

This does not mean that the ATCA has no conceivable benefits. It is imaginable that it could deter human rights abuses in existing regimes. But this argument overlooks the exceptional nature of regime transition. Even in purely domestic law, we do not relentlessly enforce the law when it interferes with pragmatic compromises to enduring political problems. Our own transitions—think of the Civil War—have usually involved pardons and amnesty. In any event, American citizens made the decision; they did not have to worry about the British hearing lawsuits brought by former slaves against former slaveholders. There is real value in allowing citizens of a country to determine their own response to the past. The ATCA, as recently interpreted by the federal courts, is a lamentable example of American unilateralism and insensitivity to the needs and local conditions of the foreign countries in which we intervene.

None of what I have said is an argument that the United States should take no interest in human rights abuses in countries that have undergone a transition to democracy. My claim is only that the Alien Tort Claims Act is not a good tool for helping these countries.<sup>2</sup> There are many better ways.

Transitional governments face numerous problems. Their main political problem is maintaining and enhancing public support for democratic institutions. The old guard must be either suppressed or conciliated; the general public must be persuaded that democracy is preferable to the old system. Police, soldiers, and bureaucrats must be retrained. In the former communist countries, inefficient state enterprises must be liquidated. Courts must be expanded and professionalized. All this takes money and expertise; the major democracies can supply both, as well as moral and political support, including, if necessary, military assistance if the old guard attempts a coup, as happened in the Philippines.

One of the benefits of this approach is that if this form of help works, as it often appears to, at some point after institutions have stabilized, the state may be able to revisit the past. Once the general public enjoys the benefits of market democracy, political support for the old guard will decline and efforts to address human rights abuses are less likely to lead to political instability. To some extent, this has happened in countries like Argentina and Chile.

#### REMARKS BY CRAIG SCOTT\*

My comments are intended to approach the *Sosa v. Alvarez-Machain* case at a somewhat abstract level, as may befit my status as northern outsider and my limited expertise in the arcane world of the ATCA. I argue that lawsuits in the domestic courts of the United States and other states that use the private-law category of tort to seek legal justice for public international law human rights violations will continue to produce both profound political conflict and unsatisfactory juridical analysis as long as quite stark dichotomies between “international law” and “national law,” on the one hand, and “public law” and “private law,” on the other, continue to structure both legal theory and legal doctrine—and, perhaps most important, the practical legal imagination.<sup>1</sup>

<sup>2</sup> For an argument that courts enforcing the ATCA should respect amnesties when they are “just” but not otherwise, see Jennifer Lewellyn, *Just Amnesty and Private International Law*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION* 567 (Craig Scott ed. 2001). I see no reason to think that courts, rather than the executive branch, should make this judgment.

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<sup>1</sup> *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION* (Craig Scott ed. 2001). See especially Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides*

the argumentative and the existential as features of the judicial landscape generate what can be called a “rhetorical responsibility”<sup>2</sup>—in this context, an inescapable (albeit unattainable) duty to persuade multiple audiences that they should be convinced by that judge’s interpretations of the content of international human rights law, of the nature and extent of violations, and of her choice to provide remedial vindication of “public international law” human-rights wrongs through the vehicle of domestic tort law.

Such responsibility inevitably involves occasional (and maybe not-so-occasional) normative leaps of faith that, in my view, can be grounded in little more than a combination of two allegiances. There is first of all the substantive commitment to a transnational common project of pursuing “fundamental” human rights values through law, including ‘reception’ of international human rights rules and principles through what amount to acts of transformation by state judges in the form of common-law incorporations and both statutory and constitutional interpretations. There is secondly an ethos of transnational dialogue among courts in the world with respect to this common project, not only through the much-vaunted phenomenon of comparative constitutional dialogue but also through a core mechanism of private international law, namely the not-infrequent necessity for judgments in one state to be given effect only when formally recognized by judges in another state as having been properly rendered, jurisdictionally, procedurally, or substantively.

In some kind of matrix created by these two kinds of normative interplay—the *reception* of international law by domestic courts and the subsequent *recognition* by foreign courts of the judgments arising from such reception—I believe we may eventually arrive at a kind of transnationalization of our understanding of tort-based liability for infringements of human rights norms initially generated by public international law.

This, then, is the project in all its abstractness. In what follows, I seek to make it concrete: Though given the limits of space, I will likely only succeed in getting to the point of preparing to mix powder with water.

In the *amicus* brief in *Sosa* submitted by the Professors of Federal Jurisdiction and Legal History can be found a marvelous nugget of a quotation, which resonates with irony. The *amicus* writers first comment that in 1789, when the predecessor of today’s ATCA was enacted, “The law of nations also applied as common law in civil cases.”<sup>3</sup> They then go on to illustrate this claim by invoking Blackstone’s Commentaries, published in 1769: “Blackstone reported, for example, that ‘in mercantile questions, such as bills of exchange and the like. . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to’ . . . The same was true in America.”<sup>4</sup>

From this short passage from Blackstone, penned almost 250 years ago, and the follow-on observations in the *amicus* brief, we catch a glimpse of a veritable lost world when one compares the commonplace assumptions of the late eighteenth century to the contemporary terms of debate and general discourse surrounding both the ATCA and the *Sosa* case. Two points in particular should be noted.

<sup>2</sup> Craig Scott, *Diverse Persuasion(s): From Rhetoric to Representation (and Back Again to Rhetoric) in International Human Rights Interpretation*, in HUMAN RIGHTS: THE INTERNATIONAL LEGAL CONTEXT (Philip Alston ed., forthcoming).

<sup>3</sup> Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, filed in the Supreme Court of the United States in Case No. 03-339, *José Francisco Sosa v. Humberto Alvarez-Machain*, et al., at 12 (Feb. 27, 2004).

<sup>4</sup> *Id.*, quoting 4 WILLIAM BLACKSTONE, COMMENTARIES at \*67.

First, note the ease with which the “law of nations” is felt by Blackstone to include what in current times is almost universally cited as the best example of a body of transnational law blending the national and the international, as well as private law and public regulation (including public regulation by abstention and by acquiescence), namely *lex mercatoria*. As we debate what the ATCA means now partly in light of what it meant in 1789, we get a sense from Blackstone of how the framework of law beyond a single state in 1789 involved a far more hybrid and pluralistic body of law than is currently the case in mainstream international legal thought.

Second, the passage reveals how the ATCA was grafted onto a seamless interaction between the unwritten “law of nations” and the “common law,” including the common law as it applied in civil (private) law relationships, and at the center of which was of course the judge as not just chief articulator but chief forger of law.

The irony I noted is that in some respects we were in 1789 exactly where we need to be heading in 2004. In what sense? In the sense that, in the interpretive and political debates about the ATCA, judicial agency is almost the reality that dare not speak its name. Some, if not most, readers will raise their eyebrows at this observation. After all, they may say, both the petitioner *Sosa* and the supporting U.S. government are taking the tack of arguing for an interpretive result by claiming that the body of interpretation is the result of judicial usurpation—obviously a form of judicial agency—and, not without inconsistency, asking the U.S. Supreme Court to engage in one gigantic paroxysm of judicial agency to overturn twenty-five years of gradual interpretive consensus among lower courts.

Granted, but my point is that what amounts to discussion of judicial agency seems to be spinning hopelessly on the tired old axis of judicial activism versus judicial restraint, as framed by the largely unhelpful metaphor of the separation (as contrasted to “balance” or, better, “interaction”) of powers. Not enough of the debate seems to consciously address the following question: Exactly what kind of body of law is at stake here and just what kind of role for judges is appropriate for that kind of body of law?

Allow me to illustrate with one important example. In the field of torture, Article 14 of the United Nations Convention against Torture (CAT) is an important touchstone for interpreting both common-law causes of action in a country like Canada and statutory private law in an ATCA (assuming there is a cause of action in ATCA) or in, say, the delict provisions of a civil-law code. Article 14 reads in part:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. . . .

Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.<sup>5</sup>

Even in the *amicus* brief of the European Commission, the *Sosa* brief that in my view is the most freshly and carefully reasoned (especially in terms of bringing public international law principles to bear on the analysis of states’ private-law adjudicative jurisdiction), there is consideration only of the obligatory dimension of Article 14, found in Article 14(1), with a statement that it is unsettled (“there is disagreement”) whether the Convention requires states to exercise universal jurisdiction (to provide a right to compensation for torture wherever the torture may be committed) or, rather, “simply jurisdiction over torture committed on their

have judges forging common-law tort claims with respect to acts of torture occurring abroad. Indeed, when one looks at the nature of the torture norm and the quasi-universalist structure of criminal-law cooperation in CAT, one can be forgiven for seeing Article 14(2) as not just permitting but *encouraging* states to enter that permissive normative space and help forge, by dint of example and the combination of reception and recognition I mentioned, the very consensus the European Commission notes does not yet exist.

Elsewhere in its brief, while the Commission does several times emphasize that international norms evolve and that domestic courts must take such evolution into account, it does not directly engage with the role of domestic judges as active participants of that evolutionary process, as a facilitative reading of Article 14(2) might suggest, as opposed to adopting an (implicitly) dualistic perspective that sees domestic judges primarily as recipients of international law only once it has evolved "out there."

However, I would be remiss if I were to end by making it seem the European Commission brief deserves to be singled out for criticism by example. In fact, of all the *amicus* briefs, it is the only one that consistently discusses the legal issues at stake in *Sosa* in terms that transcend the compartmentalization of private international law (with its attention to civil jurisdiction) and public international law (with its preoccupation with criminal-law or statutory economic-regulation jurisdiction). It is also the only brief to squarely address the similarities and differences between the purposes of civil liability (private law) and criminal responsibility (public law) in a way that seems implicitly designed to help inform the forging of a new body of law by national judges.

Perhaps most exciting in the European Commission's brief is an insightful and a fairly extended discussion of the mutually informative doctrines of exhaustion of local remedies originating in public international law and private international law doctrines of jurisdictional abstention, such as *forum non conveniens*. Although the connection between the two may be no more than what would be expected by those international lawyers who have always seen public international law and private international law as cut from the same cloth, I prefer to see this as the implicit beginning of transatlantic awareness that the future of translating torture into tort ultimately lies in transnational law.<sup>7</sup>

<sup>7</sup> In this respect, I find it significant that the sources of the principles the Commission suggests domestic judges draw upon to forge an appropriate jurisdictional discourse around international human rights torts include not only public international law and (comparative) private international law but also the statutory recognition by the U.S. Congress of exhaustion-of-local-remedies criteria in ATCA's cousin, the Torture Victim Protection Act.