

*Translating Torture into Transnational  
Tort: Conceptual Divides in the Debate  
on Corporate Accountability for  
Human Rights Harms*

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1 INTRODUCTION

FROM VARIOUS PERSPECTIVES and on various specific doctrinal issues, each contribution in this collection seeks to grapple with the relationship between two core categories of “public law”, on the one hand, and “private law”, on the other—torture and tort, respectively. The foundational premise of the present chapter is that, in understanding a relationship such as this, categorical distinctions tend to exert a constant pressure on jurists to organize the normative world of human rights in terms of (unduly) dichotomous ways of thinking. And, even when a jurist is open to seeing distinctions amongst categories less in terms of dichotomies and more in terms of differences along various continua, the tendency to organise judicial minds around a strong contrast between opposite ends of a continuum—that is, in terms of polarities—may result in instinctive either/or dichotomising. Bracketing for the moment some of the analytical virtues of thinking in terms of oppositional categories, the extent to which one adheres to dichotomies or polarities as a way of ordering one’s juridical universe will affect the ease and justifiability of moving from one legal realm to another.

One way to think of the movement across boundaries, between categories, or from one pole to another is in terms of “problems of translation”. Can a human rights norm which, according to (one reading of) public international law, applies only to states be translated into a civil cause of action within a domestic legal system? If so, can this translation go so far as to include civil suits for foreign delicts and not only for conduct occurring (or, at least, causing harm) in the other state whose courts are seized with an issue? And so on. The more one

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thinks in terms of categorical oppositions as somehow real (as opposed to simply useful starting points), the more likely one is not only to perceive problems of translation, but also to perceive those problems as serious. Conversely, in the context of the movement from (or, more accurately, between) torture and tort, the more that one approaches poles with a healthy degree of suspicion and willingness to inquire into the normative spaces that lie between them, the more likely it is that one will see value in forging (at minimum) overlapping categories of accountability or (more maximally) hybrid categories of accountability.

The purpose of the present chapter, then, is to present a series of common contrasts (whether approached in terms of dichotomies or polarities) and to do so with as much neutrality as can be mustered. An important qualification is that this chapter also seeks to make a contribution to the doctrinal debates on transnational tort liability of *corporate* actors. The chapter's premise is that an important measure of analytical clarity can be achieved by situating this book in terms of possible stances that one could take on any given doctrinal or theoretical "translation" problem as a function of each contributor's approach—whether implicit or explicit—to each in this series of relevant pairings. The poles provide stylised reference points which help construct the views of two kinds of juridical characters on the issue of liability for human rights breaches. We might call these two characters the "restrained conservative" and the "activist radical". The (stylised) position of the restrained conservative insists that international human rights standards are a matter of public law (vertical) applicability wherein corporate conduct is regulated through indirect state responsibility which attaches only to corporate harm caused within a state's own territorial space and which is assessed at the level of international treaty law by quasi-judicial institutions whose role is to apply, with no binding authority, the existing law (including any new additions to it by interstate agreement). By contrast, the (stylised) activist radical insists that international human rights standards are (not only, but) also a matter of private law (horizontal) applicability wherein corporate conduct may be regulated through direct civil liability which is capable of attaching to harm caused by corporate conduct outside a state's own territorial space and which may be assessed at the level of domestic law (receiving international law values) by national courts whose role is to interpret the law so as to creatively advance human rights values and to render decisions directly binding on the impleaded corporate actors. Thus described, these characters are, of course, as much caricatures as anything else, but they serve an important analytical function: highlighting the complex range of positions that any given person might adopt, in the real world of juridical decision and analysis, on the issue of transnational corporate accountability for human rights violations. To take just one example, a less-than-radical conservative position would be to accept a measure of involvement of national courts in extraterritorial corporate conduct (beyond existing private international law involvement revolving around already-standard private law causes of action) but only pursuant to specific statutory authorization which demonstrates the state's legisla-

ture has taken responsibility for making its domestic legal system the agent of international legal values in this way.

## 2 STATE RESPONSIBILITY: DIRECT VERSUS INDIRECT RESPONSIBILITY

“State responsibility”, simply put, is the name public international law gives to the normative state of affairs which occurs following a breach by a state of one of its international legal obligations (whether that obligation derives from treaty law, customary law or other recognised sources such as “general principles of law”). The obligations in question can be negative or positive; that is to say, a state incurs “state responsibility” when it fails to do something international law requires it to do (put differently: when it breaches a positive obligation) no less than when it does something which international law prohibits it from doing (put differently: when it breaches a negative obligation). Thus, a state may breach international law by act or omission, depending on what obligations an international norm places on it. In this sense, a state may breach a positive obligation (e.g., the duty to put into place, within national law, a particular kind of system for regulating the export of hazardous wastes abroad) no less “directly” than it may breach a negative obligation (e.g., the duty not to use police force against a foreign embassy). That being said, international lawyers do commonly use a form of shorthand which distinguishes between so-called *direct responsibility* and so-called *indirect responsibility*. This distinction does not in fact refer to any difference in the status of the responsibility a state may incur but, rather, simply signals the existence of one species of duty that international law can place on states, namely positive duties to protect some non-state actors from being harmed by other non-state actors. For instance, we say that a state is *indirectly responsible* if an unruly mob or a group of criminals causes physical harm to a person, where that state was in a position, if it had exercised due diligence (reasonable care), to have prevented the harm from taking place. One way to understand why this term is used is to think of state actors not as the direct or immediate agents of harm, but as indirect agents or secondary authors of harm. To reiterate, the state has an obligation which it “directly” breaches, but the substance of the obligation is such that it is the harm (or harm-risking conduct) of non-state actors which triggers the state’s obligations. To return to the example used above, a corporation from Canada may dump a load of toxic waste in a West African country. By current international law (the Basel Convention and perhaps customary law as well), it would be Canada, not the corporation, which would incur responsibility under international law if it failed to regulate the company in the required ways (e.g., if it had handed over responsibility for issuing waste-exporting permits to a self-regulating industry body). Finally, and perhaps most importantly, the existence of this shorthand category called “indirect (state) responsibility” attests to a wholesale substantive gap in mainstream conceptions of the actors to whom

international law normally applies. Because, as a general rule, corporations are not thought in mainstream circles to be capable of directly violating public international law, it is by way of regulating states (requiring *them* to regulate corporations) that public international law creates a degree of regulation of corporations—indirect regulation.

### 3 AXES OF LEGAL ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS: THE VERTICAL (PUBLIC LAW) VERSUS THE HORIZONTAL (PRIVATE LAW)

The final sentence in the preceding section leads us to a more specific version of the generally perceived juridical incapacity of privately-owned corporations, as non-state actors, to breach international law. International human rights law (at least, international human rights *treaty* law) has adopted a tendency from the constitutional systems of a large number of states to see human rights as generating obligations for states only. In this sense, human rights protection is seen as part of the domain of public law, with the legal relations in question running between individuals or groups and the state. A private actor seeking to use a constitutional bill of rights in national law or a human rights treaty in international law as the source of rights on which to found some cause of action (e.g., a human rights tort) against another private actor has, by and large, fallen outside the terms of mainstream legal discourse except in a few countries such as Germany. In recent years, helped along by constitutional debate in the new South Africa, it has become common to distinguish between the “vertical” as opposed to the “horizontal” axes of human rights obligations. Human rights run vertically when it is only the state owing the obligation(s) to respect, protect and fulfil them. Here, it is also worth noting that the standard form of legal vindication of the rights is the public law process of judicial review; comparatively rare are the situations in which the affected individual or group can use the human rights norm as a basis for a civil suit in which monetary compensation is sought from the state for the violation. Partly as a result of the insights of comparative legal theory and partly due to growing sensitivity to the issue of private power, new or revised constitutions, such as that of South Africa, are now more likely to stipulate that the rights in the constitution apply to private no less than public actors, at least *mutatis mutandi* (making necessary modifications that reflect the differences in extent or nature of obligations that may be generated for different actors). This application of human rights in states’ basic laws to private actors is spoken of as a situation of “horizontality”. By and large, *international* human rights law has neither led nor tracked this movement towards horizontality and has been content to leave the regulation of corporate harms to the indirect responsibility of states. The duty “to ensure” human rights (a duty that appears in a number of human rights treaties) or, amounting to the same thing, the duty to “protect and fulfil” human rights (which scholarly doctrine has added to legal discourse) provides the conceptual basis for interpreting

states to have positive duties to prevent and respond to harms caused by corporate actors no less than the traditional unruly mob besieging a foreign factory or residential enclave. The slow percolation of thinking (and some corresponding international human rights case law) around the content of states' duties with respect to corporate activity is occurring in a process of cross-pollination with the development of positive state obligations in the "private" family sphere. In this latter sphere, analysis of the duties attendant on protection of women's and children's rights is considerably more advanced (or, at least, it has been more successful in influencing official human rights discourse).

#### 4 SOURCES OF LAW: INTERNATIONAL LAW VERSUS NATIONAL LAW

Were international human rights law to develop an understanding of at least some human rights obligations owed directly by corporations as a matter of international law (whether general or treaty), would this translate into enforcement of these human rights within national legal systems? The answer to this question is relatively simple: it depends on whether international and national law are treated as separate sources of legal obligation and, further, on whether international obligations are treated as automatic sources of obligation in domestic law. More specifically, it depends (mostly) on the governing (constitutional) conception within a given national legal system of the system's relationship with international law and also (somewhat) on whether international law's development of the corporate obligations is accompanied by a reciprocal duty on states to give direct effect to these obligations within the domestic legal order. As such, the extent to which a dichotomy operates as between international and national law is largely determined by both the forms and the *ethos* of reception in each jurisdiction. The discussion in the following paragraphs assumes that the issue is whether a state's domestic law will recognize international law's development of human rights obligations owed directly by corporations as applying to harms caused by corporations and occurring within that state's own territory. (The gloss of extraterritorial application of the same norms will be dealt with in subsequent sections.)

In common law countries which have inherited the UK's Westminster conception of government, such as Canada or India or Singapore, there exists by and large a radical *formal* separation between international treaty law and its implementation by domestic courts, such that a treaty norm does not have the direct force of law but rather must be given effect by legislation; even if a statute in such a country specifically and in verbatim terms provides for an entire treaty to be applied by its courts or designated tribunals, it is still the case, in formal terms, that those institutions are applying national (statute) law and not international (treaty) law. Although not free of conceptual difficulties, it is more common for it to be said in such countries that customary law is automatically part of the law on the same level as, and indeed embedded in, the common law;

but, even here, it is probably just as true to say that custom is part of the local law only when the judiciary makes it so by adjudicating in a concrete case upon the existence and content of a claimed customary obligation.

In legal systems outside the Westminster tradition, for example some European continental systems, and also in the United States, treaty obligations can be directly adjudicated upon, although the conditions that must be fulfilled (in terms of the nature and “justiciable” quality of the obligation in question) can vary considerably from system to system. The status of the treaties that are received in this direct fashion will also vary, from being treated as superior even to the constitution, to being treated on a par with constitutional norms, to being treated as akin to statutory norms. Leaving aside the US, customary international law is less easily treated as a direct part of the law of the land in those civil law jurisdictions in which codification is the essence of law and which accordingly hold resolutely to the notion that all law stems from either the (written) constitution or from statutes. That being said, it is not unknown for some of these systems to accord custom a superior legal status, either as equivalent to constitutional norms or as hierarchically superior to statutory norms; while such treatment is invariably something provided by the constitution itself, it remains, for these systems, a potentially significant port of entry for the enforcement of non-treaty corporate obligations.

It should finally be noted that there is a significant element of commonality in how most, if not all, domestic legal systems handle the “national versus international” tension. Specifically, one principle of statutory interpretation seems so widely shared across legal systems that it probably is itself part of international law *qua* general principle of law: the presumption that the legislature does not intend to place the state in a position of breaching international law and the associated judicial duty to strive to interpret legislation, without distorting it so as to avoid an interpretation that would have this effect. Much can be done in all legal systems to create a harmonisation between international legal obligations and domestic law if the courts actively and rigorously rely on this principle of interpretation. It could be claimed that this same presumption, grounded as it is in the ideal of the rule of law, should be equally available as a directive to courts in common law countries when they are faced with the choice of whether or not to develop the common law in situations where the legislature does not appear to have implemented an international legal obligation and where that obligation is capable of enforcement in a way analogous to existing common law causes of action. However, to the extent that the international legal obligation in question is a treaty norm and cannot plausibly be said to have a parallel existence in custom, this claim would be strongly resisted by many as something which it should be presumed a court may not do; on this contrary view, the act of using a treaty to influence the judicial creation of new positive law is simultaneously an act of circumventing the formal rule of reception that requires the content of treaties to enter the domestic law through legislative enactment.

5 FIELDS OF INTERNATIONAL LAW: PUBLIC AND PRIVATE

A whole book would need to be written to adequately convey the multifarious and complex relations which do, or could, exist between the two fields of law called “public international law” and “private international law”. This relationship is at the very core of any development of corporate liability within one state’s legal system for human rights violations that take place in another state’s territory.

Both fields of law deal with legal relationships which transcend the single legal system(s) of any given state. *Public* international law is that collection of norms the primary function of which is the regulation of states’ relations *inter se*—and, to that extent, regulation *of states*. The closest analogy is to constitutional norms that govern the way federal units within a given state function so as to respect each other’s “sovereign” jurisdiction while permitting the units to act in concert for a common interest. In terms of obligations placed by public international law on non-state actors, where the conduct of other actors is directly regulated (for example, ships or international organisations or natural persons), it is generally thought that the regulation takes the form of regulation *by states*. Primarily since the advent of the UN Charter era, public international law has increasingly begun to assign rights to individuals *qua* human beings, thereby reaching inside the governance structure of states to an extent unknown when the primary focus of public international law was on providing rules of coordination to make interstate coexistence and mutually beneficial cooperation possible. Yet, crucially, this attribution of rights under international law (primarily through multilateral treaties with a core of general international law norms also being generally regarded as having crystallised as well) is still very state-centred, in that the holders of the duties that correlate with human rights are, as noted above, thought to be primarily states. Here the public law analogy within state systems is, of course, constitutional bills of rights which bind government in its relations with those it governs. It is a marginal, and some would say non-existent, function of public international law to regulate the substantive rights and obligations in private law relationships between private persons.

*Private* international law is a field of law which seeks to regulate private law relationships across borders—but structurally and not in terms of providing substantive rules that govern relationships. Although an oversimplification, private international law (often also called “conflict of laws” or “conflicts”) deals with and seeks to answer three main questions. First of all, when a plaintiff initiates proceedings (e.g., a tort claim) before a given court, does the court have the requisite connections to the dispute for it to have jurisdiction to hear the case (adjudicative jurisdiction) and, if it does, should it nonetheless exercise some form of discretion to decline to keep jurisdiction (for instance, on the ground of it being an inappropriate forum—a *forum non conveniens*)? Second, if the court does assume jurisdiction, which legal system’s rules and principles will it apply

to resolve each of the private law issues submitted for resolution? (If the most significant negligent conduct leading to harm occurs in a state different from the state in which the harm occurs, which state's law should govern?) Third, in situations where a foreign court has decided a private law dispute with geographically complex facts and issued a judgment, and one of the parties to the foreign case seeks to have a court in another state give legal effect to that judgment (by recognition or enforcement), must that latter court do so or may it decline to do so? Thus, it can be seen that private international law, as commonly conceived, deals with framework questions that allow decisions to be made as to which courts may lawfully determine a private law dispute and as to what system of norms must be applied. But, like public international law, it does not (again, on the common conception) lay down the substantive private law rules. It only tells you where to find them, namely, in which domestic legal order or other. Beyond a mainstream understanding that national law creates the substantive rules and private international law simply determines which national law to apply, it is also commonly said that public international law does not regulate the framework rules of private international law. Thus, it is said, each national legal system has its own body of private international law rules which may happen to be informed by comparative law doctrine and even by background norms of public international law (as to the limits of one state seeking to regulate another state's internal legal order), but *general* (non-treaty) public international law does not constrain what rules on adjudicative jurisdiction, on choice of law and on recognition and enforcement of foreign judgments each state's legal order may adopt. States may consent in treaty form, and increasingly do (through the Hague Conference on Private International Law and the European Union) to certain framework rules, but the exercise of express consent to be bound still keeps this phenomenon of public international legal regulation of private international law within a paradigm of each state choosing what rules it will adopt.

There was a time in the history of international law, prior to the height of state-centred domestic and international legal thought, when that body of law was thought to regulate the rights and obligations of all relevant "transnational" actors and relationships. Where international law did not directly provide rules that regulated the substance of a private law relationship, at the very least it provided framework (choice of law and jurisdictional) principles as to which law governed actors of different nationalities in different territorial contexts when one actor alleged a wrong against another. More recently, a school of international legal thought in the United States began to speak of international law, public and private, in conjoined terms often using the term "transnational law" to describe principles that are neither purely national nor international and which apply to private law and public law relationships. What results, in effect, is law that is *neither* national nor international nor public nor private at the same time as being *both* national and international, as well as public and private. In the realm of international commercial transactions, it is increasingly said that we are seeing the resurgence of the old "law merchant"

(*lex mercatoria*) according to which a fusion of the practice of business actors and various degrees of informal acquiescence and formal endorsement by states has produced a hybrid body of transnational law in this substantive field, a body of law that increasingly is articulated through international commercial arbitration that outflanks both domestic and international dispute settlement through courts. The notion that such a transnational law exists in areas of private law such as personal injury torts remains marginal, as there is not a community of practice that has forged consensus on desirable norms; in the absence of such self-regulatory practice, victims of personal injuries have begun to rely on international human rights law values as the foundation for a kind of transnational law of delictual civil liability.

#### 6 GEOGRAPHICAL SCOPE OF NORMS: TERRITORIAL VERSUS EXTRATERRITORIAL

The previous section noted that it is generally assumed that international law does not lay down substantive private law rules. Nor does it specify what legal system must be applied to a given private law dispute where there are geographically complex facts. There is, however, a growing consensus that the radical separation of public international and private international law is no longer sustainable, if it ever was, at least in respect of the public law principles of the *limits* on jurisdiction. That is to say, public international law provides at least abstract principles derived from the foundational norms of sovereignty and the (presumptive) territoriality of jurisdiction—although not necessarily many precise rules—that structure the obligation of one state and its judicial system not to regulate subject-matter and activity that is more properly regulated only by some other state's (or states') legal order(s). Territoriality is not the sole basis for regulation, although it provides the benchmark against which the weight and justifiability of other potential “extraterritorial” grounds for jurisdiction can be assessed. *Prima facie* grounds for one state having sufficient connection to an extraterritorial matter to seek to regulate it in some manner range from the nationality of the harm-causing actors to the universality of concern to regulate certain categories of activity. It is common in some legal systems, for instance, to make that system's criminal law applicable to conduct by a state's nationals outside its own borders. However, assessing competing claims to jurisdiction is not neutral as to the subject matter being regulated, and some subject matter attracts louder cries of “extraterritoriality!” than others. The more that one moves away from areas of common criminality, the more that states become sensitive when other states seek to regulate the conduct of their nationals, notably their corporate nationals, in the economic realm. One reason for the sensitivity is a dominant view that economic policy belongs in some more intrinsic way to the very idea of sovereignty (for instance, as signalled by the notion of “permanent sovereignty over natural resources”). Economic

self-determination is thought to include the sovereign prerogative of states to make decisions on what economic development path to pursue, including the right to take active advantage of an ability to attract investment capital through minimalist labour rights protection. It is also the case that economic policy can vary significantly from one jurisdiction to another, such that extraterritorial regulation of corporate conduct abroad is much more likely to interfere with, or pre-empt, policy choices the host state has made or has chosen *not* to make.

In the context of transnational corporate accountability, a further crucial spin on the limits of reasonable assertion of extraterritorial jurisdiction is the issue of jurisdiction over which corporate entity for which conduct. This is the problem posed by the principle of separate legal personality of corporations and their shareholders (including shareholders that are parent companies). It may well be that it is acceptable for Canada to assert jurisdiction over a Canada-based parent company (Company P) where conduct in Canada has a sufficient causal relationship to harm in, say, Malaysia. And it is without question reasonable for Malaysia to assert jurisdiction over that company's Malaysia-based and Malaysia-incorporated subsidiary (Company S) for Company S's conduct in Malaysia that leads to harm. But may Canada reasonably regulate the conduct of Malaysian Company S, either directly or by piercing the corporate veil and deeming Company P directly or vicariously responsible for Company S's conduct? And may Malaysia assume both prescriptive and adjudicative jurisdiction over Company P if Company P has taken care to have no legal presence in Malaysia *qua* Company P? By asking these questions in this way, it can be seen how separate corporate personality can produce gaps in liability if one or both interested states are unwilling or legally unable to exercise a measure of extraterritorial jurisdiction.

Three general kinds of jurisdiction may be spoken of, each intruding in different ways into foreign states' affairs when they operate extraterritorially. "Enforcement jurisdiction" generally refers to non-judicial forms of state enforcement of the law through police or similar power. For Canada to send its governmental inspectors to factories of Canadian companies in Malaysia and order the companies to obey Canadian law (say, on workplace safety) would generally be viewed as unreasonable, indeed intolerable. Enforcement jurisdiction is, then, essentially territorial; only another state's consent can operate as a defence to the unlawfulness of extraterritorial enforcement. The next most intrusive form of extraterritorial jurisdiction is "prescriptive jurisdiction", that is to say the power of a state to have its constitutional, statutory or common law rules apply to persons or activities outside its own territory. Here the assumption is that the rule applies abroad (say, Canadian law on workplace safety) but is enforced in Canada, for instance against a corporate officer in charge of the foreign plant. The intrusiveness is less if the officer is Canadian rather than, say, Malaysian. But, even though enforcement may take place on Canadian territory, by that fact it is still seeking to alter behaviour taking place in another country. There is finally "adjudicative jurisdiction". This is placed as the third and least intrusive

form of jurisdiction in the private law realm because, under the basic structure of private international law, the simple fact of a judge taking jurisdiction over a case does not mean that the *lex fori* (law of the forum) is applied. Rather, there is always the possibility that the choice of law process will lead to Malaysian law (e.g. on workplace safety) being applied. By applying the foreign law, foreign sovereignty would, in a sense, be affirmed and the only element of intrusion would lie in having a foreign court be the one to interpret the foreign law (no insignificant matter) and apply it, once interpreted, to the facts of the case. To the extent that assets of the person against whom judgment is then issued are located in the foreign country (e.g. Malaysia), the fact that Malaysian courts will have the final decision as to enforcement of the (Canadian) judgment against those assets also mitigates the sovereignty-intruding aspects of adjudicative jurisdiction *per se*. If, however, the court not only takes jurisdiction but also applies its own law, then the intrusiveness of extraterritorial prescriptive jurisdiction kicks in, exacerbated by the actualization of that jurisdiction in a concrete case.

7 STATE REGULATION OF NATIONALS' CONDUCT ABROAD:  
LIBERTY VERSUS OBLIGATION

Following on from section 6, mention should be made of the necessity to distinguish between powers and duties. The foregoing discussion of the limits of jurisdiction concerned the jurisdictional *power* of states to regulate matters with an extraterritorial dimension. The more consensus there is of a common international interest in a specific form of legal sanction with respect to specific subject matter the more that this will count in favour of the acceptability of extraterritorial regulation. The point at which that consensus becomes so widespread and clear that states are no longer simply *permitted* to regulate a matter but *required* to do so is the point at which we move from the realm of state jurisdiction to state obligation—i.e. to state responsibility which is incurred when a state fails to provide for jurisdiction in its domestic law and to exercise it where the triggering facts are present. For example, normative discourse has progressed to the point with respect to the problem of child sex tourism that some states, such as Canada and Australia, have made it a criminal offence for their nationals to have “sex” with children anywhere in the world. Little if any protest from states afflicted by the sex-tourism trade, such as Thailand and Sri Lanka, has occurred, and the debate has rapidly gone to another level. The real question now is not whether states are permitted to regulate their nationals' conduct but whether they have a duty to do so as an extension of their duty to ensure human rights. The more debate focuses on this question, the more it is reasonable to assume that states *at least* have (prescriptive and adjudicative) jurisdiction over their nationals' behaviour.

However, the truly interesting question from the perspective of the theme of this chapter is whether two variants on the just-described sex-tourism

regulation would meet with the same general acquiescence. The first variation would be to take the regulation out of the context of criminal law sanctions over individual tourists and extend the regulation to some form of regulation of corporate behaviour (e.g. a civil liability regime) with respect to those national travel agencies and national tour operators that deliberately facilitate such tourism. The second variation would be to see if regulation, whether criminal or corporate, could be justified beyond a nationality basis for that jurisdiction. That is to say, if Australia began to allow civil suits against Japanese corporate sex-tour operators organising trips to Bangkok or Phuket, would Japan and Thailand accept this as a reasonable exercise of extraterritorial jurisdiction?

#### 8 THE EXISTENCE OF RIGHTS: NORMATIVE VERSUS INSTITUTIONAL

The issue of jurisdiction shades into the question of the relationship between the “existence” of legal norms and the authority (or appropriateness) of a given institution giving some legal effect to those norms. Depending on one’s view of the sources of international law and how one interprets those sources, it may well be, for example, that as a normative matter, international law makes it a (civil) legal wrong for one private actor to torture another private actor. This does not, without more, give a foreign state legislative authority to sanction that conduct through its law, at least when there is no connection (other than humanity itself) to the specific wrong. International law may conceivably create a wrong but not assign universal jurisdiction to its enforcement. It may do so knowing, as it were, that politics and moral suasion are the ways in which the norm is to be enforced, or leaving enforcement to the creation, in time, of an international institution capable of supervising implementation of the norm in some juridical fashion. The basic point is that normative wrongs can exist without institutions to sanction those wrongs or, more commonly, wrongs can exist where political institutions and processes are the preferred avenues for resolution.

Two further examples are relevant. First of all, it may be that the norm/institution tension does not manifest itself in all-or-nothing fashion. It may be, for instance, that a foreign court should have authority to adjudicate, as a delict, torture occurring anywhere in the world, *but* it may also be that the court should assume a rather positivistic stance to its interpretive function. That is to say, whereas the court might be well within its institutional authority to adopt a creative interpretive role in interpreting what torture means in its application to conduct within its own society, it may only be justifiable for a court to act on a solid core of consensus in the “international community” when applying that norm to conduct that occurs abroad.

A second example takes us to the international realm. There may come a time when some of the UN human rights treaty bodies begin to interpret the rights in the various UN human rights treaties as placing direct obligations, as a matter

of treaty law, on non-state actors. This does not, in and of itself, give those bodies institutional authority to exercise direct review over those actors, such as corporations. They may have to filter assessment of corporate liability through indirect state responsibility until such time as an interstate treaty process expressly assigns them a new monitoring role, or, with time, states come to recognize that the treaty bodies' institutional authority has evolved, as a matter of necessary implication, to include the power to assess non-state conformity with the treaty norms. Again, the point is that the existence of norms within a legal order does not in and of itself decide the question of allocation of institutional authority to judge those norms.

9 INSTITUTIONAL POWER OF NORMATIVE DEVELOPMENT:  
LEGISLATIVE VERSUS JUDICIAL

Directly related to section 8, a central tension stems from the necessity to take seriously the following question: given the state of international law on the applicability of human rights norms to corporate actors, should judges assume the authority to develop such accountability without express or at least clear authorisation from the relevant legislature? This question is bound up with the general question of justiciability and the associated debates on the relative competence and legitimacy of courts and legislatures in relation to law-creation activity. When one grafts onto the general issue of the appropriate function of courts the fact of an interstate context with attendant foreign policy sensitivities, it can be seen that there will be a constant tug-of-war between the peculiarly judicial responsibility to take human rights law seriously (and corresponding degree of authority to be interpretively generous in so doing) and the peculiarly non-judicial nature of responsibility for conducting foreign relations. In civil law jurisdictions, the role of the judiciary will present itself as a question of how broadly and assertively to interpret statutes (on both jurisdiction and on applicable law) while, in common law jurisdictions, this question will be supplemented by the question of whether the historical role of judges in forging non-statute-based private law should continue into the transnational realm.

A corollary will exist at the international level with respect to the issue of how broadly international human rights treaty bodies can interpret both the applicability of treaty norms and the scope of their institutional powers of review. If it is a given that the original conception of the treaty regime, the ongoing mainstream understanding and the bulk of textual indicators point to the human rights treaties as being concerned mostly about state obligations and review of state compliance, what degree of acquiescence do treaty bodies need from states parties to the treaties before venturing in a robust way into the realm of corporate accountability for human rights harms? Or, is no degree of implicit acquiescence acceptable, such that the bodies may only take this route when they have the equivalent of interstate legislative approval in the form of treaty protocols

or parallel agreements? Would consensus (or large-majority) resolutions of the UN Commission on Human Rights or the UN General Assembly help bridge the gap between implied authority and express authorisation?

#### 10 NORMATIVE AUTHORITY OF DECISION: BINDING VERSUS NON-BINDING

The final relevant distinction deals with the formal authority of normative acts of a given institution. Does an evaluation of compliance or an interpretive statement in some dispositive manner bind the actor(s) to whom it is addressed, or does it have non-binding force? Take for example the “views” that the Human Rights Committee may issue under the ICCPR’s communications procedures or the “concluding observations” of all the UN committees. If these juridical acts are formally non-binding, such that their authority is persuasive only, what degree of persuasiveness attaches to them?

It is arguable that the non-binding status of certain forms of judgment may be a blessing in disguise, as it allows the special qualities of judicial or quasi-judicial scrutiny or reasoning to be brought to bear on conduct while accommodating the political dimension to given subject matter by not closing down the possibility that governmental bodies may take a different view. It also, arguably, allows for a greater degree of interpretive boldness because matters of principle can be embraced while leaving pragmatic and “political” issues to the operation of give-and-take in the aftermath of a body’s appraisal. Non-bindingness allows principled prodding of the political process while avoiding pre-emption of that process.

Apart from the example of the UN human rights bodies, several other contexts help cast light on the necessity to take into account the status of juridical acts in order to assess the acceptability of a given institution engaging in that juridical act. Firstly, under the European Convention on Human Rights, states “undertake to abide by” (article 53) European Court judgments when they are parties to a case. This includes abiding by Court orders under article 50 whereby the Court may “afford just satisfaction to the injured party”. To date, the Court has insisted that these words only give it authority to order financial compensation and has eschewed any form of injunction that would tell states what they must do to stop the violation or fully remedy it. One reason for this reluctance is almost certainly the assumption that any article 50 order will, by definition, be binding under article 53, and this raises the normative stakes of the Court going beyond ordering compensation. However, were the Court to read a soft authority into article 50’s wording, permitting it to *recommend* to states what measures need to be considered by them, this could add immeasurably to the impact of Court judgments. In other words, the possibility of a non-binding aspect to the Court’s judgments could increase the normative engagement of the Court with states.

A second context is the potential for an evolving relationship between different international regimes, such as between the ILO and the WTO with respect

to core labour standards. Rather than insert a binding social clause into the WTO, states parties to the GATT/WTO regime have shunted the matter to the “appropriate” institution, the ILO. Regardless of whether a formal link gets drawn between the regimes in the form of an interstate agreement, the ILO could interpret these events as already giving it the authority to begin to assess states’ compliance with ILO core labour norms in a way that directly insists on harmonised minimal standards in each state’s trade and investment laws and policies. Not only would this provide an external form of review of the WTO order, albeit very indirectly, it could also seek to harness the recommendatory power of the ILO to put forward comprehensive remedial suggestions in situations where the negative and blunt effect of the trade order’s ultimate tool, trade sanctions, will do little to better certain labour situations and may easily exacerbate them. Finding solutions to child labour and forms of bonded labour come to mind as situations that would benefit from complex, non-impositional remedial processes engaging states, corporate actors and affected groups in some cooperative problem-solving enterprise.

A third context involves cases in which domestic courts are called upon to resolve civil liability disputes between private actors, but the defendant seeks to raise what is known as the “act of state” doctrine as a defence. Put in very simplified terms and ignoring many debates over its precise contours, that doctrine tells domestic courts that, where a foreign state’s legal system has determined rights or obligations of private actors or goods in an exercise of territorial jurisdiction, then the foreign court must, as a measure of respect for the sovereignty of the foreign state, treat the legal effects of the foreign law’s determination as valid. So, for example, victims of forced labour on an oil pipeline project in Dystopia sue a Utopian oil company in Utopian courts. The forced labour is organised by Dystopia, acquiesced in by the company, and used to forward a joint venture in which the government and the company are equal partners. The government of Dystopia issues a decree, lawful within its own (repressive) legal system, saying: “No company, or corporate officers, shall incur any civil liability for acts performed by it or by the government of Dystopia on its behalf where such acts are done within the context of a joint venture project involving Dystopia and the company.” When the Utopian company invokes the decree, it will say to the courts of Utopia that the act of state doctrine should apply such that the Dystopia decree must be treated as valid in Utopia; given that the decree determines the issue of liability, the plaintiff victims’ claim must fail, it would be argued. Apart from any substantive reasons that the court may be willing to invoke to decline to respect the foreign act of state (notably what is called a “public policy exception” the content of which can be informed by international human rights values), the court may also take note of the formal legal effects of any determination of liability on the part of the Utopian company. That is to say, by refusing to treat the foreign decree as valid, the Utopian court is neither adjudicating the liability of the state of Dystopia (it is a Utopian company’s liability that is at issue, only) nor is it purporting to say that the decree is invalid

within Dystopia's own legal order. The binding effects of the decision to ignore the decree are limited to a Utopian company being sued before a Utopian court; of course, the judgment does affect activities that go on in Dystopia, but it does not do so in a way that has binding force either over Dystopia or within the Dystopian legal system.

The final context is rapidly becoming the most prevalent form of transnational "regulation" of corporate actors for human rights abuses and other kinds of problematic conduct (environmental harm, bribery, money laundering and so on): codes of conduct. There are some codes of conduct that apply to corporate actors which have been issued by international organisations—for example, the 1977 ILO Tripartite Declaration of Principles Concerning MNEs and Social Policy and the 1976 OECD Guidelines for Multinational Enterprises. These documents are intended to affect conduct by suasion, but, to date, have had limited discernible impact because their formally non-binding status has not been complemented by any kind of rigorous monitoring or conduct-spotlighting procedures. Another phenomenon has been the issuance by unofficial organisations of principles applying to conduct in specific countries, with corporations invited and pressured to endorse and internalize the principles; notable examples are the Sullivan Principles for the former *apartheid* South Africa and the MacBride Principles for Northern Ireland. In the 1990s, indeed primarily in the past few years, there has been a profusion of initiatives by individual corporations and industry-wide associations to promulgate codes of conduct. The vast majority of these codes are based on a model of self-regulation, with some companies being more serious than others about bringing the codes in as standard operating premises of the company and about permitting credible external auditing of compliance with the codes. Whether or not corporate self-regulation is largely an effort to fend off binding state and interstate regulation, it has had the distinct advantage, by virtue of its very non-bindingness, of having put a small army of Trojan horses onto the field of ideological struggle over corporate social responsibility, an army which NGOs are rapidly becoming adept at pushing through the corporate gates.

#### 11 CONCLUSION: THE IDEA OF MUTUAL TRANSLATION OF TORTURE AND TORT

"[W]e might say . . . that in the literary text an awful lot of things may be happening at once, perhaps contradicting each other, perhaps qualifying each other, and that as a result the translator may find that it is not possible to express all of these complications in the target language. The idea . . . is that by looking at the original and translation side by side and identifying those areas where translation turned out to be problematic, we can achieve a better appreciation of the original's qualities and complexities . . ."<sup>2</sup>

<sup>2</sup> T Parks, *Translating Style: The English Modernists and their Italian Translations* (London and Washington, Cassell, 1998) at 12–13.

I started this chapter with the suggestion that the relationship between tort and torture may be usefully approached in terms of a series of problems of translation, and also noted that the notion of a hybrid mediating space between poles may be a more congenial way of understanding than thinking in terms of conversion, that is, of a movement *from* tort *to* torture and, similarly, *from* torture *to* tort. To this extent, translation has its limitations as a metaphor because it risks conjuring up the image of a one-way rendering of an original into its mirror in another language—the public international right of torture *becomes* a domestic private law tort, and the law of tort *becomes* part of the apparatus of international law—and thus obscuring the fact that the “torture as tort” issue involves two-way normative traffic, a conversation between two originals neither of which can be understood entirely within the existing language of the other. While virtually no translator would contend that it is possible fully to render a literary work in the existing vocabulary, syntax, and embedded structural context of the receiving language, it is nevertheless generally accepted that the translation enterprise involves striving to be as faithful as possible to an *ideal* of reproduction of the original in another form rather than to a goal of creating something substantively new.

Without begging the very set of questions being asked in this volume about the relationship between tort and torture, the same cannot be said to be the very purpose of the interaction of two legal discourses unless one, again, simply assumes a normative priority of one and a kind of blank-slate receptivity of the other. Rather, it would seem more useful to think of a process of mutual modification in which we must be constantly open to the possibility of a new text emerging which is a reflection of neither one original nor the other original. Yet, something remains to be said for the image of translation, if we understand it less as an outcome or product than as a process or method in which, even when the movement is towards the forging of a normative betweenness, we will inevitably approach that space initially by seeking to understand a comparatively unfamiliar discourse in terms of a discourse with which we are most at home. In the course of this, we may come to better understand the limits and potentialities of our home discourse. Here, there is much of value in Tim Parks’ conclusions, as set out in the quotation starting this sub-section, about how the process of translation creates the opportunity to view an original text (that being translated) more reflectively and with greater insight, to achieve “a better appreciation of the original’s qualities and complexities.” When adapted to the normative realm of law and human rights, we could do worse than to take the cue from Parks’ view of this key value of translation and think in terms of *a process of mutual translation* in which we seek not only to grasp the strange text but also to more fully grasp the home text.

With this conceptual backdrop in mind, it may be helpful to take one example in the “torture as tort” dynamic of a doctrinal issue in which a multiplicity of options are potentially open for choice in the interplay of categories that goes on within a process of mutual translation. In view of the dual focus of this

chapter on both general framework and the specifics of corporate accountability, the example will be that of the characterisation of the causes of action that might be recognised in proceedings in domestic courts brought against multinational corporations, where both “tort” and “torture” figure in some inchoate way in the understanding of that cause of action. Here, an analytical scheme suggestive of the aforementioned multiplicity is offered.

In broad terms, it could be said that there are two ways in which a human-rights-related claim could be characterised in formulating a private law cause of action. First of all, human rights could be cited as the *direct* cause of action such that, for instance, a company could be sued for a violation of the human right not to be tortured. 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. In terms of a direct human rights action, it is conceptually possible that the plaintiff could point to four different sources for the human right in question that the plaintiff alleges to have been violated: local law (the law of the forum); foreign law (notably the law of the place where the harm occurred); public international law (either international treaty law, international customary law, or general principles of law); or transnational law (a blend of norms that do not derive from any specific legal system).<sup>3</sup> As for indirect human rights claims, it may be analytically helpful to make a further distinction between “surrogate” claims and “instrumental” claims. By surrogate claims is meant existing causes of action that come very close to capturing, in an intrinsic sense, the kinds of harms that a human rights tort would seek to tackle.<sup>4</sup> By “instrumental” is meant a claim in which a recognized legal interest is used as the basis for a law suit with some recognition that protection of that legal interest will instrumentally benefit the protection of human rights interests.<sup>5</sup>

<sup>3</sup> As for the invocation of international law as the juridical source of the alleged human rights violation, it will often be the case, *formally*, that it will be one national legal system or another that is the source of the human rights claim by virtue of that legal system having received international human rights law in one way or another.

<sup>4</sup> The example has already been given of the connection between the existing tort of assault and a potential human rights tort of torture. Another example might be the existing tort of false imprisonment and torts related to arbitrary detention and disappearances. That is not to assume, it bears adding, that reliance on existing causes of action will do justice to the specific principles that already are, or should be, in place with respect to the human rights norm: see, e.g., the discussions of the adequacy of existing tort law in G Virgo, “Characterization, Choice of Law, and Human Rights”, chapter 12 in this volume; and S Raponi, “Grounding a Cause of Action for Torture in Transnational Law”, chapter 14 in this volume.

<sup>5</sup> Probably the best and most relevant example would be tort and other civil liability claims related to harms to the environment in which rights related to the right to health, the right to inadequate standards of living (including the right to earn a livelihood) and rights to nutrition can be shown to have been detrimentally affected by impairment of the environment in which persons or whole communities live.

A final word, a caution. Nothing in the foregoing is meant to suggest a once-and-for-all choice. Temporal, contextual and pragmatic variables will, and should, influence the approach a given court decides to take. What made sense in the United States given the presence of ATCA and later the TVPA may not make sense today in Australia or France or Egypt. Tentative first steps, based on existing choice of law rules, tort law and jurisdictional principles, may be all that is necessary for a first transnational torture case to be decided in Ontario, but by 2005 this may be an unduly constrained way of understanding even cases in which no Canadian actor is either victim or perpetrator. And so on. Finally, it should be noted that even the foregoing analytical scheme has its dangers if it is mistakenly interpreted as suggesting that multiplicity means only a range of categorisation choices from which a judge must, in the end, select only one for purposes of a given case. This is not necessarily the best way to understand multiplicity. Rather, a notion of simultaneous or co-existent multiplicity may do greater justice to the issues and complexity at stake. By simultaneous multiplicity, I mean to say that courts, and legislators, should keep their minds open to plural characterisations of a claim, such that different characterisations might be chosen depending on what specific issue is dependent on that characterisation.

One illustration, situated toward the more conservative end of the spectrum of possibilities, conveys something of what I mean by plural characterisations. Assume a judge declines to characterise a cause of action as an action for torture *per se*, a kind of auxiliary characterisation as torture might still be used to trigger the application of the “public policy” exception in choice of law in order to justify applying the *lex fori* when there are barriers (such as an unjust amnesty) in the *lex loci delicti* which are illegitimate under the public international law on torture, especially when the state of the *lex fori* and the state of the *lex loci delicti* are both parties to the Convention against Torture. This way, even if the tort is initially characterised as “battery”, an “auxiliary” characterisation as “torture” would allow public policy to be used in a more principled way than presently tends to occur with the unelaborated and gut-level *ad hocery* that goes on under the guise of “public policy”. Such a notion of auxiliary characterisation does justice to the fact that, while certainly constituting battery within current tort law doctrine, the elements of this tort also constitute torture under international human rights law. On such an approach, simultaneous multiplicity might have a conceptually liberating influence on judicial reasoning, while remaining principled and firmly within the domain of the appropriate role(s) for judges to play in working justice through law.