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Introduction to Torture as Tort: From Sudan to Canada to Somalia

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Introduction to Torture as Tort: From Sudan to Canada to Somalia

CRAIG SCOTT

1 BEGINNINGS

The present volume began in a somewhat unusual way in the winter of 1998. Members of the Sudanese community living in exile outside Sudan approached me to ask about possible avenues within Canada for seeking justice against two members of the Cabinet of the Government of Sudan. Both men were also said to be Canadian citizens, their citizenship having been acquired following time spent as graduate students in Canada. One avenue was to alert the Federal Government of Canada about the possibility that criminal proceedings might need to be considered on the basis of crimes in Canada’s Criminal Code which attract universal jurisdiction. The other avenue that needed to be explored was that of bringing a civil action in Canadian courts against either man, and possibly against the state of Sudan itself, for human-rights-violating conduct in Sudan.

As with most international lawyers who work in the human rights field, I was familiar with the unique phenomenon of transnational human rights litigation that has been developed in United States federal courts since the time of the precedent-setting Filártiga case brought under the Alien Tort Claims Act (ATCA).

Bracketing for the moment the desirability of this paradigm of human rights protection, it seemed clear that a thorough study needed to be done of the myriad issues that arise in such actions in order to assess the potential for such an action to be brought successfully in Canada. The question of employing

1 Osgoode Hall Law School of York University, Toronto
2 Filártiga v. Peña-Irala, 630 F 2d 876 (CA, 2d Cir. 1980). The case involved a tort action brought in US courts against a former Paraguayan police officer by the family of a Paraguayan who had died under torture in police custody in Paraguay. Alien Tort Claims Act (of 1789), 28 USC §1350, (“ATCA”) since supplemented by the Torture Victim Protection Act, also consolidated at 28 USC §1350 (“TVPA”).
3 Only two cases seem to have been brought in Commonwealth courts where the underlying conduct of the alleged tort was torture in another country, and neither case proceeded on the basis of the human right not to be tortured as being the direct cause of action: Abukar Arone Rage and Dahabo Omar Samow by their Litigation Guardian Abdullahi Godah Barre v. Canada (Attorney General) (Unreported, 6 July 1999, Ontario Superior Court of Justice, Cunningham J.); Al-Adsani v. Government of Kuwait and Others (1996) 107 ILR 536 (Eng., CA).
“private law” to vindicate “public law” norms is an approach that has met no small degree of judicial resistance in Canada with respect to Canada’s own public law human rights norms. The doctrinal and theoretical issues involved with bringing the public international law of human rights into Canadian law through tort law would present at least as many hurdles—and likely more.

At the time I was teaching at the University of Toronto Faculty of Law. It so happened that I was approached with the Sudan query just as winter term was beginning. While I was not teaching a course from which I could draw students, a colleague was. Robert Howse (now of the University of Michigan) was teaching a course called International Law II (Private International Law) and readily agreed to permit a team of LL.B. students to work with me, for credit, on the various “interface” issues that linked conflict of laws to the question of transnational human rights torts.

The papers produced by the end of that term were of such a quality and undoubted value that I felt it was important that this work see the light of day in some academic venue. We had the beginnings of this book. But, it seemed myopic to limit the catchment area to Canada and, so, the book project evolved into an effort to bring together a group of non-American scholars to reflect on a variety of dimensions of the American phenomenon. At the most general level, the animating question for any given author was whether such human-rights-based actions were either already possible in other legal systems, primarily Commonwealth common law jurisdictions, or, whether or not possible, desirable. In this collaboration, the papers of the student research team became “foundation papers” for the scholars who agreed to contribute to the volume.

The original hope was that the foundation papers would help pave the way for several scholars from fields other than public or private international law, most notably tort theorists (both common law and civilian), to feel sufficiently comfortable with the issues to agree to contribute. In the end, this ideal proved premature as a significant proportion of the private law theorists approached to contribute were not actively working on the nexus of tort law with public law values. While generally intrigued by the subject, most were reluctant to dive into what seemed to them a normative minefield given that comparative law, private international law, public international law, and constitutional law—and not tort law—were the prevailing discourses in the literature generated in the United States around the ATCA phenomenon. To a few others, the inquiry of the planned volume seemed like much ado about nothing; either because tort law exists by definition in some near-pure non-national space or because moral rights were seen as so clearly the foundation of tort law no less than “human rights law”, these tort scholars tended to see any barriers to being able to sue for personal injury caused by torture wherever conducted in the world as merely

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4 See the discussions on this point in Hyland, infra note 33, and Raponi, infra note 32.
5 These foundation papers have evolved into chapters in this volume: see Swan, infra note 17; McConville, infra note 21; Orange, infra note 28; Bühler, infra note 31; Raponi, infra note 32; Hyland, infra note 33; and Flah (going on to co-author with Oosterveld), infra note 34.
Introduction

“jurisdictional” or “procedural”—and thus conceptually uninteresting from a substantive tort law perspective. As such, the initial ambition that this book would include not just the comparative perspectives of private and public international lawyers from different national and legal backgrounds but also the analysis of a wide range of “domestic” tort scholars has had to be postponed. That said, the central objective of the book remains unchanged: to generate analysis, debate and dialogue in policy and academic communities, both national and transnational, over the question of the feasibility and legitimacy of transnational human rights litigation. It is very much hoped that tort theorists, both civilian and common law, will find in this book something to sink their teeth into by way of both specific response and their own future work.

Undoubtedly such consideration will either dovetail with, or parallel, much of the debate generated by the recent *Pinochet* case, discussed by a number of authors in this volume. A case primarily about universal jurisdiction in the criminal law sphere (and immunity therefrom), *Pinochet* resulted in general objections to universal justice through the vehicle of foreign courts, reflecting concerns that will almost certainly resurface should the US model begin to be taken up by courts and legislatures in other states.

6 A third group were keen to contribute, but could not free up the time to be able to make a commitment.

7 And including in the United States itself where a volume devoted to “external” scrutiny of an American phenomenon may well help clarify or redirect analysis.

8 This is not to say that tort theory is absent from the volume; indeed, the book closes with chapters by two leading younger-generation tort theorists, one from both sides of the Atlantic with one from a common law system and the other from a civil law system. See Moran and Gerstenberg, infra notes 49 and 51, respectively, and further mention, infra, this chapter. It is hoped—even expected—that the discussions of judicial and scholarly discourse found in the Moran and Gerstenberg chapters will provide the bridge to tort theory. Note also the engagement with the foundations of tort law in the Raponi and Hyland chapters, infra notes 32 and 33, respectively, as well as less extensive and more indirect discussions in a good number of the other chapters. And note that Gerstenberg’s chapter, the final in the book, will additionally provide an entry-point for civilian law scholars whether they be public or private lawyers.

9 See especially the final of three House of Lords decisions: Regina v. Bartle and the Commissioner of Police for the Metropolis and others, ex parte Pinochet (No. 3), [1999] 2 All ER 97; also (1999) 39 ILM 581.

10 In the criminal law context, the clear legal duty to exercise universal jurisdiction, and not just the power to do so, meant that many of the objections made in the Pinochet affair were objections on grounds of legitimacy and not, or less so, objections on grounds of legality: for a discussion of the undesirability of British and Spanish courts trying Pinochet, see the nuanced article co-authored by Ricardo Lagos, the opponent of Pinochet who was elected as President of Chile while Pinochet was still under house detention in the UK; see R Lagos and H Muñoz, “The Pinochet Dilemma,” (1999) Foreign Policy 26. On the interaction of international criminal law and transnational civil law, it is interesting to note that one of the subjects of the original Sudan query has declined to come to Canada because of leaks that let it be known that the War Crimes Unit of the Canadian Department of Justice was actively investigating allegations of his involvement in a range of practices in the Sudan, including torture and slavery. While arrest in and extradition from a third country remain a possibility, especially should the current Sudanese regime fall, the ability to avoid criminal law prosecution in common law countries (where jurisdiction over the person requires the physical presence of the accused before criminal proceedings can move forward) points to the possible role of civil law remedies as filling the breach when criminal law is stymied. This is because courts can sometimes assume jurisdiction over civil suits by permitting service of process on a defendant who
Several final observations should be made. First of all, the present volume does not hold itself out as exhaustively covering every issue relevant even from standard public international or private international disciplinary perspectives. While the volume’s coverage of issues does border on the comprehensive, there are some matters that do not receive sustained scrutiny, for example diplomatic immunity. Secondly, the main title of the book—*Torture as Tort*—warrants comment. In order to provide a focus and also in order to make a meaningful contribution to the literature on the protection of one of the key human rights, the prohibition of torture was selected as both a focus and as an exemplar for other core human rights. By virtue of that choice, many of the concrete discussions in the book necessarily relate to the specificities of the emerging law on torture as set out primarily in the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). That being said, it is expected that the bulk of the discussion will be relevant to all norms that are plausibly characterizable as *jus cogens* (peremptory) norms of international human rights law and not simply relevant to rules and principles applicable to torture. However, readers should be aware that, even with respect to a “single” norm such as the prohibition on torture or the illegality of slavery, there are a range of factors that can affect determinations on both jurisdiction and applicable law: (a) different actors in terms of kind and degree of connection to the territorial jurisdiction of the court; (b) different kinds of conduct, including acts and omissions; and (c) different degrees of severity of infringement of the relevant norms. These and other variables may have considerable relevance to the persuasiveness of the justifications, both legal and philosophical, for a given transnational human rights action.

The primary purpose of the remainder of this Introduction is to provide an overview sense of the topics covered and arguments developed in the 25 chapters that follow the present one. The title of each sub-section corresponds to that of each Part in the book. Once this narrative is completed, an additional sub-section seeks to place the normative vistas opened up by the volume’s chapters into a concrete context. Sub-section 7 takes the opportunity to comment on some of the problems with the reasoning of the judge of first instance in the first tort case to come before a Canadian court that involves allegations of torture in another country, *Arone v. Canada*. is outside the jurisdiction and proceed to hear the case even if that person refuses to take part in the trial: see, *inter alia*, Terry, *infra* note 18, on the relative virtues of criminal law and civil law as avenues to vindicate human rights and McConville, *infra* note 21, on the conditions for *ex juris* service.


12 Including the more severe end of the adjunct right, that of the prohibition of “cruel, inhuman or degrading treatment or punishment” that does not amount to “torture.”

13 *Arone*, *supra* note 3.
The team of contributors who prepared this volume’s foundation papers were asked to approach their slice of the questions surrounding transnational human rights litigation by having regard to the conceptual barriers existing theories and legal doctrine may create to the reception of international human rights norms into domestic legal processes as the foundation of civil law causes of action. What does it take for (internationally-prohibited) torture to be transformed into (domestically-sanctioned) tort? A series of dichotomies that structure juridical thinking to varying degrees—such as those between public law and private law, between international law and domestic law, between “horizontal” application of human rights norms and “vertical” application, between public international law and private international law, between the power to regulate and the duty to regulate, and so on—were treated as “problems of translation” between legal categories and fields. In order to provide the reader of the present volume with a frame of reference for understanding the degrees of normative resistance that may exist to the translation of torture norms into tort norms, the second chapter by the present editor provides a kind of narrative of the translation issues, ending by borrowing from the literary context to suggest a notion of “mutual translation” as the best way to understand the negotiation of the space between torture and tort.\(^\text{14}\) Chapter 2 situates its otherwise-abstract discussion in a concrete focus on the accountability of a particular kind of non-state actor, the corporation and especially the multinational corporation.\(^\text{15}\) As such, this chapter seeks to make an independent contribution to the evolving analysis of human rights obligations of transnational corporations as well as to provide a lead-in to three further chapters in the volume which focus on civil law remedies against corporations, those by Upendra Baxi, Robert Wai, and Muthu Sornarajah.\(^\text{16}\)

Having thus set up some of the conceptual debates that surround treating torture as tort, Part I of the volume moves on to an overview study by Michael Swan who surveys the state of play in the United States with respect to how US courts have handled claims grounded in international human rights norms.\(^\text{17}\) For those readers unfamiliar with the experience to date under the 18th-century ATCA and the modern Torture Victim Protection Act (TVPA), the Swan chapter is an essential primer. Its intended audience is non-American, with its


\(^{15}\) Use of the corporate accountability context has the additional benefit of helping make clear that the field of transnational human rights litigation need not be an all-or-nothing question of “pure” universal civil jurisdiction—that is, foreign nationals suing foreign nationals for human rights violations that occurred in a country other than that of the court asked to hear the case—but can also be one way of conceptualising a special form of civil law accountability of nationals for their conduct abroad.

\(^{16}\) Baxi, infra note 23; Wai, infra note 24; and Sornarajah, infra note 37.

selection of topics, introductory nature and overall organisation being designed to help set the scene for references to the US phenomenon by various authors in their chapters.

With these two framework chapters in place, Part I ends with a pair of pieces containing contrasting, although not firmly opposed, perspectives on the role of tort law in protecting international human rights. John Terry discusses tort claims as “third country legal actions” that can play an integral role in providing remedies for conduct that violates international human rights law. In arguing for the special virtues of the tort remedy (and the availability of this remedy in most common law jurisdictions without further need for legislative intervention), he makes a case for its superiority to universal criminal law enforcement in important respects. In the course of making this case, he points out, *inter alia*, that civil actions may provide important symbolic victories even if actual compensation is unlikely and that civil law gives a special voice to actual victims of human rights harms in a world where states’ interests in pursuing criminal law prosecutions is hedged and sporadic. In terms of the translation question, Terry also makes an argument for doctrinal continuity and moderation when he says that existing domestic tort law and private international law are adequate for vindicating international human rights values without necessarily needing to go the next step and make human rights and associated universal jurisdiction the direct bases for the civil actions in question. A special contribution of the Terry chapter is its discussion of the action brought against Canada by the family of a young Somali man, Shidane Arone, for Arone’s torture-death in Somalia at the hands of Canadian soldiers operating under the auspices of a UN military mission.

Malcolm Evans and Rod Morgan are less convinced about the ability of transnational tort actions to effectively contribute to the eradication of the practice of torture. While accepting the compensatory goals of tort law, the authors see tort actions as involving *de facto* punishment objectives as much as restitutionary ones. As such, a universal civil law remedy is seen as part and parcel of an after-the-fact legal approach that it shares with criminal law prosecution, a reactive approach they contrast to a focus on prevention. Of course, each area of individual legal accountability, civil liability and criminal responsibility, have as part of its rationale the deterrence of future—both specific and general deterrence. However, it is here that Evans and Morgan make the case for a pride of place to be accorded to preventive mechanisms and then explain why the positive aspects of civil redress need to be carefully considered alongside the potential for civil liability before foreign courts to actually undermine preventive mechanisms. By drawing on the extensive experience of the European Committee on the Prevention of Torture, Evans and Morgan suggest how it is

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19 *Arone*, supra note 3.
that an increased risk of legal action may result in increased secrecy and unwillingness for state officials to cooperate with international prevention-oriented processes. While acknowledging that a nuanced approach that harmonizes transnational tort actions and international preventive mechanisms may be possible, Evans and Morgan conclude that it would be a mistake to proceed as if there is not, at present, a tension between the two approaches to protection against torture.

3 JURISDICTION AND IMMUNITY

In standard private international analysis, the first question one must ask is whether a court before which a claim has been brought may, or even must, hear the claim, and then whether a court having jurisdiction may decline to exercise it. The chapters in Part II deal with that question in several dimensions.

Anne McConville comprehensively examines how principles of private international law interact with principles of public international law within Canada’s current combined statutory and common law framework for the assumption of jurisdiction by courts in tort cases which have a foreign element. Her specific focus is Ontario which is Canada’s largest jurisdiction.21 Much of the Ontario jurisdictional framework is identical or similar to that prevailing in other non-American common law jurisdictions, such that her survey and analysis of the Ontario state of affairs will have a broader relevance. She concludes that these rules provide sufficient scope for plaintiffs resident in Ontario to bring transnational human rights actions, but takes the view that a territory-centred and comity-oriented theory of private international law structures the Supreme Court of Canada’s “new” conflicts jurisprudence to such an extent that there may be considerable judicial resistance to reading the existing rules in a facilitative way.22 Especially important is the case McConville makes on three fronts for how public international law should inform the “domestic” interpretation of jurisdictional principles in a conflict of laws situation. First of all, she notes that the residual power of Ontario judges to grant leave for ex juris service (service outside of a jurisdiction, here Ontario) can dovetail with the universal prescriptive jurisdiction that adheres to the most fundamental human rights norms protected by international law. Secondly, she outlines the way in which the doctrine of forum non conveniens (according to which judges may decline to exercise a jurisdiction they otherwise have) shares rationales with the doctrine of exhaustion of local remedies, a procedural condition for individuals to access


22 The focus on an Ontario resident is less in terms of this being a formal condition for assumption of jurisdiction and more in terms of it being an important factor when judges have to decide whether to stay proceedings on grounds of forum non conveniens in those cases where this doctrine is applicable (i.e. where justice can be done in a foreign court system).
international human rights mechanisms through individual petitions claiming rights violations by their states. By drawing on the extensive international jurisprudence as to when local remedies are both existing and effective, courts in transnational court cases have a solid doctrinal basis, as well as greater legitimacy, in finding that a foreign court system does not get over the threshold in *forum non conveniens* analysis of showing there is an alternative forum capable of dispensing justice. And thirdly, she notes the especially powerful claim supporting Canadian courts taking jurisdiction based on the Canadian nationality of the perpetrator of the alleged human rights violations. Quite apart from universal jurisdiction— whereby any person can come to Canada and sue any other person for violation of certain human rights norms wherever committed—there arises the question of the special onus on home states to have their courts hear human-rights-based torts brought either against the state itself or the state’s nationals.

Upendra Baxi’s discussion picks up on this question of the special place of nationality jurisdiction by focussing on those nationals whose activities abroad present the most pressing need for access to justice for victims of human rights abuses, namely corporations. The Baxi chapter offers a stinging critique of the stasis and myopia that dominates the academy, and the judiciary, in the private international law realm. Beyond his general account of the non-receptivity of much of conflict of laws to human rights values, he picks up on McConville’s detailed discussion of the availability of the *forum non conveniens* doctrine to defendants seeking to have cases removed from the jurisdiction of Canadian courts. Drawing on extensive previous work on the invocation of *forum non conveniens* by multinational corporations in transnational litigation, from the Bhopal mass deaths in the mid-1980s through various cases in the 1990s, Baxi discusses *forum non conveniens* doctrine, especially American doctrine, in terms of the role it can, and often does, play in upholding a dehumanising form of capitalism according to which the risk of harms caused by corporate activities is borne by Southern societies least equipped, from a regulatory and legal-system perspective, to prevent and seek compensation for those harms. One important reason *forum non conveniens* doctrine is so susceptible to being employed to remove human-rights-related suits against MNCs from Northern courts is the ease with which judges in home states of MNCs persist in thinking in highly parochial terms about whether the home state has an interest in being the venue for global justice against its national MNCs. In contrast, Baxi makes the case for aligning *forum non conveniens* doctrine with an ethical discourse of home state (and home society) responsibility to provide judicial forums for

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23 U Baxi, “Geographies of Injustice: Human Rights at the Altar of Convenience,” chapter 7. Note that, whatever the nature of disparate holdings and global activities, Baxi implicitly works from the premise that multinational corporations still have, and will continue to have, home states or, indeed, sometimes several home states if we consider not only the state of formal nationality of the parent company but also those states whose communities benefit from the externalisation of costs of a corporation’s global activities.
claims brought against MNCs. Yet, Baxi’s analysis hovers between the view that human rights discourse can produce some kind of “redemptive transformation” of private international law and the concern that it is a field of law that has proven to be remarkably impervious to making ethical discourse part of its own being.

Baxi’s analysis of how the political economy of private international law resists transnational corporate accountability for human rights violations dovetails with the chapter by Robert Wai who examines immunity from jurisdiction, a doctrine which lies at the intersection of public and private international law.24 The starting-point for his discussion is the fact that domestic legislation invariably treats foreign states as generally immune from suit in courts of other states. This includes, on the face of most statutes, an immunity from suit for personal injury or death torts if such torts occur outside the state where the court in question is located. In contrast to this situation regarding torts, states do not benefit from immunity where a suit relates to “commercial activity” of the state or its agents. Wai’s point of departure then is the sharp distinction drawn in the law of state immunity between commercial and non-commercial activity, with his purpose being to lay bare and query both the policy justifications for such a distinction and the ideologies of (global) political economy that underpin immunity doctrine. Two questions may be asked in this respect. First of all, why should commercial claims be treated more favourably than claims relating to personal harm, especially when the harm is also characterizable as a human rights violation? Secondly, may not the commercial activity exception provide at least one normative opening for the civil liability of foreign states to the extent that there is increasing recognition (and perhaps also incidence) of human rights violations which occurring in the course of, or in support of, commercial ventures in which states are either the sole actor, a joint partner, or a closely-involved regulator?25 In approaching these questions, Wai demonstrates that the preferential treatment of plaintiffs suing states with respect to “commercial activity” is grounded in understandings about state consent stemming from contract law’s imbrication in commercial matters as well as theories of the international co-operative benefit achieved in transnational economic relations. He reveals those premises to be ideological constructs which do not support the commercial/non-commercial distinction. However, in so doing, he is careful to be sceptical about the view that the appropriate response (whether through legislation or judicial interpretation) is to equalize the situation by removing immunity for human rights torts as well as commercial claims. Instead, the incoherence of the distinction points to the need to revisit the purpose of immunity more generally and, in the process, take a hard look at whether removal of

25 Here, the record of the failure to employ this exception in a human-rights-oriented way offers further evidence of Baxi’s thesis of the pervasive impact of political economy and judicial ideology on the actual workings of private international law.
immunity contributes to a problematic form of legalism centred on court-based adjudication—a form of legalism which, when internationalised, tends to harness itself to a broader substantive agenda of international neoliberalism pushing for more and more delegitimation of an active state. Could the removal of state immunity for the most egregious kinds of human rights violations become the opening for a broader human-rights-validated neoimperialism in which not just economic but also social and political regulation become the concern of foreign courts when they should, rather, be left to the domestic processes of state-communities around the world?

Wendy Adams’ chapter represents an interesting spin on this question of national self-determination as it relates to the operation of state immunity doctrine in transnational litigation. Adams’ task is to analyse how the assumed *jus cogens* (peremptory law) status of the international prohibition of torture should interact with the law of state immunity as set out in states’ immunity statutes. In the result, the key doctrinal question is: should domestic court judges read an implied exception into immunity statutes such that foreign states are not immune from suits grounded in violations of *jus cogens* norms, in statutory contexts where it is clear the legislature specifically provided for some exceptions (such as the commercial exception) but not this one? In answering this question, Adams argues that two theories of legitimacy are needed in order to provide a baseline for understanding how activist domestic judges in Westminster systems should be, a theory justifying one state’s courts judging other states for the latter states’ conduct within their own borders and a theory of the proper role of judges versus legislatures in taking initiatives in the name of international law. Precisely because of the interventionist nature of an immunity-disregarding interpretation based on domestic law reception of *jus cogens* norms, Adams reasons that the lack of clear legislative authorization speaks against judges forging such an exception to immunity. When this reason is combined with her view of the limits, in Canadian jurisprudence, of the principle that statutes should be interpreted in conformity with international law (here, in relation to what normative use can be made of the Convention against Torture), Adams concludes that it is up to the legislatures of Canada, and those of other Commonwealth jurisdictions, to reconcile the various tensions in play by amending immunity statutes to allow for foreign states to be sued for violations of *jus cogens* norms.

Peter Burns and Sean McBurney tackle the issue of jurisdictional bars to civil suits for torture in terms of whether a state violates the Convention against Torture by refusing to either extradite or prosecute a person accused of torture (for whom there is adequate evidence of guilt) on grounds of either immunity under international law or national amnesty having been granted by the state where the torture occurred. They present their analysis as applying, in all sub-

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stantial respects, to the issue of civil liability as well as criminal responsibility but choose to the focus on the latter due to the more developed body of doctrine and jurisprudence generated to date with respect to torture protection through
criminal law mechanisms.\textsuperscript{27} In general terms, their answer is that failure to bring an accused torturer to justice for either reason is a breach of CAT and, as such, amounts to granting (illicit) impunity to torturers; the fact that the CAT does not expressly rule out immunity is argued not to preclude such a prohibition as a necessary implication of the treaty, read in light of parallel international law. Working as they do at the level of state responsibility under international law, Burns and McBurney do not address, as Adams does, the allocation of institutional power or duties within states with respect to giving effect to the CAT’s try-or-extradite obligations. That said, their analysis has clear implications for both domestic courts (making clear what international illegality needs to be avoided if interpretively possible to do so given a statute’s language and scheme) and domestic legislatures (which have full constitutional power to rectify any clash between domestic law and the CAT, and, as such, would have, on the Burns/McBurney analysis, an international duty to make sure state and diplomatic immunity statutes do not allow individuals to invoke immunity). Burns and McBurney’s narrative relates the \textit{Pinochet} judgment of the House of Lords to a concluding observation adopted by the Committee against Torture \textit{vis-à-vis} the UK a very short time before the House of Lords ruled in \textit{Pinochet}; the Committee let it be known that, in its interpretive view, the UK had a duty to consider the feasibility of prosecuting Pinochet should it decide not to extradite him (assuming the requisite evidence). With respect to amnesties granted through tailored and genuine national reconciliation commission processes, Burns and McBurney are more equivocal about whether such amnesties always amount to unlawful impunity from a CAT perspective. Unequivocally contrary to the CAT are the kinds of “self-amnesties” granted by outgoing repressive regimes or incoming regimes who decide to mollify those who ran the previous regime. However, while harbouring some doubts as to whether any amnesty can meet the CAT obligations, they do leave open the possibility that failure to prosecute in the context of a truth and reconciliation process \textit{may} be characterisable as an acceptable decision to the extent admission of guilt and compensation for any torture victims are built into the process. In this respect, Burns and McBurney implicitly see civil redress as a \textit{sine qua non} of international torture protection obligations even where criminal law prosecution may (possibly) be foregone; such a civil redress bottom-line would seem to lend interpretive support to the argument that article 14(1), reproduced in Appendix 1, of the CAT involves universal civil jurisdiction.

\textsuperscript{27} P Burns and S McBurney, “Impunity and the United Nations Convention against Torture,” chapter 10. Sorting out the complicated question of when \textit{individuals} can invoke state immunity is beyond the scope of the Burns/McBurney chapter, especially when some states treat head-of-state immunity (at issue in the \textit{Pinochet} case) as an extension of state immunity and some as a \textit{sui generis} immunity that blends classical state immunity with analogies drawn from the law of diplomatic immunity.
Assume that the jurisdictional hurdle is overcome, or that the question of whether to retain jurisdiction in a given case will be affected by an assessment of what law will be applied to resolve the tort claim should the case go to trial. Part III of the volume deals with this question of the governing law in transnational human rights tort claims. The question of applicable law can be thought of as being answerable either through a private international law analysis (according to which rules of characterisation and choice of law point to one or more domestic legal systems as providing the tort law that will govern either the case as a whole or specific elements of it) or through a substantive analysis of whether “international” or “transnational” law grounds in “domestic” law a cause of action for foreign human rights torts. As will be seen in several of this Part’s chapters, these two avenues may interlock in interesting ways. It should be noted that all contributions are grounded in an analysis of private international law and constitutional law principles relevant to most Commonwealth common law jurisdictions, with a heavy emphasis on the situation in Canada and England.

Jennifer Orange’s chapter picks up from John Terry’s brief argument that existing tort law categories and conflicts law-selection methods are adequate for vindicating international human rights violations through civil law, making unnecessary either new legislation or a common-law forging of a specific new kind of international or transnational human rights tort. Orange starts with the basis facts in the landmark US case of *Filártiga* and asks whether, if those facts were transposed to a Canadian context, Canadian judges would find a law to apply to achieve the same result as the US court was able to do by virtue of the presence of ATCA. She reviews the evolution of Canadian tort choice-of-law doctrine. This evolution has culminated, to date, in the Supreme Court of Canada’s *Tolofson* case which applied the *lex loci delicti* in an interprovincial car-accident context and stated in *dicta* that this rule should be presumed to govern international tort claims as well. Drawing on the reasons in *Tolofson* about the rationales of tort choice of law and the comments on the differences that might distinguish interprovincial cases from “pure” international conflicts claims, Orange notes that the strict application of the *lex loci delicti* rule to international fact situations can lead to injustice, especially when one can characterise the wrong done as a human rights violation and not merely a civil wrong. She compares the approach suggested in the American Law Institute’s Second Restatement on the Conflict of Laws with that of the recently-adopted Private International Law Act in the UK, and concludes that the best approach is to treat *lex loci delicti* as a presumption sufficiently flexible to accommodate

non-application of the *lex loci delicti* where injustice would result from its application. She recommends that Canada follow the UK lead and clarify the tort choice of law principles through legislation, while making clear that *dicta* in La Forest J’s judgment in *Tolofson* are themselves sufficient in any pre-legislative period to sustain a justice-based approach where “overriding” norms (specifically mentioned by La Forest J) of international law—in other words, *jus cogens* norms—would be compromised by Canadian courts’ application of a foreign *lex loci delicti*.

While Orange’s chapter assumes that the existing tort law of one or more domestic legal orders is to be applied to torture-related claims made in a transnational context, that of Graham Virgo queries whether “tort” is necessarily the correct category to be working with. He confronts this issue by tackling one of the most vexing conceptual questions in traditional conflict of laws, that of the “characterisation,” or classification, of a legal claim for purposes of then deciding what choice of law rule, principles or method to adopt. After discussing the tendency to say the *lex fori* is the law which governs the characterisation process, Virgo suggests that this may be inadequate to the realities of human-rights-violating conduct such as torture. He argues that it is not the *lex fori* that governs as much as it is the discretion of the judge of the forum to characterise the claim, and, as such, insights from both public international law and comparative law should play a persuasive role in that exercise. When approached in this way, it becomes possible to arrive at a more nuanced characterisation of torture as a special kind of tort claim akin to existing torts but not identical to any, with this characterisation then feeding into the need for judges to fashion a choice of law process that fits this *sui generis* claim. In this way, characterisation has the potential to reorient the entire private international law analysis, and allow creative (while principled) recourse to multiple sources in deciding what norms to apply to claims based on a tort of torture even if one must integrate that analysis into application of the generic choice of law principles in England’s Private International Law Act that *prima facie* apply to a tort of torture as to other torts. Virgo ends his analysis with a detailed set of arguments as to how the justice-based flexibility of the Private International Law Act as well as public international law principles with respect to redress for torture provide the basis for avoiding application of tort rules that thwart that ideal. He then goes on to develop argument as to how the application of English law is particularly appropriate due to a broad interpretation of the new UK Human Rights Act. On Virgo’s interpretation, the Human Rights Act recognises not only torture as tortious when committed in the UK but also torture as a transnational tort if committed within the jurisdiction of any state party to the European Convention on Human Rights. He ends by noting that, even if the courts do not agree that the Human Rights Act itself creates a transnational (intraEurope) tort of torture, the interaction of the Act and traditional private

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international law rules is conducive to recognition of a kind of universal tort of torture. By using principles of public international law and forum-based public policy to reject the application of foreign law and to choose English law, courts can apply the new (statutory) tort of torture to foreign conduct just as they would apply domestic common law rules to many other foreign torts when English law is chosen as the governing law.

Virgo’s approach was to create a more cosmopolitan approach to English tort law by starting with a clarification of the notoriously underdeveloped characterisation concept. The next contributor, Martin Bühler, argues for a more rigorous understanding of another doctrinal concept, the act of state doctrine, which has begun to lose its jurisprudential way and, in the process, is in danger of becoming complicit with a very human-rights-unfriendly approach to choice of law. Bühler uses as his jump-off point comments made by several judges in the Pinochet cases which suggest that they understand there to be an Anglo-American doctrine according to which courts are precluded from inquiring into the legal validity of conduct by foreign states or their agents. If the act of state doctrine as understood in these dicta were to be adopted in future cases, argues Bühler, the path-breaking decision of the House of Lords with respect to non-immunity of a former head of state for conduct he claimed was “official” could easily be circumvented at the merits stage of a case if courts refuse to look behind the claimed “acts of state” which resulted in the human rights violations at issue in a suit. Bühler reviews the development of the notion of “act of state” in Anglo-Canadian law as an adjunct to choice of law analysis. He shows how this doctrine is distinct from a doctrine of non-justiciability and also how English and Canadian courts have consistently been willing, first of all, to evaluate the formal validity of foreign officials acts, laws and decrees according to a foreign state’s own constitutional and statutory framework and, secondly, to refuse to apply formally-valid foreign law if substantively repugnant to English or Canadian “public policy.” With respect to the content of public policy, Bühler argues that public international law informs the content of public policy rather than only being more narrowly relevant by way of invocation as a background justification for a territorialist theory of comity from which would flow near-complete deference to foreign law. He goes on to show how the US has a very distinct “act of state” doctrine which is less willing to inquire into the formal validity of foreign laws and which is heavily tied to American constitutional considerations and only secondarily to international law. While noting that US case law has been hostile to invocation of the act of state doctrine in ATCA human rights tort cases and to that extent is helpful from a comparative law perspective, Bühler cautions against full-scale borrowing of the doctrine from the US without an appreciation of the distinctive trajectory of English and Canadian common law to date. Most significantly, a proper understanding of

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the Anglo-Canadian version of the act of state doctrine will alert courts to the problematic confusion that seems to have developed in some recent decisions in Canada and the UK. In these cases, officials of foreign states have been found to be able to claim in civil cases a *state immunity* for acts carried out by them in ostensible exercise of their functions as agents of the foreign state. If this line of reasoning were to continue, Bühler notes, not only would it be inconsistent with the approach to immunity taken in the criminal law context in *Pinochet* but it would also amount to a covert dismantling of the non-deferential Anglo-Canadian approach to foreign “acts of state” through the doctrinal back door of jurisdictional immunity. In the end, Bühler contends, a more principled understanding of Anglo-Canadian conflict of laws, including its legal history, would be promoted if we were to avoid altogether the terminology of “act of state doctrine” with all the American baggage and evolving confusion attendant upon it. The question becomes one of deciding what law should be applied in light of relevant principles of choice of law and of the way in which public law values should inform private international law analysis.

Part III moves on to Sandra Raponi’s account of how we may wish to consider a way of transcending choice of law (as we have come to know it) by having courts treat “transnational law” as opposed to domestic private law as the normative source of the cause of action in tort claims for torture.32 Raponi argues that a notion of a transnational human rights action conceptually harmonises domestic and international law as well as public and private law: a transnational human rights tort is one which seeks to harness the private law processes of the forum by grounding a claim that in substance is primarily derived from rules and principles of public international law. After setting out the virtues of such a conceptualisation, Raponi then engages in a detailed analysis of the doctrinal resistance that proponents of such a cause of action might face in Canada due to the received judicial understanding of the relationship between private law and public law human rights norms as well due to the Westminster tradition of treating treaty norms as being directly received into Canadian law only through the vehicle of legislative action. One ground-breaking aspect of her analysis is that which looks at the question of the direct reception of customary international law into Canadian law as bound up in the tensions in Canadian case law on how the common law causes of action interact with statutory human rights law. She pays particular attention to the extent to which the existence of statutory human rights remedies covers the field with respect to recognition of common law human-rights actions. Her critical analysis demonstrates why these barriers are false ones, but, recognising that some Canadian judges may take a different view, she argues that the increasingly active use of international human rights law in interpreting Canadian law may serve as a starting point from which “Canadian” law is developed under the influence of “international” law, in the process forging “transnational” law without necessarily calling it such.

The analysis in Ted Hyland’s chapter in many ways overlaps with, and otherwise complements, that of Raponi. He asks whether international human rights law can be said to be received in some fashion by Canadian law such that it provides a right of action in Canadian courts against torturers whose conduct occurred abroad. In order to do this, he assesses the textual evidence with specific respect to torture, notably article 14 of the Convention against Torture which speaks of the duty of states to ensure “redress and . . . an enforceable right to fair and adequate compensation” without expressly stating this right is to apply to torture committed outside the territory of the state party whose obligation is at issue. Hyland then discusses the state of the debate in US courts and commentary on whether international law can itself be understood to create a right of action. He then moves on to the question of whether international law can directly found a cause of action before Canadian courts (assuming such an action can be said to arise on some account of international law), a question he addresses through an extensive survey and discussion of all the various ways in which Canadian courts might be willing to recognise a new tort of torture. Such recognition is clearly open to Canadian courts, Hyland argues, but he feels that a further argument about the converging trajectories of contemporary public and private international law is needed in order to convince the average judge to take the step of recognizing a universal tort of torture. He argues that the first step is for Canadian courts to at least accept that public international law on the duty to redress torture impacts enough on Canadian law to create a common law tort of torture with respect to conduct that takes place in Canada. The next step is to tap into the principles of private international law on choice of law in tort which allow extraterritorial application of Canadian tort law in those circumstances where the foreign lex loci delicti does not conform to the jus cogens imperative that remedies must be provided to torture victims who are tortured in a state’s jurisdiction. In much the same way as Virgo suggests an internationalised choice of law exception allows a UK statutory tort of torture to be applied to foreign conduct, Hyland argues for a similar syllogism with respect to the application of “Canadian” tort law on torture to foreign conduct. But the most innovative aspect of Hyland’s analysis is his concluding argument that, should neither the lex fori nor the foreign lex loci delicti adequately promote the torture-reparation goal of public international law, then a judge should apply international human rights law principles, mutatis mutandi, as the rule of decision. By adopting a “principled instrumentalism” in choice of law whereby law selection is substantively conditioned—choose that system of law which best integrates compensation for torture into its rules on civil liability—Hyland has in effect arrived by another route at a special hybrid of the public and the private as well as the domestic and the international that fuses public international law and private international

law in a “transnational” space in which general principles of law and justice intermingle.

5 EVOLVING INTERNATIONAL LAW ON CIVIL RECOURSE AGAINST NON-STATE ACTORS

Part IV consists of five chapters treating various dimensions of the question whether public international law permits, encourages or requires civil recourse against non-state actors for serious human rights abuses—actors ranging from regular individuals to high state officials to military officers to intergovernmental organisations to corporations. This question is inextricably bound up in the parallel issue of the existence and scope of an obligation of states (as well as interstate entities) to ensure that the procedural avenues to vindicate such “horizontal” claims are in place in the relevant legal order, or, possibly, the duty to provide compensation to victims where there is no avenue for victims to directly claim such compensation against their torturers or abusers.

The chapter of Valerie Oosterveld and Alejandra Flah involves argument by extrapolation from, and analogy to, two fields of law—international criminal law and shared US/Canadian principles of civil liability—on the question of the derivative liability of officials, both civilian and military, for human rights violations committed by their subordinates. Oosterveld and Flah first explore the doctrine of command responsibility as it has evolved mainly from the time of the Nuremberg and Tokyo trials to current case law of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, noting the nascent migration of this doctrine into the field of human-rights civil liability in US ATCA cases. By the doctrine of command responsibility, officials may be held liable for crimes against humanity, war crimes and genocide—and, posit Oosterveld and Flah, also torture—not for having been the torturers nor for even having ordered the torture but for the failure to stop ongoing abuses or prevent future ones where the officials had the requisite knowledge of the abuses and the necessary degree of control that could have been brought to bear on their subordinates. Command responsibility thus involves a fault standard. The authors then go on to consider the doctrine of respondeat superior—and, more particularly, the closely related doctrines of “enterprise risk liability” and “enterprise liability” as they have been developed in leading cases in Canada and California, respectively. By these doctrines, a form of strict liability is involved given that specific knowledge of subordinates’ or agents’ conduct is not required. Rather, the trigger for liability is the creation of a zone of risk for third parties by virtue of the operation of the “enterprise” whether it be corporate, governmental or non-governmental. Oosterveld and Flah acknowledge the need

for additional principles that would allow these enterprise-related doctrines to apply not only to the liability of collective actors such as corporations and governments but also to key decision-makers within such enterprises, leaving identification and development of such principles for future work. The chapter ends with a careful and quite detailed application of command responsibility and *respondeat superior* to the facts with regard to torture practices in the Sudan.

We move to the evolving framework which governs the accountability of the UN for human rights violations committed under its auspices, specifically in the course of UN field operations. Chanaka Wickremasinghe and Guglielmo Verdirame venture into poorly charted terrain with their twinned analysis of the international (public law) responsibility and the (civil) liability of the UN for serious human rights and humanitarian law violations. Notwithstanding the specificity of the legal regimes applicable to the UN, much of the authors’ analysis is directly relevant to other intergovernmental organisations (IGOs). At the level of prediction based on existing, rather *ad hoc* case law in several legal systems, Wickremasinghe and Verdirame conclude that the prospects for successful claims against the UN through the vehicle of transnational tort litigation are limited due primarily to jurisdictional immunities before national courts that are systematically in place throughout the world. In this regard, the authors are wary of the applicability by analogy of the finding by the House of Lords in the *Pinochet* judgment that acts such as torture do not constitute “official” acts for purposes of immunity analysis, in part because they see courts—at least UK courts—as not unlikely to see limitation of UN immunity as a non-justiciable determination of a matter of UN law by domestic courts. They further note the very recent European Court of Human Rights cases in which, through the vehicle of an action against a member state of an IGO, IGO immunity was questioned as an unjustifiable barrier to access to justice. The Court ruled that immunity from domestic courts was justified at least where the IGO’s internal law provided alternative procedures for resolving the disputes in question (here, employment disputes). At the same time, easy invocation of the UN’s responsibility on the international level is complicated by limitations recently placed on UN tort liability within claims procedures recently established by the UN General Assembly. On the other hand, Wickremasinghe and Verdirame make clear that it is unlikely that serious human rights conduct such as torture would fall within liability exclusions and that limitations on heads of recovery (such as

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35 Here it may be that a fusion of command responsibility and enterprise risk principles will lead to a doctrine whereby something less than specific knowledge of torture or a torture practice is required while still requiring evidence of why a particular official is, alone or collectively, responsible for having set up or maintained a situation of risk which they could alter and which they know could well lead to torture, but which they permit (indeed, often intend) to function sufficiently “autonomously” to allow them to deny the existence of the kinds of command links needed in command responsibility doctrine.

exclusion of claims for pain and suffering) may in many cases not be relevant to human-rights-based claims because the General Assembly rules lift the remedial limits in cases of gross negligence and wilful misconduct. In relation to both claims before national courts (assuming jurisdictional immunity is circumvented) and international claims (whether within UN-established claim procedures or at the level of claims of diplomatic protection brought by torture victims’ states of nationality), there remains the persistent problem of formulating the principles which should govern the allocation of responsibility as between the UN and states acting for, or under authorization by, the UN.

Like Wickremasinghe and Verdirame, Muthucumaraswamy Sornarajah analyses the question of accountability for serious human rights violations within a framework in which international responsibility and civil liability are closely connected. Sornarajah argues that home states of corporations committing serious human rights abuses abroad themselves incur responsibility for those abuses by virtue of the way in which both global power realities and the link between corporation and national state-society interact with classic international law doctrine and modern general principles. His argument as to the nature of the home state’s responsibility is that such responsibility can arise in one or both of two ways. Firstly, there can be responsibility for breach of the positive duty to provide for civil recourse by victims of *jus cogens* human rights violations against the corporation in its home state courts. Secondly, there is a form of indirect responsibility for failure to use mechanisms of control available, or potentially available, to the home state to prevent or stop abuses of which relevant state officials were forewarned or came to have knowledge. Here, especially in relation to the latter form of responsibility, Sornarajah takes great care to debunk the common view that the notion of liability of states for extraterritorial harm caused by nationals is a new normative phenomenon. He reminds us of older arbitral case law that was premised not simply on the extraterritorial application of a positive duty to prevent harm as between non-state actors but more radically on a form of direct responsibility of home states for harm caused by corporations operating abroad. On this approach, including as invoked by the US in its successful claim against Britain in the *Alabama Claims*, the conduct of the national is assimilated to that of the state itself by virtue of a notion of the state’s tacit approval of the national’s conduct by not seeking to prevent that conduct where the state had knowledge of it nor punish the national once the harm was caused. Borrowing from older law, an approach of structural state complicity in corporate activity thus becomes a central focus of Sornarajah’s analysis. He juxtaposes the evolution of late 19th-century and 20th-century positive international law in the image of capital-exporting and trade-based states—and thus away from the notion of indirect responsibility of states for corporate nationals abroad, let alone a form of


38 *Alabama Claims Arbitration*, (1872) 1 Moore 495.
vicarious responsibility—to a counter-movement that is sending new normative signals, including in areas as diverse as transfer of hazardous waste and sex tourism. Proceeding from this base, he builds a strong argument for viewing the failure to provide some system of home-state remedies for the victims of corporate harm abroad as sufficient to actually attribute the corporate conduct to the remedially-recalcitrant state. Such imputation occurs by virtue of viewing the state’s failure as amounting to the kind of implicit, tacit or constructive approval of non-state conduct spoken of in the pre-20th-century era before state positivism and global capitalism fused into mainstream international law. By thus linking home-state responsibility to civil recourse, Sornarajah takes the view that the deterrent effect with respect to future conduct is enhanced beyond that which is attributable solely to modification of corporations’ own conduct due to the risk of transnational legal accountability. It is also enhanced because the home state’s potential state responsibility should lead it to become a more active regulator of problematic conduct of its corporations abroad.

Whereas Sornarajah examines the question of civil recourse for torture and similarly serious human rights violations in relation to general principles of international law and the example of corporate actors, Andrew Clapham’s discussion of access to civil remedies is largely centred on evolving principles within the sub-field of international human rights law and is, as well, largely focussed on civil liability of non-state actors who unquestionably act in concert with the state—that is, state officials such as political leaders and police. Clapham’s starting-point is his earlier study, Human Rights in the Private Sphere, which remains the leading account of the conceptual and doctrinal dimensions of international law’s duties with respect to “private” violence and other harms. In the present chapter, Clapham uses that work as well as the Pinochet affair as the starting points for asking how “horizontal” application of human rights (claims by individuals against individuals) interacts with a “vertical” axis according to which states have duties both to prevent violence and also to ensure “horizontal” access to human rights justice. A centrepiece of Clapham’s analysis is the decision in the European Court of Human Rights case of Osman v. United Kingdom that article 6(1) of the European Convention on Human Rights, which protects the “right to a court” in civil disputes, includes a prohibition on granting police authorities immunity from negligence suits brought on the basis of the police failure to protect one person’s right to physical security, most notably the right to life, from harm at the hands of another person. This case is discussed against a backdrop of similar provisions in a number of other international human rights instruments. From there, Clapham narrates a recent effort, in which he was involved, to persuade the European Court to rule that failure of the UK to either extradite or prosecute Pinochet would amount to an interference with the rights of victims to have their article 6 “civil

rights and obligations” adjudicated before a court. Clapham’s argument as to how failure to pursue criminal proceedings undermines civil rights is too intricate to convey in an overview of the present sort, other than to say it involves the contentions that article 6 civil rights can include “human rights” not protected as such as positive law rights in a given state’s legal system and that criminal law remedies can, in some circumstances, be viewed as a protected legal avenue for vindicating “civil rights” either where this avenue is the only one specifically provided by the legal system in question or where it acts in concert with a civil remedy process. He outlines the argument that the release of Pinochet, as opposed to his extradition to various requesting countries (not just Spain but also France and Switzerland), would violate not only the rights to access to justice of UK-based victims but also victims residing in other countries (the extradition-requesting countries) who lose the opportunity to have Pinochet brought to justice—again, especially where the legal system of the country has a hybrid approach that uses criminal law as the vehicle or threshold for civil remedies. Recognising that some might see this argument for protection of a transnational right of access to justice under article 6 of the European Convention as tenuous, Clapham constructs a careful argument that pulls together normative strands from the Soering case (states may incur indirect responsibility for human rights violations committed, or to be committed, by other states) and from the Loizidou case (stating the European Court’s view that the European Convention is a “constitutional instrument” for a normatively unified Europe). On this foundation, Clapham argues that one state party can have duties towards persons located in other states parties beyond the limited Soering situation of the duty not to deport or extradite someone to a human-rights-violative situation. He ends by bolstering the normative force of his arguments by reference to the deepening content being given to the European Convention’s article 13 right to have effective remedies for Convention breaches in place within the national legal systems of states parties.

The Clapham chapter focussed on the normative specifics of the European Convention on Human Rights. In a similar vein, Andrew Byrnes takes on the issue of (transnational) access to civil remedies within a single treaty, the Convention against Torture, and primarily by reference to the proper interpretation of article 14 of the CAT which provides that each state party to the CAT “shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” The central question animating his inquiry is whether a state party to the CAT is obliged not only to exercise a form of universal criminal law jurisdiction (that is, to try or extradite an alleged torturer found on its territory) but also to exercise a form of universal civil law jurisdiction by ensuring civil remedies are

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available within the state’s national legal system for acts of torture abroad. Except in situations where those acts of torture were committed by agents of the forum state (for example, the torture-death of Shidane Arone in Somalia at the hands of Canadian soldiers), Byrnes concludes that article 14 of the CAT does not go so far as to make mandatory civil remedies for extraterritorial acts of torture or, at least, for extraterritorial acts of torture that were not committed by the forum state or its agents. His conclusion is based on an analysis of the drafting history of the treaty, the other provisions of the treaty, the CAT’s overall goals and interpretive practice to date. However, he is careful to point out that treaties, especially human rights treaties, are living instruments such that their interpretations can evolve over time especially where an independent body established under the treaty to monitor its implementation puts forward a more expansive interpretation than had previously been generally understood and states parties gradually accommodate themselves to that new interpretation. Here, it might well be added that the willingness of domestic courts to also push the normative envelope, whether before or after the Committee against Torture, will likely be as significant in adjusting normative expectations as to the territorial scope of article 14 as the reactions of the executive branches of states parties. As Byrnes notes, the first step in this direction might be for the Committee against Torture to read article 14 as not necessarily setting out an obligation to establish universal civil jurisdiction for torture but as establishing the permissive basis for the exercise of such jurisdiction by those states willing to do so. Here again, some domestic courts may well see it as their appropriate role to act on behalf of their state by recognising that article 14 provides interpretive encouragement for them to develop their common law or their interpretation of the scope of civil codes. And, finally, it bears reminding that Byrnes does not view the scope of article 14 as being entirely bound up in a traditional spatial tension between the territorial and the extraterritorial; foreign acts attributable to the forum state would trigger the article 14 duty to provide for redress and compensation. Byrnes ends by noting that the standard private international law methods for selecting applicable law will still be available even absent a free-standing international law duty to provide for a universal tort of torture in domestic law, and, in such selection, the CAT may exercise an interpretive influence.

42 Here the wording of article 14(2) assists in some respects: “Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.”

43 In this respect, the next step after recognising article 14 as permitting universal civil jurisdiction may be to read article 14 in light of evolving principles of state responsibility for acts of nationals abroad, as discussed by Sornarajah by reference to corporations, such that article 14, purposively read, requires states to provide for claims for redress and compensation in their legal systems for all acts of torture committed by their nationals anywhere in the world—whether or not those acts are imputable, as in the Somalia torture example, to the state itself.
From the quest for the universal we move to four chapters that are premised, to varying degrees and in different ways, on the view that universal jurisdiction over human rights torts raises special concerns in relation to national processes of governance, ownership of the key decisions that forge a society’s future, and normative disagreement over the content and scope of even core human rights such as the torture prohibition. Without embracing statism, each chapter argues that sovereignty of state-societies, self-determination of peoples, and culturally distinctive understandings cannot be simply ignored in a rush to justice.

Jan Klabbers opens Part V with the volume’s strongest critique of transnational tort adjudication in the name of universal human rights. As will Mayo Moran in her chapter, Klabbers starts by noting how undertheorised transnational human rights litigation has been. He attributes this in part to the gospel-like stature of human rights discourse in our times. His purpose, then, is to draw attention to legitimacy problems with this phenomenon. His primary contention is that American-style tort adjudication over human rights abuses occurring abroad amounts to a doubly unjustified intervention—of foreign states into the affairs of other polities and of judges into politics. In developing his case against the propriety of ATCA actions and thus of any mirror processes that might arise in other states, Klabbers sketches out, and then relies on, a conception of human rights as, in the main, guarantors and facilitators of politics. He ties a theory of politics into the long-standing concern of international law with the self-determination of peoples (it bears emphasising that there is no defence of state sovereignty per se in Klabbers’ account) which leads to “a certain primacy” that must be given to freedom from foreign decision-making about choices that are more legitimately made from within a given historically-situated political community. This concern slides into a parallel view that, whatever universal sociological consensus may exist for abstract formulations of a human rights norm, it is only in the context of a particular community’s historically-situated understandings that more concrete content can legitimately be given to human rights norms. Klabbers is not naïve about the consequences of the political spaces he seeks to preserve for self-determining and largely non-judicial decisions, noting as he does that human rights violations through and in the name of politics is a price that has to be paid for keeping a separate niche for politics. A form of ethical realism appears to emerge from Klabbers’ account, one that is not hesitant to point out hypocrisies that undermine claims to moral high ground, as when he notes that a state like the United States can generally refuse to allow even the International Court of Justice to function as an appellate court while failing to see that the same line of thinking should apply

45 Moran, infra n.49.
a fortiori to (US and other states’) domestic courts acting in effect in a review capacity of foreign states-societies. He ends by affirming that human rights have a crucial role to play in political discourse, just not as legalised claims let alone as claims generated from afar.

Jennifer Llewellyn tackles one slice of the question of the deference that foreign societies, and international society as a whole, should give to self-determining choices made by societies. How should the granting of amnesties from civil liability be treated in foreign torts claims? Proceeding from the unavoidable political reality that countries previously ruled by repressive regimes often compromise and co-operate with members of the outgoing regimes, Llewellyn seeks to show how it is that amnesties are not necessarily simply pragmatic ways to buy a stable context on which a new democratic order can be built. Rather, she draws on her own and others’ work in the field of restorative justice to argue that certain amnesties, notably those emerging from well-constructed truth and reconciliation processes, are morally worthy of respect. That being the case, she addresses the need for private international law to accommodate itself to justified amnesties when it comes to foreign courts deciding whether or not to recognise the liability-shielding effects of amnesties accorded by the country where a human-rights tort such as torture has occurred. To do this, she also canvasses the underdeveloped approach to amnesties taken by public international law, partly in order to see whether that body of law affords enough leeway for just amnesties to be considered lawful and thus for domestic courts deciding private international law tort cases to defer to the foreign state’s laws (or associated foreign court judgements) by reference to this public international law acceptability. Public international law has not firmly crystallised a view on amnesties, although certain developments like the Statute of the International Criminal Court do not appear welcoming of amnesty for the most serious of human rights violations amounting to crimes under international law. This somewhat open normative state of play allows Llewellyn to argue for an interpretation of international human rights law that recognises the justice-promoting dimensions of some kinds of amnesties. Those amnesties which are (restoratively) just, according to principles argued for by Llewellyn, deserve not to be circumvented by foreign tort proceedings. Amnesties such as those granted in South Africa would pass muster while blanket amnesties such as that in Chile would not. The foregoing is an ideal normative argument, but Llewellyn recognizes that there is a follow-on institutional question with respect to whether foreign courts, removed as they are from the national social context of the country of amnesty, should be empowered to make nuanced interpretations as to which side of the just/unjust line a given amnesty falls. Put differently, it might be argued that institutional reasons transform a middle-ground approach to amnesty into a kind of total deference by foreign courts—a transnational non-justiciability. However, Llewellyn contends that, on balance, the

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risks of abuse are outweighed by the virtues of holding national feet to foreign fires; in this respect, she enumerates several reasons why the potential for foreign courts to conclude that an amnesty is unjust serves an important function in ensuring that amnesties are structured and operated in a just way.

We move to Australia with the discussion by Belinda Wells and Michael Burnett of what they call the Saudi nurses case. The issue with which they grapple is the extent to which Australian law should defer to Saudi Arabian law on the implementation of the death penalty (of beheading) when such an act would be characterised in Australia as murder, torture, inhuman punishment, or all three. The context is not a typical ATCA-like situation in which a person accused of torture in one country (Saudi Arabia) is sued in tort in another country (Australia). Rather, the facts involve a complex interweaving of territoriality and nationality, and a remedy which has not yet become part of the ATCA scene: the injunction to prevent an imminent human rights violation in another country. Wells and Burnett narrate a fascinating chain of events according to which, in summary, an Australian citizen was, under Saudi shari’a law, being asked to decide whether the death penalty should be imposed on a British nurse convicted in a Saudi court of having murdered an Australian nurse. One of the authors, Burnett, found himself acting as counsel for the convicted British nurse who was seeking to find a way for an Australian court to exercise territorial jurisdiction over the Australia-located brother of the murdered nurse and order him not to exercise his prerogative under shari’a law, thereby having an extraterritorial impact: saving her life. Thus it is that the chapter offers a marvellous window not only into the legal possibilities that may exist for civil suits in Australia to deal with foreign human rights situations. It also offers a glimpse of a kind of existential limbo in which a lawyer representing a client in transnational human rights litigation might find herself or himself if they hold a non-dogmatic view that “there is clearly a tension between the principle of the universality of international human rights and the need to appreciate the cultural context of rights,” as the authors put it in the first paragraph of their chapter. In the end, the authors embrace an ideal of cross-cultural dialogue around radically-different conceptions of human rights, but point out how very difficult it is for such an ideal notion to be worked into substantive interpretations in a pressing litigation context. That said, there was an interesting outcome to the case—the brother, on the eve of the Australian injunction trial, agreed to exercise his right under Saudi law to accept compensation from the convicted person in lieu of the death penalty, and then donated most of the money to a public hospital. The authors present this outcome as having emerged from an extracourt dialogue between the victim’s brother and the convicted person (through her lawyers), a dialogue that only occurred by virtue of the legal proceedings having been initiated. Legal coercion interacted with a quest for compromise.

The compromise solution that ultimately emerged can be interpreted as substantively dialogical in nature; as the authors conclude, “the victim’s brother came to a decision that combined Islam’s preference for forgiveness . . . with a principle of charity which may well have owed much to the brother’s own moral convictions.”

We turn to another concrete context, by returning to the Middle East with a chapter by Amnon Reichman and Tsvi Kahana on the implications for foreign tort actions of a recent judgment by the Israeli Supreme Court which held that the use of physical force by Israel’s General Security Service (known as GSS or Shin Bet) in the course of interrogations was illegal under Israeli law. That judgement clearly places the methods used by Israel within the notion of “inhuman” treatment but is ambiguous on whether the Court views some or all of the methods to pass a gravity threshold so as also to be characterisable as “torture.” The chapter begins with a form of interpretive inter-Israeli (inter-author) dialogue over whether the judgment can be read as contemplating that the Court left open that new legislation could well be constitutional if it expressly permitted the currently-illegal methods to be used in “ticking bomb” situations in which it is judged that information is urgently needed in order to prevent deaths or serious injuries. This question is relevant for two reasons: first of all, because it speaks to the question of whether individual members of Shin Bet would be treated in Israeli law not just as having a “necessity” defence if charged with a crime, but as acting within the law and thus as having a defence to civil claims as well; and, secondly, because any ambiguity in Israeli law on this point may have implications with respect to how interventionist foreign courts would view themselves as being should they choose to find a member of Shin Bet liable in an ATCA or ATCA-style human rights tort claim. Before moving on to discuss transnational civil liability against this unclear normative backdrop, the authors discuss the reasoning in the House of Lords *Pinochet* case with respect to whether “official” torture can be a defence in criminal proceedings based on universal jurisdiction under the Convention against Torture. They note as well interpretations handed down by the UN Committee against Torture with specific respect to Israeli’s state responsibility for the use of the interrogation techniques that were at issue in the GSS case. Here, the authors note that characterisation of the conduct as “torture” versus “cruel, inhuman or degrading treatment” is key because article 16 of the CAT appears to contemplate the availability of some defences that are excluded when the conduct amounts to torture. Any foreign court would have to make a choice as to where to seek normative guidance. From the Committee against Torture which characterised the interrogation techniques as torture and not only as cruel, inhuman or degrading treatment, and thus as absolutely prohibited even in ticking-bomb situations? From the foreign court’s own best interpretation of what the Israeli Supreme

Court found on the characterisation of the conduct? From its own interpretation of how the facts as described in the Court’s judgment mesh with the test for torture? Quite apart from sources of interpretive authority, there would be, the authors argue, a question of deciding whether it is timely for foreign courts to adjudicate tort claims against Israeli officials when the GSS case represents evidence that the Israeli Supreme Court is no longer prepared to accept that GSS interrogation techniques are currently lawful absent specific legislative authorization for them nor to accept, it seems, they can ever be lawful outside ticking-bomb situations (which the court avoids pronouncing clearly on), and thus that this is not (or no longer) a situation of legal-system-failure such as might justify foreign courts stepping into the breach. The authors come down on the side of foreign tort proceedings when the state under whose regime torture has been committed fails to hold its officials, or itself, civilly “responsible”—although the authors do not clearly assert that monetary compensation to victims must be a *sine qua non*. They find that foreign tort liability for the use of the GSS interrogation methods in non-ticking-bomb (“normal”) situations presents a comparatively easy case, should Israel not act soon to create civil liability for harm caused in such situations (including retrospectively, it would seem). Indeed, these are comparatively easy cases because a foreign court can simply rely on the fact that the conduct was illegal not only under international criminal law but also under Israeli law itself as authoritatively found by Israel’s highest court. With respect to ticking-bomb situations, Reichman and Kahana consider there may be good reasons founded in comity for foreign courts to find themselves *forum non conveniens* to the extent it remains an open possibility that Israeli courts will find the state or the GSS officials themselves to be civilly liable for harm through interrogation even if the “necessity” defence remains a shield from criminal responsibility. Some deference—at least in terms of a wait-and-see delay (which would, one assumes, be possible to accommodate through conditional stays by foreign courts)—would have the practical benefit of increasing Israeli courts’ sense being part of a transnational human rights dialogue with foreign courts and thus of making it more likely Israeli courts will enforce foreign damage awards once foreign courts decide the wait-and-see period has lasted long enough. But, in a vein similar to Llewellyn, Reichman and Kahana emphasise the importance of foreign courts being prepared to assess the justice of any non-liability within Israel’s legal system; they argue that foreign courts should refuse to accept any subsequent Israeli Knesset legislation which in effect makes lawful the currently-unlawful interrogation methods in “normal” situations. Reichman and Kahana end by noting the inevitability (and, if I read them correctly, legitimacy) of foreign courts also passing judgment on whether ticking-bomb situations warrant different treatment. Whether eventual foreign courts’ determinations are “right” or “wrong”, they will necessarily become part of the normative context which both Israeli courts and legislators will have to take into consideration as Israeli society grapples with the issue of the limits of interrogation.
In Part VI, which concludes the volume, we enter the domain of private law theory on the relationship between tort law and public law human rights values. The volume thus ends by leaving the reader in a border zone, as it were, between a medley of (public and private) international law perspectives and various private law traditions around the world which may have much to say about the enlistment of tort law into the service of international human rights protection. That being said, this border region is much less of a minefield than it might otherwise be due to the fact that the contributors of the two final chapters are tort theorists who see a symbiosis between tort law and public law norms rather than a strong tension, let alone a radical disjunction of function.

Mayo Moran takes the view that the ATCA human rights tort cases, despite often being both “overwritten” and “undertheorised”, do not deserve the complete lack of discussion by tort theorists or complete omission from leading texts on the law of torts. Instead, there is a case to be made that the torture-as-tort cases in the US provide “a glimpse of the challenges that will face the private law of the future” in which the “geography” of the law is being reworked in such a way as to present a challenge to the very foundation of modern legal traditions. Linked to complicated transnationalisation of context, she perceives a richness in the strongly rhetorical nature of judgment, and associated reasoning, that animates the ATCA tort cases—a field that is reminiscent of the “multiple, diverse and often conflicting” sources upon which judges had to draw in fashioning persuasive reasons in old common law decisions when prior judicial precedents, and interpretive exegesis thereof, were much less of a central plank in providing parameters for judgment. From this starting point, Moran points to broader trends into which transnational human rights litigation dovetails, notably increasing comparativism that is creating an interpenetration of legal norms from various legal systems (and an associated sense of the relevance of “external” sources to “internal” norms) and a discernible breaking-down of a “separate spheres” understanding of private law and public law. The emerging legal world is “increasingly characterized by interactive and even hybrid norms” with the US international-human-rights-oriented private law actions epitomising this development. And it is not just purist understandings of private law that are becoming anachronistic. The phenomenon discussed by Moran also strikes at the very heart of traditional conflict of laws analysis which sees norms as being capable of selection from autonomous national systems of law and then straightforwardly applied to binding effect. It also challenges rather static understandings of many international lawyers that domestic systems are in essence mere enforcement vehicles for international norms. Moran engages in

50 Even as, it might be added, it equally challenges the sense of constitutional lawyers of international law as somewhere “out there”, disembodied and of questionable relevance.
a close discourse analysis of the reasoning in several of the ATCA cases in order to show judges grappling—never successfully—with all these boundary-crossing implications and with the promiscuity of potentially-meaningful normative touchstones. Ultimately, Moran concludes, the torture-as-tort and other human rights cases are pulling us toward a more cosmopolitan legal world in which judges (and other decision-makers) no longer can seek comfort in the notion of discrete normative spheres of private law and public law, of international law and domestic law, of national law and of foreign law. She sees evolving a “more multifaceted integrative understanding of sources and a broader persuasive approach to authority” in which the fundamentally rhetorical nature of the older common law may have far more useful things to say than many of the current self-understandings of the nature of legal judgment dominant in both the judiciary and legal academy.

A certain sense of the common law tradition as particularly well-suited to grasping, adapting to and working with the “new private law” (if it might be called that) flows from Moran’s analysis, which necessarily leads to the question of how various civilian legal traditions and cultures might react to the normative messiness of the ATCA phenomenon. One rumoured truth for those given to references to tendencies in other legal systems without having had the benefit of studying or working in systems is that the “horizontal” effect of constitutional norms (that is, drittwirkung—their application in “private” relationships governed by areas of law such as tort, contract, and property) is taken for granted in Germany. However, in reading Oliver Gerstenberg’s contribution with which we conclude the volume, one would be forgiven for concluding that the blurring of the public/private boundaries will face considerable conceptual resistance from tort law scholars in Germany (how representative this would be of reactions in other civilian systems cannot of course be known). Gerstenberg eases into his critique of various German legal scholars’ view of the sources and function of private law by starting with a case (already somewhat uncivilian of him, some might be thinking). The Bosman case, decided not by a German court but by the European Court of Justice, decided that the freedom of movement guarantee in the European Community’s constitutive treaty applied to non-state actors and not only to EU member states. Bosman dealt with a challenge to transfer rules in the European football world which required payments between clubs before a player could move to another team. Holding that this fell afoul of the freedom of movement protection, the Court, at the remedial level, declined to specify what rules a transfer regime would have to contain in order to strike the requisite proportionality between the interests of the players and the football association. The ECJ “regarded its role as one of promoting self-regulation experiments in private legal

relations that will foster fundamental rights.” Notwithstanding the softness and
democratic-process-prodding nature of the remedy, the ECJ’s injection of “public”
law rights into “private” relations “contrasts starkly”, notes Gerstenberg,
with the mainstream scholarly view in Germany on the effect of fundamental
rights on private law. Gerstenberg then seeks to demonstrate this disjuncture
through a detailed criticism of the positions taken by leading scholars on the
German Constitutional Court’s view that constitutional rights are “objective
legal principles” governing “private legal order” no less (albeit perhaps differently)
than state/individual relations. Such scholars appear to be challenging the wisdom
of this drittewirkung (third-party effect) step, some making the case that “the direct
binding of private actors by fundamental rights would, in effect, make private law
superfluous.” Gerstenberg counters with an account of a rights-oriented “consti-
tutionalisation and democratisation of private legal relationships” in which rights
adjudication serves as the path by which courts make certain that private actors
forge the principles and rules that bind them to each other in a process of dialogue
that amounts to democracy in the private sphere. As such, Gerstenberg’s theory of
the direct application of human rights to private law is profoundly more radical
than what has so far occurred under the auspices of ATCA-based adjudication.
This is because the vast majority of individuals sued in the name of international
human rights law in the ATCA cases have been, at some point, actors operating
within a state apparatus, whereas Gerstenberg envisages rights as pervading law
and decision in the relations amongst “private” actors with no formal connection
to the state and within the legal orders of private organisations. As such, the
German legal situation and Gerstenberg’s defence of it (or, perhaps more accu-
rately, his argument for its principled deepening) have much to say to emergent
attempts to use ATCA as a basis for suing multinational corporations for human
rights violations (as referenced in the chapters by Robert Wai and Muthu
Sornarajah), providing some theoretical foundations for moving beyond the ster-
ile formalism whereby US courts have found that the vast majority of human rights
torts must have been generated in some way characterisable as “state action.”

Taken in tandem with Moran’s call for normative openness and creativity, the
German constitutional approach to private law (as distinguished from its chal-
lenge by the private law scholars engaged by Gerstenberg) may have much to say
about the trajectory that a transnationalised process of tort claims grounded in
international human rights norms and values could take in the years to come.

52 For an overview of US litigation up to 1999, see S Zia-Zarifi, “Suing Multinational
See, more generally, S Joseph, “Taming the Leviathan: Multinational Enterprises and Human
Rights”, (1999) NILR 171. For one of numerous human rights NGO reports beginning to emerge on
corporate conduct, see, by way of example, Human Rights Watch, The Enron Corporation:
I began this introduction with mention of the Sudanese context as having been the proximate motivation for this volume. To bring this beginning to an end, I now invite the reader to take a short flight from the Sudan over Ethiopian territory to Somalia. Allusion has already been made in this Introduction to proceedings brought before a Canadian court on behalf of the parents of Shidane Arone who was tortured to death, in the most brutal fashion, by Canadian soldiers who caught him inside the perimeter of their camp. Sadism aside, it appears that one purpose was to send a message to others about trying to engage in theft from the Canadian UN peacekeeping contingent. Let it be assumed, then, that there is no question but that the torture of Arone is covered by the definition of torture found in article 1 of the Convention against Torture and that the acts, however unlawful under Canadian military law, were carried out by agents of the Canadian state. As such, it appears reasonable that Arone’s parents would bring a tort action against the government of Canada in Canada’s own courts. Intuitively reasonable perhaps, but the result of the case—the thinly-justified dismissal by the trial judge on the basis of no reasonable cause of action—is a case in point as to the distance that must be traveled before many judges will be prepared to treat torture as a transnational tort absent an express legislative directive to do so, even where Canadian nationals are the respondents or, as here, Canada itself.

The statement of claim in Arone starts by stating that Arone’s parents were seeking “general damages for torture, wrongful death, and/or murder, negligence, and breach of fiduciary duty” and then, rather cryptically, ends with a list of statutes on which the plaintiffs “plead and rely” including the Canadian statute which legislates into Canadian law the 1949 Geneva Conventions on the laws of war, together with separate mention of the treaties themselves. Cunningham J. granted the government’s motion to dismiss the action on the primary ground that it had been brought on behalf of Arone’s Somalia-based parents (by one Abdullahi Godah Barre) and not by them directly, there being no provision under the relevant Canadian law for such a “Litigation Guardian” for persons who were not disabled or unavoidably absent from the jurisdiction (with the condition precedent that the person was normally resident in the jurisdiction). The judge went on to hold that there were two further grounds on

53 The facts are set out by Terry, supra note 18, including reference to criminal proceedings in Canada against the torturers which saw one soldier convicted of the crimes of torture as well as manslaughter, and three others convicted of negligence in Arone’s torture and death.

which he would also have dismissed the case even had the parents directly brought the claim: the failure to state facts sufficient to reveal Canada owed a duty of care in tort to Arone; and the fact that the action was barred by relevant Canadian statutes of limitations applying to the Crown (Canadian government) and soldiers.

While it is not my role as editor of this volume to take a position on all the issues discussed herein, I cannot let pass the opportunity at least to point out what very relevant arguments were totally missed in this case—to the point that the Arone case represents an extreme example of limited lawyering and non-cosmopolitan judicial formalism. If the present volume comes to have any impact at all on the direction the law takes in jurisdictions outside the United States, especially in Commonwealth countries, it is hoped that it will at minimum mean that cases such as Arone will in future be decided in much fuller awareness of what is legally at stake (public and private international law, and their transnational interface, and not simply domestic statutes with limited direct relevance to the context) as well as of the rich range of normative considerations that should prompt courts to consider viewing claims such as that of Arone’s family as crying out for the common-law-like development spoken of by Raponi, Moran and others in this volume. Since John Terry has more than adequately set out the basic mistakes made by the judge in Arone, it is not my intent to replicate that analysis, but, rather, merely to supplement it by noting some of the arguments and doctrinal areas canvassed in this volume which are relevant to deciding this case on appeal—or relevant for a future trial judge should the case be recommenced.55

The judge ruled that “[n]o facts are set out in the statement of claim that would remotely give rise to a duty of care that would support the allegations of negligence.” Keeping in mind both that the soldiers were actually convicted of criminal negligence and that statements of claim need only set out the basic facts, it is nothing short of stunning that Cunningham J. would find the following passages (none of which were even alluded to, let alone quoted, by the judge) in the statement of claim as lying beyond even remoteness in terms of establishing a duty:

55 Whatever the justifiability of the first ground of dismissal—the lack of standing for a Litigation Guardian—it is assumed that it is within the discretion of both the Ontario Court of Appeal and a future trial judge to allow the case to be recommenced by the Arone parents acting as direct plaintiffs. Arguably, given the realities of litigating a case such as this when one is located in Somalia in the circumstances of Arone’s parents, it was unaccommodating of the judge not to have conditionally dismissed the case in order to have allowed a refiling. This comment applies equally to the second ground of dismissal—the lack of sufficiently pleaded facts to show the existence of a duty of care. Here, Terry is surely correct in his observation that the statement of claim is a textbook example of a sufficient pleading of facts for purposes of commencing an action, but, even were the judge correct to say clearer facts had to be pleaded, he should at least have acted as did the judge in the case of Beanal v. Freeport-McMoran, Inc., 969 F.Supp. 362 (E.D. La. 1997), by giving Beanal (a plaintiff living in Indonesia) a chance to revise the statement of claim before considering final dismissal.
Introduction

“The Plaintiffs state and it is a fact that, during the period in which he was detained and prior to his death, Shidane Abukar Arone was in the custody of various [Canadian] military personnel [listing the four soldiers convicted by military tribunal back in Canada]. . . [B]etween the time of his capture and death, a period of several hours, Shidane was blindfolded, bound at his wrists and ankles and systematically, brutally beaten and tortured by members of the Canadian Armed Forces . . . [A]t periodic intervals . . . , Shidane’s captors took turns posing for photographs with their blindfolded, bloodied, beaten and helpless victim . . . [T]he aforesaid prolonged torture and beating of Shidane was witnessed by other members of the Canadian Armed Forces stationed at the base, including [nine others names] . . . [M]any [other] Canadian soldiers including [a further six are listed] were informed of the ongoing torture and beating of Shidane . . . [N]one of the soldiers who observed or were informed of the beating and torture of Shidane took steps to protect him or put an end to this action . . . [A]t some point during the detention, Shidane Abukar Arone died as a result of the beating and tortured which he suffered at the hands of the Canadian soldiers . . .”

Recall that it is Canada being sued in the Arone case. If one were to be charitable, one might attribute the judge’s total failure to connect these facts to a duty of care owed to Arone to his profound confusion over who owed a duty to whom. The judge seemed to think a separate duty of care in negligence had to be shown as running between the state of Canada and Arone other than the one clearly running between Canadian state agents (the soldiers) and Arone. Not only is Canadian law clear on the vicarious liability of the Crown for torts of its servants (and keep in mind that the judge seemed to think the only relevant law was Canadian), but the discussion in the Oosterveld and Flah chapter on respondeat superior (applying, at minimum, to the Canadian state itself) normatively bolsters the case for liability of Canada for its agents’ torts, as does the general responsibility in international law of a state for harm by soldiers acting ultra vires as well as the positive duty of a state to prevent harm even by private actors where relevant state decision-makers have requisite knowledge of pending or ongoing harm. One reason Cunningham J. is able to be so cavalier, it would seem, is his curious insistence on discussing the action only in terms of a duty of care in negligence, completely leaving behind his initial observation that “assault [and] battery” (his distillation of the statement of claim’s reference to “torture, wrongful death, an/or murder”) were pleaded along with negligence. The closest he comes to revisiting these intentional torts is the cursory statement: “Nor are any facts pleaded which would support the plaintiff owed ‘legal and moral obligations’ to Shidane Abukar Arone.” Had the judge openly addressed the core claims relating to the torture which do not in the least involve an issue of negligence but rather direct and brutal intent to maim, he would perhaps have been less likely to have discussed the case as if it were about whether some abstraction called “Canada” had to be shown to be negligent in controlling its own soldiers.

56 Extracts from paras 9–16, Statement of Claim, supra note 54.
There is a hint in Cunningham J.’s reasons that he felt the duty of care did not arise because of the transboundary context, Canadian troops somehow not having a sufficient nexus to persons outside Canada, at least to family members of persons harmed by those troops: “If it can be said that members of the Canadian Forces on a peace-keeping mission in another country owe a duty of care to all citizens of that country beyond their ordinary duties as soldiers, it cannot be said that they owe any duty of care to . . . the parents.”57 On the face of this passage, Cunningham J did not feel he needed to decide the question of the extraterritoriality of duties of care, but at the very least he does not affirm that such duties exist and it may well be that doubts on this score had a sub-textual influence that bolstered his sense that no duty ran to the parents. Before addressing the duty-to-parents question, the duties-beyond-borders point warrants further mention. It bears emphasising that international human rights law is as clear as it can be that a state incurs state responsibility for the human-rights-violating conduct of the state’s own agents abroad, the duties in, for example, the International Covenant on Civil and Political Rights flowing from a mix of jurisdiction and opportunity to control and not from the blunt fact of territoriality.58

The just-quoted passage indicates that Cunningham J. had problems with the duty of care not simply because he seemed to fixate on some sort of duty of care on Canada independently of vicarious liability for harm caused by its agents’ breaches of their own duties of care, but also because he seemed to see the case as about whether there was a legal duty of care running directly between Canada and Arone’s parents. Terry notes how this misses the point that this is an action primarily about harm to Arone, with the issue of the parents suing being more one of standing to sue for that harm than an assertion of substantive duties owed directly to them.59 The judge has clearly said no substantive duty runs to the parents, a point to which I shall return, so it is clear he has erred in thinking this is the central question. But, then, he complicates matters by implic-

57 Arone, supra note 3 (emphasis added).
58 On this, see Byrnes, supra note 41, who views article 14(1) of the Convention against Torture, on civil redress, as clearly applicable to torture committed by a state’s agents outside the state’s own territory. See also the reference to the ICCPR Casariega case, cited in Sornarajah, supra note 37, dealing with abduction and abuse carried out in Brazil by agents of Uruguay. Communication No. 56/1979, Lilian Celiberti de Casariega v. Uruguay, Yearbook of the Human Rights Committee 1981–1982, Vol. II, 1989, pp. 327–329, at paras 10.1–10.3. Another standard example of state responsibility for extraterritorial harm by its agents is the bombing of the Rainbow Warrior (and killing of a Greenpeace photographer) by French security agents. See also, as matter of general international law, the finding by the International Court of Justice in the Namibia case that South Africa was legally responsible for violation of a host of rights of persons in, and the people of, Namibia even though South Africa’s presence in that territory was an illegal occupation: “By occupying the Territory without title, South Africa incurs international responsibility arising from a continuing violation of an international obligation. It also remains accountable for any violations of the rights of the people of Namibia, or of its obligations under international law towards other States in respect of the exercise of its powers in relation to the Territory.” Legal Consequences for States of the Continued Presence of Africa in Namibia (South West Africa) notwithstanding Council Resolution 276 (1970), [1971] ICJ Reports p 16 (Adv Op).
59 Terry, supra note 18.
itly acknowledging that there is the issue of Arone’s rights in tort surviving his death. Here, Cunningham J. resorts to an application of “trite . . . common law” that the death of an individual extinguishes existing tort claims unless such claims survive by virtue of legislation. One statute he deems relevant transmits some rights in tort to the estate of a deceased, but, since the parents did not purport to be suing in that capacity, their claim could not be recognised.60 Had the Arone family’s lawyer drawn the judge’s attention to the Convention against Torture (nowhere mentioned in the statement of claim), he would have been duty-bound to have regard to it in accordance with the principle that statutes must be interpreted, where possible, in such a way as to allow Canada to respect its international law obligations.61 Article 14(1), apart from speaking to the duty of Canada (and thus Canadian courts) to facilitate an “enforceable right to fair and adequate compensation” at least where the torture is committed by Canada (its human agents), also speaks to the issue of the right of the torture victim’s survivors. Its second sentence reads: “In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.” This provision is creatively ambiguous in that it does not state the exact basis of the compensation, whether vicarious compensation for the family member’s death (and pre-death suffering) or whether compensation for their independent harm (pain and suffering, loss of an income earner, and so on)—or both.62 Without having to decide whether the family has freestanding rights for their own harm, article 14(1) would provide a clear reason for a Canadian judge to look long and hard at a statute in order to see whether “estate” should be interpreted liberally on facts such as these or even whether the context in tandem with article 14(1) leads to the interpretation that the issue of survival of rights and the capacity in which family members can sue falls outside the scope of the statute so as to be subject to common law (development).63

60 Keeping in mind that this is an alternative ground and the judge has already found the parents were not properly before the court because this is not the kind of case properly brought by a Litigation Guardian. The judge also dismisses actions related to the death of a family member found in the (deemed) relevant family law statute, but this shall be left aside for the moment because he does not decide the parents have no claim but, rather, that (a) the statute was not even pleaded and (b), even if it had been, its two-year limitation would have barred the claim.

61 Baker v. Canada, [1999] 2 SCR 817 at paras 70–71 (majority opinion of L’Heureux-Dubé J.), is the leading case decided by the Supreme Court of Canada, and discussed or noted in a number of chapters in this volume. In that case, the Court held that the Convention on the Rights of the Child, although not expressly incorporated into Canadian law by legislation, should be used to interpret the scope of discretion of an immigration official deciding whether a deportation of a mother of four Canadian children should go ahead.

62 Here, note the final judgment in the Pinochet saga—that of the extradition judge deciding that sufficient facts were made out by Spain to justify Pinochet’s extradition for, inter alia, torture: The Kingdom of Spain v. Augusto Pinochet Ugarte, Unreported Judgement of 8 October 1999, Bow Street Magistrates’ Court. The magistrate noted that the suffering of a family during the period when a family member has been disappeared (and is not known to be dead or alive and is feared to be undergoing torture) itself may be an independent human rights violation sufficient to amount to a form of “mental torture.”

63 This latter line of reasoning—i.e. is this even a case in which either existing Canadian domestic law or existing Somalian domestic law are fully applicable?—would arguably also be relevant to
Finally, time limitations. Cunningham J. found an array of Canadian statutory limitations periods which had not been met. In addition, he did not even seem to feel the need to address whether he had any authority to waive them. Right from the outset, there is a serious error of law in assuming Canadian law on limitations is the applicable law. As noted by Terry, in Canadian conflict of laws, limitation periods are matters of substantive law and the presumptive choice of law rule for an ordinary tort is the *lex loci delicti* (Somalian law), both these rules having been laid down by the Supreme Court of Canada in *Tolofson*.64 We will return to what law or rules should, or could, have applied, but note for the moment that the judge may, unknowingly, have been justified in turning to Canadian law because Somali law was not pleaded; traditional conflicts analysis would suggest that the *lex fori* is the default law when the applicable law is either not pleaded or not proved. So, assume that Canadian law should apply to the time bar question.

The Arone family lawyer managed to file the claim on March 15, 1999, which is one day shy of six years from the date of Arone’s death. This is significant because the Crown Liability and Proceedings Act establishes a time limitation for tort actions of six years.65 I will return to the question of whether even this statute should apply, but must first note that the judge avoids finding the claim was brought within time by turning to what he considered *lex specialis* cutting back on the “generosity” of the six-year rule. He invokes the very short six-month rule of the Public Authorities Protection Act, which states in section 7:

“No action, prosecution or other proceeding lies or shall be instituted *against any person* for an act done in pursuance of execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months the Litigation Guardian issue. Should Canadian law on this point be interpreted as exhaustive or merely permissive? Thus, even if the Arone family did not fit under existing Canadian law provisos for a Litigation Guardian (disability, absence), the statutes need not be interpreted as barring suits through a Litigation Guardian in such a novel transnational context as this. The force of analogy, combined with fairness and perhaps necessity, might suggest that the difficulty of instructing a Canadian lawyer from one’s home in a quintessentially “failed state” like Somalia (especially for a family of limited means) comes very close to satisfying the underlying rationales related to the existing bases for using a Litigation Guardian, disability and absence of a resident. Indeed, treating the absence condition as fused to the parallel condition that the absentee must first have been a resident of the jurisdiction is arguably irrational, at some general normative level, if the persons who are absent are within their rights to turn to Canadian courts but cannot reasonably be on site to instruct counsel. (All this being said, cryptic comments by the judge suggest this particular Litigation Guardian either was not truly authorized or would not be acceptable as a Litigation Guardian even if he were: “In fact, on the material available to me, no court would have appointed Abdullah Godah Barre as a Litigation Guardian.” This suggests far more going on in the case than meets the eye. In light of this throwaway comment, one might be forgiven for thinking Cunningham J. should have elaborated on this concern rather than going on to decide on the duty of care and limitations points in the truncated way in which he did.)

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64 *Tolofson*, supra note 29.
after the cause of action arose, or, in the case of continuance of injury or damage, within six months after the ceasing thereof.”66

Section 269(1) of the National Defence Act, also found applicable by the judge, is materially identical to the just-quoted passage.67 There are at least three questions that the judge should have answered before assuming these two statutes covered these facts. Firstly, and most significantly, this being an action against the government and not against “any person”, do sections 7 and 269(1) even apply as lex specialis or should not the Crown Liability and Proceedings Act apply, as it states on its face, to “any proceedings by or against the Crown”? It is of some interest to note that the first and only time Cunningham J. clearly states that it is the vicarious liability of the Crown that is at issue is when mention of this fact seems, to the judge, to assist the Crown. In reference to the applicability of section 7 to the Arone family action, the judge simply asserts that “their claim . . . against members of the Canadian Armed Forces and vicariously the crown [sic]” is barred by section 7, when nowhere does section 7 indicate it covers actions against the Crown.68

Secondly, even if Crown liability is barred, the words “execution of . . . any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority” begs a major normative question which fairly shouts out for decision in a post-Pinochet world: should conduct constituting torture be interpreted as falling within this phrase or, just as the House of Lords found torture to be normatively incapable of being treated as “official” conduct, should these words be interpreted both to exclude torture as “duty or authority” and to mean that the words “neglect or default” should be read down so as to not include intentional violations of jus cogens human rights norms? In deciding whether to adopt a redress-facilitative interpretation of these six-month limitations provisions, it is worth bearing in mind that the issue is interpretation of these statutes for the non-dispositive purpose of allowing a case to go ahead and not in order to dispose of the case on the merits. Here, of course, a court must fully face up to the consequences of following Cunningham J.’s line, namely that dismissal of the case in Canada will almost certainly mean, in effect, the end of the case given the almost complete lack of a functioning state, including judicial, structure in Somalia. That is, the dismissal is not simply denial of access to Canadian courts, but denial of access to justice full stop. As he did not appreciate the case has a conflict of laws dimension, Cunningham J. likely did not turn his mind to this result, but future courts may do well to bear in mind the words of the House of Lords in the just-decided Lubbe case on the question of dismissing cases on grounds of forum non conveniens: “[A] stay will not be granted where it is established by cogent evidence

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66 Public Authorities Protection Act, RSO 1990, c.P.38, s.7 (emphasis added).
67 National Defence Act, RSC 1985, c.N-5, s. 269(1).
68 Arone, supra note 3 (emphasis added).
that the plaintiff will not obtain justice in the foreign forum.”69 This succinct statement would seem suited to stand as a general principle of access to justice in a transnational context not necessarily limited to its core application in the forum non conveniens context. If so, it would seem reasonable to request courts to consider not only article 14(1) of the CAT but also this general common law standard as interpretive baselines in reading statutes, or applying common law rules, which have the effect of dismissing a transnational case once and for all.

Thirdly, should supplementary principles of (transnational) common law be either read into limitations statutes or applied in lieu of the statutes, so as to permit the reasonableness of when an action is brought in all the circumstances of the case to be taken into account—a principle not of discoverability but of reasonable feasibility? Factors to take into account in the Arone/Somalia context could be: whether out-of-court payment discussions delayed the realisation that legal action should be taken; whether it seemed hopeless to persons such as the plaintiff, given local realities and general questions of power imbalance, to consider legal proceedings until such time as they became aware that it could be possible to sue in the courts of the state whose soldiers were the torturers; whether there were inordinate difficulties in communicating with lawyers in Canada; and so on. Admittedly, if the applicable statute is still taken to be one with a six-month rule, then a feasibility principle will only take one so far.

Which returns us to the error in assuming, without more, that Canadian limitations law applies at all. It would be possible at the outset, on reasoning such as set out in the chapters of Moran and Raponi, to have immediate recourse to a (regulative ideal of a) transnational normative sphere in order to determine what limitations period, if any, should govern the case. A less radical position would be to start with Terry’s point that, by Canada’s own conflict principles, Canadian limitations law would not normally apply to foreign tort actions. If this is so, this suggests an extra level of freedom on the part of judges in a case such as Arone to apply, forge or otherwise draw on the principles most appropriate for the case, if it should turn out that Somali law is either not discernible or underdeveloped on the point. This includes a freedom not to apply existing Canadian law in contrast to mechanistically defaulting to it. Even then, if a judge insisted on Canadian law as the most principled default law, the strongest case is for the Crown Liability and Proceedings Act to be the most applicable to actions against the Crown.70 That being assumed, a careful reading of section 32 suggests that section 32 itself appears implicitly to embody the very principle of Tolofson (that limitations periods in torts are, presumptively, governed by the law under which the cause of action arises: the lex loci delicti) when it refers

69 Speech of Lord Bingham of Cornhill (for four of five Lords) in Schalk Willem Burger Lubbe (suing as administrator of the estate of Rachel Jacoba Lubbe) and 4 others v. Cape plc and related appeals, Unreported Judgment of the House of Lords, 20 July 2000.

70 This is especially the case when it is noted that none of the potentially-applicable statutes specifically speaks of the situation of Crown liability incurred outside Canada. That being so, it seems reasonable to resolve doubts as to which statute shall be deemed to govern in favour of the most human-rights-respectful statute—in other words, that with the longer period of limitation.
Introduction

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to the six-year limitations rule as applying to “any cause of action arising in [a] province” of Canada. We come full circle. Even if direct recourse to the transnational sphere is not embraced, section 32’s circumscription seems to send us in that very direction.

Where would one turn if one were to seek to forge a transnational limitations rule for this case? With John Terry, it seems reasonable as a matter of fairness to first affirm that a foreign tort plaintiff should not be worse off than would be the case had the cause of action arisen in a Canadian province; so, six years should be the floor and, as such, the Arone family claim was actually brought in time.71 Rather than stop with such a case-specific pragmatic result, however, it is worth briefly drawing attention to the kinds of multiple normative footholds identified by Moran as paradigmatic to the “new private law” she sees emerging. We might first note that, as a matter of both first principles and doctrinal generalization, limitations periods tend to be longer the more serious the underlying legal cause, especially in the criminal law. In terms of crimes which overlap with international human rights law, we could then note the capacity to bring criminal proceedings for crimes against humanity and war crimes that occurred as far back as the Second World War. As a matter of close analogy, this reasoning would seem to apply a fortiori to legal proceedings relating to similar underlying conduct where the consequences (financial liability) are less grave than for criminal convictions (imprisonment). At minimum, we might take a comparative-law look south of the border and note that the US Congress has set 10 years as the limitations period for civil actions under the Torture Victim Protection Act.72 Finally, we could look to see if public international law offers any established or emergent norms which Canadian and other courts would find relevant.

On this front, most worthy of note is the rapidly-emerging consensus on principles governing the right to reparation for victims of serious human rights abuses. In particular, a set of principles formulated and then revised by Theo Van Boven, Special Rapporteur of the (then-named) UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, is making its way through the UN Commission on Human Rights process. It appears to have attracted wide support, sufficient for Van Boven’s successor as rapporteur, Cherif Bassiouni, to have presented a final report in 2000 containing his draft set of principles which the Commission on Human Rights is invited to adopt at its 2001 session.73 Van Boven’s 1997 Second Revised Basic Principles and

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71 Terry, supra note 18.
72 TVPA, supra note 2.
73 The final of three drafts prepared by Van Boven can be found as “Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28 [13 January 1997]”, Annexed to Question Of The Human Rights Of All Persons Subjected To Any Form Of Detention Or Imprisonment, Note by the Secretary-General, UN Doc. E/CN.4/1997/104 (16 January 1997), Appendix: [Second revised set of] Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law (“Van Boven Second Revision, 1997”). The
Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law included the following provision:

“9. Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights or international humanitarian law. Civil claims relating to reparations for gross violations of human rights and international humanitarian law shall not be subject to statutes of limitations.”

This appears to have been narrowed somewhat in Bassiouni’s proposed principles:

“6. Statutes of limitations shall not apply for prosecuting international human rights and humanitarian law norms that constitute crimes under international law.

7. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.”

It can be seen that the Bassiouni has, while maintaining a hiatus for so long as there are no effective remedies, confined the no-limitations rule to prosecutions for crimes under international law while opting for a no-undue-restriction test for all human-rights-related civil claims, whether or not the violation in question also constitutes a crime under international law. However, the principle he states is clearly inconsistent with excessively short periods such as six months and otherwise-arbitrary limitations rules. There is, furthermore, nothing in his formulation that precludes drawing analogies between criminal and civil remedies. What is an “undue restriction” for a torture claim must surely take into account the fact that there are no limitations at all for criminal prosecutions related to the same conduct. In a context such as Somalia, the further emphasis in the Bassiouni principles on availability of effective remedies much certainly play a significant role for a judge in Canada deciding whether it would be an “undue restriction” to cut off the claim of a torture victim’s family after six months, and indeed even after six years.

As noted at the outset of one of his reports, Van Boven’s mandate was to draft these guidelines “in the light of existing relevant international instruments.”

Thus, the principles he has put forward are mainly distillations of, and to some extent, elaborations on, the recommendations contained in Bassiouni’s Final Principles. The legal developments in the years since their publication have not made a crucial difference, however.

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75 Bassiouni Final Principles, 2000”, ibid. (emphasis added)
extent principled extrapolations from, the current legal state of affairs. The more conservative formulations of Bassiouni suggest that, after consultation with states, the final principles he recommends come closer to tracking (albeit by clarifying and elaborating) existing law than engaging in much of the kind of law-forging that often occurs in a codification process, and such as Van Boven seemed more inclined to engage in. This suggests that, while the Bassiouni principles need not be taken as a ceiling for Canadian judges (especially when it is the government of Canada being sued and not a human defendant with her own rights to consider), they should be viewed as uncontrovertially providing a normative floor.

Of course, when the set of principles becomes an instrument adopted by the Commission on Human Rights and perhaps also by the General Assembly, it will have even greater normative relevance, albeit as a “soft law” instrument. “Soft law” refers to instruments whose normative force derives not from formal bindingness but from the substantive worth of their contents in tandem with relevant understandings that grow up around it in that regard. But, norms that are neither “hard” treaty norms nor clear customary law norms have often been invoked by Canadian government lawyers before Canadian courts or referenced by courts themselves. As such, drawing on these just-quoted draft principles and, later, on any finally-adopted principles would be a legitimate way to seek normative guidance in the course of deciding on what transnational legal principles to embrace.77

77 To make sure this point about the flexibility of international normativity is clear as is the legitimacy of invoking “soft law” in the course of judicial reasoning, a few examples from the practice of the Supreme Court of Canada may assist. Numerous other examples could be given from this Court other than those that follow. Canada (Attorney General) v. Ward, [1993] 2 SCR 689 (“While the drafting history of the [Geneva] Convention [on Refugees] may not go far in justifying the exclusion of state complicity from the interpretation of “Convention refugee”, other sources provide more convincing support. A much-cited guide on this question is paragraph 65 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”). While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states.” Per La Forest J for the Court); Pushpanathan v. Canada [1998] 1 SCR 982 (See the invocation of numerous—a total of 20—soft law documents by Cory and Iacobucci J in their dissenting opinion; these included General Assembly resolutions (no less than nine), draft treaties, International Law Commission draft principles, UN reports and so on, all of which were pleaded and put before the Court by the Government of Canada lawyers.); R v. Ewanchuk, [1998] 1 SCR 330 (“The Committee on the Elimination of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/47/48 (1979), established under Article 17 of the Convention [on the Elimination of Discrimination Against Women], adopted General Recommendation No. 19 (Eleventh session, 1992) on the interpretation of discrimination as it relates to violence against women [going to quote passages]. . .”, per L’Heureux-Dube and Gonthier J at para 71; note, as suggested by the word “Recommendation” that the Committee’s authority does not include the power to directly bind states parties to its interpretations of the meaning of the Convention, although states conforming in good faith with their treaty obligations would need to offer persuasive reasons why they would not adhere to the Committee’s view. Also, in the same opinion: “On February 23, 1994, the U.N. General Assembly adopted the Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/48/49 (1993). Although not a treaty binding states, it sets out a common international standard that U.N. members states are invited to follow . . .” at para 72.) R v. Crown Zellerbach, [1986] 1 SCR 401 (“The internal marine waters of a
state are those which lie landward of the baseline of the territorial sea, which is determined in accordance with the rules laid down in the United Nations Convention on the Law of the Sea (1982)” per LeDain J at para 38. Note that this convention was not in force in 1986, that even Canada had yet to ratify it in 1986, and that its relationship to customary law was highly controversial four short years after adoption. As such its textual provisions referenced by the Supreme Court of Canada were classic examples of “soft law.” In the same paragraph, the Court makes use of another soft law source: “This impression is reinforced by the United Nations Report of the Joint Group of Experts on the Scientific Aspects of Marine Pollution, Reports and Studies No. 15, The Review of the Health of the Oceans (UNESCO 1982) (hereinafter referred to as the “U.N. Report”), which forms part of the materials placed before the Court in the argument.”.