CHAPTER XVII

Universal Jurisdiction in the Area of Private Law – The Alien Tort Claims Act

GEORG NOLTE

I. INTRODUCTION

Is universal jurisdiction a legal consequence of a violation of ius cogens or of obligations erga omnes?

Lord Millet has postulated this rule for the area of criminal law. In the Pinochet judgment of the House of Lords he held that crimes were subject to the principle of universal jurisdiction if they violate peremptory rules of international law, i.e. ius cogens.\(^1\) Indeed, one is tempted to ask, why should a State not have a legitimate interest in enforcing peremptory, and thus fundamental rules of international law with the help of its courts? And, if so, would there be a reason to treat civil suits differently from criminal procedures? Private law and criminal law can, after all, be functionally equivalent. Certain violations of the law which are subject to criminal prosecution in one State can be subject to civil proceedings in another. In the United States there are even hybrid legal consequences such as punitive damages.

II. THE ALIEN TORT CLAIMS ACT AND ITS PRACTICE

So far, civil judgments which rely on the principle of universal jurisdiction in cases of asserted violations of international law have mainly occurred

\(^1\) “In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe ius cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order”, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, House of Lords, Judgment of 24 March 1999, ILM 38 (1999), 581, 649.

in the United States. Many of these judgments are based on the *Alien Tort Claims Act* of 1789. This Act establishes the jurisdiction of the US federal courts for “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” The *Alien Tort Claims Act* was not applied for almost two hundred years until it was revived in 1980 in the case of *Filartiga v. Peña-Irala*. This case centred around a torts claim of a Paraguayan citizen against another citizen of Paraguay because of torture in Paraguay. In other words it was a civil suit in which the court – in substance – assumed universal jurisdiction to enforce a norm of *ius cogens* – the ban on torture in the case at hand.

Did this judgment signify the development of a new instrument for enforcing the most fundamental human rights? Later decisions such as *Kadic v. Karadzic* insinuated as much. In this case a Federal Court of Appeals in 1995 granted damages to victims of the so-called “ethnic cleansing” in Bosnia and Herzegovina against the Serb leader Radovan Karadzic. A connection to the United States only existed in so far as the suit was brought against Karadzic while he was visiting the United Nations in New York City. Since the early nineties foreigners have brought a number of other civil suits for human rights violations committed abroad before the US courts, the best known recent cases being *Doe v. Unocal Corp* and *Ken Wiwa v. Royal...*