

*Transnational Governance of Corporate
Conduct through the Migration
of Human Rights Norms: The Potential
Contribution of Transnational
'Private' Litigation*

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I. INTRODUCTION

A. International Human Rights Norms and the Governance of
Transnational Business Conduct

TRANSNATIONAL BUSINESS CONDUCT has the potential to threaten many of the concerns of international human rights law. As much as state conduct, business conduct can pose a threat to individual life and security, health and safety, access to housing, and freedoms of association and expression.³

While the regulation of business conduct is principally assigned to state governments, state performance of this regulatory function in the transnational context is impaired in several respects. In an anarchic international system with no overarching governing authority

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³See 'Note, Developments in the Law: International Criminal Law, Corporate Liability for Violations of International Human Rights Law', 114 *Harvard Law Review* 2025 (2001) at 2027–8; C Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in A Eide, *et al.* (eds), *Economic, Social and Cultural Rights*, (2nd edn) (The Hague, Kluwer, 2001) at 564–7.

to co-ordinate and enforce regulation, significant problems arise for effective governance. The lack of supranational authority may create regulatory gaps in which transnational collective action problems of cost-externalisation and free-riding by private actors are under-regulated and public goods under-supplied. Moreover, a fragmented international system increases the possibility of harmful regulatory competition among jurisdictions, particularly where private actors can shift production to take advantage of lower-cost regulation in different jurisdictions, or use threats of relocation to induce regulatory concessions. Finally, transnational business actors, whether multinational enterprises or networks of businesses regulated by non-state norms such as *lex mercatoria*, might achieve a 'lift-off' or separation from state laws as a source of norms for at least some of their conduct.⁴ In the absence of a comprehensive multilateral arrangement, effective governance of transnational private actors is compromised by regulatory gaps and competition.

International human rights law has conceptual and doctrinal tools to address harms caused by transnational private actors. The principal method is through doctrines of state responsibility. In particular, under the doctrine of indirect state responsibility, states have the responsibility to regulate private actors under their control.⁵ In areas such as criminal liability, there is increasingly the ability, if not yet an obligation, for states to claim prescriptive jurisdiction over the conduct of their own nationals abroad.⁶ In this connection, states are sometimes granted universal jurisdiction to deal with particular kinds of transnational conduct by actors. Human rights theory is also developing the idea of horizontality, in which private actors can themselves be the source of human rights violations.⁷ In general, international human rights law has been one area of public international law that has moved beyond an exclusive state focus, in which non-state actors may have rights as well as obligations under international law.

Although international human rights law is developing adequate conceptual and doctrinal tools to address transnational business conduct, its

⁴G Teubner (ed), *Global Law without a State*, (Aldershot, Dartmouth, 1997); Y Dezalay and B Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, (Chicago, University of Chicago Press, 1996). For a survey of these regulatory challenges in the context of private international law, see R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', 40 *Columbia Journal Transnational Law* 209 (2002).

⁵C Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms', in: C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, (Oxford, Hart Publishing, 2001) at Section 2 [hereinafter *Torture as Tort*].

⁶*Ibid.*, Section 7.

⁷See above n.5, Section 3.

main challenge has been enforcement and compliance. Unlike some other areas of international or national law, whether public or private, inter-national human rights institutions have limited direct enforcement capabilities, even as against states responsible for human rights violations. With respect to business conduct, there is an additional enforcement problem in that international human rights treaties do not provide for any direct international monitoring or assessment of conduct concerning private actors. Instead, monitoring is indirect, through the lens of state responsibility.

It may be that the significance of international human rights law operates in less obvious ways. International human rights complaints, in particular, can be useful to efforts by government and non-government actors to mobilise and pressure states and non-state actors such as corporations without necessarily resorting to a legalistic complaint process. The value of international human rights law may, therefore, be as part of a larger system of countervailing power and oversight by networks of civil society actors and government actors who utilise international human rights law as a basis for conceiving of and framing action against business actors such as consumer boycotts, shareholder activism, shaming strategies, and state regulation itself.⁸

This paper is an effort to link this social take-up of international human rights law to a further role that is situated between the realm of the institutions of international human rights law proper and the indirect impact of international human rights principles as they operate in countervailing networks: the use of international human rights norms within other *legal* venues and discourses of transnational economic law.

B. The Migration of International Human Rights Norms to Other Transnational Legal Regimes?

This paper builds on models of transnational governance based on plural norm systems. On the one hand, a unified system of governance of business conduct for the protection of democratic, regulatory and distributive concerns based on a single institutional venue, such as the United Nations, is unlikely.⁹ On the other hand, the current transnational order involves more interaction between and among systems in different *legal* venues than some systems theories of global networks

⁸ See M Keck and K Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca, NY, Cornell University Press, 1998).

⁹ See, for example, C Scott, 'Toward the Institutional Integration of the Core Human Rights Treaties' in I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights*, (Philadelphia, University of Pennsylvania Press, 2001).

now imagine.¹⁰ In particular, the existence of a multiplicity of international and domestic legal institutions provide venues that are points of potential conflict and dispute between different systems of interests and values. The end of the pre-eminence of state law and the failure of any world government is not yet so dramatic as to end the need to consider familiar venues and styles of law-making and disputing.

Any emerging system of governance or accountability will involve a mixture of responses, including international treaties and institutions, transnational co-operation among governmental actors, transnational NGO networks, revived national state regulation, transnational litigation, consumer boycotts, and corporate codes of conduct.¹¹ Faced with this necessary eclecticism (or, put more positively, pluralism) of normative venues, this paper attempts to explore how governance strategies that would promote the objectives of international human rights norms can be developed through the migration of these norms into legal interpretation and application in venues of transnational private litigation in domestic courts. In this task, we are also interested, at a legal-doctrinal level, in what specific roles international human rights norms themselves might play, and, at a sociological level, in the ways in which intra-legal migration is interdependent with extra-legal social and political discourses and associated institutional processes.

C. Structures of Policy Argumentation and the Collision of Policy Discourses in Transnational Economic Law

Domestic private law regimes may not seem to be concerned with the regulation of transnational economic actors for human rights concerns. But, by disturbing narrow doctrinal analysis and policy discourses in these legal regimes, international human rights norms can potentially play an effective role in empowering, framing and expressing in legally acceptable forms a set of policy concerns that would otherwise be too readily ignored.

Transnational economic law lacks a plausible single policy discourse that necessitates either particular doctrinal rules or outcomes of particular cases.¹² In this respect, many kinds of transnational economic law

¹⁰See Teubner, above n.4.

¹¹See, for example, Teubner, above n.4; J Braithwaite and P Drahos, *Global Business Regulation*, (Cambridge, Cambridge University Press, 2001); D Trubek, J Mosher and J Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks', 25 *Law & Social Inquiry* 1187 (2000).

¹²R Wai, *Commerce, Cooperation, Cosmopolitanism: Structures of Internationalist Policy Argumentation in Private International Law*, SJD Dissertation, Harvard Law School (2000).

now recall the account of the contested space of private law adjudication in the US context mapped out by critical legal studies scholars such as Duncan Kennedy. Kennedy argues that the contested terrain of formal, substantive and institutional debates in US legal adjudication is best understood as a force-field of 'conflicting considerations'.¹³ In this contested order of contemporary legal adjudication, there is no single reconstruction theory based on outside normative theories that can be considered dominant for the purposes of filling the gaps, contradictions and ambiguities built into the formal, substantive and institutional debates.¹⁴ This work also leads to a view of legal argumentation that follows a 'semiotic' or 'discursive structure' approach.¹⁵ It identifies how legal argumentation and reasoning demonstrate repeated patterns of legal and policy arguments, and attempts to map out some of these patterns. Kennedy claims that this model of adjudication applies to public, private and international law,¹⁶ and the scholarship of international lawyers such as David Kennedy and Martti Koskenniemi has provided sustained examples of the utility of this approach in examining public international law.¹⁷

This recent work on policy argumentation in international law has similarities to contemporary work by Gunther Teubner on law as a 'collision of discourses'.¹⁸ Internationalism in policy discourse in law can be examined as combining elements of economic, political and moral argumentation, each of which can be distinguished and assessed on their own terms. In Teubner's account of law, a number of different belief-systems exist in contemporary societies, and these are often dramatically different

In this chapter, transnational economic law refers to the range of private and public laws relevant to transnational economic activity, including international trade regulation, private international law, and the laws of international business transactions.

¹³See, for example, D Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* 1685 (1976); D Kennedy, 'The Structures of Blackstone's Commentaries', 28 *Buffalo Law Review* 205 (1979); D Kennedy, 'A Semiotics of Legal Argument', 42 *Syracuse Law Review* 75 (1991).

¹⁴D Kennedy, 'From the Will Theory to the Principle of Private Autonomy: L Fuller's 'Consideration and Form'', 100 *Columbia Law Review* 94 (2000) at 95.

¹⁵This approach is commonly, but not exclusively, associated with critical legal studies scholars such as D Kennedy. Other examples include J Balkin, 'The Crystalline Structure of Legal Thought', 39 *Rutgers Law Review* 195 (1986); R Unger, *Law in Modern Society*, (New York, Free Press, 1976); R Unger, *The Critical Legal Studies Movement*, (Cambridge, Mass., Harvard University Press, 1986).

¹⁶Kennedy, above n.13, at 95; D Kennedy, *A Critique of Adjudication: Fin-de-siècle*, (Cambridge, Mass., Harvard University Press, 1997) at 253-4.

¹⁷D Kennedy, *International Legal Structures*, (Baden-Baden, Nomos Verl.-Ges., 1987); M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Helsinki, Finnish Lawyers' Publishing, 1989).

¹⁸G Teubner, 'Alter Pars Audiatur: Law in the Collision of Discourses', in: R Rawlings (ed), *Law, Society and Economy: Centenary Essays of the London School of Economics and Political Science 1895-1995*, (Oxford, Oxford University Press, 1997).

in their guiding values: these include the discourses of 'politicisation, moralisation, scientification and economisation'.¹⁹ Teubner's 'discourses' or 'rationalities' are not simply ideational systems, but complex social systems which combine a 'material base of social practices' and reflexive conceptual aspects.²⁰ In the legal context, Teubner sees each of these systems as having staked out a position within legal theory and jurisprudence and in legal decision-making and legal doctrine; in addition, each of these systems is producing 'social norm production' outside the state law system.²¹

In the international context, Teubner sees the operation of transnational systems as 'breaking the frame' of state-based law, creating 'global law without a state'.²² Systems such as transnational human rights, transnational labour, transnational commerce and multinational corporations challenge the supremacy of state-based legal systems for pre-eminence in social norm production.²³ One view of the international human rights regime is that it acts as a separate system, with its own internal dynamics, in countervailing relation to, for example, networks of business bound by *lex mercatoria* and non-judicial dispute resolution, or the internal networks of large multinational enterprises. It has a formal set of treaties and institutions, in particular, the UN treaty systems and regional human rights systems, as well as a vigorous NGO network.²⁴

This paper understands the new transnational landscape of corporate governance as involving a more complex relationship of legal venues and functional systems. Across state borders, but also across functions, identities and interests, there is significant movement, interpenetration and multiple functioning. To highlight the actual and potential intersection and overlap of these different systems in law, we look at the role that international human rights norms play in private litigation in domestic courts, a legal regime that is not commonly viewed as concerned with international human rights.

This paper can be partly understood as an effort to bring a critical policy discourse approach to the subjects of private international law and international private law.²⁵ Too often what is a collision of

¹⁹ *Ibid.*, at 152.

²⁰ See above n.18, at 151–2.

²¹ See above n.18, at 152–3.

²² G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', 45 *American Journal of Comparative Law* 149 (1997).

²³ Teubner, above n.4.

²⁴ A Bianchi, 'Globalization of Human Rights: The Role of Non-State Actors', in Teubner, above n.4.

²⁵ For early examples of work of this kind in international trade law and private international law, see D Tarullo, 'Beyond Normalcy in the Regulation of International Trade', 100 *Harvard Law Review* 547 (1987) and J Paul, 'Comity in International Law', 32 *Harvard International Law Journal* 1 (1991).

discourses is claimed, in the context of the law relating to international economic transactions, to be a coherent convergence of discourses in the context of a particular liberal internationalist vision of the international system. This vision of liberal internationalism is linked together through a common principle of co-operative benefit, which, as the policy complement to consent doctrine, acts as the key policy principle that is argued to draw reinforcing support from fundamental ethical, political and economic objectives.²⁶ For example, the dominant economic, political and moral discourses, which emphasise the facilitation of commerce, the promotion of inter-state co-operation and comity, and the values of cosmopolitan non-discrimination, operate to justify reform of the rules of private international law which promote the use of international arbitration, encourage state courts to decline or limit jurisdiction, and increase the recognition and enforcement of arbitration awards and foreign judgments.²⁷ In contrast, policy goals such as distributive fairness, effective regulation and maintenance of community diversity are put aside as being too controversial or political.

The policy terrain is more open and contestable than an internationalist vision suggests. Internal conflicts among the policy dimensions do exist,²⁸ but are obscured because of a number of factors, such as the particular history of a doctrinal subject,²⁹ national and international legal cultures,³⁰ and broader ideological commitments.³¹ Moreover, policy discourse about each of the economic, political and normative bases for internationalism have numerous 'internal' conflicts with regard to the correct way to analyse particular legal problems. And, of course, there are further policy objectives that could be included in as legitimate policy concerns for transnational regimes.

In this model of policy discourse, international human rights norms may help to bring out the internal conflicts that have been obscured, and to identify further policy objectives that have been excluded

²⁶ Wai, above n.4 and n.12.

²⁷ Wai, above n.4; R Wai, 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law', 39 *Canadian Yearbook International Law* 117 (2001).

²⁸ It can be argued, for example, that the commercial activity exception to sovereign immunity is based on a model of co-operative benefit and consent that relies on strong distinctions between transnational economic activity as, unproblematically, a matter of co-operative benefit. In contrast, issues of human rights are cast in a relativistic light and, therefore, as a subject of fundamental controversy of values among states, to be avoided in the interests of a co-operative international order. See Wai, 'The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism' in *Torture as Tort*, above n.5.

²⁹ Wai, above n.4.

³⁰ Wai, above n.27.

³¹ See, for example, Wai, above n.28, at 239–45.

as incompatible, or as less of a priority, in regimes of transnational economic law.

D. The Migration of International Human Rights Normativity to Private Law Venues

Invoking international human rights norms can translate and frame a different set of policy concerns within legal venues that otherwise focus on policy goals other than human rights protection.³²

First, international human rights treaties may *directly* provide a formal vehicle at the level of sources and interpretation to which legal actors in other legal venues could turn to retrieve other policy values. In US private litigation under the Alien Tort Claims Act (ATCA), for example, the statute expressly provides for a violation of the (public international) 'law of nations' as a trigger for a (domestic, private-law) tort action.

Secondly, human rights could be *indirectly* pleaded in that, while they could be the object or purpose of the litigation, other legal categories would be invoked in order to vindicate the substance of human rights protections; for example, rather than a human right of torture providing the direct cause of action, a plaintiff might choose to sue a corporation for a recognised cause of action such as the tort of battery. Claims in categories such as tort-delict are the most obvious kind of cause of action to frame domestic common law litigation related to the protection of third parties from the harmful effect of the activities of international economic actors. In addition, private actions for private remedies also are part of mixed regimes such as anti-trust or securities regulation. Lastly, the regulatory function of contract law for claims against private actors should not be overlooked; for example, a claim in contract might be made in relation to harmful treatment by a commercial actor in its employment relations.³³

In this latter context of indirect private claims, the turn to international human rights law provides a vehicle for the introduction and consideration of alternative *policy* considerations and *value*-laden premises — let us call this *the social* — that help channel and structure reasoning 'within' law. This kind of indirect impact can be especially important,

³²For a discussion of how 'translation' is both an apt metaphor for thinking of the relationship between public international law categories (such as torture) and domestic private law categories (such as tort) and a problematic metaphor that needs to be re-worked into a notion of mutual translation, see Scott, above n.5.

³³For a discussion of the regulatory function of these various private laws in relation to transnational economic conduct, see Wai, above n.4, at 232–6. For a discussion of framing 'human rights tort' claims in terms of existing tort categories, see Scott, above n.3, at 587–95.

as we will see in the case studies that follow, with respect to various preliminary or procedural aspects of transnational litigation.

E. Transnational Civil Society as a Key Discursive-Institutional Medium for Migration of Human Rights Norms into and from Private Law Venues

It is one thing to discuss the framing of arguments for the social in transnational economic law through the injection of international human rights norms into transnational litigation against corporations. It is another — closely related — thing to map the institutional modalities by which the legal may interact with the social to produce actual behavioural change. In the narratives of litigation contexts that follow, some attention will be paid to the involvement of actors within ‘transnational civil society’ in order to speculate on the extent to which this sphere acts as the discursive medium that explains, in large part, the social↔legal↔social processes of normative migration.

It is not our purpose in this paper to elaborate a specific theory about the role of (transnational) civil society in bringing about behavioural changes in the name of human rights. That this can occur has been argued by Thomas Risse in his studies of the role of transnational actors in ‘international’ politics.³⁴ In particular, Risse’s account of the role of transnational civil society actors (non-governmental organisations, both international and local) in advancing the human rights agenda and inducing change in ‘internal’ behaviour of states seems to us to be a sophisticated demonstration of a form of what could be called ‘discursive dynamism’ — the always-evolving and often unpredictable ways in which the language of critique intersects with the material power vulnerabilities and the psychological needs of governing élites. Risse and Sikkink build on the notion of the ‘boomerang effect’ advanced by Keck and Sikkink,³⁵ in which a

‘boomerang pattern of influence exists when domestic groups in a repressive state bypass their government and directly search out international allies to bring pressure on their states from outside.’

³⁴See T Risse-Kappen (ed), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, (Cambridge, Cambridge University Press, 1995); T Risse, S Ropp and K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge, Cambridge University Press, 1999).

³⁵Risse and Sikkink, ‘The Socialisation of International Human Rights Norms into Domestic Practices’ in Risse, Ropp and Sikkink, above n.34, at 18; Keck and Sikkink, above n.8, at 12–3.

They map out a 'spiral model' in which sequences of boomerang throws crossing national boundaries spiral out, with the key involvement of transnational civil society actors. Central to this account of the five phases of the spiral effect is how external actors help to facilitate social mobilisation such that (national) local action is crucial before repressive conduct changes — even as that power could not reach the critical point without (transnational) external solidarity and pressure.

Risse focuses on the state and civil and political rights, but he observes that multinational corporations and their particular capacity to infringe upon economic, social and cultural rights is an 'underdeveloped agenda of the human rights arena.'³⁶ In this chapter, we will try to trace how various non-governmental actors are key players in the development of the human rights agenda through their efforts to use and then to build from the use of human rights norms in private litigation in domestic courts.

F. The Narratives

What follows is a modest effort to assess the potential transnationalisation of governance of multinational corporate conduct through the institutional medium of 'private party' litigation in domestic courts and the injection of international human rights discourse into this litigation. We are conscious that these 'case studies' are not detailed empirical inquiries.³⁷ Also, limitations of space preclude a discussion of other litigation contexts that would shed further light on the actual or potential migration of international human rights normativity into litigation against corporate actors, or the role of organisations of transnational civil society in this migration.³⁸ Nonetheless, we believe these abbreviated accounts usefully suggest the more probing questions that should be asked and eventually answered.

³⁶T Risse, 'The Power of Norms versus the Norms of Power: Transnational Civil Society and Human Rights', in: A Florini (ed), *The Third Force: The Rise of Transnational Civil Society*, (Washington DC, Carnegie Endowment for International Peace and Japan Center for International Exchange, 2000) at 177.

³⁷ Although we have benefited from the unpublished views delivered in talks at our university of key actors in two of the three contexts we discuss; M Ratner, partner at Lieff, Cabraser, Heinmann & Bernstein, lecture organised by the York University and Université de Montréal Centre for German and European Studies, 21 February 2002, Toronto; J Orbinski, former president of Médecins Sans Frontières (MSF), lecture on 'Global Health and Global Governance', Osgoode Hall Law School, Toronto, 2 April 2002.

³⁸ For example, the role of trade unions in transnational litigation against Unocal for conduct in Burma; and the role of activist public interest law (ie, solicitor) firms in the UK litigation against UK companies for harms caused in South Africa and Namibia.

Although the United States provides the obvious venue for most such litigation (given its overall litigation culture, its status as home state for more companies than any other state, and a congenial statutory directive which allows tort actions for breaches of the 'law of nations'), an effort has been made to choose other national contexts — Canada/Québec and South Africa — which appear to have strong transnational civil society connections. We have also tried to discuss three different examples of how human rights normativity played a role in litigation against companies. In the Nazi-era forced-labour cases brought in US courts against German industrial companies, human rights provided the cause of action due to the existence of ATCA jurisdiction, although it was a cause that was almost certainly destined to be dismissed for jurisdictional and procedural reasons. Yet, the litigation was key to the transnationalisation of the normative debate that resulted in the largest human-rights-related law-suit settlement in history — not in the United States, but in Germany. In the South African pharmaceutical patents case, we will see that a phalanx of multinational pharmaceutical companies invoked their constitutional right to property and were met by a response from a transnational social movement that invoked, as a shield, the countervailing *human* right to health, with dual connotations of being both about universal morality and about constitutional priority over corporate economic interests; and we will note how the withdrawal of the suit in this case served and continues to serve as a normative precedent in other countries, such as Brazil, and perhaps to changes in the international trade regime. In the Canadian case related to a cyanide spill in Guyana at a Canadian-owned mine, a special transnational-solidarity NGO was created for the specific purpose of litigating in Québec on behalf of communities harmed in Guyana, using standard private law to found the action, but invoking international human rights standards as a way to argue why the case could not be justly heard in Guyana; both the awarding of costs against the NGO and the failure of the argument before a single judge (and the failure to appeal due to exhaustion of resources) should not obscure the potential of human rights discourse to inform conflict-of-laws queries as to the adequacy of foreign courts.

II. CANADA/QUÉBEC: INTERNATIONAL HUMAN RIGHTS REMEDIES DOCTRINE AND AMENABILITY TO CIVIL PROCESS — A MISSED OPPORTUNITY

Canada is the world's leading capital market for mining companies. Mining corporations which are incorporated, based, or with significant ownership links in Canada, are active worldwide. This level of activity

has been accompanied by risks of serious harm to the environment, and directly associated harm to human health and sources of livelihood. Such harm has not been limited to less affluent countries such as the Philippines, but has also included countries such as Spain and the United States.³⁹ Yet, transnational law-suits against Canadian mining corporations were, to the authors' knowledge, non-existent until a recent case was brought in Québec.

A concerned humanitarian NGO called Recherches Internationales du Québec ('RIQ') was formed in Québec specifically to launch a law-suit against a Québec company, Cambior, for a cyanide spill from its Omai goldmine into a Guyanese river.⁴⁰ Under the Québec Civil Code, the court had clear general jurisdiction over the dispute because Cambior was incorporated in Québec. However, unlike civil codes in countries such as France, Québec's Code recognises a discretionary power on the part of the trial judge to decline to retain jurisdiction on the basis of *forum non conveniens*, in other words, that there is an appropriate alternative forum where the defendant is amenable to process.⁴¹ RIQ probably assumed that it would be hard for a dismissal for *forum non conveniens* to be triggered because of the state of the judicial system in Guyana, a country in the early, faltering stages of transition from repressive rule.

To prove that Cambior could not establish *forum non conveniens*, RIQ was assisted by a leading professor of international human rights law, William Schabas, who gave expert-witness testimony on his adverse conclusions as to both the willingness and the capacity of the Guyanese judiciary to deliver justice for the spill victims.⁴² This was a rare example — if not the first — of the use of international human rights law as a background to litigation that was not itself premised on the violation of human rights norms. Instead, international human rights law was used in the assessment of jurisdictional matters, in this case, to give content to the standards that a foreign judiciary must meet with respect to the *forum non conveniens* threshold test.

Two streams of international human rights law were most relevant: the jurisprudence on the right to a fair trial and the jurisprudence on the

³⁹S Seck, 'Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law', 37 *Canadian Yearbook International Law* 139 (1999).

⁴⁰*Recherches Internationales Québec v Cambior Inc.*, [1998] QJ No.2554 (Québec Superior Court, 14 August 1998) [hereinafter Cambior].

⁴¹This is its own interesting case of normative migration, as this common-law doctrine was only codified in the last revisions of Québec's private international law code.

⁴²W Schabas was, at the time, Professor of Law and head of the Department of Law at the Université du Québec à Montréal.

exhaustion of domestic remedies.⁴³ As regards the latter, international human rights tribunals generally do not require pursuit of domestic remedies before accessing international processes where it would be futile to seek to vindicate one's human rights in a national court system. As regards the former, a person's rights to a fair trial are violated when the court that is to hear the claim of a breach of legal rights is not independent from other branches of government, or is, for other reasons (such as bias or susceptibility to influence of one of the parties to the case), incapable of treating the claim fairly. While the jurisprudence on the exhaustion of local remedies applies to *human rights* claims, the fair-trial case law applies, in general, to any *legal rights* claims (such as a claim in negligence). The *Cambior* claims were both standard legal rights claims and surrogate claims for human rights violations related to health and livelihood. The fair trial norm is directly relevant to the *forum non conveniens* amenability inquiry, while the exhaustion of local remedies jurisprudence is relevant by way of close analogy.

Whether or not thoroughly documented, as a way of linking private international law jurisdictional analysis to international human rights law norms related to the judicial process, the plaintiff's strategy in *Cambior* represents a conceptual breakthrough that can be developed in other cases. At the same time, this linkage between private and public international law also serves the valuable function of reinforcing the interdependence of 'civil and political rights' and 'economic, social and cultural rights'.⁴⁴ The claims in *Cambior* were surrogate 'economic, social and cultural rights' claims related to health and livelihood; the plaintiff's *forum non conveniens* argument was, in essence, that violation of these rights would go unremedied unless they could access a court system where a classic civil and political right, the right to a fair trial, would be a reality.

The judge, however, was not impressed:

'Professor Schabas conducted what he referred to as a 'one-week fact-finding mission to Guyana' where he attended trials and met with government officials, lawyers, judges and law professors. He would have the court believe that Guyana is little more than a judicial backwater such that a refusal by the court to exercise its jurisdiction by referring the case to the courts of Guyana would likely result in a violation of the victims' human rights and a denial of justice.

⁴³It is not, it should be noted, clear from the judgment how carefully Prof. Schabas' examination-in-chief took him through the relevant international standards.

⁴⁴See the Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993) para.5; C Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', (1989) 27 *Osgoode Hall Law Journal* at 769.

'Professor Schabas' comments about Guyana's legal system are scathing. He describes Guyana's pre-1992 judicial system as nothing more than an appendage of the repressive administrative dictatorship it served. He compares it to the systems of justice which prevailed in South Africa during the worst excesses of the apartheid regimes in the 1970s and 1980s and in Nazi Germany where the concept of the rule of law did not exist. He adds that since 1992 Guyana has been doing little more than 'tottering along the road to democratic development and to the restoration of the rule of law' and that recovery has been slow

'If the court were to accept Professor Schabas' evidence at face value, it would have little hesitation in dismissing Cambior's Declinatory Exception. The picture Professor Schabas portrays is such that the victims could hardly expect to receive substantial justice before a Guyanese court. The difficulty with assessing this proof, however, is that it is based primarily, if not exclusively, on secondary sources. While the court recognises Professor Schabas' expertise in the field of international human rights, it questions the accuracy of many of his opinions on Guyana's system of justice which are not based on any first hand knowledge by him.'⁴⁵

Without going quite so far as to say it expressly, the judge seems to have found this intrusion of an international human rights lawyer presumptuous — or, to return to Teubnerian notions, an unwelcome irritant and disturbance. The normal method for receiving evidence in private international law cases is through experts in the domestic law of the foreign country. Cambior retained members of the Guyanese legal profession, including three former judges, to give testimony that Guyanese judges were not lacking in either integrity or capacity to deliver effective justice. One witness was Guyana's former Chancellor of the Judiciary and Chief Justice, Kenneth George. George headed a government-appointed commission of inquiry into the Omai spill that, in 1995, concluded that contaminated water did not pose a serious threat to life or a hazard to the health of workers or riverain residents.⁴⁶ The former Prime Minister of Barbados, now a barrister, also testified as a Cambior expert witness, going so far as to credit

'the strength of the Guyanese legal institutions as having been crucial in the preservation and enhancement of the rule of law during a period in Guyana's recent history when the executive attempted to exercise absolute power.'⁴⁷

⁴⁵ *Cambior*, paras. 82, 83 and 87. Schabas appeared to rely heavily on his on-site visit, as the judge only specifically mentions one secondary source cited by Schabas.

⁴⁶ On the basis of the report, the mine had recommenced operations. The report is cited in a Cambior press release, 'Cambior sets the record straight on Guyanese 1995 spill', 30 July 2001, found at http://www.cambior.com/archives/communiqués/2001/anglais/index/fr_press_2001.htm (last accessed 22 September 2002).

⁴⁷ *Cambior*, para 94.

Finally, a former justice of the Québec Court of Appeal conducted an on-site visit and provided an affidavit and oral testimony contradicting much of the testimony of Professor Schabas.⁴⁸ To the trial judge, the evidence of an academic who had only ever visited Guyana once, briefly, and who spoke without inside knowledge of the system was simply not credible in comparison. It was as if the expert in international human rights law embodied an alien normative system that did not translate into the dominant discourse of judges. In contrast, the trial judge seemed to warm to his brother judges on the witness stand, although some observers believed that the former Chief Justice of Guyana had not fared well under cross-examination.⁴⁹

In assessing the Guyanese judiciary, the Québec judge demonstrated a virtually non-rebuttable deference to the foreign judiciaries of democratic countries. The idea of impugning not only brethren judges but also a sister democracy may be too much for some judges;⁵⁰ from this perspective, the existence of a functioning judiciary and the existence on paper of the right to sue for the alleged harms were together sufficient. In *Cambior*, the judge made much of the credibility of the evidence provided by another former Guyanese judge, who had served for many years before the advent of democratic rule, and who claimed that the Guyanese judiciary had *always* been fair and independent, even during periods of dictatorial government.⁵¹ While the current Guyanese judiciary may have the ability to handle a case against *Cambior*, there is much reason to be sceptical of such sanguine views about the capacity of a judiciary to be fair and independent with respect to a legal system which it was required to administer on behalf of a dictatorial government.⁵²

⁴⁸ *Cambior*, para 94.

⁴⁹ For example, F Shalom, 'Head of panel that probed *Cambior*'s cyanide accident can't recall committee's findings', *The Montreal Gazette*, 3 June 1998.

⁵⁰ See A-M Slaughter, 'International Law in a World of Liberal States', (1995) 6 *European Journal International Law* 503.

⁵¹ *Cambior*, para. 89.

⁵² See, for instance, even in relation to the current (post-1992) judicial system, US Bureau for International Narcotics and Law, International Narcotics Control Strategy Report, 1998 (Washington, DC, 1999) http://www.state.gov/www/global/narcotics_law/1998_narc_report/carib98_part2.html: 'Some judges and magistrates issued questionable rulings and injunctions in connection with narcotics prosecutions and investigations, fueling rumours of corruption in the judiciary.' See, also, US Department of State, Guyana Country Report on Human Rights Practices for 1998 (26 February 1999) http://www.state.gov/www/global/human_rights/1998_hrp_report/guyana.html: 'The judiciary, although constitutionally independent, is inefficient and often appears subject to government influence.' With respect to the period preceding 1992 and the period of the immediate transition, see Amnesty International Report 1992 (New York, covering January to December 1991). The only finding against Guyana to date by the UN Human Rights Committee under the Optional Protocol petitions procedure found a violation of the Article 14 right to a fair trial with respect to court handling of a case prior to the transition (mainly from 1987 to 1992): *Abdool Saleem Yasseen v Guyana*, Communication No. 676/1996, UN Doc. CCPR/C/62/D/676/1996 (7 May 1998) at paras. 2.9 and 7.8.

The Québec judge concluded that *forum non conveniens* factors necessitated that the Québec court decline jurisdiction in favour of the case being heard in Guyana.⁵³ The judge made it a condition of the dismissal that Cambior undertake 'not to invoke any grounds based on *forum non conveniens* before the High Court of Guyana if it is sued in any action arising out of the spill at the Omai Gold Mine.'⁵⁴ However, this condition did not require Cambior to submit to the foreign courts' jurisdiction.⁵⁵ Moreover, in a further chill for transnational litigation efforts, the Québec court ordered RIQ to pay special costs to Cambior for the failed law-suit in Québec.⁵⁶

Within four days of the dismissal of the Québec action, plaintiffs filed a representative action against Omai in Guyana for US\$100 million in damages. Although information is scarce on the exact terms of the law-suit and its development, the action was apparently dismissed in February 2002 for procedural reasons.⁵⁷ At the date at which this contribution has been written, we have no clear view of how these legal proceedings ended up being dismissed. The dismissal may have occurred because of a failure by legal representatives to provide a required legal document or it may potentially signal divided or disorganised litigants. No doubt the Omai situation will provide an excellent case study of the limits of seeking justice through litigation, whether generally or in the context of a resource-dependent developing country like Guyana.⁵⁸ In this connection, we note that there has been a distinct lack of attention

⁵³ Due to the plaintiff's lack of funds, there was no appeal.

⁵⁴ *Cambior*, para. 100.

⁵⁵ This can be compared to the condition imposed on Union Carbide in the Bhopal litigation; *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India, in December 1984*, 634 F Supp 842 (SDNY 1986); *aff'd*, 809 F2d 195 (2d Cir. 1987). That case was dismissed subject to the condition that 'Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations.'

⁵⁶ *Recherches internationales Québec c Cambior inc.*, [1999] JQ No.1581 (Québec Superior Court, 12 May 1999). RIQ did not contest the application for special costs by Cambior, because it maintained that it lacked funds to hire counsel. Justice Maughan granted Cambior special costs of \$50,000 (Canadian) for a number of reasons including the complexity and novelty of the questions of law and fact addressed in the litigation. The judge also noted, at para. 29, the repercussions of the litigation on the reputation and business of the defendants, especially in light of the negative publicity campaign led by RIQ against Cambior.

⁵⁷ *Cambior*, Press Release, 'Dismissal of Omai-related class-action suit in Guyana', 22 February 2002. The press release claims that the action was struck 'for repeated failure to file an affidavit by the plaintiffs.' The action in Guyana was a representative action, not a class action, and Cambior's press release emphasises that it has settled some '522 writs representing 881 claimants.' It is not clear what overlap there is between these 'writs' and the representative action, or whether they were part of another claims process. A new suit for US \$2 billion in damages has recently been filed, in which a lawyer for the plaintiff claims procedural errors have been corrected; W Stueck, 'Cambior dam fallout brings Guyanese suit', *The Globe and Mail (Toronto)*, 24 May 2003, B3.

⁵⁸ In this regard, an Internet digest on the February 2002 dismissal claims that the government of Guyana will not support the plaintiffs, and has generally favored Cambior, the

from, and mobilisation by, a transnational network of NGOs around the Omai spill. Clearly, Guyana neither has the visibility of Germany nor its vulnerability to moral leverage.⁵⁹ It is notable in this regard that the litigation failed despite the fanfare with which the lawyers filing the August 1998 suit associated their effort with the support of a transnational network of lawyers and of NGOs.⁶⁰ The costs award against RIQ and the inability of a civil-society effort in Québec to sustain an appeal may have had an impact. Obviously, such costs-awards, if followed in Canada or elsewhere, will severely dampen solidarity-based transnational litigation against transnational companies. Finally, the lack of significant, or at least effective, transnational civil-society solidarity may also be partly attributable to the attenuated way in which 'human rights' discourse was made part of the substantive claims being advanced in the litigation efforts in Canada and Guyana, despite the alleged very serious health harms. In contrast to the successful politics of litigation in the US/German and South African cases, the pressure to allow the case to be heard on its merits or to settle has accordingly not entered into the corporate bottom line.

III. DIRECT LIABILITY OF TRANSNATIONAL ECONOMIC ACTORS THROUGH TRANSNATIONAL LITIGATION IN US COURTS

A. US Tort Litigation and Transnational Corporate Accountability

While, in general, private litigation is not the most effective regime among regulatory alternatives, it may be an effective legal regime for promoting transnational corporate responsibility.⁶¹ As Trubek, Dezalay, Buchanan and Davis have observed, the spread of 'Cravathism' and US models of corporate and commercial law abroad may be accompanied by the spread of US modes of private regulation of corporate conduct, such as through

majority owner of the Omai Mines Ltd. deposit in the country's interior and one of the country's largest sources of revenue.' 'Hotspots — Guyana' in *Drillbits and Tailings*, Volume 7, Number 3, 29 March 2002 at http://www.moles.org/ProjectUnderground/drillbits/7_03/hotspots.html (last accessed 17 May 2002).

⁵⁹Keck and Sikkink, above n.8, at 23–4.

⁶⁰See C Jones, 'Riverain residents file US\$100M suit against Omai Gold Mines', *Stabroek News*, 18 August 1999, at <http://ourworld.compuserve.com/homepages/rayobei/news3.htm> (accessed 17 May 2002). This report may overreach in its claims of northern NGO solidarity. The authors have found no evidence of a focus on Omai by the mega-NGOs cited, such as Amnesty and Greenpeace, and the inclusion of the US State Department as part of the supporting network seems implausible.

⁶¹This is also a phenomenon that has increasing presence in the UK as well, notably after two path-breaking jurisdictional decisions in *Connelly v RTZ Corp plc* [1997] 4 All ER 335 and *Lubbe v Cape plc* [2000] 4 All ER 268.

public interest litigation.⁶² Rather than the spread of public interest litigation in the US mode, this section explores whether US private litigation itself could provide assistance in the regulation of transnational business conduct for human rights concerns. This seems especially important because private law litigation in the US is an example of legal regulation at 'touchdown' points where transnational business actors might be forced to face some of the consequences of their actions.⁶³

The US private law system has distinctive procedural features that are attractive to parties interested in commencing private litigation against multinational businesses. Its features are well-known, and often criticised and feared abroad.⁶⁴ These include the presence of many such businesses in US jurisdiction, access to *pro-bono* legal representation, contingency fee arrangements, more generous rules on class actions, possible use of jury trials, no dangers of reprisals, a relatively independent judiciary, favourable rules on pre-trial discovery and on punitive damages, and a greater likelihood of recovering damages if successful.⁶⁵ More generally, the US courts operate in a jurisdiction where private actions play a significant role in what, in other countries, might be regulated directly by the legislative or executive branches of the state; examples of this include such areas as anti-trust, securities regulation, and mass tort litigation.

Litigation has a number of clear defects as well. Litigation in US courts is an asymmetric transnational governance regime in the sense of being dominated by US institutions, interests and values.⁶⁶ But the fact that it is a US regime does not necessarily rule out its potential role in transnational regulation, if only because of its effective transnational reach. Questions of the legitimacy of this reach are far more complex and even intractable, but at least some legitimacy issues relate to the purposes to which the US litigation is put, including whether it addresses international human rights claims rather than merely US domestic concerns.

⁶²D Trubek, Y Dezalay, R Buchanan and J Davis, 'Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and Creation of Transnational Areas', 44 *Case Western Law Review* 407 (1994).

⁶³See Wai, above n.4.

⁶⁴See, for example, Lord Denning's observation that 'As a moth to the light, so a litigant is drawn to the United States. If he can only get his case to their courts, he stands to win a fortune'; *Smith Kline & French Laboratories Ltd., v Bloch* (1983) 2 All ER 72 at 74. See, more generally, R Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge Mass., Harvard University Press, 2001).

⁶⁵B Stephens, 'Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts' in M Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, (The Hague, Kluwer, 2000).

⁶⁶On the complexity of US power in the contemporary international system, see S Strange, *The Retreat of the State*, (Cambridge, Cambridge University Press, 1996) Chapter 2.

B. The Third Reich Industry Cases: True Transnationalisation of Litigation

A considerable amount has now been written on recent cases brought under ATCA or, sometimes, under traditional causes of action.⁶⁷ Most of these commentaries focus on the doctrinal issues, with respect to how human rights obligations can be attached to corporate conduct, and whether US courts should, or even must, adjudicate the merits of the claims.

However, our discussion of US litigation against private actors for human rights abuses will focus on one recent episode in transnational human-rights-informed litigation against corporate actors: the law-suits and linked settlements brought first against Germany and then against (mostly) German companies for involvement in human rights abuses, notably slave labour, during World War II. Our purpose is not to narrate the reasoning in these cases in detail.⁶⁸ Instead, our purpose is to show how the opening for tort claims for transnational human rights litigation, including for foreign nationals under the ATCA, albeit a failure at law in this case, could nonetheless be taken beyond the courtroom and open up normative debate in broader social and political processes.

Despite the consistent failure to persuade American judges to allow the Nazi-Era Industry cases to proceed on their merits, the litigation was at the heart of a wider normative advocacy and political pressure strategy that produced unique transnational settlements. As extensive literature on social justice litigation has noted, courtroom defeats (or probable defeats) can still serve a rallying and shaming function that produces significant legal reforms.⁶⁹ What is special about the Nazi Era Industry cases is their trans-border character and development.

The first case, *Princz*, was launched in the mid-1990s against Germany itself.⁷⁰ This case was dismissed on the jurisdictional ground of foreign state immunity. *Princz* then sued certain corporations directly.⁷¹ The latter claim was also dismissed, this time for considerations including lack of personal and subject-matter jurisdiction, and because of a

⁶⁷ For example, Stephens, above n.65; Scott, above n.3.

⁶⁸ For excellent commentary on this litigation, see L Adler and P Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich', 39 *Harvard Journal of Legislation* 1 (2002); D Vagts and P Murray, 'Litigating the Nazi Labor Claims: The Path Not Taken', 43 *Harvard International Law Journal* 503 (2002).

⁶⁹ See, for example, A Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies', 17 *Journal of Law and Society* 309 (1990) at 317–25; T Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare*, (London, Child Poverty Action Group, 1983) at 83 and 85.

⁷⁰ *Princz v Federal Republic of Germany*, 26 F 3d 1166 (D.C.Cir. 1994).

⁷¹ See *Princz v BASF Group, et al.*, Civ. No. 92-0644 (D.D.C 18 September 1995).

concern that the issue of compensation for slave labour was the subject of state-to-state negotiations between the governments of the United States and Germany. These decisions suggested that the post-war reparations instruments and ongoing political negotiations would be interpreted so as to immunise not just Germany but also corporate actors from private law claims.⁷²

The first of the two political outcomes stemming from the US-based law-suits and losses is linked to the *Princz* litigation. A treaty was reached between the US and Germany, which provided for further reparations to a limited number of US citizens subjected to forced labour beyond the compensation stipulated in the post-war settlement instruments.⁷³ A causal link is suggested in that the settlement is generally styled 'the *Princz* Agreement.'⁷⁴

Subsequent to the *Princz* litigation and the associated treaty, a new series of cases were brought against a host of other companies, mostly German but also including companies such as Ford.⁷⁵ The *Princz* Agreement, not surprisingly then, became part of the normative context. In particular, the agreement provided an additional reason for the courts to defer to the interstate political realm as the appropriate venue for the ongoing pursuit of reparations, even for litigants who felt that the *Princz* Agreement and the earlier reparations instruments were either inapplicable to their claims, or inadequate. For example, the case in *Iwanowa* was dismissed on multiple procedural grounds, including (a) a treaty subsumption doctrine, which suggested that earlier treaties subsumed private litigation; (b) the political questions doctrine, which suggested deference to the US executive's approach to settlement, and (c) the doctrine of international comity, in this case with respect to the pronouncements of the German Federal Government.⁷⁶ However one views these reasons — deference to an interstate agreement, deference to the executive of the home state (US), or deference to the foreign state (Germany) — the plaintiffs were faced with a dismissal.⁷⁷ Arguably,

⁷² Similar barriers faced litigation in German courts; see Adler and Zumbansen, above n.68, at 30–40.

⁷³ Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, 19 September 1995, US-FRG, 35 ILM 193.

⁷⁴ *Iwanowa v Ford Motor Co and Ford Werke AG*, 67 F Supp 2d 424 (DNJ 1999) at 488.

⁷⁵ *Iwanowa*, *ibid.* For a fuller description of the variety of cases, see Vagts and Murray, above n.68, at 508–14.

⁷⁶ *Iwanowa*, above n.74.

⁷⁷ In the same year as the Ford case, the District Court in New Jersey issued its decision in *Burger-Fischer v Degussa AG*, 65 F Supp 2d 248 (DNJ 1999). Again, treaty subsumption and political questions non-justiciability were invoked, with international comity not being stated as a separate ground but implicitly being present when the court gave weight to the objections to the case presented by both Germany and Poland in the form of amicus briefs.

broader use of international human rights law might have helped to reframe these various forms of deference, as with the procedural barrier of *forum non conveniens* in the Canadian litigation previously discussed. However, in this case, what is arguably most interesting is that the legal opening of a claim of violation of the law of nations, even though unsuccessful, precipitated broader political consequences.

By 2000, some fifty cases had been launched in US courts against German banks, insurance companies and industrial corporations. Despite the discouraging US court precedents, the sheer existence (and number) of these cases appears to have tapped into a media-centred spotlight on the question of German (corporate) guilt decades after the end of the war. Whereas one might have thought that conditions were not propitious for a plaintiff-favourable settlement, given the fact of the post-war reparations regime, the passage of time, and the demonstrated tendency of the US courts to dismiss the cases,⁷⁸ the result was the opposite: an unprecedented settlement for a compensation fund initially capitalised at ten billion Deutschmarks, with the German government paying one half and German industry paying the other half. As described in a later judgment in the litigation, the process that produced the fund is a textbook paradigm of multi-actor, normative-world-finessing, border-transcending *transnational process*:

[T]he German Foundation 'Remembrance, Responsibility and the Future' ('The Foundation')...is the result of a collaboration among American plaintiffs' attorneys, representatives of German industry, numerous governments including those of the United States, Germany and Israel, and other non-governmental organizations The negotiations which culminated in the creation of the Foundation began in Fall of 1998, when the German government asked Deputy Secretary of the Treasury Stuart E Eizenstadt to help facilitate a resolution of the numerous class action lawsuits Over the span of one-and-a-half years, Eizenstadt co-chaired a series of formal and informal discussions Also participating were the State of Israel, the governments of Belarus, the Czech Republic, Poland, Russia, and Ukraine, and the Conference of Jewish Material Claims Against Germany, which is an umbrella organisation representing numerous international Jewish non-governmental organisations. The quasi-formal initiative ... was publicly announced by German Chancellor ... Schroeder, as well as a group of German companies, on February 16, 1999. After the public announcement, twelve formal conferences chaired by representatives of the United States and German governments were held to discuss the initiative As a result of these conferences, and following the personal involvement of United States President Clinton and German Chancellor Schroeder, in

⁷⁸ For a fuller discussion of the many legal barriers facing the US litigation, see Vagts and Murray, above n.68, at 514–28.

December, 1999, it was agreed that a foundation would be established, in exchange for which the claims against German defendants would be dismissed. ... In July 2000, the German Parliament passed a law creating the Foundation 'Remembrance, Responsibility and the Future', which closely embodied the detailed agreements reached by the parties to the negotiations. ... The parties gathered in Berlin on July 17, 2000, to sign a Joint Statement concluding the negotiations, and expressing their support for the Foundation. ... The governments of the [USA] and the [FRG] simultaneously signed an Executive Agreement, which memorialised the specific commitments of the two governments to the Foundation. ... Unlike typical international agreements, the [Executive] Agreement ... is not a government-to-government claims settlement agreement. ... Rather than extinguishing the legal claims of the nationals or anyone else, the United States merely helped facilitate an agreement between victims, German industry, and the German government. ... By acting in this manner, the [US] goal was to 'bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace.'⁷⁹

There is too much embedded in this description, and in the history of the establishment of the Foundation, for us to comment further on the hybrid normativity represented by the combined processes and outcomes.⁸⁰ Instead, we will limit ourselves to briefly commenting on how the multi-polar (non-)settlement of the Foundation impacted on the cases still on US court dockets.

In the wake of the creation of the Foundation in mid-2000, the Judicial Panel on Multidistrict Litigation consolidated a large number of the cases before the District Court of New Jersey. The Panel justified the consolidation not only by reference to the common subject-matter but also by reference to the existence of

'an important international agreement that promises to present significant pre-trial issues pertaining to the settlement of dismissal of the actions.'⁸¹

The Foundation and associated Agreement required that all law-suits pending in US courts against German industry be dismissed with prejudice (ie, dismissed without capacity to re-initiate) before the compensation payments could begin. Any one outstanding case could stymie the (non-)settlement. The 'overwhelming majority' of plaintiffs then voluntarily withdrew their cases with prejudice.

⁷⁹ *In re Nazi Era Cases Against German Defendants Litigation*, 129 F Supp 2d at 370 (DNJ 2001). Emphasis added.

⁸⁰ For a description and critical commentary of the legal and broader contexts for the establishment of the Foundation, see Adler and Zumbansen, above n.68.

⁸¹ *In re Holocaust Era German Indus., Bank and Ins. Litig.*, 198 FRD at 429 (DNJ 2000).

One plaintiff refused to acquiesce and maintained his action.⁸² The impleaded companies brought a motion to dismiss with prejudice. The context for the motion was not only the various legal precedents that had relied on doctrines of deference to dismiss earlier claims but also the highly charged political context in which permitting this case to go forward would result in ten billion marks continuing to sit in escrow as ageing plaintiffs in other cases began to pass away. In accordance with the terms of the Executive Agreement with Germany, the US government filed with the court a Statement of Interest recommending 'dismissal on any valid legal ground' in the light of the existence of the Foundation and the 'twin concerns of justice and urgency.' Not surprisingly, the court dismissed the case, relying on the political questions and international comity doctrines.⁸³ However, the US position implicitly expressed a logic of what we would call *transnational comity* rather than international comity. As summarised by the court, the US government favoured the Foundation:

'because it is the result of the parties, governments, and non-governments together reaching a plan for restitution and compensation through dialogue, negotiation, and cooperation.'⁸⁴

The slave-labour litigation represents a fascinating example of transnational legal process. Our interest has been in the characterisation of the nature of the process, and the nature of the transnational comity deference that seems to have emerged in relation to it, but more sociological inquiry is needed into how the German government actively pursued this settlement and how German industry were pressured into the agreement. Factors clearly include US pressure but also the ongoing debates inside Germany concerning Germany's war guilt, including German litigation.⁸⁵ As for German companies, most accounts suggest they had to be dragged into the process and agreement, and that they were much more inclined to rely on legal victory.⁸⁶ However, we speculate that concerns about corporate image may have become central considerations as the newly-elected German government was creating a political context that prevented them from remaining out of the spotlight.⁸⁷

⁸² *Ibid.*

⁸³ 'The German Foundation does not form the basis for this dismissal; the political question doctrine and considerations of international comity do'; above n.81, at 389.

⁸⁴ See above n.81, at 381.

⁸⁵ See Adler and Zumbansen, above n.68.

⁸⁶ As confirmed in question to M Ratner, an attorney at one of the leading law firms pursuing the US litigation, above n.37.

⁸⁷ The new coalition government of the Social Democrats and the Green Party, which was elected in 1998, had declared compensation of slave labour as part of their programme; see Adler and Zumbansen, above n.68, at n.65.

One final observation. The dismissals in the US courts seem to have had everything to do with what the courts perceived as deep state interests at play, whether of the US government, the German government or the two states combined. The *Princz* Agreement and the Foundation just deepened the reasons for the courts to bow out. But what would have happened had the plaintiffs begun such litigation in a context where no interstate instruments were in play, and where the individual state interests were not as salient? The strong state interest may not always be present in relation to suits against private actors such as corporations. In this respect, it is interesting to consider that, at the same time as the German cases were being dismissed *en masse*, a US federal court judge refused in *Bodner v Banque Paribas* to dismiss an action against French financial institutions alleging their participation in the expropriation of the assets of Jewish customers during the Vichy regime of Nazi-occupied France.⁸⁸ Arguments to dismiss based on the act of state doctrine, *forum non conveniens*, limitations periods, and the indispensable-third-party argument, were all rejected. But most significantly, the court also refused to rely on the 'international comity' doctrine. At least at this stage of the case, neither France nor the United States had made it known they objected to the case going forward, and the specific government regime in which the banks operated was a government (Vichy) which had suffered 'wholesale rejection ... at the close of World War II.' Where interstate politics and vocal assertions of state prerogatives are not in play, it seems that the course of transnational comity may very well be one in which claims will — and should — go forward instead of being dismissed.

IV. THE SOUTH AFRICA ESSENTIAL MEDICINES LITIGATION: TRANSNATIONAL MIGRATION OF HUMAN RIGHTS NORMS THROUGH DOMESTIC LAW TO OTHER JURISDICTIONS AND TO OTHER INTERNATIONAL LAW VENUES

A third example of litigation in domestic courts that highlights the potential impact of the migration of human rights norms is recent litigation initiated by international pharmaceutical companies as part of their campaign to challenge legislative changes to the intellectual property regime related to essential medicines in South Africa.⁸⁹ The litigation in South African courts alleged violations of South African constitutional and administrative law, as well as international law, particularly the international trade

⁸⁸ *Bodnor v Banque Paribas*, 114 F Supp 2d at 117 (EDNY 2000).

⁸⁹ Act 90 of 1997, Medicines and Related Substance Control Amendment Act of 1997.

commitments of South Africa under the TRIPS Agreement.⁹⁰ Drug companies and foreign governments also applied other pressure including diplomatic pressure and trade sanctions. Justifiably, the episode is studied as an example of complex transnational politics in which MNEs, powerful governments, political forces within each state, and transnational and local NGOs all operated to affect changes.⁹¹

The case was eventually withdrawn from the South African courts.⁹² For our purposes, there are two key points with respect to normative migration. The first is that international human rights norms would have provided a basis for framing the legal arguments in the case that was proceeding in the South African courts. In particular, vindication of the international human right to health⁹³ would have been invoked as the *raison d'être* for the South African statutory regime, thereby playing a defensive role such as has often been the case in constitutional rights adjudication in different legal systems. As often as not, a human rights victory lies in having successfully defended state law and policy from attack by economically privileged groups in the name of their (alleged) rights.⁹⁴ In the case of the South African courts, this would have been especially promising given that social rights are expressly justiciable, but also given the openness of South African courts to the use of international treaties and cases in their interpretation of domestic law, including constitutional provisions.⁹⁵

⁹⁰In the matter between Pharmaceutical Manufacturers' Association of South Africa and the President of the Republic of South Africa and others, Case No. 4183/98, Notice of Claim, 18 February 1998 (High Court of South Africa, Transvaal Provincial Division). We will not address here the precise legal status of the different arguments, including how alleged violations of international law were assumed to be cognisable — either directly or by interpretive influence — before South African courts.

⁹¹See, for example, R Park, 'The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients', 11 *Minnesota Journal of Global Trade* 125 (2002); T Rosenberg, 'How to Solve the World's AIDS Crisis', *New York Times Magazine*, 28 January 2001, 26.

⁹²R Swarns, 'Drug Makers Drop South Africa Suit Over AIDS Medicine', *New York Times*, 20 April 2001, A1.

⁹³International Covenant on Economic, Social, and Cultural Rights, 993 UNTS 3 (1966), Article 12 [hereinafter ICESCR]; Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health, General Comment 14, UN Doc. E/C.12/2000/4.

⁹⁴See, for example, J Nedelsky and C Scott, 'Constitutional Dialogue', J Bakan and D Schneiderman (eds), *Social Justice and the Constitution: Perspectives on a Social Union for Canada*, (Ottawa, Carleton University Press, 1992). See, also, the proposed defence-against-privilege clause in C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', 141 *University Pennsylvania Law Review* 1 (1992).

⁹⁵The South African courts have expressly considered the ICESCR and the General Comments of the Committee in other constitutional cases involving social rights; see *Grootboom v Oostenberg Municipality*, 3 BCLR 277 (2000), per J Davis. For a comment, see

Arguably, human rights norms could also have helped to frame an argument if there had been an international trade complaint at the WTO Dispute Settlement Body alleging that the South African legislation violated the TRIPS Agreement.⁹⁶ The importance of the interpretation issue related to intellectual property 'rights' claims has been starkly illustrated in recent controversies concerning access to medicines, public health emergencies, and intellectual property rights under the TRIPS Agreement. The TRIPS Agreement controversially expanded the protection of intellectual property through the trade regime, including, for example, a requirement for 20-year patent protection.⁹⁷ The concern about the impact of patent protection for social rights concerns has been highlighted by recent efforts by states such as India, Brazil and South Africa to address public health issues related to HIV/AIDS. In particular, treaty interpretation questions exist with respect to the scope of certain exceptions, such as those for unauthorised use in situations of 'national emergency or other circumstances of extreme urgency'.⁹⁸

In this context, international human rights law could play a 'countering' function in relation to 'trumping' claims made in terms of 'rights' under international trade agreements such as the TRIPS Agreement.⁹⁹ In this context, the deployment of international human rights norms would operate as a direct analogue to the kind of 'shield' briefly discussed above in relation to the role of the right to health in fending off the right to property.

C Scott and P Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise', 16 *South African Journal on Human Rights* 206 (2000).

⁹⁶The debate concerning whether human rights norms should be considered in international trade law is subject of an expanding trade law commentary; see, for example, R Howse and M Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000). International human rights law may be argued to be relevant to interpretation of international trade law through several possible transmission belts. These include the customary international law of interpretation set out in the Vienna Convention, Article 31(3)(c) ('relevant rules of international law') with respect to either ratified international human rights treaties or as objective law where ratification is not crucial. Additional arguments for the relevance of international human rights treaties might be based on the paramouncy provision in Article 103 of the UN Charter, and therefore for provisions such as Articles 56 (and therefore 55) which address human rights. In some cases, these norms might even be argued to have some hierarchical priority, either because an international human rights norm is a jus cogens norm or because of a general constitutional priority for human rights norms.

⁹⁷TRIPS Agreement, Article 33.

⁹⁸TRIPS Agreement, Article 31(b). For a commentary on these interpretive issues, see R Howse, 'The Canadian Generic Medicines Panel — A Dangerous Precedent in a Dangerous Time', 3 *Journal World Intellectual Property* 493 (2000).

⁹⁹These issues are discussed in more detail with respect to international economic and social rights in R Wai, 'Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime', 14 *European Journal of International Law* 35 (2003).

With respect to the expansion of 'market-friendly' rights such as those of international investors, the 'countering' function of international human rights norms could be used, for example, to defend state measures taken to advance the human rights to health of other members of that society. In this way, international human rights norms can contextualise and limit excessively expansive interpretations of IP rights in so far as they make the ability to address public health concerns difficult or impossible.¹⁰⁰ The use of international human rights norms challenges a policy understanding of the trade regime as only being related to economic objectives such as maximising incentives for IP producers; instead, international trade provisions related to IP rights are reframed as a balancing of policy concerns in which health considerations should be as important as IP protection.

The second key point arising from the South African litigation lies at the level of process. The case is a strong example of the way in which human rights ideas can help to connect narrower issues of treaty interpretation in international trade to broader world politics. The success in South Africa of the co-ordinated efforts by local NGOs (in particular, the Treatment Action Campaign),¹⁰¹ transnational NGOs (such as *Medicins Sans Frontières/MSF*), and, to a lesser extent, the South African government to link legal defence with other kinds of political action signals the role of the migration of international human rights norms in the broader structures of transnational advocacy networks.¹⁰² Former President of *MSF*, James Orbinski, recalls how he met with the president of one of the 39 pharmaceutical companies challenging the South African government, each in their capacity as point person in the NGO and corporate coalitions, respectively.¹⁰³ He conveyed the position of the NGOs that the drug company insistence on IP rights in the face of the inaccessible costs of patented drugs had devastating health — and life — effects on the huge percentage of South Africans infected with the HIV virus. He further warned that they were prepared to mount not only a legal defence in solidarity with the South African government — a number of groups were granted intervener status in the court case before the companies withdrew their actions — but also a concerted transnational spotlight-and-shame campaign if the companies did not back down. The chief executive officer in question did not budge, saying they intended to invoke every legal right and avenue they could. The subsequent transnational pressure campaign made good on the *MSF* warning, and showed how the use of

¹⁰⁰ Above n.93.

¹⁰¹ See N Geffen, 'Applying Human Rights to the HIV/AIDS Crisis', 2:4 *human rights dialogue* 13 (Spring/Summer 2001).

¹⁰² See Keck & Sikkink, above n.8.

¹⁰³ Orbinski, above n.37.

multi-lateral human rights norms can be especially important as a way of bridging tensions between transnational and domestic NGOs operating mainly in developed countries with the concerns of developing countries.¹⁰⁴ Faced with the worldwide condemnation involving states and not just civil society, the companies withdrew their case. But the migratory effects did not end there: this non-precedent (in the strict legal sense) rippled across the globe to empower other governments which had or contemplated similar legislation to that in South Africa.¹⁰⁵ US trade complaints against Brazil for similar kinds of governmental measures were withdrawn, and drug companies also appear to have abandoned — at least for now — their plans to litigate their ‘rights’ against the government of Brazil.¹⁰⁶

Finally, the WTO Ministerial Meetings at Doha in November 2001 demonstrated how the combination of the co-operative actions of non-governmental and developing country governments led to some movement on the public health issue within the domain of international trade. The Declaration on the TRIPS Agreement and Public Health acknowledges a broader ability of developing and the least-developed countries to address public health crises, including provisions affirming the right to grant compulsory licenses and to determine the grounds for their grant, and the right to determine what constitutes a national emergency.¹⁰⁷ While it remains to be seen how the Declaration will be applied in particular trade disputes at the WTO, the invocation of it, perhaps buttressed by further arguments based on international human rights norms, would seem to offer more room to argue against a purely economic understanding by a dispute settlement panel.

V. CONCLUDING REMARKS

We end by risking some speculation with respect to the potential for human rights to play a broader role in litigation (and politics of litigation) involving corporations whose activities impact on human rights. We approach the following comments obliquely, by first returning to the Risse hypotheses concerning *state* behaviour when states are normatively

¹⁰⁴On this tension, see Wai, above n.99. Note that the major South African coalition of local NGOs, TAC, and MSF shared office space during the whole campaign: Orbinski, above n.37.

¹⁰⁵See T Kasper, ‘South Africa’s Victory for the Developing World’, 1 July 2001, <http://www.accessmed-msf.org/prod>

¹⁰⁶See, for example, C Passarelli and V Terto Jr, ‘Good Medicine: Brazil’s Multifront War on AIDS’, 35:5 *NACLA Report on the Americas* 35 (March/April 2002).

¹⁰⁷Declaration on the TRIPS Agreement and Public Health, 14 November 2001, WT/MIN (01)/DEC/2, para.5.

confronted by what might be called a transnational public sphere.¹⁰⁸ In the spiral of pressure and argumentation that produces 'compliance' of states with international human rights, Risse emphasises the importance of human rights values occupying a space beyond a purely moral status, pointing to how 'the authority of international law' allows a qualitatively different form of argumentative practice:

'... advocacy groups not only have a moral case against the particular human rights violation; they can also argue that the norm violator puts itself outside the community of civilized nations and often is violating standards it has agreed to.'¹⁰⁹

However ironic may be any given actor's strategic invocation of interpretation-ridden legal norms as dispositive reference points, Risse's views on this score have an obvious relevance to the ways in which the social processes of human rights concerns can migrate into the legal processes of private law liability. A form of discursive necessity is created when international human rights norms *qua* international law can be invoked; it is putative legality that creates formal relevance to interpretation in other areas of transnational law and this formality must be dealt with by the court in question — somehow — in the language of law. Thus, plaintiffs in the Nazi-Era Industry cases were able to get their foot in the door through the formal incorporation by reference of the 'law of nations' in US alien tort claims law — even when the law-suits were probably fated to be dismissed. The ability to turn what would otherwise have been a moral and political discourse into one alchemically related to 'law' allowed a legal venue — the US federal courts — to be the magnet around which 'non-legal' parallel efforts to shame German public and private actors could coalesce. In the South African generic-drugs-versus-patents litigation, the advocacy strategy of the transnational NGO coalition almost certainly drew normative strength from the formal existence in the South African Constitution of a right to health and an express constitutional directive that international law (with a rather developed notion of the human right to health) must be used to interpret the Constitution. The decision of the drug companies to retreat appears to have been a combined social and legal result. One might ask rhetorically whether the drug companies would have bowed simply to transnational pressure had the South African constitution contained only a right to property, had that right not been circumscribed by the power of the state

¹⁰⁸ J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (1962; translated Cambridge Mass., MIT Press, 1989).

¹⁰⁹ Risse, above n.36, at 184.

to act to advance the interests of the underprivileged, had the right to health not had formal status in the same constitution, had the right to health not had a pedigree in international law, and had there been little chance that the South African courts would take international human rights law seriously in judging the companies' property claim. Finally, we would note that the (perceived) lack of formal relevance of international human rights law to a private international law question probably permitted the Québec judge in *Cambior* both to carry out a superficial analysis of the state of the Guyanese judicial system and to slide under the radar screen of media-dependent spotlighting by a transnational coalition of NGOs.¹¹⁰ Quite possibly, the fact that the actual cause of action in *Cambior* was not framed in human rights terms, but in standard private law personal-injury terms, also created a drag on the interchange between the legal system and transnational social advocacy: it may not be enough for human rights to play an interstitial or informing role on the more detailed aspects of litigation (ie, here, jurisdiction) for the normative interchange (\leftrightarrow) in the legal \leftrightarrow social relationship to have much viscosity.¹¹¹

The foregoing discussion elides the fact that, by and large, the international human rights system, conventionally understood, has no regime of direct applicability of human rights norms to corporate actors. In the main, the invocation of international human rights law has been mediated by the vagaries of domestic-law reception. We should expect this to produce a sporadic and uneven hook-up between international human rights norms and the domestic law applicable to private law obligations and the rights of corporations. Even though the indirect applicability of international human rights law does provide a degree of formal opening that can energise the link between legal and other social processes (and thus allow for the kinds of extra-legal campaigns that produced the Nazi-Era Industry settlements and the drug companies' withdrawal of their South African litigation), it seems to us that such prudential benefits cannot obscure the ongoing need to develop a clearer sense of the desirable place of transnational litigation *qua* private law phenomenon

¹¹⁰ See Seck, above n.39, on the aporia in the analysis of *forum non conveniens* in *Cambior*.

¹¹¹ For some ways in which human rights can inform without being the direct legal category at stake in private litigation, see the discussion of plural characterisations in Scott, above n.5, at 61–3, and the discussion of a transnational limitations rule in Canadian private law that draws on the 'soft' law emerging from the UN on the (human) right to reparations in C Scott, 'Introduction to Torture as Tort: From Sudan to Canada to Somalia' in *Torture as Tort*, above n.5, at 40–4. On the importance of symbolism in deciding whether to seek recognition of human rights causes of actions versus relying on functionally workable existing private law categories, see G Virgo, 'Characterisation, Choice of Law, and Human Rights' in *Torture as Tort*, above n.5.

in the overall regulation of corporate conduct. Whatever the specific constitutional doctrine of reception of a given state with respect to international law, and whatever the specific statutory regimes that may be enacted (eg ATCA), the resistance of international legal discourse to a systemic notion of direct accountability of corporate conduct will continue to produce normative drag in the legal↔social relationship over holding corporations liable in private law for violating human rights. At the moment, corporations are able to stand behind arguments that it is a public (international) law matter of the responsibility of states for regulation which cannot be outflanked by civil liability proceedings. Greater integration of the precepts of public international law (*both* jurisdiction-related precepts and human-rights-related doctrine) into the conceptual structure of private international law needs to occur before anything resembling a useful symbiosis can be expected to occur. While the precise contours of the necessary normative developments are far from clear at this early stage, there is room both for quasi-judicial bodies under international human rights treaties and domestic courts within private international law to advance transnational corporate accountability and to seek to promote normative harmonisation between the two juridical orders: private international law promoting international human rights values where possible, and international human rights law requiring that private international law processes do so and providing principled guidance on how to do so.¹¹²

Our focus on the migration of human rights norms into regulation of direct domestic claims involving corporate actors should not obscure a major point emerging from the three court-case narratives: the way such litigation can promote political response *by states*. There is good reason to believe that (many) states take very seriously their own failure to respond to corporate harms when proceedings in a foreign court begin to spotlight both that harm and the state's inadequate response.¹¹³ As noted above, the litigation begun in the United States against the successors to the Third Reich companies resulted in the German state forging a joint public-private fund to compensate the plaintiff slave and forced labourers. More work would be needed to determine how much the mobilisation against the drug companies in South Africa may also have involved a strategy of stiffening the resolve of the South African government to adhere to its generic-drugs legislation and to empower

¹¹²See the discussion of transnational corporate accountability within 'public' governance structures of the UN human rights treaty system in Scott, above n.10.

¹¹³For example, the change in attitude of Ecuador towards the responsibility of Texaco for oil-related devastation in the Amazon in the context of litigation brought against Texaco in US federal courts (*Jota v Texaco*); see Scott, above n.3, at n.79.

the state to stand up to the pressure it was getting from other states that were supporting the legal position of the drug companies. It certainly seems that the transnational NGO coalition sees the profile created around the defensive strategy in the litigation as essential to further efforts to move the right-to-health issues into forward gear, in a context in which the South African government seems to have limited its initiative to producing lower pricing in the market without a wider commitment to accessibility.¹¹⁴ Much, here, will depend on the susceptibility of entwined states to shame and embarrassment, which will, in turn, depend on factors such as the degree of activist organisation of domestic civil society, their connections to the transnational level, historical sensitivities to certain memories, the cultural concern with international reputation, the vibrancy of democratic structures, external pressures from powerful states, and the degree of media profile of a country or a particular human rights situation.¹¹⁵

None of the emphasis in this section on the take-up of legal discourses around corporations and human rights is meant to gainsay our earlier comments on the importance of inter-field normative migrations within law itself, for example between public and private international law, such as might have produced a different judicial sensibility in *Cambior*. However much we see the legal and the social processes as mutually embedded, and thus, to use now-trite phraseology, only relatively autonomous normativities, the very fact of discussing the legal and the social processes in terms of their (both analytical and institutional) relations to each other has a performative, if ironic, logic: something we can speak of as 'law' exists as an object not just of inquiry but of (social) practice, and, as such, we can meaningfully talk about the migration of the legal to the social and similarly about the effect of operating within the social. To this extent, we wish to leave open the relative

¹¹⁴For example, the TAC has subsequently challenged the failure of the South African government to provide adequate coverage with respect to mother-to-child HIV transmission; *Minister of Health v Treatment Action Campaign and others*, Case CCT8/02, 5 July 2002.

¹¹⁵See T Risse and S Ropp, 'International Human Rights Norms and Domestic Change: Conclusions' in Risse, Ropp and Sikkink, above n.34. Pressures towards globalisation of normative judgment are not limited to private law. The recent surge in judicial activity in Chile against former members of the Pinochet regime, notably by Judge Guzman, can be attributed by a number of observers to the initiatives against Pinochet led by Judge Garzon in Spain, and, in turn, to domestic and transnational human rights networks and norms; see, for example, D Hawkins, 'Human Rights Norms and Networks in Authoritarian Chile' in S Khagram, J Riker and K Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*, (Minneapolis, University of Minnesota Press, 2002) at 69. Judge Guzmán has commented that the efforts in Spain and in England to arrest and extradite Pinochet facilitated the indictment in Chile: 'It was like a vaccination: we Chileans got accustomed to him being locked up (so to speak) to seeing his case argued before the courts'; D Sugarman, 'Resilience of the judge who risked all to indict Pinochet', *The Times* (London), 19 February 2002, 7.

merits of not just speaking of, but also actively participating in, the development of an autonomous normative integrity of 'international human rights law' as important for vesting this body of law with critical power — a kind of power of the margins — when international human rights norms are invoked in other fields, such as private law or trade law.¹¹⁶ Here, we would note the non-naïve perspective of many actors who view themselves as being part of a patient, and even subversive, order-building process that may eventually be recognised as the kind of constitutional field that, for example, EU treaty law has evolved into being — and, as such, a field that will understand the migration of its norms as a necessary precept of its very constitutionality.

¹¹⁶See M Koskeniemi, 'The Pull of the Mainstream', 88 *Michigan Law Review* 1946 (1990).