The Sedona Conference Journal

Volume 6 2005

War: The Mother of All Mass Torts?

Tim Taylor

Recommended Citation: Tim Taylor, *War: The Mother of All Mass Torts?*, 6 SEDONA CONF. J. 161 (2005).

WAR: THE MOTHER OF ALL MASS TORTS?

Tim Taylor
SJ Berwin LLP
London, UK

> The military theorist Karl von Clausewitz (1780-1831) famously described war as "… *nothing but a continuation of politics with the admixture of other means*".

No-one, to my knowledge, has famously referred to war as a form of mass tort. Armed conflict is rarely the direct subject of civil litigation in national courts. Lawyers generally only get busy when things have blown up by accident. Yet, there is no shortage of armed hostilities in the world today: between 1993 and 1994 alone, 50 separate "*ethno-political*" conflicts were recorded as occurring around the globe.[1]

So what is the legal context of war and might litigation one day become a continuation of warfare by other means?

This paper first examines briefly the latterday history of the legality of warfare and then focuses on how the Iraq conflict has placed this issue at the heart of global politics. Secondly, it reviews some impediments that have tended to keep the incidence and consequences of war out of both international and national courts. Lastly, it attempts to identify where the compass may be pointing for the future of adjudicating the legality of war on the international plane and also for litigating the results of armed conflicts as a form of civil wrong in private suits.

I. AN ABRIDGED HISTORY OF THE LEGALITY OF WAR

The concept of "*just war*" has long antecedents. The notion of legal or illegal war is a much newer one. Until recently the subject was one which had exercised only a handful of academics and diplomacists. That is until the UN Security Council refused to sanction the "*use of all necessary means*" to evict Saddam from Baghdad - or, did it effectively refuse? And, if so, did that refusal make the Iraq war illegal?

Into the 19th Century the acquisition of territory by conquest continued to be recognised as "fair game" in international geo-politics.

In 1890, the International Conference of American States in Washington adopted a recommendation to establish a principle that cessions of territory brought about by the threat or use of force should be void.

This belated reaction to colonialism (or perhaps, more accurately imperialism, as this was not the initiative of Native Americans) fell on stony ground until the great upheavals of the two world wars in the next Century.

In 1928 the General Treaty for the Renunciation of war (known as the Kellogg Briand Pact) attracted several State adherents in the League of Nations who were concerned at least to establish some common rules of engagement.

1 Ted Robert Gurr "Peoples against State: ethno-political conflict and the changing world system" International Studies Quarterly (September 1994) p.347.

It took Franklin Roosevelt and Winston Churchill meeting onboard U.S.S. Augusta, anchored off Newfoundland in August 1941, to establish the principles eventually enshrined in the UN Charter on 26 June 1945, which frame the limits of lawful warfare.

It is this regime which their successors George Bush and Tony Blair now find unduly restrictive when confronted with the modern threats of terrorism and ethno-political strife.

II. THE SCHEME FOR LAWFUL WAR UNDER THE UN CHARTER

"***All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.***"[2]

This has been called the cornerstone of the UN Charter. The legality of warfare in International Law substantially resides in the exceptions to that rule either expressed within the framework of the Charter or, more controversially, within the residual realm of Customary International Law. And, as we shall see, Customary International Law, unlike the elephant, lends itself more readily to definition than recognition.

The clearest exception to the illegality of war is the Security Council's authorisation of the use of force under the mechanisms of Chapter VII of the UN Charter.

After nearly 50 years of Cold War stasis, in which the likely vetos of the Eastern and Western blocs had stymied the use of these powers, they were first exercised on 29 November 1990 when Resolution 678 authorised Member States to "*use all necessary means*" to evict Iraq from Kuwait and restore peace and security in the area.

Since then, Chapter VII powers have been relied upon to authorise measures in Somalia, Liberia, the Balkans, Sierra Leone and Haiti.[3]

The questions of:

(i) whether the authorisation of the use of force in Resolution 678 could "revive" in the event of Iraq's disobedience of the ceasefire conditions imposed in Resolution 687 (which suspended the authority to use force); and

(ii) whether individual States could determine that the authority had revived independently of the Security Council,

are the ones that have currently embroiled the Attorney General in the midst of controversy in the UK.

The issue that has received more airplay in the United States is the limits of the second main exception to the illegality of war. This is to be found in Article 51 which recognises the "*inherent right*" of States to use force singly or collectively as a means of self-defence in response to an "*armed attack*".

On 12 September 2001 George Bush's visceral response to the tragic events of the previous day captured the mood of the moment when he said, "*I don't care what the International Lawyer says, we are going to kick some ass …*"

For the war on Afghanistan he had a ready justification under the guise of self-defence as the "*substantial involvement*" of the Taliban government in the actions of an "*armed … band*" of Saudi nationals carrying carpet knives in the attacks of 9/11 qualified as an attack to which America had the right to respond.[4]

---

2 (Article 2(4) UN Charter).
3 Philippe Sands, "Lawless World", Penguin Books, 2005.
4 See Article 3(g) of the Definition of Aggression annexed to General Assembly Resolution 3314(XXIX).

With time for reflection, when Bush turned his attention to Iraq, he said in June 2002, "*The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our National Security …*". In an appeal to common sense he added, "*In an age where the enemies of civilisation openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.*"

It seems to have taken Tony Blair to deflect Bush from his instinct to head up the path of anticipatory self-defence and lead him up the cul-de-sac of seeking the sanction of the "*cheese eating surrender monkeys*" on the UN Security Council.

The barrister Blair conceded early on that Iraq posed an insufficiently immediate threat to invoke self-defence.[5] He was thus ultimately forced to nail his colours exclusively to the mast of the dubious theory that the US and the UK could unilaterally conclude that the UN authorisation to use force to evict Iraq from Kuwait had "*revived*" to allow the invasion of Baghdad.

The seeds of justification for Bush's doctrine in International Law may have been more fertile. There is a double irony in this. First, the traditional outer limit in Customary International Law for pre-emptive self-defence was set by America protesting that the UK had gone too far in using self-defence as a justification for seizing and destroying a vessel (the "*Caroline*") in US waters in 1837. Secondly, the clearest confirmation that a Customary International Law justification of self-defence (and therefore one capable of evolving to meet the threats of the modern world) survives the codification of Article 51, came from the International Court of Justice in the merits phase of the Nicaragua case. The US refused to participate in the case after the ICJ had the temerity to conclude that it had jurisdiction to rule on the legality of the Reagan regime mining Nicaraguan ports.[6]

III. THE INHERENT RIGHT ("DROIT NATUREL") OF SELF-DEFENCE IN CUSTOMARY INTERNATIONAL LAW

As already observed, Customary International Law may be easier to define than to identify - so what is it, and why is its identification difficult?

The International Law Association adopted in 2000 the London Principles on Formation of Customary (General) International Law. These contain the following definition:

> "[A] rule of customary International Law is one which is created and sustained by the constant and uniform practice of States … in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.
>
> If a sufficiently extensive and representative number of States participate in such practice in a consistent manner, the resulting rule is one of "general customary International Law" subject to [persistent denial by a State] such a rule is binding on all States."[7]

The definition only has to be stated to imagine the difficulties of identifying and recognising a rule of International Law at the cutting edges of its emergence and evolution. The sources of such rules are vague, and not always readily accessible. Article 38 of the Statute of the International Court of Justice defines them as …

> "(b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognised by civilised nations; and

5 According to Philippe Sands (op cit) Blair said this on 8 March 2003 on MTV - of all places.
6 *Nicaragua v. USA ICJ* Reports (1986) 100-1 (para 190).
7 London Principles on formation of Customary (General) International Law.

> (d) [without stare decisis as a principle]… judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

It is a recipe for subjectivity and a "*bean feast*" for lawyers.

International Treaties may or may not codify or help to "*crystallise*" Customary International Law or may just be factors used to evidence a uniform practice accompanied by the necessary belief of a State that the practice is ordained by International Law (*opinio juris*).

In this context the question has arisen whether the UN Charter effectively subsumed and "*froze frame*" on the limits of the right to self-defence by codifying Customary International Law on the subject.

This very question arose in the case of *Nicaragua v. USA*.

In a further irony, the USA argued unsuccessfully to the Court in the hearing on jurisdiction that:

> "'the provisions of the UN Charter [relevant to the use of force and self-defence] subsume and supervene related principles of customary and general International Law". The United States concludes that, "since the multi-lateral treaty reservation [excluding the jurisdiction of the ICJ for the relevant purposes] bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims. Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question; it further prevents it from applying in its decision any rule of customary International Law the content of which is also subject of a provision in those multi-lateral treaties."

The Court rejected this line of argument by the USA holding in its judgment on jurisdiction that:

> "Principles such as those of the non-use of force, non intervention, respect for the independence and territorial integrity of States … continue to be binding as part of customary International Law, despite the operation of provisions of conventional law in which they have been incorporated."

So intent had been the USA's lawyers on escaping the jurisdiction of the ICJ that they had to place themselves in the strait-jacket (from which President Bush now seeks to escape) of effectively agreeing with Nicaragua that the UN Charter froze the limits of the right to self-defence, asserting that "*Article 2(4) of the Charter is customary and general International Law*".

The Court did not buy that argument either, saying:

> "As regards the suggestion that the two sources of law are identical, the Court observes that the United Nations Charter, … by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, the treaty itself refers to pre-existing customary International Law; this reference to customary law is contained in the actual text of Article 51, which mentions the inherent right (in the French text "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognised the existence of this right, does not go on to regulate directly all aspects of its content. For example it does not contain any specific rule whereby self-defence

> would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary International Law. Moreover a definition of the "armed attack" which, if found to exist authorises the exercise of the "inherent right" of self-defence, is not provided in the Charter and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary International Law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary International Law continues to exist alongside treaty law."

This statement by the ICJ sounds remarkably like the portal by which the "Bush doctrine" of pre-emptive self-defence might enter into a field of wider respectability in International Law. The Court on that occasion left open the door for pre-emptive self-defence saying: "*the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised. Accordingly the Court expresses no view on that issue.*"

The Court even gave what reads like a prescient advance blessing to the Afghan war and the "*War on Terror*" saying:

> " … it may be considered and agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" inter alia an actual armed attack conducted by regular forces "or [the State's] substantial involvement therein."

IV. THE IMPEDIMENTS TO WAR BEING SUBJECT TO LITIGATION IN INTERNATIONAL COURTS

All in all it is supremely ironic that the ICJ's assumption of jurisdiction in the Nicaragua case was the occasion for Uncle Sam to throw his toys out of the pram in 1984 and withdraw from the compulsory jurisdiction of the Court. Eric Posner, writing in the New York Times in January this year, called this the "*watershed moment*" in the decline of the influence and importance of the ICJ in international relations.

The United States thus closed the door on the ICJ being a possible forum for it to move forward modern Customary International Law on anticipatory self-defence. This apparently remains at the point at which the USA is traditionally regarded as having defined it in 1842. In that year the US Secretary of State, Daniel Webster, castigated the British government for destroying the "*Caroline*" en route in American waters to provision an armed rebellion in Canada. He challenged the Brits to demonstrate,

> "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation …"

Those words enshrine what has become known as the "*Caroline Principle*" of pre-emptive self-defence. They fall some distance short of the Bush doctrine, but as the eminent international lawyer Professor Ian Brownlie has observed: "*[T]he reference to the period 1838 to 1842 as the critical date for the customary International Law said to be behind the United Nations Charter, drafted in 1945, is anachronistic and indefensible.*"[8] He, however, advocates that the anachronism should be removed in favour of an even less flexible doctrine than the Caroline Principle to reflect his view that, by 1945, the only visible precedent for pre-emptive self-defence was Austria-Hungary's attack on Serbia in 1914, which provoked World War I. Clearly he discounted Hitler's excuses for the invasion of Poland. Reference to that more proximate precedent to 1945 might have cheapened his point.

8 Brownlie Principles of Public Inernational Law, 6th Edition, Oxford University Press, 2003 p.702.

The logic of the ICJ's decision in the Nicaragua case implies, however, that there is no reason to freeze frame in 1939 or 1945 on the status of Customary International Law, as in principle it can evolve to meet changing threats. If armed conflict can embrace Saudis with carpet knives using civilian aircraft as weapons, it ought also to be able to embrace a hacker disabling the Global Positioning System which the USA apparently controls. By parity of reasoning, the provisions aboard the Caroline are no different from a factory manufacturing the precursors for Nerve Gas.

What is lacking at present is a forum in which any such evolution of Customary International Law can be developed and recognised. A striking illustration of both how the UN failed as a forum to develop International Law and the ICJ failed as a forum to assess it is provided by the example of Kosovo.

On 24 March 1999 (by chance the day the British House of Lords ruled for the second time that Pinochet was not immune from prosecution) NATO began bombing targets in Yugoslavia, without UN sanction, where the Russian veto stood in the way. The pretext was the aversion of a "*humanitarian disaster*" being inflicted on Kosovan Albanians by their own government. As a justification for the lawful use of force this had a slender basis in Customary International Law.[9]

The British government declared an ambition to rectify this position in the UN. This appears a forlorn hope in the light of a Ministerial Declaration produced by the Foreign Ministers of the Group of 77 produced in New York in September 1999. The opinion of 132 States (including 23 Asian, 53 African, 22 Latin American and 13 Arab States)[10] was that, "*the so-called right of humanitarian intervention … has no basis in the UN Charter or International Law*". This brings to mind a striking passage from Samuel P Huntington's luminary book, "*The Clash of Civilisations, and the remaking of World Order*":[11]

> "The West won the world not by the superiority of its ideas or values but rather by its superiority in applying organised violence. Westerners often forget this fact - non-Westerners never do …"

If a majority of constituents of the UN do not trust NATO sufficiently to give it the mandate to use force to avert genocide, how much less will the West be trusted not to use the prevention of terrorism as an excuse to deploy "*organised violence*" to impose its values on other nations?

The lack of ability of the UN as a means to sanction lawful "*humanitarian intervention*" was in turn reflected by the reaction of the ICJ following Yugoslavia suing 10 Member States of NATO for the bombing in May 1999. In its final decision of 2004 the ICJ decided it had no jurisdiction to determine whether Serbia and Montenegro had a valid claim that the NATO actions were unlawful. As Eric Posner pointed out in his New York Times article,

> "the court was in an unenviable position: If it had held against the NATO States, they would surely have ignored the judgment. By holding in favour of these States, the court showed its irrelevance."

Regrettable as it may be, the ICJ's caseload is down when increased global interaction says it should be up and only half the number of nations that once submitted to its compulsory jurisdiction currently continue to do so. Again as Posner points out, there is too much evidence that the voting of the ICJ judges breaks down along political or (to use a Huntingdon term) "*civilisational*" lines.

It may be, therefore, that the door which the ICJ apparently opened, as a matter of theory, for the Bush doctrine would prove to be a siren call in reality and that by opting out of its compulsory jurisdiction the USA was only shutting the door on an illusion. Certainly the USA has

9 See Brownlie and Apperley, ICLQ 49 (2000) p.878-910.
10 See Brownlie op cit at p.712.
11 Simon & Schuster 1997.

made it plain that it does not want to test the impartiality of the new International Criminal Court and has conducted a highly effective guerrilla campaign of foreign policy to strangle it at birth.

What is clear, therefore, is that the Global Community currently lacks an effective international forum in the UN to effect consensual change in the law and usage of nations concerning warfare. The UN's judicial organ will almost inevitably tend to mirror that reality. If the USA wishes to rescue its foreign policy in general, and the War on Terror in particular from charges of unilateralism it may need to look to the nations that share its concerns (but may mistrust its motives), to join with it in forming a new international forum and a new judicial organ less susceptible to being rendered moot by the new "*civilisational*" economic and cultural fault lines emerging around the globe. Perhaps only then can the use of force to suppress terrorism and the abuse of Human Rights be brought back within the proper embrace of International Law.

V. WAR AND ITS CONSEQUENCES AS THE SUBJECT OF PRIVATE LITIGATION

On the face of it international courts and tribunals are the obvious place for the legality of warfare to be tested and the consequences of the unlawful use of force by States to be addressed. If there are signs that the occurrence and relevance of these issues being litigated are receding in the arena of permanent international fora,[12] one might expect the same thing to be happening in the sphere of municipal courts and tribunals dealing with the claims of private citizens and commercial concerns.

The notion that it is a constitutional heresy for the judiciary of domestic municipal courts to pass judgment on the actions of the executive arm of its own or other States in International affairs, does indeed create formidable obstacles in the way of private citizens seeking redress for the consequences of war in civil litigation. And yet there are some faltering signs of the "*fools*" in municipal courts stepping in where the "*angels*" of the ICJ now begin to fear to tread. The possibility of such a trend emerging can be traced through elements of the judicial (and in the US in particular) legislative approach to issues of Sovereign Immunity, and Act of State in the spheres of Human Rights and expropriation.

VI. SOVEREIGN IMMUNITY AND ACT OF STATE

It is only possible to seize on a few strands of this large subject in this short space.

In the sphere of expropriation, one particular spat between oil companies in the 1970s concerning exploration rights in the Persian Gulf, managed to put down judicial roots on both sides of the Atlantic. This may have marked the high point of the municipal courts refusing to trespass on the arena of State expropriation.

Dr Amand Hammer was a man not known for being afraid to resort to the law courts or speak his mind. When he believed that his Occidental Petroleum Corporation had lost out because he alleged that Buttes Gas had prevailed on the Ruler of Sharjah, with the collusion of the British government, to back-date a decree affecting an oil concession in territorial waters disputed between Sharjah, Umm al Qaiwain and Iran (which was also implicated); much litigation predictably ensued. Resolution of the dispute in the courts could effectively have required a determination of the boundary dispute and the conclusion that the States had acted as conspirators.

In the UK, the judgment of the House of Lords[13] traced the emergence of a principle of "*non-justiciability*" as an off-shoot of the Act of State doctrine through both the English and American courts. It concluded that there was a longstanding principle of English Law, which was inherent in the very nature of the judicial process, that municipal courts would not adjudicate on the transactions of foreign States; that accordingly where such issues were raised in private litigation the Court would exercise judicial restraint and abstain from deciding the issues raised. Since the pleadings raised issues

12 I mention "permanent" to differentiate the special Tribunals established ad hoc for Iran, Iraq and the former Yugoslavia.
13 [1982] AC 888.

(1) requiring the Court to review transactions in which four Sovereign States were concerned and (2) asking it to find at least part of those transactions unlawful under International Law, the issues raised were non-justiciable and incapable of being entertained by the Court.

This decision broadly mirrored the conclusions reached by the Fifth Circuit Court of Appeals and Supreme Court on the opposite side of the pond.[14]

The English Court which had not been informed by the Executive, as had the American Court, that such a deliberation could lead to embarrassment of the Executive in Foreign Relations, laid less emphasis on that issue than the American Courts. It did however, echo the Fifth Circuit Court of Appeals judgment by borrowing its language to say:

> "there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the Court would be in judicial no-man's land: the Court would be asked to review transactions in which four Sovereign States were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under International Law."

The "*Buttes Gas*" principle of non-justiciability really amounts to just one more obstacle piled upon (1) the modern restrictive doctrine of Sovereign Immunity (where even expropriation as a consequence of war is unlikely to come within the exception of commercial activities by a State); and (2) the conventional Act of State doctrine which the Restatement 3rd, Foreign Relations Law records as follows:

> "In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign State of property within its own territory or from sitting in judgment on other acts of a governmental character done by a foreign State in its own territory and applicable there."

That principle was abrogated by Congress adopting the Second Hickenlooper or Sabbatino[15] amendment which provides that:

> "In the absence of a Presidential determination to the contrary, the Act of State doctrine will not be applied in a case involving a claim of title or other right to property, when the claim is based on the assertion that a foreign State confiscated the property in violation of International Law."

Despite this strong steer from Congress the US Courts in the Buttes Gas litigation failed to pick up the ball and allow Dr Hammer to avail himself of the Hickenlooper amendment.

Instead, a chink of light may have appeared once more in the House of Lords[16] where Iraqi Airways Co failed to use the Buttes Gas principle to strike out a claim by Kuwait Airways Corporation after Iraqi Airways had helped itself to the Kuwait civil air fleet under the fig leaf of Saddam's Resolution 369 purporting to authorise that taking.

In its review of the authorities the House of Lords discerned three separate insights which it considered English law was seeking to balance in setting the appropriate role of national courts when faced with a defence of foreign legislative or executive acts. In abbreviated form those insights were:

(i) a prima facie rule of Sovereign Immunity and absolute authority within the State's own territory but not outside it;

14 *Occidental Petroleum Corp. v. Buttes Gas and Oil Co,* 409 US; 93 S. Ct 272; 34L. Ed. 2nd 221 (1972).
15 *Bunio Nacional de Cuba v. Sabbatino* 376 US 398, 428, 84 S.Ct. 923, 940 II L.Ed. 804, 823-824 (1964).
16 *Kuwait Airways Corporation v. Iraqi Airways Co.* [2002] 2 AC 883.

(ii) a requirement for "*judicial or manageable standards*" as a yardstick, combined with a sensitivity to embarrassment in foreign relations - drawing a comparison to the distinction between governmental acts and acts in the commercial sphere under the modern law of Sovereign Immunity; and

(iii) the notion that the requirements of English Public Policy, in particular the preservation of fundamental Human Rights, can override the principle of judicial restraint even where the acts are Sovereign acts within a State's own territory.

These insights do appear at least to crack the door open a little for recompense for expropriation as a consequence of "*unlawful*" war and perhaps significantly more so in the field of fundamental Human Rights, which are also highly likely to be a victim of warfare.

Before turning to Human Rights it is worth noting in passing a recent legislative initiative in the United States which certainly places war-like activities centre stage in mass torts litigation. In 1996 Congress made two amendments to the Foreign Sovereign Immunities Act 1976 (FSIA) which created a jurisdiction against States and a statutory cause of action (at least) against State officials implicated in specified acts of State sponsored terrorism.[17]

On the face of it a detailed analysis of the legislation might well form the centrepiece of a paper on war as tort. On closer scrutiny, however, the legislative initiative seems so tightly hemmed in by executive hostility and judicial restraint that the statute may never give birth to much of wide jurisprudential reach, and appears a peculiarly domestic US affair. It is available only to US citizens against designated States and their officials for death and personal injury. Perhaps the interesting issue at the heart of it is whether State or Federal Common Law should be the genesis of a cause of action to the extent the section creates only a jurisdiction, and what part Customary International Law should play in all of that remains to be seen. This is a debate that has been played out in the context of fundamental Human Rights and a far more venerable legislative curiosity, namely the Alien Tort Claims Act of 1789.

Before we pass to that subject, two other sets of legal developments deserve brief mention which may yet affect the subject of war as tort.

First, the rash of 9/11 related litigation bears witness to the relevance of armed belligerence to tort claims, but has not (to my knowledge) yet percolated to the point of producing any significant new precedents. Secondly, there is now a whole raft of more or less accessible jurisprudence in the awards of ICSID and other Investment Treaty Tribunals who have the brief (and lack the qualms of municipal courts) to award compensation for wrongs allied to egregious acts of State in breach of the Law of Nations. With more than 2000 Bilateral Investment Treaties designed to protect the inflow of capital from one State to another, this has blossomed into a legal industry to the extent that there are signs of a backlash. Developing nations are beginning to suspect that such treaties may attract more liabilities than they do capital. The subject is beyond the scope of this paper and is mentioned for two reasons: first, because of the stark contrast in approach to embracing Public International Law as a calculus to establish private rights compared to what is available in municipal courts; secondly, because the model of a three party panel contrasted to the unwieldy and arguably "*politicised*" ICJ may be a better model for some new international forum to adjudge liability and compensation for unlawful warfare - a thought revisited in the conclusion of this paper.

VII. FUNDAMENTAL HUMAN RIGHTS AND THE ALIEN TORT CLAIMS ACT

24 March 1999 is likely to go down as a red letter day in the history of the march of Human Rights against the forces of State oppression and Sovereign immunity. As the NATO jets headed for Kosovo, the House of Lords prepared to give judgment, for the second time, ruling that

17 FSIA Section 1605(a) 7 and the Flatow amendment - For an in depth discussion see Rutheinne M Deutsch, The International lawyer 2004 Vol.38 No.4 p.891.

former President Pinochet of Chile was not immune from extradition to face charges of having sanctioned torture and other grave abuses of Human Rights whilst Head of State.

Space does not permit an account of the dramatic events of that case or how the UK's highest Court was forced to hear it twice because of the undisclosed affiliations of one of the Law Lords to a Human Rights charity.

The theme evident in the Pinochet case which is relevant to the present discussion is the emerging supremacy of the "*jus cogens*" and its accessibility to national courts.

Jus cogens consists of the peremptory norms of Customary International Law from which there can be no derogation by any State as they are obligations owed to the international community as a whole.[18] Amongst the less controversial examples of *jus cogens* are the prohibitions against genocide and slavery. More pertinent for present purposes, the prohibition of the unlawful use of force in international relations has also been recognised by the ICJ in (yes, you guessed it) *Nicaragua v USA*[19] as being outlawed by *jus cogens*.

The significance of *jus cogens* in municipal courts in a torts context becomes apparent when we turn to the treatment by the Supreme Court of the Alien Tort Claims Act 1789 ("ATCA"). ATCA confers on District Courts "*original jurisdiction over any action for a tort only, committed in violation of the Law of Nations*."

ATCA had languished largely unremarked for nearly two hundred years until the case of *Filartiga v Pena Irala*[20] in 1980. A man had been tortured to death in Paraguay. His family succeeded in suing his alleged torturer when he visited the States, relying on ATCA. A rash of litigation seeking to emulate this ensued. The Supreme Court put the brakes on such litigation in the case of *Sosa v Alvarez Machain*[21] in June 2004 by holding that only the most heinous acts qualifying as breaches of *jus cogens* could qualify as Public International Law claims available to private litigants. US sponsored kidnapping did not make it under this head. The ramifications of a conclusion to the contrary for the pursuit of the War on Terror had weighed heavily on many of the judges along the way. One cannot help but question whether the same reaction would have been engendered if the case had concerned Mexicans sponsoring the kidnap of an American on US soil instead of vice versa.

Nevertheless, it is reasonably plain that the door remains open for ATCA to be a medium for some of the worst manifestations of warfare and the unlawful use of force to be the subject of tort claims in private litigation, at least against the perpetrators of what would count as war crimes even in pursuit of a lawful war.

A much less likely prospect (particularly given the absence of any meaningful international mechanism to adjudicate the legality of a war *per se*) is the chance of any State or State agent being found liable in tort in private litigation for the type of "*organised violence*" towards people and property that is the very business of warfare.

VIII. CONCLUSION

When one compares the developments regarding warfare and its accompaniments in the arena of international justice with the incursions that domestic courts and tribunals have been making on this territory, it seems that the latter are doing rather better.

It is hard not to sympathise with the wish of private victims of terrible actions to find redress. The balance which national courts in the UK and US may be attempting to strike is to compensate the victims of those actions that are at the extremities of warfare and oppression which

18 Barcelona Traction case ICJ Reports (1970)3 at 32.
19 ICJ Reports (1986) 100-1 (para 190).
20 630F.2d 876 (2d Cir. 1980).
21 Supreme Court of the United States No. 03-339, 29 June 2004.

offend the sensibilities of all right thinking peoples, wherever they may take place and without allowing any individual (even a Head of State) to assume the mantle of Sovereign protection to spare themselves from retribution for such acts. The tensions at the limits of these developments are where the judiciary and the executive are trying to keep in check the wish of private citizens to bring the State perpetrators themselves to account. The State sponsored terrorism amendments to the FSIA appear to be a case in point.

It becomes harder to restrain this impetus to seek redress in private litigation instead of international courts when a war, which both the British and American governments of the moment believed was just, appears to have broken outside the limits of the legal regime that the US and UK themselves established, and beyond the reach of either the censure or blessing of the judicial organ which they set up to adjudicate that regime.

If there is no international legal forum in which States can be brought to account then, *faute de mieux*, national courts may look to provide it.

The problem with this is that the history of US courts, in particular, assuming exorbitant jurisdiction has not been a happy one for international relations. For this reason, US judgments remain a less exportable commodity than most of their counterparts in Europe and elsewhere. Even the UK retains legislation specifically crafted to curb the worst excesses of US damages judgments.[22]

The most ardent protagonist of the American way must surely recognise that a Class Action lawyer on a contingent fee, armed with extraterritorial jurisdiction and in pursuit of multiple or punitive damages, is not a safe agent to foster harmony in the global community.

But with so little chance of consensus in the UN, and the increasing impotence of the ICJ, what option can there be?

One alternative model may be the community of international Arbitrators who (with a perhaps alarming lack of checks and balances) are developing a unique expertise in mingling Public and Private International Law to give redress against Nation States to private litigants in the sphere of investment disputes.

There must surely be a sufficient body of, more or less, like minded nations to create a new international institution and subscribe to a new multilateral treaty, specifically directed to the prevention and redress of acts of terror, genocide and oppression. The new international body could have its own accompanying judicial mechanism.

Such a body might even foment a progression in the usage of nations sufficiently widespread to generate new Customary International (as well as conventional) Law capable of giving legal sanction to countermeasures (even extending to the proportionate use of force across national boundaries) aimed at occluding the sources of terrorism and averting the worst abuses of Human Rights. A dispute resolution mechanism to accompany such a treaty and international institution need not be peopled on each occasion by judges drawn from the whole constituent community which would be bound to reflect and be impeded by the cultural and "*civilisational*" fault lines which are forming the new topography of global politics.

Instead, each Nation State party to a dispute could have the right to appoint an arbitrator (perhaps a non-national) with a third arbitrator appointed by agreement between the nominees or, in default by a committee of the international body. A State's right to take proportionate countermeasures to avert terrorism pursuant to norms laid down by the treaty could be left to the State itself, but the decision subject to challenge in an arbitral tribunal with jurisdiction to award redress. Such tribunals could be far more nimble than an unwieldy "*World Court*" and could, multiply if needed. This could readily expand to assume a caseload that might embrace a dramatically increased number of State sponsored private claimants.

22 Protection of Trading Interests Act 1980.

To make that process meaningful an international legal aid fund administered by the international body could be a vital mechanism both to fund eligible victims and to filter applicants, requiring nominal State sponsorship for their claims.

In the real world, however, whilst Mr Blair may have some appetite for these suggestions, it is unlikely that Mr Bush would find them to his liking. Unless and until he develops such an appetite, they will remain a Utopia. Perhaps the two of them should meet like Churchill and Roosevelt, onboard a vessel anchored off Newfoundland, or even here in the magnificent Arizona landscape.