

## WESTPHALIAN PROCEDURE, POST-WESTPHALIAN SUBSTANCE: ALIEN TORTS IN BOLIVIA

Eric Engle\*

In *Mamani et al v. Sánchez de Lozada/Mamani et al v. Sánchez Berzain*<sup>1</sup> the survivors of the murderous suppression of a riot by the Bolivian government bring suit in the U.S. under the Alien Torts Statute (ATS).<sup>2</sup> The cases represent a conflict between Westphalian and post-Westphalian international law. Under the Westphalian system, the general principle of non-intervention,<sup>3</sup> as well as the principle of sovereign equality,<sup>4</sup> prohibited any state from interfering in the internal affairs of any other state: *Mamani* would have no legal remedy before a U.S. court. In contrast, in the post-Westphalian system, states are subject to universal non-derogable duties—*jus cogens*.<sup>5</sup> Human rights, protected as *jus cogens*, and the expansion of universal jurisdiction to enforce them mark post-Westphalian international law.<sup>6</sup>

This normative conflict is resolved by seeing it in terms of substance versus procedure: *Procedurally*, the Westphalian system's rules condition the *substantive* post-Westphalian claims. So, issues such as comity (a discretionary doctrine),<sup>7</sup> the act of

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\* Professor of Law, Pericles-ABLE LLM Program, Moscow, Russian Federation. E-mail: <EEngle@pericles.ru>.

1. The pleadings in *Mamani* are available at <<http://ccrjustice.org/ourcases/current-cases/mamani,-et-al.-v.-s%C3%A1nchez-de-lozada/-mamani,-et-al.-v.-s%C3%A1nchez-berzain>>.

2. 28 USC 1350, available at <<http://www4.law.cornell.edu/uscode/28/1350.notes.html>>

3. See, e.g., Mark Rothert, *On Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257 (2000), at 262.

4. See, S.S. Lotus (*Fr. v. Turk*), 1927 P.C.I.J. (ser. A) No. 8, 4, 32 (Sept. 7) (Rejecting France's contention that the Turkish criminal proceedings against Lt. Demons, the officer on watch on the Lotus during the collision with the Boz-Kourt, violated international law principles of sovereign equality), available at <[http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus/](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/)>.

5. A *jus cogens* norm is "a norm accepted and recognized by the international community of states as whole from which no derogation permitted can be modified only subsequent general law having same character." See, *Siderman de Blake v. Republic of Argentina*, 965 f.2d 699, 714 (9th cir. 1992) (Quoting Vienna Convention on Treaties, art. 53, May 23, 1969, 1155 UNTS 332, 8 ILM 679).

6. See E.A. Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QLR 23 (2004), available at SSRN: <<http://ssrn.com/abstract=1020475>>.

7. *Sabbatino*, 376 U.S. 408-409 (stating that "principles of comity governing this country's relations with other nations, sovereign states and [sic] allowed to sue in the courts of the United States). See also, *Hilton* 159 U.S. 163 (calling neither a matter of absolute obligation, on one hand, nor mere courtesy good will, upon other).

state doctrine, and jurisdiction<sup>8</sup> are governed by Westphalian concepts such as the general principles of non-intervention and sovereign equality<sup>9</sup>—including, at least currently, the doctrines of sovereign immunity and official immunity (which may apply even as to violations of *jus cogens*). Over the next decades one can expect immunity as a ground for exculpation to decline, as it has in other fields of tort law.

In contrast to the realist Westphalian procedural rules, the post-Westphalian universal rights such as the right to one's own life<sup>10</sup> govern substantive claims. The substantive (post Westphalian) rights are reached only after the exhaustion of domestic remedies (like comity, a discretionary doctrine), the finding of (universal) jurisdiction (over acts which violate *jus cogens*), and overcoming the burden of sovereign and/or official immunity (which ought not to apply for violations of *jus cogens*)—we must attack the Westphalian procedural obstacle course in order to reach the post-Westphalian substantive prize: real protection of basic human rights. Each procedural obstacle is challenging, yet can be overcome, but any of the procedural obstacles to an ATS claim can block finding a remedy for the plaintiffs. The fact of procedural manipulability in ATS cases is consistent with the legal realists' position, that law is sufficiently flexible as to allow judges to plausibly reach any outcome they desire.

Under the Westphalian system, the substantive claims in *Mamani* would never have been cognizable. First, the sovereign acted in his sovereign capacity and thus would be immune. Second, the general principle of non-intervention would have prohibited any state from making any legal claim to a transaction within the territory of another sovereign except as to its own citizens. Third, individuals were mere objects not subjects of international law with no directly enforceable rights. Today however, the substantive claim is admissible: exceptionally, individuals have directly applicable rights and duties under international law certainly in the context of *jus cogens* rights and also where international treaties expressly or implicitly are self executing (i.e. directly effective). Substantively, the question in *Mamani* is whether the deadly suppression of a political protest can constitute a crime against humanity; to which the answer must be yes.<sup>11</sup> Whether the suppression of this particular uprising qualifies as a crime against

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8. See generally, Eric Engle, *The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. INT'L L. & DISPUTE RES. 1 (2006), available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1020512](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020512)>.

9. No state may impose its will on any other sovereign state. See, S.S. Lotus (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

10. *Prosecutor v. Blaskic*, Appeals Judgment, No. IT-95-14-A, 143, 147-49, 152, 156-59 (July 29, 2004), available at <<http://www2.ohchr.org/english/law/ccpr.htm>>.

11. Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg Trials in 1944. See, *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003); see also *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179-80

humanity depends on the facts of this case. Since the court could choose to adjudicate on the merits, we examine the legal rights at issue in detail.

International law and U.S. law alike<sup>12</sup> recognize claims for crimes against humanity due to extrajudicial killings.<sup>13</sup> A claim for a crime against humanity in the case of extrajudicial killings must prove two elements: first, “a *widespread* or *systematic* attack directed against any civilian population, with knowledge of the attack.”<sup>14</sup> A *widespread* attack is “conducted on a large scale against many people.”<sup>15</sup> U.S. Courts have recognized crimes against humanity even with fewer than 100 victims.<sup>16</sup> In *Cabello*, the Eleventh Circuit upheld a finding of crimes against humanity involving the killing of approximately 72 people.<sup>17</sup> In *Hurtado*, this court issued a default judgment for crimes against humanity for an attack in which 60 people were killed.<sup>18</sup> A *systematic* attack in contrast reflects “a high degree of orchestration and methodical planning.”<sup>19</sup> The distinction appears to be: number of bodies (*widespread*) and whether an identifiable class of persons was deliberately targeted for killing (*systematic*). Notice also that it is in the alternative: either *systematic or widespread* extrajudicial killing is a violation of the fundamental human right to life. The facts in *Mamani* appear to meet either criterion.

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(C.D. Cal. 2005).

12. *Cabello*, 402 F.3d at 1157–58; *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002) (extrajudicial killing).

13. <<http://www.worldlii.org/int/cases/IACHR/2001/5.html>>; *Cabello*, 402 F.3d at 1154; *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 278 (E.D.N.Y. 2007); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153–54 (E.D. Cal. 2004); *Estamirov v. Russia*, 46 Eur. Ct. H.R. 33, ¶¶ 111–14 (2006); *Barrios Altos Case*, Judgment of March 14, 2001, Inter-Am. C.H.R. (Ser. C) No. 75 (summary execution a violation of international right to life).

14. Statute of the International Criminal Court, § 7(1)(a), available at <[http://www.c-fam.org/docLib/20080625\\_Rome\\_Statutes\\_Criminal\\_Ct.pdf](http://www.c-fam.org/docLib/20080625_Rome_Statutes_Criminal_Ct.pdf)>; *See also*, *Cabello*, 402 F.3d at 1161 (“To prove the claim of crimes against humanity, the Cabello survivors had to prove a *widespread* or *systematic* attack directed against any civilian population.”). Though the U.S. has not (yet) ratified its adhesion to the Rome Statute, that treaty is evidence of international customary law.

15. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479–80 (S.D.N.Y. 2005); *Aldana*, 305 F. Supp. 2d at 1300 (defining a *widespread* attack as a “frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims”), available at <<http://caselaw.findlaw.com/data2/circs/2nd/070016p.pdf>>

16. <<http://openjurist.org/402/f3d/1148/cabello-v-fernandez-larios>>

17. 402 F.3d at 1152, 1161.

18. No. CA 07-21783, at 2; *see also* *Mujica*, 381 F. Supp. 2d at 1169, 1183 (crimes against humanity involving 17 deaths). *But see*, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, ¶ 362, available at 2000 WL33348765 and at <<http://www.unhcr.org/refworld/publisher,ICTR,,,48abd5791a,0.html>> (Jan. 27, 2000).

19. *Prosecutor v. Limaj*, No. ICTY-03-66-T, Judgment, ¶ 183 (Nov. 30, 2005) [available at 2005 WL 3746053] and at <<http://www.unhcr.org/refworld/publisher,ICTY,,,48ac19112,0.html>>

Substantively then, the case presents a valid claim of a violation of the right to life. However, even if the litigants overcome the procedural obstacles (jurisdiction, comity, the act of state doctrine, immunity) they must still meet other U.S. prudential documents which could well preclude liability for what is, in Westphalian terms is a “purely internal affair” a “political” not “legal” issue. Since *Alvarez-Machain v. United States and Alvarez-Machain v. Sosa*,<sup>20</sup> it is clear that ATS claims based on customary international law must rest on clear and certain rules – *lex lata*, not *de lege ferenda*. Thus “in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.”<sup>21</sup> So, *Flores* concluded that the alleged prohibition on “intranational pollution” and “rights to life and health [were] insufficiently definite to constitute rules<sup>22</sup> of customary international law.” In sum: ATS claims must assert a ‘clear and unambiguous’ rule of customary international law”).<sup>23</sup>

Likewise, since *Sosa* it is clear that the requirement of exhaustion of local remedies is a strict one.<sup>24</sup> Lower courts have made clear that exhaustion is a serious obstacle to ATS Claims: “Although we decline to impose an absolute requirement of exhaustion in ATS cases, we conclude that, as a threshold matter, certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law. Where the “nexus” to the United States is weak, courts should carefully consider the question of exhaustion, particularly, but not exclusively, with respect to claims that do not involve matters of “universal concern.” Matters of “universal concern” are offenses “for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders.”<sup>25</sup> ATS may be

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20. See generally, Eric Allen Engle, *Alvarez-Machain v. United States and Alvarez-Machain v. Sosa: The Brooding Omnipresence of Natural Law*, 13 WILLAMETTE J. INT'L L. & DISPUTE RES. (2005), available at SSRN: <http://ssrn.com/abstract=1020514>.

21. *Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir.1995).

22. *Flores v. Southern Peru Copper Corporation* 414 F.3d 233, 254-255; *Flores*, 343 F.3d at 160, available at <<http://openjurist.org/414/f3d/233/flores-v-southern-peru-copper-corporation>> (holding that “the asserted ‘right to life’ and ‘right to health’ are insufficiently definite to constitute rules of customary international law”).

23. *Beanal v. Freeport-McMoran*, 197 F.3d 161, 167 (5th Cir.1999) (stating that customary international law cannot be established by reference to “abstract rights and liberties devoid of articulable or discernable standards and regulations”).

24. *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739 (“[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

25. *Sarei v. Rio Tinto*, PLC 550 F.3d 822 C.A.9 (Cal.), 2008, available online at <[http://ca.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%5CC09%5C2008%5C20081216\\_0005649.C09.htm/](http://ca.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%5CC09%5C2008%5C20081216_0005649.C09.htm/)> and citing 825 *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir.1995) (citing Restatement (Third) Foreign Relations Law of the United States § 404 (1987)).

invoked as to any tort, not merely *jus cogens* violations though the *jus cogens* torts have a procedural advantage with respect to the procedural limits on the ATS remedy.

Thus, in *Mamani*, I argue that plaintiffs should base their claim against extrajudicial killing on the Torture Victims Protection Act as well as the ATS. “A TVPA claim requires the following three elements: (1) an individual (2) committed torture or extrajudicial killing (3) under actual or apparent authority, or colour of law, of any foreign nation.”<sup>26</sup> On the merits, a TVPA claim would likely succeed due to specific legislative enumeration of the substantive claim, as opposed to an uncertain claim on customary international law.

*Mamani* presents *theoretically* good substantive claims under international law which *could* be remedied under the ATS or TVPA.<sup>27</sup> The question is, whether and how the U.S. government will react to these claims. I argue that a vigorous enforcement of international human rights, particularly of *jus cogens* rights, via the ATS and TVPA will prove key in restoring the U.S. to its rightful role as a leader in the struggle for human rights and freedoms.

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26. *Sinaltrainal v. Coca-Cola Co.* 578 F.3d 1252, 1265 C.A.11 (Fla., 2009), citing 28 U.S.C. § 1350 note § 2(a).

27. See, <<http://www.haguejusticeportal.net/eCache/DEF/10/034.html>> (for the legal papers on *Mamani*).