Scott, Craig (ed.). ***Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation.*** Oxford: Hart Publishing, 2001. Pp. 731. $95.

The importance of tort law in international law has greatly increased over recent years. This development was prompted in particular by the so-called forced-labour cases against German and Austrian global enterprises such

as Siemens and Degussa.[23] For the first time in legal history, almost the entire industrial sector of one state was brought before the courts of another state claiming intentional and massive abuse of human rights before and during the Second World War.[24] Companies such as Volkswagen and other global players certainly knew of the dangers of the US system of civil procedure involving class actions, punitive damages and the idea of rigid and intrusive pre-trial discovery. These companies have dealt with those phenomena mostly in the context of product liability.[25] But being sued for human rights violations was something new. The idea of human rights litigation, i.e. suing a private person for human rights abuses, was born in the US with the case of *Filartiga v. Peña-Irala*.[26] In the forced-labour cases, these two strands (human rights litigation and the powerful weapon of a civil action) were combined.

Europe deals with human rights abuses differently from the US. The classical way of dealing with human rights abuses is by prosecution in criminal proceedings. The downside of this approach is that one needs to find one or more individuals to be held responsible for the violations that have either been caused by or resulted in benefits to a company. An alternative method in Europe of dealing with human rights abuses is to communicate the violation to the European Court of Human Rights (ECHR). However, this latter system of regional human rights protection has the major flaw that it only applies to infringements linked to a state.[27]

[23] See e.g. the judgment of the District Court of New Jersey, 57 F Supp 2d 248 (1999); US Dist Lexis 13864; see also Safferling, 'Zwangsarbeit vor US-amerikanischen Gerichten', 53 *Neue Juristische Wochenschrift* (2000) 1922.

[24] For the historic and legal background to the forced-labour cases, see P. Zumbansen (ed.), *NS-Forced Labor: Remembrance and Responsibility* (2002).

[25] See e.g. *Volkswagen AG v. Schlunk*, 486 US 694 (1988).

[26] 630 F 2d 876 (2nd Cir. 1980).

[27] Cf. *Loizidou v. Turkey* (Preliminary Objections), ECHR (1996) Series A, No. 310.

The human rights litigation pioneered in the US could therefore serve as a promising way out of this dead end. Continental civil procedure does not, however, provide for such weaponry as the US system does (e.g. pre-trial discovery). Therefore, lawyers for the victims of human rights infringements will seek a forum that suits their and their clients' interests best, that is, they try to bring the case before a US court.

The legal problems in this regard are manifold, and academic writing on the subject is sparse. All the more laudable therefore is the effort of Craig Scott of York University, Toronto, to address these issues and to bring together the writings of some 30 academics into one voluminous publication to discuss different aspects of the idea of human rights litigation. The title, *Torture as Tort*, is certainly an easily remembered and perfectly fashionable alliteration, but does not mirror the entire content of the book. The subtitle therefore rightly broadens the picture when it describes the book as a *Comparative Perspective on the Development of Transnational Human Rights Litigation*. This subtitle sets a standard the individual contributions do not always live up to.

The book is divided into six parts. Part I, entitled 'Frames and Foundations', starts with a superb introduction by the editor himself which may serve as an introduction to human rights litigation in general. There follows a second chapter, also by the editor, on the problem of bringing together human rights law and tort law. Chapter 3 (Michael Swan) and Chapter 4 (John Terry) introduce US tort law, in particular the *Filartiga* case. Setting the baseline of human rights litigation, these chapters contain little that is new for lawyers who have already come across this form of action. Nevertheless, the two chapters are useful reading for those who are new to this subject. Part I concludes with a final chapter (Malcolm Evans and Rod Morgan) discussing the different ways of fighting torture (i.e. prevention and punishment) and how they relate to each other.

Part II discusses two central problems of litigating in a third state: jurisdiction and

immunity. After an introduction to Canadian law on this topic (Anne McConville), the defence of *forum non conveniens*, which is accepted by judges all over the world in far too many cases, is discussed (Upendra Baxi).[28] Ironically, human rights often take second place behind state sovereignty in any consideration of *forum non conveniens*. A question which unfortunately is not discussed is how international power, state sovereignty and immunity interrelate. To sue a Paraguayan police officer seems easy and less problematic with regard to *forum non conveniens* than to bring an action against powerful German banks. The two final chapters in Part II (Wendy Adams, and Peter Burns and Sean McBurney) discuss state immunity and *jus cogens* in transnational litigation. Adams holds a rather positivistic view,[29] while Burns and McBurney take a more public international law approach in which civil redress seems to be the necessary bottom-line for the protection of human rights, i.e. a way to force a state to act in accordance with its international obligations.

Part III is entitled 'Characterisation, Choice of Law and Causes of Action'. After an analysis of the substantive law used in *Filartiga* (Jennifer Orange), several possibilities for defining the legal nature of torture are presented: either to establish a claim *sui generis* for human rights redress (Graham Virgo); or to develop national (here, Canadian) law under the influence of public international law into transnational law (Sandra Raponi); or to develop a (common law) tort of torture in Canada (Ted Hyland).

Part IV deals with the applicability of human rights to non-state actors. The first chapter in this part assesses civil liability (Valerie Oosterveld and Alejandra Flah), beginning with command responsibility of subordinates for acts of torture as developed in international criminal law (see Article 28 of the Statute of the ICC)[30] and as applied in US human rights litigation. Secondly, the maxim of *respondeat superior*, a concept of enterprise liability (strict liability), is discussed. Introducing this principle into tort law would result in an effective system of strict liability for high-ranking superiors. Responsibility for human rights violations in UN field operations (Chanaka Wickremasinghe and Guglielmo Verdirame)[31] and state responsibility for human rights abuses by global enterprises are considered next (Muthucumaraswamy Sornarajah). The following chapter is by Andrew Clapham, one of Europe's leading scholars on the effects of human rights in the private sphere. His development of a 'right to a civil redress' for human rights violations is based on human rights law, namely, the ECHR and its Court. One could also regard the necessity for civil redress as a problem arising from Article 14 of the Convention Against Torture (Andrew Byrnes). This norm, although containing no *obligation* for states to establish universal jurisdiction, nevertheless gives at least a *permission* for doing so.

Part V addresses human rights and cultural relativism. In the first contribution (Jan Klabbers), human rights are — in contrast to

[28] In the forced-labour case against Degussa and Siemens (see *supra* note 23), Judge Debevoise declared the claim inadmissible for reasons of *forum non conveniens* and the political question doctrine.

[29] Even the International Court of Justice, in the judgment in *Democratic Republic of Congo v. Belgium*, 14 February 2002, reprinted in 41 ILM (2002) 536, seemed more open towards accepting exceptions of state immunity; cf. 'Symposium: The Congo v. Belgium Case Before the ICJ', 13 *EJIL* (2002) 853, in particular the articles by Cassese, Wirth and Spinedi.

[30] See Fenrick in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Article 28; see also K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 673–706.

[31] Responsibility in UN operations certainly needs further exploration; for a discussion of humanitarian law and UN military operations, see Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *Yearbook of International Humanitarian Law* (1998) 3.

modern legal theory[32] — presented as strictly political rights which do not, by themselves, generate legal claims. Consequently, there is no place for human rights litigation. The interrelation of the self-determination of societies and foreign tort claims are considered next (Jennifer Llewellyn): assessing the legality of amnesties in a foreign court can seriously damage the re-democratization process in a society which has suffered from an oppressive system. The last two contributions in this part discuss two interesting cases. The first (Belinda Wells and Michael Burnett) discusses the case of an Australian citizen who was asked under Saudi Arabian Islamic law to decide whether or not he wanted the convicted murderer of his sister to be executed. The convicted murderer sought an injunction in an Australian court to save her life. The case, which was eventually settled out of court, starkly highlights the problem of cultural differences in transnational litigation. The final chapter of this part (Amnon Reichman and Tsvi Kahana) discusses a judgment of the Israeli Supreme Court which declared the use of physical force in the course of police questioning illegal.

Finally, Part VI brings legal theory (in particular, tort theory) into the book. First, there is an argument in favour of a more globalized approach for judges to adopt (Mayo Moran). The notion of the exclusivity of national and international law should be overcome. The final chapter of the book (Oliver Gerstenberg) deals with the very German notion of *Drittwirkung* (third party effect) of constitutional rights.

Obviously, a brief review cannot comprehensively comment on a book of some 700 pages. I will therefore limit myself to two critical comments. The first is a substantive one, concerning the very essence of human rights law in civil courts; the second is a more structural criticism concerning the manner of dealing with comparative law.

Human rights litigation attempts to give a procedural answer to situations in which a human rights violation has been committed by private individuals. The circumstances of the violation may be either a situation where a state or a state-like entity encourages or even orders the abuse (for instance, in the *Filartiga* case) or a situation in which a global company abuses human rights, with or without a state backing the oppressive policy (this was the case of German insurance firms or banks seizing Jewish assets, or other German companies using forced labourers in their plants). In this context, I find it misleading when Sornarajah tries to link human rights abuses committed by corporate nationals abroad to state responsibility.[33] He is of the opinion that multinational corporations are not recognized as subjects of international law; the responsibility of those companies has not been discussed in international law; any redress therefore needs to be linked to state responsibility. But what else are the forced-labour or South Africa cases all about? It is certainly true that those global players are not vested with personality in public international law. But, of course, they enjoy subjectivity in private international law and they cannot be deprived of this position simply by the fact that they have violated a public international (i.e. a human rights) norm.[34] Another reason why Sornarajah meditates on state responsibility in this context is that he presumes that national states can control these global enterprises.[35] With respect, this presumption is naïve. Global companies will simply leave a state that tries to exert too much control over them, as has happened for lesser reasons.

[32] See e.g. J. Habermas, *Die postnationale Konstellation* (1998) 170–194.

[33] Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 491.

[34] Wolf has elaborated on this question in his affidavit in the forced-labour case against Degussa and Siemens; see the references at *supra* note 23.

[35] Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 496.

And, what would we win if we could find a home state responsible for the human rights abuses of a multinational company? Such state responsibility would be almost impossible to enforce.[36] Sornarajah is, however, right in his second point: national states are responsible for providing effective redress in their courts for any human rights violation. The reason for this, however, does not lie in the fact that corporate nationals could be seen as agents of national states,[37] but rather in human rights protection. The right to life, as laid down, for example, in Article 2(1) of the ECHR, contains the obligation for a national state to establish a legal system in which compensation may be paid.[38]

A separate issue is the question of sources. There seem to be some inconsistencies on the nature of torture as tort. Virgo[39] rightly addresses the question of stigmatization: does it matter whether the perpetrator is sued for an ordinary tort or for torture as an international tort? *De lege ferenda*, Moran argues in favour of an international common law as the meeting point of national and international law.[40] That would in a sense remedy the problem with sources, but will — at least in the near future — remain a dream.

What is missing in the discussion on sources of law, in my view, is a proper differentiation between the separate issues under discussion.[41] The first issue concerns the question of whether the act in question constitutes an act of torture. This issue is to be answered by international law itself, mainly the Convention Against Torture.

The second issue is whether there exists individual liability for a concrete violation of the prohibition of torture. This may be taken from domestic law, if an equivalent norm exists. If not, one needs to determine whether the norm at the international level can be applied automatically, i.e. whether the international norm is self-executing.[42] The individual chapters in this book give different answers to this question. Although the wording of the Convention Against Torture clearly pertains only to states, the prohibition of torture has become a standard norm in international law. It has been regarded as a human right by virtue in particular of Article 7 of the ICCPR and Article 3 of the ECHR.[43] The European Court of Human Rights has held in several cases that the prohibition of torture is an absolute right and therefore overrides national law.[44] The Court has thereby established an inalienable right for every individual in any situation. Also, the International Criminal Tribunal for the former Yugoslavia has ascribed self-executing effect to the prohibition of torture as far as the question of

[36] The ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, chapter IV.E.1, 34 *et seq*, and the commentary by J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), set up an interesting framework, but, despite this, there is no enforceable system. See 'Symposium: State Responsibility', 10 *EJIL* (1999) 339–460.

[37] See Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 493 *et seq*.

[38] The European Court of Human Rights was clear on this point as regards criminal prosecution. See most recently *Pretty v. United Kingdom*, 29 April 2002, Application No. 2346/02, (2002) 35 EHRR 1, para. 38 or *Orphan v. Turkey*, 18 June 2002, Application No. 25656/94, paras 333–348. There is no reason why the obligation to entertain effective criminal prosecution should not extend to provide for effective remedies in civil courts; cf. also the contribution by Clapham in this volume, at 513.

[39] Virgo, 'Characterisation, Choice of Law and Human Rights', 325 at 334 *et seq*.

[40] Moran, 'An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law', at 661.

[41] The same mistake was often made in the context of the applicability of international criminal law.

[42] Cf. A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984), paras 864–866.

[43] Cf. S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd ed., 2001) 119 *et seq*.

[44] See e.g. *Chahal v. UK*, Application No. 22414/93, ECHR (1996) Series A, No. 22, paras 74 and 78–79; the leading case in this regard is *Soering v. UK*, ECHR (1989) Series A, No. 161.

criminal responsibility is concerned.[45] What is true for criminal law must also be true for civil liability, for the simple reason that private law is less intrusive in character and is not strictly bound by the maxim of *nullum crimen, nulla poena sine lege*.[46] Relying on these two pillars, namely, human rights law and international criminal law, the internationally established prohibition of torture must be accepted as offering a legal basis for civil redress. A transformation into domestic law may be desirable for reasons of certainty and clarity in the law, but this is not strictly necessary as the international prohibition is self-executing.

The final issue is the question of implementation: which national court is accessible? This question can be solved by private international law and the ordinary rule of jurisdiction.

The book under review refers in its subtitle to 'comparative law'. If the reader expects a truly comparative work, he will be disappointed. Of the 31 authors in this volume, only two have a continental European background. There are some 15 pages of cases quoted at the beginning of the book, but only four cases stem from civil law countries; 19 cases by the ECHR and two by the ECJ are included. The book focuses largely on US and Canadian law as seen (mostly) by Canadian authors. Sometimes it appears that, when describing 'the other' system, the authors rely more on rumours than on research.[47] Further, the reviewer is frankly at a loss to understand how Sornarajah could write about international human rights without referring even once to the ECHR system, which is probably the best working system of human rights protection in the world.[48] Having said this, the book contains an excellent work on the European system by a true expert on the subject, Andrew Clapham. Furthermore, it is curious that a book on tort theory should include a chapter which discusses German constitutional law regarding the rights of soccer players after the ECJ's *Bosman* judgment.[49]

Nevertheless, some of these criticisms can be made of any book that consists of a collection of essays by different authors. Even the most diligent editor — which I have no doubt Craig Scott is — cannot prevent different standards of quality and inconsistencies here and there. *Torture as Tort* is still a good book and, above all, a necessary book. I can only hope that academics are encouraged and inspired by reading it to do further research on human rights litigation. Such litigation is a powerful weapon, after all. The German forced-labour cases (unfortunately) did not lead to legal precedents in this regard; the cases were settled and a foundation was established and endowed with some US$5 billion to compensate the victims.[50] Although the original concept of human rights litigation as a dispute between private parties was dropped as soon as the German Government stepped in and burdened the German taxpayer with 75 per cent of the settlement, the victims in the end did receive some financial compen-

[45] ICTY, *Prosecutor v. Furundzija*, Case No. IT-95–17/1-T, Judgment, 10 December 1998, paras 153–156. There, the Trial Chamber attributed *jus cogens* character to the prohibition of torture.

[46] Cf. Safferling and Zumbansen, 'Iura Novit Curia', *Juristische Rundschau* (2002) 6 at 10, concerning the forced-labour cases; reprinted in Zumbansen, *supra* note 24, at 233.

[47] See Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 505 *et seq*.

[48] This is even more surprising as the European Court of Human Rights has several times addressed the problem of state responsibility for human right violations by state agents; see *Matthews v. UK*, Application No. 24833/94, Reports 1999-I, paras 26–35.

[49] Gerstenberg, 'Private Law, Constitutionalism and the Limits of the Judicial Role', at 687.

[50] As to the forced-labour settlement, see Adler and Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the Foundation to Compensate Slave and Forced Laborers of the Third Reich', 39 *Harvard Journal on Legislation* (2002) 1–62, reprinted in Zumbansen, *supra* note 24, at 333; and Safferling, 'Zwangsarbeiterentschädigungsgesetz und Grundgesetz', 34 *Kritische Justiz* (2001) 208–221.

sation. This is a success — small as it is — which was only possible because of the class actions filed in the US. Human rights litigation has thereby proven itself to be a working tool for the protection of human rights through civil redress. In particular, in the field of corporate crime, this tool is very much needed to fill the gaps in international criminal law — and it is to be hoped that it does not always take 55 years to accomplish.

Christoph J.M. Safferling
University of Erlangen-Nürnberg