LITIGATING EXTRATERRITORIAL CORPORATE CRIMES IN CANADIAN COURTS

by

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in

The Faculty of Graduate Studies
(Law)

THE UNIVERSITY OF BRITISH COLUMBIA
(Vancouver)

September 2012

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ABSTRACT

This study investigates whether and how Canadian courts may assume jurisdiction (both criminal and civil) over extraterritorial crimes/wrongs committed by Canadian corporations operating overseas. It examines the current state of international law to see whether there is any international legal rule prohibiting a state from assuming jurisdiction over conduct occurring outside its territory. It finds that no such positive rule is in existence, whether in customary international law or in treaty law, and that the only concern is the likelihood of diplomatic protests by states which believe that the jurisdiction sought to be assumed is a threat to their territorial integrity. It argues that although the type of jurisdiction envisaged in this study is not widespread among states, the absence of widespread state practice is not tantamount to prohibition, at least in principle. The study then looks at the Canadian domestic jurisdictional bases, both criminal and civil. On the criminal front, it finds that the real and substantial link test has enough flexibility to reach the extraterritorial conduct of Canadian corporations and that the expansion of the substantive bases of corporate criminal liability that occurred in Canada in 2003 bolstered the criminal jurisdiction of Canadian courts over extraterritorial corporate crimes. On the civil front, it finds that Canadian courts may assume extraterritorial jurisdiction under three distinct theories: the real and substantial connection test, necessity jurisdiction and the recently enacted Torture Victims Protection Act. It examines the bases for declining jurisdiction under the doctrine of forum non conveniens and calls for a reformulation of the doctrine to require a Canadian court to decline jurisdiction only when it finds that it is a “clearly inappropriate” forum, in contrast to the current rule that requires the existence of a “clearly more appropriate alternative” forum. The question of choosing the applicable law in tort cases is also interrogated. A call is made for the adoption of a rule that considers the nature of the conduct in litigation as an important element in the determination of the applicable law. On the whole, this study concludes that Canada holds prospects for transnational litigation.
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ACKNOWLEDGMENTS

It is impossible for anyone to accomplish anything solely by themself. Similar thoughts and ideas are attracted from all sides and retained, constantly refining, redefining and reinforcing the original thought until it comes to fruition. This dissertation quite naturally followed this process. It is the product of the efforts of countless persons who therefore very truly deserve my gratitude.

Any reader who finds this dissertation interesting and valuable may send their thanks to my supervisors: Professors Joost Blom, Michael Byers, Shi-Ling Hsu, Janine Benedet and Mr Gib van Ert. They went to great lengths to see to the successful completion of this study. They read my earlier drafts with the highest degree of alertness to identify gaps in my arguments. The seemingly unusual length of this dissertation did not discourage them. Their diverse academic expertise was a blessing to this study. I cannot express enough gratitude to them. Professor Blom, with whom I started working on day one, was exceptionally patient and understanding. His towering wealth of experience in Canadian private international law was a rare asset to this study.

During this program, I enjoyed the warm companionship of many, without which it would have been very difficult for me to stay on when the going went tough – and the going did go tough several times. Their contributions varied from direct advice to friendly encouragement. Even the occasional hangouts for drinks were part of those contributions, as they gave me the much-needed psychological balance. Among them, I would mention but a few for want of space: Ireh Iyioha-Bangoju, Chukwudi Nwosu, Chinedu Eze, Eberechi Ifeonu, Sotonye Godwin-Hart, Helen Orkar, Moustapha Fall and Angeli Rawat.

This study would not have been completed but for the generous funding I received through the University of British Columbia. The Law Foundation of British Columbia provided a great part of that funding. I am very grateful to them. My thanks goes to Joanne Chung, the Administrator of the Graduate Program in the Faculty of Law for her ever ready helpfulness in dealing with Faculty issues. She was one of those persons who would help you get things done, even faster than you had planned to press for.

My mother, siblings and other relations back in Nigeria, who went to great lengths to see to it that I came this far, deserve my explicit thanks. Theirs is an eternal debt. There was one who
introduced distinctive details into my life, although she did so, I suspect, without knowing what she was doing. It was her who taught me, again without knowing what she was doing, self-motivation and perseverance – two key factors in my ability to complete this program. In all ramifications, hers was a great sacrifice. My love goes to Ebere.

Above all, I give thanks to the Lord for the grace of experiencing.
DEDICATION
To my father, of blessed memory
CHAPTER 1
THE GOVERNANCE GAP IN THE GLOBALIZATION OF COMMERCE

1.1 INTRODUCTION

Can a Canadian corporation carrying on business overseas be sued and/or prosecuted in Canada for crimes it committed in the course of its operations over there? This question has assumed significance following the influx of reports regarding the abusive activities of transnational corporations (TNCS)\(^1\) operating in the developing world\(^2\) and the cascade of lawsuits in the

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\(^1\) Numerous definitions of TNCs (also called Multinational Enterprises, Multinational Corporations, etc) have been put forward. While there is no standard definition, one of the most authoritative is perhaps that contained in the United Nations’ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, UN Doc E/CN/.4/Sub.2/2003/12/Rev.2 (2003), para 20: “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” The document goes ahead in paragraph 21 to define “other business enterprises” to include corporations: “The phrase ‘other business enterprise’ includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.” The Norms, however, seemed to have been shelved as they were not taken further inside the UN system. The first use of the term is, however, attributed to David Lilienthal who in 1960 delivered a paper titled “Management and Corporations, 1985” at the Carnegie Institute of Technology, later published under the title The Multinational Corporation (New York: Development & Resources Corporation, 1960) and reprinted in Melvin Anshen & Leland Back, eds, Management and Corporations, 1985 (New York: McGraw-Hill, 1960) at 119–158. He defined TNCs as “corporations ...which have their home in one country but which operate and live under the laws and customs of other countries as well”. See Peter Muchlinski, Multinational Enterprises and the Law, 2nd ed (Oxford: Oxford University Press, 2007) at 5 [Muchlinski, 2007].

\(^2\) I am aware of the debate surrounding the appropriateness of the use of the terms “developed” and “developing” countries, “first world” and “third world”, and other similar appellations. There is no intention in this study to consider that debate. I am equally aware of the pejorative meaning those terminological divisions may convey. No pejorative meaning is intended here. But it is interesting to note that the claim that those appellations are no longer useful has been disputed by TWAIL (Third World Approaches to International Law) scholars. Professor Obiora Okafor, for instance, has suggested that the significance of the appellation “third world” is linked to states and populations that self-identify as such. These states are unified by “a historical and continuing experience of subordination at the global level that they feel they share – not the existence and validity of an unproblematic monolithic third-world category”. Obiora Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall LJ 171 at 174 [Okafor, “Newness”]. Karin Mickelson has noted that the appropriateness of the appellation “third world” has been thrown in doubt in light of the growing diversity of the various states to which the term has been applied. She sees the definition of the terms as both descriptive and normative in that it brings to sharp focus the injustice those states have suffered over the years. Karin Mickelson, “Rhetoric and Rage: Third World Voices in International legal Discourse” (1997-1998) 16 Wis Int'l LJ 353 at 357. Mickelson uses the “North-South” dichotomy as an alternative way of defining the relationship between the developed and the developing worlds, first world and third world. Mickelson, “Co-opting Common Heritage: Reflections on the Need for South-North Scholarship” in Obiora Chinedu Okafor & Obijiofor Aginam, eds, Humanizing Our Global Order: Essays in Honour of Ivan Head (Toronto: University of Toronto Press, 2003) 112 at 113. However, for the reason that terms like “developing countries” and “third world” lend themselves more
United States against TNCs that have legal presence in the US for such abuses committed outside the US. The US suits are filed under the *Alien Tort Claims Act* (ATCA) enacted by the First US Congress in 1789 granting Federal District Courts original jurisdiction to hear and determine “any civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. Several TNCs, including Canada’s Talisman Energy, Inc, have been haled to US courts via this statute for abuses committed in their overseas operations. Canada has not been recognized as a viable forum for such litigation. Yet, a significant number of Canadian mining corporations are increasingly being implicated in environmental abuses in their overseas operations, especially in the developing countries. This raises the question of whether Canada, home to most of the mining corporations and to which the corporations repatriate their profits, should assist in addressing the environmental and human rights challenges posed by the activities of its mining corporations abroad, and if so, how? Moreover, if US courts could attempt to assume jurisdiction over a Canadian corporation for abuses committed neither in the US nor in Canada, one must wonder whether Canada could not itself have brought or allowed litigation against its own corporations for violations committed in their overseas operations. To explore this possibility is the task to which this dissertation is devoted. Its principal theses are that there is nothing in customary international law or treaty law that *prohibits* Canada from taking jurisdiction over extraterritorial corporate crimes involving Canadian corporations, and that Canadian law as it stands holds prospects for such litigation if only Canadian courts take a functional approach to the assumption and exercise of jurisdiction.

The type of litigation pictured here is known in US legal parlance as “transnational human rights litigation”. It is one example of what Professor Harold Koh called “transnational public law litigation”, i.e., suits brought in various judicial forums, most notably, domestic courts, alleging violations of a mix of international law and domestic law. Transnational public law litigation blends two traditionally distinct modes of litigation: domestic litigation (in which individuals make private claims against one another in domestic courts seeking both the

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1. 28 USC §1350 (1988) [ATCA].
validation of legal norms and compensation for damage suffered), and international litigation (in which states make public claims at international tribunals against one another seeking the validation of international legal norms based on treaties or customary international law). The blend of these two genres of litigation produces “claims of right based not solely on domestic or international law,” but on a hybrid of the two. The goals of such litigation include compensation of the victim, development of international law norms, deterrence of future abuses, and denial of refuge to the offender. Transnational human rights litigation becomes that aspect of transnational public law litigation that specifically seeks redress for human rights abuses.

Although civil litigation is the usual form of transnational public law litigation, transnational criminal prosecution is also a form of it as it often relates to crimes that violate fundamental norms, e.g., torture, war crimes and crimes against humanity. Moreover, criminal prosecution shares essentially the same goals of redress for victims (many criminal justice systems contain victim compensation mechanisms), norm definition, deterrence and denial of refuge to the lawbreaker. Transnational criminal prosecution is assuming popularity especially since the creation of the International Criminal Court (ICC) in 1999. Many states parties to the Rome Statute establishing the Court have enacted domestic legislation allowing the prosecution of alleged criminals for violations of international crimes even in cases where the crimes were committed outside the territory of the prosecuting state. This study considers both transnational civil litigation and transnational criminal prosecution.

1.2 THE GOVERNANCE GAP

One of the major footprints of economic globalization is increased power and influence of TNCs. It is generally believed that TNCs have become such powerful global actors that many

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5 Koh, supra note 4.
6 Ibid.
7 Ibid at 2349, n 11 (noting that because of the inherent difficulties of collecting judgment sums in a transnational setting, norm articulation, deterrence and denial of safe haven assume greater significance in transnational public law litigation).
9 A notable example is the Canadian Crimes Against Humanity and War Crimes Act, SC 2000, ch 24 (Can), C-45.9 [CAHWC Act].
10 Former UN Secretary-General Kofi Annan noted that “[t]ransnational corporations have been the first to benefit from globalization”: “Help the Third World help itself”, Wall Street Journal, 29 November, 1999, online:
individual states lack the resources and will to control them.\textsuperscript{11} Many TNCs have grown into entities of such “astonishing magnitude” that, economically speaking, they fully measure up to “nation states.”\textsuperscript{12} In a 2000 study of the economic and political power of the world’s top two hundred corporations, the Institute for Policy Studies found that corporations comprised about fifty-one per cent of the top 100 “economies” in the world.\textsuperscript{13} It also found that the sales of the top 200 corporations were growing on a larger scale than total world-wide economic activity, and that these were the entities that were dictating the course of globalization and gaining the most from it.\textsuperscript{14}

Crucial to the growth in the power of TNCs is their ability to incorporate in one country and operate in many other countries simultaneously through a multiple network of subsidiaries.\textsuperscript{15} The nature and grasp of their operations are such that “they often operate in jurisdictions in which human rights violations occur, obtain benefits from subsidized arrangements with governments that commit human rights violations, provide goods and services that result in human rights violations, or organize in ways that violate the rights of workers.”\textsuperscript{16} The Canadian Lawyers Association for International Human Rights (CLAIHR) cites four ways in which a

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\textsuperscript{14} Anderson & Cavanagh, supra note 13.


corporation’s activities may “bolster the repressive capacity and the staying power of a regime that systematically violates human rights”:

1. It can provide goods and services that increase the regime’s repressive capability;
2. It can be a main source of revenue that strengthens the despotic capability of the regime;
3. It can provide the regime infrastructure (like roads, railways, power stations, et cetera) that increases its repressive capability; and
4. Its presence there may provide the repressive regime international credibility.\textsuperscript{17}

Craig Forcese points out further that in many instances, TNCs operate in countries that are “fissured by civil war” and sometimes fall “prey to one faction or another.”\textsuperscript{18} In other instances, their operations generate opposition that sparks violent unrest. When violence erupts, they have responded by “tapping directly into the military expertise and firepower of both state and private armies.”\textsuperscript{19}

The South African Truth and Reconciliation Commission Report revealed the level of collaboration between repressive regimes and TNCs in the abuse of human rights.\textsuperscript{20} The Report indicted many Western corporations for their complicity in the atrocities of apartheid through, for instance, their racist employment policies and use of coerced labour. Credit institutions and private money lending corporations were also indicted for financing the apartheid regime and unjustly profiting from it. At a time when the international community had placed economic sanctions on the apartheid regime, making it extremely difficult for the regime to survive financially, banks and other financial institutions sustained the regime by lending it money directly at relatively high interest rates.\textsuperscript{21}

\begin{flushright}
\textsuperscript{19} Ibid.
\textsuperscript{21} \textit{Truth and Reconciliation Report}, \textit{supra} note 20 at 157.
\end{flushright}
In Myanmar (formerly Burma), Unocal is believed to have been well aware that the Myanmar military was using forced labour and torture to clear land around the Yadana Gas Pipeline and knowingly profited from it. Security for the project was provided by the Myanmar military that allegedly subjected the villagers to forced labour, torture, rape and murder. In the suit filed against Unocal in the US over those abuses, the Ninth Circuit Court of Appeals found “evidence sufficient to raise a genuine issue of material facts” that Unocal was aware that the State Law and Order Restoration Council (SLORC) – a military junta that took over the government of Myanmar in 1988 – had a terrible human rights record and was committing these human rights abuses in furtherance of the Yadana project. The plaintiffs provided documentary evidence also believed to have raised “a genuine issue of material facts” that prior to investing in the project, Unocal was adequately warned, by its own consultants and project partners, of the propensity of SLORC to commit terrible human rights abuses, and the likelihood that it would commit such abuses in connection with the project. After Unocal had invested in the project, it was again informed by its own consultants, employees, project partners and human rights organizations, that the Myanmar military was actually committing those abuses with regard to the project. The President of Unocal acknowledged before human rights organizations in 1995 that the Myanmar Military might be using forced labour in connection with the project, but added that “[p]eople are threatening physical damage to the pipeline”, that “if you threaten the pipeline there’s gonna be more military”, and that “[i]f forced labour goes hand and glove with the military yes there will be more forced labour.”

Unocal consultant John Haseman, who was a former military attaché at the US embassy in Rangoon, reported that based on his knowledge of the region derived from his three years of service there, “egregious human rights violations have occurred, and are occurring now, in southern Burma. ... Unocal, by seeming to have accepted [the Myanmar Military]’s version of events, appears at best naive and at worst a willing partner

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22 See the civil suit that arose from Unocal’s operations in Myanmar, filed in the US under ATCA: Doe v Unocal, 963 F Supp 880 (CD Cal 1997) [Unocal, 963 F Supp], aff’d in part, rev’d in part, and remanded, 395 F 3d 932 at 936 (9th Circuit, 2002) [Unocal, 9th Circuit (2002)].
23 Unocal, 9th Circuit (2002), ibid at 939-940.
24 Unocal, 963 F Supp, supra note 22 at 891-902.
25 Unocal, 9th Circuit (2002), supra note 22 at 940.
in the situation.”26 After a series of motions and appeals, the case was finally settled out of court on terms that the plaintiffs’ legal team admitted “thrilled” them.27

Professor Peter Muchlinski has decried the “sensational abuses of international corporate power” by US firms in their operations in the developing countries.28 One of the most infamous tales was the involvement of ITT Corporation in plans to overthrow the government of President Salvador Allende in Chile that resulted in General Pinochet’s ascendance to power, and the efforts of US copper firms, nationalized by President Allende’s government, to thwart Chile’s economic growth.29 Investigations of the Chilean case by the US Senate Committee on Multinationals confirmed that US corporations were a threat to the sovereignty of their host developing countries.30 The investigations were followed by Senate Committee hearings on alleged corrupt practices of US corporations operating abroad, especially in the arms industry. The findings of the hearings prompted the enactment of the Foreign Corrupt Practices Act31 in 1977 as a legislative response to the foreign corporate corruption of US firms.32

Canadian corporations, especially mining corporations, operating overseas, have equally been widely indicted in egregious environmental and human rights abuses in the course of their operations. For instance, disasters at Canadian corporations-owned mines resulted in huge spills of toxic sludge in Guyana in 1995, in the Philippines in 1996, and in Spain and Kyrgyzstan in 1998.33 These incidents resulted in massive destruction of aquatic life, hectares of farmland and the hospitalization of thousands of people.34 In 2009, the Prospectors and Developers

26 Ibid at 942.
27 See EarthRights International, “Final Settlement Reached in Doe v Unocal”, 21 March 2005, online: EarthRights, <http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal> (last accessed 12 January 2011). A joint statement issued by both the plaintiffs and Unocal reads: “Although the terms are confidential, the settlement will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who may have suffered hardships in the region. Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle. Plaintiffs and their representatives reaffirm their commitment to protecting human rights.”
29 Ibid.
30 Ibid.
31 15 USC § 78dd (1977) [FCPA].
34 Ibid.
Association of Canada commissioned research to provide a statistical report of incidents involving Canadian mining and exploration companies in the developing countries for the previous ten years, and to review the evolution and progress of corporate social responsibility in Canada in connection with the mining and exploration industry. The study, which was conducted by the Canadian Centre for the Study of Resource Conflicts, found 171 “infractions” one-third of which implicated Canadian companies. It classified the infractions into environmental crimes, human rights (violating recognized principles of international human rights), “unlawful” conduct (violating local law), “community conflicts” (cultural and economic destabilization of the host community), “occupational hazards” (serious safety and health concerns of workers), and “unethical” operations. When compared to other mining superpowers Australia and the United Kingdom, Canadian companies were implicated in more than four times as many incidents. The regions that were most commonly affected included Latin America (thirty-two per cent), Sub-Saharan Africa (twenty-four per cent), South East Asia (nineteen per cent) and South Central Asia (twelve per cent).

As another example, it is well documented that the hands of Canadian oil company Talisman Energy, Inc. were not clean in the Sudanese government’s “ethnic cleansing” of non-Muslim civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction in the region. The main thrust of the allegations was that Talisman collaborated with the Sudanese military to map out a security strategy for its oil fields. It allowed its facilities to be used by government soldiers who, to its knowledge, were engaged in ethnic cleansing. Although Talisman denied that it ever knew that ethnic cleansing was going on and with the aid of its facilities, the Harker Commission set up by the Canadian government to investigate the human security situation in Sudan found reason to believe that if

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36 Ibid at 7.
37 Ibid at 5.
38 Ibid at 10.
39 Ibid at 9.
41 Harker Report, ibid at 14-15.
Talisman had “look[ed] over the fences of their compounds”, it would have found that the abuses were being committed. Instead, Talisman relied greatly on information from the Sudanese military staff.\textsuperscript{42}

One fact these events divulge to international observers is that the capacity of individual states to resolve problems facing their own citizens arising from the activities of TNCs has been diminished dramatically. Orthodox methods of regulation through host-state domestic laws have proved ineffective because the developing countries where virtually all the violations occur are concerned that severe regulation of TNCs might drive them away to other countries and thereby hamper the states’ economic development. As the editors of \textit{ Liability of Multinational Corporations Under International Law} observe:

With foreign direct investment replacing intergovernmental aid as the most important means of transferring capital and technical know-how from the developed to the developing world, governments in developing countries are tempted to – and in some cases compelled to – attract investors by minimizing the potential costs facing investing MNCs. This desire, compounded in many instances by the relative weakness of host States compared to the larger and more experienced MNCs, means that injured citizens of these host States are left without any legal recourse [in their country].\textsuperscript{43}

Chika Onwuekwe similarly laments:

The urge for economic growth and to improve the living standards of its people (through the provision of “modern” amenities) puts any government in the [developing countries] under intense pressure to approve [foreign direct investment] or development projects without adequate consideration of the environmental consequences. It has also been demonstrated that governments in these countries sometimes consciously encourage investments or projects even at the pain of environmental degradation.\textsuperscript{44}

\textsuperscript{42} \textit{Ibid} at 14. For comprehensive studies of Talisman’s operations in Sudan and Government of Canada’s response, see: Georgette Gagnon, Audrey Macklin & Penelope Simons, “Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy”, University of Toronto Faculty of Law Public Law and Legal Theory Research Paper No 04-07, January 2003, online: University of Toronto Faculty of Law, \url{http://www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf} (last accessed 19 December 2011); Forcese, “Militarized Commerce in Sudan’s Oilfields: Lessons for Canadian Foreign Policy” (2001) 8:3 Canadian Foreign Policy 37-57 [Forces, “Militarized Commerce in Sudan’s Oilfields”].


\textsuperscript{44} Chika B Onwuekwe, “Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence: A Developing Country’s Nightmare” (2006) 7:1 Journal of World Investment and Trade 115.
Professor Forcese cites a US State Department Report that observes that in some of the developing countries where the corporate abuses occur, their courts are short-staffed. Judges are often absent in courts frequently because they are pursuing other means of livelihood to supplement their meagre salary. Courtrooms lack modern equipment and court officials often lack the proper training and motivation for work due also to inadequate salary.\(^{45}\)

Jonathan Clough has summarized the key features of the scenarios that make exclusive host-state regulation of TNCs difficult:

- The defendant is a large, well-resourced transnational corporation.
- The alleged human rights abuses occurred in a country (the “host jurisdiction”) other than the transnational corporation’s country of incorporation (the “home jurisdiction”).
- The host jurisdiction is unable and/or unwilling to investigate and prosecute the alleged abuses.
- The transnational corporation is alleged to be complicit in the human rights abuses either directly or, more commonly, indirectly through the interposition of subsidiaries or other intermediaries such as independent contractors.\(^{46}\)

For their part, the developed countries – the “birth-place” of most of the TNCs, otherwise called “home-states” – have shown strong reluctance, even opposition, to the regulation of the activities of their corporations abroad. In Talisman’s case, for instance, the Harker Commission declined to recommend a penalty against Talisman in Canada even though it found merit in some of the allegations against Talisman, because, in its view, Canadian law does not apply to the activities of its corporations abroad.\(^{47}\) And in the lawsuit against Talisman in the US, Canada, a strong

\(^{45}\) Forcese, “Deterring Militarized Commerce”, supra note 18 at 185.


\(^{47}\) See Gagnon et al, supra note 42 at 31-32 (observing that the Canadian government took “minimal action” to address Talisman’s conduct, and outlining a number of measures taken by the Canadian government, that critics argued did “little or nothing” to address the problems caused by Talisman. The measures included urging
advocate of the universality of war crimes and human rights, asserted before the US court that the court could have no jurisdiction because Talisman was a foreign company that operated in a third country and that to do otherwise would be destructive of international relations. One is constrained to question Canada’s eagerness to spring to Talisman’s defence while refusing to hold it to account under Canadian law. As Director of the McGill Centre for Human Rights and Legal Pluralism Rene Provost put it, “Canada [was] seeking to block the court action in the US but offer[ed] no indication it would be willing to do anything about it in Canada.” Another notable example was George W Bush administration’s relentless efforts to eviscerate ATCA – the major legal recourse for most victims of corporate crimes in the developing countries. In the Unocal litigation, for instance, Bush Administration’s Attorney General John Ashcroft filed an amicus brief not only urging the court to decline jurisdiction in that specific case, but was far more concerned about ATCA litigation generally. In 2003, following the US-UK invasion of Iraq and the ousting of President Saddam Hussein, President Bush issued Executive Order 13303 immunizing US corporations from any suit arising from any activity, including environmental damage and human rights violations, undertaking by a US corporation in furtherance of the Iraq invasion. The order prevented the bringing of lawsuits by US citizens against the corporations and precluded foreigners from invoking ATCA.

Unfortunately, the current state of international law offers little or no assistance. Traditionally, international law applies to states alone, but since the Nuremberg trials that followed World War II, international law has been held to apply also to individuals. All other non-state actors, like corporations, are still held to interact indirectly with international law via their national governments. In a 2008 report to the UN Human Rights Council, Harvard Professor John Ruggie began by noting that the international community had yet to adapt the human rights regime to protect individuals and communities against corporate human rights abuses. He decried the “governance gap created by globalization” as “the root cause of the business and human rights predicament today.” This suggests that there is presently no potent legal mechanism to hold TNCs accountable for international human rights violations. Yet the need for accountability is readily apparent and compelling. As Professor Naomi Roht-Arriaza puts it, “[a]ccountability [for human rights abuses] is now routinely demanded ... in part due to a recognition that the seeds of future violations are sown, in part, in the failure to come to terms with past cycles of violations.”

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52 See, for instance, the decision of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, Prosecutor v Anto Furundžija, Case No IT-95-17/1-T10, para 155 (Judgment of 10 Dec 1998) [Furundžija]; The Nuremberg Trial (United States v Goering), 6 FRD 69, 110 (International Military Tribunal at Nuremberg 1946) (rejecting the argument that only states could be liable under international law and affirming that international law recognizes individual responsibility); Robert H Jackson, Final Report to the President Concerning the Nuremberg War Crimes Trial (1946) 20 Temp LQ 338 at 342; Brigadier General Telford Taylor, USA, Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No 10, 15 August 1949, at 109 online: US Government, http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf> (last accessed 27 March 2012) (“[T]he major legal significance of the [Nuremberg] judgments lies, in my opinion, in those portions of the judgments dealing with the area of personal responsibility for international law crimes.”). See also Kenneth Randall, Federal Courts and the International Human Rights Paradigm (Durham, NC: Duke University Press, 1990) at 206. The establishment of the ICC with jurisdiction to prosecute individuals suspected to have committed crimes of serious concern to the international community is the high point of the recognition of individual responsibility in international law.

53 Some scholars, however, have challenged this orthodox notion of international law. For instance, Myres S McDougal & Gertrude CK Leighton argue that the notion that international law deals only with relations among states is a “nineteenth century canard”: Myres S McDougal & Gertruder CK Leighton, “The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action” (1949) 59:1 Yale LJ 74. And Philip Jessup has contended that recent developments have made the notion no longer true: Philip Jessup, A Modern Law of Nations: An Introduction (New York: Macmillan, 1948) 15-16.


55 Ibid at para 3.

1.3 THE SEARCH FOR ACCOUNTABILITY

Alarmed by the upsurge of reports and the egregiousness of the rights violations, activists, scholars and the world community have been searching for an effective regime of legal accountability to stem the tide. One of the initial responses of the UN was the creation of the Global Compact in 1999, a voluntary initiative that seeks to bring companies together with UN agencies, labour and civil society to support universal environmental and social principles, including human rights. Attempts at creating non-binding codes of conduct have been made, most notably, the UN Norms on the Responsibilities of TNCs earlier mentioned, and the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, discussed later. In 2005, then UN Secretary-General Kofi Annan appointed Professor Ruggie as his Special Representative to, among other things, “elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights …” Professor Ruggie submitted an interim report to the UN Commission on Human Rights in 2006, and two other reports to the Human Rights Council in 2007 and 2008, noting that further work still needed to be done. He submitted his final report in 2011 wherein he articulated a set of guiding principles (discussed later in this chapter) intended to help states and corporations implement the “Protect, Respect

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57 See the UN Global Compact, online: UN <http://www.unglobalcompact.org/> (last accessed 20 July 2012).
61 Ruggie, 2008 Report, supra note 54.
and Remedy” framework he had developed in the course of his work as Special Representative and set out in his 2008 Report which formed the foundation for his 2011 Guidelines.\textsuperscript{63} Other international efforts have been based largely on the use of market regulation and voluntary corporate codes of conduct. International financial institutions and international trade law are also playing an increasingly noteworthy role. Institutions, such as the World Bank and the International Monetary Fund (and their affiliates) now include social and environmental protection clauses in their trade and investment agreements.\textsuperscript{64} The World Trade Organization is also increasingly recognizing that there is a symbiotic relationship between trade and the environment.\textsuperscript{65}

For legal scholars, however, the inquiry touches on rudimentary questions in the evolution of modern international law: to what lengths, and how, should international law be adjusted in order to effectively respond to the influence of this new set of non-state actors? One critical aspect of the inquiry is how transnational litigation can be utilized.\textsuperscript{66} The logic is that if states possess the potential to police corporate wrongdoers, then reform should be directed towards strengthening the ability of states to do so by promoting exercise of extraterritorial jurisdiction. University of Toronto professor Patrick Macklem advocates:

Instead of establishing universal jurisdiction over multinational corporate human rights abuses, reform should be directed to promoting the exercise of sovereign authority in ways that prevent and punish corporate wrongdoing. International law should make it clear that legal presumptions that domestic law stops at the border are domestic, not international, legal presumptions. It should encourage states to act to prevent and punish human rights violations – regardless of where they occur – by multinational corporations which have a legal presence within their territories … It should … seek to rebuild what it has allowed processes of economic globalization to weaken: the state’s capacity to regulate, in the name of human rights, multinational corporations.\textsuperscript{67}


\textsuperscript{64} Blumberg, supra note 12.

\textsuperscript{65} Evaristus Oshionebo, Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study (Toronto: University of Toronto Press, 2009) at 152-153.

\textsuperscript{66} Besides the judicial mechanism of transnational litigation, it is also believed that home states possess many potential points of regulation, including stock exchange regulation, export credit regulation and the use of corporate law which could be structured to accord with the nature and reach of transnational corporate conduct.

\textsuperscript{67} Macklem, supra note 16 at 289.
This has been the practice in the US where transnational civil litigation has become an important means of enforcing international human rights law, via the vehicle of ATCA. On the criminal front, although countries like Spain and Belgium are famous for incorporating international criminal law into their criminal jurisprudence and applying their criminal statutes to criminal activities occurring outside their territories, to this date no country has the reputation of applying such statutes to extraterritorial corporate criminal activity. This is not to say, however, that no effort has so far been made to promote extraterritorial corporate accountability. There have been efforts to render TNCs accountable for wrongs committed in developing countries. These efforts have fallen into three main categories: voluntary mechanisms, regulatory mechanisms and private law mechanisms.

1.3.1 Voluntary Mechanisms

Corporate codes of conduct aimed at encouraging corporations to observe and protect human rights in their business operations have flourished in the last forty years. The movement has been marked by the emergence of instruments creating voluntary codes of conduct for companies in a great variety of albeit related issues. In most of the instruments, companies commit themselves to adhere to certain minimum social standards in their business operations. Often, companies pledge to incorporate the social standards also in their group of companies, and even to ensure that their business partners (their contractors, agents and suppliers) adhere to those principles as a condition for doing business with them. The most notable of those instruments include: the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines), the Global Compact, the Global Sullivan Principles, the Global Reporting Initiative, the Amnesty International Human Rights Guidelines for Companies, the Social Accountability 8000, and the recent Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework (Ruggie Principles), among

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others. Added to these instruments are voluntary codes of conduct enacted internally by individual corporations to guide their corporate conduct. Clothing multinational Levi-Strauss was the first TNC to create a code of conduct – in 1991 – with wide-ranging principles concerning its operations. Since then, the use of corporate codes of conduct has risen dramatically. In 2004 Robert Rosoff pointed out that a World Bank estimate put the number at about 1000. A major problem with company-initiated voluntary codes of conduct is that their contents are often very vague and vary widely between corporations.

The voluntary instruments acknowledge the positive contributions TNCs can make to socio-economic and environmental development and aim to minimize the dangers that their operations may cause. They aim, among other things, to ensure that these enterprises operate in harmony with government policies, to strengthen mutual confidence between enterprises and their host communities, to help improve the foreign investment climate, and to enhance sustainable development. They cover a wide range of activities of TNCs, including: information disclosure, employment and labour relations, environmental protection, bribery combating, consumer protection, science and technology, competition, taxation, and human rights protection.

There is growing evidence that the instruments have become major international benchmarks for measuring corporate accountability. The OECD Guidelines, for instance, is regarded as one of the most referenced instruments for corporate accountability, and has been translated into up to twenty-three languages. In 2003, a UN expert panel examining the link

70 McLeay, supra note 12 at 7.
72 After studying the corporate codes of four internationally active oil companies, Gagnon et al concluded that their commitments to human rights lacked consistency, each exhibiting a different level of commitment. Gagnon et al, supra note 42 at 76.
between natural resource exploitation and the conflict in the Democratic Republic of Congo relied extensively on the Guidelines while assessing the conduct of corporations in the exploitation. Reports also suggest that many adhering governments have deepened their use of the Guidelines through promotional programs, such as promotions targeting the financial and mining sectors, establishing alliances with universities and NGOs, television coverage of specific instances, *et cetera*. The Global Compact, for its part, has served as a forum to facilitate dialogue, learning and sharing of experiences and good practices among the corporate participants. The Ruggie Principles even took the matter further by taking a tripartite approach to addressing the problems of corporate accountability by emphasizing what states and corporations should be doing and, strikingly, in the case of states, the need to change local law to address corporate wrongdoing. Thus we find stipulated in the Principles: the duty of states to protect the citizens against human rights violations by third parties, including business enterprises, through appropriate policies and regulations; the responsibility of corporations to respect human rights, meaning that they should carry on their businesses in a manner that, through the exercise of due diligence, avoids breaching the human rights of other people; and the need for the provision of effective mechanisms for access to remedies, both judicial and non-judicial, by victims of human rights violations. Remarkably, the Principles state that should human rights abuses occur, whether as a result of failure to adhere to the measures recommended by the Principles or despite adhering to them, states on whose territory or jurisdiction the abuses occur are urged “to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, … [that] those affected have access to effective remedy.”

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reduce legal, practical and other barriers to effective access to justice for the victims of the abuses.

However, while the instruments are laudable, their lack of legal teeth is a severe drawback. The assumption behind the non-bindingness of the instruments is that business enterprises need not be “controlled” but “that internationally agreed guidelines can help prevent misunderstandings and build an atmosphere of mutual confidence and predictability [among] business, labour and governments.” The instruments remain a gentlemen’s agreement vulnerable to the whims and caprices of their adhering governments and business enterprises. There is also a widespread concern that the instruments fail to empower affected communities and that what is required is a binding mechanism that would grant legal rights to citizens and communities affected by corporate activities, incorporating the direct liability of TNCs. With regard to the Global Compact, it has been observed that companies have turned to a marketing strategy a progress report the Compact requires them to publish annually as well as the UN logo they are permitted to use. Daniel Mittler of Greenpeace International has pointed out that an analysis by McKinsey & Co, a management consultancy firm, showed that “only in 10 per cent of cases was there any evidence of companies doing something that they would otherwise not have done as a result of being a member of the Global Compact.” It follows that avowed adherence to the principles is not tantamount to greater integrity on the part of companies.

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82 Ibid. Disturbingly, too, primary funding for the Compact does not come from the regular UN budget but is provided by member states and corporations through cash and in-kind donations. In 2006, UN auditors reported that for 2002–2003, the Compact collected $4.5 million in-kind donations from such high profile firms as SAP Germany, PricewaterhouseCoopers, and McKinsey & Co for such services as website development and impact studies. See Claudia Rosett, “Can the UN’s Global Compact Initiative Teach Good Corporate Behavior?”, Fox News, July 11, 2007, <http://www.foxnews.com/story/0,2933,288989,00.html> (last accessed 20 January 2011). And Fox News reported in 2007 that at the Global Compact Leadership Summit held in Geneva on 5–6 July 2007 – an “invitation-only event” – many corporations implicated by the UN’s own inquiry into “Oil-for-Food” in kickbacks paid to Saddam Hussein’s regime were invited. It stated that the list of Global Compact participants in good standing included a Russian aviation group, Volga-Dnepr, said in a federal court testimony in New York in March 2007 “to have paid $700,000 in ‘consulting’ fees to a crooked UN procurement officer, Alexander Yakovlev, in connection with winning at least 10 U.N. peacekeeping-supply contracts.” Ibid.
could be a strategy to manipulate public perceptions. The recently enacted Ruggie Principles has also been rebuked for perpetuating “the status quo: a world where companies are encouraged, but not obliged, to respect human rights.”

A network of about 164 human rights organizations around the world – the International Federation for Human Rights – has argued that because the Ruggie Principles fail to effectively guarantee the victims’ right to a remedy and to actively require states to establish measures to prevent corporate abuses of human rights overseas, “the road towards accountability is still a long way ahead” while “[t]he denial of justice for victims requires urgent and concrete action.”

In spite of these criticisms, the importance of voluntary mechanism must not only be acknowledged, but must not be under-estimated. Sustained use of voluntary codes, one writer has assured us, can result in “cultural change within companies and promote an environment where human rights begin to form part of the business plan and everyday operations of TNCs”. Such codes may be seen as a way of formalizing corporate commitments, and socially conscious investors have seen formal codes as standards for measuring companies’ environmental and social performance, which guides them in deciding in which companies to invest. They have also certainly contributed to raising awareness about the importance of incorporating human rights standards in business. This awareness was particularly evident in the work of Ruggie as the Ruggie Principles were a product of extensive consultations with stakeholders in the business and human rights industry as well as with the general public. The consultations must have enhanced the legitimacy of the Principles. The effectiveness of codes may, however, depend substantially on having the right kind of code adapted to the kind of activity in which the corporation is engaged, and applied flexibly, adaptively and transparently, and, above all, with a genuine desire to “protect, respect and remedy” human rights.

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85 McLeay, supra note 12 at 26.

1.3.2 Regulatory Mechanisms

Regulatory mechanisms are domestic regulations that do more than prescribe conduct for corporations, they go further to either impose penalties for non-compliance, or create obligations the compliance with which will determine financial and diplomatic support from the home-state of the corporation. What distinguishes such regulatory mechanisms from private law mechanisms discussed in the next section is that unlike private law mechanisms, regulatory mechanisms place enforcement of the regulations exclusively in the hands of state agencies and do not grant private citizens a right of action against the corporations. One example of a regulatory mechanism that imposes penalties for non-compliance may be seen in a piece of US legislation: the FCPA.\footnote{\textsuperscript{87} Supra note 31.} An example of a regulatory framework that creates obligations the compliance with which is necessary for future governmental support would have been Canada’s Bill C-300 – \textit{An Act Respecting Corporate Accountability for Mining, Oil or Gas Corporations in Developing Countries}.\footnote{\textsuperscript{88} Second Session, Fortieth Parliament, 57-58 Elizabeth II, House of Commons of Canada, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4/t_blank> (last accessed 24 January 2011).} The bill was intended to ensure that Canadian corporations operating overseas in the mining and oil and gas sectors and receiving governmental assistance from Canada operate according to “international environmental best practices” and “international human rights standards” to which Canada has committed.\footnote{\textsuperscript{89} Ibid at s 3.} The bill proposed standards for Canadian mining and other extractive firms operating in developing countries, provided a complaints mechanism for alleged violation of the standards, and proposed that Canadian government financing and diplomatic support shall be contingent on the firms’ compliance with the proposed standards. Unfortunately, following fierce and relentless industry lobbying, this private member’s bill, which was introduced by Liberal Parliamentarian John McKay on 9 February 2009 and which gained widespread civil society support, was defeated on 27 October 2010.

Following revelations by the US Securities and Exchange Commission (SEC) that some US corporations operating overseas were bribing foreign government officials in order to circumvent local law and gain advantage over their competitors, Congress passed the FCPA in
1977. The main objective was to enhance the accountability of US corporations carrying on business overseas by criminalizing bribery of foreign government officials.\textsuperscript{90} The normative argument in favour of passing the FCPA was that US corporations must seek profits and business opportunities “by moral means” and that bribery was hostile to capitalism because it repressed creativity.\textsuperscript{91} Robert Levy opines that the general intent of the FCPA was “to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”\textsuperscript{92} From the perspective of the ordinary people of the countries where the bribery takes place, such bribery is an invitation to impunity since the responsibility for holding the corporations accountable falls almost entirely on the very government officials who have been compromised by the bribe.

Although the anti-bribery provisions were targeted primarily at US corporations or business organizations registered under US laws or having their principal place of business in the US, they also apply to natural persons, including US citizens, nationals and residents.\textsuperscript{93} The provisions apply to issuers of US securities, domestic concerns and their officers, directors, employees, agents and stockholders acting on behalf of such domestic concerns.\textsuperscript{94} The accounting provisions require that corporations maintain “reasonably detail[ed]” financial records as well as internal accounting practices that reasonably guarantee that their assets are handled responsibly.\textsuperscript{95} An important feature of the statute is that while it does not apply directly to foreign subsidiaries of US corporations, it blurs the traditional legal divide between parents and subsidiaries. It requires US corporations to be substantially involved in the activities of their subsidiaries or face liability for not doing so where the subsidiaries’ conduct would have been

\begin{itemize}
\item \textsuperscript{91}Ibid at 124.
\begin{quote}
First, Congress believed that the payment of bribes was counter to the moral expectations and values of the American public. Second, Congress was concerned over the public scandals engendered by bribery and the resulting foreign policy problems for the United States when friendly governments were embarrassed. Third, Congress wants to prevent the distortion of commercial competition caused by bribery. Fourth, Congress wished to prevent the spread of corruption in friendly governments. Fifth, Congress wanted to minimize foreign mistrust of American business and to improve American reputation for honesty in business dealing.
\end{quote}
\item \textsuperscript{93}FCPA, \textit{supra} note 31 at § 78dd-2(d) (1).
\item \textsuperscript{94}Ibid at §§78dd-1–78dd-3.
\item \textsuperscript{95}FCPA, 15 USC § 78m(b)(2) (1996).
\end{itemize}
shielded from liability under local law.\textsuperscript{96} Enforcement power of the FCPA lies with SEC and the Department of Justice. The SEC may bring civil action to enforce against the violations of the accounting provisions of the Act as well as violations committed by reporting corporations.\textsuperscript{97} The Department of Justice may bring criminal charges against erring corporations as well as civil actions against non-reporting corporations.\textsuperscript{98} The statute does not provide a private right of action.\textsuperscript{99}

Like day follows night, criticisms trailed the FCPA. Among the criticisms is that it was too unilateralist an approach to engender international cooperation and as a result was inimical to international bribery combating.\textsuperscript{100} This criticism will be strongly disputed in chapter two of this dissertation in connection with the potential of extraterritorial regulation of TNCs to spark international cooperation. In any event, given the worldwide acceptance of anti-bribery legislation, exemplified in the emergence of anti-corruption treaties, such as the \textit{OECD Convention on Bribery of Foreign Corrupt Public Officials in International Business Transactions}\textsuperscript{101} and the \textit{UN Convention Against Corruption},\textsuperscript{102} this criticism seems outdated. Other criticisms include: that it reduces the international competitiveness of US corporations; that it potentially violates the moral standards of other cultures, bribery being culturally relative; that it is difficult to comply with in states where bribery is standard practice for doing business; and that many of its provisions are ambiguous.\textsuperscript{103}

\subsection*{1.3.3 Private Right of Action}

Victims of corporate crimes in developing countries have routinely looked to the legal mechanism provided by the US ATCA for redress. A federal statute, ATCA grants Federal District Courts original jurisdiction to hear and determine “any civil action by an alien for a tort

\begin{itemize}
\item \textsuperscript{97} Ibid at § 78ff(c).
\item \textsuperscript{98} Ibid at § 78dd-2(g).
\item \textsuperscript{100} Lisa Harriman Randall, “Multilateralization of the Foreign Corrupt Practices Act” (1997) Minn J Global Trade 657 at 676.
\item \textsuperscript{101} 17 December 1997, 37 ILM 1 (1998).
\item \textsuperscript{102} 9 December 2003, 43 ILM 37 (2004).
\item \textsuperscript{103} For a discussion of the criticisms, see \textit{ibid} at 667-676. See also Pines, \textit{supra} note 99.
\end{itemize}
only, committed in violation of the law of nations or a treaty of the United States”. It allows suits
founded directly on international law violations.\textsuperscript{104} Although enacted by the first US Congress in
1789 as part of the First Judiciary Act, the statute was “practically dormant” for close to 200
years.\textsuperscript{105} It was in 1980 in \textit{Filartiga v Pena-Irala}\textsuperscript{106} that the first remarkable decision was
pronounced on it. Dolly Filartiga and Joel Filartiga were the sister and father of a Paraguayan
national who was kidnapped and tortured to death in Paraguay by a Paraguayan police chief.
Learning that the police chief was vacationing in New York, they brought suit against him in a
New York federal court. The Court of Appeals of the Second Circuit, reversing the decision of
the trial District Court declining jurisdiction, held that, although the case involved a foreign
plaintiff suing a foreign defendant for a foreign tort, torture violated established norms of
international law of human rights and hence the law of nations which ATCA was meant to
uphold. Therefore US courts had jurisdiction.\textsuperscript{107} The decision confirmed that pursuant to ATCA,
foreigners have a right of action in tort over certain egregious human rights violations regardless
of where they occur. With that, an era of ATCA jurisprudence began.

Since \textit{Filartiga}, defendants have included not only high profile individuals, but also
corporations with business presence in the US. As noted earlier, \textit{Unocal} was the prototype case
for the use of the statute to sue corporations and since then dozens of corporations have been the
subject of ATCA litigation. Many of those cases are still ongoing. While the results have been
mixed – with no case having been fully decided on its merits in favour of the plaintiffs, and few
having been settled out of court – ATCA has remained an important tool in the fight against
corporate impunity in human rights violations.

Not all foreign torts are actionable under ATCA. Only those that violate a US treaty or a
norm of customary international law are actionable.\textsuperscript{108} To ascertain whether a particular tort is a

Int’l & Comp L Rev 401 at 405 [Stephens, “Corporate Liability”].

\textsuperscript{105} Ugo Mattei & Jeffery Lena, “U.S. Jurisdiction over Conflicts Arising Outside of the United States:

\textsuperscript{106} 630 F 2d 876 at 878 (2d Cir 1980) [Filartiga].

\textsuperscript{107} Ibid at 887.

2004) at 23 (noting that the alleged violation need not engage a \textit{jus cogens} norm). ATCA has been interpreted as
granting subject matter jurisdiction and creating a cause of action where a plaintiff can show that the abuses
allegedly inflicted on him violate international law: \textit{Xuncax v Gramajo}, 886 F Supp 162, 179 (D Mass 1995)
(holding that “the torturer has become – like the pirate and slave trader before him – \textit{hostis humanis generis}, an
enemy of all mankind.”). However, the Supreme Court in \textit{Sosa v Alvarez-Machain}, 542 US 692 at 724 (2004)
[Sosa] held that ATCA is a jurisdictional statute creating no new causes of action. See also Sung Teak Kim,
violation of customary international law, courts examine contemporary international law. They determine the norms by “consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law.”109 Such rules must also command the “general assent of civilized nations” to become binding as contemporary customary international law.110 Hence “it is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.”111 A plaintiff is therefore required to demonstrate a violation of a defined and generally accepted norm of customary international law. The state need not be complicit in the alleged wrong.112 And the court usually ascertains, at the defendant’s instance, whether an alternative forum exists for the trial that is more convenient and appropriate and is able to better serve the interests of justice.113 In addition, personal jurisdiction over the defendant is achieved through transient or “tag” jurisdiction, i.e., jurisdiction created by serving the defendant while they are physically, even if transitorily, present within the US.114

It should be noted, however, that this seeming “planetary” jurisdiction granted under ATCA has been historically circumscribed by a number of legal principles. First is the “minimum contacts” doctrine enunciated in International Shoe Company v Washington115 which requires the plaintiff to show that the defendant has “systematic” and “continuous” contacts with the US forum in issue where the basis for jurisdiction does not relate to the claim itself, and that such contact is not accidental but purposeful. There is the “political question” doctrine that enjoins the courts to respect the principle of separation of powers and to desist from adjudicating

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109 Filartiga, supra note 106 at 880. See also Kadic v Karadzic 70 F 3d 232 at 238 (2d Cir 1995) [Kadic].
110 Filartiga, supra note 106 at 881.
112 Unocal, 963 F Supp, supra note 22 at 891-892 (holding that the plaintiff must not establish the existence of state action for ATCA jurisdiction to apply).
113 Kadic, supra note 109 at 250.
114 Ibid at 232, 237.
115 326 US 310 (1945) [International Shoe]. See also Mattei & Lena supra note 105 at 385.
issues that are constitutionally reserved to the other branches of government. There is also the doctrine of *forum non conveniens* that gives the court a discretionary power to decline an otherwise valid jurisdiction, on the basis that a foreign court is more suitable or convenient for the adjudication of the case. The likelihood that foreign courts would be unwilling to enforce a resulting judgment may also limit the exercise of jurisdiction under ATCA.

Despite these limitations, the US has remained a forum of choice for foreign plaintiffs. No other state has a statute like ATCA. But other factors have also historically made it prudential for would-be foreign plaintiffs to seek an American forum. These include: the existence of the contingency fee, which reduces the plaintiff’s risks; a discovery procedure that is the most extensive in the world; a “liability law that is more likely than foreign law to allow recovery and allow it for more elements of harm” than in any other jurisdiction; choice of law rules that are more likely than other states’ choice of law rules to select the law most sympathetic to the plaintiff; and the use of jury trial. Among these forces, the most powerful are jury trial and contingency fee. On jury trial, Russell Weintraub has remarked, albeit light-heartedly, that “if foreign law does not cap or exclude damages, the chant of [an American] plaintiff’s attorney might well be ‘give me United States law, give me French law, give me Ugandan law, but give me an American jury’.” In one ATCA case, for instance, a jury returned a $4.5 million default verdict against Radovan Karadzic, former president of the self-proclaimed Bosnian Serb Republic of Srpska, for “acts of genocide ... committed in Bosnia Herzegovina by individuals under [his] command and control.” On contingency fee, Lord Denning distinctively expressed his derision for American attorneys:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case “on spec” as we say, or on a “contingency fee” as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40

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116 Mattei & Lena, *ibid* at 385–386 (noting that “[t]he finding of a ‘political question’ may be based on a number of theories, including whether the court’s adjudication of the claim would embarrass or interfere with the co-ordinate branches, whether the claim has historically been handled by the co-ordinate branches, and whether or not a decision might result in ‘multiple pronouncements’ on the question.”).
118 Mattei & Lena, *supra* note 105 at 386.
120 *Ibid*.
percent of the damages, if they win the case in court, or out of court on a settlement.\textsuperscript{122}

On a previous occasion, he was even more scathing:

“A Texas-style claim is big business.” That is how the newspaper put it. The managers of the business are two attorneys of Houston, Texas. They keep a look-out for men injured on the North Sea oil rigs. The worse a man is injured, the better for business. Especially when he has been rendered a quadriplegic and his employers have no answer to his claim. Their look-out man tells the Texan attorneys. They come across to England. They see the injured man and say to him: “Do not bring action in England or Scotland. You will only get £150,000 there. Let us bring it in Texas. We can get you £2,500,00 in Texas.” If he agrees, they get him to sign a power of attorney which provides for their reward. Under it the attorneys are to get 40 per cent of any damages recovered. That is £1,200,000 for themselves. Big business indeed!\textsuperscript{123}

While criticisms have trailed the use of ATCA to hold corporations accountable for international law violations, the spate of ATCA litigation has not abated. There have been arguments that ATCA suits are inevitably imperialistic and threaten the sovereignty of the developing countries where the violations occur. These criticisms are addressed in chapter two of this dissertation.

It should be pointed out, however, that although ATCA has produced abundant litigation in the US, appellate decisions are few. The Second Circuit Court of Appeals – the appellate court having the highest number of ATCA decisions – has published about ten decisions\textsuperscript{124} while the Supreme Court has published only one.\textsuperscript{125} The implication of this is that even though the cases are legion, many questions still remain unanswered. On 17 September 2010, however, the Second Circuit Court of Appeals released what is hitherto the most far-reaching decision on the use of ATCA to hold corporations accountable. In Kiobel\textsuperscript{126} the court held that since corporations do not have international law obligations, they are not subject to ATCA jurisdiction.

\textsuperscript{122} Smith Kline & French Lab Ltd v Bloch [1983] 1 WLR 730 at 733-734 (Eng CA).
\textsuperscript{123} Castanho v Brown & Root (UK) Ltd [1980] 1 WLR 833 at 849 (Eng CA).
\textsuperscript{124} Among the significant ATCA cases decided by the Court are: Filartiga, supra note 106; Kadic, supra note 163; Wiwa v Royal Dutch Petroleum Co, 226 F 3d 88 (2d Cir 2000); Bigio v Coca-Cola Co, 239 F 3d 440 (2d Cir, 2000); Flores v S Peru Copper Corp, 414 F 3d 233, 237 n 2 (2d Cir 2003); Khulumani v Barclay Nat’l Bank Ltd, 504 F3d 254 (2d Cir 2007); Viet Assoc for Victims of Agent Orange v Dow Chem Co, 517 F 3d 104 (2d Cir, 2008); Abdullahi v Pfizer, Inc, 562 F 3d 163 (2d Cir 2009); Presbyterian Church of Sudan v Talisman Energy, Inc, 582 F 3d 244 (2d Cir 2009) [Talisman (2d Cir)]; Kiobel v Royal Dutch Petroleum No 06-4800-cv, 06-4877-cv (2d Cir, 17 September 2010) [Kiobel].
\textsuperscript{125} Sosa, supra note 108.
\textsuperscript{126} Supra note 124.
Barely one year after this decision, the Ninth Circuit reached the opposite conclusion in *Sarei v Rio Tinto*.127 In between these two decisions, the Seventh Circuit toed the *Kiobel* line in a suit filed under the *Torture Victims Protection Act*128 against the Palestinian Liberation Organization in *Mohamed v Rajoub*.129 The Supreme Court granted the plaintiffs’ petitions for *certiorari* in both the *Kiobel* and *Mohamed* cases. While the Court’s opinion in *Kiobel* is still being awaited, on 18th April 2012 the Court issued its opinion in *Mohamed*, affirming the Seventh Circuit’s decision that the TVPA does not embrace organizational liability.130 The reason, however, was hinged on the specific wording of the TVPA, which uses the word “individual” as against “person”. The Court held that the term “individual” encompasses only natural persons. The Court’s expected opinion in *Kiobel* will quite definitely settle what is perhaps the most controversial issue in ATCA litigation. It will have a far-reaching effect both on pending cases against corporations and on the future of ATCA generally. This speaks strikingly to the need to consider the existence of other judicial forums where alleged victims of corporate human rights abuses may consider having their complaints ventilated.

### 1.4 CANADA AS A FORUM

Canada has not been recognized as a forum for extraterritorial corporate crimes litigation. Yet Canada is a giant in global mining, being home to seventy-five per cent of the world’s global mining companies,131 with a significant number increasingly being fingered in environmental and human rights abuses in their overseas operations.132 Similar abuses were occurring in Canada in the early 20th century until the Canadian government imposed stringent rules on mining

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127 No 02-56390, DC No CV-00-11695-MMM (9th Cir, 25 October 2011) [*Sarei* (9th Cir), 2011].
128 106 Stat 73 (1991) [TVPA].
129 Nos 09-7109, 09-7158 (DC Cir 18 March 2011) [*Mohamed*].
130 *Mohamed v Palestinian Authority*, No 11-88, 18 April 2012 [Mohamed (USC)].
operations in Canada. These rules, however, do not apply to the overseas operations of Canadian mining companies. Those are typically regulated by the laws of their host states.

Admittedly, Canada has not been totally unreceptive to the impact of the activities of its mining corporations abroad. However, its response has not produced any tangible accountability regime that will address issues of corporate crimes incriminating Canadian corporations abroad. Instead, it has comprised of statements describing its commitment to corporate social responsibility and international human rights standards. Following allegations of human and environmental abuses by Canadian mining firms operating overseas, the House of Commons Sub-Committee on Human Rights and International Development held numerous hearings over the past decade to ascertain the veracity of the allegations. The hearings revealed that the activities of Canadian mining firms overseas had had serious adverse effects on local communities, especially in regions with weak regulatory structures. The Sub-Committee therefore made a number of recommendations to the Canadian Government, including the creation of incentives to encourage Canadian mining firms to act responsibly, the development of mechanisms for monitoring their activities, and the creation of legal norms in Canada to ensure that erring firms are held accountable in Canada. The Government’s response, while acknowledging the importance of the recommendations in enhancing governmental capacity to ensure that Canadian corporations operate responsibly abroad, declined to accept those recommendations because of what it called “practical policy challenges in translating [them] into

133 Seck, “Environmental Harm in Developing Countries”, *supra* note 33 at 141.

134 One that would have gone a long way to induce, if not compel, Canadian corporations operating abroad was the ill-fated Bill C-300. A bill for an act to amend the Federal Courts Act (Bill C-354) to create ATCA-like jurisdiction for the Federal Court has been lying dormant for years before Parliament.

135 A statement issued by Canada’s Foreign Minister in 1997 articulating Canada’s trade policy as one of respect for human rights is typical:

> Trade on its own does not promote democratization or greater respect for human rights. But it does open doors. It creates a relationship, within which we can begin to speak about human rights. In addition, as countries open up to foreign trade and investment, they come under increasing pressure to respect the rule of law -- and they see more and more reasons why it is in their own interests to do so. The key issue here is not a crude choice between trade or human rights, but rather a need for responsible trade.


practice.” These policy challenges were outlined as: the under-developed nature of the international architecture of corporate social responsibility, the lack of consensus about what constitutes corporate social responsibility, the conflict between international accountability mechanisms and the primary responsibility of host-states to regulate corporations operating within their territory, and the fact that Canada has “few mechanisms” with which to influence its corporations operating overseas. Instead, the Government pledged to, among others, work with “stakeholders” and “like-minded countries” to develop corporate social responsibility best practices, and to “financially and politically” support the work of Professor Ruggie.

As critics point out, while voluntary mechanisms are useful, as a tool of accountability they are slow and often leave victims without a remedy where a corporation is adamant. A complementary approach may consist in the use of transnational human rights litigation (as is currently used in the US) to extend the reach of Canadian domestic law to the extraterritorial crimes committed by Canadian corporations.

Although legal experts diverge on whether international law requires home states to help prevent human rights abuses abroad by transnational corporate actors, there seems to be greater consensus that there is nothing in principle prohibiting them from doing so where a recognized jurisdictional basis exists and the actions of the home state do not interfere in the internal affairs of other states. In fact, there is some basis in the public international law of state responsibility on which to infer that such a responsibility might actually exist. As stated already in 1941 by the Permanent Court of Arbitration in a case between the US and Canada: “A State owes at all times a duty to protect other States against injurious acts by individuals within its jurisdiction”. Ian Brownlie regards this as a principle of general international law. The same principle was more clearly expressed by the International Court of Justice (ICJ) in a 1997 advisory opinion: “The existence of the general obligation of States to ensure that activities within their jurisdiction and

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138 Ibid at 2-3.

139 Ibid at 3.

140 Ruggie, 2008 Report, supra note 54 at p 7 at para 19.

141 Trail Smelter Arbitration (US v Canada), 1941, 3 UNRIAA, 1938, para 144. See also Principle 2 of the Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26: “[States have] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States...”

control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.  

While these opinions were in the context of environmental harm where the harm-causing activity took place on the territory of one country, with the harm itself extending to the territory of another country, it is arguable that the rule pronounced in the cases might be applied to the participation of parent corporations in the criminal or wrongful activities of their subsidiaries abroad that harm the environment of other states. Although the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts speak to state conduct, as opposed to the conduct of private actors, and declare that the conduct of private actors shall not be attributable to states unless the state acknowledges and adopts the conduct in question, this, arguably, does not constitute a barrier to state responsibility to prevent or punish violations by private actors and, in fact, some scholars believe that by referring to internationally wrongful acts that involve private actors, the Draft Articles indirectly provide for a pronouncement that private actors were involved in internationally wrongful acts. In the famous Velasquez Rodriguez case, the Inter-American Court of Human Rights shared this sentiment:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on human Rights].

This decision reflects Article 1 of the American Convention on Human Rights, which states: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...” The import of state responsibility under the Rodriguez case is that the

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145 Ibid, Article 11.
147 Velasquez Rodriguez Case, Inter-American Court of Human Rights, Decision and judgments (ser c) no 4 (1988).

state has a duty to prevent or punish violations by private actors. Punishing violators arguably includes not only criminal prosecution, but also providing avenues for the victims of the violations to seek redress against the violators. Whether the duty extends to where the violations occurred outside the state’s territory through the conduct of private actors located wholly or partly within the state’s territory is not clear. But the point remains valid that there is no positive rule preventing states from doing so where a domestic basis exists and other states are not offended by it. However, as this study does not rest on the existence of such a responsibility in public international law, but on the absence of any prohibitive rule barring states from doing so, there is no compelling reason to pursue further the arguments regarding its existence. Other scholars have done extensive work on the subject.148

Besides the possible existence of state responsibility to regulate the extraterritorial activities of its corporations, Canada has a strong incentive to take proactive action to regulate the activities of its corporations abroad affecting international human rights. It enjoys a great reputation as a successful pluralistic and democratic society where the rule of law reigns, a champion of human rights and dignity for all, and a state candidly committed to world peace and security.149 The Canadian Charter of Rights and Freedoms,150 for instance, has been seen by some scholars as implementing various provisions of international human rights law151 and the Canadian Supreme Court has looked to international law to inform its interpretation of the


149 David Kilgour, “Canada’s Role in the World: New Opportunities for a Changing Global Environment” (Keynote speech delivered at the opening event of International Month, Mount St. Vincent University, Halifax, Nova Scotia, 1 November 2005) at 1-2, online: David Kilgour, <http://www.david-kilgour.com/mp/Canada%27s%20Role%20in%20the%20World.htm> (last accessed 5 September 2009) (noting that Canada’s willingness to spend its resources, and even Canadian lives, consolidated its reputation as a leader in peacekeeping and a model for what is possible when one country reaches out to help others).


Canada was on the forefront of the states that pushed for the creation of the ICC. In July 1998, it presided over the negotiations during which the international community adopted the *Rome Statute* establishing the ICC. Canada insisted, during the negotiations, that the ICC be independent and effective. When the ICC was finally created, Canada was the first country to pass domestic legislation to cooperate with it and to implement Canada’s obligations under the treaty: the *Crimes Against Humanity and War Crimes Act of 2000* (CAHWC Act).

On occasion, when the community of states have been loath, even opposed, to take action to address problems of urgent and global concern, Canada has acted unilaterally in the interest of all, even at the risk of incurring the opprobrium of other states, including its closest ally the US. For instance, it has passed domestic legislation allowing it to intervene unilaterally outside its normal jurisdictional boundaries to protect certain marine resources. The *Arctic Waters Pollution Prevention Act*, passed in 1969, sought to control the discharge of wastes into Arctic waters. The legislation reflected Canada’s policy on the environmental implications of economic development. The essence of the legislation was to prevent the passage of ships that threatened pollution of the Arctic region. Vessels were to be required, among other things, to meet Canadian safety standards before they could pass the region designated by the Canadian Government as shipping safety control zones. These zones could extend up to one hundred nautical miles off Canada’s Arctic coast. This would be way beyond the traditional limit permitted in international law. It drew the ire of many states. Even when a friendly state as powerful as the US took umbrage, Canada insisted that the extension was necessary because international rules governing the realm were either inadequate or non-existent and that the special circumstances of the area warranted immediate action. It went as far as submitting a reservation to the jurisdiction

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152 See, e.g., *R v Keegstra*, [1990] 3 SCR 697 (examining international human rights instruments to help determine whether a hate speech law is a justifiable limitation on freedom of expression), and *Health Services v BC*, [2007] SCC 27 where the Supreme Court noted that the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

153 On the second reading of the bill, Foreign Minister Axworthy noted that “the Crimes Against Humanity Act is the first major comprehensive implementing legislation brought forward by any legislature around the world and will provide a model for all other countries”: Canada, HC, 36th Parliament, 2nd Session, Edited Hansard, No. 80, at 1600 (6 April 2000), online: Canadian Parliament, <http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/080_2000-04-06/han080_1600-e.htm> (last accessed 1 Sept 2009).

154 SC 1969-70, C 47.


156 Ibid at 6.

157 Ibid.
of the ICJ in order to shield the legislation from legal challenge by other states. After justifying the legitimacy of its conduct, it played active multilateral role in the development of international rules to protect the Arctic region. It is widely believed, and Canada prides itself on it, that the international rules governing the Arctic that later developed as Article 234 of the *UN Convention on the Law of the Sea*\(^{158}\) were spurred by Canada’s unwavering singularity.\(^{159}\)

Canada may thus be looked to as a potential forum for implementing international human rights law. In fact, the need for Canada to make its courts available to foreign victims of extraterritorial crimes committed by Canadian corporations operating overseas has been openly advocated by a number of distinguished Canadians in the top judicial and political echelon. Speaking extra-judicially, former Justice of the Supreme Court of Canada Ian Binnie has called for the replication of ATCA in Canada.\(^{160}\) The eminent jurist believes that this would be consistent with Canada’s international human rights treaty obligations. He regards ATCA as “a very effective mechanism” and opines that “if that legislation were replicated in more countries, there would be more avenues whereby companies could clear their names of allegations made against them, or complainants could obtain redress, depending on what the evidence shows”.\(^{161}\) He warns that he does not suggest that the allegations against corporations are “in fact well-founded,” but that they point to the need for a forum in which they can be addressed, and should not be viewed as a disgruntled “local population squared off against a foreign company with no means of introducing a legal structure to look after the fall-out.”\(^{162}\) According to him, the International Commission of Jurists, of which he is a member, would like to see “a network of domestic courts where these disputes can be resolved.”\(^{163}\)

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\(^{158}\) 10 December 1982, 21 ILM 1261 (1982). Article 234 allows coastal states to “adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.” See DM McRae DJ Goundrey, “Environmental Jurisdiction in Arctic Waters: the Extent of Article 234” (1982) 16:2 UBC L Rev 197 at 211.


\(^{161}\) *Ibid.*

\(^{162}\) *Ibid.*

\(^{163}\) *Ibid.*
Within some segments of the political class, the need for legal accountability in Canada for the transnational corporate misconduct of Canadian corporations has equally been well acknowledged. Long-standing Parliamentarian Peter Julian introduced a Private Members’ Bill before the House of Commons on 1 April 2009 to give international jurisdiction to Canadian federal courts along the lines of the US ATCA.\(^{164}\) The bill’s aim is to amend the *Federal Courts Act* to “expressly permit persons who are not Canadian citizens to initiate tort claims based on violations of international law or treaties to which Canada is a party if the acts alleged occur outside Canada.” The claims to which the bill applies include genocide, slavery, extrajudicial killing, torture, war crimes and crimes against humanity, sexual violations, transboundary pollution, and violations of any of the fundamental conventions of the International Labour Organization.\(^{165}\) While introducing the bill in Parliament, Mr Julian stressed:

> The bill would ensure corporate accountability for Canadian firms operating abroad. It would broaden the mandate of the federal court so that it protects foreign citizens against rights violations committed by corporations operating outside of Canada. This bill would hold violators accountable for gross human rights abuses, regardless of where they take place, and it would allow lawsuits in Canada for a host of universal human rights violations.\(^{166}\)

Given the fate that befell Bill C-300, it is unlikely that this bill will pass. In fact, it will have lapsed if it has not been reintroduced in the current Parliamentary session. However, its significance lies in its showing that in the ranks of the decision-makers in Canada, there are those who believe that Canada should provide a judicial forum in which foreign victims of abuses by Canadian corporations may ventilate their complaints and obtain redress. Whether or not they will be able to prove their allegations need not be pre-judged.

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\(^{165}\) *Ibid* at s 25(2).

\(^{166}\) “In the House of Commons: New Democrat Bill ensures corporate accountability for Canadian firms operating abroad”, 1 April 2009, online: Peter Julian, <http://peterjulian.ndp.ca/node/739> (last accessed 10 February 2011).
1.5 RESEARCH QUESTION

This research asks two principal questions. (1) Does customary international law or treaty law prohibit Canada from taking adjudicatory jurisdiction (criminal or civil) over extraterritorial crimes committed by Canadian corporations? (2) If the answer is in the negative, does Canadian law as it stands permit such litigation and if it does, what legal tools are available for it? In other words, under what bases in international law can a state assume extraterritorial jurisdiction? And under what domestic bases can a Canadian court assume extraterritorial jurisdiction, criminal and civil?

On the criminal front, Canada has a specific statute granting extraterritorial criminal jurisdiction to Canadian courts over war crimes and crimes against humanity: the CAHWC Act enacted in implementation of the *Rome Statute*. While the primary targets of the statute are not corporations, it is necessary to examine whether the statute applies to corporations incriminated in extraterritorial crimes in their overseas operations and, if so, how?

To be liable under Canadian criminal law, a corporation must be found to have committed a criminal offence. This raises serious questions where the alleged criminal abuses were committed overseas by TNCs, and is made more complex by the fact that TNCs’ involvement in those abuses is more or less indirect. The abuses must therefore in most cases fit into the notion of “complicity”. The possible categories of corporate criminal complicity in Canada are therefore examined in this dissertation. As most criminal abuses require *mens rea*, and given that a corporation is not a natural person, attributing the requisite *mens rea* to a corporation is a pertinent issue. This question requires a thorough examination of Bill C-45\(^\text{167}\) enacted in 2003 (amending the Criminal Code) that changed the face of corporate criminal liability in Canada by expanding the theories underlying the attribution of criminal liability to corporations and other organizations. In a nutshell, the amendment increases the category of corporate officers who can criminally bind a corporation; the traditional theory that the officer must be part of the directing mind of the corporation is jettisoned in favour of a theory that allows ordinary senior officers and even the corporation’s agents and representatives to bind a

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\(^{167}\) *An Act to Amend the Criminal Code* (criminal liability of organizations), Second Sess., 37th Parl, 2001 (assented to 7 November 2003), SC 2003, c-21 [Bill C-45].
corporation. This change may have important implications for the jurisdiction of Canadian courts over Canadian parent companies for the actions of their overseas subsidiaries.

On the civil front, Canada has no statute granting extraterritorial civil jurisdiction along the lines of the US ATCA. To date, it appears to have seen a very negligible amount of transnational human rights civil litigation along the lines of ATCA. In the hearings on the CAHWC Act, Amnesty International (Canada) urged the House of Commons Committee to consider companion legislation providing civil remedies for victims of those crimes alongside the provisions for criminal prosecution. But this has not yet been done. However, on 13 March 2012, the Canadian Parliament enacted the Justice for Victims of Terrorism Act creating a cause of action for victims of terrorist acts whether committed in Canada or outside Canada, and granting civil jurisdiction to Canadian courts to adjudicate claims relating thereto. But this, apparently, is limited to acts of terrorism and does not extend to other crimes. In the absence of enabling general legislation, then, can a Canadian court assume ATCA-like jurisdiction over non-terrorist-related events that occurred outside Canada? Some Canadian lawyers believe that transnational human rights lawsuits might yet be possible. Forcense has argued that although bringing such a lawsuit will be difficult, the “challenges are not insurmountable.” Forcense writes specifically to address the problem of “militarized commerce,” the reliance of TNCs on military forces to provide security for their overseas operations, but his analysis can be applied generally to transnational human rights litigation. Craig Scott and his co-authors have also addressed the feasibility and legitimacy of transnational human rights

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168 Three cases have been identified, the most important being the Quebec case, *Recherches Internationales Québec v Cambior inc*, [1998] QJ No 2554 [*Cambior*] (a case dealing with environmental harm that occurred in Guyana). The two others arose from a helicopter crash in Kyrgyzstan in 1995: *Garret Estate v Cameco Corp*, [1997] 10 WWR 393 (Sask QB) and *Hermann v Kilborn Engineering Pacific Ltd*, [1995] 55 BCLR (3d) 319 (BCSC).

169 See the testimony of Alex Neve, Secretary General, Amnesty International (Canada), House of Commons, Canada, Standing Committee on Foreign Affairs and International Trade, Evidence, 30 May 2000, at 1100, online: Parliament of Canada, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040375&Language=E#T1050> (last accessed 28 Aug 2009) (noting that “[e]xperience in other countries, including the United States, has demonstrated the degree to which civil remedies are also an important and effective tool in taking action against humanity. Canadian law does not provide a civil remedy of this nature.”). See also the testimony of Bruce Broomhall of Lawyers Committee for Human Rights, *ibid* at 1050 (noting that “this has worked quite effectively in some jurisdictions and would be a welcome addition to Canada’s [domestic] measures for international justice...”).

170 SC 2012, c 1, s 2 [JVTA].


172 *Ibid* at 173.
litigation with a particular focus on the tort of torture.¹⁷³ Like Forcense’s, Scott’s analysis can be applied generally to transnational human rights litigation.

Central to the question of assumption of civil jurisdiction in Canada over foreign or extra-provincial torts is the existence of a “real and substantial connection” between the tort and/or the parties and the forum where the action is brought.¹⁷⁴ In Tolofson v Jensen, the Supreme Court of Canada stated that a Canadian court “may exercise jurisdiction only if it has a ‘real and substantial connection’ (a term not yet fully defined) with the subject matter of the litigation.”¹⁷⁵ In Hunt v T & N Plc, this test was clearly stated to be a constitutional mandate based on the principle of “order and fairness”.¹⁷⁶ This suggests at first glance that the relevant provincial jurisdictional rules are subject to the real and substantial connection test. But, as will be seen in chapter five, some courts and academics have put the matter in doubt. Be that as it may, the question to consider is: exactly what kind of connection is required to satisfy the test? And how “real” and “substantial” should the connection be to justify assumption of jurisdiction by a Canadian court?

At the heart of this dissertation, however, is its application to foreign corporate conduct where the parent corporation located in Canada is sued for the direct conduct of its subsidiaries. What kind and extent of connection with Canada would justify the assumption of jurisdiction simpliciter in such circumstance? It is suggested that much would depend on how the plaintiff frames the cause of action. If it is framed to implicate the Canadian side of the corporation in the wrongdoing, it would be relatively easy to establish a real and substantial connection with Canada. However, if the Canadian side of the corporation is not in some way implicated, the principle of corporate personality may militate against assumption of jurisdiction based on a real and substantial connection.

Besides the real and substantial connection test, can a Canadian court assume transnational jurisdiction over foreign corporate crimes as a forum of necessity? Necessity jurisdiction is relatively new in Canada and has been rarely invoked. The rationale behind it is

¹⁷⁴ Morguard Investments Ltd v De Savoye, [1990] 3 SCR 1077 [Morguard (SCR)].
¹⁷⁵ [1994] 3 SCR 1022 at 1049 (SCC) [Tolofson].
¹⁷⁶ (1993), 109 DLR (4th) 16 [Hunt].
the avoidance of denial of justice where the suit cannot possibly be initiated elsewhere or there is no other forum where the plaintiff may reasonably be expected to initiate the suit.\textsuperscript{177}

Closely connected to the jurisdiction \textit{simpliciter} inquiry is the \textit{forum non conveniens} doctrine. Even where a Canadian court assumes jurisdiction under the real and substantial connection test, it may still decline to exercise it under the \textit{forum non conveniens} doctrine where there is another competent forum elsewhere which, in light of all the circumstances, is a more appropriate forum to litigate the dispute. The objective of the doctrine is to ensure that the dispute is litigated “in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.”\textsuperscript{178} Incidentally, the factors considered in a \textit{forum non conveniens} analysis are very similar to those considered in a real and substantial connection test. The central issue therefore is the relative significance a Canadian court would accord the factors in deciding to decline jurisdiction when jurisdiction \textit{simpliciter} is already established for the competing forums.\textsuperscript{179} What then is the place of this doctrine in Canadian jurisprudence? What interests weigh heavily in the minds of Canadian courts in considering the doctrine? US courts have allowed human rights lawsuits under ATCA that have only a tangential connection with the US, reflecting “a policy favouring receptivity by [US] courts to such suits.”\textsuperscript{180} A comparative look at the practices in Canada and the US thus seems purposeful. As the kind of foreign torts this dissertation is mostly concerned with are those that can equally well be characterized as international human rights violations, it would be necessary to see if Canada’s international human rights commitments would play any role in a Canadian court’s decision to exercise or decline jurisdiction in a jurisdictional or \textit{forum non conveniens} analysis where international human rights are implicated.

\textsuperscript{178} \textit{Amchem Products Inc v British Columbia (Workers’ Compensation Board)}, [1993] 1 SCR 897 [\textit{Amchem}].
\textsuperscript{179} \textit{Lloyd’s Underwriters v Teck Cominco Ltd} (2007), 279 DLR (4th) 257 (BCCA).
\textsuperscript{180} \textit{Wiwa v Royal Dutch Petroleum}, 226 F 3d 88 (2d Cir 2000) at 105, \textit{cert denied}, 121 S Ct 1402 (2001). The US Court of Appeals in this case took into account the hardship a \textit{forum non conveniens} dismissal would cause a plaintiff who is resident in the forum where the case is already instituted, and noted that “[t]hat is the case not because of chauvinism in favor of US residents. [But] because the greater the plaintiff’s ties to the plaintiff’s chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction.” \textit{Ibid} at 107.
Assuming that the plaintiff wins the jurisdictional and *forum non conveniens* battles, there is the further inevitable question of which law is to be applied. In *Tolofson*, the Supreme Court of Canada determined that tort choice of law is governed by the *lex loci delicti commissi* rule (i.e., the law of the place where the wrong was committed). It gave no room for an exception in interprovincial cases and very little room for an exception in international cases. The exact scope of this exception remains in doubt. As this dissertation deals strictly with international cases, this exception must be examined in detail. It is significant to note that the Supreme Court did not make any reference to the possibility of applying international law. Writing on ATCA, Professor Anne Bayefsky suggests that “customary international human rights law can be directly invoked, as part of the law of the land, to itself provide the basis for a remedy.”\(^{181}\) She argues that customary international law is part of Canadian common law, and that since the *Charter* preserves “other rights” that exist in Canada, the right to sue under customary international law is preserved.\(^{182}\) It is argued in this study that where norms of customary international law are violated, the undefined exception in *Tolofson* must be construed to accommodate the application of customary international law rather than the *lex loci*.

For the sake of clarity, it should be stated that although this study does not go into the substantive question of corporate liability (criminal or civil), the nature of the allegations against corporations has an important role to play in determining jurisdiction and even in determining the applicable law. Simply put, the basis of liability determines jurisdiction. This is because TNCs’ participation in the alleged crimes or wrongs is more or less indirect. The plaintiff must therefore make allegations that implicate the Canadian based parent/subsidiary in the criminal or wrongful acts of the foreign based subsidiary/parent – indicating the nature and extent of participation that creates a *prima facie* case of liability – in order to trigger Canadian jurisdiction. It is for this reason that it is suggested above that the change in connection with the categories of corporate liability introduced by Bill C-45 has important jurisdictional implications even though the change ordinarily relates to the substantive question of corporate liability.

\(^{181}\) Bayefsky, *supra* note 151 at 17.
\(^{182}\) Ibid.
1.6 SCHOLARLY SIGNIFICANCE

I tread familiar ground and do not pretend to do what has not been ventured into before. In fact, available literature on business and human rights may fill a large auditorium. I do not claim that my approach is necessarily more philosophical than those of others. To be sure, what I consider the core of this dissertation may occupy a peripheral position in the works of others. But it is fair to say that Canada has received insufficient attention in the subject of this dissertation. This is in sharp contrast to the US where transnational litigation has become a routine means of enforcing international human rights law. A few Canadian scholars have sought to examine the subject in Canada. Professor Forcese is both the pioneer and the torchbearer. His “Deterring ‘Militarized Commerce’” was the first attempt to focus on Canada. He writes specifically to address the problem of “militarized commerce,” i.e., the reliance of TNCs on military forces to provide security for their overseas operations. Since the publication of this article in 1999, however, significant legal developments have taken place in Canada. The CAHWC Act was being debated in Parliament at the time of its writing and was enacted in 2000. Other important legal developments include various Supreme Court of Canada decisions that recalibrated the meaning and application of the real and substantial connection test as well as others that threw light on the extraterritorial applicability of Canadian domestic law (to name but two, \textit{R v Hape} and \textit{Canada v Omar Khadr}). However, Craig Scott’s \textit{Torture as Tort} seems to be the first comprehensive study of transnational human rights litigation outside the US. As Professor François Larocque points out, at the time of \textit{Torture as Tort}’s publication, the prospects of transnational human rights litigation in countries like Canada and the UK were “little more than an interesting academic possibility”. As Larocque further confirms, the issue of litigating corporate human rights violations in foreign courts received very limited treatment in \textit{Torture as Tort}. Edward Hyland’s contribution, “International Human Rights Law and the Tort of Torture:

\footnotesize{183 Supra note 18. 
184 [2007] 2 SCR 292 [\textit{Hape}]. 
185 [2008] 2 SCR 125 [\textit{Khadr}]. 
186 Supra note 173. 
187 Francois Larocque, “Recent Developments in Transnational Human Rights Litigation: A Postscript to \textit{Torture as Tort}” (2008) 46 Osgoode Hall LJ 607 (noting that since 2001 when \textit{Torture as Tort} was published, things have changed. \textit{Ibid} at 608) [Larocque, “Postscript to \textit{Torture as Tort}”]. 
188 \textit{Ibid} at 623.}
What Possibility for Canada” undertakes to provide answer to the question “does international human rights law, as received in some fashion in Canadian law, provide victims with a right of action against their torturers in Canadian courts?” While it answers this question in the affirmative, it does not address the question of whether (and how) it might apply to corporations for torture committed abroad. The issue received very little attention in Sarah Joseph, *Corporations and Transnational Human Rights Litigation*. In his “Postscript to *Torture as Tort*”, Larocque, too, fails to fill this gap “due to space constraints.” In a book recently released by Irwin Law, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Litigation*, Larocque does a detailed comparative study of transnational human rights litigation in the US, Canada and the UK. In this distinctive work, Larocque renders an illuminating account of the phenomenon of transnational human rights litigation. However, he touches the issue of corporate complicity only tangentially, and even then with a narrow focus on the US.

The implication of the above is that the issue of jurisdiction in Canada over corporations for extraterritorial wrongs remains palpably under-explored. This dissertation will be the most comprehensive study of the subject as yet. With its sole focus on corporations, it has the possibility of being able to address the entire spectrum of jurisdictional issues relevant to corporations in greater detail than has hitherto been done in Canadian legal literature. It consolidates the works of previous scholars but also benefits from them. Through a critical analysis and synthesis of those works, as well as of relevant statutes, treaties and case law, it hopes to contribute to the production of knowledge on the subject.

The dissertation draws immensely from the works of Canadian private international law scholars. Since the Supreme Court of Canada enunciated the real and substantial connection test in 1995, a massive and impressive critical scholarship has emerged. With every successive decision of the court that appears to illuminate the test, Canadian conflicts scholars have responded with vigour, very critical of the new enunciation of the test. For the purposes of this dissertation, however, it is noteworthy that these scholars have scarcely considered whether the adjudication of international human rights norms, which, as noted earlier, roughly characterizes

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189 In Scott, ed, *supra* note 173 at 401-438.
190 *Supra* note 108 at 125-127. Only three pages were devoted to it.
191 *Ibid* at 624.
192 (Toronto: Irwin Law, 2010) [Larocque, *Civil Actions for Uncivilized Acts*].
the kind of extraterritorial wrongs that are at issue here, might or should have any influence on the application of the test in international cases.\textsuperscript{193} This is one paradigm that is of interest to this dissertation.

Besides filling voids in existing literature, this study also hopes to contribute to the global search for corporate accountability in human rights violations. In this regard, its value lies in its capacity to benefit policy-makers as well as activists, both in Canada and elsewhere, who have an interest in regulating the extraterritorial conduct of corporations and in ensuring that victims of egregious abuses by corporations have an opportunity to seek accountability and justice.

The corporations themselves can also benefit from this study. For the study is not about punishing corporations \textit{per se}. It is about promoting a culture of accountability among corporations. Having a place where corporations accused of engaging in wrongful conduct can cleanse their names of those accusations can only be beneficial to the corporations in the final analysis. Similarly, having a place where those who claim to have been harmed by corporate misconduct can ventilate their grievances cannot justifiably be said to be prejudicial to the corporations. Though, corporate executives might disagree. But provided the legal proceedings are fair, claims of disadvantage to one party are unjustifiable, regardless of which way the verdict goes. Thus, where the corporations are found guilty or liable, it is only fair that they be given their just deserts. It is in these and the foregoing lights that the significance of this study should be assessed.

Two important \textit{caveats} need be clearly set forth. The first is that this study is not founded on a notion that Canada has an international law \textit{obligation} to regulate the extraterritorial activities of its corporations. Whether such an obligation exists is not essential to the principal arguments contained in this study. Rather this study is informed by the fact that there is no rule of international law \textit{prohibiting} Canada from assuming jurisdiction over the extraterritorial conduct of its corporations. It is therefore up to Canada to choose whether or not to do so.

The second \textit{caveat} is that this dissertation is not founded on a notion that corporations can violate international (human rights) law. I do not by this, however, mean that they cannot. The academic debate regarding the legal capacity of corporations to violate international norms

is still ongoing and the current appeals before the US Supreme Court in *Kiobel* and *Mohamed* will have a significant influence on how the issue will be settled, both in the US and beyond. The point here is that my arguments in favour of Canadian jurisdiction over those wrongs that violate international norms are not founded on the existence of corporate legal capacity to violate international norms. Rather, they are founded on the fact that those wrongs, in and of themselves, violate norms recognized under Canadian domestic law. However, not only because those norms derive their greatest force in international law, but also because the wrongs in question implicate norms recognized in international law, it is impossible to discuss the domestic adjudication of those norms without reference to international law, and especially international human rights law. In addition, that most of the norms have acquired international human rights force provides further grounds to say that Canadian courts should open their doors to the litigation of those norms whether or not the violator is a natural person or a corporate entity, since that would be consistent with Canada’s avowed commitment to the promotion of international human rights. Accordingly, my analysis of the legal capacity of corporations to violate international human rights norms shall be only to the extent necessary to bolster the domestic bases of extraterritorial jurisdiction in Canada.

1.7 THEORETICAL METHODOLOGY

Since US human rights activists began to frequently use ATCA litigation as an accountability mechanism against TNCs and former foreign government officials for international human rights abuses committed abroad, some scholars have questioned the propriety and utility of such litigation. They say it is a bad idea, imperalistic and creates conflicts of sovereignty, “counterproductive”, ineffective to bring any real socio-political change, and offers “hollow hope” to those who had better utilize their energy politically and appeal to “the court of public

opinion.”

Is transnational human rights litigation useful to the promotion of human rights and the prevention of their abuse? These criticisms may be rightly summarized as sovereignty and imperialistic concerns. They not only call out for the views of TWAIL (Third World Approaches to International Law) scholars, but also have been championed by TWAIL scholars. From the perspective of the lived experiences of third world peoples, they point out the imperialistic role of international law and the dangers of “transnational judicial review” by western powers.

To respond to these criticisms, this dissertation situates itself primarily within the same theoretical standpoint of TWAIL scholarship from which the criticisms have sprung. It is argued that TWAIL contains the seeds for the countering of those criticisms and that allowing transnational human rights litigation will not hinder but further the goals of TWAIL scholars. Essentially, it is argued that: (1) transnational human rights litigation is not unavoidably imperialistic and that it is capable of being divested of its imperialistic tendencies; (2) concerns of sovereignty are often exaggerated, where not misplaced; (3) the interests of the ordinary people of the third world (as distinct from the interest of their states) can be well served – if not better served – through transnational human rights litigation; and (4) transnational human rights litigation has the potential to contribute to the process of “writing resistance into international law” – to use Balakrishnan Rajagopal’s admirable expression.

In addition, this dissertation takes a functional approach to the understanding of transnational human rights litigation, drawing on the legal functionalism of Felix Cohen. Functionalism is a way of looking at legal phenomena without relying on abstract or formalistic reasoning. It looks at the socio-historical settings of legal doctrines and practices and assesses their utility on that basis. It comes to grips with the myriad of influences that affect the application of legal concepts and gives them the weight they deserve in interpreting those concepts. This approach finds practical expression in the works of socio-legal scholars who theorize about the legal mobilization power of litigation. Accordingly, the dissertation absorbs legal mobilization theory and uses it to demonstrate the potential of litigation to promote the

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198 This term was coined by Professor Mauro Cappelletti in the context of the role of national courts within the European Community (EC): Mauro Cappelletti, The Judicial Process in Comparative Perspectives (New York: Oxford University Press, 1989) at 167. Larocque defines it as “the supervisory, law-declaring function of national courts in the transnational legal order.” Larocque, Civil Actions for Uncivilized Acts, supra note 192 at 292.

goals of TWAIL scholars. Unless transnational litigation is seen not simply as an avenue for seeking judicial redress, but as a legal mobilization tactic that has a justifiable political agenda, it will continue to be seen as “a self-defeating exercise in legal expansionism.”

1.8 RESEARCH METHODOLOGY

In light of the nature of the proposed discourse, the research technique of this dissertation is primarily doctrinal, i.e., exploration of black-letter law. For the most part, the research involves wide-ranging autopsies into legal jurisprudence, literature and legislation to discover specific pieces of information that are relevant to the theme under discussion. This involves identifying, filtering, disaggregating, scrutinizing and unloading the legal issues and arguments that bear on every theme. I did a significant amount of background reading in order to orient myself with the broad area of this research and to identify and map out issues that needed further research and, perhaps more importantly, to identify gaps in the literature.

But the research technique is not only doctrinal. It is also comparative in its nature, even in its orientation. Looking at legal developments in jurisdictions outside of Canada is useful for the understanding of the feasibility of litigating extraterritorial corporate crimes in Canadian courts. In this regard, the US is the most important comparator jurisdiction since its ATCA litigation remains the most viable model of transnational litigation available. A look at what has been done in England is also useful to the understanding of the legal issues, especially issues relating to jurisdiction *simpliciter, forum non conveniens* and choice of law, as the Canadian legal tradition owes much to the English legal tradition. International law and European law are also useful comparator jurisdictions. The research also casts quick glances at a number of other jurisdictions to illumine various issues encountered.

The research also takes a critical outlook. It is critical, not in the sense of condemning what others have done, but, with an irenic spirit, in the sense of constantly grilling the legal issues in question with a view to furthering the efforts of previous scholars. In this sense, it follows the gentle admonitions of Morris Cohen to avoid “throw[ing] the baby with the bath” but to “[try] to save the truth in opposing views by drawing the proper distinction which enables us

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200 Klabbers, *supra* note 194 at 566.
to harmonize them.” Thus it is that while the research is critical of the sovereignty and imperialism concerns of opponents of transnational litigation, it acknowledges that there are instances where transnational litigation can impoverish the sovereignty of third world countries and rise to the level of imperialism.

The research is equally historical. In order to understand the present, it is useful to look at what happened before. Legal developments in Canada, especially in the area of transnational criminal prosecution, offer ample possibilities for understanding current measures. The law of civil jurisdiction in Canada has also undergone remarkable evolution within the past twenty years. Its present state cannot be fully understood outside this historical evolution.

This dissertation’s engagement with both international law and domestic law defines the types of materials needed to conduct this research. These materials include not only primary sources of both international and domestic legal materials, like treaties and legislation, but also secondary materials of both shades, like case law, books, articles, reports, et cetera. These materials are read, analyzed and synthesized in order to distil what is relevant.

1.9 ROAD MAP

The above introduction will hopefully have fully articulated the factual context, the legal issues and the central arguments of this dissertation. At this juncture, it seems apposite to equally articulate clearly and in detail the theoretical perspectives of this study. Chapter two situates the discussion into two main theoretical pillars earlier hinted at: TWAIL and legal functionalism. Using these two theoretical approaches, the dissertation hopes to adequately respond to the many criticisms that have trailed the exercise of extraterritorial jurisdiction by western courts. In a nutshell, this chapter argues that while the concerns embedded in those criticisms are well-founded, the criticisms miss the point and will substantially militate against the realization of the very aspirations they seek to advance.

Chapter three considers the bases of adjudicatory jurisdiction in international law. In order to properly understand the meaning of jurisdiction, it begins with a consideration of the nature of jurisdiction, going down to its normative basis. This will set the stage for a consideration of the various theories of jurisdiction recognized in international law in order to

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understand when a state can justifiably take jurisdiction without being said to have violated international law. To be equally addressed in this chapter is the specific assumption of jurisdiction over corporations in international law. This assumes critical importance in light of the longstanding debate about the capacity of corporations to violate international law. The two recent inconsistent US Court of Appeals decisions in *Kiobel* and *Sarei* line of cases regarding the legality of ATCA jurisdiction over corporations have brought the issue, more than ever, to the fore. In a nutshell, it will be argued that the Second Circuit misstated the question before it, which led it to reach such an unfortunate decision. As stated earlier, I do not go into the issue of whether corporations can violate international law. My discussion here will be confined to the specific context of ATCA. In my view, the question before the courts was not whether, broadly, corporations are capable of bearing international law obligations, but whether they are capable of violating rights which have been recognized in international law. The reference to the law of nations in ATCA should not be taken to have removed the essence of the violations from domestic law to international law, but to emphasize the universal condemnation of the violations. Further, the courts accepted that states have jurisdiction to enact remedies for violations of international law, and that that is precisely what the US did through ATCA. However, the court in *Kiobel* went further to say that ATCA does not specify who is liable, and that this leaves it to customary international law to determine. It deemed it inconceivable that a defendant who is not liable under international law could be liable under ATCA. As will be shown in this chapter, this argument is misconceived.

Having discussed the bases of jurisdiction in international law, it becomes necessary to step down to the domestic sphere. Chapter four discusses the extraterritorial criminal jurisdiction of Canadian courts. The question to be answered here is: under what bases can a Canadian court assume criminal jurisdiction over events that occurred outside Canada? The discourse will begin with a survey of legal developments in Canada that contributed to the enactment of CAHWC Act in 2000 which is now the main statutory basis for the assumption of extraterritorial criminal jurisdiction in Canada. The provisions of this statute are examined with an eye on how they (may) apply to Canadian corporations operating overseas. The significance of Bill C-45 to the question of jurisdiction over corporations is also examined. To be added is a synopsis of the possible substantive law bases of corporate liability. Although this last is, strictly speaking, outside the scope of this dissertation, it is my view that the basis of liability cannot be completely
divorced from the question of jurisdiction, at least in a transnational context, because the nature and extent of participation of the Canadian corporation in the foreign criminal acts are vital to establishing the link necessary for satisfying the real and substantial link test enunciated in *R v Libman*.

Chapter five takes on the civil jurisdiction of Canadian courts over foreign torts. Issues to be addressed include the assumption of jurisdiction *simpliciter* under the real and substantial connection test, and the declination of such jurisdiction under the *forum non conveniens* doctrine. The factors necessary for each are critically examined and compared with the practice in other jurisdictions, in particular the US and England. The principle of necessity jurisdiction will also receive extensive treatment here. Given the potentially overreaching character of this jurisdictional basis, its relationship with the international law bases of jurisdiction will also be addressed in order to see whether international law permits it. Again, as is done with criminal jurisdiction, and for the same reason, a synopsis of the possible substantive law bases of civil liability will be added.

The issue of choice of law is essential to the issue of jurisdiction. This is because choice of law decisions influence jurisdictional decisions. This is particularly so in transnational cases involving often radically different legal systems. For a thorough and comprehensive discussion, a separate chapter is necessary. This is dealt with in chapter six. Although tort choice of law in Canada has been fixed as the law of the place where the tort occurred, a small exception is made in international cases. The case will be made that transnational human rights cases meet the values of this small exception.

Canadian courts have adjudicated a few transnational cases that exemplify the type of litigation this dissertation is concerned with. Although the cases failed to survive jurisdictional fight, they may still be regarded as model cases that are worth examining at some length even if only to see why the cases were dismissed or what went wrong in the courts’ reasoning. This task is reserved for chapter seven.

Chapter eight summarizes the conclusions of this study and makes recommendations for future action. The principal conclusions are that neither customary international law nor treaty law prohibits Canada from exercising jurisdiction over extraterritorial wrongs implicating its corporations, and that Canadian law, as it stands, contains legal tools, both criminal and civil, by

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202 [1985] 2 SCR 178 [*Libman*].
which such corporations can be punished and their victims compensated. In addition, this study
finds that transnational criminal prosecution might prove easier than transnational civil litigation,
owing, in large part, to the relatively more precise nature of criminal law and to the civil law
doctrine of *forum non conveniens* under which a Canadian court may decline jurisdiction in
favour of the country with a closer connection with the dispute.
CHAPTER 2
EXTRATERRITORIAL HOME-STATE LITIGATION: IMPERIALISM OR ASSERTION OF FUNCTIONAL JURISDICTION?

2.1 INTRODUCTION

“Asking courts to settle our political differences for us”, declares Jan Klabbers, “is rarely a good idea, and asking foreign courts to do so is even worse.”203 “Neither force nor authority”, maintains Klabbers, “can take the place of meaningful political debate, and every attempt to solve political disputes judicially is almost automatically suspect.”204 For not only do we think that such actions amount to attempts to use the courts to circumvent established political and economic structures,205 we also think that such actions would be “impractical” and are “slightly frivolous examples of forum-shopping.”206 They are imperialistic.207 They create conflict of sovereignty.208 They amount to unjustified incursions into foreign policy that damage diplomatic relations.209 They are ineffective to bring any real socio-political change.210 They are illegitimate,211 anti-democratic,212 “counterproductive”213 and offer “hollow hope” to plaintiffs who had better deploy their energy politically.214

Although TNCs’ human rights abuses, the inability of host-state developing countries to unilaterally regulate TNCs operating within their territories, and the inadequacy of voluntary codes of conduct are well known, the above criticisms are advanced relentlessly by many academics. The concerns apparently question the propriety and utility of transnational human rights litigation. Is transnational human rights litigation normatively appropriate? Is it useful to

203 Klabbers, supra note 194 at 565.
204 Ibid.
206 Klabbers, supra note 194 at 553.
207 Mattei & Lena, supra note 105 at 382 (noting at p 388 that it imposes American standards, substantive and procedural on foreign parties and foreign conduct).
210 G Rosenberg, The Hollow Hope, supra note 197 at 336.
213 Southworth, supra note 196 at 471.
214 See generally G Rosenberg, Hollow Hope, supra note 197.
the promotion of human rights and the prevention of their abuse? This chapter explores both theoretical and practical perspectives that provide support for this unique type of litigation. It combines perspectives from TWAIL scholarship, legal functional, socio-legal scholarship, and democratic theory. The fundamental intent is to provide a deeper understanding of the significance of litigating corporate human rights violations in foreign courts.

The discussion situates home-state litigation of TNCs’ abusive conduct within the framework of TWAIL scholarship and proposes a functional approach to the understanding of its propriety and utility. It argues that criticisms relating to imperialism and sovereignty are misconceived and that to reject transnational human rights litigation on those grounds would defeat the overarching goal of TWAIL scholars: to promote and protect the well-being of the ordinary people of the third world, as distinct from their states. ATCA-style litigation has the capacity to promote the causes of TWAIL in ways that TWAIL scholarship does not seem to have addressed. This relates to the capacity of extraterritorial application of domestic law to influence the conduct of other states in a manner that leads to the creation of international norms that, in the case of ATCA, will put the interests of ordinary people of the third world on the front burner. Experiences with four extraterritorial instruments – the US Sherman Antitrust Act, the FCPA, the Truman Proclamation, and the Canadian Arctic Waters Act – are considered to buttress this point. This does not mean, however, that extraterritorial regulation invariably has the potential to produce international norms. Experiences with the Helms Burton Act are a case in point. It is argued, however, that this was due to the singular character of the HBA, which, in its extraterritorial reach, sought to make it actionable in the US for foreign companies to trade with Cuba even where they have not violated any Cuban law. ATCA does not possess the

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215 Socio-legal scholars are a group of scholars, present in many fields, whose interest involves the place of law and legal institutions in social, political, economic and cultural life. They seek to understand law in its social context – how law and legal institutions interact with the wider society. The aspect of their scholarship that is relevant here is how litigation can bring about socio-political change.

216 Democratic theory is concerned with the processes by which ordinary citizens exert control over their leaders. These processes involve the participation of citizens (either directly or through their freely chosen representatives) in the decisions that potentially affect their well-being. See generally, Robert A Dahl, A Preface to Democratic Theory: How Does Popular Sovereignty function in America? (Chicago: University of Chicago Press, 1956) (particularly at p 3). Litigation offers citizens such a participation opportunity that enables them to exert control over their political leaders.

217 Ch 647, 26 Stat. 209, 15 USC §§ 17 (1890) [Sherman Act].

218 Supra note 31.

219 Proclamation with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (1946) AJIL Supp 45.

220 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub L No 104-114, 110 Stat 785, 1996 (Helms Burton Act) [HBA]
exceptional character of the HBA and present experiences with regard to state responses to ATCA litigation demonstrate much lower level of concern compared to the HBA.

The discussion proceeds as follows. The first part synthesizes the central views of TWAIL scholarship in order to identify how TWAIL ideas can be directly used to support the exercise of transnational adjudicatory jurisdiction. The second part examines the capacity of extraterritoriality to lead to the creation of international norms, drawing on the ideas of Michael Byers. Using foreign state responses to the pieces of legislation earlier mentioned, the discussion demonstrates how unilateral assertion of extraterritoriality carries the potential to lead to the creation of international norms. The idea here is that in the case of ATCA, it may lead to the creation of international norms that serve the needs of the ordinary people of the third world. In the final analysis, this part calls for a functional approach to the understanding of unilateral assertion of extraterritoriality. The approach views unilateralism in light of what it actually does, rather than based on abstract perceptions that only reflect pre-conceived notions of unilateralism. In the same functionalist spirit, the next part examines the value of litigation as a viable unilateral measure in the fight against corporate impunity in human rights violations. It begins by theorizing the role of litigation in promoting socio-political change. The theories considered include Pierre Bourdieu’s theory of the field, democratic theory and the “politics of rights” theory. The usefulness of these theories is underscored in an impact assessment of ATCA litigation. By way of conclusion, the last part summarizes the arguments of this chapter.

2.2 LOCAL COMMUNITIES, INTERNATIONAL LAW, GLOBALIZATION AND THE EXERCISE OF EXTRATERRITORIAL JURISDICTION BY WESTERN POWERS

2.2.1 Imperialism, International Law and Local Communities: The TWAIL Project

TWAIL looks at international law from the perspective of the lived experiences of the peoples of the third world. Its basic thesis is that international law is an instrument of colonialism. Noted

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221 Antony Anghie & BS Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2004) 36 Stud In Transnat’l Legal Pol’y 185 at 186 (also published in 2:1 Chinese JIL 77-103) (all references here are to Stud In Transnat’l Legal Pol’y).
TWAIL scholar Antony Anghie observes that a “dynamic of difference” – such as between sovereign and non-sovereign, developed and developing, first world and third world, civilized and uncivilized, private and public, *et cetera* – pervades international law and that these dichotomies were formulated as part of the colonial encounter. He traces this dynamic of difference to the Mandate System of the League of Nations. The Mandate System sought to transform colonial territories into sovereign states necessary for the claims to universality of international law. However, what was transferred was empty sovereignty without political and economic power over sovereign territory. Sara Seck calls this sovereignty “impoverished sovereignty”. In essence, the sovereignty of the colonized was foundationally unequal with that of the colonizer. Applying this analysis to home-state regulation of TNCs, Seck argues that any claim that home-state regulation would breach the sovereignty of third world states is suspect in that it denies the already existing history of violation of the sovereignty of third world states. Perhaps, a better understanding of the analysis is that TWAIL scholars fear that home-state regulation may continue – and perhaps further consolidate – the violation of third world sovereignty. While this fear is not an unreasonable one, it is submitted that home-state regulation can also trigger the processes by which third world states can recover their lost sovereignty.

TWAIL is “a political project” that seeks to discover how international law can be used to further the interests of third world peoples. Its strategy is to unmask the imperialistic agenda of international law. It links the failure of international law to respond effectively to the sufferings of third world peoples to international law’s imperialistic foundations. It calls for the integration of the interests of the peoples of the third world, not merely those of the states representing these peoples, into the accounts of the history of international law as well as the future of international law. It highlights the perpetuation of economic injustice by international

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223 *Ibid* at 179.
224 Seck, “Unilateral Home State Regulation”, *supra* note 195 at 582.
225 *Ibid*.
228 Angie & Chimni, *supra* note 221 at 186.
It deconstructs the concepts of development and human rights, ideas that were ostensibly designed to benefit the peoples of the third world and lead them up the modernization ladder, to show how they destroy the values and delay the economic development of third world peoples.

Over the years, two generations of TWAIL have emerged. The first generation, termed TWAIL I, paid more attention to the imperializing project of international law. It saw colonial international law as legitimizing the oppression of third world peoples and upholding the legality of unequal treaties between the western states and third world states. It stressed the principle of sovereign equality of states denied by colonial international law. Yet, it believed in the possibility of transforming modern international law to reverse the imperializing trend of colonial international law. It believed that this could be achieved through the UN system. It believed that full liberation of the third world states could not be realized through the granting of political independence alone. The economic bonds linking the third world states and the western powers were fetters holding down the third world states. To reverse the trend, TWAIL I sought to launch a New International Economic Order.

The later generation, termed TWAIL II, takes a self-reflective attitude. It re-examines the ideas and methodologies of TWAIL I. While re-asserting the importance of true state sovereignty for third world states, it critically reviews the ideas and practices of the third world nation-state itself, focusing on how the third world nation-state treats its citizens. In other words, TWAIL II is more concerned with the destinies of the peoples of third world states, as opposed to the states themselves. It sees the ideas of development and nation-building pressed forward by international institutions and embraced by many third world states as working against the

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231 Angie & Chimni, supra note 221 at 187-188.
232 Chimni rebukes those who condemn international law for their failure to recognize that “contemporary international law offers a protective shield, however fragile, to the less powerful states in the international system”. Chimni, “TWAIL: A Manifesto”, supra note 229 at 26.
233 Ibid at 188.
234 Ibid at 189.
235 Ibid at 190.
The document discusses the legitimate interests of third world peoples. Among other things, it seeks to see how international human rights norms may be used to protect the peoples of third world states from the violence of their states and other international actors. According to Anghie, the way international law has expressed the relationship between the state and minority populations within it replicates the dynamic of difference pervading international law. Minority populations are painted as primitive while the state is modern and universal. The minorities “must be managed and controlled in the interests of preserving the modern and universal state.” In other words, TWAIL II believes that third world peoples need to be protected against the tyranny of their own states and other international actors and that there are times when it may be necessary to resort to mechanisms outside the third world states in order to protect third world peoples. The question then is, what kind of mechanisms should be resorted to?

Seck argues that “state-based processes like customary international law are particularly problematic when the issues at hand are those that affect disempowered local communities within the state.” She highlights a major weakness of the international law of self-determination which recognizes indigenous and minority interests in contradistinction to state interests: the general presumption that those engaged in self-determination are seeking their own sovereignty, instead of recognizing that other goals may prevail. These suggest that local communities have very few mechanisms – if any – with which to protect themselves.

From the perspective of local communities, it is submitted that any argument that home-state litigation of transnational corporate crimes is imperialistic and that it would erode the sovereignty of third world states is state-centric. Such a view may well serve to encourage home-states to look away from the egregious and unethical conduct of their corporations operating in the third world. The result would be that the cries of local communities would die unheard. This will be counterproductive to the TWAIL project. It is one thing to uncover a problem. It is another to recognize and acknowledge functional approaches to fixing that very problem.

Anghie interrogates the idea of a “transnational law of international contracts”. He views it as another tool by which western powers seek to enlarge the power of TNCs by granting

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236 Ibid.
238 Seck, “Unilateral Home State Regulation”, *supra* 195 at 584.
239 Ibid.
them international legal personality to enter into “quasi-treaties” with third world states.\textsuperscript{241} To Anghie, this produces a “reduction in the powers of sovereign Third World states with respect to the Western corporations.”\textsuperscript{242} It is therefore possible to view home-state concerns about their violation of third-world sovereignty as self-righteous and nothing but excuse disguisedly calculated to evade responsibility.

2.2.2 Globalization and the Exercise of Extraterritorial Jurisdiction

BS Chimni declares that “[t]he threat of recolonisation is haunting the third world.”\textsuperscript{243} The principal instrument is the process of globalization that is harming the safety and wellbeing of third world peoples.\textsuperscript{244} Rapid developments in international economic law have expanded the power of TNCs by granting them international legal status to pursue certain commercial claims, undermining the autonomy of third world countries.\textsuperscript{245}

Chimni stresses the relationship between international law and globalization, on the one hand, and states’ exercise of jurisdiction and the transnational corporate world, on the other. He observes that the impact of globalization has infected the nature and extent of jurisdiction exercised by states.\textsuperscript{246} While state jurisdiction under international law has been historically territorial, he observes that the territorial principle has never been absolute, as it has been circumvented through the nationality and protective principles of jurisdiction.\textsuperscript{247} During the colonial era, “the metropolitan powers” exceeded even the nationality and protective principles “to exercise near-complete extraterritorial jurisdiction in colonized territories either through capitulation treaties or territorial control.”\textsuperscript{248} Since decolonization, Chimni maintains, international law has been a story of efforts by western powers to recoup the jurisdiction they lost as a result of the grant of independence to the colonies “through legitimizing postcolonial forms of extraterritorial jurisdiction.”\textsuperscript{249} The principal aim of the new jurisdictional reach is to

\begin{itemize}
\item \textsuperscript{241} Ibid at 235-236.
\item \textsuperscript{242} Ibid at 235.
\item \textsuperscript{243} Chimni, “TWAIL: A Manifesto” supra note 229 at 3.
\item \textsuperscript{244} Ibid.
\item \textsuperscript{246} Ibid .at 18.
\item \textsuperscript{247} Ibid.
\item \textsuperscript{248} Ibid.
\item \textsuperscript{249} Ibid.
\end{itemize}
protect the transnational corporate world.\textsuperscript{250} The protection is achieved through restricting the jurisdiction of the postcolonial state by casting the western state as the “normal state”. It is also achieved through a set of jurisdictional principles that at once allows the exercise of extraterritorial jurisdiction by western states and uses the territorial principle to shield TNCs from transnational justice. It is further achieved through the promotion of dispute settlement mechanisms that serve the transnational corporate world towards establishing a “private justice system.”\textsuperscript{251} Chimni is further critical of the commercial activity exception to the doctrine of sovereign immunity as consolidating the universal jurisdictional power of “bourgeois capitalist states” in economic matters.\textsuperscript{252}

Chimni decries the increasing prevalence of exercise of unilateral extraterritorial jurisdiction by western states, particularly the US, based on the protective principle and the effects doctrine.\textsuperscript{253} He rejects the justification of such exercise of jurisdiction based on the existence of a “reasonable link” between the state exercising the jurisdiction and the subject matter, because in this “era of globalization, a ‘reasonable link’ is not always difficult to establish by imperial states, especially when it is backed by power.”\textsuperscript{254} Economic integration compels states to seek to control events that happen outside their territories that affect their domestic corporations and nationals.\textsuperscript{255} One mechanism of such control is the use of certification. Certification is the giving of written assurance that a product, process or service conforms to certain stipulated standards, which usually includes the origin of the product, process or service. According to Nico Krisch, the certification mechanism has enabled the US to make law for other states and “monitor its observance while remaining unbound and unmonitored.”\textsuperscript{256}

Although TWAIL scholarship decries the prevalence of extraterritorial jurisdiction and its imperialistic foundations, it equally condemns the denial of “justice jurisdiction” by western

\textsuperscript{250} Ibid.
\textsuperscript{251} Ibid.
\textsuperscript{252} Ibid at 18-19.
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid at 19.
\textsuperscript{255} Ibid.
courts when invited to adjudicate “mass torts” committed by TNCs in the third world.\textsuperscript{257} Lamentable is the use of the doctrine of \textit{forum non conveniens} by western courts to deny foreign victims of mass torts their day in court.\textsuperscript{258} What TWAIL is apparently saying here is that western states are quick to exercise extraterritorial jurisdiction to protect their TNCs, but when foreign victims of mass torts from the third world seek to use the same mechanism of extraterritorial jurisdiction to obtain accountability and justice in western courts against western corporations, western courts invoke the doctrine of \textit{forum non conveniens} to block the victims’ access to justice.

Thus, while TWAIL deplores the use of extraterritorial jurisdiction by western courts, it recognizes that extraterritorial jurisdiction can also serve as a tool for accountability and justice for third world victims of mass torts. Its main objection is the “jurisprudence of injustice” that has characterized the discriminatory use of extraterritorial jurisdiction by western courts. This conclusion is consonant with the TWAIL II project that recognizes the complicity and tyranny of third world states as well as their inability to protect their citizens against international actors. Home-state regulation of TNCs therefore fits into the counter-hegemonic project of TWAIL II.

There has also been mounting criticism of the so-called Afro-centric prosecutorial work of the ICC. Since the court’s inception in 2002, Africa has generated the only situations – seven in number – that have been the subject of ICC prosecutions. The situations are Uganda,\textsuperscript{259} Democratic Republic of Congo (DRC),\textsuperscript{260} Central African Republic (CAR),\textsuperscript{261} Sudan\textsuperscript{262} and

\textsuperscript{257} Chimni “An Outline of a Marxist Course”, \textit{supra} note 245 at 20 (also referring, at 20-21, to the exercise of universal jurisdiction over international crimes, fearing that it may be used predominantly by western states against persons in the third world).


\textsuperscript{259} The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, ICC-02/04-01/05

\textsuperscript{260} The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06; The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07; and The Prosecutor v. Callixte Mrahushiana, ICC-01/04-01/10.

\textsuperscript{261} The Prosecutor v Jean-Pierre Bemba Gemba, ICC-01/05-01/08.

\textsuperscript{262} The Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abdu-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07; The Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09; The Prosecutor v Bahar Idriss Abu Gard, ICC-02/05-02/09; and The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Hanus, ICC-02/05-03/09.
Kenya, Libya and Côte d’Ivoire. This apparent Afro-centricism has generated significant tension in the relationship between the ICC and many African states, including the African Union (AU), which has begun to see the ICC as a western court out to undermine Africa’s sovereignty. The tensions escalated following attempts to prosecute Sudanese President Omar al-Bashir for alleged genocide and crimes against humanity he committed in connection with the Darfur crisis in Sudan. The AU issued a statement warning that the move to try al-Bashir would scuttle a peace process going on in Sudan. In a resolution, AU’s Peace and Security Council called on the UN Security Council to invoke its exclusive powers under article 16 of the Rome Statute establishing the ICC to request a deferral of investigations and prosecution by the ICC with regard to al-Bashir in order to allow the ongoing peace process to run its course. ICC Chief Prosecutor Luis Moreno-Ocampo has been accused of singling out the African continent. In his forward to Courting Conflict? Justice, Peace and the ICC in Africa, former justice of the Constitutional Court of South Africa Albie Sachs began by declaring that “[t]here is nothing continentally-specific about crimes committed during conflicts. Yet the first investigations of the ICC are concentrated in Africa.” He adds that Africa’s vulnerability to ICC investigations may be related to the “absence of direct Great Power involvement” in the conflicts. By this he seems to be alluding to cases such as Iraq where the US, in disregard of UN opposition, led Britain to invade Iraq, with crimes against humanity being seriously alleged to have been committed in the invasion. The ongoing Syrian crisis is also a case in point. Ugandan scholar Mahmood Mamdani has declared that the “ICC is rapidly turning into a Western court to try

264 The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11. The suspects in this case are still at large. They originally included Muammar Gaddafi, the Commander of the Armed Forces of Libya, whose name was struck out following his assassination in the Libyan conflict.
265 The Prosecutor v Laurent Gbagbo, ICC-02/11-01/11.
269 Ibid.
African crimes against humanity”, “crimes committed by adversaries of the United States”, calling ICC’s system of justice “politicized justice”. Rwandan President Paul Kegame harshly refers to the Court as a “fraudulent … institution” evocative of “colonialism” and “imperialism”. Lawrence Freeman bluntly calls it the “Imperial Criminal Court”.

What these imperialist criticisms of the ICC seem to overlook are the legal criteria for ICC intervention under the Rome Statute. There are three triggers of ICC investigation. The first is self-referral by the state party where the crimes were committed. The second is UN Security Council referral. The third is proprio motu referral by the ICC Prosecutor through application to the Pre-trial Chamber of the ICC for authority to open investigations into a situation. In the seven situations currently under prosecution, three were self-referrals: the Ugandan, the DRC, and the CAR situations. The Sudanese situation was a Security Council referral. So was the Libyan situation. Although Kenya signalled intention to self-refer the Kenyan situation, the ICC Prosecutor ignored the signal and invoked his proprio motu power by applying to the Pre-trial Chamber of the Court for authority to launch investigation. The second proprio motu referral was Côte d’Ivoire which although not a party to the Rome Statute, accepted the jurisdiction of the Court. It must be stressed that the three self-referrals were sovereign acts of the states concerned. It is equally noteworthy that the two Security Council

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276 Dapo Akande, Max du Plessis & Charles C Jalloh, “An African Expert Study on the African Union Concerns About Article 16 of the Rome Statute of the ICC”, Position Paper, Institute for Security Studies, 2010 at 7, online: Institute for Security Studies, <http://www.iss.co.za/Uploads/PositionPaper_ICC.pdf> (last accessed 16 April 2011). The authors note that as Sudan is not a party to the Rome Statute but a party to the UN Charter, the UN action “constitutes a coercive and exceptional measure ... justifiable from the perspective of international treaty law if it is a measure aimed at the maintenance of international peace and security under article 39 of the UN Charter.”
referrals had the backing of all the African members of the Council. Even now, amidst all these criticisms, Tunisia and Cape Verde have ratified. The election of an African, Fatou Bensouda of The Gambia, as the Prosecutor of the Court after Ocampo’s tenure is also noteworthy.

These facts undermine the value of the charges that the ICC prosecutor is imperialistically targeting Africa. Instead, they reflect the central role Africa played in the founding of the Court. During the Rome Statute’s negotiations, the AU stressed Africa’s special interest in the establishment of a permanent international crimes court because of Africa’s history of conflicts and egregious atrocities. It insisted on having “a strong and independent court”, and played key role in the resolution of some of the most controversial issues in the negotiations. After the Statute was adopted, Africa spearheaded the ratification process – with Senegal being the first state to ratify – and worked assiduously towards the speedy realization of the sixty ratifications needed for the coming into force of the Statute on 1 July 2002 – much sooner than expected. And of the one hundred and twenty-one states parties to the Statute, thirty-three are African, thus representing over one-quarter of the Court’s membership and reflecting the continent’s endorsement of the ideals of the Statute. The holding of the ICC Review Conference on African soil – Kampala, the Ugandan capital – in June 2010 is a further affirmation of Africa’s belief in the Court. It must be noted however, that this endorsement has not reflected in the domestication of the Statute by African states. It must be stressed too that ICC intervention is based on the principle of complementarity. Meaning that it is only where a state is unwilling or unable to investigate or prosecute that ICC jurisdiction may be invoked.

Charles Jalloh has argued that although it may be that the Ugandan, DRC and CAR self-referrals were made even though the states might have been able and willing to investigate and prosecute,

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277 Tunisia deposited its instrument of ratification on 22 June 2011 while Cape Verde deposited its on 11 October 2011.
278 Jordan is the other Arab state that has ratified the Statute.
280 Akande et al, supra note 276.
281 Ibid (noting that one of the most controversial issues was whether the prosecutor should be empowered to trigger cases independently).
by requesting the ICC to step in, “those three countries put aside the sovereign pride that traditionally impeded state action towards punishment of gross humanitarian law violations.”

It has been alleged that the ICC Prosecutor singles out crimes committed by rebel leaders and their buddies while ignoring crimes committed by government agents. This might partly explain, its advocates might argue, the vociferousness of African political leaders against the attempts to investigate and prosecute al-Bashir. Yet, this does not provide support for the propositions that such jurisdiction is imperialistic. On the contrary, it blows up such propositions. What is being argued here, however, is not that the ICC Prosecutor should kindly ignore the AU concerns. The concerns should nevertheless be given candid consideration for the future work of the Prosecutor, otherwise the institutional integrity of the ICC might suffer. Given Africa’s colonial history, such concerns will always reincarnate in every engagement of the western world with Africa. The ICC needs to do a lot of confidence-building, and in addition to being more proactive in investigating situations in other continents, this might require an evangelical approach in spreading the gospel of international justice within the African continent. Establishing a regional office on African soil is also worth serious consideration.

2.3 UNILATERAL EXTRATERRITORIALISM AND INTERNATIONAL NORM CREATION

2.3.1 Customary International Law-Making

It is possible for unilateral assertion of extraterritorial jurisdiction to lead to the formation of customary international law. Unilateralism is defined as “the decision by any nation-state to take independent action on an issue which has major effects on other nation-states.” In response to

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283 Akande et al, supra note 276 at 448.
285 Phil Clark has suggested that the absence of prosecutions of state agents is due to the Court’s concern that prosecuting government agents might put the much-needed cooperation from states parties in jeopardy. Phil Clark, “Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda” in Waddell & Clark, eds, supra note 268 at 44.
the US criticism of the unilateral character of the *Arctic Waters Pollution Prevention Act* in 1976, Canada asserted, rightly, that “[i]t is a well-established principle of international law that customary international law develops by state practice.” The criteria for the evolution of customary international law out of state practice include the following elements: It must be the practice of a significant number of states (that of a single state is insufficient, but the practice need not be universal). The practice must be continued over a considerable period of time, though it need not be unbroken. The state carrying out the practice must view the practice as required by law. Other states must generally acquiesce in the practice. These are flexible criteria. A considerable length of time may not be necessary where a significant number of states rapidly accept the practice as binding. This will equally be the case where the accepting states are “important states greatly affected” by the rule.

It follows that however powerful a state may be, it alone cannot create a rule of customary international law through its unilateral conduct. On the contrary, unilateral acts are viewed as illegal and inimical to the international legal order. As Michael M’Gonigle points out, they are so because by their nature, they challenge the *status quo* and have far-reaching consequences states’ political and economic interests. If unchallenged, they may be taken as development of new state practice and eventually even custom.

Professor Byers has enumerated four legal principles that impact on the creation of international norms. These are the international legal principles of jurisdiction, personality, reciprocity and legitimate expectations. These principles condition how states may participate in the creation of customary international law through the exercise of power. Of these

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287 SC 1969-70, C 47.  
289 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 21-22 [van Ert, *Using International Law*]. See also the ICJ decision in the *North Sea Continental Shelf* cases (1969) ICJ Rep 3 at para 73 (stressing that “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).  
290 M’Gonigle, *supra* note 159.  
291 *Ibid* at 182.  
294 *Ibid* at 10-11.
principles, jurisdiction and reciprocity are most relevant to the analysis of unilateralism, and are discussed below.

2.3.1.1 Jurisdiction

Because jurisdiction is primarily territorial, states may enact blocking legislation to hinder the operation of an external unilateral practice on its own territory. Consequently, no matter how powerful a state asserting unilateral extraterritorial jurisdiction may be, even weaker states can weaken the potency of such unilateral practice to mature into a rule of customary international law. The Helms Burton Act, provides one instance of this. The US enacted the HBA in 1996 to facilitate the dethronement of the government of Fidel Castro in Cuba and to protect US nationals whose property had been confiscated by Castro. Among other things, the act allows suits in US courts by US nationals against anyone who “traffics” in such expropriated property. Soon after the act was passed, foreign states, including the OECD and the North Atlantic Treaty Organization, declared its extraterritorial reach unacceptable. The European Union, Canada and Mexico passed blocking legislation to hinder its operation with regard to their corporations. They hoped to see it repealed. The Organization of American States, through the Inter-American Juridical Committee, pronounced it illegal. Eventually, following the universal disapproval the act galvanized, the provisions respecting the right to bring suit in US courts were suspended. To reiterate, this demonstrates how unilateral extraterritoriality may not contribute to the creation of an international norm. But it was principally due to that

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296 Ibid, Title III.
298 Dupuy, ibid. See also Seck, “Unilateral Home State Regulation”, supra note 195 at 574.
300 Kim Campbell, “Helms Burton: The Canadian View” (1997) 20:4 Hastings Int’l & Comparative L Rev 799–808 (noting Canada’s opposition to the act, and that suspension of the right to sue, though helpful, does not solve the problem as “liability continues to accrue, the sword continues to dangle over our heads, and the other noxious provisions continue to apply.” Ibid at 799). For a fuller understanding of the legal and policy issues generated by the act, see Dodge, supra note 297 at 713-728.
301 Seck argues that although jurisdiction gives power advantage to states, third world states may be less able to exercise it due to pressure from international institutions that threaten the economic sovereignty of third world states. Seck, “Unilateral Home State Regulation”, supra note 195 at 584. But then, the power advantage of jurisdiction may equally militate against unilateral extraterritorial action maturing into an international norm in that
singular character of the HBA that sought to incriminate foreign corporations that had nothing to do with Castro’s expropriation of US businesses that US’ unilateralism in this instance did not even appeal to its friends and business partners. Moreover, as will be seen below, the HBA failed also because its opposability was heightened by the fact that other states did not stand to benefit from the HBA measure.

But assertions of the power advantage of jurisdiction may lead to the creation of international norms. Reference may be made to attempts by US courts to enforce extraterritorial antitrust regulations under the Sherman Act. The regulations were justified on the basis of the effects doctrine under which conduct which occurs on the territory of one state but which produces effect on the territory of another may be regarded as falling within the jurisdiction of the latter state. In United States v Aluminum Co of America, the Second Circuit Court of Appeals asserted that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.” These attempts at extraterritorial enforcement of antitrust laws, together with attempts to collect evidence abroad, met with the opprobrium of several states. Following the protests, the US sought to introduce “balancing tests”, based essentially on notions like comity, for determining extraterritorial jurisdiction. In Timberlane Lumber Co v Bank of America, for instance, the Ninth Circuit Court of Appeals applied the following tests:

Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

Congress followed legislatively. It enacted the Foreign Trade Antitrust Improvements Act to allow US antitrust laws to apply only to conduct that has “a direct, substantial, and reasonably

it is improbable that these third world states can muster the will to engage in similar unilateral extraterritorial conduct.

302 Supra note 217.
304 148 F 2d 416 at 443 (1945).
305 Byers, supra note 293 at 66.
306 549 F 2d 597 at 615 (1976).
foreground effect” on US businesses. Still, the protests did not abate. Several states, including Canada, the United Kingdom, Australia and South Africa introduced blocking legislation. According to Byers, blocking statutes have led US courts to retreat from attempts to assert extraterritorial jurisdiction over unfair business practices without the consent of the state whose territory is in issue. “They have also led to a series of international agreements concerning the prevention of unfair business practices.” Some of the international agreements include: the Canada-United States Memorandum of Understanding on Antitrust Laws, the Federal Republic of Germany-United States Agreement relating to Mutual Cooperation Regarding Restrictive Business Practices, the Australia-United States Agreement Relating to Cooperation on Antitrust Matters, and the UN General Assembly Resolution 35/63 of 5 December 1980 adopting the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. These agreements demonstrate that unilateral assertion of the power advantage of jurisdiction can facilitate – if not compel – the making of bilateral and international agreements addressing the subject area in issue.

2.3.1.2 Reciprocity

Byers argues that international law necessarily involves some “quid pro quo” – something for something. This is reflected in the principle of reciprocity. According to the principle, under general customary international law, any state claiming a right must allow all other states that same right. As such, the principle qualifies the application of power in international law, and does so in these ways. First, it influences what states may claim and how they go about claiming them. Second, it influences how states respond to other states’ claims. And third, it influences

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308 Ibid at § 6a.
309 Foreign Extraterritorial Measures Act, SC 1984, c 49.
310 Protection of Trading Interests Act, 1980, c 11.
313 Byers, supra note 293 at 67.
316 21 ILM 702 (1982).
318 Byers, supra note 293 at 89.
319 Ibid.
how states persistently object to developing or newly developed customary rules they find disagreeable.\textsuperscript{320} While the first two modes of influence can promote the capacity of unilateral conduct to give rise to an international norm, the last does not possess such potential. The first ensures that states claim what they would like to see universalized. This explains the success of the Truman Proclamation in 1945 by which the US unilaterally and unprecedentedly extended its control over all the natural resources of the subsoil and the seabed resources of its continental shelf beyond twelve nautical miles.\textsuperscript{321} Although this was incongruous with international law as it stood, it soon acquired the status of customary international law as other states followed suit within their continental shelves.\textsuperscript{322} By 1958 the rule was officially confirmed as a rule of customary international law by its adoption in the \textit{Geneva Convention on the Continental Shelf}.\textsuperscript{323} A major explanation for this rapid maturation of the rule into customary international law was the moral fibre of the claim itself: it allowed all other states to make the same claim; and all other states stood to benefit from the extension of the nautical mile.\textsuperscript{324}

Yehuda Blum has articulated how smaller states stood to benefit from the extension of the nautical mile and from the development of the legal regime of the continental shelf catalyzed by the Truman Proclamation. He notes that these legal developments were “intended to meet those needs of the coastal state (economic, security, etc) that had traditionally justified ‘historic’ claims and in so doing, to compensate the ‘new’ states for their lack of ‘historicity.’”\textsuperscript{325} Arguably, they were also intended to eliminate the right to assert extravagant claims. Such elimination would serve primarily the interests of weak states, whereas their retention would serve primarily the interests of the powerful states who have the clout to assert such claims in disregard of the interests of the international community.\textsuperscript{326} It is arguable too that the clout of the US might have contributed to the rapid maturation of the rule into customary international law by adding weight to the claim’s moral fibre. Attempts by weaker states to change international law in this manner

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\item \textsuperscript{320} \textit{Ibid} at 90.
\item \textsuperscript{321} Truman Proclamation, \textit{supra} note 219.
\item \textsuperscript{322} Byers, \textit{supra} note 293 at 91.
\item \textsuperscript{323} 29 April 1958, 499 UNTS 311. See Byers, \textit{supra} note 293 at 91 (noting that the only provision of the Truman Proclamation the Convention did not adopt was the Proclamation’s delimitation of shared continental shelves. Interestingly, it was precisely this aspect of the Convention that the International Court of Justice declined to recognize as a rule of customary international law in the \textit{North Sea Continental Shelf Cases}, (1969) ICJ Reports 3).
\item \textsuperscript{324} Byers, \textit{supra} note 293 at 91 (noting that the status of the US as the world’s most powerful nation was also a factor).
\item \textsuperscript{325} Yehuda Z Blum, “The Gulf of Sidra Incident” (1986) 80 Am J Int’l L 668-677.
\item \textsuperscript{326} \textit{Ibid}.
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may stand less chance of success than attempts by powerful states. Libya’s claim to the Gulf of Sidra is an example.\textsuperscript{327} The Gulf of Sidra is an arm of the Mediterranean Sea covering about 22,000 square miles. It is bordered by the land territory of Libya. In 1959 Libya fixed the limit of its territorial waters at twelve nautical miles. This was contrary to the law in force before the new Continental Shelf regime, under which Libya had only six nautical miles. In 1973, however, Libya proclaimed a further extension of the miles to what amounted to about 300 nautical miles. Knowing that this could not be supported in international law, Libya relied on “historic” claims. Even this was hardly supportable. No state recognized Libya’s claim. Not even the Arab League, which though did not explicitly challenge Libya’s claim, was reluctant to criticize Libya. The US took umbrage. Many states denied its validity. The Soviet Union – US’ historical rival and permanent member of the Security Council – evaded the issue. Radical critics of the West and long-standing supporters of Libya Iran and Yemen, skirted the issue, with Iran describing it as “academic” and Yemen calling it “a pretext to undermine … Libya.”\textsuperscript{328} That Libya’s claim was extravagant is beyond dispute. But while the fact that Libya lacked the international clout to bulldoze its way through must have been an important factor in the failure of the claim, the claim’s sheer extravagance must have infuriated the great powers.

The second influence reciprocity has on the application of power, as earlier noted, relates to the responsive initiatives of states to unilateral conduct they disagree with. This influence will occur where other states do not hope to benefit from reciprocal conduct on their part. That is, where they do not believe that generalizing the rule will profit them. They may respond either by supporting the status quo, or by advocating alternative measures. Such response would lead either to consolidating, elaborating and refining existing rules, or to creating new rules altogether.\textsuperscript{329} Either case may lead to a compromise. Attempts by the US to assert extraterritorial jurisdiction in the context of antitrust regulation may yet be cited as an example. The US justified their conduct in legal terms. Other states objected and sought basically to maintain the status quo, with more exact rules that would deny legitimacy to any future attempt to exercise

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\item \textsuperscript{328} Blum, supra note 325 at 674-676. According to Iran, “Whatever the significance of the Libyan interpretation [of the law] may be… [t]he sinister, provocative intentions of the United States should not be justified in terms of academic disagreements” regarding Libya’s claim to territorial waters. \textit{Ibid} at 677 (citing UN Doc S/PV.2670 at 43 (1986)).
\item \textsuperscript{329} Byers, supra note 293 at 101.
\end{itemize}
extraterritorial jurisdiction in antitrust regulation.\textsuperscript{330} Their objection led to the creation of more precise rules in the international law governing the field. “Had the [US] courts and Congress not justified their actions in legal terms, as falling within an exception to the general prohibition against intervention,” Byers suggests, “the content of that prohibition might not have been elaborated, through the customary process, to the degree that it is now.”\textsuperscript{331}

The FCPA is another example. The statute as discussed in chapter one, is an anti-bribery law passed by US Congress in 1977 to prohibit international bribery and corruption by US corporations operating overseas. It forbids the payment or offer of payments of gifts to foreign government officials with the corrupt intent of obtaining business. Although the statute’s primary targets were US corporations, it requires US-based corporations to participate in the management of their foreign subsidiaries or face liability for the conduct of their subsidiaries even where the subsidiaries would have been protected from prosecution under the domestic law of their host state.\textsuperscript{332} In 1998, the statute was strengthened through an amendment that allowed jurisdiction over foreign nationals where a connection exists between activity in the US and the furtherance of a violation of the statute.\textsuperscript{333} US nationals are also forbidden from engaging in any act of bribery abroad in furtherance of a violation of the statute.\textsuperscript{334}

The statute was widely condemned domestically and internationally. It was condemned domestically because it was felt that it endangered the competitive advantage of US businesses. It was condemned internationally because of its extraterritorial reach. Over time, however, anti-bribery legislation gained wide acceptance.\textsuperscript{335} In 1997, the OECD modelled a convention after the FCPA: \textit{Convention on Combating Bribery of Foreign Public Officials in International Business Transactions}.\textsuperscript{336} In 2003, the international community adopted the \textit{UN Convention Against Corruption}.\textsuperscript{337} Regional initiatives have also sprung up in Europe, Latin America and

\begin{itemize}
  \item \textsuperscript{330} \textit{Ibid} at 101-102.
  \item \textsuperscript{331} \textit{Ibid} at 102.
  \item \textsuperscript{332} Brown, “Parent-Subsidiary Liability”, \textit{supra} note 96.
  \item \textsuperscript{334} \textit{Ibid} at 317.
  \item \textsuperscript{335} Seck, “Unilateral Home State Regulation”, \textit{supra} note 195 at 570 (noting that “[t]he HBA could not play a similar role as it hurt the economic interests of other states while being used to further a policy goal strongly opposed by many states.”).
  \item \textsuperscript{336} 21 November 1997, 37 ILM 1 (1997).
  \item \textsuperscript{337} 31 October 2003, 43 ILM 37 (2003).
\end{itemize}
Africa. As Seck suggests, reciprocity may be used to “explain the success of the FCPA as a unilateral claim that, while offering no economic benefit to implementing states like the United States, influenced treaty negotiations and the development of customary international anti-bribery norms.” It is possible to conceive of the FCPA as facilitating the enforcement of the anti-corruption laws of other states “in furtherance of international policy goals.”

Similarly, reciprocity can also explain the international and domestic discussions currently going on in connection with the assertion of ATCA jurisdiction by US courts. While no international compromise has yet been reached, alternative regulatory initiatives are being taken by many states that are opposed to the generalization of ATCA jurisdiction. Canada, for instance, which is opposed to it, has repeatedly announced its commitment to strengthening its voluntary initiatives and creating more incentives to influence their corporations to respect the human and environmental rights of their overseas host communities. The creation of the Global Compact by the UN, and the appointment of a Special Representative to the UN Secretary-General on the issue of business and human rights, in the person of Professor Ruggie, among others, cannot be divorced from the US courts’ exercise of ATCA jurisdiction over corporations. While these reciprocal initiatives have not been geared towards the replication of ATCA in other states, they need not necessarily be identical with the measure engendering their emergence. All that is relevant is that an agreed upon measure that can effectively address the problem in question is the end result. Customary international law itself takes time to develop and one of its best-known routes – perhaps its only route – is state practice. It is remarkable that while other states have not simulated ATCA, some are gradually opening their judicial doors to the adjudication of disputes similar to those adjudicated in the US under ATCA. The UK and The Netherlands are two notable examples. Their willingness to allow such suits is an implicit endorsement of the legality of ATCA jurisdiction. The recent enactment of the JVTA by the Canadian Parliament granting victims of terrorist acts (wherever committed) access to Canadian courts is equally remarkable. But even more remarkable is that several Latin American states have either considered or enacted legislation prohibiting the bringing of any suit in their courts that had been previously

340 Ibid at 572.
brought in other countries, especially in the US, but dismissed on the grounds of *forum non conveniens*.

Those countries include Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, and Panama. The Environmental Committee of the Latin American Parliament, called the PARLATINO, issued a model law in 1998 – *Model Law on International Jurisdiction and Applicable Law to Tort Liability* – in which it recommended that all Latin American and Caribbean states adopt *forum non conveniens* blocking legislation. Such statutes are intended to impede *forum non conveniens* dismissals by rendering those countries adopting such legislation potentially unavailable, since dismissal is predicated on the existence of an alternative forum. This trend, which has been linked to the dismissal of the *Bhopal* case for *forum non conveniens* in the US, constitutes another implicit affirmation of the legality of ATCA jurisdiction and is a strong indication of the direction of state practice.

### 2.3.2 Unilateralism as an Assertion of Functional Jurisdiction

In its official opposition to Canada’s Arctic legislation, the US expressed concern that if not opposed, Canada’s action “would be taken as precedent” and “other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law.”

In his critique of unilateralism in the context of coastal regulation, Louis Henkin states that “unilateral coastal remedies ... are essentially undesirable. One reason is that they are not comprehensive, they are not coordinated, they are piecemeal. ...[S]tates may act capriciously. Unfortunately, the capacity for acting capriciously is

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345 “United States Statement on Canada’s Proposed Legislation” *supra* note 292.
inherent in unilateral coastal control.” In a similar context, Myres McDougal and Jan Schneider lament the potential for increased conflict as a result of unilateralism:

Unilateral assertions can, of course be directly contrary to the policies of transnational community expectation. When meant to insulate arbitrary and narrowly self-interested national actions from inclusive review (instead of providing an alternative arena for policy interpretation and other application), the consequences can be destructive of inclusive substantive interests themselves and of confidence in the world constitutive process as a whole.

Despite these criticisms, unilateralism has proved to be an essential part of the international legal system. Rightly considered, the criticisms do not seem to target unilateralism per se, so much as they target how its exercise might affect the interests of other states. This view is borne out by the fact that protesting states have not restrained from acting unilaterally when their interests militate in favour of doing so. In its defence of the Arctic legislation, for instance, Canada enumerated several instances where other states, especially the US, had acted unilaterally. It noted in particular the Truman Proclamation, claiming that “Canada reserve[d] to itself the same rights as the United States ha[d] asserted to determine for itself how best to protect its vital interests.” Of interest is that each state has sought to justify its unilateral acts by distinguishing them from those of other states. Henkin compares Canada’s unilateralism in the Arctic legislation and US’ unilateralism in the Truman Proclamation and argues that “if the Canadian kettle response to the United States pot was human enough” it still did not provide justification to Canada. The Truman Proclamation “did not infringe deeply on important bona fide interests of other states”. It was enacted at a time when “whatever law there had been was uncertain, hypothetical and largely irrelevant.”

Of note is that there has not been any general protest by states against the use of ATCA to hold individuals and corporations accountable for their transnational conduct. No state has

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349 Henkin, “Arctic Anti-Pollution: Does Canada Make or Break International Law” (1971) 65:1 AJIL 131 at 133 (noting that “the proclamation responded to a new opportunity in ways that did not affect the perceived interests of other states”, which was why “it was immediately accepted and later codified.”) [Henkin, “Arctic Anti-Pollution”].
enacted blocking or retaliatory legislation as a response to ATCA, unlike the HBA. No state has filed any complaint against the US before the ICJ challenging the international legality of ATCA. Instead, one finds states taking discordant positions with regard to individual cases. For example, the Indian government fully supported the Bhopal case. Ecuador supported the case against Texaco in Aguinda v Texaco but objected in Jota v Texaco. Canada protested in the case against Talisman. South Africa opposed the Apartheid litigation in the US, but had earlier thrown its weight behind two similar cases filed in the UK. In the case against Rio Tinto, the government of Papua New Guinea (PNG) originally protested, but while the case was still ongoing, a change of government occurred in PNG and the new administration threw its weight behind the plaintiffs. The US executive arm has itself protested against the adjudication of some of the suits in US courts, but this has depended on the policy of the administration in place. While the Jimmy Carter and Bill Clinton administrations respectively supported the Filartiga and Unocal litigation, the George W Bush administration opposed the cases against Talisman and Rio Tinto, among others. Recently, the Barrack Obama administration filed an amicus brief before the US Supreme Court supporting the plaintiffs’ position in Kiobel that corporations are proper defendants in ATCA claims for violations of the law of nations, thus seeking a reversal of the Second Circuit Court of Appeals’ decision holding otherwise. Larocque has observed that although this contradictory state practice is not tantamount to general approval by states, it “falls short of stark opposition.” A more forthright view is perhaps that the lack of general protest by states is an indication that states generally do not consider ATCA jurisdiction as infringing deeply on their important bona fide interests. Were it otherwise, ATCA jurisdiction would have attracted foreign state response akin to that of the HBA.

351 157 F 3d 153 (2d Cir 1998).
352 Re South African Apartheid Litigation, No 02-MDL-1499 (SDNY 8 April 2009).
353 Connelly v RTZ Corporation Plc [1997] 3 WLR 373 (HL) [Connelly] and Lubbe v Cape Plc [2000] 4 All ER 268 (HL) [Lubbe].
354 Sarei v Rio Tinto Plc, 456 F 3d 1069 (9th Cir 2006) [Sarei, 9th Cir 2006].
357 Larocque, Civil Actions for Uncivilized Acts, supra note 192 at 305.
A certain irony pervades criticisms of unilateralism. On the one hand, unilateralism is condemned as “illegal”. On the other hand, it is justified “as either creative or reasonable.” Acknowledging that “uncontrolled unilateralism” can destroy “the legal order”, M’Gonigle argues that “obvious necessities and benefits” can flow from unilateralism. The benefits flow from the fact that multilateral negotiations can be bogged down by special interests that reap from the status quo. Unilateralism can make an important contribution by “disturbing the complacency, focusing attention and actually encouraging meaningful compromises on issues not hitherto given due consideration.” From this perspective unilateralism need not necessarily be seen as an “alternative” to collective action, or even an antithesis of it. D Piper has suggested that, instead, the unilateral actor frequently views its conduct as the beginning of multilateral action. That it initially draws negative reaction from foreign states does not block the path to multilateral negotiation or even make it more difficult to begin negotiations. The Truman Proclamation, as the analysis on the principle of reciprocity shows, while being offensive to other states, galvanized international attention that led to the creation of international norms governing the continental shelf.

The Arctic legislation equally contributed to the development of international environmental law. Describing the background of the legislation, M’Gonigle writes that it was a response to Canada’s “frustration with the multilateral conference process” and represented Canada’s “determination to assert national interests in addition to the traditional Canadian internationalist approach.” In its protest to the legislation, the US asked Canada to defer the coming into force of the legislation until an international consensus was reached. Canada rejected this suggestion bluntly and declared its readiness to participate in international efforts to

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358 M’Gonigle, supra note 159 at 184.
359 Ibid.
360 Ibid.
361 Ibid.
363 M’Gonigle, ibid at 188 (noting that the immediate cause of the enactment of the act was the unusual passage of the tanker Manhattan through the Arctic in September 1969. The passage was an experiment to test the possibility of using the Arctic route for regular voyage. It raised concerns about pollution in the Arctic).
deal with the problem. It viewed its conduct as contributing to the development of international
rules since it is settled law that customary international law develops from state practice.\textsuperscript{364}

One of the justifications advanced by Canada was that existing international rules either
were inadequate or did not exist owing to the special circumstances of the Arctic and that no
international rules dealing with it could reasonably be expected in the foreseeable future.\textsuperscript{365} In
other words, there existed a governance void in the area. This is precisely the state the
international community currently finds itself with regard to human rights and TNCs in the
context of developing countries. TNCs are too powerful for the developing countries to control,
and international law offers virtually no assistance. Unilateral home-state regulation may play
the functional role that the Truman Proclamation and the Arctic legislation played until the
international community agrees on a workable multilateral approach. This implies that unilateral
home-state regulation should not be accepted as a \textit{permanent} measure, but as a temporary one.

Furthermore, that special circumstances exist which call for a unilateral measure does not,
however, mean that just any kind of unilateral measure is appropriate. The measure to be adopted
must be both necessary and reasonable in light of the problem it is targeted to solve. In other
words, only that type and quantum of jurisdiction required to solve the problem should be
asserted.\textsuperscript{366} In his analysis of the lawfulness of the Arctic legislation, Albert Utton states that one
must ask “whether the Canadian response was necessary, and if so, whether it was proportional
to the consequentiality of the threatened danger.”\textsuperscript{367} One of the variables for determining
necessity is the imminence of the threat.\textsuperscript{368} After examining the toxicity of oil pollution and the
prospects of remediation of an Arctic area struck by oil pollution, Utton concludes that the
consequentiality of the threat to the Arctic area necessitated the Canadian response and that the
response was “reasonable” and “proportional”.\textsuperscript{369}

In the context of regulation of TNCs, one must then ask whether transnational litigation
in home-states is necessary, reasonable and proportional to the consequentiality of the danger.
Are the same goals of transnational litigation not fully accomplishable by other means? An

\begin{itemize}
\item \textsuperscript{365} M’Gonigle, \textit{supra} note 159 at 190.
\item \textsuperscript{366} \textit{Ibid} at 192.
\item \textsuperscript{367} Albert E Utton, “The Arctic Waters Pollution Prevention Act and the Right of Self-Protection” (1972) 7:2 U Brit Colum L Rev 221 at 227.
\item \textsuperscript{368} \textit{Ibid}.
\item \textsuperscript{369} \textit{Ibid} at 228-229.
\end{itemize}
assessment of these factors must account for the egregiousness of the abuses, the immense power of TNCs, the powerlessness of developing countries in relation to TNCs, and the failure of traditional methods of regulation. These traditional methods include voluntary mechanisms (both state- and company-initiated) and exclusive host-state regulation. International law is currently lame. Until the international community finds a viable solution to the problem posed by transnational corporate actors, failure of home-states to intervene through legally effective mechanisms, such as allowing transnational litigation, may mean that the day of justice may never come to victims of transnational corporate crimes. The absence of any treaty negotiations in this area despite several years of the international community’s awareness of TNCs’ human rights impunity, and the global acknowledgement that the problem calls for global cooperation, leaves little choice than home-state intervention by those western nations which declare an interest in the global protection of human rights.

What is being argued here is a functional approach to the understanding of unilateralism. The functional approach takes the view that “[a] thing is what it does.” The “nature”, “essence” or “reality” of a thing is its manifestations, its effects and its relations with other things. The “‘it’ is nothing, or at most a point in logical space, a possibility of something happening” As F Cohen sums it up, “[i]f you want to understand something, observe it in action.” Observe the way it functions in real life. Experience it. F Cohen maintains that whatever cannot be translated in terms of the elements of “actual experience” is meaningless. Functionalism therefore seeks to do away with abstract questions and to explain legal concepts in “experiential terms.”

In the context of corporate crimes with human rights implications, the functional approach does not require human rights to have any supernatural existence. It does not rely on abstract or formalistic reasoning to ground them. Such reasoning, functionalism posits, “obstructs the path of understanding with the pretence of knowledge” and “bars the way to

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372 Ibid.
373 Ibid.
374 Ibid. See also F Cohen, “Transcendental Nonsense”, supra note 370 at 826.
intelligent investigation of social fact and social policy.”\textsuperscript{376} Functional analysis understands social policy “not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent.”\textsuperscript{377} Therefore it pays attention to how human rights are socially constructed. To say that human rights are socially constructed is to say that ideas and practices about them are “created, recreated, and instantiated by human actors in particular socio-historical settings and conditions.”\textsuperscript{378} The mission of functional jurisprudence therefore is to “permit” these socio-historical settings and conditions to “come out of hiding” and to indicate the role they play in shaping and explaining legal concepts.\textsuperscript{379}

It follows that unilateralism should be viewed in light of what it actually does. Inflexible renditions of the international legal process are neither accurate nor helpful. Assertion of functional jurisdiction is not an invitation to anarchy. It has never been. On the contrary, it is often a necessary, even if \textit{ad hoc}, response to a situation in need of immediate concerted regulatory efforts but in which the international community has been hesitant to engage proactively. It is frequently one way to trigger international negotiations. Certainly, it is not an ideal solution. But it is sometimes the only solution available. The pages that follow highlight the value of litigation to the promotion of socio-political change. What is being argued is that unilateral home-state litigation has an important role to play in the fight against transnational corporate crimes, and where those crimes engage international human rights, the role of litigation is not undermined.

2.4 THE ROLE OF LITIGATION IN PROMOTING SOCIO-POLITICAL CHANGE

As earlier noted, that special circumstances exist that justify the adoption of unilateral measures does not mean that just any kind of unilateral measure should be adopted. It is submitted that home-state litigation is a viable unilateral measure to address the incidence of transnational corporate crimes. Its viability can be seen most strikingly in the mobilizing power of litigation towards socio-political change. In order to understand how this works, one must turn to the very

\textsuperscript{376} F Cohen, “Transcendental Nonsense”, supra note 370 at 820.
\textsuperscript{377} \textit{Ibid} at 834.
\textsuperscript{379} F Cohen, “Transcendental Nonsense”, supra note 370 at 847.
extensive socio-legal literature. Socio-political change in the sense used here adopts the meaning sketched by socio-legal scholar John Morison:

It means a fundamental alteration in the way an aspect of society is structured, in the way that people relate to one another or in the way that an issue is perceived and acted upon. ... Law can tinker with the housekeeping of the legal system, it can codify, improve and refine doctrines, but if the final point of impact of such change is [only] within the legal system itself this does not count. Social change through law refers to change, originating from either outside the legal system or, more rarely, from within it, which moves through the legal system to make an impact outside it.  

2.4.1 The Brown Legacy of Reform Litigation

Interest in the socio-political significance of litigation may be traced to the seminal anti-segregation lawsuit in the US: Brown v Board of Education. Brown was a path-breaking decision of the US Supreme Court that struck down earlier pro-segregation decisions dating back to 1896. Before Brown, racial segregation had dominated race relations in the US. Within the education system, state laws had established separate public schools for black and white students. In 1896, the US Supreme Court ruled in Plessy v Ferguson that provided the separate facilities for the separate races were “equal”, segregation did not violate the equal protection clause of the Fourteenth Amendment. In 1954, however, the Court overruled itself and declared in Brown that “in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

Brown opened the door to reform litigation in the US. In the early 1980s, an “international norms shift” began to emerge towards using foreign courts and international

380 John Morison, “How to Change Things with Rules” in Stephen Livingstone & John Morison, eds, Law, Society and Change (Aldershot: Darmouth Publishing Company, 1990) 5 at 7 (noting, at 8, that “[c]hange through law works best where behaviour is economically rational, as in business activity, and less well in more customary or emotional aspects of life, such as family relationships.”).
381 347 US 483 (1954) [Brown].
382 163 US 537 (1896).
383 According to Helen Hershkoff, “Brown provided inspiration to a generation of lawyers who saw law as a source of liberation as well as transformation for marginalized groups. Courts, mostly federal but state as well, became involved in a broad range of social issues, including voting and apportionment, contraception and abortion, employment and housing discrimination, environmental regulation, and prison conditions.” Helen Hershkoff, “Public Interest Litigation: Selected Issues and Examples”, at 5, online: World Bank, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> (last accessed 5 April 2011). She notes that after Brown, public interest litigation was “generally perceived as part of the broader effort to use the tools and principles of legal liberalism as a way to change existing patterns of power and privilege.” Ibid at 7. Stuart Scheingold has similarly noted that as a result of Brown America “and virtually all of its public institutions are now officially identified with desegregation as a goal of public policy, and litigation has
judicial processes to hold individuals accountable for egregious human rights abuses. Attempts to try Argentine Navy Captain Alfredo Astiz and former Chilean President Augusto Pinochet in foreign courts for human rights crimes they committed in their countries are perhaps the most prodigious examples. According to Lutz and Sikkink:

> The impetus for the [transnational] “justice cascade” ... was neither spontaneous, nor the result of the natural evolution of law. ... Rather, it was the result of the concerted efforts of a small group of activist lawyers who pioneered the strategies, developed the legal arguments, and often recruited the plaintiffs and/or witnesses, marshalled the evidence, and persevered through years of legal challenge.

Due to the cascade of reform litigation *Brown* engendered, Harold Koh calls *Filartiga* the *Brown* of transnational human rights litigation. Larocque, however, believes that *Filartiga* is better viewed as transnational law’s *Marbury v Madison* because of its bold declaration of judicial duty to pronounce the law in unusual circumstances. However, in so far as the socio-political

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spearheaded these sweeping changes.” Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2d ed (Ann Abor: The University of Michigan Press, 2004) at 100. Compare, however, the following remarks by Michael Tigar: *Brown* is “little more than an ornament, or golden cupola, built upon the roof of a structure found rotten and infested, assuring the gentlefolk who only pass by without entering that all is well inside.” Michael E Tigar, “The Supreme Court 1969 Term – Forward: Waiver of Constitutional Rights: Disquiet in the Citadel” (1970) 84 Harv L Rev 1 at 7. Similarly, G Rosenberg views *Brown* as no more than a “mythical ... symbol”. G Rosenberg, “Courting Disaster: Looking for Change in all the Wrong Places” (2006) 54:4 Drake L Rev 795 at 814 [G Rosenberg, “Courting Disaster”].

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385 *Ibid.* (noting that “the transnational justice network was atypical, however, because its membership was confined to a handful of groups of lawyers with appreciable technical expertise in international and domestic law who systematically pursued the tactic of foreign trials.”).

386 Koh, *supra* note 4 at 2366.
387 5 US 137 (1803) [*Marbury*]. *Marbury* was a landmark decision in which the US Supreme Court for the first time declared a law unconstitutional and established the concept of judicial review in the US jurisprudence. The case was the aftermath of the presidential elections of 1800 in which Thomas Jefferson defeated incumbent President John Adams. Before leaving office, President Adams made last minute judicial appointments following an amendment to the *Judiciary Act* of 1789 in order to emasculate the in-coming Republican government. In order for the appointments to take place, however, the commissions had to be delivered. A majority of them, but not all, were delivered before Adam’s term ended. The task of delivering the remainder fell on the in-coming Jefferson who was sworn in on 4 March 1801. He refused to deliver them, impeached several of the appointees and repealed the statute that made their appointments possible. To prevent these steps from being legally challenged, Congress closed down the Supreme Court for the remaining period of 1801. Among the appointees was William Marbury, who had been appointed justice of the peace. He and three other justices of the peace appointees applied to the Supreme Court for *mandamus* to compel the Secretary of State to deliver the commissions. Declining to grant the order, Marshal CJ affirmed the power of the court to review the acts of the other branches of government. He declared the 1789 act unconstitutional. The significance of the case lies in its affirmation of the power of judicial review, an idea that was heretofore unknown in US jurisprudence.

significance of litigation is concerned, and in particular Filartiga’s ability to open a previously-believed-to-be-closed door, Filartiga seems to me a progeny of Brown.

2.4.2 Theoretical Grounds

The socio-political significance of transnational litigation rests on good, interconnected theoretical grounds. These include Pierre Bourdieu’s theory of the field, democratic theory, and the politics of rights theory.

2.4.2.1 Pierre Bourdieu’s Theory of the “Field”

Pierre Bourdieu’s theory of the “field” and in particular his notion of what he terms “symbolic capital” have considerable relevance to the socio-political significance of litigation. A field is a “social space” that tends to form an autonomous microcosm with its body of rules, assumptions and forms of authority. Each sphere of life, such as law, politics, religion, et cetera, constitutes a field. As each tends to be autonomous, it seeks to shield itself from external interference – i.e., interference from other fields – and to fiercely guard its values and standards. Within each field, there are those – who feel dominated – who want to alter the operating standards in order to better their lot. To achieve this, they need the support of external forces. Each field becomes a site of struggle – a battlefield – in which individuals and groups continually seek to safeguard or capsize the existing distribution of “capital”. Anyone who wants to succeed in their field must acquire some measure of capital and abide by the rules and regulations in force in their field. Capital comes in four basic forms: economic (material assets), cultural (titles), social (resources acquired by virtue of membership of a group), and symbolic capital. Symbolic capital designates the wealth which an individual or group has accumulated – not in the form of economic wealth but in symbolic form. Authority, knowledge, prestige, and reputation – to mention but a few –

389 According to Loïc Wacquant, Bourdieu coined the concept of “field ... in the mid-sixties for purposes of empirical inquiry into the historical genesis and transformation of the worlds of art and literature. It was later extensively modified and elaborated, by Bourdieu and his associates, in the course of studies of the intellectual, philosophical, scientific, religious, academic, poetic, publishing, political, juridical, economic, sporting, bureaucratic, and journalistic fields.” Loïc Wacquant, “Pierre Bourdieu”, May 2006, online: University of California – Berkeley, <http://sociology.berkeley.edu/faculty/wacquant/wacquant_pdf/PIERREBOURDIEU-KEYTHINK-REV2006.pdf> at 7 (last accessed 3 April 2011) (also published in Rob Stones, ed, Key Contemporary Thinkers (London: Macmillan, 2006) Chapter 16).
are forms of symbolic capital. Symbolic capital is convertible to economic wealth and its exchange value is continually being evaluated by every possessor of it. Its value, like that of other capitals, can appreciate or depreciate. As Wacquant elucidates, Bourdieu views capital as “any resource effective in a given social arena that enables one to appropriate the specific profits arising out of participation and contest in [that arena].” A field may be viewed as “the site of an ongoing struggle between those who defend its autonom[y] ... and those who seek to introduce heteronomous standards because they need the support of external forces to improve their [disadvantaged] position in it.” The position one occupies in one’s field determines one’s thought pattern and conduct. The dominant group has an interest in preserving the status quo. The dominated group has an interest in upturning it and deploy strategies for doing so. The result is that the autonomy of each field is under constant threat.

If we take the broad sense of “politics” suggested by Richard Terdiman, as “the complex of factors (economic, cultural, linguistic, and so on) that determine the forms of relation within a given social totality,” and/or the equally broad sense urged by Klabbers, as “meaningful and unrestrained debate about our common future, unrestrained by any concerns for one’s immediate survival, ... as the life-blood of community,” then there is a constant struggle in this political arena between those who occupy the dominant positions and those at the periphery – the disadvantaged. “Capital” becomes one of the factors, in Terdiman’s “politics”, that determine the forms of relations, and those who possess more of this capital will have a greater capacity to tilt the scale of “meaningful and unrestrained debate about our common future”, in Klabbers’ “politics”. This predisposes agents to seek to accumulate more capital resources. Transnational litigation provides one of the possibilities by which the disadvantaged – victims of transnational corporate crimes in developing countries – can improve their capital. In those countries where access to justice is blocked or very weak, through the help of transnational activists they can pursue the corporate violators to their home countries. The capital improvement can occur directly or indirectly, but mostly indirectly. A substantial damages award can improve the

391 Wacquant, *supra* note 389 at 8.
395 Klabbers, *supra* note 194 at 557.
disadvantaged’s economic capital. However, the real improvement likely comes from the damage a court victory – even the mere filing of the lawsuit – could bring to corporate defendants. Corporate defendants could see their symbolic capital (reputation, for instance) depreciate, causing the “market value” of the symbolic capital of their victims – international sympathy, for instance – to appreciate. The victims might then be able to convert their symbolic capital to an economic or other form of capital. The economic capital may come by way of an out-of-court settlement involving monetary compensation, as happened in *Unocal* and *Wiwa*. In the final analysis, this theory glides into the other theories discussed below.

### 2.4.2.2 Democratic Theory

The implications of the above analysis are tremendously significant when viewed from the prism of democratic theory. If courts are accessible to politically excluded groups and enable them to have a voice in what otherwise would have been dealt with politically without their participation, then courts may be seen as providing an important balance in the political process.396 In his study of variation in the rate of civil litigation in a St Louis, Missouri, trial court from 1820 to 1977, Wayne McIntosh found that high rates of litigation attended low voting turn-out and single party dominance of political offices. He concluded that “litigation may represent an alternative form of political activity, particularly when a minimal number of access points is available to a sizable segment of the population.”397 As Beth Van Schaack has put it, “[p]articipating as a plaintiff in human rights litigation can restore and promote a sense of agency – the impression that we exercise some control over the processes and events that affect us – especially when that sense was destroyed by the very conduct that is the subject of the suit.”398 Litigation facilitates discussions between parties that were blocked by power inequalities before the filing of the

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396 Contrast, however, with the dissenting voice of Rosenberg who argues that this view is “historically odd”, for courts in the US have a historical record of protecting privilege and preserving unequal distributions of power and wealth. G Rosenberg, “Courting Disaster”, *supra* note 383 at 796.


This suggests that “courts can provide an equilibrium of sorts by responding to demands of groups and classes excluded from participation in political institutions.”

Curtis Bradley has expressed concerns about the impact of transnational human rights litigation on democracy within the home state. He argues that transnational human rights litigation places substantial lawmaking power in unelected and unaccountable actors – judges. He draws attention to the type of law that is typically applied in transnational human rights litigation, which according to him is customary international law. For since, for instance, the US government signs on to human rights treaties with great caution, transnational human rights plaintiffs hardly find treaties on which to found their case. They rely mostly on customary international law. And given the manner in which customary international law is created, Bradley notes that customary international law lacks democratic input. He stresses the uncertainty that hovers around what constitutes customary international law, and concludes that this renders the adjudicative process “a highly creative” one. Bradley stresses that judges are ill-equipped to make laws: they are “slow” and “decentralized decision-makers”, narrow in their focus on individual cases, and draw their views from those of academic scholars, for judges are unfamiliar with international law.

Bradley overlooks a number of facts. First, the suggestion that customary international law lacks democratic input is, from a realistic perspective, not entirely accurate. Customary international law is a product of decades, sometimes centuries, of state practice. State practice refers to what states do. Although it is not settled whether the practice refers to their legislative practice, or to their judicial practice, or to their executive practice, or to all of these, there is greater consensus that it can be any of these. However, policy statements, legislative acts, and diplomatic correspondences are the least contentious constituents. Treaties, especially multilateral treaties, are also frequently cited. These acts are, clearly, performed by elected representatives and not by unelected judges. And while state practice does not mean the practice of every state in the world, at least in theory it is the practice of most states. The role of judges

399 Ibid at 2330.
402 Ibid at 467.
therefore is to ascertain the accumulation of state practice to see whether customary international law is in existence. This role is an important contribution by judges to the practice of democracy.

Second, the suggestion that allowing courts to pronounce on what constitutes customary international law somehow violates the principle of separation of powers is misconceived. The classic view of separation of powers no longer operates. Institutions are emerging that no longer fit into the strict boundaries of the Montesquieu principle. One should think of the various regulatory boards whose functions are best described as quasi-judicial. Judge Canivet of the Constitutional Council of France and former President of the Cour de Cassation of France notes that the classical notion of separation of powers is upset “by the new role which supreme courts have to play.” They are not only “the keepers of fundamental rights”, they protect the “hierarchy of norms” and, within the EU system, can invalidate “national law”, which can create tensions with the other organs of national governments. Courts have become an arena of dialogue where both the government and individuals can present their arguments and make the law evolve. They have thus acquired “a new political legitimacy.”

Third, no other institution is in a better position to ascertain the existence of customary international law than the courts. Whether a certain rule is a norm of customary international law will constantly figure in disputes between parties to transnational human rights litigation where customary international law is pleaded. Such a dispute cannot be described as political, but purely legal. It is independent judges that can settle it best. The charge that domestic judges are incompetent to decide questions of international law fails to account for the nature of the international legal process itself. A close look at this process reveals that when international judges are called upon to decide a legal question, they often look to the jurisprudence of domestic courts or state practice for answer. This is the effect of the pronouncement of the Permanent Court of International Justice (PCIJ) in the famous Lotus case that “the rules of law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.” It is also required by Article 38(1)(d) of the ICJ Statute which specifically refers to decisions of national courts as “subsidiary means for

405 G Canivet, “New Methods for International Coherence of Law” in Muller & Loth, eds, ibid at 145.
406 Ibid.
407 Ibid.
408 The Case of the SS Lotus (France v Turkey), PCIJ Ser A, No 10, 1927 [Lotus].
the determination of rules of [international] law.” 409 Judge Ušacka of the International Criminal Court has pointed out that “[i]nternational courts benefit from the experience of national courts and reflect the legal and procedural principles of many national legal systems.” 410 After scrutinizing the jurisdictional pronouncements of international and domestic courts, Edward Morgan concludes:

When judges, arbitrators, and lawyers operate in a transnational context their reflections on state jurisdiction seem inevitably to refer not to some transcendent notions of substantive legality, but to the international process questions surrounding the nature of sovereignty and the participation of sovereigns in an interactive system. Thus, the effect of looking first to international case law for some insight into the proper bounds of a state’s judicial or legislative reach is rather jarring; there is an immediate reference back to the domestic case law and the place of the particular jurisdictional question in the state’s own legal system. It is as if the nature of sovereign statehood itself compels international discourse to answer any challenge to sovereign power by deflecting the issue away from a consideration of universal norms and back to the state’s own concept of sovereign jurisdiction. 411

If domestic jurisprudence influences international jurisprudence – and vice versa – then international law is not that alien to domestic judges. The argument that domestic judges cannot appreciate international law is therefore not correct. The seeming unwillingness of domestic judges to apply international law may not be as a result of their lack of appreciation of international legal arguments. The prevailing legal culture in each country, that is, whether the country operates a monist or a dualist system of law, may account substantially for the unwillingness of domestic judges to consider international law. The unwillingness may also be a reflection of the protectionist ideology that views international law as foreign to domestic legal disputes. But the law is best understood as a body of principles that transcend national boundaries. 412 This understanding is mirrored in the jurisprudence of the Supreme Court of

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409 Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993.

410 Ušacka, supra note 404 (noting that domestic courts also benefit from the jurisprudence of international courts, and calling for more interaction between domestic courts and international courts). See generally AM Hol, “Internationalisation and Legitimacy of Decisions of the Highest Courts” in Muller & Loth, eds, supra note 404 at 77-86 (stressing, at 77, the need for coherency in “a strongly internationalising world”, and pointing, at 78, to the need to study decisions of foreign courts to see whether a proposed national legal solution fits in the international and transnational context); Canivet, supra note 405 at 145-152 (calling, at 146, “the reconciliation of the internal order and the international order . . . a heavy responsibility of supreme courts”).


Canada especially in the context of interpreting the Charter. While judicial references to international human rights before the Charter “were all but non-existent”, William Schabas found in 1996 about four hundred cases where international human rights law was cited. By 2006, the number had spiralled so much that “every case could no longer be listed.” This suggests that Canadian judges consider international law relevant to the interpretation of domestic law and that they do apply international law with some considerable level of comfort, hence the frequency with which they have applied it. Any suggestion that they are incompetent to appreciate international law flies in the face of this frequency.

Besides, the core issues in transnational human rights cases are “quintessentially legal”. Independence of the judiciary being a core feature of every democracy, there is a reasonable assumption that governments will not see the actions of foreign courts as actions of those foreign governments. Thus, decisions of US courts, for instance, concerning the conduct of foreign corporations in suits brought by private persons cannot be taken by foreign governments as necessarily reflective of the views of the State Department or those of Congress. Besides, courts have innovated doctrines, such as the political question and comity doctrines, which guide them to recognize and abstain where issues more suited to the other branches of government are present. It must be remembered too that the issues are subject to legislative intervention. The US Congress has always had the opportunity to limit the scope of transnational litigation through either repealing or limiting the application of ATCA. But instead of doing so, it indirectly expanded the scope of transnational litigation through the passing of the TVPA in 1991 to provide for a remedy against “an individual who, under actual or apparent authority, or color of

413 Irwin Cotler, “The Canadian Charter of Rights and Freedoms 25 Years Later: A Revolution in Five Acts” (2009) 45 SCLR (2d) 323 at 335 [Cotler, The Canadian Charter of Rights and Freedoms] (arguing that the mere fact that the Charter is linked, “by language and ideology”, to important international legal instruments to which Canada is a party, mandates a certain degree of resort to international law in order to ensure that the Charter is given its proper meaning).


415 Cotler, The Canadian Charter of Rights and Freedoms, supra note 413 at 336.

416 Koh, supra note 4 at 2368 (referring primarily to the Filartiga case where the issue was whether foreign torture victims had a right of action in federal court).

law, of any foreign nation” engages in proscribed forms of torture or extrajudicial killing. This was in implementation of the Torture Convention and one of the major differences between the TVPA and ATCA is that whereas only aliens can bring an action under ATCA, the TVPA does not discriminate on the nationality of the plaintiff. Another major difference is that unlike ATCA, the TVPA contains an exhaustion of local remedies requirement. Congress also amended the Foreign Sovereign Immunities Act of 1976 to give only restrictive immunity to foreign state officials in US courts with regard to both commercial acts and terrorist activities. Jurisdiction over foreign state officials is certainly more usurping of executive powers and more destructive of foreign relations than jurisdiction over private persons and corporations for extraterritorial crimes. If a case brought against a foreign state official does not limit the ability of the Executive to engage cooperatively with foreign governments, a case brought against a foreign corporation cannot reasonably be expected to do so.

2.4.2.3 The Politics of Rights Theory

Transnational human rights litigation rests on the symbolic power of rights claims. In his “politics of rights” thesis, Scheingold assesses the role of lawyers and litigation in changing the direction of public policy. The politics of rights is a political approach that critiques the conventional legal perspective that was premised on a direct link between rights litigation and social change – the “myth of rights”. The myth of rights viewed litigation independently of other political tactics and assessed the usefulness of litigation based on a “simple straight-line projection from judicial decision to compliance.” This approach assumed that litigation could lead to a declaration of rights by courts; that litigation could be used to guarantee realization of these rights; and that the sheer realization of these rights automatically translated to effective change. The problem with this approach was that it led to hyperbolic expectations about the socio-political impact of court decisions. By contrast, the politics of rights addresses the social realities of litigation and seeks to explain how litigation fits into the overall patterns of politics. It perceives rights as “useful political tools”:

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418 TVPA, supra note 128, § 2(a).
420 Scheingold, supra note 383 at 5.
421 Ibid at 8.
422 Ibid at 5.
It is possible to capitalize on the perceptions of entitlement associated with rights to initiate and to nurture political mobilization—a dual process of activating a quiescent citizenry and organizing groups into effective political units. Political mobilization can in this fashion build support for interests that have been excluded from existing allocations of values and thus promote a realignment of political forces.\textsuperscript{423}

Scheingold is not alone in the politics of rights thesis. JP Nettl believes that rights carry some undertone of entitlement and stir up images of something unfairly deprived.\textsuperscript{424} Judith Shklar views rights as the “operative ideals” of activist lawyers.\textsuperscript{425} Michael McCann views the rights-based approach to reform politics as an effective political strategy. In his study of wage reform politics in the US, he finds that although courts have failed to end wage discrimination practices, they have helped to structure the arena of struggle over wage equity. He finds that “litigation and other legal tactics [have] provided movement activists an important political resource for advancing their cause.”\textsuperscript{426} In his view, pay equity advocates are conscious of the inherent power of rights claims and are simply exploiting it: “[They] have gone to court not because they confine their sense of right to official verdicts or think official legal institutions are just, but instead because legal tactics have offered a rare opportunity for leverage in a world of unequal resources.”\textsuperscript{427} McCann further points out that organizations targeted by social reformers are often aware that litigation can impose enormous transaction costs on them. They fear losing control of decision-making independence to outsiders (such as judges) and so would seriously consider negotiated settlement of disputes.\textsuperscript{428} But this does not mean that the transaction costs of litigation will generate concession in every case, especially from powerful corporate defendants. Instead, prolonged and costly legal proceedings will have a greater toll on the activists’ resources, as corporations are generally well off. It also does not mean that court victory is necessary for

\begin{itemize}
\item \textsuperscript{423} Ibid at 131 (italics in original). This suggests that the myth of rights and the politics of rights theses are not in their entirety inherently contradictory. It can be said that the latter builds on, or perhaps taps from, the former. The language of rights plays a strategic role in social movement politics.
\item \textsuperscript{425} Judith Shklar, \textit{Legalism} (Cambridge, Mass: Harvard University Press, 1964) at 1.
\item \textsuperscript{426} Michael W McCann, \textit{Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization} (Chicago: University of Chicago Press, 1994) at 4 (noting that “equity activists have derived substantial power from legal tactics despite only limited judicial support”) [McCann, \textit{Rights at Work}].
\item \textsuperscript{427} Ibid at 232.
\end{itemize}
leveraging change through litigation. As McCann argues, legal tactics are “useful primarily only in concert with other tactics, such as demonstrations, legislative lobbying, collective bargaining, and media mobilization.”

Rights shape our “perceptions of legitimacy.” Where affirmed by judicial decisions, such affirmation lends political significance to the grievances of the rights-seekers. It contributes to their sense of worth – “symbolic capital” – so that “deprivations that formerly might have been viewed as symptoms of personal inadequacy” – such as suffered by victims of transnational corporate crimes let down by their state’s inability or reluctance to protect them – may be regarded as “unpaid governmental debts.” Even where courts deny the affirmation of rights, this does not necessarily serve to reinforce the status quo. At the very least, a judicial decision indicates official acknowledgement of the issue by a governmental authority. The very process of determining the validity of a claim will involve an examination of historical record. This record will further focus the investigative efforts of human rights watchdogs. It can equally refocus the expectations and efforts of rights-seekers so important to successful political mobilization. Denial will likely engender other strategies. The problem is therefore not so much with the strategy as with the strategists.

Klabbers has expressed deep concern about the use of transnational litigation to promote human rights. Focusing on the political dimensions of human rights, he argues that:

because human rights go to the heart of the political community, foreign courts run the heightened risk of misreading the political map of the originating State or, where they read the map correctly, they may be torn between attempts to do justice to the individual plaintiffs and the desire to avoid causing major embarrassment in the relations between their own states and the relevant foreign state.

Although he acknowledges that transnational human rights cases hitherto brought in US courts have “rarely” raised major foreign policy problems, he argues that this is because the cases have dealt mostly with members of regimes that were already out of power. He downplays the significance of the application of the act of state doctrine and the political question doctrine in handling foreign policy problems, charging that application of these doctrines “would quickly

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429 Ibid at 93.
430 Scheingold, supra note 383 at 90.
431 Ibid at 136.
432 Schaack, supra note 398 at 2319-2320 and 2348.
433 Klabbers, supra note 194 at 562.
434 Ibid.
raise the charge of arbitrary justice” if their application depends on what foreign states think about the impact of the case on their foreign policy and the international influence of those states.\textsuperscript{435} He raises another foreign policy quandary that will arise where the result of adjudication in one state is construed as a violation of human rights in another state, citing caning and death penalty as examples.\textsuperscript{436} Any finding of human rights violations by the second state would amount to supervising the judicial integrity of the first state.\textsuperscript{437} He also rejects the idea of the judicialization of human rights and the insistence that human rights be judicially enforced. By such insistence, he argues, “we have given up on our chances of creating and maintaining a common future” and have defeated “our best, perhaps only, way of combating evil: through the hard-worn decisions and evolving consensus of political processes.”\textsuperscript{438} These concerns are re-echoed by Professor Mamdani when, in connection with the ICC, he opines that “[t]he real danger of detaching the legal from the political regime and handing it over to human rights fundamentalists is that it will turn the pursuit of justice into revenge-seeking, thereby obstructing the search for reconciliation and a durable peace.”\textsuperscript{439} These views re-echo the claims of the Bush administration that ATCA suits threaten diplomatic relations with friendly states, and in some cases would affect diplomatic efforts on the war on terrorism.\textsuperscript{440}

These arguments, one scholar has responded, “unhappily rely on anachronistic paradigms of cultural relativism and Westphalian sovereignty” to assert that human rights are too politically charged to be litigated.\textsuperscript{441} The suggestion that insisting on the judicial enforcement of human rights lifts human rights above politics is both misplaced and naïve, if not hypocritical. Litigation does not cause “the death of the political process, or [even] its subordination.”\textsuperscript{442} It rests on a view of law as playing a leveraging role in the reform goals of social movements. It is misguided to view the use of the legal process as revengeful. In many cases, it is the only recourse open to the plaintiffs. In the domestic context, the legal process is an important means

\textsuperscript{435} Ibid (asking: “On what principled basis could one allow a claim against relatively low-ranking Ethiopian or Paraguayan officials, or even former government members of small states, but not against a former head of government of a major power, let alone an incumbent?”).
\textsuperscript{436} Ibid at 563.
\textsuperscript{437} Ibid.
\textsuperscript{438} Ibid at 564.
\textsuperscript{439} Mamdani, supra note 270.
\textsuperscript{441} Larocque, \textit{Civil Actions for Uncivilized Acts}, supra note 192 at 307.
\textsuperscript{442} Ibid.
of settling disputes. Human rights issues within the domestic context are routinely settled through the legal process (using courts and human rights tribunals), media campaign and civil demonstrations et cetera. The political process, such as legislative action and collective bargaining, frequently comes in as a consequence of the legal process, media campaign and civil demonstrations. Examining the domestic impact of foreign human rights litigation, Lutz and Sikkink observe that “[f]oreign court rulings against rights-abusing defendants have the effect of putting pressure ‘from above’ on the state where the rights abuse occurred… [which] serves to open previously blocked domestic avenues for pursuing justice.”

Reacting to the criticism that ICC investigations and prosecutions in Uganda undermined the peace process going on locally in Uganda, Nick Gronon and Adam O’Brien state that the investigations actually “rattled” the Lord’s Resistance Army (LRA) leadership in Uganda and pressed it to the discussion table; dampened foreign support for the LRA; created greater awareness about the conflict and galvanized the attention of the international community which in turn provided strong support for the fragile peace process; and helped to embed accountability and victims’ interests in the peace process.

Contrary to the views of Mattei and Lena (albeit not in connection with ICC prosecutions), these do not demonstrate “a denial of the possible use of the political process abroad but a facilitation of it. The further argument that ATCA litigation could derail the war on terror is unreasonable. Need we do a “little” wrong in order to achieve a “great” good? The war on terror is aimed to protect human dignity and freedom, and not to sacrifice one set of human values for another set of human values or even to subordinate one to the other. It cannot be used to condone violations that, though still egregious, cannot be brought under the rubric of terrorism.

The foregoing views resonate with Michel Foucault’s proposition that law “is an instrument of power which is at once complex and partial. The form of law … needs to be resituated among a number of other, non-juridical mechanisms.” Litigation is thus part of a coordinated strategy, so that success may well depend on how well it is coordinated with other strategies. Indeed, given the large number of evidence suggesting that judicial victory often

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443 Lutz & Sikkink, supra note 374 at 4.
445 Mattei & Lena, supra note 105 at 396.
produces negligible effect on targeted social practices,\textsuperscript{447} the significance of litigation as a political strategy lies in its indirect effects – in its mobilizing power.

2.5 IMPACT ASSESSMENT OF ATCA LITIGATION

Empirical studies reveal that ATCA litigation has had different kinds of impact on the protection of human rights both in the US and beyond. As argued in the foregoing section, the impact is usually more indirect than direct. Beth Stephens, who has long been active in ATCA litigation through the Centre for Constitutional Rights, firmly believes that ATCA “lawsuits contribute to the worldwide movement for accountability by exposing abuses committed by private individuals, corporations and government officials, and by compensating victims.”\textsuperscript{448} Assistant State Department Legal Adviser James Hergen believes that “[ATCA] cases have been a prod” on corporations.\textsuperscript{449} Professor Jeffrey Davis, who has done an in-depth examination of ATCA litigation in the US, confirms that ATCA litigation is an important means of enforcing international human rights law.\textsuperscript{450} Combining insights and experiences from practical work as a state Attorney General, Legal Aide to the Speaker of the Georgia House of Representatives, and scholarly knowledge of law and politics (all of which bore on his assessment of the issue), he rendered a quantitative and qualitative account of ATCA litigation in the US, relying extensively on primary data, including interviews with lawyers who have been active in ATCA litigation, human rights NGOs and government officials especially in the Department of Justice. His studies reveal that while many ATCA lawyers agree that civil litigation in foreign courts is not the ideal approach to achieve human rights accountability, they are agreed that it has its benefits.\textsuperscript{451} Civil litigation abroad obviates one real danger that especially criminal prosecution at home may pose especially in post-conflict countries. In the words of one US Department of Justice lawyer, “if you go too far you risk this tight rope that was being walked there and maybe the military would come back”.\textsuperscript{452} There is the fear that if you reopen this too far they’re going to slam down this

\textsuperscript{447} See generally McCann, Rights at Work, supra note 416.
\textsuperscript{449} This statement was made in an interview with Jeffrey Davis and is documented in Jeffrey Davis, Justice Across borders: The Struggle for Human Rights in U.S. Courts (New York: Cambridge University Press, 2009) 293.
\textsuperscript{450} Davis, ibid at 282-297.
\textsuperscript{451} Ibid at 290.
\textsuperscript{452} Ibid at 290-291.
democracy and we’re all going to go to jail”.453 While these dangers are present mostly in criminal prosecutions, civil litigation in those countries can equally reveal other interests in the issue being litigated, which may lead to calls for criminal prosecutions, and which the powers that be might find uncomfortable. For their part, industry associations, while not explicitly admitting that ATCA litigation has in any way influenced the way corporations do business, have voluntarily participated in virtually every ATCA suit filed against a corporation. They have done so through the filing of amicus briefs in support of the corporate defendants. This, from a realistic perspective, is demonstrative of how greatly concerned corporations are about the consequences of ATCA litigation.

The following pages summarize the findings of empirical studies that demonstrate the nature of the impact of ATCA litigation on the protection and promotion of human rights. For example, ATCA litigation has served to put pressure on governments to resolve disputes through diplomatic engagement. It has served to arm-twist corporations into addressing the sufferings of victims of their misconduct and to begin to put mechanisms in place to avoid future occurrences of those wrongs. It has strengthened public action, mobilized international cooperation, warded off human rights abusers from the US, and served as a catharsis for victims of human rights abuses.

2.5.1 Putting Pressure on Governments to Resolve Disputes Through Diplomatic Engagements

While states have sovereign immunity in foreign courts, foreign corporations do not. US activist lawyers have used suits against corporations as conduits to awaken states to take action to redress the issue of corporate crimes committed by corporations within their territories. Where corporations are the actual targets, the claims involved in the lawsuits have often attracted high-level governmental involvement. As Slaughter and Bosco have pointed out, “[b]y targeting larger corporations and business concerns, private plaintiffs have thus become a diplomatic force in their own right, forcing governments to pay attention at the highest levels.”454 In this way

453 Ibid.
litigation facilitates the conduct of politics in inter-state relations and open up previously neglected avenues for settling disputes.

The Holocaust cases provide important examples. In 1996, a group of plaintiffs sued several prominent Swiss banks in a federal district court in Brooklyn, New York, when it emerged that Swiss banks were still holding funds looted and seized from Nazi victims.\(^{455}\) The suit brought political factors into the picture and triggered a “diplomatic furor” between the US and Switzerland. This furor was accentuated by the publicity the suit generated.\(^ {456}\) The US Senate Banking Committee began holding hearings on the matter. A number of state governments threatened to stop doing business with the Swiss banks unless they settled the claims. The US government issued a report, written by then-Undersecretary of State Stuart Eizenstat, sharply criticizing the Swiss for their World War II dealings with the Nazis.\(^ {457}\) The US was accused of using the Holocaust to undermine Swiss success as a global financial center. Concerned by the issue’s importance to Swiss-American relations, President Clinton intervened to mediate a settlement between the plaintiffs and the banks. The negotiation produced a $1.25 billion payment to the plaintiffs.\(^ {458}\) As a term of the settlement, all sanctions and threats of sanctions against Switzerland and its banks were dropped.\(^ {459}\) The *Financial Times* reported:

The clearest lesson from the Swiss banks' $1.25bn settlement with holocaust survivors is this: threatening to impose sanctions can work. Every important breakthrough in the negotiations came soon after threats from US local government officials to impose sanctions (banning, for example, Swiss banks from certain kinds of business in New York). The settlement itself came two weeks before a threat to start the sanctions and a week after Moody's, the rating agency, published a report saying that UBS, Switzerland's (and Europe's) biggest bank, might lose its triple-A rating if sanctions were imposed.\(^ {460}\)

\(^{455}\) *In re Holocaust Victim Assets Litigation*, Case No CV-96-4849 (EDNY 1996).

\(^{456}\) Slaughter & Bosco, *supra* note 454 at 107-108.


\(^{458}\) Slaughter & Bosco, *supra* note 454 at 107-108.

\(^{459}\) Bazyler, *supra* note 447.

In 1998, another group of Holocaust victims brought suit in New Jersey against several German corporations which had used concentration camp prisoners as slave labour.\footnote{Iwanowa v Ford Motor Co, 67 F Supp 2d 424 (DCNJ 1999) (holding that enslavement and deportation of civilian populations during World War II constituted a crime against humanity and as such was within the scope of ATCA).} Again, the Clinton Administration felt concerned and together with German Chancellor Gerhard Schröder engineered a settlement that produced a contribution of almost $1 billion to a settlement fund from which the Holocaust victims were compensated.\footnote{Slaughter & Bosco, supra note 454 at 108 (noting that a key element in the settlement was a promise of protection by President Clinton for the corporations from future suits in the US).} This case was later dismissed. But as Tom McNamara points out, the various interested parties and governments went ahead with settlement talks and voluntarily established a $5.1 billion settlement fund.\footnote{Tom McNamara, “Plaintiff’s Diplomacy: Are there any Limits on American Supercourts?” 2 October 2001 at 29, online: Davis Graham & Stubbs LLP, <http://www.dgslaw.com/documents/articles/111134.pdf> (22 April 2011).}

While it cannot be said with certainty that litigation was the primary cause of these settlements, it is fair to say that litigation activated these other measures that together combined to bring healing to one of the historical injuries of the Holocaust. A senior lawyer at the US Department of Justice once said that because of the Holocaust litigation, “the Germans were interested in something that could be done to kind of get rid of all the litigation.”\footnote{Ibid.} According to him, the Germans were at first “adamant that they weren’t going to enter into a settlement pursuant to the authority of the courts.” But “eventually there was an agreement where the Germans passed a law funding this great foundation” from which the Holocaust victims were compensated.\footnote{Ibid.} Davis notes that although the result of the settlement did not please many of the victims, “it demonstrates that these cases can cause concrete efforts to address human rights violations.”\footnote{Ibid.}

2.5.2 Arm-Twisting the Corporations

At least in one important case, ATCA litigation has served to force corporations to assuage the sufferings of victims of their rights abuses and to take further steps to demonstrate commitment to high human rights standards. Human rights activists believe that litigation was an important
factor that led to the Unocal settlement. Before the suit was filed, Unocal rebuffed attempts by the victims and human rights organizations to engage in constructive dialogue with them with regard to the Yadana gas pipeline project. When the suit was filed, Unocal filed a declinatory motion urging summary dismissal. The motion was refused by the Second Circuit Court of Appeals which ordered a jury trial. While the jury was preparing to commence trial, the parties announced, quite unexpectedly, that the case had been settled out of court. Although the material terms of the settlement were confidential, it has been said that the settlement would compensate the plaintiffs and provide funds that would enable them and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.467 Also worth mentioning is the holocaust litigation against French railway company Société Nationale des Chemins de fer français (SNCF) whose trains carried innocent victims to death camps during the Nazi era.468 In January 2011, the company’s chairman “bow[ed] down before the victims, the survivors, the children of those deported, and before the suffering that still lives”.469 Although the suit was dismissed on grounds of sovereign immunity, the company being an arm of the French government, New York Times reports that the company’s apology was in response to years of litigation brought by survivors, their descendants and some American Jewish organizations.470 As Schaack has pointed out “the very filing of [a] suit can provide a ‘foot in the door’ to communicate with a defendant corporation that may have dismissed the demands of victims and activists.”471

It is noteworthy that when the litigation was brewing, Unocal announced its support for the voluntary principles of corporate social responsibility and became quite vocal about its human rights conduct. Its corporate responsibility report became a reflection of its new conviction that “We know it is not enough to set high standards of business conduct, we must also live by them.”472 In its new code of conduct, the company embraced a number of

467 For more information on the development of this case, visit EarthRights International website: www.earthrights.org (last accessed 21 April 2011).
468 Freund v SNCF, 09-0138-v (2d Cir, 7 September 2010).
470 Ibid.
471 Schaack, supra note 388.
international mechanisms, including the UN Global Compact, the Global Sullivan Principles, and the International Labour Organization Declaration on Fundamental Principles and Rights at Work, and declared its aspirations: “Unocal believes that we have a responsibility to society, especially in relation to the impact of our operations. All employees must respect the human rights and dignity of others.” It has been reported that the company later met representatives of Amnesty International and allowed observers from the Collaborative for Development Action – an independent non-profit consulting organization – to study the Myanmar pipeline project’s impact on local communities. There is a widespread belief within the human rights community that there is a strong link between the adoption of voluntary corporate codes of conduct human rights litigation under ATCA. This indicates that litigation can bring to bear “reformative pressure” on corporations. Today “a cottage industry of sorts has developed to advise corporations on doing business in repressive political environments without incurring potential human rights liability.” Stephens has observed that the Unocal decision “mobilized corporate opposition to the ATCA, making headlines in virtually all of the major financial press.” In addition, the fact that these suits have routinely drawn amicus briefs not only from governments but also from intergovernmental and business organizations testifies to what seriousness is attached to them. The Unocal litigation, for instance, drew amicus briefs from the Bush administration, USA Engage, the National Foreign Trade Council, the National Association of

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473 The Global Sullivan Principles are a corporate social responsibility framework developed in 1999 by Rev. Leon Sullivan in partnership with former UN Secretary-General Kofi Annan to enable businesses to voluntarily pursue their business objectives with due regard for human rights and social justice especially with regard to their employees and the communities in which they operate. See <http://www.thesullivanfoundation.org/gsp/default.asp> (last accessed 21 April 2011).

474 Adopted in 1998, the Declaration commits adopting governments, employers’ and workers’ organizations to respect and promote basic human work-place values in four areas: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation. See <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm> (last accessed 21 April 2011).

475 See Tarr, supra note 243.

476 Ibid. Unocal has also published an extensive report on the pipeline.

477 Davis, supra note 439 at 292-293 (documenting interview statements by human rights NGOs active in ATCA litigation, as well as by lawyers from the State Department, regarding the adoption of voluntary corporate codes of conduct by corporations, including corporations which have not been subject to ATCA suit; and noting that in 2007 sixteen corporations participated in the State Department’s annual plenary on the Voluntary Principles on Security and Human Rights, out of which seven had been subject to ATCA suits).

478 Schaack, supra note 388 at 2332

479 Ibid at 2333.

480 Stephens, “Upsetting Checks and Balances”, supra note 438 at 178.
Manufacturers, the US Chamber of Commerce, the US Council for International Business, and the Organization for International Investment.481

2.5.3 Strengthening Public Action

It is true that Talisman’s operations in Sudan were already a subject of public backlash before suit was filed against Talisman in the US, it is fair to say that the suit gave added impetus to the public to continue to put pressure on Talisman to change its ways in Sudan or pull out if it could not otherwise operate there without giving logistical support to the Sudanese military. Responding to mounting pressure from the public (including from its shareholders), Talisman disposed of its interests in Sudan in 2002 and 2003.482 According to Talisman’s chief Executive Jim Buckee, Talisman’s decision to pull out was made due to “US pressures” that threatened to remove the company from US financial markets.483 It is arguable that the suit helped to bring the human security situation in Sudan and Talisman’s role in it further into the official glare of the US government, which caused the US government to intensify its pressures on Talisman. It should be recalled, too, that the government of Canada filed an amicus brief in the suit, urging the court to decline jurisdiction in the interest of diplomatic relations. This demonstrates how greatly concerned Canada was about the litigation.

2.5.4 Mobilizing International Cooperation

In the field of international human rights, the question of how to regulate TNCs has dominated the agenda of the international community for about a decade now. This is generally believed to be due to attempts by US human rights activists to apply international human rights standards to TNCs through the medium of ATCA litigation and the consequent concerns those attempts have generated regarding whether corporations are a subject of international law. A heated debate has raged between proponents of voluntary international mechanisms and those of legally binding

481 Davis, supra note 439 at 294.
483 Ibid.
international mechanisms as to which mode of regulation is more appropriate.\footnote{See Jan Wouters & Leen Chanet, “Corporate Human Rights Responsibility: A European Perspective” (2008) 6:2 Northwestern J Int’l Hum Rts 262 at 262 (arguing for a hybrid framework that combines voluntary and binding mechanisms).} A similar debate is also raging between proponents of solely host-state mechanisms and those of transnational regulation.\footnote{See Macklem, \textit{supra} note 16 at 289 (arguing that reform should be directed towards the promotion of exercise of extraterritorial jurisdiction. “International law ... should encourage states to act to prevent and punish human rights violations – regardless of where they occur – by multinational corporations which have a legal presence within their territories.”); Duruigbo, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges” (2008) 6:2 Northwestern J Int’l Hum Rts 222–261 (arguing for a mixed home- and host-state regulatory framework, with international intervention when the corporate abuse reaches an intolerable level – a “tipping point”).} No agreement has yet been reached by the international community. However, the debate has triggered a proliferation of corporate social responsibility engagements by TNCs who are eager to demonstrate their respect for human rights in their operations. Some states that oppose binding international mechanisms have begun to develop domestic measures to assist their corporations operating overseas to operate in a human rights-friendly fashion.\footnote{Ratner, “Corporations and Human Rights”, \textit{supra} note 10 at 461.} The Canadian House of Commons’ 2005 inquiry into matters relating to the promotion of respect for international human rights and sustainable development goals by Canadian mining corporations operating overseas reflects Canada’s interest in responsible mining.\footnote{See \textit{Mining in Developing Countries and Corporate Social Responsibility}, Fourteenth Report, Standing Committee on Foreign Affairs and International Trade, 1st Session, 38th Parliament, House of Commons, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1961949&Language=E&Mode=1&Parl=38&Ses=1> (last accessed 20 April 2011).} These efforts suggest that “a fundamental alteration in the way an aspect of society is structured, in the way that people relate to one another or in the way that an issue is perceived and acted upon”,\footnote{Recall Morison’s definition of socio-political change, \textit{supra} note 370.} is taking place. These debates and efforts are taken place regardless of the fact that no court merits-based victory has yet been recorded in an ATCA suit against a corporation.

2.5.5 Ensuring that the US Does Not Remain a Safe Haven for Human Rights Abusers

Although Amnesty International in its 2002 report on torture and the US stated that the US was a refuge for torturers,\footnote{William J Aceves, \textit{United States A Safe Haven for Torture Victims} (Amnesty International USA, 2002) at 3, online: Amnesty International USA, <http://www.amnestyusa.org/stoptorture/safehaven.pdf> (last accessed 22 April 2011).} it is believed that ATCA cases have served in no insignificant measure to...
ensure that the US does not remain a refuge for them. The very filing of the suits disrupts the lives of the defendants and brings them embarrassments and ridicule. Schaack notes that of the individual defendants sued in ATCA litigation, only a handful of them have remained in or visited the US after they were served with court processes. In most cases, the negative effects of the suits have followed the defendants to their countries, making it difficult for them to reintegrate in their society and stigmatizing them perpetually as alleged or confirmed human rights abusers. For instance, after the Filartiga case against a Paraguayan police chief, the US Consulate in Paraguay reported that the lawsuit brought disquiet and nervousness at the highest ranks of the Paraguayan government and a fall in the number of Paraguayan officials and military officers seeking to visit the US. The Gramajo case was even more devastating. In the early 1990s General Gramajo was a close ally of the US top political and military shots. But the tide turned against him when he was implicated in widespread acts of brutality committed by military personnel under his command that resulted in the death of thousands of civilians in Guatemala. At the time, he had been nurturing himself for the Guatemalan presidency and had already garnered substantial US support and was visiting the US regularly. On this ill-fated occasion, he had come to the US to obtain a degree from the Kennedy School at Harvard. On his graduation day he was served with a complaint. To evade the lawsuit, Gramajo quickly fled back to Guatemala. But the suit brought him a confluence of bad publicity that killed his political career. His US visa was revoked and his party declined to field him as its presidential flag-bearer. It has also been reported that certain named human rights abusers from Central America stopped coming to the US after mid-2002, following a Florida jury’s finding of two Salvadoran ex-Defence Ministers liable to pay $54 million to the plaintiffs.

2.5.6 Serving as a Catharsis for Victims of Human Rights Abuses

There have been official acknowledgments of the healing potency of ATCA suits. One from Salvadorian torture survivor Juan Romagoza movingly states:

490 Schaeck, supra note 388 at 2330-2331.
492 Gramajo, supra note 103.
493 See Lutz and Sikkink, supra note 384, and Coliver, et al, supra note 491 at 172.
494 Coliver et al, ibid (referring to Romagoza-Arce v Garcia, 400 F 3d 1340 (11th Cir 2005)).
The case has given me the hope I need in order to believe in justice, to believe that justice can come [...] The case led me to reevaluate my own role as a survivor of these inhumane policies that resulted from Cold War policies, the dirty war policies. I had the luck to be able to survive, to stand up in the midst of people who were living in death. [...] Before the verdict I felt that, even if we lose, at least we made the denunciation, at least we got the facts out. And if the case could be won, there would be more chance to champion other lives and situations and a chance to help people recover from their pain and traumas and heal some of their wounds. [...] What I’ve learned is that this is a very powerful form of therapy. How much I wish that every survivor in El Salvador could have this opportunity. Because I feel that all of us who were crushed by the terror that the generals orchestrated have a lot to tell them. [...] The fact that I brought forward all this information and documentation, and prepared for this case, and especially, most of all, that I was there and pointed them out -- that’s the best possible therapy a torture survivor could have. I wish something like these trials could go on in El Salvador for therapeutic reasons, as well as for justice.

Clinicians have also confirmed the therapeutic power of ATCA suits. Mary Fabri, Clinical Director of the Klover Centre for the Treatment of Torture Survivors, has noted:

This legal recourse presents the opportunity for torture survivors living in the United States to seek justice and confront impunity. The few who are able to take their cases to court create a collective voice for all torture victims, bringing the issue of human rights atrocities into the public eye. This opportunity also presents a means for psychological healing of torture's wounds by breaking the silence, confronting perpetrators and refuting impunity.

The cathartic power of litigation should, however, be balanced by the potential for litigation to re-enact the sufferings of the plaintiffs. Parties are constrained by rules of evidence. Plaintiffs may thus not have adequate opportunity to tell their whole story in a manner that will purge them of their emotions. Defendants have an opportunity to defend themselves against the plaintiffs’ allegations. As the cases are brought several years after the events, the plaintiffs’ memories may be significantly blurred. This may impair their ability to present their story in a credible and

consistent manner. The chances of the plaintiffs losing the case are always there. Such loss may further traumatize the plaintiffs. Added to this is the fact that the suit may expose plaintiffs and their families to more risks where the abuses that are the subject of the suit were committed by the defendants in cooperation with a repressive regime that is still in power. One way human rights activists have used to obviate this risk, however, is by filing pseudonymous lawsuits, such as happened in Unocal (Doe v Unocal) and a number of other ATCA cases, to hide the identity of the plaintiffs.

2.6 CONCLUSION

This chapter has asked both theoretical and practical questions about the propriety and utility of litigating transnational corporate crimes in foreign courts. In so doing, it sought to provide theoretical justifications for such litigation. One of its central arguments is that litigation in home-states of TNCs implicated in those violations in developing countries has the capacity to serve as an international norms trigger. There are already signs of this in the numerous discussions that have been going on at both international and domestic forums regarding the regulation of TNCs. While no agreement has yet been reached, it is likely that a multilateral treaty may result from it in the future. The nature of such a treaty cannot at this time be predicted, given the competing interests in the sphere. But it will be an opportunity for developing countries to “write resistance into international law”.497 In this way, it will have served the goals of TWAIL scholars.

The way we look at transnational litigation will depend on our understanding of the goals of such litigation. A functional approach enables us to focus more on our actual experiences with unilateral assertions of extraterritorial jurisdiction rather than on our metaphysical ideas about it. A narrow perspective that looks only at court verdicts will fail to appreciate the larger socio-political goal of such litigation. As emerged from the discussions, the significance of transnational (human rights) litigation transcends the dispute between the named parties. Its significance lies more in its ability to mobilize other political resources for resolving disputes and the reformative pressure it brings to bear on both governments and corporate actors.

497 Balakrishnan Rajagopal, International Law From Below, supra note 199.
Transnational litigation is thus but a component of a coordinated strategy for the protection of vulnerable victims of transnational corporate conduct in developing countries.
CHAPTER 3
JURISDICTION IN INTERNATIONAL LAW

3.1 INTRODUCTION

It will have been gathered from chapter two that although states may act, and do act, extraterritorially, no state has unlimited jurisdiction to exert its powers outside its territories. Every state jealously guards what it considers its territory, ready to stop other states from violating its territorial integrity. Apart from enacting blocking or retaliatory legislation, states whose interests are affected by other states’ assertions of extraterritorial jurisdiction do sometimes drag the offending state before the ICJ seeking invalidation of such exercise of jurisdiction. The argument is that in order to ensure respect for the territorial sovereignty of every state, it is essential that each state’s exercise of jurisdiction meet certain minimum international standards. In other words, there must be some basis in international law, either by way of the existence of a positive permissive rule or the absence of a positive prohibitive rule, upon which a state may justify its assertion of extraterritorial jurisdiction. This chapter discusses the bases of state jurisdiction in international law.

Following this introduction is a brief rendition of the nature of the notion of “jurisdiction”. Thereafter an analysis of the various theories of jurisdiction in international law is made. It should be noted, however, that the traditional theories of jurisdiction were developed in the context of criminal jurisdiction. Whether they have automatic application in civil cases is scarcely discussed in the literature. Can domestic courts rely on them to found their jurisdiction in civil cases? In order to fully address this question, to see whether the civil dimensions of the theories are present in international law, it is necessary to separate the discussion into criminal jurisdiction and civil jurisdiction. The very nature of the subject of this dissertation requires that jurisdiction over corporations be given a separate treatment. In light of the ongoing debates regarding the jurisdictional amenability of corporations for violations of international law, given greater significance by the contradictory pronouncements of the US Courts of Appeals in *Kiobel* and *Sarei* (among others), the need to examine the issue is even more compelling. The last section summarizes the discussion.
3.2 THE NATURE OF JURISDICTION

The term “jurisdiction” is etymologically derived from the Latin word *juris-dictio*, meaning to “speak the law”.\(^{498}\) It is the law’s diction – “the diction that speaks the law”.\(^{499}\) It is through jurisdiction that the law is articulated. The term is more generally expressed in the authority of a court or tribunal to adjudicate a matter brought before it, that is, the authority to speak the law. An inquiry into the nature of jurisdiction is thus concerned with, at least for our present purpose, understanding the nature of this authority. Three aspects of this authority may be distinguished. First, it may be used in a substantive sense to refer to authority over a class or subject matter of disputes. Many courts are subject to jurisdictional constraints with regard to the subject matter of disputes. For example, there may be monetary limits to a court’s jurisdiction; statutes do give jurisdiction over specific matters to certain courts; and federal constitutions do delineate the jurisdictional limits of federal and state or provincial courts. In private international law, however, subject matter jurisdiction is of little interest in that it has little or nothing to do with whether the case contains a foreign element or not, which is the paradigm for the application of the rules of private international law. Second, jurisdiction can be used in a territorial sense to indicate the geographical boundaries beyond which a court has no authority to speak the law. Anything that happens outside those geographical boundaries is outside the reach of the court. This is known as territorial jurisdiction. Lastly, jurisdiction may refer to the court’s authority over the person of a defendant against whom the plaintiff has brought claims before the court.\(^{500}\) This is called “*in personam*” jurisdiction. These last two mentioned types of jurisdiction are the ones that more directly engage the rules of private international law although, strictly speaking, territorial jurisdiction is the one most central to private international law as a court’s ability to take jurisdiction over the person of a defendant depends primarily on the presence of the defendant within the jurisdictional territory of the court. In fact, jurisdiction depends, in some form or the other, on the existence of some nexus between at least one aspect of the dispute and the territorial district of the court. Even states exercising universal jurisdiction do in practice


require the existence of some nexus (one writer calls it “universal jurisdiction plus”) between it and the dispute or the parties. Understanding the nature of this nexus as recognized in international law is the task of this chapter.

More specifically speaking, jurisdiction in the sense used in this chapter refers to “a state’s power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them.” In international law, jurisdiction “reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.” Extraterritorial jurisdiction refers to the exercise of jurisdiction with regard to cases that have a foreign element in the sense that an essential ingredient thereof (such as the subject matter, the event or the parties) occurred or is located abroad. When states exercise such jurisdiction, they participate in a transnational process in that they engage in activities that touch on the interests of other states. One scholar has argued that by participating in the transnational process through the exercise of jurisdiction, states are “implicitly participating in the definition of other states’ jurisdiction.” This argument is questionable in that one state’s assertion of jurisdiction does not constrain the ability of another state to assert jurisdiction over the same subject matter and/or parties even if the jurisdiction asserted by the first state eats into the territory of the second state. One can however make sense of the argument in relation to the capacity of the exercise of extraterritorial jurisdiction to trigger diplomatic protests that in turn carry the potential to lead to the creation of a new international law of jurisdiction to which all states subscribe in the relevant sphere of activity.

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502 Hape, supra note 184 at para 57.
3.3 FORMS OF EXTRATERRITORIAL JURISDICTION

A state may express its (extraterritorial) jurisdiction in either of three basic forms: prescriptive jurisdiction (also called legislative jurisdiction), enforcement jurisdiction (also called investigative jurisdiction) and adjudicatory jurisdiction (also called judicial jurisdiction). As Benjamin Perrin points out, these forms of jurisdiction reproduce the three stages of the criminal justice process: from Parliament’s passage of criminal legislation (prescriptive jurisdiction) to executive action to enforce it (enforcement jurisdiction) and to judicial trial of persons charged with violation of criminal law (adjudicatory jurisdiction).506

Thus, prescriptive jurisdiction refers to the power of a state to pass legislation proscribing conduct that occurs outside its borders. Enforcement jurisdiction refers to the use of coercive force by the executive to ensure that such extraterritorial laws are executed abroad. Examples of such executive actions are investigation of crimes, “interviewing witnesses, issuing search and arrest warrants, court orders for production of documents and attendance of witnesses, executing searches and seizures, detaining and arresting individuals,” etc.507 Adjudicatory jurisdiction refers to “the ability of a state’s courts to adjudicate cases with foreign elements”,508 or, as the Supreme Court of Canada put it in Hape, “the power of a state’s courts to resolve disputes or interpret the law through decisions that carry binding force.”509 It should be pointed out, however, that while the exercise of extraterritorial prescriptive jurisdiction is in theory separate from the exercise of extraterritorial adjudicatory jurisdiction, in practice it implies it, for it is hardly the case that a state which seeks to legislatively prescribe extraterritorial conduct would disallow its courts the power to exercise adjudicatory jurisdiction over disputes relating to violations of that law.510 Moreover, adjudication involves some level of prescription through the application of statutes.

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507 Ibid at 179.  
508 Coughlan et al, supra note 504 at 9.  
509 Hape, supra note 184 at para. 58.  
510 Olivier de Schutter, “Extraterritorial Jurisdiction as Tool for Improving the Human Rights Accountability of Transnational Corporations” (Paper prepared in the author’s personal capacity as a background paper to a seminar organized in collaboration with the UN High Commission for Human Rights in Brussels, 3-4 November 2006) at 10, online: <http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (last accessed 4 October 2011).
3.4 THEORIES OF EXTRATERRITORIALITY

International law assumes the equal and exclusive sovereignty of states over their respective territories. Each state thus, as a primary rule, “enjoys plenary jurisdiction within, and exclusive control over, its territory.”\(^{511}\) Extending jurisdiction beyond a state’s borders may therefore be theoretically assumed to be an affront to the sovereignty of affected foreign states. In practice, however, extraterritorial jurisdiction is not totally proscribed in international law. In the famous *Lotus* case, the PCIJ refused to accept France’s argument that restrictions upon the right of a state to exercise jurisdiction to prescribe its criminal laws ought to be presumed in the absence of a positive showing that such jurisdiction exists. The court stated elaborately as follows:

> [I]nternational law [does not] prohibit[,] a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present.\(^{512}\)

The power of a state to prescribe its laws extraterritorially is therefore said to be limited, and not conferred, by international law.\(^{513}\) In *Hape*, the Supreme Court of Canada stated that “[i]nternational law ... sets the limits of state jurisdiction, while domestic law determines how and to what extent a state will assert its jurisdiction within those limits.”\(^{514}\) Despite scholarly challenge to this view,\(^{515}\) it has been pointed out that from a historical and realistic perspective, the *Lotus* view is more correct; for in reality, states do not see their jurisdiction as conferred by international law, but see international law as narrowing their jurisdiction.\(^{516}\) According to this

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\(^{511}\) Coughlan et al, *supra* note 504 at 4.

\(^{512}\) *Lotus, supra* note 408 at 14-15.


\(^{514}\) *Hape, supra* note 184 at para 59.


\(^{516}\) Prosper Weil, “International Law Limitations on State Jurisdiction” in Olmstead, ed, *ibid* at 32.
view, what the anti-\textit{Lotus} proponents are seeking is “to transcend [historical] reality in order to ‘tame’ the sovereign power of states and subject it as far as possible to the rule of law.”\textsuperscript{517} John Currie et al, however, suggest that there is a sense in which \textit{Lotus} may be said to have become obsolete. In the decades since \textit{Lotus} was decided, international law has undergone remarkable growth, much of which is characterized by a tremendous number of limitations imposed on the jurisdiction of states, so that it may now be said, in a “quantitative sense,” that these limitations are the rule whereas the states’ discretion to act is the exception.\textsuperscript{518}

Be that as it may, the question to be considered here is: To what extent, in a given case, can a state exercise extraterritorial jurisdiction under international law?

3.4.1 Criminal Jurisdiction

About five theories have been formulated for the exercise of criminal jurisdiction: the territoriality principle, the active personality or nationality principle, the passive personality or nationality principle, the protective principle, and the universality principle. As Castel points out, international law does not organize these principles in any ranked order.\textsuperscript{519} The principles are considered in turn.

3.4.1.1 The Territoriality Principle

This is the most frequently invoked basis of jurisdiction. Already in 1648, the \textit{Treaty of Westphalia}\textsuperscript{520} had posited that a nation’s power ended at its border.\textsuperscript{521} The principle of territoriality posits that the state where an event is alleged to have occurred is the state that has jurisdiction to prosecute it. It is regarded as “a manifestation of governmental control over the territory of the state.”\textsuperscript{522} Tying jurisdictional power to territory made sense. It accommodated

\textsuperscript{517} \textit{Ibid} at 33.
\textsuperscript{518} John Currie, Craig Forcese & Valerie Oosterveld, \textit{International Law: Doctrine, Practice, and Theory} (Toronto: Irwin Law, 2007) at 477-478
\textsuperscript{519} Castel, \textit{Extraterritoriality in International Trade, supra} note 513 at 9.
\textsuperscript{520} The “Treaty of Westphalia” is a Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, 24 October 1648, online: Yale Law School, \texttt{<http://avalon.law.yale.edu/17th_century/westphal.asp>} (last accessed 3 October 2011).
\textsuperscript{522} Castel, \textit{Extraterritoriality in International Trade, supra} note 513 at 11.
the competing interests and policies of sovereign states. With the world delineated into separate geographical regions, the territority principle afforded an easy way of deciding whose state’s law should regulate a certain conduct in a way that would reduce conflict to a minimum. This served the goals of efficiency and predictability: “By establishing a priori that only the nation where an event occurs has power, it limited states' lawmaking competence so that conflict was practically impossible.... The rationale was simple: because sovereignty is defined by territorial control, any other principle would be a source of friction and discord [among states].”

Territoriality is thus a parallel of the principle of sovereignty. In the Island of Palmas case, the Permanent Court of Arbitration stated that “[s]overeignty … in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.” Every state has a right, using its courts, to prosecute any individual or group, be it a national or an alien who, whilst on the state’s soil engages in conduct proscribed by the laws of that state. A state’s courts have no territorial jurisdiction unless the state has formal sovereignty over the territory in question. Territorial jurisdiction is limited by space, with the result that it can be lost if the state loses its sovereignty over any portion of its original territory.

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523 David J Gerber, “Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems” (2004) 26 Hous J Int’l L 287 at 293 (arguing that where the “relevant conduct can be identified, the task of identifying the territory in which it occurred is easy enough, and thus it avoids jurisdictional overlaps”).
525 Island of Palmas case (The Netherlands v USA) (1928) RIAA, 2, 829 at 838. See also V Lowe, “Jurisdiction” in MD Evans, International Law, 2d ed (Oxford: Oxford University Press, 2006) 324 (“[S]overeignty entails the right of the State to prescribe the laws that set the boundaries of the public order of the State. It is taken for granted that foreign visitors to a State are bound by the State’s criminal law in the same way as everyone else in the State.”).
526 Lowe, ibid.
527 The link between territorial jurisdiction and sovereignty was a subject of controversy in regard to whether the US had territorial jurisdiction over Guantanamo Bay. Following the commencement of the war on terror after the 11 September attacks on the US, the US President issued a Military Order authorizing the indefinite detention and trial of persons captured in connection with the attack at Guantanamo Bay. Guantanamo Bay was Cuban land leased to the US in 1903 for the purpose of coaling and naval stations. Some of the detainees challenged the Military Order through a request in US Federal Court for the issuance of the writ of habeas corpus. In Rasul and Odah v Bush, 215 F Supp 2d 55 (DDC, 2002), the Federal Court of the District of Columbia tied the question of the availability of the writ in US Federal Court to the question of whether the US had sovereign power over Guantanamo Bay. In other words, whether US’ jurisdiction extended to Guantanamo Bay depends on whether the US had “ultimate sovereignty” of Guantanamo Bay. The court read the lease agreement between Cuba and the US as giving “ultimate sovereignty” to Cuba and only “jurisdiction and control” to the US. To the court, jurisdiction and control without more amounted to limited sovereignty, so that Cuba retained full sovereignty. It concluded that the US Federal Court had no jurisdiction to issue a writ of habeas corpus in favour of detainees in Guantanamo Bay. On a final appeal to the US Supreme Court, the question was whether US Federal Courts had jurisdiction to consider the legality of detention of foreign nationals captured abroad and detained in Guantanamo Bay. The Supreme Court decided the question based on a Congressional mandate that federal courts could decide petitions for writ of habeas corpus “within their respective jurisdiction” by persons “in custody in violation of the Constitution or laws or
To assert jurisdiction under the territoriality principle the prosecution must prove that the alleged conduct took place within the territory of the trial state. In practice, it often happens that the alleged conduct took place in more than one state; that is, partly in one state and partly in another. Michael Akehurst has observed that at the turn of the 20th century, some scholars argued in favour of conferring jurisdiction on the state where the crime was initiated, while others preferred the state where the crime was completed. “But the arguments were so evenly matched that it was eventually realized that there was no logical reason for preferring the claims of one State over the claims of the other; and the only alternative to granting jurisdiction to neither State (which would have led to intolerable results) was to grant jurisdiction to both States.” Thus, as the territory of the conduct is shared by both states, each state can assert jurisdiction under the territoriality principle. All the prosecution must show is that a constituent element of the offence took place on the territory of the trial state. This is the position adopted in Canada, the US, England, even in civil law countries, and the Lotus case. In Canada, for instance, the Canadian Supreme Court formulated the territoriality principle in terms of the “real and substantial link” test (also called the Libman test): “all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada. ...[t] is sufficient that there be a ‘real and substantial link’ between the offence and this country”. And in *R v Cook*, *Libman* cited with approval the reasoning of Lord Diplock of the English House of Lords in *R v Treacy*, and wrote: “[T]he rules of international comity, in my view, do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state treaties of the United States”. The question the court asked was whether it was the person holding the detainee (the custodian) or the detainees themselves who were required to be within the court’s jurisdiction. It held, by a majority, that the custodian’s amenability to jurisdiction was sufficient to make habeas corpus available. The logic of this holding is that the writ is directed at the custodian (in this case, US Military) and not at the petitioner. In this sense, the jurisdiction character espoused by the Supreme Court was not territorial, but may better be described as nationality jurisdiction. See generally Stewart Motha, “Guantanamo Bay, abandoned being and the constitution of jurisdiction” in Shaun McVeigh, *Jurisprudence of Jurisdiction* (Oxford (UK): Routledge-Cavendish, 2007) at 63-83 (arguing, at 69 that “the determination of jurisdiction for the purposes of the habeas corpus is a function of the court’s regulation of government officials within an economy of governmental power in the sense described by Foucault”).

Akehurst, *supra* note 303 at 152. The same device may also be used to assert jurisdiction over offences regarded as “continuing offences”. If a thief brings into State B goods they stole in State A, they may also be regarded as a thief in State B as theft, in this circumstance, is a continuing offence. Akehurst, *ibid* at 153.

*Libman,* *supra* note 202 at para 74.

[1998] 2SCR 597 [*Cook*].

[1971] AC 537 at 564 [*Treacy*].
where that conduct has had no harmful consequences within the territory of the state which imposes the punishment.”

The territoriality principle has also been used as a basis for jurisdiction over foreign criminal conduct that merely produced effects within the territory. This is known as the “effects doctrine”. The doctrine permits a court to take jurisdiction when an activity has “direct or substantial effects” within the territory of the forum state. The connection between the conduct and the state can be described as remote in the sense that, except by those effects, the conduct has no direct connection with the state’s territory. The emergence of the doctrine is linked to changes in legal theory in the early 20th century and in particular to the advent of legal realism that sought to deconstruct the formalistic assumptions that supported the territoriality principle. Realists argued that jurisdictional power could not flow naturally from territorial control, but that “reasonableness” was the appropriate test. The increasing volume of cross-border activities, with the concomitant effect of increasing interdependence of world economies, driven by globalization, rendered the territorial approach to jurisdiction unworkable. This was coupled with the realization that some powerful states, like the US, had used territoriality for ulterior motives, such as to limit grants of constitutional protections and to prevent the enforcement of human and indigenous rights. Strict territoriality receded, and “the prohibition against extraterritoriality weakened to a mere presumption.”

Although the effects doctrine first began to be applied by the US in the realm of commercial cases, including antitrust and securities, other states, such as Germany, Austria, Canada, Finland, Denmark, France, Greece, Norway, Portugal, Spain, and Sweden, have accepted the doctrine within both commercial and criminal spheres – indeed even in the realm of tort – though with varying interpretations of the doctrine and after initial “vigorous and repeated

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532 Cook, supra note 530 at 669.
533 Parrish, “The Effects Test”, supra note 521 at 1457-1458.
536 Parrish, “The Effects Test, supra note 521 at 1470.
537 The doctrine was formulated by Judge learned Hand in United States v Aluminum Company of America, 377 US 271 (1964). Here, Judge Hand applied US Antitrust laws to extraterritorial commercial activities despite the absence of Congressional language making the statutes extraterritorially applicable.
538 See Restatement (Third) of the Foreign Relations Law of the United States, § 403 cmt n 3 (1987) [Restatement (Third) (Foreign Relations)].
protests”. For instance, in Treacy, Bastarache J stated that “it is permissible to assert criminal jurisdiction over acts taking place in another state if they are connected to other acts that take place in the forum state which are in furtherance of criminal behaviour, or if the acts in the other state have some pernicious consequence within the forum.”

3.4.1.2 The Nationality Principle

The nationality principle allows a state to assert jurisdiction over the extraterritorial conduct of its nationals. The rationale for such jurisdiction has been explained as follows: (1) nationals owe allegiance to their states regardless of where they are; (2) states owe certain responsibilities to one another for the conduct of their nationals wherever they may be; and (3) each state has an interest in the welfare of its nationals while they are abroad. Andrew Strauss has added that if one views the state as “legitimately a nationally defined sovereign entity”, it would be fair for a state to assert nationality jurisdiction, “depending on how we define national sovereignty”. In Hape, while favouring territoriality-based jurisdiction, the Supreme Court of Canada recognized nationality as a valid basis for jurisdiction. One of the policy justifications for extraterritorial action by Canada is to control the public face of Canada. This policy justification supports the nationality principle. It behooves Canada to monitor the behaviour of its corporations both at home and abroad. It provides a strong incentive for Canada to ensure that any Canadian corporation incriminated in criminal/wrongful conduct abroad is brought to justice in Canada. This might be the only way for Canada to demonstrate its abhorrence of such conduct and protect its international image.

540 Treacy, supra note 531 at 667-668. In addition, the Foreign Extraterritorial Measures Act, RSC 1985, c. F-29 contains ample provisions adopting the effects doctrine. See, for instance, sections 3(1), 5(1), and 7(1).
542 Strauss, “Beyond National Law” supra note 505 at 404 (suggesting that we could define national sovereignty to include only the sovereign’s ability to exercise jurisdiction over its nationals).
543 Hape, supra note 184 at para. 60.
544 Coughlan et al, supra note 504 at 33.
Article 8(ii) of the *International Crimes Act 2008* of Kenya\(^{545}\) is an expression of nationality jurisdiction. It authorizes the High Court of Kenya to try persons alleged to have committed any offence under the Rome Statute of the ICC if “at the time of the offence the person was a Kenyan citizen”.

It is possible to construe nationality jurisdiction to refer not only to where the nationality of the offender is the forum state, but equally where jurisdiction is tied to the nationality of the offender regardless of whether it is the forum state or not. For instance, Article 8(ii) of Kenya’s *International Crimes Act* which creates criminal jurisdiction over a person who commits a crime under the Rome Statute if that person “was a citizen of a State engaged in an armed conflict against Kenya” can be viewed as creating nationality-based jurisdiction.

Since this is a nationality-based jurisdiction, for jurisdiction to lie it will be necessary to first establish the nationality of the defendant. The basic rule is that it is the domestic law of a state that determines a person’s nationality. As will be seen below, this rule is recognized by international law. The implication of this is that states may take different approaches to the determination of nationality. Still, international law provides broad guidelines that define the limits of a state’s ability to determine the nationality of a person. These depend, however, on whether the entity is a natural person or a legal person such as a corporation.

I. Nationality of Individuals

Typically, states base nationality of individuals on the birth of a person within the territory of the state, on descent from persons who are already nationals of the state, and on naturalization after birth following fulfillment of laid down residency requirements.\(^{546}\) Under the *Citizenship Act* of Canada, for instance, a person is a citizen of Canada if:

- (a) the person was born in Canada after February 14, 1977;
- (b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents other than a parent who adopted him, was a citizen;
- (c) the person has been granted or acquired citizenship pursuant to section 5 or 11 [i.e. pursuant to a naturalization process in accordance with the act] and, in the case of

\(^{545}\) KEN-2008-L-82568 (entered into force 1 January 2009). This Act is Kenya’s implementing legislation for the Rome Statute.

\(^{546}\) Currie et al, *supra* note 518 at 453.
a person who is fourteen years of age or over on the day that he is granted
citizenship, he has taken the oath of citizenship….547

International law defers to states to determine who are its nationals. In its advisory opinion on
the Nationality Decrees Issued in Tunis and Morocco, the PCIJ stated that “[t]he question
whether a certain matter is or is not solely within the jurisdiction of a State is an essentially
relative question; it depends upon the development of international relations. Thus in the present
state of international law, questions of nationality are, in the opinion of the Court, in principle
within [the] reserved domain [of states].”548 Article 1 of the 1930 Hague Convention on Certain
Questions Relating to Conflict of Nationality Laws549 adopted this position: “It is for each State
to determine under its own laws who are its nationals. This law shall be recognised by other
States in so far as it is consistent with international conventions, international custom, and the
principles of law generally recognised with regard to nationality.” Currie et al note that although
this Hague Convention provision is “not particularly significant in its own right” by reason of the
limited number of ratifications of the Convention, it mirrors the “fundamental starting point” in
customary international law.550

This is not to say, however, that states have unfettered discretion to say who its nationals
are. In its aforesaid advisory opinion, the PCIJ observed that in a matter that, like nationality, is
not in principle regulated by international law, the discretionary power of a state is nevertheless
circumscribed by obligations that the state may have incurred towards other states, so that it can
be said that it is limited by rules of international law.551 In addition, a state’s determination may
equally be challenged “where there is insufficient connection between the State of nationality
and the individual or where nationality has been improperly conferred.”552

The clearest statement on the extent of the restrictions imposed on states by international
law is perhaps found in the ICJ decision in the Nottebohm Case.553 Nottebohm, a German
national by birth, moved to Guatemala in 1905 and established a home, business and family

547 Citizenship Act, RSC 1985, c C-29, s 3.
548 (1923) PCIJ (Ser. B) No. 4 at 24 [Nationality Decrees].
549 12 April 1930, 179 UNTS 89.
550 Currie et al, supra note 518 at 453.
551 Nationality Decrees, supra note 548.
552 J Dugard, “First Report on Diplomatic Protection.” International Law Commission, 52nd Session, UN
In 1939 he travelled from there to Lichtenstein where he obtained Lichtenstein nationality. Germany did not permit dual nationality; so he automatically lost his German nationality. Later, he returned to Guatemala where he was detained and deported to Germany and had his property seized without compensation. Guatemala regarded him as an enemy (German) national as it was in a state of belligerency with Germany at the time. Lichtenstein protested Guatemala’s action and brought a claim for compensation to the ICJ on the basis that Nottebohm was a Lichtenstein, and not a German, national. Guatemala claimed that it did not recognize Lichtenstein as Nottebohm’s nationality. The question before the ICJ was whether Guatemala had an unflagging obligation in international law to recognize Lichtenstein’s unilateral grant of nationality to Nottebohm. The ICJ acknowledged the domestic character of the capacity of states to grant nationality:

It is for Lichtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain.\(^554\)

It added, however, that this discretionary power is not absolute. It described nationality as “a legal bond” and the grant of it as “a juridical expression of a social fact of a connection” between the individual and the granting state.\(^555\) According to the Court, nationality expresses the fact that a person has closer links with the population of the state granting him nationality than with the population of any other state.\(^556\) In order to evaluate the international significance of nationality, therefore, “it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.”\(^557\) Noting that Nottebohm’s connection with Lichtenstein was only tenuous – he had no settled abode in Lichtenstein, no prolonged residence there at the time of his application for naturalization, and no bond of attachment between him and Lichtenstein – and equally noting the existence of a longstanding connection between Nottebohm and Guatemala – he lived there for 34 years and had several

\(^554\) Ibid at 398.
\(^555\) Ibid at 401.
\(^556\) Ibid.
\(^557\) Ibid.
members of his family there – the ICJ decided that Guatemala was under no obligation to recognize Lichtenstein’s grant of nationality to Nottebohm.\textsuperscript{558}

*Nottebohm* has been construed as requiring that there “be an ‘effective’ or ‘genuine’ link between the individual and the state of nationality, not only in the case of dual or plural nationality (where such a requirement is generally recognized), but also where the national possesses only one nationality.”\textsuperscript{559} Currie et al point out one potential danger this approach portends: expatriates may see their nationality fade away as their connection with their state of nationality wanes.\textsuperscript{560} However, the requirement of a real and effective link does not seem consistent with Currie et al’s concerns. This may be the position in some states with regard to nationality obtained by naturalization, but does not seem to be the position in international law enunciated in *Nottebohm*. *Nottebohm* did not hold that Nottebohm’s Lichtenstein nationality faded away as a result of a loss of a real and effective link between him and Lichtenstein. Rather, it held that the nationality Lichtenstein conferred on Nottebohm fell short of what was acceptable in international law because of the circumstances of its grant, with the result that no state could be mandated to recognize it. Certainly Guatemala could have chosen to recognize Nottebohm’s nationality within its own domestic legal system, if it so wished, without being held to have violated international law. It was only because it refused to recognize it that it became an international law question.

The *Flegenheimer Case*,\textsuperscript{561} decided by the United States-Italian Conciliation Commission in 1958, rejected the “fading away” theory (or the effective theory) of nationality. Albert Flegenheimer was a naturalized US national although he spent only a short period of time in the US. Subsequently, he lost his German nationality. The question was whether he was still a US national for purposes of compensation under the terms of a post-World War II peace treaty

\textsuperscript{558} Ibid at 403.
\textsuperscript{559} Dugard, *supra* note 552 at 37.
\textsuperscript{560} Currie et al, *supra* note 518 at 457. One way of curing this danger, Currie et al suggest, is by treating birth in the state of nationality (or descent from nationals of that state) as an unbreakable link with that state. As they point out, however, this proposal does not address cases where the individual’s sole nationality is a product of naturalization. States have begun to address this latter case by way of treaties. Two treaties stand out: the *Convention Relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117, and the *Convention on the Reduction of Statelessness*, 10 August 1961, 989 UNTS 175. Article 8 of the latter requires contracting parties not to “deprive a person of his nationality if such deprivation would render him stateless.” For sates that are parties to this treaty, it may be argued, the absence of a real and effective connection between the individual and the state of nationality would not justify a refusal to recognize the individual’s nationality where such refusal would render the individual stateless.

\textsuperscript{561} Case No 182 (1958), 14 RIAA 327 (20 September 1958).
between the US and Italy. Italy claimed Flegenheimer could not be considered a US national. Although the Commission agreed with this submission for various treaty-based reasons, it rejected Italy’s argument that in the absence of those treaties, Flegenheimer could still not be considered a US national because of the “fading away” theory of nationality.\textsuperscript{562} The Commission made it clear that it was by virtue of state positive law, in application of international treaties to which the US was party, not by virtue of any social fact, family or business ties, that it determined that Flegenheimer had lost his American nationality.\textsuperscript{563}

For countries that assume judicial jurisdiction based on the nationality principle, the \textit{Nottebohm} decision may not have any serious implications. To begin with, it affirmed the discretion of states to determine who its nationals are – it affirmed the discretion of Lichtenstein to regard Nottebohm as its national. No individual can unilaterally renounce its nationality of a particular state without following laid down renunciation procedures. No individual can claim that he has lost real and effective connection with a state of his nationality and on that account is no longer a national of that state. The “fading away” theory was rejected in the \textit{Flegenheimer Case}. Second, what the \textit{Nottebohm} decision preserved was the right of a state to refuse to recognize a state’s diplomatic claim based on nationality. While a state’s definition of nationality within its domestic forum cannot be questioned, a state’s refusal to recognize a claim to nationality must be based on principles of international law since the recognizing state cannot define nationality for the state that conferred it. The limitation imposed on states’ ability to define who their nationals are come into play only in states’ relations \textit{inter se}, and not in their relations with individuals. An individual cannot personally rely on that limitation except through a state on his behalf; even then, it would be in an international, and not a domestic, forum.

\textsuperscript{562} \textit{Ibid} at 377:

But when a person is vested with only one nationality, which is attributed to him or her either \textit{jure sanguinis} or \textit{jure soli}, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law. There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.

\textsuperscript{563} \textit{Ibid} at 377-378.
II. Nationality of Corporations

The nationality of a corporation determines which state has a justifiable interest in it so as to regulate its activities both within and outside the territory of that state. The nature of the interest a state has in a corporation may determine how it defines a corporation’s nationality. In other words, states may define the nationality of a corporation for several purposes, including taxation, choice of law, diplomatic protection, and export control purposes.\(^{564}\) There have been five criteria used by states, namely, the place of incorporation, the place of the corporation’s management powerhouse, the nationality of the corporation’s shareholders, the nationality of the corporation’s managers, and the corporation’s principal place of business.\(^{565}\) At common law, however, the nationality of a corporation is the state where it was incorporated. In contrast, civil law countries define the nationality of a corporation as the state where the corporation’s principal place of business or place of central management is located.\(^{566}\)

While state practice on the nationality of corporations varies – both as between common law and civil law countries, and according to the nature of the interest a state has in a corporation – an international approach is concerned with whether there exist agreed upon rules governing state determination of corporate nationality. Vaughan Williams and Matthew Chrussachi write that in the early days of the joint stock company when the consent of the state was required for the formation of a company, the universally accepted view was that a corporation was the national of the state where it was incorporated.\(^{567}\) Before World War I, however, the prevalent view had changed and corporations were regarded as incapable of having nationality.\(^{568}\) Policy considerations were largely answerable for this change of view:

In many countries it was felt that, with the facilities afforded by the new company laws, there was a serious danger of their nationals being induced to invest their capital in companies incorporated abroad when they should have been incorporated at home. Company promoters, it was said, could in this way form their company under the comparatively lax law of country A, though the capital of the company was subscribed, and its business mainly or wholly carried on, in country B. If the place of incorporation was to determine the nationality of the company, this nationality would

\(^{564}\) Castel, *Extraterritoriality in International Trade*, supra note 513 at 132.

\(^{565}\) Ibid.

\(^{566}\) Ibid.

\(^{567}\) REL Vaughan Williams & Matthew Chrussachi, “The Nationality of Corporations” (1933) 49 LQ Rev 334.

\(^{568}\) William H Roberts, “Corporate Nationality in international Law” (1952) 10 Seminar Jurist 71 at 73 [WH Roberts, “Corporate Nationality”].
in the circumstances be a spurious one, assumed with more or less improper intent. This being so, the Courts, it was argued, should look to the substance rather than to the form and should treat the company as a domestic, instead of a foreign, company, thus obliging it to conform to the national law.\textsuperscript{569}

The change was equally bound up with the doubts as to whether corporations were capable of holding rights and obligations like natural persons. De Vareilles-Sommières stated in 1900 that “the moral personality being a résumé and a representative of the members … has no nationality …. [O]nly the members have nationality.”\textsuperscript{570} An unsigned note in a 1918 edition of Yale law Journal stated that “there are no internationally accepted rules in existence with respect to the nationality and domicile of corporate bodies.”\textsuperscript{571} EJ Schuster argued that “strictly speaking” the concept of nationality is not applicable to corporations. “Nationality imposes duties which can only be performed by human beings and confers rights which only human beings can enjoy.”\textsuperscript{572} Yet, already by 1912, other ideas had entered the legal discourse.\textsuperscript{573} Among the pioneers of these other ideas were Edward Hilton Young and GC Henderson. These two scholars saw nationality in two senses: a legal sense and a political sense. Nationality in the legal sense, according to Young, refers to the personal law of a corporation.\textsuperscript{574} The personal law of a corporation refers to the law under which a corporation was created and under which it carries on “its legal life”.\textsuperscript{575} Nationality in the political sense refers to the functional aspects of a corporation. These functional aspects speak to the commercial activities of a corporation. Both Young and Henderson believed that nationality in the political sense was impossible, as any attempt to establish formal functional connections with a particular state must fail.\textsuperscript{576} But if nationality in the political sense existed at all, Young believed that it would consist mainly of a corporation’s

\textsuperscript{569} Williams & Chrussachi, \textit{supra} note 567.
\textsuperscript{570} G de Vareilles-Sommières, \textit{Les persones morales}, (Paris: Cotillon, 1900) at 645 (cited in Roberts, \textit{supra} note 609).
\textsuperscript{571} “Is an American Corporation Substantially owned by German Stockholders an Alien Enemy?” (Unsigned Note) (1917-1918) 27 Yale LJ 108 at 108-109.
\textsuperscript{573} WH Roberts, “Corporate Nationality”, \textit{supra} note 568.
\textsuperscript{574} Edward Hilton Young, \textit{Foreign Companies and Other Corporations} (Cambridge (UK): Cambridge University Press, 1912) at 111.
\textsuperscript{575} WH Roberts, \textit{supra} note 568 at 74 (adding that a corporation’s personal law also includes the law governing its liquidation and dissolution).
\textsuperscript{576} Young, \textit{supra} note 574; GC Henderson, \textit{The Position of Foreign Corporations in American Law} (Cambridge (UK): Cambridge University Press, 1918) at 42.
right to claim the diplomatic protection of a certain state. Incidentally, in public international law, it is in connection with requests for diplomatic protection that the question of corporate nationality has presented itself most frequently. Writing in 1952, Roberts asserted that the key to resolving the question lay in the “activité sociale” of the corporation, i.e., “in the functional rather than the legal aspects of corporate life.” This view reflected the prevalent practice of states at the time and entailed the lifting of the corporate veil of a corporation. In a 1938 diplomatic note to the Mexican Government, for instance, the British Government argued:

If the doctrine were admitted that a government can first make the operation of foreign interests in its territory dependent upon their incorporation under local law and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign governments could be prevented from exercising their undoubted rights under international law to protect the commercial interests of their nationals abroad.

After reviewing US practice, CC Hyde concluded in 1947:

At the present time the Department of State would probably not be reluctant to interpose on behalf of American shareholders … should the foreign state of incorporation irreparably injure their interests through illegal conduct, or should there be offered no reasonable means of obtaining redress through domestic channels. The decision as to interpose might, however, in the particular case depend upon the extent of American interests involved.

Modern international law, however, aligns with the legal aspects of corporate life. It accepts that nationality may be based on the place of incorporation and/or the head office of the corporation. The ICJ decision in *Barcelona Traction* is, today, the best-known authority on modern international law of corporate nationality.

*Barcelona Traction* was a holding company incorporated in Canada. It had its head office in Canada but with several subsidiaries located across the country and one subsidiary formed pursuant to Spanish law and carrying on business in Spain, eighty-eight percent-owned by Belgians. Owing to financial restrictions the Spanish government imposed on the company’s assets, the company was declared bankrupt by a Spanish court and expropriated by the Spanish

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577 Young, *supra* note 574.
581 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Rep 3 [*Barcelona Traction*].
government. Belgium sought diplomatic protection for the Belgian shareholders by filing this claim at the ICJ. One of the questions put before the ICJ was the question of the nationality of Barcelona Traction. In resolving the issue, the ICJ noted that the rules of international law governing corporate nationality are analogous “only to a limited extent” with those governing the nationality of individuals. It noted state practice as requiring the existence of a “genuine connection” between the state seeking diplomatic protection and the corporation, but stressed that “no absolute test of the ‘genuine connection’ has found general acceptance.” It refused to find an analogy between the issues raised in this case and those raised in Nottebohm.

The ICJ reviewed the concept of the corporation in municipal law. It affirmed the distinction, founded on the distinct legal personality of a corporation, between the corporation and its shareholders. It stressed that a wrong inflicted on a corporation does not trigger responsibility towards the shareholders and that corporate rights are different from shareholders’ rights. This implies that an infringement of shareholders’ interests cannot warrant a claim for diplomatic protection of the corporation by the state of nationality of the shareholders.

The ICJ refused to adopt the nationality of shareholders as a criterion for determining the nationality of corporations. Instead, it recognized Canada as the state entitled to seek diplomatic protection for Barcelona Traction, since Barcelona Traction was incorporated in Canada and had its registered office in Canada. It held that where an unlawful act is committed against a company representing foreign capital, international law allows the national state of the company alone to exercise the right of diplomatic protection to redress the wrong done to the company, emphasizing that “[n]o rule of international law expressly confers such a right on the shareholders’ national State.”

The Court was asked whether there might not be exceptional circumstances where the above general rule of international law would not apply. It attempted to consider two possibilities: (1) where the company has ceased to exist, and (2) where the rightful state lacks capacity to take action. Rather than exploring these hypothetical situations, however, the Court merely observed, with regard to the first possibility, that whilst Barcelona Traction had lost all its Spanish assets and was placed in receivership in Canada, it could not be said that it had ceased to exist or that it had lost its corporate capacity to act. With regard to the second possibility, the

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582 Ibid at para 70.
583 Ibid at para 41.
584 Ibid at para 51.
Court simply observed that the corporation’s Canadian nationality was not questioned by either party to the dispute and that Canada had exercised the right of diplomatic protection for it for many years. Even if Canada ceased to exercise such protection for the corporation, the Court added, it could not be contended that it had lost capacity to do so, and that Canada’s withdrawal of protection cannot explain the exercise of protection by another state.\textsuperscript{585}

It was further argued before the Court that a state could have a right to seek diplomatic protection when foreign investments by its nationals, made as part of that state’s national economic resources, are “prejudicially affected in violation of the right of the state itself to have its nationals enjoy a certain treatment.”\textsuperscript{586} This contention was equally rejected by the Court, which held that such a right must be founded on “treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed.”\textsuperscript{587} There being no such instrument between Belgium and Spain in the case at bar, the right did not exist in the view of the Court.

Finally, it was argued that for equitable considerations, a state should be allowed in certain cases to seek diplomatic protection for its nationals who are shareholders of a foreign corporation if they are victims of a violation of international law. This was also rejected by the Court based on the reasoning that the adoption of this theory would result in competing claims on the part of different states whose nationals hold shares in the corporation, which is capable of creating “an atmosphere of confusion and insecurity in international economic relations.”\textsuperscript{588}

Whatever may be the dark side of \textit{Barcelona Traction}, there is something unstable about the suggestion that the nationality of a corporation formed under the laws of state A can be imputed to state B simply on account of the corporation’s shareholders being largely nationals of state B. Even if one were to look for the intentions of the shareholders or promoters of the corporation as the barometer for determining corporate nationality, the place of incorporation theory is consistent with such a test. By choosing to form the company according to the laws of state A, the shareholders and promoters can almost conclusively be deemed to have chosen state A as their corporation’s nationality. No doubt, this approach would deny many states the right to protect the interests of their nationals who have invested heavily in foreign corporations. “Tramp”

\begin{itemize}
\item \textsuperscript{585} \textit{Ibid} at paras 81-84.
\item \textsuperscript{586} \textit{Ibid} at para 86.
\item \textsuperscript{587} \textit{Ibid} at para 90.
\item \textsuperscript{588} \textit{Ibid} at para 96.
\end{itemize}
corporations may be formed with the object of dubiously carrying on business abroad. However, a more reasonable response might be to reform the law on diplomatic protection with a view to untying the right to exercise diplomatic protection from the nationality of the corporation. Williams and Chrussachi have argued that state protection of its nationals “can surely be met by municipal law without invoking some unsound theory of nationality” and suggested that the company law of every state can contain sufficient safeguards for shareholders to make incorporation abroad no longer worthwhile for dubious promoters.

It is true that *Barcelona Traction* raised only the issue of the right of a state to seek diplomatic protection for a corporation, its theory for determining corporate nationality would likely influence the determination of corporate nationality for purposes other than diplomatic protection in domestic courts especially given the concept of corporate personality that is already firmly established in domestic law. Thus, a state would legitimately claim that a foreign subsidiary of its corporation is not its national. This means that criminal jurisdiction over such a foreign subsidiary cannot be founded upon the nationality principle. Other bases of jurisdiction that are themselves also recognized by international law may however be used to assert jurisdiction. The territorial principle may be invoked to take jurisdiction where some kind of territorial connection between the criminal activity and the forum state is established. As will be seen below, the protective principle may equally be used where a corporation owns the shares of another corporation and it is shown that the former is a mere economic tool of an enemy state. A wholly owned subsidiary may also be treated as a branch of its parent so as to take *in personam* jurisdiction over the parent.

3.4.1.3 The Passive Personality Principle

This closely resembles the nationality principle. The difference between them, however, is that whereas the nationality principle is based on the nationality of the offender, jurisdiction based on the passive personality principle looks at the nationality of the victim of the offence. Jurisdiction is therefore taken by the state of which the victim is a national. As Professor Strauss puts it,

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589 Williams & Chrussachi, *supra* note 567 at 349.
590 *Ibid* (arguing, at 348, that the place of incorporation theory “reduces uncertainty to a minimum”).
591 *Ibid* at 133.
592 *Ibid*. 
albeit almost sarcastically, “by merely interacting with a national, one could by definition enter the sovereign’s jurisdictional ambit.”

Although states have not often embraced it, a good example is when the US hunted, found and prosecuted individuals who were alleged to have bombed its embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania). Another example is Germany’s more recent surrender of Rose Kabuye (a Rwandan national) to France for prosecution for her alleged complicity in the bringing down of an aircraft in which some French nationals were travelling. Canadian criminal legislation itself has a number of passive personality-based offences. For instance, section 8(a) (iii) of the CAHWC Act prescribes a passive personality basis for jurisdiction. It provides for the prosecution of a person who is alleged to have committed an offence under the Act if at the time of the alleged offence the victim is a Canadian. The Criminal Code equally contains provisions permitting passive personality-based jurisdiction. These include various terrorism offences (s. 7(3.73)), offence of torture (s. 269.1), and offences against fixed platforms or international maritime navigation (s. 7(2.1)). These offences implement Canada’s obligation under certain international treaties.

Article 8(ii) of Kenya’s International Crimes Act also creates passive personality jurisdiction when it provides that jurisdiction may be taken over a person who commits a Rome Statute crime if the victim of that crime is a Kenyan citizen.

It is possible to conceive of the passive personality principle as being in operation where jurisdiction is tied to the nationality of the victim generally, regardless of whether the victim’s nationality is that of the forum state or not. Under this definition, the authority of Kenyan courts to try Rome Statute offences where the victim was “a citizen of a state that was allied with Kenya in an armed conflict” pursuant to article 8(ii) of the International Crimes Act would be regarded as an expression of the passive personality principle.

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596 Currie et al, supra note 518 at 462. A civil dimension of passive personality jurisdiction is created by the newly enacted Justice for Victims of Terrorism Act which creates a cause of action for Canadians and permanent residents who are victims of terrorist acts committed either in Canada or elsewhere and grants Canadian courts civil jurisdiction to hear such claims. See section 4 thereof.
It is possible for a corporation to be prosecuted under the passive personality principle since what is required is that the victim of the offence is a national of the forum state. Thus, where a Canadian corporation participates in foreign criminal activity engaging any of the above-mentioned crimes where the victim is a Canadian, such a corporation can be prosecuted under the passive personality principle.

3.4.1.4 The Protective Principle

The protective principle allows a state to take jurisdiction over crimes committed “against its security and integrity or its vital economic interest.” The rationale for such jurisdiction has been identified as follows: the offences “are such that their consequences may be of utmost gravity and concern to the state against which they are directed”, and unless protective jurisdiction is taken, many such offences would go unaccounted for because they do not violate the law of the place where they were committed. What distinguishes the protective principle from the effects doctrine is that although both engage conduct that occurred wholly outside the territory of the state asserting jurisdiction, the protective principle is not founded on any actual or potential deleterious effect of the extraterritorial conduct within the territory. If the act constitutes a real threat to national security, the protective principle would be activated. The focus of the protective principle is the nature of the interest that the conduct violates, and not the situs of the crime or the nationality of the crime’s perpetrators or victims. Lying to a consular officer abroad, for instance, may be viewed as a threat to the national security and sovereignty of the state and so punishable at home based on the protective principle. The recent activities of Julian Asange through his Wikileaks publications may produce a basis for protective jurisdiction over Julian Asange by any state that views those publications as threatening its national security. The protective principle is found in Article 694 of the French Code de Procédure Pénal 1975 which provides that “every alien who, outside the territory of the Republic, commits, either as author or as accomplice, a crime or delict against the security of the State or of counterfeiting the seal of the State or national currency in circulation, or a crime against French diplomatic or

597 Ibid at 463 (citing Shearer).
598 Ibid.
600 Ibid.
consular agents or posts is to be prosecuted and adjudged according to the disposition of French law, whether he is arrested in France or the Government obtains his extradition.”

The Canadian Criminal Code contains provisions that speak to the protective principle. Section 7 gives Canadian courts jurisdiction over hostage-taking, offences against United Nations personnel and various terrorism offences where the crimes are designed to compel the Canadian government to behave in a certain way or, in some cases, are targeted against Canadian government facilities. The US prosecution of those who bombed its embassies in Kenya and Tanzania may also be viewed as an assertion of protective jurisdiction in that the offence was equally against US government facilities and vital interests. This goes to show that a single offence may engage more than one principle of jurisdiction.

Since the protective principle simply requires that the offence be directed against the interest or security of the state seeking to exercise jurisdiction, it offers a feasible theory for the exercise of extraterritorial criminal jurisdiction over a corporation. All that would be necessary is to show that a Canadian corporation participated in the criminal activity resulting in harm to the security or economic interests of Canada. The corporation’s participation need not be direct.

3.4.1.5 The Universality Principle

This is the most controversial theory of jurisdiction even though for centuries it has been exercised to try pirates. It is controversial not because its existence is in doubt, but because of its frequent clash with the territorial integrity of other states, and with respect to the exact category of conduct to which it applies. It is associated with the retreat of the principle of sovereignty on which post-Westphalian international law was founded. The term itself is said to have been coined by Willard Cowles in 1945 in his analysis of the practice of states in

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601 For cases where French courts have asserted protective jurisdiction, see Blakesley, “United States Jurisdiction” *ibid* at 703–704, particularly at n 52.
602 RSC, 1985, c C-46 [*Criminal Code*].
603 *Ibid*.
604 Akehurst, *supra* note 303 at 160.
605 Currie *et al*, *supra* note 518 at 463.
response to “brigandism” – the ancient name for war crimes.\textsuperscript{608} Cowles concluded that every state had jurisdiction to punish war crimes regardless of the time and place of the offence or the victim’s nationality.\textsuperscript{609}

Universal jurisdiction has an ancient genesis. It is existed as early as in “medieval Italy, sixteenth-century Brittany, seventeenth- and eighteenth-century France until 1782, and seventeenth- and eighteenth-century Germany.”\textsuperscript{610} In our time, both international and national courts have recognized it. In Furundzija, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that “international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.”\textsuperscript{611} In Attorney General of Israel v Eichmann, the Supreme Court of Israel stated that “it is the universal character of the crimes in question which vests in every State the authority to try and punish those who participated in their commission”.\textsuperscript{612} It is still recognized as applying to piracy, slave trade, genocide, war crimes, crimes against humanity, and even torture. In Filartiga, Judge Kaufman wrote that “the torturer has become – like the pirate and slave trader before him – hostis humanis generis, an enemy of all mankind.”\textsuperscript{613} Universal jurisdiction has been recognized as applying to certain international human rights abuses and is now a creation of treaty and customary international law.\textsuperscript{614} A number of conventions now require the exercise of universal jurisdiction. The most well known of the conventions are the four Geneva Conventions\textsuperscript{615} and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{616} The Geneva Conventions require the exercise of universal criminal jurisdiction for “grave breaches”, including willful killing, torture and inhuman treatment and willfully

\textsuperscript{608} Willard B Cowles, “Universality of Jurisdiction over War Crimes” (1945) 33 Cal L Rev 177 at 181.
\textsuperscript{609} Ibid at 218.
\textsuperscript{610} Akehurst, supra note 303 at 163.
\textsuperscript{611} Furundzija, supra note 52 at para 156.
\textsuperscript{613} Filartiga, supra note 106 at 890.
\textsuperscript{616} 10 December 1984, 23 ILM 1027 (1984) [Torture Convention].
causing great suffering to others.\textsuperscript{617} The Torture Convention requires states parties to prosecute torturers found within their territory, or extradite them to where they may be prosecuted.\textsuperscript{618} Today, more than one hundred states have adopted some form of universal jurisdiction in their criminal legislation.\textsuperscript{619} Still, the precise category of crimes to which states may apply universal jurisdiction remains controversial. The fact that an act is recognized as a crime under international law does not mean that every state can exercise universal jurisdiction over it.\textsuperscript{620} But there is no doubt that the list is expanding through the vehicle of treaty law.

Two principal accounts explain the theoretical basis of universal jurisdiction: international morality and mutual (or international) convenience. International morality ties universal jurisdiction to crimes (under international law) which are so odious that they shock the conscience of all earthmen and “represent a threat to the international legal order.”\textsuperscript{621} In the words of Emerich de Vattel:

\begin{quote}
[\textit{A\textit{l}}]though the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this those villains, who, by the nature and habitual frequency of their crimes, violate all public safety, and declare themselves the enemies of the human race. Prisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall.\textsuperscript{622}
\end{quote}

All states have therefore come together to criminalize these acts and make them punishable in every state. By contrast, mutual convenience has led international law to grant jurisdiction to all

\textsuperscript{617} See the First Geneva Convention, \textit{supra} note 615 at Article 50; Second Geneva Convention, \textit{supra} note 615 at Article 51; Article 130 of the Third Geneva Convention, \textit{supra} note 615, Article 130; and Fourth Geneva Conventions, \textit{supra} note 615 at Article 147.

\textsuperscript{618} Torture Convention, \textit{supra} note 616 at Articles 4 & 5. For a comprehensive review of treaties requiring universal jurisdiction, see Roger S Clark, “Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg” (1988) 57 Nordic J Int’l L 49 (concluding, at 85, that each of these treaties require universal jurisdiction as a “last resort”).


\textsuperscript{620} \textit{Ex parte Pinochet (Regina v Bartle)}, 37 ILM 1302 at 1313 (1998) (HL) (per Lord Slynn of Hadley).

\textsuperscript{621} \textit{ILA Final Report, supra} note 607 at 3; Akehurst, \textit{supra} note 303 at 162.

states “to punish specified acts that are independently crimes under national law.” Edwin Dickinson captured these two theoretical rationales when he wrote almost a century ago:

> So heinous is the offence considered, so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and the enemies of all mankind. They are international criminals. It follows that they may be arrested by the authorized agents of any state and taken in for trial anywhere. The jurisdiction is universal.

Dickinson was writing in the specific context of the crime of piracy, the most notable example of such crimes. The crime of piracy is defined under national law, but the right to prosecute flows from international law and the prosecution takes place under the national law of the prosecuting country. The indiscriminate manner in which piracy is committed, in terms of paying no regard to the nationality of the victims, and the fact that it is committed on the high seas operated by all states, make it difficult to exercise jurisdiction based on nationality or territoriality, and mutually convenient to allow every state to prosecute.

Unlike the other principles, universal jurisdiction obviates the need to establish some kind of connection with the trial state. It “depends on domestic courts for its application.” In practice, however, states are reluctant to take full advantage of its potentials. Many judges restrict the range of crimes to which they apply it. Many require some link, insisting on the existence of some nexus, either through nationality or through territoriality, for universal jurisdiction to be invoked. Professor Anne-Marie Slaughter calls this requirement of some connection “universal jurisdiction plus”, the plus being provided by one of the other bases of jurisdiction. In addition, since trial in absentia is unknown to international law, the presence of the accused within the forum state is essential for jurisdiction. The exercise of pure universal jurisdiction is, therefore, in practice virtually non-existent. Its purest form would be those situations where the only link required is the presence of the suspect within the territory of the

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623 Ibid.
625 Ibid.
626 Ibid.
627 Slaughter, supra note 501 at 168.
628 Ibid at 169.
629 Ibid at 170.
630 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), [2002] ICJ Rep. 3 [Arrest Warrant Case] (Judge ad hoc van den Wyngaert dissenting, arguing that there is no rule of conventional international law or customary international law prohibiting the exercise of universal jurisdiction in absentia).
state. In other words, personal jurisdiction over the suspect is a *sine qua non* to prosecution. Personal jurisdiction is acquired through the suspect’s presence within the territory of the state. In the US, how this presence is procured is inconsequential. *Ker v Illinois*, 631 decided by the US Supreme Court in 1886, though not dealing with universal jurisdiction, is illustrative of this. The case addressed the issue of a criminal defendant brought before the court by way of a forcible abduction. Frederick Ker had been tried and convicted in the State of Illinois for larceny. His appearance in the Illinois court was procured by means of forcible abduction from Peru. The US Supreme Court rejected Ker’s due process argument, holding that such forcible abduction did not constitute a valid defence to trial by a court that had jurisdiction to try the offence. Also, in *United States v Alvarez-Machain*, 632 Alvarez-Machain was abducted from Mexico and flown to the US by persons who had acted on the instruction of the US Drug Enforcement Agency (DEA). Upon his landing in Texas, he was arrested by DEA officials on charges that he had taken part in the kidnaping, torture and murder of a DEA agent. Meanwhile the US had an extradition treaty with Mexico. The issue before the court was whether a criminal defendant, abducted to the US from a state with which the US had an extradition treaty, could be prosecuted in the US. In other words, does the fact that he was abducted outside US territory and brought to the US deny jurisdiction to US courts? Delivering the opinion of the court (Justices Stevens, Blackmun and O’Connor dissenting), Chief Justice Rehnquist applied the holding in *Ker* and held that Alvarez-Machain was triable in the US. Although Alvarez-Machain pointed to the existence of the extradition treaty between the US and Mexico, and to the fact that the US government was involved in the abduction (unlike in *Ker*), Rehnquist stated that unless the treaty prohibited abduction, “the rule in *Ker* applies, and the court need not inquire as to how respondent came before it.” 633 The US approach may, however, be contrasted with the decision of the Court of Appeal of the Republic of South Africa in *S v Ebrahim* 634 that the prosecution of a person abducted to South Africa from the Kingdom of Swaziland by South African agents was a nullity because such abduction was a violation of international law, wrongful and unlawful and that the

631 119 US 436, 7 S Ct 225 (1886) [*Ker*].
633 *Ibid* at 663. In their dissenting opinion, Stevens, Blackmun and O’Connor, JJ, believed the US government’s participation in the abduction of Alvarez-Machain was critical to the case. They invoked the words of Thomas Paine who wrote that “an avidity to punish is always dangerous to liberty…. He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty he establishes a precedent that will reach to himself.” *Ibid* at 689.
appellant thus abducted could not be said to have been properly brought before the court for the purpose of trial. The practice of most states, however, is to issue an international arrest warrant against the suspect, so that the suspect can be arrested wherever he may be and extradited to the state seeking to prosecute. Such arrest is effected with the consent, if not cooperation, of the law enforcement agencies of the foreign state. Still, it is usually the state with which the criminal conduct is connected that goes as far as issuing an international arrest warrant, and jurisdiction taken by such state is usually based on principles other than universality. Other interested states would wait for the suspect to wander onto their territory.

There have been recent exercises of universal jurisdiction over pirates. In 2009 a Kenyan court convicted ten Somalis of piracy that occurred off the coast of Somalia.\textsuperscript{635} In fact, Kenya has become an international forum of choice for piracy prosecutions. This is remarkable because none of the pirates being tried by Kenya was captured by Kenya but by other countries that have signed piracy prosecution agreements with Kenya following UN Security Council Resolution 1851 of 16 December 2008 urging “States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of” and prosecute pirates.\textsuperscript{636} Kenya has signed such agreements with at least the UK, the US, the European Union, Denmark, China and Canada.\textsuperscript{637} However, the agreements with the US the European Union, China and Canada have collapsed because of the flood of Kenyan courts with pirates, which threatened to collapse of Kenya’s justice system.\textsuperscript{638} The inability of other countries to prosecute pirates is not for lack of an international basis to prosecute, but partly for lack of a domestic legal basis to prosecute and mostly for convenience. Kenya is an attractive trial destination not only because Kenyan laws give Kenyan courts jurisdiction to try pirates, but also because Kenya borders Somalia, which means that it would be easier to transfer captured pirates to Kenya than to fly them to far-off countries. In 2011, however, a US District Court in Norfolk, Virginia, tried and sentenced two Somalis for piracy in which they took control of an

\textsuperscript{635} Ahmed v Republic, Crim App Nos 198, 199, 201, 203, 204, 205, 207 & 207 of 2008 (HCK, 12 May 2009).
\textsuperscript{636} UNSC Resolution, para 3.
\textsuperscript{637} James Thuo Gathii, “Kenya’s Piracy Prosecutions” (2010) 104 AJIL 416 (observing that Kenyan courts have embraced universal jurisdiction over piracy as a norm of international law. \textit{Ibid} at 419).
American yacht, Quest, and killed four Americans in the Arabian Sea. The US has also prosecuted Somali pirates who hijacked a US ship, Maersk Alabama, and held hostage its captain on 1 April 2010. The trials were the first series of piracy trials in the US in one hundred years. A similar trial and conviction took place in The Netherlands in 2010 – the first of its kind in modern Europe. Other similar trials are currently going on in both France and Germany in connection with piracies that occurred in Somalia as well. The German trials are the first in four hundred years – the last trial took place in 1624. These trials are clear expressions of universal jurisdiction although they also meet the requirements of passive personality jurisdiction.

The two theoretical accounts for universal jurisdiction (stated above) both support the exercise of such jurisdiction over corporations. There is no reason in principle why universal jurisdiction should not be taken over a corporation that engages in any of the acts to which universal jurisdiction applies. The mutual convenience account in particular supports the taking of jurisdiction by the state where the parent corporation is situated where it is shown that the parent corporation participated in the foreign criminal conduct, although the territoriality principle provides a clearer and more fitting basis for jurisdiction in such a case since whatever may be the corporation’s involvement in the foreign criminal conduct must have been formulated, either in whole or in part, in the prosecuting state where the corporation is located. Indeed, mutual convenience imposes a heavy duty on such state since it is the only state in a position to prosecute such a parent corporation. Thus, it may be argued that in spite of international criminal law’s failure to regard corporations as subject to international criminal jurisdiction, international law still contains the seeds for the exercise of extraterritorial criminal jurisdiction over corporations. The argument that corporations cannot violate international law cannot apply to domestic criminal prosecution where domestic criminal legislation exists proscribing the commission of international crimes by “any person” in the absence of clear statutory language precluding corporations from liability for international crimes.

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639 United States v Salad, No 11-cr-34 (ED Va 2011).
640 United States v Muse, No 09-cr-00512 (SDNY, 2010).
3.4.2 Civil Jurisdiction

The assumption in *Lotus* was that state jurisdiction is not derived from international law, but that international law merely prescribes limits on state jurisdiction. In the criminal context, we saw a number of those limits in the form of theories. Are those theories immediately transposable to the civil context? In other words, are there any rules in public international law that limit states’ exercise of jurisdiction in civil cases? We are naturally speaking of civil cases with foreign elements, as cases of purely domestic character do not engage the interests of other states and so do not ordinarily invite international law considerations.

Several decades ago, John Wigmore argued that “there is no international rule as to the jurisdiction of courts. Each system has developed, and naturally clings to, those rules for the jurisdiction of its own courts which are considered to be in the interest of the population normally dealt with by them.”\(^{643}\) The authors of the 1962 US Restatement of the Foreign Relations Law shared this view when they wrote that there were “no rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of a private nature.”\(^{644}\) Even if this view was true then, it has lost its acceptance. The authors of the US Restatement of the Foreign Relations Law altered their position in 1987:

The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement. States have long maintained the right to refuse to give effect to judgments of other states that are based on assertions of jurisdiction that are considered extravagant; increasingly, they object to the improper exercise of jurisdiction as itself a violation of international principles.\(^{645}\)

Many scholars also disagree, and have suggested that there are public international law limits on states’ exercise of civil jurisdiction. Professor Ian Brownlie, for instance, has argued that “there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens”,\(^{646}\) suggesting that the international principles governing the exercise of

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\(^{644}\) Restatement, Foreign Relations Law § 19, cmt d at 63 (1962).

\(^{645}\) Restatement (Third) (Foreign Relations), supra note 537.

criminal jurisdiction apply to the exercise of civil jurisdiction as well. Akehurst calls this “an extreme view”.647 Professor John Moore has likewise argued that “the rules governing jurisdiction in civil and in criminal cases [over foreigners] are founded in many respects on radically different principles,” so that assertion of jurisdiction in the one cannot automatically serve as precedent for the other.648 This view is consistent with the way the Supreme Court of Canada has treated civil and criminal jurisdiction.

It is noteworthy that most scholars discussing jurisdictional issues in civil cases of a private nature with foreign elements have assumed that the jurisdictional principles that should be applied are domestic, without giving any consideration to international law.649 Exceptions are however found with scholars examining international human rights cases. Judicial approaches have equally usually been one of looking at the national constitution and statutes, rather than international law, to derive civil jurisdiction in international cases,650 except where there is a clear treaty law dealing with the subject. This sharply contrasts with the courts’ approaches in criminal cases involving foreign elements. In this latter scenario, they frequently look to international law to ascertain that the scope of jurisdiction they are called upon to assume is consistent with international law.

Yet, it is not to be assumed that international law places no limits on the assumption of civil jurisdiction. It is possible that it places limits of a different character. One basic limit is that

647 Akehurst, supra note 303 at 170.
648 John Bassett Moore, Foreign Relations of the United States (1887) at 757 and 806 (cited in Akehurst, ibid at 170.).
650 This is particularly true of the US Supreme Court that has historically been faced with personal jurisdiction questions in cases with foreign elements. See, for instance, Perkins v Benent Consolidated Mining Company, 342 US 432 (1952); Insurance Corporation of Ireland, Ltd. v Compagnie Des Bauxites De Guinee, 456 US 694 (1981); Helicopteros Nacionales de Colombia, SA v Hall, 466 US 408 (1984); and Asahi Metal Industry Co v Superior Court, 480 US 102 (1987). These cases involved foreign parties or foreign defendants in the conflict of laws sense – i.e., not necessarily that they were not US citizens, but that they were either non-US citizens or US citizens sued outside their state of legal residence. The courts in these cases did not consider the applicability of international law but based their determination on the US constitution, statutes and common law doctrines of jurisdiction. However, this approach may be contrasted with the court’s earlier isolated approach in D’Arcy v Ketchum, 52 US (11 How) 165 (1850), where it held that a state could refuse to recognize and enforce a sister state’s judgment for lack of jurisdiction of the sister state and noted that “this is in conformity to the well-established rules of international law, regulating governments foreign to each other.” Also in Pennoyer v Neff, 95 US 714 (1877), the court generated the local requirements for personal jurisdiction by comparing the “well-established principles of public law respecting the jurisdiction of an independent state over persons and property” to the domestic system under the US Constitution.
foreign sovereigns and their diplomatic representatives are immune, as a matter of customary international law, from the jurisdiction of state courts, subject to certain exceptions. This immunity of course applies to both criminal and civil cases. In addition, one finds in the *Lotus* decision a general limit that apparently applies to both criminal and civil cases as well: “the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state.”\(^{651}\) Even then, in practice states do exercise civil jurisdiction over matters which, relatively speaking, have only a tangential connection with their territory. The “permissive rule” *Lotus* talks about therefore seems to be a permissive rule of the forum state itself or that contained in any treaty the forum state has committed itself to. For no state can unilaterally preclude another state from taking jurisdiction over a matter. Such monopolistic jurisdiction would amount to legislating for that other state and to a violation of its sovereignty.\(^{652}\)

Still, beyond these obvious and general limitations, there seem to be no settled specific international principles governing the civil jurisdiction of states in international cases. But there are grounds to assert that some governing rules exist. These rules are, however, not derived from the practice of states, but from specific international conventions especially within the ECC. The following discussion is organized in terms of personal jurisdiction and jurisdiction over extraterritorial conduct to show that while some rules can be commonly observed among states, they are too variegated for any general rule to be derived from them. To be considered separately is the question of whether international law contains any principle supporting universal civil jurisdiction. An important part of jurisdiction in international cases is the recognizability and enforceability of any resulting judgment in other jurisdictions. The rules on recognition and enforcement of foreign judgments therefore play a crucial role in taming the jurisdiction of states. These rules are discussed to see whether any general jurisdictional standards can be derived from them.

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\(^{651}\) *Lotus*, *supra* note 408 at 18.

\(^{652}\) The US Supreme Court has held that, “subject to the restrictions imposed by the Federal Constitution,” every state of the US has the power “to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them.” *McKnett v St Louis & SF Ry*, 292 US 253 (1934). This means that no state can legislatively or judicially abbreviate the jurisdiction of another state.
3.4.2.1 Personal Jurisdiction

At common law, personal jurisdiction is tied to the presence of the defendant within the forum. It is inconsequential, at least in theory, even if the defendant’s presence is ephemeral or for an inconceivably short period of time. This is the law in most common law jurisdictions. However, most courts may halt the proceedings where doing so is necessary to avert injustice to the defendant, or based on the doctrine of forum non conveniens – the doctrine which allows a court properly seized with jurisdiction to decline to hear a case generally because a foreign court is in a better position to meet the ends of justice in the case. In the US, presence-based jurisdiction is embedded in the principle of “tag jurisdiction” which is now swallowed up by the “minimum contacts doctrine”. The US Supreme Court discovered the minimum contacts doctrine in the Due Process Clause of the Fourteenth Amendment and penned it in the 1945 decision in International Shoe Co v Washington: “[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’.”

A major difference between the presence doctrine and the contacts doctrine is that whereas the presence doctrine is tied to the defendant, the contacts doctrine is tied to either the defendant or the subject matter of the dispute. Professor Strauss points out that the contacts doctrine was developed as a response to the reality of economic activity, especially with regard to the involvement of corporations in global business, corporations whose presence in a place could not be precisely determined, thus making it difficult to “tag” them. Although in theory minimum contacts would satisfy the jurisdictional test, courts can still decline to hear the suit based on the doctrine of forum non conveniens.

Aside from presence and contacts, personal jurisdiction may also be produced by the defendant’s consent to the authority of the court. This consent can be evinced by the defendant’s

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653 See, e.g., the English case of Maharanee of Baroda v Wildenstein [1972] 2 QB 283 (CA).
654 326 US 310 (1945).
656 Patrick J Borchers, “Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform” (1992) 40:1 Am J Comp L 121 at 125 [Borchers, “Comparing Personal Jurisdiction”] (arguing, at 127, that although many scholars believe that tag jurisdiction was killed by the minimum contacts doctrine, as a practical matter tag jurisdiction is alive and kicking, citing Burnham v Superior Court, 110 SC 2105).
appearance in court without protest to the jurisdiction of the court. What is required is that the consent be freely given, and not a product of the plaintiff’s fraud. In the US, the consent has been construed widely, and can be drawn constructively. Constructive consent has been applied most especially to corporations. A corporation’s conduct of business within the forum may be construed as constructive consent to the jurisdiction of the forum court. In *Hanson v Denckla*, the US Supreme Court held that a defendant who “purposefully avails itself of the privilege of conducting activities within the forum state”, has fully consented to the personal jurisdiction of the forum court. And in *World-Wide Volkswagen Corp v Woodson*, it stated, conversely, that defendants who had “avail[ed] themselves of none of the privileges and benefits” of the forum state cannot be properly brought under the personal jurisdiction of that forum.

Under these common law rules, service of process is essential to trigger jurisdiction, but it is not the service itself that produces jurisdiction. Jurisdiction predates service and must already exist for service to have meaning. While a judgment that arises from the exercise of presence-based jurisdiction may not be recognized by other states because of the tenuousness of the case to the forum state, no state is known to have objected that such jurisdiction is contrary to international law. Instead, the objecting state typically grounds its refusal to recognize and enforce the foreign judgment on its own notions of jurisdiction. This was what the Supreme Court of Canada did in *Morguard* where it held that for the judgment of a foreign court to be recognized in Canada, the foreign court must have assumed jurisdiction on grounds that comport with Canadian notions of jurisdiction. Canadian notions of jurisdiction require that the grounds manifest a real and substantial connection with the foreign forum. What amounts to a real and substantial connection is dealt with in chapter five.

The approach to personal jurisdiction in civil law countries is different. In some countries, personal jurisdiction is tied to the nationality of the parties, especially that of the defendant. Under Article 14 of the French Civil Code, for instance, French nationality of the parties – even that of the plaintiff alone – can give a French court personal jurisdiction over the parties. This (without the plaintiff’s nationality alone) was also the rule in Medieval Belgium, until 1940 in

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659 444 US 286 at 295.
The Netherlands, and until 1946 in Greece. In many other countries, personal jurisdiction is even tied to the existence of the defendant’s property within the forum. Some of these countries include Austria, Germany, Denmark, Sweden and Switzerland. As with presence-based jurisdiction, judgments that arise from nationality and property-based jurisdictions may not be recognized in foreign courts. This suggests that some additional connection is required for the judgment to be accorded respect by other states.

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662 Under the doctrine of Vermögensgerichtstand, defendant’s ownership of property within a German forum was sufficient for the exercise of in personam jurisdiction over such defendant regardless of his place of domicile. Kuner, ibid at 692. This doctrine is codified in section 23 of the German Code of Civil Procedure 1877 that remains in force till date: “For complaints asserting pecuniary claims against a person who has no domicile (Wohnsitz) within the country, the court of the district within which this person has property (Vermogen), or within which is found the object claimed by the complainant, has jurisdiction.” Under this provision, jurisdiction is not limited to claims having some nexus with the property that is the basis of jurisdiction. Jurisdiction may be asserted against any defendant, natural or legal person. The plaintiff may be German or foreign and need not be domiciled in Germany. Once jurisdiction it established, it continues to inhere in the court even if the defendant ceases to have property in the German forum. The value of the property need not correspond in any particular relation to the value of the claim. Property may be a physical object, debt or some other claim to property or performance but must have an independent value, “some sort of monetary value on the open market”. Even a debt owed a defendant suffices even though it may not lead to actual payment and even if it is the plaintiff that owes the debt. However, the defendant’s property must be owned in good faith, so that, for example, the plaintiff may not rely on the defendant’s claim for costs following a previous lawsuit dismissed with costs. See Kuner, ibid at 695-700 (observing that the expansive nature of Vermögensgerichtstand has led to controversial decisions). See also Born, “Reflections on Judicial Jurisdiction”, supra note 660.

663 Danish Law on Civil Procedure, article 248. See also Born, “Reflections on Judicial Jurisdiction”, supra note 660 at 15.

664 Under the famous “Swedish Umbrella Rule”, a Swedish court can assume jurisdiction based on the presence of the defendant’s property within the Swedish forum. Hans Smit, “Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies” (1972) 21 Int’l & Comp LQ 335 (observing that “[t]he danger of leaving one’s umbrella in Sweden is known the world over. For if a non-resident leaves his umbrella in Sweden, he creates the authority for a Swedish court to cast him in a personal judgment for a debt obligation in any amount.”).

665 Swiss Debt Collection Statute, SCHKG, SSBGV, § 271. See also Born, “Reflections on Judicial Jurisdiction” supra note 660 at 15.

666 Akehurst, supra note 303 at 173 (noting that such a jurisdiction may be unusual in in personam proceedings, but not in matrimonial proceedings).
On the whole, presence-based jurisdiction reflects the territoriality principle of international law since it is tied to some form of connection with the territory of the forum state. Property-based jurisdiction equally reflects the territoriality principle, obviously for the same reason. The same goes for contacts-based jurisdiction although the territorial connection may sometimes only be by effect. Where the territorial connection is only by effect, contacts-based jurisdiction may be justified on the basis of the protective principle. Nationality-based jurisdiction, on the other hand, reflects the nationality principle and, in the case of the French Civil Code that regards the nationality of the plaintiff alone as sufficient to provide the necessary jurisdictional link, the passive personality principle. The categorization of consent-based jurisdiction seems a little complex. Where it is constructive, it speaks to the territoriality principle. But where the defendant simply shows up for trial and submits itself to the jurisdiction of the court, this renders the consideration of any personal jurisdictional basis otiose, for the court’s power over the person of such a defendant is independent of any principle except the consent itself.

However, the real question is whether the fact that most states adopt either (or a combination of) the presence-based, contacts-based, consent-based, nationality-based and property-based jurisdictional standards means that a general rule of international law of state civil jurisdiction could be assumed. Arthur Lenhoff is of the view that this fact “precludes any assumption that a general rule of international law exists to the contrary.”\(^667\) This view is surprising, for, as Lenhoff himself rightly asserts, “[o]nly a practice accepted as law by general consent can be regarded as a rule of customary, that is, general international law.”\(^668\) There does not seem to be sufficient uniformity in state practice in this area to say that a contrary rule of general international law should be assumed to be precluded. Personal jurisdiction in common law states is different than in civil law states, although they sometimes overlap, as, for instance, the existence of property within a state of the US (property-based jurisdiction) may provide the minimum contact sufficient to produce contacts-based jurisdiction in the US. In this instance, property-based jurisdiction meets contacts-based jurisdiction. The conclusion that state practice on personal jurisdiction is not sufficiently uniform to amount to general international law is further buttressed by the fact that the jurisdictional bases are not reflected in the treaties and


\(^{668}\) Ibid.
conventions dealing with jurisdiction and the recognition and enforcement of foreign judgments to which most of the states discussed are parties. Had the states wished that the jurisdictional standards they practiced locally should be generalized, especially in international cases, the jurisdictional treaties they entered into would have reflected that wish. However, what may be assumed as the general rule of international law is that each state is free to fashion its jurisdictional rule as it pleases, subject, however, to the obvious limitation imposed by the customary international law rule of state and diplomatic immunity. Though this amounts to “no-rule”, it is consistent with the Lotus view that states do not derive their jurisdiction from international law, but have their jurisdictions limited by international law. These limits are to be found in treaty law, outside of which a state is free to determine its jurisdictional policy, subject to its constitution.

3.4.2.2 Jurisdiction over Conduct Occurring Abroad

Here, we are dealing with jurisdiction over the conduct itself, as against jurisdiction over the person of the defendant. In the context of extraterritoriality, the question is whether the forum law can govern extraterritorial conduct and, by extension, whether the forum court can adjudicate extraterritorial conduct. In private international law the question is one of whose state’s law governs the conduct. The question in private international law is thus not strictly one of jurisdiction – but of choice of law – as a state can assume jurisdiction and apply another state’s law to the conduct. This may be contrasted with criminal law where it is always the law of the forum state that is applied to the criminal conduct no matter the geography of the conduct. But the fact that the conduct occurred outside the territory of the forum state inevitably triggers jurisdictional considerations in private international law.

Does international law preclude a state court from adjudicating a tort where the conduct took place outside the state’s legislative precincts? From the standpoint of private international law, judicial jurisdiction is not tied to legislative jurisdiction. A state may therefore have judicial jurisdiction over a situation it lacks legislative jurisdiction. But how far can judicial jurisdiction transcend legislative jurisdiction? Lenhoff opines that a state may not assume judicial jurisdiction over situations that are destitute of any contacts with its territory by an “abuse” of its
private international law rules.\textsuperscript{669} The US Supreme Court held in \textit{Lauritzen v Larsen}\textsuperscript{670} that international law neither strives for uniformity of private international law rules, nor restricts any state from making or changing its rules. “[I]t aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own.”\textsuperscript{671} Thus, every state is free to fix for itself the bases for its courts’ exercise of jurisdiction. One state’s extraterritorial laws cannot operate to preclude or limit another state’s jurisdiction even on the same subject matter. In \textit{Tennessee Coal Iron & RR v George}, the US Supreme Court stated that “[j]urisdiction is to be determined by the law of the court’s creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action.”\textsuperscript{672} This was in the context of the federating states of the US. Among sovereign states, this should be even truer. Granted that it does create inter-jurisdictional problems between competing states, states have always had a way of tackling such problems. One of such ways is the use of the doctrine of \textit{forum non conveniens} to decline jurisdiction. Another is the use of anti-suit injunctions to stop a party from commencing proceedings in a foreign court. Although comity may be considered as part of a \textit{forum non conveniens} analysis, it may also serve as an independent basis for declining an otherwise valid jurisdiction. Among these mechanisms, only comity has roots in international law, but even then, is controlled by the foreign policy of each state. \textit{Forum non conveniens} and anti-suit injunctions are purely domestic.

In sum, jurisdiction in international cases of a private nature is not governed by international law, but by the domestic law of each state. The only limitations imposed on each state are its constitution and statutes and, from an international perspective, its willingness to maintain friendly diplomatic relations with other states. These limitations are self-imposed. Hence the conclusion that Akehurst reached in 1973 that “the acid test of the limits of [civil] jurisdiction in international law is the presence or absence of diplomatic protests”\textsuperscript{673} still holds true today.

However, in practice most states require some kind of connection with their territory. The US minimum contacts doctrine still operates to govern jurisdiction over extraterritorial conduct.

\textsuperscript{669} Lenhoff, \textit{ibid} at 16.
\textsuperscript{670} 345 US 571 (1953).
\textsuperscript{671} \textit{Ibid} at 582.
\textsuperscript{672} 233 US 354 at 360 (1914).
\textsuperscript{673} Akehurst, \textit{supra} note 303 at 176.
Canada’s real and substantial connection test applies. These two tests do not require that the conduct be wholly connected with the state. Partial connection would suffice if it meets a threshold that satisfies the court.

3.4.2.3 Treaty-Based Jurisdiction: Brussels I Regulation

Treaties on international civil jurisdiction were conceived mainly in response to the obstacles to recognition and enforcement of foreign judgments created by the varying jurisdictional rules as well as judgment recognition rules among states. The difference in the rules entailed that states denied recognition and enforcement to foreign judgments that were the product of the exercise of jurisdiction based on standards that did not comport with the jurisdictional standard of the recognizing state. This had the practical effect of “one hand taking back what the other hand conferred.” The panacea was found in the conclusion of treaties. Such treaties were meant to bring harmony into the recognition and enforcement rules through the “cross-fertiliz[ation]” of the doctrines and practices in the states parties to the treaties. This would ensure “decisional harmony”, “predictable and easily administered jurisdictional norms” and “free movement of judgments”. The states parties thus agreed to dislodge the dominance of national law and put up unvarying jurisdictional rules that would apply to cases under the treaties. The most remarkable of such jurisdictional treaties are regional, the EU Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, otherwise called “Brussels I Regulation” (which transformed the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters being two of the most notable. Attempts to have a world-wide treaty failed with the collapse of negotiations of the Hague Conference on Private

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675 Ibid at 215.
677 Burbank, supra note 674 at 216,
679 27 September 1968, 8 ILM 229 (1969) [Brussels Convention].
International Law for a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. 681 There is also the 2005 Hague Convention on Choice of Court Agreements, which, though not yet into force and which focuses on exclusive jurisdiction clauses, has a section (Article 8) on recognition and enforcement of foreign judgments resulting from such clauses. 682 The significance of these treaties is that in international cases to which they apply, states parties may base their jurisdiction only on them. For instance, Article 3 of the Lugano Convention explicitly excludes the jurisdiction of states parties based on property within the forum state.

Brussels I Regulation and the Lugano Convention are substantially the same. The latter is intended principally to build up cooperation between the EU states and the European Free Trade Association (EFTA) states. 683 Together, they have produced “an extensive network of harmonized rules of jurisdiction among a wide group of European countries.” 684 The major distinction between the two conventions, however, is that unlike under Brussels I Regulation, the European Court of Justice (ECJ) does not have jurisdiction to give preliminary rulings under the Lugano Convention. 685 This distinction places Brussels I Regulation a step above the Lugano Convention in that it gives Brussels I Regulation greater potentials to generate international jurisprudence capable of attracting high respect outside the contracting states. It also ensures uniformity of interpretations of the convention. For these reasons the following discussion focuses on Brussels I Regulation.

Brussels I Regulation’s precursor the Brussels Convention is a regional treaty concluded by members of the EU to determine the international jurisdiction of the courts of member states and to facilitate mutual recognition and enforcement of judgments within the EU region. The convention, which came into force in 1973, applies to civil and commercial matters regardless of the nature of the adjudicatory body. It does not, however, apply to revenue, customs or

685 Powell & Burt, supra note 683.
administrative matters, matrimonial matters, insolvency proceedings, and wills and succession. The basis for these exclusions has been said to be that either they occupy an unsettled area within the civil/public law divide or the laws of the States parties were, before 1968, highly inconsistent. 686

The original parties to the Regulation’s mother convention (the Brussels Convention) were six: Belgium, France, Germany, Italy, Luxemburg and The Netherlands. Later, the UK, Ireland and Denmark accepted the convention upon joining the EC. 687 The convention was later amended to include new members of the EU as well as the states of the EFTA. 688 Following negotiations that began in 1997, an agreement was reached on 22 December 2000 transforming the convention into a community law instrument through the adoption of Brussels I Regulation. The basic framework of the convention remains unchanged, although there are numerous changes on points of detail. The only convention state where the Regulation does not apply is Denmark. 689 This is because pursuant to Articles 1 and 2 of the Protocol on the position of Denmark, Denmark did not take part in the adoption of the Regulation and so is not subject to its application. 690 And Article 1(3) of the Regulation expressly defines “Member State” for the purposes of the Regulation as “Member State with the exception of Denmark”. The UK and Ireland were originally the subject of special arrangements in relation to the applicability of the Regulation, but they later gave notices of their wish to adopt the Regulation. 691 This does not, however, mean that the Brussels Convention has lost all its force. It remains in force in Denmark and applies in relations between Denmark and the states parties to the Regulation. It also remains operational in the territories of the member states to the Regulation which fall within the

686 Ibid.
687 See Accession Convention of Denmark, the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland, 9 October 1978, 18 ILM 20 (1979).
688 See, e.g., Convention on the Accession of the Hellenic Republic to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice with the Adjustments made to Them by the Convention on the Accession of Denmark, the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland, 25 October 1982; Convention on the Accession of the Kingdom of Spain, and of Portugal to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice with the Adjustments made to Them by the Convention on the Accession of Denmark, the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland, 26 May 1989.
689 Brussels I Regulation, supra note 678, Article 1(3).
690 Ibid at Recital 21.
691 Ibid, Preamble, para 20.
territorial scope of the Brussels Convention and which are excluded from the Regulation pursuant to Article 299 of the Treaty establishing the European Community.\textsuperscript{692}

Unlike pure judgment recognition and enforcement rules that seek to control jurisdiction only at the point the judgment is presented for recognition in a foreign court, the Brussels I Regulation seeks to control jurisdiction from the point of commencement of the suit giving rise to the judgment and then again at the recognition stage. As Professor Borchers describes this (albeit with reference to the Brussels Convention), the Regulation employs both “direct” and “indirect” controls on jurisdiction.\textsuperscript{693} The direct controls are targeted at inflated national jurisdictional rules while the indirect controls are targeted at narrow recognition rules.\textsuperscript{694}

Realizing that contracting states might interpret the provisions of the Convention narrowly, and determined to preserve the spirit and letter of the Convention, by a 1971 Protocol, contracting parties to the Brussels Convention gave the ECJ appellate jurisdiction over the interpretation of the Convention.\textsuperscript{695} This remains unaltered in Brussels I Regulation.

The Regulation begins by outlining its limits. Article 1 states that the Regulation does not apply to revenue, customs or administrative matters; the status or legal capacity of natural persons, rights in property arising out of matrimonial relations, wills and succession; bankruptcy and insolvency proceedings; social security; and arbitration.

The Regulation establishes that defendants shall be sued in their state of domicile regardless of their nationality.\textsuperscript{696} This is regardless of the plaintiff’s domicile. Thus, even if the plaintiff is domiciled in a non-contracting state, jurisdiction lies provided the defendant is domiciled within a contracting state. Conversely, where the plaintiff is domiciled within a contracting state, there is no jurisdiction unless the defendant is also domiciled within a contracting state. This rule, however, does not preclude a contracting state from asserting jurisdiction, pursuant to its national law, over a defendant who is not domiciled within its territory,\textsuperscript{697} but it expresses the territorial limits of the Regulation. The main question for the

\begin{itemize}
\item \textsuperscript{692} \textit{Ibid} at paras 22-23.
\item \textsuperscript{693} Borchers, “Comparing Personal Jurisdiction”, \textit{supra} note 656 at 128.
\item \textsuperscript{694} \textit{Ibid}.
\item \textsuperscript{696} Brussels I Regulation, \textit{supra} note 678 at Article 2(1).
\item \textsuperscript{697} \textit{Ibid} at Article 4(1).
\end{itemize}
purposes of the Regulation therefore is to determine where the defendant is domiciled. Domicile, however, is not defined in the Convention. With regard to that of natural persons, it is left to national law to define. But the law to be applied to define domicile is the law of the country where the defendant is alleged to be domiciled, not necessarily the law of the forum court. With regard to the domicile of corporations and other legal persons, however, the Regulation does not leave it to the internal law of contracting states to decide, but provides a freestanding rule. Its Article 60(1) fixes a legal person’s domicile as the place where it has its statutory seat or central administration or principal place of business. Contracting states cannot deviate from this definition. For the UK and Ireland, Article 60(2) of the Regulation defines what the statutory seat of a legal person means for them: “the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.” The significance of this provision for the purposes of jurisdiction over a foreign subsidiary of a UK or Irish corporation, is that if it can be shown that the foreign subsidiary’s central management and control is exercised by the UK or Irish parent company domiciled in the UK or Ireland, then a UK or Irish court (as the case may be) has jurisdiction over such foreign corporation.

In case of multiple defendants, a court having jurisdiction over one defendant has automatic jurisdiction over all the other defendants, provided the claims against the defendants are so closely related that it is expedient to adjudicate them together to avoid the risk of conflicting rulings from separate proceedings. A court hearing original proceedings equally has jurisdiction to hear third party proceedings relating to the same facts, unless the proceedings were instituted for the sole purpose of removing the third party from the jurisdiction of an otherwise competent court. Counterclaims arising from the same facts as the original claim are also to be decided by the court deciding the original claim. In cases of parallel proceedings, however, the court first seized of jurisdiction has primacy over the court later seized. The court later seised is required to stay its proceedings until the court first seised has determined its jurisdiction. Where the court first seised has determined that it has jurisdiction, the court later

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698 *Ibid* at Article 59.
699 *Ibid*.
700 *Ibid* at Article 6 (1).
701 *Ibid* at Article 6(2).
702 *Ibid* at Article 6(3).
seised shall decline jurisdiction.\textsuperscript{704} In contrast to the Brussels Convention, Brussels I Regulation does not leave to contracting states the determination of when a court is seised. Rather, it provides an autonomous meaning:

[A] court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.\textsuperscript{705}

This definition recognizes that there are divergences in domestic practices. In some jurisdictions originating summonses are filed directly in court before being served on the defendant; in others they are served on the defendant before being lodged with the court. This provision seeks to establish a compromise. While it does not make service of process a requirement in the first alternative, it recognizes that in some jurisdictions service of process on the defendant is the responsibility of the plaintiff. Where the plaintiff fails to take the required steps to effect service on the defendant after the document is lodged with the court, the court cannot be said to be seised of the case. It seems that what is required is that the plaintiff take those steps, not that service be actually effected. What is required is that the plaintiff evince willingness to proceed with the case. In jurisdictions where the document has to be served on the defendant before being filed in court, the court is seised the moment the plaintiff furnishes the serving authority the documents for service, unless the plaintiff is subsequently required to take any steps to have the document filed in court and has failed to take those steps. Like the first alternative, it seems that what is required is that the plaintiff take those steps, not that the documents be actually filed in court. As in the first alternative, the plaintiff is merely required to manifest willingness to proceed with the case.

\textsuperscript{704} Ibid at Articles 27-28.

\textsuperscript{705} Ibid at Article 30. Under the Brussels Convention, the ECJ held that “[f]irst seised” is to be determined under the conflicts rules of the domestic law of the forum state. Zelger v Salinitri (No 2) [1984] ECR 2397. Under English law, for a court to be seised of a matter, the proceedings must be pending before that court. This would be satisfied when service has been effected and not when writ is issued by the court. See Dresser UK Ltd v Falcongate Dredge Management Ltd [1992] 3 All ER 450 (CA).
Article 5 of the Regulation establishes alternative bases of jurisdiction to domicile. In matters relating to contract, the defendant may be sued in the court of the state party where the contract is to be performed.\(^{706}\) In tort matters, a defendant domiciled in the territory of a state party may be sued in the court of another state party in whose territory the wrong occurred or may occur.\(^{707}\) Where the civil claim relates to an act that gives rise to criminal proceedings, the court seised of the criminal proceedings has civil jurisdiction as well.\(^{708}\)

Although the Regulation does not specifically deal with the issue of whether a contracting state has discretion to decline jurisdiction under the Regulation, such as based on the doctrine of *forum non conveniens*, the ECJ has held that the exercise of jurisdiction under the Regulation is obligatory.\(^{709}\) However, a proposal to reform the Regulation is currently being considered by the EC Parliament to allow the application of the doctrine to non-European defendants.\(^{710}\) This amendment will accord with the view expressed early in 1990 by Lawrence Collins that a court of a signatory state can decline jurisdiction in favour of the courts of non-signatory states.\(^{711}\) This view was adopted by the English Court of Appeal in 1992 in *In re Harrods (Buenos Aires) Ltd* when it held that where the alternative forum is a non-contracting state, the doctrine of *forum non conveniens* applies.\(^{712}\) The House of Lords’ decisions in *Connelly*\(^{713}\) and *Lubbe*\(^{714}\) though not explicitly saying so, may be construed as endorsing the same view since it undertook an extensive consideration of the application of the doctrine. If it had thought that *forum non conveniens* was inapplicable, it would not have gone into a

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\(^{706}\) *Ibid* at Article 5(1).

\(^{707}\) *Ibid* at Article 5(3).

\(^{708}\) *Ibid* at Article 5(4).

\(^{709}\) *Owusu v Jackson*, ECJ, 1 March 2005, C-281/02 (decided under the Brussels Convention) [*Owusu*]. See also the English case of *Arkwright Mutual Ins Co v Bryanston Ins Co* [1990] 1 All ER 335 (holding that *forum non conveniens* cannot be invoked even in favour of courts of non-contracting states). See also Peter Schlosser, *Report of the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice* (1979) OJ Eur Comm (No C 59) 71 at 97-99, online: Archive of European Integration, <http://aei.pitt.edu/1467/1/commercial_reports_schlosser_C_59_79.pdf> (last accessed 10 May 2011); and Borchers, *supra* note 696 at 128.


\(^{712}\) [1992] Ch 72 at 96-98.

\(^{713}\) *Supra* note 353.

\(^{714}\) *Supra* note 353.
consideration of the applicable factors at all let alone gone to the length that it did in assessing the factors.

The second aspect of jurisdictional control created by the Regulation is that courts of states parties should recognize and enforce judgments of courts of other states parties without special procedure.\textsuperscript{715} Findings of fact upon which the court that gave the judgment based its jurisdiction are not to be disturbed.\textsuperscript{716} And a review of the substance of the foreign judgment is strictly prohibited.\textsuperscript{717}

In a nutshell, the Brussels I Regulation is a jurisdictional expression of the states within the EU and EFTA region. It is limited to international cases. Domicile provides the basic jurisdictional nexus. Lastly, the Regulation has no force outside the EU and EFTA region although the judgment recognition arm of the jurisdictional expression could have unacceptable effects on non-states parties. It must be pointed out, however, that a reform of the Regulation is currently being considered by the European Parliament to expand the application of the Regulation to non-contracting countries.\textsuperscript{718} While the Regulation does not require a link between the claimant and the forum, the requirement of a link between the defendant and/or the dispute and the forum prevents it from being regarded as creating a true universal jurisdiction.

With regard to extraterritorial corporate crimes, the Regulation is a viable mechanism for the assumption of jurisdiction over a European parent company implicated in the extraterritorial crimes of its foreign subsidiary. This will come under Article 2 of the Regulation, which permits the court where the defendant is domiciled to take jurisdiction. Article 60 will be invoked to determine the domicile of the corporation. And this will be the statutory seat or central place of administration or principal place of business of the corporation. The jurisdiction of a Dutch

\textsuperscript{715} Ibid at Article 33. Article 34 provides exceptions, namely, where the judgment is contrary to the public policy of the recognizing state; where the judgment is a default judgment and the defendant was not duly served with essential documents; if the judgment is inconsistent with a judgment of a court of the recognizing State in a dispute between the same parties; if the judgment relates to matrimonial matters, wills or succession, if the judgment is inconsistent with an earlier judgment of the court of a non-contracting State relating to the same cause of action and parties. A judgement shall also not be recognized if it was given without jurisdiction in accordance (Article 35(1)). Of these exceptions, however, Article 35(3) prohibits the application of public policy to the jurisdictional rules of the court that gave the judgment.

\textsuperscript{716} Ibid at Article 35(2). See, generally, Morse, “International Shoe”, supra note 684 at 1005-1009.

\textsuperscript{717} Ibid at Article 36.

District Court over a case against Shell by Nigerian plaintiffs was based on the fact that Shell has its principal place of business in The Netherlands. The plaintiffs might as well have brought the suit in England where Shell was incorporated, as the statutory seat of the company. Article 5(3) may also be invoked to enable the state where the wrongful act occurred take jurisdiction. Establishing the place where the wrongful act occurred may be a difficult task, as one might argue that the wrongful act occurred where the actual harm occurred, and another might argue that it occurred where the conduct producing the harm was hatched. Some academic opinions have suggested that the place where the wrongful act occurred is “the place where the parent company is seated, as this is where decisions were made that resulted in the harmful effect abroad.” However, where the plaintiff wishes to sue the subsidiary of the European parent, the domicile requirement provided under Article 2 will bar jurisdiction. The provisions of Article 6(1) which allows jurisdiction over multiple defendants where one of them is domiciled within the member state seeking to assume jurisdiction cannot support jurisdiction over the non-European subsidiary since the Regulation, as it stands now, does not apply to defendants from non-member states. Any member state seeking to assume jurisdiction will have to look to its own rules of private international law. In the Shell case just mentioned, the Dutch court assumed jurisdiction over Shell Nigeria based on Article 7 of the Dutch Code of Civil Procedure, which confers jurisdiction on Dutch courts over foreign defendants if it has jurisdiction over one of the defendants, provided the claims against the defendants are related. Having assumed jurisdiction over Royal Dutch Shell, headquartered in The Netherlands, it held that jurisdiction was proper over Shell Nigeria since the claims against both defendants were interconnected. This exercise of jurisdiction would not have been possible under the Brussels I Regulation.

719 District Court of The Hague, 30 December 2009, Case Number LJN: BK861624 (Oruma); 24 February 2010, Case Number LJN: BM1469 (Ikat Ada Uda); and 24 February 2010, Case Number LJN: BM1470 (Goi), cited in Katinka Jesse and Jonathan Verschuuren, “Country Report: Netherlands” (2011) 1 IUCN Academy of Environmental e-Journal 159-162. The case was filed by four Nigerian plaintiffs, Friends of the Earth Netherlands and Friends of the Earth Nigeria on behalf of Nigerian villagers in Ogoni land of the Niger Delta.


721 The claim against Shell Nigeria was based on negligence relating to environmental damage caused by oil leakages from facilities of Shell Nigeria in Nigeria. The case against Royal Dutch was that it failed its due diligence duty by failing to use its influence and control over Shell Nigeria to prevent Shell Nigeria from causing the alleged environmental damage.
3.4.2.4 Is there a Civil Dimension to Universal Criminal Jurisdiction?

There is controversy over whether there is a civil dimension to universal criminal jurisdiction. After considering developments at national and international jurisdictions, Donald Donovan and Anthea Roberts argue that there is “an increasing recognition that the well-accepted modern rationale for exercising universal jurisdiction to impose criminal penalties also justifies exercising it to provide civil remedies.” They reject the practice of looking for “separate and independent evidence” to establish the existence of universal civil jurisdiction and call for a reconsideration of our understanding of universal jurisdiction to see whether there is not “a civil dimension” to it. After reviewing the history of universal jurisdiction, Beth Stephens argues that there is no basis for a rigid divide between criminal and civil remedies. She argues that the “exclusive focus” on universal criminal jurisdiction is due to “a translation failure, a failure that results in a skewed analysis of the diverse legal systems of the world.” What matters, according to her, is whether the choice of accountability mechanism is appropriate to the goals of accountability. Customary international law and a number of conventions and domestic statutes have been seen by many scholars as expressions of universal civil jurisdiction. These conventions include, most notably, the Torture Convention and Article 6(1) of the European Convention on Human Rights (ECHR). ATCA (and its sister statute, the TVPA) remains the most remarkable universal jurisdictional statute at the domestic level.

I. Customary International Law

Although the meaning of, and what constitutes, customary international law was discussed in chapter two, additional remarks are imperative here, even at the risk of repetition. Customary international law is defined as the general practice of states which, with the passage of time, becomes binding through repeated usage. It is discovered by studying the “customs and usages

723 Ibid.
725 Ibid at 45 (pointing to the “changed and blurred” lines between torts and crimes).
726 4 November 1950, Europ TS No 5.
of civilized nations; and as evidence of these, the works of jurists and commentators.”

Opinions differ as to whether customary international law represents a body of pre- eminent law that underlines the predominance of the interests of the international community over the interests of individual states, or whether it is simply one of a group of connected concepts that underlie this predominance. The most notable of such related concepts are the concepts of *jus cogens* and *obligatio erga omnes*. The preponderance of opinion, however, treats these concepts as categories of customary international law, with *jus cogens* and *obligatio erga omnes* being the highest categories of it.

Mark Janis regards *jus cogens* as higher than customary international law, calling it “international constitutional law”. However, the exact contours of each of the concepts are not without controversy, leading to interchangeable use of the terms. The concept of *jus cogens* is used to refer to a body of “peremptory” norms of such primordial importance that they cannot be abrogated by consent or agreement of states, least of all by a unilateral action of a single state. It is called “compelling law”. Article 53 of the *Vienna Convention on the Law of Treaties* defines *jus cogens* as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Its Article 64 adds that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” The notion of *obligatio erga omnes*, posited (obiter) by the ICJ in the *Barcelona Traction* case, is used to refer to a category of obligations owed by states to the international community as a whole, intended to protect the fundamental values and common interests of all. The difference

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728 *Ibid* (citing *The Paquete Habana*, 175 US 677, 700 (1900)).
733 23 May 1969, 8 ILM 679 (1969) [Vienna Convention].
734 *Barcelona Traction*, *supra* note 621.
between *jus cogens* and *obligatio erga omnes* is that whereas *jus cogens* speaks to the legal status of certain norms, *obligatio erga omnes* speaks to the legal implications, for states, of giving a norm a particular legal status. The two concepts therefore work cooperatively, with *obligatio erga omnes* giving meaning to *jus cogens*. Although the actual relationship between *jus cogens* and *obligatio erga omnes* has not been determined in international law, as Bassiouni captures it, albeit in the context of international criminal law, “the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.” According to Bassiouni, “the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law.” Bartram Brown has argued that universal jurisdiction implies some state obligation. For its part, however, the African Union has argued that the classification of an act as an international crime, likewise its classification as a violation of a norm of *jus cogens*, does not mean that universal jurisdiction lies over such act. Similarly, the existence of an *erga omnes* obligation with respect to the protection of certain international norms “does not mean that States can exercise universal jurisdiction.”

While Bassiouni’s view does not enjoy broad academic support and has not been determined by any international tribunal, some support for Brown’s view may be found in paragraph 6 of the Preamble to the Rome Statute which refers to “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” The duty referred to therein may be described as an *erga omnes* obligation. In this instance, however, it is imposed only on states parties to the Rome Statute. And while the views of the African Union can hardly be questioned, they fail to highlight the fact that the exercise of universal jurisdiction in those circumstances is not clearly prohibited in international law. At the minimum, therefore,

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737 Ibid at 66.
738 Ibid at 65.
741 Ibid.
states have an optional right to exercise universal jurisdiction where *jus cogens* norms are violated, likewise where an *erga omnes* obligation exists to protect certain universal norms.

It has been argued that the very nature of customary international law makes it an inappropriate device for the creation of non-derogable rules as are associated with *jus cogens*.\(^742\) This is because whereas customary international law develops from state practice and *opinio juris*,\(^743\) the notion of *jus cogens* is traced to natural law and not to any acts of states or to *opinio juris*.\(^744\) Being the practice of states, customary international law can be set aside by the agreement of states whereas *jus cogens* cannot. Moreover, *jus cogens* norms are not subject to the persistent objector rule.\(^745\) This explains why *jus cogens* norms are regarded as more powerful than ordinary customary international law norms. Furthermore, customary international law may be said to be weaker than even treaty law. Both are based on state practice (state practice including the act of treaty-making), but treaty law shows the practice more explicitly and incontestably, in the form of written rules, than does customary international law.\(^746\) Although both are based on the consent and agreement of states, the agreement and consent with regard to treaties are explicit and in writing whereas the existence of consent and agreement requires demonstration with regard to customary international law.\(^747\) And whereas the sources of customary international law are vague, modern treaties are in writing and require only a reference to the text of the treaty.\(^748\) In this respect it should be pointed out that the sources of *jus cogens* are as vague as the sources of customary international law. As with customary international law, scholars are not on the same page on what constitutes a *jus cogens* norm, on how a norm ascends to that level, and even on how to establish the existence of such a norm.\(^749\)

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\(^742\) Janis, *supra* note 730 at 360.

\(^743\) The various ways in which customary international law develops were discussed in chapter two.

\(^744\) Janis, *supra* note 730 at 161 (positing that “[*jus cogens* is a legal emanation which grew out of the naturalist school, from those who were uncomfortable with the positivists’ elevation of the state as the sole source of international law.”). See also Parker & Neylon, *supra* note 765 at 419 (arguing that whether or not *jus cogens* is synonymous with natural law, it is surely an attribute of natural law). While this view is correct, both state practice and *opinio juris* equally accompany the existence of *jus cogens* norms.

\(^745\) Parker & Neylon, *supra* note 727 at 418.

\(^746\) Janis, *supra* note 730 at 160.

\(^747\) *Ibid* at 161.

\(^748\) *Ibid*

Be that as it may, it is settled that customary international law and *jus cogens* norms represent a high category of norms,\(^{750}\) with *jus cogens* representing the higher – the highest – category. Their fundamental nature is such that, in the common law tradition, they are regarded as part of the law of the land without the need of a treaty. One of the earliest commentators, William Blackstone, wrote that “the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is to be part of the law of the land.”\(^{751}\) Hersch Lauterpacht regards this as a true description of eighteenth century law.\(^{752}\) Although exactly how the law of nations came to be viewed as part of the common law (of England) is not clear,\(^{753}\) Larocque has pointed out that “the common law certainly had natural law characteristics, holding its principles to be discoverable by right reason conceiving itself as the historical successor to the great legal systems of the past.”\(^{754}\)

Whatever its genesis, it is accepted in Canada that customary international law is part of Canadian law. No treaty or legislation is required to bring it about. In *Bouzari v Islamic Republic of Iran*, the Court of Appeal for Ontario stated that “customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation.”\(^{755}\) In *Hape*, after reviewing English and Canadian jurisprudence the Supreme Court of Canada stated that the principle that customary international law is part of Canadian law has never been rejected in Canada.\(^{756}\) If customary international law is part of Canadian law, it suggests that a cause of action can be founded on it and remedies can be provided for its violation. Lord Denning expressed his belief in the direct domestic enforceability of customary international law when he wrote in *Trendtex Trading Co v Central Bank of Nigeria*:

> I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts would ever recognize a change in the rules of international law. . . .

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\(^{750}\) While states can, by way of treaty law, contract out of customary international law, there is a sense in which customary international law may be said to be higher than treaty law. Because customary international law represents the practice of states, and treaty law simply the express agreement of only those states that have signed onto it, violations of customary international law attract more universal condemnation than violations of treaty law.


\(^{754}\) Larocque, *Civil Actions for Uncivilized Acts*, supra note 192 at 126.

\(^{755}\) (2004) 71 OR (3d) 675, para 65 [Bouzari].

\(^{756}\) *Hape*, supra note 184 at 237.
It seems that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of [customary] international law, as existing from time to time, do form part of our English law.\(^{757}\)

If common law states are obliged or authorized to provide remedies for violations of customary international law, can they do so where the violation took place outside their territory? The codification of torture in the Torture Convention without clear grant of universal civil jurisdiction over torture\(^{758}\) raises the question of whether the international community has not by agreement decided that states confine their jurisdiction to torture committed within their territory, or at least left it open to states to decide whether or not to take jurisdiction in such cases. The weight of academic opinion is that where certain norms have been recognized as \textit{jus cogens}, states are fully entitled to exercise universal jurisdiction over their violation regardless of where the violation occurred, the identity of the perpetrators and that of the victims, and the context in which the violation occurred.\(^{759}\) Besides this, it may be important to consider whether torture is a violation of a norm broadly regarded as a norm of customary international law or a violation of a norm characterized as \textit{jus cogens}. Where it is a violation of a \textit{jus cogens} norm, then even a treaty-based denial of jurisdiction to states to enforce it is inconsequential since a \textit{jus cogens} norm cannot be modified by treaty. Instead, its sheer mention in the Torture Convention without being clear on whether states should enforce it further heightens and fortifies the non-derogable nature of the norm. It is therefore essential to discover the legal characterization of each norm. With regard to torture, Judge Kaufman found in \textit{Filartiga} sufficient evidence within both customary and conventional sources of international law to conclude that torture is so universally condemned as to constitute a violation of customary international law. He equated the torturer with the pirate and slave trader, describing them as “\textit{hostis humanis generis} – enemies of all mankind.”\(^{760}\) In \textit{Furundzija}, the International Criminal Tribunal for the former Yugoslavia

\(^{757}\) (1977) 1 All ER 881 at 889-890 [\textit{Trendtex}].

\(^{758}\) This issue is discussed in detail in the next section.


\(^{760}\) \textit{Filartiga, supra} note 106.
suggested that the violation of a *jus cogens* norm, such as the commission of torture, had legal consequences in the domestic legal system of every state:

The fact that torture is prohibited by a peremptory norm of international law has effect at the inter-State and individual levels. At the inter-State level, it serves to internationally delegitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. … Proceedings could be initiated by potential victims if they had locus standi before a competent international or national body with a view to asking to hold the national measures to be internationally unlawful; or the victim could bring a civil suit for damages in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. …

Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. 761

“It seems to go beyond doubt”, writes Andreas Zimmermann, that torture is not merely a violation of customary international law, but a violation of *jus cogens*. 762 Since once enshrined, a *jus cogens* norm cannot be dislodged by any state, states are authorized to provide remedies for torture victims regardless of where the torture occurred without reference to any treaty. Furthermore, the concept of *jus cogens* does not seem to recognize any distinction between

761 *Furundzija*, *supra* note 52 at paras 155-156.
criminal law and civil law. Therefore any distinction created by any treaty or statute is impotent if it has the effect of modifying the concept of *jus cogens*.

Yet, a case can equally well be made the other way, that while *jus cogens* norms are non-derogable, and that while by virtue of the principle of *obligatio erga omnes* states are required to prevent or punish or remedy their violation, states are free to choose their enforcement methods. There is no norm of *jus cogens* that requires states to use any particular set of enforcement methods to prevent, punish or remedy the violation of *jus cogens* norms. They can choose to use criminal law or civil law. This line of argument may be further strengthened by the argument that the non-derogable character of *jus cogens* norms as established by the Vienna Convention on the Law of Treaties applies only to treaties. That is to say, that the Vienna Convention confines the inviolability of *jus cogens* norms to the application of treaties. In other words, that it does not extend to domestic laws of states. There is some support for this view in the drafting history of the Convention. As Zimmermann has pointed out, during the preparatory work of the International Law Commission on the adoption of the Convention, no efforts were made to extend the notion of *jus cogens* as non-derogable beyond the nullification of inconsistent treaties.763

Yet again, it can be argued that no state would have fully discharged its *erga omnes* obligations where the victims of the violation of a *jus cogens* norm have not been compensated in one form or the other. States may create varying types of remedies to suit local conditions, but to provide remedies they must. Moreover, looking at the nature of *jus cogens* norms, such as the prohibition against torture, it hardly need be stressed that it is in the intra-state sphere, rather than the inter-state sphere, that the violation of these norms would be expected to occur. It is unlikely that states would enter into treaties whose object is to facilitate the commission of torture. By their nature, *jus cogens* norms are directed at the protection of individuals within states, and not at the regulation of interstate relations.764 That the Vienna Convention operates at the interstate level means that states should not enter into treaties or other legal relations that would hamper their individual ability to bring to justice anyone suspected of having violated a *jus cogens* norm regardless of whom the culprit is and regardless of where the violation occurred. Instead, a *jus cogens* prohibition of torture requires states to view torturers as *hostis humanis generis* who

764 Wet, *ibid* at 99-100.
should find no refuge anywhere on earth. States should either bring them to justice within their territory, or send them to where justice may be served.

In sum, it is theoretically possible for states to assert universal civil jurisdiction over conduct that is prohibited by customary international law. Where the conduct rises to the level of violating a norm of *jus cogens*, the lawfulness of asserting universal jurisdiction is even more unquestionable, at least in the absence of a prohibitive rule. The existence of *erga omnes* obligation, even if not mandating the exercise of universal jurisdiction, heightens the legitimacy of exercising it.

Furthermore, if customary international law is automatically part of the common law, it follows, theoretically, that a cause of action can be founded directly upon it. This would be so even if the prohibited conduct cannot be pigeonholed into any theory of liability pre-existing in the common law. This view is supported by the principle contained in the old legal maxim “*Ubi jus ibi remedium*” – where there is a right there is a remedy. Equity does not suffer a wrong to be without a remedy. In the old English case *Asbhy v White*, Lord Chief Justice Holt held that a man who was deprived of his right to vote at an election for Members of Parliament could maintain an action against the Returning Officer who refused to admit his vote. He stated that the man was entitled to damages, for “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy”. This would be so, Holt added, even though the persons he offered to vote for were actually elected, for to do otherwise would be “denying him his English right, and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to chuse such persons, as are to bind a man's life and property by the laws they make.”

The principle has received near universal endorsement. One writer has noted that “[t]he principle is so obviously correct that assent to it is instinctive.” It was one of the principles decided by the US Supreme Court in *Marbury v Madison*. In that case, following the 1800 elections in which Republicans recorded a landslide victory, out-going President Adams made

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765 (1703) 92 ER 126.
766 *Ibid* at 10.
769 5 US 137 (1803).
last-minute judicial appointments. Upon taking office, however, President Jefferson refused to recognize a number of the appointments, personally ordering the Secretary of State not to deliver the commissions. Marbury and three other appointees applied to the US Supreme Court for an order of mandamus compelling the Secretary of State to deliver the commissions. Chief Justice Marshal framed the questions as follows: (1) Had Marbury a right to the commissions? (2) If he had the right, did the laws of the US afford him a remedy? (3) If they afforded him a remedy, was it a mandamus issuing from the Supreme Court? Marshal CJ resolved the first two questions in favour of the applicants. Regarding the last, he held that though mandamus was the appropriate remedy, the Supreme Court lacked original jurisdiction to issue an order of mandamus. Regarding the second question, he wrote: “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded…. [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

The Constitutional Court of South Africa affirmed the principle in August & Anor v Electoral Commission & Ors. A group of prisoners wished to exercise their franchise. No law precluded them from doing so. The only thing preventing them was the imprisonment. The Court employed the maxim ubi jus ibi remedium to direct the government to take steps that would make it practical for the prisoners to vote.

The Nigerian Supreme Court equally affirmed the principle when it stated (per Karibi-Whyte, JSC) in Bello & Ors v A-G Oyo State:

I think it is erroneous to assume that the maxim ubi jus ubi remedium is only an English Common Law principle. It is a principle of universal validity couched in Latin and available to all legal systems involved in the impartial administration of justice. It enjoins the Courts to provide a remedy whenever the Plaintiff has established a right. The Court obviously cannot do otherwise. It is enjoined to eschew reliance on technicalities in the determination of disputes. … The substance of the action rather than the form should be the predominating consideration. The Appellants have relied on the decision of this Court in Falobi v Falobi (1976) I NMLR 169, 171 to argue that even if the writ of summons and statement of claim had not specified a particular law under which the action was brought, the Court will give a remedy where the facts as disclosed fall within a remedy recognised in law. I think this is a correct principle deducible from Falobi v Falobi.

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770 Ibid at 163-166.
771 1999 (3) SA (CC) 1 at para 34.
772 (1986) 5 NWLR (Part 45) 871 (underlining in original).
What the court was saying here was that what the plaintiff needed to show was the existence of a right. Even if a wrong cannot be pigeonholed into a specific existing tort, if the court is satisfied that a wrong has been established, then a remedy ought to be provided. As the common law consists of judge-made rules, any international legal norm that ripens into a norm of customary international law must be recognized by courts as having become part of the common law without waiting for the legislature to do it. As Lord Denning put it, “[i]nternational law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law– without waiting for the House of Lords to do it.”

This means that a plaintiff can directly plead customary international law as the basis of his claim. This plea should be sustained even where there is an inconsistent rule of the common law already in place. Gib van Ert writes:

If [customary] international law is truly to be the law of the land, . . . it must apply even when – perhaps especially when – domestic case law violates it. Unlike conventional international law, where constitutional concerns preclude judges from applying treaties directly in domestic law, there is no reason why judges should not take it upon themselves to assure the compliance of their decisions with custom. It is unbecoming of judges to uphold decisions of their courts that violate international law. Furthermore, it is incongruous for our courts to apply the presumption of conformity, which strives to bring legislation into harmony with international obligations, but not go further and assure that the results of their own adjudication also meet the requirements of international law.

Larocque has queried whether it is proper to distinguish customary international law from domestic law once customary international law is adopted into the common law. It is important to maintain that distinction given the presumption of conformity of domestic law to international law. For the presumption suggests – indeed requires – that those rules of the common law that evolved from judicial decisions should be subordinated to those rules that

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773 Trendtex, supra note 757 at 890.
775 Larocque, Civil Actions for Uncivilized Acts, supra note 192 at 110.
evolved from customary international law. Customary international law is therefore immediately enforceable “as a matter of first principles.”

The implication of the foregoing is that the fact that an extraterritorial violation cannot, in its nature, be categorized under a known domestic tort cannot bar jurisdiction where the wrong is known to customary international law. In other words, the exercise of universal jurisdiction over violations of customary international law cannot be affected by the fact that the customary violation has no conceptual equivalence in domestic law.

II. The Torture Convention

The Torture Convention is frequently referenced as an expression of universal jurisdiction and scholars, such as Donovan and Roberts, have argued that the acceptance of universal criminal jurisdiction under the convention should be carried over to universal civil jurisdiction because the goals of criminal law and civil law are interlocked. Other scholars, such as Andrew Byrnes, have sought to extrapolate universal civil jurisdiction directly from the Torture Convention itself through a broad and purposive reading of it.

The Convention obliges states parties to prosecute all torturers found within their territory regardless of where the torture was committed, or to extradite them to where they may be prosecuted. Article 1 of the Convention, however, imposes an important constraint on the type of torture states are to take measures to prevent or remedy. The torture must have been committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Apparently, this does not mean that only the public official (or other person acting in that capacity) is to be prosecuted. It rather means that a public official (or a person acting in that capacity) must have been involved in the torture. Private torturers are within the purview of the Convention provided a public official was involved. But private torturers who acted on their own are precluded from the reach of the Convention.

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776 Chilenye Nwapi, “International Treaties in Nigerian and Canadian Courts” (2011) 19:1 AJICL 38 at 56 (arguing, however, that the presumption should not be used against rules of native law and custom that have passed the repugnancy test).
777 Larocque, Civil Actions for Uncivilized Acts, supra note 192 at 111.
778 Donovan & Roberts, supra note 722 at 154.
780 Torture Convention, supra note 616 at Articles 4 & 5.
The jurisdiction states are required to exercise under the Articles 4 and 5 of the Convention is universal criminal jurisdiction. However, Article 14 (1) equally obliges states parties to ensure in their legal systems that torture victims “obtain redress and ha[ve] an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” This is without prejudice to any other rights that may exist under the national law of states parties.\(^\text{781}\) Critically, Article 14 does not indicate whether states parties are to provide this civil remedy regardless of where the torture occurred. This is in clear contrast to the provisions on criminal jurisdiction, which explicitly states that the place of torture is immaterial. Larocque suggests that the non-appearance of geographical language in the provision possibly suggests that civil remedies are to be provided without regard to the geography of the torture.\(^\text{782}\) Donovan and Roberts are of the view that the obligation to provide civil remedies regardless of where the torture occurred “is consistent with the text, as it would promote the purpose of the Convention to bring torturers to justice.”\(^\text{783}\) They find “some support” for this reading of the text from the drafting history of the Convention which shows that the words “committed in any territory under its jurisdiction” was added to and later deleted from the text of the Convention, even though “universal jurisdiction appears not to have been discussed during the drafting of Article 14.”\(^\text{784}\) This manner of reading of the text is unpersuasive. It finds no support in the views of states that have considered the import of Article 14. For instance, when the US Senate gave its advice and consent to the US President to ratify the Convention, it appended an “understanding” that “Article 14 of the Convention requires a State Party to provide a private right of action for damages for acts of torture committed in territory under the jurisdiction of that State Party.”\(^\text{785}\) In the second periodic report of Germany to the UN Committee against Torture pursuant to Article 19(1) of the Convention, Germany stated that rehabilitation support it provided for “victims of torture who come to Germany as refugees” went “[b]eyond its duties under article 14 of the Convention.”\(^\text{786}\) New Zealand has also expressed the

\(^\text{781}\) Ibid at Article 14 (2).
\(^\text{782}\) Larocque, Civil Actions for Uncivil Acts, supra note 186 at 260.
\(^\text{783}\) Donovan & Roberts, supra note 722 at 148.
\(^\text{784}\) Ibid.
\(^\text{786}\) Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention, Germany, UN Doc CAT/C/29/Add.2, para 39 (1997).
view that it does not accept that Article 14 requires states parties to provide civil remedies for extraterritorial torture.\textsuperscript{787} Even in those cases where states have provided remedies in the form of rehabilitation services to foreign torture victims, the UN Torture Committee has simply commended such efforts without signifying that those states were under Article 14 obligation to provide the remedies.\textsuperscript{788} In a 2000 report, the Committee commended the US for its “broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the territory of the United States” under the TVPA, without suggesting that the US had an obligation under Article 14 to provide remedies for extraterritorial torture.\textsuperscript{789} The Committee made specific reference to Article 14(2) which provides that “[n]othing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.” This reference more strongly suggests that the Committee believed that the remedy created by the TVPA was rooted in US domestic law than it suggests that the US had an Article 14 obligation to create a cause of action for extraterritorial torture.

Professor Byrne has observed that the Torture Committee has not raised the issue of the obligations of states parties with regard to extraterritorial torture, or even with specific reference to Article 14, in contrast to its continuous insistence in relation to states’ criminal law obligations.\textsuperscript{790} This is not entirely true. In its Conclusions and Recommendations on Canada’s implementation of the Convention, the Committee expressed concerns at “the absence of effective measures to provide civil compensation to victims of torture in all cases”, and recommended that Canada “review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”\textsuperscript{791} However, the wording of these concerns and recommendations are both cautious and vague. The Committee’s use of the words “in all cases” and “to all victims”, when compared to the Committee’s attitude to extraterritorial criminal jurisdiction, might well suggest an inner shyness on the part of the

\textsuperscript{787} See the Second periodic report of New Zealand, UN Doc CAT/C/29/Add.4 (1997).
\textsuperscript{788} See, e.g., Concluding comments on third periodic report of Denmark, UN Doc A/52/44, para 177 (1997).
\textsuperscript{790} Byrne, supra note 779 at 544 (observing, at footnote 19, that the export of weapons or instruments that could be used or misused for torture purposes is one issue that the Committee could have taken up with states as an issue of complicity in extraterritorial torture, but that the Committee has paid no attention to it).
\textsuperscript{791} Conclusions and recommendations of the Committee against Torture: Canada, CAT/C/CR/34/CAN, paras 4(g) &5(f), 7 July 2005.
committee about using words that do not fully accord with their convictions, or at least a lack of certainty about whether extraterritorial civil remedies are contemplated by the Convention. Manfred Nowalk and Elizabeth McArthur suggest that the Committee could have ended its “expression of concern with the words ‘wherever or [by] whomever committed’” so as to remove all doubts.\footnote{792} In \textit{Jones v Saudi Arabia}, Lord Hoffman of the English House of Lords even wondered “why Canada was singled out” by the Torture Committee for such treatment, stressing that “as an interpretation of Article 14 or a statement of international law, I regard it as having no value.”\footnote{793} And in \textit{Bouzari}, the Court of Appeal for Ontario (Canada) stated that “the text of the Convention itself simply provides no answer to the question” whether Article 14 obliges states to provide civil remedies for extraterritorial torture.\footnote{794}

Larocque criticizes the House of Lord’s dismissal in \textit{Jones} of the Torture Committee’s recommendations as improper and as “effectively [undermining] the international legal framework of the convention”.\footnote{795} The Committee, composed of “experts of … recognized competence in the field of human rights”,\footnote{796} is authorized to make “such comments or suggestions on reports submitted to it [by states parties to the Convention] as it considers appropriate.”\footnote{797} As such, its pronouncements, like that of other treaty-monitoring bodies, have persuasive force in international courts and tribunals when these are articulating treaty obligations. National courts also look to those pronouncements when interpreting domestic law.\footnote{798} However, the particular context in which the Committee has over and over again used those very vague expressions in its recommendations to states, instead of clarifying them, despite widespread frustration with the enigmatic character of those expressions, leaves little choice than to regard them as not of much value in the interpretation of Article 14.

\footnote{793} [2006] UKHL 26 § 57 [\textit{Jones}]. It must be pointed out that since the Committee expressed those concerns to Canada, it has expressed similar concerns to some other states, including the Republic of Korea (see \textit{Conclusions and recommendations of the Committee against Torture: Republic of Korea}, UN CAT, 36\textsuperscript{th} Sess, UN Doc CAT/C/KOR/CO/2, 25 July 2006, online: UN, \texttt{<http://daccess-dds- ny.un.org/doc/UNDOC/GEN/G06/432/53/PDF/G0643253.pdf?OpenElement>}) (last accessed 14 June 2011)), Japan (see \textit{Conclusions and recommendations of the Committee against Torture: Japan}, UN CAT, 38\textsuperscript{th} Sess, UN Doc CAT/C/JPN/CO/1, 3 August 2007) and New Zealand (see \textit{Conclusions and recommendations of the Committee against Torture: New Zealand}, UN CAT, 42\textsuperscript{nd} Sess, UN Doc CAT/C/NZL/CO/5, 4 June 2009).
\footnote{794} \textit{Bouzari}, supra note 755 at para. 76.
\footnote{795} \textit{Civil Actions for Uncivil Acts}, supra note 186 at 266.
\footnote{796} Torture Convention, supra note 616 at Article 17.
\footnote{797} \textit{Ibid} at Article 19.
\footnote{798} See generally Nwapi, \textit{supra} note 776 at 38-65.
Byrne suggests that the initial territorial language in Article 14 must have been deleted “to make clear that the revised version was not territorially limited”.\textsuperscript{799} In his expert testimony to the Ontario Court of Appeal in the \textit{Bouzari} case, Professor Christopher Greenwood opined that the territorial language was dropped because they were believed to be otiose as the territorial limitation was already “implicit” in the Article.\textsuperscript{800} The singling out of Article 14 for such treatment makes Greenwood’s view less probable than Byrne’s. Why was the same territorial language not taken away from the other Articles containing explicit territorial limitation? One of such is Article 12 that deals with state investigations of torture. It states that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”\textsuperscript{801} It seems more legitimate to imply territorial limitations in provisions creating investigative jurisdiction, in the absence of clear limiting language, than to do so in provisions requiring the provision of substantive remedies. No one would expect a state to open investigations into allegations of torture that have no connection with its territory or with any of its nationals. Therefore the explicit limitation of states’ investigative jurisdiction in Article 12 suggests, more strongly than not, that the absence, or presence and subsequent deletion, of those limitations from the obligation to provide civil remedies under Article 14 is intended to remove those limitations.

Byrne equally suggests that the deletion might have been the draftsman’s mistake.\textsuperscript{802} There is little support for this from the fact that while the initial inclusion is documented, the subsequent deletion is not.\textsuperscript{803} There is further support for this from the following analysis of Article 14 by President Reagan while submitting the Convention to the US Senate for advice and consent in 1988:

The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for acts of torture occurring abroad. Article 14 was in fact adopted with express reference to “the victim of an act of torture committed in any territory under its jurisdiction”. The italicized wording appears to have been deleted by mistake. This interpretation is confirmed by the absence

\textsuperscript{799} Byrne, \textit{supra} note 779 at 546 (stressing that “it cannot be lightly assumed that a crucially important phrase is dropped for no reason.”).
\textsuperscript{800} \textit{Bouzari}, \textit{supra} not 755, para. 80.
\textsuperscript{801} Italics for emphasis.
\textsuperscript{802} Byrne, \textit{supra} note 779 at 546
\textsuperscript{803} \textit{Ibid.}
of discussion of the issue, since the creation of a “universal” right to sue would have been controversial as was the creation of “universal jurisdiction”, if not more so.  

That the US attached an understanding to Article 14 when ratifying the Convention in 1990 explicitly limiting the scope of the Article to torture committed within the territory of the forum state suggests that the US considered the possibility that the provision might be construed to oblige states to provide remedies for extraterritorial torture, and, not desiring it, did not want to gamble with that possibility.

Larocque argues that Canadian domestic practice provides some evidence of a broad interpretation of Article 14. He points to the Torture Prohibition Act\(^\text{805}\) of the Yukon Territory that creates a civil cause of action for torture. After a preambular acknowledgement that Canada is a party to the Torture Convention, the act provides that “every public official, and every person acting at the instigation of or with the consent or acquiescence of a public official, who inflicts torture on any other person commits a tort and is liable and renders his or her employer liable to pay damages to the victim of the torture.”\(^\text{806}\) The provision lacks any territorial restrictions to the cause of action. Larocque views this as an implicit permission of civil suits against Yukon officials for torture wherever committed.\(^\text{807}\) This reading is surprising given that Larocque has not viewed the absence of territorial language in Article 14 in identical fashion. A better view is that as the act was enacted with the Torture Convention and Canada’s obligations thereunder in mind, rather than seen as providing support for a broad interpretation of the Torture Convention, the Torture Convention should be seen as informing its interpretation. In addition, the presumption against extraterritoriality would operate to give the statute its literal meaning.

The Vienna Convention sets out principles for the interpretation of treaties. Its Article 31(1) requires that the terms of a treaty be interpreted according to their ordinary meaning “in their context and in the light of its object and purpose.” Context is defined under Article 31(2)(a) to include both the text of the treaty itself and any agreements made by the parties in connection with the conclusion of the treaty. It also includes any instrument made by one or more states

\(^{804}\) "Summary and Analysis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", in Message from the President of the United States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 20 May 1988, 100\(^\text{th}\) Congress, 2\(^\text{nd}\) Session, Treaty Doc 100-20, at 13 (1988) (cited in Byrne, ibid).

\(^{805}\) SY 1988 c 26.

\(^{806}\) Ibid at s. 1.

\(^{807}\) Larocque, Civil Actions for Uncivil Acts, supra note 186 at 262.
parties with regard to the conclusion of the treaty and accepted by the other states parties as a treaty instrument. 808 “[A]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” is also taken into account. 809 So is “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” 810 and “any relevant rules of international law applicable in the relations between the parties.” 811 Recourse to “the preparatory work of the treaty and the circumstances of its conclusion” may be had to confirm the meaning arising from Article 31 or to resolve an ambiguity or to prevent a “manifestly absurd or unreasonable” interpretive outcome. 812

We must recall that the text of Article 14 contains no territorial language. This contrasts with some other Articles, in particular those dealing with criminal jurisdiction in the Convention. As the Court of Appeal for Ontario pointed out in Bouzari, “a full textual analysis of the provisions of the Convention shows that the absence of explicit territorial language does not necessarily mean the absence of territorial limitation.” 813 Recourse must then be had to the context of the treaty. The drafting history reviewed above is not of much help; it even further confounds the issue. State practice does not show that any state has interpreted Article 14 as providing civil remedies for extraterritorial torture. The Article 14 Understanding the US attached to its ratification of the Convention limiting article 14’s application to torture committed within the territory of the US qualifies as an instrument made by a state party in connection with the conclusion of a treaty under Article 31(2)(b). Taking into account the text of the Convention and the entire context established by the Vienna Convention, in particular the deletion of the initial territorial language and state practice, there is no firm basis on which to say that Article 14 requires states to provide remedies for torture committed outside their territory.

That said, a more balanced view seems to be that the territorial silence of Article 14 suggests that the Torture Convention authorizes, but does not mandate, the exercise of universal civil jurisdiction over torture. This view seems accurate given that the absence of territorial language cannot be interpreted to mean that the Convention prohibits the exercise of universal jurisdiction.

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808 Vienna Convention, supra note 733 at Article 31(2)(b).
809 Ibid, Article 31(3)(a).
810 Ibid, Article 31(3)(b).
811 Ibid, Article 31(3)(c).
812 Ibid, Article 32.
813 Bouzari, supra note 755 at para 76.
civil jurisdiction over torture. (Such an interpretation would be lacking in logical objectivity.) This view is consistent with the Lotus theory that in the international law of jurisdiction, what is not prohibited is permitted.

Still, does the fact that the Torture Convention allows states to provide civil remedies for torture wherever committed mean that a private right of action can be founded on the Torture Convention? The jurisprudence answers this question in the negative. In Hanoch Tel-Oren v Libyan Arab Republic, Judge Bork stated that a private cause of action cannot be inferred from international human rights law unless it is expressly granted by an international treaty or by customary international law. In his view, individuals do not have a private right of action under the ICCPR because the ICCPR does not explicitly confer a private right of action on individuals. Applying this to the Torture Convention, even if it is accepted that the Torture Convention creates universal civil jurisdiction over torture, individuals cannot found a cause of action directly on it because there is apparently no grant of a private right of action under the Convention. The Convention only obliges states parties to effectuate the provisions of the Convention domestically to enable their citizens enjoy the benefits of the Convention. Until a state enacts implementing legislation, no private right of action can arise.

The Tel-Oren decision appears to have been mirrored in the manner in which Canadian courts have treated the relationship between public and private law rights. In The Queen in the Right of Canada v Saskatchewan Wheat Pool, the Supreme Court of Canada held that a violation of a penal or regulatory statute would not give rise to an independent private cause of action for damages if the statute is silent on the availability of civil remedies. In a later case, the Court of Appeal for Ontario was urged to recognize the tort of discrimination from a breach of the Ontario Human Rights Code. Wilson JA recognized the tort, but not by inferring it directly from the Code. She did so by declaring a new civil cause of action, a common law duty not to discriminate, justifying this by reference to the goals and values the statute sought to promote. On appeal, the Supreme Court overruled Wilson JA, holding that when the legislature creates a comprehensive regulatory enforcement regime (the Code created a complaints procedure that has

814 726 F 2d 774 at 808 (DC Cir 1984) [Tel-Oren].
817 Bhadauria v Board of Governors of Seneca College of Applied arts and Technology (1979), 105 DLR (3d) 707 at 715 (Ont CA).
a board of inquiry that deals with complaints), private and civil actions are excluded.\textsuperscript{818} It distinguished the case from other cases that arose under legislation that, though had “a regulatory authority to prescribe standards enforceable by penal sanction”, it did not “prescribe a regulatory enforcement authority”.\textsuperscript{819} In yet another case, better known as \textit{Dolphin Delivery}, the Supreme Court decided that the Charter does not apply to private litigation or to the common law in the absence of some governmental participation in the conduct that produced the cause of action.\textsuperscript{820} Underlying this decision was that the Charter was intended to regulate the relationship between the government and individuals, and not between individuals \textit{inter se}. In other words, for the Charter to apply, the Government must be a party to the proceedings.

It is apparent that the \textit{Bhadauria} and the \textit{Dolphin Delivery} cases were based on different theories. The theory in \textit{Bhadauria} is that there is a regulatory enforcement mechanism in place for the enforcement of rights guaranteed under the Code, and that where such an enforcement mechanism is effective and comprehensive enough to cover the entire field of the Code, no other enforcement mechanism is permitted. In \textit{Dolphin Delivery}, it is that the Charter does not apply to individuals \textit{inter se}.

The \textit{Bhadauria} theory of comprehensiveness and effectiveness does not seem to have attracted serious academic criticisms. The main concern is when to determine that the remedy provided by a treaty is comprehensive and effective so as to preclude recourse to other measures, including a private right of action. Theodor Meron has argued that to determine whether a treaty precludes resort to other measures, it is necessary to consider the comprehensiveness and effectiveness of the dispute settlement mechanism of the treaty as well as the integrity of the treaty.\textsuperscript{821} Of course, this does not depend “on abstract legal theory but on a good faith interpretation of the terms of the treaty in light of their context and the object and purpose of the treaty.”\textsuperscript{822} Meron states, for example, that the comprehensiveness and effectiveness of the dispute settlement mechanism of the European Economic Commission supports the view that the legal system of the EU is a self-contained regime that precludes alternative measures.\textsuperscript{823}

\textsuperscript{818} Board of Seneca College \textit{v} Bhadauria [1981] 2 SCR 181 [Bhadauria].
\textsuperscript{819} \textit{Ibid} at 189.
\textsuperscript{820} Retail, Wholesale and Department Store Union, Local 580 \textit{v} Dolphin Delivery Ltd [1986] 2 SCR 573 [Dolphin Delivery].
\textsuperscript{822} \textit{Ibid}.
\textsuperscript{823} \textit{Ibid} at 231.
Professor Henkin too has argued against the creation of a presumption in favour of comprehensiveness and effectiveness of human rights treaty’s dispute settlement mechanisms. According to him, there is nothing in the inherent nature of human rights treaties that commends such a presumption.\footnote{Henkin, “Human Rights and ‘Domestic Jurisdiction’” in T Buegenthal, ed., Human Rights, International Law and the Helsinki Accord (New Jersey: Allanheld, Osman & Co Publishers, 1977) at 31.}

Sandra Raponi has criticized the Supreme Court of Canada’s “unsubstantiated assumption” that the remedy provided by the Ontario Human Rights Code is comprehensive and effective. She points to “the backlog of cases” before the Ontario Human Rights Commission, stressing that this backlog undermines the argument that the remedy provided by the Code is effective.\footnote{Sandra Raponi, “Grounding a Cause of Action for Tort in Transnational Law” in Scott, ed, Torture as Tort, supra note 173, 373 at 393.} She considers whether the use of transnational human rights litigation would be compatible with the goals and forms of the mechanisms established under international human rights treaties such as the Torture Convention and the ICCPR.\footnote{Ibid at 394.} She notes the weaknesses of the procedures and remedies provided by human rights treaties and stresses that the effectiveness of the procedures and remedies depends on the goodwill of states. The treaties leave it to states to fashion ways of domestically effectuating the rights guaranteed under them. The primary procedural mechanism of the treaties consists of a reporting system whereby individuals are even given a right to send communications to the enforcement bodies of the treaties.\footnote{Ibid at 394-395.} Raponi concludes from these that allowing individual actions against one’s state does not itself undermine the integrity of the treaties.\footnote{Ibid at 395.} The fact that most of the human rights treaties such as the ICCPR requires individuals to exhaust domestic remedies before bringing communications to the Human Rights Committee established under the Covenant suggests that the treaty system recognizes that the enforcement mechanisms provided under human rights treaties are not the most appropriate way of enforcing the rights they seek to enforce. On the contrary, it evinces a preference for domestic procedures, with international procedures being complementary and serving as the last hope of the victims.\footnote{Ibid.}

Apart from the fact that Raponi’s analysis focuses narrowly on situations where state-officials are the defendants, ignoring situations involving private actors only, it fails to address...
the particular obstacles presented by *Dolphin Delivery* that as the Charter was intended to regulate the relationship between individuals and states, individuals do not have a private right of action except against the state. This is of particular interest. The holding can be criticized for failing to recognize that the traditionally statist nature of international law through which the international protection of human rights developed has given way to the recognition of individuals as both subjects and objects of international human rights law. Virtually all human rights treaties since Nuremberg have recognized or provided explicitly or impliedly for private duties. However the Torture Convention seems to be an exception in that Article 1(1) limits the application of the Convention to acts of torture “committed by or at the instigation of a public official or other person acting in an official capacity.” Besides, it must be pointed out that treaties do not have automatic effect in Canada. So even though individuals are now the major subjects of international human rights treaties, those treaties cannot be given effect to beyond the extent explicitly allowed by domestic law. Therefore how far individuals can enjoy the rights guaranteed by human rights treaties is to be determined by domestic law, and not by the treaties themselves. Although states have an *erga omnes* obligation to protect individuals from rights breaches, this obligation does not seem to arise with every breach of every treaty-protected right. At the minimum, the right in question must be protected by customary international law. This makes it difficult to ground a cause of action on treaty provisions.

Furthermore, where treaty provisions have been domesticated, the domesticating statute must be examined to see whether the rights guaranteed under the treaty have been extended to individuals *inter se* within the state and, if so, to what extent it has. It cannot be legally presumed from the mere act of domestication that individuals can enforce those rights as between themselves. This is why the holding in *Dolphin Delivery* seems legally accurate.

Returning to the *Saskatchewan Wheat Pool* case, a criminal statute must be examined to discover if there is any legislative intent to provide a tort remedy for victims of the crime in addition to criminal prosecution by the state. This is the rule not only in Canada, but also in

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830 The preamble to the African Charter on Human and Peoples’ Rights, 27 June 1981, 21 ILM 58 (1982), for example, recognizes that “the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.” Its Articles 27-29 contains specific duties of individuals towards one another. Other treaties providing for private duties, either explicitly or impliedly, include: the American Convention on Human Rights (Article 29a does so impliedly), the ICCPR (explicit recognition is contained in the Preamble), and the International Covenant on Economic, Social and Cultural Rights (Article 5(1) contains similar provisions to the ICCPR provisions). For a comprehensive review of treaties imposing duties on individuals, see generally, Jordan J Paust, “The Other Side of Right: Private Duties and Human Rights Law” (1992) 5 Harv Hum Rts J 51-64.
Australia, England and the US. The intent to provide a tort remedy is expected to be explicit from the language of the statute. Caroline Forell has, however, suggested that the finding of an implied statutory tort may be justified “where the statute refers to civil liability in some way, and where the statute provides no express remedy, civil or otherwise.” There is some historical antecedent to this view at least in the US. In US tort doctrine, violation of a criminal statute is in certain circumstances negligence per se. This reflects a presumption that a reasonable person obeys the law, whereas one who violates a statute must be negligent. The negligence per se theory was however rejected by the Supreme Court of Canada in Saskatchewan Wheat Pool on the basis that it inflexibly applies the legislature’s criminal standard of conduct to civil cases whereas a civil defendant does not benefit from the defences or protections available in criminal law. The court instead regarded breach of a statutory duty as evidence of negligence, as opposed to negligence per se. Prosser has argued that when the legislature says nothing about civil remedies, “they either did not have a civil suit in mind at all, or deliberately omitted to provide for it.” The Canadian CAHWC Act represents a case of deliberate but implicit omission to provide for civil remedies. The statute not only criminalizes violations of international humanitarian law but also is explicitly a clear domestic implementation of Canada’s commitment to the Rome Statute. However, during the hearings at the House of Commons, Amnesty International (Canada) called for the enactment of civil legislation alongside the statute itself. But this was not done. The call for companion civil legislation presupposes an awareness that in the absence of such legislation, individuals cannot found a civil suit on the criminal statute.

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833 The Restatement (Second) of Torts (1965) para 288B(1) provides that “[t]he unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.” See generally Gregory R Mowe, “Federal Statutes and Implied Private Actions” (1976) 35: 1 Or L Rev 3 at 4. (reviewing the philosophical underpinning of the doctrine of implied statutory tort as well as of early cases that endorsed it).
834 Ibid.
835 Saskatchewan Wheat Pool, supra note 815 at 221.
836 Ibid at 225 (“I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence.”).
It may be easier to imply the existence of tort remedies in regulatory statutes than in criminal statutes. This is because, as the Supreme Court of Canada held in *Bhadauria*, the existence or non-existence of civil remedies in regulatory statutes depends on whether the remedies provided under the statute are comprehensive and effective. This means that for such statutes, even where there is no explicit grant of a private right of action, such a right of action may still be implied if it can be shown that the remedies and procedures provided by the statute are not comprehensive and effective. A state that has domesticated the Torture Convention through the enactment of a criminal statute will therefore be fulfilling its *erga omnes* obligations to prevent or remedy torture by directing the torturer, during sentencing, to pay a compensatory sum to his victims. In the absence of domestic legislation explicitly providing civil remedies to victims of torture, this may be the only legally feasible way of domestically giving effect to Article 14 of the Torture Convention, apart from reparation programmes that states may decide to create.

III. The ECHR

Although a number of human rights instruments have been interpreted as individualizing international human rights violations and as imposing obligation on states to protect individuals from human rights abuses by other individuals or groups, it is the ECHR that has been mostly touted as requiring states parties to do so even where the violations occurred outside the territory of the state. Drafted in 1950 by the Council of Europe, the ECHR is an international treaty

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838 The following conventions have also been frequently cited: the *International Covenant on Civil and Political Rights*, 16 December 1966, 6 ILM 368 (1967) (Article 6(1) states that “[e]very human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” In its General Comment on Art. 6, the Convention’s monitoring committee, the Human Rights Committee, has interpreted the right to life as applicable also in the private sphere: “The Committee considers that State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.” General Comment No. 6, UN Doc. HR/GEN/1/Rev.1 at 6 para 2.); the *American Declaration on the Rights and Duties of Man*, 10 December 1948, (1949) 43 AJIL Supp 133 (Article 2 states that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” In its report in the *Coard* case (Report No. 109/99, case No. 10.951, *Coard et al v the United States*, 29 September 1999, §§ 37, 39, 41 and 43), the Inter-American Commission of Human Rights commented:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – ‘without
designed to protect human rights and fundamental freedoms within the European region. The Convention established the European Court on Human Rights (ECtHR) where individuals who claim their rights have been breached could ventilate their claims. States parties are required to execute the court’s judgments. These last two features, perhaps more than anything else, make the Convention a very innovative instrument.

The relevant portion of the ECHR is Article 6(1). It states, in part, that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Although it is not fully borne out by the text, this provision has been described in the jurisprudence as granting “a right of access to justice” or “a right of access to a court”. In Airey v Ireland, a woman wanted to divorce her husband. She was factually unable to commence legal proceedings against her husband due to the fact that she did not have knowledge of legal proceedings and had no financial means of hiring a lawyer. There was no legal aid. The ECtHR held that Article 6(1) of the ECHR had been violated by Ireland’s failure to provide the necessary legal aid that would grant the woman access to Irish courts. In Osman v...
The United Kingdom, the ECtHR held that the creation of public policy immunity for the police in the UK when sued for negligence in connection with police investigations and suppression of crime was a violation of Article 6(1) of the Convention in that it blocked the claimant’s access to justice. The ECtHR stated that the “water-tight defence” provided by the blanket immunity from civil suit in respect of their acts and omissions in the investigation and suppression of crimes was “a disproportionate restriction on the right of access to a court”. It observed further that:

the application of the rule in this manner without further inquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant’s right to have a determination on the merits of his or her claim against the police in deserving cases.

[It] must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule.

The first contentious issue about Article 6(1) is the scope of the phrase “civil rights and obligations”. Professor Fawcett has suggested that:

[a] broad construction of “civil rights and obligations” in Article 6(1) would … cover all rights or obligations enforceable at law, regardless of whether the parties were individuals, corporations, or public authorities, or the State itself. It has some support in the fact that the expressions “civil rights” or “civil and political rights” have been adopted to describe the contents of the [International Covenant on Civil and Political Rights], which corresponds of course at many points to Section 1 of the European Convention.

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842 Ibid. This decision did not pass without criticism. Writing extra-judicially, Lord Hoffman of the English House of Lords laments:

[T]his decision fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the Courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration.

… … …

It is often said that the tendency of every court is to increase its jurisdiction and the Strasbourg Court is no exception.
This broad reading of Article 6(1) was adopted by the ECtHR in Moreira de zevedo v Portugal:

[T]he right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively. Conformity with the spirit of the Convention requires that the word ‘contestations’ [the French language version of ‘in the determination of his civil rights and obligations’] should not be construed too technically and that it should be given a substantive rather than a formal meaning.844

Under this broad interpretation, it is not necessary that the rights be recognized in the national law of the forum state.845 As Professor Clapham notes, the concurring opinion of three judges in the Osman case (Judges Meyer, Rocha and Casadevall) support this view. They wrote:

Whether or not [the applicants] could rely on any substantive right thereto in domestic law is irrelevant, since they were asserting that they were the victims of a violation of fundamental (and therefore also civil) rights, which had to be secured to them under the Convention, notwithstanding anything to the contrary in domestic law or practice, and since their right to have their case heard in court was also such a right.846

This reading seems in accord with the black-letter meaning of the Article 6(1) provision which does not contain a requirement that the civil rights exist in the national law of the forum state. It seems also, as DJ Haris et al847 and Clapham848 have suggested, that even where the civil rights are to be determined as part of a criminal justice process, they are still civil rights under the meaning of Article 6(1).

There is the further, decidedly more relevant, question of whether Article 6(1) creates a transnational right of access to justice. Professor Clapham has sought to develop such a right from Article 6(1).849 He traces this to the constitutional character of the ECHR recognized by the ECtHR in Loizidou v Turkey (Preliminary Objections) that the Convention represents “a constitutional instrument of the European public order (ordre public)”.850 The ECtHR recalled the “special character of the Convention as a treaty for the collective enforcement of human

848 “Human Rights in the Private Sphere”, supra note 845 at 528.
849 Ibid (italics in original).
rights and fundamental freedoms”.\textsuperscript{851} Clapham argues that this imposes an obligation on states parties to the ECHR to provide torture victims from contracting states access to their courts regardless of whether the torture occurred within the forum state’s territory.\textsuperscript{852} For the obligations created under the ECHR “reflect the importance of greater European unity and an objective European system for the protection of human rights which is not based purely on direct responsibility for the acts of the public officials of that State.”\textsuperscript{853} He stresses further that the ECtHR:

> is not really applying inter-State obligations but rather operating as a sort of Constitutional Court for Europe: defining the scope of the human rights guarantees found in the Convention and articulating rules, principles and policies which are becoming part of the tapestry of European law … at all levels, local, national, international and even in the supranational European Court of Justice.\textsuperscript{854}

The issue of the extraterritorial applicability of the ECHR was notably dealt with by the ECtHR in \textit{Banković v Belgium et al.}\textsuperscript{855} However, the Article in issue in the complaint was not Article 6(1) but Article 1. The complaint concerned bombardments by the North Atlantic Treaty Organization (NATO) that took place in Yugoslavia. While the applicants were victims and relatives of victims of the bombardments, the respondents were states that participated in the bombardments through their membership of NATO. Yugoslavia was not a NATO member state. The acts thus took place outside the territory of the respondent states. The applicants argued that the case concerned a deliberate act approved by each of the respondent states and executed as planned. They stressed that if the ECtHR declined jurisdiction, they would be left without a remedy as they could not bring complaints before the ICJ or the ICTY. The complaint was based on Articles 1 and (alternatively) 15 of the ECHR. Article 1 states: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Article 15 requires states parties to take measures that derogate from their obligations under the Convention, in times of war or other public emergency, to the extent necessary to meet the exigencies of the situation. The ECtHR stressed the extraterritorial nature

\textsuperscript{851} \textit{Ibid} at para 70.
\textsuperscript{852} Clapham, [“Human Rights in the Private Sphere”, supra note 845 at 530.
\textsuperscript{853} \textit{Ibid}.
\textsuperscript{854} \textit{Ibid} at 530-531.
\textsuperscript{855} Decision as to the Admissibility of Application No 52207/99, 12 December 1999 (Grand Chamber) [\textit{Banković}].
of the acts complained of. After reviewing the Convention’s *travaux préparatoires* and relevant state practice and case law in the application of the Convention, the Court expressed the view that Article 1 of the Convention must be interpreted to reflect the essentially territorial notion of jurisdiction.\(^{856}\) It held that the words “within the jurisdiction” contained in Article 1 of the Convention should be given a territorial meaning. But it gave room for an exception: “when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”\(^{857}\) It found no basis to accept the applicant’s alternative suggestion that Article 15 covers all “war” and “public emergency” situations, whether occurring inside or outside the territory of a state party. Instead, Article 15 is to be read subject to the “within the jurisdiction” restriction imposed by Article 1.\(^{858}\)

Two recent decisions of the Court dealt with extraterritorial situations, but the arguments and decisions did not turn on whether the Convention applies extraterritorially. They turned on whether the alleged conduct, which occurred outside the territory of the respondent state, was attributable to the respondent state in light of the alleged involvement of the UN in the conduct. Besides, none of the decisions engaged Article 6(1). However, the facts of both cases are identical, so that a discussion of one – the one based on the ECHR – will suffice.\(^{859}\) *Al-Jedda v the United Kingdom*\(^{860}\) concerned the internment of an Iraqi civilian for more than three years (2004–2007) in a detention centre run by British forces in Basrah, Iraq. During the time of the internment, the Iraqi Interim Government was in power but the Coalition Forces remained in Iraq at the request of the Iraqi Interim Government and with the UN Security Council's authorization. However, Al-Jedda’s internment was maintained by British forces based on suspicions that he had links with terrorist attacks in Iraq. He applied for judicial review in the UK, claiming that his detention violated his right to liberty under Article 5(1) of the ECHR. The British Government argued before the House of Lords that Article 5(1) did not apply because the UN was responsible for Al-Jedda’s detention, having authorized it by the Security Council Resolution 1546, and that as a matter of international law, the Resolution superseded the ECHR. The House of Lords

\(^{856}\) *Ibid* at para 61.
\(^{857}\) *Ibid* at para 71.
\(^{858}\) *Ibid* at para 62.
\(^{859}\) The other case is *Al-Skeini & Others v United Kingdom*, Application No 55721/07.
\(^{860}\) Application No 27021/08 (Grand Chamber), 7 July 2011 [*Al-Jedda*].
rejected the argument that the UN, and not the UK, was responsible for Al-Jedda’s detention in international law. It held, however, that Security Council Resolution 1546 placed the UK under an obligation to intern individuals considered a threat to the security of Iraq and that, in accordance with Article 103 of the UN Charter, that obligation was superior to the UK’s obligation under the ECHR. Al-Jedda applied to the ECtHR. The ECtHR rejected the argument that his internment was attributable to the UN. It noted that at the time of the invasion of Iraq in 2003, there was no UN Security Council resolution providing for role allocation in Iraq in the event that Saddam Hussein was dislodged. After the exit of Saddam, the US and the UK assumed control over the provision of security in Iraq while the UN assumed humanitarian roles. As the UK was in control of Basrah and masterminded Al-Jedda’s detention, it was responsible for his detention as well. On the second argument, that Resolution 1546 permitted internment and took precedence over the ECHR, the Court noted that the resolution did not explicitly provide for internment, but that it simply authorized the coalition forces “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”

As the UN was created not only “[t]o maintain international peace and security,” but also to “achieve international cooperation in … promoting and encouraging respect for human rights and fundamental freedoms”, authorizations by the Security Council must be construed in a manner consistent with states’ ECHR obligations to respect international human rights, unless explicit language to the contrary is used in the authorization.

It is noteworthy that these cases concerned situations where the alleged extraterritorial infractions were committed by states. The relevance of the cases lies in their articulation of the relationship between international human rights obligations and obligations under UN Security Council resolutions authorizing peace-keeping operations. The cases are also significant in their treatment of when a state may be said to be in control of a place outside its territory so as to incur ECHR liability at home if it engages in conduct prohibited by the ECHR. But the issue of the existence of a transnational right in situations where the extraterritorial infraction was committed}

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861 See R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58, 12 December 2007).
862 Al-Jedda, supra note 860 at para 86.
863 Ibid at para 81-83.
865 UN Charter, Article 1(1) and (3).
866 Al-Jedda, supra note 860 at para 109.
by private actors, whether under Article 6(1) or under Article 1 or any other provision of the Convention, has not been litigated either in the ECtHR or in a state party.\textsuperscript{867} The text of Article 6(1) itself does not provide any support for the existence of such a right. It reads, quite simply, “…in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The existence of a transnational right does not seem to find support in the mere idea of the constitutional status of the ECHR. The constitutionalization of the Convention within Europe does not logically make the rights and obligations it creates transnational. Instead, the constitutionalization means that the Convention supersedes any inconsistent domestic law of a state party to the extent of such inconsistency. In addition, the Supreme Court of Canada holding in \textit{Dolphin Delivery} that the Charter is not intended to create a private right of action between individuals might be applied to the ECHR. This means that individuals have no Convention right to sue other individuals or private entities. However, the jurisprudence of the ECtHR does not contain any opinion that the duties created under the Convention are owed exclusively by states. But the right guaranteed under Article 6(1) imposes a direct duty on states to provide access to justice to individuals since it is only states that can provide such access to justice. But the access to justice must be in connection with the rights guaranteed under the Convention. It is not access to justice whenever any individual feels that he/she has a cause of action against anybody, regardless of the foundation of that cause of action. If Convention duties are also owed by individuals, then access to justice is to be provided whether the complaint is against the state or against an individual. In conclusion, in the absence of any clear language “extraterritorializing” Article 6(1), the “within the jurisdiction” curb imposed under Article 1 still applies. This conclusion is consistent with the holding of Aikens J in the English case of \textit{OT Africa line ltd v Hijazy},\textsuperscript{868} where the issue was whether the issuance of anti-suit injunction would violate a party’s right of access to justice. Aitkens J held that Article 6(1) “does not deal at all with where the right to a ‘fair and public hearing before an independent and impartial tribunal established by law’ is to be exercised by a litigant. Rather, the decisive


\textsuperscript{868} [2001] 1 Lloyd’s Rep 76 (QB (Com Ct)).
point in Article 6(1) is that the right must be exercised “somewhere”, i.e., there must be a forum for the exercise of that right. But a plaintiff does not have an unfettered right to choose where to litigate. 869 A forum would be in breach of Article 6(1) if it is the only forum available to the plaintiff but declines to exercise jurisdiction.

3.4.2.5 Developments in the US under ATCA (and the TVPA)

In Filartiga, Kaufman J read ATCA not as creating new rights, but as “opening the federal courts for adjudication of the rights already recognized by international law.”870 He added that “the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.”871 In other words, Kaufman J believed that civil jurisdiction under ATCA should be confined to violations of universally recognized norms, and that such norms already existed.

The status of ATCA as granting universal jurisdiction has not often received the consideration of US courts since Filartiga. In Kadic v Karadzic872 the issue was raised. But instead of relying on ATCA to recognize the exercise of universal civil jurisdiction, the Court of Appeals of the Second Circuit relied on the Third Restatement.873 The Third Restatement provision relied on states that “[i]n general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.”874

In Sosa,875 the US Supreme Court was asked to decide whether ATCA permits private citizens to bring suit against foreign citizens for extraterritorial crimes in violation of the law of nations. After his acquittal in Alvarez-Machain,876 Alvarez-Machain filed suit against the US and

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869 Ibid at 87 (italics in original).
870 Filartiga, supra note 106 at 887 (italics added for emphasis).
871 Ibid at 888.
872 Kadic, supra note 164 at 240.
873 Ibid. See also Talisman (SDNY), supra note 39 at 306; Beanal v Freeport-McMoran, Inc, 969 F Supp 362 at 371 (ED La, 1977).
874 Third Restatement, supra note 39, § 404, cmt b.
875 Supra note 103.
876 Supra note 632.
Sosa who the DEA used to abduct him in Mexico for trial in the US. The suit was founded on a violation of the law of nations under ATCA. The claims against the Government was founded on the *Federal Tort Claims Act*, which waives immunity in actions “for … personal injury … caused by the negligent or wrongful act or omission of any [Government] employee while acting within the scope of his office or employment.” The issue for our consideration, as stated above, is whether ATCA permits suit against foreign citizens for extraterritorial crimes in violation of the law of nations. Australia, Switzerland and the UK submitted a joint *amicus* brief addressing the status of ATCA as granting universal civil jurisdiction. The *amici* argued that ATCA should be construed to restrict jurisdiction to violations with an appropriate link with the US or to violations involving conduct by US nationals. They expressed concerns about how not doing so would interfere with the sovereignty of other states and “impose legal uncertainty and costs.” They noted that although international law recognizes universal criminal jurisdiction in a small category of cases, it does not recognize universal civil jurisdiction “for any category of cases at all” except by consent of states or through the process of customary international law. They rejected the existence of any basis in international law creating a civil cause of action in disputes involving aliens domiciled outside the US, based on activities, on foreign territory, that have no effects within the US. While they recognized that human rights violators should be brought to justice, they believed that assertion of jurisdiction over foreign conduct by aliens is inconsistent with international law and state practice. Instructively, the *amici* contrasted ATCA with the TVPA, describing the latter as “an explicit exercise of extraterritorial jurisdiction based on the ‘universality principle’.” The TVPA, believed to have been enacted in implementation of the Torture Convention, provides for a remedy against “an individual who, under actual or

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\[877\] 25 June 1948, ch 646, Title IV, 62 Stat 982.
\[879\] *Ibid* at 6.
\[880\] *Ibid* at 7.
\[881\] *Ibid* at 2.
\[882\] Government *Amicus Brief*, supra note 878 at 21.
\[883\] Within the US government, there is controversy about the actual relationship between the TVPA and the Torture Convention. While both Congress and the Senate believed the TVPA was passed in implementation of the Torture Convention, the Bush administration rejected this position while signing it into law. In the words of the Senate Judiciary Committee:

This legislation [the TVPA] will carry out the intent of the Torture Convention, which was ratified by the US Senate on October 27, 1990. The Convention obligates states parties to adopt measures
apparent authority, or color of law, of any foreign nation” engages in proscribed forms of torture or extrajudicial killing.\textsuperscript{884} It contains an “exhaustion of local remedies” requirement.\textsuperscript{885} The \textit{amici} opined that even if the courts read into ATCA a requirement that local remedies be exhausted before ATCA jurisdiction could be triggered, it would only “ameliorate, but not eliminate,” their concerns about the potential adverse effects of universal civil jurisdiction.\textsuperscript{886} They however did not seem to have any concerns with the TVPA universal jurisdiction.\textsuperscript{887} The reason appears to be that the TVPA creates a treaty-based jurisdiction. This does not have much to do with “the exhaustion of local remedies” requirement since such a requirement merely “ameliorates, but [does] not eliminate,” the \textit{amici’s} concerns. It is hard to say, from the \textit{amici’s}
position, whether if ATCA jurisdiction in a particular case relates to the category of torture prohibited under the TVPA, without the exhaustion of local remedies requirement, the *amici* would still feel threatened by an assertion of universal civil jurisdiction.

The European Commission also submitted an *amicus* brief in the *Sosa* case. In contrast to the Governments of Australia, Switzerland and the UK brief, however, the Commission took a moderate posture to the issue of the status of universal civil jurisdiction in international law. It avoided direct criticism of universal civil jurisdiction under ATCA and opined instead that neither the existence nor the scope of universal civil jurisdiction was at present well established in international law. It called for the confinement of universal civil jurisdiction to the category of cases that were already subject to universal criminal jurisdiction. It urged the US Supreme Court to consider the exhaustion of local remedies rule. It further advocated for the exercise of universal civil jurisdiction along the lines of the complementarity principle of the Rome Statute of the ICC. According to this principle, states, *vis-à-vis* the ICC, have primacy of jurisdiction over international crimes. It is therefore only when states are unwilling or unable to investigate and/or prosecute suspected offenders would ICC intervention be justified. Applied to universal civil jurisdiction, it is only when the state on whose territory the harm occurred is unwilling or unable to provide remedies to victims of human rights violations would it be justified for US courts (and foreign courts in general) to assume universal civil jurisdiction. These views suggest that the Commission was, at least in principle, not against the exercise of universal civil jurisdiction *per se*. It was more concerned with the danger that universal civil jurisdiction might be abused, if unchecked. Just as it was concerned with the dangers of a denial of access to remedy to victims of human rights violations if states on whose territory the abuses occurred are unwilling or unable to prosecute. The Commission’s position thus partly resembles the position under Article 6(1) of the ECHR that was adopted to prevent a denial of access to justice to victims of human rights abuses.

From a *Lotus* perspective, the approach of the Governments’ brief is inconsistent with international law. The *Lotus* framework considers jurisdictional assertions – regardless of their basis – to be presumptively lawful unless prohibited by a positive rule of international law. The

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889 *Ibid* at 17-22.
891 See Rome Statute, *supra* note 8, Preamble, para 10, and Article 17.
Governments’ brief is under-girded by the view that jurisdictional assertion is presumptively unlawful unless a permissive rule to the contrary exists. According to this view, as no rule exists permitting universal civil jurisdiction, the exercise of universal civil jurisdiction under ATCA is illegal under international law.

Cedric Ryngaert has argued that the *Lotus* framework is the appropriate benchmark on which to measure the lawfulness of universal civil jurisdiction and, by implication, the correctness of the Governments’ position. He considers the effect of persistent foreign objection to the exercise of universal civil jurisdiction in light of *Lotus*. The persistent objector rule applies if a practice is in the process of developing into a rule of customary international law. Ryngaert argues that as the established rule under *Lotus* is that jurisdictional assertions are presumptively lawful under international law, the persistent objector rule can apply only to an emerging prohibitive rule and not to the already existing permissive presumption. This argument has important implications from a purely international legal perspective. It means that it is in fact supporters of the already existing permissive presumption that are in a legal position to use persistent objection to either problematize the internationalization of the purported prohibitive presumption or immunize themselves against its operation. The permissive presumption cannot itself be altered through the principle of persistent objection unless states uniformly oppose it. Opponents of universal civil jurisdiction, such as Australia, Switzerland and the UK, i.e., opponents of the permissive presumption, therefore remain bound by it in spite of their objection.

Ryngaert also considers the significance of the European Commission’s non-condemnation of the US exercise of universal civil jurisdiction, in terms of state practice. Given the Commission’s status as an organ of the European Union, could its views reflect state practice? The International Law Association is of the view that “[t]he practice of intergovernmental organizations in their own right is a form of ‘State practice’.” The issue then is

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894 Ryngaert, *supra* note 892.

895 International Law Association, Committee on the Formation of Customary (General) International Law, Rule 11 (cited in Rynaert, *ibid* at 147).
whether the practice of an organ of an international organization could itself represent state practice. Ryngaert is of the view that if an international organization is conferred with a separate international legal personality, the practice of its organs may contribute to the formation of customary international law.\(^896\) He believes that this may be even truer where “the organ is not composed of representatives of Member States” of the organization, “in which case the organ’s act could not be considered as a series of acts by the individual Member States participating in the organ.”\(^897\) The better view seems to be the opposite, i.e., that where member states of the inter-governmental organization are represented in that organ, the practice of such organ would have a greater potential to lead to the creation of customary international law since it more fully represents state practice, than where member states are not represented in the organ.

The US Supreme Court did not itself have occasion in \emph{Sosa} to consider the international jurisdictional basis of ATCA in situations where the cause of action had no link with US territory or US nationals. But it expressed its willingness to consider, on an appropriate occasion, any possible limits to jurisdiction in such cases, including the recognition of the exhaustion of local remedies theory.\(^898\) In his concurring opinion, however, Breyer J virtually declared the existence of universal civil jurisdiction when he wrote that “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.” For, as many states allow victim compensation in criminal prosecutions, universal civil jurisdiction “would be no more threatening” than universal criminal jurisdiction.\(^899\)

The ICJ jurisprudence contains opinions regarding the international legality of universal jurisdiction under ATCA. In the \emph{Arrest Warrant Case}, although the majority opinion of the court concerned only criminal jurisdiction, Judges Rosalyn Higgins, Pieter Kooijmans and Thomas Buergenthal considered, in a joint separate opinion on jurisdictional issues, the lawfulness of ATCA’s universal civil jurisdiction:

Under the Alien Tort Claims Act, the United States … has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. … While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of State generally.\(^900\)

\(^{896}\) Ryngaert, \textit{supra} note 892 at 147.  
\(^{897}\) \textit{Ibid}, citing the ILA Committee, Rule 11(b).  
\(^{898}\) \textit{Sosa}, \textit{supra} note 103 at 733 n 21.  
\(^{899}\) \textit{Ibid} at 760-763.  
\(^{900}\) \textit{Arrest Warrant Case}, \textit{supra} note 630 at 77, para 48.
The joint separate opinion went on to note that “[t]here is … nothing in [the] case law which evidences an opinio juris on the illegality of such a jurisdiction. In short, national legislation and case law – that is, State practice – is neutral as to the exercise of universal jurisdiction.”\textsuperscript{901} To the Court, even the absence of case law forming the basis of universal jurisdiction does “not necessarily indicate … that such an exercise would be unlawful”.\textsuperscript{902} On the contrary, “national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction”, and “a State is not required to legislate up to the full scope of the jurisdiction allowed by international law.”\textsuperscript{903} Although these statements were made in the context of reviewing state practice on universal criminal jurisdiction, the statements seem to be speaking about universal jurisdiction generally as the statements do not specifically mention universal criminal jurisdiction. The repeated use of the term “universal jurisdiction” as against “universal criminal jurisdiction” is fairly indicative that the judges were referring to universal jurisdiction generally.

In sum, therefore, it can be said that absent the crystallization of a prohibitive rule, universal civil jurisdiction is lawful in certain circumstances. The fact that it is not widely exercised by states does not logically lead to the conclusion that it is unlawful in international law.

3.5 Civil Jurisdiction Over Corporations under ATCA

The facts of \textit{Kiobel} are not unusual in ATCA litigation. A group of Nigerian plaintiffs claimed that Royal Dutch Petroleum Company (a Dutch corporation) and Shell Transport and Trading Company (a British corporation), acting through their Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, aided and abetted the Nigerian government in committing acts against the plaintiffs that amounted to violations of the law of nations. They sought damages under ATCA. As the Second Circuit put it, the action would proceed only if ATCA provides jurisdiction over tort actions brought against corporations for violations of customary

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\textsuperscript{901} \textit{Ibid} at para 45.  \\
\textsuperscript{902} \textit{Ibid}.  \\
\textsuperscript{903} \textit{Ibid}. 
\end{flushright}
international law, otherwise called the law of nations.\textsuperscript{904} The critical issue then is where to look for the answer to the question of whether ATCA provides jurisdiction over tort actions brought against corporations for violations of customary international law. Is it in US domestic law or in customary international law? What law determines jurisdiction under ATCA?

Writing for the court (Judge Leval concurring only in the result and filed a separate opinion), Judge Cabranes stated:

\[\text{T}he\ \text{substantive\ law\ that\ determines\ our\ jurisdiction\ under\ the\ ATS\ is\ neither\ the\ domestic\ law\ of\ the\ United\ States\ nor\ the\ domestic\ law\ of\ any\ other\ country.\ \text{By}\ \text{confering\ subject\ matter\ jurisdiction\ over\ a\ limited\ number\ of\ offenses\ defined\ by\ international\ law,\ the\ ATS\ requires\ federal\ courts\ to\ look\ beyond\ rules\ of\ domestic\ law\ –\ however\ well-established\ they\ may\ be\ –\ to\ examine\ the\ specific\ and\ universally\ accepted\ rules\ that\ the\ nations\ of\ the\ world\ treat\ as\ binding\ in\ their\ dealings\ with\ one\ another.}\textsuperscript{905}\]

Having determined that the answer lies in international law, the court then examined international law to see whether corporations could be held liable for violations of customary international law. After reviewing the evolution of international law since Nuremberg, the court noted that while states are no longer the only subjects of international law, individuals having been recognized as subjects of international law:

\[\text{[f]rom\ \text{the\ beginning,\ however,\ the\ principle\ of\ individual\ liability\ for\ violations\ of\ international\ law\ has\ been\ limited\ to\ natural\ persons\ –\ not\ “juridical”\ persons\ such\ as\ corporations\ –\ because\ the\ moral\ responsibility\ for\ a\ crime\ so\ heinous\ and\ unbounded\ as\ to\ rise\ to\ the\ level\ of\ an\ “international\ crime”\ has\ rested\ solely\ with\ the\ individual\ men\ and\ women\ who\ have\ perpetrated\ it.}\textsuperscript{906}\]

Nine days before the Second Circuit issued its decision, a Californian District Court had reached the same conclusion.\textsuperscript{907} About a year earlier, the Second Circuit had equally come close to reaching this same conclusion when it held in \textit{Talisman} that the scope of ATCA violations should be determined by reference to international law.\textsuperscript{908} I say come very close to reaching that decision because the decision seems limited to a specific issue in the case, namely, whether US

\begin{itemize}
  \item \textsuperscript{904} \textit{Kiobel}, \textit{supra} note 124 at 5.
  \item \textsuperscript{905} \textit{Ibid} at 5-6.
  \item \textsuperscript{906} \textit{Ibid} at 7.
  \item \textsuperscript{907} \textit{Doe I v Nestle}, cv-05-5133 (CD Cal, 8 September 2010).
  \item \textsuperscript{908} \textit{Talisman} (2d Cir), \textit{supra} note 124 at 258.
\end{itemize}
law or customary international law should govern the determination of the proper *mens rea* for aiding and abetting liability. The court held that customary international law governs. This was, strictly speaking, a choice of law determination with little, if any, jurisdictional implications. The DC Circuit toed the *Kiobel* path when it held in *Mohamed v Rajoub* that the Palestinian Liberation Organization, not being a natural person, was not a proper defendant in an, albeit, TVPA litigation. The Court held that the term “individual” used in the TVPA has a narrower meaning than the term “person” used in other statutes. In determining that “individual” refers to natural persons only, it called in aid the US *Dictionary Act* which defines “person” to include “corporations, companies, associations, firms, partnerships, societies, … as well as individuals.” This reasoning will have no effect on the interpretation of ATCA given that the textual language of ATCA does not refer to the category of defendants that may be sued.

The Supreme Court has granted the plaintiffs’ petitions in both *Kiobel* and *Mohamed* for writ of *certiorari* to review the decisions, directing that both appeals be heard together. As at the time of this writing oral arguments had been taken in the appeals. It is noteworthy that the decisions are far reaching in that they are categorical and apply to all ATCA suits against corporations regardless of the theory of liability on which the suit is based, the place where the conduct occurred or the nature of the international norm violated.

Since *Kiobel*, however, three Circuits have reached the opposite conclusion. In *Flomo v Firestone*, the Seventh Circuit dismissed the plaintiffs’ claims against the defendant but stated that “corporate liability is possible” under ATCA. Judge Richard Posner found “the factual premise of the majority opinion in the *Kiobel* case … incorrect.” In his view, “[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them.” The case concerned claims that children at the defendant’s rubber plantation in Liberia worked in such hazardous conditions that the work violated customary international law. The Court found for the defendant on the basis that the conditions under which the children allegedly worked did not provide a sufficient basis to deduce that customary international law had been violated.

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909 Nos 09-7109, 09-7158 (DC Cir 2010) [*Mohamad*].
910 1 USC § 1.
912 643 F3d 1013 (7th Cir 2011).
913 *Ibid* at 1021.
914 *Ibid* at 1017.
915 *Ibid* at 1020 (adding, at 1017, that “suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be.”).
In *Doe v ExxonMobil*, villagers of Aceh, Indonesia, alleged that ExxonMobil and its Indonesian subsidiary were responsible for killings, torture and other human rights abuses committed by the Indonesian military. In a 2–1 majority decision, the DC Circuit explicitly rejected *Kiobel*, stating that “neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.” The court stated that *Kiobel* “overlooks the key distinction between norms of conduct and remedies” and opined that while international law provides the norms of conduct applicable in ATCA cases, US domestic law governs the remedies. Accordingly, it rejected the second Circuit’s holding in *Talisman* that the applicable standard for aiding and abetting liability is governed by international law – that is, the existence of both knowledge and purpose. It was of the view that knowledge alone was, in accordance with federal common law, sufficient for aiding and abetting liability.

And in a 7–4 majority opinion in *Sarei*, delivered shortly after the Supreme Court’s decision granting the plaintiffs’ petition for *certiorari* in *Kiobel*, the Ninth Circuit held that claims on genocide and war crimes could proceed against Rio Tinto. It “agree[d] and concluded that international law extends the scope of liability for war crimes to all actors, including corporations”. The decision had six separate opinions. A dissent from Senior Judge Andrew Kleinfed, joined by Judges Carlos Bea and Sandra Ikuta, attacked the majority for creating “a new imperialism, entitling our court, and not the peoples of other countries, to make the law governing persons within those countries.” Another dissent from Judge Ikuta described the majority opinion as an “ill-conceived, ill-reasoned and, I fear, ill-fated exercise of judicial

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916 No 09-7125, 8 July 2011 (DC Cir) [*ExxonMobil*].
917 Ibid at 4.
918 Ibid at 71.
919 The Second Circuit found that customary international law required that the aider and abettor had knowledge that a crime would be committed and acted with the purpose of assisting the commission of that crime. Whether this finding is accurate is debatable. The DC Circuit in *ExxonMobil* contested this finding. See *ExxonMobil*, ibid at 36-50.
920 *ExxonMobil*, ibid at 50. The 7th Circuit had earlier reached this same conclusion. See *Cabello v Fernandez-Larios*, 402 F3d 1148, 1157–60 (11th Cir 2005).
921 *Sarei* (9th Cir) 2011, *supra* note 127 at 19372.
922 Ibid at 19431.
power.” Reacting to the decision, however, one scholar declared that “[t]his opinion reiterates that Kiobel is an outlier.”

Both the Second Circuit and the California District Court committed an error when they decided that international law, and not US domestic law, provides the answer to the question of whether corporations can be held liable for violations of the law of nations under ATCA. The strongest support for the courts’ opinions seems to flow from an obiter dictum buried in footnote 20 of the US Supreme Court opinion in Sosa. Although the defendant in Sosa was not a corporation, the Supreme Court stated that “[a] related consideration [to the issue at bar] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” The issue the court was considering was when to determine that a norm is sufficiently definite in international law to support a private cause of action alleging a violation of international law in federal court. In my view, though footnote 20 is not authoritative because of its obiter character, the question the Supreme Court raised leans against the textual reading of ATCA.

The specific wording of ATCA speaks to “a violation of the law of nations”. At first blush, this might be taken to mean that since corporations are not subject to liability in international law, they cannot commit acts that violate customary international law. This is not correct. Conduct is not adjudged a violation of customary international law by reference to the type of entity that committed it. Even treaties that codify prohibited conduct in customary international law do not usually define such conduct by reference to the type of entity that committed it or include the type of entity as an element of the crime. Rather it is the loathsomeness and wickedness of the conduct itself that makes it a violation of customary international law. That corporations cannot be held liable in international law simply means that they cannot be brought into the mills of justice of international tribunals. Corporations that

923 Ibid at 19491.
925 Sosa, supra note 103 at 732.
926 In the case of the Torture Convention, however, Article 1 simply requires that the torture be instigated or committed with the consent or acquiescence of a state official or another person acting in that capacity. This, as pointed out earlier, does not mean that private actors, whether natural or legal persons, cannot be held accountable for torture, but that they must have committed the act in connivance with a state official or another person in that capacity. The Convention does not therefore draw a distinction between natural persons and legal persons. It does not define the category of persons per se, but defines the circumstance under which the torturer may be punished.
engage in the prohibited conduct have still committed the crime in question, but cannot be punished by international tribunals.\textsuperscript{927} The preparatory work that produced the Rome Statute offers us an important insight. Per Saland, Director of the Department for International Law and Human Rights of the Swedish Ministry for Foreign Affairs, who chaired the Working Group on the General Principles of Criminal Law during the Rome Conference, explains the effort made by the drafters and negotiators at the Conference to subject “legal entities” to the jurisdiction of the Court. He begins by explaining the difficulties associated with individual responsibility:

The central article on individual criminal responsibility originally posed great difficulties to negotiate in a number of ways. One problem that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way; e.g., have a different concept, or give the same name to a concept but with slightly different content. The issue of conspiracy is a case in point.\textsuperscript{928}

He then goes on to give a detailed account of why corporate responsibility was excluded:

This matter deeply divided the delegations. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its inclusion, which would have had far-reaching legal consequences for the question of complementarity. Others strongly favored the inclusion on grounds of efficiency, and argued moreover that it would have seemed retrograde, after the Nurnberg and Tokyo trials, not to do so.

In Rome, after the inconclusive debate in the Committee of the Whole, I asked the French delegate, who was the warmest proponent for the inclusion, to conduct informal consultations with the help of the Solomon Islands’ delegate to see if agreement was possible. They came up with a series of proposals that, more and more, linked the criminal responsibility of legal entities to that of an individual. The inclusion gradually became acceptable to a wider group of countries, probably a relatively broad majority. Among the last opponents were Nordic countries, Switzerland, the Russian Federation and Japan. Some other countries opposed inclusion on procedural rather than substantive grounds. Time was running out, and the inclusion of the criminal responsibility of legal entities would have had repercussions in the part on penalties as well as on procedural issues, which had to be settled so as to enable work to be finished. Eventually, it was recognized that the issue could not be settled by consensus in Rome, and France and Solomon Islands

\textsuperscript{927} Volker Nerlich has argued that “the question of whether any international court or tribunal has jurisdiction may be distinguished from the question of whether there is a rule of substantive international law providing for the punishment of legal persons for core crimes. It is conceivable that a norm exists even though there is currently no forum where it could be enforced.” Volker Nerlich, “Core Crimes and Transnational Business Corporations” \textit{(2010)} 8 JICJ 895 at 898.

gracefully withdrew the proposals on which they had worked very hard and diligently for a long time.\textsuperscript{929}

This account demonstrates that the preclusion of legal entities from the jurisdiction of the ICC was not because the delegates at the Conference believed that as a matter of legal principle legal entities are not proper subjects of international law. It was instead at least mostly for practical considerations. The broad support the inclusion garnered is instructive of the general sentiments of states. One can reasonably conclude that the delegates at the Conference left the matter to states to deal with. Doug Cassel has suggested that since the ICC’s jurisdiction was complementary to that of states, the ICC would automatically have jurisdiction over corporations in those countries that do not recognize corporate criminal liability since those countries are automatically unable to prosecute corporations.\textsuperscript{930} This view explains Saland’s account concerning the legal consequences of including corporate responsibility for the question of complementarity. Those states that do not have corporate criminal responsibility might have felt threatened by that.

In his analysis of English law, William Blackstone writes that “when [violations of international law] are committed by private subjects,” they “are then the objects of municipal law.”\textsuperscript{931} This suggests that even entities that are not subjects of international law could still violate international law norms. The question then is where they can be held accountable. This is a matter of jurisdiction. The principle resembles the principle of immunity in domestic courts, under which a foreign diplomat cannot be subjected to the judicial processes of the forum state. Yet the diplomat can be subjected to the judicial processes of his home state for that same conduct in accordance with the laws of his home state.

Besides, but relatedly, the theory that corporations cannot be held accountable for violations of international law is an international, and not a domestic, legal theory. Domestic courts can therefore not be bound by it when acting domestically unless it is a rule of customary international law. Where states have enacted legislation that makes reference to violations of international law, the theory that corporations cannot be held accountable for violations of international law cannot operate to shield corporations from liability within the domestic forum,

\textsuperscript{929} Ibid at 1919.
in so far as under domestic law corporations are capable of committing violations of that
substance. Rather, such reference to international law expresses the heightened nature of the
violations contemplated by the domestic legislation. There is need for caution in transporting
international legal principles directly into the domestic sphere. Conventional international law is
applicable municipally only to the extent that it has been adopted by a given state and this
depends on whether a state takes a dualist or a monist approach to treaties. Customary
international law is immediately applicable and binding an all states. The view that corporations
are not subjects of international law has been presented as if it is a rule of customary
international law. But this approach overlooks the process by which customary international law
is created. Customary international law is created, most importantly, by state practice, and not by
absence of state practice. So if there is not state practice supporting the accountability of
corporations for violations of international law, it does not mean that a rule of customary
international law prohibiting corporate accountability for violations of international law is in
existence. The same reasoning applies to the other sources of customary international law, for
instance, *opinio juris*. Expert opinion is deeply divided regarding the accountability of
corporations for international law violations. Although on balance, whether corporations are
subjects of international law “appears to be easily answered in the negative”, and there is
simply no basis to say that such a rule is a rule of customary international law. States are
therefore generally not automatically bound by it.

If international law has not yet drawn corporations into the vortex of its enforcement
mechanisms, it does not mean that states cannot provide remedies against corporations for
violations of norms of international law. The absence of international corporate accountability
for violations of international law is better viewed as tantamount to a governance hole in the
international regulatory system. As the analysis on the Torture Convention shows, while it
cannot be firmly said that Article 14 of the Convention mandates states to provide civil remedies
for torture regardless of where it is committed, there is a good basis to say that states are not
prohibited from doing so. It is inconceivable that the Torture Convention, by reason of the fact

932 Nerlich, *supra* note 927 at 897.
933 There are indeed some scholars who believe that customary international law provides for criminal
punishment of corporations for violations of core norms. See Clapham, “Extending international Criminal Law
beyond the individual to Corporations and Armed Opposition Groups” (2008) 6 JICL 899. See also A Ramasastry,
“Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labour Cases and Their Impact
that it makes no explicit reference to corporate liability, will be read as prohibiting states from providing such remedies where the torture is committed by a corporation in cooperation with a state official or some other person acting in that capacity. A responsible interpretation is that it is for states to decide attribution of liability. For, while it is arguable that international law does not recognize corporate accountability for violations of customary international law, there is no positive rule of customary international law prohibiting states from doing so. Quite a few international instruments, such as the Rome Statute, the ICTY Statute, and the ICTR Statute, expressly preclude corporate accountability under their respective mechanisms by limiting the jurisdiction their courts to natural persons; but these instruments are very specific and the prohibition cannot be applied outside the context of the instruments. Moreover, when states enact domestic statutes to implement treaties, they are free to modify the terms of those treaties for their domestic application as long as the modification does not result in a violation of the treaty obligations. For instance, even though the Rome Statute expressly precludes corporate accountability, Canada’s CAHWC Act has no provision precluding corporate accountability. The statute’s definition of “person” is drawn from the Canadian Criminal Code, which applies the definition to both natural and legal persons. It would be absurd to argue that when interpreting “person” under the CAHWC Act, corporations should be precluded because the crimes under the CAHWC Act are international crimes. Treaty exclusion relates to court jurisdiction and not to whether corporations can breach international law. Thus, the specific exclusion of corporate criminal liability for violations of international legal norms under the Rome Statute has not deterred states from domestically creating corporate criminal liability for violations of those same norms. Furthermore, most instruments, notably the Torture Convention, are silent on the issue of corporate liability and so must be viewed as leaving the matter open. In accordance with the Lotus ruling that in the international law of jurisdiction what is not clearly prohibited is permitted, states are free to decide domestically whether to take jurisdiction over corporations for violations of norms of international law.

Furthermore, to exempt corporations from the reach of ATCA on the basis that corporations are not subject to the law of nations would mean that before World War II

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934 Rome Statute, supra note 8 at Article 25(1).
individuals could not have been subject to ATCA jurisdiction for violations of the law of nations since the formal acceptance of individual accountability for violations of international law took place after the War. The question then is: who could have been subject to ATCA jurisdiction for violations of the law of nations? The only entities subject to international accountability at that time were states. Foreign states could not have been subject to ATCA jurisdiction due to the doctrine of state immunity. The US could not have been suable because ATCA applies only to aliens, and the US cannot be an alien before US courts. If the drafters of ATCA intended this result, they would have stated so. It should further be pointed out that international law has till date not assumed civil jurisdiction over individuals for violations of the law of nations. Jurisdiction has been limited to violations of a criminal nature. It cannot be argued on this account that individuals are not subject to the civil jurisdiction of states’ courts for violations of domestic norms that are simultaneously violations of international law.

Further still, the text of the statute does not limit the class of defendants. It creates only the class of plaintiffs who can seek remedies under it. Drawing a distinction between natural persons and legal persons is inconsistent with the text of the statute. As the DC Circuit stated in ExxonMobil, there is no good “reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so.” If Congress intended to provide civil remedy to the injured plaintiff, there is no apparent reason to conclude that it intended to do so only where the acts were perpetrated by a natural person, while the corporation on whose behalf, or in concert with whom, the individual defendant (might have) acted would be immunized from liability. The text of ATCA may be contrasted to the text of the TVPA, which makes explicit reference to “individual” defendants. After reviewing relevant statutes and canons of interpretation, the Supreme Court decided that the term individual speaks only to natural persons, and stressed that the term

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938 ExxonMobil, supra note 916 at 64.
“individual”, especially as used in the TVPA, is quite distinct from the term “person” as understood in law.\textsuperscript{939} It is not likely that this decision would have any impact on the \textit{Kiobel} decision because of the specific textual character of the TVPA. In fact Justice Sotomayor, who wrote the majority opinion in \textit{Mohamed}, did state that ATCA does not offer any “comparative value” to the interpretation of the TVPA on the question since it does not employ the term “individual” to identify the class of defendants covered.\textsuperscript{940} This, it appears, explains why the Court chose to decide the two cases separately even though they both raised the issue of the category of defendants suable under them.

There is an important distinction between the question of what amounts to a crime and the question of who has the legal capacity to commit that crime. Under section 30 of the Nigerian Criminal Code (and under most criminal codes), for instance, a person below the age of seven – twelve years in Canada\textsuperscript{941} – is \textit{doli incapax}, i.e., legally incapable of committing any crime whatsoever. And under the same section of the Nigerian Criminal Code, a male person below the age of twelve is presumed to be incapable of having carnal knowledge, thus incapable of committing rape. The question of whether a male person below the age of twelve is capable of committing rape is thus distinct from the definition of rape. This is adumbrated by the assignment of separate sections to definitions of crimes and the class of persons capable of being held accountable for violations of the crimes in most criminal statutes. It should be remembered too that an adult who procures a child below the age of criminal responsibility to commit a crime is guilty of that crime even though the child cannot be charged. This goes to show that the crime has been committed irrespective of the child’s legal incapacity to commit it; it goes to show that the definition of crimes is generally distinct from the capacity of anyone to commit them. By the same logic, the question whether corporations can commit international crimes is distinct from the question of what amounts to an international crime. A domestic law’s reference to international crimes cannot therefore be taken to automatically contemplate the legal capacity of anyone to commit those crimes under international law. That capacity is to be determined by the domestic law of the forum state. As an example, article 50(2)(n) of the \textit{2010 Constitution of Kenya} provides that an accused person may be tried for an offence which was at the time of its commission either an offence under the law of Kenya or a crime under international law. This is

\begin{itemize}
\item \textsuperscript{939} \textit{Mohamed} (USC), supra note 135.
\item \textsuperscript{940} Ibid at 8.
\item \textsuperscript{941} \textit{Canadian Criminal Code}, supra note 613, s 13.
\end{itemize}
also the position in Canada under section 11(g) of the Charter. Taking torture as an example, the question should be framed as: is torture an international crime? The question does not include, who is capable of committing torture in international law? This would be different, however, where the domestic statute makes reference to an international crime under a specific international treaty that defines that crime in a manner that makes the capacity to commit the proscribed act an integral part of the definition of that crime. This is not the case with ATCA. And in the case of the Rome Statute, as pointed out earlier, even though the Statute explicitly excludes corporations, countries enacting implementing legislation have not incorporated that provision of the Statute.

3.6 CONCLUSION

Lotus still remains good law. International law leaves it to states to determine the scope of their jurisdiction. The classic view that jurisdiction is territorial no longer holds true as we knew it. Even the argument that some territorial connection is always required is not completely accurate from a legal standpoint. It is accurate only for reasons for practicality. For, in war crimes and crimes against humanity, a suspect transiting through the territory of a state may be apprehended and prosecuted by that state. It is not that momentary presence that gives jurisdiction in criminal law; it only makes the suspect’s capture for prosecution possible. Jurisdiction already lies, only waiting to be ignited.

On the civil front, there is nothing in international law prohibiting a state from extending the reach of its civil laws beyond its borders any more than it prohibits it from extending the reach of its criminal laws beyond its borders. On the liability of corporations for violations of international law norms, the principal argument of this chapter is that insofar as the violation at issue is recognized under the domestic law of a given state, the fact that the specific conduct is simultaneously a violation of international law norms cannot operate to shield corporations from liability in domestic courts. The view that corporations cannot be held accountable for

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942 That section provides: “Any person charged with an offence has the right … not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations”.

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international crimes is an international, and not a domestic, legal theory, one that does not have immediate application in the domestic sphere.
CHAPTER 4
EXTRATERRITORIALITY IN CANADIAN CRIMINAL LAW

4.1 INTRODUCTION

We gathered from the preceding chapter that international law leaves it to states – subject to certain limitations – to determine the scope of their criminal jurisdiction. Does it follow then that the federal Parliament of Canada can, by virtue of this international legal rule, pass legislation criminalizing extraterritorial conduct? Or must there be some internal source from which Parliament can derive the power to pass such legislation? If so, what is that source? These questions must be answered before I examine the legislative framework for extraterritorial criminal jurisdiction in Canada to see whether and how a Canadian court may assume jurisdiction over a Canadian corporation operating overseas for conduct engaged by such corporation outside Canada. This is in light of the federal structure of the Canadian state. The major piece of legislation upon which such jurisdiction may be assumed in Canada, as pointed out in chapter one, is the CAHWC Act. Other pieces of legislation also have important bearing on it, such as various sections of the Canadian Criminal Code, in particular the conspiracy provisions. To fully understand the significance of these pieces of legislation, most of which are relatively new in the history of Canadian criminal law, a review of Canada’s initial efforts to bring to justice foreign war criminals who had sought refuge in Canada is necessary. This review covers up to the period the infamous Finta decision943 was rendered as well as the aftermath of the decision. Thereafter, the common law basis for establishing criminal jurisdiction in Canada is examined, drawing essentially from the jurisprudence. What follows is an examination of the relevant provisions of the CAHWC Act. Given that this statute’s primary targets are not corporations, it is necessary to see how its provisions might be adapted to the specific nature of corporations. Criminal Code provisions that relate to extraterritoriality are then examined in order to identify the scope of jurisdiction allowed under them. Next, special attention is paid to Bill C-45 that was enacted in 2003 to reform the law of corporate criminal liability in Canada. Although this law was enacted with the substantive criminal liability of corporations in mind, it is submitted that it has significant jurisdictional implications. To give some flesh to the

943 R v Finta, [1994] 1 SCR 701 [Finta (SCR)].
jurisdictional analysis, especially in light of Bill C-45, a synopsis of the substantive bases of criminal liability is made before the chapter is concluded.

4.2 THE SOURCES OF PARLIAMENTARY POWER TO LEGISLATE EXTRATERRITORIALLY

Consistent with federalism, legislative power in Canada is divided between the federal government and the federating provinces and territories. The Canadian Constitution Act 1876 (i.e. the British North America Act, as it was originally called) makes no reference to the power of the federal Parliament to enact extraterritorial legislation. The closest it goes is contained in its section 132 that states that Parliament “shall have all the Powers necessary or proper for performing the Obligations of Canada ... towards Foreign Countries, arising under Treaties between the [British] Empire and such Foreign Countries.” However, the 1931 Statute of Westminster, enacted for Canada (and other British dominions) by the British Parliament, does make such a reference. Its section 3 states quite explicitly: “the Parliament of a Dominion has full power to make laws having extraterritorial operation.” 944 Most of the early cases before the enactment of this statute held that criminal jurisdiction was confined to Canadian territory. 945 Some early constitutional cases before the Act, however, seemed to suggest that Parliament could enact such laws. 946 The only limitation the constitutional cases placed on the federal Parliament, Symon Zucker argues, was that in the exercise of this power, the federal Parliament ought not to intrude in the powers reserved for the provinces. 947 Although one notable Supreme Court of Canada decision 948 tried to cast doubt over Parliament’s competence to legislate extraterritorially, later cases seemed to have re-affirmed it. One case viewed as such authority

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944 Statute of Westminster, 22 George V, c 4 (UK), 11 December 1931.
945 In R v Blythe (1895), 1 CCC 263 (BCCA), for instance, an accused had by letters written in British Columbia induced an under-sixteen year old girl to leave the State of Washington where she lived with her parents to come to stay with him in British Columbia. He was acquitted on a charge of abduction on the ground that the abduction took place in the State of Washington and not in British Columbia. See also Re Gertie Johnson (1904), 8 CCC 243 (BCSC), R v Wetman (1894), 1 CCC 287 (Ont. H.C.), and R v Walkem (1908), 14 CCC 122 (BCCA) In Re Criminal Code Sections Relating to Bigamy (1897), 27 SCR 461.
948 Re Bigamy Section of the Criminal Code (1897), 1 CCC 172, 27 SCR 461. All the judges were of the view that Parliament had no power to legislate extraterritorially. See Zucker, supra note 946.
was *The Ship “North” v The King*. An American vessel was found fishing illegally within Canadian territorial waters. The question was whether a lawful seizure could be made on the high seas for a crime committed within Canadian territorial waters. In deciding the case, the court applied the international legal doctrine of “hot pursuit” which allows pursuit beyond a state’s territory if the pursuit began lawfully within the state’s territory. The court referred to the powers of the federal government over the seacoast and inland fisheries. The case is however a weak authority on which to build the proposition that Parliament could legislate extraterritorially. The facts of the case do not provide an apt example of extraterritorial application of domestic law. The illegal fishing took place within Canada’s territorial waters. The only extraterritorial element in the case was the arrest of the ship, which took place outside Canada’s territorial waters. This speaks more to enforcement jurisdiction than to legislative or to adjudicatory jurisdiction. And the extraterritorial enforcement was justified on the basis of the international legal doctrine of “hot pursuit”, not on any inherent powers or domestic legislative grant. Besides, extraterritoriality was not directly argued by the parties, although the court made reference to the wide powers Parliament had over the seacoast and inland fisheries. The case is better seen as an early authority for the application of international law by Canadian courts. *Croft v Dunphy* provides a better, yet, for reasons outlined shortly, limited basis for the view that Parliament had a general power to pass extraterritorial legislation before 1931. Pursuant to powers conferred on it by the *Customs Act* 1927, Canadian Customs seized the schooner “Dorothy M Smart” about eleven miles off the coast of Nova Scotia. The defendants argued that the seizure was illegal because the legislation authorizing it was ultra vires the Parliament of Canada to pass by virtue of its extraterritorial effect. The Privy Council wrote:

> [T]he Parliament of Canada is not under any disability [to legislate extraterritorially]. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the [British North America] Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a full Sovereign State.

949 [1906] 37 SCR 385.
950 Zucker, *supra* note 946 at 150.
951 (1932) 59 CCC 141 [*Croft*].
952 RSC 1927, c-42.
953 *Croft, supra* note 951 at 144.
Although the case was decided after the *Statute of Westminster* had been passed, the Privy Council did not base its decision on it even though it had been drawn to its attention. It found it unnecessary to refer to the Statute, stating that there was sufficient basis outside the Statute to hold that Parliament had authority to pass extraterritorial laws.

*Croft* provides only a limited basis for the assertion that Parliament could pass extraterritorial laws before the *Statute of Westminster* for two reasons. First, it was based on a state’s competence in international law to pass laws that operated beyond the traditional three-mile limit in the seaward belt. “But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.”\(^{954}\) Thus, the sphere of activity where Parliament could pass such laws was specific.

Second, the Privy Council relied on the English practice of passing customs legislation that operated beyond the territorial waters, and presumed that this power was conferred on Canada in 1867 by necessary implication.

It will thus be seen that, when the Imperial Parliament in 1867 conferred upon the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits . . . In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy.\(^{955}\)

Parliament’s power to legislate extraterritorially was thus confined to customs matters relating to the territorial sea. It may be said that before the *Statute of Westminster*, there was no strong basis, outside matters appurtenant to the seacoast, to say that the Canadian Parliament was competent to legislate extraterritorially. With the *Statute of Westminster*, however, the question was settled beyond doubt that Parliament could act extraterritorially. This has been confirmed again and

\(^{954}\) *Ibid* at 162. See also SD Sharma, “Applicability of the Doctrine of Extraterritoriality to Legislation by the Indian Legislature” (1946) 28:3 J of Comp Legislation & Int’l Law 91 at 92 (noting that as the ship seized was Canadian, no question of any violation of international law arose).

\(^{955}\) *Croft*, supra note 939 at 166; Sharma, *ibid* at 92-93.
again by the Supreme Court of Canada. Yet, the presumption against extraterritoriality remains the primary rule in Canadian criminal law. Judicial authority indicates that express and clear language is required to upset that presumption, or the inference can be drawn by necessary implication. In *Society of Composers, Authors & Music Publishers of Canada v Canadian Association of Internet Providers*, Binnie J stated that

[w]hile the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This is because “[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would result if the principle of territorial jurisdiction were not at least generally respected.”

Still, as will be seen later, that presumption has been considerably weakened especially since the decision in *Libman* and with the increasing number of legislative provisions in Canada granting extraterritorial criminal jurisdiction. Yet, it remains accurate to say that extraterritoriality is the exception rather than the rule in Canada.

### 4.3 THE DEVELOPMENT OF EXTRATERRITORIAL CRIMINAL PROSECUTION IN CANADA

#### 4.3.1 The Presence of Foreign War Criminals in Canada and the Establishment of the Deschênes Commission

The development of extraterritorial criminal prosecution in Canada may be traced to the establishment of the Deschênes Commission in 1985. In order to mitigate the sufferings of World War II victims, Canada liberalized its immigration policy in 1949. The liberalization resulted in the influx of Europeans into Canada. War scoundrels allegedly seized the opportunity to sneak into the country in search of refuge. The sheer number of the war criminals estimated by...
various newspapers – not without discrepancies though\textsuperscript{960} – created a sense of revulsion among the Canadian public who widely registered their concerns over the harbouring of war criminals in Canada. One case caused particular sensation. Joseph Mengele, an infamous Nazi war criminal, was alleged to have applied to immigrate to Canada in 1962. It was alleged that he was granted entry into Canada even though his identity had been revealed to Canadian government officials at the time. Mengele’s case was brought to the attention of the House of Commons in 1985. It was suggested that he might still currently be in Canada. The debates that ensued at the House of Commons led the Privy Council to set up the Deschênes Commission that same year. The mandate of the Commission was to:

conduct such investigations regarding alleged war criminals in Canada, including whether any such persons are now resident in Canada and how and when they obtained entry into Canada … [and to recommend] what further action might be taken in Canada to bring to justice such alleged war criminals who might be residing within Canada, including what legal means are now available to bring to justice any such in Canada, and whether or what legislation might be adopted by the Parliament of Canada to ensure that war criminals are brought to justice and made to answer for their crimes.\textsuperscript{961}

In creating the Commission, the Privy Council was concerned that “persons responsible for war crimes… [were] currently resident in Canada,” and desired “to ensure that any such war criminals currently resident in Canada, or hereafter found in Canada, [were] brought to justice.”\textsuperscript{962} The Commission was further concerned with Nazi-era war crimes rather than modern war crimes, genocide and crimes against humanity. After extensive investigations, the Commission submitted its report in 1986. It found that the estimated number of war criminals residing in Canada was grossly overstated. According to Grant Purves, this might have been due to the casual massing together of “war criminals” and “war-time collaborators”, some due to blanket indictment of all members of military units of the Nazi regime, and some due to “duplication.”\textsuperscript{963} The Commission found \textit{prima facie} evidence of war crimes in only twenty of

\textsuperscript{960} One publication that appeared in \textit{Toronto Star} put the figure at 3,000. \textit{The New York Daily News} even put it at 6,000. See Commission of Inquiry on War Criminals: Report, Pt 1, online: <http://lib.galiciadivision.com/veryha-eng/d02.html> (last accessed 3 August 2011) (noting that the figures were widely exaggerated).


\textsuperscript{962} \textit{Ibid.}

the 774 cases contained in its master list and submitted a confidential report detailing how to deal with each of the cases. To deal with the problem of war criminals in Canada, it called for an integrated approach. It recommended that the Criminal Code be amended to allow the prosecution of war crimes and crimes against humanity, even in some cases where the acts were committed outside Canada; that the Extradition Act and extradition treaties to which Canada was a party be amended to facilitate the extradition of persons sought by other countries for war crimes; and that Canada’s denaturalization and deportation laws be amended to facilitate the deportation or removal of war criminals from Canada. Consequently, in 1987, the Criminal Code was amended to extend the jurisdiction of Canadian courts to war crimes and crimes against humanity committed outside Canada if the person was or became a Canadian citizen or was found in Canada after the commission of the crime. This was known as the “made-in-Canada” solution to the problem of harbouring war criminals. The new Criminal Code conferred jurisdiction on Canadian courts over war crimes and crimes against humanity committed outside Canada if:

at the time of the act or omission… [the accused] is a Canadian citizen or is employed by Canada,… is a citizen of, or is employed… by, a state that is engaged in armed conflict against Canada, or… the victim… is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict . . . or [if] at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person… on the basis of the person’s presence in Canada and, subsequent[ly]… the person is present in Canada.

This provision was a welcome development in the evolution of criminal law in Canada even though its meaning has been described as “opaque”. The provision created what may be regarded as “quasi-universal jurisdiction”, but no true universal jurisdiction, in that it tied jurisdiction to the existence of some link between the offender or the victim and Canada, or to Canada’s ability to exercise jurisdiction under international law over the offender at the time the

<http://www.parl.gc.ca/Content/LOP/researchpublications/873-e.pdf> (last accessed 25 October 2011) (noting that the master list the Commission compiled contained the names of only 774 suspects, an addendum had 38 other names and that there was another list containing the names of 71 German scientists and technicians).

964 Ibid at 6.
965 Ibid.
968 Purves, supra note 963 at 17.
offence was committed. Universal jurisdiction is shorn of these niceties except the presence of the suspect within the territory of the forum state. The first alternative (i.e. the requirement of some link between the offender or the victim to Canada) speaks to the nationality and passive personality principles of jurisdiction while the second alternative (the requirement that Canada be able to exercise jurisdiction in international law at the time of the offence) cannot be precisely pigeonholed into any jurisdictional principle. Besides, the statute did not directly incorporate international law offenses. Rather than criminalizing war crimes and crimes against humanity through defining these crimes, the statute allowed acts amounting to war crimes or crimes against humanity (as defined in international law) to be prosecuted as if they had occurred in Canada. Parliament could simply have proceeded to make them crimes under Canadian law in their own terms, wherever committed. In failing to directly criminalize war crimes and crimes against humanity committed in Canada as well as elsewhere, Parliament might have missed an opportunity to more directly advance the norms against these international crimes.

The Extradition Act was amended to apply to (war) crimes without regard to the date they were committed, i.e., whether after or before the coming into force of the relevant extradition treaties between Canada and other states, without regard to whether the crime was committed within the territory of the state seeking the extradition, and without regard to whether Canada could have exercised jurisdiction over similar conduct. 969

The Immigration Act was amended to render a person inadmissible to Canada if there were reasonable grounds to believe that he/she committed a war crime or crime against humanity anywhere in the world, and to make permanent residents removable from Canada if they were war criminals and were granted permanent residence after the coming into force of the Act. 970 The Citizenship Act was equally amended to prevent persons who were under investigation for war crimes and crimes against humanity from acquiring Canadian citizenship. 971

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969 This amendment is now contained in Extradition Act, SC 1999, c 18, s 5 (“(a) whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction; and (b) whether or not Canada could exercise jurisdiction in similar circumstances.”) and s. 6 (“Subject to a relevant extradition agreement, extradition may be granted under this Act whether the conduct or conviction in respect of which the extradition is requested occurred before or after this Act or the relevant extradition agreement or specific agreement came into force.”).


971 Ibid.
4.3.2 The Case of Finta

_Finta_ exposed the weaknesses of the new crimes legislation for the prosecution of international crimes that occurred outside Canada. The case not only turned in large part on the interpretation of the new amendment now contained in section 7(3.1) of the _Criminal Code_, “its factual backdrop was an exercise in Holocaust historiography”.972 The case concerned a Nazi-era war crime and was the test case in Canada for such crimes. Mr Finta was alleged to have played key role in the deportation, torture and extermination of Jews in Nazi concentration camps in Szeged and Auschwitz, Hungary, during World War II. He had immigrated to Canada in 1951 and by 1956 had obtained Canadian citizenship. He was charged with unlawful confinement, robbery, kidnapping and manslaughter. The charges stated that each of these offences amounted to a war crime and/or crime against humanity under what is now section 7(3.71–6) of the _Criminal Code_. The issues that arose before the courts were multi-layered, but for the present purpose it was whether section 7(3.71) of the _Criminal Code_ was merely jurisdictional, or rather created two new offences – crime against humanity and war crime. The centrality of this question was such that it influenced the course of inquiry in the case. That section bears stating in full:

Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

(a) at the time of the act or omission,

(i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.

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Regarding the significance of interpreting the section 7(3.71) as jurisdictional or substantive, Irwin Cotler argues that interpreting the section as creating two new offences allows the inference to be drawn that the offences were not part of international law but creatures of the section. And interpreting them as jurisdictional underlines the idea that war crimes and crimes against humanity are not creatures of the section but declaratory of customary international law as codified in the Nuremberg Principles.\footnote{Cotler, “War Crimes Law”, ibid at 602–603 (arguing that the interpretation given the section would affect the determination of the requisite \textit{mens rea} and the requisite defences, indeed, the outcome of the case. \textit{Ibid} at 603-604).} He adds that the interpretive problem posed by the section was not unconnected to the dispute in the case about the retroactivity of the section and its constitutionality.\footnote{\textit{Ibid} at 603.}

The interpretive question first arose during the pre-trial stage when Callaghan ACJ was dealing with the issue of the constitutionality of the section. He ruled that “the legislation in issue does not create new offences but merely confers jurisdiction on Canadian courts with respect to acts that would have been offences against Canadian law in force at the time of their occurrence if such acts had occurred in Canada.”\footnote{\textit{R v Finta} (1990), 69 OR (2d) 557 at 577 (HCJ).} The trial judge agreed. Both the Court of Appeal for Ontario and the Supreme Court were divided on the characterization of section 7(3.71). The majority of the Court of Appeal for Ontario characterized it as creating new offences or, to use the Court of Appeal’s words, as “speak[ing] not to the jurisdiction of the court but to the territorial scope of the offences referred to in the section.”\footnote{\textit{R v Finta} (1992), 73 CCC (3d) 65 at 168 (Ont CA).} The result of this reasoning is that where the Prosecution alleges a particular crime under section 7(3.71), rather than proving that the crime was committed in Canada, the Prosecution must prove that had the conduct taken place in Canada, it would have constituted the crime alleged, and that the act amounted to a war crime or a crime against humanity.\footnote{\textit{Ibid} at 169.} Dubin CJO dissented. In Dubin CJO’s opinion:

\begin{quote}
that subsection does not create two offences, namely a crime against humanity and a war crime, nor does it define the essential elements of the offences with which the respondent was charged. …Section 7(3.71) provides a mechanism for persons to be convicted for violating the Criminal Code of Canada for acts or omissions committed abroad if those acts or omissions are deemed to have been committed in Canada and thus subject to the Criminal Code of Canada.
\end{quote}

\begin{footnotes}
\footnote{Cotler, “War Crimes Law”, ibid at 602–603 (arguing that the interpretation given the section would affect the determination of the requisite \textit{mens rea} and the requisite defences, indeed, the outcome of the case. \textit{Ibid} at 603-604).}
\footnote{\textit{Ibid} at 603.}
\footnote{\textit{R v Finta} (1990), 69 OR (2d) 557 at 577 (HCJ).}
\footnote{\textit{R v Finta} (1992), 73 CCC (3d) 65 at 168 (Ont CA).}
\footnote{\textit{Ibid} at 169.}
\footnote{\textit{Ibid} at 84.}
\end{footnotes}
Tarnopolsky JA joined Dubin CJO on this point. In his view, section 7(3.71) is “merely procedural in nature, in that it confers jurisdiction on Canadian courts with respect to acts committed outside Canada, which would have been offences against Canadian law in force at the time of their occurrence, by deeming such acts to have occurred in Canada.”

The majority of the Supreme Court, led by Cory J, held to the effect that section 7(3.71) creates two offences: crime against humanity and war crime, and that it is the nature of the crime alleged to have been committed that triggers jurisdiction. Cory J wrote:

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified in s. 7(3.71) are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction.

Somewhat contrary to the view of Cotler, this holding does not entirely reject the jurisdiction-creating argument. Rather, it regards section 7(3.71) both as creating two new offences and as creating jurisdiction. This view is buttressed by the more direct rejection of the jurisdiction-creating argument by the majority of the Court of Appeal for Ontario and by the fact that nothing in the judgment of Cory J suggests that jurisdiction over crimes against humanity and war crimes is to be found outside section 7(3.71) itself. In dissent, La Forest J, joined by L'Heureux-Dubé and McLachlin JJ, rejected the theory that section 7(3.71) created two new offences. In his words:

On a literal reading of s 7(3.71), an appreciation of its legislative context along with analogous provisions in the Code and an understanding of its legislative history, I conclude that s. 7(3.71) is unquestionably intended to confer jurisdiction on Canadian courts to prosecute domestically, according to Canadian criminal law in force at the time of their commission, foreign acts amounting to war crimes or crimes against humanity. The provision does not create any new offences.

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979 Ibid at 117.
980 Finta (SCR), supra note 943 at para 72.
981 Cotler, “War Crimes Law”, supra note 957 at 606 (stating that “[t]he Supreme Court, in a 4:3 decision, affirmed the decision of the Ontario Court of Appeal that section 7(3.71) creates two new offences, that of war crimes and crimes against humanity; and that ‘jurisdiction’ is triggered only if the alleged offence constitutes a war crime or crime against humanity”).
982 Finta (SCR), supra note 943 at para 266.
There is ample support for La Forest J’s interpretation. The provision simply subjects to
domestic prosecution any act amounting to a crime against humanity or war crime committed
outside Canada. It does so by deeming such acts as if they were committed in Canada. This
deeiming is for the purpose of conferring jurisdiction on Canadian courts. The provision does not
itself create those offences. In the backdrop of its enacting history, the provision stands as an
exception to the principle of territoriality. The following statement of the Deschênes Commission Report provides an important context to the interpretation of the provision:

"Need it be stressed again: we are not aiming to make acts, which were deemed
innocent when committed, criminal now; such would be unacceptable retroactivity. But extermination of a civilian population, for instance, was already as much criminal in 1940 as it would be today, under the laws of all so-called civilized nations. We are only trying to establish now in Canada a forum where those suspected of having committed such offences may be tried, if found in Canada."983

Thus, what the Commission was seeking was “an express grant of jurisdiction” to Canadian
courts.984 The Commission believed that from the perspective of international law Canada could
prosecute crimes against humanity and war crimes committed outside Canada even in the
absence of an express grant of jurisdiction within Canadian law. It however saw it prudent to
recommend an express grant of jurisdiction because it felt that jurisdiction in the absence of an
express grant might be viewed as too “esoteric” by Canadian legal observers.985 The Commission
further linked the need for express grant of jurisdiction to section 11(g) of the Charter that
enjoin Canada to bring its domestic legislation in line with its obligations under international
law. The Commission stated:

"In entrenching that provision [i.e. section 11(g) of the Charter] into its Constitution,
Canada could not have more clearly acknowledged its respect for international law; it
could not have bowed more reverently to the universal belief in a basic law common to
all mankind; it could not have more eloquently adopted that law into its own legal
system."986

983 Deschênes Commission Report, supra note 961 at 158
984 Ibid at 165.
985 Cotler, “War Crimes Law”, supra note 973 at 610.
Besides the above context, the deeming language of the provision may be paralleled with the conspiracy provisions of the *Criminal Code*, in particular section 465(3) which provides that “[e]very one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.” The Supreme Court has interpreted this provision as follows:

It is apparent on its face that this subsection does not create an offence. It creates a presumption of territoriality so as to make the conspiracy an offence punishable in Canada. Where, as in the case at bar, persons conspire in Canada to effect an unlawful purpose in the United States, which would not in itself be an offence punishable in Canada, they “shall be deemed to have conspired to do in Canada that thing”. The result is to introduce the essential aspect which would otherwise be absent, and to make the offence punishable in Canada.⁹⁸⁷

As La Forest J argues, the structural similarity of the two provisions calls for “a consistent interpretation.”⁹⁸⁸ The textual location of the provision within the Code lends further authority to La Forest J’s view. It is located in Part 1 of the Code, under the Code’s “General” provisions, standing as an exception to the principle of territoriality articulated in section 6(2): “Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada.” Though, exceptions to the territoriality principle can still be sketched in offence-creating language. However, section 7(3.71)’s wording “closely resembles that of other purely jurisdiction-endowing provisions [of the Code] and can be contrasted with [the] offence-creating provisions.”⁹⁸⁹ The absence of any penalty provision in section 7(3.71), while not conclusive (as one subsection of a statute might create an offence and another subsection creates the punishment) lends further weight to a jurisdiction-creating interpretation.

Imre Finta was acquitted of all charges. While the jurisdictional issue might have influenced the course of inquiry in the case, his acquittal was not based on that jurisdictional issue, as the case actually went to full trial. A myriad of factors have been held answerable for the outcome of the case. One of these was the use of jury trial.⁹⁹⁰ It has been argued too that

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⁹⁸⁷ *Bolduc v Attorney General of Quebec* [1982] 1 SCR 573 at 577 [*Bolduc*].
⁹⁸⁸ *Finta* (SCR), supra note 943 at para 269.
⁹⁸⁹ *Finta*, ibid at para 270.
⁹⁹⁰ Both the jury selection process and proceedings have been condemned. The jury selection process was
Finta established a standard of proof for the prosecution of war crimes and crimes against humanity that was higher than that recognized in international law and which made it difficult for the further prosecution of such crimes in Canada. For Chile Eboe-Osuji – now a judge of the ICC – the bitter end of the Finta prosecution “may have had much to do with a tentative, if not foggy, understanding of international criminal law at the time, not only by the Canadian lawyers and judges involved in the case, but also by some of the famous foreign international lawyers who gave expert evidence in that case.” He notes in particular a “clash of understanding” between La Forest J (a renowned international law expert himself) and Professor Cheriff Bassiouni (a professor of international criminal law) who testified as expert witness for the government.

so flawed that David Matas describes what took place as “jury stacking” and not jury selection. Matas believes that the evidence against Finta was “overwhelming and unanswered”, and wonders why it was possible that Finta, who declined to call a single evidence on his own behalf, could be acquitted. “The answer is that there was a stacked jury and an appeal to racial [and religious] prejudice[s].” David Matas, “The Case of Imre Finta” (1994) 34 UNBLJ 281-282. Matas states that Finta’s counsel Douglas Christie introduced religion into the proceedings during his jury address, noting for instance, that Christie “quoted from the New Testament at length. The purpose of the quote appeared to be to appeal to the stereotype that the Jews killed Christ through bearing false witnesses in a Roman Court.” Ibid at 285. Describing Douglas Christie’s address as improper and inflammatory, Matas states that Douglas Christie invited the jury “to find that what the Nazis did was not wrong, but just circumstancestially, at this time and place, illegal.” Matas, “The Case of Imre Finta”, ibid at 283. What Douglas Christie told the jury was specifically this: “You had better have moral certainty if you are to convict, because if somebody 45 years from now puts you on trial in another country for persecuting Imre Finta and that country might be as hostile to Jews as we are now to Nazis, who would you be calling? Don’t call me.” Cited in Matas, “The Case of Imre Finta”, ibid. Matas is of the view that the judge “was either oblivious to what Christie was doing or did not appreciate its significance.” Matas, “The Case of Imre Finta”, ibid at 287. Cotler has warned:

[I]f the government is to engage in war crimes jury trials, it will have to be much more careful about jury selection. For given the process of jury selection in the Finta case – let alone the jury that was in fact picked – the verdict may well have been the same even without the improprieties involved in the questioning of witnesses and the inflammatory jury address.


Canadian Department of Justice, Background Paper: The Investigation of War Crimes in Canada (31 January 1995), cited in Cotler, “War Crimes Law”, supra note 973 at 461. Morris Rosenberg – former Deputy Minister of Justice and Deputy Attorney General of Canada, now Deputy Minister of Foreign Affairs – calls the evidentiary threshold established by the Supreme Court “extremely high”. Morris Rosenberg, “Canadian Legislation Against Crimes Against Humanity and War Crimes” in The Changing Face of International Criminal Law: Selected Papers (Vancouver: International Centre for Criminal Law Reform and Criminal Justice policy, 2002) 229 at 231. Cotler notes two other key problems with Finta: first, the characterization of the mens rea and actus reus elements of crimes against humanity and war crimes raised the bar for those crimes beyond that required by international law; second, the defences allowed the accused were exorbitant in relation to those available in international law. Cotler, “International Decision”, supra note 951 at 467-474. See also Cotler, “War Crimes Law”, supra note 973 at 608 (stressing that the identification of the available defences was erroneous).


Ibid (blaming the clash on the undeveloped state of international criminal law at the time).
Thus, even though the Supreme Court validated the international crimes provisions of the *Criminal Code*, it did so in a manner that discouraged prosecution through the recognition of defences that were potentially insurmountable for the prosecution.

4.3.3 The Aftermath of Finta

Following the adverse fallout of *Finta*, but more specifically to implement the Rome Statute of the ICC, Parliament passed the CAHWC Act in 2000 addressing what were considered the biggest obstacles to the prosecution of extraterritorial crimes in Canada as they relate to war crimes and crimes against humanity. While the jurisdictional problems that arose in *Finta* did not turn out to be the most critical concerns that have been expressed about the case, Parliament used the occasion of the passage of the CAHWC Act to straighten the jurisdictional aspects as well.

Regarding the defences, section 14(3) of the CAHWC Act provides:

> An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.

It is not necessary to go into an analysis of the above provision as that would digress too far into the substantive elements of the crimes in question, which would be beyond the scope of this study. Suffice it to add, however, that in 2005, the Supreme Court itself overruled the objectionable aspects of *Finta*. In *Mugesera v Canada (Minister of Citizenship and Immigration)*,\(^\text{994}\) it stated:

> Since *Finta* was rendered in 1994, a vast body of international jurisprudence has emerged from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR. These tribunals have generated a unique body of authority which cogently reviews the sources, evolution and application of customary international law. Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the Criminal Code, which expressly incorporate customary international law. Therefore to the extent that *Finta* is in need of clarification and does not accord with

\(^{994}\) 2005 SCC 40 [*Mugesera*].
the jurisprudence of the ICTY and the ICTR, it warrants reconsideration.  

Furthermore, Canada reconsidered its approach to the problem of war criminals and criminals against humanity in Canada. It abandoned the “made in Canada” solution – as its use of criminal prosecution was called – and resorted to the use of non-criminal prosecution remedies like extradition, revocation of citizenship and deportation. By 2010, it had had twenty-eight Nazi war crimes deportation and extradition cases. Most of these cases were terminated before their prime due to either the death or the illness of the persons concerned or that of key witnesses. In some cases, the persons concerned left Canada of their own accord either without contesting the proceedings or, where they contested, before the proceedings could be completed. The government also lost some of the cases – four on the merits and one on procedural grounds. A few of the cases are still pending in court.  

One scholar has expressed the hope that with the *Mugesera* decision, the Canadian government would be revitalized to revert to prosecution.  

But since then there has been only one war crimes and crimes against humanity prosecution in Canada: the case against Désiré Munyaneza, discussed later.

### 4.4 Establishing Criminal Jurisdiction in Canada

#### 4.4.1 Subject Matter Jurisdiction: The Real and Substantial Link Test

In *Libman*, the Supreme Court of Canada laid down the test for determining subject matter jurisdiction. And it is subject matter jurisdiction in the factual sense that *Libman* dealt with. Mr Libman operated a telephone sales solicitation room in Toronto. He employed a number of individuals as telephone sales personnel. On his directions, the salesmen made material

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995 *Ibid* at para 126. One of the objectionable aspects of Finta repealed by the decision was Finta’s holding that a “discriminatory intent” was required for all crimes against humanity. *Ibid* at para 144. The court stated that in matters like this, it is right and wise to defer to the jurisprudence of international criminal tribunals, not as a matter of judicial precedent, but as a matter of judicial prudence. The court noted that Finta’s error might be blamed on the paucity of international crimes jurisprudence at the time Finta was decided. But now that international crimes jurisprudence has percolated through the ICTY and ICTY, it was proper to align the interpretation of Canadian laws to that jurisprudence because of the “unified response” the fight against international crimes require. *Ibid* at para 178.


998 *R v Munyaneza*, 2009 QCCS 2201 [*Munyaneza*].
misrepresentations to US residents about their identity, their location and the quality and value of shares in two mining companies that purportedly engaged in gold mining in Costa Rica. The US residents received, in addition, promotional materials sent from Costa Rica and Panama by Libman’s associates. These misrepresentations induced the US residents to buy shares in the two mining companies. These shares were later shown to be worthless. The US residents were asked to send their purchase money to offices operated by Libman’s associates in Costa Rica and Panama, from where Libman collected his share which he brought back to Toronto to settle with his salesmen. Libman was charged with conspiracy to commit fraud. The issue before the Supreme Court of Canada was whether Libman could be prosecuted in Canada. Libman’s lawyers raised the point that the essential element in the offence was the deprivation of the US victims of their money and that such deprivation, if any, occurred outside Canada. The alleged offence could therefore not be tried in Canada. Writing for the Court, La Forest J rejected the idea of picking one ingredient of an offence and holding the place where that ingredient occurred as the location of the offence. He began his analysis by affirming that the primary basis of criminal jurisdiction in Canada is territorial. He stressed, however, that other bases of jurisdiction are equally permissible in international law, among them the nationality principle and the protective principle. After reviewing English authorities on transnational crimes, he decried the “doctrinal confusion” that characterized the way England had approached the question. His survey revealed that no single principle could be said to reconcile the various approaches English courts had taken in dealing with transnational crimes. Still, he recognized a general drift away from the traditional notions of territoriality:

[T]he English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single *situs* of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be

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1000 Ibid at para 11.
1001 Ibid at para 17. He observed the existence of different theories of jurisdiction in transnational cases, namely, the place of initiation theory (where the crime was initiated or planned), the gist or gravamen of the offence theory (*R v Ellis*, [1899] 1 QB 230), the completion of the offence theory (where the offence was committed: *R v Stoddart* (1909), 2 Cr App R 217), the effects theory (where the crimes impact was felt by the victim: *R v Jacobi and Hiller* (1881), 46 LTR 595n; *R v Nillins* (1884), 53 LJQB (NS) MC 157), and the continuing offence theory (where the offence is continuous: *R v Mackenzie and Higginson* (1910), 6 Cr App R 64). Libman, *supra* note 202 at paras 17-25.
argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country.\textsuperscript{1002}

La Forest J noted that to determine where a crime should be prosecuted in transnational cases, what the English courts did “was to consider the substantial links that connected the crime to that jurisdiction” without denying that the crime may have “sufficient links to different jurisdictions to justify prosecution in more than one place.”\textsuperscript{1003} He reviewed Canadian jurisprudence, after which he concluded:

The Canadian experience may be summed up as follows. In the early years after Confederation the territorial principle was narrowly construed in both civil and criminal cases, consistent with Canada's dependent status. But as time went on the courts began to interpret their territorial jurisdiction more liberally. On the whole, though, despite their policy of extending jurisdiction, they tended to apply the gist of the offence approach more consistently and mechanically than the English courts. The countervailing policies that, rightly or wrongly, affected the House of Lords in Board of Trade v. Owen, supra, do not appear to have been perceived in the Canadian cases that took the opposite view. However, as in England, the Canadian courts were prepared to move beyond the gist of the offence test when the impact of a crime was felt in Canada. And like the English courts, too, they in time adopted techniques to avoid the strait-jacket in which the rigorous application of that test had put them, notably the technique of continuing offences.\textsuperscript{1004}

La Forest J’s approach was to sift through the policy thrusts of the different judicial approaches, both in England and in Canada, and to determinedly identify the rationales that informed the various paradigm shifts in the jurisprudence. The rationale of the English House of Lord’s reasoning in \textit{DPP v Doot}\textsuperscript{1005} found particular favour with La Forest J. \textit{Doot} was a conspiracy initiated outside England for the purpose of smuggling narcotics to the US via England. In holding that English courts had jurisdiction, Lord Salmon adopted the “continuing offence” theory, reasoning that the offence was amply linked with any state through which the narcotics passed and that this comported with the principle of international comity.\textsuperscript{1006} La Forest J found in Lord Salmon’s approach “the realism that must prevail in approaching the nature of comity” in jurisdictional analysis.\textsuperscript{1007} He declared that Canada “has a legitimate interest in prosecuting

\begin{enumerate}
\item[1002] \textit{Libman}, \textit{ibid} at para 42.
\item[1003] \textit{Ibid} at para 21.
\item[1004] \textit{Ibid} at para 59.
\item[1005] [1973] A.C. 807 (HL) [\textit{Doot}].
\item[1006] \textit{Ibid} at 831–834.
\item[1007] \textit{Libman}, supra note 202 at para 39.
\end{enumerate}
persons for activities that take place abroad but have an unlawful consequence” in Canada.\textsuperscript{1008} In considering whether a criminal transaction falls outside Canadian jurisdiction, he stated that one must “take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence.”\textsuperscript{1009} He declared the test as follows: [A]ll that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. …[I]t is sufficient that there be a ‘real and substantial link’ between an offence and this country, a test well-known in public and private international law”.\textsuperscript{1010} La Forest J stressed that no legislation was required for the validity of this test, as it was after all “the courts that defined the manner in which the territoriality principle was applied,” and that this test simply animates the earlier formulations of the territoriality principle.\textsuperscript{1011} Applying the test to the facts of Libman, he found that there were “ample links” with Canada: the fraudulent scheme was devised in Canada; the operations that made the scheme function – the salesmen, the boiler room, \textit{et cetera} – were located in Canada.\textsuperscript{1012}

Comity lies behind the “real and substantial link” test as nothing in its requirements would dictate that a Canadian court restrain from asserting jurisdiction where there is a real and substantial link between the offence and Canada.\textsuperscript{1013} Stressing that comity “means no more nor less than kindly and considerate behaviour towards others”, La Forest J asked:

How considerate is it of the interests of the United States in this case to permit criminals based in this country to prey on its citizens? How does it conform to its interests or to ours for us to permit such activities when law enforcement agencies in both countries have developed cooperative schemes to prevent and prosecute those engaged in such activities? To ask these questions is to answer them.\textsuperscript{1014}

\begin{footnotes}
\item[1008] \textit{Ibid} at para 67 (noting the protection of the public as a widely acknowledged purpose of criminal law).
\item[1009] \textit{Ibid} at para 71.
\item[1010] \textit{Ibid} at para 74.
\item[1011] \textit{Ibid} (noting that Parliament has “seldom adverted to territorial considerations in finding criminal offences”) Morgan has questioned why the courts should take a greater interest than Parliament in imposing territorial restraints on itself. Morgan, \textit{supra} note 411 at 270.
\item[1012] \textit{Ibid} at para 72.
\item[1013] \textit{Ibid} at para 78.
\item[1014] \textit{Ibid} at para 77.
\end{footnotes}
Libman has been interpreted as engaging only the territoriality principle and not addressing cases of extraterritorial conduct that produces effects in Canada. In *R v Klassen*, Cullen J of the British Columbia Supreme Court stated:

*Libman* was dealing with the circumstances that justify a court assuming jurisdiction over a particular offence in the absence of explicit extraterritorial legislation, and was thus necessarily based on the territoriality principle alone. It says little or nothing about jurisdiction over offences based on the four other principles recognized in customary international law.  

Neil Campbell and William Rowley write that “[t]he courts have not definitively determined whether subject-matter jurisdiction exists in the reverse scenario where foreign conduct affects Canadian victims in Canada.”  

Benjamin Perrin has equally argued that *Libman* is well suited to adjudicatory jurisdiction based on the territoriality principle, but ill suited for addressing extraterritorial claims.  

It is submitted that it is not entirely accurate to interpret *Libman* as limited to jurisdiction based on the territoriality principle alone. That it concerned jurisdiction in the absence of explicit extraterritorial legislation does not necessarily mean that it was based exclusively on the territoriality principle. While the specific facts of the case engaged the territoriality principle, the significance of the Supreme Court’s entire holding exceeds the territoriality principle. La Forest J cited approvingly the following statement by Lord Diplock in *Treacy*:  

There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state. Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. The state is under a correlative duty to

1015 2008 BCSC 1762, para 73.  
1017 Perrin, “Taking a Vacation from the Law?”, supra note 506 at 194.  
1018 *Treacy*, supra note 531.
those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by deterring by threat of punishment conduct by other persons which is calculated to harm those interests. Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.\textsuperscript{1019}

He cited several other English decisions that followed Treacy, including \textit{R v Baxter},\textsuperscript{1020} \textit{Doot},\textsuperscript{1021} \textit{R v Wall}\textsuperscript{1022} and \textit{Secretary of State for Trade v Markus}.\textsuperscript{1023} What is clear from the above passage is that a state can assert extraterritorial jurisdiction without violating the principle of comity. However, as the court was not faced with the reverse scenario engaging conduct abroad that produced harmful effects within Canada, La Forest J understandably saw no need to elaborate on that. Yet, in his review of Canadian jurisprudence, he found that “though the courts were willing to find jurisdiction in Canada when the agreement and preparation took place here, they were also ready to hold that the country where the results contemplated by the conspiracy took effect also had jurisdiction though the accused was not present there”.\textsuperscript{1024} This suggests that were the fraudulent scheme orchestrated outside Canada but had adverse effects in Canada, La Forest J would have found “ample links” with Canada. Given the nature of the crime of conspiracy as a crime that does not require consummation of the intended crime for its punishment, even if actual effects are not produced, jurisdiction would lie in the state where the effects are intended. In practice, however, such a state might have little interest to prosecute where the criminal plans are not actually carried out. But in the post 9/11 era, states would not hesitate to take jurisdiction over persons who conspire abroad to commit terrorist acts within their territory even if their plans have not been carried out. It is not likely that the existence of specific legislation would be required as a basis for such jurisdiction although given the global attention terrorism has generated, most states would have specific legislation to deal with extraterritorial conspiracies to commit terrorist acts within their territory.

\begin{footnotes}
\footnotetext[1019]{Libman, supra note 202 at para. 37.}
\footnotetext[1020]{[1972] 1 QB 1 (CA).}
\footnotetext[1021]{Supra note 1005.}
\footnotetext[1022]{[1974] 1 WLR 930 (CA).}
\footnotetext[1023]{[1976] AC 35 (HL).}
\footnotetext[1024]{Libman, supra note 202 at para 50 (citing \textit{Re Brisbois} (1962), 133 CCC 188 (Ont HC) and \textit{Re Devlin}, [1964] 3 CCC 228 (Ont Co Ct)).}
\end{footnotes}
Lord Diplock would appear to disagree that a conspiracy in one state intended to be implemented in another state was triable in that other state where the conspiracy has not actually been implemented and has had no harmful consequences there. In Treacy, he wrote that “the rules of international comity … do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment.” He thereby implied that unless the conspiracy has actually been executed in the state where it is intended to be executed, thus unless it has actually had harmful consequences there, comity would prevent the intended state from taken jurisdiction. This view seems to have been supported by Bastarache J who in R v Cook cited with approval the above remarks of Lord Diplock. However, it is submitted that the nature of the conduct that is conspired to be committed would prevent the operation of comity if it is such that the international community has an interest in. Conspiracies in one state to commit acts of terrorism in another may provide an example in the present era. Besides, Lord Diplock’s statement does not sit easily with the way in which many English authorities have treated the question of jurisdiction over extraterritorial conspiracy. Liangsiriprasert v United States was an appeal from the Hong Kong Court of Appeal to the Judicial Committee of the Privy Council over the extradition of a Thai from Hong Kong to the US on charges of conspiracy to traffic dangerous drugs. The conspiracy took place in Thailand. The trafficking was to take place in Hong Kong but no overt act had yet occurred. Writing for the Privy Council, Lord Griffith stated that an overt act was not an ingredient of the crime of conspiracy, but that it may be useful in proving the existence of conspiracy. He held that a conspiracy formulated outside Hong Kong was triable in Hong Kong even in the absence of any overt act in Hong Kong if the conspiracy was intended for Hong Kong. The only element linking the crime with Hong Kong was thus the intent to execute the conspiracy there. This is a rejection of the territoriality principle without consideration of comity. In the words of Lord Griffith:

Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that

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1025 Treacy, supra note 531 at 564.
1026 Cook, supra note 520 at 669.
1028 Ibid at 251.
should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.\footnote{Ibid.}

In fact, one might argue, as did the Hong Kong Court of Appeal in *Attorney-General v Yeung Sun-shun*,\footnote{[1987] HKLR 987 at 998. Joshua Blackmore has noted that this case laid the groundwork for the decision in *Liangsiriprasert*. Joshua DA Blackmore, “The Jurisdictional Problem of the Extraterritorial Conspiracy” (2006) 17 Criminal Law Forum 71 at 77.} that where the conspiracy was not directed at residents of the state where it was formulated, that state cannot reasonably seek to invoke comity to stop trial in the state whose residents were the target of the conspiracy.

*Liangsiriprasert* has been followed by later English cases. *R v Naini*\footnote{[1999] 2 Cr App R 398 [*Naini*].} involved the defrauding of English nationals. The appellants argued that as the English victims were based abroad when the crime was alleged to have been committed, England lacked jurisdiction. The English Court of Appeal applied *Liangsiriprasert*, holding that “[t]he residence of the party who suffered the loss did not determine where the crime of defrauding took place” and that as the conspiracy to defraud was intended for England, English courts had jurisdiction.\footnote{Ibid at 399.} Blackmore regards the assumption of jurisdiction in this case as an assertion of the protective principle.\footnote{Blackmore, supra note 1030 at 79.}

This is questionable. First, nothing in the language of the court suggests that it was applying the protective principle. Second, there was no national security issue involved, nor were vital economic interests of the UK as a state, nor UK’s territorial integrity or other governmental interests, affected. For the protective principle, as we know it, to be engaged, the attack must be directed against the state, and not merely against private citizens of the state. What the protective principle seeks to protect are state interests, not individual interests. It is therefore the nature of the interest that is threatened, rather than the residence of the victims, that is the focus of the protective principle. The *Naini* decision may equally not be regarded as a manifestation of the nationality principle as it was not the English nationality of the victims that actually gave the English court jurisdiction. Rather, it was the fact that the fraudulent conspiracy was directed at residents of England – who no doubt would mostly be and were English nationals – although those who eventually fell prey to the conspiracy happened to reside outside England at the time. Moreover, it is not the nationality of the victims that is the focus of the nationality principle. It is
the passive personality principle that focuses on the nationality of the victims, but the English court’s jurisdiction in the case was not based on the nationality of the victims. The decision may be justified on the basis of the effects doctrine, even though it went beyond what the territoriality principle, from which the effects doctrine developed, permits. Strictly speaking, however, it does not properly fit into any known jurisdictional principle. Christopher Blakesley, after examining the US judicial approach to “thwarted extraterritorial narcotics conspiracies”, concludes that jurisdiction over those conspiracies comes very near to fitting into several of the known extraterritorial jurisdictional bases, but actually fits into none of them.\(^\text{1034}\) He opines that attempting to cabin botched extraterritorial conspiracies into any of the traditional jurisdictional theories violates the “conceptual integrity” and traditional iterations of the theories.\(^\text{1035}\) For instance, he argues, the territoriality principle requires that a constituent element of the offence, or some adverse effect of the offence (under the effects doctrine), actually occur within the territory of the state asserting jurisdiction. But when the conspiracy is nipped in the bud, there is nothing to activate the territoriality principle. The protective principle applies to offences that threaten national security, sovereignty or some other governmental function. But most (narcotics) conspiracies do not pose such a threat. The universality principle speaks to the heinousness of the crime and its universal condemnation. But most conspiracies, and in fact narcotics conspiracies, have not been so universally condemned as to engage the universality principle. Even what constitutes narcotics, and what quantities are prohibited, varies from state to state.\(^\text{1036}\) Blakesley calls for the adoption of a “hybrid theory of jurisdiction”, founded on a principle of “reasonableness”, that combines two or more of the traditional theories in order to meet the jurisdictional needs of the asserting state. Under the hybrid theory, jurisdiction would be proper if the offence meets “all but one of the requirements of any two or more” of the existing theories but does not meet “all the requirements of any single theory,” provided the assertion of jurisdiction does not breach the principle of reasonableness.\(^\text{1037}\) The principle of reasonableness operates to check assertion of exorbitant jurisdiction by allowing jurisdictional

\(^{1034}\) Christopher L Blakesley, “A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes” (1984) 4 Utah L Rev 685 [Blakesley, “Extradition and Jurisdiction”]. This may be contrasted with the French approach which insists on the existence of actual effect within French territory for jurisdiction to lie. \textit{Ibid} at 697.

\(^{1035}\) \textit{Ibid} at 723.

\(^{1036}\) Blakesley, “Extradition and Jurisdiction”, \textit{ibid} at 719–720.

\(^{1037}\) \textit{Ibid} at 723.
expansion only to the extent that other states cannot be offended by it.\textsuperscript{1038} Applying the hybrid theory to botched extraterritorial narcotics conspiracy, Blakesley argues that the offence meets all the requirements of the territoriality principle except the absence of any actual effect within the territory of the asserting state. It meets all the requirements of the protective principle in that it threatens national interests but the interests do not (necessarily) relate to security, sovereignty or important governmental functions. It meets all the requirements of the universality principle in that narcotics is universally condemned except that it is not regarded as so heinous as to engage the universality principle.\textsuperscript{1039} All that is therefore required, according to Blakesley, is that the offence meets all but one of the requirements of any two or more, and not all, of the existing theories.

Blakesley’s analysis is limited to the consideration of thwarted extraterritorial narcotics conspiracies. It does not consider other thwarted extraterritorial conspiracies that do not concern narcotics. Some other thwarted extraterritorial conspiracies may fully meet the requirements of a single existing theory. For instance, a thwarted extraterritorial conspiracy to commit murder by nationals of a state may meet the requirements of the nationality principle since what is required under the principle is that the offenders be nationals of the state seeking to assert jurisdiction, and since conspiracy is by itself a punishable crime, the conspirators can be punished even if their conspiracy has been thwarted. Even where this relates to narcotics, there is no reason in principle why nationality jurisdiction should not lie. It is arguable too that a thwarted extraterritorial conspiracy may meet the requirements of the passive personality principle where the conspiracy is targeted at nationals of the state seeking to assert jurisdiction.

Thus, given the nature of the crime of conspiracy, it is submitted that a thwarted extraterritorial conspiracy to commit a crime in Canada would meet the requirements of the real and substantial link test. To hold otherwise could defeat the purpose of criminalizing conspiracies. As an inchoate crime, it is “[a] a step toward the commission of another crime, the step in itself being serious enough to merit punishment.”\textsuperscript{1040} In Shulman v The King – a case involving a conspiracy in Canada to induce members of the public outside Canada to purchase the shares of a worthless company – Walsh J stated that “[i]n the eyes of some people only financial gains matter; but there is more to conspiracy than its successful culmination. Its

\textsuperscript{1038} Ibid.
\textsuperscript{1039} Ibid.
\textsuperscript{1040} Black’s Law Dictionary, 9\textsuperscript{th} ed. (St Paul, (MN): Thomson Reuters, 2009).
preparation and evolution, even in the case of failure, is reprehensible.”

In the words of Lord Griffiths in Liangsiriprasert, “it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.” And in the words of Meredith J, “[t]he law would be lame if it were powerless to reach conspirators so long as they took care to agree to carry into effect their wrongs beyond the borders of the country in which they conspired to do the wrongs. It must be born in mind always that the crime of conspiracy may be complete without anything having been done to carry it out.” La Forest J cited this statement of Meredith J with apparent approval in Libman. Botched extraterritorial conspiracies may be deemed as potentially connected with the state where they are intended to be carried out. There is no reason why such a potential connection should not suffice to meet the requirements of the real and substantial link test for the purpose of prosecuting extraterritorial conspiracies. All that should be required is proof that the conspirators intended to carry out their conspiracy here.

The point being made here is that, with respect to conspiracies, insisting on actual (in the sense of physical) connection, as opposed to potential connection, would defeat the essence of criminalizing conspiracies. This would be particularly so where the conduct conspired to be committed is not criminalized in the state where the conspiracy took place. Regarding potential effects of botched extraterritorial conspiracies as sufficient, when combined with the preemptive goal of criminalizing conspiracies, is largely consistent with the dictionary meaning of “real” and “substantial”. In Canadian Oxford Dictionary, the following words/expressions are used to describe the meaning of “real”: “actually existing or occurring in fact”, “not imaginary”, “actual or true”, “not just appearing so”, “genuine”, and “sincere”. Black’s Law Dictionary uses the words “actual”, “genuine”, and “true”. The catchall word seems to be “genuine”, i.e., not false or sham. A proven extraterritorial conspiracy to commit a crime in Canada cannot be described as having a false connection with Canada. Canada has a genuine interest to prevent it from happening by punishing the conspirators if they are found in Canada. The substantiality of

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1041 (1946), 2 CR 153 (Que CA).
1042 Liangsiriprasert, supra note 1027 at 251.
1043 R v Backrack, (1913) 21 CCC 257 at 265.
1044 Libman, supra note 202 at para 48.
1045 The principle of potential connection should be limited to cases where the conspirators positively intended to carry the conspiracy into effect in the state seeking to assert jurisdiction, and not include cases where the state was not the target of the conspirators, but the impact of the conspired conduct would be felt if the conspiracy is carried out. Asserting jurisdiction in the latter case would be exorbitant.
1047 Black’s Law Dictionary, supra note 1025.
the connection to Canada, for the purpose of Canadian jurisdiction, may then depend on whether the conspiracy is intended to be executed wholly or partially in Canada. Whether Canada should – as opposed to can – assert jurisdiction in the case would then depend, as discussed shortly, on the requirements of international comity. It should be pointed out, however, that jurisdiction over botched extraterritorial conspiracies is encompassed by section 465(4) of the Criminal Code\(^\text{1048}\) which expressly renders justiciable in Canada conspiracies formulated outside Canada but which are intended to be executed in Canada. What is being argued here is that in the absence of such statutory grant, the real and substantial link test provides a valid basis to assume jurisdiction over botched extraterritorial conspiracies.

Thus, while the real and substantial link test is especially suited to jurisdictional claims based on territoriality, it may also be used to support jurisdictional claims over botched extraterritorial conspiracies.

It might seem that only the crime of conspiracy is suited to effects-based jurisdiction. But there exists in Canada cases where Canadian courts exercised jurisdiction over non-conspiracy offences consisting of acts committed abroad that produced adverse effects in Canada.\(^\text{1049}\) Such jurisdiction has been justified on the basis of the “continuing offence” theory.\(^\text{1050}\)

Perrin has argued that “Libman is fundamentally about ensuring that claims of adjudicative jurisdiction respect the international principle of comity.”\(^\text{1051}\) There is support for this view in La Forest J’s reasons. The centrality of comity in La Forest J’s formulation of the real and substantial link test was such that the only factor that could have prevented La Forest J from declaring that Mr Libman was triable in Canada was comity. He made his the words of

\(^\text{1048}\) The section provides: “Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) [i.e., with respect to conspiracy to commit murder and other indictable offences as well as offences punishable on summary conviction] in Canada shall be deemed to have conspired in Canada to do that thing.”

\(^\text{1049}\) One of such cases is Re Hanes and The Queen (1982), 69 CCC (2d) 420 (Ont HC). See Libman, supra note 202 at para 50.

\(^\text{1050}\) In R v Trudel, Ex parte Horbas and Myhaluk, [1969] 3 CCC 95, the accused were charged with conspiracy to forge documents. The alleged conspiracy was made outside Manitoba. The only element that engaged Manitoba was the receipt of false documents in Manitoba by the accused. The court dismissed the view that the principles applicable to the place of formation of civil contracts applied to the determination of the situs of a crime. In deciding whether Manitoba had jurisdiction, it noted “the fact that some criminal acts are of a continuing character and may rightly be deemed to occur in more than one jurisdiction”. Although this was an interprovincial case, its reasoning is still relevant to an international case. See also R v W McKenzie Securities Ltd, [1966] 4 CCC 29. And see generally Libman, supra note 202 at paras 52-56.

\(^\text{1051}\) Perrin, “Taking a Vacation from the Law”, supra note 506 at 194.
Lord Diplock in *Treacy* cited earlier. He also endorsed Lord Salmon’s sentiments in *Doot* to the effect that “we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies.” What La Forest J is saying here is that the real and substantial link test serves as a safeguard for the principle of comity. It must be pointed out, however, that the real and substantial link test does not provide safeguard for comity in cases involving international crimes like war crimes and crimes against humanity committed abroad. Instead, it is the presence of treaties and customary international law governing those crimes that provide a yardstick for the application of comity. Although La Forest J seemed oblivious to this point in *Libman*, he did recognize it in his dissent in *Finta* when, in evaluating the applicability of *Libman*, he wrote: “The international community has not only stated that it does not object to our exercising jurisdiction in this field; it actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity.” The relevance of the existence of international treaties to considerations of comity is also contained in the following remarks of Estey J in *R v Spencer*.

Comity, according to Estey J:

is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

Thus, if assuming jurisdiction in war crimes and crimes against humanity committed abroad is in the interest of the international community, then no issue of comity is involved or, to put it more correctly, asserting jurisdiction will be in the interest of comity. Michael Hirst writes: “[C]onsiderations of international law or comity impose no such general constraint on the ambit

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1052 *Treacy, supra* note 531 and accompanying text.
1053 *Libman, supra* note 202 at para 77.
1055 *Finta* (SCR), *supra* note 931 at para 84.
1056 [1985] 2 SCR 278.
1057 *Ibid* at 283 (italics mine) (quoting the words of the US Supreme Court in *Hilton v Guyot*, 159 US 113, 163-164 (1895) [*Hilton*]).
of a state’s criminal law.” He notes that “considerations of international law have tended” in recent times to increase the scope of English criminal law in order to enable England fulfill its international obligations. Perrin suggests that relying on treaty law or customary international law as a basis for jurisdiction “respects comity more fully than other possible approaches.” This is because no state party to a treaty can be heard to complain that its interests are being infringed upon as a result of a jurisdiction exercised by another state on the basis of that treaty. In the case of customary international law, this disability to complain is placed on every state since every state is enjoined to prosecute violations of customary international law.

In fact, La Forest J restrained to cast the real and substantial link test into a rigid formula. Instead, he left the limits of the test to be determined by the requirements of international comity. In his words, “the outer limits of the test may, however, well be coterminous with the requirements of international comity.” These “outer limits” have hitherto not been spelled out. In Cook, Bastarache J stated that “it is permissible to assert criminal jurisdiction over acts taking place in another state if they are connected to other acts that take place in the forum state which are in furtherance of criminal behaviour, or if the acts in the other state have some pernicious consequence within the forum”. Forcese has argued that Bastarache J’s statement to the effect that extraterritorial conduct that has adverse effects within Canada can ground Canadian jurisdiction without offending the principle of comity is “largely inconsistent both with the wording in Libman and the practice of lower courts.” Forcese’s argument overlooks La Forest J’s clear statement that Canada “has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence” in Canada. In his review of Canadian jurisdictional practice, La Forest J also stated that “though the courts were willing to find jurisdiction in Canada when the agreement and preparation took place here, they were also ready to hold that the country where the results contemplated by the conspiracy took effect also had jurisdiction though the accused was not present there”. Libman should not be understood as

1059 Ibid at 35.
1060 Ibid at 35.
1061 Libman, supra note 202 at para 76.
1062 Cook, supra note 520 at 667-668.
1063 Craig Forcese, “Deterring ‘Militarized Commerce’, supra note 18 at 188.
1064 Libman, supra note 202 at para 67.
1065 Ibid at para 50.
creating a novel jurisdictional theory *per se* that is in opposition to the theories already adopted by Canadian courts. Rather, what La Forest J intended to do – and did do – in *Libman* was to create order out of the doctrinal chaos manifest in the miscellany of jurisdictional approaches adopted by Canadian (and English) courts. He observed that all the approaches boil down to a requirement of some form of connection with the forum territory. The real and substantial link test should therefore be seen as the common denominator in all the jurisdictional approaches hitherto adopted in Canada. It is an all-encompassing, shorthand expression of the different approaches. While there was a focus on connection related to the elements of the offence in *Libman*, there was a clear recognition that the consequences of the offence could supply the requisite connection.

Forcese’s further argument that reading *Libman* as supporting effects-based jurisdiction is not consistent with the practice of lower courts is not borne out by a review of the jurisprudence. The truth is that lower courts have inconsistently interpreted what constitutes the requisite link. In *R v OB*, the accused was alleged to have sexually assaulted his granddaughter during a car trip to the US and while they were in the US. The question was whether Canada had jurisdiction to try him. The Court of Appeal for Ontario held that there was no real and substantial connection with Canada, and that for such a connection to exist “there must be a significant link between Canada and the formulation, initiation, or commission of the offence”. This holding contrasts with the decision of the Superior Court of Quebec in *Re Ouellette and The Queen*. Two Canadian residents were vacationing in the Bahamas while one (the accused) struck the other. The victim later died in a hospital in Canada. The question was whether the accused could be prosecuted in Canada. Béliveau J of the Quebec Superior Court cited both *Libman* and *R v OB* and stated the law as follows:

[There are] two basic hypotheses in relation to the connection of an offence to Canada. First, the crime may have been committed in Canada but have effects outside of Canada or, second, it may have been committed outside of Canada and produce harmful consequences in Canada.... [I]t is clear that there is no principle concerning the matter which would be against Canadian courts taking jurisdiction in either

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1067 *Ibid* at 192 (italics mine).
1068 (1998), 126 CCC (3d) 219. Forcese views this case as consistent with the holding in *R v OB*. Forcese, “Deterring Militarized Commerce”, supra note 18 at 188. As the analysis that follows shows, this view is hard to accept.
situation.\textsuperscript{1069}

After noting the interest of the international community in seeing that no offence goes unpunished, Béliveau J stated the applicable test as:

\begin{quote}
[a] test of varying content which is assessed in relation to the circumstances and, in particular, the importance of the elements of the offence linked to Canada, the relevant facts which arose in Canada and the harmful consequences which were caused, or which could have been caused, in Canada. When weighing these factors, one must determine whether, by taking jurisdiction over the matter, the Canadian court offends international comity and one must take into account the universally recognized objective of not letting crime go unpunished.\textsuperscript{1070}
\end{quote}

The British Columbia Court of Appeal has also interpreted \textit{Libman} as supporting effects-based jurisdiction. In \textit{R v Hammerbeck},\textsuperscript{1071} the accused had lawful custody of a child for a specified period of time, after which he must return the child to its mother. He took the child in British Columbia from its mother and travelled with it to California. If he had returned the child to its mother in British Columbia within the lawful custodial period permitted him under a custody order, he would not have committed any offence. But he kept the child in California beyond the lawful custodial period. His lawyers argued, quite astutely, that since he could lawfully take the child to California, provided he returned the child to its mother within the permitted period, the act of “taking” took place in California and not in British Columbia. Accordingly, that British Columbia had no territorial jurisdiction. There was evidence that he formed the intention in British Columbia to unlawfully detain the child in California. In resolving the jurisdictional issue, the British Columbia Court of Appeal cited with approval the following statement of the Court of Appeal for Ontario in \textit{Re Bigelow and The Queen}:

\begin{quote}
The test in reality has become whether any element of the offence has occurred in the province claiming jurisdiction. … They are offences where the province claiming jurisdiction can establish, first, a continuity of operation extending from that province to other provinces; secondly, the commission of an overt act in that province, or thirdly, the registration of effects in that province from acts committed in other provinces.\textsuperscript{1072}
\end{quote}

\textsuperscript{1069} \textit{Ibid} at 228-229.
\textsuperscript{1070} \textit{Ibid} at 229.
\textsuperscript{1071} (1993) 45 RFL (3d) 265 [\textit{Hammerbeck}].
\textsuperscript{1072} (1982), 69 CCC (2d) 204 (Ont CA) (italics mine).
The *Bigelow* case was an interprovincial custody case. Mother and child lived in Ontario while father lived in Calgary where he took the child. The charge was laid in London, Ontario. The argument was that the detention of the child occurred in Alberta and not in Ontario, so that Ontario courts did not have jurisdiction. The Court of Appeal for Ontario concluded, among other things, that as the effect of the withholding of the child in Alberta was felt in Ontario, Ontario courts had jurisdiction. Although this case was decided before *Libman*, the British Columbia Court of Appeal stated that “[t]he test in *Libman* encompasses the test in *Bigelow* and applying it to the case herein establishes that the Supreme Court of British Columbia had the jurisdiction to try the appellant.”

Following the above authorities, it cannot be said that the occurrence of the effects of the offence within Canadian territory cannot supply the jurisdictional link necessary for Canadian jurisdiction. Rather, in considering whether there is a real and substantial link, the effects of the crime within Canadian territory is one of the factors to be considered. Whether it alone can fully supply the jurisdictional link would depend on the substantiality of the effects and, generally, the particular facts of the case. What the court would therefore be looking for is whether those effects are real and substantial, and not simply imaginary, fictional, negligible or trivial.

Applying the real and substantial link test to the extraterritorial criminal conduct of Canadian corporations, the necessary connection can be established in a variety of ways. It would be established if it can be shown that the preparation of the offence took place (in whole or in part) in the corporation’s office (or anywhere else) in Canada even though it was executed abroad. The preparation could have been done by telephone with the other conspirators located abroad. Where the Canadian corporation operated through its foreign subsidiary, all that is required for the necessary connection to be established is for the Canadian parent to be somehow implicated in the conduct of its subsidiary. Thus owing to the doctrine of corporate separate personality, a clearer territorial connection between the offence and the state would be required for jurisdiction to lie. Where the alleged extraterritorial conduct is that of the parent corporation’s subsidiaries without the participation of the parent, there would be no real and substantial link with Canada unless Canadian criminal law imposes obligations on Canadian parent companies towards their foreign subsidiaries and those obligations have been breached; or unless the conduct has an unlawful consequence in Canada. In this latter alternative, the only

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1073 *Hammerbeck*, *supra* note 1071 at para 22.
obstacle to a Canadian court exercising jurisdiction would relate to personal jurisdiction over the foreign subsidiaries since they are located abroad. The issue of personal jurisdiction in criminal law is dealt with shortly in this chapter.

La Forest J’s notion of comity as “kindly and considerate behaviour towards others” may have a positive implication for the prosecution of extraterritorial corporate crimes. One might ask, as asked La Forest J, how considerate is it of the interests of other countries to permit corporate criminals in Canada to prey on their citizens through the instrumentality of an intricate network of subsidiaries? How does it conform to Canada’s interests or to those of other states for Canadian courts to turn a blind eye to overseas corporate criminal activities of Canadian corporations merely because the conduct was executed by the overseas subsidiary? “To ask these questions is to answer them.”

4.4.2 Personal Jurisdiction

Where subject matter jurisdiction has been established, it is still necessary to establish jurisdiction over the person of the suspect. Trial in absentia is unknown to Canadian criminal law. The suspect must therefore be physically or legally present within the jurisdiction of the court. The criminal summons must be served personally on the individual suspect. In the case of a corporation, the summons may be served by physically delivering it to the “manager, secretary or other executive of the corporation or a branch thereof”.

Ex juris service of criminal summons is thus unknown to Canadian criminal law. In Schulman v The Queen, the accused was personally served by a Royal Canadian Mounted Police officer in Australia for alleged violations of Canadian income tax laws. When the accused did not appear at the trial, the prosecution brought a motion to proceed ex parte. The British Columbia Supreme Court granted the motion. Mr Schulman’s lawyers applied to stop the trial on the basis of defective service. The court accepted Mr Schulman’s lawyers’ application and the Crown appealed. Dismissing the appeal, the British Columbia Court of Appeal stated:

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1074 The US Supreme Court has once upheld contempt proceedings held in the absence of the accused, stating that it did not violate the due process clause. Blackmer v United States, 284 US 421 (1932). Here, a US national residing in France was held in contempt for failing to honour a subpoena to appear as a witness in a criminal trial in the US. See generally, Blakesley, “Extradition and Jurisdiction”, supra note 1034 at 711 n 74.

1075 Criminal Code, supra note 561, s 509(2).

1076 Ibid at s 703.2.

1077 (1975), 58 DLR (3d) 586 [Schulman].
In penal proceedings such as those here, a summons cannot properly be served on a person outside Canada without such service being authorized by a statute, and that in the absence of a proper service the Court has no jurisdiction over the person, even though it may have jurisdiction over the subject-matter of the complaint.  

In *R v RJ Reynolds Tobacco (Delaware)*, the Crown posted a summons from Ontario by registered mail to the corporate accused’s address in the US. The accused had no office or place of business in Canada. The Crown drew the court’s attention to the fact that section 701.1 of the *Criminal Code* incorporates the service procedures of a province. In Ontario, the *Provincial Offences Act* allows summons to be executed on a corporation “by registered mail to the corporation at an address held out by the corporation to be its address”. The provision is silent on whether the address must be a Canadian address. Macdonell J held that because the Criminal Code has incorporated provincial service procedures, and since the Ontario *Provincial Offences Act* allows service by mail, the mailed service was proper and effective. He stated that in any case, service was effected in Ontario where the summons was mailed, and not in the US where the summons was received. According to him, service was complete at the point of mailing the summons, and the actual place of delivery was inconsequential, for under Ontario law, there was no requirement to show that the mail was actually delivered to the addressee. Upon review, however, Gans J held that the mailed service was ineffective to establish personal jurisdiction over the corporate accused. He stated that the incorporation of provincial procedural rules on service did not render service outside Canada effective for the purposes of federal prosecution. In his words, “[i]f Parliament wished to provide service of a summons *ex juris* beyond the borders of Canada, it should have done so in clear and unequivocal language.” Thus, the absence of territorial language in the service provision was not viewed as permitting *ex juris* service. The decision is justified on the basis that the prohibition of *ex juris* service of criminal summons is so well entrenched in the common law of Canada that clear and explicit language is required to supplant it.

The holdings in *Schulman* and *Reynolds Tobacco* have important implications for the prosecution of Canadian corporations operating overseas. They mean that personal jurisdiction cannot be taken against a foreign subsidiary of a Canadian corporation that has no office in

1078 *Ibid* at 591.
1079 (2004) 182 CCC (3d) 126 [*Reynolds Tobacco*].
1081 *Reynolds Tobacco*, supra note 1079 at para 55.
Canada. Unless the participation of the Canadian parent in the offence can be established, jurisdiction cannot lie over the Canadian parent since the principle of corporate personality would operate to shield the parent from liability for the activities of its subsidiary.

Martin Low has suggested that it might be theoretically possible to effect service of criminal summons abroad. This would be done through mutual legal assistance treaties. Under Article II of the *Canada-United States Mutual Legal Assistance Treaty*, the assistance to be mutually provided by the two states includes “service of documents”. Although this has never been used to initiate criminal prosecution in either Canada or the US, Low suggests that service of documents could include serving summons on a corporation situated in the US to compel its attendance for trial in a Canadian court. But whether service of originating summons in criminal cases is within the language of the treaty is debatable. Given the entrenched nature of the rule against *ex juris* service of criminal summons in Canada, it is highly unlikely that *ex juris* service of originating criminal summons can be read into the treaty in the absence of clear language. But even if the treaty contains such language, it cannot be said that it thereby alters the rule against *ex juris* service within Canada’s domestic forum. Rather, it merely creates obligations on Canada to assist the US to effect such service within Canadian soil, should the US so request, and a corresponding duty on the US to allow Canada to do the same should Canada so request. But Canada would request such assistance only if its domestic law permits *ex juris* service. As Low puts it, while the treaty permits service of documents, and assuming “documents” include originating criminal summons, “the legal effect of serving documents has to be determined by other, specific provisions of Canadian law.”

Dilks J partially captured these points when he wrote in *R v Filinov*, with reference to this very treaty, that “the only provisions of the treaty which had to be addressed in new Canadian legislation were those that dealt with

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the procedure whereby assistance was to be given by Canadian authorities to their counterparts in
the United States. Assuming, however, Canada is inclined to initiate ex juris service of
criminal summons under the cover of the treaty, it might be concerned that the US might
reciprocally seek ex juris service against Canadian corporations equally under the cover of the
treaty.

It might yet be possible to take criminal jurisdiction over a foreign corporation. This may
be done through service effected on senior level employees of the foreign corporation who are
found in Canada since service on a corporation can be effected through its senior level
employees, like managers and secretaries. In Santa Marina Shipping Co v Lunham & Moore Ltd,
the Ontario Superior Court held that such service could be effective only where it is shown that
the senior officer is in Canada on the business of the corporation. Although this case dealt
with service of civil summons, there is no clear basis on which to regard such service as
improper for the purpose of criminal trial of the foreign corporation where a real and substantial
link between the offence and Canada has been established and it is shown that the senior
manager is in Canada on the business of the foreign corporation. In civil actions the corporation
must have some ongoing presence in Canada to be considered resident. This does not seem to
apply in the criminal context because residence is not a basis for criminal jurisdiction. And as
service of criminal summons is effected on a senior officer of the corporation, the rule in Santa
Marina can be extended to criminal proceedings provided the criminal conduct has a real and
substantial link with Canada.

It is also possible to cause the attendance of a corporate suspect, thus to procure personal
jurisdiction over it, through the process of extradition. Although extradition is used to secure the
attendance of individual suspects, it has served in one Canadian case as a means of securing the
attendance of a corporate accused, albeit indirectly. In the Thomas Liquidation case, charges
were brought against parties resident in the US as a result of their engagement in deceptive
marketing against Canadians in violation of the Competition Act of Canada. Canada made an
extradition request to the US and an arrest warrant was issued against the individuals. One of the

1085 (1993), 82 CCC (3d) 516 (Ont Ct (Gen Div)).
1086 Low, “International Cartel Enforcement”, supra note 1083 at 15.
1087 (1978), 18 OR (2d) 315 (applying the Ontario Rules of Civil Procedure, RRO 1990,) [Santa Marina].
1088 Competition Bureau Canada, “Thomas Liquidation Inc. Fined $130,000 for One Count of misleading
Advertising Under the Competition Act”, Press Release, 7 February 1995, online: Competition Bureau Canada,
1089 RSC 1985, c C-34.
suspects, who was an executive officer of Thomas liquidation Inc, waived his right to an extradition hearing and came to Canada and pleaded guilty to the charge. He not only pleaded guilty on behalf of himself, he also pleaded guilty on behalf of Thomas Liquidation Inc, the corporate accused. Although the extradition of the senior officer would not have automatically activated jurisdiction over the corporation due to the separate legal personality of the corporation and due to the fact that the senior officer could not be said to have been in Canada on the business of the corporation, the threat of extradition of the senior officer led to voluntary surrender to jurisdiction by the corporation through its senior officer. The case remains the only case in which extradition was used to indirectly cause a foreign corporation to come to Canada to answer criminal charges.

4.5 THE CAHWC ACT

4.5.1 Background to Legislation

Bill C-19, the proposed CAHWC Act, was introduced in Parliament on the 51st anniversary of the Universal Declaration of Human Rights: 1091 10 December 1999. This was no happenstance. The UDHR is believed to have cleared the path leading to the creation of the proposed legislation. 1092 The bill’s subject matter was seen as furthering the principles uttered in the UDHR. That a Canadian diplomat – John Peters Humphrey – is credited as the primary author of the UDHR must have made the introduction of the bill on UDHR’s anniversary more attractive. The bill was meant to serve two purposes. The first, and primary purpose, was to implement domestically the Rome Statute – a statute that Canada played key role in creating. The second was to fill the loopholes created by Finta in Canada’s efforts to prosecute crimes against humanity and war crimes in furtherance of its policy that Canada would not be a sanctuary for perpetrators of these crimes. 1093 Thus, regarding the first purpose, it was to promote the
complementarity principle of the Rome Statute. Regarding the second purpose, Ruth Wedgwood notes that the statute’s treatment of available defences was intended to “overcome the Finta problem.”\textsuperscript{1094} She notes, for instance, that the statute “rules out an ‘obedience to superior orders defence’ in Canadian courts where the order was manifestly unlawful \textit{and} the defendant’s claimed belief in its lawfulness was based on hate propaganda.”\textsuperscript{1095} But the statute actually goes further than Wedgwood indicates. It rules out this defence if the order was manifestly unlawful \textit{or} if belief in its lawfulness was due to propaganda, and provides that orders to commit genocide or crimes against humanity are manifestly unlawful.\textsuperscript{1096} The new legislation has been extolled as going “a long way to laying the ghost of Finta to rest.”\textsuperscript{1097}

4.5.2 The Jurisdictional Framework

The long title of the Act makes it clear that the act is intended to criminalize in Canada genocide, crimes against humanity and war crimes, to implement domestically the Rome Statute, and to make consequential amendments to other Acts relevant to the prosecution of these crimes. It creates and redefines these crimes, creating punishment for their violations. It defines a “crime against humanity” as:

- murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place

some of the adverse fallout from Canadian jurisprudence that could be problematic in terms of domestic criminal prosecution in Canada relying on that jurisprudence. Therefore it has to serve as a corrective, not only in terms of, as I say, implementing the ICC statute, but in terms of the history of Canadian jurisprudence in this regard.” House of Commons, Canada, Standing Committee on Foreign Affairs and International Trade, Evidence, 30 May 2000, at 1155, online: Parliament of Canada, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040375&Language=E#T1050> (last accessed 29 October 2011) [HC Standing Committee Hearing].


\textsuperscript{1095} \textit{Ibid} (italics mine for emphasis).

\textsuperscript{1096} CAHWC Act, \textit{supra} note 9, s 14.

\textsuperscript{1097} David Turner, “Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected other States” in Dominick McGoldrick, Peter Rowe & Eric Donnelly, eds, \textit{The Permanent International Criminal Court} (Portland (Oregon): Hart publishing, 2004) 337 at 361. 11 begins by granting the accused the right to rely on any justification, excuse or defence available under Canadian or international law either at the time of the offence or at the time of the proceedings. Section 12(2) limits the right of the accused to plead \textit{autrefois acquit}, \textit{autrefois convict} and pardon in respect of the crimes under the Act. For instance, these defences would not avail the accused where he/she was tried in a foreign court and the proceedings in that court were for the purpose of shielding the accused from criminal responsibility, or were not conducted independently or impartially in keeping with due process norms recognized in international law and in a manner that was inconsistent with an intent to bring the accused to justice.
of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.\textsuperscript{1098}

It defines “genocide” as:

an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.\textsuperscript{1099}

And it defines a “war crime” as:

an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.\textsuperscript{1100}

The Act establishes Canadian jurisdiction over these offences regardless of whether they are committed in or outside Canada. In doing so it incorporates the international law jurisdictional principles of nationality, passive personality and universality. Its section 8 reads:

A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

(a) at the time the offence is alleged to have been committed,

(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,

(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

(iii) the victim of the alleged offence was a Canadian citizen, or

\textsuperscript{1098} CAHWC Act, supra note 9, s 6(3).
\textsuperscript{1099} Ibid.
\textsuperscript{1100} Ibid.
(iv) the victim of the alleged offence was a citizen of a state that was allied with
Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present
in Canada.

The Act thus expands the provisions of the old Code. In particular, it provides (under section
8(b)) that jurisdiction may be assumed over anyone who commits those crimes outside Canada
and is later present in Canada, even where the culpable act was committed before the coming
into force of the section. It thus drops the requirement that Canada must have been able to
exercise jurisdiction over the suspect, consistent with international law, at the time of the offence.
The only requirement for universal jurisdiction under the Act therefore is that the suspect be
present in Canada. Section 8(b) creates no further requirement, as the conditions that apply under
subsection (a) do not apply under subsection (b). “The rationale for this enlarged mandate”,
Rosenberg has told us, “is the universal condemnation of the conduct as criminal and the fact
that the alleged perpetrator creates the required nexus to Canada at the time he or she enters our
country.”

Since the perpetrator is present in Canada only after the crime has been committed,
the characterization of his/her presence in Canada as a form of connection with Canada in
relation to the alleged crime is dubious. Given that trial *in absentia* is unknown to international
law, exercise of jurisdiction based on the suspect’s retroactive connection with the forum (with
regard to the offence) is certainly the highest form of universal jurisdiction permissible in
international law. Therefore describing section 8(b) of the Act as granting “limited universal
jurisdiction” is erroneous. Finally, the Act provides that proceedings against the suspect may
be commenced in any territorial division in Canada as if the offence had occurred in that
territorial division. The wording of the provision suggests that proceedings may be
commenced even where the suspect is not yet in Canada. It reads:

Proceedings for an offence under this Act alleged to have been committed outside
Canada for which a person may be prosecuted under this Act may, whether or not the
person is in Canada, be commenced in any territorial division in Canada and the
person may be tried and punished in respect of that offence in the same manner as if
the offence had been committed in that territorial division.

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1101 M Rosenberg, *supra* note 991 at 233.
1102 M Rosenberg, *ibid*.
1103 CAHWC Act, *supra* note 9, s 9(1).
However, since section 8(b) requires the presence of the suspect in Canada for jurisdiction to lie, actual trial under that section cannot commence in the absence of the suspect. Moreover, since the suspect is to be tried in the same manner as if the offence had been committed in that territory, the rules on personal jurisdiction in operation within that territory would apply. Since in Canada, trial in absentia is unknown, the presence of the suspect in that territory is fundamental to jurisdiction.

Since the coming into force of the Act in 2000, there has been only one prosecution that is based on it. Munyaneza was accused in a Quebec court of murdering and raping civilians, and of leading attacks against ethnic Tutsis at the National University of Rwanda during the 1994 Rwanda genocide. He was charged with seven counts of genocide, crimes against humanity and war crimes. On 22 May 2009, the Superior Court of Quebec found him guilty and sentenced him to life imprisonment without parole for 25 years. For being the first case under the CAHWC Act, the case is historic. Beyond this, however, the case is of little assistance to the determination of the jurisdictional aspects of the Act. For one thing, jurisdiction was not contested in the case. This might be because of the facts of the case and the expansive nature of the jurisdiction uttered in the CAHWC Act. It might equally be because Munyaneza was charged in his own capacity. The 200-page judgment focused largely on analyzing the evidence substantiating the indictment. Sixty-six witnesses – thirty for the prosecution and thirty-six for the defence – were heard.\footnote{Fannie Lafontaine, “Canada’s Crime against Humanity and War Crimes Act on Trial” (2010) 8 JICJ 269 at 271.} The judge’s analysis of the substantive content of the international crimes, while correct, has been rightly described as lacking in “breadth” and “depth”.\footnote{Ibid.} As the case concerned a natural person who was charged in his own capacity, its usefulness to the analysis of the Act’s applicability to corporations is very limited in light of the lack of depth in the judge’s analysis. The Act’s applicability to foreign corporate conduct must therefore be based exclusively on a textual analysis of the Act.
4.5.3 Application to Corporations

The Act is silent on the issue of applicability to corporations. But this does not necessarily lead to an inference that it does not apply to corporations. For the Act’s silence may be contrasted to an identical provision in the Rome Statute which explicitly confines the definition of the court’s jurisdiction to natural persons.\textsuperscript{1106} Section 2(2) of the Act provides that “[u]nless otherwise provided, words and expressions used [therein] have the same meaning as in the Criminal Code.” This implies that the Act is not a self-contained and freestanding legislation, but one that is intended to merge with the Criminal Code for the purpose of prosecuting genocide, crimes against humanity and war crimes.\textsuperscript{1107} While listing the offences chargeable thereunder, the Act makes use of the words “every person” who commits….\textsuperscript{1108} Nowhere in the Act is “every person” defined. As this expression is used and defined in the Criminal Code, the definition uttered in the Criminal Code applies to the Act. Section 2 of the Criminal Code states: “‘every one’, ‘person’, ‘owner’, and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of countries, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.” Supporting this definition is section 35 of the Interpretation Act\textsuperscript{1109} which states that “[i]n every enactment … person, or any word or expression descriptive of a person, includes a corporation.” It follows inexorably that the words “every person” used in the Act includes corporations. It follows that the Act applies to corporations as much as it applies to individuals.

In addition, in accordance with section 8(b), the presence of the suspect, in this instance the corporate suspect, in Canada is necessary for prosecution. The Act does not define when a suspect can be said to be present in Canada. In the case of natural suspects this poses no difficulty. Complexities arise in the case of corporate suspects. This is due to the principles of separate personality and limited liability, under which shareholders, employees or directors of a corporation cannot ordinarily be held accountable for the actions of the corporation, and under which, likewise, parent corporations cannot ordinarily be held accountable for the actions of their

\begin{footnotesize}
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\item \textsuperscript{1106} Rome Statute, \textit{supra} note 8 at s 25(1)
\item \textsuperscript{1107} The relationship between the Act and the Criminal Code is also articulated in the Interpretation Act, RSC 1985, c 1-21, whose section 34(2) provides: “all the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment”.
\item \textsuperscript{1108} CAHWC Act, \textit{supra} note 9, ss 4 and 6.
\item \textsuperscript{1109} RSC 1985, c 1-21.
\end{itemize}
\end{footnotesize}
subsidiaries or *vice versa*. In cases where the direct liability of the Canadian parent is alleged, determining the suspect’s presence poses no difficulty since the corporation is registered in Canada. But where indirect liability is alleged, it becomes necessary to establish the nature of the relationship between the Canadian parent and its foreign subsidiary. In the absence of any guide under the CAHWC Act for determining this, Canadian courts may turn to the “agency theory” of the common law for guide. The common law has applied the following factors to determine agency: (1) Are the subsidiary’s profits treated as those of its parent? (2) Does the parent appoint the persons conducting the business of the subsidiary? (3) Is the parent the head and brain of the trading venture? (4) Is the parent in effective and constant control of the parent? The provisions of section 2(3)(a) of the *Canadian Business Corporations Act* may also be applied. It provides that “a body corporate is controlled by a person or by two or more bodies corporate if securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those bodies corporate”. Under these circumstances, the actions of the foreign subsidiary may be attributed to the Canadian parent corporation, with the result that the suspect may be said to be in Canada for the purposes of jurisdiction under the CAHWC Act. Other modes of implicating the Canadian parent through the acts of its representatives are discussed in a separate section under Bill C-45.

4.6 OTHER POSSIBLE STATUTORY BASES FOR EXTRATERRITORIAL CRIMINAL JURISDICTION OVER CORPORATIONS

Besides the CAHWC Act, the *Criminal Code* itself contains provisions permitting the prosecution of extraterritorial crimes in Canada. One of such provisions is section 465 (which replaced section 423) of the *Criminal Code*. The section deals with extraterritorial conspiracies. The relevant portions of the section are contained in subsections (3) and (4):

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.

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1110 *Smith, Stone & Knight Ltd v Birmingham (City)* [1939] 4 All ER 116. See also Hélène Dragatsi, *Criminal Liability of Canadian Corporations for International Crimes* (Toronto: Carswell, 2011) at 174-175.

1111 RSC 1985, c C-44.
(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

Subsection (1)(a) deals with conspiracies to commit or cause the commission of murder, subsection (1)(b) deals with conspiracy to prosecute a person for an alleged offence which the conspirator knows that person did not commit, while subsection (1)(c) and (d) deals with conspiracy to commit indictable and summary offences. It is apparent that the provision embodies the principle of double criminality for jurisdiction to lie. In Bolduc, the Supreme Court stated that section 465 “does not create an offence … [but] creates a presumption of territoriality so as to make the conspiracy an offence punishable in Canada.” It is necessary to prove that the accused violated foreign law and that the conduct would equally have amounted to an offence in Canada were it committed in Canada. Bolduc related to an offence of unlawful entry into the US. The appellant argued that identity of offences means that unlawful entry into the US must itself constitute an offence in Canada. That is to say, that there must be a statutory provision in Canada criminalizing unlawful entry into the US. The prosecution responded that the essence of the provision is that the offence has its equivalence in Canada, and that the corresponding offence in Canada to unlawful entry into the US is unlawful entry into Canada. Writing for the whole court, Chouinard J held that in determining the identity of the offences, the focus should be on the “essential elements” of the offences and not on whatever name they are called in both countries. He concluded that the presumption under section 465(3) means that “persons who have conspired to cause others to come into the United States unlawfully are deemed to have conspired to cause persons to come into Canada unlawfully.”

Forcese has argued that “transnational jurisdiction over a conspiracy to commit a wrongful act other than murder requires both that the conspiracy take place in Canada and that the act which the conspirators seek to commit overseas be an offence under the laws of the foreign jurisdiction.” This argument does not capture section 465(4) that relates to conspiracy formulated outside Canada. Subsection (4) is not limited to conspiracy to commit murder, but

1112 Bolduc, supra note 987 at 578.
1113 Ibid at 580-581.
includes conspiracy to commit an “indictable offence”. It creates transnational jurisdiction over conspiracy formulated outside Canada to commit an offence, including murder, in Canada by deeming such offence as having been committed in Canada. This means that for jurisdiction over a conspiracy to commit a wrongful act other than murder in Canada, that the conspiracy take place in Canada is not required.

The British Columbia Court of Appeal considered the provisions of section 465 (which, again, were then under section 423) in *R v Lai and Lau*. A conspiracy formulated in Hong Kong and Malaysia to import drugs into Canada was thwarted when one of the conspirators was arrested in Toronto. The other conspirators were extradited from Hong Kong to Canada and convicted by the British Columbia Supreme Court. The accused argued on appeal that the British Columbia Supreme Court had no jurisdiction to try them because the conspiracy was not formulated in British Columbia and that the only Canadian province that might have jurisdiction was Ontario, being the only Canadian province where any part of the conspiracy might be said to have taken place. In dismissing the jurisdictional challenge, Esson JA relied on section 465(5) (which was then section 423(5)) which provides:

Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada, and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

Other provisions abound in the *Criminal Code* criminalizing extraterritorial conduct. Most of the provisions reflect Canada’s desire to implement its international legal obligations. These provisions include: section 7(4.1) dealing with extraterritorial child sex trafficking in implementation of Canada’s obligations under the *UN Convention on the Rights of the Child*; section 7(1) dealing with offences on an aircraft; section 7(2.01) dealing with offences committed in relation to cultural property in implementation of the *Convention for the Protection

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1115 Section 465(1) has four paragraphs, (a) to (d). Only paragraph (a) relates to murder. Paragraph (b) relates to conspiracy to prosecute a person for an offence one knows that person did not commit. Paragraph (c) relates to conspiracy to commit an indictable offence other than that provided in paragraph (b). And paragraph (d) relates to a conspiracy to commit an offence punishable on summary conviction. Subsection (4) covers the entire subsection (1) and is not limited to paragraph (a).


1117 Ibid at para 10.

of Cultural Property in the Event of Armed conflict;\textsuperscript{1119} section 7(2.1) dealing with offences relating to international maritime navigation; section 7(3.1) dealing with offences against hostage taking; section 7(3.71) dealing with offences against UN personnel; section 7(3.2) and (3.72) dealing with offences involving nuclear material, explosives, or other lethal devices; section 7(3.7) dealing with torture committed by government officials or by persons acting with the consent or acquiescence of government officials; and section 7(3.73) dealing with offences related to the financing of terrorism. These provisions require some sort of connection with Canada, either through the nationality of the offender or that of the victim, in some cases through the residence (ordinary or permanent) of the offender, for jurisdiction to lie.\textsuperscript{1120} Most of them also embody the double criminality requirement. There is nothing in the nature of the offences that suggests that corporations cannot be held liable for their violations.

\textbf{4.7 BILL C-45 AND ITS JURISDICTIONAL SIGNIFICANCE}

On 27 October 2003, Canadian Parliament passed Bill C-45 – \textit{An Act to Amend the Criminal Code (criminal liability of organizations)} – the Westray Bill, named after the mining disaster that killed twenty-six miners in Westray, Nova Scotia. The bill was intended to modernize the law on criminal liability (and sentencing) of corporations to reflect the complexity of modern business and organizational structures. It does so by expanding the theories underlying the attribution of criminal liability to corporations and other organizations. Before the coming into force of the bill, corporate criminal liability was based on the “identification doctrine”. The identification doctrine was tied to the “directing mind” of the corporation. For a corporation to be criminally liable under the doctrine, the corporation’s officer who directed or participated in the conduct in question must have been part of the directing mind of the corporation. This was called the “identification doctrine” because, as a corporation has neither brain nor volition, what the law sought to do was to identify the individual whose conduct (\textit{actus reus}) and mental state (\textit{mens rea}) could be attributed to the corporation by virtue of that individual’s position in the

\textsuperscript{1119} 14 May 1954, 249 UNTS 216.
\textsuperscript{1120} Section 7 of the Criminal Code is also being amended to add human trafficking as one of the offences which, if committed outside Canada, would be prosecutable in Canada if the offender is a Canadian national or permanent resident. See Bill C-310 (An Act to Amend the Criminal Code (trafficking in persons)), Fourth Session, Forty-first Parliament, 60 Elizabeth II, 2011.
managerial hierarchy of the corporation.  The law regards any such person as the “directing mind” of the corporation. To be a directing mind of a corporation, the person must have “governing executive authority” over the activity complained of. Governing executive authority means “authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.” As Iacobucci J put it, the court’s concern is whether the officer has “decision-making power in a relevant sphere of corporate activity.” This means that governing executive authority is “activity-specific.” It follows that a person could have governing executive authority in one sphere of corporate life but not in another. A person with governing executive authority in the operations department of a corporation could, for instance, not bind a corporation if he/she directed a criminal activity in the marketing department. Such a person, however, could still be liable in his/her personal capacity. As the term “governing executive authority” suggests, one must look at the corporate structure of a corporation to identify the corporation’s directing mind. Such a person would naturally be high up in the corporate structure of the corporation. But how high such a person should be has not been clearly defined and may vary from case to case, as it involves a fair measure of judicial discretion. One Canadian scholar has observed that Canadian courts are prepared to locate such a person at a lower level than do English courts. D Hanna has pointed out that in Canada identifying the directing mind of a corporation would depend on the type of organization, the command structure of the organization and the type of misconduct in question. Generally, however, directing minds are located among the executives of the organization who have authority to set policies for the corporation; ordinary managerial authority is not enough. And

1122 See Canadian Dredge & Dock Co v The Queen, [1985] 1 SCR 662 at 628 [Canadian Dredge & Dock Co].
1123 Rhone (The) v Peter A.B. Widener (The), [1993] 1 SCR 497 at 521 [Rhone].
1124 Rhone, ibid.
1128 MacPherson, supra note 1125.
the *Rhone* case,\(^{1130}\) though a civil case, suggests that directing minds would be found at higher levels of authority.\(^{1131}\) This was the law as it stood before Bill C-45.

The major provisions of Bill C-45 are now contained in section 22 of the *Criminal Code*. One of the major changes brought by this amendment is the application of the principles of corporate criminal liability not only to business corporations as traditionally understood, but to “organizations” generally. Organizations are defined as:

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that
   (i) is created for a common purpose
   (ii) has an operational structure, and
   (iii) holds itself out to the public as an association of persons.\(^{1132}\)

The reference to “organizations” as opposed to “persons” or “corporate bodies” was introduced so as to cover the various groups of persons that may not fit into the definition of “persons” or “corporate bodies” but which still engage in criminal activity.\(^{1133}\)

The new amendment does away with the identification doctrine and establishes that in respect of offences where the prosecution is required to prove fault, liability is attributable to an organization if a “senior officer” of the organization, with the intent at least in part to benefit the organization:

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.\(^{1134}\)

The provision goes further. It employs more specific language by expounding the definitions of “representative” and “senior officer”:

\(^{1130}\) *Supra* note 1123.


\(^{1132}\) *Criminal Code, supra* note 591 at s 2.


\(^{1134}\) *Criminal Code, supra* note 591 at s. 22.2.
“[R]epresentative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization; [and] “senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.\footnote{1135} It is therefore no longer necessary to establish the participation of the highest-level employees of a corporation; the participation even of middle managers may suffice to implicate the corporation.\footnote{1136} The new provision is far reaching in another respect. Mere knowledge on the part of a senior officer that a representative of the organization is or is about to commit an offence would trigger the organization’s liability if the senior officer fails to take all reasonable steps to stop the representative from becoming a party to the offence, with the intention of benefiting the corporation. From the way section 22.2(b) is worded, even if the representative does not have the requisite \textit{mens rea} to commit the offence, the company would still be liable based on the senior officer’s \textit{mens rea}.\footnote{1137} Section 22.2(c) is far-reaching to the point that no active participation in the conduct on the part of the senior officer is required to engage the corporation’s liability. The implication of this is that a corporation may be criminally liable even though the senior officer whose conduct triggered the liability cannot be held criminally liable in his/her individual capacity. This is because, as the Supreme Court of Canada held in \textit{R v Dunlop and Sylvester},\footnote{1138} an individual’s knowledge of the criminal intent of another is generally not enough to ground his/her conviction. The senior officer need not have any authority in the specific sphere of activity from where the conduct emanated. A senior officer in the human resources department, for instance, can bind the corporation if he/she knows that a representative of the corporation, working in another department of the corporation, is or is about to engage in criminal activity and, with an intent at least in part to benefit the corporation, fails to take all reasonable steps to prevent the representative from carrying on with the criminal activity. The provision thus silently enjoins all senior officers of a corporation to cooperate in their day-to-day activities within the corporation, as this may be one of the best ways to avoid liability for the

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\item \footnote{1135}{Ibid at s 2.}
\item \footnote{1136}{Archibald \textit{et al}, supra note 1129.}
\item \footnote{1137}{This provision, however, does not seem to have altered the old law since the concept of innocent agent is well known in the common law See MacPherson, \textit{supra} note 1125 at 261.}
\item \footnote{1138}{[1979] 2 SCR 881 at 898.}
\end{itemize}
}
corporation. The only provisos are that the senior officer must have acted with intent at least in part to benefit the organization, that the senior officer “knows” that the representative is or is about to engage in the conduct, and that the senior officer did not exercise due diligence to prevent the crime. This requirement of “knowledge”, as opposed to “recklessness”, however, places a huge burden on the prosecution. The definition of “representatives” to include the corporation’s contractors is also significant in light of the modern practice of corporations. Modern corporations, especially those operating in crisis-prone regions, increasingly undertake most of their activities through contractors. The definition of “representatives” places a huge burden on corporations to pay close attention to what their contractors are doing in the course of executing their contracts.

The wording of section 22.2(c) seems to have been slightly poorly drafted. It speaks of where a representative of a corporation “is or is about to be a party to an offence”. It requires the senior officer of the corporation to “take all reasonable measures” to prevent the representative from being a party to that offence. Taking the first alternative, where the representative “is” a party to an offence, what is there for a senior officer to prevent if the representative is already a party to the offence? Perhaps it should be interpreted to mean that a senior officer is required to stop the representative from continuing to be a party to the offence. This makes sense since the corporation’s liability begins only from the moment a senior officer becomes aware of the representative’s conduct. A contrary view would render this first alternative useless, it being impossible to stop what has already been done.

The second alternative containing the clause “is about to be a party to the offence” apparently speaks to a situation where the commission of the crime is at an inchoate stage. This includes where the representative is attempting or conspiring to commit an offence, or counselling or aiding and abetting another person to commit an offence. This means, for instance, that if the senior officer takes all reasonable steps to prevent the representative from actually committing that offence, the corporation would not be liable for the attempt already made by the representative, although the representative may be liable for it in his/her individual capacity. Although these are by themselves crimes and punishable without more, they are steps towards the commission of substantive crimes. Acts that take place before their commission, such as the formation of the thoughts to commit them, are not cognizable as crimes. In R v Chan, Simmons JA of the Court of Appeal for Ontario stated that “[s]trictly inchoate crimes are a unique class of
criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts.”  

It follows that there can be no attempt to commit an inchoate crime, unless the statute explicitly and specifically provides otherwise.  

In United States of America v Dynar, Major J stated that “[c]riminal law should not patrol people’s thoughts.”  

In R v Dungey, the Court of Appeal for Ontario held that “there is no such offence [in Canada] as attempt to conspire to commit a further substantive offence”.  

This holding was confirmed by the Supreme Court of Canada in R v Déry.  

The definition of attempt under section 24 of the Criminal Code differentiates attempt from preparation to commit a crime.  

In Dungey, Dubin JA, however, left the door of attempted conspiracy open to a possible exception to substantive conspiracy because the conspiracy in that context is the main focus of the harm and not seen as the risk of commission of a crime.  

The provisions of section 22.2 may have important implications for the jurisdiction of Canadian courts over Canadian parent corporations for the actions of their overseas subsidiaries. True, the section does not contain any territorial language. But nothing in its drafting history suggests that it has extraterritorial application. However, the nature of the section is such that it is to be applied alongside other provisions of the Criminal Code as well as other criminal statutes, such as the CAHWC Act. Crimes against humanity and war crimes committed with the participation of foreign representatives of a Canadian corporation may trigger the application of section 22.2. A foreign subsidiary can serve as its parent’s representative for certain transactions. If on the instruction of the parent corporation’s senior officer, the foreign subsidiary engages in conduct overseas that amounts to a crime there, the parent corporation may be held liable in Canada for such conduct. The same would apply to the corporation’s contractors. In fact, a

1139 (2003), 178 CCC (3d) 269 at para 69.  

1140 Section 9(a) of the Criminal Code, supra note 591, prohibits the recognition of common law crimes. This means that no one shall be convicted of a crime that is not a creature of statute.  


1142 (1979), 51 CCC (2d) 86 at 98-99 (per Dubin JA) [Dungey].  

1143 [2006] 2 SCR 669, para 47 [Déry].  

1144 Section 24(1): Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence. (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.  

1145 Dungey, supra note 1142 at 99.
combined effect of section 22.2 and the CAHWC Act imposes an onerous burden on Canadian corporations in regard to their foreign subsidiaries operating in war zones if they are to avoid criminal liability in Canada for crimes against humanity and war crimes committed on the foreign land. Lowering the category of employees who can bind a corporation makes it easier for a corporation to be implicated since knowledge of a senior officer of a corporation that a foreign subsidiary or contractor is engaging in the prohibited conduct abroad, and the failure of that senior officer to take all reasonable measures to stop the foreign subsidiary or contractor from committing the crime, with intent at least in part to benefit the parent corporation, would bind the corporation in Canada. Thus section 22.2, while not directed at jurisdiction, has opened wider the gates of jurisdiction over corporations.

4.8 SYNOPSIS OF POSSIBLE SUBSTANTIVE BASES OF CORPORATE CRIMINAL LIABILITY

A number of liability theories emerge from the discussion on the CAHWC Act as well as the Criminal Code. The theories apply to corporations as much as they apply to natural persons. In the context of extraterritorial acts of Canadian corporations, particularly in light of the fact that the participation of corporations is more or less indirect, their liability must somehow fit into the notion of complicity. Four complicity theories may be distilled from the statute, jurisprudence and literature. These include conspiracy, aiding and abetting, joint criminal enterprise (JCE), and criminal negligence. As this study is not engaged with the substantive aspects of corporate liability, only a brief summary of these theories are provided below for the purpose of giving flesh to the preceding jurisdictional analysis.

4.8.1 Conspiracy

Conspiracy is a viable ground of corporate liability. The provisions relating to conspiracy have earlier been set out (see, for instance, section 465 of the Criminal Code). Conspiracy is defined as an “agreement to perform an illegal act or to achieve a result by illegal means.”\footnote{\textit{R v Douglas} [1991] 1 SCR 301 at 316.} Conspiracy
is “essentially a crime of intention”. The core of conspiracy is agreement. In the words of Dickson J, “[t]he important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy.” In *R v Kotyszyn*, the accused was a suspected professional abortionist. An undercover police officer, pretending to be pregnant, approached her for abortion. The accused agreed to perform the abortion and was paid $100 by the undercover police officer’s “boyfriend”. Just as the accused wanted to commence the abortion, with her instruments laid out, the undercover revealed her identity and arrested the accused. The accused was charged with conspiracy to perform an abortion and attempted conspiracy to commit that same offence. The accused was acquitted on both counts. On the first count – conspiracy to commit an abortion – the court held that agreement – an essential ingredient of the offence – was not made out as the undercover officer – the apparent co-conspirator – only wished to set a snare for the accused and not to have an abortion. The second count was dismissed on the ground that there is no such thing as the crime of attempted conspiracy in Canada. This implies that for there to be conspiracy, there must be a common purpose – “a meeting of the minds” – between the conspirators. In the US, however, what the accused did in this case would amount to “unilateral conspiracy”. A person is guilty of unilateral conspiracy if the agreement of his/her co-conspirators is pretended, as in *Kotyszyn*. In Canada, however, the doctrine of unilateral conspiracy does not exist.

It is an essential element of the crime of conspiracy that an overt act is not required for the crime to be complete. This issue was directly considered by the Privy Council in *Liangsiriprasert*. Lord Griffith held that an overt act was not required, but was useful in proving the existence of conspiracy and for establishing a link between the jurisdiction and the

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1147 Déry, *supra* note 1143 at para 47.
1148 *R v Papalia* [1979] 2 SCR 256 at 276-277.
1149 (1949), 8 CR 246 (Que CA).
1150 *Dynar, supra* note 1141 at para 87.
1152 Déry, *supra* note at 1143 at para 35 (noting that the unilateral conspiracy doctrine, however well established in the US, is not viable in Canada, and rejecting the existence of the crime of attempted conspiracy in Canada). See also *R v O’Brien*, [1954] SCR 666; *R v Lessard* (1982), 10 CCC (3d) 61 (Que CA).
conspiracy. It follows that if the conspiracy can be established by other means, such as by eavesdropping, the existence of an overt act is unimportant.

For a corporation to be guilty of conspiracy to commit an extraterritorial crime, the corporation must be shown to have entered into an agreement to commit those crimes there. It seems that it is sufficient even if only part of the agreement is entered into in Canada. Under section 465(3) of the Criminal Code, the offence conspired must be an offence in the state where the conspiracy is intended to be executed. Writing in the context of militarized commerce, Forcese points out that were a Canadian corporation to conspire to use excessive force in their overseas operations, and were the state, where such force is to be used, to allow the use of excessive force by security forces to protect the operations of foreign corporations, no liability for conspiracy in Canada would appear to be possible in that event under section 465(3). The requirement that the conduct be a crime in the foreign country would, however, not apply to crimes against humanity and war crimes under the CAHWC Act since the criminalization of the conduct under customary international law or conventional international law is enough for Canadian jurisdiction under the Act. But even under section 465(3), where the conspiracy relates to the extraterritorial commission of murder, the requirement of double criminality would not arise. All that is required is that the agreement be freely entered by the corporation and, in light of section 22.2 of the Criminal Code, any of the corporation’s representatives can bind the corporation. The operation of section 22.2 to the offence of conspiracy would be limited. This is because the section attaches liability where the representative “is or is about to” commit an offence. The “about to” aspect of the section is synonymous with the notion of “attempt”. And as noted earlier, there is no such thing as attempt to conspire. For section 22.2 to apply, therefore, the representative must have actually conspired to commit a crime, and not “about to” conspire to commit a crime. Thus, where a senior officer of a corporation knows that a representative of the corporation is conspiring to commit an offence and the senior officer does not take all reasonable steps to thwart the conspiracy, with the intention of even only partly benefiting the corporation, the corporation may be held liable for that very conspiracy. This would apply both

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1153 Liang siriprasert, supra note 1027 at 251. See also Blackmore, supra note 1030 at 75 (“Proof of an overt act may be useful in ascertaining the existence of a conspiracy generally, but is not required”, criticizing Doot for “contriv[ing]” the requirement of an overt act within England for English jurisdiction to lie in respect of an extraterritorial conspiracy and the English decision in Board of Trade v Owen [1957] 1 All ER 411 at 421–422 declining jurisdiction where a conspiracy was formed in England to commit an offence outside England on the ground that the case was justiciable only in the state where the impact of the conspiracy was felt.

Aiding and abetting is a liability theory that is well known in both international law and Canadian law. In Furundzija,\textsuperscript{1155} the International Criminal Tribunal for the former Yugoslavia surveyed 50 years of customary international law on aiding and abetting and concluded that aiding and abetting consists of “the \textit{actus reus} of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The \textit{mens rea} required is the knowledge that these acts assist the commission of such offence.”\textsuperscript{1156} The assistance need not be tangible\textsuperscript{1157} nor need it have a causative link to, or be “a \textit{conditio sine qua non}” for the commission of the crime.\textsuperscript{1158} However, the assistance must have had a “substantial effect” on the commission of the crime.\textsuperscript{1159} It could be an act or an omission and may occur “before, during or after the act of the principal.”\textsuperscript{1160} Silence may also constitute the aiding and abetting conduct especially if the person is in a position of authority and chooses to do nothing while his/her subjects are perpetrating the crime with his/her knowledge.\textsuperscript{1161} The Furundzija Trial Chamber noted that the aiding and abetting conduct may itself be lawful, but “becomes criminal only when combined with the principal’s unlawful conduct.”\textsuperscript{1162} It is not necessary for the aider and abettor to share the criminal intent of the perpetrator of the crime; all that is required is that the aider and abettor has knowledge that his/her conduct would contribute to the commission of the crime.\textsuperscript{1163} Knowledge of the exact crime the perpetrator is about to commit is also not required. If the aider and abettor “is aware that one of a number of crimes will probably be committed, and one of

\begin{itemize}
  \item \textsuperscript{1155} Supra note 52.
  \item \textsuperscript{1156} Ibid at para 249.
  \item \textsuperscript{1157} Ibid at para 232.
  \item \textsuperscript{1158} Ibid at para 233.
  \item \textsuperscript{1159} Prosecutor v Blagojevic and Jokic, ICTY Case No. IT-02-60, 17 January 2005, para 726 (Trial Chamber) [Blagojevic and Jokic].
  \item \textsuperscript{1160} Prosecutor v Tadic, ICTY Case No. IT-94-1-T, 7 May 1997, para 691–692 (Trial Chamber). See also Blagojevic and Jokic, ibid.
  \item \textsuperscript{1162} Supra note 52 at para 243.
  \item \textsuperscript{1163} Ibid at 245.
\end{itemize}
those crimes is in fact committed, he has intended to facilitate the commission of that crime, and
is guilty as an aider and abettor.”\textsuperscript{1164}

In Canada, aiding and abetting liability can be found in section 21(1) of the \textit{Criminal Code}. That section provides that “every one is a party to an offence who...(b) does or omits to do
anything for the purpose of aiding any person to commit it; or (c) abets any person in committing
it.” The meaning of aiding and abetting was considered by the Supreme Court of Canada in \textit{R v Greyeyes}.\textsuperscript{1165} Here, Cory J defined “aiding” as “to assist or help the actor” and “abetting” as
“encouraging, instigating, promoting or procuring the crime to be committed”\textsuperscript{1166} This definition
of aiding and abetting apparently goes beyond the elements enumerated in the \textit{Furundzija} and
other line of international cases cited above in that it includes the elements of “instigating” and
“procuring”. The definition Dickson J proffered in \textit{R v Dunlop}\textsuperscript{1167} seems more in line with the
elements outlined in the international cases. Dickson J described the nature of aiding and
abetting thus:

\begin{quote}
Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.\textsuperscript{1168}
\end{quote}

However, Cory J’s definition was adopted in the recent decision of the Supreme Court in \textit{R v Briscoe}.\textsuperscript{1169} The instigating and procuring component of Cory J’s definition sits uncomfortably
with the ordinary meaning of the words “aid” and “abet”. The \textit{Canadian Oxford Dictionary}
defines “aid” as “promote or encourage”, and abet as “encourage or assist”. It defines “procure”
as “obtain, bring about”, and “instigate” as “bring about by incitement or persuasion”, “provoke”,
“urge on”, “incite”.\textsuperscript{1170} \textit{Black’s law Dictionary} also defines abet as “to aid, encourage, or assist
(someone), especially in the commission of a crime”; “[t]o support actively”; and instigate as “to

\begin{footnotesize}
\bibitem{1164} Ibid at para 246.
\bibitem{1165} [1997] 2 SCR 825 [Greyeyes].
\bibitem{1166} Ibid at 837.
\bibitem{1167} [1997] 2 SCR 881.
\bibitem{1168} Ibid at 891.
\bibitem{1169} [2010] 1 SCR 411 at para 14 (per Charron J) [Briscoe].
\bibitem{1170} \textit{Canadian Oxford Dictionary}, supra note 1046.
\end{footnotesize}
goad or incite (someone) to take some action or course”.

Thus the acts of instigating and procuring speak to the actual inauguration of the crime – that is, the stage before the actus reus of the crime – whereas “aiding” and “abetting” speak to a secondary role in the execution of what has already been planned or is being planned. Although the aiding and abetting conduct can occur before (or during or after) the commission of the crime, it cannot itself initiate the crime, but can form part of the preparation for the commission of the crime. It is likely for these definitional reasons that procurement and instigation are treated in the literature as different theories of liability. Instigation and procurement fit more properly into the crime of counselling an offence, which is also provided for in the Criminal Code and is discussed later.

In Greyeyes, Cory J stated that not only must the accused have encouraged the commission of the offence, he must also have intended to do so. This means that mere knowledge on the part of the accused that the principal would commit the offence with the accused’s aiding and abetting is not enough: there must be a positive intention on the part of the aider and abettor to aid and abet the commission of the crime. In R v Pickton, LeBel J stated that “[t]he act or omission relied upon must in fact aid or abet, and it must also have been done with the particular intention to facilitate or encourage the principal’s commission of the offence, with knowledge that the principal intends to commit the crime”. Accordingly, if the conduct does not in fact assist the principal in committing the crime, there can be no aiding and abetting liability. This would appear to be so, from the wording of LeBel J’s statement, even if the would-be aider and abettor had knowledge of the principal’s intention and even actually intended to assist. LeBel J adds that “willful blindness” would meet the knowledge requirements of aiding and abetting. In Briscoe, Charron J stated that the “for the purpose” requirement contained in section 21(1)(b) of the Criminal Code should be viewed as “essentially synonymous with

1171 Black’s Law Dictionary, supra note 1025. However, “abettor” is defined as “[a] person who instigates the commission of a crime or advises and encourages others to commit it.”

1172 In R v Dooley, (2009), 249 CCC (3d) 449 at para 123, the Court of Appeal for Ontario gave a description of aiding and abetting that is more in tune with the ordinary meaning of the terms: “The authorities take a wide view of the necessary connection between the acts of alleged aiding or abetting and the commission of the offence. Any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime. The necessary connection between the accessory's conduct and the perpetrator's commission of the crime is captured by phrases such as ‘actual assistance or encouragement’ or ‘assistance or encouragement in fact’ or as the appellants argue, conduct that ‘has the effect of aiding or abetting’.

1173 [2010] 2 SCR 198 at para 76.

1174 Ibid.
‘intention’.”¹¹⁷⁵ He adopted the view earlier expressed in R v Hibbert¹¹⁷⁶ that purpose should not be equated with the notion of desire in the mens rea requirement for aiding and abetting.¹¹⁷⁷ The rationale for this view is provided by the following hypothetical illustration:

If a man is approached by a friend who tells him that he is going to rob a bank and would like to use his car as the getaway vehicle for which he will pay him $100, when that person is . . . charged under s. 21 for doing something for the purpose of aiding his friend to commit the offence, can he say “My purpose was not to aid the robbery but to make $100”? His argument would be that while he knew that he was helping the robbery, his desire was to obtain $100 and he did not care one way or the other whether the robbery was successful or not.¹¹⁷⁸

Thus there is no requirement that the aider and abettor “subjectively approve of or desire” the result.¹¹⁷⁹

The forms of extraterritorial corporate crimes contemplated in this study fit well into the nature of aiding and abetting liability. Providing logistical support to an authoritarian regime with knowledge that such support would assist the regime in acts of violent oppression of the masses, and with the intent of providing such assistance, would meet the requirements of aiding and abetting where the violent oppression is in fact perpetrated. It is no defence that the corporation providing such assistance desires thereby to protect its facilities and operations in the area; such would amount to nothing but motive. Forcese has argued that where a corporation engages security forces to guard its operations, the aiding and abetting liability of the corporation in the acts of the security forces “must be such that the corporation intended, though perhaps did not desire, to assist the commission of the acts that constitute the offence.”¹¹⁸⁰ He adds that where the security forces commit murder, aiding and abetting liability for manslaughter may attach to the corporation where bodily harm was a reasonably foreseeable consequence of the acts of the security forces.¹¹⁸¹ However, as the crime aided and abetted must in fact have been committed for aiding and abetting liability to arise, if a corporation, with the requisite intent, ships ammunitions to an oppressive regime, and the weapons arrive only after the crime charged

¹¹⁷⁵ Briscoe, supra note 1169 at para 16.
¹¹⁷⁶ [1995] 2 SCR 973 [Hibbert].
¹¹⁷⁷ Briscoe, supra note 1169 at paras 16-17.
¹¹⁷⁸ Alan W Mewett & Morris Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) at 112 (cited in Briscoe, ibid at para 17).
¹¹⁷⁹ Hibbert, supra note 1176 at para 37.
¹¹⁸¹ Ibid.
has been committed, there can be no aiding and abetting liability. Where the crime is in fact not committed, it may still be possible to convict the supposed aider and abettor but not as an aider and abettor; that same conduct may meet the requirements for a conviction for attempt or for conspiracy to commit the substantive offence depending on the overall fact situation.

Under section 22.2 of the *Criminal Code*, corporate aiding and abetting liability would attach where a senior officer of a corporation, with intent at least in part to benefit the corporation, knows that a representative of the corporation is aiding and abetting the commission of a crime and fails to take reasonable steps to stop the senior officer from aiding and abetting the commission of that crime, and the crime is in fact committed.

4.8.3 Joint Criminal Enterprise

In *Tadic*, the Appeals Chamber of the ICTY forged a form of accomplice liability known as JCE. It defined JCE as “those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.” Thus “[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common purpose,” incurs a JCE liability. The Appeals Chamber distinguished three categories of JCE. The first category consists of cases where the co-perpetrators, “acting pursuant to a common design, possess the same criminal intention”. The second category comprehends “the so-called ‘concentration camp’ cases … where the offences charged were alleged to have been committed by members of military or administrative units such as those running the concentration camps”. The third category consists of “cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.”

The Appeals Chamber summarized the *actus reus* of JCE as follows:

1. A plurality of persons. They need not be organised in a military, political or

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1182 Case No IT-94-1-A, 15 July 1999 (Appeals Chamber).
1183 *Ibid* at para 190.
1184 *Ibid*.
1186 *Ibid* at para 204.
administrative structure.

ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.\(^{1187}\)

The mens rea requirement depends on the category of JCE. The first category requires the shared intent of the co-perpetrators; the second category requires “personal knowledge of the system of ill-treatment” (which can be proved by inference from accused’s position of authority) and “the intent to further [the] common concerted system of ill-treatment”; and the third category requires “the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group.”\(^{1188}\)

The doctrine of JCE is well known in Canadian criminal law. Section 21(2) of the Criminal Code reads:

Where two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each one of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.”

In \(R v\) Simpson, the Supreme Court of Canada stated that section 21(2) covers cases where, without aiding and abetting, a person may be regarded as a party to an offence committed by someone else which he/she “knew or ought to have known was a probable consequence of carrying out an unlawful purpose in common with the actual perpetrator.”\(^{1189}\) In \(R v\) AD, the British Columbia Supreme Court stated that if any one of a member of a group involved in a

\(^{1187}\) *Ibid* at para 204 (italics in original).

\(^{1188}\) *Ibid* at para 228 (italics in original).

\(^{1189}\) [1988] 1 SCR 3 at 15.
joint criminal enterprise commits an offence in carrying out their original enterprise, any other member of the group who knew or ought to have known that the offence would likely be committed by a member of the group carrying out their original purpose, is guilty of the offence thus committed.\footnote{2010 BCSC 1780 at para 50.}

It follows that the accused need not have directly carried out the specific conduct for which he is charged. The offence committed need not be the exact offence contemplated in the common design, provided it is one that is foreseeable as furthering the common purpose of the parties. Accordingly, an offence that cannot reasonably be connected with the common enterprise cannot trigger JCE liability.

Apparently, section 21(2) requires an objective foreseeability test to determine the accused’s knowledge that a member of the group would likely commit an offence in furtherance of their JCE. But this was modified by the Supreme Court of Canada with regard to the offence of murder.\footnote{R v Logan, [1990] 2 SCR 731, 1990 CanLII 84 at 15 (cited to CanLII).} The Court viewed a subjective intent as a constitutional requirement because of the stigma and severity of punishment attached to the offence of murder.\footnote{Ibid.} The Court added that the standard of intent required for the conviction of the principal perpetrator cannot be higher than that for which the accomplice can be convicted: “In those instances where the principal is held to a mens rea standard of subjective foresight, the party cannot constitutionally be convicted for the same crime on the basis of an objective foreseeability standard.”\footnote{Ibid at 26 (“in so far as a party can be convicted on the basis that he or she ought to have known that an offence was a probable result of the common purpose, in cases where a subjective standard is constitutionally required for the principal; as a result, the words ‘ought to know’ are inoperative in cases, and only in those cases, where subjective foresight is constitutionally required of the principal”).}

Applying JCE principles to corporate criminal complicity seems fruitful. In a case like Unocal, which involved illegal and forcible resettlement of villagers and suppression of local resistance, the Prosecution may be able to show that the corporation shared with the government a common design to illegally and forcibly resettle the villagers and to suppress any resistance that may be mounted by the villagers. If in furtherance of that design, murder is committed by soldiers charged with executing the design, the corporation may be subject to JCE liability for that murder as murder may be regarded as a foreseeable result of illegal and forcible resettlement of villagers by gun-wielding soldiers who have been instructed to crush all resistance.

In light of section 22.2 of the \textit{Criminal Code}, can a senior officer of a corporation who,
with intent to benefit the corporation, knows that a representative of the corporation is or is about to engage in conduct triggering JCE liability, and who fails to take all reasonable steps to stop the representative from engaging in such conduct, bind the corporation? The operation of section 22.2 with regard to JCE would be similar to its operation with regard to conspiracy and aiding and abetting. This is because JCE liability cannot attach unless a substantive offence is committed. Where the corporation’s representative is about to engage in a common criminal enterprise with other persons, a senior officer’s knowledge of that fact with intent to benefit the corporation cannot trigger JCE liability for the corporation since, being an inchoate crime, acts preceding it are outside the grasp of criminal law. Even where the representative is already engaging in that common design, JCE liability would be triggered only where a substantive offence is actually committed in furtherance of the group’s common design. This, however, does not preclude the possibility of other forms of liability being founded on the same facts that do not produce JCE liability.

4.8.4 Counselling

The offence of counselling an offence is set out in sections 22 and 464 of the Criminal Code. Section 22(1) provides that “[w]here a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.” Section 22(2) enlarges the counsellor’s liability by holding him/her liable for the collateral crimes the person counselled commits. It reads: “Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.” Section 22(3) defines counsel as including “procure, solicit or incite.”

It is evident on the wordings of section 22(1) and (2) that for the counsellor to be liable, the party counselled must have committed an offence. Section 464 rounds up persons who counsel an offence that is later not committed. It states:

Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
(a) every one who counsels another person to commit an indictable offence is, if the
offence is not committed, guilty of an indictable offence and liable to the same
punishment to which a person who attempts to commit that offence is liable; and

(b) every one who counsels another person to commit an offence punishable on
summary conviction is, if the offence is not committed, guilty of an offence punishable
on summary conviction.

In *R v Hamilton*, Fish J held for the majority of the Supreme Court of Canada that “the actus reus
for counselling is the deliberate encouragement or active inducement of the commission of a
criminal offence.”\(^{1194}\) In *R v Sharp*, the Court stated that mere passive communication would not
satisfy the actus reus requirement, but that the counsellor must have “actively induc[ed]” the
other person to commit the offence.\(^{1195}\) This means that mere advice is not enough.\(^{1196}\) Although
the statutory provisions do not state the mens rea requirement, Fish J stated in *Hamilton* that it
consists in the “intent or conscious disregard of the substantial and unjustified risk inherent in
the counselling”.\(^{1197}\) That is to say, the counsellor must either have intended the offence
counselled to be committed, or counselled the offence with knowledge of the “unjustified risk”
that the offence counselled would likely be committed as a result of his/her conduct.\(^{1198}\) Fish J
stressed that the counsellor’s motive is irrelevant, provided he/she has the requisite intention.\(^{1199}\)

In *Dynar*, the Supreme Court held that “[i]t does not matter to society, in its efforts to secure
social peace and order, what an accused’s motive was, but only what the accused intended to do.
It is of no consolation to one whose car has been stolen that the thief stole the car intending to
sell it to purchase food for a food bank.”\(^{1200}\) It has been argued, however, that the objective
standard of “ought to know” may not apply to the counselling of murder because of the
constitutional requirement of a subjective intent.\(^{1201}\)

Although *Hamilton* required active inducement, it is likely that a subtle or veiled
inducement coupled with the requisite intent or conscious disregard of the unjustified risk

\(^{1194}\) [2005] 2 SCR 432 at para 29 [*Hamilton*] (italics in original).
\(^{1195}\) [2001] 1 SCR 45 at para 56.
\(^{1196}\) *Hamilton*, supra note 1194 at para 69 (per Charron J (who dissented in the judgment but not on this
point)).
\(^{1197}\) *Ibid* at para 29 (italics in original).
\(^{1198}\) *Ibid*.
\(^{1199}\) *Ibid* at para 43.
\(^{1200}\) *Dynar*, supra note 1141 at para 1167.
\(^{1201}\) Kent Roach, *Criminal Law* (Concord: Irwin law, 1996) at 79. See also Forcense, “Deterring Militarized
Commerce”, *supra* note 18 at 195.
inherent in the inducement would satisfy the requirements of counselling. This is likely the kind of inducement corporations would use – perhaps coupled with a veiled threat of relocating their business to other states – to elicit aggressive host-government protection of their operations. A corporation involved in militarized commerce may be implicated by the offences of security forces if the corporation provokes the offences knowing, or ought to have known, that the security forces would commit the crimes.\textsuperscript{1202}

The relationship of the offence of counselling to section 22.2 of the \textit{Criminal Code} would depend on whether the counselled offence is in fact committed or not committed, i.e., on whether it is section 22(1) and (2) or section 464 that is engaged. Where the offence is in fact committed, a senior officer of a corporation who knows that a representative of the corporation is counselling the commission of an offence and, with intent at least in part to benefit the corporation, does not take all reasonable steps to prevent the counselling, has bound the corporation. But as counselling under section 22(1) is an inchoate offence, the “about to” element under section 22.2 (c) cannot operate to bind the corporation since it speaks to acts that precede the commission of an inchoate offence. That is, if the representative is about to counsel an offence, but has not actually counselled it, the corporation cannot be bound by its senior officer’s knowledge of that, even if the senior officer intended to benefit the corporation and wished that the counselling had taken place and the offence committed. However, if a corporation is charged under section 464, whether or not the offence counselled by the corporation’s representative is in fact committed as a result of the counselling, the corporation would be liable, all other elements of counselling being present. And since counselling under section 464 is in and of itself a substantive offence, it would appear that acts that precede its commission are within the grasp of criminal law and so may be captured by the “about to” element in section 22.2(c). That is, if a representative of a corporation is “about to” commit counselling, the corporation would be liable if a senior officer of the corporation knows about it and, with intent to benefit the corporation, does not take all reasonable measures to stop the counselling. However, given the nature of the offence itself, how this would play out in practice remains to be seen.\textsuperscript{1203}

\textsuperscript{1202} Forcense, “Deterring Militarized Commerce”, \textit{ibid.}

\textsuperscript{1203} The offence of counselling is defined under section 22(3) of the \textit{Criminal Code} to include procurement, soliciting and incitement of persons to commit an offence. In some legal systems, procurement and instigation are considered distinct offences. The \textit{Rwandan Penal Code} recognizes procurement and instigation as distinct crimes.
4.8.5 Criminal Negligence

The offence of criminal negligence might provide another fruitful mode of prosecuting corporations for transnational criminal conduct. The offence is provided under section 219 of the Criminal Code. Section 219(1) provides that “[e]very one is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.” Subsection (2) defines duty to mean “a duty imposed by law.” In R v Tutton, the Supreme Court of Canada stated the actus reus of criminal negligence as “a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances.”¹²⁰⁴ In R v Creighton,¹²⁰⁵ McLachlin J (as she then was) stated the mens rea requirement as the standard of “the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care.” In other words, the test for determining mens rea is an objective one.

Applying this to the facts of Unocal, there was evidence that if Unocal had looked over its shoulders, it would have seen and known that human rights violations were likely to be committed, and in fact were being committed, by the Myanmar military. Any evidence that Unocal provided support to the military in wanton disregard as to whether the support it was providing would be used for human rights violations, would support a conviction for criminal negligence. It has also been suggested that “liability in criminal negligence for militarized commerce could arise where a company provides material or financial support or calls upon the

Tarek F Maassarani, “Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act” (2006) 38:39 NYUJ Int’l L & Politics 39 at 63 (citing the ICTR decision in Tadic)(stating also that in US law, “procurement may be upheld as a specific theory of accomplice liability”). In international criminal law, procurement is not listed in the mode of criminal responsibility in the ICTY and ICTR Statutes but is treated as a form of aiding and abetting. Maassarani, ibid. In Akayesu, supra note 1149 at para 539 (Trial Chamber), the ICTR defined procurement as the provision of “weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes”. Maassarni has argued that where a corporation provides its host government with funding, facilities or equipment to secure its operations, with knowledge of the fact that the provision would be used for human rights abuses, the corporation would be guilty of procurement. The difference between procurement and aiding and abetting would seem to be that in aiding and abetting the offence aided and abetted must actually be committed for liability to accrue.

services of security forces whose human rights record is so notorious that the corporation's act departs markedly from the standard of a reasonable person in the circumstances.”

In the context of section 22.2 of the Criminal Code, if a senior officer of a corporation is aware that one of the corporation’s contractors is providing financial or other material support to an oppressive regime in circumstances where the contractor ought reasonably to know that such support would be used to commit an offence, and the senior officer does not take all reasonable measures to stop the contractor, with intent to benefit the corporation, the corporation may be liable.

4.9 CONCLUSION

It has long been recognized in Canada that Parliament can enact extraterritorial laws. Even before the enactment of the Statute of Westminster, many Canadian judges believed that Parliament could pass extraterritorial laws. Although the matter was still debatable, the Statute of Westminster settled all doubt and the Canadian Supreme Court has again and again affirmed Parliament’s power to act extraterritorially.

The development of extraterritorial criminal prosecution in Canada is linked to the alleged influx of war criminals into Canada following the end of World War II. The establishment of the Deschênes Commission in 1985 to look into the allegations and to make recommendations led to amendments to the Canadian Criminal Code that later became the basis for the prosecution of Imre Finta. Although the Finta case ended disastrously for Canada, it shaped both the law and policy for future efforts to address the problem of war criminals in Canada. Today, jurisdiction over extraterritorial crimes may be founded on the common law real and substantial link test or on statutory provisions enacted not only to overcome the Finta problem, but also to address violations of international human rights law wherever and by whomever committed. These statutory provisions are contained in the Criminal Code and in the CAHWC Act.

While the real and substantial link test is primarily related to the territoriality principle, the test itself is not cast in stone. Yet, scholars seem to have a narrow view of the test, a view that largely ignores La Forest J’s analytical methodology in Libman. The real and substantial link test should be understood not as supplanting the pre-existing jurisdictional theories, but as creating

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1206 Forcese, “Deterring Militarized Commerce” supra note 18 at 199.
order out of the variety of approaches – such as the place of initiation theory, the gravamen theory, the place of completion theory, the continuing offence theory and the effects doctrine – used to determine jurisdiction by Canadian courts. The test should be understood as encompassing all of these pre-existing jurisdictional theories. The test is broad enough to admit of extraterritorial conduct that produces effect in Canada. It is broad enough to admit of botched extraterritorial conspiracies destined for Canada. Especially in cases where the conspiracy is not criminalized in the state where it is formulated, if the outer limits of the test are to be determined by the requirements of international comity, there seems to be nothing in comity that would militate against Canada, where the conspiracy is planned to be executed, asserting jurisdiction. The story might be different where the conspiracy is criminalized by the state where it is formulated, for in that case, the requirements of international comity would weigh in favour of allowing the state where it is formulated to prosecute.

Conspiracy, aiding and abetting, JCE, counselling, and criminal negligence are viable complicity theories for the prosecution of extraterritorial corporate crimes. The theories are not mutually exclusive. So two or more of them can provide a viable basis for prosecution in the same case. Section 22.2 of the Criminal Code makes it easier for the establishment of corporate liability under each of these theories, due to its expansion of the categories of officers of a corporation who are capable of criminally binding a corporation as well as through the re-description of the nature of the conduct of those officers that can bind a corporation.
CHAPTER 5
JURISDICTION IN CANADIAN PRIVATE INTERNATIONAL LAW

5.1 INTRODUCTION

In this chapter, I examine the bases for adjudicatory civil jurisdiction in international cases in Canada. The first part is a real and substantial look at “the real and substantial connection” test that has become the principal basis for adjudicatory jurisdiction in interprovincial and international cases in Canada. Also considered is the emerging doctrine of jurisdiction by necessity. The doctrine has received very scant judicial and academic attention and, needless to say, its exact scope has not been laid down by any court. An attempt will therefore be made in this chapter to propose appropriate limits to the application of the doctrine. The new Justice for Victims of Terrorism Act also takes a centre of interest in this chapter. The task here is to critically examine the scope of jurisdiction the statute allows and to relate it to the other bases of jurisdiction. Even where a Canadian court assumes jurisdiction, it may decline to exercise it on the basis that there is a more appropriate alternative forum for the litigation of the action – the doctrine of forum non conveniens. The application of the doctrine remains controversial and the judicial policy in Canada is that the need to exercise jurisdiction is more easily justified in interprovincial cases than in international cases. It shall be the endeavour here to critically examine the factors influencing the application of the doctrine with a view to proposing how the doctrine can be adjusted to meet the jurisdictional needs of international cases. This examination will draw on the practice in other jurisdictions, particularly the US and the UK. Finally, as stated in chapter one, the basis of liability influences the jurisdictional question. This is because it is the liability theory canvassed that determines the acts that would be pleaded to establish jurisdiction. This chapter would therefore be incomplete without a synopsis of the substantive bases of liability especially in light of the Justice for Victims of Terrorism Act that seems to have created a new basis of liability – called in this study the “tort of terrorism” – for perpetrators of extraterritorial acts of terrorism. The last section summarizes the findings of this chapter.
5.2 THE REAL AND SUBSTANTIAL CONNECTION TEST

5.2.1 The Provenance

Traditionally, a court could take jurisdiction over a civil suit only where the defendant was personally served with the originating process within the territorial jurisdiction of the court. This is known as service *in juris*. For defendants ordinarily located outside jurisdiction, jurisdiction would lie only where the defendant was found within the forum, or consented to the jurisdiction of the forum court. Such consent may be by voluntary submission, attornment by appearance and defence, or by prior agreement (in the case of contracts) to submit disputes to the jurisdiction of the forum court.1207 This common law rule, however, was expanded by “long-arm” statutes that authorized service of process on defendants located outside the jurisdiction of the court – service *ex juris*.1208 The *ex juris* service rules varied from province to province. In Ontario until 1975, leave of court was required before *ex juris* service could be effected. Even then, courts were cautious in granting leave. They frequently deferred to the foreign defendant where doubts existed as to whether leave should or should not be granted.1209 Even where the dry letters of the rules were satisfied, courts still had discretion to decline leave. They could also decline leave on the grounds of *forum non conveniens* where a more suitable forum existed elsewhere for the trial of the action.1210 By the last quarter of the twentieth century, however, this rule began to be seen as over-indulgent of foreign defendants and out of tune with modern commerce and transportation. In *Jannock Cor Ltd v RI Tamblyn & Partners Ltd*, the Court of Appeal for Ontario decided that it was “quite unrealistic to treat as a foreigner one who lives in a Province of this country and does business in his own and other Provinces”.1211 The search for an appropriate jurisdictional response to the demands of modern times immediately began. Many provinces amended their *ex juris* service rules to remove the obnoxious constraints to jurisdiction over foreign defendants, in particular, the requirement of leave when the case came under some

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1207 Muscutt v Courcells (2002), 213 DLR (4th) 577 at para 19 (Ont CA) [Muscutt].
1209 Muscutt, supra note 1209 at para 22.
1211 (1975), 8 OR (2d) 622 at 632.
 enumerated grounds. These changes progressed and the Supreme Court of Canada was not oblivious to the jurisdictional needs of the time. Its own response was both innovative and revolutionary. In 1990, it pronounced that the test for determining the jurisdiction of Canadian courts in situations where the defendants were outside the traditional territorial jurisdiction of the forum court was the “real and substantial connection” test.

The real and substantial connection test is not a native of Canada. It may be traced to early twentieth century England. Incidentally, the concept did not develop in the context of determining the jurisdiction of English courts; it developed in the context of determining the governing law for contractual transactions. The rule then prevailing was that contracts were governed by the law of the place expressly or impliedly picked by the parties. Where the parties had not selected (expressly or impliedly) a specific system of law, determining the governing law was problematic. The judicial tendency then, however, was to presume that the parties had chosen the law of the place where the contract was made. Would such a presumption produce an unreasonable result, the tendency was to hold that the parties had implicitly intended that some other law, such as the law of the place of performance of the contract, should govern their transaction. With transformations in the techniques of international commerce, however, it turned out that the place of contracting was frequently different from the place of performance, and the place of contracting became a “fortuitous question” dependent on who was the offeror and who the offeree. This state of affairs led English courts to reconsider the system of law that should govern contractual obligations.

The first appeal for the use of a connection test for determining the governing law of a contract seems to have been first expressed by Westlake who himself coined the words “the proper law” in the early part of the twentieth century. Westlake believed that the

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1212 Muscutt, supra note 1209 at para 26.
1213 Morguard (SCR), supra note 174.
1215 Joost Blom & Elizabeth Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38 UBCL Rev 373 at 374 (citing Lloyd v Guibert (1865-66), LR 1 QB 115 (Ex Ch) at 121).
1216 Dicey and Morris, supra note 1216 at para 32-003.
1217 Mann, “The Proper Law in the Conflict of Laws” (1987) 46 int’l & Comp LQ 438 at 444. Dicey and Morris suggest that the origins of the terminology can be seen in earlier authorities. Dicey and Morris, ibid at para 32-006. It is believed that Westlake’s idea was adapted from the ideas of German jurist Friedrich Carl von Savigny
identification of the proper law should be based “on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not the law of the place of the contract as such.”\textsuperscript{1218} He thus defined the proper law as “the law of the country with which the contract has its most real connection”\textsuperscript{1219} This view was picked up by Cheshire.\textsuperscript{1220} But the terminology’s first judicial appearance seems to be in a 1949 \textit{obiter dictum} of Lord Denning who, confessedly influenced by Cheshire, wrote during his short stint at the House of Lords that “the question whether the contract to repay is valid … depends on the proper law of the contract, and that depends not so much on the place where it was made or on the intention of the parties as on the place with which it has the most substantial connection.”\textsuperscript{1221} Two years later, the Judicial Committee of the Privy Council adopted the formulation in \textit{Bonython v Commonwealth of Australia}.\textsuperscript{1222} The case related to a contract to issue debentures in “pound sterling”. The principal sum was to be paid in Australia or in England, at the option of the debenture holder. The issue was whether the words “pound sterling” as used in the contract referred to British pounds or to Australian pounds. Lord Simons held that “the substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the contract has its closest and most real connection.”\textsuperscript{1223}

As the term itself suggests, the “most real and substantial connection” test was in essence a comparative test. What the courts sought to do was to identify the legal system with which the contract was most closely connected and to hold that the rules of that legal system governed. But the test did not incarnate in Canada in those exact terms. It followed a modified form of the test ensconced in 1967 by the English House of Lords in \textit{Indyka v Indyka}.\textsuperscript{1224} The test was modified in the sense that the comparative term, “most”, was omitted by the House of Lords. Although the test was expressed in jurisdictional terms, it was in the context of recognition of a foreign

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\item[1218] Westlake, \textit{Private International Law}, 7\textsuperscript{th} ed (1925) at 302, cited in Mann, “The Proper Law of the Contract”, \textit{supra} note 1216 at 68.
\item[1219] Westlake, \textit{ibid} at 212.
\item[1221] \textit{Boissevain v Weil} [1949] 1 KB 482, 490, 491.
\item[1222] [1951] AC 201 (PC) [\textit{Bonython}].
\item[1223] \textit{Ibid} at 219.
\item[1224] [1967] 2 All ER 689, [1969] 1 AC 33 (HL) [\textit{Indyka}].
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divorce that the House of Lords formulated it. At the time, the rule for recognition of foreign divorces in England was based on the domicile of the husband.\textsuperscript{1225} A foreign divorce was recognized only if it was obtained in the place of the husband’s domicile, or, where it was not, if the law of the place of the husband’s domicile recognized it.\textsuperscript{1226} At that time, a wife had no separate domicile from that of her husband. She could therefore not obtain a divorce from her home country unless it was her husband’s domicile as well or the law of her husband’s domicile recognized a divorce obtained from her domicile. But English courts had jurisdiction to grant a divorce to a wife who, though not domiciled in England, had been ordinarily resident in England for at least three years.\textsuperscript{1227} The English Court of Appeal had earlier extended the recognition rule in \textit{Travers v Holley}\textsuperscript{1228} to foreign divorces based on facts that, were it in England, would have met the requirements of English rules of jurisdiction. What the House of Lords did in \textit{Indyka} was to further extend the recognition rules to divorces where a “real and substantial connection” existed between the petitioner (whether husband or wife) and the country in which the divorce was obtained. According to the House of Lords, this approach was intended to address the problem of “limping” marriages\textsuperscript{1229} – marriages that were considered dissolved in other countries but still subsisting in the eyes of English law. Apparently, unlike the “most real and substantial connection” test adopted in \textit{Bonython} for determining the proper law of a contract, the “real and substantial connection” test adopted in \textit{Indyka} is non-comparative. All that is required is that the connection between the petitioner and the country where the divorce was obtained be real and substantial. The sufficiency of the connection of the country with the petitioner is therefore not to be weighed against the connection with the respondent.

The real and substantial connection test made its first appearance in Canadian jurisprudence in 1973.\textsuperscript{1230} It was in a context analogous to the context in \textit{Libman} where La Forest J sought to determine the locus of a crime for the purposes of establishing Canadian criminal jurisdiction. \textit{Moran v Pyle} was a products liability case. William Moran was an electrician at

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\textsuperscript{1225} \textit{Le Mesurier v Le Mesurier} [1895] AC 517 (PC).
\textsuperscript{1226} \textit{Armitage v AG} [1906] P. 135 (Probate Division), cited in Blom & Edinger, \textit{supra} note 1217 at 376.
\textsuperscript{1227} Blom & Edinger, \textit{ibid} at 376.
\textsuperscript{1228} [1953] 2 All ER 794 (CA) [\textit{Travers}].
\textsuperscript{1229} \textit{Ibid} at 59. The facts in \textit{Indyka} were that the husband, while domiciled in Czechoslovakia, married there in 1938. As a result of World War II, he found himself in England and in 1946 acquired an English domicile. His wife, who had remained in Czechoslovakia, obtained a divorce from a Czech court in 1949 on the ground of a profound disruption of matrimonial relations. In 1959 the husband remarried in England. The issue in the case was the validity of his second marriage and the Czech divorce. Was the Czech divorce recognizable in England?
\textsuperscript{1230} \textit{Moran v Pyle National (Canada) Ltd} [1975] 1 S.C.R. 393 [\textit{Moran}].
\end{footnotesize}
International Minerals and Chemical Corporation (Canada) Ltd. While working for the company in Saskatchewan, he was electrocuted while removing a spent light bulb manufactured by the defendants. His widow and children brought this suit claiming that the defendant was negligent in the manufacture and construction of the bulb and in failing to provide adequate safety checks to ensure that any of its products containing faulty wiring did not leave the plant or was not distributed or used. The defendant itself did not carry on business in Saskatchewan and had no assets there. All its manufacturing took place in Ontario and the US. It sold its products only to distributors. It did not sell directly to consumers. None of its salespersons or agents was in Saskatchewan. The court determined that Saskatchewan courts had jurisdiction over torts committed in Saskatchewan regardless of the residence of the defendant. The central issue for determination before the Supreme Court of Canada therefore was whether the tort in the present case was committed in Saskatchewan so as to bring the defendant under the jurisdiction of Saskatchewan courts. Was the tort committed in Ontario (or the US) where the product was manufactured? Or was it in Saskatchewan where the damage occurred? Dickson J, for the whole court, reviewed the jurisprudence to identify the theories advanced by courts to determine the situs of a tort. He found in the jurisprudence the “place of acting” theory (the place where the original act of the defendant which caused the damage occurred), the “last ingredient” (or “last event”) theory (the place where the last event which completes the cause of action occurred) and the “place of damage” theory (the place where the injury occurred). In rejecting these theories, Dickson J stated that in determining where a tort had been committed, “it is unnecessary, and unwise, to have resort to any arbitrary [and rigid] set of rules.” He preferred instead “a real and substantial connection test” hinted at by Lord Pearson in Distillers Co (Biochemicals) Ltd v Thompson, by Winn LJ in Cordova Land Co Ltd v Victor Brothers Inc, and by Cheshire. Dickson J described this approach as “a more flexible, qualitative and quantitative

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1231 Ibid at 409.
1232 Ibid.
1233 [1971] AC 458, [1971] 1 All ER 694, cited in Moran, ibid at 407 (“[T]he search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor.” Ibid at 699).
1234 [1966] 1 WLR 739 (QB), cited in Moran, ibid at 408 (“The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question: where in substance did this cause of action arise?”).
In holding that this test supported jurisdiction in Saskatchewan, Dickson J formulated the following rule:

[W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.\(^\text{1237}\)

This test was mirrored by La Forest J in *Libman* when he formulated the “real and substantial link” test as the standard for determining the criminal jurisdiction of Canadian courts. It is, however, odd that in formulating the test in *Libman*, La Forest J did not make any reference to *Moran*. One explanation for this might be that La Forest J was concerned with criminal cases alone and did not advert his mind to the possibility of a pre-existing civil parallel to the test he was articulating. Another explanation for it might be that Dickson J’s reference to the existence of the test in English jurisprudence was relatively casual and he gave no indication that he was pronouncing an overarching jurisdictional standard that was henceforth to be the yardstick for determining the civil jurisdiction of Canadian courts. Moreover, he made no attempt to explain the rationale for the test beyond the passage reproduced above, which is evidently limited to products liability cases. In his analysis of *Moran* in 1985, however, Professor Peter Hogg referred to the requirement of “a real and substantial connection” between the defendant and the forum province as a basis for finding that the defendant had voluntarily submitted to the jurisdiction of that court.\(^\text{1238}\)

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\(^{1236}\) *Moran*, *ibid* at 409.

\(^{1237}\) *Ibid* at 410.

\(^{1238}\) Peter W Hogg, *Constitutional Law of Canada*, 2nd ed (Toronto: Carswell, 1985) at 279 [Hogg (1985)].
It was in 1990 that the test was formally and courageously adopted in Canada. Incidentally, again, the adoption did not take place in a purely jurisdictional context. Jurisdiction was largely ancillary to the question before the court. It was in a recognition-and-enforcement-of-foreign-judgment context – a context analogous to \textit{Indyka}. A British Columbia court was asked in \textit{Morguard}^{1239} to recognize and enforce a default judgment obtained in Alberta. The question was the basis on which the judgment should be recognized. Ordinarily, this would not have been a seriously arguable issue but for the facts that the defendant was not present in Alberta, was served \textit{ex juris}, did not participate in the proceedings and this non-participation resulted in the judgment being a default judgment. For there were a plethora of authorities enjoining recognition where the defendant was present in the foreign province during the proceedings or where he/she in some way submitted to the jurisdiction of the foreign court.\footnote{1239} Jurisdiction in the inter-provincial sense, for recognition and enforcement purposes (and in private international law generally), was treated as exactly the same with jurisdiction in the international sense. Boyd LJSC of the British Columbia Supreme Court decided that the judgment should be recognized on the simple basis that the assumption of jurisdiction by the Alberta court was proper.\footnote{1241} This was at a time when jurisdiction was not considered a pertinent criterion for determining recognition.\footnote{1242} The British Columbia Court of Appeal affirmed the recognition but on a slightly different ground.\footnote{1243} It held that the judgment should be recognized on the basis of the principle of jurisdictional reciprocity established by the English Court of Appeal in \textit{Travers}^{1244} and promoted by Dr GD Kennedy.\footnote{1245} The principle of jurisdictional reciprocity stipulates that a foreign judgment should be recognized and enforced only if the foreign court that issued the judgment had assumed jurisdiction based on facts which, were they

\footnotesize{\begin{itemize}
  \item Morguard Investment Ltd v De Savoye, [1988] 1 WWW 87 at 88 (BCSC).
  \item Blom, “Conflict of Laws”, supra note 1212 at 734.
  \item Morguard Investment Ltd. v De Savoye [1988] 5 WWW 650 (BCCA).
  \item Supra note 1230.
\end{itemize}}
transposed in the forum court, would have justified the assumption of jurisdiction by the forum court. The court in *Travers* had recognized a divorce decree issued in New South Wales on the ground that were it in England English courts would in similar circumstances have assumed jurisdiction to grant the divorce.\(^{1246}\) The Canadian Supreme Court equally affirmed the recognition of the judgment but still for a slightly different reason, although for a reason that more closely resembles the reason given by the British Columbia Supreme Court than the reason given by the British Columbia Court of Appeal. La Forest J, who wrote the unanimous judgment of the court, believed that “the taking of jurisdiction by a court in one province and its recognition in another [province] must be viewed as correlative\(^{1247}\).” He held that a foreign judgment should be recognized only if the foreign court had assumed jurisdiction on proper and appropriate grounds. In his words:

> recognition in other provinces should be dependent on the fact that the court giving judgment “properly” or “appropriately” exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit…. Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.\(^{1248}\)

On the question of when jurisdiction is proper and appropriate, La Forest J stated that this poses no difficulty where, in the case of judgments *in personam*, the defendant was within the jurisdiction of the foreign court at the time of the action or where the defendant submitted to the foreign court’s jurisdiction.\(^{1249}\) Difficulty arises, he noted, where the defendant was outside the jurisdiction of the foreign court at the time of the action and was served *ex juris*. La Forest J

\(^{1246}\) The divorce was granted pursuant to a New South Wales statute giving New South Wales courts jurisdiction to grant a divorce to a wife who was domiciled in New South Wales at the time she was deserted by her husband, even if her husband has acquired another domicile. A similar statute existed in England and it was on this basis of reciprocal jurisdiction that the English Court of Appeal recognized the divorce. Hodson LJ wrote: “[W]here it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves.” *Travers*, supra note 1215 at 800.

\(^{1247}\) *Morguard* (SCR), supra note 174 at para 42.

\(^{1248}\) Ibid.

\(^{1249}\) Ibid at para 43.
believed that given the varying rules on *ex juris* service among the provinces, “if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.”

He rejected the “reciprocity approach” in *Travers* on the basis that it failed to provide an answer to the difficulty arising from *in personam* judgments in the context of *ex juris* service, and preferred instead the “real and substantial connection” test applied in *Indyka*. Citing *Moran*, he described the *Indyka* approach as “inherently reasonable”, and reasoned as follows: if it was considered inherently reasonable for a court to assume jurisdiction based on a real and substantial connection test, it would be incongruous if it was not also considered reasonable for the courts of other provinces to recognize and enforce the resulting judgment.

This decision marked “the dawn of a new era” in private international law in Canada, for by the standards then prevailing the judgment was unenforceable outside the province that issued it. While the decision related to recognition and enforcement of a foreign judgment, it had far-reaching repercussions for the law of jurisdiction in Canada. It created a third basis for the assumption of *in personam* jurisdiction. The implication of this is that not only would jurisdictional assertions that fail the test be resisted retroactively at the point of recognition and enforcement of a resulting judgment, they would even be challenged at the point of commencement of trial to ensure that the court’s assertion of jurisdiction comports with the requirements of the test.

At the core of the test lies the principle of comity. La Forest J described comity as “the informing principle of private international law”, “an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states, of adopting a doctrine of this kind.” He believed that “[t]he rules of private international law are grounded in the need in modern times to

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1250 *Ibid* at para 44.
1251 *Ibid* at para 45.
1254 Vaughan Black opines that the jurisdictional pronouncements in the case would have more lasting effect than its enforcement pronouncements. Vaughan Black, “The Other Side of *Morguard*: New Limits on Judicial Jurisdiction” (1993) 22 Can Bus LJ 4 at 6 [Black, “The Other Side of *Morguard*”].
facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner”\textsuperscript{1257} and called for “the content of comity [to] be adjusted in light of a changing world order.”\textsuperscript{1258} Like Estey J did in \textit{Spencer},\textsuperscript{1259} La Forest J adopted the “more complete formulation” of comity pronounced by the US Supreme Court in \textit{Hilton}:\textsuperscript{1260}

> “Comity” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.\textsuperscript{1261}

Among the federating units of a state, “[t]he considerations underlying the rules of comity apply [even] with much greater force”.\textsuperscript{1262} The interprovincial and inter-territorial mobility of Canadians and the “common market” created by free trade between and among the provinces call for national cooperation. The need for “economic integration” through the creation of a common market, according to him, makes it necessary to remove barriers that impede the interprovincial mobility of Canadians. Such barriers, La Forest J said, have been removed by section 121 of the \textit{Constitution Act}. Refusal to recognize and enforce interprovincial judgments would stand in the way of economic integration.\textsuperscript{1263} This is further reinforced by the fact that the court system of Canada is so arranged as to ensure uniform quality of justice among the provinces and territories.\textsuperscript{1264}

La Forest J anchored the real and substantial connection test also in the demands of order and fairness. “[W]hat must underlie a modern system of private international law”, he wrote, “are principles of order and fairness, principles that ensure security of transactions with justice.”\textsuperscript{1265} Continuing:

> It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that

\textsuperscript{1257} \textit{Ibid} at para 31.  
\textsuperscript{1258} \textit{Ibid} at para 33.  
\textsuperscript{1259} \textit{Supra} note 1056.  
\textsuperscript{1260} \textit{Supra} note 1057.  
\textsuperscript{1261} \textit{Morguard (SCR)}, \textit{supra} note 174 at para 31.  
\textsuperscript{1262} \textit{Ibid} at para 35.  
\textsuperscript{1263} \textit{Ibid} at para 36.  
\textsuperscript{1264} \textit{Ibid} at para 37.  
\textsuperscript{1265} \textit{Ibid} at para 32.
jurisdiction may have to the defendant or the subject-matter of the suit…. Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.1266

The test is further justified on the bases that it affords “a reasonable balance between the rights of the parties” as well as “some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.”1267

In spite of these clear justifications, there is as yet no clear guidance on how the test is to be applied. The Supreme Court has been quite cautious in delineating the test’s exact contours. In Tolofson, the Court referred to the test as “a term not yet fully defined”.1268 In Hunt, it stated that “[t]he exact limits of what constitutes a reasonable assumption of jurisdiction were not defined [in Morguard], and . . . no test can perhaps ever be rigidly applied”.1269 It added that “the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.”1270

The boldest attempt to define the type of connections required by the test was made by the Court of Appeal for Ontario twelve years after the test was formulated in Morguard. In Muscutt, the Court of Appeal enumerated a list of eight non-exhaustive factors:

1. the connection between the forum and the plaintiff’s claim;

2. the connection between the forum and the defendant;

3. unfairness to the defendant in assuming jurisdiction;

4. unfairness to the plaintiff in not assuming jurisdiction;

5. the involvement of other parties to the suit;

6. the court’s willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;

1266 Ibid at para 42.
1267 Ibid at para 51.
1268 Tolofson, supra note 175 at 1049.
1269 Hunt, supra note 176 at para 58.
1270 Ibid at 42.
7. whether the case is interprovincial or international in nature; and

8. comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere.\textsuperscript{1271}

Until the recent decision of the Supreme Court in \textit{Club Resorts Ltd v Van Breda},\textsuperscript{1272} there has been no opportunity for a principled judicial commentary by the top court on the correctness of these factors. In a concurring opinion in \textit{Castillo v Castillo}, however, Bastarache J had suggested that the factors “reflect important policy considerations such as fairness, comity and efficiency.”\textsuperscript{1273} However, the factors were generally embraced by other courts across Canada.\textsuperscript{1274} In light of the significance of the \textit{Van Breda} decision in the development of the test, the holdings in the case are considered separately in this chapter.

It should be pointed out, however, that many provinces have stutorized the test. Under the auspices of the Uniform Law Conference of Canada, a number of provinces have enacted the \textit{Court Jurisdiction and Proceedings Transfer Act} (CJPTA) to implement uniform jurisdictional rules incorporating the real and substantial connection test.\textsuperscript{1275} Section 3 of the CJPTA sets out five jurisdictional grounds:

1. Where the person is a plaintiff in the case and the proceeding in question is a counterclaim;

2. Where the person has submitted to the jurisdiction of the court;

\textsuperscript{1271} Muscutt, supra note 1209 at paras 75-107.
\textsuperscript{1272} 2012 SCC 17 \{Van Breda (SCC)\}.
\textsuperscript{1273} (2005), 260 DLR (4th) 439 at para 45 \{Castillo\}.
3. Where the person has agreed that the court has jurisdiction;
4. Where the person is ordinarily resident in the jurisdiction at the time of the commencement of the proceeding; and
5. Where there is a real and substantial connection between the jurisdiction and the facts on which the proceeding is based.

5.2.2 The Constitutional Status of the Real and Substantial Connection Test

Five years before the Morguard decision, John Swan had called for the recognition of constitutional limits on adjudicatory jurisdiction in Canada. Professor Hogg picked this argument up instantly. From there it found its way into the thoughts of Guérin J who wrote in Dupont v Taronga Holdings Ltd that “in the case of service outside the issuing province, service ex juris must measure up to constitutional rules.” La Forest J was admittedly influenced by Guérin J.

Blom and Edinger write that “[u]ntil Morguard, the relationship between conflicts rules and constitutional law had been a one-way street, with all the traffic running from conflicts to constitutional law.” While conflicts rules had been applied in constitutional cases, there was no suggestion that those rules were thereby constitutionalized. With Morguard, however, the “one-way street” was transformed into “a two-way thoroughfare”, with the result that the test

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1277 Hogg (1985), supra note 1240 at 278-279: In Moran v. Pyle, Dickson J. emphasized that the ‘sole issue’ was whether Saskatchewan’s rules regarding jurisdiction based on service ex juris had been complied with. He did not consider whether there were constitutional limits on the jurisdiction which could be conferred by the Saskatchewan Legislature on the Saskatchewan courts. But the rule which he announced could serve satisfactorily as a statement of the constitutional limits of provincial-court jurisdiction over defendants outside the province, requiring as it does a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province.
1278 (1986), 49 DLR (4th) 335 (QSC) at 339.
1279 Morguard (SCR), supra note 174 at para 52 (confessing to finding the approach “attractive”).
1280 Blom & Edinger, supra note 1217 at 378.
1281 Ibid at 378-379. See also Hogg, Constitutional Law of Canada, loose-leaf ed (Toronto: Carswell, 1997) vol 1 at § 13.5(a) (“The conflicts law of each Canadian province has developed with little regard for the idea that there are constitutional limits on provincial extraterritorial competence, or the idea that, within a federal state, conflicts law rules might require modification upon constitutional grounds.”); and Black, “The Other Side of Morguard”, supra note 1256 at 7 (emphasizing that the notion of constitutional limits on judicial jurisdiction was novel).
became both “a constitutionally-mandated” conflicts rule and “a constitutional principle” for measuring the jurisdictional-conflicts rules of the provinces.1282

Yet, it was not Morguard that informed us that the rule was constitutional, although numerous statements by La Forest J suggest, even if long-windedly, that the Supreme Court was headed to establishing a jurisdictional test that the spirit of the Canadian Constitution dictates.1283 While laying the foundation for the test, La Forest J summoned the Canadian constitutional arrangement and stressed the need for the creation of a common market through economic integration enjoined by section 121 of the Constitution Act. He stated that “the private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power ‘in the province’.”1284 But for the barrier that “the case was not argued in constitutional terms,”1285 La Forest J would have explicitly and definitively made this constitutional pronouncement. It follows that those constitutional statements were obiter; but being the obiter dictum of a unanimous court, they cannot be regarded lightly.

It was in Hunt that the Supreme Court announced that the rule it enunciated in Morguard must be considered constitutional and not simply legal. The case related to the constitutionality of a Quebec statute that sought to protect Quebec corporations from complying with orders issued by courts in other provinces for the production of documents located in Quebec. Was the statute ultra vires the Quebec legislature or was it simply constitutionally inapplicable to judicial proceedings in other provinces? La Forest J, who again wrote the unanimous judgment of the court, held the Quebec statute constitutionally inapplicable to proceedings in other provinces.1286 He stated that the statute was a breach of the obligation to give full faith and credit to judgments (which in this case must be taken to include orders) within Canada. In penning these holdings, he re-acknowledged that Morguard was not argued in constitutional terms, but that it was sufficient to “infuse the constitutional considerations into the rules.”1287 He declared the requirements of order and fairness upon which the real and substantial connection test rests “constitutional

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1282 Blom & Edinger, supra note 1217 at 379.
1283 For a summary of those statements, see Morguard (SCR), supra note 174 at paras 31-37, summarized in nn 1242-1245, and 1249-1251, infra, and accompanying text.
1284 Morguard (SCR), supra note 174 at para 52.
1285 Ibid.
1286 Hunt, supra note 176 at 67.
1287 Ibid at 56.
imperatives”. Very recently in Van Breda, LeBel J reiterated the test’s constitutional status. He viewed the test as both a “constitutional principle” and an “organizing principle” of private international law.

In declaring the test constitutional, however, Hunt did not, oddly, point to any constitutional provision clearly mandating the test. And there is apparently no provision of the Canadian Constitution in which the test may be anchored. In Morguard, La Forest J suggested that the constitutional limit might be derived from section 7 of the Charter. Section 7 of the Charter provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” It is not self-evident that this provision creates limits on judicial jurisdiction. The territorial limits in the “in province” provisions under section 92 of the Constitution Act might come to mind and LeBel J did refer to the section in Van Breda. But even this is hardly self-evident. In fact, Watson and Au have suggested that the constitutional jurisdiction established in Morguard is not founded on section 92 but is distinct from and additional to the legislative jurisdiction granted under the section. It is suggested, however, that while the Morguard test is not manifestly founded on section 92, it may be derived from it. Section 92 speaks to legislative jurisdiction and enumerates a number of subject areas and defines the territorial scope within which provincial legislative jurisdiction lies. It does not speak to adjudicative jurisdiction. But it is arguable that the imposition of adjudicative jurisdictional limits is necessary to bolster and sustain the legislative limits explicitly imposed under the section. It can equally well be said that adjudicative jurisdiction and legislative jurisdiction are, from a constitutional perspective, correlative. This view may have been captured by LeBel J when he stated that the limits imposed under the section are essentially “concerned with the legitimate exercise of state power, be it legislative or adjudicative.” He argued: “The legitimate exercise of power rests, inter alia, upon the existence of an appropriate relationship or connection between the state and the persons

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1288 Ibid.
1289 Van Breda (SCC), supra note 1274 at para 22 (stressing that Morguard crafted “a constitutional principle rather than a simple conflicts rule”, and adding, however, that the test was initially a “general organizing principle of the conflict of laws” and that its “constitutional dimension appeared only later.”).
1290 Ibid at para 31.
1291 Morguard (SCR), supra note 174 at 279.
1292 Van Breda (SCC), supra note 1274 at para 31.
1294 Van Breda (SCC), supra note 1274 at para 31.
who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy."\(^{1295}\)

LeBel J went a step further in explaining the constitutionalization of adjudicative jurisdiction. He drew a careful distinction between “constitutionally imposed territorial limits on adjudicative jurisdiction” and the real and substantial connection test as a conflicts rule. Conflicts rules include not only purely jurisdictional rules, but also choice of law and judgment recognition and enforcement rules. But constitutional territorial limits speak to the “outer territorial boundaries” within which conflicts rules may be applied. What the constitutional principle therefore does is to ensure that conflicts rules are confined within those boundaries.\(^{1296}\)

However, like La Forest J did in Morguard, LeBel explicitly deferred further consideration of the constitutional principle for a future time when a conflicts rule is challenged for violating constitutional limits.\(^{1297}\)

Even assuming constitutional limits on adjudicative jurisdiction are not derivable from section 92 or any other section of the Constitution, one possible explanation for declaring the real and substantial connection test constitutional is that it might have been considered so fundamental in the context of Canadian federalism that the requirement of a real and substantial connection with a province seeking to assert adjudicative jurisdiction in an interprovincial dispute should be read into the constitution. La Forest J’s numerous references to the Canadian federal structure are suggestive of this view.

The constitutionalization of the real and substantial connection test is comparable to the constitutionalization of the “minimum contacts” doctrine by the US Supreme Court. The minimum contacts doctrine is traced to the due process clause of the Fourteenth Amendment. The due process clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law”. In International Shoe Co v Washington, the US Supreme Court stated that “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair

\(^{1295}\) Ibid.
\(^{1296}\) Ibid at para 33.
\(^{1297}\) Ibid at para 34.
play and substantial justice”.” Like the constitutionalization of the real and substantial connection test, the constitutionalization of the minimum contacts doctrine is not explicitly borne out by the due process clause. There is both judicial and academic incongruity about which exact section of the US Constitution authorizes the minimum contacts doctrine. While the dominant opinion is that it is the due process clause, there is debate as to whether the due process clause is the “sole source.” There is the additional question of whether the language of the due process clause clearly supports the constitutionalization of adjudicatory jurisdiction. The requirement that no state shall “deprive any person of life, liberty, or property, without due process of law” does not self-evidently speak to any limits on territorial jurisdiction, but some courts have read territorial limits into it.

It should be pointed out, too, that the constitutional restraints imposed by the real and substantial connection test do not apply to federal courts. This is because the legislative powers of the Federal Parliament are not subject to territorial constraints within Canada. As such, the adjudicatory powers of federal courts are not constrainable by the real and substantial connection test. But provincial legislative rules are required by section 92(14) to come within the provincial legislative power over “the administration of justice in the province”. Accordingly, ex juris service rules are confined to the territorial limits of provincial legislative power. Since ex juris service rules necessarily have out-of-province repercussions, it is clear that “there must be

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1298 326 US 310 at 316 (1945) (US Sup. Ct.). See also World-Wide Volkswagen Corp v Woodson, 444 US 286 (1980) (US Sup Ct) [World-Wide Volkswagen] (“The concept of minimum contacts … can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”).


1300 In World-Wide Volkswagen, supra note 1300 at 292, for instance, White J stated that the due process clause “acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”. See also Black, “The Other Side of Morguard”, supra note 1256 at 14 (observing that one reason constitutional limits on judicial jurisdiction have proven difficult and contentious in the US is that “they are deeply political”).

1301 Hogg (2005), supra note 1210 at 322. Federal legislative power, however, is constitutionally challengeable on division of powers grounds.

1302 Ibid.
some limits to the exercise of jurisdiction against persons outside the province”. Otherwise, the “in the province” limitation imposed under section 92 would be meaningless.

5.2.3 Relationship of the Real and Substantial Connection Test to the Provincial Jurisdictional Bases

Flowing necessarily from the constitutional status of the real and substantial connection test is the question of its relationship with the traditional bases of jurisdiction – residence of the defendant within the forum, consent and attornment. Were these traditional bases preserved (intact or in part) by the test or are they now to be tested against the test? At first glance, the constitutionalization of the test means that the relevant provincial jurisdictional rules are subject to the test. But this presumptive view does not enjoy complete jurisprudential support.

*Morguard* itself suggests that the real and substantial connection test applies only to situations where the defendant is not present in the forum. The implication is that the real and substantial connection test is not intended to replace the provincial jurisdictional bases that govern situations where the defendant is present in the forum, but is to be confined to service *ex juris* situations. Support for this may be drawn from the fact that the test was developed to address the problems of recognition and enforcement of foreign judgments where the judgment debtor was served *ex juris* in the foreign court. It is striking too that so far, the test has not been used to oust jurisdiction over actions brought against defendants who are resident or domiciled in the forum. In *Teja v Rai*, the British Columbia Court of Appeal held that *Morguard* did not call into question the traditional bases that allow courts to take jurisdiction over persons who attorn to their jurisdiction or who are present, even if momentarily, in their forum. The recognition of momentary presence as giving jurisdiction is particularly striking in that momentary presence of the defendant can hardly be said to constitute a substantial connection with the forum. The implication is that jurisdiction might be taken under the traditional bases in

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1303 *Morguard* (SCR), *supra* note 174 at para 44.
1304 *Ibid* ("The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments – in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.").
circumstances where it would fail under the real and substantial connection test. In *Kertas v Helm*, the British Columbia Supreme Court found that where “each of [the] defendants is resident in British Columbia, was resident [t]here at the date of service, and was served within the province . . ., [t]hose facts, in and of themselves, are sufficient to establish a real and substantial connection between this court and the defendants.” The court again found jurisdiction *simpliciter* in *Wong v Wong* where the defendant was served *in juris*, since “[h]istorically, that would be sufficient reason for this court to take jurisdiction over the parties and their world-wide property.” And in a model Canadian case where a Canadian corporation was sued for environmental harm that occurred in Guyana, the Quebec Superior Court applied the jurisdictional standards under the Quebec Civil Code. Under the Code, Quebec authorities have jurisdiction where the defendant is domiciled in Quebec, and in personal actions of a patrimonial nature, either where the defendant is domiciled in Quebec or where the fault was committed in Quebec or where the injurious conduct occurred in Quebec. The defendant’s domicile was deemed sufficient for jurisdiction without reference to the real and substantial connection. However, a statement by Maughan J is instructive with regard to the real and substantial connection test and would have an influence outside Quebec. He stated that “if it is the case that Cambior [as alleged by the plaintiffs] made certain decisions relating to the construction and operation of the mine which resulted in the failure of the tailings dam, those decisions would have been made in Quebec.” These facts might be sufficient to satisfy the real and substantial connection test.

The above cases suggest that the existence of any of the traditional jurisdictional bases precludes the application of the real and substantial connection test. The exception is the decision in *Kertas*, which is cast in a manner that suggests that the existence of any of the traditional jurisdictional bases should be regarded as sufficient to meet the requirements of the real and substantial connection test, somewhat implying that those traditional bases retain their validity only or largely because they meet the requirements of the real and substantial connection test. In his analysis of the same question, Forcese concludes that “[w]here service is *in juris* to a defendant ordinarily resident in the province, it is unlikely a court would decline jurisdiction on

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1306 [2000] BCSC 97 at para 15 [*Kertas*].
1308 *Civil Code of Quebec*, SQ 1991, c 64, Articles 3141, 3148(1) and (3).
1309 *Cambior*, supra note 168 at 22.
the basis of the real and substantial connection test.” Forcese thus seems to recognize the traditional jurisdictional bases as in and of themselves valid jurisdictional bases.

By contrast, in *Beals v Saldanha*, Major J stated that the real and substantial connection test is “the overriding factor in the determination of jurisdiction” and that “[t]he presence of one or more of the indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties.” Major J thereby suggests that the provincial jurisdictional rules are subsumed under the real and substantial connection test and are presumptively valid. As pointed out earlier, some cases that meet the traditional jurisdictional bases may not meet the real and substantial connection test if the word “substantial” is to be given any value, one of the best examples being presence-based jurisdiction where the defendant’s presence was merely momentary.

Professor J-G Castel has treated the real and substantial connection test as an additional basis of jurisdiction. So has Janet Walker. Elizabeth Edinger has however identified two cases that appear to assume that the real and substantial connection test replaces the traditional rules. In *Federal Deposit Insurance Corp v Vanstone*, Gow J of the British Columbia Supreme Court spoke of the “demise of the threshold rule in *Emanuel*”. And in *Amopharm Inc v Harris Computer Corp*, Brooke JA of the Court of Appeal for Ontario stated that “[l]aws fashioned on common law rules for the enforcement of judgments of foreign courts were replaced by a law fashioned to the need of comity under the Canadian Constitution.” These statements do not accord with La Forest J’s statement that the exercise of jurisdiction poses no difficulty where it was based on any one of the traditional bases. On the significance of the test’s constitutional status to the relationship under consideration, the inference may be drawn that in

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1311 [2003] 3 SCR 416 at para 23 [*Beals*].
1312 *Ibid* at para 37.
1313 Jean-Gabriel Castel, “Back to the Future! Is the ‘New’ Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?” (1995) 33 Osgoode Hall LJ 35 at 37 [Castel, “Back to the Future”] (“[T]here are now two grounds for challenging the constitutionality of a statutory or judicial rule of private international law: the traditional limitation on the power of the provinces to legislate extraterritorially and the new constitutional principles or order and fairness.”).
1314 Walker, “*The Muscutt Quintet*, *supra* note 193 at 72-73.
1316 (1992), 88 DLR (4th) 448 at 463 (referring to the now defunct rule in *Emanuel v Symon* [1908] 1 K.B. 302 on the recognition and enforcement of foreign judgments).
1317 (1992), 93 DLR (4th) 524 at 528.
service in juris situations, the assumption of jurisdiction does not invite constitutional considerations.\textsuperscript{1318} In Van Breda, LeBel J expressed the test as applicable only in interprovincial and international cases.\textsuperscript{1319} In his words, “the real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.”\textsuperscript{1320} Given that the constitutionalization of jurisdiction in service ex juris situations is anchored in the federal character of Canada, there appears to be no need to subject provincial jurisdictional assertions to a constitutional test where the fact situation is located wholly within the province since the interests of other provinces are not engaged.

5.2.4 Analysis of the Test

5.2.4.1 Two Possible Approaches

Hardly had La Forest J pronounced the real and substantial connection test than there ensued an avalanche of academic commentary on the utility and proper formulation of the test. Professor Blom – one of the earliest commentators – offers two possible ways of thinking about the test. The first is an “administration of justice” theory which is based on a notion of suitability and fairness that speaks to the reasonableness of the case being heard in the jurisdiction where it is brought. An approach coming very near to forum non conveniens, it weighs the interests of both the plaintiff and the defendant as well as the potential costs and length of litigation, however not for the purpose of identifying a more suitable forum, but to identify an acceptable forum.\textsuperscript{1321} Blom grounds this approach on the fact that the judicial system of Canada is a group of “independent but co-ordinated sub-systems among which jurisdiction should be allocated on the basis of where cases can reasonably be heard.”\textsuperscript{1322} The second approach is a “personal subjection” theory that is based on a notion of in personam jurisdiction that speaks to the degree of the defendant’s connection with the forum that makes it legitimate and reasonable for the forum

\textsuperscript{1318} In Burnham v Superior Court of California, 495 US 604 (1990), the US Supreme Court stated that a state could assert personal jurisdiction over a nonresident who was personally served with process while temporarily in the state, even if his purpose for being in the state was unrelated to the matter before the court, and that this would not violate the due process clause.
\textsuperscript{1319} Van Breda (SCC), supra note 1274 at paras 23 and 79.
\textsuperscript{1320} Ibid at para 79.
\textsuperscript{1321} Blom, “Conflict of Laws”, supra note 1200 at 741 and 742.
\textsuperscript{1322} Ibid at 742.
court to take jurisdiction over the defendant. It would be reasonable and legitimate to take jurisdiction if the action is brought in the province where defendant “either regularly lived or carried on business” or otherwise voluntarily brought himself within that jurisdiction. Blom grounds this approach in the belief that each Canadian province is akin to an independent sovereign state (in a private international law sense) so that the rights of a foreign defendant cannot be disturbed absent a showing that the defendant has somehow subjected himself/herself to the local sovereign. How one appraises the connections would depend on which of the two theories one adopts.

The personal subjection theory bears close resemblance to the US minimum contacts doctrine noted earlier. The kind of minimum contact required is “some act by which the defendant purposefully avails itself of the privileges of conducting activities in the forum state, thus invoking the benefits and protections of its laws”. Those activities, however, need not be direct; but they must be purposeful and not merely casual or accidental. A “corporation that delivers its products into the stream of commerce [of a state] with the expectation that they will be purchased in [that state]” has been held to have met the minimum contacts required.

Watson and Au have called for a rejection of the personal subjection theory. They give three policy reasons for this. (1) Where the suit involves multijurisdictional defendants, insisting on a real and substantial connection between each defendant and the forum may lead to a multiplicity of suits and foster inconsistent results since each defendant would be sued in the forum with which they have a real and substantial connection. (2) The practical uncertainties of the personal subjection approach increase the incidence of interlocutory applications, which in turn increases the cost and length of litigation. (3) A narrow focus on the defendant’s link with the forum could result in decisions that are inconsistent with “common sense and practicability”; but an approach that has regard to “all relevant circumstances” is to be preferred. They suggest that the real and substantial connection test be defined “as one between the forum and either the ‘subject matter of the action’ or the ‘defendant’.” There is an inconsistency in

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1323 Ibid at 741.
1324 Ibid.
1325 Ibid at 742.
1326 Ibid at 741.
1327 Hanson v Denckla, 357 US 235 at 253 (1958).
1328 World-Wide Volkswagen, supra note 1300 at 316.
1329 Watson & Au, supra note 1295 at 200.
1330 Ibid at 200-201 (italics in original).
Watson and Au’s analysis. They reject the personal subjection theory. Yet they define the real and substantial connection as one between the forum and the subject matter or the defendant. They go a step further to say that “[t]he defendant’s interests should be among the factors to be weighed, and should not be determinative of the choice of forum.”

It is apparent that by “[t]he defendant’s interests”, Watson and Au mean the defendant’s connections with the forum. Watson and Au might have intended to endorse only the administration of justice theory, but what they have actually succeeded in doing is to highlight the shortcomings of the personal subjection theory and then subsume it under the administration of justice theory, but not actually to reject it. It is always useful to point out the inadequacies of a theory; that a theory leaves out certain relevant considerations. But M Cohen has warned against the dangers of rejecting a legal theory on the simple account of the theory’s failure to account for all circumstances.

It is important also in any intellectual enterprise to remember that there must always be a certain difference between theory and practice or experience. A theory must certainly be simpler than the factual complexity or chaos that faces us when we lack the guidance which a general chart of the field affords us. … Similarly, it is not necessary that the principles or theoretic assumptions of legal science shall be found to be fully realized. No science offers us an absolutely complete account of its subject matter. It is sufficient if it indicates some general pattern to which the phenomena approximate more or less.

The totality of jurisdiction should be viewed as fragmentary and no individual jurisdictional theory should be expected to account for all possible situations. The personal subjection theory can be injected with a vitality that would enable it to overcome the problems of multijurisdictional defendants. Any remaining shortcomings would be progressively accounted for, or at least minimized, through the creation of subsidiary principles by the courts. As will be seen later in this chapter, this is the philosophy behind the recognition of necessity jurisdiction by the Court of Appeal for Ontario in Van Breda.

Blom’s theories were suggested even before the Supreme Court had had the first opportunity to reassess Morguard. Both the administration of justice theory and the personal subjection theory are fully compatible with the test. In Morguard itself, La Forest J variously described the test as a real and substantial connection “between the subject matter of the action

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1331 Ibid at 209.
1332 M Cohen, supra note 201 at 681-682.
and the territory where the action is brought”, “between the jurisdiction and the wrong doing”,”
“between the damages suffered and the jurisdiction”, “with the transaction or the parties”,
“with the action”, and “between the defendant and the forum province”. In Beals, delivered in 2003, the Supreme Court endorsed both theories as alternative ways of drawing the connecting arrows when it noted that a court properly exercises jurisdiction in an action if the action “had a real and substantial connection with either the subject matter of the action or the defendant.” It further stated that “[a] substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.” At yet another point it stated:

The “real and substantial connection” test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction’s law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

In other words, one aspect of the connection suffices.

Lower courts have accepted either theory as sufficient. In Long v Citi Club, the Ontario Superior Court stated that “[i]n order for Ontario to assume jurisdiction over this defendant, there must exist a substantial connection between Ontario and the defendant, such that it makes it reasonable to infer that the defendant has voluntarily submitted himself or herself to the risk of litigation in the courts of the forum province.” In McNichol Estate v Woldnick, Goudge JA of the Court of Appeal for Ontario applied the administration of justice theory without necessarily rejecting the personal subjection theory. He stated:

I think that the approach prescribed by Morguard and Hunt requires the court to

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1333 Morguard (SCR), supra note 174 at para 47.
1334 Ibid at para 50.
1335 Ibid at para 51.
1336 Ibid.
1337 Ibid at para 52.
1338 Beals, supra note 1313 at para 23.
1339 Ibid.
1340 Ibid at para 32.
1342 (2001), 13 CPC (5th) 61 (Ont CA).
evaluate the connection with Ontario of the subject matter of the litigation framed as it is to include both the claim against the foreign defendant and the claims against the domestic defendants. In doing so, the courts must be guided by these requirements of order and fairness. If it serves these requirements to try the foreign claim together with the claims that are clearly rooted in Ontario, then the foreign claim meets the “real and substantial connection” test. This is so even if that claim would fail the test if it were constituted as a separate action. This approach goes beyond showing that the foreign defendant is a proper party to the litigation. It rests on those values, namely order and fairness, that properly inform the real and substantial connection test and allows the court the flexibility to balance the globalization of litigation against the problems for a defendant who is sued in a foreign jurisdiction.1343

In *Cook v Parcel, Mauro, Hultin & Spaanstra, PC*, the British Columbia Court of Appeal accepted that a real and substantial connection could be based on either the personal subjection theory or the administration of justice theory:

It is common ground that the test to be applied in determining whether the B.C. Supreme Court has jurisdiction over these proceedings is whether there is a real and substantial connection between the court and either the defendant ... or the subject-matter of the litigation (occasionally referred to in the authorities as the “transaction” or the “cause of action”).1344

In *Duncan (Litigation guardian of) v Neptunia Corp*, the Superior Court of Ontario implicitly affirmed the two approaches when it held that “it is clear that a real and substantial connection between the forum province and the subject matter of the litigation, not necessarily the defendant, is sufficient to meet the test”.1345 In *MacDonald v Lasnier*1346 – a case involving an Ontario plaintiff injured in a motor accident in Quebec and treated by the defendant physician in Quebec, who returned to Ontario to receive a fresh treatment for injuries suffered allegedly as a result of the negligence of the Quebec physician – although the Ontario Court of Justice stated that the requisite connection in the case was between the forum and “the action”, its analysis of the connections yields to a connection between the forum and the defendant:

[T]he defendant hospital's sole place of business is in the province of Quebec. The defendant doctor, as indicated, is licensed to practice in and is regulated by the province of Quebec. Furthermore, the care afforded by the defendant physician to his

1344 (1997), 143 DLR (4th) 213 at 219 (BCCA).
1345 (2001), 53 OR (3d) 754 at 768 (SCJ).
1346 (1994), 21 OR (3d) 177 (Gen Div) [*MacDonald*]
patients must be in accordance with the standard of care applicable in the province of Quebec. He is a resident of the province of Quebec.

MacDonald has been criticized for attempting to confuse jurisdiction simpliciter with forum non conveniens. In Muscutt, however, Sharpe JA confessed to the two theories being compatible with the language of La Forest J, but preferred the administration of justice theory. Confessedly influenced by Watson and Au, he argued that “[w]hile the defendant’s contact with the jurisdiction is an important factor, it is not a necessary factor.” In his view, the personal subjection theory is inconsistent with the Supreme Court of Canada’s direction that the test be applied flexibly.

1347 MacDonald, supra note 1295 at 182.
1348 See, for instance, Genevieve Saumier, “Judicial Jurisdiction in International Cases: The Supreme Court’s Unfinished Business” (1995) 18 Dalhousie LJ 447 at 471:
The court in MacDonald v Lasnier ... failed to clearly distinguish between these two phases of jurisdiction. In determining whether the assumption of jurisdiction was constitutional, the Court considered several factors usually relevant to a forum non conveniens analysis. For example, the Court mentioned the location of witnesses and documents ... When the Court then came to determine whether it should exercise its discretion to decline jurisdiction, there was little further analysis because most of the factors had already been balanced for the constitutional argument.

Watson & Au, supra note 1295 at 186-187 (stressing that MacDonald interpreted the real and substantial connection test as though a forum having a real and substantial connection with an action would necessarily have it to the exclusion of other forums).

1349 Muscutt, supra note 1209 at para 56.
1350 Ibid at para 58.
1351 Muscutt, supra note 1209 at para 74 (italics in original).
1352 Ibid.
1353 158 DLR (4th) 679 (NSCA) [Oakley].
citing John and Swan’s summary\textsuperscript{1354} of the formulations, he wrote:

I would apply Morguard in a flexible manner and conclude that in this case, there is both a real and substantial connection between the subject matter of the action and the Province of Nova Scotia, as well as a real and substantial connection between the damages caused by the alleged negligence of the appellant physicians, and the defendant hospital, and the Province of Nova Scotia.\textsuperscript{1355}

Watson and Au’s argument that “Oakley was an implicit rejection of the MacDonald line of cases which held, inter alia, that ‘there must exist a substantial connection between [the forum] and the defendant’\textsuperscript{1356} is such an incomplete interpretation of Oakley that would lead to an inaccurate understanding of the case. Oakley did not reject a defendant-oriented connection. What it rejected was the argument put forward by the appellant in the case that if there was no connection between the forum and the defendant, there could be no real and substantial connection. Oakley implicitly accepted a defendant-oriented connection, but held that in the absence of such a connection, a real and substantial connection with the subject matter or the damage suffered could suffice for jurisdiction. In fact, Blom’s presentation of the two approaches as alternatives – or perhaps the interpretation of his presentation as such – is incompatible with the various formulations used by La Forest J to describe the kind of connection required. Viewing them as alternatives somehow suggests that the acceptance of one implies a rejection of the other, whereas they are simply different, inexclusive connecting techniques.

The specific suggestion by Sharpe JA that the personal subjection theory lacks flexibility is mistaken. There is ample room for flexibility within it. There seems to be an abnormal focus on the “connection” arm of the test, ignoring the “real and substantial” arm of the test. Flexibility comes in when determining the nature and extent of that connection, whichever approach is taken. Thus it is in determining the reality and substantiality of the connection that courts are to demonstrate flexibility. There is ample support in the different formulations of the test (earlier enumerated) by La Forest J – and no subsequent Supreme Court formulation has suggested otherwise – for the view that a connection between the forum and the defendant can produce the requisite real and substantial connection. There is no basis to make one kind of connection

\begin{itemize}
\item \textsuperscript{1354} Black & Swan, “New Rules for the Enforcement of Judgments” (1991) 12 Adv Q 489 at 500.
\item \textsuperscript{1355} Oakley, supra note 1355 at para 45 (italics mine).
\item \textsuperscript{1356} Watson & Au, supra note 1295 at 197.
\end{itemize}
superior to the other without regard to the specific facts of each case. Granted that no individual factor is controlling, it is inconsistent with the express words of La Forest J to hold that a connection between the forum and the defendant, however strong – however real and substantial – is inadequate without some additional connection between the forum and the subject matter. All that is required is that the totality of the connections be weighed to determine whether they are real and substantial. Some cases may have only one kind of connection to the forum. Whether that will suffice does not depend – should not depend – on whether it relates to the personal subjection theory or to the administration of justice theory. Its reality and substantiality is determinative. This view comports with the statement of La Forest J in *Hunt* when, after declining to comment on the merits of adopting either approach, stressed that “[w]hatever approach is used, the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts and connections.”

5.2.4.2 The *Muscutt* Factors

A critical look at the *Muscutt* factors earlier enumerated raises questions about whether some of the factors properly fit into a notion of connection. As Tanya Monestier points out, only the first two factors “speak to any sort of connection” while the others are largely unrelated to any connection with the forum.

I. Damage Suffered in the Forum

Most of the jurisdictional contests that have been fought since *Morguard* have typically been in the context of damage suffered in the forum by forum residents as a result of the out-of-province actions of out-of-province defendants. The plaintiff travels to province B where he/she obtains medical treatment. He/she returns to province A where he/she undergoes another medical treatment occasioned by the negligence of the province B doctor. He/she files suit in province A alleging that since the effects of province B’s doctor’s negligence were suffered in province A,

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1357 *Hunt,* supra note 176 at 326
the courts of province A have jurisdiction.

*Muscutt* itself assumed jurisdiction based on damage suffered in the forum. As Sharpe JA described the fact situation and the issue raised therein:

An Ontario resident suffers serious personal injury in another province or in another country. The injured party returns home to Ontario, endures pain and suffering, receives medical treatment, and suffers loss of income and amenities of life, all as a result of the injury sustained outside the province. The question is whether the courts of Ontario should entertain the injured party’s suit against the out-of-province defendants who are alleged to be liable in tort for damages.\(^{1359}\)

Sharpe JA decided that damage suffered in the forum could provide the necessary real and substantial connection. Damage-suffered-in-the-forum jurisdiction is provided by Rule 17.02(h) of the Ontario *Rules of Civil Procedure*.\(^{1360}\) The rule sanctions service outside Ontario in respect of “damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed.” The provision is not concerned with situations where the harm occurred in Ontario, but with situations where persons injured outside Ontario come or return to Ontario where they continue to suffer from the damage.\(^{1361}\) Going by this, a victim of an extraterritorial corporate crime who comes to Ontario after the injury has been inflicted and continues to suffer the effects of that injury in Ontario can bring action before Ontario courts against the corporation. It is not clear whether this is what La Forest J envisaged in *Morguard* when he listed a connection between the forum and the damage suffered as one of the possible connections that might give rise to a real and substantial connection. He could have meant where the damage was actually inflicted, not including where the plaintiff suffered the effects of the damage already inflicted.

Walker has explained the rationale for jurisdiction based on damage suffered in the forum. First, she notes that damage-in-the-forum does not fit into the rationale for the real and substantial connection framework.\(^{1362}\) Support for this view may be found in the fact that the CJPTA lists a number of factors that are to be presumed to have a real and substantial connection with the forum to which they relate, but this list does not include damage suffered in the forum. While the list is not exhaustive of real and substantial connections, and does not preclude “the

\(^{1359}\) *Muscutt*, *supra* note 1209 at para 2.

\(^{1360}\) *Supra* note 1085 at Reg 194.

\(^{1361}\) Walker, “The *Muscutt* Quintet”, *supra* note 193 at 72.

\(^{1362}\) Ibid at 73.
right of a plaintiff to prove other circumstances that constitute a real and substantial connection.”\(^\text{1363}\) the absence of a factor in that list is significant. Walker argues that the rationale for it is the need to advance access to justice: “Where the plaintiff is unable to travel to another forum to pursue a claim against the defendant, but the defendant is able to travel to defend the claim, it may be unfair to deprive the plaintiff of access to justice by refusing to exercise jurisdiction over the matter.”\(^\text{1364}\) Accordingly, jurisdiction based on damage suffered in the forum may play “an important role in making jurisdictional determinations that conform to the principles of order and fairness.”\(^\text{1365}\) Walker’s analysis speaks to the need for subsidiary principles that would deal with situations where the real and substantial connection test cannot be met without overstraining the meaning of “real and substantial connection”, but where failure to assume jurisdiction would militate against the principles of order and fairness that after all is the goal of the real and substantial connection test.

II. The Connection Between the Forum and the Plaintiff’s Claim

Sharpe JA stressed that it is the plaintiff’s claim that provides the connecting factor, and not the plaintiff’s residence. In the context of Muscutt (and its companion cases) one would have to ask about the focus of the analysis concerning damage. The harm was not inflicted in Ontario. The plaintiffs, who were originally Ontario residents, only returned to Ontario where they continued to suffer the effects of the harm and received medical treatment. If the focus were on the “damages sustained” then the test would easily be met by looking to the plaintiff’s residence.\(^\text{1366}\) But if the focus is on the “character of the damages sustained”, then this factor can be met by looking to where the harm occurred.\(^\text{1367}\) In Muscutt, Sharpe JA focused on the damages sustained and held that the “extensive medical” treatment the plaintiffs received in Ontario constituted “a significant connection” with Ontario.\(^\text{1368}\)

Regarding the plaintiff’s subsequent suffering in the forum after the harm has been inflicted as a connecting factor with the forum is too pro-plaintiff and may lead to forum

\(^{1363}\) CJPTA, supra note 1277, s 10.
\(^{1365}\) Ibid.
\(^{1367}\) Ibid at 503 (italics in original).
\(^{1368}\) Muscutt, supra note 1209 at para 81.
shopping.\textsuperscript{1369} Black has pointed to the unfairness of compelling a defendant to litigate in another jurisdiction over a tort committed in the defendant’s jurisdiction simply on the basis of the plaintiff’s residence in that other jurisdiction.\textsuperscript{1370} Accordingly, this factor should be focused on where the injury occurred. This factor would therefore hardly support a victim of extraterritorial corporate crimes committed abroad who returns to Canada and receives medical treatment here for the injuries suffered there.

III. The Connection Between the Forum and the Defendant

This factor reflects the personal subjection theory. Sharpe JA drew the factor from \textit{Moran} where the Supreme Court stated:

\begin{quote}
[W]here a foreign defendant … knows or ought to know that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff sued or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.\textsuperscript{1371}
\end{quote}

Sharpe JA stated that if the defendant has undertaken any activity within the forum that “bears upon” the plaintiff’s claim, the case for assuming jurisdiction is strong.\textsuperscript{1372} From this holding, it is clear that the defendant’s activity must relate to the plaintiff’s claim. Activity totally unconnected to the plaintiff’s claim cannot awaken this factor. A plaintiff seeking to bring suit against a Canadian corporation for conduct that took place overseas must therefore allege some activity within Canada that is related to the foreign conduct on which the claim is based. If the decisions or an important part of them leading to the conduct were taken in Canada, this may give rise to a real and substantial connection sufficient for Canadian jurisdiction. The difficulty here, however, is the extent to which the activity must relate to the claim. Would the fact that funds for the construction of a project were provided from Canada, for instance, by a Canadian

\begin{footnotes}
\item[1369] Walker, “The Muscutt Quintet”, \textit{supra} note 193 at 65.
\item[1370] Vaughan Black, “Territorial Jurisdiction Based on the Plaintiff’s Residence: Dennis v. Salvation Army Grace General Hospital” (1998), 14 CPC (4th) 222 (“Permitting a plaintiff to assume a new residence and sue a defendant there in respect of events that occurred elsewhere seems to be harsh to defendants, and this is particularly so when those events comprise a completed tort.” \textit{Ibid} at 232).
\item[1371] Moran, \textit{supra} note 1232 at 409.
\item[1372] Muscutt, \textit{supra} note 1209 at para 82.
\end{footnotes}
bank, meet the requirements of this factor if physical actions taken in the construction of the project result in injury to the plaintiffs? It is submitted that a greater level of connection with the claim be required than the mere advancement of funds to the foreign corporation, unless it was reasonably foreseeable at the time the funds were advanced that the project would result in those injuries.

IV. The Fairness Factors

Sharpe JA held that the fairness or otherwise, to both the plaintiff and the defendant, of assuming jurisdiction is a relevant consideration in a real and substantial connection inquiry.\textsuperscript{1373} Clearly, this factor has nothing to do with connection to the forum. In \textit{Beals}, however, LeBel J stated in dissent that in international cases, it is proper to consider fairness to the foreign defendant:

\begin{quote}
In my view, it is important to take into account the burdens that defending in the foreign forum would impose on a defendant, in order to determine whether it is reasonable to expect the defendant to accept them. Among the factors that affect the onerousness of defending in a foreign forum are the difficulty and expense of travelling there and the juridical disadvantage that the defendant may face as a result of differences between the foreign legal system and our own…. [D]efendants should not be compelled to defend in the jurisdiction of the plaintiff’s choosing regardless of the inconvenience and expense entailed; all of these factors should be taken into account by the court in arriving at a solution that justly accommodates the legitimate interests of both parties.\textsuperscript{1374}
\end{quote}

The majority in the case was of the view that fairness is a factor more appropriate for a \textit{forum non conveniens} inquiry.\textsuperscript{1375} LeBel J’s view was rejected by the New Brunswick Court of Appeal in \textit{La Succession de feu André Gauthier v Coutu}.\textsuperscript{1376} There, Drapeau CJNB wrote:

\begin{quote}
Order and fairness are the considerations that come into play in settling jurisdiction \textit{simpliciter} disputes that arise in circumstances where the defendant has been served \textit{ex juris}. Those considerations are guiding \textit{principles}. They are given practical effect through the real and substantial test adopted by the Supreme Court of Canada. Except in the most unusual case, the principles of order and fairness are given substance and are respected whenever the real and substantial test, correctly understood (it is concerned with more than a minor connection), is judicially applied. Thus, with respect to factor (3) (unfairness to the defendant in assuming jurisdiction), in particular,
\end{quote}

\textsuperscript{1373} \textit{Ibid} at paras 86-90.
\textsuperscript{1374} \textit{Beals, supra} note 1313 at para 176.
\textsuperscript{1375} \textit{Ibid} at para 35.
\textsuperscript{1376} (2006), 264 DLR (4th) 319 [\textit{Coutu}].
I can only say that its inclusion as a factor, alongside the connection between the plaintiff’s claim and the forum, seems at odds with the fundamental premise of the real and substantial connection test, namely that “if the necessary connection [with the subject matter of the action] is present, it is no injustice to the defendant to be forced to defend the claim in the country where it is brought”.  

Some lower courts have, however, used language suggestive of an adoption of LeBel J.  

Monestier submits that hinging jurisdiction on fairness to the parties contains “the potential for patchwork justice” as fairness considerations are bound up with “highly individualized personal circumstances of the parties”.  

She argues vehemently that “jurisdiction is a legal rule” and “should not depend on the discretion of judges.” Comparable set of facts should yield comparable jurisdictional results. Otherwise, apart from problems of predictability, other problems would arise. For instance, with regard to enforcement of foreign judgments, a judge in one province may take a different view on whether discretionary jurisdiction was properly exercised and refuse to recognize and enforce the judgment of another province.  

Monestier is not alone in her view. Castel laments that the conflation of jurisdiction simpliciter and forum non conveniens inquiries has produced “an integrated jurisdictional determination that is quite confusing and unhelpful.” He stresses that both inquiries should be kept separate because jurisdiction is a legal rule while forum non conveniens is a discretionary rule. Canadian courts, according to him, have gone too far in their application of the test. Which prompts him to call for “a return to the clear and predictable rules of the past” that leave little or no room for interpretation by the courts. But where the application of the predictable rules of the past would lead to the designation of a jurisdiction with little or no connection with the subject-matter, Castel suggests that the real and substantial connection test may be called in

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1377 Ibid at para 70 (underline in original).
1378 See, for instance, 6012621 Canada Inc v J & R Electronics Inc [2004] OJ No 1768 (stating at para 18 that “the unfairness to the defendant in assuming jurisdiction is based upon practical considerations of [the] added burden of inconvenience and expense”); and Sobeys Land Holdings Ltd v Harvey & Co (2006) NTLD 67 (stating at para 48 that “it will be expensive and cumbersome for a defendant … to mount a defence in this province”).
1380 Ibid at 187.
1381 Ibid.
1382 Ibid at 188, n 19.
1384 Ibid.
1385 Ibid at 569.
aid “to perform a *corrective* function so as to avoid a totally unjust end result.”

He calls this theory “*limited principled flexibility*”. There is no stressing the fact that fairness does not fit into the real and substantial connection framework. However, as pointed out earlier, while analyzing the real and substantial connection test, attention should also be given to the principle of order and fairness which the test itself is intended to promote. The court in *Coutu* noted that order and fairness are given practical effect through the application of the real and substantial connection test. Does the real and substantial connection test *monopolistically* produce order and fairness? It has been suggested that “the exercise of jurisdiction must conform to the constitutional principles of order and fairness, but that these requirements are not exhaustively comprised of ‘connections’ of the sort that would meet the real and substantial connection test.” Thus, while the test would promote order and fairness in the great majority of cases, there might be cases where it would be unworkable if order and fairness were the goal. The fairness arm of the principle of order and fairness may not be seen from the defendant’s angle alone, but from the plaintiff’s as well. The need for subsidiary principles to complement the real and substantial connection test is compelling if order and fairness is not to be elusive in no small number of cases. Walker has provided a useful insight into an understanding of why fairness should sometimes count in the assumption of jurisdiction despite lack of a real and substantial connection. Where the fairness concerns rise to the level of genuine issues of access to justice, refusal to assume jurisdiction would be improper. This kind of concern for fairness is not an issue that *forum non conveniens* can address, since refusal to assume jurisdiction *simpliciter* would prevent the consideration of *forum non conveniens*. Indeed, there is some support for the view that where the principles of order and fairness are met, a court can assume jurisdiction even in the absence of connections that fit into the real and substantial connection test. This support may be found in the statement of La Forest J in *Hunt* earlier cited but which bears repeating: “Whatever approach is used, the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts and

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1386 Ibid (italics in original).
1387 Ibid (italics in original).
1389 Ibid at 78-80.
V. The Involvement of Other Parties to the Suit

Sharpe JA stated that “[t]he twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.” In his view, where the core of the action involves domestic defendants and other foreign defendants, courts should be more wary of assuming jurisdiction simply on the basis of the involvement of a domestic defendant. It is not clear whether Sharpe JA is saying that jurisdiction should be assumed only over the domestic defendant or whether the existence of additional foreign defendants should raise a red flag against assuming jurisdiction even over the domestic defendant. The second alternative would imply that the plaintiff may be required to bring the suit in the foreign forum, suing both the domestic defendant and the foreign defendants there.

What would promote multiplicity of proceedings is a requirement that jurisdiction be assumed only over the domestic defendant, for this would require that separate actions be brought against the foreign defendants. In *McNichol Estate v Woldnik* – which was distinguished by Sharpe JA – a case involving both domestic and foreign defendants, the court assumed jurisdiction over all the defendants, including the foreign defendant, even though a separate action against the foreign defendant might not have survived the real and substantial connection test. As is argued later, a better approach is not to regard the involvement of other parties as essential to the assumption of jurisdiction *simpliciter*. It is more appropriate in determining whether the court should exercise jurisdiction under the *forum non conveniens* doctrine.

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1390 *Hunt, supra* note 176 at 326.
1391 *Muscutt, supra* note 1209 at para 98.
1392 Ibid.
VI. The Court’s Willingness to Recognize and Enforce an Extra-provincial Judgment Rendered on the Same Jurisdictional Basis

Do unto others as you would be done by! Sharpe JA stated that in assuming jurisdiction, it is important for the court to ask itself if it would be willing, as a matter of common law principles or statutory obligation, to recognize and enforce a judgment rendered in another province on the same jurisdictional grounds as it is faced with. He regards this approach as a “fundamental” and “self-imposed constraint” in-built in the real and substantial connection test.\(^\text{1394}\)

Considering whether the court would be willing to recognize and enforce the judgment of another province rendered on the same basis is laudable. It speaks to the fairness of assuming jurisdiction rather than to any connection between the action or the defendant and the forum. The following observations of O’Leary J in \textit{Lemmex v Bernard} portray the unfairness of a court doing otherwise: “I do not see how it can be fair or just because a tourist pays $21 for a bus-tour in Grenada, that he can require the Grenadian tour operator and the bus driver to come to Ontario to defend themselves against a claim for damages based on an alleged tort committed by them in Grenada.”\(^\text{1395}\) This factor is more of a general principle to be borne in mind in deciding whether to assume jurisdiction. It is related to considerations of comity. It reflects the proposition that the standards for assumption of jurisdiction and for enforcement of judgments are correlative.

VII. Whether the Case is Interprovincial or International in Nature

The requirement that a distinction be drawn between interprovincial and international cases was not the creation of Sharpe JA. It finds support in both pre- and post-\textit{Muscutt} Supreme Court decisions. In \textit{Morguard}, La Forest J stated that the “considerations underlying the rules of comity apply with much greater force between the units of a federal state”, that a federation “implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation”, and that “the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.”\(^\text{1396}\)

\(^{1394}\) \textit{Muscutt, supra} note 1209 at para 93.
\(^{1395}\) (2002), 213 DLR (4th) 643.
\(^{1396}\) \textit{Morguard} (SCR), supra note 174 at 1101.
between interprovincial and international cases in the context of Mareva injunctions and added that he did not “think litigation engendered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce”.\footnote{1397}{[1985] 1 SCR 2 [\textit{Aetna}].} In \textit{Teck Cominco Metals Ltd v Lloyd’s Underwriters}, the Supreme Court also stated, in the context of \textit{forum non conveniens}, that “[a] distinction should be made between situations that involve a uniform and shared approach to the exercise of jurisdiction (e.g. inter-provincial conflicts) and those [involving foreign parties] that do not.”\footnote{1398}{\textit{Hunt}, supra note 176 at 232. See \textit{Aetna}, \textit{ibid} at 34-35.} For the purposes of choice of law, this distinction was equally recognized in \textit{Tolofson} where La Forest J was inclined to recognize an exception to the \textit{lex loci declictui} rule in international cases but not in domestic cases and based the strict rule for domestic cases on the nature of Canadian federalism.

The implication of drawing a distinction between interprovincial and international cases is that Canadian courts would more readily assume jurisdiction in interprovincial cases than in international cases. A plaintiff seeking to invoke Canadian jurisdiction over a foreign defendant would, in practical terms, have to be required to demonstrate a stronger nexus between the cause of action and the forum.

\textbf{VIII. Comity and the Standards of Jurisdiction, Recognition and Enforcement Prevailing Elsewhere}

This factor has a close relationship to the court’s willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis as the case at bar. Like that other factor, it reflects the assertion that jurisdictional standards must be correlated with enforcement standards.

The requirement that Canadian courts should consider the jurisdictional, recognition and enforcement standards prevailing elsewhere suggests that the nationality or residence of the foreign defendant might influence the jurisdictional determination. Where, for instance, the defendant is a US citizen and resident, the jurisdictional, recognition and enforcement standards

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\footnote{1397}{[1985] 1 SCR 2 [\textit{Aetna}].}
\footnote{1398}{\textit{Hunt}, supra note 176 at 232. See \textit{Aetna}, \textit{ibid} at 34-35.}
\footnote{1399}{[2009] 1 SCR 321 [\textit{Teck Cominco} (SCR)].}
\end{flushright}
prevailing in the US would be a relevant consideration. Where he is a Japanese, the standards prevailing in Japan would be relevant.\textsuperscript{1400} Sharpe JA stated that “in cases involving international defendants, international standards and the standards applied in the defendant’s jurisdiction are helpful in determining whether the real and substantial connection test has been met on the basis of damage sustained within the jurisdiction.”\textsuperscript{1401} Although it follows from this that the court would consider the practice of states generally, and not merely the standards in the defendant’s nationality or residence, the standards prevailing in the defendant’s home jurisdiction would likely be given more weight.\textsuperscript{1402}

The requirement that courts look at foreign jurisdictional and judgment recognition and enforcement standards has been much criticized. Black and Brechtel opine:

A final complaint about the Muscutt test concerns its eighth factor, which requires courts to consider both comity and international standards, particularly the practice of the courts of other countries. The main charge against this factor is that as a matter of principle “Canadian rules on jurisdiction should not depend on the jurisdictional and recognition standards prevailing elsewhere.” It is said that such considerations are simply impertinent. . . . This has disturbing echoes of the debate in the United States of America concerning the use of foreign precedent in interpreting the constitution. There are many proponents of this view, the most notable being Supreme Court Justice Antonin Scalia, who has characterized the use of foreign views and practice as meaningless, [and] dangerous . . .\textsuperscript{1403}

Besides, and however useful this factor may be in the determination of jurisdiction, the prevailing standards elsewhere for enforcement of judgments seem less relevant to a jurisdictional determination than are the standards for assuming jurisdiction. Concerns about

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\textsuperscript{1400} Monestier has argued that “[i]t would seem odd – indeed, unprincipled – that an Ontario court would distinguish between defendants in similar factual circumstances based on a foreign forum’s procedural rules, a factor that has absolutely no connection to the litigants or the dispute in issue.” Monestier, “A Real and Substantial Improvement?”, \textit{supra} note 1276 at 214.

\textsuperscript{1401} \textit{Muscutt}, \textit{supra} note 1209 at para 109.

\textsuperscript{1402} In paragraph 102 of \textit{Muscutt} (\textit{ibid}) Sharpe JA stated: “However, in international cases, it may be helpful to consider international standards, particularly the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location in which the defendant is situated.” While most courts have understood this factor as requiring a focus on the specific standards prevailing in the defendant’s home jurisdiction (see Walker, The \textit{Muscutt} Quintet, \textit{supra} note 193 at 70), Black & Brechtel are of the view that this factor requires a look at international practice generally, not only or necessarily the standards in the defendant’s home jurisdiction. See Black & Brechtel “\textit{Muscutt Revisited}”, \textit{supra} note 1276 at 48. However, after reviewing the cases where this factor was applied, Monestier found no case where the court looked at standards prevailing elsewhere other than in the defendant’s home jurisdiction. Monestier, “A Real and Substantial Improvement?”, \textit{supra} note 1276 at 211 n 107.

\textsuperscript{1403} Black & Brechtel, “\textit{Muscutt Revisited}”, \textit{supra} note 1276 at 46-47.
Judgment enforcement mechanisms elsewhere are those of the parties and not those of the courts. Judges render decisions based on the specific facts of the cases before them, applying the relevant legal principles and statutes, without considering whether the judgment would be enforceable in other countries. Even if the defendant’s residence and nationality are known, the defendant may have property in a third country unknown to the judge but known to the plaintiff. The judge would be unable to consider the recognition and enforcement standards prevailing in that third country where the plaintiff hopes to enforce the judgment.

There are also practical problems associated with this requirement. These include the fact that jurisdiction and judgment enforcement may not be as correlative in the foreign country as it is in Canada, the difficulty of proving foreign law, and the difficulty of evaluating and applying foreign jurisdictional standards, especially taken into account the doctrine of forum non conveniens. Requiring considerations of judgment recognition and enforcement standards prevailing in other countries would amount to overstretching the meaning of comity. In any case, if comity is relevant to the assessment of this factor, then the definition of comity in Hilton, which La Forest J adopted in Morguard, applies: “Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws”. Comity therefore requires that in assessing this factor to determine Canadian jurisdiction in international cases, Canadian courts should have regard to Canada’s obligations under international law. These obligations are contained in both customary international law and treaty law to which Canada is a party. In fact, the existence of an international obligation to provide remedies to victims of certain violations would tilt the scale of comity in favour of assuming jurisdiction. For being an international duty, it means that the international community recognizes the exercise of jurisdiction in that area and no state can legitimately complain that the principles of comity are being violated. Jurisdiction assumed in

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1405 Monestier, “A Real and Substantial Improvement?”, supra note 1276 at 213–214. See also Monestier, “A ‘Real and Substantial’ Mess”, supra note 1255 at 203 (arguing that “it is unduly onerous to require a court to wade through a morass of complicated and potentially inconsistent foreign rules concerning both jurisdiction and enforcement as a precursor to determining whether it has jurisdiction over a defendant.”). See, however, Black & Brechtel, “Muscutt Revisited”, supra note 1276 at 48 (arguing that the difficulties of proving foreign law in Canadian courts have been “exaggerated.”).
1406 Morguard (SCR), supra note 174 at 1096.
this manner cannot reasonably face recognition and enforcement problems elsewhere. In the area of international human rights, for instance, especially with regard to those norms recognized as *jus cogens*, the need to assume jurisdiction would be fully supported by the principle of comity. The fact that the defendant is a corporation may not change the comity equation. For, as has been argued in chapter three, while international corporate responsibility is still debatable, states are not under any customary international law disability to hold corporations accountable for the violation of those international norms. Indeed, it is precisely because international law is unable to bring corporations to account for violations of international norms that states should assume enforcement responsibility for those norms.

5.2.5 Reformulating Muscutt: The Van Breda Decision

The *Van Breda* decision concerned the issue of when Ontario courts should assume jurisdiction over out-of-province defendants. It related to two separate claims for personal death and injury suffered by Canadians at resorts in Cuba. The resort contracts were made in Ontario through Ontario travel agents who had an agreement with the operators of the Cuban resort to promote the resort in Ontario. The contracts included trainings on scuba diving and chin-ups during the resort in Cuba. The death and injuries occurred respectively during the scuba diving and chin-up sessions. The estate of the deceased scuba diver brought suit in Ontario against the Ontario travel agents and the operators of the resort in Cuba for breach of contract and for negligence. The party injured during the chin-up session also brought a similar claim. The foreign defendants moved to dismiss the action for want of jurisdiction or, alternatively, to stay the action for *forum non conveniens*. The Ontario Superior Court applied the Muscutt factors and additional factors stated by Cullity J of the Ontario Superior Court in *Schreiber v Mulroney* as relevant to contracts cases but not to torts, and concluded that Ontario had jurisdiction. The central issue before the Ontario Court of Appeal was whether the Muscutt factors should be retained intact, modified or abandoned in favour of some other test. Writing for a unanimous court, Sharpe JA

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1407 (2008), 88 OR (3d) 605 [Schreiber].
1408 *Van Breda v Village Resorts Limited*, 2008 CanLII 32309 (ON SC) [Van Breda (ONSC)]. Those additional factors were drawn from rule 17.02(f) and (h) of the Ontario *Rules of Civil Procedure* and include: the place where a contract was made, the place of breach, and the place where damage caused by the breach was sustained. Other factors include the place the contract was to be performed, and, especially in contracts for personal service, the defendant’s residence during the term of the contract as well as at its inception. *Schreiber, supra* note 1394 at para 38.
reviewed the \textit{Muscutt} decision and its progeny and expressed agreement with Vaughan Black and Mat Brechtel that \textit{Muscutt} was “due for a tune-up.”\footnote{\textit{Van Breda v Village Resorts Ltd}, 2010 ONCA 84 at para 51 [\textit{Van Breda} (ONCA)]. See Vaughan Black & Mat Brechtel, \textit{“Muscutt Revisited”}, supra note 1276 at 36 (“It is not surprising that after seven years in the trenches \textit{Muscutt} would be due for a tune-up.”).} He noted academic commentary perceiving the eight-factor test as creating “undue complexity and lack of predictability” in the law of jurisdiction in Canada,\footnote{\textit{Van Breda} (ONCA), supra note 1399 at para 56. He summarized the scholarly criticisms of the test as follows (internal citations omitted):} pointing out that this perception, though true, has been “exaggerate[d]”.\footnote{\textit{Van Breda}, (ONCA), ibid at para 68.} In opting to reformulate \textit{Muscutt}, Sharpe JA looked to the CJPTA. Section 10 of the CJPTA outlines a list of factors that may be regarded as presumptively real and substantial. The factors were drawn from provincial rules on service \textit{ex juris} and include where a suit:

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property in British Columbia of the deceased person, or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in British Columbia,

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) property in British Columbia that is immovable or movable property, or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;
(ii) that trustee is ordinarily resident in British Columbia;
(iii) the administration of the trust is principally carried on in British Columbia;
(iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,
(e) concerns contractual obligations, and
   (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
   (ii) by its express terms, the contract is governed by the law of British Columbia, or
   (iii) the contract
      (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
      (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,
(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
(g) concerns a tort committed in British Columbia,
(h) concerns a business carried on in British Columbia,
(i) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia, or
   (ii) in relation to property in British Columbia that is immovable or movable property,
(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,
(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or
(l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

It must be emphasized that these factors are merely presumptive as well as inexaustive. A defendant is permitted to adduce evidence in rebuttal of the presumption in any particular case.\(^{1412}\)

Sharpe JA referred to rule 17.02 of the Ontario Rules of Civil Procedure\(^{1413}\) and created a presumption of real and substantial connection similar but not identical to the CJPTA. He, however, expressly excluded “damages sustained in Ontario”\(^{1414}\) and “a necessary or proper party”\(^{1415}\) from the presumptive circumstances. Thus if a case falls under any of the enumerated bases in rule 17.02, with the exception of the above two, a real and substantial connection shall

\(^{1412}\) Van Breda (ONCA), ibid at para 72.

\(^{1413}\) Supra note 1087, rule 17.02 relates to circumstances where ex juris service of originating processes would be proper.

\(^{1414}\) Ibid at rule 17.02(h).

\(^{1415}\) Ibid at rule 17.02(o).
be presumed to exist and jurisdiction shall be taken over the defendant.\textsuperscript{1416} These factors are similar to those in section 10 of the CJPTA.

Sharpe JA then reviewed the eight \textit{Muscutt} factors. He regarded the connection between the forum, the plaintiff’s claim and the defendant as “the core” of the real and substantial connection test, the rest of the factors being mere “analytical tools” for assessing the extent of this connection.\textsuperscript{1417} In other words, the remaining factors are not to be treated as if they were independent factors. As he did in \textit{Muscutt}, he rejected the suggestion that the defendant’s connection with the forum is a \textit{necessary} factor. He regarded it only as an “\textit{important}” factor.\textsuperscript{1418} He maintained the connection between the plaintiff’s claim and the forum as “a core element” of the test.\textsuperscript{1419} He stressed that the primary focus in assessing the connection between the forum and the defendant should be on what the defendant has done within the forum.\textsuperscript{1420} This however does not require that the defendant’s physical presence or activity within the forum be established. Rather, where the defendant could reasonably foresee that his/her activity would cause harm within the forum, jurisdiction may be assumed.\textsuperscript{1421} He drew a distinction between the situation in \textit{Moran} where the defendant took out its product in a manner that it ought to have foreseen that it might cause harm to foreign users and it did cause harm there, and the situation where a plaintiff injured abroad returns home where he/she continues to suffer consequential damage. According to Sharpe JA, the latter does not by itself render the defendant subject to the jurisdiction of the plaintiff’s home court.\textsuperscript{1422}

Sharpe JA maintained the two fairness factors, albeit merging them into one. They are the fairness of assuming jurisdiction and that of refusing jurisdiction. Yet, as previously pointed out, fairness shall not be seen as a separate factor, but one that is intimately tied to the core of the test.\textsuperscript{1423} The implication of this is that the fact that refusing to assume jurisdiction would be unfair to the plaintiff cannot, without more, support the assumption of jurisdiction. And the fact that assuming jurisdiction would be unfair to the defendant cannot alone ground a refusal to assume jurisdiction. Sharpe JA relegated fairness considerations to an exception to the real and

\begin{itemize}
\item \textsuperscript{1416} \textit{Van Breda} (ONCA), \textit{supra} note 1411 at para 72.
\item \textsuperscript{1417} \textit{Ibid} at para 84.
\item \textsuperscript{1418} \textit{Ibid} at para 86.
\item \textsuperscript{1419} \textit{Ibid} at para 88.
\item \textsuperscript{1420} \textit{Ibid} at para 89.
\item \textsuperscript{1421} \textit{Ibid}.
\item \textsuperscript{1422} \textit{Ibid} at para 91.
\item \textsuperscript{1423} \textit{Ibid} at para 98.
\end{itemize}
substantial connection test under necessity jurisdiction (discussed later). This relegation, however, ignores the fact that necessity jurisdiction is plaintiff-focused. It is concerned with ensuring the plaintiff’s access to justice and has little, if any, to do with any unfairness assuming jurisdiction would cause the defendant.

The involvement of other parties in the suit is rejected as a presumptive factor. Any party wishing to assert it is absolutely free to do so. But he/she must demonstrate how it produces a real and substantial connection between the forum on the one hand, and the plaintiff’s claim and/or the defendant on the other hand in any particular case.

On “the willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis”, Sharpe JA suggested that a court urged to assume jurisdiction in a matter should ask itself if it would recognize a judgment rendered in another jurisdiction on the same jurisdictional grounds as it is urged to assume. The court should assume jurisdiction only if it would answer this question affirmatively. This is thus not a separate factor, but a principle that the court should bear in mind.

Sharpe JA insisted that the distinction between interprovincial and international cases should be maintained. He rejected one of the appellants’ attempt to read Beals’ holding that “the ‘real and substantial connection’ test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments” as obliterating this distinction. This difference, however, is not to be seen as a distinct factor in the real and substantial connection test having more or less equal weight with the other factors. It does not require that a different set of factors must be applied to international cases. Rather, it is to be regarded as a general principle of law that influences the analysis of the connections.

On “comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere”, Sharpe JA maintained that it was appropriate to consider foreign law when applying the real and substantial connection test in an area of law that has “obvious and immediate

1424 Ibid at para 100.
1425 Ibid at para 102.
1426 Ibid at para 103.
1427 Beals, supra note 1313 at para 19.
1428 Van Breda (ONCA), supra note 1411 at para 105 (“[B]y applying the real and substantial connection test to international judgments, Beals does not require that in its precise application in particular cases, the real and substantial connection test will inevitably treat interprovincial and international cases identically.”).
1429 Ibid at para 106.
application to foreign litigants.” While he would not insist on proof of foreign law in every case, he viewed it useful to know how foreign courts treat identical cases when assessing the appropriateness of assuming jurisdiction in Ontario over foreigners. While this is not to be treated as a separate factor, it is appropriate to bear it in mind as a general principle of law that guides the assessment of the appropriateness of assuming jurisdiction in international cases.

Sharpe JA’s decision was essentially confirmed by the Supreme Court. LeBel J, who penned the decision for the whole court, began by stressing that “[g]iven the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, ad hoc system made up ‘on the fly’ on a case-by-case basis – however laudable the objectives of individual fairness may be.” He acknowledged the essential nature of justice and fairness in private international law, but pointed out that “a system of principles and rules that ensure security and predictability” are essential to the attainment of justice and fairness. The challenge therefore is to reconcile predictability and fairness. LeBel J believed that this reconciliation could be achieved through the identification of objective factors that connect a “legal situation” or subject matter to the forum court while bearing in mind the need for justice and fairness. He approved of the use of presumptive factors: “[I]dentifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.” He described the legal nature of the presumptive factors as inexhaustive and rebuttable. Like Sharpe JA, he precluded the objective principles of fairness, efficiency and comity from the list of presumptive factors. The list includes: (1) the domicile or residence of the defendant within the forum; (2) the fact that the defendant is carrying on business within the forum; (3) the situs of the tort (once identified); and (4) the fact that a contract connected with the tort was entered into in the

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1430 Ibid at para 107.
1431 Ibid at para 108.
1432 Ibid.
1433 Van Breda (SCC), supra note 1274 at para 73.
1434 Ibid.
1435 Ibid at para 75.
1436 Ibid at para 78.
1437 Ibid at paras 80-81.
1438 Ibid at para 84.
But LeBel J cautioned that in the case of legal persons said to be carrying on business within the forum, there is need for caution in defining the meaning of “carrying on business” “to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity.” He expressly rejected active advertising within the forum and the fact that the defendant’s website can be accessed within the forum as connecting factors. He rejected damage-in-the-forum as a presumptive factor, but not altogether as a possible connecting factor, arguing that while it may be problematic to regard it as a connecting factor, in certain torts, such as defamation, it is an essential element of the tort and so cannot be discounted as a connecting factor. But it does not merit presumptive effect.

LeBel J gave room for the emergence of new presumptive factors. He directed, however, that in identifying new presumptive factors, courts should be concerned with connections that produce a relationship with the forum similar in nature to the relationships produced by the factors already listed as presumptive. Other criteria to consider are the manner in which the connecting factor has been treated in the case law, in statute law, and in the private international law of other legal systems which share a commitment to order, fairness and comity.

Again, like Sharpe JA, LeBel J characterized order, fairness and comity as “useful analytical tools in assessing the strength of the relationship with the forum to which the factor in question points.”

Strikingly, LeBel J wrote that should it happen that “no recognized presumptive connecting factor – whether listed or new – applies,” jurisdiction should be denied. Even “a combined effect of a number of non-presumptive connecting factors” cannot produce jurisdiction. The reason for this, according to him, is to avoid opening the floodgate to jurisdictional assumptions based on palm tree justice, as that would emasculate the objectives of “order, certainty and predictability” that are said to be at the heart of a sound system of private

1439 Ibid at para 90.
1440 Ibid at para 87.
1441 Ibid. He however reserved for another day the possibility of regarding electronic trading as a connecting factor.
1442 Ibid at para 89.
1443 Ibid.
1444 Ibid at para 91.
1445 Ibid at para 92.
1446 Ibid at para 93.
1447 Ibid.
international law.\textsuperscript{1448} I will return to a critique of this rule.

Strikingly, again, LeBel J stated that where the connecting factors point to only one aspect of the case, the court should assume jurisdiction over the entire case. To do otherwise, according to him, would violate “the principles of fairness and efficiency” on which jurisdictional assumptions are after all based.\textsuperscript{1449}

Before the Supreme Court \textit{Van Breda} decision, Ontario Court of Appeal’s decision was already being applied widely in subsequent cases in Ontario. In \textit{Black v Breeden},\textsuperscript{1450} the plaintiff brought several libel actions in Ontario against a US company’s directors, officers and advisors alleging that the company’s website posted defamatory matter about him that was downloaded, read and published by Ontario newspapers, damaging his reputation in that province. The Ontario Court of Appeal applied the presumptive approach laid down in \textit{Van Breda} and found that a presumption of a real and substantial connection arose from the fact that the tort of defamation was committed in Ontario. The court clarified that the inquiry about a connection between the forum and the plaintiff’s claim should focus only upon ties that were relevant to the claim, and not upon ties between the forum and the plaintiff, such as whether the plaintiff is a resident of the forum. The court also looked at fairness as an analytical tool, and held that it would be unfair to deprive the plaintiff of a trial in the forum where his reputation was damaged, but fair to require the defendants to defend in the place where both the tort and the damage occurred.

Also in \textit{Mahmood v Gray},\textsuperscript{1451} a group of Canadians were injured in a car crash in Florida. The defendant was a New York resident who was driving a rental vehicle owned by a US company. The only connection with Ontario was that the plaintiff returned to Ontario after the accident and that the US corporation had a relationship with a rental company that carried on business in Ontario. Sproat J of the Superior Court of Ontario held that these did not amount to a connection between Ontario and the plaintiffs’ claim. The judge stressed that the primary focus as laid down in \textit{Van Breda} is on “‘things done by the defendant’ within Ontario.”\textsuperscript{1452} As there was no evidence that the defendant did anything in Ontario relating to the claim, there was no

\begin{footnotes}
\item[1448] \textit{ibid.}.
\item[1449] \textit{ibid} at para 99.
\item[1450] 2010 ONCA 547. This decision was appealed and the Supreme Court of Canada delivered its decision dismissing the appeal the same day as \textit{Van Breda. Breeden v Black}, 2012 SCC 19 (CanLII).
\item[1451] 2011 ONSC 1735.
\item[1452] \textit{ibid} at para 9.
\end{footnotes}
real and substantial connection with Ontario. The judge also considered the “analytical tools” and found no unfairness to the plaintiff in not assuming jurisdiction. The fact that the case was international, according to the judge, weighed against assuming jurisdiction.\textsuperscript{1453}

Courts of other provinces have not ignored \textit{Van Breda}. The British Columbia Court of Appeal cited it with approval in \textit{Dembroski v Rhainds}.\textsuperscript{1454} Writing for a unanimous court, Hall JA stated that “[the \textit{Van Breda}] approach is consistent with the trend of British Columbia authorities both before and after the enactment of the \textit{CJPTA}.”\textsuperscript{1455} In \textit{Fewer v Ellis},\textsuperscript{1456} the Court of Appeal of Newfoundland and Labrador explicitly disagreed with the \textit{Muscutt} framework but accepted the \textit{Van Breda} approach, citing Sharpe JA’s statement that “the fact that it was foreseeable that a visiting plaintiff will return home and continue to suffer damages from the injury does not, by itself, make the defendant subject to the plaintiff’s home jurisdiction under the \textit{Moran} principle” and then added: “I agree with that statement of the law. If courts could assume jurisdiction in such circumstances, the risk of forum shopping is clear. It would be unfair to subject a defendant to a legal system with different rules (longer limitation periods, the existence of presumed damages, etc.) merely because a plaintiff chose to move there to recuperate.”\textsuperscript{1457} And in \textit{Ayles v Arsenault},\textsuperscript{1458} the Court of Queen’s Bench of Alberta noted that while there were no reported Alberta decisions adopting \textit{Van Breda}, Alberta courts had followed \textit{Muscutt}. It noted that the outcome of the case before it would be the same whether it adopted the \textit{Muscutt} formulation or the \textit{Van Breda} formulation, “as \textit{Van Breda} does not substantially alter the relevant considerations set out in \textit{Muscutt}.”\textsuperscript{1459} \textit{Van Breda} “is consistent with the law as it presently stands in Alberta.”\textsuperscript{1460} Thus, some courts that did not accept \textit{Muscutt} are willing to accept \textit{Van Breda}.

\begin{itemize}
\item \textsuperscript{1453} Ibid at paras 10–14. For other Ontario cases applying \textit{Van Breda}, see Cannon v Funds for Canada Foundation, 2011 ONCA 185; Dilkas v Red Seal Tours Inc (Sunwing Vacations), 2010 ONCA 634; Paulsson v Cooper, 2011 ONCA 150; Kais v Abu Dhabi Education Council, 2011 ONSC 75; Lintner v Saunders, 2010 ONSC 4862; Kahlon v Cheecham, 2010 ONSC 1957; Bond v Brookfield Asset Management Inc, 2011 ONSC 2529.
\item \textsuperscript{1454} 2001 BCCA 185 [Dembroski].
\item \textsuperscript{1455} Ibid at para 38.
\item \textsuperscript{1456} 2011 NLCA 17 [Fewer].
\item \textsuperscript{1457} Ibid at para 58.
\item \textsuperscript{1458} 2011 ABQB 493 [Ayles].
\item \textsuperscript{1459} Ibid at para 31.
\item \textsuperscript{1460} Ibid.
\end{itemize}
5.2.5.1 Critique of Van Breda

As soon as Van Breda was released, a great shout went out in the circle of Canadian legal practitioners, praising the decision, but also indicating that uncertainty still remains in the application of the real and substantial connection test. Osler, Hoskin & Harcourt, LLP declared the decision “a welcome clarification to the ‘real and substantial connection test’ [that] has simplified the eight-factor test” laid down in Muscutt and commented as follows on its website:

Greater consistency and predictability in the approach of our courts to questions of jurisdiction and forum non conveniens may be expected as a result. … Non-resident parties who contract with counterparts in Ontario or who have other meaningful ties to the Province that give rise to claims by Ontario residents will continue to face the threat of litigation in Ontario courts but they may now expect more rigour and consistency in the application of jurisdictional principles.¹⁴⁶¹

McCarthy Tétrault published on its website:

The Van Breda test clarifies the test for jurisdiction and is a welcome improvement over Muscutt. The focus on connections between Ontario and the plaintiff’s claim and Ontario and the defendant’s claim should simplify jurisdiction simpliciter and avoid duplication of analysis at the forum non conveniens stage. The move to a category-based approach under Rule 17.02 will also go some way towards assisting litigants and courts in identifying the types of situations in which a real and substantial connection will be satisfied.¹⁴⁶²

It added however that despite the decision, the jurisdictional inquiry remains in large part discretionary and “the inherently unpredictable notion of ‘fairness’” continues to play key role in jurisdictional determinations.¹⁴⁶³

Blakes, Cassles & Graydon, LLP, however, cautioned:

It is early to say whether Van Breda will result in more or less actions against foreign-based defendants being tried in Ontario. Generally speaking, where the Rules of Civil Procedure permit service abroad, it seems likely, given the presumption, that Ontario courts will assume jurisdiction. On the other hand, where the claim does not fit within the categories enumerated, the courts may be less inclined to assert jurisdiction. In all cases, it appears that the courts now will focus on what always should have been the

¹⁴⁶³ Ibid.
main issue, which is what, if anything, the defendant has done to bring itself within the jurisdiction of an Ontario court.\textsuperscript{1464}

The \textit{Van Breda} decision deserves commendation. It has helped to refocus the debate on the \textit{Muscutt} framework. It is arguable that but for its attempt to reform the \textit{Muscutt} framework, the Supreme Court of Canada would not have granted leave to appeal so as to have an opportunity to express its views on the suitability of the \textit{Muscutt} factors in the application of the real and substantial connection test. Most importantly, Sharpe JA, who judicially initiated the reform at the Ontario Court of Appeal, approached the resolution of the issue from a perspective that no scholar appeared to have hitherto suggested or even predicted. The decision is therefore a significant contribution to the continuing debate concerning judicial jurisdiction in Canada. However, a critical look at the \textit{Van Breda} decision reveals that the new formulation has its inherent problems as well and might well, in large part, be a spray-on solution.

I. The Use of Presumptions

It has been argued that by creating jurisdictional presumptions, \textit{Van Breda} overstepped the bounds of judicial authority and stepped onto legislative territory.\textsuperscript{1465} Dwigt Newman has written:

Legislators have seriously considered appropriate presumptions of real and substantial connection. Indeed, after careful consideration, three provinces and one territory have enacted versions of the Uniform Court Jurisdiction and Proceedings Transfer Act (CJPTA), which contains a set of rebuttable presumptions. A recent consultation paper prepared by Janet Walker for the Law Commission of Ontario (LCO) alternatively proposed the possibility of a set of non-rebuttable presumptions. Legislators have important reasons for choosing particular rebuttable and/or non-rebuttable presumptions without the Court of Appeal pre-empting such discussion.\textsuperscript{1466}

Newman believes that the Ontario Court of Appeal should have waited for the Ontario legislature


\textsuperscript{1465} Monestier, “A Real and Substantial Improvement?”, \textit{supra} note 1276 at 200.

\textsuperscript{1466} Dwight Newman, “Van Breda: Ontario CA’s clarification on jurisdiction creates confusion”, \textit{Lawyer’s Weekly} (5 March 2010) 4.
to complete the legislative discussion ongoing regarding the Muscutt factors.\textsuperscript{1467} For Monestier, however, \textit{Van Breda’s} foray has, rather than pre-empted legislative discussion, “stimulated it.”\textsuperscript{1468}

While the Muscutt debate has reached a critical mass for legislative intervention, the use of presumptions is not unknown to the common law. In fact, most of our legal presumptions are judge-made. The suggestion that courts are ill-suited to create presumptions is quite mistaken. Courts have a unique advantage over legislators in fashioning legal rules. In adjudicating so many cases, they put their own ideas and theories to experiment. They listen to academics and test their ideas and assumptions as well. They bring to bear their own experiences with the application of older rules. It is therefore fair to say that the solutions that develop from the experiments express the ideas and assumptions that have survived the mills of reality-check. As such, those solutions carry a powerful supposition of correctness.

The court’s creation of those presumptions is a useful contribution to the ongoing legislative discussions. The Ontario legislature stands to gain from what the Ontario Court of Appeal has done in \textit{Van Breda}. Given that those presumptions are not different from those contained in the CJPTA, there is nothing radical in this regard about what the Ontario Court of Appeal has done in \textit{Van Breda}.

That said, would the use of presumptions serve any practical purpose? The presumptions might serve no more than to stipulate who bears the burden of proof in establishing the existence or non-existence of a real and substantial connection between the forum and the plaintiff’s claim and/or between the forum and the defendant.\textsuperscript{1469} One scholar has pointed out that “[w]hat evidence it would take to rebut the presumption and how often that would be accomplished is speculative.”\textsuperscript{1470} LeBel J apparently responded to this criticism when he gave a few examples of how the presumptions might be rebutted. Where the presumptive factor is a contract made in the forum, for instance, he wrote that the presumption could be rebutted by demonstrating that the

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\textsuperscript{1467} \textit{Ibid} (“That the court would launch onto an activist past and even revise Muscutt when legislators will be considering carefully recommendations from the LCO consultation paper and other forthcoming analysis from the LCO is startling.”).

\textsuperscript{1468} Monestier, “A Real and Substantial Improvement?”, \textit{supra} note 1276 at 201.

\textsuperscript{1469} \textit{Ibid} at 198.

\textsuperscript{1470} Edinger, “New British Columbia Legislation: The court Jurisdiction and Proceedings Transfer Act; The Enforcement of Canadian Judgments and Decree Act” (2006) 39 UBCL Rev 407 at 417 [Edinger, “New British Columbia Legislation”] (suggesting that “What is needed in this area is a bit more of the pre-Morguard certainty about jurisdiction \textit{simpliciter}; so it is to be hoped that the presumption will prove to be rarely, if ever, rebuttable.”).
contract had little or nothing to do with the tort in question. Where the presumptive factor is the fact that the defendant carries on business within the forum, the presumption can be rebutted by demonstrating that the defendant’s business in the forum is unrelated to the subject matter of the litigation.\textsuperscript{1471} He acknowledged, however, that where the presumptive factor is the commission of a tort in the forum, it would be difficult to rebut the presumption although in multijurisdictional torts it might be possible to do so where only “a relatively minor” part of the tort took place in the forum.\textsuperscript{1472} In that case, assessing this factor for the purpose of establishing jurisdiction \textit{simpliciter} would look very much like a \textit{forum non conveniens} inquiry since it would, perhaps unselfconsciously, involve a comparative look at the connection with other forums to identify the forum with which the action has the strongest connection. LeBel J did not indicate how the first presumption – i.e., the fact that the defendant is domiciled or resident in the forum – could be rebutted. This is presumably because it is inconceivable how it can be rebutted. The only way the defendant can challenge jurisdiction in that case is to show that he is not in fact domiciled or resident in the forum. This is not a rebuttal of the presumption but a denial of the facts giving rise to the presumption in the first place. It is a rebuttal of the presumption only if the defendant demonstrates that in spite of the existence of that connection, there is no real and substantial connection with the forum.\textsuperscript{1473}

In addition, LeBel J formulated the presumptions in a manner that does not allow any connecting factor that falls outside a recognized presumption, existing or new, to provide the real and substantial connection. This undermines the conceptual integrity of the idea of presumptions. The idea of presumptive factors admits of the existence of non-presumptive factors that, when established, would perform the same function presumptive factors perform. One would theoretically ordinarily imagine that the defendant should be allowed to establish factors that do not create a presumption of connection, but which can be positively demonstrated as creating a real and substantial connection between the dispute and the forum. Calling every conceivable connecting factor that is capable of establishing a real and substantial connection between the dispute and the forum a presumptive connecting factor does not add anything to the inquiry if

\begin{itemize}
\item \textsuperscript{1471} \textit{Van Breda} (SCC), supra note 1274 at para 96.
\item \textsuperscript{1472} Ibid.
\item \textsuperscript{1473} Stephen Pitel has written: “For many, \textit{Van Breda} violates the idiom ‘if it ain’t broken, don’t fix it’. The \textit{Muscutt} framework was well-known and was working effectively. It was relatively easy to explain and to apply. In time we will know if as much can be said for the use of presumptions and the \textit{Van Breda} framework”. Stephen Pitel, “Reformulating a Real and Substantial Connection” (2009) 60 UNBLJ 177 at 184.
\end{itemize}
there are not other non-presumptive factors that, if proved, can satisfy the requirements of the real and substantial connection test.

II. The Requirement that Each Defendant in a Multi-Party Suit Meet the Real and Substantial Connection Test

The Ontario Court of Appeal’s reason for excluding the fact that the foreign defendant is a necessary or property party to the suit (and the damage-suffered-in-the-forum factor) from the list of presumptions is that these are not included in the list of presumptions under the CJPTA and as such have not gained general acceptance in Canada as a pointer to a real and substantial connection. He found further reason for excluding the necessary or proper party factor in the Drafter’s comment to section 10 of the CJPTA:

[S]uch a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present.... Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test.

The nature of this factor is such that its exclusion eliminates it from the possibility of ever being a real and substantial connection factor. It is perhaps a factor deserving of being accorded a presumptive status. If a foreign defendant is a necessary or proper party to a suit properly brought in the forum court, that fact alone links him to that forum for the purposes of that suit.

Moreover, requiring a real and substantial connection with each defendant in a suit involving multiple parties residing in different jurisdictions will lead inevitably to multiplicity of proceedings in those situations. Where the forum court has jurisdiction over one of the defendants, a better approach is for it to take jurisdiction simpliciter over all the defendants provided the plaintiff’s claim raises a common question of law or fact against all the defendants. The only rationale against taking jurisdiction would be the inconvenience it would occasion to the foreign defendants who might have to travel long distances to attend the proceedings in the forum court. But this consideration relates to convenience of the parties – an issue more

1474 Van Breda (ONCA), supra note 1411 at para 78.
appropriately considered at the stage of *forum non conveniens*. Both LeBel J and Sharpe JA emphasized the need to maintain a clear distinction between jurisdiction *simpliciter* and *forum non conveniens*, but the requirement that a real and substantial connection be established against each defendant fails to achieve that goal. It does not fully appreciate the nature of multiparty suits and the advantages of a single trial in the matter. Requiring the plaintiff to travel to each jurisdiction to bring suit against the defendant that resides there would unwieldily increase the cost of litigation. One witness who would have given a single testimony against all the defendants would have to travel with the plaintiff to each jurisdiction. The plaintiff might have to hire a different lawyer to represent him in each jurisdiction since most lawyers are admitted to practice only in one jurisdiction. For plaintiffs with poor financial means, this might effectively bar their access to justice. For the defendants, it would make counterclaims difficult to make. It would prevent a defendant who intends to claim contribution or indemnity from a person who has not been made a party to the suit and who resides in another jurisdiction from making such a claim.

A correlation to this view may be found in LeBel J’s statement that where a court has jurisdiction over an aspect of a case, it should assume jurisdiction over the entire case. To do otherwise in this case would breach the principle of efficiency no more than it would if jurisdiction must be established with respect to each defendant in a multiparty suit.

Most common law countries have taken the approach advocated here. In England, under Order 11 of the *Rules of the Supreme Court*, English courts have jurisdiction over a defendant who is a necessary or proper party to a claim brought against another person who has been duly served in England. In Australia, the New South Wales *Supreme Court Rules, 1970, 1A(1)(i)*, permits the service of originating process outside Australia “where the proceedings are properly brought against a person served or to be served in the State and the person to be served outside the State is properly joined as a party to the proceedings”. Also, in Nigeria, Order 12 Rule 13(h) of the *High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules* permits service *ex juris* where “any person out of jurisdiction is a necessary or proper party to an action properly brought against some other party within the jurisdiction”. This is also the rule under the Brussels I Regulation. Its Article 6(1) provides that “[a] person domiciled in a Contracting State may be sued: where he is one of a number of defendants, in the courts of the place where anyone

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1475 See also Tilbury et al, *supra* note 500 at 64.
of them is domiciled provided the claims are so closely connected that it is expedient to hear and
determine them together to avoid the risk of irreconcilable judgments resulting from separate
proceedings”. The only limit to this is that the extraterritorial defendant must be domiciled
within the contracting region. Article 6(2) also requires that third party proceedings be brought in
the court of the original proceedings, unless the original proceedings were brought solely for the
purpose of removing the third party from the country having jurisdiction over him.

A country that views jurisdictional standards in other countries as an important
consideration in its own jurisdictional determinations in international cases is expected to
endeavour to bring its own jurisdictional standards as close as possible to those obtained in those
other countries especially when a common jurisdictional thread runs through those countries.
Otherwise, it would be pointless to look to what jurisdictional standards prevailing in other
countries while considering whether to assume jurisdiction in international cases.

In the context of extraterritorial corporate wrongs, the approach advocated here would
allow the assumption of jurisdiction over the foreign subsidiary of the Canadian corporation that
participated, together with its Canadian parent, in the wrongful acts. The basis for not
adjudicating the case should rather be for *forum non conveniens*. Because, as shown above, most
countries permit the assumption of jurisdiction in similar situations, it would not offend the
principles of international comity if their corporations are subjected to the jurisdiction of foreign
courts. This also means that concerns about whether a resulting judgment would be recognized in
those countries have no weight.

III. Connections v Analytical Tools

Sharpe JA stressed that the core of the real and substantial connection test is the connection
between the forum and the plaintiff’s claim and/or the defendant. LeBel J confirmed this when
he listed four presumptive connecting factors that in essence speak to the connection between the
forum and the plaintiff’s claim and/or the defendant. The other *Muscutt* factors – fairness, comity,
etc – are regarded as mere analytical tools to be used in assessing the quality of the core
connections. Sharpe JA stated, for instance, that fairness “does not amount to an independent
factor capable of trumping the want of a real and substantial connection between the forum and
the plaintiff’s claim and/or the defendant.” Monestier views this approach “a welcome development in the law of jurisdiction, and one which directly responds to the argument that an independent consideration of fairness to the plaintiff is contrary to the spirit of the real and substantial connection test.”

However welcome this approach may be, the characterization of a factor such as “fairness” as an “analytical tool” and not a factor to be considered in the jurisdictional inquiry is either mysterious or erroneous. On reading Van Breda, one perceives a certain intellectual uncertainty, on the part especially of Sharpe JA who initiated this development, about retaining these so-called “analytical tools” as relevant considerations in a jurisdictional inquiry in face of the weight of academic criticisms against doing so, and a lack of exact knowledge about what role these “analytical tools” should play in that inquiry. A factor like fairness is not a tool. It is a principle informing the requirement that there be a real and substantial connection between the forum, on the one hand, and the plaintiff’s claim and/or the defendant, on the other. Fairness is a product of the existence of this connection and not a method or tool for determining whether this connection exists. Sharpe JA was apparently overwhelmed by the weight of academic criticisms against Muscutt, but in his effort to respond to those criticisms, he has inadvertently created a new set of confusion and LeBel J did not see this confusion. A better approach would have been to entirely eliminate fairness from the real and substantial connection inquiry and transfer it to the inquiries for necessity jurisdiction as an exception to the real and substantial connection test.

Regarding the other analytical tools – involvement of other parties to the suit, willingness to recognize and enforce an extra-provincial judgment rendered on the same basis as the case at bar, whether the case is interprovincial or international, and comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere – exactly how they will bolster the core connections is not clear. That is, exactly what impact they would have on the assessment of the connection between the forum and the plaintiff’s claim and/or the defendant is far from obvious. It is only the involvement of other parties to the suit that may help in determining whether the necessary connection is real and substantial for the court to assume jurisdiction. The others have apparently nothing to contribute to that assessment. Denying them freestanding

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1476 Van Breda (ONCA), supra note 1411 at para 109 (stressing, at paras 93 and 109, that fairness to the parties “bears upon” the real and substantial connection test and that the “inquiry necessarily entails consideration of the fairness or unfairness of asserting jurisdiction against the defendant in light of those contacts.”).

1477 Monestier, “A Real and Substantial Improvement?”, supra note 1276 at 203.
status serves no real purpose. It is important to consider whether the case is interprovincial or international because in international cases comity has a much greater role to play than in interprovincial cases as every nation has a greater interest in settling local disputes than in settling international disputes. While the fact that the case is interprovincial or international is a matter of whether the case is wholly or partly connected to Canada and partly to another country, it is not this type of connection that the real and substantial connection test is concerned about. Rather, it is concerned about the connection with the specific jurisdiction in Canada where the case is brought. Apparently, this factor has nothing to contribute to the assessment of whether there is a connection with the forum or whether that connection is real and substantial.

A better approach would be to regard the so-called presumptive connecting factors as the primary factors while the others as subsidiary principles that make assumption of jurisdiction more reasonable.

5.2.5.2 Is the Van Breda Framework Transportable to Other Provinces?

Some commentators have criticized Van Breda as not easily transportable to other provinces because it was drawn from Ontario service rules. In the words of one commentator:

To the extent that Van Breda uses an Ontario rule on service to define part of the new test, it is . . . not clear what the other provinces that had regarded Muscutt as persuasive authority will do. Do they continue following Muscutt when it has been gutted by its originating court? Do they adopt Van Breda, including a set of service rules from Ontario? Do they devise some new combination?1478

This view ignores the fact that Sharpe JA was deeply influenced by the CJPTA provisions and that these provisions are not that different from the Ontario rules. In fact, the CJPTA was the sole influence on Sharpe JA’s creation of presumptive factors and in affirming Sharpe JA’s formulation LeBel J referred copiously to the CJPTA. Specifically, their elimination of damage-in-the-forum and necessary-or-proper-party from the list of presumptions was drawn from the CJPTA and Sharpe JA did indicate that the CJPTA’s rejection of these two factors as presumptively real and substantial connections reflected broad acceptance within Canada that

1478 Newman, supra note 1468 at 4. This view is shared by Monestier, “A Real and Substantial Improvement?”, supra note 1276 at 199-200.
these two factors could not properly be regarded as presumptively real and substantial connections. But even if Van Breda’s approach were remarkably different from the CJPTA, courts of other provinces would still find it adaptable to their own situations, just as they have generally applied the Muscutt factors. As shown earlier, courts of other provinces have already cited Van Breda with approval. In Fewer, the Court of Appeal of Newfoundland and Labrador, which rejected Muscutt, expressed its approval of Van Breda.

5.3 Necessity Jurisdiction

5.3.1 Meaning and Rationale

Under the banner of “necessity jurisdiction” or, as it is also called, “jurisdiction as a forum of necessity”, “jurisdiction by necessity”, or, as it is called in civil law countries, forum necessitatis, a court may be called upon to exercise a jurisdiction that it ordinarily lacks, on the basis that no other forum exists in which the suit may reasonably be expected to be instituted. Such jurisdiction plays a complementary role to the traditional jurisdictional bases and serves as “a safety valve”. It is grounded in the recognition that there is more to the jurisdictional question than, for instance, a real and substantial connection test, minimum contacts, consent or presence. Its rationale is that there could be exceptional scenarios where these traditional jurisdictional bases would be unworkable in the sense that they might prevent the possibility of the case being heard at all anywhere because the dispute does not fit within those bases. The overriding consideration is therefore the need to avoid a denial of justice. Given this backdrop, forum non conveniens cannot apply to prevent the exercise of necessity jurisdiction.

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1479 See Dembroski, supra note 1456; Ayles, supra note 1460; and Fewer, supra note 1458.
1480 See Fewer, ibid.
1481 Ibid at 90.
1482 Ibid at 64.
1483 The need to avoid a denial of justice is generally recognized in public international law. Ibid at 80. The ECHR has even elevated access to justice to the status of a human right. See Article 6(1) thereof.
The earliest adoption of the doctrine may be found in the 1950 decision of the US Supreme Court in *Mullane v Central Hanover Bank and Trust Co.* In compliance with a New York statute, trustees of 113 participating trusts with beneficiaries residing in different parts of the US deposited the trust assets into a common fund under the care of a common trustee, the plaintiff. The statute required the plaintiff trustee to bring an action for judicial settlement of its accounts within a specified time after the common trust was established, the purpose being to ascertain how the trustee was managing the trust funds. It also required it to publish a notice of the action in a specified manner. The court was required, under the statute, to appoint two guardians, one to represent persons who had an interest in the trust income, the other for persons who had an interest in the principal. Whatever order the court then made would bind everyone who had an interest in the common trust fund. The plaintiff gave the required notice, made the necessary publications, and the court assigned the needed guardians. Under the law as it stood in New York at the time, however, a New York court had no jurisdiction to entertain the action over the non-resident beneficiaries. First, *in personam* jurisdiction under the then recently enunciated minimum contacts doctrine in *International Shoe* required that the non-resident defendants have minimum contacts with New York or consent to New York jurisdiction. These contacts were effectively lacking with regard to the non-resident defendants who equally did not consent. Second, *in rem* jurisdiction was likewise lacking because the action did not relate to title to property but to settle the trustees’ personal obligations. So whether the court characterized the issue as *in personam* or as *in rem* made no jurisdictional difference. In the absence of both *in personam* and *in rem* jurisdiction, then, could a court hear a case? The Supreme Court apparently

1485 George B Fraser, Jr, “Jurisdiction by Necessity: An Analysis of the *Mullane* Case” (1951) 100:3 Univ Penn L Rev 305 at 305.
1486 *Ibid* at 308.
1487 It should be noted though that Jackson J, who wrote the majority opinion of the court, undermined the significance of the *in personam*-in *rem* difference to the analysis of the minimum contacts doctrine and this was after pointing out how difficult it was to classify the action: “It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some of the characteristics and is wanting in some features of proceedings both in rem and in personam.” *Mullane*, *supra* note 1486 at 312. See Fraser, *supra* note 1487 at 311 (stating that “a court must be exercising a third type of jurisdiction when it settles a trustee’s account”); Robert C Casad, “*Shaffer v. Heitner*: An End to Ambivalence in Jurisdiction Theory?” (1977) 26 U Kan L Rev 61 at 67 [Casad, “An End to Ambivalence”].
answered this question in the affirmative. It held that New York had the power to settle the trustees’ accounts and to make determinations that would bind the non-resident beneficiaries. The Court grounded its decision solely upon the “vital interest” of New York “in bringing any issues concerning its fiduciaries to a final settlement.” 1488 This was clearly a circumvention of International Shoe. In dispute in the case also was the sufficiency of the various statutory notices given to the plaintiff. The Supreme Court held that the non-resident beneficiaries were not bound by the court’s order unless they were notified of the proceedings and given an opportunity to be heard. The notices were given by publication in newspapers. It held that the publications were sufficient for those beneficiaries whose addresses were not known since there was no other way of notifying them of the proceedings, but insufficient for those beneficiaries whose addresses were known, since notification by mail would have been more effective. 1489 This holding reinforces the first holding that New York had jurisdiction over the non-consenting non-resident defendants.

Although Mullane did not expressly use the term “necessity jurisdiction”, analysts believe that necessity jurisdiction was the only basis upon which the decision could be rationalized. George Fraser opines that Mullane permits a court to bind a non-resident who is not a party to the action, adding that “although this is unusual, it is permitted in a few situations when it is impossible to obtain jurisdiction in personam and the question must be litigated.” 1490 He concludes that “jurisdiction is not based on power alone. Fairness to both parties is becoming the major consideration in determining if a court has jurisdiction of a case. In fact, where it is reasonable and necessary, a court may act even though it has no power over the defendant.” 1491

Arthur von Mehren and Donald Trautman have described Mullane as an example of necessity jurisdiction. 1492 They argue that other forms of necessity jurisdiction will emerge, namely, where the defendant’s whereabouts are unknown but the location of his/her property is known, 1493 and to permit “the assertion of jurisdiction in the interest of justice in those rare cases where no forum that is appropriate under conventional standards is prepared to act.” 1494 Harold

1488 Mullane, supra note 1486 at 313.
1489 Ibid at 318-319.
1490 Fraser, supra note 1487 at 311 (observing that divorce actions are an example of necessity jurisdiction).
1491 Ibid at 319.
1493 Ibid at 1164 at n 137.
1494 Ibid at 1173-1174.
Lewis has similarly submitted that *Mullane* was justified “only under broader standards of fairness” because the rights of the beneficiaries under the trust fund were at risk.\footnote{Lewis, supra note 1486 at at 62. He summarized the fairness factors as follows: “the plaintiff's unusually strong need for a single forum; the unusually slight need of any particular defendant to appear in the action to advance a position that a similarly situated defendant was likely to assert; and the expectations of suit reasonably imputable to the defendants once they learned of the action.” *Ibid* at 63. See also Casad, “Long Arm and Convenient Forum” (1971) 20 U Kan L Rev 1 at 11 [Casad, “Long Arm”].}

It was not that the non-resident defendants could not be sued in their place of residence. It was that to require the plaintiff to do so, given the sheer number of potential defendants – 113 in number – and given that they resided in several states, would be unreasonable and unfair, coming very close to an impossible demand. This was coupled with the fact that the advantages of litigating the rights and liabilities of all the parties in one suit could not be over-emphasized. The difficulties of a separate suit for residents of each state were extreme and unusual. Not to mention the expenses that that would entail on the part of a trustee that was expected to exhibit a high degree of judiciousness in the management of funds entrusted to it. That the bringing of the action was a statutory obligation not subject to the wish of the plaintiff might also have been an important consideration heightening the need to allow the action. Therefore, by necessity, New York ought to be permitted to assume jurisdiction over non-consenting non-resident defendants.

Since *Mullane*, the Supreme Court does not seem to have directly applied necessity jurisdiction. But it has neither prohibited its application nor shut out the possibility of applying it. A few of its subsequent decisions may be viewed as sounding in necessity jurisdiction. For instance, Borchers has argued that the court’s 1952 decision in *Perkins v Benguet Consolidated Mining Co*\footnote{342 US 4 \textsuperscript{37} (1952).} affirming Ohio’s jurisdiction in a suit brought in Ohio by a shareholder against a Philippines company for dividends payments and stock issuances, even though the action did not bear any contacts with Ohio, made the case one of “jurisdiction by necessity” because of the absence of any alternative forum.\footnote{Borchers, “The Problem with General Jurisdiction” (2001) U Chi Legal F 119 at 124 [Borchers, “General Jurisdiction”].}

In 1977, the US Supreme Court seemed to have suggested that the door to necessity jurisdiction was open. In *Shaffer v Heitner*,\footnote{433 US 186 (1977) [Shaffer].} a non-resident plaintiff filed a shareholder’s derivative action in Delaware against a corporation, a subsidiary, and twenty-eight corporate officers of these companies. All the defendants were non-residents of Delaware. The complaint

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\footnote{Lewis, supra note 1486 at at 62. He summarized the fairness factors as follows: “the plaintiff's unusually strong need for a single forum; the unusually slight need of any particular defendant to appear in the action to advance a position that a similarly situated defendant was likely to assert; and the expectations of suit reasonably imputable to the defendants once they learned of the action.” *Ibid* at 63. See also Casad, “Long Arm and Convenient Forum” (1971) 20 U Kan L Rev 1 at 11 [Casad, “Long Arm”].}
alleged that the defendants violated corporate duties by engaging the corporation in activities in Oregon that gave rise to corporate liability. The only contact the defendants had with Delaware was ownership of property in Delaware. The trial court granted an order sequestrating the defendants’ Delaware property. Twenty-one of the defendants sought to vacate the order on the grounds that the sequestration order did not follow due process and that they lacked sufficient contacts with Delaware to meet the minimum contacts requirements. The Delaware Supreme Court upheld the sequestration order. It also held that Delaware had jurisdiction because the cause of action was quasi in rem and not based on the defendants’ contacts with Delaware, i.e., by implication, that the minimum contacts doctrine was inapplicable to quasi in rem actions. The Supreme Court reversed. It held that jurisdiction over a non-resident defendant must be based on minimum contacts. In its view (expressed through justice Marshall), the exercise of in rem jurisdiction requires that a court find sufficient contacts with the forum to permit “jurisdiction over the interest of persons in a thing.” But, to the court, the existence of property in the forum is not conclusive of minimum contacts. The property must be related to the plaintiff’s cause of action.

A suggestion of necessity jurisdiction in the decision may be found in the decision’s footnote 37 and its accompanying text. Footnote 37 states: “This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.” The accompanying text reads: “[A]llowing in rem jurisdiction avoids the uncertainty inherent in the International Shoe standard and assures a plaintiff of a forum. … We believe, however, that the fairness standard of International Shoe can be easily applied in the vast majority of cases.”

It is true that the above quotes did not directly adopt necessity jurisdiction, but the phrase “in the vast majority of cases” contemplates that there are genuine cases where International Shoe would fail to cover, and whether the court should assume jurisdiction in those cases remains open, that is to say, not prohibited. In particular, the fact that the Court suggested this possibility, and did so suo motu, is remarkable in our context. Robert Casad has expressed the view that the Supreme Court “apparently was reserving its opinion on the so-called jurisdiction

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1499 Ibid at 207.
1500 Ibid.
1501 Ibid at 208-209.
1502 Italics mine for emphasis.
1503 Shaffer, supra note 1500 at 211.
by necessity principle.”

David Vernon has suggested that the scenario envisaged in footnote 37 might arise where a foreign defendant with property in one state, is involved in a transaction outside the US, or has contacts only with another state, which has a long-arm statute not long enough to reach the foreign defendant. If personal jurisdiction is not available in the defendant’s domicile or anywhere else outside the US, it is likely that the court would not insist on the necessary nexus between the forum and either the litigation or the defendant. Vernon argues that “[m]ost likely, practical considerations will prevail over technicalities, and jurisdiction by necessity will be recognized.” Another scholar has observed in the same vein that “[s]ubsequent language by the [Supreme] Court has further suggested a potential opening for the development and application of such a doctrine.” She argues that under the US context, necessity jurisdiction would not mean a dethronement of the minimum contacts doctrine, but “a relaxation” of it. Contacts between the defendant and the forum would still be relevant, but rather than determining the adequacy of those contacts, the standard would be that of “reasonableness.” It would take into account the interests of all the parties, not merely fairness to the defendant.

In 1984, the US Supreme Court was urged to consider the significance of footnote 37 in *Helicopteros Nacionales de Colombia, SA v Hall*. The plaintiffs filed a wrongful death action against a Colombian corporation which owned a helicopter that had crashed in Peru, killing four US nationals employed by a Peruvian consortium at the time. The Peruvian consortium had a service contract with the Colombian company, under which the latter was providing helicopter services to the former. The Peruvian consortium was the alter ego of a joint venture that had its headquarters in Houston, Texas. The Colombian corporation (i.e., the defendant) was not licensed in Texas and had no place of business there. The only contacts it had with Texas were:

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1504 Casad, “An End to Ambivalence”, *supra* note 1489 at 77 (noting, however, that “[i]n the context of the *Shaffer* case the comment may mean only that the plaintiff was free to sue each defendant severally in that defendant's home state, so that other fora were available. Whether that alternative is adequate to offset the advantage of permitting suit against twenty-one of the defendants in Delaware, the state whose law will probably be applied wherever the suit is brought, would depend on factual considerations requiring evidence apparently not adduced in the *Shafler* case.”).


1506 *Ibid* at 1010.


1508 *Ibid*.

1509 *Ibid* at 409-410.

1510 466 US 408 (1984) [*Helicopteros*].
The Texas Supreme Court found these contacts sufficient for jurisdiction. The US Supreme Court found the contacts insufficient to satisfy the requirements of the Due Process Clause. It found the enumerated contacts too weak to trigger personal jurisdiction. It appears from the judgment that the court was invited to consider the applicability of necessity jurisdiction. In footnote 13, the court stated:

As an alternative to traditional minimum-contacts analysis, respondents suggest that the Court hold that the State of Texas had personal jurisdiction over [the defendant] under a doctrine of “jurisdiction by necessity.” See Shaffer v. Heitner, 433 U.S. 186, 211, n. 37 (1977). We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity — a potentially far-reaching modification of existing law - in the absence of a more complete record.

The Supreme Court thus left open the question whether necessity jurisdiction should be recognized. But for the absence of complete record before the court, the court, apparently, would have considered its applicability. From the overall tenor of the footnote, it seems that if at all it is recognized, it will most likely be an alternative to the minimum contacts doctrine rather than a variant of it. It regarded necessity jurisdiction as “a potentially far-reaching modification of the existing law.”

From the three cases identified as creating possible openings for necessity jurisdiction – Mullane, Shaffer and Helicopteros – it is arguable that necessity jurisdiction might be possible in cases of multiple, multi-jurisdictional defendants where it would be unreasonable to require the plaintiff to travel to each state where the defendants are located to file a separate action. Where, however, an alternative forum exists where the defendants may be sued together, the court cannot assume necessity jurisdiction. The case of Burger King Corp v Rudzewicz suggests that the existence of an alternative forum is an important consideration in the determination of

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1511 Ibid at 416.
1512 Ibid at 418.
1513 Ibid at 419 at n 13.
1514 Ibid.
jurisdiction *simpliciter*. In this contract case, the Supreme Court was called upon to answer whether a plaintiff must establish both that an out-of-state defendant has minimum contacts with the forum state and that it would be both fair and equitable to subject the defendant to suit there. Answering this question in the negative, the court stated that the following factors must be balanced in determining when it would be reasonable to assume personal jurisdiction:

1. the burden on the defendant in defending the suit;
2. the interest of the forum state in adjudicating the dispute;
3. the interest of the plaintiff in obtaining “convenient and effective relief”;
4. the interest of the interstate judicial system “in obtaining the most efficient resolution of controversies”; and
5. the “‘shared interest of the several States in furthering fundamental substantive social policies.’”\(^{1516}\)

The court noted that “a lesser showing of minimum contacts than would otherwise be required” may suffice where the above factors are present.\(^{1517}\) The evaluation of these factors, however, is permitted where some contacts between the defendant and the forum are present.\(^{1518}\) It also stressed that “jurisdictional rules may not be employed in such a way as to make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.”\(^{1519}\) Arguably, such severe disadvantage may be present where the contacts sufficient for jurisdiction are lacking, but the interests of justice would be served *only* by allowing the suit to proceed in that there is no other forum where the suit may be heard, or may be reasonably expected to be heard.\(^{1520}\) Necessity jurisdiction founded on this basis would seem to require that *some* connection, even if tenuous, between the forum and the action, not necessarily the defendant, be present. The test would be that it not be unreasonable to require the defendant to litigate in the plaintiff’s chosen forum.

The above review shows the closest necessity jurisdiction has gone in entering into the jurisprudence of American courts. At the same time, it represents the oldest appearance of necessity jurisdiction at least in the common law tradition. Although the US has not formally

\(^{1516}\) *Ibid* at 477 (internal citation omitted).

\(^{1517}\) *Ibid*.

\(^{1518}\) *Ibid*.

\(^{1519}\) *Ibid* at 478.

\(^{1520}\) Troutman, *supra* note 1509 at 414.
adopted it, a review of international legal instruments and national legal systems shows that necessity jurisdiction is being generalized even though it is hard to find cases where it has been explicitly applied. The doctrine’s first formal adoption may be found in Article 2 of the 1985 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, which provides:

The requirements for jurisdiction in the international sphere shall also be deemed to be satisfied if, in the opinion of the judicial or other adjudicatory authority of the State Party in which the judgment is to be given effect, the judicial or other adjudicatory authority that rendered the judgment assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other adjudicatory authority.\footnote{24 May 1984, 24 ILM 468 (1985).}

It also finds broad support in Article 6 of the ECHR\footnote{Walker, “Muscutt Misplaced”, supra note 193 at 137 (pointing to the denial of access to justice provisions of the Convention and citing the English House of Lords decision in Lubbe, supra note 353).} and is explicitly provided for in the EU’s Council Regulation (EC) No 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations.\footnote{18 December 2008, 2009 OJ (L7/8).} Article 7 thereof states:

Where no court of a Member State has jurisdiction pursuant to [the Regulation] the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.

In March 2011, the European Commission proposed a regulation for matrimonial property regimes.\footnote{Proposal for a Council Regulation on jurisdiction, applicable law and the recognition of decisions in matters of matrimonial property regimes’ COM (2011) 126 of 16 March 2011. For a copy of the proposal, see online: European Commission, <http://ec.europa.eu/justice/policies/civil/docs/com_2011_126_en.pdf> (last accessed 26 March 2012).} The proposal seeks to ensure that there are uniform jurisdictional rules throughout Europe for the regulation of proceedings relating to matrimonial property. Article 7 of the proposed regulation provides is identical with the passage just quoted: “Where no court of a Member State has jurisdiction under [the regulation], the courts of a Member State may, exceptionally and if the case has a sufficient connection with that Member State, rule on a matrimonial property regime case if proceedings would be impossible or cannot reasonably be
brought or conducted in a third State.”\textsuperscript{1525} The Proposed Reform of Brussels I Regulation also contains a forum of necessity provision to enable plaintiffs bring action against non-European defendants to prevent a denial of “the right to a fair trial or the right to access to justice”.\textsuperscript{1526}

At the national level, it has been adopted by Article 3 of the 1987 Swiss \textit{Federal Code on Private International Law}.\textsuperscript{1527} Headed “Emergency jurisdiction”, Article 3 of the Swiss Code provides: “If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction.” From the Swiss Code, necessity jurisdiction found its way into Article 3136 of the Civil Code of Quebec,\textsuperscript{1528} and later into section 6 of the CJPTA. Necessity jurisdiction is also recognized in Argentina,\textsuperscript{1529} Belgium,\textsuperscript{1530} Mexico,\textsuperscript{1531} Uruguay\textsuperscript{1532} and The Netherlands.\textsuperscript{1533} Other jurisdictions adopting it include Austria, Belgium, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain, Turkey and the UK.\textsuperscript{1534} A 2007 study commissioned by the EU to provide a comparative analysis of residual jurisdiction in the twenty-seven EU member states and to

\textsuperscript{1525} For a review of the proposed regulation, see CMV Clarkson, “Matrimonial Property: The Proposed EU Regulation” (2011) 17: 9 Trusts & Trustees 846-854.
\textsuperscript{1526} Proposed Reform of Brussels I Regulation, supra note 710 at Article 26.
\textsuperscript{1527} 8 December 1987.
\textsuperscript{1528} Ibid at 1328. See Josephson v Balfour Recreation Commission, 2010 BCSC 603 at para 86 (CanLII) [Josephson] (noting that the “forum of necessity concept was drawn from article 3 of the Swiss Federal Code on Private International Law”).
\textsuperscript{1529} Mario JA Oyarzábal, “Jurisdiction over International Electronic Contracts: A View on Inter-American, Mercosur, and Argentine Rules” (2005) 19 Temp Int’l & Comp LJ 87 at 95 (stating that though the defendant’s domicile supplies the jurisdictional link, “if it is not possible to determine the defendant’s current domicile, but the defendant has a substantial connection to Argentina, the Argentine courts may still exercise jurisdiction under forum necessitatis, or subsidiary jurisdiction, if there is clearly no more appropriate forum abroad or if there is positive and cogent evidence that the plaintiff, if forced to litigate abroad, would not obtain justice (déni de justice)”).
\textsuperscript{1530} Belgian \textit{Private International Law Code}, Article 11.
\textsuperscript{1531} Mexican \textit{Federal Civil procedure Code}, Article 565.
\textsuperscript{1532} Uruguayan \textit{Private International Law Act} 2009, Article 56(8).
\textsuperscript{1533} Dutch \textit{Code of Civil Procedure}, Article 9:
When Articles 2 up to and including 8 indicate that Dutch courts have no jurisdiction, then they nevertheless have if: (a) the case concerns a legal relationship that only affects the interests of the involved parties themselves and the defendant or a party with an interest in the legal proceedings has appeared in court, not exclusively or with the intention to dispute the jurisdiction of the Dutch court, unless there is no reasonable interest to conclude that the Dutch court has jurisdiction; (b) a civil case outside the Netherlands appears to be impossible; or (c) the legal proceedings, which are to be initiated by a writ of summons, have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to a judgment of a foreign court
recommend ways of harmonizing the rules reported that in countries where there was no statutory or case law basis for necessity jurisdiction, necessity jurisdiction would not necessarily be rejected should a relevant case arise. The study noted that some national reporters were of the view that while there was no current practice in their countries affirming necessity jurisdiction, it was not theoretically accurate to say that a party would be deprived of his right of access to a court if access to a court was necessary to uphold his rights.\textsuperscript{1535}

Arguments in favour of necessity jurisdiction include that the plaintiff should not be denied a judicial forum to seek redress. Justice Brennan has suggested that the rule that the plaintiff should pursue the defendant in the defendant’s forum is now outdated in today’s world where cross-border movement of persons has become easier and far more rapid.\textsuperscript{1536} In determining whether it is reasonable to deny the plaintiff a day in court, or to force the defendant to litigate in the plaintiff’s chosen forum, it may be necessary to look at the ability of the parties to litigate in either forum. Troutman has opined that this issue is at the heart of necessity jurisdiction.\textsuperscript{1537} Von Mehren recognizes this as a legitimate consideration in the determination of adjudicatory jurisdiction.\textsuperscript{1538} Where the plaintiff is an indigent individual and the defendant a large corporation, the need to consider their relative capacity to litigate in the competing forums assumes greater salience.\textsuperscript{1539}

5.3.3 Necessity Jurisdiction in Canada

Article 3136 of the Quebec Civil Code provides that “[e]ven though a Quebec authority has no jurisdiction to hear a dispute, it may hear it if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required.”\textsuperscript{1540}

\begin{footnotes}
\footnote{1536} World-Wide Volkswagen, supra note 1288 at 308 (in dissent).
\footnote{1537} Troutman, supra note 1509 at 415.
\footnote{1539} Troutman, supra note 1509 at 416.
\end{footnotes}
provides that “[a] court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that (a) there is no court outside British Columbia in which the plaintiff can commence the proceedings, or (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.”

An important difference between the two provisions cited above must be noted. The CJPTA provision seems broader in scope than the Quebec Civil Code provision which is circumscribed by a requirement that the dispute “has a sufficient connection with Quebec”. No similar wording is found in the CJPTA. The requirement of “a sufficient connection with Quebec” is significant and is more in line with the provisions of the international instruments quoted earlier. The rule in the national jurisdictions listed also requires some connection with the forum, The Netherlands excepted.1541 They use such concepts as “close contacts”, “adequate relation”, or “strong linking factor”, without defining what constitutes such contacts or connections.1542 Austrian rule however requires that the plaintiff be an Austrian national, domiciliary or resident.1543 In the Quebec context, it is open to question whether a dispute that has a sufficient connection with Quebec would fail to meet the requirements of the real and substantial connection test, especially given the minimalist approach to the test adopted by the Supreme Court of Canada in Spar Aerospace v American mobile Satellite Corp1544 – a case that arose in Quebec.1545 This must have led the Quebec Court of Appeal to hold in Lamborghini (Canada) Inc v Automobili Lamborghini SPA that Article 3136 does not permit a Quebec authority to exercise a jurisdiction it does not otherwise possess.1546 In that case, Lamborghini Canada has an agency agreement with Lamborghini Italy, under which Lamborghini Canada was to market Lamborghini Italy’s automobiles in Canada. Chrysler bought Lamborghini Italy and, as part of its reorganization, issued Lamborghini Canada a notice terminating the agency. Lamborghini Canada rejected the notice and filed suit before the Quebec Superior Court, seeking injunction

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1542 Ibid.
1543 Ibid.
1544 [2002] 4 SCR 205 [Spar Aerospace].
1545 Granted that the dictionary meaning of “sufficient” may not be easily equated with the dictionary meaning of “real” and “substantial” (the word “sufficient” means “adequate”, “enough”; the word “real” means “actual”, “genuine”, “not artificial”; and the word “substantial” means “considerable”: Oxford Advanced Learner’s Dictionary, 7th ed. (Oxford: Oxford University Press, 2005)), the adoption of a minimalist approach blurs the conceptual distinction between “sufficient” and “real and substantial”.
1546 [1997] RJQ 58 [Lamborghini] (cited in McEvoy, “Forum of Necessity in Quebec Private International Law”, supra note 1542 at 64-65 (arguing that this statement is statement is striking given that Article 3136 permits jurisdiction “even though a Quebec authority has no jurisdiction to hear a dispute”)).
and damages. Lamborghini Italy opposed the suit, relying on a choice of law and choice of jurisdiction clause in their agency agreement stipulating the courts of Bologna (Italy) as having exclusive jurisdiction. The Quebec Superior Court upheld the objection on the basis that a Quebec court had no jurisdiction where the parties had agreed to submit any dispute arising between them to a foreign authority unless the defendant submits to the jurisdiction of Quebec courts. In affirming the decision, the Quebec Court of Appeal considered Article 3136. It asserted that “Article 3136 of CCQ expresses an exception rule based on the impossibility of having access to a foreign court in a litigation that has a sufficient link with Québec.”

It considered the relative inconvenience of accessing the foreign court as not providing justification for jurisdiction based on Article 3136.

It is arguable that the true necessity jurisdiction provision is section 6 of the CJPTA. However, it is equally arguable that what Article 3136 requires is any form of connection, such as the existence of the defendant’s property within the forum, or the plaintiff’s domicile or nationality – connections that ordinarily do not meet the requirements of the real and substantial connection test. Talpis and Castel have suggested that temporary residence of one of the parties in Quebec, or the fact that “a juridical act is to be used here,” or the existence of property in Quebec, may provide sufficient link with Quebec.

The assumption of necessity jurisdiction was briefly discussed by Sharpe JA in the Van Breda decision. He referred to it as “a significant jurisdictional doctrine” that emerged after the Muscutt decision. In that case, it was the contention of the appellants that Muscutt was formulated to house certain extraordinary cases where plaintiffs have nowhere else to bring their case. With the emergence of necessity jurisdiction, however, they argued, those extraordinary cases are no longer suitable for jurisdictional assumption based on the real and substantial connection test. By effect, the bases for assumed jurisdiction should be interpreted narrowly. Sharpe JA explicitly recognized necessity jurisdiction as a residual basis for assuming jurisdiction in the absence of the real and substantial connection test and as an exception to it. He wrote:

1547 Lamborghini, ibid at para 48 (italics mine).
1548 Ibid.
1550 Van Breda (ONCA), supra note 1411 at para 54.
1551 Ibid.
The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace “forum of last resort” cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.\textsuperscript{1552}

Sharpe JA suggested that necessity jurisdiction might have been applied in \textit{Bouzari v Islamic Republic of Iran}\textsuperscript{1553} – a case that involved international human rights abuses committed in Iran where there was no other forum where the plaintiff could reasonably have been expected to bring his action. He suggested that cases meeting the \textit{Muscutt} fairness factor, specifically, those where it would be unfair to the plaintiff not to assume jurisdiction might fall under necessity jurisdiction. LeBel J declined to pronounce on the validity of necessity jurisdiction on the basis that the appeal was not argued on that term.\textsuperscript{1554}

However, while considering whether to assume jurisdiction based on the \textit{Van Breda} framework, the Ontario Superior Court stated in \textit{Obégi v Kilani},\textsuperscript{1555} based on the facts before it, that even if it would amount to a distortion of \textit{Van Breda} to assume jurisdiction in the matter based on the existence of a real and substantial connection with Ontario, the particular circumstances of the cases justified the application of necessity jurisdiction to ensure that the plaintiff had access to justice.\textsuperscript{1556} The Alberta Court of Queen’s Bench has considered the role of fairness in the assumption of jurisdiction \textit{simpliciter}, referring approvingly to necessity jurisdiction as stated in \textit{Van Breda}, but refused to assume jurisdiction on the basis of necessity because none of the parties asserted that necessity jurisdiction should be assumed and because it did not think the case was proper for the assumption of necessity jurisdiction.\textsuperscript{1557} And in \textit{Fewer}, the Court of Appeal of Newfoundland and Labrador observed that “[i]t may be desirable to leave

\textsuperscript{1552} \textit{Ibid} at para 100.
\textsuperscript{1553} (2004), 71 OR (3d) 675 (ONCA). See \textit{Van Breda} (ONCA), \textit{supra} note 1411 at para 54.
\textsuperscript{1554} \textit{Van Breda} (SCC), \textit{supra} note 1274 at para 86.
\textsuperscript{1555} 2011 ONSC 1636.
\textsuperscript{1556} \textit{Ibid} at 118-119.
\textsuperscript{1557} \textit{Ayles}, \textit{supra} note 1460 at paras 32-33.
open the possibility of establishing new, discrete categories for the assertion of jurisdiction in exceptional cases where order, fairness and access to justice require it, such as the newly developing forum of necessity doctrine”, although expressing concerns about the constitutionality of such as exception. The British Columbia Supreme Court also applied necessity jurisdiction under section 6 of the CJPTA in Josephson to hear third party proceedings.

5.3.4 Constitutionality of Necessity Jurisdiction

While Sharpe JA explicitly recognized necessity jurisdiction, he did not consider its validity from a constitutional point of view in light of Morguard. Edinger has argued that although necessity jurisdiction is “undoubtedly practical and very desirable” from the point of view of litigation, it is “fragile” from a constitutional perspective:

The fragility arises from the fact that territorial competence has been defined so as to satisfy constitutional principles. How can a British Columbia court validly assume jurisdiction under section 6 of the Court Jurisdiction Act, where the constitutional principle has not been satisfied? And when jurisdiction is assumed pursuant to section 6, will British Columbia judgments be recognized by other Canadian courts that are not subject to the Enforcement Act and which, therefore, still require there to have been a real and substantial connection between the action and British Columbia?

Other scholars share Edinger’s sentiments. Professor Walker, who has championed the call for recognition of necessity jurisdiction in Canada, has argued that we should avoid “strain[ing] logic” by interpreting the real and substantial connection test broadly, but rather “recognize that considerations of access to justice and the avoidance of multiplicity may occasionally warrant the exercise of jurisdiction in order to meet the requirements of the principle of order and fairness even where there is no real and substantial connection.” She argues further that “even though the law of jurisdiction is constitutionally grounded, the Constitution serves as a foundation or a framework for jurisdiction, not a limit to it; and in certain extraordinary situations,
the court has a discretion to exercise jurisdiction in cases beyond the three traditional bases.”

Monestier similarly observes:

The solution to the problem of ensuring fairness to litigants lies not in manipulating the real and substantial connection test, but instead in providing an alternative route for a plaintiff to have access to his home courts in circumstances where the plaintiff would otherwise be unable to bring suit. Canadian courts need not turn a blind eye to access to justice issues. Rather, they should acknowledge that they are assuming jurisdiction on grounds of fairness even though the real and substantial connection test, properly understood, is not satisfied.

If the assumption of jurisdiction “is ultimately to be guided by the requirements of order and fairness”, as stated in *Hunt*, then it is arguable that the constitutionality of necessity jurisdiction is to measured by its compliance with the requirements of order and fairness. The challenge here, however, lies in the competing salience of “order” and “fairness”. Must both “order” and “fairness” be met? Order comes first, we are told. Suggesting that order must first be met before fairness can be considered. As Walker admonishes us, there is no need to “strain logic”. Order in the sense of “certainty” and “predictability” would be sacrificed by the recognition of necessity jurisdiction. However, there is need to strengthen the fairness arm of the principle to take care of extraordinary circumstances that even though they do not meet the principle of order, denial of jurisdiction would lead to an egregious end result in the sense that there will be no forum where the plaintiff may ventilate his claim and the defendant clear his name of unfounded allegations.

5.3.5 Necessity Jurisdiction and International Law

The question arises whether there is any basis in international law upon which states may assert necessity jurisdiction. There is no worldwide convention explicitly recognizing necessity jurisdiction. At the regional level, however, necessity jurisdiction can be found within the European system. The relevant instruments are the ECHR (Article 6(1)), the EU Council Regulation (No 4/2009) on jurisdiction, applicable law, recognition and enforcement decisions.

1563 Monestier, “A Real and Substantial Improvement?”, *supra* note 1276 at 217.
1564 Tolofson, *supra* note 175 at para 56.
and cooperation in matters relating to maintenance obligations, and the Proposed Reform of Brussels I Regulation. Article 6(1) of the ECHR was extensively discussed in chapter three and there is nothing to add to that discussion except to say that Article 6(1) has provided the background for the adoption of necessity jurisdiction by many European countries.

Article 26 of the Proposed Reform of Brussels I Regulation provides:

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or

(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seised.

The above provision is clearly wider in scope than both Article 3136 of the Quebec Civil Code and section 6 of the CJPTA. Before turning to that scope, however, it must be pointed out that necessity jurisdiction would lie under the Regulation only where there is no court of a member state that has jurisdiction over the dispute. Where a court of a member state has jurisdiction, considerations of whether fair trial or access to justice is guaranteed in that court, are not permitted and the court seised must decline jurisdiction. This is evident from the opening words of the Article. There is thus an inherent assumption in the Article that fair trial and access to justice are guaranteed in courts of member states. Like Article 3136 of the Quebec Civil Code, the proposed regulation requires a sufficient connection with the member state seeking to exercise jurisdiction. It does not define what amounts to “sufficient connection”. It may be assumed that it means the kind of connections suggested earlier – nationality, domicile, residence, et cetera.

The Article permits necessity jurisdiction not only where access to justice would otherwise be denied, but also where the right to a fair trial is not guaranteed in the foreign court. This is certainly a manifestation of the influence of Article 6(1) of the ECHR, which includes guarantees of fair trial. Thus, a plaintiff who is able to establish that there is no guarantee of fair trial in the non-European country where the dispute should ordinarily be litigated can urge

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necessity jurisdiction on the forum court if the proposal is passed. In the context of extraterritorial corporate crimes committed on the territory of non-member states, the provision makes it easier for European courts to assume jurisdiction since they would now have two specific grounds for invoking necessity jurisdiction: absence of fair trial guarantees and absence of access to justice.

The second new element introduced by the Article lies in paragraph (b). Paragraph (b) requires the court seised to consider whether judgment given in the non-European forum with which the dispute is closely connected would be enforceable under its law and whether such extraterritorial enforcement is necessary to ensure that the claimant does not receive a pyrrhic victory. It is not clear why the provision requires the forum court to consider only the recognition and enforcement rules in its own forum and not also the recognition and enforcement rules in other member states. The possible explanation for this might be that the recognition and enforcement rules operative in member states are uniform by virtue of the Regulation itself, so that what applies to one state applies to all. It must be underlined that this subsection does not require that there be no court with jurisdiction to hear the case. It aims to guarantee that the plaintiff will enjoy the fruits of any judgment resulting from the adjudication of the dispute. It follows that if the judgment can be enforced somewhere else, whether in Europe or outside Europe, a member state cannot exercise necessity jurisdiction.

A further question to ask is whether necessity jurisdiction can be regarded as a principle of international law. A look at the various international bases of jurisdiction, however, points to universal jurisdiction as a possible international basis for the assertion of necessity jurisdiction. This is because as one of the goals of universal jurisdiction is to prevent impunity, prevention of a denial of access to justice through the exercise of necessity jurisdiction is compatible with that goal. Mutual convenience also favours the exercise of necessity jurisdiction by the only country that can reasonably be expected to adjudicate the dispute. Avoidance of denial of justice is itself a principle of international human rights law recognized not only in Article 6(1) of the ECHR but also in other instruments some of which have worldwide application and some of which do not, such as Articles 7 and 8 of the UDHR, Article 14 of the ICCPR, Article 9 of the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental matters, Article 6 ECHR, et cetera. Access to justice is a human right.

\footnote{25 June 1998, 38 ILM 515 (1999).}
guaranteed in all national constitutions. None of these instruments (and arguably national constitutions) requires that the citizenship of the plaintiff be considered in granting access to justice. They could not have required such when discrimination itself is prohibited in international law.

Furthermore, it is significant that many states and international instruments have explicitly adopted necessity jurisdiction and have done so in identical language. With the exception of Canada (under the CJPTA) and The Netherlands, all the other states and the international instruments mentioned earlier require some form of connection with the forum seeking to assert jurisdiction. With its increasing adoption, the probability that its exercise would offend the principles of comity is equally diminishing. What is of concern at this moment, however, is whether it would apply to all categories of wrongs and none of the instruments reviewed adverted its mind to this.

5.3.6 Application of Necessity Jurisdiction

For necessity jurisdiction to be invoked, it must be clear that the dispute does not meet the requirements of any of the accepted jurisdictional bases. Hence the forum must lack jurisdiction in the matter, and either the plaintiff cannot possibly institute the proceedings elsewhere or its institution elsewhere cannot reasonably be required. It follows that what is required is not absolute impossibility in bringing the suit in the foreign forum. Of course, where there is absolute impossibility, such as where the foreign forum with which the dispute is closely connected and where the action is reasonably expected to be brought is without jurisdiction, the need for necessity jurisdiction is compelling.

Necessity jurisdiction may be problematic in its application. It is not easy to determine when proceedings cannot possibly be instituted elsewhere. Does the impossibility test speak to legal impossibility or to practical impossibility or to both? Talpis and Castel define legal impossibility as arising “where no foreign court has jurisdiction,” or where “only the natural forum” or “the court having a link to the issue,” has jurisdiction, or where “only a court which has annulled a clause choosing the forum” has jurisdiction.\(^\text{1567}\) They define practical impossibility as arising where there is a foreign that has jurisdiction, but whose justice system is

“corrupt” or the costs of litigating there are “too high”. They favour a narrow interpretation of impossibility that limits it to legal impossibility relating to the court of the forum having “the closest connection with the issue.” For analytical purposes, it is better to limit impossibility to legal impossibility and deal with practical impossibility under the second alternative: “where the institution of such proceedings outside [the forum] cannot reasonably be required”. This is because this reasonableness requirement covers all cases of practical impossibility.

The requirement that foreign proceedings be not reasonably required presupposes that there is no legal barrier to instituting proceedings in the foreign forum. Interpreting this provision, Talpis and Castel suggest that where the exercise of jurisdiction in the foreign forum is “discretionary,” where “the defendant benefits from a certain immunity”, where the plaintiff is “a refugee who cannot act in the country he has fled”, and “cases of superior force such as war”, are examples of where the plaintiff cannot reasonably be required to litigate in the foreign forum. McEvoy suggests that foreign proceedings cannot reasonably be required if there is a defect in the foreign proceedings, such as delay in the administration of justice, corrupt judiciary or an “ideological imperative,” if the remedy sought is specific to the domestic purposes of the forum, if “an unacceptable risk” to the plaintiff is involved if he is to litigate in the foreign forum, and if the plaintiff is financially incapable of litigating the suit there.

The inclusion of situations where the defendant would benefit from a certain immunity in the foreign forum as part of the reasonableness assessment is improper. It accords more with legal impossibility since immunity is a creation of law and goes to the jurisdiction of the court since it bars legal proceedings against the defendant. Also, it is difficult to make sense of how situations where the foreign court’s jurisdiction is discretionary make it unreasonable to require the plaintiff to litigate in that forum. If the foreign court’s jurisdiction is discretionary, the plaintiff must show that the foreign court has declined jurisdiction before it can be said that it is unreasonable to require him to litigate in that forum. Even then, this situation would give rise to a legal impossibility since that declination legally and effectively bars the plaintiff from litigating in the foreign forum. It is therefore not a situation appropriate for a reasonableness assessment.

Where the plaintiff can theoretically get his case into the courts of the foreign forum,
necessity jurisdiction should be assumed only where there is a genuine obstacle which makes it unreasonable or unacceptable to require the plaintiff to bring the suit there in the foreign forum. A genuine and unacceptable risk to the life of the plaintiff if required to travel to the foreign forum is such an obstacle. Such risk may consist in the plaintiff’s well-founded fear that he/she might be politically persecuted if found in that foreign forum, or might lose his/her life or subjected to torture or other inhuman treatment. It may also arise where that forum is in a state of war and the action might become statute-barred under the laws of that forum if the plaintiff is required to wait for the end of the war before travelling to initiate the proceedings there. But if, for instance, while in that forum, the plaintiff engaged in conduct that amounted to a crime under the laws of that forum, but which is not a crime here, and is simply evading prosecution, it would amount to supervising the integrity of the legal system of a foreign sovereign for the forum court to assume necessity jurisdiction. But arguments that there is a defect in the foreign legal system, such as delay in the administration of justice or corruption in the foreign judiciary or what McEvoy calls “ideological imperative” should be ousted from considerations of necessity jurisdiction. Like the last argument made, they amount to an unacceptable pronouncement on the integrity of a foreign judicial system. Claims of financial incapacity to litigate the suit in the foreign forum should not be accommodated in a necessity jurisdiction analysis; otherwise the threshold would be dangerously lowered. Great care ought to be taken to avoid lowering the standard for necessity jurisdiction to the standard for assessment of forum non conveniens.

Professor Nuyts has reported that in Belgium the fact that bringing the action in the foreign forum would be “out of proportion” with the financial interests involved would be accepted as a basis for necessity jurisdiction. This approach ignores the fact that the cost to the foreign defendant of travelling to the forum court to defend the suit might equally outweigh the claim against him/her. Considering the costs to the plaintiff of being required to litigate abroad relative to the financial interests involved in the claim would miss the essence of necessity jurisdiction, which is to ensure that a forum is provided where the dispute can be decided. The purpose is not to provide a forum that is advantageous to the plaintiff. As the Quebec Court of Appeal stated in Lamborghini, it is not sufficient that litigating abroad is more costly or onerous:

The costs and relative inconvenience of an Italian trial do not justify its application.

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1572 Nuyts, supra note 1537 at 65.
Italy has, just as Canada, a judicial system associated with the Western tradition. There has been no argument that such forum would not allow for a hearing conforming to the fundamental rules of law or procedure. Such a thing would shock those who are cognizant of the long juridical tradition in Italy, and its role as a source of many of the elements of Western law. We find, in reality, the concern of a litigant, who justifiably believes his tactical position will be weakened if required to plead before an Italian court. This concern is not sufficient to ground the application of Article 3136 CCQ and the first judge rightly rejected it.\textsuperscript{1573}

In fact, it is rational to consider the defendant’s potential ability to travel to the forum court to defend the suit. The plaintiff seeking to invoke necessity jurisdiction should be required to demonstrate that the foreign defendant has the capacity to travel to the forum court to defend the suit. It is also essential to look at the nature of the remedy the plaintiff seeks and the potential cost to the defendant of travelling to the forum court to defend the suit. If the cost to the defendant outweighs the remedy, it will not be reasonable for the forum court to adjudicate the dispute in the absence of jurisdiction. Where it will be practically impossible for the defendant to undertake such a trip, it would defeat the essence of necessity jurisdiction for the forum court to insist on adjudicating the dispute on the grounds that the plaintiff cannot reasonably be required to bring the action in the foreign forum with which the dispute is closely connected. This means that the capacity of both parties to defend the suit in any forum should be considered. There is no rational basis to compel a defendant to travel to the forum court that ordinarily has no jurisdiction where that defendant is genuinely unable to bear the costs of doing so.

The question may arise whether where no court has jurisdiction to adjudicate every facet of a dispute, the forum court might assume jurisdiction over the entire dispute where it would be unreasonable to require the plaintiff to travel to several forums to initiate separate actions there. This was the issue that was present in the US \textit{Mullane} case\textsuperscript{1574} and the court there assumed jurisdiction though without expressly saying it was assuming necessity jurisdiction. The issue arose in Switzerland in 1990. The Zurich Obergericht exercised necessity jurisdiction over the succession of a UK national who was last domiciled in Italy with property in various countries, including Switzerland and Luxembourg. The trial court declined jurisdiction over the Luxembourg property on the basis that Swiss law conferred international jurisdiction on Swiss

\textsuperscript{1573} \textit{Lamborghini}, supra note 1548 at para 48.  
\textsuperscript{1574} Supra note 1486.
courts in succession matters only where the deceased was last domiciled in Switzerland. The Zurich Appeal Court reversed the decision on the grounds that the court that ordinarily would have adjudicated the succession dispute – i.e., an Italian court, since the deceased was last domiciled in Italy, or a UK court, since the deceased was a UK national, or a Luxembourg court, since part of the estate was located in Luxembourg – could not have addressed it in its totality. None of these courts could have address the estates located outside their territory. The Zurich appellate court concluded that requiring the plaintiff to initiate proceedings in each of these countries would have been unreasonable. By necessity, therefore, Switzerland should assume jurisdiction over the entire estate.\textsuperscript{1575} While the reasoning of this case may be commended, it need not be applied invariably without regard to the specific facts of each case. In the case of multiple defendants resident in different countries, it may be problematic. The ability of each of the defendants to travel to the forum court cannot be ignored if it is always remembered that the forum court approached to adjudicate the dispute ordinarily does not have jurisdiction. The aim should be to find the best way possible to let the plaintiff ventilate his claims and the defendant respond to the plaintiff’s claims. There may be nothing inherently wrong with the forum court deciding to adjudicate only a part of the dispute relating to those defendants who can be reasonably required to travel to the forum court, against the backdrop that the case cannot be heard or cannot reasonably be expected to be heard in the forum with which the dispute is connected. The plaintiff may not get all he desires, but he cannot be given all he desires at all costs to the defendant. Unless it can be shown that the impossibility – legal or practical – of litigating in the foreign forum was the making of the defendant, there is no reason to subject the defendant to unlimited hardship in order to give the plaintiff the kind of hearing he desires. Because there is no other forum where the dispute may be adjudicated, a certain level of inconvenience or hardship to the defendant if required to litigate in the forum court would be acceptable; but it cannot be at all costs to him.

A related scenario is where the plaintiff seeks to adjudicate third party proceedings that do not have autonomous connection with the forum. This scenario came up before the British Columbia Supreme Court in \textit{Josephson}.\textsuperscript{1576} Plaintiff and defendant were residents of Idaho. The plaintiff was a passenger in a golf cart driven by the defendant during a golf course in British

\begin{quote}
\textsuperscript{1575} \textit{Obergericht ZH}, 26 February 1992, ZR 90 (1991), n 89, p 289 (Swiss), cited in Ubertazzi, \textit{supra} note 1536 at 394.

\textsuperscript{1576} \textit{Supra} note 1530.
\end{quote}
Columbia. The plaintiff sustained injuries when he was thrown from the cart. He received medical treatment both in British Columbia and Idaho. The defendant claimed that the injuries for which the plaintiff was in court were caused by the Idaho hospital and doctors either in whole or in part. The defendant therefore sought to bring third party proceedings against the Idaho doctors. The third party defendants sought to dismiss the third party proceedings on the grounds that there was no real and substantial connection between them or the action and British Columbia – they were all residents of Idaho and the medical treatment they gave the defendant was in Idaho and not British Columbia. The defendant’s aim in bringing third party proceedings was to enable him claim on contribution and indemnity from the third party defendants should the court find that the injury was caused by the medical treatment the plaintiff received in Idaho. Expert testimony showed that liability for medical malpractice in Idaho was limited to cases where the plaintiff had a patient-physician or patient-hospital relationship with the defendant and that a two-year limitation period applied. Idaho law did not recognize claim by other persons who did not have this relationship. This meant that the defendant’s third party claim against the third party defendants was not recognizable in Idaho. The defendant intensely argued that the choice of a British Columbian forum was not his, but that he had been forced to bring the third party proceedings in British Columbia because the plaintiff sued him there. Relying on the necessity jurisdiction provisions of section 6 of the CJPTA, the defendant argued that on these facts, he could not reasonably be required to commence proceedings against the hospital and doctors in Idaho and that British Columbia was the only forum in which he could proceed against the third party defendants for contribution and indemnity. If he was denied the opportunity of claiming contribution and indemnity from the Idaho doctors, he would be “on the hook hundred percent” and this would be unfair to him. The third party defendants argued that section 6 of the CJPTA was applicable only when “a party is in peril or in situations that are particularly egregious.” The Honourable Madam Justice Loo held that a real and substantial connection with British Columbia could not be found on the basis of a medical treatment obtained in another jurisdiction for illness or injury sustained in British Columbia. She stressed that while the real and substantial connection test has the “ability to bend without breaking”, it still contains “a

1577 Ibid at para 92.
1578 Ibid at para 61.
1579 Ibid at para 94.
requirement to prevent overreaching."¹⁵⁸⁰ She turned to section 6 of the CJPTA. On the facts set out above, she concluded that it was not reasonable to require the defendant to proceed against the third party defendants in Idaho since any suit filed there would not be recognized.¹⁵⁸¹ In reaching the decision, she articulated the following test: if “the factual matrix of the third party claims is very closely connected with the claim initiated by the [plaintiff,] [t]he only practical approach is for one court to hear all the matters relating to the cause”.¹⁵⁸²

Loo J’s decision is attractive because the defendant acted reasonably in seeking to bring the third party proceedings for contribution and indemnity. If he missed or was denied that opportunity, it would be impossible to bring the proceedings anywhere else. British Columbia was the defendant’s “forum of last resort”.¹⁵⁸³ This was a case of legal impossibility and not practical impossibility. The drafters of the UCJPTA envisaged this scenario when they attached the following comment to section 10 thereof:

[R]esidual discretion, also provides a basis upon which jurisdiction can be exercised over a necessary and proper party who cannot be caught under the normal rules. A plaintiff seeking to bring in such a party would argue first, that there is a real and substantial connection between the territory and the party, or secondly that there is no other forum in which the plaintiff can or can reasonably be required to seek relief against the party.

Castel and Walker have similarly argued that “[e]ven if a claim against a foreign defendant would fail the real and substantial connection test if it were constituted as a separate action, it may serve the requirements of order and fairness to try the foreign claim together with the claims that are clearly rooted in the forum.”¹⁵⁸⁴ LeBel J did endorse this view in Van Breda when he wrote that if “a [real and substantial] connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.”¹⁵⁸⁵

¹⁵⁸⁰ Ibid at para 77.
¹⁵⁸¹ Ibid at para 102.
¹⁵⁸² Ibid at para 100. Leave to appeal to the British Columbia Court of Appeal was granted in Josephson v Balfour, 2010 BCCA 339 and it appears that the appeal is still pending at the time of this writing.
¹⁵⁸³ The comment attached to section 6 by the Uniform Law Conference of Canada, which drafted the Uniform Court Jurisdiction and Proceedings Transfer Act (UCJPTA) that formed the template for the CJPTA enacted by the provinces, used this phrase to describe a forum of necessity.
¹⁵⁸⁵ Van Breda (SCC), supra note 1274 at para 99.
However, Loo J’s decision failed in one important respect. The court did not consider the significance of the expiration of the limitation period in Idaho. Even if the defendant could have maintained a suit against the hospital and doctors in Idaho, he would nevertheless have been unable to do so due to the expiration of the limitation period. The question is whether a person who is caught by a statute of limitation can escape the consequences through third party proceedings for contribution and indemnity in an action in another jurisdiction brought by another person. The answer is no. In *Ell v Con-Pro Industries Ltd and Kowalaski*1586 – a case that though contained no reference to necessity jurisdiction, and which in fact was decided before either the Quebec Civil Code or the CJPTA was enacted – Hollinrake JA of the British Columbia Court of Appeal stated (*obiter*, because the issue was not before it) that he had “no difficulty in seeing that the expiration of a limitation period in the proper forum can be a fact that clothes another forum with jurisdiction where but for that fact that forum would have no such jurisdiction.”1587 In *Jordan v Schatz*,1588 however, Leggatt J of the British Columbia Supreme Court refused to follow Hollinrake JA on the grounds that Hollinrake JA’s statement was *obiter*, arguing that “simple fairness and justice” warranted the exercise of jurisdiction in such a case:

Where there is no other forum other than this province to address the claim of the plaintiff, I am of the view that discretion must be exercised in favour of the plaintiff. Where the limitation period denies the plaintiff any claim other than in the province of British Columbia, this court should exercise its discretion in favour of the plaintiff out of simple fairness and justice.1589

The learned trial judge appeared to have been motivated by the fact that the defendant *appeared* to have “lulled” the plaintiff to sleep until the limitation periods in Alberta and Saskatchewan, either of where the action might have been brought, expired. Although the defendant denied lulling the plaintiff to sleep, Cumming JA of the British Columbia Court of Appeal overturned Leggatt J’s decision, holding that “jurisdiction *simpliciter* cannot be founded on the simple fact that the Alberta and Saskatchewan limitation periods expired, whether or not the plaintiff was...

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1586 (1992), 11 BCCA 174
1587 Ibid.
1588 1999 CanLII 6035 (BC SC).
1589 Ibid at para 26. The learned trial judge appeared to have been motivated by the fact that the defendant *appeared* to have “lulled” the defendant to sleep until the limitation periods in Alberta and Saskatchewan, either of where the action might have been brought, expired.
lulled to sleep by the defendant.”

When an action is statute-barred, it is the entire action without reservations, unless the statute says otherwise. Necessity jurisdiction does not seem to envision situations where the action is statute-barred in the forum with jurisdiction over the dispute. If a plaintiff sleeps upon his right of action until the action becomes statute-barred, he cannot run to another jurisdiction on the basis that it is legally impossible for him to institute the action in the first forum or that he cannot reasonably be expected to institute the action in the forum with jurisdiction. It is true that in *Josephson*, the defendant was helpless in the sense that it was the plaintiff who was expected to institute action against the Idaho hospital and doctors. But a plaintiff who has multiple potential defendants to sue is entitled to choose his actual defendants. And if he has multiple jurisdictions to sue, he is also fully entitled to choose his jurisdiction. His choice must be respected unless for reasons of *forum non conveniens* (discussed later), the court is of the view that the case is better tried elsewhere. The concern in the case at bar is whether it will be just to deny the defendant an opportunity to claim contribution and indemnity from third parties who the plaintiff himself can no longer proceed against due, among other factors, to a statute of limitation barrier. It is submitted that LeBel J’s statement in *Van Breda* does not comprehend situations where the aspect of the action at issue is statute-barred in the forum with jurisdiction to adjudicate that aspect. To use third party proceedings to circumvent the effects of the limitation period where the forum court has no jurisdiction would be unfair to the third party defendant. It would be different where the action is not statute-barred, for in that case reasons of efficiency would commend the assumption of jurisdiction by the forum court.

It is further submitted that unless the wrong in question is unconscionable to the extent of being of universal concern, and the length of the limitation period allowed by the foreign forum can be described as unreasonable in light of the overall circumstances of the case, limitation periods should be respected. The party seeking jurisdiction should further be required to demonstrate that he was unable to beat the limitation period due to some physical, mental or psychological condition that was no fault of his. To do otherwise would undermine the value of statutes of limitation. A defendant legitimately entitled to the benefits of a limitation period cannot be lightly denied those benefits through a third party procedure for contribution and

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1590 *Jordan v Schatz*, [2000] 7 WWR 442 at para 20 (BCCA) (stressing, at para 26, that “[t]he fact that no other forum is available to the plaintiff, due to the lapse of a limitation period in another jurisdiction, unfortunately does not bear upon the question of whether British Columbia has jurisdiction.”) [*Jordan* (BCCA)].
indemnity.

Furthermore, since the underlying rationale for necessity jurisdiction is to ensure access to justice, its application must be limited to circumstances that present access to justice problems. The access to justice problem must be shown to be genuine and serious. Otherwise, issues of convenience and suitability of the foreign forum would unconsciously creep in, making the analysis more or less a *forum non conveniens* analysis. There is also a need to limit the meaning of legal impossibility. It should not include cases where the defendant has a total defence (e.g. immunity) in the foreign forum nor where the action has already become statute-barred there. And to avoid forum shopping, there is need to require some nexus between the plaintiff and the forum. The nexus can be that the plaintiff is a national, domiciliary or resident of the forum, as is explicitly contained in the Austrian rule. Where the plaintiff receives treatment in the forum – a ground that, under the *Van Breda* framework, is no longer sufficient for jurisdiction – that may be regarded as providing the necessary nexus.

The rule under the Proposed Reform of Brussels I Regulation that the absence of fair trial guarantees in the foreign forum is a ground for the exercise of necessity jurisdiction should be discarded. It gives room for unnecessary speculation about the legal system of a foreign sovereign. The fact that the forum court has no jurisdiction in the matter should remain present in the mind of the court, constituting a background principle informing the application of necessity jurisdiction. There is something unconscionable about a court that has no jurisdiction over a matter engaging in making pronouncements concerning the existence of fair trial in the justice system of a country having jurisdiction.

Apart from the above procedural limits, given necessity jurisdiction’s link to the universality principle, the question arises whether necessity jurisdiction should be limited to the type of violations over which universal jurisdiction would lie. This question is critical because if unchecked, necessity jurisdiction might become wider in scope even than universal jurisdiction. A person who suffers a minor assault in Country A and later moves to Country B might seek to invoke necessity jurisdiction if he believes that it would not be reasonably practicable for him to travel back to Country A to seek judicial remedies for the assault. Unless the wrong complained

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1591 Jeffrey Talpis and Gerald Goldstein have opined that “as more and more countries are adopting necessity jurisdiction, they might theoretically exclude each other’s jurisdiction if there is no requirement of some connection. Jeffrey Talpis & Gerald Goldstein, “The Influence of Swiss Law on Quebec’s 1994 Codification of Private International Law” (2009) Yearbook of Private International Law, Vol II, 339 at 352.
is of sufficient gravity to attract the attention of the international community, it is hard to see why another country should be interested in adjudicating the dispute in the absence of jurisdiction. Such exercise of jurisdiction would offend the principles of international comity. It is submitted therefore that necessity jurisdiction should be limited to the violations to which universal jurisdiction applies.

In the context of extraterritorial corporate crimes, necessity jurisdiction can apply even with greater force than it can to individual defendants. This is because it will hardly be the case that a multinational corporation with offices and businesses in several countries will be financially unable to send one of its officers to any forum to defend the corporation. So the issue of the defendant’s capacity to litigate in the forum court – which is suggested should be a great concern in the exercise of necessity jurisdiction – poses no serious problems where the defendant is a multinational corporation.

5.4 THE JVTA

On 12 March 2012, the Canadian Parliament passed the JVTA. The Act, which received royal assent the day after it was passed, was aimed at deterring terrorism, creating a cause of action to allow victims of terrorism to bring civil actions in Canadian courts against perpetrators of terrorism and their supporters. It also amends the State Immunity Act to prevent a state listed as a terrorist state from claiming state immunity from the jurisdiction of Canadian courts with regard to actions relating to its support of terrorism. The Act is part of an omnibus statute, the Safe Streets and Communities Act, which comprises nine crime acts intended to strengthen Canada’s toughness on crime.

The JVTA recognizes that terrorism relies on financial and material support, and that it is

1592 It also amends certain sections of the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act, and other Acts.

1593 Soon after the Act was passed, the Canada India Foundation described the JVTA as “a milestone event in Canada’s fight against terrorism”. Canada India Foundation (CIF), CIF applauds passage of Justice for Victims of Terrorism Act”, 12 March 2012, online: CIF, [http://www.canadaindia.org/pr/984-cif-applauds-passage-of-justice-for-victims-of-terrorism-act] (last accessed 28 March 2012). In Cotler’s words, “Canadians should rejoice that they will now have a civil remedy against terrorism, a major step forward in the pursuit of justice, and holding perpetrators of terrorist acts to account.” Cotler, “Courts No Longer Favour the Terrorist”, Huffington Post, 16 March 2012, online: Huffington Post, [http://www.huffingtonpost.ca/irwin-cotler/omnibus-c-10_b_1353567.html] (last accessed 28 March 2012).
in the interest of the public to allow victims of terrorism to bring action against the terrorists and their supporters, as this will have the effect of weakening the functioning of terrorist organizations.\(^{1594}\) The Act would also conform to Canada’s obligations under the *International Convention for the Suppression of the Financing of Terrorism*,\(^{1595}\) which Canada ratified on 15 February 2002.\(^{1596}\)

The relevant provisions of the Act are contained in sections 3 to 5 thereof. Section 3 establishes the purpose of the Act, which, as stated above, is “to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters.” The cause of action is available to “a person” who has suffered loss or damage, whether in Canada or outside Canada, due to an act or omission that is, or, had it been committed in Canada, would have been, punishable as terrorism under Part II.I of the *Criminal Code*.\(^{1597}\) The cause of action is established retrospectively under the Act, in that the act or omission must have occurred on or before 1 January 1985.\(^{1598}\) Statutes do not usually create retrospective cause of action. The goal of the JVTA is presumably to enable victims of past terrorist activities, such as the Air India Flight 182 bombing that occurred in 23 June 1985 in which two hundred and sixty-eight Canadians were killed, and the Lockerbie bombing (Pan AM Flight 103) that occurred on 21 December 1988 in which three Canadians were killed, to bring claims before Canadian courts against the perpetrators and supporters of those terrorist acts. Realizing that under current law, many causes of action that arose within the applicable time line might have become statute-barred, the Act suspends the applicability of any pre-existing limitation period in respect of an action brought thereunder.\(^{1599}\) It states that the limitation period shall begin to run from the day the Act came into force – that is, on 13 March 2012 – when the Act received royal assent. Such limitation period shall also be suspended during any period in which the victim is incapable of initiating proceedings due to any physical, mental or psychological impairment or during any period in which such victim is unable to ascertain the identity of the defendants.\(^{1600}\)

The Act creates a list of potential defendants, which includes:

(a) any listed entity or foreign state whose immunity is lifted under section 6.1 of the

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\(^{1594}\) *JVTA, supra* note 164, Preamble.


\(^{1596}\) *JVTA, supra* note 164, Preamble.

\(^{1597}\) *Ibid* at s 4(1).

\(^{1598}\) *Ibid*.

\(^{1599}\) *Ibid* at 4(3).

\(^{1600}\) *Ibid*. 

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State Immunity Act, or other person that committed the act or omission that resulted in the loss or damage; or
(b) a foreign state whose immunity is lifted under section 6.1 of the State Immunity Act, or listed entity or other person that – for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) – committed an act or omission that is, or had it been committed in Canada would be, punishable under any of [the terrorism provisions] of the Criminal Code. 1601

“Listed entity” takes its meaning from subsection 83.01(1) of the Criminal Code; “person”, under the provision, is defined to include “organization” as defined under section 2 of the Criminal Code; and “foreign state” takes its meaning from section 2 of the State Immunity Act. 1602  A “listed entity”, under section 83.01 of the Criminal Code, means “a person, group, trust, partnership or fund or an unincorporated association or organization … on a list established by the Governor in Council under section 83.05 [of the Criminal Code].” With regard to the meaning of “person”, section 2 of the Criminal Code defines “organization” as: “(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons.” And section 35 of the Interpretation Act provides that “[i]n every enactment … person, or any word or expression descriptive of a person, includes a corporation.” The definition of “person” is clearly wide enough to encompass both natural and legal persons. It follows that a corporation can be sued under the Act if found to have committed any of the proscribed conduct under the JVTA. And it is not necessary that the corporation be listed as an “entity” under section 83.05 of the Criminal Code since “person” under section 4 of the JVTA is autonomous from “person” that is subsumed under the meaning of “listed entity” under the same section.

The Act does not confer jurisdiction on any particular court, but allows the plaintiff to bring his action “in any court of competent jurisdiction”. 1603 Thus, the plaintiff can bring the action in any forum in Canada, provided the court has jurisdiction over the subject matter and can make the kind of order sought by the plaintiff. Any court of general jurisdiction can adjudicate the claim, provided section 4(2), which provides that a Canadian court may assume

1601 Ibid.
1602 Ibid at s 2.
1603 Ibid at s 4(1).
jurisdiction “only if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident”, is satisfied. The Act does not define what amounts to “a real and substantial connection” nor does it associate its meaning to that found in any statute, such as the CJPTA. It will be presumed to have left that to be determined by the courts. In determining that, however, the enumerated connections under the CJPTA will be a good place to start. With regard to terrorist acts or omissions that occurred outside Canada, the easiest jurisdictional bases under the Act would be the victim’s Canadian citizenship and permanent residence since it will be a lot more difficult to establish a real and substantial connection between the action and Canada, unless, in the case of aircraft bombings, the aircraft is a Canadian aircraft.

It is noteworthy that the Act does not contain a forum non conveniens provision. The closest it goes – which actually is not a forum non conveniens provision – is contained in section 4(4) with regard to foreign states. It permits a court to refuse to hear a claim against a foreign state “if the loss or damage to the plaintiff occurred in the foreign state and the plaintiff has not given the foreign state a reasonable opportunity to submit the dispute to arbitration in accordance with accepted international rules of arbitration.” This provision may be described as a limited exhaustion of local remedies requirement. The question that arises is whether a Canadian court can decline jurisdiction for forum non conveniens in the absence of a clear statutory authorization where both the cause of action and the jurisdiction to adjudicate are creations of statute. Given the well-entrenched nature of the doctrine in Canadian law, it is submitted that explicit parliamentary language is required to preclude its application.

Finally, the Act enjoins Canadian courts to recognize a judgment of a foreign court that meets the standards for recognition and enforcement of foreign judgments in Canada. But this is only where the judgment is “in favour of a person who has suffered loss or damage” of the kind defined in section 4(1) of the Act. It places a restriction on judgments against foreign states. Such judgments shall be recognized only if the foreign state in question is among the listed states under section 6(1) of the SIA.1604

One potential objection to the JVTA is worth considering, and that is its constitutionality. Under section 92(13) of the Constitution Act 1876, rights to recover civil remedies for injuries suffered due to someone else’s tortious conduct are deemed matters of provincial jurisdiction.

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1604 Ibid at 4(5).
That provision gives to the provinces the power to regulate “property and civil rights in the province.” As Professor Hogg puts it: “The federal Parliament has no independent power to create civil remedies akin to its power over criminal law. This means that if the pith and substance of federal law is the creation of a new civil cause of action, the law will be invalid as coming within the provincial head of power ‘property and civil rights in the province’.”\textsuperscript{1605} However, the constitutionality of the Act may be viewed in light of the Supreme Court of Canada decision in \textit{General Motors of Canada Ltd v City of National Leasing}.\textsuperscript{1606} The issue was the constitutionality of the then existing \textit{Combines Investigation Act},\textsuperscript{1607} which established a private right of action under its section 31.1. Was it, in whole or in part, \textit{intra vires} or \textit{ultra vires} the Parliament of Canada under the trade and commerce provisions of section 91(12) of the \textit{Constitution Act} since the creation of civil rights of action lies with the provinces under section 92(13)? The purpose of the Act was to abolish conditions that discouraged competition in the market place. Section 31.1(1) thereof creates a civil right of action in favour of “[a]ny person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of the Act, (b) or the failure of any person to comply with an order of the [Restrictive Trade Practices] Commission or a court under the Act”. The Supreme Court held that though section 31.1 encroached upon provincial powers, the encroachment was not grave, was merely a remedial one, and had been well restricted by the statute itself. It held further that the section was part of an integrated economic regulatory scheme designed to remove various forms of economic conduct that was damaging to the Canadian economy. The court cautioned that the fact that the legislation was a regulatory scheme did not necessarily render the creation of civil rights \textit{intra vires} Parliament. To be constitutional, the court argued, the civil rights created must have a close relationship with that regulatory scheme. But they need not be “truly necessary” or “integral” to the scheme. The correct test is whether the creation of civil rights is “functionally related to the general objective of the legislation, and to the structure and content of the scheme.”\textsuperscript{1608}

It follows from the foregoing that whether the JVTA can pass a constitutional test depends on whether the provision of civil rights is functionally related to the overall scheme of the legislation. The overall scheme of the legislation is to combat terrorism. It can be argued that

\begin{footnotes}
\item[1606] [1989] 1 SCR 641 [\textit{General Motors}].
\item[1607] RSC 1970, c C-23.
\item[1608] \textit{General Motors}, supra note 1608.
\end{footnotes}
terrorism is of national concern and that the legislation is intended to protect Canada and Canadians. There is no question that the federal Parliament has jurisdiction to legislate over terrorism throughout Canada. The “peace, order and good government” jurisdiction of the federal Parliament can ground such exercise even in the absence of explicit constitutional grant, given the threat that terrorism poses to any country. Although the provision of a private right of action may not be “truly necessary” or “integral” to the realization of that goal, it is functionally related to it in that redress for victims of terrorism is a reasonable objective in the fight against terrorism. It serves to reinforce and complement the criminal sanctions provided under the Act. In addition, the scope of the civil right of action provided under the Act is well limited in that it does not usurp the jurisdictional rules operative in the provinces, but ties the action to the real and substantial connection test already applied in all the provinces, and to Canadian citizenship and permanent residence. This means that each province can entertain only those actions that have a real and substantial connection with its territory, or in which the plaintiff is a Canadian citizen or permanent resident. In the last two alternatives, it would appear that some connection between the plaintiff and the province, such as residence in the province, would be required.

On the whole, the JVTA is a viable mechanism for extraterritorial corporate crimes litigation. It permits civil suit by Canadians, Canadian permanent residents, and others who can establish a real and substantial connection between a terrorist act or omission and Canada, against listed foreign states, natural persons and legal persons (including corporations) for terrorist acts or omissions that occurred either in Canada or outside Canada. It is the closest equivalent to the US ATCA, one major difference being that it is narrower than ATCA in relation to the category of violations to which it applies. One advantage it has over ATCA is that because of the category of violations to which it applies, and the explicit definitions it contains regarding the category of plaintiffs and defendants to which it applies, it is not vulnerable to many of the attacks that have trailed the use of ATCA, such as whether corporations are subject to ATCA jurisdiction. And while it cannot be said that without the JVTA, victims of terrorist acts overseas cannot sue the actors in Canadian courts using already existing common law and statutory mechanisms of jurisdiction and tort law, the Act has put the matter clearer and beyond doubt. In fact, one of such suits was filed in 2008 before the Superior Court of Quebec by a group of Israeli-Canadians against the Lebanese Canadian Bank for injuries suffered in 2006 during the hostilities that occurred between Israel and Hezbollah, alleging that the bank provided
financing to Hezbollah.\textsuperscript{1609} The relevance of the statute, however, is limited by the definition of terrorism.

5.5 THE DOCTRINE OF \textit{FORUM NON CONVENIENS}

5.5.1 The Genesis

The genesis of the doctrine of \textit{forum non conveniens} is credited to seventeenth century Scotland, even though Scottish courts at that time did not use the term “\textit{forum non conveniens}”.\textsuperscript{1610} But Scottish courts did have authority to decline jurisdiction, “in the interest of justice”, to hear a matter it properly had jurisdiction to hear.\textsuperscript{1611} Early nineteenth century Scottish courts used the term “\textit{forum non competens}” to describe this declinatory authority which by then was “a settled rule of Scottish practice”.\textsuperscript{1612} When it emerged in the later part of the nineteenth century that the term \textit{forum non competens} inaccurately described the question litigated in the earlier cases that used it – the plain meaning of the term speaking to the court’s lack of competence or jurisdiction – “\textit{forum non conveniens}” was formulated to correct this injudiciousness.\textsuperscript{1613}

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\item[1613] Barrett, Jr, \textit{ibid} at n 35 points out that \textit{forum non competens} was sustained in a few early cases (such as in \textit{Vernor v Elvis} (1610) 6 Dict of Dec 4788) “where jurisdiction seemed clear but the parties were non-residents and trial in Scotland would have been inconvenient.” Later, it was sustained both where the court lacked jurisdiction and where it was not convenient for the due administration of justice to hear the case. For instance, in \textit{Longworth v Hope} (1865) 3 Sess Cas (3d ser) 1049 at 1053, the court stated that the plea of “forum non competens ... does not mean that the forum is one in which it is wholly incompetent to deal with the question. The plea has received a wide signification, and is frequently stated in reference to cases in which the court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum.” Robert Braucher, “The Inconvenient Federal Forum” (1946-1947) 60 Harv L Rev 909 points out that “[e]arly Scottish cases dealing with a plea of ‘forum non competens’ suggest that the question litigated was one of power or jurisdiction rather than discretion; but as early as 1845 it was recognized that the question was one ‘on the merits’ rather than one of jurisdiction, and the English words ‘inconvenient forum’ were used to point out the inaccuracy of the traditional Latin form.”
\end{footnotes}
At the core of the doctrine was the existence of a more suitable forum. In *Sim v Robinow*, \(^{1614}\) decided in 1892, the Scottish Court of Session held that “the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.” \(^{1615}\) In *La Société du Gaz de Paris v La Société Anonyme de Navigation “Les Armateurs Français”*, \(^{1616}\) the English House of Lords (sitting on an appeal from Scotland), penned the nature of the doctrine:

> [I]f in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court.\(^{1617}\)

The court noted that “the mere balance of convenience is not enough” \(^{1618}\) and that there had to be “a real unfairness” for the plea to succeed. \(^{1619}\) In a concurring opinion, Lord Sumner stated that the true purpose of the doctrine was not to find the most “convenient” forum, as the plaintiff would be inevitably inconvenienced whenever a *forum non conveniens* plea was granted. Rather, it was to “find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure the ends of justice.” \(^{1620}\) These opinions accord with the etymology of the Latin term “*conveniens*”, which means “appropriate”, or “suitable”; \(^{1621}\) they also suggest that there was at the time a popular misconception about the meaning of the term “*conveniens*”. Some leading decisions (mostly outside Scotland) have in fact expressed the doctrine as if “*conveniens*” translates to “convenient”. Lord Goff of the English House of Lords, for instance, spoke as if the term *forum*...
non conveniens, going by its Latin meaning, just like the former term forum non competens, still described the question inexacty: “I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction.” It might be that convenience of trial was seen as the means to the ends of justice. But whether justice treads the path of convenience is seriously debatable. As Brand and Jablonski have characterized it, the doctrine was “a balancing test applied to determine whether Scotland was the more appropriate forum.” At least conceptually, this leads us away from seeing “convenience” as the fulcrum of the doctrine, the difference between “appropriate forum” and “convenient forum” being significant.

The doctrine of forum non conveniens has dual nativity. While it was first used in Scotland, it sprouted in the US quite oblivious of Scottish law. The reasons for its emergence in the US are numerous and scholars have not always agreed on them. In the early 20th century when calendar congestion was the bane of the American Bar, Paxton Blair had recommended the use of the doctrine as a method of decongesting the courts. Summoning Justice Proskauer’s venerable comment that in order to decongest the courts, “[i]t will not suffice to fall back upon the panacea of more judges”, Blair argued that an effective method of dealing with the problem lay “in the wider dissemination” and “increased use” of the doctrine of forum non conveniens. In his review of American jurisprudence, he found that American courts had been

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1622 That was in Spiliada Maritime Corp v Cansulex Ltd (1987) 1 A.C. 460 at 474 (HL) [Spiliada].
1623 Supra note 1613 at 10 (citing La Société du Gaz de Paris, supra note 1618).
1624 “If the central purpose of the doctrine is to assure convenient litigation, then it seems right to conclude that the doctrine should have a limited role in modern times due to advances in technology that make litigation in virtually any forum in the world more convenient. However, if the meaning of the doctrine is to seek the most appropriate forum not the most convenient one, the doctrine still has a role to fulfill. In my view, this latter role is more compelling not only because it conforms with the original meaning of the term ‘conveniens’ but also because it equips us with a better tooled doctrine to confront the challenges of the modern age.” Karayanni, supra note 1623.
1625 Barrett, Jr, supra note 1614 at 387. See, however, Dicey, Morris & Collins, supra note 1623 at 465 (suggesting that the doctrine was developed in Scotland and was later adopted by the US with some modifications).
1627 Mr Justice Proskauer, “A New Professional Psychology as an Essential for Law Reform” (1928) 14 Am. Bar Ass’n J. 122.
1628 Supra note 1613 (noting that this proposal had the merit of being quick and easy in implementation, since new legislation was not needed to effectuate it. The only thing it required was an appeal to the inherent powers possessed by every court of justice for the effective performance of its judicial functions.). David W Robertson, “The Federal Doctrine of Forum Non Conveniens: ‘An Object Lesson in Uncontrolled Discretion’” (1994) 29:3 Tex Int’l LJ 380 [Robertson, “The Federal Doctrine of Forum Non Conveniens”] has, however, questioned the potential
applying the doctrine ignorantly for years\textsuperscript{1629} – that is to say, without giving the doctrine a name. The decisions include \textit{Howell v Chicago & NW Ry}\textsuperscript{1630} (a case requiring the supervision of the internal affairs of a mining foreign corporation), \textit{Ophir Silver Mining Co v Superior Ct}\textsuperscript{1631} (a case involving foreign mining law), \textit{Van Ommen v Hageman}\textsuperscript{1632} (a case involving real estate law), and numerous others.\textsuperscript{1633} The major reason for the courts’ declining jurisdiction in those cases was “the complexity of the governing foreign law”\textsuperscript{1634} – a ground, as will be seen later, that is still relevant today in \textit{forum non conveniens} analyses.\textsuperscript{1635}

Despite its age, it was in 1947 that the US Supreme Court expressly adopted the doctrine. That was in the landmark \textit{Gilbert}.\textsuperscript{1636} The case related to an allegation of tortious negligence that occurred in Virginia. The plaintiff was a Virginia resident while the defendant was a Pennsylvania corporation that was doing business in Virginia as well as in New York. The suit was filed in federal court in New York. The Southern District Court of New York dismissed the case for \textit{forum non conveniens}, holding that Virginia was the \textit{forum conveniens}. The Court of Appeals reversed. Restoring the decision of the District Court, the Supreme Court held that the doctrine of \textit{forum non conveniens} applied in America. This case was clearly a domestic \textit{forum non conveniens} case. With time, however, it came to be seen as authorizing the exercise of \textit{forum non conveniens} discretion also in transnational cases.\textsuperscript{1637}

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\item\textsuperscript{1629} Supra note 1628 at 21.
\item\textsuperscript{1630} 51 Barb 378 (1868).
\item\textsuperscript{1631} 147 Cal. 467, 82 Pac. 70 (1905).
\item\textsuperscript{1632} 100 NJL 224, 126 Atl. 468 (1924).
\item\textsuperscript{1633} See Blair, supra note 1628 at 22.
\item\textsuperscript{1634} Ibid.
\item\textsuperscript{1635} The first specific employment of the phrase in American jurisprudence seems to be in the 1917 opinion of Putman J in \textit{Bagdon v Phila & RC & I Co}, 178 App Div 662, 105 NY Supp 910 (2d Dept 1917). See Blair, supra note 1628 at 2, n 4. Brand, however, believes that the doctrine had manifested in the US as early as 1801 when a federal district court in Pennsylvania declined jurisdiction in favour of Denmark over a matter in which both parties were Danish. Brand, “Comparative Forum Non Conveniens”, supra note 1597 at 474 (citing \textit{Willendson v Forsoket}, 29 F Cas 1283 at 1284 (D. Pa. 1801) (No 17,682)). The declination was “based on notions of ‘justice and reciprocal policy,’ looking very much like the approach to forum non conveniens developing in Scotland at the time.” Blair, \textit{ibid}. The earliest cases were mostly in the field of admiralty, and in federal courts. Some early non-admiralty decisions in state courts also employed the doctrine. See, e.g., \textit{Gardener v Thomas}, 14 Johns. 134 (NY Sup Ct 1817); \textit{Collard v Beach}, 87 NYS 884 (App Div 1904). See Brand & Jablonski, supra note 1613 at 40-41 (noting that other courts thought that discretion to decline valid jurisdiction was barred by the Privileges and Immunities Clause, citing \textit{Corfield v Coryell}, 6 Fed Cas 546, 552 (ED Pa 1823)).
\item\textsuperscript{1636} \textit{Gilbert}, supra note 117.
\item\textsuperscript{1637} David W Robertson, “Forum Non Conveniens in America and England: A Rather Fantastic Fiction” (1987) 103 LQ Rev 400 [Robertson, “A Rather Fantastic Fiction”].
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Barely a year after *Gilbert*, Congress responded legislatively by enacting section 1404(a) of Title 28 of the US Code.\(^{1638}\) The provision states that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The effect of this provision is that when a federal court is convinced that a case before it is better tried elsewhere in the US, it will transfer the case, rather than dismiss on *forum non conveniens* grounds, to a federal court in that location. However, the doctrine “has continuing application [in federal courts] only in cases where the alternative forum is abroad,”\(^{1639}\) and, in rare cases, “where a state or territorial court serves litigational convenience best.”\(^{1640}\)

David Robertson has summarized the evolution of the doctrine in the US as a movement from an “abuse of process version” to “the most suitable forum” version:

\(^{1638}\) 28 USCA §1404(a) (1993). See Brand & Jablonski, *supra* note 1613 at 48–49. Robertson, “A Rather Fantastic Fiction”, *supra* note 1639 at 402, suggests that “it may have been the principal motive of the Gilbert court to prod Congress into passing the law.”


\(^{1640}\) *Sinochem International Co Ltd v Malaysia International Shipping Corp.*, 549 US 5 (2007) [*Sinochem*]. See also Robertson, “A Rather Fantastic Fiction” *supra* note 1639 at 402 (noting that the only exception is where the only appropriate place for trial is a distant state court, in which case the court may dismiss on *forum non conveniens* grounds; also noting that dismissal for *forum non conveniens* is inappropriate where the proper state forum is located in the same state with the federal court). It has been said that the US Supreme Court adopted the doctrine as a result of demands from “influential commentators”. These commentators include Joseph Dainow, “The Inappropriate Forum” (1935) 29 Ill L Rev 867; Roger S. Foster, “Place of Trial – Interstate Application of Intrastate Methods of Adjustment” (1931) 44 Harv L Rev 41; Blair, *supra* note 1628; and Robert Jackson, “Full Faith and Credit – The Lawyers’ Clause of the Constitution” (1945) 45 Colum L Rev 1. See Robertson, “A Rather Fantastic Fiction”, *supra* note 1639. It has also been suggested that the doctrine was introduced in order to balance the then newly expanded jurisdictional reach of the courts so as to enable the courts to decline a jurisdiction they properly possessed. William R Reynolds, “The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts” (1992) 70 Tex L Rev 1704. *Gilbert*, however, does not seem to explain the *raison d’tre* for the doctrine beyond referring perfunctorily to “misuse of venue” by plaintiffs. *Gilbert*, *supra* note 117 at 507. Some other scholars have suggested that the main concern was forum-shopping by personal injury plaintiffs’ lawyers who hunted for causes of action overseas for litigation in the US because of promises of liberal settlements or larger judgment sums in US courts. See for instance, Barrett, Jr., *supra* note 1614 at 382. In a later case, the US Supreme Court noted that the doctrine was “designed in part to help the courts avoid conducting complex exercises in comparative law” where the law of an alternative foreign jurisdiction would apply. *Piper*, *supra* note 117 at 247. In Karayanni’s view, however, these “explanations are unsatisfactory”. Karayanni, *supra* note 1623 at 109. He sees *forum non conveniens* as a progeny of legal realism that dominated conflict of laws theory in the first half of the 20th century. Realism sought to substitute rigid traditional notions of territoriality with functional standards that guaranteed just outcomes. It found the jurisdictional rule established in *Pennoyer v Neff* that “every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory” (95 US 714 at 722 (1877) (USSC)) too rigid to guarantee fair outcomes. As a substitute, it developed the minimum contacts doctrine embedded in the principle of “tag jurisdiction” that required only a tangential connection with the forum state. Under this principle, even an accidental presence of the defendant in the forum state that enabled opening summons to be served on her was sufficient for jurisdiction to be taken over such a defendant. This development overly expanded the jurisdictional reach of the courts and frequently caused jurisdictional unfairness to defendants. Therefore something needed to be done about it. “[F]orum non conveniens afforded the needed functionalism and has therefore become part of jurisdictional theory ever since.” Karayanni, *supra* note 1623 at 109-120.
Speaking very broadly, it can be said that for the first thirty years after Gilbert – until the mid-1970s – the lower courts applied the abuse of process version, generally refusing to dismiss forum non conveniens absent a showing that defendant would be “unfairly prejudiced” or “deprived of substantial justice” by being tried in the United States. Only a handful of reported decisions resulted in forum non conveniens dismissals, and these involved alien plaintiffs; the court insisted that a bona fide resident of the United States had a virtually indefeasible right to litigate at home.

... ... ...

But beginning in the mid-70s, the courts, without saying what they were doing, began ... shifting away from abuse of process thinking toward a most suitable forum approach. The shift showed up first in cases between alien parties. The courts began saying that jurisdiction should not be retained in such cases unless “a sufficient nexus exists between the controversy and the forum to obligate the court to expend the time and resources necessary to resolve the matter.”

While the use of the doctrine in the US has significantly influenced its development in Canada, Canada imported the doctrine directly from England. In England, it was always a relevant factor in the determination of whether ex juris service of originating processes should be granted.\(\text{\textsuperscript{1642}}\) Yet, “[a]s a practical matter forum non conveniens achieved general acceptance at an earlier time in Canada and the United States than in England where it was dismissed as a civil law principle of Scots law.”\(\text{\textsuperscript{1643}}\) Outside ex juris service situations, grant of stay in England was premised on an “oppressive or vexatious” doctrine. Stay was grantable only where the suit was so oppressive or vexatious to the defendant as to be regarded as unjust to continue the proceedings in the forum court.\(\text{\textsuperscript{1644}}\) In\(\text{\textsuperscript{1645}}\) The Atlantic Star, however, the House of Lords relaxed the application of the “oppressive or vexatious” doctrine, calling for a liberal interpretation of it, so that in deciding whether a stay should be granted, the court should take into account any advantage to the plaintiff and any disadvantage to the defendant the decision would cause. Four years later, in

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  \item \text{\textsuperscript{1641}} Robertson, “A Rather Fantastic Fiction”, \textit{supra} note 1639 at 403-404 (noting, at 400, that “[t]he evolution was not the product of conscious or careful thought on anyone’s part.”). See also David W. Robertson & Paula K Speck, “Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions” (1989-1990) 68 Tex L Rev 940 (“The early forum non conveniens doctrine was an abuse-of-process version that did not permit dismissal unless the plaintiff’s forum choice was so egregiously inappropriate as to appear motivated by a desire to vex and harass the defendant. In the mid- 1970s the doctrine began to evolve into the current most-suitable-forum version, under which the judge’s belief, for virtually any reason, that trial elsewhere would be more appropriate justifies a forum non conveniens dismissal.”).
  \item \text{\textsuperscript{1642}} Dicey, Morris & Collins, \textit{supra} note 1623 at 466.
  \item \text{\textsuperscript{1644}} \textit{St Pierre v South American Stores (Gath and Chaves) Ltd} [1936] 1 KB 382 (CA).
  \item \text{\textsuperscript{1645}} [1974] AC 436 [The Atlantic Star].
\end{itemize}
MacShannon v Rockware Glass Ltd, the House advanced the relaxation of the “oppressive or vexatious” doctrine and ordered a discontinuance of the use of the term “oppressive or vexations”. In the House’s view, for a stay to be warranted, the defendant must show that there was another forum, having jurisdiction and in which justice could be served at substantially less inconvenience or expense, and that the stay would not deprive the plaintiff a legitimate juridical advantage available to him in England. This was in substance an application of the forum non conveniens doctrine, but the House declined to incorporate it into English law. Six years, later, however, the House (through Lord Diplock, who also penned the MacShannon decision) decided in Abidin Daver to bury national pride by confessing that The Atlantic Star and MacShannon line of decisions indicated that “judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens.” Three years later, the deal was completely sealed when in Spiliada the House was more concerned with whether Lord Diplock’s formulation of the doctrine was right. The House felt that Lord Diplock gave too much prominence to the denial of legitimate juridical advantage to the plaintiff. It set forth the applicable principle as follows: “[A] stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”

The doctrine developed separately in common law Canada and in civil law Canada. In common law Canada, where it first developed, it was closely tied to the concept of service of process. This has been credited to the fact that “under traditional common law rules, jurisdiction was largely based upon control over the person of the defendant, and was achieved by way of

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1647 Ibid at 812.
1649 Spiliada, supra note 1624 at 476. The late adoption of the doctrine in England has been explained by sentiments such as the following contained in the Atlantic Star, supra note 1641 at 381-382 (per Lord Denning): “No one who comes to these courts asking for justice should come in vain. The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this ‘forum-shopping’ if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of service.” See CGJ Morse, “Not in the Public Interest? Lubbe v. Cape Plc” (2002) 37 Tex Int’l LJ 541 at 543 [Morse, “Not in the Public Interest?”].
personal service of a writ of summons.” The doctrine’s original development contained a distinction between actions commenced by service \textit{ex juris} and those commenced by service \textit{in juris}. The former were governed by \textit{forum non conveniens} while the latter were governed by “a test which centred on the tortured phrase ‘oppressive or vexatious’ as the appropriate standard.” This distinction resulted in a murky jurisprudence. With time, the “vexatious and oppressive” test was revisited and transformed in favour of the \textit{forum non conveniens} test. The “principles governing the grant of an anti-suit injunction were [also] tied to the test for the grant of a stay in a service \textit{in juris} situation.”

The jurisprudence was streamlined by the Supreme Court of Canada in 1993 in \textit{Amchem}. This was in the context of an anti-suit injunction. Multiple plaintiffs brought action in Texas for injury arising from exposure to asbestos. The exposure occurred in various jurisdictions, including Canada (and including British Columbia) and the US. The Texas defendants brought action in British Columbia for an anti-suit injunction against the Texas plaintiffs. Some of the Texas plaintiffs successfully brought an anti-anti-suit injunction in Texas against the Texas defendants prohibiting the seeking of anti-suit injunctions in British Columbia. Both the British Columbia Supreme Court and Court of Appeal granted the anti-suit injunction against the Texas plaintiffs. The question before the Supreme Court of Canada was, on what principles should a court exercise its discretion to grant an anti-suit injunction? Reversing the decision of the Court of Appeal, the Supreme Court held that a court should issue an anti-suit

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1650 Jeffrey Talpis & Shelley L Kath, “The Exceptional as the Commonplace in Quebec \textit{Forum Non Conveniens} Law: Cambior, a Case in Point” (2000) 34 RJT ns 778 (noting that today the service rules have expanded to include alternatives to personal service, as well as special rules for service \textit{ex juris}).

1651 \textit{Ibid}. An early Canadian Supreme Court case where the doctrine was urged recognized a distinction between service \textit{ex juris} and service \textit{in juris} situations: \textit{Antares Shipping v. The Ship “Capricon”} [1977] 2 S.C.R. 422 at 450-451. However, the court did not consider service \textit{ex juris} an important factor in analyzing the test. Its discussion of the doctrine was rather scant.

1652 Talpis & Kath, \textit{supra} note 1652.


1654 McEvoy, “International Litigation”, \textit{supra} note 1645.

1655 \textit{Ibid}.

1656 \textit{Supra} note 178. Writing shortly before \textit{Amchem}, Hayes noted that before \textit{Amchem}, the application of the doctrine of \textit{forum non conveniens} in Canada was in disarray, and that Canadian courts had generally looked to English authorities when considering the doctrine, albeit with inconsistent approach. Hayes, “\textit{Forum Non Conveniens}” \textit{supra} note 1655.
injunction only where the foreign court cannot be considered *forum conveniens*, the most appropriate or the natural forum for the action.\(^{1657}\)

Justice Sopinka, who wrote the Supreme Court’s unanimous decision, explained the rationale for controlling the choice of forum by parties through the doctrine of *forum non conveniens*:

\[\text{[T]he business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to ... pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. In some jurisdictions, novel principles requiring joinder of all who have participated in a field of commercial activity have been developed for determining how liability should be apportioned among defendants. In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p. 913, that "[t]he substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate.}\(^{1658}\)

He stated that in order to discourage forum-shopping, to which the existence of multiple jurisdictions may lead:

\[\text{[t]he choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.}\(^{1659}\)

\(^{1657}\) *Amchem*, *supra* note 178 at para 53 (noting that where it appears from the decision of the foreign court that it acted on principles similar to those that obtain in Canada, or, even where it does not so appear, the result of the principles adopted by the foreign court is consistent with Canadian principles, a Canadian court should not issue an anti-suit injunction. “If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or ‘would-be’ litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.” *Ibid* at para 56).

\(^{1658}\) *Amchem, ibid* at para 20.

\(^{1659}\) *Ibid* at para. 21.
He acknowledged that *forum non conveniens* in common law Canada evolved from English law. While he “did not adopt the English formulations of the principles governing [the doctrine] and anti-suit injunctions ..., [he] did confirm the existence in Canada of reasonable facsimiles.” After reviewing the historical development of the doctrine in England – from the “oppressive and vexatious” edition to the more liberal “appropriate forum” edition – up to its then most seminal exposition by the House of Lords in *Spiliada*, Sopinka J concluded that “the law in common law jurisdictions is... remarkably uniform. While there are differences in the language used, each jurisdiction applies principles designed to identify the most appropriate or appropriate forum for the litigation based on factors which connect the litigation and the parties to the competing forums.” He collapsed the distinction between service *ex juris* and service *in juris* situations and stated the rationale for doing so:

> It seems to me that whether it is a case for service out of the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors. If the defendant resides out of the jurisdiction this is a factor whether or not service is effected out of the jurisdiction. Residence outside of the jurisdiction ... may be artificial. It may have been arranged for tax or other reasons notwithstanding the defendant has a real and substantial connection with this country. The special treatment which the English courts have accorded to ex juris cases appears to be based on the dictates of Ord. 11 of the English rules which imposes a heavy burden on the plaintiff to justify the assertion of jurisdiction over a foreigner. In most provinces in Canada, leave to serve ex juris is no longer required except in special circumstances and this trend is one that is likely to spread to other provinces.

The modern law of *forum non conveniens* in Canada considerably conflates the criteria for declining jurisdiction for *forum non conveniens* and those for assuming jurisdiction *simpliciter* based on the real and substantial connection test. The difference in the application of the factors in the two situations is that whereas in a *forum non conveniens* situation the it is comparative, to determine jurisdiction *simpliciter* it is non-comparative. Hence in *Amchem*, Sopinka J noted that the “so-called ‘natural forum’ is the one with which the action has the most real and

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1661 Blom & Edinger, *supra* note 1217 at 383.
1662 *Amchem, supra* note 178 at para. 34.
1663 *Ibid* at para 33.
substantial connection”1665 The determination of the appropriate forum “is [therefore] to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties.”1666

5.5.2  Forum Non Conveniens in Quebec

Until the new Civil Code of Quebec came into force in 1994, forum non conveniens was generally regarded as inapplicable in Quebec Canada. The rules governing jurisdiction in Quebec were derived from the Quebec Code of Civil Procedure, generally interpreted as excluding any discretion in the exercise of jurisdiction.1667 However, Article 3135 of the new Civil Code provides that “[e]ven though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.” Sylvette Guillemard et al have distilled four essential elements from this provision: (1) There must exist a Quebec court that is competent to hear the case. (2) The case must be exceptional. (3) The doctrine is invoked only at the instance of one of the parties – of course the defendant. (4) For the plea to succeed, the foreign court must be better situated to decide the case.1668 Also, in Lamborghini (Canada) Inc v Automobili Lamborghini SPA,1669 a Quebec court described the nature of Article 3135 as follows:

[T]he mechanism established in article 3135 ... does not specifically set out immutable or limiting factors, but allows the court to consider the circumstances. If it concludes that the defendant has clearly established that the circumstances of the case as a whole allow the court to find that a foreign court or a court in another province is a more appropriate forum, the court may stay the proceeding in Quebec by deciding that it must instead be commenced or continued outside the territorial jurisdiction of the Quebec courts. The application of article 3135 C.C.Q. presupposes that the defendant has been properly brought before the Quebec forum. Once that has been done, the article gives the defendant an opportunity to avoid this “natural” jurisdiction, established in accordance with the legal connecting factors, by

1665  Amchem, supra note 178 at para 108.
1666  Ibid at 104.
requesting that the case be referred to a foreign court, if the defendant can show that that court is the most appropriate. However, the application of the article does not permit the creation of a jurisdiction that would not otherwise exist, but instead creates selective restrictions on the jurisdiction resulting from the application of the connecting factors recognized by the law.1670

The doctrine under Quebec law is thus somewhat more explicit than under the common law.1671 In Spar Aerospace, the Supreme Court of Canada emphasized the exceptional nature of the doctrine in Quebec.1672 However, Talpis and Kath have observed that since the coming into force of the Code in 1994, the doctrine “has been invoked with great frequency ... [and] has now penetrated every [nook and cranny of] discretionary power in the exercise of jurisdiction in Quebec.”1673 They lament that in spite of the explicit legislative intendment that the doctrine be used “exceptionally”, “far more cases are dismissed on the basis of the doctrine than one would expect.”1674 This has been blamed on the influence of Amchem on Quebec courts and to the fact that Quebec courts have often looked to courts in other provinces in their interpretation of the doctrine.1675 The doctrine thus plays a more significant role in deciding the appropriateness of Quebec asserting jurisdiction “than it should in international and interprovincial cases.”1676

It is noteworthy that Amchem did not contain the constitutional undercurrents contained in Morguard. No subsequent decision has constitutionalized forum non conveniens. But Amchem did make copious references to Morguard. For instance, it noted that the principles should be applied having regard to Canadian approach to private international law exemplified in Morguard where “La Forest J. stressed the role of comity and the need to adjust its content in light of the changing world order.”1677 It may thus be said that the Amchem requirements for forum non conveniens determinations are not constitutionally mandated; each province remains free to enact provincial legislation spelling out the factors to be considered in a forum non conveniens inquiry.

1670 Ibid at 67-68.
1671 Saumier, “Forum Non Conveniens”, supra note 1669 at 129.
1672 Spar Aerospace, supra note 1546 at paras 65-82.
1674 Ibid (citing, at 796, a 1995 study that found that by December 1999, 27 out of 77 cases had been stayed on the basis of the doctrine). See also Saumier, “Forum Non Conveniens”, supra note 1669 where she notes that since the Quebec Civil Code entered into force, courts “have faced a variety of cases whose resolution has one way or another involved the application of the doctrine”.
1675 Saumier, “Forum Non Conveniens”, ibid at 130.
1676 Guillemand et al, supra note 1670 at 797.
1677 Amchem, supra note 178 at 930.
5.5.3 Relationship Between *Forum Non Conveniens* and Jurisdiction *Simpliciter*

Jurisdiction is a legal rule. *Forum non conveniens* is a purely discretionary tool.\(^{1678}\) A decision given in the absence of jurisdiction is a complete nullity incurable by consent or agreement of the parties even if the agreement was approved by the trial judge. Jurisdiction is so fundamental that it can be raised for the first time even at the Supreme Court and the court can raise the issue *proprio motu*. A decision given in an “inconvenient forum” – as American scholars would call it – however, is not by that very fact a nullity. If the defendant fails to raise the plea of *forum non conveniens*, the case will proceed to the end. The decision to raise the plea rests with the defendant, not with the court.\(^{1679}\) An appellate discovery that the trial court was *forum non conveniens* cannot therefore render the trial judgment a nullity where the defendant failed to raise the plea at the trial court. It goes without saying that it cannot be raised for the first time on appeal.

The factors for determining jurisdiction *simpliciter* are “different and distinct” from those applied in determining *forum non conveniens*.\(^{1680}\) Even where the factors interpenetrate, the factors for determining jurisdiction *simpliciter* are applied non-comparatively. The court is not looking for the forum with greater real and substantial connection. At this stage, it must pretend to know of no other forum vying jurisdictional supremacy with it. The only question is: “Is there a real and substantial connection with this forum?” By contrast, the *forum non conveniens* factors are applied comparatively.\(^{1681}\) The judge’s task is to weigh the totality of the connections with

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\(^{1678}\) *Muscutt*, *supra* note 1209 at paras 42-43:
While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant.

\(^{1679}\) *Van Breda* (SCC), *supra* note 1274 at para 102.

\(^{1680}\) *Van Breda* (ONCA), *supra* note 1399 at 109.

\(^{1681}\) *Saumier*, “*Forum Non Conveniens*” *supra* note 1669 at 131.
one forum against the other.\textsuperscript{1682} The court in \textit{Van Breda} emphasized the need to keep the waters of jurisdiction \textit{simpliciter} and \textit{forum non conveniens} separate.\textsuperscript{1683}

A defendant challenging the jurisdiction \textit{simpliciter} of a court can argue in the alternative that even if the court has jurisdiction, it should decline to exercise it on the basis of \textit{forum non conveniens}. Methodologically, although the Supreme Court of Canada has yet to decide on the issue, Canadian courts generally adopt a two-step jurisdictional inquiry. A Canadian court first determines whether it has jurisdiction \textit{simpliciter} based on the real and substantial connection test. Not until it has determined this does it proceed to the second question of whether the alternative forum suggested by the defendant is the more appropriate forum.\textsuperscript{1684} This is particularly so in Quebec where the Civil Code explicitly requires that the forum court seised of the matter be competent to begin with. Definitely, a \textit{forum non conveniens} analysis presupposes the existence of jurisdiction \textit{simpliciter} in both forums. Otherwise, it would be improper for the forum court to consider declining jurisdiction in favour of the other forum.

The Canadian approach may be interestingly contrasted with what obtains in the US. US conflicts rules permit a one-fell-swoop approach. Although the general trend is to determine jurisdiction \textit{simpliciter} first, a court can, exceptionally, sidestep the jurisdiction \textit{simpliciter} inquiry to attend to a \textit{forum non conveniens} motion. In \textit{Sinochem}, the question was whether a district court must first definitively determine its own jurisdiction before dismissing a suit for \textit{forum non conveniens}. Sinochem was a Chinese corporation. It had agreed to purchase steel coils from Triorient (an American corporation), a non-party to the proceedings. Payment for the steel coils was to be made by a letter of credit and the Triorient was to generate a valid bill of lading certifying that the steel coils had been loaded for shipment to China on or before 30 April 2003.

\begin{itemize}
\item \textsuperscript{1682} Blom \& Edinger, \textit{supra} note 1217 at 375 (pointing out that “exactly how the connections are to be weighed against each other is left undefined”).
\item \textsuperscript{1683} \textit{Van Breda} (ONCA), \textit{supra} note 1399 at para 109.
\item \textsuperscript{1684} Sharpe JA stated in \textit{Van Breda} that “[t]he \textit{forum non conveniens} factors have no bearing on real and substantial connection and, therefore, should only be considered after it has been determined that there is a real and substantial connection and that jurisdiction \textit{simpliciter} has been established.” \textit{Van Breda} (ONCA), \textit{supra} note 1399 at para 109. See also \textit{Westec Aerospace Inc v Raytheon Aircraft Co.} [1998] 84 ACWS (3d) 479 (BCSC), \textit{Big Sky Farms Inc v Agway Metals Inc} [2008] 165 ACWS (3d) 639 (SKQB), \textit{Commonwealth Insurance Co v American Home Assurance Co} [2008] 11 WWR 690 (MBQB), \textit{Norex Petroleum Ltd. v Chubb Insurance Co of Canada} [2008] 12 WWR 322 (ABQB), \textit{JS v RW} [2008] 95 Alta LR (4th) 47 (ABQB), \textit{1092072 Ontario Inc. (c.o.b. Elfe Juvenile Products) v GCan Insurance Co} [2008] 67 CCLI (4th) 230 (OSCI), \textit{Foote Estate} [2007] 84 Alta L.R. (4th) 114 (ABQB), \textit{Apoplex Inc v Sanofi-Aventis} [2008] 54 CPC (6th) 182 (OSCI), \textit{Research in Motion Ltd v Visto Corp} [2008] 93 OR (3d) 593 (OSCI), \textit{England v Research Capital Corp} [2008] 166 ACWS (3d) 254 (BSCS), and \textit{582556 Alberta Inc v Canadian Royalties Inc} [2008] 164 ACWS (3d) 246 (Ont CA). See Brand \& Jablonski, \textit{supra} note 1613 at 113 (pointing out that “Canadian common law courts often blend the initial jurisdictional inquiry, blurring the distinction between jurisdiction as of right and the concept of \textit{forum non conveniens.”}).
\end{itemize}
Triorient sub-chartered Malaysia International (a Malaysian company) – the respondent in the proceedings – to transport the steel coils, and hired a stevedoring company to load the coils in Philadelphia. A bill of lading dated 30 April 2003 called for payment under the letter of credit. Sinochem petitioned a Chinese admiralty court for preservation of a maritime claim against Malaysia International and for arrest of the ship on the grounds that Malaysia International had fraudulently backdated the bill of lading. The Chinese admiralty court order the arrest of the ship and Sinochem followed with a substantive complaint before the Chinese court. Malaysia International objected to the jurisdiction of the Chinese court over Sinochem’s complaint, and objection that was rejected. Meanwhile, shortly after the Chinese court make the preservation order, Malaysia International brought the current proceedings in the Eastern District Court in Pennsylvania alleging that Sinochem’s petition for preservation order contained material misrepresentations and seeking damages for losses incurred owing to the arrest of the ship. Sinochem sought to dismiss the suit on grounds of subject matter and personal jurisdiction and, alternatively, for forum non conveniens. The District Court held that it had subject matter jurisdiction but prima facie lacked personal jurisdiction over Sinochem under Pennsylvania’s long-arm statute. Instead of determining whether personal jurisdiction could be established after discovery under the Federal Rule of Civil Procedure, it “conjectured” that limited discovery might reveal the existence of personal jurisdiction over Sinochem. But it did not permit such discovery because it felt that China was a more appropriate forum anyway and so dismissed for forum non conveniens in favour of Chinese courts. The Third Circuit Court of Appeals reversed the forum non conveniens dismissal (Judge Stapleton dissenting\textsuperscript{1685}), holding that the District Court could not dismiss on forum non conveniens grounds unless it first determined conclusively that it had both subject matter and personal jurisdiction. The Supreme Court disagreed with the Court of Appeals. Speaking for a unanimous court, Justice Ginsburg stated: “A district court ... may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.”\textsuperscript{1686} The basis for this ruling is that forum non conveniens is a “nonmerits

\textsuperscript{1685} Holding that requiring discovery on a jurisdictional question when the court “rightly regards [the forum] as inappropriate subverts a primary purpose of” the doctrine of forum non conveniens, namely, “protecting the defendant from ... substantial and unnecessary effort and expense.” 436 F 3d 368 (CA 2006).

\textsuperscript{1686} Sinochem, supra note 1642 at 8.
threshold question”, for the “critical point” is that the inquiry “does not entail any assumption by
the court of substantive ‘law-declaring power.’”\footnote{1687}

On its face, \textit{Sinochem} flies in the face of the Supreme Court’s previous opinion in \textit{Gilbert}
where the court stated that “the doctrine of forum non conveniens can never apply if there is
absence of jurisdiction,”\footnote{1688} and that “[i]n all cases in which . . . forum non conveniens comes
into play, it presupposes at least two forums in which the defendant is amenable to process.”\footnote{1689}
Intriguingly, the court in \textit{Sinochem} found “no hindrance” in these \textit{Gilbert} opinions\footnote{1690} which it
said were “perhaps less than ‘felicitously’ crafted”.\footnote{1691} It noted that \textit{Gilbert} did not deny the
authority of the court “to presume, rather than dispositively decide, the propriety of the forum in
which the plaintiff filed suit.”\footnote{1692} Ginsburg J held that where due to the nature of the case, the
jurisdictional inquiry would be an easy task for the court, the proper course would be to dismiss
on that ground. But where, due to the nature of the case, jurisdiction would be difficult to
determine (as where discovery is required), “and forum non conveniens considerations weigh
heavily in favor of dismissal, the court properly takes the less burdensome course.”\footnote{1693}

Granted that the question in \textit{Gilbert} was not whether a court must first determine
jurisdiction \textit{simpliciter} before conducting a forum non conveniens inquiry, it is difficult to
reconcile \textit{Sinochem} with the clear statement in \textit{Gilbert} that “the doctrine of forum non conveniens can never apply if there is absence of jurisdiction.” Yet, while the Canadian approach
makes easy and logical sense – for the court ought first to satisfy itself that it has legal authority
to adjudicate the dispute before considering other possible competent jurisdictions – it seems a
little too formalistic. It is true that considering whether the other forum is more appropriate
unavoidably entails first being satisfied that that forum has jurisdiction, and it seems quite
reasonable for the court to take the trouble to first positively establish its own jurisdiction before
looking at the court of another forum. Moreover, since forum non conveniens entails the
declination of an existent jurisdiction, the court ought not to purport to decline a jurisdiction it is
not certain that it possesses. Still, there could be cases where the inappropriateness of the forum
court would be palpable and unmistakable on its face. Provided there is another forum with

\begin{footnotes}
\item 1687 \textit{Ibid} at 9.
\item 1688 \textit{Gilbert, supra} note 117 at 504.
\item 1689 \textit{Ibid} at 506-507.
\item 1690 \textit{Sinochem, supra} note 1642 at 11.
\item 1691 \textit{Ibid} at 10.
\item 1692 \textit{Ibid} at 10-11.
\item 1693 \textit{Ibid} at 12.
\end{footnotes}
which the case is, on its face, palpably and unmistakably connected, it serves no purpose to engage in a jurisdictional inquiry before invoking the *forum non conveniens* doctrine, especially where the jurisdictional inquiry would involve extensive and time-consuming discovery investigations.

*Sinochem* may be better read very narrowly in order to be less undesirable. And it seems that in practice, lower courts in the US do not bypass the jurisdictional question as a matter of course. Canada’s approach of dealing with the primary jurisdictional question first may be rationalized by the fact that a successful *forum non conveniens* motion results in a stay of proceedings, meaning that plaintiff can resuscitate the Canadian proceedings if the foreign court declines jurisdiction without having to file a fresh suit. But a successful *forum non conveniens* motion in the US results in dismissal of the suit. The *Sinochem* court might thus have reasoned that there was no need wasting judicial time and resources conducting extensive discoveries for the purpose of determining jurisdiction where the case would ultimately be dismissed anyway.

Lastly, as jurisdictional and *forum non conveniens* determinations are non-merits based, judges are not to take an aggressive approach to fact-finding. Wherever possible, they are not to make findings of fact about fundamental issues – factual or legal – in the case – that is, issues that should be resolved at trial.\(^{1694}\)

5.5.4 Analysis of the Doctrine

Following *Amchem*, the law on *forum non conveniens* may be summarized as follows. (1) A foreign forum must be available. (2) That forum must be a “clearly more appropriate” forum for securing the ends of justice in the case must exist. (3) In determining the appropriateness of that forum, the court considers all relevant factors, which might vary according to the context, including: the location of parties and witnesses, the cost of sending the case to another jurisdiction, the impact of a transfer on the conduct of the litigation or even of related or parallel proceedings, the possibility of having conflicting judgments, difficulties associated with the recognition and enforcement of judgments, the comparative strengths of the connections of the two parties to the contending forums, and the juridical advantage adjudicating the case in any

\(^{1694}\) *Young v Tyco International of Canada Ltd*, (2008) 92 OR (3d) 161 at para 31 (ONCA).
Section 11 of the CJPTA, which purports to codify the doctrine, similarly provides that the court “must consider the circumstances relevant to the proceedings”, including:

(a) the comparative convenience and expense for the parties to the proceedings and for their witnesses, in litigating in the court or in any alternative forum;
(b) the applicable law;
(c) the desirability of avoiding multiplicity of proceedings
(d) the desirability of avoiding conflicting decisions in the different jurisdictions;
(e) the enforcement of a resulting judgment; and
(f) the fair and efficient working of the Canadian legal system.

By contrast, Article 3135 of the Quebec Civil offers no list of factors, but simply requires that the doctrine be applied “exceptionally”. Nevertheless, the inquiry is about a balancing of multifarious factors aimed at determining the relative connection between the dispute and the competing forums. A comment attached to section 11(2) makes it clear that the listed factors would apply without distinction as to whether the defendant was served in juris or ex juris. This

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1696 CJPTA, supra note 1277, s 11(2).
1697 By way of comparison, US courts conduct a “dual-focus balancing test” that examines a variety of “private and public interest” factors to determine the clearly more appropriate forum. The private interest factors look to the interests of both plaintiff and defendant:

- [1.] the relative ease of access to the sources of proof;
- [2.] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witness;
- [3.] possibility of view of premises if view would be appropriate to the action; and
- [4.] that make trial of a case easy, expeditious and expensive.

The public interest factors include:

- [1. the] administrative burden of crowded dockets;
- [2.] the public interest in having local controversies decided at home;
- [3. the] public interest in having the trial of diversity case in a forum familiar with the applicable law;
- [4.] difficulties in the application of a forum law;
- [5.] avoiding undue forum shopping;
- [6.] unfair burden on citizens of an unrelated forum of jury and tax duties.

See Gilbert, supra note 117 at 508-509. See also James P George, “Parallel Litigation” (1999) 51:4 Baylor L Rev 943 [George, “Parallel Litigation”]. Thus, in determining the appropriateness of the foreign forum, US forum non conveniens analysis explicitly includes private and public interest factors. These factors, in their totality, seem to demonstrate a concern for judicial economy. Donald J Carney, “Forum Non Conveniens in the United States and Canada” (1996) 3 Buff J Int’l L at 121. In Canada, however, except the onus factor, the factors enumerated in Muscutt all seem to be private interest factors. The factors seem to speak to a “party-neutral approach” as a broad theme in ascertainment of the more appropriate forum. Carney, ibid. Brand & Jablonski have suggested that the inclusion of public interest factors (especially those relating to administrative convenience) by the US Supreme Court may stem in part from the history of docket congestion in the US, and that there absence from Canadian analysis may be because docket congestion does not seem to be as great an issue in Canadian courts as it is in the US. Brand & Jablonski, supra note 1613 at 113-114.
approach is consistent with Amchem, to which the drafters of the Act expressly referred in the comment.

5.5.4.1 Availability of a Foreign Forum: When is a Foreign Forum Available?

Availability of a foreign forum relates primarily to the presence of jurisdiction in the foreign court. Unless the foreign forum said to be more appropriate has jurisdictional competence, forum non conveniens cannot operate. The defendant who claims that there is a foreign forum more appropriate for the trial must therefore show that the foreign forum has jurisdiction to try the case. This means that it is enough to show that the forum court is not the natural forum. Even if it is not the natural forum, there must be another forum – natural or not – that is clearly more appropriate for the litigation. In Amchem, the Supreme Court of Canada held that “[t]he test for forum non conveniens is there must be some other forum ... for the pursuit of the action”. The existence of a more appropriate forum must be “clearly established” in order to displace the forum chosen by the plaintiff. Similarly, the US Supreme Court has held that an alternative forum would “ordinarily” exist if the defendant is “amenable to process” there. A court “cannot justify dismiss[al] ... when it is uncertain whether plaintiffs have an alternative forum.” English rules similarly require that the existence of another forum that is clearly more appropriate than the English forum be first established. In Lubbe the House of Lords stated that a foreign forum would be considered available if at the time of application for stay, it would be open to the plaintiff to initiate the proceedings there. How this availability comes about is of no consequence. Even if

1698 Castel, Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997) at 251 [Castel, Canadian Conflict of Laws].
1699 Amchem, supra note 178 at para 33.
1700 Piper, supra note 117 at 254 n 22.
1701 Gassner v Stotler & Co, 671 F Supp 1187, 1190 (ND Ill 1987). A seeming exception was made in the case of Islamic Republic of Iran v Pahlavi, 467 NE 2d 245 (NY 1984). The Iranian government sued the former Shah or Iran in New York state court to recover property the Shah had transferred out of Iran when he was in power. The Shah moved to dismiss on forum non conveniens grounds in favour of Iran. The Shah had no intention of being party to any proceedings in Iran. The Court of Appeals sitting in New York concluded that the suit should be dismissed on forum non conveniens notwithstanding the unavailability of an alternative forum in the circumstances. The court appeared to have been influenced by the fact that the unavailability of Iran as an alternative forum was caused largely by the actions of the Iranian government that was the plaintiff in the suit.
1703 Supra note 353 (overruling the English Court of Appeal on the point).
but for the defendant’s voluntary submission to the jurisdiction of the foreign court, or his/her voluntary undertaking to do so, the foreign forum would not have been available, this does not count. In English law as well, and arguably in Canada too, practical difficulties in the initiation of the proceedings in the foreign forum, though relevant to a *forum non conveniens* decision, are not treated as issues of availability. What, therefore, is required is that an alternative forum exists in the legal sense.

Is an alternative forum available where the action has become statute-barred in that alternative forum? In *Josephson*, Madam Justice Loo recognized, without adequate explanation, that a statute of limitation in Idaho rendered the Idaho forum unavailable. Most other Canadian cases have treated the issue as one juridical advantage.

If there must be some other forum for the pursuit of the action, it cannot be rightly said that there is an alternative forum where action is statute-barred unless the defendant is prepared to waive the limitation period and the alternative forum permits a waiver. For a forum to be an alternative forum, it must be capable of going into the merits of the case. After all, the purpose of the *forum non conveniens* doctrine is to let the forum better suited to try the case on its merits do so. Where the defendant is vulnerable to suit in two or more forums and action in all but one is statute-barred, there is no justifiable reason to deny the plaintiff a hearing in the one remaining forum. The question should be, is there an alternative forum *now*? Not, was there an alternative forum when the cause of action arose? In fact, within the EU system, although the application of *forum non conveniens* is prohibited under Brussels I Regulation, in those situations where Brussels I Regulation does not apply, a plaintiff may invoke the access to justice provisions of Article 6(1) of the ECHR to prevent a stay where the action is statute-barred in the foreign forum. It is submitted that unless it can be shown that the plaintiff consciously waited for the action to become statute-barred in the more appropriate forum in order to take advantage of the more favourable law in the less appropriate forum, he should be allowed to proceed in the one remaining forum. This should be contrasted with what is argued under necessity jurisdiction, that limitation statutes should be respected. The difference between the two situations is that under necessity jurisdiction, the forum court has no jurisdiction at all (except by necessity) whereas in the present situation the forum court has jurisdiction.

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1705 Ibid at 477-478 (citing Connelly, supra note 353).
1706 *Josephson*, supra note 1518 at para 91.
That said, the hearing of the plaintiff’s claim might still be defeated in the determination of applicable law. But this would depend on the characterization of statutes of limitation. In Tolofson, the Canadian Supreme Court characterized choice of law as a substantive issue. This means that a Canadian court would apply the foreign forum’s statute of limitation to dismiss the plaintiff’s action. In countries where choice of law is characterized as procedural, however, the domestic forum would apply its own statute of limitation to justify the hearing of the action. As is argued later under choice of law, where an overriding universal norm is implicated, even such a statute of limitation may be ignored, particularly if it is too short in light of the overall circumstances of the violation and the plaintiff’s ability to institute the action within the prescribed period.

5.5.4.2 Loss of Juridical Advantage

It may be an issue of availability, Pascal Grolimund has argued, if the remedy provided by the domestic court is lacking in the foreign court (as where the action would be time-barred), “or if the principles of fair trial are not guaranteed abroad.” However, this is not how it has been treated by Canadian courts. The issue of the existence of remedies is addressed quite distinctly from the issue of whether there is an alternative forum.

In Canada, an alternative forum is available even though that forum does not provide the same range of remedies that are available in the domestic forum. In other words, that the plaintiff would lose a legitimate juridical advantage available to her in the domestic forum if he were forced to litigate in the foreign forum does not compel the exercise of jurisdiction by the domestic court. In Amchem, the Canadian Supreme Court noted that the determination of the appropriate forum is to be based on factors that ensure that the case is tried in the forum with the closest connection with the dispute “and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.” In addition, that the plaintiff chose to bring his suit in a jurisdiction that would give him a legitimate, even if

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1707 Paschal Grolimund, “Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of Forum Non Conveniens and Forum Conveniens” (2002) 4:1 Eur JL Reform 106. However, Waples has argued that a distinction should be drawn between the availability of a foreign forum that is inadequate and a remedy that is inadequate. She argues that the merger of inadequate forum and inadequate remedy “implie[s] that an inadequate remedy could make the forum itself inadequate.” Waples, supra note 1704 at 1483.

1708 Supra note 178 at 912 (italics mine). Carney’s assertion that “with few exceptions, disfavorable law in the alternate forum can be dispositive of [a Canadian] court’s decision [to stay a suit for forum non conveniens], ensuring its retention in the Canadian forum” is seriously questionable. Carney, supra note 1699 at 135.
disproportionate, advantage over the defendant is not a basis for stay provided the chosen forum is forum conveniens.\textsuperscript{1709} Whether juridical advantage would be a matter of importance depends very much on the connection between the parties and the jurisdiction in question. In Sopinka J’s words, “a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.”\textsuperscript{1710} In one case, the plaintiff argued that a forum non conveniens motion should be dismissed because he enjoyed a juridical advantage in Quebec and that the fact that Quebec was the defendant’s domicile provided sufficient connection with Quebec to make it reasonable for him not to be deprived of those advantages through the grant of stay. The court held that the substantiality of the connection with each forum should be measured in a “pragmatic and functional manner”. It found that except for the fact that the defendant was domiciled in Quebec, all the other connecting factors pointed to Ontario. It held that the plaintiff’s claim to juridical advantage was illegitimate.\textsuperscript{1711}

The issue of juridical advantage draws attention to the elements of the foreign legal system, procedural and substantive, in terms of the advantages they confer on the parties. In tort actions, however, the substantive elements of the foreign law are of no relevance within the Canadian federation since the applicable law in tort is the law of the place the tort took place, irrespective of which province adjudicates the action. However, they retain their relevance in international cases since the conflicts rules of those countries will apply if the case is adjudicated there.

Canadian courts have treated the issue of statute-bar as an issue of juridical advantage. In Hurst v Société Nationale de L'Amiante,\textsuperscript{1712} for instance, the appellants had a juridical advantage in Ontario because the action had now become statute-barred in Quebec. The Ontario Court of Appeal upheld the decision of the motion judge declining jurisdiction in favour of Quebec because Quebec was a more appropriate forum, for to do otherwise would deny the respondents a legitimate

\textsuperscript{1709} Marchand (Guard, ad litem of) v Alta Motors Assn Ins, (1994) 25 CCLI 111 at 114-115 (noting that the factors involved in a forum non conveniens analysis “should not be affected by the motive of the party in choosing the disputed jurisdiction because it is only rational to sue in the most advantageous place.”).

\textsuperscript{1710} Amchem, supra note 178 at 920. See also Unifund Assurance Co v Insurance Corp of British Columbia [2003] 2 SCR 63 at para 138.

\textsuperscript{1711} Garantie (La), compagnie d'assurances de l'Amérique du Nord v Gordon Capital Corp, [1995] RDJ 537 (Que CA).

limitation defence available to them in Quebec.\textsuperscript{1713} It is submitted that it is wrong to treat the issue of statute-bar as an issue of juridical advantage. Juridical advantage is better confined to advantages that might accrue from the hearing of the case. Statute-bar prevents the case from being heard at all. However, if it can be shown that the plaintiff deliberately waited for the action to become statute-barred in the otherwise more appropriate foreign forum in order to take advantage of the more favourable law in the forum court, it may be justified to treat the issue of statute-bar as an issue of juridical advantage. Yet, even this approach seems needless, at least in tort cases, given the holding in \textit{Tolofson} that the applicable law in tort is the \textit{lex loci delicti} (the law of the place where the tort occurred) and that limitation periods are matters of substantive law to be governed by the \textit{lex loci}.\textsuperscript{1714} The implication of this holding for the analysis of juridical advantage is that that the action would be statute-barred in the foreign forum no longer constitutes a juridical advantage to the plaintiff since the applicable limitation period does not depend on where the tort is adjudicated. Wherever it may be, the limitation period applicable in the forum where the tort occurred would apply.

It should be noted that juridical advantage is not one of the factors listed under section 11(2) of the CJPTA as factors to be considered in a \textit{forum non conveniens} inquiry. This omission seems consistent with the holding in \textit{Amchem} that juridical advantage is not to be considered a separate factor, but one to be borne in mind in the assessment of the other factors. Its apparent omission from the CJPTA shows its considerable unimportance in the assessment of whether a forum is appropriate. However, section 11(1) of the CJPTA enjoins the court to consider the “interests of the parties” and the “ends of justice” in deciding whether it is an appropriate forum to litigate the suit. A collective reading of section 11(1) and section 11(2) suggests that the ultimate goal is to serve the interests of justice and the ends of justice and that the factors listed under section 11(2) do not necessarily cover the interests of the parties and the ends of justice that are to be considered under section 11(1). Juridical advantage may therefore be seen as a factor going to show whether declining jurisdiction would be in the interest of the parties and serve the ends of justice.

\textsuperscript{1713} \textit{Ibid.} All the relevant events occurred in Quebec, or in the US. Respondents’ surviving witnesses were all in Quebec, or in the US. Although copies of relevant documents were in Ontario, their originals were outside Ontario. See also \textit{Lilydale Cooperative Ltd v Meyn Canada Inc} (2008), 50 CPC (6th) 1 (Ont CA); \textit{Caspian Construction Inc v Drake Surveys Ltd}, [2006] 2 WWR 264 (MBCA); \textit{Toronto Dominion Bank v Switlo}, 2004 ABQB 207 at para 26; \textit{Gotch v Ramirez}, 48 OR (3d) 515 (ONSC) (stating at para 11: “There is, however, a clear loss of juridical advantage to the plaintiff if he is required to litigate the matter in Pennsylvania since his claim, both counsel acknowledge, will be statute-barred.”).

\textsuperscript{1714} \textit{Tolofson, supra} note 175 at para 99.
The Canadian approach is comparable to the practice in England. In *Spiliada*, the House of Lords held that differences such as lower damages award, more restricted discovery procedures, absence of interest awards, and more restrictive limitation statutes would not justify a *forum non conveniens* stay.\(^{1715}\) Later in *Connelly*, the House stated that “generally speaking, the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum.”\(^{1716}\)

A look at what obtains in the US might help in the understanding of the role juridical advantage should play in *forum non conveniens* determinations. The US Supreme Court in *Piper* rejected the view that dismissal for *forum non conveniens* was unwarranted where the plaintiff would be met with an unfavourable law at the foreign forum.\(^{1717}\) It stressed that the possibility of an unfavourable change in substantive law should not be accorded “conclusive or even substantial weight in a *forum non conveniens* inquiry.”\(^{1718}\) However, where the remedy available in the foreign forum is “so clearly inadequate or unsatisfactory that it is no remedy at all,” the plaintiff’s loss of favourable law may deserve substantial weight.\(^{1719}\) In other words, change in law is merely a relevant consideration. However, where the foreign forum prohibits adjudication of the subject matter of the dispute, dismissal would be inappropriate.\(^{1720}\) On the authority of *Piper*, the Eastern District Court of New York dismissed a case to Canada even though it found that the plaintiff’s damage award might be smaller in Canada, and litigation in Canada might be “more expensive and more difficult”, holding that the fact that Canada might be less favourable to the plaintiff was not controlling.\(^{1721}\) But where the action would be statute-barred in the foreign court, American courts “routinely condition dismissal on the defendant’s waiving the foreign limitations period and agreeing to accept service in the foreign jurisdiction.”\(^{1722}\) Robertson has, however,

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\(^{1715}\) *Spiliada*, *supra* note 1624.

\(^{1716}\) *Connelly*, *supra* note 353 at 345. See also *Dicey, Morris and Collins*, *supra* note 1623 at 476.

\(^{1717}\) *Piper, supra* note 117 at 248.

\(^{1718}\) *Ibid* (noting that “if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice of law rules are most advantageous. Thus, ... dismissal would rarely be proper.” *Ibid* at 251. “American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.” *Ibid* at 253).

\(^{1719}\) *Ibid* at 254.

\(^{1720}\) *Ibid*.

\(^{1721}\) *Ledingham v Parke Davis*, 628 F Supp, 1447, 1450 (EDNY 1986).

\(^{1722}\) Reynolds, *supra* note 1642 at 1666 (noting that since it is the defendant who seeks the dismissal, “those conditions are fair.”). One notable case was the *Bhopal* case (In *Re Union Carbide Corp Gas Plant Disaster*, 809 F
identified one case in which the foreign forum (Italy) dismissed the plaintiff’s claim (after the plaintiff had suffered a *forum non conveniens* dismissal in the US) because under Italian law, limitation periods could not be waived.  

The Ninth Circuit has affirmed a *forum non conveniens* dismissal where the plaintiff’s legal fees would be greater than the maximum amount of damages the plaintiff could recover if forced to litigate in the foreign forum, so that it would be economically foolish for the plaintiff to venture filing a suit there. In *Loya v Starwood Hotels & Resorts Worldwide, Inc.*, a woman filed a wrongful death action in Washington State over the death of her husband who was killed while scuba-diving off the coast of Mexico. The defendant was an American company that operated the resort in which the plaintiff’s husband was vacationing. The suit alleged that the defendant used an under-aged and untrained scuba guide. It charged the defendant of false advertising and of violation of Washington’s consumer protection laws. In response to a *forum non conveniens* motion, the plaintiff alleged that the damages she could recover in Mexico were limited to about $17,000, while her legal fees would be about $50,000. In other words, she would suffer a juridical disadvantage of losing about $33,000 if the suit was filed in Mexico, assuming she won. Affirming the district courts dismissal for *forum non conveniens* on the basis that all that was required was the presence of “a” remedy or “some” remedy in the foreign forum, the Ninth Circuit Court of Appeal stated that Mexico had a “substantial interest in holding businesses operating in Mexico accountable and insuring that foreign tourists are treated fairly.”

In another case, the Seventh Circuit was presented with the argument that Bulgarian law did not provide a tort remedy against legal entities unless the plaintiff could identify a specific natural person who committed the tort on behalf of the legal entity. Here (*Stroitelstvo Bulgaria Ltd v Bulgarian-American Enterprise Fund*), a Bulgarian borrower sued a Bulgarian bank and its American parents claiming that they engaged in predatory practices with regard to a loan advanced in Bulgaria to finance a building project there. The Seventh Circuit stated that if it

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1723 In *Snam Progetti v Lauro Lines*, 387 F Supp 322 (SDNY 1974), “Plaintiff could theoretically have returned to the United States courts at that point, but the Italian action had taken five years, by which time all the fight had gone out of plaintiff.” *Ibid.*

1724 *583 F 3d 656 (9th Cir 2009).*

1725 *Ibid* at 665.

1726 *589 F 3d 417 (7th Cir 2009) [Stroitelstvo Bulgaria]*.
were true that corporate defendants were not subject to tort liability in Bulgaria unless a natural person who acted for them was identified, the plaintiff could still obtain contractual liability against the corporate defendants. Even if this remedy were less than tort remedy, the Court noted, it was not “so clearly inadequate or unsatisfactory [as to be] no remedy at all.”\footnote{1727} It follows that it is essential only that the defendant be amenable to suit in the foreign forum.\footnote{1728}

In Canada, it is true that Amchem regards “legitimate juridical advantage” as an important factor, but the language of Amchem suggests that loss of juridical advantage is inextricably tied to the connections with the contending forums. Loss of a legitimate juridical advantage would be important only where the connecting factors already tilt towards the forum where such advantage would be lost by a party if the case is not tried there. The potential loss of the advantage would be the more reason why the case should be tried there.\footnote{1729} Thus, provided the case is tried in the

\footnote{1727} Ibid (citing Piper, supra note 112).\footnote{1728} Several Latin American countries have enacted statutes barring jurisdiction over cases previously filed abroad, especially in the US, and especially those dismissed for forum non conveniens. An example is Article 1421-J of the Panamanian Civil Code that provides that “for reasons of constitutional order,” Panamanian courts lack jurisdiction “if the claim or action attempted to be brought in [Panama] has been previously rejected or denied by a foreign judge [for] forum non conveniens doctrine”. See Symeonides, “Choice of Law in American Courts in 2009: Twenty-Third Annual Survey” (2010) 58 Am J Comp L 227 at 249; Symeonides, “Choice of Law in American Courts in 2008”, supra note 343. However, the Minnesota Supreme Court has refused to see such statutes as a bar to dismissal for forum non conveniens. Paulownia Plantations de Panama Corp v Rajamannan, No A07-2199, 2009 WL 3644186 (Minn, 5 Nov 2009) (cited in Symeonides, “Choice of Law in American Courts in 2009”, ibid at 249-250). The court based its rejection on the fact that the statute was enacted after the suit had been filed and that it was intended to protect Panamanian plaintiffs whereas the plaintiffs in the case were Australians. In Chandler v Multidata Systems International Corp, 163 SW 3d 537 (Mo Ct App 2005), however, A group of Panamanian cancer patients exposed to radiation at an oncology institute in Panama brought suit in Missouri, the home of one of the corporate defendants. The allegation was that the defendants’ computer-operated treatment wrongly calculated the dosages required for their cancer treatment. The defendants moved for forum non conveniens, whereupon the plaintiffs invoked the Panamanian statute. While the motion was pending, one of the plaintiffs brought a petition in Panama against the defendants. The Panamanian court dismissed the petition for lack of jurisdiction based on the doctrine of “pre-emptive jurisdiction” which was created by the pending suit in the US. The plaintiffs presented this decision to the Missouri court as further proof that Panama was not an available forum. Still, the Missouri court dismissed the plaintiffs’ claim, but explicitly granted the plaintiffs permission to re-file the case in Missouri should a Panamanian court of competent jurisdiction and venue refuse jurisdiction on the basis of the dismissal. The plaintiffs’ subsequent filing in Panama was eventually rejected. See Sold, supra note 343 at 1439-1442. It appears that the motive behind those statutes is to indirectly enjoin foreign courts, and especially US courts, to exercise jurisdiction in cases brought in their courts instead of declining jurisdiction, as, if the suit cannot be heard in Panama, for instance, the basis to decline jurisdiction is lacking unless there is a third country with which the case has a closer connection than with the US. Sold has argued that since the solution to the jurisdictional quagmire created by these blocking statutes should be tied to the root of the problem: the advantageous tort remedies afforded by litigation in the US. He calls for the enactment of choice of law legislation that categorically stipulates foreign law as the applicable law in foreign torts. Sold, supra note 343 at 1471-1476.\footnote{1729} Saumier, has observed that “[s]ince the appropriateness of a forum is defined according to the real and substantial connection test, the implication is that the juridical advantage sought in an appropriate forum is not only legitimate, but is also indicative of the appropriateness of that forum.” Saumier, “Jurisdiction in International Cases: The Supreme Court’s Unfinished Business” (1995) 18 Dalhousie LJ 456 [Saumier, “Jurisdiction in international Law”].
more appropriate forum, loss of juridical advantage does not amount to an injustice provided substantial justice can be done in that forum. Although Amchem believes that the plaintiff’s potential “[l]oss of personal advantage [if the action is stayed] might ... amount to an injustice” sufficient to warrant assertion of jurisdiction, it seems that injustice would result only where the loss is grave if the plaintiff is forced (by virtue of the stay) to litigate in a foreign forum that has a lesser real and substantial connection with the dispute. How grave it should be is uncertain.

The US approach seems to place lesser emphasis on the connection with the forum than the Canadian approach does when it comes to the question of favourable law. At least, Piper makes it clear that where the foreign remedy is so grossly inadequate as to amount to no remedy, plaintiff’s potential loss of favourable law may gain substantial weight. It is likely that this weight may still be gained even if the connection of the dispute with the domestic forum is not so strong, providing there is jurisdiction simpliciter. In addition, where the action would be time-barred in the foreign court, American courts “routinely” enjoin the defendant to waive the limitation period.\textsuperscript{1730} This is also possible in Canada.\textsuperscript{1731} The use of conditional stay is perhaps one of the best ways of curing the inadequacy of the foreign forum if that forum is otherwise more appropriate.\textsuperscript{1732} The US approach thus seems more sympathetic to the plaintiff than does the Canadian approach.

\textsuperscript{1730} There seems to be only one Canadian case in which a condition was imposed on the defendant in a stay for \textit{forum non conveniens} supposedly in order to ensure the adequacy of the foreign forum. That was a Prothonotary’s decision in the Federal Court: \textit{Sumisho Reftech v Great Pride (The)}, 2006 FC 388. And generally, there seems to be nothing in principle and in practice preventing the defendant from voluntarily waiving any of his legal rights in the alternative forum in order to guarantee the continuation of the proceedings in that forum and thereby to strengthen her \textit{forum non conveniens} case. The English House of Lords \textit{Spiliada} (supra note 1624) case extensively referred to by the Amchem Court approved the use of such conditions; it is unlikely that a Canadian court would refuse an invitation by the plaintiff to require the defendant to make an undertaking.

\textsuperscript{1731} \textit{Jordan} (BCCA), supra note1592 at para 25 (noting that “if a court has jurisdiction but declines it under \textit{forum non conveniens}, the court may condition the stay of proceedings on, among other things, the defendant agreeing to submit to the jurisdiction of the more proper forum or to waive a statute of limitations defence in the other forum.”).

\textsuperscript{1732} Karayanni, \textit{Forum Non Conveniens in the Modern Age}, supra note 1623 at 35, has, however, argued that conditional dismissal promotes the very forum shopping that \textit{forum non conveniens} purports to discourage. “If the initial forum conditions dismissal by [a waiver of limitation period], the plaintiff now filing suit in the alternative forum will have gained an advantage [that was otherwise not available to her], assuming that the alternative forum would recognise the waiver.” He questions: “why should the plaintiff be in any way privileged by force of conditional dismissal or stay for not filing the action in the appropriate forum in the first place?” \textit{Ibid} at 36.
5.5.4.3 Applicable Law

In *forum non conveniens* inquiries, the law applicable to the case is generally a relevant factor. It is provided in section 11(1)(b) of the CJPTA. In *Spar Aerospace*, it is explicitly listed as one of the factors for consideration.\(^{1733}\) On this factor, the court is not so much concerned with the specific contents of the foreign law as with whether the fact that foreign law is applicable instructs dismissal. In a case relating to the construction of residential buildings and the relocation of the civilian population in the West Bank, the Quebec Court of Appeal affirmed the decision of the Quebec Superior Court staying the action on the ground that the West Bank law was applicable and that Israeli courts were in a better position to apply it.\(^{1734}\) A recent decision of the US Second Circuit Court of Appeals provides one of the best illustrations of the influence of the applicable law in a *forum non conveniens* determination. In *Figueiredo Ferraz E Engenharia De Projeto LTDA v Republic of Peru*,\(^{1735}\) a Brazilian company sought the enforcement of a Peruvian arbitration award in the amount of US $21,607,003 for the company's engineering studies on water and sewage services in Peru to which it and the Peruvian government had agreed in 1997. When a dispute arose between them in 2005, the Brazilian company commenced arbitral proceedings in Peru. The arbitral tribunal rendered an award of $21 million to the Brazilian company. Due to a Peruvian law capping the amount the Peruvian government can pay per year to satisfy a judgment against it, the Brazilian company did not seek to execute the award in Peru but preferred to do so in the US. In 2008 it brought a petition in the Southern District of New York to confirm and execute the arbitral award. The District Court granted the petition after rejecting Peru’s motion to dismiss. Peru appealed. Reversing the decision of the District Court, the Second Circuit noted that the District Court failed to consider the *forum non conveniens* point raised by Peru. On the *forum non conveniens*, it stated that the Peruvian government’s cap on the amount of compensation was “a highly significant public factor” justifying dismissal for *forum non conveniens*. To the court, this was “intimately involved with sovereign prerogative,” and “Peruvian courts are ‘the only tribunals empowered to speak authoritatively’ on the meaning and

\(^{1733}\) *Spar Aerospace*, *supra* note 1546 at 71.
\(^{1734}\) *Yassin v Green Park International Inc*, 2010 QCCA 1455 (CanLII) [*Yassin*] (affirming the Superior Court’s decision in *Bil‘in*).
\(^{1735}\) Nos 09-3925-CV (L) and 10-1612-CV (CON) (2\(^{nd}\) Cir, 14 December 2011).
operation of the cap statute.”\textsuperscript{1736} George Gerard Lynch delivered a dissenting opinion. He noted that the Brazilian company was merely seeking to enforce an award already obtained in an international arbitration and not to litigate the case on its merits. In his view, “[b]y using the mechanism of \textit{forum non conveniens} to import a substantive and self-serving provision of Peruvian law into what should properly be a summary proceeding, the majority significantly undermines the background expectations against which the parties made their contract.”\textsuperscript{1737}

The manner in which the majority of the Second Circuit treated the issue of foreign law is not commendable. It treated it as though the forum court is totally incapable of applying foreign law. That the foreign court is in a better position than any other court to apply the laws of its forum is self-evident. A case should not be dismissed for \textit{forum non conveniens} simply because foreign law is found to be applicable. Where, for instance, the competing forums are common law jurisdictions and the issue is governed by the common law in both forums, the relevance of the applicable law must be practically nil. Even where the legal systems of the competing forums vary, such as common law and civil law, the applicable law should remain of rather little significance. This is because many legal systems have enacted statutes to facilitate proof of foreign law,\textsuperscript{1738} and the enactment of these statutes presupposes legislative belief that courts are capable of interpreting foreign law. Dismissal would be justified only where the foreign law in question is characterized by such unusual complexity and novelty that the forum court had better allow the foreign court to deal with it. Such complexity does not appear to be present in the \textit{Figueiredo} case. Under the “\textit{Cambridgeshire} factor” in England, if a court has acquired a unique expertise in resolving particular disputes, so that it may serve the interests of justice to allow it to resolve the dispute at bar, this may in extraordinary cases tilt the scale in favour of trial in the foreign forum.\textsuperscript{1739} One example of such disputes may be where the foreign law in question comprises the native law and custom of the foreign country. In most of those countries where native law and custom is part of the \textit{corpus} of their laws, eg, most African countries, special courts, called customary courts, are established to deal with matters involving native law and custom. Members of the customary courts are drawn, not from lawyers, but from ordinary members of the community who are thoroughly familiar with the native law and custom of that

\textsuperscript{1736} \textit{Ibid} at 13.  
\textsuperscript{1737} \textit{Ibid} at 2.  
\textsuperscript{1738} See, for instance, Article 2809 of the Quebec Civil Code.  
\textsuperscript{1739} Dicey, Morris and Collins, \textit{supra} note 1623 at 479-480 (observing that cases where this argument has been accepted are “extremely rare”). See also Spiliada, \textit{supra} note 1624 at 484-486.
community. They are far better able to appreciate the meaning and value of the customs of the people and have through years of interpreting those customs over and over again as members of customary courts acquired expertise in the interpretation of those customs. As those customs are largely unwritten, and many issues without precedent, the courts rely largely on oral tradition. It would be difficult for a foreign judge far removed from those communities to efficiently interpret those customs. It is in cases like this that the applicable law should be given serious relevance. In the context of extraterritorial corporate wrongs, however, it is unlikely such cases would arise. Judges are generally able to deal with legal rules and it does not seem that the particular legal system creating those rules give them any particular feature that necessarily makes foreign judges incompetent to deal with them. Application of foreign law is an integral part of private international law adjudication. An exception may be made where the public policy of the forum forms part of the applicable law in the case. It may be difficult for the forum court to identify and fully appreciate the public policy of a foreign court. So where public policy issues are dominant in a case, the need for a stay is stronger than where it is a matter of interpreting the legal rules of the foreign forum. In the interprovincial context in Canada, however, applicable law has no justifiable role to play in a forum non conveniens analysis.

5.5.4.4 Allegations that the Foreign Judiciary is Corrupt

Courts have been generally hesitant to accept allegations that the foreign judiciary is corrupt. Not many Canadian cases have been found where allegations of judicial corruption were raised. The most recent case is Van Breda where it was discussed in the context of determining jurisdiction simpliciter. While it might have affected the forum non conveniens assessment, the extent to which it affected it remains unclear. The plaintiffs argued that Cuban courts did not have jurisdiction in the matter, and that even if they had, there was no guarantee Cuban courts would do “substantial justice” in the matter. The trial judge had before him affidavit evidence from a former Canadian ambassador to Cuba testifying to the lack of independence of the Cuban judiciary. There was also contradictory affidavit evidence from a law professor at the University of Florida who had studied, written and lectured in Cuba for over forty years, testifying to the

1740 Van Breda (ONSC), supra note 1398 at para 44.
Pattillo J stated, based on the evidence before him, he was concerned by “the existence of the communist regime in Cuba and its corresponding control over all matters, including, in particular, its judicial system.”\textsuperscript{1741} In his view, “an uncertainty” existed about the fairness of the Cuban legal system.\textsuperscript{1742} On the strength of this uncertainty, he resolved the issue in favour of the plaintiffs. On appeal, however, Sharpe JA stated that “comity requires more than ‘an uncertainty’ to justify a judicial determination that condemns a foreign legal system as unfair.”\textsuperscript{1743} This suggests that some heightened level of proof is required to convince the court to accept such allegations.

This has also generally been the approach in the US where such allegations have been raised again and again, the general attitude being that “it is not the business of our courts to assume responsibility for supervising the integrity of the judicial system of another sovereign nation.”\textsuperscript{1744} In \textit{Aguinda},\textsuperscript{1745} the plaintiffs contended that Ecuadorian courts were subject to corrupt influences and were incapable of delivering decisions impartially. The trial judge ordered supplemental briefings on the issue. It found that: (1) there was no evidence of impropriety by Texaco or any member of its group of companies in any previous judicial proceedings in Ecuador; (2) that there were at pending numerous suits in Ecuadorian courts against TNCs without any evidence of corruption; (3) that Ecuador had recently taken significant steps stimulate the independence of its judiciary; (4) that the US State Department’s general description of Ecuador’s judiciary as politicized concerned mainly cases involving the police and political protesters; (5) that numerous US courts had held Ecuador adequate for the adjudication of civil suits involving US corporations; and (6) that in light of the public attention the case had garnered, coupled with the Ecuadorian government’s involvement in the case, the possibility of undue interference in the case was very little.\textsuperscript{1746}

In \textit{Stroitelstvo Bulgaria},\textsuperscript{1747} all the expert witnesses lamented a public perception of corruption in the Bulgarian justice system, with one expert claiming that Bulgaria was incapable of providing a fair hearing. The Seventh Circuit noted that the experts made no attempt to

\textsuperscript{1741} \textit{Ibid} at paras 49-50.
\textsuperscript{1742} \textit{Ibid} at para 51.
\textsuperscript{1743} \textit{Ibid}.
\textsuperscript{1744} \textit{Van Breda (ONCA), supra} note 1399 at para 147.
\textsuperscript{1745} \textit{Jhirad v Ferrandina}, 536 F 2d 478 at 484-485 (2d Cir, 1976) [\textit{Jhirad}].
\textsuperscript{1746} 303 F 3d 470 (2d Cir 2002) [\textit{Aguinda (2nd Cir)}].
\textsuperscript{1747} \textit{Ibid} at para 28.
\textsuperscript{1748} \textit{Supra} note 1713.
“quantify this purported corruption” or to refer to particular claims that were treated unfairly. It found the experts’ “generalized anecdotal complaints of corruption” insufficient for it to pronounce an EU legal system so corrupt that it could not serve as an adequate forum.1749 Also, in *In re Arbitration between Monegasque de Reassurances SAM v Nak Naftogaz of Ukr*,1750 the second Circuit refused “to pass value judgments on the adequacy of justice and the integrity of Ukraine's judicial system on the basis of no more than . . . bare denunciations and sweeping generalizations”1751 And in *Leon v Millon Air, Inc*,1752 the Eleventh Circuit called on the plaintiff to substantiate allegations of serious corruption or delay with “significant evidence documenting the partiality or delay . . . typically associated with the adjudication of similar claims”.1753

By contrast, in 1997 a federal court held that corruption in the Bolivian justice system warranted trial in the US.1754 The sources of evidence of corruption relied upon were not unique: they included a Bolivian newspaper publication quoting the Bolivian Justice Minister calling the Bolivian justice system “a collection agency and the penal system an agent of extortion”,1755 US State Department Reports and World Bank Reports identifying widespread corruption in Bolivia, and the testimony of a Bolivian lawyer.1756 The court upheld the corruption claims after noting that such allegations do “not enjoy a particularly impressive track record” in US

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1749 *Ibid*.
1750 311 F 3d 488 (2d Cir 2002).
1751 *Ibid* at 499.
1752 251 F 3d 1305 (11th Cir 2001).
1753 *Ibid* at 1312. See also *Tuazon v RJ Reynolds Tobacco Co*, 433 F 3d 1163 at 1179 (9th Cir 2006), where the Ninth Circuit found the plaintiff’s “anecdotal evidence of corruption and delay” in the Philippines system of justice unsatisfactory to show that the Philippines was an inadequate forum; *Mercier v Sheraton Int'l, Inc*, 981 F 2d 1345 at 1351 (1st Cir, 1992) (finding that Turkey was an adequate forum despite the plaintiff's claim that Turkish courts had a historical bias against US nationals and foreign women); *Torres v Southern Peru Copper Corp*, 965 F Supp 899 at 903 (SD Tex,1996) (finding that Peruvian justice system was not so corrupt as to preclude dismissal); *Banco Mercantil, SA v Hernandez Arencibia*, 927 F Supp 565 at 567 (D Puerto Rico 1996) (rejecting allegation that the justice system of Dominican Republic was so corrupt as to render Dominican Republic an inadequate alternative forum); *Chesley v Union Carbide Corp*, 927 F 2d 60 at 66 (2d Cir, 1991) (quoting *Jhirad, supra* note 1732 “It is not the business of our courts to assume responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity”).
1755 *Ibid* at 1085 (describing the evidence of the Bolivian Justice Minister “compelling”).
1756 *Ibid* at 1085-1087.
jurisprudence.\textsuperscript{1757} In two other cases, the courts gave weight to the corruption allegations but explicitly decided the \textit{forum non conveniens} issue on other grounds.\textsuperscript{1758}

Courts should desist from attacking the integrity of foreign courts through making unguarded pronouncements such as was made in \textit{Eastman Kodak}. It is surprising that judges can accept such claims as proof that the foreign judiciary is corrupt. In the interprovincial or interstate context, allegations that a sister province’s or state’s judiciary is corrupt would be subjected to a high standard of proof equivalent to the standard of proof required in criminal cases, and not on a balance of probability. Newspaper reports, as well as criticisms by academics and State Departments, would not be accepted as sufficient. There is no reason why the justice system of a foreign country should be treated differently. Inter-judicial comity is an aspect of international comity and calls for respect for judges in other jurisdictions. In fact, those pronouncements raise more serious issues of comity than the assumption of jurisdiction in those cases.\textsuperscript{1759}

The claim that the foreign judiciary is reeling in systemic corruption could be a two-edged sword. If the forum court accepts it and retains jurisdiction, it is viewed as an unacceptable pronouncement on the integrity of a foreign legal system that may trigger retaliatory pronouncements sooner or later. If the claimant loses the \textit{forum non conveniens} battle, he runs a risk of not having any resulting judgment from the foreign forum recognized in the first forum because his own words may be used against him to establish that the foreign judgment was contaminated by lack of due process, lack of impartiality or fraud. We are seeing this in the Ecuadorean case. The case related to the pollution of the Amazonian rain forest during the years ending in 1992 by Texaco, whose stock was later acquired by Chevron in 2001. Following the Second Circuit’s dismissal of the plaintiffs’ claims in \textit{Aguinda} on \textit{forum non conveniens} grounds,

\begin{itemize}
\item \textsuperscript{1757} \textit{Ibid at 1085}. See also, Daniel E Lee & Elizabeth J Lee, \textit{Human Rights and the Ethics of Globalization} (New York: Cambridge University Press, 2010) at 222 (observing that corruption arguments have “not been very successful” in the US).
\item \textsuperscript{1758} \textit{Hatzlachh Supply Inc v Savannah Bank of Nigeria}, 649 F Supp 688 at 692 (SDNY 1986) (the court considered the claim that Nigeria was “filthy, contaminated, lawless, and corrupt…”); \textit{Shonac Corp v Marquesa Intl Corp}, 1988 WL 50601 (DNJ), (the court expressed some doubt as to whether Brazil was an adequate alternative forum, due apparently in part to the plaintiff’s corruption claims).
\item \textsuperscript{1759} For an article favouring reliance on corruption claims as grounds for declining jurisdiction, see Christopher M Marlowe, “Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America” (2001) 32:2 U M Inter-Am L Rev 295-320 (noting, at 312, that “the climate of fear and corruption” prevalent in Columbia merits consideration not currently afforded them in US courts).
\end{itemize}
the plaintiffs filed a fresh suit against Chevron in Ecuador. The Ecuadorian court delivered an unprecedented $8.6 billion judgment against Chevron. In anticipation that the plaintiffs would come to the US to execute the judgment, Chevron brought a pre-emptive suit to block the recognition and enforcement of the judgment anywhere outside Ecuador, under New York’s Uniform Foreign Country Money-Judgment Recognition Act. It argued that the judgment was unenforceable outside Ecuador because (1) the Ecuadorean justice system lacked impartial tribunals or procedures that accord with the requirements of due process, and (2) it was obtained by fraud. It sought a declaration that the judgment was not entitled to recognition and enforcement and brought a preliminary worldwide injunction to stop the enforcement of the judgment outside Ecuador pending the determination of the merits of the case. It reminded the US court of the plaintiffs’ initial claim that the Ecuadorean judiciary was corrupt and sought to use that claim as an admission on the part of the plaintiffs. In a 127-page decision that chronicled the history of the case and analyzed with enhanced importance several issues that arise in international litigation: international comity, grounds for recognition and enforcement of foreign judgments, the ability to enjoin foreign proceedings, and service of process, Kaplan J granted Chevron’s preliminary motion. On 26 January 2012, the Second Circuit allowed the plaintiffs’ appeal without ruling on the correctness of Judge Kaplan’s analysis of those issues, on the ground that there was no legal basis under the New York law on which to preemptively block the recognition of a foreign judgment that has not been presented for recognition. It vacated the injunction and remanded to the District Court with instruction to dismiss Chevrons suit for declaratory relief in its entirety.

While it is unclear what weight the Second Circuit would have given to Chevron’s fraud and corruption arguments, should a defendant who prevailed in a forum non conveniens motion be allowed to raise the inadequacy of the foreign forum to block recognition? It must be noted that fraud and lack of due process are viable bases for refusal of recognition of a foreign

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1760 Chevron Corp v Donziger, No 11 Civ 0691 (SDNY, 7 March 2011).
1761 NYCPLR §§ 5301-5309.
1762 Ibid at 2.
1763 Ibid at 3 (citing the reply brief of the plaintiffs in the earlier Aguinda case: “Plaintiffs’ reply memorandum of law passim, Aguinda v Texaco, Inc, No 93 Civ 7527 (JSR) (SDNY filed Apr 24, 2000) (DI 151)” and the plaintiffs’ other out-of-court statements describing the Ecuadorean judiciary as corrupt).
1764 Chevron Corp v Naranjo, Nos 11-1150-cv(L) 11-1264-cv(CON) (2d Cir, 26 January 2012) [Naranjo (2d Cir, Jan 2012)]. Earlier, the court had vacated the District Court’s injunction and ordered a stay of the proceedings there. See Chevron Corp v Naranjo, No 11-1150-cv(L), 2011 WL 4376022 (2d Cir, 19 September 2011).
1765 Naranjo (2d Cir, Jan 2012), ibid at 4.
judgment. But where the plaintiff had resisted trial in the foreign forum on the grounds of systemic fraud and corruption in the foreign judiciary, should the defendant who insisted that the suit be dismissed to that foreign forum be allowed to use those very grounds to deny the plaintiff the fruits of his/her judgment? It is arguable that the defendant be compelled to accept the foreign forum as it finds it. Otherwise, the situation may result where the plaintiffs would have no forum to bring their claim since the alternative forum had been declared *forum non conveniens*. However, it is submitted that since fraud and due process remain valid grounds, in law and in policy, to deny recognition of a foreign judgment, in order to stop recognition of the judgment the defendant should be required in this circumstance to prove specific allegations of fraud and corruption and not rely on sweeping generalizations condemning the entire justice system of the foreign forum. Reliance on State Department and World Bank reports, as well as newspaper publications and expert testimonies, must be considered insufficient since the defendant had initially denied the sufficiency of these sources in its *forum non conveniens* arguments. If the defendant alleges that the foreign court was bribed, the bribery must be specifically proved. Still, in the end, even though the plaintiffs’ initial claim that the foreign judiciary was corrupt cannot substantiate a fraud claim at the recognition stage, it may lend credibility to such a claim by the defendant judgment-debtor in the presence of other sources of evidence. In the Ecuadorean case, however, in view of the wide variety of sources of evidence presented before the District Court, it is not clear to what extent the plaintiffs’ initial claim in *Aguinda* that the Ecuadorean judiciary was corrupt affected the District Court’s finding of corruption.

For European countries bound by the ECHR, the access to justice provisions of Article 6 of the convention might influence considerations of allegations that the foreign judiciary is corrupt. Article 6(1) requires that the plaintiff have access to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Apparently, this provision requires that the court take seriously allegations that the foreign judiciary is corrupt since requiring the plaintiff to litigate in a forum where the judiciary is neither independent nor impartial would amount to a denial of justice. The difficulty then is how to establish that a foreign judiciary is neither impartial nor independent. Does the fact that some individual judges have been indicted of corruption render the entire judiciary corrupt and wanting in independent and impartiality? Whatever might be the interpretation to be given to Article 6(1), the relevance
of the Article is whittled down by the fact that Brussels I Regulation prohibits the use of the doctrine of forum non conveniens. Article 6(1) can therefore be applied only in those cases where Brussels I Regulation is not the basis of jurisdiction simpliciter.

5.5.4.5 Practical Difficulties in Bringing the Suit in the Foreign Forum

This issue somewhat takes us back to the meaning of “available forum”. As derived from the words of Lord Kennear in the Scottish case of Sim v Robinow, a plea of forum non conveniens cannot be sustained unless the court is satisfied that there was some other tribunal having competent authority. Strictly speaking, the alternative forum need not be available “in practice”. However, practical difficulties in bringing the suit in the foreign forum would ground a forum non conveniens motion under the criteria listed in the CJPTA. The idea here is that even though there is an alternative forum in the legal sense, it would be unreasonable to require the plaintiff to litigate in that forum if practical difficulties render the plaintiff unable to do so. This speaks to the forum of necessity doctrine. The best examples of such practical difficulties have been offered by English jurisprudence. In Connelly, the plaintiff was a Scottish national who had emigrated to South Africa and later to Namibia where he worked in a uranium mine for several years. He was diagnosed with cancer of the larynx several years after he had returned to Scotland. He claimed that he contacted cancer as a result of exposure to radioactive radiations in the mine. He obtained legal aid in England and sued the English parent of the Namibian corporation that operated the mine. The defendant moved to stay the action on the grounds of forum non conveniens. The plaintiff alleged the absence of legal aid in Namibia and claimed that he would not be able to pursue the action in the absence of legal aid, whether in England or in Namibia. The House of Lords found that “the nature and complexity of the case [was] such that it [could not] be tried at all without the benefit of financial assistance.” It was of the view that it would not be possible to try the case without professional legal assistance and expert scientific witnesses. He concluded that these practical factors would make it impossible for substantial justice to be done in Namibia which otherwise would have been a more appropriate forum. Lord Goff, who wrote the decision for the House of Lords, took care in drafting the judgment. He did not say that absence of legal aid would necessarily lead to a stay.

1766 Supra note 1616.
1767 Connelly, supra note 353 at 346.
1768 Ibid.
Rather it was because absence of legal aid would prevent the plaintiff from bringing the case in the first place.\textsuperscript{1769} Thus, due to the plaintiff’s impecuniosity, and the unavailability of financial assistance in Namibia, “the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.”\textsuperscript{1770} One scholar has viewed this approach as “a refreshingly realistic approach to evaluating … the plaintiff’s ability to go to trial in the foreign forum.”\textsuperscript{1771}

In the case of \textit{Lubbe}, which involved an English parent of a foreign corporation, the House of Lords also focused on whether the plaintiffs would be able to secure financial assistance without which they would not be able to obtain professional legal services and expert witnesses to present a case of great complexity.\textsuperscript{1772} The case involved claims for personal injuries and death caused by exposure to asbestos while the plaintiffs were working in South Africa for the defendant’s (Cape Plc) South African subsidiaries. The allegation was that the British had failed to discharge its duties to ensure the observance of proper standards of health and safety by its subsidiaries. The suit was initially filed by five South African claimants. On the defendant’s application for forum non conveniens, the trial court stayed the proceedings on the ground that South Africa was the more appropriate forum. The Court of Appeal reversed. Apparently seeing that case could proceed in England, some 3000 other claimants brought a class action against the defendant. One of the claimants was a British citizen while the others were South African. The defendant applied to stay the new action. Both the trial court and the Court of Appeal granted the stay on the ground that South Africa was the more appropriate forum. The House of Lords allowed the plaintiffs’ appeal even though it found that South Africa was clearly a more appropriate forum for the litigation of the action.\textsuperscript{1773} Based on evidence regarding the availability of legal aid in South Africa, the House found that the plaintiffs were unlikely to obtain the necessary financial aid to be able to bring the action in South Africa.\textsuperscript{1774} Although South Africa had a contingency fee system, the House found

\textsuperscript{1769} \textit{Ibid} at 347.
\textsuperscript{1770} \textit{Ibid}.
\textsuperscript{1771} Waples, \textit{supra} note 1704 at 1507.
\textsuperscript{1772} \textit{Lubbe, supra} note 353.
\textsuperscript{1773} \textit{Ibid} at 1554.
\textsuperscript{1774} \textit{Ibid} at 1558.

If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion, provides a compelling ground, at the second
that its structure in South Africa would not provide the plaintiffs with adequate legal representation because South African law did not allow for the payment of experts on contingency and because of evidence that no South African law firm had enough wherewithal to assume the risk of handling a case as large and complex as this one on a contingency fee basis.\textsuperscript{1775} This was a class action case. The class action procedure was unavailable in South African legal system. Lord Bingham, who wrote the opinion of the House, made it clear that the unavailability of class action in South Africa did not by itself render South Africa an inappropriate forum.\textsuperscript{1776} Rather, he was of the view that efficient and expeditious trial of the plaintiffs’ claims, in their nature, warranted the class action procedure, and that the class action procedure seriously affected the costs of litigating the case.\textsuperscript{1777}

Indicting the capability of South African lawyers to assume the risk of handling complex cases such as this on a contingency fee is unpalatable. It is highly speculative. To be sure, it requires a measure of self-confidence to assume the risk of handling a case on a contingency fee basis. What the House of Lords did here was to assume that South African lawyers have less self-confidence than English lawyers. The case could likely have been decided in favour of trial in England without introducing this element. As the House found, expert evidence was indispensible to a proper adjudication of the case, because of the case’s complexity. As the cost of obtaining expert evidence was not covered by the contingency fee system in South Africa, and as the nature of the case, together with the plaintiffs’ impecuniosity, raised a real probability that the cost of obtaining such evidence would be unaffordable by the plaintiffs, to require litigation in South Africa would be as good as a denial of justice to the plaintiffs since the plaintiffs would either not be able to proceed, or, if they did, be unable to litigate the case to any meaningful conclusion.

The plaintiffs in the \textit{Lubbe} case had, specifically, drawn attention to the right of access to justice guaranteed under Article 6 of the ECHR, arguing that this right would be violated if the English court declined jurisdiction since they would be unable to bring proceedings elsewhere. Lord Bingham believed that applying Article 6 would not lead to a different conclusion than applying \textit{Spiliada} would lead,\textsuperscript{1778} suggesting that the decision in the case was compatible with Article 6.\textsuperscript{1779}

\begin{itemize}
\item stage of the \textit{Spiliada} test, for refusing to stay the proceedings here.
\item \textit{Ibid} at 1559 (per Lord Bingham).
\item \textit{Ibid}.
\item \textit{Ibid} at 1559-1560.
\item \textit{Ibid} at 1557 (noting, at 1560, that “[i]t is one thing to embark on and fund a heavy group action where the procedures governing the conduct of the proceedings are known to and understood by experienced judges and practitioners. It may be quite another where the exercise is novel and un- tried.”).
\item \textit{Lubbe, supra} note 353 at 1561 (“I do not think article 6 supports any conclusion which is not already.
\end{itemize}
As noted earlier, Article 6 does not mandate that a case be heard in a particular forum, but that it be heard somewhere. It follows that a stay does not necessarily violate Article 6. It violates Article 6 only where it results in a denial of access to justice. If there is access to a foreign court, a denial of access to the forum court does not amount to a denial of access to justice under Article 6 (1). As a stay in the case would, in all probability, have rendered the plaintiffs unable to proceed in South Africa, the decision impliedly upheld Article 6.

In another case involving South African plaintiffs, the reasons one of the plaintiffs gave for not bringing the suit in South Africa were that a warrant of arrest was hanging over him in South Africa; that South African law did not allow a person living abroad who was avoiding criminal charges in South Africa to bring civil proceedings in South Africa; and that he feared for his personal safety if he was required to return to South Africa. The question was whether these constituted practical difficulties in bringing the suit in the otherwise more appropriate forum. The judge accepted that “available” meant “available in practice”, but rejected the view that the plaintiff’s situation rendered South Africa unavailable. This is a well-reasoned decision. It speaks to the argument made earlier with regard to necessity jurisdiction. It would amount to assisting a fugitive to escape justice if the fact that he/she would be subject to arrest and prosecution in a country more appropriate to litigate the suit is the basis for exercising jurisdiction in the forum court.

The cases reviewed above are typical of the cases contemplated by this study. They all related to conduct of multinational corporations that took place in a developing country. The decisions suggest that the personal circumstances of the parties are a factor worthy of consideration. Where the parties are “on an unequal footing”, especially in a transnational context, as happened in the cases – and in cases between individuals and corporations generally – the chances of the case not being heard at all if a stay is granted are present.

1779 This approach, J Fawcett has pointed out, contains dangers in that it speculates that where the Spiliada principles are met Article 6 is also met, whereas might just be coincidence that the Spiliada principles and Article 6 were simultaneously met. See J Fawcett, “The Impact of Article 6(1)”, supra note 828 at 10-11 (criticizing the subordination of human rights to private international law in Lord Bingham’s approach).


1781 In holding that “available” meant “available in practice”, the judge referred to Mohammed v Bank of Kuwait [1996] 1 WLR 1483, where the Court of Appeal affirmed the trial judge’s definition that “available” meant “available in practice to the plaintiff to have his dispute resolved”.

1782 Morse, “Not in the Public Interest”, supra note 1651 at 555.
5.5.4.6 Forum Non Conveniens and Parallel Litigation

Where there are parallel proceedings in the courts of different forums, how do Canadian courts deal with the issue of forum non conveniens? Under the principle of lis pendens, the case first filed has priority over the case last filed, so that the later in time would be dismissed in deference to the first.¹⁷⁸³ This is the law in Quebec Canada.¹⁷⁸⁴ Both the forum non conveniens doctrine and the lis pendens principle deal with declining jurisdiction in certain circumstances. What happens where the defendant invokes lis pendens and the plaintiff argues that the foreign forum is forum non conveniens?

This question came up in the Supreme Court of Canada in Teck Cominco.¹⁷⁸⁵ Teck Cominco sued its insurers (Lloyd’s) in Washington State for indemnity over claims in relation to environmental damage alleged to have occurred in the US from Teck Cominco’s mine site in British Columbia. On the same day, Lloyd’s commenced a parallel suit in British Columbia for a negative declaration that it had no duty to defend or indemnify Teck Cominco in respect of the claims. Lloyd’s challenged the jurisdiction of the Washington court and failed. Teck Cominco equally filed a declinatory motion in the British Columbia proceedings for forum non conveniens, arguing that Washington State was the more appropriate forum. The British Columbia Supreme Court dismissed Teck Cominco’s motion, holding that British Columbia was the more appropriate forum. Teck Cominco’s appeal to the British Columbia Court of Appeal was dismissed. Leave to appeal to the Supreme Court was granted. The Supreme Court was called upon to answer whether, in a parallel proceedings situation, prior assertion of jurisdiction by the foreign court was conclusive of the forum non conveniens inquiry so as to warrant a stay in the domestic forum. Teck Cominco argued that where a foreign court has assumed jurisdiction in parallel proceedings, the usual test under section 11 of the CJPTA must yield to a “comity-based test” that respects the foreign court’s prior assertion of jurisdiction. It drew a distinction between cases where the defendant argues that the foreign court is the more appropriate forum, and cases

¹⁷⁸⁴ Civil Code of Quebec, Article 3137.
¹⁷⁸⁵ Supra note 1401.
where the foreign court has positively asserted jurisdiction. It argued that where the foreign court has asserted jurisdiction, as in the instant case, the forum court is “effectively bound” to stay the local action.

Speaking for an undivided court, McLachlin, CJ (dismissing the appeal) held that section 11 of the CJPTA is “a complete codification of the common law test for *forum non conveniens* [and] admits of no exceptions.” It follows that avoidance of multiplicity of proceedings is simply one of the factors to be considered in a *forum non conveniens* analysis. Rejecting the contention that comity would be served by a routine deferral to the court that asserts jurisdiction first, the learned Chief Justice stated that:

> policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the *forum non conveniens* analysis. To adopt this approach would be to encourage a first-to-file system, where each party would rush to commence proceedings in the jurisdiction which it thinks will be most favourable to it and try to delay the proceedings in the other jurisdiction in order to secure a prior assertion in their preferred jurisdiction. Technicalities, such as how long it takes a particular judge to assert jurisdiction, might be determinative of the outcome. In short, considerations that have little or nothing to do with where an action is most conveniently or appropriately heard, would carry the day. Such a result is undesirable and inconsistent with the language and purpose of s. 11 [of the CJPTA].

The court thus favoured a “holistic approach” towards judicial comity where no single factor is domineering without due regard to the overall facts of each case.

Again, the rule in Quebec Canada is a little more explicit. Article 3137 of the Civil Code gives the court discretion to stay proceedings where litigation “between the same parties, based on the same facts and having the same object is pending before a foreign authority.” Additionally, it requires that for a stay to be granted, the potential resulting judgment of the foreign court must be subject to recognition in Quebec.

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1786 “A foreign court can be said to have asserted jurisdiction where it has been asked to decline its jurisdiction over the matter and has refused to do so, holding that it is the appropriate forum to hear the dispute.” *Teck Cominco* (SCR), supra note 1401 at para 18.

1787 *Ibid* at para 22.


The Canadian approach may be usefully compared with what obtains in the US. When faced with parallel proceedings US courts adopt two principal balancing tests that make no reference to forum non conveniens but the first of which, on close examination, looks very much like a forum non conveniens inquiry. This first test was derived from a pre-Gilbert decision of the US Supreme Court, Landis v North American Co. This case concerned when a federal court should stay proceedings in favour of a parallel proceeding in another federal court. It set out a multi-factored test based on: (1) comity; (2) the adequacy of relief in the other forum; (3) judicial efficiency; (4) the relatedness of the parties and the issues in the two cases; (5) the likelihood of expeditious disposition of the case in the other forum; (6) convenience to the parties, their counsel and witnesses; and (7) the likelihood of prejudice on either party if the stay is granted. These factors are essentially the factors considered in forum non conveniens inquiries in both Canada and the US. The other test was derived from a post-Gilbert case, Colorado River Water Conservation District v United States – a case that concerned the exercise of jurisdiction by a federal court when a parallel case is before a state court. The test poses the following questions: (1) which court first assumed jurisdiction over a res, if applicable? (2) what is the relative convenience of the alternative forum? (3) the desirability of avoiding piecemeal litigation (4) which of the cases was filed first? (5) how far have the cases progressed? (6) to what extent does federal law apply? (7) are there other special factors? (8) can the alternative forum adequately protect the rights of the litigants? (9) was the action in the present forum vexatious or filed in bad faith?

While the above tests can be invoked in parallel proceedings situations in the absence of a forum non conveniens plea by the defendant, the existence of parallel litigation “enhances the forum non conveniens motion [where one is filed] by providing the necessary alternative forum.” Professor Reynolds states that the existence of parallel proceedings is a “powerful

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1790 299 US 248 (1936).
1793 Moses H Cone Mem’l Hosp v Mercury Constr Corp, 460 US 1 (1983). See also George, “International Parallel Litigation”, supra note 1793 at 508 (noting that the “factors may be summarized as federalism, comity, fairness to parties, and judicial economy”).
1794 George, “Parallel Litigation”, supra note 1699.
factor favouring dismissal”, although “not controlling.” Thus, the mere existence of parallel proceedings does not compel the dismissal of the case in the local forum even if the other court has already positively asserted jurisdiction. “The court must apply just as strict an analysis under Gilbert as it would in the absence of a pending parallel case.” Where the parallel proceedings were instituted by the same plaintiff, it has sometimes been accepted that the plaintiff filed the foreign suit as a defensive mechanism to avoid being caught by statutes of limitation. The dominant tendency in the US is thus against declining jurisdiction.

The earlier refusal of the British Columbia Court of Appeal (in the Teck Cominco case) to stay proceedings where the foreign court had already asserted jurisdiction was a subject of lively conversation among leading Canadian conflicts scholars. That was while appeal was pending at the Supreme Court. While Professors Blom and Walker took a more eclectic attitude to the issue, Black and Swan (on the one hand) and Parrish (on the other) followed sharply differing sets of ideas. Black and Swan urged the Supreme Court to affirm the Court of Appeal’s judgment. They opined that it would amount to “subordination of local values” if a Canadian court should decline jurisdiction in a matter that was more closely connected with Canada than with any other country on the mere basis that a similar case had earlier been initiated elsewhere. While the existence of parallel proceedings should be a factor, Black and Swan insist that it should not be determinative. Parrish, on the other hand, argued for a strict lis pendens rule that gives precedence to the first-filed case provided the foreign court has jurisdiction consistent with Canadian jurisdictional principles, “unless the party opposing the

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1795 Reynolds, supra note 1642 at 1676.
1796 George, “Parallel Litigation”, supra note 1699 at 944.
1797 Ibid.
1799 Teck Cominco (SCR), supra note 1401.
1801 “Teck Cominco and the Wisdom of Deferring to the Court First Seised, All Things Being Equal” (2009) 47 CBLJ 192-208 [Walker, “Teck Cominco and the Wisdom of Deferring to the Court First Seised”].
1802 Both scholars concur that “all things being equal”, the wisdom of the first-filed rule is unimpeachable, but as all things are hardly equal in parallel proceedings situations, the usefulness of the first-filed rule may be very limited. The decision will frequently turn on the facts of each case, so that discretion is indispensable.
1805 Ibid at 295.
1806 Ibid at 306.
stay can demonstrate that a clear injustice would occur.”

This approach, according to Parrish, is justified by the principle of comity: “In the context of parallel proceedings, comity requires that courts of different countries, when reasonably exercising jurisdiction, be viewed as adjudicatory coequals in those areas where their jurisdictions overlap.”

The difference between Black and Swan’s argument and Parrish’s may not be as significant as it appears. The proviso to Parrish’s view “... unless the party opposing the stay can demonstrate that a clear injustice would occur” considerably blurs the dividing line between the two. For such injustice would generally be established where the domestic forum has a closer connection with the dispute and the parties than the foreign forum. The difference between those views is essentially one of who bears the presumptive burden of proof. Parrish would like to have that burden shifted to the plaintiff to show that the foreign forum is inappropriate or that the domestic forum is clearly more appropriate than the foreign forum in parallel proceedings situations where the defendant seeks stay – a burden that is presumptively on the defendant.

Comparing the Canadian and US practices, Parrish laments that “the same doctrinal confusion” characterizes the US system. The doctrinal confusion relates to the refusal of the courts of both countries to adopt a clear first-to-file rule in parallel proceedings situations subject only to exceptional circumstances. Parrish views the first-to-file rule as a way to tame extraterritorial jurisdiction and “cabin the excesses of modern jurisdictional law”. The argument can equally go the other way. Where the first-filed case is in the domestic forum, and the dispute is such that it is better tried elsewhere due, for instance, to a very tenuous connection of the dispute with the domestic forum, the first-to-file rule would advance, rather than cabin, the excesses of modern jurisdictional law. But by ensuring that disputes that are more appropriately settled elsewhere do not congest our courts, and also that the courts of other countries do not exorbitantly assume jurisdiction over disputes that are better settled in our forum, the forum non

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1807 Parrish, “Comity and Parallel Foreign Proceedings”, supra note 1806 at 211.
1808 Ibid at 216.
1809 Applying Black & Swan’s view, the only ground on which a plaintiff would insist that the domestic court exercise its jurisdiction would seem to be that the dispute is more closely connected with the domestic forum than with the foreign forum. In any case in which a plaintiff is able to show this, it seems that a clear injustice would occur if the court declines jurisdiction. It is noteworthy that Parrish does not give an example of “a clear injustice” that would likely occur, and the circumstances under which it might occur, if the court declines jurisdiction. He might have thought that where the second-seised forum is “slightly” more appropriate, a clear injustice would not occur and so forum non conveniens should not operate. But forum non conveniens operates (in Canada) only where the foreign forum is “clearly” more appropriate.
1811 Ibid at 5.
The existence of an alternative forum must be clearly established. Who bears the burden of establishing it? This is an aspect where the old distinction between service in juris and service ex juris situations seems to reincarnate in Canada. In service in juris situations, the burden is that of the movant, and it is typically the defendant, who asserts that there is an alternative forum. But there seems to be one type of case where the burden may be on the plaintiff. In parallel proceedings situations (discussed shortly) where the defendant argues that there is a prior proceeding on the same subject matter and parties in a foreign court and urges that the present action be stayed based on *lis pendens*, plaintiff may himself invoke the doctrine of *forum non conveniens* in favour of retention of jurisdiction, arguing that the foreign court is *forum non conveniens*. In that case, plaintiff would have the burden of proof.

In service ex juris situations, however, the story is different. *Amchem* decided that the answer in an ex juris service situation depends on whether the relevant provincial rule permits ex juris service with leave or without leave:

> Whether the burden of proof should be on the plaintiff in ex juris cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service ex juris where no order is required, then the rule must govern. The burden of proof should [however] not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the materials presented by the parties. While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff.\(^{1813}\)

Thus, in provinces where leave is required for ex juris service, the plaintiff must prove positively that the domestic forum is clearly more appropriate.\(^{1814}\) The British Columbia Court of Appeal

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\(^{1812}\) For an interesting exposition of the problems attending the first-to-file rule, see, generally, Walker, “*Teck Cominco and the Wisdom of Deferring to the Court First Seised*, *supra* note 1803, and Blom, “Concurrent Judicial Jurisdiction”, *supra* note 1802.

\(^{1813}\) *Amchem*, *supra* note 178 at 921.

\(^{1814}\) Castel, *Canadian Conflict of Laws*, *supra* note 1700 at 252.
has held that where leave is not required for service \textit{ex juris}, it is still the plaintiff’s burden, where the defendant has raised the issue, to show that British Columbia is clearly the more appropriate forum.\footnote{Bushell \textit{v} T \& P Plc (1992), 92 DLR (4th) 228 (BCCA).} In the Ontario Court of Appeal case, \textit{Frymer \textit{v} Brettenschneider},\footnote{(1994), 19 OR (3d) 60 at 79.} a majority of the court equally refused to recognize any division between service \textit{ex juris} with leave and service \textit{ex juris} without leave. It held that in both cases, the burden is on the plaintiff to show the appropriateness of the domestic forum if challenged by the defendant.\footnote{Ibid.}

However, in service \textit{ex juris} situations where the relevant provincial rule does not allocate the burden of proof, \textit{Amchem} placed the burden of establishing the more appropriate forum on the defendant who is alleging that the domestic forum is \textit{forum non conveniens}.\footnote{\textit{Amchem, supra} note 178.}

In the US, rather than drawing a distinction between service \textit{ex juris} and service \textit{in juris}, the court in \textit{Piper} drew a distinction between cases where the plaintiff is a US resident and cases where the plaintiff is foreign. In the former case, the defendant has the burden of showing the existence of an alternative forum that is clearly more appropriate or convenient. In the latter case, the foreign plaintiff has the burden of showing that the chosen forum is clearly more appropriate or convenient.\footnote{\textit{Piper, supra} note 117 at 249 (stating that “dismissal will ordinarily be appropriate ... where the [foreign] plaintiff is unable to offer any specific reasons of convenience supporting his choice.”).}

In establishing the existence of an alternative forum, the defendant must identify specifically the alternative forum that is available. In \textit{Van Breda}, LeBel J stated that the defendant must establish the alternative forum’s availability using the same connecting arrows that the court used in establishing a real and substantial connection between the action and its own jurisdiction.\footnote{\textit{Van Breda} (SCC), \textit{supra} note 1274 at para 103 (“The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation.”).}

This suggests that that forum must be available according to Canadian standards. But at another point, LeBel J stated that “the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules.”\footnote{Ibid at para 109.} The approach contained in the first statement seems objectionable because it would allow a Canadian court to deny the availability of a foreign forum that relies on jurisdictional standards that are
more tenuous than a real and substantial connection. The approach fits better within the Canadian federation where the standards are almost entirely uniform.

The burden further requires the defendant to show that the alternative forum is “clearly more appropriate”. Although the expression “clearly more appropriate” is not used in the statutes that have codified the doctrine – the CJPTA uses the words “more appropriate” while the Quebec Civil Code merely refers to the exceptional nature of the doctrine – the expression seems well entrenched in the jurisprudence.\textsuperscript{1822} Thus, the defendant must show, not that the alternative forum is “comparable” with the domestic forum, but that it is better in material respects. In the words of LeBel J, “[i]t is not a matter of flipping a coin.”\textsuperscript{1823}

5.5.5 Reformulating the Forum Non Conveniens Doctrine

It is submitted that a court should decline jurisdiction on the grounds of forum non conveniens only where it is a clearly inappropriate forum and not when there is a clearly more appropriate forum, unless refusal to decline jurisdiction might deprive the defendant adequate opportunity to defend the case. Where the competing forums are both appropriate, the plaintiff’s choice of forum should prevail unless the defendant’s ability to defend the case in that forum is so hampered that there are serious doubts as to whether justice can be served in the plaintiff’s chosen forum. The meaning of “a clearly inappropriate forum” would depend on the specific facts of each case. Roughly, a forum is clearly inappropriate when, due to practical difficulties that render adjudication of the case there cumbersome, clumsy and awkward, justice in the case cannot reasonably be expected to be served there. Where justice can be served, but it is only that another forum is merely less cumbersome, clumsy and awkward, or, to use the traditional language, clearly more appropriate, stay should not be granted. In this way, declining jurisdiction would be in truly exceptional circumstances.\textsuperscript{1824}

Accordingly, many a factor that has hitherto been considered important should have little or no role to play in the determination of whether or not a forum is clearly inappropriate. With

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\textsuperscript{1822} It was the expression used in Spiliada and Amchem and LeBel J stressed it in Van Breda (SCC), supra note 1274 at paras 108-109. \\
\textsuperscript{1823} Ibid at para 109. \\
\textsuperscript{1824} Talpis and Kath have made a similar suggestion with regard to the application of forum non conveniens in Quebec. However, they give no guidance on how this approach should be applied, such as what factors the court should focus on, and whether this approach might help to address the problems associated with parallel litigation. Talpis & Kath, supra note 1652 at 849-851.
\end{flushleft}
the increasing incidence of multijurisdictional cases, judges can now hardly be described as neophytes in the application of foreign laws. Courts do apply foreign law and many legal systems have statutes that facilitate the application of foreign law through the prescription of rules of proof.\footnote{See, for instance, Article 2809 of the Quebec Civil Code.} No doubt, forum judges are in the best position to interpret their forum laws, but foreign judges can also do it well enough in most cases. As argued previously, one area where it would be unsafe to allow judges interpret foreign law is where the foreign law in question comprises the native law and custom of the foreign country.

The existence of parallel proceedings may raise a slightly different consideration because of the need to avoid inconsistent rulings from two competent jurisdictions. Where the forum court is the court first seized, it is entitled to deference unless it is a clearly inappropriate forum. The court last seized should ask itself whether the court first seized is a clearly inappropriate forum, and exercise jurisdiction only when it answers this question affirmatively. If, however, it finds that the court first seized is \textit{not} a clearly inappropriate forum, but is merely less appropriate, it should decline jurisdiction in deference to that court to avoid the likelihood of inconsistent rulings. The court first seized is thus obliged to first consider the clearly inappropriateness of the court first seized, but the court first seized is not required to do the same with regard to the court last seized. In essence, this is a modified form of the \textit{lis pendens} rule.

This approach differs slightly from Parrish’s approach. Parrish argues for a strict \textit{lis pendens} rule unless the objecting party can demonstrate that “a clear injustice would result” therefrom. In the approach advocated here, although respect is still accorded to the court first seized, the case is nevertheless subjected to the “clearly inappropriate forum” test, and the first seized court does not exercise jurisdiction merely because it is the court first seized, but because it is \textit{not} a \textit{clearly inappropriate} forum. Thus, the “clearly inappropriate forum” test is considered first with regard to the court first seized and then later with regard to the court last seized. In addition, what amounts to “a clear injustice” occupies a lower threshold than what amounts to “a clearly inappropriate forum”. The notion of a clear injustice in this context is defendant-oriented. But what amounts to a clearly inappropriate forum is more party-neutral. Certainly, a clear injustice would result where the defendant might not be able to defend the suit if the suit is heard in a clearly inappropriate forum. But a clear injustice might also result where the suit is heard in
a less appropriate forum if, for instance, the defendant will have to incur additional costs transporting his witnesses.

The most important factor to consider should be the location of witnesses and elements of proof. The location of witnesses and elements of proof is the most important factor because it is the one that has the most significant impact on the adjudicatory process. Whatever be the plaintiff’s case, it all boils down to his ability to prove his case. Whatever be the defendant’s defence, it all boils down to his ability to adduce counter evidence to establish his defence, assuming the plaintiff has discharged his part of the bargain. So evidence is at the heart of all judicial proceedings. The residence of the parties should matter only insofar as it relates to the location of witnesses and elements of proof.

The issue of statute bar should generally not be treated as an issue of juridical advantage, but as an issue that speaks to the availability of an alternative forum. This is because, as argued earlier, the notion of forum non conveniens contemplates the existence of an alternative forum that is able to hear the case on the merits and not a mere theoretical possibility that the case would be heard elsewhere. An exception may be made, however. Where it can be shown that the plaintiff deliberately or negligently waited for the action to become statute-barred in the alternative forum so that he would take advantage of the favourable law in a clearly inappropriate forum, stay should be granted. To do otherwise would require the court to undertake a very onerous task of providing the plaintiff a forum where the plaintiff has acted in bad faith. Such judicial indulgence is a sacrifice on the part of the court, but one that would be worthy and justified only where the plaintiff has come with clean hands. But where the plaintiff, for no fault of his, was unable to bring the suit in the alternative forum until it became statute-barred there, the forum court should provide the plaintiff a forum even if it is a clearly inappropriate forum. This is because there is no other place the plaintiff can go, unless, as earlier argued, the statute bar is waivable in the alternative forum and the defendant undertakes to waive it. Ensuring that an actual forum is available where parties can ventilate their grievances should be regarded as paramount in any forum non conveniens consideration.
The liability theories that apply to individuals can be well adapted to corporations. These include the traditional ones: negligence, nuisance, wrongful death, etc. A less known and rarely used liability theory is the tort of civil conspiracy. It is suggested that that JVCA has created a new civil liability theory: the tort of terrorism. Since the traditional liability theories are extensively discussed in the literature, the following discussion shall focus on the tort of civil conspiracy and the new tort of terrorism. It is argued that both can be fully applied to hold corporations liable for extraterritorial corporate crimes.

5.6.1 Civil Conspiracy

The tort of civil conspiracy is recognized in Canadian jurisprudence. Although the law concerning its scope is unclear, Canadian courts have found liability for it. The seminal case is *Canada Cement Lafarge v BC Lightweight Aggregate*. There the Supreme Court of Canada sketched its elements as follows:

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

1. whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants’ conduct is to cause injury to the plaintiff; or,
2. where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants’ conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

In *Waters v Michie*, the British Columbia Court of Appeal described the tort’s elements as follows:

1. an agreement between two or more persons;

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1826 [1983] I SCR 452.
1827 *Ibid* at 471 (Estey J).
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must at least be evidence that the conspirators intended to cause damage to the plaintiff
   (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e. constructive intent);
4. actual damage suffered by the plaintiff.  

For the tort to be committed, therefore,

a. the specific conduct in question need not be unlawful, provided the defendants intended to cause injury to the plaintiff;
b. the conduct must have been committed by more than one person;
c. the persons must have acted in concert, by agreement or by a common design;
d. the conduct must be directed against the plaintiff;
e. the defendants ought to know that in the circumstances prevailing injury to the plaintiff is likely to be the result of their conduct; and
f. the conduct of the defendants must actually cause injury to the plaintiff.

The rationale for the tort is to address situations where the acts of a group of persons create an injury that would not have occurred were the acts to be undertaken by one person. In Agribrands Purina Canada Inc v Kasamekas, the Court of Appeal for Ontario stated that “[t]he tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct.” It stated that “unlawful conduct” under situation 2 above is not to be defined in connection with the substantive tort conspired to be committed, reason being that the tort of civil conspiracy has developed separately from other torts and the concept of “unlawful conduct” has a different meaning in each tort. Thus, “quasi-criminal conduct, when undertaken in concert” suffices to constitute unlawful conduct for the tort of civil conspiracy “even though that conduct is not actionable in a private law sense.” In Economic Interests in Canadian Tort law, Peter Burns and Joost Blom list the following activities as examples of the tort of civil conspiracy: inducing breach of contract, wrongful interference with contractual

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1828 2011 BCCA 364 at para 38.
1829 Frame v Smith [1987] 2 SCR 99 at 125 (refusing to extend the tort to the realm of family law as it would inhibit collaborative parenting and so not be in the best interest of children).
1831 Ibid at para 35.
1832 Ibid at para 37.
1833 (Markham: LexisNexis, 2009).
rights, nuisance, intimation, defamation, breach of a statute which does not grant a private right of action, breach of a labour relations statute, and breach of a criminal statute.\textsuperscript{1834} There is no requirement that all the conspirators be sued together. If the plaintiff can get only one of them into the court, there is no barrier to establishing the commission of the tort provided the plaintiff can prove the existence of a conspiracy between the defendant and other persons to undertake an unlawful act that, were the defendant (or any single one of the alleged conspirators) acting alone, would not have been committed.

The nature of the violations envisaged in this study can be relatively easily pigeonholed into this tort. The plaintiff only needs to show that the Canadian parent of the foreign subsidiary participated in the agreement to commit the alleged violations and that the scale of the violations could not have been perpetrated by a single person. In fact, the tort of civil conspiracy would bear on all other possible bases of civil liability. This is because to trigger Canadian jurisdiction, the plaintiff must plead the participation of the Canadian parent corporation in the extraterritorial conduct. For acts committed wholly by the subsidiary without the participation of its Canadian parent will hardly pass jurisdictional muster.

5.6.2 Tort of Terrorism

The JVTA created a new and distinct cause of action in favour of victims of terrorism. For want of a better term, I would call it the “tort of terrorism” since it is restricted to loss or damage suffered mostly from terrorist conduct. I say “mostly” because some of the conduct incorporated from the Criminal Code does not relate to terrorism. But the Act’s title justifies the characterization of the prohibited conduct as the tort of terrorism. Any person who has been terrorized and can establish Canadian jurisdiction can base his claim solely on the Act by pleading the tort of terrorism. Although the Act itself does not directly and fully set out the ingredients of this tort, its incorporation of relevant Criminal Code provisions supplies the missing elements. The question of capacity to sue or be sued under the Act was part of the jurisdictional analysis earlier in this chapter.

\textsuperscript{1834} \textit{Ibid} at 167-168.
Principally, the conduct complained of must fall into the definition of any of the conduct proscribed under Part II.1 of the *Criminal Code.*\(^\text{1835}\) The conduct is myriad and broadly includes:

- financing terrorism
- dealing with property owned or controlled by or on behalf of a terrorist group
- instructing a person to carry out a terrorist activity
- harbouring or concealing a terrorist
- facilitating terrorist activity
- creating a hoax about the occurrence of terrorism

Thus, the plaintiff has an assortment of potential defendants to sue. The last conduct outlined above – creating a hoax about the occurrence of terrorism – is particularly remarkable in that a plaintiff who suffers loss or damage as a result of such hoax can claim against the author of the hoax.

It must be pointed out, however, that the acts and omissions constituting the conduct set out above are penned in the tradition of criminal law and cannot always apply to civil proceedings without modification. For instance, section 83.19 provides that a person who knowingly facilitates a terrorist activity has committed an indictable offence, and subsection (2) states that a terrorist activity is facilitated whether or not (a) the facilitator knows that a particular terrorist activity is facilitated; (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or (c) any terrorist activity was actually carried out. Since the plaintiff must show that he suffered loss or damage due to the defendant having committed one of the above acts or omissions, in this instance, facilitating terrorism, where no terrorist act was actually carried out, the plaintiff cannot succeed since he will be unable to show in that case that he suffered any loss or damage. Yet the defendant can still be held criminally liable for facilitating the commission of terrorism.

Lastly, none of the above acts or omissions is a strict liability offence. The plaintiff will therefore be required to prove that the defendant acted knowingly or intentionally. However, the standard of proof will be that applicable in civil proceedings, that is, proof on a balance of probability.

\(^{1835}\) JVTA, *supra* note 164, s 4(1).
In 1998, the plaintiff in the Cambior case, RIQ, argued that the only Canadian province where a Canadian corporation could be sued for environmental harm it caused overseas was Quebec because of the operation of French civil law in Quebec. This chapter has demonstrated that this assertion is not accurate. It may be easier to sustain such an action in Quebec because of the Quebec Civil Code’s express mandate that the doctrine of *forum non conveniens* be applied exceptionally. Yet there are clear legal prospects that such an action would survive jurisdictional muster in the other provinces. That in spite of the legislative mandate for an exceptional use of the doctrine of *forum non conveniens* in Quebec, two of such cases were dismissed for *forum non conveniens* does not necessarily mean it would be more difficult in the other provinces. This is because of the highly discretionary character of the doctrine of *forum non conveniens* and because each case is treated on its own merits. In addition, the national influence of the Supreme Court of Canada on the application of the doctrine has rendered the difference between the application of the doctrine in Quebec and in the other provinces virtually nothing more than a theoretical difference. As has been pointed out, in spite of the legislative admonition that the doctrine be applied exceptionally in Quebec, “far more cases are dismissed on the basis of [the doctrine] than one would expect.”

Besides, with the emergence of necessity jurisdiction and its express adoption both in the Quebec Civil Code and in the CJPTA, victims of corporate wrongs committed abroad now have a new jurisdictional possibility to weigh. In situations where it would be impossible for the plaintiff to initiate the suit in the foreign country where the dispute ought to be decided, or where for practical reasons the plaintiff cannot reasonably be expected to initiate the suit there, a Canadian court may assume jurisdiction where failure to do so might prevent the suit from being heard at all.

In addition, the newly enacted JVTA opens the door of Canadian courts to victims of terrorism where the action has a real and substantial connection with Canada or the victim is a Canadian citizen or permanent resident. Corporations implicated in terrorist activities may face liability in Canadian courts regardless of where the terrorism occurred, provided the above

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requirements are met. Finally, whether the plaintiff would be able to establish Canadian
jurisdiction would also depend on the nature of corporate involvement in the extraterritorial
wrong. Such involvement is in turn dependent on the liability theory the plaintiff canvasses. Only
two of such theories have been dealt with here: civil conspiracy and the tort of terrorism.
CHAPTER 6
TORT CHOICE OF LAW

6.1 INTRODUCTION

The link between jurisdiction and choice of law is well known to conflicts scholars, who believe that choice of law may be the real issue behind the veneer of jurisdictional contests.\(^{1838}\) Thus, when litigants are engaged in jurisdictional fights, they may be actually concerned with the law that would be applied to their case since the jurisdiction where the case is litigated has a substantial influence on the choice of applicable law. Issues of choice of law drive jurisdiction, and issues of jurisdiction drive choice of law.\(^{1839}\) Therefore the jurisdictional discussion in this study would be incomplete without a consideration of choice of law. Because of the controversial nature of choice of law, a look at how other jurisdictions have tackled their own choice of law problems is considered beneficial. For obvious reasons, the discussion is limited to tort choice of law.

6.2 A LITTLE HISTORY

Tort choice of law in Canada is governed by the Supreme Court of Canada decision in *Tolofson* and *Gagnon v Lucas* – two companion cases that presented similar fact-situations and similar questions of law. Each, however, raised an additional issue that the other did not. The Supreme Court issued a consolidated decision covering both cases. Put simply, the plaintiffs in both cases were residents of province A. They were both passengers in cars registered and insured in Province A. The drivers of those cars were also residents of province A. The passengers were injured in an accident that occurred in Province B. The drivers of the other cars were residents of province B and their cars were registered in Province B. In one of the cases, liability was covered by an insurance contract made in Province B. In the other case, it was covered under the terms of Province B’s “no fault” insurance scheme. The plaintiffs brought suit in Province A against the two drivers. The question then was which Province’s law should govern. Was it that of province?


\(^{1839}\) Ibid.
A or that of Province B? The Supreme Court held that the *lex loci delicti commissi* (also called the *lex loci*), that is, the law of the place where the tort was committed, governed, subject to a few exceptions.

The above holding cannot be fully understood outside the historical context of tort choice of law in Canada. Prior to *Tolofson*, the prevailing rule in tort choice of law was the *lex fori* rule – that is, the law of the forum where the tort is being adjudicated.\(^{1840}\) This rule was so strong that liability could not be found for acts that were wrongful in the place where they occurred unless they were equally wrongful under the law of the forum.\(^ {1841}\) The current rule in *Tolofson* owes its genesis to the English case of *Phillips v Eyre*.\(^ {1842}\) The plaintiff in *Phillips v Eyre* filed suit in England against the defendant for assault and false imprisonment committed in Jamaica. At the time the torts were committed, the defendant was the Governor of Jamaica. The conduct the plaintiff complained of was part of a series of acts authorized by the Jamaican government to suppress an ongoing rebellion. The Governor of Jamaica had passed legislation absolving all persons of liability for all acts done in the suppression of the rebellion. The plaintiff’s case was that assuming the legislation was valid in Jamaica, it did not have the effect of denying a right of action in England. Willes J objected that the plaintiff’s argument was based on a comingling of a civil obligation and a right of action. Stressing that a right of action is distinct from and subordinate to a civil obligation, he formulated the following:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.\(^ {1843}\)

This rule is known as the “double actionability” doctrine. Double actionability required that the wrong be actionable under both the law of the forum and the law of the place it occurred.\(^ {1844}\) The House of Lords in *Machado v Fontes*\(^ {1845}\) however indicated that the rule in *Phillips v Eyre* did not create the double actionability doctrine as we know it. The House interpreted *Phillips v Eyre*...
as saying that the act need only be actionable in England and merely “unjustifiable” in the place where it was committed. “Unjustifiable”, one scholar has noted, “was always a subject of intense debate.” The phrase has been used “if the act is criminal, if it gives rise to liability for property damage, even if not physical injury, if it exposes the defendant to any civil liability, even if the amount of damages is a tiny fraction of the liability under the lex fori, or, in perhaps the extreme cases, if the defendant simply did something that the court thought was bad.” However, double actionability calls for the assessment of the availability of substantive defences under foreign law so as to see how much of the lex fori should be applied. “Unjustified” thus adopts a lower threshold than “double actionability”. It was essentially an application of the lex fori rule. In Chaplin v Boys, however, the House overruled Machado by reinterpreting Phillips v Eyre to restore the traditional understanding of the double actionability doctrine. It held that English law was applicable where the conduct was actionable both in England and in the place where it was committed, with the exception that where justice warranted, courts had discretion to depart from this rule. The double actionability doctrine, however, no longer operates in England.

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1847 Ibid.
1848 Orange, supra note 1844.
1850 This rule has been summarized by L Collins, Dicey & Morris on Conflict of Laws, vol 2, 11th ed. (London: Stevens & Sons, 1987) at 1365–1366: “Rule 205 – (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done. (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.”
1851 The English Law Commission and the Scottish Law Commission published a Working Paper in 1990 in which they reconsidered the merits of the double actionability doctrine and called for its reconsideration. See UK Law Commission & Scottish Law Commission, Private International Law: Choice of Law in Tort and Delict (Law Com No 193/Scot Law Com 129) (London: Her Majesty’s Stationery Office, 1990). The Working Paper noted a number of weaknesses in the double actionability doctrine. First, it considered it “anomalous” to require actionability by two separate legal systems, the lex fori and the lex loci. Ibid at para 2.6. Second, it considered it “parochial in appearance” to give prominent role to the lex fori, which was the practical result of the application of the double actionability doctrine (for no action would lie if the wrong was unknown to English domestic law), regardless of the presence of a foreign element in the fact situation. Ibid at para 2.7. The Commission thought that the presence of the foreign element might make it just in principle to apply foreign law to determine the dispute even though that law is different from English law. Ibid. Third, the double actionability rule favoured the wrongdoer since it required the plaintiff to show that the claim is actionable in both the lex fori and the lex loci whereas the wrongdoer may take advantage of a defence available in either the lex fori or the lex loci. Ibid at para 2.8. Fourth, the double actionability rule was “uncertain.” Ibid at para 2.9. Although the general rule is clear, the nature of the exception established in Boys v Chaplin is “almost wholly undefined” and its future application is highly speculative. Ibid. After noting these defects, the Commission made recommendations that provided the
Canadian law, before Tolofson, was founded on Machado. The case importing it into Canada was McLean v Pettigrew. How this operated was that the *lex fori* determined liability but the *lex loci* would kill the right of action *ab initio* where, under the law of the place of the tort, the defendant’s conduct was utterly without liability, criminal or civil. Subsequent cases followed McLean. With time, the application of the *lex fori* rule in Machado came to be deprecated as provincial. In Tolofson, La Forest J stated that a rule that applied the *lex fori* (and the *lex loci* only as a defence) failed to appreciate the “underlying realities” in which the rules operated. In his words, “[t]he court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order.” The English and Scottish Law Commissions expressed a similar concern when they wrote that “the law of tort and delict was formerly seen, much more than it is today, as having a punitive rather than a compensatory function. As such it was more closely allied to criminal law, an area of law where there is no question of a court in this country applying anything other than the domestic law of England or Scotland.” No state applies the criminal law of another state. A state that has custody of a person alleged to have committed an offence abroad does not prosecute that person, applying the criminal law of that foreign state.


See, for instance, *Going v Reid Brothers Motor Sales Ltd* (1982), 35 OR (2d) 201 (HC); *Walpole v Canadian Northern Railway Co*, [1923] AC 113 (P.C.); *Ang v Trach*, (1986), 57 OR (2d) 300 (HC); *Grimes v Cloutier*, (1989), 61 DLR (4th) 505 [Grimes]; and *Prefontaine Estate v Frizzle*, (1990), 71 OR (2d) 385 [Prefontaine Estate]. *Grimes* and *Prefontaine Estate* expressed doubts over the soundness of *McLean* and confined *McLean’s* application to its particular facts.

There were in the 19th century context in which the British approach was established a number of forces that militated in favour of the English rule. To begin with Great Britain was the metropolitan state for many colonies and dependencies spread throughout the globe over which it had sovereign legislative power and superintending judicial authority through the Privy Council. Because of its dominant position in the world, it must have seemed natural to extend the same approach to foreign countries, especially when this dominance probably led to the temptation, not always resisted, that British laws were superior to those of other lands (see *Chaplin v. Boys*, supra, at p. 1100). There was, as well, the very practical consideration that proof of laws of far-off countries would not have been easy in those days, and the convenience of using the law with which the judges were familiar must have proved irresistible. All the social considerations enumerated above are gone now, and the problem of proof of foreign law has now been considerably attenuated in light of advances in transportation and communication, as Lord Wilberforce acknowledged in *Chaplin v. Boys*.

Instead it extradites the person to the state under whose criminal laws he may be prosecuted. Insisting on applying the *lex fori* makes the law of tort look pretty much like criminal law. Applying the *lex fori* would also result in the application of different rules to the same wrong by different states as well as invite litigants to forum-shop for the place with the law most favourable to them. It is arguably unjust to hold a defendant liable for conduct that is not condemned in the place where it took place. In the words of Cardozo J, “we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” Catherine Walsh has observed that “[a] choice of law rule that directs the court to apply its own law is a choice of law rule in name only.” After reviewing the evolution of tort choice of law, Walker concludes that “[t]here is now a widespread consensus that it is not appropriate to apply the *lex fori*, and that it is appropriate in most cases to apply the *lex loci*.”

The *lex loci delicti commissi* rule itself has its roots in the vested rights theory of Joseph Beale. The vested rights theory propounds that a court purporting to apply the law of another state is not actually enforcing that state’s law, but is merely proclaiming or recognizing the rights created by that state’s law. That right, according to vested rights, is vested in the person at the time of the occurrence of the cause of action – not at the time of litigation – and follows that person like his shadow wherever he may go. Describing the theory, Cardozo wrote: “A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 

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1858 Walker, “Are We There Yet?”, ibid.
1859 *Loucks v Standard Oil Co of New York*, 120 NE 198 at 201 (NY 1918) [Loucks].
1860 Catherine Walsh, “Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims” (1997) 76 Can Bar Rev 91 at 100. The same may equally be said of a choice of law rule that directs the courts to apply the *lex loci*. Save in cases where the *situs* of the wrong transcends local boundaries, there is really no choice at all for the court.
1861 Walker, “Are We There Yet?”, *supra* note 1840 at 340.

Beale's theory of vested rights rested upon a set of territorial assumptions about the proper geographical scope of a state's authority. Each state was said to have exclusive authority over its own territory, and was thought to be utterly without power to property or events in other states.

How then, one might ask, could a sovereign state feel confident that its laws would be respected in the courts of another sovereign state? If the effect of a state’s laws supposedly stooped at its borders, then how could those laws have any force in the forum which was called upon to adjudicate legal claims arising within the first state? The answer provided by the First Restatement was that the forum did not really enforce the first state's laws, as such, but only recognized the rights that were created by those laws. If certain relevant activities occurred in the first state, then rights would rest under its laws and these rights would acquire an extra-territorial effect - a claim for recognition in the courts of another state - that the laws themselves would not have.

‘follows the person and may be enforced wherever the person may be found’ ... ‘No law can exist as such except the law of the land; but ... it is a principle of every civilized law that vested rights shall be protected’ . . . The plaintiff owns something, and we help him to get it.”  

Essentially, this comports with the territorial view of law.

6.3 LA FOREST J’S REASONS

La Forest J stressed that the lex loci delicti rule has the merit of “certainty, ease of application and predictability.” It would also meet the natural expectations of the parties. For in the normal course of events people would expect their actions to be governed by the law of the place where the actions took place and that the legal consequences of those actions be defined by the same law. For these reasons La Forest J found the application of the lex loci delicti rule “axiomatic”, “at least as a general rule”. He acknowledged, however, that situations may arise where an act that occurs in one place has its consequences directly felt in another. It may be such that the consequences may be taken to constitute the wrong. The issue of where the tort takes place becomes debatable. This may be the case where the wrong is of transnational or international character. In this case, territorial considerations may become less important. La Forest J seemed to suggest that the lex loci delicti rule may not apply to cases of these kinds, but he did not elaborate on the point since the cases before him presented a different scenario. At another point, he was more specific in allowing an exception: “There may be room for exceptions but they would need to be very carefully defined.” He found McLean unsatisfactory. He also found Chaplin unsatisfactory despite its reformulation of Machado. The law as it stands today in Canada is thus: the lex loci delicti rule applies, subject to undefined exceptions. But the exceptions are limited to wrongs that occurred outside Canada. In defence of this rule JP McEvoy writes: “Certainty and simplicity have triumphed in Canadian conflict of laws. Having lex loci delicti as the strict choice of law rule for intra Canadian multi-jurisdictional torts but with a rare exception in relation to international torts simplifies the judicial task and will

1863 Loucks, supra note 1859 at 201.
1864 Tolofson, supra note 175 at para 43.
1865 Ibid.
1866 Ibid at para 42.
1867 Ibid.
1868 Ibid at para 45.
1869 Ibid at para 66.
promote settlements, reduce transaction costs and promote efficiencies within the legal system.”

La Forest J added that the *lex loci delicti* rule seems consistent with the Canadian constitutional arrangement. As he did in *Morguard*, however, he was not prepared to make a constitutional pronouncement because a constitutional question was not put before the court. But he did say that the application of the *lex loci* rule would be “clearly constitutionally acceptable” while the application of the *lex fori* rule might pose “intractable constitutional problems”. He adopted, among others, the remarks of Wilson and Gaudron JJ of the High Court of Australia in *Breavington v Godleman* that “[i]t is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.” Ensuring that a wrong in one province is given the same legal effect throughout Canada is obviously consistent with the idea of creating a single country. “While… the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.”

The *lex loci* rule is also the operative rule in Australia. In *John Pfeiffer Pty Ltd v Rogerson*, the High Court of Australia reconsidered the choice of law rules for “intra-Australian torts” – torts between Australian states. It overruled the double actionability doctrine in favour of the *lex loci*. In *Régie National des Usines Renault v Zhang*, it was invited to extend the *lex loci* rule to international torts. It accepted the invitation unequivocally. In adopting the *lex loci*, it made only passing reference to *Tolofson*, suggesting that it was not influenced by *Tolofson*, but was merely noting that the double actionability doctrine had since been discarded in favour of the *lex loci* elsewhere.

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1871 *Ibid* at para 71.
1872 (1988), 80 ALR 362 at 379 (HC); *Tolofson*, supra note 175 at para 67.
1873 *Tolofson*, *ibid* at para 69.
1874 *Ibid* at para 56.
1875 (2000) 201 CLR 552 [*Pfeiffer*].
1877 (2002) 187 ALR 1 [*Zhang*].
La Forest J declined to allow an exception to the *lex loci delicti* rule in interprovincial cases (with Major and Sopinka JJ dissenting on the point). He allowed the possibility of an exception in international cases. This means that it might sometimes be appropriate to apply a law other than the *lex loci* to transnational and international torts. He wrote in *Tolofson*: “I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.”\(^{1878}\) The rationale for the interprovincial/international dichotomy remains not fully clear. The exact limits of the exception in international cases equally remain undefined although La Forest J’s reference to “our own law” suggests that he had in mind the application of the *lex fori*. This reference to the *lex fori*, however, seems relatively casual and the result is that it is not clear whether La Forest J would not allow some other law, other than the *lex fori*, to serve as an exception in certain circumstances. The development of the jurisprudence has not provided opportunities for this to be elaborated. In fact, the Ontario Court of Appeal has suggested that an exception should rarely be allowed even in international cases.\(^{1879}\)

A few arguments may be made against the outright rejection of the *lex fori*. It is not always accurate to say that the court applies the *lex fori* simply because it is the *lex fori*, that is, in order to promote the public policy of the forum. In *Hanlan v Sernesky*, the Ontario Court of Appeal affirmed the decision of the Ontario Superior Court applying the *lex fori* in an international case engaging Ontario and Minnesota. The reason for applying the *lex fori* was not because the case was litigated in Ontario. The Ontario Court of Appeal stated that *Tolofson* allows “a discretion to apply the *lex fori* in circumstances where the *lex loci delicti* rule would work an injustice.”\(^{1880}\) While what amounts to injustice informing the application of a law other than the *lex loci* remains unclear, the law applied in the case, the *lex fori*, happened to be the

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\(^{1878}\) *Ibid* at para 49. In contrast to Canada, the majority in *Zhang* rejected the idea of a “flexible exception” in international torts. The only exception it allowed was one based on public policy grounds, an exception it had held in *Pfeiffer* to be constitutionally impermissible in inter-state torts. Zhang, *ibid* at 516-517, 528-529. See Reid Mortensen, “Homing Devices in Choice of Tort law: Australian, British, and Canadian Approaches” (2006) 105 ICLQ 839 at 846.


\(^{1880}\) (1998), 38 OR (3d) 479 at 479 [*Hanlan*].
personal law of the parties. Injustice would result in the case because (1) the parties were both Ontario residents; (2) the contract of insurance was issued in Ontario; (3) the only connection between the case and Ontario was the occurrence of the accident; (4) the consequences of the accident were directly felt in Ontario; and (5) Minnesota law – the lex loci – did not allow claims of the nature in question in the case. Forcese has pointed out that the consideration of the difference in the law of the two jurisdictions went against the views of La Forest J who stated that difference in the laws of the two jurisdictions does not amount to injustice. While this is true, the other factors might have contributed to give different shading to the difference in the law of the two jurisdictions.

What was applied in Hanlan was essentially the personal law of the parties. The application of the personal law is not new. It is endorsed by article 3126 of the Quebec Civil Code as an exception to the general rule in favour of the lex loci in interprovincial cases established in the Code. The second paragraph of the Code states that “[i]n any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.” Since La Forest J did not declare the lex loci delicti rule constitutionally mandated, this exception is preserved in Quebec, and other provinces might enact similar legislation. Many civil law jurisdictions have also adopted the lex fori as an acceptable exception. The application of the personal law means that courts would be prepared to apply a law other than both the lex loci and the lex fori if that other law is the personal law of the parties.

The application of the lex loci has further implications. Where foreign law does not provide a remedy for a wrong, it is obvious that the lex loci rule would deny recovery to the plaintiff. In fact, the application of the lex loci would have the effect of compelling a declination of jurisdiction already assumed since there would be no need to adjudicate the claim if the

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1881 Hanlan, ibid.
1883 The first paragraph of the Code states: “The obligation to make reparation for injury caused is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.” Thus in international cases, the application of the lex loci is conditional upon the wrongdoer being in a position that he/she ought to have foreseen that damage would occur from his/her conduct.
1884 Walker lists these countries as Australia (Australian Federal Law, Art 48, s 1); Italy (Italian Law No. 218 of 31 May 1995, Article 62, s 2); and Germany (German Draft Code, Article 40, s 2 and Article 41). Walker, “Are We There Yet?”, supra note 1840 at 341.
1885 Walker, “Are We There Yet?”, ibid at 341.
plaintiff stands no chance of recovering anything even if the allegations were proved. This would be so even if the act is criminal under foreign law. Unless the case comes within the justice-based exception allowed in Tolofson, the case is effectively over for the plaintiff. This scenario would be disturbing to potential plaintiffs in light of the current trend of amnesty laws that bar suits against certain persons in countries in political transition, especially those just recovering from ethnic or religious conflicts.\textsuperscript{1886}

Forcese has argued that “where the \textit{lex loci} is the product of a despotic regime unacceptable to a democratic society”, some other law may be applied.\textsuperscript{1887} There is need for caution in pronouncing a regime despotic in a choice of law inquiry. It very easily amounts to an indefensible pronouncement on the integrity of a foreign legal system. It is better and less imperialistic to focus the inquiry on whether justice can be served if the foreign law is applied, regardless of whether the foreign regime is believed to be despotic or democratic.

While La Forest J left undefined the circumstances when an exception is appropriate in international cases, Article 3081 of the Quebec Civil Code expressly provides the situation when an exception is warranted: “The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations.” The expression “public order as understood in international relations” may be understood as meaning more than the concept of “\textit{ordre public}” found in civil law countries as well as the concept of “public policy” found in common law countries, under which a court will not apply foreign law where the foreign law would offend some fundamental values of the forum.\textsuperscript{1888} This is because of the expression’s reference to international relations. C Emmanueli has opined that “Quebec public order, for the purposes of private international law, encompasses principles and values of fundamental importance to Quebec society”, which “principles are often anchored in international texts,” and are found in the Charter as well as in the Quebec Charter of Human Rights and Freedoms.\textsuperscript{1889} Talpis and Castel have similarly suggested that in qualifying

\textsuperscript{1886} Phillips v Eyre, supra note 1842 was just such a case where it was pointed out that comity would support recognizing a general amnesty issued by the foreign state on whose law the forum court relies.

\textsuperscript{1887} Forcese, “Determing Militarized Commerce”, supra note 18 at 208.

\textsuperscript{1888} The major difference between “\textit{ordre public}” and “public policy” is that \textit{ordre public} contemplates “not so much the contents of the foreign law… as its effects.” Talpis & Castel, supra note 1539 at 14. See also James Yap, “Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from Bil’in (Village Council) v. Green Park international Ltd.” (2010) 8 JICJ 631 at 636.

\textsuperscript{1889} C Emmanueli, \textit{Droit international prive que be cois}, 2\textsuperscript{nd} ed (Montreal: Wilson & Lafleur, 2006) at 253 (cited in Yap, \textit{ibid}).
the term public order with the terms “manifestly” and “as understood in international relations”, “the legislator aims to instill an internationalist attitude in the judge”. Quebec courts are therefore enjoined to look to international principles in determining whether an exception to the lex loci rule should be made.

The meaning of “manifestly inconsistent with public order as understood in international relations” was considered in *Bil’In (Village Council) v Green Park International Inc*, a case (discussed more fully later in this chapter as a model case of transnational litigation of corporate wrongs in Canada) relating to the Israeli occupation of the West Bank. Two Montreal corporations and their sole director were sued for their alleged involvement in the development of dense residential housing in the West Bank. The plaintiffs alleged that by forcefully transferring its caviling population from territory it occupied in the West Bank, the defendants assisted Israel in violating the Fourth Geneva Convention, the Rome Statute, Canadian law and Quebec law. In response to a *forum non conveniens* motion, the plaintiffs argued that the law applicable in the West Bank was “manifestly inconsistent with public order as understood in international law” because the High Court of Justice of Israel does not recognize the application of the Fourth Geneva Convention. The Fourth Geneva Convention provides, under Article 49(6), that an occupying state may not “transfer parts of its own civilian population into the territory it occupies”. What the plaintiffs were essentially saying was that their claims would be non-justiciable in Israel because Israel does not accept that its forceful transfer of civilian population in the West Bank was a violation of international law. Cullen JSC of the Superior Court of Quebec did not find convincing evidence demonstrating that the High Court of Justice of Israel would refuse to hear the action on the basis that Article 49(6) of the Fourth Geneva Convention was non-justiciable in Israel. Without explaining what the expression “manifestly inconsistent with public order as understood in international relations” means, however, Cullen JSC stated that, like Canadian courts, Israeli courts do not apply treaty law unless they have been incorporated into Israeli domestic law and that this requirement is not “manifestly inconsistent with public order as understood in international relations”. He found that the Israeli High Court of Justice had not applied Article 49(6) of the Fourth Geneva Convention, not because of

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1891 2009 QCCS 4151 (CanLII) [*Bil’In*].
1892 *Bil’In*, *ibid* at paras 239-240.
1893 *ibid* at para 265.
1894 *ibid* at paras 274-275.
its “unwillingness” to do so in view of the political import of the matter, but either because it was unnecessary to do so or because the court did not regard it as customary international law and that it was not part of Israeli domestic law.\textsuperscript{1895} He noted that the fact that Canada had domestically implemented the Fourth Geneva Convention did not lead to the conclusion that the application of the West Bank law would produce a result “manifestly inconsistent with public order as understood in international relations”.\textsuperscript{1896} He also noted that Canadian courts would, in general, not hear a case that merely raised a “hypothetical or abstract” question, and that this requirement is not “manifestly inconsistent with public order as understood in international relations”.\textsuperscript{1897} On appeal, the Quebec Court of Appeal did not address the meaning of “manifestly inconsistent with public order as understood in international relations” even though the plaintiffs renewed their argument that the non-justiciability of his claims in Israel was “manifestly inconsistent with public order as understood in international relations”. Forget JA limited his analysis to Cullen JSC’s finding that the plaintiffs’ claim was justiciable in Israel. He refrained from interfering with this finding.\textsuperscript{1898}

It is not clear whether Cullen JSC would have held that the West Bank law was “manifestly inconsistent with public order as understood in international relations” assuming he found that Article 49(6) of the Fourth Geneva Convention was an articulation of customary international law and that Israeli courts would not apply it. It is submitted that there is no better manifestation of inconsistency with public order as understood in international relations than a refusal to apply customary international law. It is further suggested that a law would be deemed as “manifestly inconsistent with public order as understood in international relations” if it offends some core values held by the international community, for example, if it fails to recognize gender equality.

Cullen JSC stressed that Article 3081 of the Quebec Civil Code “does not purport to invalidate ‘acts’, but to deny the application of the ‘provisions of the law’ of a foreign country.”\textsuperscript{1899} He rightly pointed out that the Article targets the “result” of applying the provisions of the foreign law.\textsuperscript{1900} Thereafter he stated that the plaintiffs were not contesting the application

\textsuperscript{1895} \textit{Ibid} at para 288.  
\textsuperscript{1896} \textit{Ibid} at para 289.  
\textsuperscript{1897} \textit{Ibid} at para 267.  
\textsuperscript{1898} \textit{Yassin, supra} note 1736.  
\textsuperscript{1899} \textit{Bil’in, supra} note 1891 para 296.  
\textsuperscript{1900} \textit{Ibid}.  

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of any “provisions of the law” of Israel, but “prospectively oppose what they presume would be a legally unjustifiable refusal by the [Israeli High Court of Justice] to apply Article 49(6) of the Fourth Geneva Convention on which the Action is based.” There is no real difference between what the plaintiffs were doing and what Cullen JSC thought they should be doing. The target of Article 3081 is the effect of applying the provisions of a foreign law, not the provisions of the foreign law themselves. If Israeli courts would apply Israeli law, they would by effect refuse to apply Article 49(6) of the Fourth Geneva Convention which was not part of Israeli domestic law. So attacking the prospective refusal of Israeli courts to apply Article 49(6) of the Fourth Geneva Convention was in essence an attack on the effect of applying Israeli law. What was left for Cullen JSC to determine was whether such effect was “manifestly inconsistent with public order as understood in international relations”.

6.5 A LOOK AT OTHER JURISDICTIONS

6.5.1 The US

US choice of law jurisprudence has considered an assortment of theories over a span of a century. Broadly speaking, the courts have considered the lex fori, the doctrine of comity, the lex loci delicti, the vested rights theory, governmental interest analysis and its variant the comparative impairment approach, the Restatement (Second) of the Conflict of Laws, the better law theory, and hybrid approaches. This panoply of approaches emerged as a result of the influence of legal pundits and the fact that every state of the US is free to create its own choice of law rules – the US Supreme Court has not thought it wise to standardize the rules but believes that choice of law is better left to individual states to decide. At the same time, the panoply reflects the inherent difficulty of choosing a substantive rule to govern choice of law determinations.

1901 Ibid at paras 297-298.
1902 Restatement (Second) of the Conflict of Laws (1968) (Restatement (Second)).
1903 Friedrich Juenger, “Choice of Law in Interstate Torts” (1969) 118:2 U Penn L Rev 202 at 203 (arguing that the “conflicts revolution was motivated by the pronunciamentos of legal scholars” like Cook, Lorenzen, Yntema, Cavers, Ehrenzweig and Currie) [Juenger, “Choice of Law in Interstate Torts”].
Lawyers, judges and litigants are left with “Hobson’s choice” as to which of the rival themes and policies to choose.\textsuperscript{1905} Benjamin Cardozo bemoaned this difficulty when he referred to choice of law as “one of the most baffling subjects of legal science.”\textsuperscript{1906}

An early influential choice of law theory was the doctrine of comity postulated by Joseph Story in the early nineteenth century.\textsuperscript{1907} According to Story, comity refers to the paramount obligation of courts to give effect to foreign laws when it is the appropriate law for the case at bar. The obligation, however, is not rooted in any right possessed by the foreign state to have its law applied by the forum court. Instead, it rests on the forum’s voluntary consent to apply that foreign law because it would serve the interests of justice.\textsuperscript{1908} Comity as a choice of law principle is therefore a matter of concession that a state makes for “convenience and utility.”\textsuperscript{1909} The only exception to this principle is public policy. Story wrote that states would not apply foreign law where to do so would be prejudicial to the state’s own public policy or interests.\textsuperscript{1910} This exception was recognized by Cardozo J in \textit{Loucks} when he wrote that foreign law should not be applied when it violates “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”\textsuperscript{1911} The public policy exception seems consistent with the vested rights theory discussed shortly.\textsuperscript{1912}

Both the comity doctrine and its public policy exception have been described as

\begin{itemize}
\item \textsuperscript{1906} Benjamin N Cardozo, \textit{The Paradoxes of Legal Science} (New York: Columbia University Press, 1928) at 67. This view was re-echoed in England by Lord Denning in \textit{Chaplin} where he described tort choice of law as “one of the most vexed questions in conflict of laws.” \textit{Boys v Chaplin} [1968] 2 QB 1.
\item \textsuperscript{1907} The principle has, however, been said to have been developed from Ulrich Huber’s famous “three maxims”: 1) The laws of each state have force within the limits of its government and bind all subject to it and not outside it; 2) All persons within the limits of a state’s government, whether they live there permanently or transitorily, are deemed to be the state’s subjects; and 3) Sovereigns will act in such a way that rights acquired within the limits of its government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.
\item \textsuperscript{1908} Joseph Story, \textit{Commentaries on the Conflict of Laws, Foreign and Domestic in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments}, 4\textsuperscript{th} ed (Boston: Little, Brown, 1852) at §§ 33, 36 and 38 (cited in Holly Sprague, “Choice of law: A Fond Farewell to Comity and public Policy” (1986) 74 Cal L Rev 1447 at at 1450).
\item \textsuperscript{1909} Lorenzen, \textit{supra} note 1883 at 378.
\item \textsuperscript{1910} Story, \textit{supra} note 1908 at § 38.
\item \textsuperscript{1911} \textit{Loucks}, \textit{supra} note 1859 at 202.
\item \textsuperscript{1912} Perry Dane, “Vested Rights, Vestedness, and Choice of Law” (1987) 96:6 Yale L.J. 1191 at 1208.
\end{itemize}
imprecise and devoid of “analytical focus”, leading to inconsistent results in the jurisprudence.\textsuperscript{1913} The public policy exception, in particular, has been condemned for fostering intellectual lethargy on the part of judges in that it is too easy to use.\textsuperscript{1914} It has also been described as uncertain and unprincipled.\textsuperscript{1915} The rule may also be criticized on the basis that it requires states to apply foreign law only when they seek comity with that foreign state. Yet, it may be defended on the ground that judicial decisions should not “exhibit to the citizens of the state an example pernicious and detestable.”\textsuperscript{1916}

Until the mid-twentieth century, however, the general tort choice of law rule was the \textit{lex loci delicti} throughout the US.\textsuperscript{1917} As noted earlier, the rule has its roots in the vested rights theory of Beale although it was not until the \textit{Restatement (First)} of 1934 (of which Beale was the Reporter) that it became “a black letter rule” in US conflict of laws.\textsuperscript{1918} In the course of applying the \textit{lex loci} to a tort, Justice Holmes captured the relationship between the \textit{lex loci} and the vested rights theory in the following passage:

The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an \textit{obligatio}, which, like other obligations follows the person and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, but equally determines its extent.\textsuperscript{1919}

Beale’s theory was hailed as having the prestige of pragmatism, certainty, ease of application and

\textsuperscript{1913} Sprague, \textit{supra} note 1908 at 1450–1451.

\textsuperscript{1914} Monrad G Paulsen & Michael I Sovern, “Public Policy in the Conflict of Laws” (1956) 56 Colum L Rev 969 at 1016 (“Resort to the concept is beguilingly easy and does not demand the hard thinking which the careful formulation of narrower, more realistic, choice of law rules would require.”).

\textsuperscript{1915} Nicholas deBelleville Katzenbach, “Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law” (1956) 65 Yale LJ 1087 at 1103 (“[T]here is nothing in the very general notion of comity from which one can conjure specific doctrine. One cannot deduce from it … what the principles of conflict of laws ought to be in any given case.”). For a synthesis of the criticisms, see Sprague, \textit{supra} note 1908 at 1451-1452.

\textsuperscript{1916} \textit{Greenwood v Curtis}, 6 Mass 358 at 378 (1810).

\textsuperscript{1917} Juenger, “Choice of Law in Interstate Torts”, \textit{supra} note 1902 at 202 (pointing out that the \textit{lex loci} was dethroned following \textit{Babcock v Jackson}, 12 NY 2d 473 (1963) [\textit{Babcock}], decided in New York, and was widely followed by other states, including the District of Columbia).


\textsuperscript{1919} \textit{Slater v Mexican National RR}, 194 US 120 at 126 (1904) (Internal citations omitted). See also Arthur M Sherwood, “\textit{Babcock v Jackson}: The Transition from the \textit{Lex Loci Delicti} Rule to the Dominant Contacts Approach” (1964) 62:8 Mich L Rev 1358 at 1359 (noting that the vested rights theory “requires a jurisdiction-selecting rule to determine which law defines the rights which have vested, and the \textit{lex loci delicti} principle has served as the jurisdiction-selecting rule in suits for torts.”).
Legal realists responded with their usual vigour. They argued that the theory rested on imaginary assumptions that did not reflect what the courts actually did. Cook is quoted to have uncharitably called the theory “an outrageous bit of nonsense.” Currie went even further (referring specifically to the lex loci rule) by declaring that “[we] would be better off without choice of law rules.” If comity’s sin was being too imprecise, one analyst has argued that “[v]ested rights erred by being too precise.” Yet, if the lex loci rule reflects an application of the vested rights theory, then the vested rights theory continues to apply in one form or another in many states in the US in spite of the conflicts revolution that occurred in the mid-twentieth century. A 2011 survey showed that ten states still applied the lex loci.

Whatever were the iniquities of the lex loci, it must be frankly acknowledged that it operated agreeably for decades. William Page remarked in 1943: “The law of the ox-cart and sailing-vessel days has thus persisted through the horse-and-buggy days, into the railroad and street-car days, and thence on into the automobile days. The result seems to have been fairly satisfactory to the bench, to the bar, and to the laity; defeated litigants and their attorneys always excepted.” Yet, paradoxically enough, a conflicts revolution was looming. Although instigated by legal commentators, the Restatement (Second) was being drafted to usher in this revolution. Courts, with time, began to see the evils in the lex loci delicti rule identified by legal commentators. Now here, now there, they departed from the rule in order to avoid an overly anomalous result. The New York Court of Appeals yielded to the pressure of academic

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1924 Sprague, supra note 1908 at 1477.


1926 William H Page, “Conflict of Law Problems in Automobile Accidents” (1943) 2 Wis L Rev 145 at 179.

1927 Sherwood, supra note 1919 at 1361–1368 (capturing the growing judicial dissatisfaction with the lex loci and the gradual accumulation of cases that either manipulated the rule to apply the lex fori, or blatantly refused to apply it). In Auten v Auten, 308 NY 155 [Auten], for instance, the court applied the “centre of gravity” (or
commentary and seemed to have lost its patience with the slow process that had marked the preparation of the Restatement (Second). Without waiting for the Restatement to be concluded, it officially ushered in the revolution in 1963 in the seminal decision in Babcock v Jackson, although relying partially on the then most recent draft of the Restatement. The plaintiff was a guest-passenger in the defendant’s car on a weekend trip from New York to Ontario. Both were New York residents. While they had reached Ontario, the defendant lost control of the car, which went off the highway into an adjacent stone wall. The plaintiff was seriously injured. Upon her return to New York, she sued the defendant, alleging negligent driving. In force in Ontario at the time of the accident was a guest-statute: the Highway Traffic Act of Ontario. This statute provided that “the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or death of any person being carried in the motor vehicle.” The defendant sought to dismiss the suit on the basis of this statute for, as the accident occurred in Ontario, Ontario law governed under the traditional lex loci rule. The court repudiated the lex loci rule for “ignor[ing] the interests which jurisdictions other than that where the tort occurred may have in the resolution of particular issues”. The court adopted the “centre of gravity” theory it had employed in contracts conflicts in cases like Auten, for, “‘it gives to the place ‘having the most interest in the problem’ paramount control over the legal issues arising out of a particular factual situation” and thereby allows the forum to apply “the policy of the jurisdiction ‘most intimately concerned with the outcome of [the] particular litigation.'” The basic rule the court enunciated is thus, that the substantive rights of the parties are to be governed by the law of the forum having the most significant interest in the consequences of the litigation. This, in essence, is a “significant interest” test. It bears close resemblance to the public policy exception to the comity doctrine. It also shares borders with the Restatement (Second) (discussed

“grouping of contacts” theory, which is, that the court looks for the law of the place “which has the most significant contacts with the matter in dispute” (ibid at 160). In Kilberg v. Northeast Airlines, 9 NY 2d 34, the court emphasized that the place of wrong might be merely fortuitous, and adopt a contacts/interest weighing analysis of the contending jurisdictions in multi-state torts.

1928 Babcock v Jackson, 12 NY 2d 473 (1963) [Babcock].
1929 Juenger, “Choice of Law in Interstate Torts”, supra note 1902 at 202. See also Sherwood, supra note 1919 at 1369.
1931 Ibid at s 105.
1932 Babcock, supra note 1928 at 478.
1933 Ibid at 481-482 (citing Auten, supra note 1927 at 161).
later) because of their requirement of contacts and an issue-by-issue analysis. As will be seen, the governmental interests analysis of Brainerd Currie was built upon it.

One of the rule’s major features is that every issue in a tort requires its own governing law. Several jurisdictions may therefore supply the governing laws for a single tort. Each issue is to be governed by the law of the jurisdiction having dominant contacts with the aspects of the tort relevant to that particular issue. The court stated that Ontario’s interests would have been dominant “had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant’s exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern.” Thus the court was seemingly willing to allow Ontario law govern the issue of standard of care since the accident occurred in Ontario, but since the dominant contacts of the parties and their trip to Ontario were with New York, it felt that New York law should govern the issue of whether a guest can recover damages from his host following an automobile accident. To the court, it is the law of the place that created that legal relationship that should govern recovery. Here, “it is new York, the place where the parties resided, where the guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and superior claim for application of its law.” To the court, “the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place.”

Babcock has been criticized for not providing adequate guidance on how to determine what contacts or relationships are dominant in determining the jurisdiction that has a dominant interest in a case. It has also been criticized for lacking in “predictive power.” Yet, Babcock was adopted by a number of states, and as at 2011 was still operative in three states – Indiana, North Dakota and Puerto Rico. New York has partially abandoned it for a hybrid approach.

\[1934\] Babcock, supra note 1928 at 483.
\[1935\] Ibid at 483.
\[1936\] Ibid.
\[1937\] Sherwood, supra note 1919 at 1370–1371 (arguing that this will depend on whether one adopts a quantitative or a qualitative approach).
Governmental interests analysis sees conflict of laws essentially as a conflict of interests between the involved states. Its aim is to recognize and respect the policy interests of a jurisdiction in a particular issue. It requires the court to consider the governmental policy underlying the laws of its forum. Currie, who propounded the theory, believed that every state has an interest in effectuating the policies behind its laws and that in choice of law, the function of courts should be to discover the relevant policies of the competing laws, and if the forum has a legitimate interest in applying its law to the matter, to apply its law so as to give effect to its policies. Choice of law becomes a matter of “determining which interest shall yield”. Several states adopted it, though many later rejected it either wholly or partially. It was introduced into California law in 1961 and is still applied there till date.

Critics have argued that interest analysis gives generous room for judicial acrobatics. Juenger has asserted that Currie’s “teachings ignore the experience of centuries” which reveals a judicial tendency to apply law on broader grounds than Currie suggested, and that interest analysis has “an inbuilt bias that favors application of forum law”, arguing that this is why it appeals to judges, since forum law is what they know best. He insists that “to explain choice of law decision by reference to sovereign [interests] is surely no less mystagogic as to say that rights have vested or [that] obligations have ‘accrued’.” In realist fashion, he flatly denies that states have interests: “To believe that states have interests in effectuating the policies behind their laws requires a leap of faith, a willingness to cast [the] Leviathan as a human being with wants and desires.”

Despite these criticisms, California and the District of Columbia still apply interest

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1941 Currie, ibid at 178.
1942 New York, for instance, adopted it but today applies a hybrid theory that to an extent incorporates interest analysis. See Miller v Miller, 22 NY 2d 12 (1968).
1943 Juenger, “Choice of Law in Interstate Torts”, supra note 1902 at 207.
1944 Ibid at 207.
analysis. The comparative impairment approach adopted in California is a species of interest analysis. The major difference between them seems to be that governmental interests analysis, in its original formulation, is more forum-centred than comparative impairment. The comparative impairment approach entails a comparison of the adverse impact of the choice of law decision on the respective interests of the states concerned. It was first proposed by William Baxter as a solution to the problem of what Currie termed “true conflicts”, i.e., a choice of law situation in which two or more states have legitimate conflicting interests in having their laws applied, as opposed to “false conflicts”, i.e., cases in which only one state has such an interest. Baxter writes: “The principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand.” One writer has called it “interest weighing by another name.” The comparative impairment approach was quickly adopted in California although it has been suggested that it was already present in California jurisprudence long before Baxter proposed it.

The application of the comparative impairment approach could lead to the application of foreign law. In one recent noteworthy case, McCann v Foster Wheeler LLC, the California Supreme Court applied the approach to uphold the application of a pro-defendant Oklahoma law. The plaintiff was exposed to asbestos in 1957 while installing a boiler in Oklahoma. The boiler was designed and manufactured in New York by the defendant. The plaintiff at the time was domiciled in Oklahoma. He moved to California in 1975. In 2005 he was diagnosed with mesothelioma, claiming that it was caused by his exposure to asbestos in 1957. The plaintiff’s action was statute-barred in Oklahoma under a statute of repose which had a ten-year statutory

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1951 Currie later called for moderation in the application of forum law. See Juenger, “Choice of Law in Interstate Torts”, supra note 1902 at 208 (arguing that the concept “governmental interests” “has become a mere figure of speech”, “stripped of [its] trimmings, [and] appear no less fictitious than the metaphoric vesting of rights”).
1954 Harold Horowitz, “The Law of Choice of Law in California – A Restatement” (1974) 21 UCLAL Rev 719 at 743-747 (citing several cases where it was applied before Baxter’s article).
limit, but still timely in California under its statute of limitation. The California statute provides that an action arising in another state and time-barred by the laws of that state may not be maintained in California “except in favor of one who has been a citizen of [California], and who has held the cause of action from the time it accrued.” The plaintiff argued that because he was a California citizen at the time he was diagnosed with the disease and henceforward, the exception barred the application of Oklahoma law. The California Supreme Court rejected this argument. It reasoned that when a state adopts a policy limiting liability for commercial activity carried on within its territory so as to provide what the state believes is just treatment to business enterprises and an inducement to attract out-of-state companies, the state has an interest in having that policy of limited liability applied to all companies, regardless of where registered, that conduct business in the state. This is because a state has “a legitimate interest in attracting out-of-state companies to do business within the state”. Although the court agreed that California equally had a legitimate interest in applying its own law to protect the plaintiff, it held that the non-application of Oklahoma law in the case would more significantly impair Oklahoma’s interests in protecting the defendant than the non-application of California law would impair California’s interests in protecting the plaintiff. Of significance to the court was the fact that the plaintiff’s exposure to asbestos took place in Oklahoma and that the plaintiff was domiciled there at the time. It stated:

[A] jurisdiction ordinarily has ‘the predominant interest’ in regulating conduct that occurs within its borders . . . and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction’s law will be available to those individuals and businesses in the event they are faced with litigation in the future.

It was the court’s view that that assurance would be whitewashed if the application of Oklahoma law could be avoided by the plaintiff’s subsequent relocation to another state, even assuming that relocation, as in the case at bar, was not prompted by an intent to take advantage of a more

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1956 A statute of repose is similar to a statute of limitation. The difference between them is that a statute of repose imposes a much stricter deadline than a statute of limitation and is enforced more absolutely. The most important distinction between them, however, is that for statutes of repose, time begins to run from the date the harm-causing event occurred, regardless of when damage is discovered. For statutes of limitation, time ordinarily begins to run from the date the damage is discovered. Statutes of repose are more commonly found in products liability cases.


1958 McCann, supra note 1955 at 530.

1959 Ibid.

1960 Ibid at 534.
favourable law.\textsuperscript{1961} It further reasoned that because potential defendants had no way of knowing where potential plaintiffs would go in the future, “subjecting a defendant to a different rule of law based upon the law of a place to which a potential plaintiff ultimately may move would significantly undermine Oklahoma’s interest in establishing a reliable rule of law governing a business’s potential liability for conduct undertaken in Oklahoma.”\textsuperscript{1962}

\textit{McCann} is a commendable decision. The California Court of Appeal had held that California had a stronger interest in applying its limitation statute to provide remedy to a California citizen injured in California, but that Oklahoma had weaker interest in applying its statute of repose to protect a manufacturer that after all was not an Oklahoma company and whose harm-causing conduct had occurred only partly in Oklahoma (the boiler was designed outside Oklahoma). The California Supreme Court was rightly unimpressed by the rigid analytical method exhibited by the Court of Appeal. The Supreme Court’s decision lays bare how interest weighing conducted impartially can produce a sound result. It counters the allegation that interest analysis has “an inbuilt bias that favours application of forum law.” As Symeonides has put it, “[i]f nothing else, \textit{McCann} illustrates that, in the hands of erudite and enlightened judges, interest-analysis/comparative-impairment is capable of shedding the pro-forum and pro-recovery bias that characterized it in Currie’s original conception.”\textsuperscript{1963} It is interesting to note that the court blinded itself to the substantive contents of the competing laws. It “[d]id not ‘weigh’ the conflicting governmental interests in the sense of determining which conflicting law manifested the ‘better’ or the ‘worthier’ social policy.”\textsuperscript{1964} It was not motivated by “any preference for substantive justice (or injustice)”, but by “considerations of ‘conflicts justice’ (or injustice).”\textsuperscript{1965} California’s use of comparative impairment has, however, been criticized as hastily assuming that a true conflict exists whenever each state has a legitimate interest in applying its own law, as “parochial in its tendency”, and as militating against “interstate harmony” and even the “internal consistency of California conflicts law.”\textsuperscript{1966} The \textit{McCann} decision seems to have diffused most of these criticisms. If, as is required, California lower courts follow the enlightened and altruistic approach adopted by the California Supreme

\begin{footnotes}
\footnotetext[1961]{\textit{Ibid}.}
\footnotetext[1962]{\textit{Ibid} at 534-535.}
\footnotetext[1963]{Symeonides, “Choice of Law in the American Courts 2010”, supra note 1953 at 328.}
\footnotetext[1964]{\textit{McCann}, supra note 1955 at 533.}
\footnotetext[1965]{Symeonides, “Choice of Law in the American Courts 2010”, supra note 1953 at 329.}
\footnotetext[1966]{Kay, “Theory into Practice”, supra note 1938 at 606–607.}
\end{footnotes}
Court in McCann, the argument that the use of comparative impairment would damage the internal consistency of California conflicts law would be unsuccessful.

The Second Restatement laid down that “the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties.” Several states have adopted the Second Restatement although they diverge in their interpretation of the “most significant relationship”. Choice of law determination thereunder is based on an analysis of contacts or relationships. It “involves a two-step process of identifying the relevant ‘contacts’” between the dispute and the respective states and then weighing the significance of those contacts or relationships with respect to the particular issue in order to discover “the state with the most significant relationships.” As one scholar loosely put it, it is “a process of balancing relationships in order to identify the most significant one.”

The most relevant parts of the Restatement (Second) are sections 6 and 145. Section 6 provides:

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
   a. the needs of the interstate and international systems
   b. the relevant policies of the forum,
   c. the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
   d. the protection of justified expectations,
   e. the basic policies underlying the particular field of law,
   f. certainty, predictability, uniformity of results, and
   g. ease in the determination and application of the law to be applied.

Section 145 sets out the relevant contacts:

1. The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.

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1967 Restatement (Second) of Conflict of Laws, § 145.
1968 Sprague, supra note 1908 at 1453.
2. Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
   a. the place where the injury occurred,
   b. the place where the conduct causing the injury occurred,
   c. the domicile, residence, nationality, place of incorporation and place of business of the parties, and
   d. the place where the relationship, if any, between the parties concerned.

The Restatement (Second) thus adopts an issue-by-issue analytical methodology. It adopts a functional approach to the choice of applicable law. While section 6 contains general policy considerations, section 145 contains detailed contact considerations that are intended to effectuate the policies contained in section 6.

Shortly after the Restatement (Second) was released, a renowned English conflicts scholar described it as “the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time.”1971 Ironically, this view is not shared by American conflicts academics, whose attitude towards the Restatement “ranged from lukewarm to hostility.”1972 The Restatement has been criticized as “amorphous”, “schizophrenic”, and as giving too much power to the courts in the choice of applicable law.1973 It has also been branded as “too much of a compromise between conflicting philosophies, too vague, exceedingly elastic, unpredictable, directionless, and rudderless.”1974 Robert Leflar has argued that “although the place of injury may be the point at which to begin a search for the most significant relationship, the Restatement (Second) is misleading to the extent that it may be read to imply that the locus of wrong is where such a relationship will ordinarily be found.”1975 In spite of these criticisms, the Restatement (Second) has won “the hearts and minds of American judges.” Babcock was the most seminal case relying on an albeit earlier draft of the Restatement. A 1997 survey listed twenty-one states that had adopted the Restatement in tort

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1976 Ibid at 1250.
conflicts since Babcock. In 2000, the number had increased to twenty-two and by 2011 it had reached twenty-four. Some of these states, however, have since moved to different choice of law camps. The District of Columbia, for instance, has moved to interest analysis. Some other states now practice a mixture of these rules.

Leflar believes that instead of weighing interests or contacts, courts should consider a set of “choice-influencing considerations” in their choice of law analysis. This approach, popularly known as the “better law” theory, calls for the consideration of five principles in the determination of the applicable law: the predictability of results, the maintenance of interstate and international order, the simplification of the judicial task, the advancement of the forum’s governmental interests, and the application of the better rule of law. The factors are in no particular order, but the weight they carry depends on the legal field involved. What Leflar sought to do was to reduce the multitude of factors found in the conflicts literature to a “manageable number and identity.” The most distinctive feature of his theory seems to be the fifth factor since the other factors feature in one form or the other in the Restatement (Second) and in Currie’s governmental interests analysis. However, it is broader than governmental interests in that while the fourth factor speaks to the interests of the forum government, the second factor directs courts to consider the conflicting interests of other states. In Leflar’s words, “[a] state’s governmental interests in the choice-of-law sense need not coincide with its rules of local law, especially if the local rules, whether statutory or judge-made, are old or out of tune with the times.” Thus governmental interests are a less salient factor in Leflar’s world

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1980 Symeonides has argued that the Second Restatement’s popularity in the face of the harsh criticism against is due to the following reasons: it gives judges “virtually unlimited discretion”; it is easy to apply; it is not “ideologically loaded”; it is “a complete system”; it “carries the prestige of the American Law Institute”; and it “has momentum”. Symeonides, “The Judicial Acceptance of the Second Restatement”, supra note 1960 at 1269-1277.


1982 Ibid at 282.

1983 Ibid.

1984 Ibid at 281.


than in Currie’s world.

The “most controversial” of these factors is the fifth factor – the better rule of law.\footnote{1987} According to Kay, this factor was intended to give conflicts judges “the freedom to ignore disfavored local law that would bind them in domestic cases.”\footnote{1988} By the better rule of law, Leflar intends “a weighing of the quality of the rules of law” in competition.\footnote{1989} Thus, a judge that finds’ forum law “anachronistic, behind the times, [or] ‘a drag on the coat tails of civilization’,” would apply foreign law.\footnote{1990} Leflar distinguishes the better law theory from the vested rights approach in that whereas vested rights entails a choice between states, the better law theory calls for a choice between laws.\footnote{1991} He also distinguishes the better law from individualized justice, arguing that whereas individualized justice strives for the “better party”, the better law strives for the better rule of law.\footnote{1992} “A choice made between competing rules of law”, he argues, “is more impersonal, less subjective, more in keeping with the traditional law-discovering functions of a common-law court [than one based on individualized justice].”\footnote{1993} One can also distinguish better law from governmental interests by saying that governmental interests looks for the state with better interests, thus, a choice between competing interests, while better law looks for the state with the better rule of law.

The better law theory has been criticized for offering a “powerful incentive for the use of value judgments”.\footnote{1994} It has also been described as “highly subjective” and prone to produce “arbitrary” and “unpredictable” results.\footnote{1995} From a third world perspective, it may be viewed as a way by which a western power universalizes its national laws and policies. Although credited to Leflar, a plea to apply “the better and more useful rule of law” was made over 800 years ago by

\footnote{1987}Ibid.
\footnote{1988} Kay, “Theory into Practice”, supra note 1938 at 564.
\footnote{1990} Ibid at 299-300 (internal citations omitted) (“A court sufficiently aware of the relation between law and societal needs to recognize superiority of one rule over another will seldom be restrained in its choice by the fact that the outmoded rule happens still to prevail in its own state. One way or another it will normally choose the law that makes good sense when applied to the facts.”).
\footnote{1991} Ibid at 295.
\footnote{1992} Ibid at 296-297.
\footnote{1993} Ibid at 297.
\footnote{1994} Kay, “Theory into Practice”, supra note 1938 at 586.
an Italian glossator, Magister Aldricus. New Hampshire was the first to adopt the theory. Four other states have since joined: Arkansas, Minnesota, Rhode Island and Wisconsin. A few other states have cited Leflar approvingly without quite adopting it while some have mingled it with other approaches.

On the whole, it can be concluded that most US courts take a largely functional approach to choice of law. Under this approach, the courts seek to find the law that would best account for the purposes behind the laws of the state most likely to bear the consequences of the choice. This approach emphasizes the state’s interests in the case much more than it looks at the geographical location of the harm-causing event. Each state is greatly concerned with how applying its law to the dispute would advance its policies although whether a state would apply its law and whether doing that would advance its policies depend substantially on the relevant links between the state and the dispute. Yet, both the *lex fori* and the *lex loci* are still operative in some states. As the 2011 survey earlier cited indicates, twenty-four states now practice the

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1999 Kay has noted that several courts refused to follow Leflar for “inconsistent reasons”, some (such as Iowa) because it would lead them to give inadequate deference to the views of their local legislature, some others (such as Oregon) “thought it would lead too frequently to the uncritical application of forum law.” Kay, “Theory into Practice”, *supra* note 1938 at 564.”

2000 Although scholars like Arthur von Mehren, Donald Trautman and Russell Weintraub have promoted a choice of law approach they call “functional analysis” distinct from the approaches discussed here, these approaches (minus the *lex fori* and the *lex loci*) may still be described as functional to some degree. See Mehren & Trautman, *The Law of Multistate Problems* (Boston: Little, Brown & Co, 965) at 345-375; von Mehren, “Special Substantive Rules for multistate Problems: Their Role and Significance in Contemporary choice of Law Methodology” (1974) 88 Harv L Rev 347; Weintraub, *Commentary on the Conflict of Laws*, 3d ed (New York: Foundation press,1986 & Supp 1991); Weintraub, “An Approach to Choice of Law that Focuses on Consequences” (1993) 56 Alb L Rev 701 at 702. They articulated a set of criteria for weighing Mehren & Trautman articulated a set of functional criteria for weighing governmental interests: (1) the choice of the state’s law whose policies are most strongly held; (2) the choice of the law reflecting an “emerging” policy over one embodying a “regressive” policy; (3) the choice of a law expressing the more specific rather than the more general policy; (4) the selection of the rule best designed to effectuate an underlying policy; and (5) the avoidance of a choice which would frustrate an underlying policy. Weintraub articulated the following criteria: (1) the advancement of clearly discernible trends in the law; (2) The avoidance of unfair surprise to the defendant; (3) The avoidance of anachronistic rules; and (4) reference to the foreign jurisdiction’s choice of law rule to determine the extent of its interests. These criteria embody to a degree the spirit of the Restatement (Second), governmental interests and better law. Specifically, Weintraub is of the view that in tort conflicts, courts that apply the law more favourable to the plaintiff unless that law is anachronistic or abberational, or unless the state having that law lacks sufficient connection with the defendant or the defendant’s conduct to make the application of that law reasonable. See Tilbury et al, *supra* note 500 at 270. However, no state seems to have directly adopted functional analysis as postulated by these scholars.
Restatement (Second) in torts, ten practice the lex loci, six practice a hybrid model,\textsuperscript{2001} five practice the better law, three practice significant contacts, two practice interest analysis, and another two still practice the lex fori.\textsuperscript{2002} Comity (together with its public policy exception) does not seem to be directly practiced today, but may be said to be intricately entwined in interest analysis.

Furthermore, it can be said that US choice of law methodology is more substantively oriented than Canada’s in that with the exception of the lex fori and the lex loci that are still applied in two and ten US states respectively, the other approaches look more or less to the substance of the competing laws. Jurisdiction-selecting rules are overruled in favour of result-oriented approaches that look at the insides of the competing laws. Thus, substantive policies are important to most states in the US, whereas the lex loci rule applied in Canada is concerned only with pinpointing the situs of the wrong.

There is also a certain eclecticism in US choice of law practice. Rarely do their courts (including those that avow to apply a single theory) base a choice of law decision on one theory alone. At least two different theories can be discerned from their reasoning, and frequently it is “the most significant relationship” theory in the Restatement (Second) and governmental interests analysis\textsuperscript{2003} although, arguably, one theory is usually more dominant in every case. Perhaps the courts do this without actually knowing what they are doing.

One broad criticism that may be leveled against the US approach, seen in its totality, is that it lacks methodological exactitude. Courts lack adequate guidance on how to weigh the miscellany of criteria developed over the years. There is no clear “road map” to assist them to know which principles and policies are more important than the others in a given conflicts case.\textsuperscript{2004} Yet, inherent in this deficiency is the advantage of flexibility, which in turn makes justice in the individual case more realizable. But this is not at no cost to the parties and to judicial resources. AE Anton has summarized the costs:

One of the major objections to all the American theories relying on policy or interest analysis is their impracticality. They require courts to consider the substantive law rules of foreign systems of law, possibly several, that might be concerned with the case. This is expensive and time consuming in that it requires those foreign laws to be proved in court. The obtaining of such proof is not particularly demanding in inter-

\textsuperscript{2001} Hawaii, Louisiana, Massachusetts, New York, Oregon and Pennsylvania.
\textsuperscript{2002} Kentucky and Michigan.
\textsuperscript{2003} Tilbury et al, supra note 500 at 274.
\textsuperscript{2004} Ibid.
state conflicts in the United States but it is demanding in the context of international conflicts. In addition, it is not enough to prove the substantive rules of foreign laws; it is also necessary to ascertain, if possible, the interest of that foreign State in having its rule of law applied to the particular circumstances of the case.\textsuperscript{2005}

With regard to the type of wrongs contemplated in this study, it is argued later in this chapter that of all the theories just considered, the better law theory appears to be best suited to meet the needs of such cases. Section 6(2)(a) of the Restatement (Second) which refers to the “interests of the interstate and international system” also captures what is argued should be the general policy consideration behind such cases, especially those involving violations of international fundamental norms. Interest analysis is too preoccupied with the interests of the individual forums involved, rather than the interests of the international community. Except by sheer happenstance, it will not lead to the application of a law that meets the interests of the international community where those interests should take centre stage in light of the overall circumstances of a case.

6.5.2 The European Union: Rome II Regulation

Rome II Regulation – Regulation (EC) 864/2007 on the Law Applicable to Non-contractual Obligations\textsuperscript{2006} – was adopted by the EC Parliament and Council on 11 July 2007. The purpose of the Regulation was to harmonize the choice of law rules in torts/delicts and restitutionary obligations among the EC countries. The various Recitals in the Regulation reveal the general purpose underlying the harmonization. These purposes include, in substance: the achievement of certainty, predictability and uniformity of results irrespective of the country where the case is litigated; the need to do justice in individual cases; and the need to strike a reasonable balance between the interests of the parties involved.\textsuperscript{2007} The objective of the Regulation is to establish connecting factors that are the most appropriate to achieve these ends.\textsuperscript{2008}

The Regulation applies to non-contractual obligations in civil and commercial matters involving conflict of laws. It does not, needless to say, apply to obligations arising out of a

\textsuperscript{2006} 11 July 2007, OJ L 199.
\textsuperscript{2007} Ibid, particularly Recitals 13, 14, 16 & 19.
\textsuperscript{2008} Ibid at Recital 14.
contract. Nor does it apply to non-contractual obligations arising out of family relationships, matrimonial property regimes, nuclear damage, revenue, customs or administrative matters, violation of privacy rights (including defamation), nor to the liability of a state for its acts or omissions made in the exercise of State authority. These matters are expressly excluded by the Regulation. But the Regulation applies regardless of the nature of the court or tribunal seised with a matter. Recital 12 explains that the law applicable should also govern the question of the capacity of anyone to incur tort liability. This provision reminds one of the decision of the US Second Circuit Court of Appeals in *Kiobel* that the applicable law to determine whether corporations had the capacity to violate the law of nations so as to be subject to ATCA jurisdiction was international law and not US domestic law. Were *Kiobel* decided by a European court applying on Rome II Regulation, the decision would have been different if it were found that US law applied to the tort. Furthermore, there is no definition of tort anywhere in the Regulation. But it seems clear from the Regulation that tort refers to an act that is wrongful, other than by reason of its being a breach of contract or trust, and which gives rise to liability to compensate the person wronged by the act. Restitutionary obligations, by contrast, do not require the act to be wrongful *per se*, but refer to situations involving “unjust enrichment, unauthorized agency, or pre-contractual dealings.”

Territorially, the Regulation applies in every contracting state regardless of any inconsistency between the provisions of the Regulation and the domestic law of that contracting state. In other words, the Regulation has primacy over the domestic choice of law rules of contracting states. However, the Regulation recognizes that within its contracting states, there may be territorial units constituting of distinct legal systems. It regards these territorial units as distinct countries for the purposes of identifying the applicable law under the Regulation. It goes further to state that in disputes involving conflicts solely between the territorial units, those states may choose to apply their own choice of law rules rather than the rules under the

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2009 *Ibid* at Article 1(1).
2010 *Ibid* at Recital 8.
Regulation. Therefore it is only where the dispute is inter-state that the Regulation applies inexorably.

Article 3 of the Regulation is headed “universal application”, and provides that “[a]ny law specified by this Regulation shall be applied whether or not it is the law of a member State.” This provision has been construed as meaning that no link with the EU, other than that a member state is seised with the matter, is required for the Regulation to apply. The problem with this interpretation is that it hastily relies on Article 3 whereas it is not explicitly borne out by the words of Article 3. Only a comprehensive reading of the Regulation can lead to that conclusion. The primary choice of law rule under the Regulation is the lex loci damni, i.e., the law of the place where the damage occurred. Deferring for the moment a full analysis of this provision, it must be stated for the present purpose that in practice, the place where the damage occurred will usually be the place where the tort occurred. The specific reference in Article 3 to “whether or not it is the law of a Member State” suggests that the lex loci damni could be the law of a non-member state. In other words, the Regulation encompasses not only torts where the damage occurred within the territories of member states, but also torts where the damage occurred outside the territories of member states. It is for this reason that it can be said that the Regulation has universal application. This conclusion is further supported by the fact that the Regulation does not contain any geographical language limiting its application to domiciles of the EU or to events that occurred within the EU.

But a contrary view might yet be possible. It is arguable that Rome II Regulation applies only to those matters where jurisdiction is taken in accordance with Brussels I Regulation. Brussels I Regulation, as noted earlier, does not itself create universal jurisdiction. It does not apply to defendants domiciled outside the EU. However, it preserves the jurisdictional bases available under national law where the defendant is domiciled outside the EU. Yet, it is possible to argue that by preserving the jurisdictional bases under national law, Rome II Regulation implicitly incorporated those national jurisdictional bases and may logically be said to have a universal territorial scope. The result is that choice of law questions arising from international torts where jurisdiction is based on national law are governed by Rome II Regulation. This, of

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2014 Ibid at Article 25(2).
2016 Rome II Regulation, supra note 2006 at Article 4(1).
course, does not include international torts where the conflict is between the internal units of the state – such cases are international only in the private international law sense. It should also be recalled that Brussels I Regulation permits the exercise of civil jurisdiction over any person over whom a state has assumed criminal jurisdiction, regardless of his or her domicile or where the tort occurred. Choice of law questions that arise in such matters will be governed by Rome II Regulation unless the conflict is between the internal units of a state. It is therefore accurate to say that Rome II Regulation has universal application.

It must be added that being a regulation, Rome II Regulation is “binding in its entirety and directly applicable”\(^\text{2017}\) in all contracting states without the need for implementing legislation in the individual states. It follows that the only situation where the domestic choice of law rule of a contracting state may apply is where the conflict in the case is between the territorial units of that state. The only EU state where the Regulation does not apply, as noted earlier, is Denmark. For other contracting states, their tort choice of law rules are effectively replaced by the Regulation, subject only to situations where the conflict of law is between the territorial units of that state. It must be added, too, that the Regulation repudiates the application of \textit{renvoi}. Thus, any reference to the law of any country does not include the conflicts rules of that country, but refers to the domestic laws of that country without the conflicts rules.\(^\text{2018}\)

The Regulation seeks to create a flexible framework for tort choice of law. Accordingly, it provides for a general rule, for specific rules for certain kinds of torts, and for an “escape clause” that permits a departure from the rules where circumstances point to a closer connection between the tort and another country.

The general rule is the \textit{lex loci damni} rule, that is, the application of the law of the place where the damage occurs. This is regardless of the country where the event producing the damage occurs and regardless of the country where “the indirect consequences of that event occur.”\(^\text{2019}\) By rejecting the law of the place where the indirect consequences of the event occurred, the Regulation repudiates the \textit{Muscutt}-type damage-in-the-forum jurisdictional scenario where the plaintiff suffers damage in Province A and returns to Province B where he receives treatment and claims that the damage is suffered in Province B. The \textit{lex loci damni} rule

\(^{2017}\) Rome II Regulation, \textit{supra} note 2006, closing sentence. See also \textit{Treaty Establishing the European Community}. 2002 OJ (C325), Article 249(2).


\(^{2019}\) \textit{Ibid} at Article 4(1).
thus speaks to the place where the actual harm is inflicted, that is, where the event caused the injury, or, better still, where the harm-causing event has contact the plaintiff. It does not include the place where the plaintiff suffers consequential harm or continues to suffer harm already inflicted, but refers to where the original harm was inflicted.\textsuperscript{2020} The fact situation in the \textit{Moran} case fits perfectly into this rule since the harm-causing event met the victim in Saskatchewan even though the product was not manufactured in either in Ontario or in the US. Where a person is wrongfully arrested and his tangible property wrongfully seized, the direct injury arises in the country where the arrest and seizure take place, and only consequential loss is incurred at his residence in another country.\textsuperscript{2021}

Article 4(2) quickly provides a proviso to the above general rule. It provides that where both parties are habitually resident in the same country when the damage occurs, the law of that country governs.\textsuperscript{2022} And article 4(3) adds a more telling exception, described under Recital 18 as an “escape clause”. Where a tort is “manifestly more closely connected with a country” other than the country where the damage occurs or where the parties habitually reside, the law of that other country governs. The Article suggests that a connection might be based on the pre-existence of a relationship between the parties, such as contract, that is closely connected with the tort. This rule admits of the application of different laws to different sets of parties in the same dispute since such a relationship may exist with regard to some parties and not with others.

An important qualification to Article 4 is Article 17. Article 17 requires the court seised to take into account rules of safety and conduct in operation at the place and time where the harm occurred, in assessing the conduct of the defendant. Thus, suppose the plaintiff and the defendant have their habitual residence in Austria while the event giving rise to the alleged liability – in this case, an automobile accident – took place in Germany. Although Austrian law would be applied (unless the tort is manifestly more closely connected with a third country), the court is required to consider the driving safety rules – the rule of the road, as the New York Court of Appeals called in \textit{Babcock} – operational in Germany at the time of the accident. This does not

\begin{footnotesize}
\textsuperscript{2020} Stone, “The Rome II Regulation”, \textit{supra} note 2011 at 110.
\textsuperscript{2021} Marinari \textit{v Lloyd’s Bank}, 1995 ECR I-2719.
\textsuperscript{2022} Article 23 lays down ancillary rules on habitual residence. For companies and other bodies, their habitual residence is fixed as the place of central administration. Where the harm-causing activity occurs, of the damage arises, in the course of operation of a branch or agency or any other establishment of the company, the place of habitual residence shall be the place where such branch, agency or other establishment is located. For natural persons acting in the course of their business activity, their habitual residence shall be their principal place of business.
\end{footnotesize}
mean, however, that those rules of safety must be applied to determine liability. The European Commission stressed this point in its Proposal 25: “Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example, when assessing the seriousness of the fault of the author’s good or bad faith for the purposes of the measure of damages.”

Article 7 creates a special rule for environmental torts. Recital 24 defines “environmental damage” as “adverse change in natural resources such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.” Article 7 provides that the applicable law shall be governed by Article 4(1), that is, the lex loci damni. But it gives the plaintiff an overriding right to elect that the law of the place where the harm-causing activity occurred – not the place where the harm actually occurred – shall govern. However, the plaintiff cannot elect that some other law govern. The exception created in favour of the parties’ common habitual residence under Article 4(2) and the escape clause in favour of the law of the place manifestly more closely connected with the tort under Article 4(3) are excluded from operation in environmental torts. The rationale for Article 7 is provided in Recital 25 which summons Article 174 of the EC Treaty which itself requires a high level of protection based on the precautionary and preventative principles of international environmental law, the principle of priority for corrective action at source, and the polluter pays principle. Recital 25 notes that these principles fully justify the use of a principle that discriminates in favour of the person that sustained the damage.

With the exception of the provision for environmental torts, the choice of law rule established by Rome II Regulation is neutral both as between the parties and as between the countries whose rules conflict. There is an apparent focus on connecting factors regardless of whether they favour the plaintiff or the defendant and regardless of the interests of the countries involved. Article 17’s reference to the rules of safety and conduct in the country where the wrongful act occurred is not for the purpose of promoting the interests of that country. As Recital

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2023 Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford: Oxford university Press, 2010) at 442 (arguing that this is particularly so “where those rules exonerate the defendant or authorized particular conduct that caused or may cause environmental damage”).

34 makes clear, the purpose is “to strike a reasonable balance between the parties.” In addition, the rule for environmental torts may be described as oriented to corrective justice while that for other torts is oriented to distributive justice.

With regard to the context of the violations considered in this study, it is argued later in this chapter that the tort choice of law rules under Rome II Regulation fails by not taking into account the interest of the international community that often takes centre stage in such cases, especially those involving the violation of international fundamental norms.

6.6 OTHER ALTERNATIVE APPROACHES

Castel has argued for a rule that reflects the real and substantial connection test applied in determining jurisdiction simpliciter. This approach, according to him, should be required regardless of whether it amounts to the lex fori or to the lex loci. He opines that a higher quality of connection should be required for choice of law than for jurisdiction, so that the applicable law would be the law of the place with the “most” real and substantial connection with the issue. He reasons that were the forum to apply its own law, ignoring the law of the place with the most real and substantial connection to the issue before the court, it would defy the implied Full Faith and Credit clause found in the constitution and would equally violate the territoriality principle.\(^\text{2025}\) Hanlan seems to be an application of Castel’s theory, as the factors considered resulted in the application of the law of the place with the most real and substantial connection with the action. The application of the personal law of the parties is in fact favoured by Castel who notes that it “can be justified constitutionally under Morguard” if it is the law most substantially connected with the tort.\(^\text{2026}\)

In what she tags “A Unifying Theory”, Walker has suggested a modification of the rule in a manner that addresses the social context in which the tort occurred. The social context of the tort refers to the common background of the parties, i.e. the relationship between them, if it is relevant to their mutual rights and obligations.\(^\text{2027}\) According to her, this social context should be the general rule while the geographical location of the tort the exception. She summarizes her theory as follows: “1. Where the relationship between the parties makes it reasonable for liability

\(^{2025}\) Castel, “Back to the Future!”, supra note 1315 at 45-46.

\(^{2026}\) Ibid at 65-66.

\(^{2027}\) Walker, “Are We There Yet?”, supra note 1840 at 358.
and recovery to be governed by the standards of a particular legal system, those standards should apply to claims between them in tort. 2. Where no such relationship exists, the law of the place where the tort occurs should ordinarily apply.”

This requires looking at the totality of the features of the legal context in which the harm occurred and identifying the reasonable expectations of the parties in light of that context. Walker’s theory closely resembles the rule in Babcock, especially as applied in its specific facts, where the law of New York was applied because it created the legal relationship of guest-passenger/host-driver between the parties, and this relationship was found to be a dominant feature of the cause of action in the case.

There is merit in both Castel’s and Walker’s approaches. It makes intuitive and easy sense to apply the law of the place with which the issue in the case has the most real and substantial connection, especially since the taking of jurisdiction is based on the connections between the forum and the subject matter and or the parties. Applying a single law to all issues of tort may not meet the justified expectations of the parties. It may breed uniformity among all the provinces, but is uniformity always necessary, especially in a federal state? Diversity may be more desirable. Moreover, there may be need for different issues to be regulated by different laws. But this approach lacks the certainty that Castel would like to see pervade the rules of private international law. The approach overlooks other important features of tort claims that may not reasonably be disregarded in favour of the place having the most substantial connection with the tort in choice of law determinations. One of those features is the nature of the tortious violation itself. If the tort engages the interest of the international community, as in international human rights violations, it would be both reasonable and essential to look to international law in the choice of applicable law. A narrow focus on the place most substantially connected with the tort may miss the essence of prohibiting those violations where the law of that place lags behind.

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2028 Ibid. A focus on the nature of the relationship between the parties is drawn from Article 133 of the Swiss Code of Conflict of Laws which provides:

1. If the damaging and the damaged parties have their habitual residences in the same country, claims based on unlawful acts are governed by the law of that country.
2. If the damaging and the damaged parties do not have their habitual residences in the same country, the law of the country where the unlawful act was committed is applicable. If the effect did not occur in the country where the unlawful act was committed, the law of the country where the effect occurred is applicable if the damaging party should have expected the effect to occur in that country.
3. Notwithstanding subsections 1 and 2, claims based on an unlawful act violating an existing legal relationship between the damaging and the damaged party are governed by the law that applies to the pre-existing legal relationship.

2029 Castel, “Back to the Future!”, supra note 1315 at 66.
2030 See generally, Castel, “The Uncertainty Factor”, supra note 1385.
well-established and overriding principles of international law. Another feature it overlooks is the one pointed out by Walker: the nature of the relationship between the parties. There are cases where that relationship would be more significant to the determination of liability than the place of tort. What is not fully clear in Walker’s theory, however, is why the social context should be the general rule and the geographical context the exception. Also, her “unifying theory” gives no relevance to the nature of the tortious violation being litigated. The nature of the tortious violation may have nothing to do with the legal relationship between the parties, and the place of tort, which serves as the exception, may not provide a reasonable response to that violation especially where the interests of the international community are engaged. Is the purpose of choice of law limited to resolving the narrow issues between the parties? While that is the primary focus, the increasing intercourse between tort law and other fields of law, in particular human rights law, calls for a choice of law orientation that takes full cognizance of this intercourse and all its consequences both for the parties and for society. The divide between private law and public law, as also between domestic law and international law, is getting thinner. There is no justification for choice of law theory to feign ignorance of this irrefutable reality. In choice of law, the court is more than engaged in deciding the specific case before it. It is equally engaged in advancing the prohibition of the breach or violation that is the subject of the litigation. Policy considerations are therefore essential for rational and balanced choice of law decisions.

Walker does not see the legal relationship between the legal systems of the world as giving rise to “any particular [choice of law] requirements at all.” She believes that the potential distinction between those legal systems might just be “fortuitous”. With great respect to the erudite professor, this view reveals a restricted focus on the differences between the legal rules of the legal systems and ignores the shared values reflected in well-established principles of international law to which all legal systems have subscribed. Her analysis seems restricted to the kind of purely private law disputes presented in cases like Hanlan. It is not adverted to other cases that might engage shared interests of states in addition to the private interests of litigants. The distinction between public international law and private international law is not that tight. In a world with increasing common interests, choice of law determinations that fail to take into account well-established principles of public international law where those

\[\text{\cite{2031} Walker, “Are We There Yet?”, supra note 1840 at 359-360.}\]
\[\text{\cite{2032} Ibid at 360.}\]
principles are engaged in domestic litigation must be ill-founded. Nowhere, perhaps, would those principles beg for consideration as they would in international human rights litigation. The legal relationship between the parties may be important; but so is the nature of the tort, and this is not necessarily dependent on that legal relationship.

In fact, it might just be sheer happenstance that the legal relationship between the parties is governed by the law of a certain place. Suppose A resides in Port Coquitlam, British Columbia but operates a taxi business in Bellingham, Washington State. A returns to Port Coquitlam every evening from Bellingham. On his return journey, he carries a passenger in his taxi from Bellingham to Port Coquitlam or to anywhere else near Port Coquitlam that is in British Columbia. Suppose on this occasion he carries B, who himself is a resident of British Columbia and is returning to British Columbia from a trip to Portland, Oregon, with a brief stop at Bellingham. The one does not know the fact that the other is a resident of British Columbia. On their way to Port Coquitlam and already while on British Columbia territory, A’s car tumbles due to his reckless driving and B is injured. B sues in British Columbia. The legal relationship between A and B is obviously that of driver and passenger. This legal relationship is integral to the accident. Under Walker’s theory, the applicable law would be the law that created this legal relationship. That law is the law of Washington, and not that of British Columbia, since it was in Washington that the legal relationship of driver/passenger was created. That it was merely fortuitous that the law of Washington created their legal relationship is too obvious to require further demonstration. 

Lastly, although Walker states at some point that certain issues may be governed by different choice of law rules, she does not indicate what kind of issues should not be governed by her legal relationship theory. The New York Court of Appeals’ decision in Babcock shows that it would be inappropriate for the law of the place creating the parties’ legal relationship to govern issues like “the rule of the road” in automobile accident cases.

2033 Walker rejects the adoption of rules that are easily based on fortuitous happenings. But a rule based on the legal relationship between the parties is also amenable to that same weakness. Moreover, many legal relationships are created by contract and in circumstances where the commission of any tort was beyond the remotest imagination of the parties at the time of contracting. The legal relationship in such cases, for the purposes of applying Walker’s theory, would be automatically governed by the law of the place where the contract was made. It is not clear whether where the parties had chosen the law of another place in the terms of their contract, Walker’s theory would regard the law so chosen as the law governing the parties’ legal relationship for the purposes of any tort committed in connection with the contract.
None of the foregoing approaches gave any relevance to international human rights in international torts where international human rights are engaged. In chapter three of this dissertation, however, it was stated that “customary international human rights law can be directly invoked, as part of the law of the land, to itself provide the basis for a remedy.” If customary international law could provide a basis for jurisdiction and liability in international human rights cases, it might be necessary to consider whether it might not influence choice of law analysis in such cases. It is argued that it should and that it might have a role to play in the determination of whether the justice of a case informs a departure from Tolofson. La Forest J recognized that an unflagging application of the lex loci might yield an unsatisfactory result where the conduct or the elements of the harm are multijurisdictional. International human rights cases can readily fall into any of these categories. While the initial harm may occur in one country, the victim may continue to suffer the effects of the harm in another. The effects of the harm may be such as were reasonably foreseeable at the time of the conduct. That the victim would travel or return to Canada, for instance, might or might not itself have been foreseeable. Should the lex fori be chosen simply because the effects of the harm were foreseeable and that the victim would later be in Canada was equally foreseeable? Rome II Regulation proscribes this choice. Should the lex loci be chosen simply because that was where the harm was inflicted? Neither of these choices seems satisfactory. Whichever one is chosen, it must be because of some factor superior to the forum or the place of tort, since the issue at stake in international human rights cases transcends the interests of any individual state as well as that of the individual parties.

6.7.1 Violations of Customary International Law and Jus Cogens

La Forest J noted that it was from international law that private international law developed. On the international plane, the “underlying reality” is the territoriality principle. Behind the territoriality principle dwells the doctrine of comity. Both the territoriality principle and the

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2034 Bayefsky, supra note 151 at 17.
2035 Tolofson, supra note 175 at para 35.
2036 Ibid.
doctrine of comity, Jennifer Orange has pointed out, are international legal concepts that have stood with relatively few exceptions, one of those exceptions being the norm of *jus cogens*.\textsuperscript{2037} *Jus cogens*, as discussed in chapter three, refers to norms of such degree of inviolability that they are regarded as peremptory and non-derogable.\textsuperscript{2038} Such norms are found mostly in the realm of international human rights. They reflect the intimate and sincerest values of the international society. It is in the interest of all states that whenever they are violated, remedy must be provided. The provision of remedies to redress violations of *jus cogens* may have much to do with choice of law. Writing in the context of choice of law in contracts, FA Mann (citing Cheshire) argues that “‘it is elementary common sense ‘that the applicability of rules of *jus cogens*’ must be decided independently of the expressed intention of the parties or, to put it another way, that the law by which they are to be governed cannot be a matter of free will.”\textsuperscript{2039} If in contract where parties are permitted to choose the governing law of their transaction, *jus cogens* norms cannot be overridden by exercise of free will, there is no reason why the application of *jus cogens* norms can be supplanted by any court-formulated tort choice of law rule where those norms are germane to the conduct in question. To overlook such norms in the choice of applicable law would be to delegitimize the inclusion of those norms in domestic statutes such as Article 3081 of the Quebec Civil Code that proscribes the application of a foreign law that is “manifestly inconsistent with public order as understood in international relations”.

La Forest J hinted, perhaps inadvertently, at the reasonableness of supplanting the *lex loci* where some “overriding norm” is implicated. He stated: “The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limits. *Absent a breach of some overriding norm*, other states as a matter of ‘comity’ will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do with those limits.”\textsuperscript{2040} The term “overriding norm” speaks undoubtedly to a category of norm equivalent or comparable to *jus cogens* or to customary international law generally. This view of comity reflects the new insight that the Supreme Court of Canada has progressively added to our understanding of comity. In *Morguard*, comity was regarded as the “informing

\textsuperscript{2037} Orange, *supra* note 1844 at 301-302.
\textsuperscript{2038} See Vienna Convention, *supra* note 733 at Article 53.
\textsuperscript{2039} Mann, “The Proper Law of the Contract”, *supra* note 1216 at 62.
\textsuperscript{2040} Tolofson, *supra* note 175 at para 36 (italics added for emphasis).
principle” stimulating Canadian private international law.\textsuperscript{2041} In \textit{Hape} the court stated that “[w]hen cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations.”\textsuperscript{2042} Here the court considered the question of the extraterritorial applicability of the Charter. While it gave considerable weight to the doctrine of comity, it added one interesting and remarkable restriction: “the need to uphold international law may trump the principle of comity.”\textsuperscript{2043} This restriction was expounded in \textit{Khadr v Canada} where the Supreme Court stated:

In \textit{Hape}, however, the Court stated an important exception to the principle of comity… [C]omity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations. It was held that the deference required by the principle of comity “ends where clear violations of international law and fundamental human rights begin”.\textsuperscript{2044}

The importance of the above proclamations must be taken to extend beyond the application of the Charter, to any dispute where international comity is at issue, such as the application of the Canadian rules of private international law, to wit, choice of law. Where “clear violations of international law and fundamental human rights” are the subject of a dispute, courts, in applying the rules of private international law, must accord comity a back seat.

The English House of Lord’s decision in \textit{Kuwait Airways Corp v Iraq Airways Co}\textsuperscript{2045} is classically illustrative of the arguments advanced here. The case arose from the precipitations of the 1990 Iraq-Kuwait war triggered by Iraq’s attempt to annex Kuwait. Following UN Security Council authorization, the US led the Operation Desert Storm to force Iraq out of Kuwait. Subsequently, the Iraq-state-owned Iraqi Airways transported ten commercial airplanes belonging to Kuwaiti Airways into Iraq, pursuant to Resolution 369 issued by the Iraqi government. Iraqi Airways treated and utilized the airplanes as theirs. Calls to return the airplanes to Kuwaiti Airways failed. However, both Iraq Airways and Kuwait Airways had places of business in London. Kuwait Airways initiated proceedings in England to recover the airplanes or their equivalent value. Iraq Airways pleaded immunity on the basis of Resolution

\textsuperscript{2041} Morguard (SCR), supra note 174 at para 29.
\textsuperscript{2042} Hape, supra note 184 at para 47.
\textsuperscript{2043} Ibid at para 52.
\textsuperscript{2044} [2008] 2 SCR 125.
\textsuperscript{2045} [2002] 2 WLR 1353 (Eng HL) [\textit{Kuwait Airways (HL)}].
369 which authorized the seizure of the airplanes. The claim for immunity failed at the House of Lords which remitted the case to the Commercial Court\footnote{Kuwait Airways Corp v Iraqi Airways Co [1999] CLC 31.} to determine liability. The Commercial Court decided that Kuwait Airways was not entitled to damages. This was appealed at the Court of Appeal\footnote{Kuwait Airways Corp v Iraqi Airways Co [2001] 3 WLR 1117 (Eng CA).} and up to the House of Lords. The English Private International Law (Miscellaneous Provisions) Act of 1995 provides that the law of the country where the elements of the tort took place is the applicable law. So ordinarily, Iraqi law would apply. Also, title to immovable property was governed by the \textit{lex situs} – the law of the place where the property is situated. English law would therefore treat as valid, transfers made in accordance with the \textit{lex situs}. This meant that Kuwait Airways’ claim would fail since the transfers were made pursuant to Resolution 369 – a valid piece of legislation in Iraq. Kuwait Airways argued that Resolution 369 should not be given effect to on grounds of public policy. The public policy argument was not new in England. It had been accepted in some cases, most notably in \textit{Oppenheimer v Cattermole}\footnote{[1976] AC 249 (Eng HL).} where the House of Lords refused to recognized racist Nazi decrees purporting to strip Jews of their German nationality and confiscated their property. But in \textit{Buttes Gas & Oil Co v Hammer}, Lord Wilberforce stated that English courts would abstain from litigating “the validity, meaning and effect of transactions of sovereign states”.\footnote{[1981] 3 All ER 616 at 625 (HL) [Buttes Gas].} In \textit{Kuwait Airways}, the House of Lords stated that the rule in \textit{Buttes Gas} was not absolute. It stated that the discretion not to recognize foreign laws on grounds of public policy extended from gross human rights infringements to violation of “fundamentally acceptable” norms.\footnote{\textit{Kuwait Airways} (HL), supra note 2045 at 1361 at para 18.} It held that gross violation of fundamental international norms was offensive to English public policy and roused the obligations of England under international law.\footnote{\textit{Ibid} at 1363 at para 29.} It was clear that Iraq’s action violated Article 2(4) of the UN Charter that protects Kuwait’s territorial integrity and political independence. The House took note of the fact that Iraq’s conduct received “almost universal condemnation” and there were various calls by the Security Council for states to take measures to protect the assets of Kuwaitis and restore the authority of Kuwait over its territory.\footnote{\textit{Ibid}.} The House would have been remiss if it failed to add that it was not every breach of international law that would invite the public policy exception: it must be a gross violation of a fundamental international norm – a
“truly international public policy”. It follows that the fundamentality of the international norm was the paramount test. Violation of a *jus cogens* norm is just such an event.

It follows that in determining the applicable law in international tort cases, it is proper for Canadian courts to look at the status of the violated norm in international law. If the norm violated were an “overriding norm”, it would offend neither the territoriality principle nor the doctrine of comity to apply the law that most adequately responds to the nature of that norm. That law may be the *lex fori*; it may be the *lex loci*. It may even be some other law provided there is some connection between that law’s forum and the action or the parties. Applying Castel’s “most substantial connection theory” may not meet the needs of the case since that law need not necessarily be the law with which the case is most substantially connected. Applying Walker’s theory may also not meet the needs of the case as no legal relationship may exist between the parties to animate the theory and even if a legal relationship between the parties exists, it may point to some law without regard to whether that law can adequately respond to the nature of the violated norm. The *lex loci* exception to her theory will simply point to the place the tort was committed without regard to the nature of the violated norm. In the context of human rights abuses committed by subsidiaries of Canadian corporations abroad, the legal relationship between the corporation and the victims may not capture the essence of the norms violated so as to make actionability, liability and recovery, or either of them, governable by international standards found in customary international law. A concrete example can be sketched. A Canadian corporation conspires with its foreign subsidiary to apply operational standards abroad that are substandard by international legal standards and lower than the standards with which the corporation operates in Canada. They may actually conspire to commit specific human rights violations or to not care whether such were being committed by the state, with their knowledge and with the purpose of protecting their operations. If in the course of that a *jus cogens* norm, such as torture, is violated, the application of international principles would be justified. It would be justified not because of any legal relationship between the corporation and the victims of the violations, but because of the very nature of the norm implicated, and perhaps additionally, because of the corporation’s knowledge, actual or imputed, that those norms may be violated and its willful or reckless refusal to conduct its operations to avoid the violation of those norms, in the knowledge or hope that the weak enforcement mechanisms of the foreign state would enable

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2053 *Ibid* at 1385 at para 115.
it to escape liability there.

In addition, Currie’s governmental interest analysis is too preoccupied with the interests of the contending states rather than those of the international community. Rome II Regulation was apparently drafted without envisaging cases that might involve violations of international fundamental norms. The Restatement (Second) makes reference to international interests under section 6(2)(a) but none of the factors listed for consideration under section 145 seems geared towards identifying international interests. Leflar’s better law theory seems to have the greatest potential to address the concerns of the international community in cases involving violations of international fundamental norms. It lists, in no particular hierarchy, the predictability of results, the maintenance of interstate and international order, the simplification of the judicial task, the advancement of the forum’s governmental interests, and the application of the better rule of law, as the factors to be considered. The approach requires a weighing of the quality of the laws in contention. The weighing is not to be done in vacuo, but in light of the wrong being litigated and the overall circumstances of the case. Whatever may be weaknesses of the better law theory, it seems especially useful for a sound resolution of choice of law problems in cases involving the violation of international fundamental norms.

In formulating the lex loci rule, La Forest J referred to The Hague Convention on Traffic Accidents (to which Canada is, however, not a signatory) as a reflection of state practice in favour of the application of the lex loci. State practice was thus so important to La Forest J that its existence in favour of the lex loci provided added support for the adoption of the lex loci rule. This goes to show that the requirement that the norm have an “overriding” status in the sense of jus cogens is even too high a standard.

It is true that customary international law may not contain concrete elements necessary for determining liability in a specific case involving violations of customary international law. But at least customary international law may determine the issue of actionability where that is well settled in customary international law while some other law may determine liability, damages. The practical effect is that any law that would reject the application of customary international law would not be applied regardless of whether it is the law of the forum with the

2054 26 October 1968, 8 ILM 34 (1969).
2055 As Beth Stephens et al have observed, the “international system relies on domestic courts to provide the rules necessary to resolve complex claims. International law does not provide the level of detail necessary to resolve the many ancillary issues triggered by domestic litigation.” Beth Stephens et al, International Human Rights Litigation in U.S. Courts, 2nd ed (Boston: Martinus Nijhoff Publishers, 2008) at 36-37.
most real and substantial connection with the dispute and/or the parties. The existence of treaties regulating the legal field presented by a certain international case, especially where those treaties have been extensively ratified, may appropriately guide the choice of law determination. Strict application of the *lex loci* would be unwarranted. This may not result in the application of any specific treaty as the domestic application of treaty law is governed by domestic law. But it points to the need to identify which of the law of the competing forums most closely reflects the contents of the relevant treaties. The process of identifying this may not be easy, but neither is the process of identifying the law most substantially connected with the tort, nor that of identifying whether the legal relationship between the parties has any meaningful bearing on the choice of law, nor the process of interest analysis. However, in the context of international human rights, it may not be too difficult to identify which country’s law most closely reflects the contents of international human treaties. A look at which country has most ratified and domesticated the relevant treaties would be a useful place to start.

To be sure, US courts have looked to international law to determine the existence of a cause of action. In *Abdullahi v Pfizer*, a group of Nigerian plaintiffs brought action on behalf of Nigerian children. An unprecedented epidemic of bacteria meningitis, cholera and measles had occurred in Kano State, Nigeria in 1996. US Pharmaceutical company Pfizer requested and received approval from the Nigerian government to administer its new antibiotic Trovan to the children suffering from bacterial meningitis. At the time, although Trovan had been tested on adults, it had not yet received the approval of the US Federal Drug Administration. Many of the children died after receiving the treatment while many others suffered deafness, paralysis, blindness and damage to their brain. In 2001 a group of parents/guardians filed a class action ATCA suit in the US on behalf of those children. They alleged, among other things, that Pfizer failed to obtain informed consent for the treatment and to inform the parents of the children of the possible risks associated with the drugs. Writing for the majority of a divided Second Circuit Court of Appeals, Judge Parker applied customary international law to hold that non-consensual drug tests provided a cause of action recognizable by the courts. He referred to various sources of international law expressing a norm against nonconsensual drug experimentation that was “sufficiently specific, universally accepted, and obligatory for courts to recognize a cause of action.”

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*Abdullahi v Pfizer*, 562 F 3d 163 (2nd Cir 2009) [*Pfizer*].
action to enforce the norm” under ATCA. It is clear that it was the nature of the norm allegedly violated that informed Parker J’s application of customary international law. The minority’s dissent concerned only the sufficiency of the basis to hold that nonconsensual drug experimentation is a violation of customary international law, and discussing that issue is beyond the task of this study.

In addition, the Kiobel line of cases discussed in chapter three was actually a choice of law decision, although one that went to the foundation of the cases in that it had jurisdictional consequences. The question is whether in determining the accountability of corporations in domestic courts for violations of international law norms, courts should apply international law or domestic law. In Kiobel, the Second Circuit held that the proper place to look for the answer was in international law. In Sarei, the Ninth Circuit held that domestic law should be applied. Pfizer would have raised the same issue, but did not, arguably for the reason that it was not framed in the Kiobel and Sarei terms. It is arguable that the courts in Kiobel and Pfizer looked to international law because of ATCA’s specific reference to the law of nations. But in states where customary international law is part of the law of the land, the absence of specific statutory reference to international law cannot constitute a bar to the application of customary international law where the norms allegedly violated are norms of customary international law.

There is an important difference between the question in Kiobel and Sarei on the one hand, and the question in Talisman where the Second Circuit looked to customary international law to establish aiding and abetting liability, on the other hand. That difference explains why it was right for Talisman to look to international law to ascertain aiding and abetting liability, but wrong for Kiobel to look to international law to ascertain the suability of corporations for violation of the law of nations under ATCA, and right for Sarei to look to domestic law to answer the same question Kiobel looked to international law to answer, and even if Kiobel was right to look to international law, it reached the wrong conclusion. That difference is the fact that while it can be stated that corporations have no international accountability, there is no rule of customary international law saying so. As argued earlier on, to say there is such a rule in existence is to ignore the process of customary international law making. That argument bears

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2057 Ibid at 187. Judge Wesley rendered a strong dissent, arguing that the majority “create[d] a new norm [of international law] out of whole cloth,” one that was “heretofore unrecognized by any American court or treaty obligation, on the basis of materials inadequate for the task.” Ibid at 191. The majority described Judge Wesley’s approach to customary international law as “unselfconsciously reactionary and static.” Ibid at 188.
reiteration. The absence of state practice in favour of corporate accountability for violations of international law is not proof of the existence of customary international law that corporate accountability for violations of international law is prohibited, unless there is positive state practice demonstrating that prohibition. This means that a state that holds corporations liable for violations of the law of nations is not thereby breaching its international law obligations. For this reason it was wrong for *Kiobel* to look to international law for the answer. And if the *Kiobel* court had appreciated what it means to say that a rule of customary international law is in existence, it would not have found any answer because customary international law is blank on that. When one considers, too, that a number of treaties now recognize international corporate accountability – most notably in relation to terrorism and financial crimes – the *Kiobel* court should not expect any understanding for their decision. The existence of these treaties, and the absence of any positive rule of customary international law precluding corporate accountability for violations of the law of nations, should have rendered a reasonable court more favourably disposed to locating the answer *Kiobel* sought in international law, within the domestic law of the US.

On the other hand, the *Talisman* court looked to customary international law and found in the numerous decisions of international tribunals as well as the statutes establishing them the existence of a rule of customary international law governing aiding and abetting liability. It found that the applicable standard for aiding and abetting liability required both knowledge and purpose. This was opposed to the standard under US federal common law, which required only knowledge on the part of the aider and abettor that his conduct would assist the principal in the commission of the offence. Whether the Second Circuit’s finding was accurate is not the concern here.\(^{2058}\) Indeed, some uncertainty still exists as to the appropriate aiding and abetting liability standard in customary international law. The point being made here is that where an issue is settled under customary international law, domestic common law must yield. It was therefore right for the Second Circuit to look to customary international law, rather than US federal common law. The court would be breaching the obligations of the US under customary international law if it applied a standard different from that established in customary international law. It is remarkable that scholars have also criticized domestic courts that adopt

\(^{2058}\) As noted earlier, the DC Circuit disputed *Talisman*’s finding in *ExxonMobil.*
standards higher than that adopted under customary international law. The determination of whether to apply international law or to apply domestic law should not depend on which law would make it easier to hold the defendant liable. To use the language of forum non conveniens, the goal is not to confer a juridical advantage on either party.

In conclusion, granted that international law does not provide with specificity the substantive issues (and is not concerned with the procedural issues) that arise in the litigation of norm violations, granted that it may be sufficient that the substantive violation of the norms be prohibited by well-established principles of international law, and granted that states are required to take it up from there to ensure that the prohibitions are upheld domestically, it does not mean that international law must always be completely jettisoned once states have assumed that responsibility. In areas and issues where the rules of customary international law are sufficiently developed and settled, states have a duty not merely to allow those rules to inform their interpretation of their domestic laws, but to directly apply those rules domestically regardless of what their domestic common law says. Where the nature of the violation at bar implicates norms of customary international law, it is proper to consider the applicability of customary international law. A rule that mandates resort to the lex fori or to the lex loci or to the law of the place most substantially connected with the cause of action or to the legal relationship between the parties or to governmental interest analysis or to the lex loci damni, without regard to the nature of the violated norm as an essential feature of the cause of action, is deficient and of little policy value. Moreover, if the universal condemnation of a norm violation is a key factor justifying the assumption of jurisdiction in a particular case, that is, if the goal of home states in assuming jurisdiction over transnational corporate conduct in host states is to promote universal values, there is no reason why choice of law theory applicable to those disputes should not point to a law that most promotes those values. The goal of choice of law should be to advance the

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2059 The Finta case is a good example. Scholars (like Cotler) and the Canadian government attacked the decision for establishing a mens rea and actus reus threshold for war crimes and crimes against humanity that was higher than that established in international law.

2060 Seck has drawn attention to the colonial implications of claims to universality, but also criticizes international law for not doing enough to acknowledge the universal seriousness of certain environmental harm: “While TWAIL scholars may have good reason to be suspicious of the colonial implications of universality narratives, and unilateral regulation designed to implement them, international law’s refusal to acknowledge the universal seriousness of local ecological harm appears equally suspicious from a TWAIL perspective.” Seck, “Transnational Business”, supra note 195 at 199. It should be pointed out, however, that TWAIL does not, strictly, reject the universality of the values contained in these international norms, but rejects the western refusal to recognize third world values as valid and their readiness to brand them primitive. And since TWAIL does not deny
prohibition of the violations. One of the merits of this approach is that because of the overriding international interest in the violation, it would be difficult for either party to complain that looking to international standards would produce an unfair result. The approach has the merit of forum-neutrality.

6.7.2 Maintenance of Order and Certainty in Private International Law

Order and certainty were “front and centre in Tolofson”\(^\text{2061}\) While fairness between the parties is important, order comes before fairness and is “a precondition to justice.” However, the need for order and certainty is more intensified in the context of federating provinces than in the relations among states.\(^\text{2062}\) Yet the significance of order in the international context is so much that:

[i]f other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.\(^\text{2065}\)

At the same time, La Forest J turned to “the underlying reality of the international legal order… to structure a rational and workable system of private international law.”\(^\text{2064}\) As Orange notes, the underlying realities to which La Forest J turned were “the global economic order and related transactions” and the reality of “easy travel”.\(^\text{2065}\) The Supreme Court reiterated the same view in Beals when it stated that the doctrine of international comity “must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility”.\(^\text{2066}\)

The need for certainty and predictability cannot be overstressed whether in the interprovincial context or in the international context. But the adamantine superimposition of

\(^{2061}\) Blom & Edinger, supra note 1217 at 389.
\(^{2062}\) One would think that fairness would sometimes triumph over order in the international context.
\(^{2063}\) Tolofson, supra note 175 at para 43.
\(^{2064}\) Ibid at para 37.
\(^{2065}\) Orange, supra note 1844 at 307.
\(^{2066}\) Beals, supra note 1313 at para 27.
order over fairness is too rigid and does not fully appreciate the reality of the international legal order. In a highly integrated global economy, the task of private international law must be to apply the law that would best foster a safe environment for international business, bearing in mind not only the need to transnationally facilitate international business transactions but also the need to transnationally ensure that the businesses abide by safe environmental and human rights standards in the localities where they operate. The image of the international legal order La Forest J presented was incomplete. On closer examination “it will emerge”, it has been rightly argued, “that as a normative matter, international law places ever greater value on protecting individual human rights, but also that, as an institutional reality, the systems set up to deal with human rights issues do not effectively address the needs of their constituents.”

La Forest J failed to recognize that the benefits of economic globalization have been in the hands of a few – the big corporations and the few wealthy states and individuals. Victims of human rights abuses in developing countries live in a different reality, with little or no power to confront back the situations that confront them. This reality should be seen as an important feature of the cause of action and, a fortiori, as an important factor in choice of law determinations in international human rights cases. It is thus with a sense of agreement that one must view the following critique of Tolofson: “Choice of law issues do not seek to interrupt the adjudicative process or the effort to reach a fair disposition of the claim, but rather to enhance the justice of the result by enabling

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2067 Walker has argued:
The “order” that is the “precondition to justice” need not come at the expense of “fairness” in the individual case. Decisional harmony would prevail as long as the choice between the lex loci and the other potentially applicable law was made through application of the same rule to the facts of the case (for example, whether a relationship between the parties indicated that it would be reasonable for their dispute to be governed by another potentially applicable law). “Order” is undermined only by the application of arbitrary choice of law rules that produce predictably inconsistent results. As has been observed, rules that arbitrarily dictate application of the lex fori exemplify this and they encourage manipulative tactics. Further, to achieve order it is not necessary to guarantee that every Canadian court decides the choice of law question in precisely the same way in any given case. No such certainty exists with respect to determinations in domestic cases. Rather, it is necessary only to establish a basis for confidence that the potential for variation is the same between courts within one province as it is between courts in different provinces.

Walker, “Are We There Yet?”, supra note 1840 at 363-364.

2068 Ibid. Yap has made a similar line of argument:
One of the realities of international commerce is that, along with increased exposure to opportunities to conduct profitable business overseas, comes increased exposure to opportunities to become implicated in egregious violations of fundamental human rights overseas. Atrocities such as war crimes, genocide, slavery, torture, and recruitment of child soldiers are all acts that would be well beyond the realm of contemplation for a company carrying on business in Canada today, but which are encountered frequently on the international stage.

Yap, “Corporate Civil Liability for War Crimes, supra note 1888 at 645.
the court to give effect to an important feature of the context in which the cause of action arose.”

Canada as a state has ratified and domesticated more international human rights treaties than most other states. It therefore has a heightened interest in ensuring that human rights are protected and their violations redressed. In international human rights cases presenting choice of law questions, the special status of human rights in current international legal order and the heightened interest Canada has in promoting international human rights must play leading role in the choice of law determination. To do otherwise would be tantamount to Canada abdicating its responsibility.

There may be need to create different choice of law rules for different types of torts. There is no compelling reason to have only a single theory that would govern all types of torts, subject to a so-called “flexible exception”. The example shown earlier of how Walker’s “unifying theory” would sometimes operate in practice illustrates the inherent narrowness of even a well-thought out theory and how the search for a unifying theory must prove elusive. It is for this reason that one must see eternal values in the irenic remarks of M Cohen cited earlier.

6.8 CONCLUSION

Where a Canadian court has assumed jurisdiction and decided to exercise it after a forum non conveniens consideration, the question of the applicable law will generally follow the lex loci delicti rule. This rule will in most cases point towards the application of foreign law since the wrong will generally be found to have occurred abroad, even though some elements of it might have occurred in Canada. However, it may be possible to rely on the small exception allowed in international cases to apply some law other than the lex loci. In penning his exception, La Forest J did suggest the application of forum law but he appeared to have done so in a manner that admits of the application of some other law. It is fair to assume that the exception need not necessarily lead to the application of Canadian law. In cases involving a violation of some overriding norm, the exception might justify the application of a law that is not necessarily the lex fori but one which is in keeping with the development of customary international law.

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2069 Walker, “Are We There Yet?”, supra note 1840 at 351.
2070 M Cohen, supra note 201.
provided the case has some connection with that legal forum. It is argued that the requirements of international comity would fully support such an approach.
CHAPTER 7
THREE MODEL CASES

7.1 INTRODUCTION

Examined below are three cases that exemplify extraterritorial corporate wrongs litigation in Canada. The cases are *Cambior*, *Bil’In (Village Council)* and *Piedra v Copper Mesa Mining Corporation*. The first two of these cases were litigated in Quebec while the last was litigated in Ontario. The Quebec courts assumed jurisdiction in the first two cases but declined to exercise it on the basis of the doctrine of *forum non conveniens*. The Ontario case was not argued in jurisdictional terms but it raised an issue that would be critical in the litigation of extraterritorial corporate wrongs, namely, the extent of participation of the Canadian parent in the alleged extraterritorial wrong sufficient to establish Canadian jurisdiction. The purpose here is to critically analyze the courts’ decisions to see whether the legal principles were accurately analyzed and applied.

7.2 CAMBIOR

*Cambior* related to a mining disaster that occurred in Guyana, South America on 18 and 19 August 1995. Following the rupture of a dam, some 2.3 billion litres of liquid containing cyanide and other pollutants spilled into two rivers, one of which was Guyana’s main waterway, the Essequibo. Some 23,000 Guyanese whose existence depended substantially on the integrity of the river instituted a class action lawsuit in Quebec against Cambior Inc for $69,000,000. Cambior is a Quebec corporation that owned 65% shares in Omai Gold Mines Ltd – the Guyanese corporation which owned the mine that caused the disaster. The other shareholders were Golden Star Resources and the Government of Guyana. The suit was initiated through Recherches Internationales Quebec (RIQ), a company formed in Quebec to assist the Guyanese victims initiate the suit in Quebec. Cambior contested the jurisdiction of Quebec courts to hear the case and argued in the alternative that even if Quebec courts had jurisdiction, Guyana was a more suitable forum for the action.

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2071 2011 ONCA 191 (CanLII) [*Copper Mesa*].
7.2.1 Jurisdiction

Both parties argued doggedly as to the corporate entity that could be held responsible for the spill. Cambior insisted that it and Omai were not one and the same person and that even though it held majority shares in Omai, this did not make it responsible for Omai’s actions in Guyana. It denied RIQ’s allegation that it had any responsibility in the construction, maintenance, operation and management of the mine. It also denied RIQ’s claim that it took part in the principal decisions regarding the daily operation of the mine. Before the construction of the mine, Cambior and the other co-shareholders of Omai entered into a mineral agreement, under which Omai would be responsible for the design, maintenance and operation of the mine. The agreement stated that Omai would operate as a distinct corporate entity. However, Cambior had extensive powers as “managing member”. Those included assisting Omai in the day-to-day running of the mine, preparation of work programmes relating to the development and operation of the mine, preparation of Omai’s budgets, and directing Omai in the implementation of Board decisions. Cambior was responsible for appointing four of the six members of Omai’s Board. But it was not a party to the various contracts entered into between Omai and various consultants for the construction of the mine or the tailings dam. Although Cambior offered services to Omai, these services were described by Cambior as minimal and were billed to Omai; moreover, they amounted to no more than $200,000 to $300,000 per year. Lastly, of the about one thousand employees of Omai, Cambior stated that only ten were its former employees. On these facts, Cambior argued that Quebec lacked jurisdiction in the case as the facts did not establish that it was Omai’s directing mind and could not be held responsible for any negligent acts of Omai. On the other hand, RIQ relied on their claim that Cambior financed the study that established that the mining project was economically viable and that this study included the construction of the tailings dam. It also made case of the fact that the Chairman of both Cambior’s and Omai’s Boards were one and the same person.

In determining Quebec jurisdiction, Maughan J considered Articles 3134 and 3148 of the Quebec Civil Code. Article 3134 reads: “In the absence of any special provision, the Quebec

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2072 Cambior, supra note 168 at para 18.
2073 Ibid at para 25.
authorities have jurisdiction when the defendant is domiciled in Quebec.” Article 3148 reads: “In personal actions of a patrimonial nature, a Quebec authority has jurisdiction where (1) the defendant has his domicile or his residence in Quebec; [and] (2) a fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec.” It was clear in the record that Cambior was domiciled in Quebec. Maughan J held that this fact alone conferred jurisdiction on the Quebec Superior Court over Cambior. Maughan J went further to state that “if it is the case that Cambior made certain decisions relating to the construction and operation of the mine which resulted in the failure of the tailings dam, those decisions would have been made in Quebec.” As Seck has noted, this reasoning served to bolster the domicile link between Cambior and Quebec, but also spoke to the real and substantial connection test applicable throughout Canada. Regarding Cambior’s claim that it was not the directing mind of Omai and had not committed any acts that could give rise to liability, Maughan J pointed out that determining these issues would amount to going into the merits of the suit, an impermissible exercise in jurisdictional inquiries. Jurisdictional inquiries are certainly not merits-based. It would therefore be overreaching for the court to make pronouncements, even if merely preliminary pronouncements, regarding the liability of the defendant.

This case was decided in 1998, i.e., four years after Morguard. The court did not found its jurisdiction on the real and substantial connection test enunciated in Morguard, but on the Quebec Civil Code. This suggests that the court regarded the Quebec’s provincial jurisdictional rule as a distinct basis of jurisdiction and not one subsumed under the real and substantial connection test. However, Maughan J’s remarks regarding the place where the decisions relating to the construction of the mine took place, although might have been intended to bolster the domicile connection – as Seck argues – could as well have served to give the court jurisdiction under the real and substantial connection test assuming the requirements of domicile were not met. So Maughan J’s remarks more than served to bolster the domicile connection.

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2074 Cambior, supra note 168 at para 22.
2075 As Seck has noted, this reasoning served to bolster the domicile link between Cambior and Quebec, but also spoke to the real and substantial connection test applicable throughout Canada.
2076 Jurisdictional inquiries are certainly not merits-based. It would therefore be overreaching for the court to make pronouncements, even if merely preliminary pronouncements, regarding the liability of the defendant.
2077 It must be mentioned that Spar Aerospace affirmed that the Quebec rules were consistent with the constitutional requirement.
7.2.2  *Forum Non Conveniens*

As already noted, *forum non conveniens* was incorporated into Quebec law through Article 3135 of the Civil Code which provides: “Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.” The task of Maughan J in this case was to ascertain whether exceptional circumstances existed to justify Quebec declining jurisdiction in favour of Guyana. Was Guyana in a better position than Quebec to decide the case? In the determination of this question, *Maughan* J reminded himself of La Forest J’s admonition that “[w]hatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contracts or connections.”

Maughan J divided the analysis into an eight-factor analysis: (1) the residence of the parties and witnesses; (2) the location of the elements of proof; (3) the place of the harm-causing event; (4) pending litigation; (5) the location of the defendant’s assets; (6) the applicable law; (7) the potential loss of juridical advantage; and (8) the interests of justice. For a better appreciation of how these factors played out in the case, it is best to analyze the factors *seriatim*.

7.2.2.1 The Residence of the Parties and Witnesses

Maughan J acknowledged that RIQ was a Quebec corporation. He also acknowledged that Cambior was domiciled in Quebec. However, he was clear that the domicile or residence of the parties not be given controlling effect. He pointed out that RIQ was incorporated primarily, if not solely, to act as a vehicle for the 23,000 Guyanese victims of the spill to bring the suit in Quebec. It seems apparent that were Cambior not domiciled in Quebec, RIQ could not have been incorporated in Quebec. Were Cambior domiciled in British Columbia, RIQ would presumably have been incorporated in British Columbia. It follows that the actual victims of the spill were not Quebec domiciliary, but Guyanese. Their only link with Quebec was the litigation, through RIQ. Cambior, on the other hand, has a stronger link with Quebec. It has its head office in Val d’Or and its executive offices in Montreal. Its corporate records, including minutes of its Board

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2078 *Hunt, supra* note 176 at para 59.
meetings, are located in Quebec. RIQ stressed the fact that Cambior was domiciled in Quebec, and argued that this fact made Quebec the “natural forum” for the litigation. It appears from Maughan J’s judgment that the domicile of the parties would have weighed in favour of litigation in Quebec, but he was quite strict about not regarding a specific factor as determinative. So he considered the domicile of the parties together with that of potential witnesses. Although this approach seems commendable, Professor Seck thinks it is “somewhat formalistic”, emasculates the “principles of order and fairness” that should be the driving force behind the inquiry, and “leaves no room” for the assessment of the relative weight of the factors. 2079 I think that what weight to be accorded to the residence of the parties should be considered together, as Maughan J did, with the residence of the witnesses since, especially in this case where the case is to be fought not nearly as much on documentary evidence as on the testimony of witnesses, the ability of the witnesses to attend hearing is more crucial to the litigation than the ability of the parties to attend hearing. In addition, Maughan J was concerned that though the plaintiff on record (i.e., RIQ) was based in Quebec, the actual victims whom the plaintiff represented and who would constitute a great part of the witnesses were in Guyana. He worried: “The inconvenience to the victims of having to litigate in Quebec is far greater than that of Cambior's Board members and executive officers who would be called upon to testify in Guyana.” 2080 Seck regards this statement as “paternalistic” for presupposing that the court knew what was best for the victims than the victims themselves knew. 2081 There is a problem here. How far should a court restrain itself from interfering with a party’s claim in a forum non conveniens inquiry that what clearly appears as grave inconvenience to him is what he/she in fact prefers? Where the inconvenience is clear and undeniable, and there is another forum clearly less inconvenient, it may smack of dishonesty, in the absence of adequate explanation, on the part of that party to insist that he/she prefers to have the case litigated in that forum. Where parties find it inconvenient – whether they admit it or not – to attend hearings, delay in litigation is often the result. Protracted proceedings are pressure on judicial resources, both economic and administrative. The end result therefore is

2079 Seck, “Environmental Harm in Developing Countries”, supra note 32 at 160.
2080 Cambior, supra note 168 at para 47.
2081 Seck, “Environmental Harm in Developing Countries”, supra note 32 at 160 (likening it to what Keenan J did in the Bhopal case where the presence of the Indian government as plaintiff did not suffice to convince Keenan J that it would be in the best interest of India that the case be litigated in the US). Talpis & Kath have expressed the view that the case illustrated some level of discrimination against foreign plaintiffs who had sued a Canadian corporation for harm committed abroad. Talpis & Kath, “The Exceptional and the Commonplace”, supra note 1652 at 818.
that the court itself suffers. Therefore it is not necessarily paternalistic for the court to determine objectively – based on information in the record – what is inconvenient for the parties in disregard of the parties’ claims. There could certainly be cases where a party might legitimately wish to bear certain inconvenience so as to have the case litigated in his/her chosen forum. But whether the court should accord full respect to that choice should depend on the entire facts of the case, i.e., on all the other factors linking the case to the contending forums. It must be pointed out, however, that under the Scottish formulation of the *forum non conveniens* doctrine the court cannot cite its own (in)convenience as the basis for declining jurisdiction.\footnote{La Société du Gaz, supra note 1618 at 21 (per Lord Sumner) (“Obviously the Court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French, as a ground for refusal”).} The meaning of this seems to be that the main reason for declining jurisdiction cannot be for the convenience of the court. However, inconvenience of the court might serve to bolster the arguments of the party inconvenienced by the very factors that inconvenience the court.

In fact, why the residence of the parties matters is mainly because it is assumed that they will be witnesses in the case. Where they would not serve as witnesses, the significance of their residence weakens considerably. In the present case, RIQ listed forty witnesses, in addition to the representatives of Cambior and the other two defendants. The forty witnesses were resident in Vancouver (fifteen), Ottawa (five), Montreal (five), Edmonton (one), the United States (ten), and the United Kingdom (four). Of these, only ten were compellable in Quebec – those residing in Montreal and Ottawa. None seemed compellable in Guyana. These witnesses would give evidence on matters concerning the design and construction of the tailings dam, environmental matters, the feasibility study conducted on the mining operation, project financing, management and supervision of the mine, and the managing of events during and after the spill. Maughan J found that the cost for these witnesses of travelling to Guyana and back to their various destinations would be greater than the cost of travelling to Montreal. However, he did not consider the difference in cost substantial in light of the overall cost of litigating in either Montreal or Guyana.

Noticeably absent from RIQ’s list of witnesses, however, were those it intended to call to prove causation and damages. While it was uncertain whether these witnesses would in fact be required,\footnote{Seck, “Environmental Harm in Developing Countries”, *supra* note 32 at 161.} that they would be required seemed reasonably presumable. Otherwise, how else
could damages, in particular, be proven? RIQ did allege that the 23,000 victims it was representing either resided, worked, fished or owned property within the area affected by the disaster. It claimed environmental, economic and psychological damage on behalf of these victims. While expert testimony would most likely be required to establish causation, who, other than the victims themselves, could give evidence of the damage suffered?

Additionally, Maughan J pointed to the fact that the disaster had already been investigated by a Commission of Inquiry set up by the Guyanese government. All the members of the Commission were Guyanese. There were also three specialized committees appointed to investigate specific areas of concern. Fourteen, out of the twenty persons that constituted these committees, were Guyanese. That the members of the Commission of Inquiry as well as the members of these specialized committees would be called to testify seemed to Maughan J reasonably presumable although the extent to which parties would make use of them was uncertain. After balancing all these factors, Maughan J concluded that the residence of both the parties and the witnesses favoured litigation in Guyana.

Maughan J made use of presumptions of what witnesses might be called in the case. While it is important to exercise caution in making such presumptions since the court cannot decide for parties what witnesses to call, the nature of the case seemed to have justified the particular presumptions Maughan J made. One comes off with the feeling that RIQ was not especially upfront in its presentation of its *forum non conveniens* arguments. There was no reason to be silent about what witnesses to be called to prove causation and damage – the very heart of the case. If the parties are silent on such crucial issues, the court should be free to delve into the facts before it and make appropriate inferences and draw presumptions where there are reasonable grounds to do so.

Talpis and Kath have criticized Maughan J for viewing the “nationality of the plaintiff[s]” as relevant, calling it “unconstitutional” and “[un]wise in today’s world.” They argue that by looking at the residence of the victims, Maughan J lifted the corporate veil of RIQ and gave little relevance to the fact that Cambior itself, the named defendant in the case, was domiciled in Quebec. This view misses the point of why the residence/nationality of the victims mattered in the case. First, it was not in doubt that the named plaintiff represented the victims. Second, it

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2084 Talpis & Kath, *supra* note 1652 at 846.
2085 *Ibid* at 821.
was not actually the nationality of the victims that mattered to Maughan J, but their residence. This mattered because they would be key witnesses in the case. To ignore the practical difficulties of their travelling from Guyana to Quebec to give testimony in the case would defeat the whole purpose of the *forum non conveniens* doctrine. So it was not that the domicile of RIQ did not matter, but for practical purposes the domicile of the victims who would be key witnesses in the case was clearly more important than that of RIQ. While modern technology has made international travel and transportation of documents easier, the benefits of such advancements have not spread evenly throughout the world. Many in the developing countries still find it very difficult to travel abroad. Flying an airplane is still a huge luxury. Visas are frequently denied them when they seek to travel to one of the developed countries for fear, real and imagined, that they might not return home; whereas many citizens of developed countries do not need a visa to travel to most countries. So when victims from developing countries bring suits in western courts, the benefits of modern technology with regard to the attendance of witnesses should be assessed with great caution.

7.2.2.2 The Location of Elements of Proof

It was clear that most of the evidence that would be used in the case was located in Guyana. The Essequibo River itself into which the discharge spilled was undoubtedly located there. So were mine itself, the plans and documents relating to the construction of the mine, the victims’ medical records, and other documentation relating to results of the Guyanese government-sponsored studies regarding the spill. While documents may be transported from Guyana to Montreal, the Essequibo River and the mine itself, needless to say, were not transportable. Even then, the cost of transporting documents from Guyana to Montreal outweighs the cost of transporting them from wherever they may be in Guyana to the court in Guyana. So Maughan J found that this factor weighed in favour of trial in Guyana.

Seck has pointed out that Maughan J did not factor in the location of decision-making authority relating to the construction and operation of the mine. The location, if the plaintiff was to be believed, was Quebec. Seck criticizes Maughan J for focusing only upon the location

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2086 Talpis and Kath argue that modern technology has whittled down the problems associated with international travels and that documents are now easily transportable either via email or facsimiles. *Ibid* at 846.

2087 Seck, “Environmental Harm in Developing Countries”, *supra* note 32 at 162.
However, even if this were taken into account, it is doubtful if it would have altered the result reached by Maughan J on the location of evidence. Evidence that the relevant decisions were made in Quebec and the content of those decisions would have been documentary, at best oral. If they were documentary, they would have been transportable to Guyana; if they were oral, the individuals would have travelled to Guyana, compared to the river and the mine located in Guyana, which were immovable. It is also not proper to downplay the potential need for a visit to *locus in quo*.

While the dam had been repaired at the time of the proceedings, its proximity to the environment claimed to have been damaged might have been of relevance in the determination of causation. So a visit to the site would most likely have been warranted.

Yet, there was an aspect of the argument regarding the location of decision-making that Maughan J seemed to have misappreciated. He was somewhat dismissive of RIQ’s insistence on the location of decision-making, insisting himself on the fact that the mine was located in Guyana and that Omai was the one that operated the mine. To him, therefore, “[a]ny act of negligence in the construction, management and operation of the mine which Omai committed and for which Cambior, as principal, could be held liable would have occurred in Guyana.”

The acts of negligence would have included the decisions regarding the construction, management and operation of the mine. This, it appears, was what RIQ was arguing. The impact of this error would, however, not have been significant in the assessment of the location of evidence since the amount of evidence located in Guyana outweighed by a wide margin, at least quantitatively, the amount located in Quebec. While RIQ built its case on the decisions taken in Quebec, allegedly masterminded by Cambior, those decisions would have meant nothing if they did not result in damage to the victims in Guyana. The decisions in no wise constituted the damage, but were part of the chain of events that caused the damage. Proving that those decisions were made in Quebec was important, and proving that Cambior masterminded those decisions was even more important to RIQ’s case. But proving those facts would, in all objectivity, be less time- and cost-consuming than proving causality and damage in the case. So, the location of the evidence needed to prove causality and damage was more significant to the inquiry than the location of the evidence to prove that Cambior masterminded the negligent

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*Seek is of the view that given that the dam had been repaired, a visit to *locus in quo* “would be of limited value.” Ibid*

*Cambior, supra* note 168 at para 60
decisions. One might argue that RIQ was challenging only the negligent decisions made in Quebec. But this argument is of limited value in that negligence is not actionable \textit{per se}. Damage must result for a remedy to lie. So proof of damage remains essential to RIQ’s case. An inquiry into the location of evidence cannot rationally ignore the elements that would need to be proved in the case assuming the case goes to trial. There is therefore need to identify the issues that would arise during trial and to relate the factors to those issues.\footnote{On the need to identify the likely issues in the trial during a \textit{forum non conveniens} inquiry, see the English Court of Appeal decision in \textit{Limit (No 3) Ltd v PDV Insurance Co} [2005] 2 All ER (Comm) 347.}

But Maughan J’s error is significant in another respect. As captured by Seck, it “serves to illustrate the significance of the different approaches to parent company liability in cases of contested jurisdiction.”\footnote{Seck, “Environmental Harm in Developing Countries”, \textit{supra} note 32 at 163.} Maughan J characterized the liability theory being advanced by RIQ as though it was one of vicarious liability against Cambior – he refers to Cambior as “principal”, suggesting that Omar was its agent – whereas RIQ was building a direct liability theory. RIQ was not simply saying that Omai acted on behalf of Cambior, but that Cambior was a direct participant through the decisions it conceived and directed.

7.2.2.3 The Place of the Harm-Causing Event

This factor has been somewhat touched upon above. It was RIQ’s case that one or more of the harmful acts, to wit, the negligent decisions, occurred in Quebec. These were not self-executing decisions. It was a settled fact in the case that the day-to-day running of the mine was the responsibility of Omai. As noted earlier, the decisions were part of the chain of causative events that led to the disaster. But the execution of the decisions by Omai in Guyana was a significant causative factor.\footnote{See United Nations Environment Programme (UNEP), “Compendium of judicial Decisions on Matters Related to Environment: National Decisions”, vol III, UNEP/UNDP/Dutch Joint Project on Environmental law and Institutions in Africa, October 2001, p 31, online: UNEP, \textless http://www.unep.org/padelia/publications/Nation.Deci._Vol_3=prelims.pdf\textgreater (last accessed 28 February 2012).} Maughan J was right in resolving the issue in favour of trial in Guyana.

7.2.2.4 Parallel Litigation

While the case was before the Quebec court, about 900 of the victims had already brought claims in Guyana against Omai with regard to the spill. However, Maughan J distinguished these claims
from the one before him in that the Guyanese claims named Omai as defendant while the case before him named Cambior as the defendant. This obviously reflects the doctrine of separate corporate personality. This meant that there was no risk of inconsistent decisions if the Quebec proceedings were allowed to proceed. This factor was accordingly resolved in favour of Quebec.\footnote{Cambior, supra note 168 at paras 63-64.}

7.2.2.5 The Location of the Defendant’s Assets

There was evidence before the court that Cambior had assets in both Quebec and Guyana. Its Guyanese assets consisted of shares in Omai. It also had creditor rights under loan facilities advanced to Omai. These assets were deemed sufficient to satisfy any resulting judgment against it in Guyana. Since it had assets in both forums, Maughan J considered this factor of neutral effect on the decision to decline or exercise jurisdiction since the plaintiff would not have had any difficulty in executing the judgment of either court.\footnote{Ibid at paras 65-66.}

7.2.2.6 The Applicable Law

Article 3126 of the Quebec Civil Code provides: “The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.” Neither party contested the applicable law. It seemed clear to them that Guyanese law applied, whether the general rule or the exception is considered. For under the exception, even if Cambior argued that the injurious act was the decisions that took place in Quebec, Guyanese law would still apply since the damage did occur in Guyana and Cambior ought to have known that that was where the damage would occur. The issue remaining therefore was whether Maughan J should decline jurisdiction because Guyanese law incontestably applied. As noted earlier, that foreign law would apply does not automatically warrant a stay. The nature of the foreign law must be of such apparent complexity that the forum court had better allow the foreign court to deal with it.
A former Chief Justice of Guyana, who was also the Chairman of the Commission of Inquiry that investigated the spill, testified as to the state of Guyanese law relevant to the action. He testified that there was little or no environmental legislation in Guyana that would govern the claim. He opined that in the absence of such environmental legislation the applicable law was the common law of mass torts. In addition, under the mineral agreement between Omai and the Guyanese government, Omai was bound by environmental standards set out in an Environmental Impact Assessment prepared for the mine. Although Maughan J did not refer to any feature of the common law of mass torts that made it clearly judicious to allow a Guyanese court to decide the case, he simply concluded that a Guyanese court was in a better position to decide and resolved the factor in favour of trial in Guyana. This is a misapplication of this factor. It cannot be doubted that every court is in a better position than any other court to interpret the laws of its forum. But if every case where foreign law applies must be resolved in favour of trial in the foreign court, then the significance of private international law would be diminished, if not wiped off. Choice of law rules are not created to enable or encourage courts to decide only those cases where their forum law applies. Implicit in the principle of choice of law is that courts are able to interpret foreign laws. Maughan J acknowledged this much when he stated that the “very essence of provisions of the Quebec Civil Code on private international law is that Quebec courts will apply foreign law in many varying circumstances.” As noted in the preceding paragraph, for a stay to be warranted on this score, the applicable law must display such complexity that the foreign court is better allowed to deal with it. Because there was nothing uniquely complex about the common law of mass torts, Maughan J should have resolved the issue as having neutral impact on the forum non conveniens inquiry. And where the impact is neutral, the case for stay is weakened.

Talpis and Kath have argued that it was wrong of Maughan J to consider applicable law as a relevant forum non conveniens factor. They argue that considering whether foreign law applied assumed that Quebec courts were not competent to apply foreign law and that this ran counter to Quebec private international law. Quebec courts do apply foreign law and Article

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2096 Ibid at paras 69-70.
2097 Ibid at para 70.
2098 Although Maughan J was a civil judge, it cannot be assumed that civil judges cannot interpret principles of the common law well enough.
2809 of the Quebec Civil Code is intended to facilitate proof of foreign law.\textsuperscript{2099} The problem with this argument is that it rejects \textit{in toto} any role for the applicable law and this is because it misconceives the relevance of considering applicable law. It is not because any forum is incapable of interpreting the laws of another forum. It is simply because where the issues are unusually complex, it would better serve the interests of justice if the court of the forum whose law is to be applied is allowed to deal with it, for having been dealing with the relevant jurisprudence over the years, that court has the benefit of hindsight. Talpis and Kath are further concerned that considering the applicable law as part of the \textit{forum non conveniens} inquiry raises issues that are better dealt with later in the proceedings and thereby causes unnecessary delay.\textsuperscript{2100} If the justice of a case requires that the dispute be decided by a particular forum, then delays occasioned by efforts to discover that forum may not be described as unacceptable. However, with the increasing cross-fertilization of law, resulting in lawyers and judges with knowledge of several legal systems, the significance of the applicable law factor would equally be diminishing. But whether it has diminished to the point that it should no longer be regarded as a relevant factor in \textit{forum non conveniens} inquiries is doubtful.

7.2.2.7 The Potential loss of Juridical Advantage

On this factor, the main issue was whether the absence of the class action procedure in Guyana constituted a juridical disadvantage to the plaintiffs sufficient to require that the action be tried in Quebec. Cambior argued that the procedure available in Guyana was representative action and that the advantages of the class action – which was available to them in Quebec – outweighed those of representative action.

Under Guyanese law, representative actions are limited to persons having the “same interest” in the action. By contrast, Article 1003(a) of the Quebec Civil Code allows class action for persons whose claims raise “identical, similar to or related” questions of law or fact.\textsuperscript{2101} Quebec courts have interpreted this provision liberally, so that it is not necessary that all of the questions of fact or of law in the claims of the class members be identical, similar or related. It suffices if the claims raise some questions of law or of fact that are sufficiently similar or

\textsuperscript{2099} Talpis & Kath, “The Exceptional as Commonplace”, \textit{supra} note 1652 at 845.
\textsuperscript{2100} \textit{Ibid.}
\textsuperscript{2101} See \textit{ibid} at 856.
related. There was no evidence as to whether Guyanese courts interpreted “same interest” liberally or restrictively. Cambior found only about three representative actions in Guyana since 1950. This suggesting that even this representative action was not a procedure commonly used in Guyana. The class action has the additional advantage of being more flexible in relation to the manner in which damage may be proved. As has been pointed out, unlike in a representative action in Guyana, proof of the damage caused by the defendant to each plaintiff is not a pre-requisite for recovery in the Quebec class action. “[I]f the evidence enables a court to establish with sufficient accuracy the total amount of the claims of the members of the class, it may order collective recovery.” It thus seemed clear that the class action procedure had obvious advantages over the representative action procedure.

Does it then mean that a stay was warranted? It has been argued that the Maughan J gave insufficient weight to the differences between the class action procedure and the representative action procedure. In Talpis and Kath’s words, “the alternative forum contemplated in article 3135 CCQ must, among other things, be a forum which has authority and capacity to hear the specific type of action introduced by the plaintiff.” This view is not borne out by the express words of the code. In Amchem, Sopinka J stated that loss of a juridical advantage is not a factor to be weighed separately, but one to be borne in mind in the consideration of the forum with which the action and the parties have the most real and substantial connection. A stay cannot be refused simply because the plaintiff may suffer a juridical disadvantage if it is granted. Maughan J held that since the six factors considered pointed to Guyana as the natural forum for the action, the plaintiffs’ loss of the class action procedure did not suffice to refuse a stay. Maughan J was influenced by the fact that even though the class action procedure would not be available to the plaintiffs in Guyana, they still had the benefit of a representative action, and that even if this offered lesser advantages to the plaintiffs than a class action, individual plaintiffs could still institute separate actions in Guyana. Seck has sought to contrast this holding with the House of Lords’ decision in Connelly, arguing that “given the prohibitive costs of complex litigation of this type, a denial of access to the class action procedure would have essentially rendered the

2102 See UNEP, *supra* note 2093 at 32.
2105 Talpis & Kath, “The Exceptional as Commonplace”, *supra* note 1652 at 857.
2106 *Cambior, supra* note 168 at paras 80-81.
alternate forum no alternative at all.” This argument seems to ignore the fact that in Connelly the absence of legal aid in Namibia was the most decisive factor in the House of Lords’ decision because it might deny the plaintiffs access to justice. The House in fact stated: “generally speaking, the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum.” Cambior did not allege that the costs of litigating in Guyana were prohibitive.

7.2.2.8 The Interests of Justice

RIQ canvassed that it would be denied justice if the case was heard to Guyana. It invited Professor William Schabas, an expert in international human rights law, who testified as to the possibility of the plaintiff obtaining justice in a Guyanese court. In his affidavit evidence, Schabas stated that he had conducted a “one-week fact-finding mission in Guyana” during which he had attended Guyanese trials and met with Guyanese government officials, lawyers, judges and academics. He made damning remarks about the Guyanese justice system, comparing it with the justice system in Apartheid South Africa and Nazi Germany. He said the justice system in Guyana had reached “a state of collapse”, citing a memo to the Guyanese Attorney General by a lawyer he met during his trip. He cited a 1997 statement credited to the Guyanese Prime Minister describing the judiciary as corrupt, and another statement credited to the Chief Justice of Guyana describing the judiciary as demoralized – both statements were denied by their alleged authors. He referred to the salaries of judicial officers in Guyana as scandalizingly low, arguing that this made it difficult for capable hands to be appointed to the Guyanese judiciary. He also referred to delays in the administration of justice, alleging that it could take four to five years to get a court hearing, this being largely due to inadequate judges. Regarding the representative action procedure, he stated that this was available only to unincorporated associations such as clubs, labour unions and bondholders.

In response, Cambior called the testimony of the former Chief Justice of Guyana who chaired the Commission of Inquiry that investigated the disaster, Kenneth George. He testified that throughout his 40 years in the legal profession in Guyana, he was not aware of any serious

\[2107\] Seck, “Environmental Harm in Developing Countries”, supra note 32 at 166.

\[2108\] Connelly, supra note 353 at 345.

\[2109\] UNEP, supra note 2093 at 32-33.
allegations made concerning the integrity or competence of Guyanese judges. He stated that Guyana had been served by strong and independent attorneys general since its independence in 1966 and that he himself was never under any pressure to decide any case in any particular way throughout his 29 years as a judge. He added that none of his colleagues ever made such complaints to him. He denied Schabas’ claim that he was scandalized by the emoluments of judicial officers in Guyana, stating that they were comparable to the salaries of permanent secretaries in government ministries. He stated that the Guyanese Bench was made up of dedicated judges conscious of their public image. Referring to Guyanese jurisprudence, he countered Schabas’ view that representative action was available only to unincorporated associations. Regarding delay in the administration of justice, he admitted that the administration of justice was slow, but that cases were heard between two and two and a half years and that it was not uncommon for this time to be shortened.\textsuperscript{2110} Several other expert witnesses corroborated Mr. George’s testimony. These include Guya Persaud (a former judge of the High Court of Guyana and former Chief Justice of the Guyana Court of Appeal), Sir Harold Bernard St John (a lawyer from Barbados and former Prime Minister) who testified that Guyanese judgments were cited approvingly in the Commonwealth Caribbean, and Mr Marcel Nichols (a former Justice of the Quebec Court of Appeal) who undertook a six-day mission to investigate the Guyanese judicial system. All were agreed that justice would be served in Guyana if Quebec declined jurisdiction.\textsuperscript{2111}

Maughan J expressed his satisfaction with the quality of testimony of Mr George. Compared to Schabas, he found Mr George’s testimony direct, frank and unexaggerated. Mr George did not claim to know everything, but was unpretentious when he did not know the answer to a question. Where he believed the Guyanese legal system was weak, he admitted it.\textsuperscript{2112} Maughan J found Schabas’s testimony as made up of secondary evidence since Schabas relied very much on information supplied to him by other persons. He deemed the delays in the administration of justice in Guyana as not unreasonable, compared to delays in other jurisdictions. He concluded that that the claim that the plaintiff would be denied justice in Guyana was unsubstantiated.\textsuperscript{2113}

\textsuperscript{2110} \textit{Ibid} at 33.
\textsuperscript{2111} \textit{Ibid} at 33-34.
\textsuperscript{2112} \textit{Ibid} at 33.
\textsuperscript{2113} \textit{Cambior, supra} note 168 at paras 82-99.
This issue illustrates the difficulty of proving allegations attacking the justice system of other countries. It is surprising that the court was urged to believe that a one-week fact-finding mission to a foreign country was enough to acquire reliable knowledge of how the legal system of that country functioned and, in particular, the quality of justice obtainable there. As has been argued, “no matter what the evidence is,” attacking the integrity of the justice system of another country is distractive in transnational corporate torts.\(^\text{2114}\) It lends credence to the view that allowing such litigation in host-state countries is imperialistic.

7.3 *BIL’IN (VILLAGE COUNCIL)*

The plaintiffs sued two Montreal corporations and their sole director for their alleged involvement in the development of dense residential buildings in the West Bank which resulted in the forcible transfer of the villagers from their land for the occupation of Israelis. The plaintiffs were a village Council located in the West Bank, a Palestinian territory occupied by Israel, and the head of the Council. The Council was appointed in 2003 by the Palestinian Authority and given municipal authority over the land in dispute in the case. It brought the suit on its own behalf and on behalf of residents of Bil’In. The corporate defendants were registered in Quebec while the individual defendant was their sole director and officer. They were said to have built condominiums on Bil’In land in the West Bank and were selling them illegally to the Jewish civilian population alone. In 1991 Israel declared the lands state land and in 1996 assigned the lands to a Jewish local council for the construction of a Jewish settlement in pursuance of a state policy of removing the Palestinian population and occupying the West Bank. Subsequently, the local council assigned the lands to the corporate defendants in this case.\(^\text{2115}\) The plaintiffs argued that the forcible transfer violated customary international law, Canadian law and Quebec laws.\(^\text{2116}\) They argued that the defendants were carrying out the Israeli policy

\(^\text{2114}\) Seck, “Environmental Harm in Developing Countries”, *supra* note 32 at 168.

\(^\text{2115}\) *Ibid* at para 14.

\(^\text{2116}\) *Ibid*. The alleged customary international law violated was Article 49 of the Fourth Geneva Convention that provides that an occupying state may not “transfer parts of its own civilian population into the territory it occupies”. A similar provision is found under Article 8(2)(b)(viii) of the Rome Statute. Both conventions have been domesticated in Canada: the *Geneva Conventions Act*, RSC 1985, c G-3, and the CAHWC Act. The Quebec law alleged to have been violated was Article 1457 of the Quebec Civil Code that provides that “[e]very person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.”
for profit and on their own behalf and as agents of the Israeli government. They sought punitive damages and injunctions. They specifically asked that the action be decided in accordance with Canadian and Quebec laws, rather than the laws of the place where the wrong occurred, that is, Israel. This request was premised on the plaintiffs’ apprehension that Israeli courts would not find that Israel violated customary international law in the West Bank. The defendants challenged the jurisdiction of the court to hear the suit and argued in the alternative that Quebec was *forum non conveniens.*

7.3.1 Jurisdiction

For the purposes of this study, this case is unique in the sense that it was not about the overseas activities of subsidiaries of Canadian corporations, but about the overseas activities of parents of Canadian subsidiaries. Again, unlike in *Cambior,* the defendants’ jurisdictional challenge here was premised on sovereign immunity, *res judicata* (by virtue of three previous decisions rendered by Israeli courts allegedly on the same matter), lack of sufficient legal interest in the action on the part of the plaintiffs, and lack of a legal basis for the action assuming the facts alleged were taken to be true. The defendants’ residence in Quebec was apparently the jurisdictional basis on which the plaintiffs filed the suit in Quebec. In order to limit the analysis to what is most relevant for the purposes of this study, only the sovereign immunity issue is discussed below in detail. Suffice it to say that the corporate plaintiff was held to lack sufficient legal interest in the action and so its claims were struck out on that basis. The reason for this holding was that it had had no ownership interest in the lands in question. The individual plaintiff was held to have sufficient legal interest in the lands in that he owned lands there. The *res judicata* challenge failed on the basis that though the Israeli decisions were final decisions and the juridical identity of the parties was the same with regard to one of the decisions – the other two decisions were found to concern not exactly the same parties – the objects of the decisions, as well as their cause, were not identical with the present case. The judge concluded that the

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2118 Affidavit evidence before the court showed that the defendant corporations were incorporated in Canada for purposes of domestic Israeli tax reasons only, were “alter egos of a corporation that was not resident in Canada and did not have any assets anywhere in Canada. *Ibid* at para 215.
2119 *Ibid* at paras 137-144.
2120 *Ibid* at paras 77-117.
decisions did not completely settle all the issues raised in the action.\textsuperscript{2121} After considering the applicable laws, he held that if the facts alleged were true, a “generous reading” of the pleadings provided a legal basis for the plaintiffs’ claims.\textsuperscript{2122}

The defendants argued that they were agents of the Israeli State and as such were entitled to immunity under the Canadian \textit{State Immunities Act}.\textsuperscript{2123} Under section 3(1) of the Act, a “foreign state” is immune from the jurisdiction of Canadian courts. The immunity is also conferred on an agency of a foreign state. Section 2 of the Act defines an agency of a foreign state as “any legal entity that is an organ of the foreign state but that is separate from the foreign state”. A foreign state, itself, is defined as:

\begin{itemize}
  \item[(a)] any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
  \item[(b)] any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
  \item[(c)] any political subdivision of the foreign state;\textsuperscript{2124}
\end{itemize}

The defendants argued, not that they were agents or functionaries of Israel, but that the plaintiff’s entire suit is built on the allegation that they were agents of Israel. By this they implied that if the suit regarded them as agents of Israel, then they were entitled to the protections of the SIA. Cullen JSC pointed out that the plaintiffs’ pleadings included an alternative that the defendants were acting “on their own behalf” and “conspired” with the Israeli State in the illegal transfer.\textsuperscript{2125} He concluded that the defendants were not entitled to sovereign immunity. He addressed the issue in a manner that suggests that had the plaintiffs not had an alternative pleading where they alleged the direct liability of the defendants, he would have accorded the defendants the protection of the SIA as agents of the State of Israel. After setting forth the definition of “agency of a foreign state and “foreign state” under the SIA, he wrote:

\begin{itemize}
  \item[[23]] The inclusive definition of a "foreign state" has been found to encompass functionaries.
  \item[[24]] The Defendants do not claim that they are agents or functionaries of Israel.
  \item[[25]] They argue nonetheless that the Action is entirely based on the allegation that
\end{itemize}

\begin{itemize}
  \item[2121] \textit{Ibid} at paras 118.
  \item[2122] \textit{Ibid} at 145-206.
  \item[2123] RSC 1985, c S-18 [SIA].
  \item[2124] \textit{Ibid}, s 2.
  \item[2125] Bil’In, supra note 1891 at para 26
\end{itemize}
they are acting as "agents of the State of Israel".

[26] This contention is inaccurate. The Plaintiffs also plead in the alternative that the Defendants are acting "on their own behalf". Those allegations are reinforced by the allegation that the Corporations are "conspiring" with Israel in carrying out an illegal purpose.

[27] The allegations that the Corporations are acting on their own behalf are undisputed. If this is true, the Corporations cannot claim jurisdictional immunity pursuant to the SIA.2126

First, this decision is noteworthy in that it shows the importance of pleadings in the adjudication of corporate wrongs where the corporation is alleged to have collaborated with its host state or facilitated the commission of the wrongs by that state. That said, Cullen JSC erred when he suggested that had the plaintiffs not pleaded the direct liability of the defendants, the defendants would have been accorded the protection of the SIA as agents of the State of Israeli. As section 2 of the SIA states, for a legal entity to be regarded as an agent of a foreign state, it must be “an organ” of that state. The defendants do not qualify as an organ of a foreign state. The corporate defendants were not even set up by the State of Israel. While, as Cullen JSC pointed out, the definition of a foreign state encompasses functionaries of a state, the individual defendant was not described as a functionary of the State of Israel. The case of University of Calgary v Colorado School of Mines2127 throws light on the meaning of “agency of a foreign state” under the SIA. The Alberta Court of Queens Bench considered a state immunity argument raised by a Colorado college alleging that it was an agent of the state of Colorado in respect of a defamation suit brought against it by the University of Calgary. Kent J pointed out that while the Colorado School of Mines was an educational institution whose board was appointed by the Colorado government, in view of the School’s autonomy, it could not be regarded as an “arm or agency” of the state of Colorado.2128 In TMR Energy v State Property Fund of Ukraine,2129 the Federal

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2126 Ibid at paras 23-27.
2127 [1996] 2 WWR 596.
2128 Ibid at para 34:
Although the appointment of all of the members of the board indicates a higher level of control than there was in Harrison or McKinney, when one looks at what the board's function is, namely to be responsible to the institution for the day to day operation of the institution, CSM is not an arm or agency of the state of Colorado. The board has control and management of the institution, it sets its own bylaws and regulations, it makes decisions like setting the amount of tuition and the legislature has recognized in some circumstances it may act independently, albeit without the aid of government funds. CSM is not immune pursuant to the State Immunity Act.
Court of Canada stated that the test for determining whether an entity was an “organ” of a foreign state so as to constitute that state’s agency was whether the entity was the “alter ego” of the foreign state:

[T]here are three concepts at play here: First, the concept of agency of a foreign state, which is included in the greater definition of foreign state. Then, there are the two defining characteristics of an agency of a foreign state: (1) that it be an organ of the foreign state (and our Courts in interpreting this requirement still use the alter ego test) and (2) that it be a legal entity separate from the foreign state. The concept of separate legal entity necessarily refers to a distinct corporate personality. Thus the concept of “organ of a foreign state” continues to refer to the function and control aspects which distinguishes true emanations of a government regardless of legal status, and a new concept is introduced, that of separate legal entity. The distinction is relevant to the scheme of the State Immunity Act...

An agency of a foreign state may thus be described as an outgrowth of the state, which performs state functions regardless of its legal status. Typically, their board members are appointed by the government and they cannot take important initiatives without governmental approval. It is thus essentially a question of how much control the foreign state exacts over the entity.

2129 2003 FC 1517.
2130 Ibid at para 115. See also Collavino Incorporated v Yemen (Tihama Development Authority), [2007] 9 WWR 290, 75 Alta LR (4th) 185 at paras 105-121 (ABQB) (adopting the alter ego test). But see the 1994 decision of the Ontario Court of Appeal, Walker v Bank of New York Inc, (1994), 111 DLR (4TH) 186 at para 10, where the court stated that the word “organ” should be construed liberally to include where the entity acted at the request of the foreign state:

The word “organ” is a very broad one. The Oxford English Dictionary defines it as "a means of action or operation, an instrument, a 'tool'; a person, body of persons, or thing by which some purpose is carried out or some function performed". In this case the bank employees involved did not act on their own initiative. They acted at the request of U.S. government law enforcement officers for the purpose of assisting them in their investigation of possible criminal activities. To acknowledge sovereign immunity for the U.S. government and its employees in such a situation, and to expose persons providing them with requested assistance is, on the surface, grossly unfair. But, as has been pointed out in many cases, the doctrine of sovereign immunity is not a doctrine of fairness but, rather, one of necessity developed in the interest of international comity. However, we are of the view that the use of the broad word "organ" in the Act, which was promulgated to codify the application of the doctrine in Canada, indicates the intention of Parliament to protect individuals and institutions who act at the request of a foreign state in situations where that state would enjoy sovereign immunity.

 Apparently, this holding is inconsistent with the alter ego test and was not followed by either the Federal Court in TMR Energy or the Alberta Court in Collavino, cases that were decided years after the Ontario Court of Appeal case.

2131 This view is derivable from Harrison v University of British Columbia, [1990] 3 SCR 451 and McKinney v University of Guelph (1990), 76 DLR (4th) 545 (SCC), which though did not deal with the SIA, dealt with when the acts of an entity can be equated with that of the state. In these two cases, the Supreme Court of Canada considered the criteria for determining whether an entity is subject to Charter liability. The Court laid down three criteria: (1) Does the government exercise general control over the entity in question? (2) Does the entity perform a traditional government function or a function which is today recognized as a responsibility of the state? (3) Does the entity act pursuant to statutory authority specifically granted to it to enable it to further a governmental objective being promoted in the broader public interest? See also Antonin I Pribetic, “Adjudicating International
It is true that the plaintiffs at some points described the defendants as agents of the State of Israel, it is submitted that the term “agents”, as used in the pleadings, cannot be given the meaning under the SIA. The SIA has assigned a specific meaning to the word “agent”, a meaning that cannot be easily transplanted into other contexts. “Agent” as used by the plaintiffs in their pleading should have been given the traditional meaning found in tort law – a person who acts on behalf of another. A person can act on behalf of a sovereign state without qualifying as an agent under the SIA. A person can qualify as a state agent only if that person is an organ of that state.

7.3.2 Forum Non Conveniens

Having held that the Quebec Superior Court had jurisdiction with regard to the individual plaintiff – the corporate plaintiff’s clams were dismissed for lack of legal interest – Cullen JSC considered the forum non conveniens motion. After referring to the ten factors outlined in Spar Aerospace, he divided the inquiry into eleven factors. The include:

1. the residences of the parties, witnesses and experts, as well as the location of evidence;
2. the place where contracts were negotiated and performed;
3. the place where the injuries were suffered;
4. the place where the injuries occurred;
5. the existence of parallel proceedings abroad;
6. the location of the defendants’ assets;
7. whether the judgment would be recognized abroad;
8. the applicable law;
9. the potential loss of juridical advantage;
10. the interests of the parties; and
11. the interests of justice

It was clear that not all of these factors were relevant in view of the specific facts of the case. For instance, the second factor – the place of contracting and its performance – had little to do with the case since the action had its proper sounding in tort and not in contract. Both the place where the injuries occurred and were suffered were not in dispute between the parties – the West Bank.

Human Rights Claims in Canada” (2011) 8:3 Revue Canadian International Lawyer 117 at 120 (“An organ of a foreign state is an entity that is coextensive with or an adjunct of the state and that performs state functions… ”).
The existence of proceedings elsewhere was also irrelevant since no such claim was made by the defendant. The need to have the judgment recognized abroad and the interests of the parties were equally only tersely discussed by Cullen JSC. Lastly, tersely discussed also was the location of the defendants’ assets – a factor whose relevance to the case is difficult to see in view of how Cullen JSC treated it. One would expect that the location of the defendants’ assets would matter only with regard to whether the plaintiff would be able to recover any eventual damages award. But Cullen JSC treated the factor in isolation. The following analysis, however, focuses on the remaining factors that were decisive in Cullen JSC’s decision to decline jurisdiction, namely, the residences of the parties and their witnesses and the location of evidence, the applicable law, and the potential loss of juridical advantage.

7.3.2.1 The Residence of the Parties, Witnesses and Experts, and the Location of Evidence

Having dismissed the claims of the corporate plaintiff, the only plaintiff remaining was the individual plaintiff. However, the original individual plaintiff had passed on during the pendency of the suit and his claims were continued by eleven plaintiffs. All of these plaintiffs resided in the West Bank or Israel. All the three defendants, however, were Quebec residents. It was reasonable to assume – and Cullen JSC did just that – that these eleven plaintiffs would testify in the case. They would testify regarding the ownership of the lands, their alleged forcible removal from those lands and the discrimination they allegedly suffered in the hands of the defendants. If the case were to be heard in Quebec, they would have be travel from the West Bank or Israel to Quebec. Cullen JSC rightly held that this factor favoured trial in Israel. He noted that if expert evidence were needed, the experts would most likely be residents of the West Bank or Israel. In my view, this factor might have been of little significance since expert evidence is now routinely submitted by affidavit. Relevant elements of proof were reasonably to be expected to be in the West Bank. These include the lands, the buildings allegedly built and sold discriminatorily by the defendants and the promotional materials used to attract buyers. Cullen JSC held these factors to be in favour of trial in Israel.

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2132 Bil’in, supra note 1891 paras 213-218.
7.3.2.2 The Applicable Law

As earlier noted, the applicable law in tort cases in Quebec is the lex loci delicti, subject to a public policy exception in international cases.\footnote{Civil Code of Quebec, Article 3081.} Since the tort occurred indisputably in the West Bank, the law applicable in the West Bank would apply unless the case meets the public policy exception under Article 3081. The issue here, however, is how the applicable law matters in Cullen JSC’s forum non conveniens inquiry. As argued already in this chapter, applicable law should not be accorded only little weight except where the law identified as applicable is of such unusual complexity that the court of the forum whose law it is better allowed to deal with it. Cullen JSC approached the issue as though if Quebec law did not apply, then this factor should be immediately resolved against trial in Quebec. The plaintiffs’ counsel appeared to hold the same belief as they took pains to demonstrate that the case met the public policy exception under Article 3081. They argued that the law applicable in the West Bank was “manifestly inconsistent with public order as understood in international law” because the High Court of Justice of Israel did not recognize the application of the Fourth Geneva Convention.\footnote{Bil’In, supra note 1891 at paras 239-240.} Cullen JSC’s analysis was devoted entirely to ascertaining whether the law applicable in the West Bank was “manifestly inconsistent with public order as understood in international relations.”\footnote{His review of the jurisprudence of the Israeli High Court of Justice was intended to ascertain whether Israel would recognize the plaintiffs’ claim, with the final aim of determining whether non-recognition of the plaintiffs’ claim was “manifestly inconsistent with public order as understood in international relations”.} He thus took the analysis away from a forum non conveniens inquiry and segued into a choice of law inquiry. He did not need to do that in order to determine whether Quebec is forum non conveniens. All he needed to do was to consider the complexity of the law applicable in the West Bank and then determine whether a Quebec court would be in an awkward position to interpret it. Clearly, his failure to do so was due to the fundamental error that the applicable law, in and by itself, is a significant factor in a forum non conveniens inquiry. Regrettably, the Quebec Court of Appeal did not see the futility of Cullen JSC’s lengthy consideration of whether the West Bank law was “manifestly inconsistent with public order as understood in international relations,” but appeared itself to suffer from the same error when, on appeal, it treated the effect of applying the West Bank law as an issue affecting the applicable law factor in a forum non conveniens
inquiry. The factor does not require a consideration of the effect of applying the applicable law, but whether the applicable law – that has been identified – possesses such unusual complexity that the court of a particular forum be better allowed to deal with it.

It must be specifically added too, although it somewhat flows from the foregoing arguments, that whether the plaintiffs’ claim was justiciable in Israel does not belong to the applicable law factor in a forum non conveniens inquiry. It is a matter that goes to the possibility of the case being heard at all if a stay is granted, i.e., to the interests of justice. If it affects the plaintiffs’ entire claim, it may be regarded as an access to justice issue. In fact, the justiciability issue should have formed part of the jurisdiction simpliciter analysis. That Cullen JSC considered it only at the forum non conveniens stage was a serious flaw in the decision. He might have been influenced by the manner in which the plaintiffs presented the issue, but jurisdiction being so fundamental that the court can raise it suo motu, what Cullen JSC did was nonetheless wrong. His unspoken assumption that since the injurious acts occurred in the West Bank, Israel, ipso facto, had jurisdiction simpliciter is legally wrong. This is not least because Israeli occupation of the West Bank remains one of the most contentious issues in international law and international relations. The extent of power Israel can legally exercise over the area remains in dispute. Article 3135 requires a Quebec court to decline jurisdiction only when the courts of a foreign country are in a better position to decide, and even then to do so exceptionally. The courts of a foreign country cannot be regarded as being in a better position to decide if it is unclear that they have jurisdiction.

Yap has suggested that even if the Israeli High Court of Justice would have jurisdiction, there was no evidence that it would do so from the perspective of Quebec private international law. He notes that Quebec conflicts rules do not provide jurisdiction over the extraterritorial acts of non-residents who acted on behalf of Quebec government. He questions whether it is appropriate for a Quebec court to decline jurisdiction in favour of a country in whose shoes it would not assert jurisdiction. The authority for this argument is Article 3164 that provides that “[t]he jurisdiction of foreign authorities is established in accordance with the rules on

2136 Yassin, supra note 1736 (affirming the decision of Cullen JSC).
2138 Yap, “Corporate Civil liability for War Crimes”, supra note 1888 at 642.
jurisdiction applicable to Quebec authorities”. Article 3164 speaks to recognition and enforcement of foreign judgments.\textsuperscript{2139} It operates like the real and substantial connection test in the context of recognition and enforcement of foreign judgments, under which a Canadian court is required to ascertain whether the foreign court had assumed jurisdiction in accordance with Canadian standards. It is not meant to be used in ascertaining whether a foreign court has jurisdiction for \textit{forum non conveniens} purposes.

Just before Cullen JSC concluded his analysis on the applicable law factor in favour of trial in Israel, he stated that “contrary to the HCJ, the Superior Court possesses no expertise in respect to the laws that apply in the West bank.”\textsuperscript{2140} Does the doctrine of \textit{forum non conveniens} require that the forum court possess expertise in the applicable law? Expertise in the applicable law would be required only where interpretation of that law requires expert knowledge and skills due to some important unique features of that law. Cullen JSC did not offer any background from which one might conclude that the West Bank law applicable to the case was of such intricacy and/or novelty that special expertise was needed to interpret it aright. Quebec courts, as earlier noted, are known to be competent to interpret foreign law and the Quebec legislature acknowledged this when it laid down rules to facilitate proof of foreign law under Article 2809 of the Quebec Civil Code.

\subsection*{7.3.2.3 The Potential Loss of Juridical Advantage}

The juridical advantage in contention was the advantage offered by Canadian and Quebec laws, under which Quebec courts would ensure that the plaintiffs benefit from the provisions of the Fourth Geneva Convention and the Rome Statute. The plaintiffs argued that if a stay was granted, they would lose the possible advantage of having the case decided in accordance with these laws. After reviewing the Supreme Court of Canada and Quebec decisions, Cullen JSC held that the case’s relative connection with Quebec was “superficial” and that it would be “inappropriate” to litigate the case in Quebec merely to give the plaintiffs a juridical advantage they would not find

\textsuperscript{2139} In all fairness, Yap, in a footnote, expressed doubt whether Article 3164 can be applied outside the context of recognition and enforcement of foreign judgments. See \textit{ibid} at n 64.
\textsuperscript{2140} \textit{Bil’in, supra} note 1891 at 304.
in litigating in the forum more fully connected with the case.\textsuperscript{2141} He stressed that Quebec had jurisdiction “solely because the Defendant were domiciled in Quebec.”\textsuperscript{2142}

Cullen JSC’s consideration of this factor was very transitory. There was more to this factor in the case than he seemed to appreciate. One of his major problems was that he included in the applicable law factor issues that more appropriately belonged to juridical advantage. While the extent of connection between the forum and the dispute remains critical in the determination of the juridical advantage, the plaintiffs’ argument that Israeli courts would apply a law that was “manifestly inconsistent with public order as understood in international relations” (Article 3081 of the Quebec Civil Code) deserved substantial weight. Unlike the applicable law factor, juridical advantage looks at the content of the law to be applied, procedurally and substantively. Given the category of the norms in question, Cullen JSC should have been less dismissive of the plaintiff’s desire to take advantage of Canadian and Quebec laws even though the case had a stronger connection with West Bank. I do not think that it is correct to read \textit{Amchem} as though it says that the substantiality of the connection with the contending forums is unalterably conclusive of the juridical advantage factor. While whether juridical advantage would prevail is “very much a function of the parties’ connection with the forum,” the legitimacy of a claim to juridical advantage “is based on a \textit{reasonable expectation} that in the event of litigation arising out of the transaction in question, those advantages will be available.”\textsuperscript{2143} What amounts to “a reasonable expectation” is subject to interpretation and must depend on the particular facts of the case. Where the case is more closely connected with a particular forum, the juridical advantages conferred by that forum can be said to be within the reasonable expectations of the parties. But the Israeli occupation of the West Bank presents different considerations of reasonable expectations. The occupation has attracted international condemnation. The issues arising from the occupation are shrouded in both customary international law and conventional international law. The UN Security Council has condemned it and the ICJ has issued an advisory opinion condemning the constructions going on in the West Bank.\textsuperscript{2144} Even Israel’s strongest ally, the US, has often been very critical of Israel’s constructions and forcible removal of the civilian population in the area. There was evidence before Cullen JSC that the Canadian government had

\textsuperscript{2141} \textit{Ibid} at para 335.
\textsuperscript{2142} \textit{Ibid} at para 311.
\textsuperscript{2143} \textit{Amchem, supra} note 178 at para 31 [italics mine].
\textsuperscript{2144} \textit{Bil’In, supra} note 1891 at paras 293-294.
issued a statement describing its disapproval of the Israeli occupation.\textsuperscript{2145} And Israel is a High Contracting Party to the Fourth Geneva Convention, even though it has not domesticated it. It is submitted that in the event of litigation arising from conduct connected with the occupation, subjecting the defendants’ conduct to the application of customary international law would meet the reasonable expectations of the parties and the international community. To do otherwise would be “manifestly inconsistent with public order as understood in international relations”.

The juridical advantage the plaintiffs sought by asking for trial in Quebec could therefore be described as legitimate, even though the case was more closely connected with the West Bank. To dismiss the case to a forum where this reasonable expectation cannot be fulfilled was unjust to the plaintiff who was entitled to the benefits of that reasonable expectation.

Cullen JSC noted a 1979 decision of the Israeli High Court of Justice\textsuperscript{2146} wherein the Israeli High Court pronounced that Article 49(6) was not part of customary international law. He stated that it was now open for the plaintiffs to prove to the Israeli court that since that time Article 49(6) had indeed become a rule of customary international law, thus ensuring for themselves the juridical advantage they were now seeking.\textsuperscript{2147} This is an unreasonable demand on the plaintiffs. Assessment of the \textit{forum non conveniens} factors is based on the state of the law in the competing jurisdictions at the material time, and not on a remote possibility that the foreign court might depart from its previous decision if urged to do so. It would be unreasonable and highly speculative to require the plaintiffs to hope that they would convince the foreign court to overrule itself. As one scholar has wondered aloud: “If the source of the law in question had been legislative rather than judicial, would Cullen J. then have instructed the plaintiffs to lobby politicians in the Knesset?”\textsuperscript{2148} If Canadian courts have accepted that Article 49(6) has become part of customary international law, it is no guarantee that Israeli courts (or other courts for that matter) would so hold. To urge the plaintiffs to nurse the hope that Israeli courts would overrule themselves is, to say the least, unjust; and to use that probability to justify a stay is not in accord with the requirements of the doctrine of \textit{forum non conveniens}.

\begin{footnotes}
\item\textsuperscript{2145} \textit{Ibid} at paras 290-292. Although the plaintiffs did not produce the letter containing this statement, they cited one Federal Court of Appeal decision where the statement was cited: \textit{Canadian Magen David Adam for Israel v Canada}, [2002] FCJ No 1269 (FCA). Cullen JSC gave little probative value to the statement, arguing that it had been ten years since the statement was issued; he relied also on the fact that the letter was not produced for him to see the identity and level of authority of its signatory.
\item\textsuperscript{2146} Ayub v Minister of Defense (1978) 33 (2) PD 113 (decided 15 March 1979).
\item\textsuperscript{2147} \textit{Bil’In}, \textit{supra} note 1891 at paras 324-326.
\item\textsuperscript{2148} Yap, “Corporate Civil liability for War Crimes”, \textit{supra} note 1888 at 639.
\end{footnotes}
7.3.2.4 The Interests of Justice

Regarding the interests of justice, Cullen JSC noted that the plaintiffs failed to implead the purchasers and occupants of the residential buildings they sought to have demolished, arguing that it would not be in the interests of justice to order the demolition of the buildings without hearing from the owners. He also noted that the plaintiffs were indirectly seeking the court to pronounce that Israel had committed war crimes, without impleading Israel as a party to the suit, thus ensuring that Israel was denied the benefit of sovereign immunity. It is not accurate to suggest that Israel was a necessary party to the suit. If a legal entity commits war crimes in complicity with a state, nothing prohibits the victim from suing the legal entity alone if the victim believes that the legal entity is directly liable. The state and the legal entity can be viewed as co-conspirators. If the state is entitled to immunity, it does not automatically extend to the legal entity unless the legal entity acted as the state’s agent. The plaintiffs in this case pleaded both that the defendants acted as the agents of the state and that they acted on their own. A finding that the legal entity is liable does not extend to the state. It was therefore wrong of Cullen JSC to assume that the State of Israel should have been impleaded and that failure to implead them was against the interests of justice warranting declining jurisdiction.

Regarding the failure to implead the owners of the residential buildings, there is no doubt that a judicial decision ordering the demolition of the buildings would affect them. It would therefore be unjust to determine the case without their participation, insofar as the plaintiffs’ claims affected them. The question is, how does this favour trial in Israel? Cullen JSC’s analysis lacked details of how the absence of the buildings-owners favoured trial in Israel. However, one can frame the issue in terms of involvement of other parties in the suit and argue that the interests of justice in the case required that the suit be tried in the forum where all the parties could have an opportunity to be heard. If at all a Quebec court could have jurisdiction over the owners of the buildings who were resident in the West Bank and had no connection with Quebec, it would be unjust to require them to travel to Quebec on the basis of an assumption of jurisdiction that rested on the domicile of a few defendants. The potential number of those other parties would be an important factor to be considered.

2149 Bil‘In, supra note 1891 at para 317.
Cullen JSC also pointed out that under the *Geneva Conventions Act* and the CAHWC Act, criminal proceedings could not be instituted without the authorization of the Attorney General of Canada. He noted that even though the suit was civil, the plaintiffs could not proceed without the Attorney General’s authorization in view of the fact that the suit was predicated on the finding that Israel was committing war crimes in violation of public international law.\(^\text{2150}\) Cullen JSC thus read into the two statutes what Parliament clearly did not stipulate. If Parliament had intended that civil actions predicated on war crimes could not proceed without the Attorney General’s authorization, it would have expressly stated so. Besides, even if the prohibition of criminal proceedings without the Attorney General’s authorization could be extended to civil proceedings, the issue should have been raised at the stage of determining jurisdiction *simpliciter*. By raising the issue at the *forum non conveniens* stage, Cullen JSC manifested a lack of understanding of the distinction between jurisdiction *simpliciter* and *forum non conveniens*. This was further manifested in his reference to the US ATCA which expressly grants civil jurisdiction to US courts over torts committed against aliens in violation of the law of nations, and to the absence of such legislation or any precedent to that effect in Canada.\(^\text{2151}\)

Cullen JSC concluded:

To sum up, this is one of those exceptional situations where the Superior Court is compelled to decline jurisdiction on the basis of *forum non conveniens*, as the Plaintiffs have selected a forum having little connection with the Action in order to inappropriately gain a juridical advantage over the Defendants and where the relevant connecting factors, considered as a whole, clearly point to the HCJ as the logical forum and the authority in a better position to decide.\(^\text{2152}\)

Apart from not being able to draw a distinction between issues meant to be considered for jurisdiction *simpliciter* and those for *forum non conveniens*, Cullen JSC, as noted earlier, was equally not able to separate the issues appropriate for each of the factors. On many occasions, he inappropriately interlaced the factors. This certainly affected the relative weight he gave to each of the factors. A further conceptual error in his decision was his consistent reference to the Israeli High Court of Justice as though the doctrine of *forum non conveniens* requires the judge the designate the exact court that should adjudicate the dispute. What the doctrine under Article 3135

\(^{2150}\) *Ibid* at para 318.
\(^{2151}\) *Ibid* at para 329.
\(^{2152}\) *Ibid* at para 335.
requires is the existence of an alternative *forum* – that “the authorities of another country are in a better position to decide”.

To sum up, the reasonable expectation that the dispute over the conduct of the defendants in the West Bank would be decided in accordance with customary international law should have weighed in favour of Quebec retaining jurisdiction since it was not likely that Israeli courts would have pronounced the alleged war crimes going on in the West Bank a violation of customary international law. The international community had a strong interest in the alleged violations going on in the West Bank and the Canadian forum was in a better position to decide the dispute in accordance with international law by virtue of Canada's domestication of the Fourth Geneva Convention and the Rome Statute. It would have been “manifestly inconsistent with public order as understood in international relations” to require the suit to be adjudicated in Israel. The interests of the purchasers and owners of the buildings would have favoured trial in Israel only insofar as the plaintiffs’ claims affected them. Requests for demolition of the buildings cannot justly be decided without their participation. But such a request is severable from claims for compensation, which was determinable without necessarily involving the current occupants of the building, as a damages award made against the defendants cannot affect the occupants. Because of the overriding interest to adjudicate the dispute in accordance with the principles of customary international law, Cullen JSC should have dismissed that portion of the claims that would affect the buildings’ occupants.

### 7.4 COPPER MESA

The unique thing about this case is that although the facts fit aptly into the scenario envisaged in this study, it was argued and decided, not on points of jurisdiction or *forum non conveniens*, but on points that speak more to the substantive sources of liability. The plaintiffs were Ecuadorian residents. One of the corporate defendants (Copper Mesa) was a mining corporation incorporated under the laws of British Columbia. It carried on business through a series of subsidiaries, one of which was a Barbardian corporation which in turn wholly owned another company that carried...
on mining business in Ecuador. The other corporate defendants were the TSX Inc and TSX Group Inc. The individual defendants were directors of Copper Mesa, and had their residence in Toronto. The plaintiffs had opposed a proposed mining project in Ecuador to be carried out by Copper Mesa’s Ecuadorian subsidiary, on the basis that they would be “severely impacted” by the project. They claimed that they were subjected to a “campaign of intimidation, harassment, threats and violence” carried out by security forces and other agents controlled by Copper Mesa. The plaintiffs’ claims against TSX were that it listed the shares of Copper Mesa on the Toronto Stock Exchange (TSE) and that this enabled Copper Mesa to raise funds for the project in Ecuador. The claims stated that but for this listing and the consequent funds raised therefrom, Copper Mesa would not have been able to carry out the alleged acts of assault and intimidation. As such, TSX “caused or materially contributed” to those acts. The plaintiffs asserted that TSX Inc was “under a legal duty not to list a corporation when there is a reasonably foreseeable and serious risk that funds raised on the [TSE] will be used in such a way as to harm individuals such as the Plaintiffs”. They asserted, alternatively, that TSX Inc was “under a legal duty not to list a corporation on the [TSE] without instituting precautionary measures to prevent a serious risk that funds raised through the [TSE] will be used to harm individuals such as the Plaintiffs”. This duty arose, according to the plaintiffs, from the fact that TSX Inc “knew or ought to have known”, before the listing of the shares, that the proposed project posed a serious risk of harm to the plaintiffs. They knew or ought to have known because they were warned against the listing, through two separate letters, of the potential for violent conflicts in connection with the project. The plaintiffs believed that TSX Inc breached the above duty by failing to take any steps to reduce the risk of harm created through the provision of access to funds to Copper Mesa, thereby “causing or materially contributing to the harm suffered by the plaintiffs.” There was no direct claim against Copper Mesa itself, but only claims of vicarious liability for the alleged wrongs of its directors who had knowledge of the risk of harm to the local communities but breached the duty arising from that knowledge by failing to avoid acts or
omissions that caused or materially contributed to the harm, including approving funding for the security forces that directly inflicted the harm.\textsuperscript{2159}

In their defence, the defendants avoided making a jurisdictional argument, apparently for the reason that they were Ontario residents. They framed their arguments in terms of whether they owed a duty of care to the plaintiffs. In determining the existence of a duty of care, the Ontario Court of Appeal applied the reasonable foreseeability test set out by the Supreme Court of Canada in \textit{Kamloops v Nielsen}\textsuperscript{2160} and later confirmed in \textit{Edwards v Law Society of Upper Canada}.\textsuperscript{2161} The test looks to see whether the relationship between the parties justifies the imposition of a duty of care to the defendant. This requires a consideration of proximity and foreseeability. Is the relationship between the plaintiff and the defendant so close and direct that the defendant could reasonably foresee that his conduct would injure the plaintiff?\textsuperscript{2162} Applying this test, Cronk JA found that the facts pleaded by the plaintiffs did not establish that the plaintiffs were in such a close relationship with TSX that at the time of listing Copper Mesa’s shares, TSX could reasonably have foreseen that the listing would occasion harm to the plaintiffs.\textsuperscript{2163} First, none of the plaintiffs was an investor or shareholder at Copper Mesa, none participated in the capital market and none had any dealings of any kind with TSX.\textsuperscript{2164} Cronk JA examined the letters that allegedly informed TSX of the risk of harm to the plaintiffs, and, after pointing out that both letters were written by strangers to the suit, concluded that none of them warned of the risk of the alleged harm.\textsuperscript{2165} While holding that no duty of care existed, Cronk JA was careful to add that this holding did not preclude the possibility of a future finding that a risk of harm to “third parties by a company whose shares are proposed to be listed on the TSE might be found to be reasonably foreseeable to entities like the TSX defendants where it is alleged, on the basis of sufficient material facts, that such entities received specific advance notice of the risk of specific harm attendant on a public securities offering.”\textsuperscript{2166}

The vicarious claims against Copper Mesa were also dismissed for disclosing no reasonable cause of action. Copper Mesa was claimed to be vicariously liable for the actions of

\begin{footnotes}
\item\textsuperscript{2159} \textit{Ibid} at paras 20-26.
\item\textsuperscript{2160} [1984] 2 SCR 2.
\item\textsuperscript{2161} [2001] 3 SCR 562.
\item\textsuperscript{2162} \textit{Cooper v Hobart}, [2001] 3 SCR 537 at para 34.
\item\textsuperscript{2163} \textit{Copper Mesa, supra} note 2071 at para 43.
\item\textsuperscript{2164} \textit{Ibid} at para 44.
\item\textsuperscript{2165} \textit{Ibid} at paras 45-56.
\item\textsuperscript{2166} \textit{Ibid} at para 55.
\end{footnotes}
its directors. But the court found that the claims against the directors, which if proved might have vicariously attached to Copper Mesa, consisted of conclusory statements and general allegations of wrongdoing without supporting particulars.

This case reveals the kind of hurdles plaintiffs would face even after they have overcome the jurisdictional and *forum non conveniens* hurdles. The plaintiffs’ claims against TSX might have been made more difficult by the fact that TSX was a body whose obligations are owed to the public at large, and not to private individuals. Even then, those obligations are related to the capital market. To found a duty of care towards individuals in connection with matters unrelated to capital markets would be onerous without a direct relationship between those individuals and TSX. However, as Cronk JA noted, it would be possible to establish a duty of care where the entity can be fixed with knowledge of the risk of harm. Although Cronk JA did point out in the course of his writing that the two letters the plaintiffs relied upon to establish that TSX had advance notice of the risk of harm,2167 there is nothing in principle that regards the source of that advance knowledge as relevant. Finally, as far as one can gather from the facts disclosed in the judgment, the plaintiffs’ failure to disclose particulars of their allegations against Copper Mesa’s directors was fatal to the vicarious claims against Copper Mesa. This is not a problem unique to extraterritorial corporate wrongs litigation, but one that is constant in tort litigation generally. A plaintiff that alleges wrongdoing must supply the particulars of wrongdoing.

7.5 CONCLUSION

The outcome of the foregoing cases does not bode well for the litigation of transnational corporate wrongs in Canada. In the first two cases, the courts displayed a somewhat narrow understanding of the doctrine of *forum non conveniens*. They appeared to have misunderstood the importance of the various factors, especially the applicable law factor. In the *Bil’In* case, the court was even unable to draw a proper distinction between jurisdiction *simpliciter* and *forum non conveniens* and this affected its consideration of the factors. The *Copper Mesa* case, even though not argued on jurisdictional terms, could have raised jurisdictional considerations perhaps in a slightly different scenario. This is because the participation of the Canadian parent corporation in the alleged wrong is usually through a network of subsidiaries and/or

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2167 *Ibid* at para 45.
representatives. Establishing the appropriate connection between the Canadian parent corporation and the subsidiaries or representatives in relation to the alleged wrong is essential for jurisdiction. In summary, the cases reveal the kind of hurdles that plaintiffs bringing transnational lawsuits would face in Canadian courts.
8.1 CLOSING THE GOVERNANCE GAP

While the capacity of individual states to address problems facing their own citizens from the activities of TNCs has been diminished dramatically, the need for accountability and justice is evident and compelling. With the developing countries being in a vulnerable position with regard to the problems, and international law offering little or no assistance, the developed countries, which are home to most of the TNCs, have a responsibility to assist in closing the governance gap between business and accountability. Canada has a strong incentive to take proactive action in this direction by addressing domestically the adverse impact of the overseas activities of its corporations. Being home to most of the world’s mining corporations, many of which have been implicated in egregious abuses in their overseas operations, Canada cannot sit unconcerned at home.

Past experiences have shown that while voluntary mechanisms are useful, even indispensable, they are weak and slow in eliciting compliance. This study finds that Canadian law, as it stands today, provides possibilities for the prosecution of Canadian corporations for their extraterritorial crimes as well as for victims of those crimes to bring civil suit against the corporations in Canadian courts.

8.2 TWAIL AND THE INTERNATIONAL LAW-MAKING PROCESS

TWAIL scholarship, even in its criticism of the exercise of universal jurisdiction by western powers, carries the seeds that readily provide support for unilateral exercise of extraterritorial jurisdiction by western courts over transnational corporate torts affecting the ordinary people of the third world. The seeds lie in the overarching goal of TWAIL scholarship: to protect and safeguard the wellbeing of the ordinary people of the third world, as distinct from their states. As demonstrated in chapter two, while TWAIL is critical of western courts in exercising extraterritorial jurisdiction to protect their TNCs, it recognizes that extraterritorial jurisdiction can serve an important function in the fight for transnational corporate accountability if western
states grant third world victims of transnational corporate impunity access to their courts. Indeed, the weaknesses of exclusive host state regulation of TNCs and the failure of international law to step in leave little option than unilateral home state regulation. From the perspective of the ordinary people of the third world, arguments that home state regulation is imperialistic and erode the sovereign power of third world states is state-centric.

Writing resistance into international law is one of the projects of TWAIL. The analysis on the processes of customary international law making reveals how this can be achieved through the exercise of unilateral extraterritorial jurisdiction. These processes are conceptualized in the principles of “jurisdiction” and “reciprocity”. Although unilateral assertion of extraterritoriality will not necessarily lead to the creation of international norms, legal history contains evidence that it can facilitate the production of international norms and has in fact done so on several occasions. The main determining factor is the character of the extraterritorial measure. The HBA, for instance, failed principally because it sought to incriminate foreign corporations that had nothing to do with Fidel Castro’s expropriation of US business; moreover, other states did not stand to benefit from an adoption of the HBA measure. However, the Truman proclamation facilitated the creation of international norms principally because all other states stood to benefit from the extension of the nautical mile.

It follows that unilateralism is better viewed from a functional prism – i.e., in light of what it actually does, rather than from some abstract perspective of what it entails. In fact, both democratic theory and socio-legal theory, such as Pierre Bourdieu’s theory of the field and the politics of rights theory, provide analytical support for this, as found in the analysis of how transnational litigation can promote socio-political change. Experiences with the US ATCA, as the impact assessment of ATCA litigation shows, reveal that unilateral assertion of extraterritorial jurisdiction under the statute has contributed positively to the worldwide fight against human rights violations. While it has not led to the creation of international norms, it has generated intense discussion both internationally and in individual countries regarding how best to check and remedy transnational corporate wrongdoing.
8.3 CRIMINAL JURISDICTION

Both the Canadian *Criminal Code* and the CAHWC Act provide viable jurisdictional bases for the prosecution of extraterritorial corporate crimes in Canada. The definition of “person” under the statutes explicitly includes corporations. Although the CAHWC Act was enacted in implementation of the Rome Statute that does not itself allow the prosecution of legal entities, there is nothing in the CAHWC Act that shows that this provision of the Rome Statute was incorporated into the Act. In fact, the Act’s definition of “person” is tied to the Criminal Code, which explicitly defines person to include legal entities. The prosecution of corporations has been made easier by the enactment of Bill C-45 which amended the criminal liability of corporations by broadening the scope of corporate officers who can bind corporations. Although this amendment was aimed at the substantive liability of corporations, it has far-reaching jurisdictional implications in that as jurisdiction is tied inextricably to the participation of the corporation in a crime, the amendment implicitly redefines what amounts to participation, so that mere knowledge on the part of a senior officer of a corporation that a representative of the corporation is about to engage in criminal conduct will bind the corporation if the senior officer, with intent, in whole or in part, to benefit the corporation, does not take reasonable steps to stop the representative from engaging in that conduct. Corporations outsourcing their businesses will have to be wary.

8.4 CIVIL JURISDICTION

8.4.1 Jurisdiction Simpliciter

There are three bases for the assumption of jurisdiction *simpliciter* in international cases in Canada. These include the real and substantial connection test, jurisdiction as a forum of necessity, and jurisdiction based on the newly enacted JVTA. The real and substantial connection test contains enough flexibility to allow jurisdiction over Canadian corporations implicated in extraterritorial wrongs. Although the wrong might have been committed by the corporation’s foreign subsidiary, if it can be shown that the Canadian parent participated in some way, be it only through the decisions that resulted in the wrongful conduct, that alone can satisfy the
requirements of the test. The possibilities for the use of necessity jurisdiction are quite limited since it requires that it be impossible for the plaintiff to bring the suit in the forum having jurisdiction over the dispute, or that the plaintiff bring the suit in that forum cannot reasonably be required. The main advantage necessity jurisdiction has over the real and substantial connection test and the JVTA is that where jurisdiction is assumed based on necessity, the adjudication of the case cannot subsequently be subjected to the application of *forum non conveniens*. Although no court has decided this, it is inherent in the nature of necessity jurisdiction, as otherwise, the purpose of assuming jurisdiction in the first place would be totally defeated. Of these three bases, the JVTA provides the most viable basis in that apart from incorporating the real and substantial connection test, the fact that the plaintiff is a Canadian citizen or permanent resident is sufficient for jurisdiction, provided the action has some connection – not a real and substantial connection – with Canada. Moreover, the category of potential defendants under the JVTA is quite broad. One limitation to the use of the JVTA, however, is that the wrong complained of must be in connection with a terrorist activity.

8.4.2 *Forum Non Conveniens*

In light of the considerations weighed in a *forum non conveniens* analysis, persuading a Canadian court not to decline jurisdiction in a transnational tort case is a difficult one. One scholar has argued that the problem is “at least partly institutional”.2168 It is perhaps too quick to pass this verdict given that Canadian courts have not had much extraterritorial corporate crimes litigation. The *Cambior* case and the *Bil’in* case do not substantiate such a conclusion especially since both cases emerged from one province and only one of them – the *Bil’in* case – produced an appellate decision. Yet, it is arguable that if it is difficult to persuade Quebec courts, explicitly mandated by the Quebec Civil Code to decline jurisdiction only “exceptionally”, not to decline jurisdiction, it would be even more difficult to convince a common law court that declining jurisdiction is improper. But as pointed out in the concluding part of chapter five, the highly discretionary character of the doctrine as well as the influence of the Supreme Court of Canada on all Canadian courts renders the difference in the application of the doctrine in Quebec and other provinces nothing more than a theoretical difference.

2168 Yap, “Corporate Civil Liability for War Crimes”, *supra* note 1888 at 647.
In cases involving environmental harm, the difficulty of persuading Canadian courts is even heightened. This is because the *situs* of the harm will naturally be in the foreign country. Primary evidence will naturally be located there as well. In the case of multiple victims, most of the victims who will be expected to appear in court to give evidence of the damage they suffered will most likely be resident in the foreign country. The *lex loci delicti* rule will naturally point to the law of the foreign country although this factor, as argued in this study, does not deserve substantial weight unless the foreign law in question is of such unusual complexity and novelty that the forum court would be in an awkward position to interpret it.

Still, some arguments can be made in favour of retaining jurisdiction. That the corporate headquarters of the corporation is located in Canada is one of such arguments. Given the weight of the location of witnesses and material evidence, however, it is unlikely this factor will ever be accorded substantial weight unless the case is such as would be fought mostly on documentary evidence and most of that evidence is located in Canada. Documents regarding decisions on environmental standards may likely be located in their corporate headquarters. But documents regarding the day-to-day operation of the projects are likely to be located in the office closest to the project site. That the decision to establish the project was made in Canada[^169] is not a factor that should be accorded considerable weight in a *forum non conveniens* analysis, but goes more to the establishment of jurisdiction *simpliciter* as that does not seem to possess any feature that would practically affect the adjudication of the case. The strongest argument against stay will be possible in cases where access to justice concerns is present. A very strong argument will also be possible where some fundamental norms of international concern are claimed to have been violated, such as in the *Bil‘in* case. The court in that case declined jurisdiction, but the declination may be blamed in part on the judge’s comingling of issues of jurisdiction *simpliciter* and issues of *forum non conveniens* and in part also on the somewhat uncertain manner in which the plaintiffs presented the issue, which might have contributed to the judge’s error. The case had enough characteristics – more than the *Cambior* case – to be used to present a stronger argument.

[^169]: Professor Seck attached great weight to this in her *forum non conveniens* analysis of the *Cambior* case. See Seck, “Environmental Harm in Developing Countries”, supra note 32 at 162-163. I do not think that this is a factor deserving considerable weight in a *forum non conveniens* analysis.
8.4.3 Tort Choice of Law

La Forest J formulated Canadian tort choice of law in international cases without a full appreciation of the international legal order. He was more concerned with the facilitation of international commerce in an era of economic globalization without recognizing that the benefits of globalization have been concentrated in the hands of a few, most notably multinational corporations and a few Western countries. Globalization has produced victims who are unable to seek redress in their home countries due to the enormous influence TNCs exact on their poor host countries, making their regulation in those countries difficult.

A tort choice of law theory that ignores the nature of the violations being litigated and the need to advance the prohibition of those violations is like a rudderless ship. Contract choice of law should be viewed differently from tort choice of law. This is because parties to a contract have the freedom to choose the governing law for their contract, and even where they have not chosen a specific law, it is more reasonable to impute a certain choice to them. In tort, parties generally do not contemplate that a tort will occur in the first place. But if even in contract, *jus cogens* norms – fundamental norms of international concern – cannot be overridden by the express choice of the parties,²¹⁷⁰ a tort choice of law rule that defeats the application of such norms is illegitimate. Canada – and other states – has a duty to respect customary international law and where its norms have been violated, courts must adapt existing choice of law rules to provide adequate remedy for the victims. The *Bil'in* decision failed to provide an opportunity for this when in spite of the legislative provision that foreign law should not be applied where it is “manifestly inconsistent with public order as understood in international relations”, it instructed the plaintiffs to initiate the suit in Israel where it was unlikely that fundamental norms of international concern would be allowed to operate.

8.5 PROPOSAL

Although jurisdictional law as it presently stands in Canada permits both criminal and civil suits over extraterritorial wrongs implicating Canadian corporations, there is a clearer basis for criminal jurisdiction than for civil jurisdiction. This, of course, is due to the more precise nature

of criminal law. This precision is undoubtedly due to the existence of criminal legislation granting criminal jurisdiction to Canadian courts to prosecute such matters. It hardly needs be stressed that the absence of companion civil legislation is a real obstacle to the search for justice for victims of those wrongs. It is therefore suggested that legislation equivalent to the US ATCA should be enacted in Canada to expressly allow foreign victims of corporate wrongs to bring suit in Canada against Canadian corporations found to be complicit in environmental and other abuses in their overseas operations. Such legislation should explicitly make it clear that the notion that corporations cannot legally commit international crimes shall not be viable before Canadian courts, provided that the conduct can be pigeonholed into a recognizable crime/wrong under Canadian law. Furthermore, the application of the doctrine of forum non conveniens should be limited to cases where the Canadian forum is clearly inappropriate, and not where there is a clearly more appropriate alternative forum. Such legislation should explicitly provide for the applicable law in those cases and, without necessarily rejecting the lex loci rule as the primary choice of law theory, contain an exception that looks to the nature of the alleged violated norm. Such exception should require the application of customary international law where the violated norm is an overriding norm and the rules of customary international law are sufficiently settled on the point. The legislation should also allow jurisdiction to be founded not only on the active participation of the Canadian parent corporation in the prohibited extraterritorial conduct, but also in the negligent failure of the Canadian parent to monitor the activities of its subsidiary to ensure that mechanisms for preventing such conduct are in place. It shall of course be the duty of the plaintiff to prove that the Canadian parent corporation was negligent.

Prevention, as is well known, is better than cure. While criminal prosecution and private right of action are useful tools, their usefulness is limited by the fact that they operate ex post facto, i.e., after the harm has been done. Measures that seek to prevent the occurrence of the harm should be promoted. Such measures include:

1. Requiring Canadian corporations to become more involved in the activities of their subsidiaries abroad to ensure that mechanisms for preventing such harms are in place, or (as was shortly pointed out) face negligence liability for not doing so where harm occurs as a result of the absence of such mechanisms. This requirement is reasonable since the decision to set up subsidiaries is made by the parent corporation. The level of involvement should reflect the social and political environment the corporations find
themselves overseas. Accordingly, countries with repressive regimes, and countries embroiled in civil war and other conflicts, require greater involvement because the probability of complicity on the part of the subsidiary in those countries is extremely high.

(2) Requiring Canadian corporations to mandatorily disclose their social and environmental performance

(3) Government support to corporations should be predicated on the corporations’ adherence to a set of minimum standards of conduct.

(4) Last but not least, the use of voluntary mechanisms should be supported. While their efficacy is slow and depends substantially on the corporation’s free volition, they serve to internally remind companies of their obligations to their communities. Their sustained use would bring corporations closer to compliance with mandatory standards.
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