4. Tort law and human rights

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1. INTRODUCTION

Human rights violations are often torts. In the national laws of the wealthy and well-developed first world, we often see human rights torts recognized as constitutional torts and as a basis for judicial review of the legality of ordinary legislation against the Constitution, which raises the paradox of illegal law, of self-limiting law: that paradox is resolved by recognizing the mutually imbricated nature of national and international (human rights) law. National law is bound by international law because states in forming international rules bind other states. Each state is not hostage of all other states; rather, every state is some kind of partner with all other states. Constitutional torts generally invoke the domestic constitutional law of the state, though the rights of immigrants, legal or unauthorized, or of prisoners of war are sometimes implicated in constitutional tort cases. This chapter does not treat constitutional torts in national law. That is because the number of rights and countries involved would be intractable in a brief chapter (many states, numerous norms). In this chapter I instead wish to address a field where the law is not so well developed and to limit my inquiry to a more tractable field: personal injury torts where international human rights are implicated.

Injuries to the person which implicate human rights occur most often in the developing countries of the global periphery because transparent, effective rule of law state governance mechanisms are lacking and also because low labor standards and natural resources present shady profit opportunities. Human rights abuses in the developing countries of the global periphery are either perpetrated by governments or private actors, or both acting in concert. In some cases the government is complicit to criminal acts by corporate or other private principals; in other cases the corporation is complicit to rampant governmental wrongdoing. This mix of public and private wrongdoing in the extraterritorial context explains the controversies; the greater problem of terrorism and counter-terrorism, whether by state or non-state actors, compounds the confusion and controversy.

This chapter first examines the historical roots and contemporary developments of extraterritorial and universal international civil jurisdiction. Corporate cases will also define the paradigm because often (not always) immunity or prudential political concerns limit the liability of the state itself for its egregious human rights violations.

Case law is a de jure source of law in the common law and is also binding precedent in EU law.\(^2\) Case law is strong evidence of the law in civilianist legal systems.

The liability of enterprises for human rights torts is also our starting point because it is heavily litigated. Corporations have cash, a fact which makes them attractive targets for supposedly frivolous lawsuits. Yet, because of lax or nonexistent laws and corruption, corporations do in fact at times violate human rights for profit in the developing countries of the global periphery. The double role of the corporation as “deep pockets,” a fat target, and as ruthless self-interested externalizer of costs of pollution, industrial accidents, and labor, explain why courts are rightly doubly concerned about the existence and extent of corporate tort liability; add to that the fact that the torts involved often occur in foreign lands far from the court and we can see that the governance of corporate conduct is conflicted here, and inevitably so. I regard these problems as more pressing, yet doctrinally less settled, than domestic constitutional torts, which also explains this chapter’s focus.

Transnational enterprise liability for violations of human rights is most readily understood and attained by means of ordinary tort law as private international law. Usually, lex loci delicti will determine the substantive law to apply. The personality and territoriality principles will ordinarily govern jurisdiction.

Although corporate liability is heavily litigated, human rights torts are only exceptionally litigated on a theory of universal civil jurisdiction. The justification for extraterritorial jurisdiction is the lack of an effective remedy: whether due to corruption, war, or oppression of unpopular minorities there is often no effective remedy in the lex situs, the place where the tort occurred. Extraterritoriality also crops up because torts often involve more than one jurisdiction, either as to the lex loci delicti (cross-border pollution causing cancers, for example) or as to the victims, and possibly both.\(^3\)

Once jurisdiction obtains, relevant tort doctrines include imputed liability of employers for employees under theories of agency such as respondeat superior and whether to “lift the corporate veil” and ignore the corporate form. First, we will explain the rise of international human rights law, after which we will examine the tort law aspects of such liability in some depth.

2. INTERNATIONAL LAW

A. Historical Antecedents to Contemporary International Human Rights Law

In principle, where one private person violates another private person’s right, the resultant tort is a matter of private law. Thus, ordinarily, when a tort is of a transnational nature, the usual private international law principles (known to U.S. jurists as “conflicts of law”) apply and determine the civil responsibility of a non-state tortfeasor through the choice of which law to apply, the determination of proper


\(^3\) See also Symeon C. Symeonides, Tort Law and Conflict of Laws, in this volume.
jurisdiction, and exceptionally through the attribution of customary international private law where there is no state authority, for example stateless persons not within the territory of an effectively governed state (the high seas; failed states).

The international human rights regime, in contrast, is generally seen as public law. How do public law rights entail (exceptionally) private law remedies?

Human rights, in their earliest form, emerged as hortatory political programmatic goals, not as substantive positive laws. Thus, for example, the French Declaration of Rights of Man, which Bentham described as “nonsense upon stilts”, was not, initially, seen as other than hortatory: a declaratory instrument. Moreover, such instruments were seen as public law, not private law.

The political and non-justiciable nature of human rights echoed into international law as the idea worked its way into legal consciousness. From about 1840 until the last world war individuals were seen as having no directly enforceable rights of their own under international law: physical persons were seen as mere objects, not subjects, of public international law and, moreover, who would enforce the putative human right? Consequently, any pre-war international human right would of necessity only be enforceable by the state whose citizen or citizens were injured. Many rights under international law still suffer from this bifurcation of the rights-holder and the rights-enforcer. So, for example, abduction is clearly illegal under international law, yet the abductee has no remedy apart from complaint to the state of their citizenship and hope for political redress thereby. The remedy for abduction is held by the government of the abducted and also the location from where they were abducted; the ability to enforce this right is not held by the abductee. Thus, in Eichmann, Argoud, and Noriega, where the sovereign did not complain when foreign powers kidnapped undesirable people resident on their soil for trial outside of their territory, the wrongfully abducted criminal defendants had no personal remedy, only a political one. Alvarez-Machain v. Sosa could also be seen as a case which stands for the proposition that abduction, while illegal, does not entail an individual, that is, personal, right to a remedy. In contrast, Italy has instituted proceedings against U.S. intelligence service

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6 Eichmann is not the only case where a national was kidnapped in a foreign state by a prosecuting state but had no remedy because the remedy was held by the state from where he was kidnapped. See: Crim. 4 juin 1964, Argoud, JCP. 1964, II, 13806, rapport Comte (France: Cour de Cassation, Chambre Criminelle). See also: Brigette Belton Homrig, Abduction as An Alternative To Extradition – A Dangerous Method To Obtain Jurisdiction Over Criminal Defendants, 28 Wake Forest L. Rev. 671 (1993). While abduction is unpleasant assassination is more so.


personnel for their abduction of Abu Omar on Italian territory. However, abducted persons do not have a remedy of their own: their remedy is in the hands of their government or of the government of the place where the abduction occurred.

The indirect enforcement of human rights by invoking the diplomatic protection of one’s state was characteristic of international law prior to 1945. The rise of directly held and enforceable individual human rights marks international law since 1945. Directly enforceable individual rights under international law are increasingly recognized because they are a means to prevent and remedy one of the causes and consequences of wars: the abuse of human rights. Human rights arose in the post-war era as an objective and legitimator of the failed international system in the hope to prevent one of the causes and consequences of war. The use of civil remedies for human rights abuses is merely an extension of the post-1945 trend.

Thus, although constitutional rights and human rights are public law, these public laws may have radiating effects (Ausstrahlwirkungen) into private law relations. Public law (constitutional law, human rights law) may serve as persuasive authority, a guide, in the interpretation of private law rights. In Europe this is known as the doctrine of “indirect third party effect”. The law which has “indirect effect” into private law relations is public law: constitutional/human rights principles. Public law has indirect persuasive authority to determining private law relations because the public law creates the general framework (Rahmenbedingungen; cadre juridique) for private law interactions. As a general rule, public law does not create directly enforceable private rights. However, public law may have indirect persuasive or interpretive value as to the substance of private law rights: that is known as indirect third party effect. Exceptionally, however, public law rights are intended to be directly effective and enforceable by private law persons against the government (vertical direct effect) or even against other private law persons (horizontal direct effect). Third party effect is the idea of third party beneficiary doctrine from contract law in the public law context. Thus, even though human rights laws are in principle public law, violations of human rights may entail a private law tort.

B. The UN Convention System

International human rights have become enforceable personal rights both under national constitutional law and international law. Since 1945 we have witnessed the creation of national constitutional courts such as the Italian Constitutional Court, the Bundesverfassungsgericht in Germany and the Conseil Constitutionnel in France. Internationally, too, we have seen the creation of legal instruments to defend human rights and the formation of court-like bodies for the adjudication of human rights. These

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10 See, e.g., Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (District Ct. 1961) (Israel); 130 In re Argoud, 45 I.L.R. 90 (Cour de Cassation 1964) (France).
11 Professor Surya Deva points out that in India constitutional torts are recognized, and that courts invoke non-binding international laws as persuasive evidence of the contours of binding national law. Surya Deva, Access to Justice: Human Rights Abuses Involving Corporations – India, International Commission of Jurists (ICJ), 2011, p. 17.
processes are known respectively as the constitutionalization and juridification of rights. So, for example, we see the UN’s hortatory Universal Declaration of Human Rights, inspired or even modeled after the French Declaration of Rights of Man. More interestingly, we also see the various UN Human Rights Conventions: the Convention to Eliminate Racial Discrimination, the Convention to Eliminate Discrimination Against Women, the Children’s Convention, inter alia. The UN also established the Human Rights Commission to report on the state of human rights protection in various regions, now known as the United Nations Human Rights Council. These courts and court-like bodies were created to prevent inhuman abuse of basic rights and thereby to avoid one casus belli: often, human rights abuses had been used as legitimate justifications or mere pretexts for war. Juridification internationally is exemplified by the International Court of Justice, the International Criminal Court, the European Court of Human Rights, the Inter-American Court of Human Rights, and a variety of functionally defined international tribunals such as the World Trade Organization’s Dispute Settlement Body.

C. Jus Cogens

As well as establishing universal conventions, sometimes with optional protocols for their enforcement, the post-war era also saw the increased protection of human rights through the expansion of the concept of non-derogable international law (jus cogens) to prevent and remedy various human rights abuses such as torture and rape during war;12 prohibition of child-sex tourism likely will be the next jus cogens norm to be formed.13 Possibly the prohibition of international abduction by terrorists will also become a jus cogens norm.14 The reason for the post-war expansion of human rights’ protection was to avoid one of the causes and consequences of war: human rights’ abuses. Of course, if the protection of human rights also improves human well being, making a more productive and prosperous planet, so much the better. Both fear and hope explain the rise of global human rights. As a matter of binding international law, certain international human rights are definitely non-derogable jus cogens: the prohibitions against piracy, slavery, genocide, war crimes, and torture. Jus cogens violations entail universal jurisdiction: while no state is obligated to remedy a jus cogens violation, any state may do so. All those points of positively binding international law are uncontroversial lex lata. However, the interesting argument, most often seen before U.S. courts but increasingly aired elsewhere, is this: violations of jus cogens are torts and entail universal civil jurisdiction.

13 For example, the EuroParliament has enacted a Directive instructing Member States to make child-sex tourism illegal. See Directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. Germany had already provided that German sex tourists would be liable in Germany for their illegal acts overseas. See: BGH 3 StR 437/99 – Beschluss v. 08. März 2000 (LG Hannover).
The most well-known laws which offer universal jurisdiction over violations of jus cogens are the U.S. Alien Tort Statute (ATS) and the Torture Victim’s Protection Act (TVPA). The ATS is no longer applied outside of U.S. territory because there is a strict presumption against extraterritorial effect of U.S. laws. Absent explicit legislative intent, reflected in the text of the law, U.S. legislation is not to be applied outside of United States territory, per the U.S. Supreme Court. That is self-limitation, not a limitation imposed by international law. Belgium has legislation enabling a remedy for Belgian residents for such torts. Extraterritorial rights protections are also offered by Spain.

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20 Loi de 5 Août 2003 relative à la répression des infractions graves au droit international humanitaire, Title I, Belgian Penal Code of 5 August 2003, Art. 136 bis.
21 Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. Art. 23-4 4 (revisión vigente desde 29 de diciembre de 2012). “Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la Ley española, como alguno de los siguientes delitos:

Genocidio y lesa humanidad.

a. Terrorismo.

b. Piratería y apoderamiento ilícito de aeronaves.

c. Delitos relativos a la prostitución y corrupción de menores e incapaces.

d. Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.

e. Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores.

f. Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España.

Cualquier otro que, según los tratados y convenios internacionales, en particular los Convenios de derecho internacional humanitario y de protección de los derechos humanos, deba ser perseguido en España.

Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los Tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentran en España o que existen víctimas de nacionalidad española, o constatarse algún vínculo de conexión relevante con España y, en todo caso, que en otro país competente o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles.

El proceso penal iniciado ante la jurisdicción española se sobreseará provisionalmente cuando quede constancia del comienzo de otro proceso sobre los hechos denunciados en el país o por el Tribunal a los que se refiere el párrafo anterior.”

Also see Articles 13, 299, 615 to 621 and 625 Criminal Procedure Code of Spain (ancillary private claim to criminal claim as the French action civile).
Israel, Britain, France, Argentina, the Russian Federation, and the People’s Republic of China, to name other prominent examples. This leads to the distinction between extraterritorial and universal jurisdiction.

D. Extraterritorial and Universal Jurisdiction

Torts which occur outside the forum jurisdiction are usually cases of extraterritoriality based on the nationality principle, not of universal jurisdiction. Universal jurisdiction only applies to violations of jus cogens or where states have agreed to such in a binding treaty.

Internationally, jurisdiction is generally asserted based on the principles of territory or nationality; that is, the forum state has a sufficient nexus to the litigants and/or the matter litigated that its exercise of jurisdiction to adjudicate the case is seen as justified. In the U.S. this nexus is known as “minimum contacts” needed to exercise “personal jurisdiction”; that is, jurisdiction ratione personae. The principles of jurisdiction on the territorial or nationality principle are generally the same world-wide.

Jurisdiction may also be asserted based on a principle of universality. Some legal issues are of such concern to the world community that any state may adjudicate them. Universal jurisdiction is entailed in cases of jus cogens violations. Thus, for example, any state may take jurisdiction over pirates, slave traders, war criminals, and torturers.


24 Article 689 of the French Code of Criminal Procedure (Code du Procédure Pénale) provides that: “[t]he authors or accomplices of offences committed outside the territory of the Republic can be sued in the French courts and judged by them... whenever an international convention grants jurisdiction to the French courts.” In concert with the French action civile (Art. 2, Code of Criminal Procedure) the French victim of an international tort can obtain a remedy in France similar to that provided in the U.S. Alien Tort Statute. Moreover, France permits jurisdiction on the passive personality principle: the French prosecutor may prosecute a crime against a French national which occurs anywhere on earth. The victim may thereto append an action civile to obtain compensation in tort.


26 The Russian Constitution (Конституцию Российской Федерации, Принята всенародным голосованием 12 декабря 1993) and Russian Penal Code (Уголовный Кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (принят ГД ФС РФ 24.05.1996) prohibit various jus cogens violations and provide universal jurisdiction over them.

27 Criminal Law of the People’s Republic of China, Art. 36 (ancillary private claim for damages entailed by criminal cause of action).

Universal criminal jurisdiction over violations of jus cogens and under the protective principle is uncontroversial. The status of universal civil jurisdiction under international law is less certain. United States courts implied 1) extraterritorial effect and 2) private civil remedies to some wrongs which are remedied (in theory …) in other countries via criminal law. Many U.S. scholars, and this author, continue to regard universal civil jurisdiction as lawful under international law; every crime at common law implies a corresponding tort. However, as noted earlier, the U.S. Supreme Court has elected to interpret U.S. laws against extraterritorial effect strictly, leaving the TVPA as perhaps the sole vehicle for civil liability in U.S. law on the basis of universal civil jurisdiction, barring congressional amendment of the ATS (or the Securities and Exchange Acts or Racketeering Influenced and Corrupt Organizations Act (RICO) for that matter).

The U.S. is not unique in offering extraterritorial civil remedies. Other states offer similar ancillary private remedies to human rights violations. The EU offers an extraterritorial remedy homologous to the Alien Tort Statute in its Regulation 1215/2012. France and systems modeled on French law offer the action civile, whose extraterritorial uses are examined below. Other states have generally not objected to the U.S. invocation of universal civil jurisdiction. This is likely because universal civil jurisdiction is seen as entailed by the existence of universal criminal jurisdiction as it is less burdensome to defendants than criminal jurisdiction.

One aspect of the general principle of sovereign equality is the untrammeled power of any state to undertake any action which it may choose that is no violation of its existing customary or treaty obligations. States, constituted by peoples, in turn constitute the international system. Just as the private person in the state may undertake

29 The more famous examples are the Alien Tort Statute and The Torture Victims Protection Act, though in fact the Racketeering Influenced and Corrupt Organizations Act and the Securities and Exchange Act also provide private remedies in tort for wrongs which may also be addressed by criminal law.
30 Caveat lector: the French action civile provides a similar private right of restitution to criminal wrongs.
33 Antonio Cassese, INTERNATIONAL CRIMINAL LAW, 290–291 n. 29 (2003).
34 “What applies for criminal jurisdiction applies to some extent mutatis mutandis for civil jurisdiction, because the latter is considered less intrusive. The presumption is that if universal criminal jurisdiction is permissible under international law, universal civil jurisdiction is also permissible (qui peut le plus peut le moins, the greater includes the lesser).” Luc Reydams, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES, pp. 2–3 (2005).
35 But see Curtis A. Bradley, Universal Jurisdiction and U.S. Law, University of Chicago Legal Forum 323–350 (2001) (arguing that the Restatement and Filartiga merely assume but do not prove the entailment of universal civil jurisdiction from universal criminal jurisdiction; notes that civil jurisdiction may be seen as more burdensome to governments due to the lack of state control over private lawsuits. As to that latter argument, this chapter directs the reader’s attention to the numerous common law and U.S. constitutional rules delimiting jurisdiction).
any action which is not expressly prohibited, so too may states undertake any action which they choose, provided the state in question respects its international obligations. The absence of a customary prohibition of civil jurisdiction under the universality principle, as evidenced by 30 years of state practice without serious objection, also indicates that civil jurisdiction under the universality principle is permitted. Thus, universal civil jurisdiction is consistent with international law and is logically entailed in cases where universal criminal jurisdiction obtains.

3. SUPRANATIONAL EUROPEAN LAW

Theoretically, EU law is international law, lex specialis so to speak. However, in practice EU law is a hybrid of international law and the law of the EU Member States. This section details EU level liability. EU law is as a legal matter autonomous with respect to the laws of the Member States. So while national principles of law are relevant to determining the content of EU principles, they are not dispositive: EU law is independent of the national laws of the EU Member States.

A. Extraterritorial Civil Jurisdiction under the Brussels Regime

Extraterritorial civil jurisdiction is permitted in the EU under Regulation 1215/2012. The tortfeasor must be European, though the tort may be of a subsidiary and the locus of the tort may be outside of the EU; the plaintiff need not be an EU resident or citizen. Forum non conveniens does not bar a claim under Regulation 1215/2012. The Regulation permits liability for overseas branches and subsidiaries to be attributed to EU-based main offices (parent companies). Scholars like Olivier de Schutter and others analogize the Brussels I Regulation (predecessor to Regulation 1215/2012) to

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38 See Case C-412/98, Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC), 2000 E.C.R. I-5925, paras. 45, 57–61 (confirming that the Brussels I Regulation does not require that the plaintiff be domiciled in a Member State).
41 For a good introduction to the idea of EU equivalents to the Alien Tort Statute in English see: Jan Wouters and Leen Chanet, Corporate Human Rights Responsibility: A European Perspective 6 Nw. U. J. Int’l Hum. Rts. 262 (2008) at law.northwestern.edu/journals/jihr/v6/n2/3

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the ATS, arguing that similar extraterritorial liability for subsidiary enterprises is possible under EU law thereby.

B. Extraterritorial Jurisdiction under the European Convention on Human Rights

In principle, the European Convention on Human Rights (ECHR) only applies on the territory or dependencies of the contracting parties. This was the logic of the *Bankovic* decision, which denied the extraterritorial application of the ECHR to aerial bombardment in ex-Yugoslavia by a state party to the ECHR. More recently, however, scholars have argued that the ECHR in fact has a general extraterritorial effect on the basis of Article I of the ECHR. Article I provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Thus, it is possible to bring a case for an extraterritorial violation of the ECHR against a state party to the convention, at least where the state in question exercised both de facto and de jure control over the plaintiff. The best view is to see the applicability of the ECHR as proportional to the degree to which state power and control of a state party are exercised. In *Bankovic* there was no control of the territory — that is, the ground — which to me is the best way to explain why the ECHR did not apply. The portion of ex-Yugoslavia bombarded in *Bankovic* was an area where international humanitarian law (the law of war) applied, not civilian law. That would reconcile the apparent inconsistency between *Bankovic* and more recent cases. Thus, extraterritorial application of the ECHR is possible but it is also an exception.47


46 Stocke v. Germany, Appl No. 11755/85 (ECtHR, 12 October 1989).

47 *Al-Skeini and Others v. United Kingdom*, App No. 55721/07 (ECtHR, 7 July 2011), para. 149.
4. NATIONAL LAW

A. Private Causes of Action in Civilianist Law of the Member States of the EU

National laws of EU Member States can be used to obtain extraterritorial and universal civil jurisdiction over human rights torts. Here we briefly examine the actio popularis, the action civile, and Adhäsionsverfahren.

i. Spain: Actio popularis

The Roman law roots of the various private rights of action are found in the actio popularis.\(^48\) The actio popularis was a method whereby private citizens could invoke state power to prosecute crimes. States may bring an actio popularis before international tribunals.\(^49\) Individuals and NGOs may bring an actio popularis under national law in those states which recognize it. For example, Spain permitted an actio popularis regarding the “disappearances” (murders) of victims of the Argentinian military dictatorship.\(^50\)

ii. Francophone countries: Action civile

a. France

Extraterritorial civil jurisdiction can be asserted in France under Code de Procédure Civil Francais, Article 46(1), 46(3).\(^51\) Likewise, Article 14 of the French Code Civil\(^52\) provides absolute French jurisdiction for lawsuits by French citizens against any criminal defendant, regardless of the defendant’s citizenship or nationality;

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\(^51\) “Le demandeur peut saisir à son choix, outre la juridiction du lieu où demeure le défendeur:

- en matière contractuelle, la juridiction du lieu de la livraison effective de la chose ou du lieu de l’exécution de la prestation de service; – en matière délictuelle, la juridiction du lieu du fait dommageable ou celle dans le ressort de laquelle le dommage a été subi;
- en matière mixte, la juridiction du lieu où est situé l’immeuble;

to which civil claims can be attached as actions civiles. Article 15 Code Civil provides absolute jurisdiction in France for lawsuits against French citizens. Article 11 Code Civil extends to non-French citizens in France the same rights as their state of citizenship extends to French citizens. However, French extraterritorial civil jurisdiction may not be invoked against a resident of a Brussels-Lugano state. Nevertheless, EU Regulation 1215/2012 Article 4(2) extends French nationality based jurisdiction to EU citizens domiciled in France: thus, an EU citizen resident in France may initiate civil proceedings against a person who is not a citizen of a state party to the Brussels-Lugano regime. France may even be procedurally advantageous in some regards as a forum state in comparison with the U.S.

While most European states have established the principle of universal jurisdiction in their law, they usually do so in criminal matters: however, nothing prevents them from doing so in civil matters. France, and systems modeled on French law, also offers the remedy of the action civile, wherein a civil claims in tort may be joined to criminal proceedings for litigation in one proceeding; the action civile is similar to the implied private cause of action which may arise out of the criminal prohibitions of the U.S. Securities and Exchange laws (SEA 10b) and the U.S. RICO. The action civile, to which we now turn our attention, enables a private restitutionary remedy to extraterritorial violations of rights.

In principle and in practice victims of crime in France have the right to compensation in tort through an action civile. The action civile can only be initiated by the victim

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57 French law does not currently have homologues to the act of state doctrine or forum non conveniens: “ni la doctrina del forum non conveniens, ni la del acto de Estado o la de los asuntos políticos, que se encuentran contemplados en el sistema legal estadounidense, se apican en Francia.” Federación Internacional de Derechos Humanos, UNA GUÍA SOBRE MECANISMOS DE DENUNCIA PARA VÍCTIMAS Y ONG, 2011, p. 247, available at: fidh.org/IMG/pdf/guia_empresas_seccion-ii.pdf (last visited 9 April 2014). The “political question doctrine” is a U.S. Constitutional rule which limits the jurisdiction of the Court to review acts of the executive or legislature and thus also does not exist in French law.


60 Stefan Gewaltig, DIE ACTION CIVILE IM FRANZÖSISCHEN STRAFVERFAHREN, Peter Lang: Frankfurt am Main, page 6 (1990) (Hereafter Gewaltig).
of a crime.\textsuperscript{61} It is an ancillary private law claim instituted pursuant to a criminal claim brought by the state. Historically, the common law permitted private persons to initiate prosecutions of crimes in order to conserve very limited judicial resources. That is no longer the case in U.S. common law: U.S. law no longer offers a procedure similar to the \textit{action civile} or actio popularis to permit essentially private criminal prosecutions, even in the civil law jurisdiction of Louisiana.\textsuperscript{62} The RICO\textsuperscript{63} does however permit a combination of civil and criminal claims in cases combating organized crime. The RICO likely does not have extraterritorial civil effect.\textsuperscript{64}

In the \textit{action civile} criminal and tort procedures are combined. That combination offers a certain judicial economy by reducing the number of court proceedings. Article 2 of the French Penal Code\textsuperscript{65} provides that:

all who have personally suffered a damage directly caused by the crime have a right to reparation of that damage by a civil cause of action. [\textit{action civile}].

Renunciation of the civil cause of action in no way suspends or stops the public prosecution, subject to the exceptions provided for in line 3 of article 6.\textsuperscript{66}

Article 418, paragraph 2, “On the constitution and effects of the civil party” of the French Code of Criminal Procedure further states that:

All persons who, in conformity with Article 2, claim to have been injured by a wrong can, if they have not yet done so, move to be considered a civil party in the case. No lawyer is required to make this motion before the court. The civil party can, in support of their cause of action, ask for damages corresponding to the damages which they have suffered.\textsuperscript{67}


\textsuperscript{62} “In France, by virtue of the procedure of \textit{la partie civile}, the civil action may be brought along with the penal proceedings but such is not the case in Louisiana or the United States.” William E. Crawford, \textit{Louisiana Civil Law Treatise: Tort Law}, § 3.1. (2000).


\textsuperscript{64} \textit{Morrison v. National Australia Bank} (U.S.S.Ct., 2010) denied extraterritorial effect of the Securities and Exchange Act implied private cause of action, holding \textit{simplicissimus} that extraterritorial effect of U.S. law will not be implied but must be explicitly provided for and proven.


\textsuperscript{66} Author’s translation. The original text reads: “L’\textit{action civile} en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l’infraction.


\textsuperscript{67} Art. 418, French Code of Criminal Procedure (author’s translation). The original text states:

“Toute personne qui, conformément à l’article 2, prétend avoir été lésée par un délit, peut, si elle ne l’a déjà fait, se constituer partie civile à l’audience même.
Thus, all persons who are directly injured through the criminal act have the right to compensation for the damages resulting therefrom. However, the claim for damages must be made at trial, and may not be first made on appeal. Interestingly, civil parties are disqualified from being witnesses in the criminal action.

The resulting compensation from damages to parties civiles may be enforced anywhere the defendant’s assets can be found.

The action civile is evidence of the general legal principle that a criminal act entails a corresponding civil tort for restitution of damages. The action civile exists in French, Italian civil law, and in other jurisdictions which model their domestic law on French law. A similar cause of action, the Adhäsionsverfahren, also exists in German civil law (see below), though it is rarely resorted to.

In sum, civilianist legal systems recognize 1) the actionability of international crimes in domestic proceedings; and 2) the possibility that an injured plaintiff may sue the defendant criminal tortfeasor. Extraterritorial or even universal civil jurisdiction is not an American idiosyncrasy.

Another basis for a civil claim in tort for violation of human rights is the Convention Against Torture. In France, the case In Re Javor recognized that “all persons who are victims of a crime in contravention of the New York Convention Against Torture of 1984 have a right to bring an action civile against the criminal tortfeasor” and that “denial of this right constitutes denial of an equitable trial as guaranteed by the European Convention on Human rights.”

b. Belgium

Belgian civil law, like French civil law, recognizes the existence of an action civile for damages in cases of crimes. Belgium offers universal jurisdiction over violations of jus cogens in Article 136 of the Belgian penal code. In this case, suit...
may be brought by “all Belgians or any other person having their principal residence in Belgium”76 (Art. 6); Article 10 also permits jurisdiction on behalf of victims legally resident in Belgium for at least three years.77

Accomplice liability in Belgian law is extensive: the plaintiff need not prove that the defendant accomplice intended to aid the criminal principal to achieve the criminal object.78 Plaintiffs need not prove fraudulent intention of accomplices to defraud79 or criminal intent.80 Further, all defendants, accomplices, and principals are liable jointly and severally for all damages resulting from the criminal tort, even absent any overt action or agreement to act in concert.81

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3 réduction en esclavage;
4 déportation ou transfert forcé de population;
5 emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international;
6 torture;
7 viol, esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée et toute autre forme de violence sexuelle de gravité comparable;
8 persécution de tout groupe ou de toute collectivité identifiable pour des motifs d’ordre politique, racial, national, ethnique, culturel, religieux ou sexistes ou en fonction d’autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans les articles 136bis, 136ter et 136quater;
9 disparitions forcées de personnes;
10 crime d’apartheid;
11 autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l’intégrité physique ou à la santé physique ou mentale.”

76 Id., Art. 6.
77 Id., Art. 10.
78 “Pour être coauteur ou complice, il n’est pas nécessaire qu’il y ait eu intention criminelle tendant à porter préjudice à la masse” (Cass. 13 septembre 1989, Rev. dr. pén. 1990, 59). (Author’s translation: To be an accomplice or co-author it is not necessary that there has been criminal intent tending to cause injury.) (Hereafter: Accomplice cause.)
79 “Pour condamner en droit un accusé comme coauteur ou complice d’une faillite frauduleuse, il n’est pas requis que l’accusé ait agi dans l’intention frauduleuse de porter atteinte aux biens; il suffit qu’il soit établi que quelqu’un ait commis ce délit et que l’accusé y ait participé d’une des manières énumérées aux articles 66 et 67 du Code pénal (art. 489 du Code pénal)” (Cass. AR P. 93.0510.N, 22 mars 1994, Arr. Cass. 1994,299). (Author’s translation: To legally sanction an accused as accomplice or co-author of fraudulent bankruptcy it is not necessary that the accused acted with a fraudulent intention to damage goods; it suffices that it be established that someone has committed this wrong and that the accused participated in one of the manners enumerated in Articles 66 and 67 of the Penal Code.)
80 Id.
81 “Toutes les personnes condamnées pour un même délit sont tenues dans leur propre chef d’indemniser la partie civile, quel que soit le degré de participation de chacune d’elles au délit commun, et même si entre les personnes condamnées il n’y avait ni accord préalable, ni unité d’action” (Cass. 22 décembre 1947, Arr. Cass. 1947, 425). (Author’s translation: All persons found guilty of one crime are held individually responsible to indemnify the civil party, whatever their degree of individual participation in the common crime, and even if among the condemned there was no agreement prior to the crime nor any unity of action.)
iii. Germany: The Adhäsionsverfahren

The Adhäsionsverfahren is the German homologue to the action civile. Essentially, like the action civile, it permits the incorporation of tort claims in a criminal trial in order to avoid the risk of inconsistent judgments and for reasons of judicial economy.

According to § 403, para. 1, line 1 of the Code of Criminal Procedure, injured parties can make claims for monetary compensation in criminal trials. The right to compensation is covered in § 823, para. 2 of the German Civil Code in connection with § 266 of the German Criminal Code. Thus, at least in theory, it would be possible to bring an Adhäsionsverfahren so that a criminal prosecution would also result in compensation to claimants. Such proceedings in practice are rare. There are several possible reasons for this: the plaintiff must know that they have the right; the plaintiff must take the initiative and ask for the application of the right; plaintiffs may prefer to go before the civil courts; the Adhäsionsverfahren is obscure and complicates the proceedings; and, finally, the penal judge may be uncomfortable determining the existence and extent of tort damages.

Having examined international extraterritorial and universal jurisdiction law in theory we now turn to its application in practice.

B. Common Law Procedural Restrictions on Extraterritoriality

Up to this point this chapter has highlighted remedies similar to the Alien Tort Statute in international and European law to show that civil jurisdiction in tort under the universal principle is permitted under international law as a logical consequence of state sovereignty for greater powers (universal criminal jurisdiction) imply lesser powers (universal civil jurisdiction) and because states, generally speaking, are free to undertake any action they please which is not prohibited by non-derogable peremptory norms (jus cogens), a fortiori where such actions are intended to secure enforcement of those jus cogens norms. Foreign states usually do not object to the exercise of extraterritorial and universal civil jurisdiction by the United States. That may be due to the fact that bad actions merit redress. It may also be due to the fact that every state wants to have the capacity to exercise its own powers. It may also be due to the fact that there are a number of procedural rules which restrict U.S. extraterritorial civil jurisdiction. Potential procedural bars to adjudication on the merits include the doctrines of exhaustion, comity, forum non conveniens, the act of state doctrine, and the political question doctrine and immunity. Similar procedural obstacles exist in civilianist jurisdictions. Here we examine the procedural limits on extraterritorial law in the common law; most of these procedural limitations have parallels in civilianist jurisdictions such as France and Germany.

i. Exhaustion

Exhaustion (Erschöpfung) is the internationally recognized idea that one must seek and conclude local remedies first – whether within the corporation (the “demand” requirement), in a federated state, or in national law – prior to proceeding to remedies at a higher level of governance such as international law. However, the absence of an effective remedy or futility of requests for a remedy will generally excuse a failure to
exhaust local remedies. Thus, where the foreign courts are corrupt or nonexistent, exhaustion would not block the lawsuit.

ii. Comity
Comity (Comitas; gutes Einvernehmen der Völker) is the gracious respect accorded to the legal acts and decisions of other states. It is not legally compelled, at least under U.S. law, but is the ordinary consequence of being de jure recognized as a friendly government: a form of international “full faith and credit.” Comity in the U.S. and the U.K. – that is, throughout the common law system – is essentially the same: it is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” Comity is best seen as a discretionary doctrine. The legal acts of states which are de jure recognized as friendly will be granted comity as a matter of course. Legal acts of unrecognized and unfriendly states will not be granted comity. The gray area is countries which are friendly but de jure unrecognized, such as nationalist China (Taiwan). The legal effect of comity is a sort of international res judicata. If a case has already been litigated in a recognized and friendly foreign jurisdiction, then comity bars re-litigation of the issue.

iii. Forum non conveniens
Another defense to jurisdiction is forum non conveniens. Forum non conveniens is a discretionary, not mandatory, doctrine. The court may refuse jurisdiction, at its discretion, on the logic that there is another, more convenient forum for litigation.

A precondition for a finding of forum non conveniens is the existence of a foreign forum with jurisdiction to adjudicate. If such a forum exists and would not refuse the suit for discretionary reasons, then the court must balance the competing interests of the foreign forum, of its own judiciary, and the interests of the plaintiff and defendant.

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83 “Principles of comity governing this country’s relations with other nations, sovereign states are allowed to sue in the courts of the United States,” The Sapphire, 11 Wall. 164, 167; Guaranty Trust Co. v. United States, 304 U.S. 126, 134. This Court has called “comity” in the legal sense “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” Hilton v. Guyot, 159 U.S. 113, 163–164. (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398;84 S. Ct. 923;11 L. Ed. 2d 804;1964 U.S. LEXIS 2252, 18–19.)
89 Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).
90 Id.
Ordinarily the plaintiff’s choice of forum will be respected. Compelling circumstances can nonetheless cause a court to reject a plaintiff’s claim because of inconvenience either to the court or to the defendant, or both. The court examines whether the choice of forum by the plaintiff is oppressive to the defendant. If not, and if there are no compelling issues of judicial economy, the plaintiff’s choice of forum will be respected.

In Wiwa v. Royal Dutch Petroleum an Anglo-Dutch company was sued in the United States for a tort in Nigeria. The forum non conveniens objection was accepted at trial but then rejected on appeal. The appellate court in Wiwa considered the substantive English law and balanced the interests of the U.K., the U.S., Nigeria, the plaintiff, and the defendant, in determining whether forum non conveniens applied.

Forum non conveniens is similar in Britain:

Where a plaintiff sues a defendant as of right in the English court and the defendant applies to stay the proceedings on grounds of *forum non conveniens*, the principles to be applied by the English court in deciding that application in any case not governed by Article 2 of the Brussels Convention are not in doubt. They derive from the judgment of Lord Kinnear in *Sim v. Robinow* where he said: “the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.”

However, though the British court looks to the interest of the plaintiff and defendant as well as the ends of justice, it does not, unlike U.S. courts, consider public interest or public policy. The U.S. and British courts engage in a balancing of several different factors to determine whether the forum is inconvenient, but the number of factors in the British formulation of forum non conveniens is more limited than is the case in the U.S.

Forum non conveniens reduces the risk of unjust jurisdiction, which reduces in turn the objection of other states to the exercise of extraterritorial civil jurisdiction.

**iv. The act of state doctrine**

The act of state doctrine precludes courts from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory. Historically, the act of state doctrine was an outgrowth of comity. As such, it was and possibly still is a discretionary remedy. More recently the act of state doctrine in

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91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Sim v. Robinow* (1892) 19 R. 665 at 668.
97 *Id.*
U.S. law has been viewed as grounded in notions of separation of powers, which might indicate it is not discretionary. The act of state doctrine arises where the relief sought or the defense interposed would require the court to declare invalid the official act of a foreign sovereign performed in its own territory. In determining the applicability of this doctrine, the court should also consider whether the foreign sovereign acted in the public interest. Thus, a mere commercial act (acto jure gestionis) will be less likely to be found to be an “act of state” whereas a sovereign act (acto jure imperii) would be much more likely to be found to be an act of state.

However, the act of state doctrine is no shield for illegal activity. An act of a state official in violation of the state’s laws (or the law of nations) is not an “act of state” because the acts are illegal, and the act of state doctrine is a discretionary outgrowth of comity. The use of the act of state doctrine represents a refusal of the court’s usual duty to adjudicate cases before it; thus, judicial review of the application of the act of state doctrine is not deferential.

The act of state doctrine is essentially the same in British law as in the U.S.: “[c]ourts will not sit in judgment on the act of a foreign sovereign performed within the territories of that sovereign.” So, for example, the House of Lords in *Pinochet* cited the U.S. case of *Filartiga v. Pena-Irala* as evidence to justify its rejection of the notion that the act of state doctrine bars proceedings against an individual for acts of torture: British and U.S. courts regularly cite each other as persuasive evidence of...
the law.\textsuperscript{111} Lord Slynn of Hadley noted that the act of state doctrine in U.K. law “is much the same as it was in the earlier statements of the United States courts.”\textsuperscript{112}

v. The political question doctrine
The political question doctrine is a rule of U.S. domestic constitutional law. Where the U.S. court is confronted with a “political question”\textsuperscript{113} it will regard such a question as non-justiciable. The political question doctrine is a manifestation of the principle of separation of powers. To determine whether a question is “political,” courts inquire into whether the issue was committed to the executive or legislative branch. If the issue is exclusively at the discretion of the executive or legislature, then the political question doctrine applies, barring adjudication of the issue. A finding that the case requires unquestioning adherence to a political decision already made or that the court’s decision risks potential embarrassment by creating multiple conflicting pronouncements from different branches of government are also factors that will weigh in favor of a finding of a political question: again, the issue is separation of powers. Alternatively, if the court finds that there is an absence of judicially manageable standards or that it would be impossible to decide the case without also making a policy determination, then that makes it likely that the case will be considered a non-justiciable political question. The political question doctrine, unlike comity and perhaps the act of state doctrine, is not discretionary. In the alien tort context,\textsuperscript{114} no political question was found in the case of a de facto state with a head of state claiming sovereign immunity.\textsuperscript{115} The court ruled on the merits, determining that head of state immunity does not apply to unrecognized states. This brings us to the next procedural limit on extraterritorial civil jurisdiction: immunity.

vi. Immunity
The principles of immunity in international and national laws are generally similar worldwide. The examples given here are taken from the common law,\textsuperscript{116} especially U.S. law. However, the principles those laws embody are found both in international law and in the domestic law of civilianist jurisdictions.

Immunity is of two types: immunity of the state itself (sovereign immunity) and immunity of the state’s agents (official immunity). Official immunity is also of two types: absolute or relative. The historical basis of sovereign immunity in U.S. law is in principles of “grace and comity,” not the U.S. Constitution.\textsuperscript{117} The United States grants

\begin{footnotesize}
\begin{itemize}
\item[112] Id.
\item[114] Id., at 249.
\item[115] Id.
\item[116] E.g., sovereign immunity under British law; see e.g. C. David Baker, TORT (London: 1991) pp. 450–451 (citing The Cristina (1938)).
\item[117] Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149 n.3 (7th Cir. 2001) (implying that comity was one justification for the grant of immunity to Germany).
\end{itemize}
\end{footnotesize}
head-of-state immunity only to governments de jure recognized by the United States.\textsuperscript{118} De facto statehood is insufficient to support a claim of sovereign immunity.\textsuperscript{119}

Heads of state and ministers\textsuperscript{120} enjoy absolute immunity for any acts during their terms of office and relative immunity as to their official acts after their term is complete. However, official immunity is no defense where the act was illegal under the law of the state.\textsuperscript{121} Thus, in Filartiga v. Pena-Irala,\textsuperscript{122} where a Colombian government official engaged in extra-legal torture and murder outside of his official duties, that official could not claim immunity a priori because torture is illegal under international law and a violation of jus cogens and a fortiori because Colombian domestic law clearly states that torture is illegal. The better view is that jus cogens violations are not subject to immunity. Thus, Pinochet was not regarded as immune.\textsuperscript{123} Official immunity did not prevent the United States from successfully trying Manuel Noriega, the former dictator of Panama, for drug trafficking,\textsuperscript{124} perhaps in part because the United States never recognized Noriega’s government.

Official immunity is no defense as to acts prior to or following one’s office. However, during their tenure heads of state are absolutely immune. Even after their tenure a head of state retains a qualified immunity as to his or her official acts. This explains why it is difficult to try foreign heads of state, for example the late heads of state Ariel Sharon\textsuperscript{125} and Agosto Pinochet.\textsuperscript{126} Official immunity did not, however, prevent trial of de facto heads of state Manuel Noriega\textsuperscript{127} and Radovan Karadzic. There is an obligation under international law to respect the immunity of heads of state and ministers during their term of office. However, after their term of office has expired, any immunity to the acts of state officials prior to their term of office, and perhaps even as to unofficial acts during their term of office, is granted at the discretion of the granting state. Further, there is no immunity for violations of jus cogens.

\begin{thebibliography}{9}
\bibitem{Kadic} Kadic, 70 F.3d at 248.
\bibitem{Id} Id. at 250 (“In a ‘Statement of Interest,’ signed by the Solicitor General and the State Department’s Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the [current] litigation.”).
\bibitem{Schooner Exchange} See, e.g., The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).
\bibitem{Filartiga} See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (concluding that “Paraguay’s renunciation of torture... does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority”).
\bibitem{Pinochet UG} Filartiga v. Pena-Irala, 630 F.2d 876.
\bibitem{Pinochet} In 1998, Spain unsuccessfully attempted to extradite former Chilean dictator, Senator Pinochet, from the United Kingdom to try him for acts committed by him or under his direction in violation of international law during his tenure in office. Regina v. Bartle & the Comm’r of Police for the Metropolis—Ex Parte Pinochet, 38 I.L.M. 581, 583–585 (1999).
\bibitem{Noriega} United States v. Noriega, 117 F.3d 1206, 1209 (11th Cir. 1997). The Noriega court articulated the idea that in assessing an immunity claim, the court must look to the executive branch for guidance as to whether or not immunity is appropriate. Id. at 1212.
\bibitem{Arrêt de la Cour} See Arrêt de la Cour D’Appel de Bruxelles, Sharon Ariel, Yaron Amos et autres, art. 136 bis, al 2 et 235 bis CIC (26 June 2002).
\bibitem{Pinochet Ugarte} See Regina v. Bow Street Magistrate, Ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (House of Lords 1999).
\bibitem{Pinochet Ugarte2} U.S. v. Noriega, 117 F.3d 1206 to 117 F.3d 1206, 1222 (11th Cir. 1997).
\end{thebibliography}
Litigants must also consider the immunity of the state itself. The general rule, both within the U.S. and internationally, is that the state is immune for its sovereign acts (acto jure imperii) but not for its commercial acts (acto jure gestionis). This distinction is reflected in U.S. national law in the Foreign Sovereign Immunities Act. Thus, for example, when a Liberian (neutral) vessel outside the zone of exclusion was attacked by the Argentine air force during the Falklands War with resulting property loss, there was no liability under the ATS due to the sovereign immunity of the Argentine government because the act was sovereign, not commercial. 128

We now discuss the U.S. Foreign Sovereign Immunities Act (FSIA) because it represents the general rules internationally, as seen in parallel U.K. laws.

a. The U.S. Foreign Sovereign Immunities Act The FSIA is a jurisdictional act. 129 It is the only way to obtain jurisdiction in the United States over a foreign sovereign. 130 The general rule of the FSIA is that foreign states are immune from suit in the United States. 131 There are several exceptions, however, which can be summarized as either based on (1) waivers of immunity or (2) commercial acts. 132

(1) WAIvERS OF IMMUNITY The FSIA permits a suit against a state where the state has waived its liability. 133 Waiver may be implied, but implied waivers are strictly construed against the plaintiff. 134 For example, the case of Sampson v. FRG determined that there is no implied waiver of immunity under the FSIA merely because the act was a violation of jus cogens. 135 Other evidence to imply a waiver must be adduced. Mere declarations by Germany of a desire to compensate compulsory laborers were not sufficient to waive Germany’s sovereign immunity.

(2) COMMERCIAL ACTS The FSIA also governs liability for purely commercial acts 136 which are known internationally as acto jure gestionis, although the statute uses the term “commercial” acts and does not rely on the Latin term. Claims are permitted where a tortious act either occurred in the United States or has direct effects in the United States. 137 Mere financial effects may not be sufficient to support a finding of “direct effects” for the FSIA. 138

133 FSIA § 1605 (a)(1).
134 Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1150 (7th Cir. 2001).
136 FSIA §1605.
137 FSIA §1605(a) esp. §1605(a)(2).
92 Comparative tort law

The FSIA places the burden of proof on the defendant state to demonstrate that it is immune,139 but places a burden of production on the plaintiff to demonstrate that one of the exceptions to the general rule of immunity applies.140

b. The British State Immunity Act141 The British State Immunity Act and the U.S. Foreign Sovereign Immunities Act are remarkably similar parallel legislation. So, in Pinochet 3, the House of Lords cited an interpretation of the U.S. FSIA (enacted in 1976) as evidence of the correct interpretation of the British State Immunity Act of 1978.142 The House of Lords, like the U.S. courts, noted the bifurcation of immunity into commercial acts (acto jure gestiones) and sovereign acts (acto jure imperii), a distinction also made under international law.143 There are also parallels between the Hostage Taking Acts in U.S. and British law. These are far from the only statutory similarities between the two countries. These similarities track similarities in customary law, constitutional law, sources of law, and legal methods and doctrines.144

5. CONCLUSION

International law permits extraterritorial civil jurisdiction on the universality and protective principles. Extraterritorial civil jurisdiction is not a uniquely United States or common law practice. It is also allowed by the Convention Against Torture and EU Regulation 1215/2012 and is also a part of the domestic laws of France, Spain, and other civil law countries. Private law enforcement of human rights norms via tort law is a very recent development but is legal under international law. It is a practical method to enable self-help enforcement of human rights despite the failure of the state to protect them. That’s progress.

140 Id.
142 Pinochet 3 at 161.
143 Id. The court again cites U.S. case law, namely Saudi Arabia v. Nelson, 88 I.L.R. 189.