Vanderbilt Journal of Transnational Law

Volume 38
Issue 5 *November 2005*

Article 4

2005

Tort au canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law

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*Caroline Davidson**

ABSTRACT

Despite Canada's strong rhetoric on the protection of human rights, Canada lacks a meaningful tort scheme for gross human rights violations akin to that of the United States. This Article argues that legislation to facilitate tort suits for gross violations of international human rights and humanitarian law can be consistent with, and in fact supports, Canada's commitments to human rights, the rule of law and multilateralism. In particular, provincial tort legislation should be one of a panoply of mechanisms in place to punish and deter violations of international humanitarian and human rights law. This Article proposes the shape of the legislation with respect to such key considerations as jurisdiction, sovereign immunity, and exhaustion. It contends that to comport with Canada's strong backing for the international rule of law and emphasis on multilaterism and international cooperation, this "transnational" human rights legislation must be firmly grounded in international law with respect not only to the human rights norms covered but also to the jurisdictional principles to be applied.

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* This Article is based on research conducted as a Lloyd Graham Fellow of International Human Rights at the University of Toronto Faculty of Law. Caroline Davidson graduated from Princeton University in 1995 and Harvard Law School in 2000. She would like to thank Craig Scott, Maya Manian, Milbert Shin, Jen Mueller, Klara Starr, and Janie Chuang for their comments and much needed encouragement and Noah Novogrodsky for giving her a room (almost) of her own in Bora Laskin.

I. INTRODUCTION

Canadians pride themselves on their commitment to internationalism and human rights. Canada is a member of almost every international agency and organization. As one author has

commented, "[N]o country belongs to more clubs."[1] In addition, Canada views itself as a champion of human rights. Canada's Department of Foreign Affairs and International Trade (DFAIT) proclaims on its website:

> A priority field of international concern and action for Canadians has been and remains that of human rights. The Government regards respect for human rights not only as a fundamental value, but also as a crucial element in the development of stable, democratic and prosperous societies at peace with each other.[2]

Yet despite Canada's international inclinations and vociferous support for human rights, Canadian courts are much more closed to cases arising out of violations of international human rights law than are the courts of its purportedly more isolationist and international law-scoffing neighbor to the south.

This seeming contradiction has caused something of a stir in the past year. Torture of Canadians abroad has garnered a great deal of attention in the Canadian press. Canadian headlines have been filled with reports of incidents of human rights violations: the torture and killing of an Iranian-Canadian journalist in Iranian custody in 2003,[3] the United States' rendition to Syria of a Syrian Canadian who was then tortured for months,[4] Saudi Arabia's detention and torture of a

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1. ANDREW COHEN, WHILE CANADA SLEPT: HOW WE LOST OUR PLACE IN THE WORLD 15 (2003).

2. DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE (DFAIT), CANADA IN THE WORLD: CANADIAN FOREIGN POLICY REVIEW 1995, PROJECTING CANADIAN VALUES AND CULTURE, http://www.dfait-maeci.gc.ca/foreign_policy/cnd-world/chap5-en.asp [hereinafter DFAIT Chapter 5].

3. *See, e.g.*, Bruce Campion-Smith, *Ottawa Demands New Kazemi Probe*, TORONTO STAR, Aug. 18, 2004, at A12; Miro Cernetig, *Accused Kazemi Killer Acquitted*, TORONTO STAR, July 25, 2004, at A1.

4. Arar was arrested as he passed through JFK airport on the way home from a family vacation. *See e.g.*, Center for Constitutional Rights, John Ashcroft Sued by CCR for Torture [hereinafter John Ashcroft Sued], http://www.ccr-ny.org/v2/print_page.asp?ObjID=vRQgEt97ZX&Content=318. He ended up in Syria after U.S. officials deemed him an Al Qaeda suspect and decided to "outsource" their interrogation of him to Syria, knowing full well that Syria was likely to torture him. *See id.* Syria complied and, after weeks of torturing Arar, exacted a confession from him of involvement in Al Qaeda. Eventually realizing that the confession was false and that they had nothing on Arar, and after a significant lobbying by Arar's wife back in Canada, the Syrians released him and he returned to Canada. The Canadian government has launched an inquiry into the Canadian government's involvement in the affair. *See* Center for Constitutional Rights, Canadian Government to Conduct Inquiry into Treatment of CCR Torture Client Maher Arar, http://ccr-ny.org/v2 /print_page.asp?ObjID=AJ48mobzZ1& Content=322. Arar has sued Attorney General John Ashcroft and other U.S. officials in the Eastern District of New York for sending him to be tortured in Syria. *See supra* John Ashcroft Sued. Arar based his suit on the Torture Victim Protection Act, the Fifth Amendment to the U.S. Constitution, and treaty law. Complaint at ¶ 3, Arar v. Ashcroft, 2004 WL 2410405 (E.D.N.Y. 2004) (No. 1:04-CV-00249). Arar has sued the Canadian government in Canadian courts for $400

Canadian for thirty-one months[5] and others. Canadians have also been in the news as perpetrators of human rights violations. A Canadian oil company, Talisman, has come under fire for its role in human rights violations in the Sudan.[6] In the not so distant past, Canadian soldiers were also the alleged perpetrators of gross violations of human rights, particularly the torture of Shidane Arone in the Canadian military compound in Somalia.[7]

Should these victims try to file suit in Canadian courts, they are likely to encounter some hurdles. Canadian law does not make bringing tort suits based on gross human rights violations easy. Canada has no equivalent to the U.S. Alien Tort Claims Act (ATCA) or Torture Victim Protection Act (TVPA),[8] which provide jurisdiction for violations of the "law of nations" and a cause of action for torture, respectively.[9]

A recent case illustrates the difficulty of tort suits based on human rights violations in Canada. Houshang Bouzari, a prominent Iranian businessman and Canadian citizen, was jailed and tortured in Iran for eight months. Bouzari then sued Iran in an Ontario trial court for torture.[10] To the dismay of the human rights community in Canada, the case was dismissed on grounds of sovereign immunity.[11]

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million. Kim Lunman, *Arar Suing Canada Over U.S. Deportation*, The Globe and Mail, Apr. 23, 2004, at A8. Mr. Arar alleges that CSIS, the RCMP and the Canada Border Services Agency targeted him "on the basis of racial and cultural stereotypes and prejudices." *Id.*

5. Bill Sampson, a Canadian held and tortured in Saudi prison for 31 months sued his torturers and Saudi Arabia in a court in the United Kingdom. Saudi Arabia v. Ministry of the Interior, [2005] W.B. 699, *available at* 2004 WL 2387139; *see* Kevin Ward, *Sampson Can Sue Captors; Canadian Beaten in Saudi Jail Wins Key Legal Victory British Court Backs Bid to Seek Redress from Torturers*, TORONTO STAR, Oct. 29, 2004, at A26.

6. *See* JEMERA RONE, SUDAN, OIL, AND HUMAN RIGHTS (2003), *available at* http://www.hrw.org/reports/2003/sudan1103/. A class action complaint was filed against Talisman and the Republic of Sudan in the Southern District of New York for

> extrajudicial killing (including murder and summary execution), forced displacement, military bombings and assaults on civilian targets, confiscation and destruction of property, kidnappings, rape and slavery, relating to or arising from the oil exploration and extraction activities of Defendants Talisman Energy, Inc. . . . and the Republic of Sudan . . . .

Amended Class Action Complaint ¶ 1, Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2002) (No. 01 CB 9882), *available at* 2002 WL 32768900.

7. *See* CRAIG SCOTT, TORTURE AS TORT 33–35 (2001).

8. INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 846 (Hugh M. Kindred et al. eds., 6th ed. 2000) [hereinafter INTERNATIONAL LAW].

9. 28 U.S.C. § 1350 (1994); Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004).

10. Larry Krotz, *Houshang's Promise*, THE WALRUS, Sept. 2004, at 6.

11. Bouzari v. Islamic Republic of Iran, [2004] D.L.R. 406.

Alternative human rights enforcement mechanisms in Canada are likewise inadequate. To comply with its obligations as a state party of the International Criminal Court (ICC), Canada passed domestic implementing legislation: the Crimes against Humanity and War Crimes Act (CAHWCA).[12] CAHWCA provides that genocide, crimes against humanity, and war crimes are indictable offenses under Canadian law, whether committed inside or outside of Canada.[13] CAHWCA "asserts universal jurisdiction, allowing Canada to prosecute anyone (regardless of nationality) present in Canada for the crimes listed in the CAHWCA."[14] So far, no cases have been brought under the CAHWCA.[15]

Prior to CAHWCA, Canada unsuccessfully attempted to criminally prosecute and deport Canadian citizens found guilty of war crimes in Nazi-occupied Europe.[16] Canada amended its criminal code to allow extraterritorial jurisdiction for prosecution of war crimes or crimes against humanity if the accused is a Canadian citizen, if the accused is a citizen of a country at war with Canada, or if the victim is a Canadian citizen or a citizen of one of Canada's allies.[17] In 1994, in the first case to come before it under the amendment, the Supreme Court acquitted the defendant, Imre Finta, who was accused of war crimes and crimes against humanity against Hungarian Jews during World War II.[18] By January 1995, the Canadian government had announced a shift in its approach for dealing with individuals accused of war crimes and crimes against humanity who were present in Canada.[19] This shift stemmed in part from the perception that the Finta case established a burden of proof that was impossible to meet.[20] The government announced a new policy, whereby it "would

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12. Crimes Against Humanity & War Crimes Act, 2000 S.C., ch. 24; *see* DFAIT, Canada and the International Criminal Court, http://www.dfait-maeci.gc.ca/foreign_policy/icc/canada_ icc-en.asp (describing Canada's role in the ICC's creation and stating that, "Canadians can be proud of Canada's role at the forefront of the effort to establish the International Criminal Court").

13. Crimes Against Humanity & War Crimes Act, 2000 S.C., ch. 24, §§ 4(1), 6(1) (Can.), *available at* http://laws.justice.gc.ca/en/C-45.9/index.html.

14. Department of Foreign Affairs and International Trade (DFAIT), Canada and the International Criminal Court: Canada's Crimes Against Humanity and War Crimes Act, http://www.dfait-maeci.gc.ca/foreign_policy/icc/crimes-en.asp.

15. Adrian Humphreys, *Ottawa Targets 86 War Thugs*, NATIONAL POST, May 5, 2004, at A1.

16. Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgements Convention*, 42 HARV. INT'L L. J. 141, 148 (2001); *see* COMMISSION OF INQUIRY ON WAR CRIMINALS, REPORT PART I: PUBLIC (1986) (discussing prosecuting war criminals in Canada).

17. Van Schaack, *supra* note 16, at 148.

18. *Id.*

19. *Id.*

20. *Id.*; *see also* Judith Hippler Bello & Irwin Cotler, *International Decision*, 90 AM. J. INT'L L. 456, 467–73 (1996) (discussing the Regina v. Finta decision).

respond with administrative actions seeking the denaturalization, revocation of citizenship, and/or deportation of offenders" in lieu of prosecution.[21]

Unfortunately, immigration law is a blunt tool for holding human rights violators accountable for their transgressions and for providing victims with a legal voice. The government has allowed a great number of violator-deportees to escape.[22] In addition, as in criminal cases, victims play no role in directing the government's immigration and deportation proceedings against human rights violators.

International mechanisms are similarly limited: most afford an individual victim no means by which to bring a case. As one scholar has explained,

> [i]nstitutions based on the U.N. Charter, international multilateral treaties, or regional agreements typically address state responsibility and norm compliance but do not assign liability to individual defendants, generate enforceable remedies, or provide victims with a judicial forum in which to bear witness and confront their abusers.[23]

Ad hoc criminal tribunals are plagued by budgetary concerns and can process relatively few claims.[24] The ICC lacks money (and, notoriously, U.S. support) and has very limited jurisdiction.[25]

This Article argues that Canada should enact legislation that provides universal jurisdiction for tort suits involving gross violations of international human rights law, akin to the U.S.'s TVPA. This Article gives an overview of the shape the legislation should take. Part II discusses the U.S.'s ATCA,[26] the TVPA, and the emerging field of transnational public law litigation. Part III examines whether such legislation would be appropriate and feasible in Canada and concludes that it is. Provincial tort legislation should be one of a panoply of mechanisms to punish and deter violations of

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21. Van Schaack, *supra* note 16, at 148.

22. *Canada Draws a Hard Line on Deporting War Criminals*, NATIONAL POST, May 5, 2004, at A8.

23. Van Schaack, *supra* note 16, at 161.

24. Patricia McGowan Wald, Former Judge International Tribunal for the Former Yugoslavia, Testimony at Committee on International Relations, U.S. House of Representatives, Hearing on U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice, at 3, 6, Feb. 28, 2002; *see also* Ralph Zacklin, *The Failings of Adhoc International Criminal Tribunals*, 2 J. INT'L CRIM. JUST. 541, 545 (2004).

25. *See* Larry Krotz, *Reasonable Doubts: The International Criminal Court Gets Cross-Examined*, THE WALRUS, Nov.–Dec. 2003; The United States and the International Criminal Court, http://www.hrw.org/campaigns/icc/us.htm.

26. The choice of ATCA versus Alien Tort Statute is a loaded one. Proponents of the statute as a tool for human rights plaintiffs tend to choose the former; whereas opponents of this use tend to choose the latter. In *Sosa*, the Supreme Court chose the Alien Tort Statute. Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).

humanitarian and human rights law. Part IV proposes the shape of the legislation with respect to such key considerations as jurisdiction, sovereign immunity, and exhaustion. Such legislation should be firmly grounded in international law with respect to both human rights and jurisdictional norms. This "transnational" legislation is consistent with Canada's various identities as protector of human rights, rule-abiding international player, and proponent of multilateral solutions to international problems.

II. OVERVIEW OF U.S. HUMAN RIGHTS TORT LEGISLATION AND CASE LAW

A. *ATCA*

The United States has been the host to a variety of tort suits for human rights abuses since the 1980s. The ATCA, which provides that federal 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,"[27] has played a central role in these human rights suits. For roughly two hundred years, "the statute was largely ignored, rarely cited, and relied upon in only two cases."[28] The history and intended purpose of the statute are hotly debated. [29] As one judge put it, "[t]his old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[30]

In 1980, some creative human rights lawyers invoked the long-forgotten statute in a suit against Paraguayan military officials for torture. In *Filartiga v. Pena-Irala*, the Second Circuit held that relatives of a young man tortured and killed in Paraguay by a Paraguayan police officer could obtain damages under the ATCA because the acts violated international law.[31] The Second Circuit's decision in *Filartiga* "established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of

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27. 28 U.S.C. § 1350.

28. Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 7 (2002).

29. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Content*, 42 VA. J. INT'L L. 687, 701 (2002); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 239 (1996).

30. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

31. Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

the law of nations (i.e., international law)."[32] Or, as one scholar stated, "[t]he decision has been read to stand for a breathtakingly simple proposition: that a foreigner, merely by alleging a violation of the law of nations, is entitled to sue in the courts of the United States."[33]

Indeed, the ATCA is a vague and broad statute. The statute "does not specify the defendants who can be sued, the nature of the claims, or the limitations on such claims. Courts must look to customary international law and other common law principles."[34] Citing cases based on allegations of economic wrongs and conduct of non-government officials, one scholar argues that "the breadth of many of these claims make it difficult to ascertain the boundaries, if any, encompassed within the idea of human rights or 'the law of nations.'"[35]

Recently, human rights lawyers have begun using the ATCA to sue corporations as well as individuals. Perhaps the most famous example of this appeared in *Doe v. Unocal*, where plaintiffs sued Unocal for

> (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (2) forced labor; (3) crimes against humanity; (4) torture; (5) violence against women; (6) arbitrary arrest and detention; (7) cruel, inhuman, or degrading treatment; (8) wrongful death; (9) battery; (10) false imprisonment; (11) assault; (12) intentional infliction of emotional distress; (13) negligent infliction of emotional distress; (14) negligence per se; (15) conversion; (16) negligent hiring; (17) negligent supervision; (18) violation of California Business & Professions Code § 17200.[36]

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32. Kadic v. Karadzic, 70 F.3d 232, 238–39 (2d Cir. 1995); *see also* Thomas E. Vanderbloemen, *Assessing the Potential Impact of the Proposed Hague Jurisdiction and Judgments Convention on Human Rights Litigation in the United States*, 50 DUKE L.J. 917, 926 (2000) (quoting *Kadic's* formulation of subject matter jurisdiction under the ATCA).

33. M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1080 (1999).

34. CURTIS A. BRADLEY, THE COSTS OF INTERNATIONAL HUMAN RIGHTS LITIGATION 457, 472 (2001).

35. Chibundu, *supra* note 33, at 1141–42.

36. Doe v. Unocal, 248 F.3d 915, 921 (9th Cir. 2001). A panel of the Ninth Circuit held that plaintiffs had sufficiently alleged violations of the law of nations under the ATCA, Doe v. Unocal Corp., 395 F.3d 932, 937–38 (9th Cir. 2002), but the Ninth Circuit has ordered that the case be reheard en banc, Doe I v. Unocal Corp., 395 F.3d 978, 978–79 (9th Cir. 2003). The parties ultimately settled the case out of court. *See* Docket: Doe v. Unocal, http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45.

In *Unocal*, the U.S. Department of Justice argued that the ATCA provided no private cause of action, but rather was only a jurisdictional statute, and that the ATCA had no extraterritorial application.[37] It made the same argument before the U.S. Supreme Court in *Sosa v. Alvarez-Machain*.[38]

The ATCA has survived a sustained challenge from the Bush administration,[39] which culminated in the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*.[40] The case stemmed from an incident in 1985, in which a U.S. Drug Enforcement Administration (DEA) agent, Enrique Camarena-Salazar, "was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a two-day interrogation, then murdered."[41] DEA officials in the United States believed that Humberto Alvarez-Machain (Alvarez), a Mexican physician, was involved in the torture. In 1990, Alvarez was indicted for the torture and murder of Camarena.[42] The U.S. District Court for the Central District of California issued a warrant for his arrest.[43] After negotiations with the Mexican government for the handover of Alvarez proved fruitless, the DEA hired Mexican nationals to capture Alvarez and bring him to the United States for trial. Pursuant to the plan, a group of Mexicans "abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas," where federal officers arrested him.[44] Arguing that his seizure was "outrageous government conduct" and violated the extradition treaty between the United States and Mexico, Alvarez moved to dismiss the indictment against him.[45] The district court agreed, the Ninth Circuit affirmed, and the Supreme Court reversed.[46] Alvarez was tried in 1992 and acquitted.[47]

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37. Brief for the United States of America [as Amici Curiae Supporting Unocal Corp.], Doe I v. Unocal Corp., 395 F.3d at 5–12, 27–29 (9th Cir. 2003) (Nos. 00-566003 & 0056628).

38. *See* Transcript of Oral Argument before the U.S. Supreme Court, Mar. 30, 2004. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (Nos. 03-339, 03-485) [hereinafter Transcript of Oral Argument] (discussing whether the ATCA is a jurisdictional statute).

39. *See* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 169 (2004).

40. *Sosa*, 542 U.S. at 692.

41. *Id.* at 697.

42. *Id.*

43. *Id.* at 698.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

In 1993, upon returning to Mexico, Alvarez filed a civil suit against Sosa, Antonio Garate-Bustamente—a Mexican citizen and DEA operative—five unnamed Mexican civilians, the United States, and four DEA agents.[48] Relying on the ATCA, Alvarez sought damages from Sosa for a violation of the "law of nations."[49] The district court awarded $25,000 in damages to Alvarez on his ATCA claim.[50] A three-judge panel and an en banc court of the Ninth Circuit affirmed the decision on the ATCA. [51] The Supreme Court granted certiorari, among other things, to clarify the scope of the statute.[52] It reversed the decision of the Ninth Circuit, but left the ATCA largely intact.[53]

In *Sosa*, the U.S. Department of Justice and the other defendants argued that the ATCA did not provide a cause of action. Rather, they argued it was merely a jurisdictional statute.[54] Alvarez, by contrast, argued that the statute was "authority for the creation of a new cause of action for torts in violation of international law."[55] The Supreme Court found Alvarez's reading "implausible"[56] and held that the ATCA is a jurisdictional statute that creates no new causes of action. Nevertheless, it held that "the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law."[57] The Court concluded: "The jurisdictional grant is best read as having been enacted on the understanding that 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."[58]

Much to Justice Scalia's dismay,[59] the ensuing discussion left the door open for the recognition of torts stemming from customary international law because the Court qualified its holding by saying:

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48. *Id.*
49. *Id.*
50. *Id.* at 699.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See* Transcript of Oral Argument , *supra* note 38.
55. *Sosa*, 542 U.S. at 713.
56. *Id.*
57. *Id.* at 724.
58. *Id.*
59. Justice Scalia noted that,

> [i]n holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits.

> We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect that Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offences: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980) has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.[60]

The absence of a categorical preclusion suggests that U.S. courts may continue to recognize torts in violation of the "law of nations."

The Supreme Court, however, urged caution in recognizing torts under the "law of nations." It held that federal courts must "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."[61] The Court deemed this requirement to be "fatal to Alvarez's claim."[62]

The U.S. Supreme Court listed a "series of reasons" for judicial caution in the consideration of individual claims,[63] some of which would likely be of interest to Canadian legislators. For example, it cited the foreign relations implications of private causes of action. The Court explained:

> [T]he subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.[64]

Further, the Court encouraged restraint because courts have "no congressional mandate to seek out and define new and debatable

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Id. at 747 (Scalia, J., dissenting).

60. *Id.* at 724–25.

61. *Id.* at 725. Framed in the negative, the Court held that, "[f]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732.

62. *Id.* at 725. The Court deemed the tort of "arbitrary detention" that is not prolonged not to meet this standard. It concluded, "[w]hatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738.

63. *Id.* at 725–28.

64. *Id.* at 727.

violations of the law of nations, and modern indications of congressional understanding of the judicial role in the filed have not affirmatively encouraged greater judicial creativity."[65] It read the TVPA to be confined to the subject matter of torture. Much like the *Bouzari* court in Ontario, the *Sosa* court shied away from pushing the bounds of international law absent an explicit mandate from the legislature.

B. *TVPA*

In 1992, the U.S. Congress enacted the TVPA, which codified the holding in *Filartiga* and extended it to U.S. citizens.[66] The TVPA provides a civil remedy against anyone who has subjected an individual to torture or extrajudicial killing:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[68]

The TVPA requires a plaintiff to exhaust adequate and available local remedies and imposes a ten-year statute of limitations.[69] It also defines the terms "extrajudicial killing" and "torture."[70] Unlike the ATCA, which clearly provides jurisdiction, but (at least until *Sosa*) was ambiguous as to whether it provided a cause of action, the TVPA creates a cause of action, but does not provide jurisdiction.[71] The TVPA permits an appellant to ground his or her torture claim

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65. *Id.* at 728.

66. *See* Brief of International Law Scholars and Human Rights Organizations as Amici Curiae Supporting Plaintiffs, Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2002) (No. 01 Civ. 9882) (citing H.R. Rep. No. 102-367, pt. 1 (1991)) ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 . . . ."). Both the House and the Senate reports cited *Filartiga* with approval and affirmed the ATCA's importance and viability. *Id.* (citing H.R. REP. NO. 102-367, pt. 1 (1991) and S. REP. NO. 102-249 (1991)); Goodman & Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 514 (1997).

68. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, § 2(a)(1)–(2) (2005).

69. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (citing 28 U.S.C. § 1350).

70. *Id.*

71. *Id.*

jurisdictionally in either the ATCA or the general federal question jurisdiction of § 1331.[72]

Although the TVPA is clearer in most respects than the ATCA, the TVPA presents a new complication because of a tension between its state actor requirement—based on that of the underlying Convention Against Torture (CAT)[73]—and sovereign immunity.[74] The TVPA only applies to those acting "under actual or apparent authority, or color of law, of any foreign nation."[75] The tension arises because, absent some controlling exception, U.S. courts have held that sovereign immunity bars suits against states under the ATCA and the TVPA.[76] Plaintiffs have circumvented the sovereign immunity bar in suits against officials by arguing that the individual is acting "in an official capacity" for the purposes of legal liability but not for the purpose of immunity.[77] If plaintiffs sue under the TVPA,

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72. *Id.*

73. The CAT likewise makes state participation an element of torture. It defines torture as,

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or *at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.* It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (emphasis added).

74. *See, e.g.*, David Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255 (1996); *see also Karadzic*, 70 F.3d at 237–38.

75. 28 U.S.C. § 1350(2)(a)(1)–(2) (1992).

76. Argentine Rep. v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173–74 (D.C. Cir. 1994) (rejecting the argument that there was an implied waiver of sovereign immunity in cases of *jus cogens* violations); *see also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718–19 (9th Cir. 1992) (holding that there was no exception to sovereign immunity for acts of torture committed outside the UNITED STATES); Beth Stephens, *Conceptualizing Violence Under International Criminal Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 598 (1997) ("Litigation under the ATCA and the TVPA has not been successful against sovereign states, which are protected from suits in U.S. courts by the Foreign Sovereign Immunities Act (FSIA), unless the claim falls within one of the enumerated exceptions to immunity," and these "do not include a general authorization for claims of gross human rights abuses."). *But see Princz*, 26 F.3d at 1179–85 (Wald, J., dissenting) (arguing for implied waiver of FSIA in cases of *jus cogens* violations).

77. *See* Chuidian v. Philippine National Bank, 912 F.2d 1095, 1103 (9th Cir. 1990); *see also* Doe v. Qi, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004) (holding that people with command responsibility may be sued under TVPA in their official capacity).

however, they must be careful to show that the torturer was nevertheless a state actor for the purposes of the TVPA.

Despite Canadian courts' apparent scepticism about the notion that suing a state official is different than suing the state, the state actor should not be immune from suits for torture under Canadian law. The Ontario Court of Appeal, for example, has held that suing an individual is essentially the same as suing the state because the money ultimately comes from the same place.[78] The difference between U.S. and Canadian law on this point is perhaps overstated. In the United States too, "[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly."[79] Lord Mance's interpretation of the state actor language in the CAT in the Court of Appeal in the United Kingdom is instructive. Lord Mance reasoned that:

> [t]he requirement that pain or suffering be inflicted by a public official does no more in my view than identify the author and the public context in which the author must be acting. It does not lend to the acts of torture themselves any official function to inflict, or that an official can be regarded as representing the state in inflicting, such pain or suffering.[80]

Moreover, Lord Mance squarely addressed the concerns of the Ontario Supreme Court in *Jaffe* that the money for any judgment would come out of the same pockets. Lord Mance explained that if "torture by one of [a state's] officials was confirmed it [the state] would presumably disown the official's conduct. There is no basis on which the state could be made liable to indemnify one of its officials provided to have committed systematic torture."[81]

C. *Transnational Litigation*

Tort suits under the ATCA and the TVPA are prime examples of an emerging field of law that has been dubbed "transnational public law litigation."[82] Transnational public law litigation breaks down the traditional division between international litigation (between states) and domestic litigation (between private individuals).[83] Traditionally, in domestic litigation, "private individuals bring private claims

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78. Jaffe v. Miller, [1993] D.L.R. 315.
79. *Chuidian*, 912 F.2d at 1101.
80. Jones v. Ministry of the Interior, 148 S.J.L.B. 1286 (C.A. 2004).
81. *Id.* ¶ 77.
82. Harold Hogju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348 (1991).
83. *Id.*; *see also* Craig Scott, *Translating Torture into Transnational Tort*, *in* SCOTT, *supra* note 7, at 49–50.

against one another based on national law before competent domestic judicial fora, seeking both enunciation of norms and damages relief in the form of a retrospective judgment." [84] By contrast, in international litigation, "nation-states bring public claims against one another based on treaty or customary international law before international tribunals of limited competence."[85] The main goal of this international litigation was "usually the enunciation of a public international norm that will stimulate 'relief' in the form of a negotiated political settlement." [86]

In the emerging field of transnational public law litigation, however, a new model has emerged:

> Private individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently, domestic courts. In these fora, these actors invoke claims of right based not solely on domestic or international law, but rather, on a body of "transnational" law that blends the two.[87]

For example, the ATCA does not explicitly name a particular type of conduct, such as murder, that gives rise to the cause of action, but rather requires courts to interpret the "law of nations" or customary international law.[88] Thus, a U.S. court dealing with an ATCA case must examine U.S. and other national domestic laws regarding issues such as service, jurisdiction, conflict of laws, forum non conveniens, and customary international norms, in determining whether the "law of nations" has been violated.

Although Canada lacks ATCA- or TVPA-style legislation, Canadian courts have been carving out a space for "transnational law" on their own initiative. A prime example of this trend is the use of international law as a tool of statutory interpretation, even when it has not been explicitly enacted with implementing legislation.[89] The Canadian Supreme Court has held that whether or not international

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84. Koh, *supra* note 82, at 2348–49.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. In Canada, as

> [i]n [other] common law countries which have inherited the UK's Westminster conception of government, . . . there exists by and large a radical formal separation between international treaty law and its implementation by domestic courts, such that a treaty norm does not have the direct force of law but rather must be given effect by legislation; even if a statue in such a country specifically and verbatim provides for an entire treaty to be applied by its courts or designated tribunals, it is still the case, in formal terms, that those institutions are applying national (statute) law and not international (treaty) law.

Scott, *supra* note 83, at 49.

norms have been adopted into Canadian law through implementing legislation, "they are relevant sources for interpreting rights domestically."[90] It has explained that "the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred."[91]

Enacting tort legislation for gross violations of international human rights and humanitarian law norms would signal legislative approval of this transnational law ethos already existing in Canadian judges, particularly in the context of human rights. By taking on tort cases for violations of international law, Canada also puts itself in a position to shape transnational and, relatedly, customary international law, which is defined in part by the practice and decisions of states.[92]

III. LOOKING SOUTH: SHOULD CANADIANS HAVE ATCA- AND TVPA-STYLE LEGISLATION?

A. *Canada as Human Rights Champion and Good International Citizen*

Canada sees itself as an upstanding player in the international system and a champion of human rights. Although at first glance these priorities seem to go hand in hand—a good international player abides by international law, and a protector of human rights follows international human rights law—the situation is significantly more complex. Aggressive enforcement of human rights norms via far-reaching jurisdictional principles requires stretching international law, sometimes in ways that much of the international community finds uncomfortable. Yet, in Canada, we want to have our cake and eat it too.

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90. Baker v. Canada, [1999] 2 S.C.R. 817; *see Reference re* Public Service Employee Relations Act (Alberta) [1987] 1 S.C.R. 313.

91. R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 S.C.C. 2 (quoting R. SULLIVAN, DRIEDGER ON THE CONSTRUCTION OF STATUTES 330 (3d ed. 1994)).

92. Arguably, Canada has attempted to do this in its sovereign immunity statute. The editors of one Canadian treatise on international law note that Parliament's passing of the SIA "is singularly remarkable for attempting to legislate customary international law." Arguably, the provincial parliaments should do the same with an ATCA.

1. Canada as Multilateralist and Proponent of International Law

Multilateralism and international cooperation based on the rule of law are central to Canadian foreign policy. As one commentator has put it, "[w]e've made multilateralism into almost a secular religion. It defines our foreign policy."[93] According to Alan Henrikson, professor of diplomatic history at the Fletcher School of Law and Diplomacy at Tufts University, "Canada has traditionally been in more multilateral organizations than any other country."[94] Following a recent project to canvass the opinions of Canadians on foreign policy, the government concluded that "[o]ne of the most consistent themes . . . is that despite the problems highlighted by the Iraq crisis, multilateral cooperation based on international law must remain a foundation of Canadian foreign policy."[95]

DFAIT clearly places a lot of stock in the concept of "rule of law":

> The rule of law is the essence of civilized behaviour both within and among nations. Clearly defined rules allow us to plan commitments and activities with reasonable certainty that our expectations about the surrounding environment will not be upset by arbitrary and erratic changes. Perhaps even more importantly, agreed rules help to diminish the capacity of those with the greatest raw influence to bend society—and the international community—to their own ends. Rule-making helps to redress power imbalances. Canada will remain in the forefront of those countries working to expand the rule of law internationally.[96]

Thus, the rule of law in itself is viewed as a way of curbing abuses, such as human rights violations.

One needs look little further than the detention facility at Guantanamo and the invasion of Iraq to conclude that the United States is less wedded to the idea of multilateralism.[97] Ironically, the maverick U.S. position in the international order is in many ways philosophically consistent with its sweeping tort legislation. Although embraced by human rights groups, the U.S.'s aggressive tort legislation, which reaches violators of international law who may have no connection to the country, serves as an example of U.S. exceptionalism and even scorn for the international community.

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93. Richard Gwyn, *Multilateralism has limits*, GUELPH MERCURY, Apr. 28, 2003, at A7. For a critique of Canada's unprincipled commitment to multilateralism, see Frank Harvey, *Principles? What Principles?*, NATIONAL POST, Apr. 16, 2003, at A19.

94. Bob Deans, *G-8 Backgrounder: Canada: Major Player, New Leader Neighbor has Border Issues, Security Among Key Concerns*, ATLANTA J.- CONST., May 2, 2004, at C5.

95. DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, A DIALOGUE ON FOREIGN POLICY: REPORT TO CANADIANS 12 (2003), http://www.foreign-policy-dialogue.ca/pdf/FinalReport.pdf [hereinafter A Dialogue on Foreign Policy].

96. DFAIT Chapter 5, *supra* note 2.

97. *See* Harry Sterling, *Sometimes 'Quiet Diplomacy' Just Isn't Effective*, TORONTO STAR, Nov. 14, 2003, at A25.

Arguably, using Canadian courts to condemn people in other states or, depending on the status of sovereign immunity, other states themselves, would compromise Canada's multilaterist and international law-abiding stances. Indeed, both the government lawyers and the *Bouzari* lower court seemed to wrestle with this tension. A federal lawyer who represented the Canadian government in the *Bouzari* case told the Canadian press that "while Canada is opposed to torture, it also believes treaties to prevent such things as human rights abuses depend on international cooperation, which could be in jeopardy if Canada assumed legal jurisdiction over foreign governments."[98] Similarly, in rejecting Bouzari's arguments that the State Immunity Act (SIA) should be interpreted to allow the suit for torture against Iran to proceed, the court noted that "even more important than the problem which the plaintiff faces with the language of the Act is the fact that the legislation in its current form, without further exception, is consistent with both customary international law respecting state immunity and Canada's treaty obligations."[99]

2. Canada as Human Rights Champion

Canada also views itself as a champion of global human rights and talks a big game on international justice and human rights. Irwin Cotler, the Minister of Justice, has emphasized that human rights are a priority for the country: "Canada has a reputation worldwide for being a leader in ensuring that there is no safe haven for individuals involved in crimes against humanity or war crimes, regardless of when or where these crimes took place."[100] This leadership role appears to encompass judicial efforts to ensure accountability. According to Cotler, "We want to take a leadership role in engaging the international community to work even more closely with us to bring the perpetrators to justice." [101] International

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98. Tracey Tyler, *Victims Fight Law Shielding Torturers*, TORONTO STAR, Oct. 2, 2004, at A22.

99. Bouzari v. Islamic Republic of Iran, [2004] D.L.R. 406.

100. Humphreys, *supra* note 15.

101. *Id.* Cotler said at a 2002 conference in Sweden,

> [t]he presence of war criminals among the world's democracies, including Canada . . . is a moral and juridical obscenity, an affront to conscience . . . . Fifty-five years after Nuremberg, the lessons of the past not only remain unlearned, but the tragedy is being repeated. Instead of diminishing over time, [genocidal] assaults have continued . . . . Regrettably, this international criminality has been accompanied by a culture of impunity . . . . If human security is to be safeguarded, this culture of impunity must be replaced by a culture of accountability.

law scholars have noted that human rights play an ever larger role in Canadian foreign policy—for example, in the realm of development assistance.[102]

Canadians themselves seem to support the government's rhetoric on human rights. One participant in the government's survey of the foreign policy priorities of Canadians captured the view of many Canadians in stating that "Canada should endorse and actively champion the principle that it is only by unequivocally and consistently embracing the full range of universal human rights standards that governments will provide true and sustainable security for their people."[103] Another participant stated: "We cannot sustain our values and quality of life if we do not defend these values across the globe."[104]

B. *Tort Suits as a Means of Dealing with Gross Violations of Human Rights*

Tort suits are appropriate and advisable in cases of gross violations of human rights.[105] Tort law may seem too watered-down a concept to apply to genocide, torture, and other gross violations of international human rights and humanitarian law.[106] Our impulse is

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Id.

102. *See, e.g.*, INTERNATIONAL LAW, *supra* note 8, at 846.

103. A DIALOGUE ON FOREIGN POLICY, *supra* note 95, at 7 (quoting a Dialogue participant).

104. *Id.* at 17 (quoting a Dialogue participant).

105. Some argue that states are obligated under international law to provide a remedy for victims of human rights violations even if the state is not responsible for the violation. *See* Andrew Byrnes, *Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture, in* SCOTT, *supra* note 7, at 539–40 (arguing that although "CAT does not require that the resources of a State party's civil law system be made available to persons who wish to pursue actions or other remedies for acts of torture which occurred outside that State—and for which that State is not otherwise responsible," Articles 14(1) and (2) leave room for civil suits); Van Schaack, *supra* note 16, at 166–68 (citing the Universal Declaration of Human Rights, the ICCPR, the American Convention and the Torture Convention and noting that "all require states to provide effective remedies within their national courts for victims of violations of fundamental right guaranteed by those instruments" and arguing that they should not be read to apply "only when it is the State Party that is responsible for the treaty violation"). Professor Craig Scott has posed the question whether the mere insertion of Article 14(2) after 14(1) in the CAT is encouragement of civil suits in cases of torture. Craig Scott, Beyond *Sosa v. Alvarez-Machain* Terms of Debate: Conceptualizing International Human Rights Torts in Terms of Transnational Law, Alien Tort Claims Under Attack, Presentation at American Society for International Law Conference (Apr. 1, 2004).

106. Damage awards may seem too petty a remedy for gross violations of human rights, however, civil tort suits are not the only place where monetary awards are used as remedies for violations of human rights. *See* Stephens, *supra* note 76, at 604. International human rights bodies also use non-criminal sanctions like damages,

to condemn these acts in the harshest terms possible. To take an extreme example, after World War II, Winston Churchill had to be talked out of the idea of summarily executing the Nazi leadership.[107] But tort has value despite its seeming insipidity.[108]

1. The Benefits of Tort Suits for Human Rights Violations

The argument that tort law is a valuable tool for addressing human rights abuses has been made extensively in the context of the U.S. tort scheme.[109]

a. Some Measure of Justice When Criminal Law Sanctions Not Available

Proponents of the ATCA and TVPA concede that "complete justice for victims of violence ideally includes criminal prosecution as well as a civil tort remedy . . . ."[110] Nevertheless, they argue that "civil remedies are that much more important" due to the rarity of international criminal prosecutions.[111] Even where criminal prosecutions are available, "an international tort remedy may complement such a proceeding. . . [by] offer[ing] victims of violence a legal remedy which they control and which may satisfy needs not met by the criminal law system."[112]

b. Satisfaction and Perhaps Compensation for Victims

The Center for Constitutional Rights, a U.S. non-governmental organization (NGO) responsible for bringing many ATCA cases,

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reparations and findings of liability. *Id.* (citing the example of the *Velasquez-Rodriguez* case where the Inter-American Human Rights Court found the government of Honduras responsible for human rights abuses, ordering it to investigate the fate of the disappeared person, to punish those responsible and to prevent future disappearances and ordering Honduras to pay reparations to the family); *see also* Inter-American Court of Human Rights: Judgment in *Velasquez-Rodriquez* Case (Forced Disappearance and Death of Individual in Honduras), 28 I.L.M. 291 (1989). In many countries, restitution is a standard part of criminal punishment.

107. JONATHAN GARY BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 151, 182 (2000).

108. *See* Stephens, *supra* note 76, at 603–05; *see also* Van Schaack, *supra* note 16, at 166–68.

109. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 233–38 (1996); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2101–04 (1998); Stephens, *supra* note 76, at 603–05; Van Schaack, *supra* note 16, at 143–44.

110. Stephens, *supra* note 76, at 581.

111. *Id.*

112. *Id.*

contends that for plaintiffs "satisfaction comes from the mere filing of a lawsuit, from confronting the defendant in court or forcing him to flee from the U.S., and from obtaining judgment from a U.S. court which makes a formal record of the human rights violations and of the defendant's responsibility."[113] Although traditionally, ATCA plaintiffs have had difficulties enforcing judgments, tort—unlike Canadian or many international criminal remedies[114]—offers the prospect of compensation. This prospect may be more than illusory at least in cases against corporations. In *Doe v. Unocal*, for example, plaintiffs settled out of court for an undisclosed amount.[115]

c. Showing Respect for Life in Other Countries

Discussing the lawsuits in which his clinic is involved, Noah Novogrosky, director of the International Human Rights Program at the University of Toronto frames the issue as one of respect:

> Taking an interest in conflicts in Africa matters to survivors. It shows that a life in Africa is not worth less than a life in Toronto. We can care for people who live in very different cultures and communities because we are all bound together by the basic principle of human rights.[116]

d. Addressing Cases the Government Lacks the Incentive to Investigate

In some cases, tort law is superior to criminal law for dealing with human rights violations for practical reasons: the ability of individuals to initiate a suit rather than having to rely on a state is an advantage because "states have little incentive to investigate and prosecute another state's human rights offences."[117] Tort suits may also push public knowledge of wrongdoing through investigation that

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113. John Terry, *Taking* Filártiga *on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad*, *in* SCOTT, *supra* note 7, at 112–13 (citing Michael Ratner & Beth Stephens, The Centre for Constitutional Rights: Using Law and the *Filartiga* Principle in the Fight for Human Rights (1993) (unpublished paper, on file with the Centre for Constitutional Rights)).

114. The ICC in theory will attempt to provide for victim compensation via its Victims Trust Fund. *See* http://www.icc-cpi.int/vtf.html. Pursuant to Article 75, para. 2 of the Rome Statute, the Court may order a convicted person to pay money for compensation, restitution or rehabilitation. *See id.*

115. *See* Synopsis of *Doe v. Unocal*, http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45.

116. Nicholas Keung, *U of T Human Rights Clinic Makes Law School A Crusade*, TORONTO STAR, Jan. 4, 2004, at A4.

117. Terry, *supra* note 113, at 115.

leads to the identification of the responsible individual, punishment, and compensation.[118]

e. Empowering Victims

Tort suits empower victims by giving them a role not only in initiating, but also in shaping the suit. Unlike in a criminal case, control is nominally in the hands of the victim, rather than a government prosecutor. The individual, rather than the government, is the gateway to justice. In tort suits, victims can tell their stories on their terms rather than in a criminal trial where the prosecutor is focusing on establishing the requisite elements to prove guilt.[119]

f. Giving Human Rights a Bigger Role in the Foreign Policy Cost-Benefit Analysis

Tort suits may also have the power to affect foreign policy in positive ways. After a century of holocausts met with apathy and bureaucratic foot-dragging from the powerful nations of the world,[120] there is a strong case for adding a human rights dimension to the foreign policy calculation. Professors Anne-Marie Slaughter and David Bosco laud the trend of the decentralization and the democratization of foreign policy: "When traditional diplomacy proves inadequate to the task of enforcing international law and justice, plaintiffs should be able to carve out new diplomatic channels, bypassing the uncertainty of political negotiations and compensating for the weakness of international tribunals by turning to effective national courts."[121] In particular, they note the impact of suits levied against corporations:

> If the diplomatic impact of suits against individuals has been limited, not so the growing body of litigation against foreign and multinational corporations for violations of international law. . . . By targeting major corporations and business concerns, private plaintiffs have thus become a diplomatic force in their own right, forcing governments to pay attention at the highest levels.[122]

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118. Stephens, *supra* note 76, at 603.

119. At least one recent study has found that in the context of international criminal trials, victim witnesses tend to have a bad experience, at least in part due to the differing agenda of prosecutors. *See generally* ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE (2005).

120. *See generally* SAMANTHA POWERS, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002).

121. *Id.*

122. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF. 102, 107 (2000).

Harold Koh makes a similar point in arguing for transnational litigation, arguing that, in addition to seeking compensation and redress for individual victims, transnational public law plaintiffs seek

> prospective aim[s] as well: to promote a political settlement in which both governmental and nongovernmental entities will participate . . . Even a judgment that the plaintiff cannot enforce against the defendant in the rendering forum empowers the plaintiff by creating a bargaining chip for use in other political fora.[123]

2. The Drawbacks of Tort Suits for Human Rights Violations

Unsurprisingly, not everyone is as enthusiastic about using tort to redress human rights violations. There is a significant body of scholarship that discusses the drawbacks of *Filartiga*-style suits. The common criticisms of the ATCA and the TVPA are, by and large, the flipsides of the benefits usually cited. Perhaps the most compelling criticisms for Canada are those that go to the legitimacy of the undertaking under international law.

a. The Role of Courts in Shaping Foreign Policy

Detractors of human rights tort suits often argue that courts have no business deciding cases that have foreign policy implications. Some frame their concerns in terms of the unfitness of courts to make what are essentially political decisions. Judge Bork's concurrence in the *Tel-Oren* case is often cited for the proposition that foreign policy concerns are best left to political branches of the government.[124] Others argue that it is undemocratic for judges to make decisions that should be made by politically accountable actors. As one scholar explains, "[t]he most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives."[125] Bradley notes that "[t]he plaintiffs and their representatives decide whom to sue, when to sue, and which claims to bring,"[126] but laments that "[t]hese actors . . . have neither the expertise nor the constitutional authority to determine U.S. foreign policy. Nor, unlike our elected officials, will

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123. Koh, *supra* note 82, at 2349.

124. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 (D.C. Cir. 1984) (Bork, J., concurring); *see also* Jan Klabbers, *Doing the Right Thing? Foreign Tort Law and Human Rights*, *in* Scott, *supra* note 7, at 565 (arguing that that these disputes are inherently political and that "every attempt to solve political disputes judicially is almost always suspect").

125. BRADLEY, *supra* note 34, at 460.

126. *Id.*

these actors have the incentive to weigh the benefits of this litigation against its foreign relations costs."[127]

These arguments, however, ignore the fact that a judge's insulation from politics and special interest groups is potentially a great advantage. Moreover, democracy is not always the best way to protect human rights or minorities. Courts play an important role in ensuring that the human rights of the minority are protected, even when it may be in the majority's interest to trample them.[128] In *Brown v. Board of Education*, the U.S. Supreme Court case that declared unconstitutional state laws mandating segregated schools, exemplifies the judiciary's protective role.[129]

The United States' experience with the law on sovereign immunity should serve as a reminder that leaving the decisions over issues raised by tort cases, such as sovereign immunity, exclusively to the political branches of government is problematic. The United States changed its law on sovereign immunity specifically to diminish the role of the political branches in determining when suits against states and state officials could proceed.[130] Until the 1970s, even after the restrictive form of sovereign immunity was formally recognized in the United States, "the determination of whether a suit was barred under the principles of the Restatement was made not by the courts but by the State Department."[131] In the 1970s, the U.S. Congress grew concerned that the law on sovereign immunity "was leaving immunity decisions subject to diplomatic pressures rather than to the rule of law."[132] Congress reported:

> From a legal standpoint, if the [State] Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. . . . From a foreign relations standpoint, the initiative is left to the foreign state . . . . From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign sovereign will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.[133]

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127. *Id.*

128. MICHAEL IGNATIEFF, THE RIGHTS REVOLUTION 46 (2000) ("Democracies are not always right. When majority decisions are unjust, dissenting minorities must have the capacity to appeal to a higher law.").

129. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

130. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990).

131. *Id.*

132. *Id.*

133. *Id.*

Thus in 1976, Congress enacted the FSIA, which "codified the existing common law of sovereign immunity"[134] and abolished the Department of State's role in determining immunity.[135] The concerns raised by the U.S. Congress apply not only to the United States and the issue of sovereign immunity, but rather speak more broadly to the dangers of political branches having too great an influence in the outcome of litigation against states and state officials.

Regarding the fitness of courts to make political decisions, the words of Justice Wilson of the Canadian Supreme Court seem apt. Justice Wilson observed in response to arguments about judicial competence to decide political issues in *Operation Dismantle* that "however unsuited Courts may be for the task, they are called upon all the time to decide questions of principle and policy."[136] Further, Justice Wilson noted that

> [t]he word "justiciable" . . . is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication from which practical consequences in human conduct are to follow.[137]

b. The Costs to Foreign Policy

On a related front, others base their arguments against ATCA-style suits on the sheer costs to the state's foreign policy interests. In the *Sosa* case, Paul Clement (then-deputy U.S. Solicitor General) argued that ATCA suits "provide tremendous problems for the foreign policy interests of the United States."[138] The U.S. position in *Sosa* is consistent with the current administration's position in a number of ATCA cases.[139] Again, however, the current cost-benefit analysis used by governments to structure their foreign policy appears to undervalue human rights: if the government wishes to preserve good

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134. *Id.*
135. *Id.*
136. Operation Dismantle v. The Queen, [1985] S.C.R. 441.
137. *Id.* (quoting Melville Weston, *Political Questions*, 38 HARV. L. REV. 296, 299 (1925)).
138. Transcript of Oral Argument, *supra* note 38, at 9.
139. Stephens, *supra* note 39, at 169 (noting that contrary to its position in prior administrations,

> [u]nder the current Bush Administration, . . . the Department of Justice has strenuously opposed human rights litigation, intervening in a dozen cases to challenge both the modern interpretation of the ATCA and its application in particular cases. Common to each of these interventions is the claim that judicial review of allegations of gross human rights abuses constitutes an unconstitutional interference with executive branch foreign affairs powers.

relations with a country because, for example, it is a major trading partner or has oil, then incentives to press for them to obey international human rights or humanitarian law are minimal. U.S. foreign policy with China is an oft-cited example of this conundrum.[140] Empowering individuals to take on human rights abusers is one way to tilt this imbalance to a healthier point.

c. Legal Imperialism

One argument against international human rights litigation under the ATCA relates to legal imperialism and distance from the areas where the underlying events have occurred. Curtis explains that "the adjudication of these foreign human rights abuses by a U.S. court may disconnect these events from the society most affected by the abuses."[141] In a compelling criticism, Chibundu argues that "a claim for international legitimacy must be grounded on more than narrow domestic propriety . . ."[142] Chibundu explains:

> As appealing as it may thus appear at first blush, the arrogation by a municipal court of the unbridled power to punish wrongdoing under the guise of enforcing international law should be resisted not only on account of its effectiveness, but more fundamentally because of what it says about the social distribution of power within the international community.[143]

Or as fugitive from the International Criminal Tribunal for the Former Yugoslavia (ICTY) alleged war criminal, and former President of the Republika Srpska, Radovan Karadzic, wrote to the U.S. district judge hearing an ATCA case against him,

> Can you really hope to find truth, or do justice, or protect rights of people in distant nations? . . . Do you really believe that attaching a U.S. dollar sign to human tragedy around the world by empty judgments in uncontested lawsuits is a step toward peace or justice?[144]

This view, however, may define "community" too narrowly, at least in the realm of human rights. As Michael Ignatieff put it: "Human rights create extraterritorial relationships between people

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140. *See* Margaret Huang, *U.S. Human Rights Policy Toward China*, FOREIGN POLICY IN FOCUS, Mar. 2001, *available at* http://www.fpif.org/pdf/vol6/08IFchinahr.pdf; George Kourous & Tom Barry, *U.S. China Policy: Trade, Aid, and Human Rights*, FOREIGN POLICY IN FOCUS, Nov. 1996, *available at* http://www.fpif.org/briefs/vol1/china.html.

141. BRADLEY, *supra* note 34, at 470.

142. Chibundu, *supra* note 33, at 1073.

143. *Id.* at 1147.

144. Thomas E. Vanderbloemen, *Assessing the Potential Impact of the Proposed Hague Jurisdiction and Judgments Convention on Human Rights Litigation in the United States*, 50 DUKE L.J. 917, 924 (2000) (quoting David Rohde, *Jury in New York Orders Bosnian Serb to Pay Billions*, N.Y. Times, Sept. 26, 2000, at A10).

who can't protect themselves and people who have the resources to assist them. The rights revolution since 1945 has widened the bounds of community so that our obligations no longer cease at our own frontiers."[145] Ignatieff's comments on intervention by force are apt in the litigation context as well. Ignatieff notes: "Those who criticize interventions in the name of human rights on the grounds that we must always respect the sovereignty of a state need to remember that the victims of that state are usually imploring us to intervene."[146] Similarly, victims of abuses in other states are imploring Canada to give them an opportunity to have their day in court against their oppressors.

d. Transitional Justice

Others have noted that the suits have costs from a transitional justice perspective. Amnesties, although criticized by many, are a way to get a repressive regime to leave power. If a court allows a tort suit to go forward despite an amnesty, the court diminishes the value of the amnesty, which may make it more difficult to get officials to agree to leave power.[147] Given that local institutions must do most of the work in protecting human rights and that the international community can only act as an occasional stand-in, sometimes "stability . . . may count more than justice."[148]

In a way, it seems that the more effective these suits are as a stick in the international human rights incentive system, the more valid this transitional justice concern. Paradoxically, the unlikelihood of recovery in these suits in fact seems an advantage with respect to this transitional justice concern. There seems to be no evidence, however, that the prospect of ATCA or TVPA suits has affected tyrants' decisions to leave power. Moreover, as discussed below, courts may bar suits on exhaustion grounds if the state where the conduct occurred has some alternative remedy in place, even if the remedy is tied to an amnesty. Finally, and perhaps most importantly, getting the leaders of a rogue regime to leave power is just one aspect of transitional justice. Other critical components include the encouragement of respect for human rights and accountability,[149]

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145. MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY 50, (Amy Gutmann ed., 2001).

146. *Id.*

147. *See* Eric Posner, Remarks, The Alien Tort Claims Act Under Attack, ASIL Proceedings, April 1, 2004.

148. IGNATIEFF, *supra* note 128, at 25 (discussing the slide of regions, such as the Balkans, Rwanda and Southern Islamic front of former U.S.S.R., into civil war).

149. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9–10 (1999); M. Cherif Bassiouni,

which tort suits for human rights violations seek to promote and amnesties undermine.

e. Problems with Relying on Customary International Law

Some of the criticisms of these *Filartiga*-style suits are specific to the broad wording of the ATCA itself—in particular its definitional reliance on customary international law or the "law of nations"—and are perhaps instructive for Canada. Chibundu decries the haphazard ways in which U.S. courts have been interpreting and thereby creating international customary law:

> [I]f [domestic courts] are to usefully and legitimately fill the lacunae in the making and enforcement of customary international law, those who have thus far unquestioningly resorted to them to create their image of what the international society ought to be need to engage in a more searching inquiry of the role of law in shaping and creating respect for the rule of law within a genuinely international community.[150]

Curtis frames the issue as the "cost to democracy," explaining that customary international law involves fewer "U.S. democratic inputs than other forms of law applied by U.S. courts" and noting that there exist "substantial uncertainties today concerning both the way in which customary international law is formed and the specific content of this law."[151] Curtis bemoans the reliance of the judges on academic literature written by experts of questionable objectivity, due to judge's "unfamiliarity with international law and the relative difficulty of doing research on international law questions."[152]

The risk posed by reliance on broad and vague terms such as "the law of nations" can be greatly diminished by more specific legislation. Even Chibundu appears to embrace the TVPA due to its specificity. For example, on the issue of sovereign immunity, Chibundu explains that, with the TVPA, "the legislative branch crafted a clearly defined civil liability statute which expresses the policies of the United States government with regard to individual liability for 'torture' or 'extrajudicial killing' committed by a foreign official or an agent of a foreign government." [153] The scheme reflects an understanding of institutional competencies: "The right to relief is matched against both the competence of a foreign government to

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Searching for Peace and Achieving Justice: The Need for Accountability, 59 LAW AND CONTEMP. PROBS. 4, 9–28 (1996).

150. Chibundu, *supra* note 33, at 1079–80 (arguing that we need to assess "the propriety of such use of courts within a framework where domestic institutions are not otherwise accountable to the 'international community . . .").

151. BRADLEY, *supra* note 34, at 465.

152. *Id.* at 467.

153. Chibundu, *supra* note 33, at 1114.

regulate the behavior of its officials and agents—including the functioning of its own judiciary—and the practical limitations of U.S. courts to evaluate evidence of extraterritorial conduct." [154] Finally, Chibundu lauds its transparency, nothing that "[t]he political branches of the United States government are thus directly answerable for the correctness or otherwise of the policy choices clearly evident in the law."[155]

Therefore, on balance, tort suits for violations of international human rights and humanitarian law are worthwhile. Tort suits offer the significant benefits of giving victims control over their day in court, shifting governments' cost-benefit analyses on human rights, and, particularly in the case of corporations, offering victims the possibility of compensation for their suffering. As set forth above, the disadvantages commonly cited are overstated and, in many cases, can be avoided by clear legislation. Even accepting that providing a tort remedy for victims of torture, crimes against humanity, genocide, war crimes, and the like is desirable, an important question remains: would these measures work outside the context of the U.S. legal system and U.S. society?

C. *Would Tort Suits Work in the Canadian Context?*

1. Constitutionality of Canadian Legislation

A threshold question is whether legislation like the ATCA or the TVPA would be constitutional in Canada. In the United States, the ATCA passes constitutional muster because Article 3 provides that the "law of nations" is federal common law.[156] Thus, the suits arise under federal law and fall under the federal question jurisdiction of federal courts.[157] In Canada, the use of customary international law in itself does not pose constitutional problems: "Customary international law may be applied by Canadian courts without any need for an express legislative act, unless there is a clear conflict with

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154. *Id.*

155. *Id.*

156. *See* BRADLEY, *supra* note 34, at 466 (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); *In re* Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1473 (9th Cir. 1994); Filartiga v. Penalrala, 630 F.2d 826, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995). A number of scholars, however, have challenged *Filartiga*-style cases based on the argument that the reasoning of *Filartiga* "relies upon a flawed assumption that customary international law . . . is federal common law and, as such is actionable in U.S. federal courts." Ryan Goodman & Derek P. Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 468–70 (1997) ("Filartiga properly followed the Supreme Court's jurisprudence on post-Erie federal common law.").

157. *See* BRADLEY, *supra* note 34, at 466.

statute law or common law."[158] Nevertheless, legislation allowing for universal jurisdiction over certain types of conduct would increase transparency and provide courts with much needed guidance in navigating the tricky waters of jurisdiction, sovereign immunity, and the like.

Canadian federalism, however, may raise an obstacle. Under Canadian constitutional law, it is unlikely that the federal Parliament could pass tort legislation for violations of international human rights and humanitarian norms. In Canada, "property and civil rights in the province," which a leading Canadian constitutional scholar contends "is apt to include most of the private law of property, contracts and torts and their many derivatives," fall under the jurisdiction of the provinces, not the federal government.[159]

Arguably, however, if Canadian tort legislation for violations of human rights norms were framed as an adjunct to a federal criminal scheme, such as the CAHWCA, then it could fall within federal domain. Section 91(27) of the Constitution Act of 1867 gives the federal Parliament the power to make laws in relation to "[t]he criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."[160] This provision makes criminal law a federal responsibility.[161]

Canadian case law leaves open the possibility of financial compensation where it is closely related to a criminal sanction. For example, in *R v. Zelensky*,

> the Supreme Court of Canada, by a majority of six to three, upheld a provision of the Criminal Code that authorized a criminal court, upon convicting an accused of an indictable offence, to order the accused to pay the victim compensation for any loss or damage caused by the commission of the offence.[162]

The award of compensation bore appeared civil in three ways:

> (1) the order was to be made, not at the request of the prosecutor or at the initiative of the court, but only on the application of the victim; (2) the amount of compensation was to be related, not to the degree of

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158. William Schabas, INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER 16 (2d ed. 1996); *see also* Suresh v. Canada [2000] D.L.R. 629, 659. *But see*, Baker v. Canada [1999] S.C.R. 817, 861 (an international obligation created by treaty or convention has no direct application in Canada until implemented by legislation. Nevertheless, even when an international norm has not been implemented, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.").

159. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, Vol. 1 at 17-2 (citing Section 92(13) of the Constitution Act, 1867).

160. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), § 91(27), *as reprinted in* R.S.C., No. 5 (App. II 1985).

161. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 435 (student ed. 1997).

162. *Id.* at 457.

> blameworthiness of the accused, but to the value of the victim's loss; and (3) the order was to be enforced, not by the state as a fine would be, but by the victim as if it were a civil judgment.[163]

The majority and the dissent quibbled over the nature of the remedy—the majority claimed that it was predominantly criminal in nature; the dissent claimed it was impermissibly civil.

Nevertheless, *Zelensky* did not decide "whether the federal Parliament could authorize a person, who had suffered a loss as the result of the breach of a criminal law, to bring a separate civil action to recover damages (or other relief) outside the criminal process."[164] This question is precisely the one that matters for possible Canadian TVPA-style legislation. One commentator thinks such a move is unlikely:

> The fact that the Court divided in Zelensky, and the emphasis in the majority opinion on the fact that the compensation order was a discretionary part of the sentencing process, suggest that the Court will be unwilling to uphold a separate civil right of action as ancillary to a criminal law.[165]

The issue comes down to the "pith and substance" of the legislation: "[w]here the pith and substance of a federal law is not the creation of a civil remedy, but is some other matter within federal power, there is no reason to doubt the validity of a civil remedy provided for enforcement of the law."[166] For example, in *MacDonald v. Vapor*, the Supreme Court of Canada held that a provision of the federal Trade Marks Act was invalid because the provision was in essence based in tort, which came within the domain of property and civil rights in the province.[167] By contrast, in *Papp v. Papp*, the Court upheld the validity of a provision of the federal Divorce Act of 1968 for the custody of children of a dissolved marriage, which normally would fall within property and civil rights in the province.[168] The Court held that the provisions passed constitutional muster because there was a "rational, functional connection" between the child custody provisions and the valid divorce provisions of the Divorce Act.[169]

It seems most likely that tort legislation would fall to the provinces. If the legislation were tightly intertwined with a criminal process in CAHWCA, then it is possible that it could be passed on the federal level. Although CAHWCA does not explicitly address the

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163. *Id.*
164. *Id.* at 457–58.
165. *Id.* at 458.
166. *Id.* at 455.
167. *Id.*; MacDonald v. Vapor, [1977] S.C.R. 134, 149.
168. Papp v. Papp [1970] O.R. 331 (C.A.), 336.
169. *Id.*; Hogg, *supra* note 161, at 455–56.

issue, the ICC statute provides that compensation can be awarded to victims for their suffering.[170] Were the legislation to offer the benefit of giving victims the ability to initiate suits without government approval and control, however, such a procedure likely would be deemed too distant from the criminal process, pushing it into the domain of the provinces.

Further, this Article argues that Canadian tort legislation should encompass *jus cogens* violations of human rights norms such as the prohibition against torture; it should not merely address violations in the context of armed conflict or an attack on a civilian population. Thus, the tort legislation would exceed the scope of CAHWCA, straining arguments that the "pith and substance" of the two regimes were the same. As a result, any Canadian tort legislation likely would have to be provincial.

2. Do ATCA-style Suits Translate Into Canadian?

Beyond the question of constitutionality lies an array of practical concerns as to how tort legislation would operate in the context of Canadian culture and the Canadian legal system. An examination of some of the key practical questions reveals that the Canadian legal system is in fact well-suited to TVPA-style tort suits.

A good way of framing the inquiry is to ask whether tort as a remedy for human rights abuses "translates" north of the border. A leading U.S. ATCA scholar, Beth Stephens, has applied Lawrence Lessig's translation theory to international legal responses to international law violations. [171] Stephens posits that different legal systems deal with violations of human rights differently. She essentially argues that a civil lawsuit in the United States is basically a private criminal action and outlines the peculiarities of the U.S. legal system that make it a good place for human rights tort suits.[172] She notes three major features of the U.S. system that make it particularly suitable for *Filartiga*-style suits: (1) laws on subject matter jurisdiction, personal jurisdiction and choice of law; (2) a long-standing tradition of public interest and impact litigation; (3) systematic procedural advantages.[173]

The procedural advantages of the U.S. system Stephens deems important are : (1) the lack of a loser-pays rule, (2) the availability of

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170. Rome Statute of the International Criminal Court, July 17, 1998, art. 77(2), U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999, 1046.

171. *See* Stephens, *supra* note 28.

172. *See id.*

173. *Id.* at 11–12. For example, the United States allows for general jurisdiction over persons transitorily present in the jurisdiction at the time of service and over corporations that have minimum contacts with the jurisdiction. *See id.*

contingency fees, (3) the availability of punitive damages, (4) the possibility of courts' entering default judgments against countries that refuse to appear before it, (5) rules allowing for extensive discovery, (6) extraterritoriality. In the United States, unlike in the United Kingdom, for example, there is no rule whereby claims can only be sustained if they would be recognized as actionable in the place where the dispute's underlying events took place.[174] To determine whether *Filartiga*-style litigation would work in Canada, it is useful to consider whether these peculiarities exist in Canada.

a. Subject-matter Jurisdiction, Personal Jurisdiction and Choice of Law

(1) Subject-matter jurisdiction

As discussed above, it is likely that provincial rather than federal courts would have subject matter jurisdiction over the cases. Therefore, legislation explicitly allowing for ATCA- and TVPA-style suits would be a matter for the provinces.

Whether the cases and legislation fall in the federal or the provincial domain, Canadian law offers leeway for the assertion of universal jurisdiction over the subject matter of certain egregious violations of international law, particularly those that have been criminalized under international law. The legislature has asserted universal jurisdiction in the criminal context with the CAHWCA. Arguably, applying universal jurisdiction to the civil context is a logical extension of the concept that certain offences are "significant enough to threaten the interests 'of civilization everywhere.'"[175]

Thus far, however, Canadian courts have not recognized universal jurisdiction in the civil realm. Although it did not decide the case based on jurisdiction, the *Bouzari* court included dicta that bodes ill for universal jurisdiction absent legislation. Appearing to conflate the issues of subject-matter jurisdiction and personal jurisdiction, the Ontario Court of Appeal stated:

> There is no basis for departing from the real and substantial connection test [the test for personal jurisdiction] in this kind of case. There is nothing in the SIA [State Immunity Act] nor in any treaty by which Canada is bound that would require Ontario to apply a rule of universal jurisdiction . . . to a civil action for torture abroad by a foreign state. Nor does there appear to be any norm of customary international law to

174. *Id.* at 32–33.

175. Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute*—Trajano v. Marcos, 27 CORNELL INT'L L. J. 387, 416 (1994) (quoting Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53, 60 (1981)).

> that effect. There is no general practice nor wide-spread legal acknowledgement by states that civil jurisdiction is to be accorded on this basis for an action based on foreign torture. There is thus no reason to displace the usual common law test. . .[176]

The court ultimately skirted the jurisdiction issue, however, by deciding the case on the basis of state immunity.[177]

(2) Service and Personal Jurisdiction

(a) Service

Canadian rules on service and personal jurisdiction are not significantly more onerous than those of the United States. A great challenge in U.S. cases tends to be the issue of service. The strict rules on service are often difficult to comply with in cases that involve defendants who live outside the United States and who visit the United States only briefly.[178]

Service on out-of-province defendants is in fact easier for Canadian plaintiffs than for plaintiffs in the United States. For example, in Ontario, under Rule 17.02(h) of the Ontario Rules of Civil Procedure, service outside of Ontario is permissible for a claim for "damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed."[179] The Ontario Court of Appeal recently upheld the constitutionality of the rule in *Muscutt v. Courcelles*.[180] *Muscutt* involved the "issue whether the Ontario courts should assume jurisdiction over out-of-province defendants in claims for damage

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176. Bouzari v. Islamic Republic of Iran, [2004] O.A.C. ¶ 28.

177. *Id.* ¶ 38.

178. *See* Alvin H. Chu, *Vindicating the Tiananmen Square Massacre "The Case Against Li Peng,"* 20 WIS. INT'L L.J. 199, 211 (2001).

> Typically, valid service requires delivering a copy of the summons and complaint to the defendant personally, or leaving copies at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion. Alternatively, the plaintiff can deliver a copy to an agent authorized by appointment or by law to receive service of process.

Karadzic captures the difficulty of service in the United States. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). The Second Circuit deemed service complete when the process server, Jonathan Soroko, attempted to hand papers to Karadzic in his hotel in New York during a visit to the United Nations, but the papers were intercepted by a security agent and Soroko shouted "You've been served." *See id.* at 246–47; *see also* Doreen Cronin, *Recent Decision:* Kadic v. Karadzic, 10 N.Y. INT'L L. REV. 215, 218 (1997).

179. Ont. R. Civ. Pro.17.02, R.R.O. 1990, Ont. Reg. 194.

180. *See* Teresa Kowalishin, Case Comment, *In the Wake of* Muscutt v. Courcelles, 31 C.P.C. (5th.) 232; *see also* Muscutt v. Courcelles, 213 D.L.R. (4th.) 577, ¶ 48 (Ont. C.A. 2002).

sustained in Ontario as a result of tort committed elsewhere."[181] The case—argued together with four other appeals based on similar fact patterns—involved an Ontario resident who had suffered serious personal injury outside the province. The common theme of the cases was that "[t]he injured party returns to Ontario, endures pain and suffering, receives medical treatment, and suffers loss of income and amenities of life, all as a result of the injury sustained outside the province."[182] Service of process, however, does not end the inquiry. Like U.S. courts, Ontario courts must also have personal jurisdiction over the defendant.

(b) Personal Jurisdiction

Although Canadian law appears not to allow for transient or tag jurisdiction,[183] relied on by many ATCA plaintiffs in the United States, [184] personal jurisdiction otherwise appears to involve a more fluid analysis in Canadian courts than in U.S. courts, which may alleviate the jurisdictional difficulties of potential plaintiffs.

In Canada, jurisdiction over out-of-province or out-of-country defendants is based on the "real and substantial connection" test. The test is potentially looser than the "minimum contacts" standard which generally applies to out-of-state defendants in the United States. In *Morguard*[185] and *Hunt*,[186] the Canadian Supreme Court held that the principles of "order and fairness" require limits on the reach of provincial jurisdiction against out-of-province defendants, and that jurisdiction can only be asserted against an out-of-province defendant on the basis of a "real and substantial connection."[187] *Muscatt* explained that "the proper exercise of jurisdiction depends on two principles. First, there is a need for 'order and fairness' and

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181. *Muscutt*, 213 D.L.R. ¶ 1.

182. *Id.* ¶¶ 1, 2.

183. *See* Eric B. Fastiff, *The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems*, 28 CORNELL INTL. L.J. 469, 485 (1995) (noting that relinquishing tag jurisdiction "is the carrot which is enticing the Europeans (and the Japanese and Canadians) to join the negotiations").

184. Tag jurisdiction is based solely on the presence of the defendant in the jurisdiction irrespective of any link between his or her presence and the injury. *See* Thomas E. Vanderbloemen, *Assessing the Potential Impact of the Proposed Hague Jurisdiction and Judgments Convention on Human Rights Litigation in the United States*, 50 DUKE L.J. 917, 919 (2000). The Brussels Convention on Jurisdiction, widely ratified in Europe, rejects tag jurisdiction and requires a connection between the forum state and the claim. *See* Stephens, *supra* note 76, at 599.

185. Morguard Investments Ltd. v. De Savoye [1990] 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.).

186. Hunt v. T & N plc [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269.

187. *Muscutt*, 213 D.L.R. ¶ 15.

jurisdictional restraint. Second, there must be a 'real and substantial connection.'"[188]

Muscatt also provided a list of factors relevant to the determination of whether the real and substantial connection test has been met: (1) "The connection between the forum and the plaintiff's claim";[189] (2) "The connection between the forum and the defendant";[190] (3) "Unfairness to the defendant in assuming jurisdiction";[191] (4) "Unfairness to the plaintiff in not assuming jurisdiction";[192] (5) "The involvement of other parties to the suit";[193] (6) "The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis";[194] (8) "Whether the case is inter-provincial or international in nature";[195] and (9) "Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere."[196]

Heeding the guidance of the Supreme Court of Canada that the "real and substantial test is flexible," the court noted that "[w]hile the defendant's contact with the jurisdiction is an important factor, it is not a necessary factor."[197] It bears noting, however, that this sort of "doing-business" or contacts-based jurisdiction is also not widely accepted in international law.[198]

The application of this rule to human rights cases has yet to be fully tested. In the *Bouzari* case for example, the trial court skirted the issue of jurisdiction. The court explained that the brutal acts occurred in Iran and caused injury in Iran, albeit injury that had lingering effects in Canada, and that therefore "the logical conclusion would [normally] be that there is no real and substantial

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188. *Id.* ¶ 34 (quoting *Morguard*).
189. *Id.* ¶¶ 77–81.
190. *Id.* ¶¶ 82–85.
191. *Id.* ¶¶ 86–87.
192. *Id.* ¶¶ 88–90.
193. *Id.* ¶¶ 91–91.
194. *Id.* ¶¶ 93–94.
195. *Id.* ¶¶ 95–100. The court explained that "the fact that [it] [wa]s an interprovincial [as opposed to international] case clearly weigh[ed] in favour of assuming jurisdiction." *Id.* ¶ 100.
196. *Id.* ¶¶ 101–10.
197. *Id.* ¶ 74. In a demonstration of this flexibility and of openness to international law, the court also provided guidance for cases involving international defendants by concluding that in such cases, "international standards and standards applied in the defendant's jurisdiction are helpful in determining whether the real and substantial connection test has been met on the basis of damage sustained within the jurisdiction." *Id.* ¶ 108.
198. *See* Van Schaak, *supra* note 16, at 176 ("[T]he main bargaining chip for the United States [at the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters] is the relinquishment of forms of U.S. jurisdiction deemed exorbitant from a continental perspective," including transient (or tag) jurisdiction and "general doing-business jurisdiction.").

connection."[199] The court, however, left room for flexibility in cases that involve torture. It noted:

> [T]he plaintiff here is seeking damages for torture. Clearly, he can not [sic] bring such an action in Iran, given the facts alleged. Given this reality, I do not feel it appropriate to decide this case on conflicts rules alone. It may be that the Canadian courts will modify the rules on jurisdiction and forum non conveniens where an action for damages for torture is brought with respect to events outside the forum.[200]

Instead, the trial court and the appeals court decided the case on sovereign immunity grounds.[201]

3. Choice of Law

Choice-of-law considerations do not present major difficulties for Canadian tort plaintiffs any more than in the United States. In the United States, choice-of-law rules allow for some flexibility on the law to be applied.[202] In Canada, although the Supreme Court has instructed that tort cases are generally governed by the law of the place where the tort was committed,[203] it has left some wiggle room for international cases. As Justice La Forest explained, "because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances."[204] Justice La Forest qualified the statement by adding that he could "imagine few cases where this would be necessary."[205]

(b) Tradition of Public Interest and Impact Litigation

The United States has a long history of public interest and impact litigation,[206] which manifests itself in the ATCA litigation. Nonprofit legal groups have brought the bulk of U.S. ATCA cases.[207] Plaintiffs rely on "advocates who can afford to ignore the bottom line, including law school clinics, nongovernmental organizations (NGOs), and private practitioners willing to engage in § 1350 litigation on a

199. Bouzari v. Iran (Islamic Republic), [2004] D.L.R. 406.
200. *Id.* ¶ 17.
201. *Id.*
202. Stephens, *supra* note 28, at 11.
203. Muscutt v. Courcelles, [2002] D.L.R. 577 (citing Tolofson v. Jensen, [1994] S.C.R. 1022).
204. Tolofson v. Jensen, [1994] S.C.R. 1022.
205. *Id.*
206. Stephens, *supra* note 28, at 12–13; *see also* George Norris Stavis, Note, *Collecting Judgments in Human Rights Torts Cases: Flexibility for Non-Profit Litigators?*, 31 COLUM. HUM. RTS. L. REV. 209, 215 (1999).
207. *See* Stavis, *supra* note 206, at 214.

pro bono basis, [because they] are usually the only legal actors willing to represent ATCA and TVPA claimants."[208]

Canada lacks the United States' long history of public interest litigation.[209] Public interest litigation, however, appears to be gaining ground in Canada.[210] Courts have eliminated the key hurdles facing public interest litigants: standing and mootness.[211] *Finlay v. Canada (Minister of Finance)*,[212] a Canadian Supreme Court decision on standing, opened the door for more public interest litigation. [214] Whereas prior to *Finlay* "public interest standing was limited to cases challenging the validity of legislation," afterwards standing was expanded "to embrace the proceedings commenced to review the validity of administrative action."[215] Public interest litigation has yet to garner the type of support it enjoys in the United States, but new organizations resembling U.S. groups are sprouting up in Canada. For example, the International Coalition Against Torture (InCAT) was founded in 2003[216] and Human Rights Watch has opened a Toronto office.[217] In addition, the Faculty of Law at the University of Toronto has recently opened a legal clinic for students as part of its International Human Rights Program.[218]

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208. *Id.* at 214–15 (quoting Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2178 (1998)).

209. *See* TED MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION & THE COURT PARTY 22 (2000) ("In 1975, on the one-hundredth anniversary of the Supreme Court of Canada, the historian Kenneth McNaught wrote that 'Our judges and lawyers, supported by the press and public opinion, reject any concept of the courts as a positive instrument in the political process.'").

210. *See, e.g.*, Chris Tollefson, *Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation*, 41 U. N.B. L.J. 175, 194 (2002) (arguing that the growing field of public interest environmental litigation has enhanced the ability of citizens to ensure governments follow through on legal commitments they have made to protect the environment and that there has been a positive change in the attitudes of courts towards the participation of public interest environmental groups); *see also infra* note 224, at 102 ("Canada is currently witnessing an increase in public interest litigation . . . ."); *id.* at 13 (arguing that since the adoption of the Charter of Rights and Freedoms in 1982, "[a] long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy").

211. MORTON & KNOPFF, *supra* note 209, at 54.

212. Finlay v. Canada, [1986] S.C.R. 607. *Finlay* is one of a series of cases, dubbed the "Standing Quartet," which relaxed the standing rules in Canada for public interest litigants. *See infra* note 224, at 57, 92.

214. Tollefson, *supra* note 210, at 183.

215. *Id.*

216. InCAT, I Never Thought . . ., http://www.incat.org/president_message.php (last visited Nov. 10, 2005).

217. *See* Human Rights Watch, Get Involved, Toronto Young Advocates, http://www.hrw.org/canada/toronto/ya/.

218. Keung, *supra* note 116, at A4.

In the context of human rights, the tort-shy nature of Canadians appears to be changing. Bouzari, Arar, Sampson and others are examples of Canadians who believe that tort is a way for their voices to be heard and their torturers to be punished. As Mr. Bouzari puts it, "If each time they move their arm back to strike a victim they think, '[t]his will cost ten thousand dollars,' they will not so easily do it. They will have to stop. We will make it impossible for them to commit these crimes any longer."[219] When confronted with the dismal figures on collection in U.S. cases,[220] Mr. Bouzari focuses on the value of finding a forum in which to tell one's story and letting the truth be known.[221] Politicians are likewise beginning to see the value in this opportunity. Based on the lobbying related to the *Bouzari* case, the New Democratic Party has proposed that the SIA be amended and may propose a private members' bill to amend it.[222]

c. Systematic Procedural Advantages

(1) Loser-Pays Rule

Canadian plaintiffs are beginning to enjoy some of the same procedural perks as American litigants. Although the traditional rule in the provincial courts is that the loser pays costs,[223] forming a barrier to public interest litigation,[224] this rule has relaxed in recent years.[225] In some cases, courts have begun awarding costs to public interest litigants even when they do not win.[226] One court reasoned that awarding costs was appropriate to recognize that "the testing of the constitutional principles involved in this matter is clearly in the public interest, since they are at the heart of our constitutional

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219. Krotz, *supra* note 10, at 65.

220. *See* Stavis, *supra* note 206, at 213–14.

221. *See* Notes from InCAT meeting, Jan. 2004, on file with author.

222. Krotz, *supra* note 10, at 65.

223. Stephens, *supra* note 28, at 29; *see also* Mark S. Winfield, *A Political and Legal Analysis of Ontario's Environmental Bill of Rights*, U. N.B. L.J. 325, 353 n.164 (1998).

> The general rule in civil suits is that 'costs follow the cause,' meaning that the loser pays the costs of the winner. However, such an award is only for 'party and party,' as opposed to 'solicitor and client' costs. The former are set by tariff and typically amount to one-half to two-thirds of the actual legal fees incurred.

224. *See generally* Lara Friedlander, *Costs and the Public Interest Litigant*, 40 MCGILL L.J. 55, 57, 61 (1995) (arguing for a no-way costs rule for public interest cases in conjunction with a statutory scheme that would fund public interest litigants).

225. Tollefson, *supra* note 210, at 188.

226. *See id.*

democracy."[227] This approach has found support in the Ontario Court of Appeal and the Supreme Court of Canada.[228]

Moreover, when the public interest litigant loses, he or she often does not have to pay costs. Although there is no formal public interest costs exception, courts have frequently exercised their discretion to excuse unsuccessful public interest litigants from costs liability."[229] Simply raising the money for a suit may pose a problem though. One commentator has noted the problem that funding for public interest litigation in Canada is "limited in application to both subject matter and quantum."[230] In an effort to address this barrier, courts have begun to grant interim awards of costs to public interest litigants in order to facilitate their hiring counsel in complex litigation against the government.[231]

(2) Class actions

Although note explicitly discussed by Stephens, the possibility for class action law suits is also a relevant procedural consideration. Although prohibited under the common law in Canada, "most provinces now have detailed legislation" on class actions, which are a potentially useful tool for human rights plaintiffs."[232] Moreover, "[e]ven where there is no legislation on class actions, the Supreme Court of Canada has now endorsed a broad flexible approach to class actions";[233] Ontario and Quebec have passed legislation that allows them.[234] Ontario's rule on class actions resembles Rule 23 of the U.S. Federal Rules of Civil Procedure in many ways.[235] According to one specialist in Ontario civil litigation, "[i]n many respects, particularly certification, the Ontario regime is more liberal."[236] For example, there is no numerosity requirement. Rather, there must only be a

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227. *Id.* (quoting Singh v. Canada (A.G.), [1999] F.C. 583).

228. *Id.*

229. *Id.*

230. Friedlander, *supra* note 224, at 61.

231. *Id.*

232. WILLIAM A. STEVENSON & JEAN E. CÔTÉ, CIVIL PROCEDURE ENCYCLOPEDIA 9-2 (2003). As of June 2003, the jurisdictions in Canada with comprehensive class proceedings legislation in force were: Quebec, Ontario, British Columbia, Saskatchewan, Newfoundland, Manitoba, and the Federal Court. Ward Branch, CLASS ACTIONS IN CANADA 1-1(2003).

233. *Id.* at 9-3 (citing Western Canadian Shopping Centres v. Dutton (Bennett Jones & Co.), [2001] S.C.R. 534.

234. *See* Ontario's Class Proceedings Act, 1992 S.O., ch. 6; *see also* Friedlander, *supra* note 224, at 61.

235. *See* Michael McGowan, *Certification of Class Actions in Ontario: A Comparison of Rule 23 of the U.S. Federal Rules of Civil Procedure*, 16 CARSWELL PRACTICE CASES 172 (1993).

236. *Id.*

class of two or more persons. [237] Moreover, unlike in the U.S. system where common issues must predominate over individual issues,[238] in Ontario a court must only be satisfied that a class proceeding would be the "preferable procedure for the resolution of the common issues."[239] Ontario's Class Proceedings Act even provides partial subsidization of public interest litigants.[240]

(3) Contingency Fees

As in the United States, contingency fees are permissible in all of the provinces of Canada in civil cases.[241]

(4) Punitive Damages

Punitive damages, which are typically lower than those awarded in the United States, are nevertheless available in Canada. They "are awarded against a defendant in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency.' The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour." [242]

The reasoning courts have given for allowing punitive damages seems to legitimize their use in human rights tort cases. As one court has framed it, "Punishment is a legitimate objective not only of the criminal law but of the civil law as well. Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law."[243] Stated differently, "there is a substantial consensus that . . . the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or . . . 'the means by which the jury or the judge expresses its outrage at the egregious conduct')."[244] Torture, crimes

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237. *Id.*

238. FED. R. CIV. P. 23(b)(3).

239. McGowan, *supra* note 235 (citing Class Proceedings Act, S.O., s. 5(1)(d)).

240. Friedlander, *supra* note 224, at 82.

241. McIntyre v. Ontario (Attorney General), [2002] C.P.C. 59 (holding that contingency fees were permissible in civil cases in Ontario as long as they are reasonable and fair and noting that "every Canadian province and territory other than Ontario ha[d] enacted legislation or rules of court to permit and regulate the use of contingency fees").

242. Whiten v. Pilot Ins. Co., [2002] S.C.R. 595. The court noted that,"[b]ecause their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)." *Id.*

243. *Id.* ¶ 37.

244. *Id.* ¶ 68.

against humanity, genocide, and the like are nothing if not "egregious."

(5) Default Judgment

As in the United States, default judgments—common in ATCA cases—are permissible in Canada.[245] In the *Bouzari* case, for example, the court noted that since Iran had not defended itself in the proceeding, it was "deemed to have admitted the truth of all allegations of fact in the Statement of Claim under the Ontario rules with respect to default judgment . . ."[246]

(6) Discovery

Although discovery traditionally has been more extensive in the United States than in Canada,[247] the trend in all of the provincial courts "is to take a wider approach in interpretation."[248] In Canada, "[t]he general rule is the broadening of discovery."[249]

(7) Extraterritoriality

It is unclear whether double actionability or extraterritoritality, whereby claims can only be sustained if they would be recognized as actionable in the place where the underlying events took place,[250] would be a hurdle for human rights litigants in Canada. Unlike in the United Kingdom, where the double actionability rule barred a number of counts in the *Pinochet* case, in the United States, there is no double actionability rule.[251] In Canada, it is unclear whether this double actionability rule exists. In *Tolofson*, Justice La Forest questioned the utility of such a rule: "[G]iven the fact that the

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245. *See, e.g.*, Courts of Justice Act, R.S.O. Rule 19.02(1)(a) (1990) (Can).

246. Bouzari v. Iran (Islamic Republic), [2004] D.L.R. 406, ¶ 16.

247. In the United States, the systems of written interrogatories and of depositions or oral examinations are both in use, with the latter being extensively used in the Federal Courts. The Federal discovery rules constituted the first comprehensive scheme of discovery provisions in the United States and these rules have been followed closely in most State jurisdictions. There is a wealth of decisions in the United States arising under State and Federal pre-trial discovery rules which have no real counterpart in Canada.

GORDON D. CUDMORE, CHOATE ON DISCOVERY 1-4 (2d ed. 1994).

248. *Id.* at 1-6.

249. *Id.*

250. Stephens, *supra* note 28, at 32–33.

251. *See* Stephens, *supra* note 28, at 33; R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 1 All E.R. 924 (HL).

jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement that the wrong be actionable in that jurisdiction is really necessary."[252] Justice La Forest suggests that "the fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens, or on the international plane, whether entertaining the action would violate the public policy of the forum jurisdiction."[253]

Overall, Stephens's translation analysis suggests that tort suits in Canadian courts are an appropriate and viable means of dealing with gross violations of international human rights law. Legislation providing for universal jurisdiction over a set of gross human rights and humanitarian law violations, as outlined below, would make tort law an even more suitable remedy. In particular, explicit legislation would address Professor Chibundu's concerns over transparency. Given Canada's leading role in promoting accountability for human rights and humanitarian law violations via transnational public law litigation in the criminal realm (most publicly in its support for the ICC), it is fitting that Canada play a leading role in the creation of a complementary scheme of transnational civil law mechanisms.

4. Will the United States Let Canada Get Away with this Sort of Legislation?

The foreign policy effects of such legislation may be trickier in the Canadian context because Canada faces a foreign policy problem that the United States does not: the United States. Eighty-eight percent of Canada's exports go to the United States.[254] According to the U.S. Commercial Service, "The volume of Canada-U.S. trade last year was far greater than the total amount of Canada's trade with all of its other trading partners combined."[255] These statistics, however, also cut the other way. When Canada did not support the U.S. war in Iraq, Richard Perle, U.S. policy advisor and noted hawk, said that the "Canadian and U.S. economies are so intertwined that a backlash against one is a backlash against the other."[256]

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252. Tolofson v. Jensen, [1994] S.C.R. 1022.

253. *Id.*

254. Michael Reid, *Canada's New Spirit*, THE ECONOMIST, Sept. 25, 2003, at 15.

255. BuyUSA.gov—U.S. Commercial Service, Canada-U.S. Trade Relationship, http://www.buyusa.gov/canada/en/traderelationsusacanada.html (last visited May 13, 2004).

256. Jeffrey Simpson, *Worried About U.S. Retribution? Don't Be*, The GLOBE AND MAIL, Apr. 9, 2003, at A15.

All the same, Belgium's experience with its universal jurisdiction criminal statute serves as a cautionary tale. In 1993, Belgium added to its penal code a provision criminalizing "certain violations of the 1949 Geneva Conventions and 1977 Additional Protocols, regardless of where such crimes were committed."[257] In 1999, Belgium amended the statute to include genocide and crimes against humanity.[258] This amendment also provided that state officials were not immune from prosecution.[259] As one scholar has put it, Belgium's statute providing "universal jurisdiction for human rights abuses . . . was the broadest in the crimes it covered and its lack of any required link between the suspect, victims, or events, on the one hand, and Belgium, on the other."[260]

A number of cases came before Belgian courts under this statute. Least controversially, the government tried two Rwandan nuns and two Rwandan men for their roles in the nation's genocide.[261] The defendants were each convicted and sentenced to prison terms of between twelve and twenty years.[262] Then, in 2001, twenty-three survivors of the 1982 massacre of Palestinian refugees at the Sabra and Shatila camps by Lebanese militiamen filed a criminal complaint against Ariel Sharon based on provisions of Belgian criminal procedure allowing victims to initiate cases before an investigating judge.[263] Soon thereafter, a group of Israelis and Belgians filed a complaint against Yasir Arafat. [264] Victims ultimately filed criminal complaints against, among others, Fidel Castro, Saddam Hussein, Abuldaye Yerodia (former Foreign Minister of the Democratic Republic of Congo), and Hashemi Rafsanjani (former President of Iran).[265]

Before long, the Belgian statute came under attack on several fronts. In October 2000, the Democratic Republic of Congo (DRC) filed a case against Belgium in the International Court of Justice (ICJ).[266] It argued that the arrest warrant issued by a Belgian judge against Yerodia in April 2000 was illegal. [267] In February 2002, the ICJ held that the arrest warrant was inconsistent with Yerodia's immunity as

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257. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003).
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 889–90.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*

foreign affairs minister when the warrant was issued. [268] Although the court decided the case on sovereign immunity grounds, universal jurisdiction played a prominent role in the five separate opinions and three dissents.[269]

In June 2002, a Belgian appeals court held that Sharon and Amos Yaron (the Israeli general responsible for the Beirut sector in 1982) could not be tried because they were not physically present in Belgium.[270] In February 2003, however, Belgium's highest court, the Cour de Cassation, overruled the appeals court and held that the presence of the accused was unnecessary under Belgian law.[271] Nevertheless, the Court affirmed the customary international law principle of immunity for sitting heads of state and governments and dismissed the case against Sharon.[272] The Court allowed the case against Yaron to proceed. In response, Israel withdrew its ambassador to Belgium.[273]

The decisive blow to the statute came in March 2003 when seven Iraqi families requested an investigation of former U.S. President George H. W. Bush, Vice President and former Secretary of Defense Dick Cheney, Secretary of State and former Chairman of the Joint Chiefs of Staff Colin Powell, and retired General Norman Schwarzkopf for their alleged commission of war crimes during the 1991 Gulf War.[274] Secretary Powell acknowledged that the United States had chided Belgium: "We have cautioned our Belgian colleagues that they need to be very careful about this kind of effort, this kind of legislation, because it makes it hard for us to go places that put you at such easy risk."[275] Lamenting that the criminal law

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268. *Id.*; *see also* Marius Emberland, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 96 AM. J. INT'L L. 677 (2002); Sarah C. Rispin, *Implications of* Democratic Republic of Congo v. Belgium *on the* Pinochet *Precedent: A Setback For International Human Rights Litigation?*, 3 CHI. J. INT'L L. 527, 528 (2002) (stating that incumbent Ministers for Foreign Affairs are immune from criminal suit abroad, notwithstanding allegations of having committed "war crimes" or "crimes against humanity").

269. Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), No. 121 (I.C.J. Feb. 14, 2002), available at http://www.icj-cij.org (follow "Decisions," source is located under the "2002" heading). [hereinafter Arrest Warrant].

270. Ratner, *supra* note 257, at 890.

271. *Id.*; *see also* H.S.A v. S.A., No. P.02.1139.F (Ct. of Cassation of Belg., Feb. 12, 2003), *translated in* 42 I..L.M. 596, 598 (2003) (indictment of Sharon, Yaron, and others).

272. H.S.A. v. S.A., No. P.02.1139.F at 599.

273. Marc Perelman, *Israel Seeks to Counter Belgian 'War Crimes' Ruling*, FORWARD, Feb. 21, 2003, http://www.forward.com/issues/2003/03.02.21/news6.html.

274. RAMSEY CLARK ET AL., WAR CRIMES: A REPORT ON U.S. WAR CRIMES AGAINST IRAQ (1992), *available at* http://deoxy.org/wc/wc-index.htm.

275. *US Chides Belgium Over Rights Laws*, BBC NEWS, Mar. 19, 2003, http://news.bbc.co.uk/1/hi/world/europe/2863273.stm; *see also* Ratner, *supra* note 257, at 890 ("Secretary Powell warned the Belgian government that Belgium was raising its

was "being abused by opportunists" and that "Belgium must not impose itself as the moral conscience of the world," Belgium's Foreign Minister, Louis Michel, denounced the case.[276]

In April 2003 and again in August 2003, the United States threatened to withhold funding for a new NATO building in Belgium or to forbid officials to travel to the country if further changes were not made to the law.[277] Belgium caved and amended the law. The version of the law that entered into force in August 2003 allowed Belgian courts to hear cases involving war crimes, crimes against humanity, and genocide when the offenses are committed outside of Belgium only if the defendant or victim is a citizen or resident of Belgium.[278] In addition, it expressly barred cases against acting heads of state, heads of government, foreign ministers, and individuals whose immunity is recognized by international law or by a treaty to which Belgium is a party.[279] Finally, it strengthened the role of the public prosecutor only when the victim is Belgian.[280] These changes reined in Belgium's legislation to a point acceptable to the United States and other powerful nations.

Canada will have to "walk the fine line" between irking its neighbor to the south and holding the United States to lower standards than the rest of the world. The latter part of the equation is essential, because to borrow again Michael Ignatieff's words, "the crisis of human rights relates first of all to our failure to be consistent—to apply criteria to the strong as well as to the weak . . ."[281] These "problems of consistency have consequences for the legitimacy of human rights standards themselves. For example, non-Western cultures look at the partial and inconsistent way we enforce and apply human rights principles and conclude that there is something wrong with the principles themselves."[282]

Another difficult question will be how to avoid irking the United States while still holding it accountable when private plaintiffs decide what cases to bring. Who or what will serve as a filter? Is a filter necessary or good? Belgium's experience begs the question of whether

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status as a diplomatic capital and the host for the North Atlantic Treaty Organization (NATO) by allowing investigations of those who might visit Belgium.").

276. Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?*, 25 CARDOZO L. REV. 247, 251 (2003).

277. *See* Ratner, *supra* note 257, at 891.

278. *Id.* (citing Loi relative aux violations grave du droit humanitaire, Aug. 5, 2003, M.B., Aug. 7, 2003, arts. 14–16; House Justice Committee Report, Belg. Parl. Doc. 51 0103/003, at 4-5 (2003), *available at* http://www.dekamer.be/FLWB/pdf/51/0103/51K0103003.pdf).

279. Ratner, *supra* note 257, at 891.

280. *Id.*

281. IGNATIEFF, *supra* note 145, at 47.

282. *Id.* at 48.

a robust Canadian human rights tort system is realistic. It helps that the United States also has broad tort legislation for human rights violations. Nevertheless, the Belgian experience and Belgium's ultimate formulation of its criminal statute seem to suggest that Canadian legislators should take care to ground tort legislation for human right violations in international law, both with respect to the norms covered and jurisdictional and other limitations.

IV. RECONCILING CANADA'S COMMITMENT TO HUMAN RIGHTS AND ITS INTERNATIONALISM

A Canadian tort regime for human rights and humanitarian law violations must find a balance between Canada's internationalism (i.e., multilateralism and a penchant for the international rule of law) and its desire to protect human rights. An aggressive stance on human rights in other countries may be in tension with Canada's role as a law abiding player in the international arena. Anne Marie Slaughter and David Bosco's analysis of ATCA cases, discussed above, merits contemplation in the Canadian context. They argue that "American courts today are walking a fine line between expanding a transnational legal system capable of enforcing international law and engaging in a unilateral legal expansion that will damage long-term U.S. interests."[284] Moreover, they acknowledge that "the expansion of plaintiffs' power in U.S. courts looks quite different from the perspective of other countries." [285] They wisely note

> the juxtaposition of this increased involvement of U.S. courts in foreign affairs with the continued American refusal to participate in bodies like the International Criminal Court creates the image of a country happy to haul foreign defendants into its own courts while stubbornly resisting even the remote possibility that its own citizens might be called to account.[286]

Importantly, they contend that "[t]o have value, such [international legal commitments] should apply equally at home and abroad." [287]

Canada is on better footing than the United States with respect to consistency. Canada, unlike the United States, is a member state of the ICC. Therefore, far-reaching domestic tort legislation arguably is an appropriate complement to Canada's commitment to accountability for human rights in the international realm. Nevertheless, pushing international human rights norms too far, or

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284. Slaughter & Bosco, *supra* note 122, at 115.
285. *Id.*
286. *Id.*
287. *Id.* at 116.

exercising jurisdiction or encroaching on sovereign immunity when international law would not support it, renders Slaughter and Bosco's concerns all the more applicable to Canada.

A. *Jurisdiction and Jurisdictional Immunities*

1. Universal Jurisdiction

To comport with Canada's pro-international-law stance, any ATCA-style legislation should be grounded in international law principles of jurisdiction. As the European Community (EC) argued in *Sosa*,

> in order to respect the authority of States and organizations . . . exercising their authority to regulate activities occurring on their own territory, and hence to preserve international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory.[288]

Although normally "[c]ustomary and conventional international law do not set down any general rules placing restrictions on the jurisdiction of domestic courts in civil matters,"[289] arguably due to the punitive nature of ATCA-style cases, there must be a valid basis for prescriptive or enforcement jurisdiction in these cases.[290]

Claims to prescriptive or enforcement jurisdiction may be founded on at least six bases: territorial principle, nationality principle, passive personality principle, protective principle, universal principle, and agreement.[291] It is well-established under international law that "States have jurisdiction to prescribe when there is a nexus between the conduct the State purports to regulate and the regulating State." This proposition is least controversial when the nexus is based on the "territorial principle,"[292] the "nationality principle"[293] or the "protection principle."[294] International law allows the exercise of universal jurisdiction, which "permits States to exercise jurisdiction over matters of universal concern even when the

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288. Brief for the European Commission as Amicus Curiae Supporting Neither Party, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), *available at* 2004 WL 177036, at *4 (Jan. 23, 2004) [hereinafter EC Amicus Brief].

289. INTERNATIONAL LAW, *supra* note 8, at 508.

290. *Id.* at 509.

291. *Id.* at 515–19.

292. The territorial principle refers to the regulation of conduct that occurs on a state's territory. EC Amicus Brief, *supra* note 288, at *13.

293. The nationality principle refers to the regulation of a state's nationals. *Id.*

294. The protective principle refers to regulation of the "conduct of non-nationals who are outside their territory when that conduct is directed against the security of the regulating State." *Id.*

State exercising jurisdiction has no connection with the case,"[295] only when certain types of norms are involved.

Jurisdictional self-restraint is essential: "if domestic courts are to be legitimate participants in the formulation of substantive international law doctrine, they must exercise self-restraint in asserting jurisdiction over international law claims."[296] In the *Sosa* case, the EC argued that "the subject matter of the statute should be defined by reference to the limits set forth by international law of the U.S.'s jurisdiction to prescribe."[297] It maintained that "when jurisdiction to prescribe is based on territory, nationality, or protection, the Alien Tort Statute may be interpreted to incorporate the full body of the law of nations."[298] However, "where the US's jurisdiction to prescribe is based on universal jurisdiction, the ATS should be interpreted to reach only that conduct subject to such jurisdiction." [299] In essence, the EC argues that what can be covered depends on the asserted basis for jurisdiction.[300]

As discussed below, Canadian legislation should apply universal jurisdiction to a restricted category of cases and "only when the claimant would face a denial of justice in any State that could exercise jurisdiction on a traditional basis, such as territory or nationality."[301] As the EC explained in its brief in *Sosa*, although "[i]nternational law sanctions universal criminal jurisdiction in order to end impunity for violations of the most fundamental norms of international law, such as the prohibitions against genocide, torture, war crimes, and crimes against humanity . . . the existence and scope of universal civil jurisdiction are not well established." [302] Indeed, "[t]o the extent that universal civil jurisdiction is recognized, it applies only to a narrow category of cases. Any exercise of universal civil jurisdiction should also be limited in accord with its

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295. *Id.* at *14.

296. Chibundu, *supra* note 33, at 1137.

297. EC Amicus Brief, *supra* note 288, at *i, *4. The Restatement (Third) of Foreign Relations Law recognizes five bases for extending jurisdiction beyond a nation's borders: territoriality, nationality, the protective principle, passive personality, and universality. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 402, 404 (1987). "Universal jurisdiction permits States to exercise jurisdiction over matters of universal concern even when the State exercising jurisdiction has no connection with the case." EC Amicus Brief, *supra* note 288, at *14.

298. EC Amicus Brief, *supra* note 288, at *1.

299. *Id.* at *ii.

300. *Id.* at *19. The EC also notes that "[i]nternational law is also unsettled as to the correspondence between the categories of conduct regulable as a matter of universal criminal jurisdiction and those regulable as a matter of universal civil jurisdiction." *Id.*

301. *Id.* at *4–5.

302. *Id.*

rationale."[303] At a minimum though, international law lends support to the exercise of universal jurisdiction in cases involving torture, genocide, war crimes, and crimes against humanity.[304]

Support for extending universal jurisdiction from the criminal to the civil realm can be found not only in U.S. jurisprudence, but also in the decisions of international tribunals, the Restatement, and other secondary materials. In his concurrence in the *Alvarez-Machain* case, U.S. Supreme Court Justice Breyer stated that the similarities between criminal and civil proceedings in many jurisdictions mean that if universal jurisdiction is recognized for certain norms in the criminal context, it should also be recognized in the civil context.[305] Justice Breyer noted:

> The fact that this procedural consensus exists [viz. a consensus that universal jurisdiction exists to prosecute a subset of certain universally condemned behaviour which includes torture] suggests the recognition of universal jurisdiction in respect of a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect.[306]

In the ICTY case *Prosecutor v. Furundzija*, Judge Cassese remarked that a victim of torture could pursue a civil claim against a state in the courts of another state.[307] Three ICJ judges in the separate opinion in the *Arrest Warrant* case, saw in the ATCA "the beginnings of a very broad form of extraterritorial jurisdiction" in the civil sphere," but noted that the United States' assertion of this form of jurisdiction had "not attracted the approbation of States generally."[308] The Restatement states that "[i]n general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal

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303. *Id.*

304. *Id.* at *16 (citing INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 5–8 (2000) (including genocide, crimes against humanity, war crimes and torture) and citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (including genocide, war crimes, piracy, slave trade, attacks on or hijacking of aircraft)); *see also* The Princeton Principles on Universal Jurisdiction (2001), http://www.princeton.edu/~lapa/unive_jur.pdf.

305. Sosa v. Alvaraz-Machain, 542 U.S. 692, 772 (2004); *see* EC Amicus Brief, *supra* note 288, at *21–22 (noting that the civil-criminal distinction breaks down in a lot of systems, particularly those where victims of crimes can recover monetary compensation as part of the prosecution of the wrongdoer); *see also* Stephens, *supra* note 28, at 18–20; Transcript of Oral Argument, *supra* note 38, at 68.

306. Sosa, 542 U.S. at 772.

307. Prosecutor v. Furundzjija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998), *translated in* 38 I.L.M. 317 (1999).

308. EC Amicus Brief, *supra* note 288, at *18.

law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy." [309] Similarly leaving the door open for a civil application of universal jurisdiction, the International Law Association's *Report on Universal Jurisdiction* remarked that the United States has had "some success" in exercising universal jurisdiction in the civil context.[310] The secondary literature is divided on the propriety of the exercise of universal jurisdiction in the civil context.[311]

Even Chibundu, an opponent of the ATCA, seems to concede that universal jurisdiction could attach to violations of international human rights norms in some contexts:

> The doctrinal development of the concept—essentially a creature of customary international law—is not (and should not be) frozen in time; and in particular, it should be expanded to include civil actions that arise from the violation of international human rights norms. This argument appears particularly strong where no superior alternative forum is immediately available to the civil claimants. Furthermore, in the absence of such an expansion, meritorious claims might go uncompensated, and wrongful conduct will go unpunished.[312]

Thus, where there is no superior alternative forum, the argument for universal jurisdiction grows stronger. It is worth recalling though that universal jurisdiction is a form of subject matter jurisdiction. As discussed below, cases brought in Canadian courts would still have to meet the real and substantial connection test for courts to exercise personal jurisdiction over defendants.

2. Sovereign immunity

The inquiry does not end with jurisdiction. Courts must still determine whether a jurisdictional immunity exists. As the ICJ has explained:

> [A]lthough various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.[313]

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309. *Id.* at *17.

310. *Id.*; *see also* Restatement (Third) of Foreign Relations § 404, cmt. B.

311. *Compare* Jason Jarvis, A *New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671 (2003), *with* Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150 (2001).

312. Chibundu, *supra* note 33, at 1133.

313. Arrest Warrant, *supra* note 269, ¶ 10.

It bears noting that "the principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law and comity."[314]

Canadian tort legislation, whether enacted on a federal or provincial level, ought to be accompanied by clarification of the scope of immunity for human rights abusers in the SIA. Canada's SIA, which codified Canada's move from the notion of absolute immunity to that of restrictive immunity,[315] provides that "[e]xcept as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada."[316] The exceptions to the Act are for waiver of immunity, commercial activities, and death and property damage that occurs in Canada.[317]

There is ever-increasing support for the proposition that state officials are not immune from cases based on violations of *jus cogens* norms. Perhaps the most famous example of the erosion of sovereign immunity appeared in the *Pinochet* case, in which the High Court of the United Kingdom held that former Chilean dictator Augusto Pinochet was not immune from prosecution.[318] Although three judges in the *Pinochet* case expressly noted that immunity would apply in civil proceedings against a state for torture committed in that state,[319] one has now changed his mind.[320] Recently, the U.K. Court

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314. Jones v. Ministry of the Interior of Saudi Arabia, [2004] EWCA Civ. 1394, ¶ 10 (appeal taken from Eng.) (U.K.), *available at* http://www.hrothgar.co.uk/YAWS/reps/04a1394.htm.

315. INTERNATIONAL LAW, *supra* note 8, at 286–87.

316. State Immunity Act, R.S.C., c. S-18, § 3(1) (2005) (Can.). The Act defines "foreign state" as "(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity, (b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and (c) any political subdivision of the foreign state . . . ." *Id.* § 2.

317. *Id.* § 4(1); *id.* § 5 ("A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."); *id.* § 6 ("A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.).

318. Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte, [2000] 1 A.C. 147 (H.L.). Pinochet was ultimately deemed not fit to stand trial for health reasons. *See id.*

319. *See* Bouzari v. Iran, [2004] 71 O.R.3d 675, ¶ 91; *see also* 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 545 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

320. Jones v. Ministry of the Interior of Saudi Arabia, [2004] EWCA Civ 1394, ¶ 128, [2005] Q.B. 699, ¶ 128 (U.K. Ct. App.), *available at* http://www.hrothgar.co.uk/YAWS/reps/04a1394.htm (L. Phillips, concurring).

> On reflection I have concluded that the argument does not run in relation to civil proceedings either. If civil proceedings are brought against individuals for acts of torture in circumstances where the state is immune from suit *ratione personae*, there can be no suggestion that the state is vicariously liable. It is the

of Appeal held that state officials who commit torture should not be protected from lawsuits by the U.K.'s SIA. Lord Mance stated: "It can no longer be appropriate to give blanket effect to a foreign state's claim to state immunity . . . in respect of a state official alleged to have committed acts of systematic torture."[321] In the United States, although the TVPA "was intended to preserve FSIA immunity for foreign state governmental agencies, it assumes that 'sovereign immunity would not generally be an available defense' to a suit against individual officials."[322]

Some have argued that, under existing Canadian law, even states can be sued for violations of certain human rights norms, [323] but this argument has had little success in the courts. The Ontario Court of Appeal declined to read into the SIA a waiver of immunity or an implied exception for torture in *Bouzari*.[324] The court stated that

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personal responsibility of the individuals, not that of the state, which is in issue. The state is not indirectly impleaded by the proceedings..

321. *Id.* ¶ 92. It is notable though that, like the Ontario courts in *Bouzari*, the High Court did not address the issue of jurisdiction. *Id.* Indeed, it flagged that one of the reasons to refuse to apply sovereign immunity as a bar to suits against officials is that jurisdictional principles would still have to be satisfied. *See id.* ¶ 97. Lord Mance explained:

> [W]here there is no adequate remedy in the state where the systematic torture occurs, it might well in my view be regarded as disproportionate to maintain a blanket refusal of recourse to the civil courts of another European jurisdiction, the courts of which would under their ordinary domestic rules possess and (apart from immunity) be able to exercise jurisdiction.

Id. Lord Mance also noted that jurisdictional hurdles were likely to be a key reason that England would not "become a forum of choice for the bringing of claims for torture committed throughout the world." *Id.*

322. Doe v. Qi, 349 F. Supp. 2d 1258, 1287 (quoting H.R. Rep. No. 102-367, at 3–4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 85–86).

323. This argument can be framed in terms of waiver of immunity or in terms of implied exceptions to the SIA. These arguments have also not fared well in other jurisdictions. *See* Princz v. Germany, 26 F.3d 1166, 1179–85 (D.C. Cir. 1994) (Wald, J., dissenting) (arguing for implied waiver of FSIA in cases of *jus cogens* violations). Challenges to the UK's SIA in the European Court of Human Rights based on their alleged infringement with the right of access to a Court, which has been held to form part of Article 6's due process guarantee, have also failed. *See* International Law Association Human Rights Committee, *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, Eur. H. R. L.R. 2001, 129–166 n.25 (citing *Al-Adsani v. U.K.* (Application no. 35763/97), *Fogarty v. U.K.* (Application no. 37112/97), and *McElinney v. Ireland* (Application no. 31253/96) (declared admissible on Mar. 1, 2000), and contrasting *Holland v. Lampen-Wolfe*, July 20, 2000 *rev'd in* (1995) 65 B.Y.I.L. 491).

324. In *Bouzari*, the plaintiffs levied a multi-pronged attack on the SIA before the Superior Court of Ontario. They argued that the case fell into three different exceptions set out in the Act: the commercial activities, tort, and the penal law exceptions. *See* Bouzari v. Iran, [2002] O.J. 1264 QUICKLAW ¶ 2 (O.S.C.J. May 1, 2002 LOWER COURT'S RULING). In the alternative, they argued that another

neither treaty law nor customary international law gave Bouzari his desired civil remedy:

> Both under customary international law and international treaty there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction. It would be inconsistent with this balance to provide a civil remedy against a foreign state for torture committed abroad. [325]

The *Bouzari* court left open the possibility that international law on state immunity could change with time:

> In the future, perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of states or by international treaty. However, this is not a change to be effected by a domestic court adding an exception to the SIA that is not there, or seeing a widespread state practice that does not exist today.[326]

Wendy Adams considered the viability of implied exceptions to domestic state immunity statutes, generally and in Canada, and, like the *Bouzari* Court, concluded that the judicial creation of an implied exception would be impermissible judicial legislation.[327] She reasoned that as a result of Canada's "transformationist" approach to international law, whereby implementing legislation is necessary to make international treaties enforceable in Canada, legislation would be necessary to address exceptions to immunity under the SIA.[328]

If Canada wants to boldly go where Belgium has gone before and push the frontiers of international law on immunity (and likely the patience of its influential neighbor), Parliament could tackle this

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exception to the immunity should be read into the Act to permit a civil action for torture. *See id.* In support of their argument for an additional exception for torture suits, Plaintiffs argued (1) "that Canada has an obligation to provide victims of torture with a civil remedy by the terms of the [Torture] Convention," and (2) that "an exception to the doctrine of state immunity for civil actions for damages for torture must be read into the Act in order that Canada not be in violation of international law" due to the *jus cogens* status of the prohibition on torture. *See id.* ¶ 40. The court held that the case fit none of the existing exceptions to the SIA and refused to read another exception into the SIA for torture. *Id.* ¶¶ 21, 29, 34, 89. It concluded that Iran was protected from suit by the SIA. *Id.* ¶¶ 89, 90. The Ontario Court of Appeal upheld the lower court's decision. Bouzari v. Iran, 71 O.R.3d 675 (2004).

325. *Bouzari*, 71 O.R.3d at ¶ 95.

326. *Id.*

327. *See* Wendy Adams, *In Search of a Defence of the Transnational Human Rights Paradigm: May* Jus Cogens *Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes*, *in* SCOTT, *supra* note 7, at 262. Adams contends that *Baker v. Canada*, which allowed for a "contextual approach" to statutory interpretation based on the Convention on the Rights of the Child, would be more difficult to apply in the context of torture, because the terms of the CAT more vague. *Id.* at 257–58.

328. *Id.* at 255.

issue legislatively by adding an exception to SIA.[329] The United States has adopted this approach in the context of terrorism. The U.S. Congress amended the FSIA to allow suits against nations the Executive Branch branded "state sponsor[s] of terrorism."[330] But in adopting this approach, Canada would be putting itself on icy footing in international law.

Although, as discussed above, there seems to be increasing authority for the proposition that state officials (other than acting heads of state and foreign ministers) seeking immunity *ratione materiae*[331] are not protected by sovereign immunity, sovereign immunity is intact with respect to states, acting heads of state, and a small group of state agents, including foreign ministers on the basis of immunity *ratione personae*.[332] The ICJ held in *Congo v. Belgium*

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329. One proposal put forth by the New Democratic Party is for an amendment of the SIA whereby, torture, as well as commerce, would fall outside the bounds of state immunity. Another alternative is to expand an existing exception to state immunity. Section 6 of the SIA provides: "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada." State Immunity Act, R.S.C. 1985, ch. s-18, s-6. Parliament could just add the language "wherever they have occurred" to (a).

330. *See* BRADLEY, *supra* note 34, at 463 (citing Foreign Sovereign Immunities Act § 1605(a)(7), *codified at* 28 U.S.C. §§ 1330, 1332, 1602–11 (1994)).

331. Donald Macdougal sets out a good explanation on immunity *ratione personae*. He explains:

> In international law, the concept of immunity *ratione personae* provides immunity from all legal process in foreign national courts upon a person who is head of state or in a small group of important state agents, during their term of office. This type of immunity covers all crimes, including international crimes such as genocide, crimes against humanity and war crimes. It is an absolute immunity; an immunity that not only protects the state agent acting on behalf of the state but also renders him or her completely immune from any foreign jurisdiction regardless of whether the act is official or private. As soon as they leave their post, immunity ratione personae ceases and only immunity ratione materiae for official acts remains.

Donald V. Macdougal, *Torture in Canadian Criminal Law, 24 CR-ART 74 (6th Ser. 2005).*

332. Macdougal likewise gives a good summary of immunity *ratione materiae*:

> The doctrine of immunity *ratione materiae* confers immunity in foreign national courts concerning the conduct of state business while in office, even after leaving office. It concerns the official acts of a state official, the acts performed in pursuit of his or her official tasks. In Pinochet, the majority of the House of Lords held that this immunity did apply to Pinochet for acts done before Spain (which was requesting extradition of Pinochet for torture charges in Spain), Chile (the locus of the acts) and the UK (the locus of Pinochet) had ratified the Convention Against Torture, but immunity did not apply for acts after that ratification, when the acts were systematic and widespread and part of state policy.

Id.

that the Congo's foreign minister was immune from prosecution in foreign courts while in office.[333] The Court noted "that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal." Further, the Court found nothing in State practice or in the rules or decisions of any of the international criminal tribunals that would cause it to deviate from this rule.[334] Similarly, in the *Al-Adsani* case, the European Court of Human Rights explained that

> [n]otwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities, or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[335]

B. *Conduct Covered*

Canadian legislators must then choose between, on the one hand, broad language that acknowledges the variety of forms of human rights abuses condemned by the international community and the changing nature of customary international law and, on the other, more specific language that heightens clarity and jurisdictional legitimacy. To further Canada's commitments to internationalism, the rule of law, and human rights, Canadian tort legislation should address as many human rights violations as it can, consistent with international law.

Just as the EC argued of U.S. legislation in *Sosa*, Canadian tort legislation should cover "only truly international standards – that is, standards that govern matters 'of mutual, and not merely several, concern' of States."[336] In *Sosa*, the EC took the example of murder: "[A]lthough murder may be universally proscribed by States in their domestic law, it should not provide a cause of action under the statute unless and until it reaches the level of international concern—in other words, unless it occurs in such circumstances or on such a scale

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333. Democratic Republic of Congo v. Belgium, 2002 I.C.J. 121 (Feb. 2002).

334. *Id.* ¶¶ 51, 58.

335. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 752, ¶ 61.

336. EC Amicus Brief, *supra* note 288, at *8–9. Further, the EC argued that "the substantive standards imposed by the [ATCA] should be defined by reference to international law." *Id.* at *3. In particular, the EC contended that (1) U.S. courts should apply international law rigorously "to determine the conduct that may give rise to a tort in violation of the law of nations . . . ." *Id.* at *3–4.

that it would qualify as a war crime, a crime against humanity, or genocide."[337]

The option that places due emphasis on international law and still leaves the most room for its evolution would be to provide jurisdiction and a cause of action for *jus cogens* violations of international human rights and humanitarian law. The minimum human rights norms set out in the *Restatement (Third) of Foreign Relations Law*[338] are:

(i) Genocide;
(i) Slavery or slave trade;
(iii) Murder or causing the disappearance of individuals;
(iv) Torture or other cruel, inhuman, or degrading treatment or punishment;
(v) Prolonged arbitrary detention;
(vi) Systematic racial discrimination; and
(vii) A consistent pattern of gross violations of internationally recognized human rights.[339]

CAHWCA lays out the violations of international humanitarian law that Canada has chosen to condemn—war crimes, crimes against humanity, and genocide.[340] It would likely be useful to courts for any such new legislation to include a list of norms that have reached *jus cogens* status, such as those set out in the Restatement and in CAHWCA. Although this approach sacrifices flexibility, the benefits of clarity probably outweigh the drawbacks. Further, if international law grows to encompass more of these norms, the legislation could always be amended to reflect this change.

In the case of torture, the legislation should maintain the definitions that exist in the criminal code. Currently, Canadian criminal law has different definitions for torture depending on whether the torture alleged is torture as an ordinary criminal violation (based on the CAT), torture as a crime against humanity, or torture as a war crime.[341] The first requires "the involvement of a state official and the necessity of a purpose for the infliction of pain

337. *Id.* at *9.

338. "The Restatement is an unofficial compendium of existing law prepared by academics in the United States. It is generally considered highly persuasive both within and outside the United States." INTERNATIONAL LAW, *supra* note 8, at 813.

339. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987). Beth Van Schaack has set out language of minimum human rights norms broader than that of the Restatement in her article on the Proposed Hague Judgments Convention, which could serve as another useful model. *See* Van Schaack, *supra* note 16, at 159–60.

340. Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24, *amended by* 2001 S.C., ch. 32, §§ 59–61; 2001 S.C., ch. 34, § 36 (Can.).

341. Macdougal, *supra* note 331.

and suffering."[342] The second two require neither the involvement of a state official nor a particular purpose for the infliction of pain and suffering. [343] Torture as a crime against humanity, however, requires that the acts be "committed against a civilian population or any identifiable group" and be "part of a widespread or systematic attack."[344] Torture as a war crime requires that the torture have taken place in the context of an armed conflict. [345] These requirements in Canadian criminal law on torture reflect international law, including international criminal law and the Convention on Torture,[346] and should be preserved in civil legislation.

Finally, tying tort legislation to the *jus cogens* norms is beneficial for the purposes of jurisdictional legitimacy, particularly if plaintiffs in Canada hope to assert universal jurisdiction over tortfeasors. As discussed above, Canadian courts can only exercise universal jurisdiction legitimately over a certain set of norms. The assertion of universal jurisdiction is most valid with respect to *jus cogens* norms. If plaintiffs wished to sue for violations of norms that fall short of *jus cogens* violations where universal jurisdiction is accepted under international law, such as kidnapping or arbitrary detention that is not prolonged, then they would have to look elsewhere in Canadian law and ground their claims in a jurisdictional basis other than universal jurisdiction.[347]

C. *Non-State Actors as Possible Defendants*

The applicability of tort legislation to non-state actors is a critical issue with respect to both the effectiveness and the potential resistance to any tort legislation for human rights violations. Thus, the rigorous application of international law with respect to the actors who may be found liable is also necessary.[348] As the EC noted in *Sosa*, for example, "[C]ourts should recognize that only a subset of norms that make up customary international law apply to non-state actors, such as corporations."[349] Although "non-state actors may be liable for genocide, war crimes, and piracy, . . . torture, summary execution, and prolonged arbitrary detention do not violate the law of

342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *See* EC Amicus Brief, *supra* note 288, at *14–15.
348. *Id.* at *7–8.
349. *Id.* at *4.

nations unless they are committed by state officials or under color of law."[350]

This framework, however, still leaves room for holding non-state actors liable for their complicity in the violation of norms not directly applicable to them by state actors.[351] For example, the Ninth Circuit and other U.S. courts have examined case law from Nuremberg, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR) to determine the international law standard applicable to a claim that a defendant in an ATCA case had aided and abetted the violation of a norm that fell within the scope of the statute but was directly applicable only to state actors.[352] Although it may not be necessary for legislation to clarify this point, ultimately courts should be guided by international law in determining whether the non-state actors can be held liable indirectly for violations of human rights and humanitarian law violations.[353]

D. *Exhaustion Requirement*

A position in keeping with Canada's dual role as defender of human rights and law-abiding international player would be to provide universal jurisdiction, but to impose an explicit exhaustion requirement. Even enthusiastic proponents of the ATCA, like Stephens, agree that

> [t]he need to invoke international law to address 'domestic' violence implies a breakdown of domestic legal remedies. Were the local system willing and able to address the violence by providing timely investigation, punishment and redress to the victim, the violence would probably not rise to the level of an international law violation. International law is triggered where State officials commit and condone violent acts, or where the State violates its obligation to prevent and punish abuses.[354]

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350. *Id.* at *11 (citing, for example, Kadic v. Karadzic, 70 F.3d 232, 241–46 (2d Cir. 1995) (discussing torture and summary execution); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 500 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (discussing torture); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985) (discussing torture); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995) (discussing torture, summary execution, disappearance, and arbitrary detention); Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (causing disappearances); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541–43 (N.D. Cal. 1987) (discussing torture, summary execution and prolonged arbitrary detention)).

351. *See id.* at *11.

352. Doe I v. Unocal Corp. 395 F.3d 932, 949–50 (9th Cir. 2002); *see also* Doe v. Qi, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004).

353. EC Amicus Brief, *supra* note 288, at *11–12.

354. Stephens, *supra* note 76, at 593.

Notably, the clearer and less controversial of the two U.S. tort statutes, the TVPA, has an explicit exhaustion requirement.[355] The EC explained in its brief in the *Sosa* case that the TVPA's exhaustion requirement "derive[d] from a rule of general international law requiring that, before a claim may be asserted in an international forum, the claimant must have exhausted remedies in the domestic legal system."[356] The reasoning behind the rule is that states must provide "an opportunity to prevent, correct, or remedy conduct that would otherwise constitute a violation of international law."[357] In many of these human rights cases, however, victims cannot use domestic forums. Under international law, however, they would be excused of the exhaustion requirement when "local redress is unavailable or obviously futile."[358] The EC concludes: "In a similar fashion, an exercise of universal civil jurisdiction should be predicated on a showing that there was no reasonable prospect of redress in either a State exercising jurisdiction on a traditional basis or through an international mechanism." [359]

An explicit exhaustion requirement would bring Canadian legislation in line, on its face, with international law, address concerns about legal imperialism, and promote the growth of meaningful remedies elsewhere. Such was the aim of the exhaustion requirement of the TVPA.[360] The plaintiffs in *Sosa* argued that the ATCA had an implied exhaustion requirement due to the exhaustion requirement imposed by international law.[361]

Moreover, requiring plaintiffs to exhaust remedies, where possible, with states that have jurisdiction on traditional bases would make Canadian tort legislation on gross violations of human rights

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355. 28 U.S.C. § 1350(2)(b) (1994); *see also* Transcript of Oral Argument, *supra* note 38, at 15–16.

356. *See* EC Amicus Brief, *supra* note 288, at *24.

357. *Id.*

358. *Id.*

359. *Id.*

360. With the TVPA, Congress sought

> to strike a balance between, on the one hand, the need to provide redress for victims of fragrant human rights abuses, considering that judicial protection is often least effective in those countries where abuses are most common, and, on the other, the need to ensure that United States courts would not intrude upon cases that could be more appropriately handled by the courts where the alleged torture or killing occurred, the need to avoid exposing United States courts to unnecessary burdens, and the need to encourage the development of meaningful remedies in other countries.

EC Amicus Brief, *supra* note 288, at *23 (citing Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as amended at 28 U.S.C. § 1350) and citing H.R. Rep. No. 102-367, at 1, 3 (Nov. 25, 1991)).

361. Transcript of Oral Argument, *supra* note 38, at 63–64.

consistent with its criminal legislation implementing the ICC statute. At the heart of the ICC is the "principle of complementarity whereby the Court is subsidiary or complementary to national courts: these courts enjoy priority in the exercise of jurisdiction except under special circumstances, when the ICC is entitled to take over and assert its jurisdiction."[362] This approach was based not only on practical limits on the number of cases the court could handle, but also on the "intent to respect state sovereignty as much as possible."[363] Thus, only where the courts with a nexus to the underlying events offer no meaningful remedy should a plaintiff be able to pursue a tort suit in Canadian courts. The exhaustion determination also should be made with sensitivity to and a degree of deference to local approaches.[364]

The absence of prosecutors or other government officials as a filter to decide which cases to bring will not cause litigation to spiral out of control. Although in civil cases there is no role for prosecutors or other officials[365] who could "take into account such considerations of public policy and international comity as they deem appropriate,"[366] there still is a role for judges. Arguably, prosecutors may take executive policy into account more than judges do. As discussed above, however, this filter of cases through the policy concerns of the executive is often not a good thing.

Sticky issues related to exhaustion persist, but they are surmountable. One is whether tort suits should be permitted when the country in which the acts occurred has dealt with the acts via a truth commission. It is highly debated whether truth commissions preclude criminal or civil suits. In some nations, such as Sierra Leone, the view that a truth commission did not bar criminal suits prevailed.[367] Yet some truth commissions, such as South Africa's

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362. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 351 (2003).

363. *Id.*

364. *See* Halberstam, *supra* note 276, at 266.

365. For example, in criminal cases for torture in Canada, "if the accused is not a Canadian citizen, the Attorney General of Canada must consent to the prosecution." Macdougal, *supra* note 331.

366. EC Amicus Brief, *supra* note 288, at *20.

367. Indeed, a hybrid international-domestic criminal court was set up by the Government of Sierra Leone and the United Nations after the creation of the Truth Commission. *See generally* The Special Court for Sierra Leone, http://www.sc-sl.org. The Special Court

> is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Currently, eleven persons associated with all three of the country's former warring factions stand indicted by the Special Court. They are charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Specifically, the charges include murder, rape,

Truth and Reconciliation Commission, which gives amnesty to those who apply for it and who show sufficient remorse, are embraced as alternatives.[368] Would civil suits disrupt a delicate balance? As Chibundu has put it, South Africa's "experiment may not work, but it seems not only presumptuous but solely heuristic to suppose that the customary international law doctrines of punishment developed in United States courts and which, under South African law, thus becomes part of their law, should foreclose the capacity of South Africa to innovate in this area."[369] The U.S. Supreme Court appeared to struggle with this issue. At oral argument, one Justice commented:

> Apartheid is a terrible thing, but according to the government, . . . the President of South Africa, has told the United States that the judicial efforts to give compensation to victims are interfering with his efforts to build a democratic South Africa. Now, if I have to choose between these two I'd say democratic South Africa, protective of human rights has it all over compensating the victims even though that's terrible.[370]

Often related to the issue of truth commissions is the effect of amnesties granted in the place where the acts occurred on the viability of tort suits in Canada. Amnesties seem to have fallen under disfavor recently. For example, the Inter-American Human Rights Commission condemned Chile's blanket amnesty by saying that it deprived individuals of "their right to due process for their just complaints against persons who had committed excesses and acts of barbarism against them."[371] One chamber of the ICTY has also chimed in on this issue:

> The [United Nations Human Rights Committee] Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy,

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extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on United Nations peacekeepers and humanitarian workers, among others. Indictments against two other persons were withdrawn in December 2003 due to the deaths of the accused.

Id.

368. Chibundu, *supra* note 33, at 1144.

369. *Id.*

370. Transcript of Oral Argument, *supra* note 38, at 54.

371. Garay Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Rep. No. 36/96, OEA/ser.L./V./II.95, doc. 7 rev. 156, ¶10 (1997).

> including compensation and such full rehabilitation as may be possible.[372]

Yet there need not be an all or nothing approach to truth commissions or amnesties. Coming from a restorative justice perspective, Jennifer Llewellyn advocates that courts attempt to distinguish between just and unjust amnesties.[373] She notes that the most obvious example of such a distinction would be between blanket amnesties and individualized amnesty provisions, such as those provided in South Africa's Truth and Reconciliation Commission, and favors the latter over the former.[374]

A broad view of justice is advisable in the determination whether local approaches are sufficient to satisfy an exhaustion requirement and thus bar jurisdiction in Canadian courts. To borrow again Chibundu's words:

> [t]he point of particular importance . . . is not whether they successfully punish wrongdoers. Although fashionable, it is a mistake to equate "justice" with "punishment." What is important is that the experience of trying to come to grips with the interplay of criminality and politics within the particular society is one that shapes the structures and institutions of that society, not the least of which are the judiciary and related institutions.[375]

E. *Forum Non Conveniens*

Whether explicit in the legislation or not, the doctrine of forum non conveniens should inform courts' decisions about whether or not to accept a case based on violations of international human rights law.[376] In Canada, the doctrine of forum non conveniens is a flexible

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372. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, n.172 (Dec. 10, 1998) (citing *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1 Rev. 1 at 30 (1994)).

373. Jennifer Llewellyn, *Just Amnesty and Private International Law*, in SCOTT, *supra* note 7, at 567–600. She explains that,

> underlying the various practical forms restorative justice may take are various common commitments: to restoration over retribution, reintegration over isolation; to understanding the community as an integral part in the creation and solution of social conflict, with a concomitant acknowledgement that the focus is always broader than the individual or the immediately interpersonal; to looking at the implications for the future of a wrong and of proposed means of redress; and to bringing together all those with a stake in the development of that future.

Id. at 581–82.

374. *Id.* at 582.

375. Chibundu, *supra* note 33, at 1146.

376. Unlike the United States, Canada does not have the limiting political question doctrine. *Compare* Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441,

one. The test boils down to the question whether there is another more appropriate forum.[377] In many human rights cases, this doctrine does not come into play, because the otherwise more appropriate forum, such as Iran in the *Bouzari* case, is not a realistic alternative.[378]

The doctrine of forum non conveniens may operate to assuage Chibundu's imperialist fears—if a local court is a viable and more appropriate alternative, it ought to be used. Of course, the requirement does not do away with the fundamental chicken and egg problem that exists with both the exhaustion and forum non conveniens doctrines—how do you develop capacity in local courts if you take away all the cases that would give them the chance to exercise that capacity? Encouraging the development and strength of local judicial institutions is essential and a project worthy of Canadian time and resources. It should not be used, however, as an excuse to allow gross violations of human rights norms to go unpunished.

F. *Balancing Approach*

Ultimately, Canadian courts will have discretion in determining whether the hurdles set up by Canadian legislation and by ordinary rules of civil litigation bar individual suits. In determining whether a claim for gross violations of human rights norms is allowed to proceed, courts must consider a variety of factors. As Lord Mance explained in *Jones*:

> [A] proportionate approach in pursuit of a legitimate aim is, by definition, not the same as an approach requiring all states either to assume universal civil jurisdiction or (in the case of countries like England) to forgo all discretionary qualifications on the breadth of their technical jurisdictional rules.[379]

Lord Mance stated that courts deciding whether to here a claim for torture still must

> consider and balance all relevant factors, including any evidence before it as to the availability or otherwise of an effective remedy for the torture in the state responsible for it. This exercise would have to be undertaken at the same time as considering any other jurisdictional

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472, 459, *and Re* Canada Assistance Plan, [1991] 2 S.C.R. 525, 545, *with* Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002).

377. *See* Amchem Products, Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, ¶¶ 38–39.

378. The Ontario Court of Appeals noted in *Bouzari*, for example, that "if Ontario does not take jurisdiction, the appellant will be left without a place to sue." [2004] 71 O.R.3d 675, ¶ 37.

379. Jones v. Ministry of the Interior of Saudi Arabia, [2005] Q.B. 699 ¶ 92 (U.K. Ct. App.).

> issues which arise (including thereby issues of discretion and forum non conveniens).[380]

This analysis applies readily to the Canadian context as well. Legislation would help clarify the factors to be considered in determining whether a Canadian court should proceed with a given case, but ultimately it does not remove the need inherent in all civil litigation for courts to examine the overall context. Doctrines, such as the "real and substantial connection" test for personal jurisdiction, forum non conveniens, exhaustion, and a thorough investigation of international law must guide courts in determining whether a tort case for violations of international human rights and humanitarian law should proceed.

V. CONCLUSION

In sum, provincial tort legislation making explicit Canada's commitment to promoting human rights and the international rule of law via transnational public law litigation is needed. If Canada wishes to safeguard its role and its reputation as proponent of international law and protector of human rights, it must keep in mind "the extent to which adjudication in a domestic court effectively promotes the core value of accountability," which "is central to the idea of the 'rule of law.'"[381] The difficulty of balancing the often competing agendas of multilateralism, rule of law, and human rights is not unique to Canada. As Judges Higgins, Kooijmans, and Buergenthal noted in the *Arrest Warrant* case,

> [o]ne of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law faces today is to provide stability in international relations by a means other than the impunity of those responsible for major human rights violations.[382]

Canadian tort legislation for gross violations of human right and humanitarian law that is firmly grounded in international law is a step in the right direction.

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380. *Id.*
381. Chibundu, *supra* note 33, at 1074.
382. Arrest Warrant, *supra* note 269, ¶ 5.

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