that even if the specific rule was not in conformity with international law (which was not decided), this does not mean that the prosecution itself is necessarily contrary to international law as it may rely on a provision of international law that permits such a prosecution. From the PCIJ's opinion it is safe to conclude that the passive personality principle is in conformity with international law.

The basis for this jurisdiction is sound. However, it is logically primarily concerned with jurisdiction to adjudicate.<sup>9</sup> It is arguable that the conduct was not so grave that it attracted universal criminal jurisdiction. Indeed, the charge was involuntary manslaughter, which is essentially a criminalized form of tortious negligence. France did not contend that Turkey lacked jurisdiction to have a law that contains sanctions for the commission of the act in question. Rather, the contention was of the enforcement of criminal law in a particular scenario. The PCIJ stated clearly that it would not be lawful for Turkey to extend its jurisdiction outside its territorial boundaries; this must be referring to the extension of its jurisdiction to adjudicate outside its territorial boundaries, because it is clear from the opinion that in international law there may be jurisdiction to prescribe conduct outside a state's territory in certain scenarios, the PCIJ giving the example of effects being felt within sovereign territory.

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<sup>8</sup> Treaty of Peace Between the Allied powers and Turkey, art. 15, July 24, 1923, 28 L.N.T.S. 11 [hereinafter Treaty of Lausanne].

<sup>9</sup> See the distinction between jurisdiction to prescribe and to enforce *infra* p. 4.

In his article, O’Keefe<sup>10</sup> makes it clear that the jurisdiction in a case such as *Eichmann* is not based on territoriality<sup>11</sup>—the prescriptive element is a classic, no-strings-attached case of universal jurisdiction. It is merely the enforcement element that might be based on territoriality. O’Keefe insists that universal jurisdiction is split into jurisdiction to prescribe and jurisdiction to enforce. He notes the fact that in the *Arrest Warrant*<sup>12</sup> case, in the joint Higgins, Koojimans, Buergenthal opinion the judges state that a number of countries link jurisdiction for War Crimes to residency, and that they therefore draw the conclusion that this is not true universal jurisdiction (though they see no reason why this is not possible, only that it does not exist in those states). O’Keefe rejects this analysis for the above reason.

### III. POSITIVE USE OF AND PRACTICAL LIMITS ON UNIVERSAL CRIMINAL JURISDICTION

Jurisdiction to prescribe is the ability of a legal system to render conduct illegal. When we speak of crimes of universal jurisdiction, we mean those which a state may categorize as illegal regardless of where it is committed. It would make no sense to tie this to territoriality—of course a state can criminalize conduct in its own territory. Jurisdiction to enforce or to adjudicate is a very different question. This is the jurisdiction to hold trial.

The joint opinion in the *Arrest Warrant* case, when talking about universal jurisdiction, indicated that in many ways the existence of such jurisdiction is a decision for the member state, often as to whether or not trial can take place *in absentia*. This is distinct from jurisdiction to prescribe, which is effectively taken out of the domestic legal system’s hands (inasmuch as all nations have positive duties to prescribe offenses of *jus cogens*). This was stated by the Israeli Supreme Court in the *Eichmann* case: However, it is clear that without jurisdiction to enforce, from a policy perspective, jurisdiction to prescribe is of limited assistance. It is normally clear whether or not an act is one over which a country may assert universal jurisdiction, controversies, and indeed the potency of international law as a serious and enforceable corpus depends on the existence of jurisdiction to adjudicate and its ability to apprehend the perpetrators. In the field of criminal law, trial *in absentia* is often difficult in domestic law. Courts might be very slow to exercise criminal jurisdiction and to hold a criminal trial when the defendant is not present. Indeed, it may even be a waste of time as another country, especially the defendant’s home state, is unlikely to give recognition and enforcement to such a judgment or determination. Civil claims are less objectionable; their adjudication does not represent executive authority and is less likely to be subject to accusations of meddling in other countries’ affairs.

The amenability of the courts of the United States to enforcement of foreign civil judgments is displayed by the U.S. Supreme Court in *Hilton v. Guyot*<sup>13</sup> where a judgment

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<sup>10</sup> Roger O’Keefe, *Universal Jurisdiction, Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735 (2004).  
<sup>11</sup> O’Keefe makes no reference to *Eichmann*, it is given here as an example of a successful application of universal jurisdiction—both prescribed and enforced.  
<sup>12</sup> Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 2002), available at [http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe\\_ijjudgment\\_20020214.PDF](http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijjudgment_20020214.PDF).  
<sup>13</sup> 159 U.S. 113 (1895).

was obtained in a Parisian court. Justice Gray embarked upon a lengthy discourse of English common law, and concluded that the judgment of the Parisian court would be accorded recognition, with the following reasoning:

[Where] there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.<sup>14</sup>

This standard was applied by the Third Circuit in *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*<sup>15</sup> where the plaintiff sought to enforce a judgment handed down by the English Court of Appeal. The Second Circuit expressly applied the *Hilton v. Guyot* rationale. Moreover, the Second Circuit held that there was no need for the lower court to examine the basis for the English court's assumption of extraterritorial jurisdiction because there was the opportunity for representation at every point.

Are there limits to this doctrine? The answer is yes. It is clear from the Supreme Court's decision above that there is a certain standard of justice that must be present in the foreign court. That standard is made clear in *Hilton v. Guyot*. The general recognition rule is stated in section 98 of the Restatement (Second) of Conflict of Laws: "A valid judgment rendered in a foreign nation after a *fair trial* in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned."<sup>16</sup>

The United Kingdom has witnessed a lengthy bout of litigation concerning the extradition of former Chilean dictator Augusto Pinochet, who was accused of torturing Spanish civilians. In *Ex parte Pinochet Ugarte (No. 3)*<sup>17</sup> the House of Lords concluded that there is universal jurisdiction to try those accused of torture. Lord Brown-Wilkinson stated that torture is a *jus cogens* crime and that the United Kingdom has a duty to prosecute or extradite to a prosecuting country suspected perpetrators of torture due to section 134 of the Criminal Justice Act of 1988,<sup>18</sup> which incorporated the Torture Convention<sup>19</sup> into English law. The Act has effect irrespective of the location of the offense. His Lordship continued: "*The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.*"<sup>20</sup> His Lordship cites *Eichmann*<sup>21</sup> and *Demjanjuk*<sup>22</sup> to display how domestic courts must be proactive in such prosecutions.

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<sup>14</sup> 159 U.S. at 123.

<sup>15</sup> 453 F.2d 435 (3d Cir. 1971).

<sup>16</sup> Emphasis added.

<sup>17</sup> *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L. 1999).

<sup>18</sup> Criminal Justice Act, 1988, ch. 33, pt. XI § 134 (Eng.).

<sup>19</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

<sup>20</sup> [2000] 1 A.C. at 198 (emphasis added).

<sup>21</sup> CrimA 336/61 *Israel v. Eichmann* [1962] IsrSC 16 2033, *reprinted in* 36 I.L.R. 277.

#### IV. PUTTING THE REINS ON UNIVERSAL JURISDICTION

In *Pinochet*, the defendant was present in the United Kingdom and, therefore, according to the joint opinion in the *Arrest Warrant* case, this is not necessarily true exercise of universal jurisdiction. It was certainly a true exercise of universal jurisdiction to prescribe, because Pinochet was a non-national (so there is no invocation of the active personality principle), the crimes took place on foreign soil, and the acts were those which international law categorizes as crimes of *jus cogens* which are subject to universal jurisdiction to prescribe. There was indeed an exercise of jurisdiction to enforce, but this was not an exercise of the universality principle, because Pinochet was present in the United Kingdom. This was not the level of jurisdiction that Belgium had purported to exercise in the *Arrest Warrant* case, and it was not the type of jurisdiction for which the authors of the joint separate opinion were frantically searching in vain. They were looking for an example of a state exercising jurisdiction over an act bearing international criminal responsibility where the defendant is not domiciled or present in the forum state. It is submitted that the exercise of such a jurisdiction is inappropriate in today's legal environment. We have recently witnessed the attempted prosecution of Ariel Sharon in Belgium, a suit which has now been dropped and in which the relevant Belgian legislation has been amended. The reason that the attempted trial should be objectionable has nothing to do with whether or not Sharon is a war criminal. Rather, the objectionability concerns notions of judicial comity. If we consider theories of the conflict of laws, it should be held that this matter was *res judicata*. Sharon's actions had been assessed by an independent tribunal of fact, where the same facts were at issue. That was the Kahan Commission<sup>23</sup> and it stated the following:

We have found, as has been detailed in this report, that the Minister of Defense bears personal responsibility. In our opinion, it is fitting that the Minister of Defense draw the appropriate personal conclusions arising out of the defects revealed with regard to the manner in which he discharged the duties of his office—and if necessary, that the Prime Minister consider whether he should exercise his authority under Section 21-A(a) of the Basic Law: the Government, according to which “the Prime Minister may, after informing the Cabinet of his intention to do so, remove a minister from office.”<sup>24</sup>

If the Belgian court had doubts about the Commission's integrity, then it took a position contrary to the New York District Court in *Sharon v. Time*.<sup>25</sup>

It is jurisprudentially unsafe to embark upon a course which questions the decisions of foreign judicial systems unless it is shown that the system is compromised

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<sup>22</sup> CrimA 347/88 Israel v. Demjanjuk [1993] IsrSC 47(4) 221, *reprinted in* 36 I.L.R. 18.

<sup>23</sup> An independent Knesset (parliamentary) commission examining the role of Israeli officials and the Israel Defense Force into the Sabra and Shatilla killings. The commission was so named as it was chaired by then justice of the Israel Supreme Court Kahan.

<sup>24</sup> Kahane Commission, <http://www.caabu.org/press/documents/kahan-commission-part13.html> (last visited Jan. 11, 2007).

<sup>25</sup> 575 F. Supp. 1162 (S.D.N.Y. 1983) (not questioning the Commission's findings).

## *Handcuffs or Papers*

by fraud, partiality or that there is concrete evidence showing that trial has not been properly conducted according to accepted theories of due process. In this vein, regard should be had to Article 17 of the Statute of the International Criminal Court:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.<sup>26</sup>

This provision is an important and welcome element to the ICC Statute as it accords international judicial proceedings mutual respect as regards war crimes and crimes against humanity. The author would put a strong emphasis on Article 17(1)(b) that accords protection to the defendant where the state which has jurisdiction has decided not to prosecute unless that is due to unwillingness or inability. Article 17(2)-(3) defines inability and unwillingness in the following way:

- 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
  - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

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<sup>26</sup> Rome Statute of the International Criminal Court, July 17, 1998, art. 17(1), 37 I.L.M. 1012 [hereinafter ICC Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

We live in a world where judicial comity is replacing judicial chauvinism and as such the decision should not be questioned. This statement should not be considered to be a blanket argument and does not support unqualified recognition of all judgments. It envisions a scenario where if a court, or state, recognizes the judicial effectiveness and integrity of another state, those judgments should be awarded *res judicata status*.<sup>27</sup> In short, there should not be arbitrary choices based on whether or not the enforcing state approves of the outcome of the judicial process.

Even if the tribunal had never met, the action would still be inappropriate. It is argued that theories underlying *forum non conveniens* should apply in actions concerning defendants abroad. The whole point of the doctrine is to determine where trial should be held in the interests of justice. Even where the charge has not been investigated by the state which has jurisdiction, the Article 17 idea should be extended to say that absent fraud or unwillingness of the sort described therein no such charge should go ahead outside the *forum conveniens*. It is judicially bigoted to presume that one's own courts should step into the shoes of global law enforcement where there is no concrete evidence that a court is acting in bad faith or is defunct and the compromise suggested would provide courts with a method of analyzing whether or not it is appropriate to entertain an action. Furthermore, a court has always the option of staying, rather than dismissing, an action though this is a question of domestic law. This is a concept that should not differ in public and private law. So as long as one accepts that a given country's law is administered by an independent judiciary and that there will be a fair trial, the charge must take place in the *forum conveniens*. This article is not the place to discuss whether or not this applies to the Israeli courts; the Sharon example was given merely to illustrate the argument that universal jurisdiction should be limited. However, as will be displayed below, the use of the *forum non conveniens* analysis can actually serve as a far more effective tool to bring war criminals to justice.

## **V. THE UNITED STATES: BLURRING THE PUBLIC/PRIVATE DIVIDE?**

In the United States, the Alien Tort Claims Act<sup>28</sup> provides for the U.S. district courts to have jurisdiction over a tort which violates the law of nations: "*The District*

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<sup>27</sup> See *supra* p. 6.

<sup>28</sup> 28 U.S.C. § 1350 [hereinafter ATCA].

*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.”*<sup>29</sup>

The United States has a system whereby public international law can form a cause of action in private proceedings. It will be argued below that this is an ideal compromise and one that the United Kingdom should follow. The ATCA has a very specific history, and one might argue that the use to which it has been put in the ensuing cases does not give effect to the then legislative intent. That history has been the subject of debate, and a useful analysis has been given by Anne-Marie Burley.<sup>30</sup> She notes that the ATCA came about due to a desire by the drafters to protect the application of what we have termed public international law. Implicit in her analysis is that the concern was not so much humanitarian than national. The first major element is the need to protect ambassadors. Failure to do so, Burley argues, could, in the world order that existed, result in a war. She points to commitments made to France that the United States would grant the protection of the laws of nations to ambassadors. The United States, being a new country, had to make such commitments explicit so as to alleviate the fears of other countries. She also argues that this same reasoning applied to individuals: Firstly, the failure of courts to protect an individual from crimes contrary to the laws of nations might have led to war, and secondly, the United States wanted to satisfy merchants travelling from abroad that safety and criminal justice would be of a standard found in other countries. They were therefore meticulous in providing their courts with jurisdiction to try international crimes, so that aliens and ambassadors could see their claims prosecuted in the criminal courts, but if for some reason this failed, a civil claim might be possible. So, the ATCA is jurisdictional in scope; it provides that whatever those crimes might be, the district court can take jurisdiction.

In *Filartiga v. Pena-Irala*,<sup>31</sup> the Second Circuit expressly upheld and applied public international law principles in a private tort claim. The plaintiff’s son had been abducted and murdered in Paraguay by the defendant who was a police officer there, and the Second Circuit held that the case should proceed. The Second Circuit was under no doubt that torture by a public official does indeed contravene the law of nations and that a breach of such law must be enforced in the U.S. courts. “*It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.*”<sup>32</sup>

Furthermore, the Second Circuit did not see anything controversial about the United States asserting jurisdiction: “*It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders.*”<sup>33</sup>

The remaining issue in this case was one of personal jurisdiction. In this situation the defendant was present in the United States, and so the exercise of personal jurisdiction was relatively uncontroversial.

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<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989).

<sup>31</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>32</sup> 630 F.2d at 885 (emphasis added). *See also* United States v. The Paquete Habana, 189 U.S. 453 (1903) (applying rules of international law uncodified in any act of Congress).

<sup>33</sup> 630 F.2d at 885 (emphasis added).

A similar attitude was taken by the Second Circuit in *Mehinovic v. Vuckovic*.<sup>34</sup> Here the claim was again under the ATCA and was brought by (Muslim) Bosnian refugees against the defendant who was a Serbian soldier. It was alleged that the defendant had committed acts of brutality, specifically torture in Bosnian detention facilities, against the plaintiffs in contravention of international peremptory norms as part of a Serbian campaign of ethnic cleansing. The court found that the defendant was liable to the plaintiffs. The defendant was residing in the United States (hence no discussion of personal jurisdiction was necessary), and the facts were proved to the court's satisfaction. Judge Shoob's judgment refers to the defendant's superior, Todorovic, who pleaded guilty to torture at the International Criminal Tribunal for the former Yugoslavia,<sup>35</sup> as having initiated the torture against one of the plaintiffs, and the defendant of his own volition carried out acts of severe brutality, and also witnessed such acts by Todorovic. Judge Shoob continues at length concerning the particularly disturbing acts carried out by the defendant on all of the plaintiffs.<sup>36</sup> The Second Circuit cites the Eleventh Circuit in *Abebe-Jira*<sup>37</sup> where it was held that the ATCA provides jurisdiction to the U.S. district courts where an alien sues for a tort committed "in violation of the law of nations." These criteria were all met in the instant case and so the defendant was found liable. It should be noted that this is not a complex legal analysis because such analysis is obviated by the statute which provides jurisdiction, the only remaining legal question being whether an act constitutes a violation of "the law of nations." It is submitted that in most cases before the courts the answer will be relatively clear. The standard was set in *Filartiga* and was cited in *Mehinovic* as being "*well-established, universally recognized norms of international law.*"<sup>38</sup>

The most recent U.S. case is *Sosa v. Alvarez-Machain*<sup>39</sup> where the U.S. Supreme Court was ruling on the Federal Tort Claims Act<sup>40</sup> and the ATCA with reference to an individual who had been (illegally) abducted from Mexican territory by U.S. law enforcement authorities. Justice Souter stated that the foreign country exception<sup>41</sup> in the FTCA applied here, and as such the U.S. government was immune from a claim in tort, and once the victim was on U.S. soil it is permissible to let the judicial system take its course and a prosecution commence. Although this point has been the subject of wide academic criticism, it is not the point with which we are concerned here. Justice Souter held that the ATCA was not intended to create new causes of action. Rather, it was intended to give the U.S. courts *jurisdiction* to hold trial for breaches of the law of nations. Justice Souter gives a worrying limitation (which it is submitted must be obiter dictum) that Congress' intent in the statute was limited to matters concerning ambassadors, prize captures and piracy. He cites Blackstone to argue that only a select few offenses of the law of nations were actionable at common law. As Larocque<sup>42</sup> points out in a case note, Justice Souter explains that the ATCA was intended to give effect to

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<sup>34</sup> 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

<sup>35</sup> Hereinafter ICTY.

<sup>36</sup> See *id.* at 1333 for precise details of the physical abuse inflicted.

<sup>37</sup> *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996).

<sup>38</sup> *Filartiga*, 630 F.2d at 888 (emphasis added).

<sup>39</sup> 542 U.S. 692 (2004).

<sup>40</sup> 28 U.S.C. § 1346(b) [hereinafter FTCA].

<sup>41</sup> 28 U.S.C. § 2680(k).

<sup>42</sup> François Larocque, *Alien Tort Statute Survives the Supreme Court*, 63 CAMBRIDGE L.J. 532 (2004).

certain international norms that have become part of U.S. common law.<sup>43</sup> Justice Souter states that torture is covered because today, a torturer is akin to a pirate and is seen as *hostis humani generis*. This, with respect, is apologetic and arbitrary. Why can we not say that torture is a violation of rules of *jus cogens*—Justice Souter admits that the ATCA was intended to implement customary norms as the founding fathers saw them—why not say that the United States will enforce customary international peremptory norms in private actions? Furthermore, it is submitted that this analysis is inconsistent with the original intent of the ATCA. Burley states that the framers wanted to protect people from crimes contrary to the laws of nations. It is true that at that time the list of acts offensive to the laws of nations was shorter, but this does not mean that the framers would wish for the ATCA to become stagnant. There is a statute aimed at prosecuting perpetrators of violations of public international law; it does not make sense to say that because a particular offense was not then part of public international law it is not covered under that statute. However, the point is that international law can be enforced in such a private action. It is argued that this is a better system than trying to push complex, politically controversial, and often fruitless and unenforceable arguments of universal criminal jurisdiction. As shall be displayed below, courts are (correctly) more ready to assume jurisdiction in a private action than in a criminal suit. This is not to say that such private law actions would not be politically controversial. However, the lack of direct state involvement, and the absence of criminal law soften the approach somewhat.

Using the ATCA as an alternative way of enforcing international human rights law has been considered by Laura Dickinson:

[A]n under-explored avenue is the extent to which ordinary municipal law, such as tort law, might provide norms that could be used to address human rights abuses like those committed at Abu Ghraib. For example, assault or battery in the law of many countries would cover the same conduct that would give rise to a torture claim. In many suits brought under the Alien Tort Claims Act in the United States, plaintiffs assert state law tort claims under a theory of pendant jurisdiction. But such claims might also be asserted directly. Just as transnational tort cases can sometimes be brought in areas such as products liability, so too human rights suits might take the form of a transnational tort.<sup>44</sup>

The matter has also been addressed by David Deal.<sup>45</sup> He points out that the entire point of the Torture Victim Protection Act of 1991<sup>46</sup> was to add to the ATCA's ammunition, thus creating a private right of action for torture under the ATCA. Regarding subject-matter jurisdiction, Deal summarizes the position of the Second

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<sup>43</sup> Larocque also notes the vehement disagreement of Justices Scalia, Rehnquist and Thomas as they see this as contradictory to the *Erie* doctrine.

<sup>44</sup> Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 188–89 (2005).

<sup>45</sup> David W. Deal, *The ATCA: Are Foreign Defendants Vulnerable to Lawsuits in United States Courts for Human Rights Violations that Occur Outside of the United States?*, 59 CONSUMER FIN. L.Q. REP. 104 (2005).

<sup>46</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

Circuit in *Kadic v. Karadic*<sup>47</sup> as stating that private individuals may be sued under the ATCA, but there is a need for a modicum of state action. The qualification that there needs to be some state action is unfortunate and inconsistent with the ATCA's original purpose. It is indisputable that the ATCA covers piracy, which cannot be considered state action—if a state engages in piracy then this would have been, and still might be considered an act of war. So the ATCA was not initially contingent on state action, and the framers did not wish it to be limited to state action, so there is no need for this qualification. This argument can equally be applied to criticize the *Tel-Oren*<sup>48</sup> decision. In *Tel-Oren v. Libyan Arab Republic*, the Supreme Court ruled that there could not be an ATCA action against perpetrators of terrorist attacks against civilians because the perpetrators were not state actors, unlike in *Filartiga* and all the other cases referred to above. The Court there argues that the Second Circuit in *Filartiga* was able to use the ATCA against the defendant because he had committed “official torture.” It was argued that because the PLO was not a state at international law it could not be the defendant in an ATCA suit for international crimes, as this would serve to create uncertainty as to who is, or is not a subject of international law. It is submitted that today, this is not an acceptable judicial attitude. We live in a world where non-state actors perpetrate horrific crimes against civilians. Human Rights Watch has argued that terrorist attacks against civilians are to be categorized as crimes against humanity under international law. Referring to Palestinian suicide bombings against Israeli civilians, it was stated that: “There can be no doubt that such attacks are grave crimes. In most, if not all cases, they are crimes against humanity. International law defines those who perpetrate these atrocities as criminals. So are those who incite, plan, and assist them. They should be brought to justice.”<sup>49</sup>

Furthermore, it is submitted that the act of state requirement is irrelevant. If an act was an act of state, and the individual is accused of crimes against humanity, she still bears individual criminal responsibility. This was made clear by the Israeli Supreme Court in *Eichmann*<sup>50</sup> applying the judgment of the International Criminal Tribunal at Nuremberg. With this in mind, it is unclear what difference an act of state makes. Since criminal defendants are not shielded by the doctrine in war crimes actions, it is not logical, where the *actus reus* is identical, for the doctrine to protect civil defendants from liability. Maintenance of the requirement displays an arcane view of the world order. It reflects a world where states were the only persons with the capacity to commit mass murder and genocide. Furthermore the *Tel-Oren* logic is at loggerheads with U.S. case law. In *Sosa*, Justice Souter stated that the ATCA claims would be permissible against perpetrators of traditional international offenses, for example pirates. *Tel-Oren* wants to restrict the ATCA claims to those in which there exists state involvement. Since when is state involvement a defining element of piracy? If that were the case the state would be

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<sup>47</sup> 70 F.3d. 232 (2d Cir. 1995), *quoted in Deal, supra* note 44, at 106. Judge Newman summarized the complaints against Karadic, who was the self-proclaimed president of a Bosnian-Serb republic, as “including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution.” 70 F.3d at 236. The court ultimately held that there was subject-matter jurisdiction under ATCA for such breaches of international law and the Geneva Convention.

<sup>48</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

<sup>49</sup> Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians*, <http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002.pdf> (last visited Jan. 11, 2007).

<sup>50</sup> CrimA 336/61 Israel v. Eichmann [1962] IsrSC 16 2033, *reprinted in* 36 I.L.R. 277.

committing an act of war! *Tel-Oren's* rationale would deprive plaintiffs of a right of action even for the most basic breaches of *jus cogens* contemplated by Blackstone. In addition, there is no requirement to piracy to be a state act; yet this is a crime of international law, so why should there be this restriction for torture or terrorism? *Tel-Oren* must therefore be viewed as bad law.

## **VI. SERVICE OUT OF THE JURISDICTION, THE U.K. REGIME IN THE CIVIL PROCEDURE RULES**

For these purposes, let it be assumed that we are dealing with service out of the jurisdiction where the defendant resides in a state that is fortunate enough not to be a Member of the European Union, as the jurisdictional rules would be different. Jurisdiction to serve out of the United Kingdom for a private dispute under English common law is governed by Rule 6.20 of the Civil Procedure Rules. In the United Kingdom, in order to serve a defendant out of the jurisdiction, the plaintiff initiates *ex parte* proceedings before a High Court Master, a decision which can be appealed and set aside. Rule 6.20 (3)(a) states that there must be a serious issue to be tried, Rule 6.21(1)(a) states that it must then fall under one of the heads in Rule 6.20, Rule 6.21(1)(b) mandates that the claimant must believe that the claim has a reasonable prospect of success and, finally, Rule 6.21(2A) states that the court must be satisfied that England is “the proper place in which to bring the claim.” In *The Spiliada*<sup>51</sup> it was stated by Lord Goff of Chieveley that:

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.<sup>52</sup>

His Lordship continued, saying that where another country is shown to be the most appropriate forum, there must be significant reasons why the case should be tried in England, and that if no more appropriate forum is displayed, then a stay will be refused. His Lordship then gives the following example of a situation in which England will try a case even though there is a substantially more appropriate forum: “*One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction.*”<sup>53</sup> It is this issue that we shall now examine. In *Oppenheimer v. Louis Rosenthal & Co. AG*,<sup>54</sup> a German Jew (note the date) wished to sue a company whose principal office was in Germany, but there was a branch in England. The Court of Appeal allowed service out of the jurisdiction as their Lordships found that the breach of contract had taken place in England and as such England was the *forum*

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<sup>51</sup> *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460, 476 (H.L. 1986). This is a case concerning a stay of proceedings on grounds of *forum non conveniens*. The principles concerning a stay and service out of the United Kingdom are the same.

<sup>52</sup> *Id.* at 480.

<sup>53</sup> *Id.* at 478.

<sup>54</sup> [1937] 1 All E.R. 23 (H.L. 1937).

*conveniens*. However, Lord Justice Slesser refers obiter to the problem of the plaintiff not being able to be represented in Germany.

North and Fawcett<sup>55</sup> cite two cases where the possibility of a lack of substantial justice in the natural forum is sufficient to warrant the English courts asserting jurisdiction. They cite *Coast Lines v. Hudig and Veder Chartering NV*<sup>56</sup> where the Court of Appeal held that when a foreign forum applies a law against commercial norms, the English courts will allow a service out of the jurisdiction. The second case cited is *Islamic Arab Insurance Co. v. Saudi Egyptian American Reinsurance Co.*<sup>57</sup> where a Saudi court lacked the ability to deal with questions of insurance, whereas England did not have this problem, and so England allowed service out of the jurisdiction.

In *Lubbe v. Cape*<sup>58</sup> the House of Lords held that if the plaintiffs' right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights would not be upheld in the natural forum, then England would take jurisdiction. The point here was that the natural forum was South Africa, where such group actions were not available which would effectively make trial impossible for the plaintiffs in South Africa.<sup>59</sup> Similarly, in *Connelly v. R.T.Z. Corp.*,<sup>60</sup> the House of Lords accepted that Namibia was the natural forum for the dispute but declined a stay of proceedings because this case was exceptional as its complexity meant that it could not be tried without financial aid to the plaintiffs, such aid being unavailable in Namibia. This was an exception to the general rule, as Lord Goff stated, that usually the case must go to the most appropriate forum, even if it is less advantageous to the plaintiff. This discussion does not intend to provide an in-depth analysis of the application of *forum non conveniens* principles in English law, but merely to show that English law will in essence take jurisdiction where the natural forum will not provide for an adequate trial. English law has not contemplated the use of private international law to enforce *jus cogens* responsibility and it would be a stretch of the existing law, but not an impossible stretch.

## **VII. PERSONAL JURISDICTION OVER A NON-RESIDENT DEFENDANT IN THE UNITED STATES**

The regime in the United States is distinctly different from that of the United Kingdom. That distinction is that a U.S. plaintiff need not show that the United States is the most appropriate forum, rather the burden is on the defendant to show why it would be totally impracticable to hold trial in the United States. Furthermore, there will often be jurisdiction if that defendant has had "minimum contacts" with the United States. The position is stated clearly by the U.S. Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*<sup>61</sup> that there is a "minimum contacts" requirement based on the Due Process Clause of the Fourteenth Amendment. There is no mention in the opinions of a factor similar to that in *Spiliada* of the possibilities of justice not been done abroad. This article is not the place to discuss the merits of the intricacies of U.S. international civil

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<sup>55</sup> PETER NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* (13th ed. 1999).

<sup>56</sup> *Id.* at 316.

<sup>57</sup> [1987] 1 Lloyd's Rep. 315, 319–20 (H.L. 1987); NORTH & FAWCETT, *supra* note 54, at 317.

<sup>58</sup> [2000] 4 All E.R. 268 (H.L. 2000).

<sup>59</sup> The trial was concerning the defendants' liability for causing asbestosis in their mines.

<sup>60</sup> [1998] A.C. 854 (H.L. 1997).

<sup>61</sup> 444 U.S. 286 (1980).

jurisdiction rules, but it is important to note the distinction between the U.S. and the U.K. position. It is submitted that the U.S. courts in their attempts to protect the defendant are flawed. This is because in cases deserving of justice, justice is denied, and in other cases there is the potential for abuse. In cases where the minimum contact rule has been satisfied, *Piper Aircraft Co. v. Reyno*<sup>62</sup> cites *Gulf Oil Corp. v. Gilbert*<sup>63</sup> which states that a plaintiff's chosen forum in general should be respected unless this results in a particularly high burden for the defendant. This lax test has been the result of a number of U.K. anti-suit injunctions as it was held that a U.S. state (usually Texas) had exercised exorbitant jurisdiction.<sup>64</sup> However, it will effectively deny justice to a person who has been wronged by another where the *forum conveniens* will not provide justice, often due to a corrupt court system.

There are numerous bizarre elements to this regime. The United States is willing to extend a broad criminal jurisdiction, but only a narrow civil jurisdiction. This is strange in the sense that the passive personality principle is logically a lengthy extension of jurisdiction where the effects have not been felt on U.S. soil (note the PCIJ's distinction in the *Lotus* case). On a public policy standpoint, extension of civil jurisdiction is certainly less controversial as penal sanctions do not apply, therefore it is perplexing why there is a minimum contacts requirement in civil actions, but for criminal jurisdiction it is permissible to illegally abduct the defendant, bring him to the United States and try him. However, in reality the minimum contacts element is easy to satisfy, as is displayed below. The other bizarre element is that the reason for the minimum contacts rule is surely to ensure that it is logical and fair to have trial in the United States. It is therefore totally logical to say that if another place is more logical and fairer, the court should determine that trial should be there, rather than putting an extremely high onus on the defendant to show that trial in the United States will pose an unfair burden. It is submitted that the conflict of laws must be about ensuring that causes of action are tried in the correct for a; a forum should not give automatic preference to either party's choice, it should be objective and fair.

The United States strongly endorse both the territorial principle (where effects will be felt in the United States) and the passive personality principle (where the victim is a U.S. citizen) as displayed in *United States v. Neil*.<sup>65</sup> In that case the defendant had raped a U.S. citizen while on Mexican territorial waters. The Ninth Circuit led by Judge William A. Fletcher held that the fact that the victim went to high school and received counselling in the United States satisfied the territorial principle. This logic is based on *United States v. Hill*,<sup>66</sup> yet another Ninth Circuit decision. The case was concerning harboring a fugitive, but regarding extra-territorial jurisdiction, the court was referring to application of the Deadbeat Parents Punishment Act<sup>67</sup> (the question involved was failure to pay child support). The child support, the very substance of this part of the litigation, was to be paid in the United States and as such the effects were directly and necessarily felt in the United States. It is easy to see a fundamental distinction here: In one case the

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<sup>62</sup> 454 U.S. 235 (1981).

<sup>63</sup> 330 U.S. 501 (1947).

<sup>64</sup> *E.g.*, *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, [1987] A.C. 871 (P.C. 1987).

<sup>65</sup> 312 F.3d 419 (9th Cir. 2002) (a Ninth Circuit decision, though there are further grounds for criticism).

<sup>66</sup> 279 F.3d 731 (9th Cir. 2002).

<sup>67</sup> 18 U.S.C. § 228.

order for payment had been issued in the United States and was prima facie only enforceable there (without foreign enforcement proceedings). In *Neil* the victim could have gone to Papua New Guinea for high school and counseling. Does Papua New Guinea then have jurisdiction on the territoriality principle? Surely not! Interestingly enough Judge Fletcher also relied on a decision of the Louisiana District Court in *United States v. Roberts*.<sup>68</sup> There are similar facts, however Judge Vance gives a more sophisticated analysis. While he places much reliance on the facts that there was an investigation by the FBI and psychiatric counseling in the United States, he also points out that none of the other countries that had obvious jurisdiction were willing to prosecute the defendant. This sounds familiar! Maybe it is obiter dictum, but it is a dictum that is weaved firmly into the substance of the decision and it seems that Judge Vance is using this factor as a material consideration. It is worrying that Judge Fletcher chose not to take account of the precise reasoning of Judge Vance, as he might have espoused a slightly more subtle and sophisticated rule of law with great value in precedent. So, it is submitted that the learned judge misdirected himself in this part of his decision and missed an opportunity to give force to the idea of the U.K. courts in civil proceedings, which is the focus of this study.

Both *Neil* and *Hill* apply the passive personality principle as grounds for jurisdiction. This is relatively uncontroversial, if we accept that there is a passive personality principle whose operation should not be overly complex. Its basis in federal common law is found in *United States v. Felix-Gutierrez*,<sup>69</sup> which was relied on in *Hill* and *Neil*. Judge Reinhardt gave judgment in the Second Circuit, however it is arguably incorrect to use his decision as standalone authority for passive personality jurisdiction. Applying the protective, territorial and passive personality principles cumulatively, he expressly declined to decide whether or not any of these principles would be sufficient to establish jurisdiction alone. All he stated was that their cumulative effect was sufficient grounds for asserting criminal jurisdiction against the defendant. It is unfortunate that Judge Fletcher negated to address this point, thus leaving the law in a state of insufficient development.

Anne-Marie Burley<sup>70</sup> brings an apparent dichotomy or inconsistency concerning the U.S. courts' approach. She notes that in *Amerada Hess Shipping Corp. v. Argentine Republic*,<sup>71</sup> the Second Circuit held that Argentina was liable for the destruction of a Liberian tanker during the Falklands War under the ATCA. This judgment was reversed by the Supreme Court. The Supreme Court held that the Foreign Sovereign Immunities Act<sup>72</sup> provides the only jurisdictional basis for an action against a foreign sovereign. There are exceptions to immunity provided within that Act, and in those circumstances only may the federal courts assume personal jurisdiction over the sovereign. Furthermore the Act will only allow jurisdiction for damage to property that took place in U.S. territory.<sup>73</sup> Burley contrasts this to the approach in *Forti v. Suarez-Mason*.<sup>74</sup> There Argentine residents of the United States brought an action against a general for torture,

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<sup>68</sup> 1 F. Supp. 2d 601 (E.D. La. 1998).

<sup>69</sup> 940 F.2d 1200 (9th Cir. 1991).

<sup>70</sup> *Supra* note 29.

<sup>71</sup> 830 F.2d 421 (2d Cir. 1987).

<sup>72</sup> 28 U.S.C. § 1330.

<sup>73</sup> 28 U.S.C. § 1605(a)(5).

<sup>74</sup> 694 F. Supp. 707, 711 (N.D. Cal. 1987) (reinstating plaintiffs' claim for "causing disappearance").

and the action was maintained by the district court. It is submitted that there is no dichotomy; in international law it is not acceptable to have *Amerada Hess* tried in the Second Circuit. The correct procedure would be for Liberia to assert diplomatic protection over the tankers bearing its flag, and to bring a suit at the International Court of Justice<sup>75</sup> in The Hague. The Foreign Sovereign Immunities Act is correct to uphold this point, and gives strength to international civil procedure. To allow such an action in the U.S. courts would be a display of judicial intolerance and a flaunting of all notions of *forum conveniens*. However, in *Forti v. Suarez-Mason* the defendant was an individual. There is a bright logical distinction between the two: Those with international legal personality should in these circumstances be tried at the ICJ, but an individual *cannot* be tried at the ICJ, as an individual lacks international legal personality. Thus, recourse to domestic courts is the most effective option.<sup>76</sup>

The distinction buttresses the argument of this article. In *Amerada Hess* there was a forum which was clearly more appropriate—the ICJ. Using a *Spiliada* type analysis, a court might conclude that there should be a stay of proceedings for these purposes. The use of the phrase “appropriate forum” is not ideal as it is not intended to convey the same meaning of practicability or “natural forum” ideas as is used in the *Spiliada*. Rather, Article 7 of the U.N. Charter established the ICJ as a court of consensual jurisdiction that has particular expertise in deciding cases against international persons and that does not need to concern itself with questions of choice of law or dichotomies between the application of municipal law and international law. No state can argue that the ICJ by allowing an action against it is exercising exorbitant jurisdiction, because that jurisdiction is the basis for its existence. The ICJ is the “appropriate forum” not for reasons of law, nor practicability, rather it is in the best interests of international public policy to use the ICJ in such instances. One might well argue that the possibility of a government refusing to extend diplomatic protection to a citizen would lead to a denial of justice as envisioned in *Rosenthal* or *Lubbe v. Cape*. This cannot be the case for a number of reasons. Firstly, there is no precedent for the judicial review of an executive decision of a foreign executive—such a decision is not contrary to *jus cogens* and it is not the place of a national court to question it, as long as there is accountability in that state. If there is not, then admittedly, this presents new issues for this argument—can a national court involve itself in this decision? Unfortunately this article’s length must be limited! Secondly, we arrive back at O’Keefe’s distinction between jurisdiction to prescribe and jurisdiction to enforce. O’Keefe’s argument logically would say that the individual state could give itself *prima facie* jurisdiction to prescribe, but no jurisdiction to enforce. Indeed it is submitted that even the authors of the joint opinion in the *Arrest Warrant* case would be at pains to countenance a private action against a foreign sovereign under such circumstances. If the state giving judgment tried to take the issue to the ICJ, the judgment debtor would surely not consent to the ICJ’s jurisdiction, a right to which it is entitled under the Statute of the International Court of Justice.

### **VIII. SERVICE OUT OF THE JURISDICTION IN THE UNITED STATES**

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<sup>75</sup> Hereinafter ICJ.

<sup>76</sup> Though now there is the ICJ option, we have yet to see a single prosecution in that court.

To what extent is it possible to serve a defendant not present in the United States, and how does it affect an ATCA claim? The black-letter law provides that a defendant may in principle be served abroad.<sup>77</sup> This is a point of civil procedure rather than a question to jurisdiction and as such this does not show that the U.S. courts have personal jurisdiction. This was the question in *Mwani v. bin Laden*.<sup>78</sup> There foreign plaintiffs brought actions against the defendant in connexion with the terrorist attack on the U.S. embassy in Kenya. The D.C. Circuit ruled that the D.C. long-arm statute<sup>79</sup> was insufficient to establish personal jurisdiction over the plaintiff because it was stipulated there that jurisdiction was contingent upon the defendant conducting some sort of business in the United States—clearly this was not the case. The D.C. Circuit continued that where the defendant is not subject to the jurisdiction of a particular U.S. state, there can be personal jurisdiction as long as it is in keeping with the Constitution.<sup>80</sup> The requirement under the Due Process Clause is that the defendant have minimum contacts with the forum. This does not mean exclusively physical contact, and indeed this was the flaw of the D.C. District Court. The D.C. Circuit cited *Burger King Corp. v. Rudzewicz*<sup>81</sup> where the U.S. Supreme Court stated that:

Jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.<sup>82</sup>

Applying this logic, the D.C. Circuit held that the defendants' actions were sufficient to satisfy the Due Process requirements of the Fifth Amendment. This is because although all the plaintiffs were Kenyan, the attack itself was directed against the United States and therefore the defendants could reasonably expect litigation in the United States.

This standard highlights the distinction between jurisdiction to prescribe and jurisdiction to adjudicate. Both the ATCA and the Due Process Clause concern jurisdiction to adjudicate, and the ATCA presumes jurisdiction to prescribe. However, the interpretation of the Fifth Amendment as a minimum contacts rule limits the federal courts' jurisdiction to adjudicate, and herein lies the obstacle that needs to be overcome. *Burger King* makes it clear that in actual fact, the Due Process Clause is concerned with fair warning to the defendant. This is due to the decision *International Shoe Co. v.*

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<sup>77</sup> FED. R. CIV. P. 4(f)(3).

<sup>78</sup> 417 F.3d 1 (D.C. Cir. 2005).

<sup>79</sup> D.C. CODE § 13-423(a)(4).

<sup>80</sup> FED. R. CIV. P. 4(k)(2).

<sup>81</sup> 471 U.S. 462 (1985).

<sup>82</sup> *Id.* at 476.

*Washington*<sup>83</sup> of the U.S. Supreme Court which stated that “*due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it.*”<sup>84</sup> To follow on from this in *Shaffer v. Heitner*,<sup>85</sup> Justice Stevens in the U.S. Supreme Court refers to the *International Shoe* decision and further argues<sup>86</sup> that the Due Process Clause is in a large part concerned with giving a defendant fair warning that she risks to subject her person to the jurisdiction of a foreign sovereign.

It is submitted that this logic should permit the federal courts to take jurisdiction over a defendant where there are no “minimum contacts” in the exclusive situation of offenses of *jus cogens*. Pirates are *hostes humani generis*, so are perpetrators of torture; as such they have offended the whole world and under international law any nation can enforce international law against them. By committing crimes against humanity they are risking that all nations will commence proceedings against them, and so the “minimum contacts” requirement should be broadly interpreted as such acts should be considered contrary to the interests of each and every nation. This argument is no more tenuous than the one given in *Mwani v. bin Laden*. Although acts were directed at the U.S. embassy, it is a great leap to say that this allows minimum contacts for the purposes of allowing non-U.S. citizens to sue. To say that this is minimum contacts under the *International Shoe* logic (which was decided in a situation where commercial efforts were directed at the United States) is pushing the boundaries. However, it is no fiction to say that the Supreme Court in *Sosa v. Alvarez-Machain* acknowledged that torturers are the enemies of all mankind. It is inappropriate to say in this context that the actions are not directed precisely at U.S. interests and therefore that the minimum contacts rule is not satisfied.

## **IX. PROSPECTIVE PROGRESS**

The aim of this paper is to attempt to make people accountable under international law in the fairest way possible. The enforcement of international law is (or at least should be) spectacularly important to today’s world order, but it is equally crucial that this should not be at the expense of due process, individual rights or mutual judicial respect.

It is understandable that jurisdictions are wary of trying any crimes *in absentia*, and it is argued that it is best to be cautious when exercising criminal jurisdiction under these circumstances. However, private international law can offer an alternative, second best option. Although there will not be criminal sanctions as a result of a private action, assets can be frozen, and public awareness will be increased, and such defendants will be held out as international criminals and *hostes humani generis*.

There have been instances of multinational corporations being held accountable under the ATCA. A useful analysis of these cases has been supplied by Jenny Bounngaseng.<sup>87</sup> She refers to *Doe v. Unocal Corp.*<sup>88</sup> and explains that in that case it was

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<sup>83</sup> 326 U.S. 310 (1945).

<sup>84</sup> *Id.* at 316 (emphasis added).

<sup>85</sup> 433 U.S. 186 (1977).

<sup>86</sup> *Id.* at 218 (Stevens, J., concurring).

<sup>87</sup> Jenny Bounngaseng, *Adjudication of International Human Rights Claims in the European Court of Human Rights and the Inter-American Court of Human Rights: Why ATCA Suits in U.S. Courts Are the*

alleged that an organ of the Burmese government had subjected civilians to human rights abuses including forced labor, murder, rape and torture with the knowledge of the defendant. Unfortunately for legal progress this case settled, after the claim was dismissed by an en banc rehearing. Bounngaseng argues that this shows that such corporations will be liable. This argument is tenuous. While it is submitted that such multinationals should be liable, the fact that the case was dismissed en banc is a step backwards. Furthermore, it does not help us with the problem of an act of state, as there was state involvement in that case. So even had it been successful, the *Tel-Oren* legacy would live on.

## **X. CONCLUSION**

It is argued that the domestic exercise of universal criminal jurisdiction without any element tying the defendant to the forum state is problematic and controversial as a matter of policy, though not as a matter of law. Therefore, when assessing such a suit a domestic court should import a *forum non conveniens* mentality to the jurisdictional question: If justice can be done in the natural forum, then the court must decline jurisdiction. It is not the place of foreign courts to exercise criminal jurisdiction for crimes abroad where the defendant is not present—territoriality should be a significant factor if not a prerequisite for criminal jurisdiction. Even if this argument is not accepted, it is a matter of fact that it is often difficult to effect criminal sanctions against perpetrators of crimes of *jus cogens*. This might be because a state does not give itself jurisdiction to adjudicate, or because the defendant is *in absentia* (the latter often resulting in the former). When proceeding in private law, the courts need not be so squeamish concerning the extension of jurisdiction to adjudicate as private law does not involve state policy or criminal sanctions, and so it has a greater chance of being internationally enforced, thus enabling, for example, account freezing. It is proposed that a hybrid between the U.S and U.K. regimes be established. The U.S. approach of allowing violations of public international law to be framed as tort claims is highly desirable.<sup>89</sup> It allows victims to take the initiative and rids the state of the public policy considerations inherent in applying its criminal law to a foreigner. Furthermore, applying a private suit to a foreign defendant is less objectionable than applying criminal law. The U.K. approach of serving a defendant abroad where justice will not be done in the natural forum is essential in order for the hybrid regime to function. This is possible under the U.S. system by interpreting the minimum contacts rule to include all offenses of *jus cogens*. The proposed system will allow for greater judicial discretion which, one presumes, will facilitate a better administration of justice. The ideas contained in this paper do not purport to solve the much argued policy concerns of assertion of universal jurisdiction, they are merely used to present a workable alternative. The alternative has flaws; it necessitates changes in the law and judicial thinking. This system is not an ideal one but it is a practicable compromise from the necessity of using the criminal justice system against these defendants. It represents in many cases the most feasible means of

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*Better Alternative for Claims Against American Multinational Corporations*, 33 GA. J. INT'L & COMP. L. 467, 479 (2005).

<sup>88</sup> 395 F.3d 932 (9th Cir. 2002).

<sup>89</sup> This framing is not *per se* impossible in the United Kingdom, but it does not seem to occur.

*Handcuffs or Papers*

having the acts of the defendant heard in court, being declared as war crimes, and maybe this is some way of giving the victims and their families a sense that the civilized world is prepared to act to condemn such vile human rights violations.