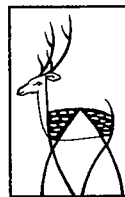


Torture as Tort

*Comparative Perspectives on the
Development of Transnational Human
Rights Litigation*

Edited by
CRAIG SCOTT
Associate Professor of Law,
Osgoode Hall Law School, York University,
Toronto, Ontario



• H A R T •
PUBLISHING

OXFORD – PORTLAND OREGON
2001

Table of Contents

<i>List of Contributors</i>	xi
<i>Table of Cases</i>	xvii
<i>Table of Legislation</i>	xxxiii

PART I:

FRAMES AND FOUNDATIONS

1. Introduction to *Torture as Tort*: From Sudan to Canada to Somalia 3
CRAIG SCOTT
2. Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms 45
CRAIG SCOTT
3. International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines 65
MICHAEL SWAN
4. Taking *Filártiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad 109
JOHN TERRY
5. Torture: Prevention versus Punishment? 135
MALCOLM EVANS and ROD MORGAN

PART II:

JURISDICTION AND IMMUNITY

6. Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to *Ex Juris Service, Forum Non Conveniens* and the Presumption of Territoriality 157
ANNE C. McCONVILLE
7. Geographies of Injustice: Human Rights at the Altar of Convenience 197
UPENDRA BAXI
8. The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism 213
ROBERT WAI
9. In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms Be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes? 247
WENDY ADAMS

viii *Contents*

10. Impunity and the United Nations Convention against Torture:
A Shadow Play Without an Ending? 275
PETER BURNS and SEAN MCBURNEY

PART III:

CHARACTERISATION, CHOICE OF LAW AND CAUSES OF ACTION

11. Torture, Tort Choice of Law, and *Tolofson* 291
JENNIFER A. ORANGE
12. Characterisation, Choice of Law, and Human Rights 325
GRAHAM VIRGO
13. The Emperor's New Clothes: Defabricating the Myth of "Act of State"
in Anglo-Canadian Law 343
MARTIN BÜHLER
14. Grounding a Cause of Action for Torture in Transnational Law 373
SANDRA RAPONI
15. International Human Rights Law and the Tort of Torture: What
Possibility for Canada? 401
EDWARD M HYLAND

PART IV:

EVOLVING INTERNATIONAL LAW ON CIVIL RECOURSE
AGAINST NON-STATE ACTORS

16. Holding Leaders Liable for Torture by Others: Command Responsibility
and *Respondeat Superior* as Frameworks for Derivative Civil Liability 441
VALERIE OOSTERVELD and ALEJANDRA FLAH
17. Responsibility and Liability for Violations of Human Rights in
the Course of UN Field Operations 465
CHANAKA WICKREMASINGHE and GUGLIELMO VERDIRAME
18. Linking State Responsibility for Certain Harms Caused By
Corporate Nationals Abroad to Civil Recourse in the Legal Systems
of Home States 491
MUTHUCUMARASWAMY SORNARAJAH
19. Revisiting *Human Rights in the Private Sphere*: Using the European
Convention on Human Rights to Protect the Right of Access to the
Civil Courts 513
ANDREW CLAPHAM
20. Civil Remedies for Torture Committed Abroad: An Obligation
under the Convention against Torture? 537
ANDREW BYRNES

PART V:
LEGITIMACY, INTERVENTION AND THE FORGING OF
NATIONAL HISTORIES

- | | |
|---|-----|
| 21. Doing the Right Thing? Foreign Tort Law and Human Rights
JAN KLABBERS | 553 |
| 22. Just Amnesty and Private International Law
JENNIFER LLEWELLYN | 567 |
| 23. Cultural Challenges: Injunctions in Australian Courts and the Right
to Demand the Death Penalty under Saudi Arabian Law
BELINDA WELLS and MICHAEL BURNETT | 601 |
| 24. Israel and the Recognition of Torture: Domestic and International
Aspects
AMNON REICHMAN and TSVI KAHANA | 631 |

PART VI:
ON THE BORDERS OF TORT THEORY

- | | |
|--|-----|
| 25. An Uncivil Action: The Tort of Torture and Cosmopolitan Private
Law
MAYO MORAN | 661 |
| 26. Private Law, Constitutionalism and the Limits of the Judicial Role
OLIVER GERSTENBERG | 687 |
| <i>Appendix 1: UN Convention against Torture</i> | 705 |
| <i>Appendix 2: United States Legislation: Alien Tort Claims Act and
Torture Victim Protection Act</i> | 711 |
| <i>Appendix 3: UK Private International Law (Miscellaneous Provisions)
Act</i> | 713 |
| <i>Appendix 4: Revisiting Human Rights in the Private Sphere, Postscript:
Developments Related to Pinochet as of January 2001
ANDREW CLAPHAM</i> | 717 |
| <i>Index</i> | 725 |