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Beyond Territoriality: The Case of Transnational Human Rights Litigation*

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Abstract

Cases for civil damages that have been brought before Western courts by victims of torture and persecution against states officials or corporations, challenge the principles of state sovereignty and jurisdictional competence. While national courts can in cases of serious crimes hear cases that grow out of acts committed in another country, the same is not true for cases for civil compensation. A persisting and rising number of private law cases that attempts to empower disenfranchised victims of crime and abuse, points to the necessity of reconsidering the prevailing procedural and substantial obstacles that govern the so-far unsuccessful civil law suits. The law of transnational civil litigation [TCL] emerged with the US American decision in *Filartiga* in 1980 and perhaps culminated in the US Supreme Court's Decision in *Sosa v. Alvarez-Machain* in 2004. TCL has become a laboratory for our inquiry into the relationship between laws that were developed within and for the nation-state on the one hand and an increasingly globalized political and legal human rights discourse, on the other. As such, TCL is a case in point for the dramatically changing nature of norm-creation, law, and law enforcement in an era of globalization.

Keywords: law, human rights, sovereignty, globalization

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A. Territorial Jurisdiction and *Openness to International Law*

In recent years, litigation for civil compensation claims for human rights abuses has begun to occupy courts and – on all fronts – lawyers, academics, practitioners, politicians and journalists around the world.¹ Cases that have been inspired by the American *Filartiga*-decision of the Second Circuit in 1980² are being brought against states, state officials and private corporations by former victims of torture, persecution and other human rights violations.³ The fate of these cases has been mixed at best. While such cases mostly fail to overcome thresholds such as various existing state immunity acts (whereby states and their officials are immune from law suits before courts in foreign states) or are rejected on the basis that the court in question was not suited to hear the case involving incidents that often took place in distant places (the so-called *forum non conveniens* doctrine)⁴, plaintiffs and their lawyers do not seem willing to give up their struggle for legal recognition of the wrongdoing.⁵ Again, the reasons for these often futile pursuits merit particular attention. Some litigants and their lawyers see those law suits as a success even if they end without the defendant's recognition of legal responsibility for the committed crimes or torts but, instead, with a settlement and subsequent financial compensation to get the case out of the courts.⁶ Yet, the resolution of very painful legal proceedings without the defendant's recognition of his or her legal responsibility might just as much be seen as falling short of the originally aspired outcome.⁷

¹ For an excellent introduction see Scott, Introduction to *Torture as Tort: From Sudan to Canada to Somalia*.

² *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), available at: <http://homepage.ntlworld.com/jksonc/docs/filartiga-630F2d876.html>; see hereto, e.g., Stephens 2002.

³ Blumberg, Asserting Human Rights Against Multinational Corporations under United States Law; Koh, Separating Myth from Reality About Corporate Responsibility Litigation; Rau, *After Pinochet*.

⁴ See, e.g., *Aguinda v. Texaco Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 903 (S.D. Texas 1996); Boyd, The Inconvenience Of Victims: Abolishing Forum Non Conveniens In U.S. Human Rights Litigation, at 45-6; Rau, Domestic Adjudication of International Human Rights Abuses and the Doctrine of Forum non Conveniens, at 196.

⁵ For an overview of the relevant caselaw see Baumgartner, Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases; Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts; Paust, History, Nature, and Reach of the Alien Tort Claims Act; Sarkin, Reparation for Past Wrongs; Adler/Zumbansen, Forgetfulness of Noblesse; Bartsch/Elberling, The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v Greece and Germany Decision.

⁶ Bazyler, WWW.SWISSBANKCLAIMS.COM: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks; Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts.

⁷ Adler / Zumbansen, The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich.

But, beyond these underlying issues that are certainly very present for the judge ruling in such cases⁸, lies another very dynamic element that has been informing recent cases in the field of human rights law. To borrow Ralf Michaels' gripping formula, the challenge presented by these cases must be seen in the attempt to overcome territory-based rules of jurisdiction, and to conceptualize and to develop "territorial jurisdiction after territoriality".⁹ It is here where the following observations take their starting point. The conflict of laws with which courts in the respective cases seem to be confronted is no longer confined to territorial borders as the norms governing the claim are of such border-transgressing nature that they both undercut and surpass territorial boundaries based on which jurisdictional competences have been defined and ascertained. It is here where the general *openness* and *receptiveness* of domestic courts towards international law becomes a prime issue in ascertaining the prospects of cases for human rights abuses committed on foreign soil.

The following paper takes issue with both the longstanding focus on territorial confines as prevalent in the conflict of laws interpretation of jurisdiction/forum issues on the one hand and with the permeability of national legal orders by traditionally understood, i.e. predominantly state-oriented international law on the other. It will argue in favor of an *alternative* interpretation of the process by which domestic courts become aware of distant human rights abuses and the need to grant legal standing for the victims and, at the same time, of the norms and their particular character that they will have to draw on in resolving these cases.¹⁰ This alternative understanding of the proto-universal quality of norms is developed within a contextual assessment of norms as elements of an emerging body of transnational law. Transnational law is here understood – much as has been suggested by Philip Jessup in 1957 – as the body of norms governing the interaction of private and public bodies regardless of their territorial or political whereabouts or constraints. Transnational law should be conceived of as the governing regime for transactions unfolding among a widely dispersed and multi-polar global civil society.¹¹

⁸ See the opinion by Debevoise, J in *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (DNJ 1999), 285: "Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many millions of people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated. For the reasons set forth above, however, this court does not have the power to engage in such remediation."

⁹ Michaels, *Territorial Jurisdiction after Territoriality*.

¹⁰ Wai, *Internationalist Transformation of Canadian Private International Law*; Scott, *Translating Torture into Transnational Tort*; Scott/Wai, *Transnational Governance of Corporate Conduct*.

¹¹ See for this concept of a global civil society Kaldor, *Global Civil Society*; Zumbansen, *Vergangene Zukunft des Völkerrechts*.

Transnational law complements and supplements both international law and domestic legal regimes as it attains regulatory quality in cases that escape the reach of the former two for reasons alluded to before.

But, there is another striking characteristic that feeds the particular quality of transnational law: emerging from various border-crossing interactions between public and private actors, transnational law is the prime example of a *learning* law in the sense that as a regulatory regime it is informed, structured and constantly adapted by the changing regulatory demands of a complex society. In mature welfare states where the boundaries between state intervention and social autonomy have irrevocably been perforated from above (through international cooperation) and from below (through privatization and delegation of public power to private actors), from the public as from the private¹², law itself has grown in various dimensions, eventually becoming an ubiquitous and yet increasingly amorphous regulatory and post-regulatory instrument. Law is challenged to retain its regulatory capacity in post-industrial, complex societies by embracing the concrete and contextual qualities of the regulatory fields¹³, and yet it is this embrace of the concrete that endangers its very own regulatory quality.¹⁴

Against the background of this growing case law and the commentary and scholarship in the field of transnational human rights litigation, one of our tasks is to reflect on the ways in which law has been able and might in the future be able to address the different issues raised by this phenomenon. The fact that ‘movements to bring justice for historical wrongs’¹⁵ have been developing with various dynamics and success – depending on the evaluation of the outcome – points to the intricacy of this type of legal redress. Comparing the different assessments of the motives, the procedures and the substantive law, we can only begin to realize the challenges to the law – and to those teaching it.¹⁶ They are aptly reflected in the growing difficulty of

¹² See the brilliant exposure of this thought by Habermas, *Paradigms of Law*; for a more extensive treatment, see Habermas, *Krise des Wohlfahrtsstaates*; Frankenberg, *Shifting Boundaries*.

¹³ Teubner, *Reflexives Recht*; Teubner, *Juridification*.

¹⁴ Teubner, *Global Bukowina*, 26-28.

¹⁵ Bazzyler, WWW.SWISSBANKCLAIMS.COM: *The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 64.

¹⁶ For an overview of recent examples of such litigative and alternative undertakings, see Bazzyler, *The Holocaust Restitution Movement in Comparative Perspective*; Stephens, *Translating Filártiga*; see also the contributions in Christodoulidis / Veitch eds. 2001. – On the impact on law school curricula, see Arthurs, *Poor Canadian Legal Education*; Valcke, *Global Law Teaching*; Reimann, *Taking Globalization Seriously*; Knop, *Here and there*; Dorsen, *N.Y.U.'s Global Law School Program*.

upholding clear divides in law school curricula between so-called basic, core curriculum courses on the one hand and ‘international’, comparative subjects on the other.¹⁷

The task is to develop an adequate understanding of globalized law. A closer look at transnational law and, in particular, at transnational human rights litigation or *transnational civil litigation* [TCL] will serve to sketch the ways in which any analysis of the backgrounds and prospects of TCL is likely to unfold in a fragmentary, opened discourse in which voices and vocabulary from other times¹⁸ and disciplines¹⁹ inevitably find their way into legal argument. Following an unwritten rule for the presentation of a paper in front of a legal audience – always to begin with a case – the following section will provide a series of comments on a recent case from the Federal Constitutional Court in Germany. This case has begun to stir discussions and is likely to continue to do so.²⁰ The case exposes – as under a magnifying glass – the intricacies of an emerging transnational human rights law. Following a first tentative interpretation of the case, the paper will tie the case back to the context of contemporary developments in different countries with regard to civil human rights litigation. In a concluding section, these developments are evaluated in the context of a more deepened discussion of the concept and reach of transnational law.

B. Courts’ Open Windows

On 14 October 2004, the German Federal Constitutional Court (FCC – *Bundesverfassungsgericht*) voided a decision by the Higher Regional Court (HRC – *Oberlandesgericht*) Naumburg, finding for a violation of the complainant’s rights guaranteed by the *Grundgesetz* (German Basic Law).²¹ The Decision directly addresses both the observation and application of the European Convention of Human Rights and of case law from the European Court of Human

¹⁷ On the erosion of this boundary, see the references, *supra*, note 2; see also Reimann, End of Comparative Law as an autonomous subject, and Ginsburg, Looking Beyond our Borders, particularly highlighting the relevance of the German Law Journal in this light, *ibid.*, at 3.

¹⁸ See only Morgan, Slaughterhouse Six.

¹⁹ See the “questions” raised by Burt Neuborne towards the end of his ‘preliminary reflections’: Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts.

²⁰ See the comprehensive case note by Hartwig, Much Ado About Human Rights.

²¹ See the decision by the German Federal Constitutional Court of 14 October 2004 [Register No. 2 BvR 1481/04] (in German and English) at: http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html; it has also been published in NEUE JURISTISCHE WOCHENSCHRIFT 3407 (2004).

Rights under the Basic Law's "rule of law provision" in Art. 20.III.²² While there is a myriad of important aspects with regard to this decision, we may limit ourselves at this point to the introductory outlook contained in the holdings of the case. One of them reads as follows:

*"The obligation to respect the law and justice (Art. 20.3) also applies to the observation of the ECHR guarantees as well as the decisions of the European Court of Human Rights within the confines of methodologically justifiable statutory interpretation. The failure to consider a decision of the Court, just as much as a schematic "execution" of the Court's law against priority law may constitute a violation of fundamental rights in connection with the command of the Rule of Law."*²³

The background to the case is easily told.²⁴ The complainant is the natural parent of a boy born in 1999 whom his mother had successfully offered for adoption after birth. The complainant sought custody and contact rights but saw his claims rejected by German courts.

While pursuing his rights before German courts, the complaint went before the European Court of Justice for recognition of violation of his rights "to respect for his private and family life" in Article 8 of the European Convention for Human Rights (ECHR) of 1950. The ECtHR, in its decision in *Görgülü v Deutschland* on 26 February 2004, found for a violation of the complainant's rights in Art. 8 ECHR and ordered a compensation of 15,000 EURO pursuant to Art. 41 ECHR. The Court held that the State was obliged – in cases of familial ties between the parent and the child to facilitate the exercise of parental rights.²⁵ In light of this decision, a lower civil court ordered parental custody for the complainant, but the HRC Naumburg voided this decision on 30 June 2004, holding that the family court, in granting custody and contact rights, had not followed the required procedures. With respect to the ruling of the ECtHR, the HRC held that the European Court's decision constituted a binding obligation only for the International addressee, Germany, but not for German courts and governmental agencies. According to the

²² "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

²³ Formal case citation, sub C I 3. The original German reads: "Zur Bindung an Gesetz und Recht (Art. 20 Abs. 3 GG) gehört die Berücksichtigung der Gewährleistungen der Konvention zum Schutze der Menschenrechte und Grundfreiheiten und der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte im Rahmen methodisch vertretbarer Gesetzesauslegung. Sowohl die fehlende Auseinandersetzung mit einer Entscheidung des Gerichtshofs als auch deren gegen vorrangiges Recht verstoßende **schematische "Vollstreckung"** können gegen Grundrechte in Verbindung mit dem Rechtsstaatsprinzip verstoßen." (Translated by Russell Miller, emphasis added.)

²⁴ See also the case note by Matthias Hartwig (2005).

²⁵ See the decision *Görgülü v Deutschland*, published in NEUE JURISTISCHE WOCHENSCHRIFT 3397 (2004). Available online in full text through the Court at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=G%F6rg%FCI%FC%20%7C%20v%20%7C%20Deutschland&sessionid=1933938&skin=hudoc-en>.

HRC, it followed neither from the ECHR nor from the German Basic Law, that a decision by the ECtHR that found for a ECHR violation through a German court could void this Court's decision. In its decision of 14 October 2004, the FCC found that the decision by the HRC constituted a violation of the complainant's constitutional rights in Art. 6 *Basic Law* (protection of family) and the rule of law principle.

The FCC held that German courts and governmental agencies were obliged – “under certain circumstances” – to consider the interpretation of the European Convention of Human Rights as delivered by the ECtHR when deliberating on the case before them. After transformation of the ECHR by the German federal legislature into German law in 1952²⁶, the Convention had become integral part of German federal law and as such created legal obligations for German courts and agencies.

The FCC found that German courts were thus bound to consider and to apply the Convention “within the frame of methodologically justifiable interpretation”.²⁷ The Court hastened to add, however, that in light of this standing of the ECHR within the German legal order (i.e. as German federal law), it was impossible to bring a constitutional complaint before the German FCC directly invoking the constitutional standards of the ECHR. Instead, the FCC continued, the ECHR was influencing the interpretation of the fundamental liberties and rule of law principles as contained in the Basic Law.²⁸ More precisely, the FCC underlined that the text of the Convention and the case law of the ECtHR served – on the level of (German) constitutional law – as interpretation aids (*Auslegungshilfen*) for the identification of content and reach of fundamental liberties and rule of law principles of the *Grundgesetz*, insofar this does not lead to a diminution of the Basic Law's level of protection – as the latter would clearly not be intended by the Convention.

The FCC, in paragraphs 30-63, offers a very thoughtful and compelling exploration of the relationship between domestic constitutional law and international law. Culminating in paras. 47 and 53, the FCC – while acknowledging the existence of “two distinct circles of law”²⁹ –

²⁶ GESETZ ÜBER DIE KONVENTION ZUM SCHUTZE DER MENSCHENRECHTE UND GRUNDFREIHEITEN of 7 August 1952, published in *Bundesgesetzblatt* [Federal Gazette] 1952 II, p. 685.

²⁷ “Diese Rangzuweisung führt dazu, dass deutsche Gerichte die Konvention wie anderes Gesetzesrecht des Bundes im Rahmen methodisch vertretbarer Auslegung zu beachten und anzuwenden haben.“

²⁸ “Die Gewährleistungen der Konvention beeinflussen jedoch die Auslegung der Grundrechte und rechtsstaatlichen Grundsätze des Grundgesetzes.“

²⁹ “...ein Verhältnis zweier unterschiedlicher Rechtskreise...” – para. 34.

underlines the relevance of international legal obligations for the interpretation and application of domestic law. The Court stresses, thus, the “friendliness of the Basic Law with respect to international law”³⁰, from which follows an overarching attempt by German courts and regulatory agencies to interpret and to apply the law so that no conflict arises with Germany’s obligations under international law. It is of central importance in this context that international law will not be applied directly but indirectly through an interpretation and application of German constitutional law in light of international law.

With regard to the application of the ECHR and the case law by the European Court of Human Rights, the ECtHR recognizes an intention of the Grundgesetz to embrace a far-reaching friendliness with regard to international law, a border transcending cooperation and a political integration into a slowly emerging international community of democratic states (para. 36).³¹

With this formula, the Court opens the German legal order to a dynamic process of legal evolution and community building that involves a complex interplay among various legal and political regimes. This meets the standards set by the European Court of Justice. In its *Maestri*-decision of 17 February 2004, which involved compensations under Article 41 of the Convention, the ECtHR emphasized that the Treaty Parties, in ratifying the Convention, have accepted the obligation to work towards a compatibility of their domestic laws with the Convention.³²

It is against this background that the FCC (citing to the just referred-to case law by the ECtHR in para. 43 of its judgment of 14 October 2004), develops the standard of applying and interpreting the *Grundgesetz* in light of international law. Relying on the admittedly ambiguous formula of a “methodologically justifiable” interpretation, the Court emphasizes that both the failure by German courts to assess the relevance of the case law by the ECtHR as well as the “schematic execution” of it against higher ranking law could constitute a violation of fundamental liberties in connection with the rule of law principle (para. 47). While this section of the decision adds little

³⁰ *Völkerrechtsfreundlichkeit des Grundgesetzes*.

³¹ “Das Grundgesetz will eine weitergehende Völkerrechtsfreundlichkeit, grenzüberschreitende Zusammenarbeit und politische Integration in eine sich allmählich entwickelnde internationale Gemeinschaft demokratischer Rechtsstaaten.“

³² *Maestri v Italy*, Judgment of the ECtHR of 17 February 20004, at para. 47: “...it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.” – The full judgment is available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Maestri&sessionid=1946528&skin=hudoc-en>.

in illuminating the elements of “methodological justification” and “schematic execution” as we find them included in the holdings of the decision, the Court expands later in a most fruitful manner on the issue of the Grundgesetz’ openness to international law and on the obligations following from that perspective: in paras. 61-62, the FCC declares itself to be standing indirectly in the service of executing international law.³³ Consequently, this would lead – according to the FCC – to a reduction of the risk of non-compliance with international law. With regard to the obligations flowing from the ECtHR, the FCC recognizes their particular importance in strengthening the development of a general European fundamental rights regime.³⁴

C. Transnational Civil Litigation as Looking Glass

This holding goes to the heart of any discussion of transnational law. With the rise of emerging or *migrating* human rights standards³⁵, it has become ever more difficult to discern the borders and divisions of law. In our assessment of border-crossing legal (and other) standards, our focus on *law* as a contained system of rules guides our perception and our evaluation of what in fact must be recognized as a highly differentiated, fragmented and decentralized interlocking of regulatory and self-regulatory processes.³⁶ This development not only concerns territorial borders or the doctrinal confines of public and private law.³⁷ The reference in the cited decision of the Federal Constitutional Court to *methodological sovereignty* in asserting its right to review the case law of the European Court of Human Rights (instead of “schematically executing” the holdings of this supranational court) serves as an urgent reminder of the need to further explore the possibilities and the scope of such methodological self-constraint. The Federal Constitutional Court itself,

³³ “Das Bundesverfassungsgericht steht damit mittelbar im Dienst der Durchsetzung des Völkerrechts und vermindert dadurch das Risiko der Nichtbefolgung internationalen Rechts.“ [Thus, the FCC directly serves the enforcement of public international law and thereby reduces the risk of non-observance of international law.]

³⁴ “Dies gilt in besonderem Maße für die völkerrechtlichen Verpflichtungen aus der Europäischen Menschenrechtskonvention, die dazu beiträgt, eine gemeineuropäische Grundrechtsentwicklung zu befördern.“ [This holds in particular for the obligations under public international law that flow from the European Convention of Human Rights that contributes to the development of common European fundamental rights.]

³⁵ See, in particular, Scott/Wai, Transnational Governance of Corporate Conduct.

³⁶ Still, the authoritative formula is offered by Jessup, Transnational Law, 1-16; see also Calliess, Lex Mercatoria: A Reflexive Law Guide To An Autonomous Legal System; for an overview of the concept’s origin and subsequent development see Zumbansen, Transnational Law; Zumbansen, Piercing the Legal Veil.

³⁷ See only Schepel, Constituting Private Governance Regimes.

however, offers only limited guidance as to the adequate ways in which we may confront the methodological pressure on law in an Era of Globalization.³⁸ Our task is to take up this challenge. In this respect, *transnational civil litigation* [TCL] offers itself as a fruitful instrument through which we can critically assess contemporary aspirations of a globalized law as we see it emerging. In the case law and scholarship on TCL, we find an abundance of examples of intricate fusions of law and politics, of theory and myth.³⁹ The struggling of TCL to gain ground in a world where we must console ourselves with symbolic advances and gains in the light of repeated failures in the courts⁴⁰, presents numerous challenges to legal theorizing that so often self-assuredly dismisses ‘unknown’ or new claims and at the same time remains very skeptical towards an interdisciplinary assessment of legal argument.⁴¹ One way to move ahead, then, would be to draw analogies between the theory building on the international level of legal scholarship and that which is going on within domestic law, can help us understand the challenges of globalized law and globalized legal scholarship. As portrayed before, the phenomenon of litigation brought before foreign courts for distant human rights violations, perpetrated by governments or private actors forcefully undermines these categories. While many questions remain regarding the admissibility of such litigation, the numerous attempts to bring instances of past and distant injustice to courts – ever since the groundbreaking *Filartiga* case in 1980⁴² – give testimony of the present challenge.

Thus, it would be already against this background that we might accommodate ourselves to the use of the term *transnational* to address and to identify phenomena of civil human rights litigation before foreign courts.⁴³ Moreover, however, the term transnational offers itself to capture the ambiguous quality of such litigation in a wider sense. What becomes obvious in the

³⁸ There are proposals in this regard: see, e.g., Starck, *Rechtswissenschaft in der Zukunft*, (trusting in the rationality of our „legal methodology“ to select from the influences of Globalization what is worthy); on the other hand, see Kennedy, *Two Globalizations* (reconstructing the rise and fall of formalist ‘classical legal thought’ and the emergence of ‘the social’ as the subsequently dominating theme in legal theory); while Kennedy’s article still holds the promise to extend (in a sequel) to globalized law as such, see for an assessment of ‘the social’ in transnational civil litigation: Scott/Wai 2004, at 294.

³⁹ See Morgan, *Slaughterhouse Six*; Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*.

⁴⁰ See hereto the accounts by Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*; Bazylar, *WWW.SWISSBANKCLAIMS.COM: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*; Neuborne 2002; Adler / Zumbansen, *Forgetfulness of Noblesse*.

⁴¹ See hereto Wrangé, *Of Power and Justice*.

⁴² *Filartiga v. Pena-Irala*, 630 F.2d 876 (U.S. Court of App., 2nd Cir. 30 June 1980).

⁴³ See the concise analysis by Michaels, *Three Proceedings of Legal Unification: National, International, Transnational*.

light of newspaper reporting on cases such as *Bouzari*⁴⁴ or *Arar* in Canada⁴⁵, is an increasingly widespread discussion, concern and awareness of distant rights violations, regardless of the level of (legal or other) expertise in effectively persecuting the perpetrators. The first of these cases was brought by Houshang Bouzari, an Iranian born, landed immigrant in Canada, who sued the Iranian government for compensation for endured torture in 1993/1994. This case presented Canadian Courts over the last years with the issue of jurisdictional competence for tort claims arising out of incidents having taken place in Iran. While the case was brought to an end by the decision of the Supreme Court of Canada to deny leave to appeal to the Court of Appeal's dismissal of the case in 2005⁴⁶, the two preceding decisions on the case, from the Ontario Superior Court of Justice in 2002⁴⁷ and from the Court of Appeal for Ontario in 2004⁴⁸ continue to stir immense legal imagination. In particular, the former decision, delivered by Swinton J of the Ontario Court of Appeal for Ontario reads nothing short of a concise textbook on the current frontiers of the intersection between domestic and international law.⁴⁹ Surely, Swinton J's discussion of the legal expert opinions presented by Ed Morgan of the University of Toronto⁵⁰

⁴⁴ *Bouzari v. Iran* [2002], O.J. No. 1624, available at <http://incat.org/projects/bouzari.pdf>; <http://www.theglobeandmail.com/servlet/story/RTGAM.20041001.wnovogrodsky01/BNStory/Front/>.

⁴⁵ The *Arar*-case involves the claims brought by Canadian-born, Syrian citizen, Maher Arar, for an alleged unlawful rendition by US immigration authorities to Syria in 2002, where Arar was held captured for ten months and reportedly subjected to torture. Upon his return to Canada in 2003, a public inquiry was initiated to explore if and to what degree there had been an information sharing between Canadian and US authorities with respect to a suspected affiliation of Arar with terrorist networks. See http://www.cbc.ca/stories/2003/11/24/arar_lawsuit031124; <http://www.cbc.ca/news/background/arar/>; for more background on the inquiry, see the official website at: <http://www.ararcommission.ca/eng/>. I am grateful for information received from Jordan Zed, LL.B. 2005, Osgoode Hall Law School, in this context. – The Ontario Superior Court of Justice heard argument in the *Arar* case on 9 February 2005 and delivered judgment on 28 February 2005. See *Arar v. Syrian Arab Republic*, [2005] O.J. No. 752. The Court, in relying on the *Bouzari* decisions and on case law by the Supreme Court of Canada with regard to international law obligations, held that the State Immunity Act protected the Syrian Government from the suit brought by Arar. Insofar as the claims necessitated a modification of the exceptions of the State Immunity Act, the Court held that it was up to the parliament, not the courts, to bring about such changes, see *id.*, at para. 30. The decision is, again, a small but important lesson on the growing pressure on domestic law brought about by international human rights law and the permeability of domestic legal discourses for human rights concerns arising out of action in other jurisdictions.

⁴⁶ See Supreme Court of Canada, 27 January 2005, S.C.C.A. No. 410.

⁴⁷ *Bouzari v. Iran*, Ontario Superior Court of Justice, Swinton J., [2002] O.J. No. 1624. Decision of 1 May 2002, available at: <http://incat.org/projects/bouzari.pdf>.

⁴⁸ *Bouzari v. Islamic Republic of Iran*, June 30, 2004, [2004] O.J. No. 2400, available at: <http://www.ontariocourts.on.ca/decisions/2004/june/bouzariC38295.htm>

⁴⁹ The decision is worthy of ongoing exploration, whether in research or teaching circumstances. See, e.g., http://osgoode.yorku.ca/QuickPlace/peerzumbansen/PageLibrary85256F4E005EE69A.nsf/h_962A55C7B69CD05585256F6400730090/8AA8D20372EBB88585256F650010A39C/?OpenDocument.

⁵⁰ See http://www.law.utoronto.ca/faculty_content.asp?profile=39&cType=facMembers&itemPath=1/3/4/0/0. See also Morgan, *Slaughterhouse-Six*.

and of Christopher Greenwood of the London School of Economics⁵¹, will be remembered as one of the more compelling engagements of a Court with the uncontainable dynamics of international law and its influence on national legal interpretation.⁵² The Court, engaging in a wide-ranging discussion of the state of international law in the context of drawing on the opinions of the learned scholars of international law as indicated in Article 38 of the Statute of the International Court of Justice, eventually rejected Ed Morgan's views as describing International Law less as it was than as it might become. It is this very borderline-discussion that will continue to inform and inspire future decisions in this respect.

The importance of these cases and ongoing proceedings is emphasized in that they resound in a greater wave of legal initiatives and court decisions in other countries at present. Among these we find cases in the United States, beginning with the already mentioned *Filartiga* case of 1980 and perhaps culminating in the *Sosa v. Alvarez-Machain* decision delivered by the Supreme Court in 2004.⁵³ This decision that must be regarded as severely limiting the scope of the *Filartiga* case law⁵⁴, will most certainly overshadow subsequent decisions by the Supreme Court, but also by lower level courts, the most recent and notable example of which being the November 2004 decision in the Apartheid-litigation. The Apartheid class actions had been brought by a large group of former Apartheid victims and related interest groups against corporations for alleged collaboration with and support of South-Africa's Apartheid regime before the governmental takeover. On 29 November, the US District Court for the Southern District of New York (S.D.N.Y.) in a spectacular and long-awaited decision granted defendants' motion to dismiss each of plaintiffs' claims, hereby relying extensively on the Supreme Court's *Alvarez-Machain* decision of June 2004.⁵⁵ This case – as well as a number of decisions coming out of Germany⁵⁶,

⁵¹ <http://www.lse.ac.uk/people/c.greenwood@lse.ac.uk/>.

⁵² See *Bouzari v Iran*, *supra* n. 47, paras. 38-73.

⁵³ *Sosa v. Alvarez-Machain*, 159 L. Ed. 2d. 718, 124 S. Ct. 2739 (2004), available at: <http://supct.law.cornell.edu/supct/html/03-339.ZS.html>

⁵⁴ See for more background Chemerinsky, Unanswered Questions; Sarkin, Reparation for Past Wrongs.

⁵⁵ See *In re: South African Apartheid Litigation, Ntsebeza, et. al. v. Citicorp, Inc. et al.*, 2004 U.S. Dist. LEXIS 23944; see Burkhard Hess, *Amerikas Justiz zieht Menschenrechtsklagen Grenzen – Neueste Rechtsprechung dammt Schadensersatzprozesse ein*, in: FRANKFURTER ALLGEMEINE ZEITUNG, No. 287, 8 December 2004, at 23.

⁵⁶ See the *Distomo* Decision by the German Federal Court of Justice of 26 June 2003 (Az. III ZR 245/98), published in NEUE JURISTISCHE WOCHENSCHRIFT 2003, 3488. The case involved claims brought by heirs to victims of a massacre in Distomo, Greece, committed during WWII by German military. See hereto the casenote by Pittrof, Compensation Claims for Human Rights Breaches Committed by German Armed Forces.

Great Britain⁵⁷, Italy⁵⁸ and Greece⁵⁹ - is part of a most compelling series of judgments that show courts addressing not only the boundaries of their own respective legal regimes pertaining to jurisdictional competence and immunity. In an almost more important sense, the cited decisions all reflect the Courts' shared awareness of the necessity to consider the ongoing developments in neighboring jurisdictions. Decisions such as *Filartiga* were for the longest time a transnational reference case for similar court proceedings in many parts of the world, and *Filartiga* served both as a precedent and inspiration.⁶⁰ While this is echoed by decisions such as *Bouzari* in Canada or *Ferrini* in Italy, positive expectations for future successful litigation are likely to be frustrated after the *Alvarez-Machain* and *Apartheid* decisions in the United States. Far from being merely national judicial events, these cases are already exerting considerable influence in shaping legal consciousness in many other jurisdictions and will continue to do so.⁶¹ At this time, the aftermath of a *Filartiga*-inspired transnational human rights litigation is not entirely clear. Whether or not the recent cases from the United States constitute an end to the US-American line of case law – and its echoes and irritations worldwide – remains to be seen.

Whether or not such awareness amounts to the emergence of a global public sphere, or a global civil society, an ubiquitous transnational human rights dialogue or even a constitutionalized sphere of world law⁶², there are already strong signs of increased border-crossing activities among private parties and public officials addressing instances of human rights violations worldwide.⁶³ One of the pertinent questions then is what role the law can play in this regard. Is

⁵⁷ See, most notably, the decision by the House of Lords in *Jones v. Ministry of the Interior of Al-Mamlaka Al-Arabiya as Sudiya (The Kingdom of Saudi Arabia) and others*, of 28 October 2004. The *Jones* case raised the question of jurisdictional competence of British courts for compensation claims brought by torture victims against Saudi state officials and agents for acts of torture and necessitated a scrutinous review of UK's State Immunity Act of 1978. The decision is available at: <http://www.hrothgar.co.uk/YAWS/reps/04a1394.htm>

⁵⁸ See the *Ferrini v Germany* decision by the Italian Court of Cassation of 11 March 2004. The *Ferrini* Court held that Ferrini, who had been deported to Germany and subjected to forced labor in 1942, was entitled to compensation by Germany for this war crime and that Germany could not effectively bring the State immunity defence that the Court found inadmissible in the context of violations of peremptory international law. Hereto, see the contribution by Gattini, War Crimes and State Immunity.

⁵⁹ See the *Distomo*-decision of the Greek Aeropag (High Court): *Prefecture of Voiotia v. Federal Republic of Germany*, of 4 May 2000. The Greek text of the decision was published in: 49 NOMIKO VIMA 212 (2001) [cited in Gattini, previous note, at 224]. See hereto the casenote by Bantekas and Gouvouneli in 95 AM. J INT'L L 198 (2001).

⁶⁰ See hereto, e.g., Stephens, Translating Filártiga; Stephens, Taking Pride in International Human Rights Litigation; Scott, *Introduction to Torture as Tort: From Sudan to Canada to Somalia*.

⁶¹ See Stephens, preceding note.

⁶² See, e.g., Fischer-Lescano, *Emergenz der Globalverfassung*

⁶³ See Safferling, *Can Criminal Prosecution be the Answer to massive Human Rights Violations?*

law's dominion the mere identification of the correct place for litigation or is it the establishment of procedural and substantive rules that allow for an universal treatment of human rights issues? Where and how, between these minimum and maximum scenarios, are we to identify a starting point for an assessment of the role of law?

D. “To the understanding of transnational legal problems we may then address ourselves”⁶⁴

The central argument put forward here is that we need to further strengthen the current doctrinal attempts at widening domestic law's conceptual horizon for an adequate treatment of indeed, new claims, identities and entities and their ‘translation’⁶⁵ into our domestically applied legal language.⁶⁶ With regard to the case law identified above on the one hand and the need to further explore the challenges contained in the herein reflected transnationalization of legal discourse on the other, issues of judicial forum and jurisdiction, of universal rights claims and state immunity, and of judicial activism versus the alleged parliamentary prerogative, become testing cases of an emerging de-territorialized legal consciousness. With every new case that affirms the principle of state immunity or *forum non conveniens* against the invocation of claims for universal civil rights jurisdiction, what we see is the paradoxical strengthening of these very claims. In light of an undoubtedly unfolding transnational legal discourse – both in theory and in practice – the cited decisions show nothing less than the signs of stretching and exhaustion of our state-border oriented categories. With each new judicial ‘embrace’⁶⁷ – however reluctant, fearful or wholehearted this may be from case to case – of the challenge of border transcending human rights claims, we are reminded of the tension between an emerging legal consciousness encompassing rights abuses and denials in other jurisdictions and the limitations encountered in pursuing these rights.

⁶⁴ Philip Jessup, *Transnational Law*, 11.

⁶⁵ Scott, *Translating Torture into Transnational Tort*; Zumbansen, *Piercing the Legal Veil*.

⁶⁶ Compare with Toope, *Inside and Out*, who argues that we ought to be less thinking of “translation” than of “story telling”. See, *id.*, at 12: “...those charged with relating the story of international law in Canada are best analogized to storytellers, not translators. Like most storytellers, they are preoccupied with questions of identity and human social relationships.”

⁶⁷ Brunnée/Toope, *Hesitant Embrace*.

I. The Inside and Outside View of International Law

And yet, one is constantly reminded that the law of jurisdictional competence is sticky, persistent and sturdy – in contrast to this global human rights discourse. The reasons are, if not entirely visible in the cited case law, at least discernible from the structure of the legal argument presented therein. Decisions such as *Bouzari* or *Arar* in Canada, *Sosa v. Alvarez* or *Apartheid* in the United States must be read as troubling reminders of the continuing struggle over the adequacy of territoriality-oriented assessments of the appropriate judicial forum for universally appealing human rights claims. In this struggle, courts have regularly addressed the existing rules governing jurisdictional competence and those rules applying to the introduction of obligations under international law into the domestic legal order. In performing this exercise, judges are constantly asking themselves how to adequately address the presented legal challenge. The questions presented to them focus primarily on the perspective taken with regard to the applicable law. For the Forum state, i.e. the state where the case is brought, the legal challenge concerns the foreign sovereignty (state immunity) of the state where the torture occurred. This challenge follows from the question how the assumption of domestic ‘universal jurisdiction’ will fare with the sovereignty of the nation state where the events took place or against whose officials the legal proceedings are directed. The inside perspective, thus, is developed against the background of the sovereign nation state and reaffirms this framework of reference.⁶⁸

In contrast, an “outside”-perspective would be the classical international law conception that distinguishes between different spheres of legal regimes with reference to nation states. International Law is the law governing relations among and between nation states and it follows from this understanding that the application of international law to domestic situations depends to a large degree on the willingness of states for the international law to permeate their borders. This is true where we speak of international treaty law and customary international law. While there is an ongoing dispute over the direct applicability of mandatory international law – *ius cogens* and peremptory human rights norms – the question of the reach of international law becomes even more complex where we find the very content of international law to be in flux. With the enumeration of the sources of international law in Article 38 of the ICJ Statute being a mere shadow of the unceasing struggles to readily identify the wealth of development in International

⁶⁸ See again Toope, *Inside and Out*, supra; see also Zumbansen, Innen- und Außenansichten des Rechts in der Globalisierung.

Law, we continue to address International Law in applying the outside-perspective as long as the nation state holds the central conceptual position within our International Law architecture.

II. Experiencing the Paradox

The question then is how to overcome this dichotomy the foundations of which regularly seem to be either overstated or understated. Or, is it? The suggestion is to understand the domestic-international divide in human rights litigation as a paradox. A paradox that consists of two opposed elements that can neither be merged nor reduced onto each other. Instead, our challenge is to sustain the paradox by fully unfolding the conceptual premises that inform each side. While contemporary assessments of ‘governance without government’ suggest that much of our traditional theorizing and modeling is rendered useless⁶⁹ as it remains too focused on the nation state, it is here suggested to look back to the nation state in order to revisit the ways in which we have learned to speak, to develop and to fight over political power and government by law.⁷⁰ Against this background we shall be able to better discern and confront the challenges that emerge from the ongoing multiplications and fragmentations of legislative and adjudicative sources.⁷¹ Revisiting central vocabulary of democratic government, such as state, rights, separation of powers, legal process, representation, rule of law, and democracy will allow us to realize the degree to which our learned, tacit understandings continue to inform our contemporary conceptualizing of new claims and new forms of rights, their genesis, recognition and enforcement. The recurring debates over the democratization of the WTO or the International Financial Institutions⁷² emphasize to which degree these discussions draw on regulatory experiences made within the nation state. While there is far reaching consensus that we need to reach beyond the nation state to develop a conceptual imagination for the emerging global regulatory architecture⁷³ there is great merit in drawing on the rich reservoir of past experiences of rights development, adjudication and legal formants.⁷⁴ It is here where we find elaborations in

⁶⁹ See the contributions in Rosenau/Czempiel eds., *Governance without Government*.

⁷⁰ See hereto Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat*; Zumbansen, *Gedächtnis des Rechts*. See also Stephen Toope, *Inside and Out*, supra, at 12: “...international law is both outside and in. It is not only a foreign story but is part of our story.” This perspective is also taken by Koh 1996.

⁷¹ See, e.g., Romano, *The Proliferation of International Judicial Bodies*.

⁷² For the current discussion see Anghie, *International Financial Institutions*; an excellent historical overview is provided by Quiggin, *Globalization and Economic Sovereignty*.

⁷³ Very insightful Zürn, *Sovereignty in a Denationalised World*; see also Gessner et al., *Introduction*.

⁷⁴ See already Koh, *Transnational Legal Process*.

theory and practice of different stages of the rule of law, the welfare state and its contemporary contenders.⁷⁵ While these narratives developed within specific historical, socio-economic and political contexts⁷⁶, our critical reassessment of them is ever more important in light of legal transplants⁷⁷, comparisons⁷⁸ and cross-border fertilizations of the legal mind.⁷⁹ “The more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever needed new solutions of problems whether old or new. Conflicts and laws are made by man. So are the theories which pronounce, for example, that international law cannot confer rights or impose duties directly on an individual because, says Theory, the individual is not a subject but an object of international law. It is not inappropriate here to invoke again the high authority of an earlier Storrs lecturer and to say with Cardozo: ‘Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them [sic] seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities.’”⁸⁰

⁷⁵ Compare Zumbansen, *Quod Omnes Tangit*.

⁷⁶ See Habermas, *Paradigms of Law*; Stolleis, *Entstehung des Interventionsstaates*.

⁷⁷ Pistor, *Of Legal Transplants*; see the classical exposition and discussion of the concept of legal transplants, WATSON, *LEGAL TRANSPLANTS*; see, for a recent, self-reassessment, Watson, *Legal Transplants and European Private Law*, (defending his approach against the attack of Pierre Legrand).

⁷⁸ Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*; Kennedy, *When Renewal Repeats*.

⁷⁹ Arthurs, *Globalization of the Mind*.

⁸⁰ Philip Jessup, *Transnational Law*, 7, *citing* CARDOZO, *JUDICIAL PROCESS*, 127.

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