NYU International Law Course (Kingsbury)

Unit 5: Jurisdiction in National and International Law

User's Guide

Last Updated April 28, 2009

A. Framework

The theory of jurisdiction in international law is underwritten by a normative assumption that the territorial boundaries or national identities of citizens constitute the boundaries of the law. As we move to assert jurisdiction in circumstances different than the ones envisaged by these traditional principles of jurisdiction, this Foreign Office premise is constantly challenged by rule of law considerations.

Conceptually, these struggles could be restated by the three theoretical frameworks of realism, institutionalism and cosmopolitanism. A realist perspective perceives the international world as anarchical; international law is aimed at facilitating inter-state relations. Exceptions to principles of state jurisdiction could only be justified in specific instances that are 'beyond states', transnational in essence (such as piracy, human trafficking, or terror). The institutionalist position supports an *international* legal framework to address issues that require inter-state coordination or, alternatively, issues which otherwise would be left unregulated (as some of the cases in the ATCA litigation suggest). In addition, institutionalist analysis could shed light on the failure to regulate some of these issues through the strategic benefits in the absence of regulation. A cosmopolitan perspective negates the anarchical understanding of international relations: there is no sphere of 'no law' or black holes; the international sphere is already governed by law. Such position would put less emphasis on national borders and shift attention to the violation of the law and the struggle against impunity.

Given the difficulty of reaching consensus on the theory of justice that should underlie international regulation, the Global Administrative Law framework (GAL) provides an intermediate position addressing the duty of international regulatory bodies to adhere to procedural and substantive safeguards. This is the law of transparency, participation, review,

and above all accountability in global governance.[1] GAL considerations provide us a critical tool to evaluate whether the move to international regulation isn't, in itself, a move to evade legal constraints. Notwithstanding the importance of cosmopolitan considerations in addressing the challenges to the foreign office model, they will often be critically considered in light of the power relations they might reflect.

B. Trajectory

This Unit introduces the principles of international law which govern the issue of state jurisdiction in the context of regulation and then discusses the challenges posed to those principles in the national and international arenas. Five main challenges to the principles of state jurisdiction are dealt with throughout the unit. The *first* set of challenges arises in the context of *extradition*. The analysis focuses on instances of abduction. The *second* set of challenges arises in the context of use of force situations outside of the territorial sphere, such as private military contractors, extraordinary rendition, and secret detentions. The two challenges that follow involve national legislation which provides jurisdiction over non-citizens for violations of international law. The *third* is focused on American legislation providing *non-citizen victims* a private cause of action for the enforcement of the law of nations in American courts (the Alien Tort Claims Act). Fourth, *Universal Jurisdiction in Absentia* is raised in the cases of Pinochet and Yerodia. The *last* challenge to state jurisdiction is the involvement of both national courts and international organizations and courts in the War on Terror. The state is the primary unit we deal with in this unit; throughout the discussion we work outward to see what issues of jurisdiction arise in units other than the state. The discussion thus moves beyond the *inter-state* challenges towards tensions between international organizations, states, individuals and other actors.

[1] For further reading see Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, The Emergence of Global Administrative Law, 68 LAW & CONTEMPORARY PROBLEMS, 15-61 (2005); Nico Krisch & Benedict Kingsbury, Introduction: Global Administrative Law and Global Market Regulation in the International Legal Order, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 1-14 (2006).

C. The Foreign Office Model on National Jurisdiction

Traditional analysis has divided the possible bases of jurisdiction into *five* different headings: territorial, personal, protective, nationality, and universal. These criteria are thought to apply both to criminal and civil jurisdiction but should be conceived more broadly as dealing with *regulation* which includes further elements as the duty to report, providing data, adherence to a standard.

(1) The Territorial Principle is concerned with the state's responsibility of maintaining the order within its territory; "to prescribe the laws that set the boundaries of the public order of the state."[2] This principle is divided to a *subjective* jurisdiction (a state could exercise its jurisdiction when a person initiated an act within its territory, although it was completed outside the territory); *objective* jurisdiction (a state could apply its laws to an act which was completed in its territory even though it was initiated outside its territory). The *Effects Doctrine* is an attempt to address some of the challenges posed by the objective jurisdiction. The American anti-trust law which engages with the effect of cartels upon the United States is a central example of this doctrine. Though historically resistant to this rationale, European competition law has recently adopted the doctrine. Another central field concerns internet crimes. The Yahoo! case,[3] concerning a French court order requiring Yahoo to prevent French Internet users from accessing images of Nazi memorabilia available on its American web site, is a prominent example.

(2) According to *The Principle of Nationality* states have jurisdiction over their nationals. The nationality of the *perpetrator* is raised when nationals are violating criminal law outside the territory of the state. When the national is a *victim* the state would use the doctrine of *passive personality* to regulate the people who affected him or her. The recent rise in terrorist threats led the United States to change its policy to abstain from proscribing its jurisdiction on nationals outside the United States. This tendency has spilled over to other areas.

(3) According to the principle of *Protective Jurisdiction* a state can exercise criminal jurisdiction to protect *vital state interests*. While asserted by the United States in the context of illegal trade in narcotics it remains an open-ended category with contested limitations.

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[2] Vaughan Lowe, Jurisdiction, *in* INTERNATIONAL LAW 335, 342 (Malcolm Evans., ed, 2006). Please note the application of this principle to the law of the sea.
[3] Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199.

(4) The principle of *Universal Jurisdiction* is raised when the state has custody of the person but it is not clear whether there are laws that can be properly applied by the state for charging that person with a criminal offense. One should distinguish between cases in which a *person is present in the state* but other bases of jurisdiction are not present and cases in which the person is not present in the state's territory. Both scenarios address either heinous crimes (such as genocide and crimes against humanity) or serious crimes which might otherwise go unpunished (e.g. piracy).[4] In the latter case - if the state *doesn't* have the person - it could seek extradition, or try the person in absentia (see the discussion below of the ***Pinochet case***).

(5) *Passive Personality* jurisdiction is popular in US law and often applies to situations of hostage taking or piracy, where the victim is a US national.

Treaty Based Extension of Jurisdiction covers most current assertions of extraterritorial jurisdiction and is based upon the large network of treaties among states. Such treaties frequently include an *aut dedere, aut iudicare* obligation to provide for jurisdiction over offenses in every case where the alleged offender is found within the state territory, regardless of the offender's nationality or the place in which the offense was committed. The aim is to ensure that alleged offenders don't escape prosecution; the convention does this in part by creating a universal jurisdiction between the parties. A prominent example for such a convention is the 1979 International Convention against the taking of Hostages.[5]

The five bases of jurisdiction aforementioned – territorial, nationality, protective, universal jurisdiction and passive personality– as well as other forms, such as treaty based jurisdiction – are concerned with states' jurisdiction to prescribe or legislate (*Prescriptive Jurisdiction).* Closely related is the *jurisdiction to adjudicate* which deals with the right of the state court to receive, try and determine cases referred to them. The rules that should govern the jurisdiction to prescribe and adjudicate are still highly contested and will occupy much of our following discussion. The third type of jurisdiction – *Enforcement Jurisdiction* – is clear and established. Enforcement jurisdiction cannot be exercised in another state's territory without its consent.

The ***Lotus Case (PCIJ, 1927)*** concerned a collision in the high seas between the French steamer (the Lotus) and a Turkish steamer (the Boz-Kourt). When the French vessel

[4] This distinction is made by Lowe, *supra* note 2, at 348.
[5] Vaughan Lowe, Jurisdiction, *in* INTERNATIONAL LAW 335, 349-350 (Malcolm Evans., ed, 2006).

entered Turkey, the Turkish authorities prosecuted M. Demons, the officer of the watch on Lotus at the time of the collision. The court asserts that vessels on the high seas are subject to no authority but that of the state whose flag they fly. Note that the question is not whether Turkey has jurisdiction over M. Demons for crimes committed on the high seas; Demons *is subsequently found* in Turkey and the ship in question is docked in Turkey *after* the incident. The question was whether having arrested a French citizen, Turkey could prosecute him in its territory for his acts outside Turkish territory, on the high seas. The court concludes that *the effects* of the offense on a ship could be regarded as committed on the territory of the state whose flag it flies. The Court thus concludes that the effects on the Turkish vessel provide a basis for Turkey to *proscribe* its law against the act and then *adjudicate* the case of M. Demons. A state could thus extend the reach of its prescriptive jurisdiction unless a rule of international law specifically prohibits it from doing so.

This rule was later changed to prohibit assertion of jurisdiction of the affected state. The standard discussion over the Lotus case engages with its famous passage asserting that states are free to exercise their authority unless restricted by international law. International lawyers have often sought to challenge the residual perception of international law embedded in the Lotus assertion in favor of a view of international law as a regulatory legal order. Viewed from a historical perspective, Lotus represents the attempt of the PCIJ to move away from an Imperial international legal regime towards the establishment of the universal model of the modern state, asserting Turkish authority to exercise its sovereignty over foreign nationals. Prior to World War II, western powers regularly maintained "consular courts" within non-western nations such as Turkey**,** Morocco, and China. These courts adjudicated claims among western citizens abroad as well as between western citizens and locals, to ascertain they are tried in accordance with the *standard of civilization.* Turkey had overthrown the Consular Consulate not long before this case was brought to the PCIJ and thus one could read its assertion of the Turkish authority to try the French captain as a vote of trust in its capacity and legal authority to do so.

D. Extradition

Extradition refers to the formal process by which an individual is delivered from the state where he is located to a requesting state in order to face prosecution, or if already convicted, to serve a sentence.[6]

(i) ***Extradition: Customary International Law***

In ***The Alvarez-Machain Case (U.S. Supreme Court, 1992***) *Humberto Alvarez-Machain*, a Mexican resident and citizen, was indicted for participating in the kidnap and murder of a United States DEA special agent. Rather than being extradited to the United States, the respondent was forcibly kidnapped from his medical office. The District Court concluded that the DEA officials are responsible for his abduction, although they were not personally involved in it. The Supreme Court Majority decision (delivered by Justice Rehnquist) focused its analysis on the Extradition Treaty between the United States and Mexico and concluded that it doesn't prohibit abductions outside its terms. The Dissent (delivered by Stevens and agreed upon by Blackmun and O'Connor) forcefully criticized the majority decision ("A critical flaw pervades the Court's entire opinion") and focused on the failure of the Decision to differentiate between a conduct authorized by the government and the conduct of private citizens that should have led the Court to uphold the Rule of Law.

In ***Bennet (The House of Lords, 1993)*** the defendant, citizen of New Zealand was alleged to have committed criminal offences in England and was forcibly returned to England from South Africa by the English police. Absent an extradition treaty between the UK and South Africa, the Court declines the American position that distinguishes between the trial and the abduction. *Lord Griffiths' decision* focused on *the role of the Court* to "ensure that executive action is exercised responsibly and as Parliament intended." While the Courts cannot apply direct discipline in such instances over prosecuting authorities they can refuse to allow them "to take advantage of abuse of power by regarding their behaviour as an abuse of power and thus preventing a prosecution." *Lord Bridge's opinion* followed the same line of reasoning and further emphasized that the decision involves "the maintenance of the rule of law itself". The Court, according to Lord Bridge, cannot turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction. The rationale underlying the House of Lords Decision is two fold: First, it creates a *structure of incentives*, to discourage law enforcement authorities from engaging with such harmful abduction. Second, it states the

[6] AJIL article, 848

importance of a holistic approach to the principle of the *Rule of Law*. Indeed the decision quote other jurisdictions on the matter (Ebrahim, South Africa (1991), the United States (especially Toscanino (1974) and the controversy in Alvarez-Machain), focusing primarily on the New Zealand Judgment of Woodhouse J. (1978)) but refrains from stating the issue as a violation of customary int'l law. Why? One could argue that the Supreme Court ruling in itself negates the claim that there is a unified practice. In addition, an assertion that a violation of customary international law occurred would, in fact, declare the Supreme Court decision had put the US authorities in a position of illegality.

What would be the remedy for abduction? The practice quoted in the decision (e.g. the New Zealand Case, Moevao (1980); the South African Case, Ebrahim (1991)) suggested that the remedy would be *not to put the abducted person to trial*. Another option is presented in the circumstances which surrounded the case of The State of Israel v. Eichmann (1961). The abduction of Eichmann in Argentina with no prior consent on behalf of Argentinean authorities was clearly illegal on the part of Israeli authorities. The int'l remedy was Israel's international apology, which was accepted by Argentina. The remedy of restitution (*Restituio in Integrum)* wasn't sought. The international legal presumption exemplified in the case of Eichmann is that the consent of the state from which a person was abducted *ex post* could preclude the abducting state's international responsibility. The desirability of this rational is seriously problematized in light its abuse in the context of *Operation Condor.*[7] The Foreign Office rationale informs this approach.

In *Bennet* the House of Lords rejects this Foreign Office track; the alternative it presented is procedural - allowing the *individual* to trigger the process and argue a violation has occurred. However, although the focus is turned towards the individual there is no clear statement that an individual right was violated. The discussion focuses on the court. The more robust claim that the right of *freedom of movement* was violated isn't stated here. Indeed, the Human Rights Committee and the Inter-American Tribunal moved towards this direction but the House of Lords didn't. Could rights be protected in this context if we follow the Foreign Office Model?

[7] See, e.g. JOHN DINGES, THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS (2004/2005). Operation Candor was an international state-sponsored terror network set up by the Pinochet regime (in consort with Argentina, Uruguay, Paraguay, Bolivia, and, later, Brazil, Peru, and Ecuador) to track and eliminate opponents. Kenneth Maxwell, The Case of the Missing Letter in *Foreign Affairs*: Kissinger, Pinochet and Operation Condor, No. 04/05-3 The David Rockefeller Center for Latin American Studies, Harvard University (2004).

A pragmatic challenge to this model is the difficulty of asserting consent in such circumstances. It remains unclear whether Mexico consented to the abduction in the context of ***Alvarez- Machain***. The conflicting evidence raise the question of agency -- who should consent on behalf of the state and when would such consent suffice to abide with the international legal obligation? We could answer the question of agency by looking at state practice (who would usually be in charge of deciding such matters). Another approach would inquire whether the rule – no abduction without state consent – requires the involvement of higher level officials. To the extent it involves the violation of state sovereignty and thus *Foreign Relations.* In this context we should compare the Supreme Court's approach in ***Medellin* (U.S. Supreme Court, 2008)** (a narrow definition of the President's power to influence the practice of states) to its approach in ***Hamdi* (U.S. Supreme Court, 2004)** (Despite the Congress' lawful authorization of the detention of enemy combatants, and although Hamdi was captured overseas, he couldn't be held indefinitely without provided certain due process rights provided to other citizen. Hamdi's liberty interests should be weighed against the governments' valid interests). Further, the **NYU Law Center for Human Rights and Global Justice memo on Extraordinary Renditions (2005)** deals at length with the international law applicable to the practice of transferring a person to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or derogating treatment.

(ii) Extradition Treaties

In the American context extradition treaties are self-executing. An extradition from the United States could usually proceed only when there is a treaty in force between the United State and the requesting state. Many other countries don't require a treaty as a basis of extradition but have a general power to extradite on a case-by-case basis. The US could request a person from other countries even without a treaty but couldn't send a person there without a treaty. What happens if there are multiple requests? There is a provision like that in the EU-US treaty, but it isn't settled in other contexts. In addition, the US doesn't tend to extradite American citizens. The following discussion of the U.S./Mexico Extradition treaty and the U.S./U.K extradition treaty introduces central doctrines and concepts usually used in such agreements.

The U.S/Mexico Extradition Treaty

The US Supreme Court cases suggest that if a person has been extradited the *Principle of Specialty* applies, namely the state to which the person was extradited cannot prosecute the defendant for a crime other than the crime for which he had been extradited (***Rauscher, 1886 and Cook, 1933***). ***Alvarez-Machain (1992)*** raised the question of how should a case in which a person was abducted, without following the treaty process, be treated. According to the Majority opinion the treaty in itself doesn't preclude other methods of brining the person to the US. The outcome of this decision creates perverse incentives for the executive to abide the treaty. Moreover, we are confronted with the difficulty to reconcile the different layers in this jurisprudence, namely the emphasis of the treaty as governing the law of extradition in the context of the offenses one could be tried for (see e.g. *the Principle of Specialty*) and the conclusion that the treaty doesn't prohibit methods of extradition which deviate from the extradition process it requires. The dissenting opinion's interpretation of the treaty implicitly reads it to include a presumption of cooperation between US and Mexico ("The parties announced their purpose in the preamble: "The two governments desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."). Such interpretation derives from the idea of interpreting treaties in good faith.

Article 9 of the U.S/Mexico extradition treaty introduces *a priority structure*: A state has a priority of adjudicating its nationals in its territory, even if the more serious offense happened in the other country. Why would Mexico prefer this structure? Mexico might have considered the US to be a very aggressive criminal system. Nonetheless, the Article maintains the possibility of adjudicating Mexican nationals in the US which is important to states that are influenced by corruption. In addition, some states have constitutional prohibition over the surrender of their citizens to be tried in another country. There's a growing tendency of treaties that allow sending people who were indicted in other states to serve their sentence in their home countries because of humanitarian considerations. Others object to this option because of the costs imprisonment entails.

The U.S/U.K Extradition Treaty

In 2003 the United States and the United Kingdom negotiated a new extradition treaty; the U.S. Senate approved this treaty during the fall of 2006. Central extradition doctrines are either revisited or introduced in this treaty:

Extraditable offence: In the past, in order to extradite someone, that person must be considered a criminal in both countries – both in the US and in the country to which the person is extradited (also called "double criminality"). Under the 2003 Treaty, the parties will extradite for any "*extraditable offense*", defined as an offense "punishable under the laws in both States by deprivation of liberty for a period of one year or more by a more severe penalty." (Article 1, 2).

Political Offense: In the previous treaty, the US had an exception according to which extradition wouldn't apply to an offense which is a *political offense*. Such provisions have existed in the extradition treaties since the 19th century. The Political Offense provision embodies a central idea of modern refugee law, the principle of *nonrefoulement*, which is used to protect refugees from being returned to places where their lives or freedoms could be threatened. Article 4 (2) of the US/UK Extradition treaty define the exception to the political offense rule, thus narrowing the scope of protection. Notwithstanding the terms of paragraph 2, it authorizes the American executive branch to refuse granting extradition if it determines the request was politically motivated. The narrower definition led some U.S. human rights and Irish-American groups to oppose the treaty.

Rule of Non-Inquiry: extradition under the treaty must include various supporting materials, including "a statement of the facts of the offense(s)." The Rule of Non Inquiry is that the Magistrate who is investigating the evidence lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country (e.g. a fair legal system, torture etc.). In practice, the magistrates weren't willing to exercise their authority without discretion on that matter.

The US/UK extradition treaty was aimed to combat globalised crime and terrorism. But in practice it was used for the extradition of three British bankers ("Natwest Three") who were to face trial for multiple counts of wire fraud in connection with transactions involving Enron. In addition it was criticized in Britain for creating a lower threshold to extradite from Britain to the U.S. which is specifically problematic in the context of economic transactions (see **the Economist article, 2006**).

E. Civilian Contractors in the context of Armed Conflict and Occupation

The set of concerns raised by the issue of extradition are focused on *bringing the perpetrators to justice*; a particularly salient concern for the regulation of civilians who accompany military forces in an armed conflict or occupation outside its territory. The US forces in Iraq are immune from local jurisdiction unless it is waived by the US; in exchange, the military subjects its members to American military law. Could the United States assert the jurisdiction of its military tribunals to regulate the conduct of private security contractors? (See ***the NYTimes article on Blackwater, Oct. 2007***). The limited reach of current doctrines of jurisdiction, laws of war and the laws of contracts highlights the need to move towards *regulation*. One regulatory attempt is presented in the ***CPA Order 17, 27 June 2004***. Its limited success invites further thought on the challenges contemporary developments pose to the prevailing national and international doctrines in this context.

F. Jurisdiction over Victims who are Non Citizens for Violation of International Law: the Alien Tort Claims Act and the Torture Victims Protection Act

(i) Alien Tort Claims Act (1789)/ Alien Tort Statute

The cases dealt with thus far concentrated on criminal jurisdiction. The Alien Tort Claims Act deals with a private cause of action for a tort. It states that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." (hereinafter: ATCA)[8]. The Alien Tort Claims Act was first enacted by the first Congress in 1789. The historical record suggests the Congress intended the ATCA to furnish jurisdiction in actions alleging offenses against ambassadors, violations of safe conduct and individual actions arising out of prize captures and piracy. The new and vulnerable republic wanted other countries to see that it abided by the law of nations but feared state courts were too biased to deal with foreign relations. Piracy was quite significant at the time while violations of safe conduct were more rare but serious when they occurred.

For almost two hundred years the statute was not used in any significant way. This changed dramatically after the landmark case of ***Filartiga*** in 1980.[9] The Filartigas (father and daughter) brought an action in the Eastern District of New York against a citizen of

[8] Judiciary Act of 1789, ch. 20, 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. 1350 (2000). The following is a concise overview of the Alien Tort Claims Act; last updated on April 2008.
[9] Filartiga, 630 F.2d at 878.

Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. In *Filartiga*, the Court concluded that international law confers the right to be free from torture upon all people vis-à-vis their governments. The Second Circuit held that the federal courts had jurisdiction under the ATCA to hear the case regardless of the fact that a foreign official committed the torture. A feature of torture is that although it must be exercised under the *color* of law, it cannot be legal in any country that is a signatory to CAT, and would therefore be less likely to be consistent with a claim for functional immunity.

The decision in *Filartiga* dealt with the liability of foreign officials. Judge Edwards in ***Tel-Oren*** addressed the complexities involved in applying international law to non-state actors (e.g. the PLO). But it was only in the ***Kadic*** decision in 1995 that the scope of the ATCA to include liability for certain private, individual actions was broadened.[10] The appellants in *Kadic*, victims of atrocities committed in Bosnia, sued the leader of the insurgent Bosnian-Serb forces. The court held that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.[11] The Court ruled that the defendant could have been liable for genocide (planning and ordering a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats), war crimes, and crimes against humanity in his private or official capacity, and there was no immunity from service of process.

The *Kadic* decision led to a proliferation of suits against corporations, many of which were dismissed. In 1996 fifteen villagers from the Tenasserim area filed a U.S. federal class action lawsuit against Unocal, Total S.A., and an entity owned by the Burmese government. The defendants were involved in a joint venture to extract natural gas from offshore fields and to transport it to Thailand via a 62-kilometer pipeline. The suits alleged that the defendants were responsible for multiple violations of internationally protected human rights, including killings, forced labor, and other serious abuses, perpetrated by the government of Burma/Myanmar in connection with the project.[12] In ***Doe I v. Unocal Corp (2002)***[13] the Ninth Circuit Court of Appeals reversed the district court decision that plaintiffs had to show

[10] Kadic v. Karadzic, 70 F.3d 232.
[11] *Id.*, at 239.
[12] See, John R. Crook (ed.,), Tentative Settlement of ATCA Human Rights Suits Against Unocal, 99 A.J.I.L., 497 (2005).
[13] Doe I v. Unocal Corp., 395 F.3d 978 (9th Circ. 2002).

that Unocal controlled the actions of the Burmese military. It was sufficient to show that Unocal knowingly assisted the military in its actions. In addition, the Court held that forced labor is a modern variant of slavery that, like traditional variants of slave trading, does not require state action to give rise to liability under the ATCA.[14] Following ***Sosa*** (see below) the Unocal litigation ultimately culminated in a settlement in 2005 for the Burmese plaintiffs.

Another famous case involving corporate actors was ***Wiwa v. Royal Dutch Petroleum***.[15] Ken Saro Wiwa was a representative of the Ogoni movement which demanded the government's and Shell adherence to environmental standards in its oil exploration and production activities in Nigeria. In response to the Ogoni's demands, the Nigerian military and police forces, allegedly supported and assisted by Shell, retaliated against the Ogoni by visiting a campaign of terror on them, which allegedly included launching armed attacks on their villages, subjecting the inhabitants to arbitrary arrest, confinement, and torture, and executing leaders of the protest following proceedings in a military kangaroo court. Saro Wiwa was hanged and his family brought the case against Shell in the United States. An appeal on the case is currently pending in the Second Circuit. In a similar case, ***The Presbyterian Church of Sudan v. Talisman Energy***,[16] villagers and the Church are suing Talisman for its participation in the Sudanese Government's ethnic cleansing of Christian and other non-Muslim minorities in southern Sudan. Similar litigation is currently pursued in the context of corporate actors' involvement in the Apartheid regime in South Africa.[17] These cases often focus their analysis on corporate actors' *complicity* with governments' violations of human rights.

In 2004 the Supreme Court sought to solve some of the controversies arising in the jurisprudence of the ATCA in its decision on the case of ***Sosa v. Alvarez-Machain (2004)***.[18] The Court concluded the ATCA is a jurisdictional statute and does not in itself create a cause of action. Historically, the private cause of action was established through

[14] John Doe I v. Unocal Corp., 395 F.3d 932, 947.
[15] 392 F.3d 812 (5th Cir. 2004)
[16] Presbyterian Church of Sudan v. Talisman Energy, Inc., 2006 U.S. Dist. LEXIS 86609.
[17] In Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2nd Circ. 2007) the Second Circuit vacated the district court's dismissal of the ATCA concluding it erred in holding that aiding and abetting violations of customary international law could not provide a basis for ATCA jurisdiction. Rather, the matter was remanded to allow the district court to address the applicable case-specific prudential doctrines, i.e., the political question doctrine and the doctrine of international comity.
[18] Please be advised that this case is dealing with the same facts dealt with in ***The Alaverz-Machain Case (U.S. Supreme Court, 1992)***, discussed earlier in this guide.

federal common law ("the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[19]). Following *Erie* (the 20th century case which abolished federal common law except in gap-filling around federal legislation), the majority opinion emphasized the need for restraint. The key holding for future ATCA litigants was that the international law norms at issue must be "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized". [20]

Despite the attempt to provide guidance to lower courts, the majority decision presents a tension between the *Erie* framing of the question as merely a *cause of action issue* (as defined by Justice Scalia) and it being an issue of *crafting remedies* for the violation of new norms of international law that should be undertaken, "if at all, with great caution." As captured in an often quoted passage from the majority decision: "…the door is still ajar subject to vigilant doorkeeping."[21] The questions currently being litigated center around which principles must come from American tort law and which principles must come from international law—for example, in suing a corporation, must one find that there is a norm specifically against *corporations* committing genocide or solely against the commission of genocide? Must one find that there is an international *tort* of terrorism or only that international law *prescribes* terrorism? The question is particularly salient as, aside from claims commissions, there are not many forums where individuals can complain of civil injury.

Applying the criteria to the case of Alvarez-Machain, the discussion focuses on whether *the rule against arbitrary detention* is binding upon the U.S. The Court concluded that the rule as it is stated in the UDHR and the ICCPR doesn't bind the U.S. (the ICCPR isn't self executing). The Court further concluded that to invoke the violation of customary international law would require a factual basis beyond "relatively brief detention in excess of positive authority."[22] It therefore concluded that the single illegal detention of Alvarez-Machain of less than a day, followed by a transfer of custody to lawful authorities and a prompt arraignment, doesn't violate customary international law.

The Court in *Sosa* stated five reasons for judicial caution; these include, *inter alia*, the collateral consequences such judicial decisions could have on the discretion of the legislative

[19] Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).
[20] *Id*. at 725.
[21] *Id.*, at 729.
[22] *Id.*, at 737.

and executive branches in their management of foreign affairs. American courts have tried to avoid interfering in foreign relations through ATCA. The assumption embedded in the Supreme Court's discussion is that it is an *American law* issue and that American tort law controls it. By focusing on the American legal framework the Supreme Court elides disagreement and controversy amongst states on this issue. Another way in which the Supreme Court tries to avoid interstate dispute over these norms, or outcry by other states over US courts hearing claims from other jurisdictions, is through the double requirement of generality and specificity. In the *Talisman* case, Canada can argue that through ATCA the United States is attempting to prescribe norms within its territory, in violation of prescriptive jurisdiction requirements. The response by the litigants is that as the norms are generally prescribed by international law, adjudicative jurisdiction applies, and courts regularly apply law that is not their own to the party before them (for example, in a contract dispute). Finally, exhaustion and *forum non conveniens* requirements can also defer to foreign adjudication of a claim. The question in ***Sarei v. Rio Tinto*** is whether ATCA should have a separate exhaustion requirement, beyond *forum non conveniens*, because international courts often impose an exhaustion of domestic remedies requirement.

(ii) The Torture Victims Protection Act (1991)

The debate over the ATCA struggles with the desired scope of American jurisdiction over violations of international law. The Torture Victim Protection Act presents a clear basis for private cause of action for civil liability in cases of extrajudicial killings and torture. The act is limited by an *exhaustion of remedies* rule. The introduction of this rule could be attributed to case management considerations, an attempt to create incentives for local adjudication of such issues or an anti-Imperialist sensitivity. A related judicial doctrine that could have been used is *Forum non Conveniens*. This doctrine is quite similar to that of exhaustion of remedies, but doesn't capture all the considerations in which the primacy of the local authorities is preferable.

F. Universal Jurisdiction in Absentia

(i) **The Torture Convention**

The Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment entered into force in 1987 and is often referred to as the CAT.

Article 4 defines the state obligation under the convention is to ensure that all acts of torture are offenses under its criminal law. Each state party should make these offences punishable. The issue of jurisdiction is dealt with in Article 5; the principles of territoriality or nationality of offender or the victim are addressed in accordance to the international legal principles. Paragraph 2 establishes universal jurisdiction as it establishes an obligation either to try or extradite to another country, even in cases where neither the alleged perpetrator nor the victim are nationals of the state. "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article." It isn't clear whether this article provides a basis for *Universal Jurisdiction in Absentia*. The obligations of states under the CAT in the context of the issue of jurisdiction are further stated in Articles 2, 3, 11,12,13,14.

The Exclusionary Rule is introduced in Article 15, "a statement which have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." In a decision of the House of Lords ***A (FC) v. Secretary of State (2005)*** the Court grappled with the application on the rule on evidence which was provided to the UK authorities and was possibly obtained by torture exercised by non-UK authorities. The Court interpreted the common law against torture as including the exclusionary rule defined in the Article 15 of the CAT. The House of Lords held that while *the Court* cannot be tainted by evidence made possible as a result of torture, *the executive* could rely upon such evidence. Having reached that conclusion, it held that in order to conclude that the evidence brought to the court were tainted by torture the detainee has to adduce to cast doubt on the state. This holding poses a great challenge to detainees and would probably lead to further difficulties if the torture was exercised within or outside the jurisdiction of the court.

(ii) ***The Case of Pinochet (House of Lords, 1999)***

The House of Lords decision in the case of Pinochet was triggered by a warrant served for his arrest through a Spanish court. The extradition of Pinochet requires both waiver of his immunity (to the extent he has one as former head of state) and double criminality. While the condition of double criminality is fulfilled, the issue of the scope of his immunity isn't. The British law on the immunity of heads of state is rather peculiar and is

analogous to that of an ambassador: *Ratione Personae*. However, since Pinochet is no longer in office, the immunity becomes functional – *Ratione Materiae* ("in relation to acts done by him as head f state as part of his official functions as head of state"). The House of Lords decision held that the CAT introduced further limitation on the scope of immunity. According to the decision, the date in which the Convention came into force - both in Chile and the UK - an agreement was reached by both states that acts of torture wouldn't be covered by immunity. Thus, Pinochet retains his immunity for all the actions he committed before the CAT came into force in both countries and the latter is interpreted to have a prospective effect. The Court held that since a feature of the international crime of torture is that it must be committed "by or with the acquiescence of a public official or other person acting in an official capacity" giving rise to functional immunity for the implementation of a torture regime would undermine the objective of the CAT to establish a worldwide universal jurisdiction (or to use the phrasing of the Court – "this produces bizarre results)." The grounds for the extradition were based upon *state consent* in the context of *torture*; no similar universal jurisdiction could be inferred from this decision to persons who are charged with crimes against humanity or genocide.

(iii) ***The Yerodia Case (D.R.C v. Belgium, ICJ, 2002)***

The case concerned an international arrest warrant issued by a Belgian investigating Judge against the Minister of Foreign Affairs in office of the DRC (Mr. Abdulaye Yerodia Ndombasi). These proceedings are brought to the ICJ after the holding in the case of Pinochet with an increasing assertion towards limiting the reach of universal jurisdiction. The majority decision (?) follows the Foreign Office model and frames the discussion around the issue of immunity. The court accordingly concludes that the functions of Mr. Yerodia as *Foreign Minister* are such that he enjoys full immunity from criminal jurisdiction and inviolability throughout the duration of his office. Indeed, the decision doesn't refer to such immunity a absolute (it does not cover charges of violations of international law brought against the person in his or her country, it could be waived by the state, it ceases when the person is no longer in office and would ordinarily not cover charges brought against this person in an international criminal tribunal). However it left unanswered the prospects of a arrest warrant issued when Mr. Yerodia is no longer in office.

The separate opinion of Judges Higgins, Kooijmans and Burgenthal pose a challenge to the decision's emphasis on *immunity* and raise the concerns of *impunity*. The opinion stated

the anti – impunity rationale embedded in doctrine of universal jurisdiction over the crimes which are regarded as the most heinous in the international community. The genealogy of the logic of 'no place to hide'/deterrence begins historically from the universal jurisdiction over piracy, to the Nuremberg Trials jurisdiction over crimes against humanity and crimes of war in the context of war towards their application over crimes against humanity regardless of an armed conflict. The limited jurisdiction and capacity of the ICC cannot preclude the option of exercising universal jurisdiction.

Between the Foreign Office rationale of the decision opening the case and the cosmopolitan approach presented in the separate opinion, Judge Guillaume acknowledges the concerns presented in the Separate Opinion but concludes that the opinion went beyond what is settled in current international legal practice and doctrine. Underlying Guillame's opinion is anxiety about judges disrupting proper political processes (see also the excerpt from Kissinger). Also noted is the particularly troubling legacy of the colonial involvement of Belgium in Congo. More pragmatically, such episodic interferences in the politics of weaker states don't enable them to build up their legal systems and rehabilitate their communities.

Most states do not have legal basis to exercise universal jurisdiction in absentia but some have sought to broaden the reach of their jurisdiction as exemplified in ***the Genocide Accountability Act of 2007***.

G. Challenges posed to the Principles of Jurisdiction by the War on Terror

The Supreme Court decision in ***Hamdan v. Ramsfeld (2006)***[23] held that absent a more specific congressional authorization, the President lacked the authority to convene the military commission to try Hamdan. With the passing of ***the Military Commissions Act of 2006*** the legislature sought to remedy that absence. Despite some attempts to comply with procedural safeguards (e.g. providing the defense lawyer further access to materials and allowing representation) its content and procedures are contested vigorously (see, e.g. ***Comments of Amnesty International on the Military Commissions Act (2006)***. While the number of persons tried by these commissions is quite limited, many detainees are simply kept in prison with no trial; attempts to extradite some of them to other countries are of limited success. In June 2008, the Supreme Court found in *Boumediene* that the Constitution,

[23] This case is dealt with in greater detail in Unit IV.

or at least the Suspension Clause, applied to the detainees at Guantanamo, and that detainees had the right to bring habeas petitions. In fall 2008, a district court judge ruled under the Constitution that the U.S. could not continue to hold detainees who had found not to be dangerous indefinitely and ordered the release of a group into the United States. The decision is currently on appeal to the Supreme Court. There is also ongoing litigation about whether habeas rights extend to other detention facilities, such as Bagram in Afghanistan.

Should the struggle to address the 'War on Terror' move beyond national jurisdictions to an international setting? Such attempt is captured in the **Security Council Resolution 1267 (1999)**. The *Listing Regime* established by the Resolution sought to impose financial sanctions on the Taliban regime in Afghanistan and established a Sanctions Committee. The Committee was also tasked with the maintenance of a list of individuals and entities designated as associated with the Taliban or Osama bin Laden based on unspecified information provided by government and regional organizations. It is aimed to disrupt the conduit by which funds aimed at supporting terrorist attacks flows and deter the people involved in such attacks. The costs of exercising national jurisdiction to coerce such practices and the need for cooperation across boarders are the underling institutional logics which led to the establishment of this regime. The U.N lacks the competence to decide on the list and thus information is given by states with initially no option of review.

The Council of the European Union put the Security Council Resolution into effect by adopting a Community Regulations which are directly applicable on the domestic legal orders of the EU member states. The Case of ***Yusuf v. Council of the European Union (2006),*** brought before the European Court of First Instance, challenged one of these regulations. The Court decisions moves on two tracks: first, it engaged with some form of constitutional review, considering whether the Security Council acted in violation of the UN Charter. Its second track considered whether the Security Council breached international law. More specifically, concluding that the Security Council is bound by jus cogens the judges move to analyze the legality of the violation of these rights. They concluded that there was no violation of the jus cogens dimension of the right of property or the right of fair hearing. As for the right for effective judicial remedy they seem to think that although ordinary law would require such review the Security Council isn't ordinarily subject to such review and no structure exists to exercise it. The decision tendency to *balance* the violation of jus cogens

rights with other considerations is at odds with the essence of jus cognes rights as non derogative and absolute. The appeal to this decision is currently pending.

In 2002 the Security Council attempted to review this process in a new **Security Council Resolution 1390 (2002)**. The resolution introduces a De-Listing procedure that provides 'listed' persons right to send a letter to the Security Council contesting its decision. The review process is dependent upon the willingness of the state that provided the information to reconsider its decision. Basic rule of law safeguards such as the right for a reasoned decision or the right to be heard are not protected in this procedure. Its doubtful effectiveness comes at a great cost to the rule of law. It raises further questions on the desirability of the Security Council engaging in adjudicative and legislative functions. Its involvement in such administrative practices without abiding to Global Administrative Law norms raises serious concerns. It highlights the difficulty to move away from national jurisdictions, where such procedural safeguards are well established towards governance by international bodies.

E. Questions to Consider

UUExtradition

Consider the different approach taken by the English Case (*Ex parte Bennett*) – do you think that the rule of law requires that a court take cognizance of an illegal arrest, or is it entirely irrelevant? (What incentives or disincentives does your answer give to law enforcement officials, and how should these be balanced against other concerns?) Does the remedy of state consent to preclude responsibility of states in this context a desirable one? What theory of agency would be suitable if consent could be regarded as a remedy?

Civilian Contractors in the context of Armed Conflict

What are the challenges posed by civilian military contractors to the current international law governing situations of armed conflict and the American military law?

Alien Tort Claims Act

Do you think American Courts should follow a restrictive approach or a more permissive one? Did the decision of the Supreme Court in *Sosa* resolved the dispute in the preceding jurisprudence? what criteria are introduced in *Sosa?* Do you find them helpful? Does it makes sense to distinguish between American procedural tort law and substantive claims based on international law? How would you draw the line between these two categories?

Universal Jurisdiction

The Pinochet case addresses different forms of immunity, and particularly the difference between immunity *rationae personae* (i.e. for *sitting* heads of state) and immunity *rationae materiae.* What are the tensions introduced in the Case between state consent and the CAT regime against torture? In *Congo v. Belgium (Yerodia),* consider the role that Mr. Yerodia's position in the government plays in the ICJ's decision. If Mr. Yerodia were not the Minister for *Foreign* Affairs (but rather the Minister for Interior Affairs), would the case come out differently?

The War on Terror

How does the decision in *Hamdan* approach the question of the relationship between national criminal jurisdiction, and particularly US executive branch decisions and international law? Would an *international* coordinated regime be a better platform to resolve the problem raised by Terror? How would the different rationales – realism, institutionalism and cosmopolitanism answer those question? What could be the contribution of the GAL principles if introduced in this context?