

TORT CHOICE OF LAW AND INTERNATIONAL FUNDAMENTAL NORMS: A CASE STUDY OF CANADA AND THE UNITED STATES

Chilenye Nwapi*

ABSTRACT

This article considers the tort choice of law rules in Canada and the United States – two highly internationalist societies with similar legal traditions but whose choice of law rules vary dramatically. The two jurisdictions are also known for their constant reference to international law in the resolution of domestic disputes. Moreover, Canada embodies both the common law and the civil law traditions. The aim here is twofold. The first is to evaluate the suitability of their choice of law rules for addressing cases alleging violations of international fundamental norms. The second is to see what other jurisdictions can learn from the experiences of these two jurisdictions in their adjudication of international norms.

This article makes these principal findings. While none of the two jurisdictions has a choice of law rule specially attuned to deal with violations of international norms, the operative rule in Canada contains reasonable flexibility to meet the needs of such cases. It finds within the assortment of tort choice of law rules in the US, some rules that at least mention the interests of the international community as an important consideration in the choice of applicable law, and that US courts already do look to international law to determine certain substantive issues arising in cases brought under the Alien Tort Statute.

I. INTRODUCTION

The growing recognition of certain norms as fundamental to the interests of the international community has raised questions about the application of traditional tort choice of law rules in national courts. The times when international legal rules were thought to affect only relations among States have since passed. Particularly with the recognition of human rights as a subject of international law, individuals can now, subject to certain legal constraints, seek the enforcement of internationally protected rights in domestic courts. Choice of law scholarship, however, is negligible on the role of the interests of the international community in the resolution of choice of law disputes engaging norms of fundamental concern to the international community. The dilemma in such cases is how national courts, applying domestic tort choice of law theories, can incorporate the interests of the international community to advance the prohibition of the violation of such international fundamental norms. In an age where business and social activities ignore inter-State boundaries, a consideration of how the existing rules in some jurisdictions may be or have been applied to deal with such situations is valuable, even if only so as to provide guidance to other jurisdictions.¹

* Fellow, Canadian Centre for International Justice; PhD (University of British Columbia); LLM (University of Calgary); LLB (Imo State University).

¹ As long ago as 1952, Professors Cheatham and Reese believed that ‘the smooth functioning of the interstate and international systems in private law matters should be the basic consideration in the decision of every choice of law case.’ Elliot E. Cheatham & Willis LM Reese, ‘Choice of the Applicable Law’ (1952) 52 Colum L Rev 959, 962.

This article considers the tort choice of law rules in Canada and the United States – two highly internationalist societies with similar legal traditions but whose choice of law rules vary dramatically. The two jurisdictions are also known for their constant reference to international law in the resolution of domestic disputes. Moreover, Canada embodies both the common law and the civil law traditions. The aim here is twofold. The first is to evaluate the suitability of their choice of law rules for addressing cases alleging violations of international fundamental norms. The second is to see what other jurisdictions can learn from the experiences of these two jurisdictions in their adjudication of international norms.

This article makes these principal findings. While none of the two jurisdictions has a choice of law rule specially attuned to deal with violations of international norms, the operative rule in Canada contains reasonable flexibility to meet the needs of such cases. It finds within the assortment of tort choice of law rules in the US, some rules that at least mention the interests of the international community as an important consideration in the choice of applicable law, and that US courts already do look to international law to determine certain substantive issues arising in cases brought under the Alien Tort Statute.²

II. CANADA

Tort choice of law in Canada is governed by the Supreme Court of Canada's decision in *Tolofson v Jensen* and *Gagnon v Lucas*³ – two companion cases that presented similar fact-situations and similar questions of law. 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 the one case, 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 A or that of Province B? The Supreme Court held that the *lex loci delicti* rule governed, subject to a flexible exception.

La Forest J, who penned the decision for the Court, justified the application of the *lex loci*. He stressed that the *lex loci* rule has the merit of 'certainty, ease of application and predictability.'⁴ It would 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.⁵ La Forest J thus found the application of the *lex loci* rule 'axiomatic', 'at least as a general rule'.⁶ 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.

² 28 USC §1350 (1988).

³ [1994] 3 SCR 1022.

⁴ *Ibid* [43].

⁵ *Ibid*.

⁶ *Ibid* [42].

Transnational wrongs present an example of this. Territorial considerations may become less important.⁷ La Forest J suggested that the *lex loci* 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.”⁸

La Forest J explicitly rejected an exception in interprovincial cases (Major and Sopinka JJ dissenting on this point) but reserved the exception for 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:

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.⁹

The rationale for the interprovincial/international dichotomy remains largely unclear. The exact limits of the exception in international cases equally remain undefined although La Forest J’s decision contains statements upon which some projections can be made. His reference to “our own law” in the above passage, for instance, suggests that he had in mind the application of the *lex fori* as an exception to the *lex loci*. This reference to the *lex fori*, however, seems relatively casual, with the result that it is not clear whether La Forest J would not allow some other law, other than the *lex fori*, to perform the exceptional role in appropriate circumstances. The development of the jurisprudence has not provided opportunities for this to be elaborated.

In *Hanlan v Sernesky*,¹⁰ 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 Court stated that *Tolofson* allows ‘a discretion to apply the *lex fori* in circumstances where the *lex loci delicti* rule would work an injustice.’¹¹ 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 personal law of the parties. Injustice would result in applying the *lex loci* 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.¹² Craig 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.¹³ While this is accurate, the other factors present in *Hanlan* might have

⁷ Ibid.

⁸ Ibid [45].

⁹ Ibid [49].

¹⁰ (1998), 38 OR (3d) 479.

¹¹ Ibid 479.

¹² Ibid.

¹³ Craig Forcese, ‘Detering “Militarized Commerce”: The Prospects of Liability for “Privatized” Human Rights Abuses’ (2000) 31 Ottawa L Rev 173, 208.

contributed to giving different shading to the difference in the laws 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 in Canada. It is endorsed by Article 3126 of the Civil Code of Quebec¹⁴ 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.'¹⁵ Since La Forest J did not declare the *lex loci* rule constitutionally mandated, this exception is preserved in Quebec, and other provinces might enact similar legislation.

It has been suggested that 'where the *lex loci* is the product of a despotic regime unacceptable to a democratic society', some other law may be applied.¹⁶ This suggestion should be rejected. The criteria for declaring a regime despotic are highly political. Courts should not get embroiled in such political questions. Such pronouncements very easily amount to an indefensible verdict on the integrity of a foreign legal system and could very easily be seen as imperialistic. It is better 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 warranted in international cases, Article 3081 of the CCQ 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 '*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.¹⁷ This is because of the expression's reference to international relations. Emmanuelli 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 Canadian Charter of Rights and Freedoms as well as in the Quebec Charter of Human Rights and Freedoms.¹⁸ Talpis and Castel have similarly suggested that in qualifying the term public order with the term 'manifestly' and the expression 'as

¹⁴ SQ 1991, c 64 (CCQ).

¹⁵ 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 ought to have foreseen that damage would occur from his/her conduct.

¹⁶ Forcese (n 13).

¹⁷ The major difference between '*ordre public*' and 'public policy' is that *ordre public* contemplates 'not so much the contents of the foreign law... as its effects.' JA Talpis & J-G Castel, 'Interpreting the Rules of Private International Law' in *Reform of the Civil Code*, vol 5B: Private International Law, translated by Me Susan Altschul, (Barreau du Quebec and the Chambre des notaires du Quebec 1993) 1, 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, 636.

¹⁸ Claude Emanuelli, *Droit international privé que be cois* (2nd edn, Wilson & Lafleur 2006) 253 (cited in Yap, *ibid*).

understood in international relations', Quebec Parliament aimed 'to instill an internationalist attitude in the judge'.¹⁹ 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 by the Superior Court of Quebec in *Bil'In (Village Council) v Green Park International Inc.*,²⁰ a case 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 population from territory it occupied in the West Bank, the defendants assisted Israel in violating the Fourth Geneva Convention,²¹ the Rome Statute of the International Criminal Court,²² 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 relations' because the High Court of Justice of Israel did not recognize the application of the Fourth Geneva Convention.²³ 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 did 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.²⁴ Without explaining the meaning of the expression 'manifestly inconsistent with public order as understood in international relations', however, Cullen JSC stated that, like Canadian courts, Israeli courts do not apply international 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'.²⁵ He found, or rather speculated, that the Israeli High Court of Justice had not applied Article 49(6) of the Fourth Geneva Convention, not because of its 'unwillingness' to do so, 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.²⁶ 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'.²⁷ 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

¹⁹ Talpis & Castel (n 17) 14.

²⁰ 2009 QCCS 4151 (CanLII).

²¹ Convention Relative to the Protection of Civil Persons in Time of War, 12 August 1949, 75 UNTS 287.

²² 17 July 1998, 2187 UNTS 3, 37 ILM 999 (1998).

²³ *Bil'In* (n 20) [239-40].

²⁴ *Ibid* [265].

²⁵ *Ibid* [274-5].

²⁶ *Ibid* [288].

²⁷ *Ibid* [289].

international relations'.²⁸ 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 plaintiff renewed their argument that the non-justiciability of their 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.²⁹

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' had 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 '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 or racial equality.

Cullen JSC stressed that Article 3081 of the CCQ 'does not purport to invalidate "acts", but to deny the application of the "provisions of the law" of a foreign country'.³⁰ He rightly pointed out that the Article targets the 'result' of applying the provisions of the foreign law.³¹ Thereafter he stated that the plaintiffs were not contesting the application 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'.³² 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. Therefore 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'.

In *Tolofson*, La Forest J noted that it was from out of international law that private international law developed.³³ On the international plane, the 'underlying reality' is the territoriality principle.³⁴ Behind the territoriality principle dwells the doctrine of comity. Both the territoriality principle and the 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*.³⁵

²⁸ Ibid [267].

²⁹ *Yassin v Green Park International Inc*, 2010 QCCA 1455 (CanLII).

³⁰ *Bil'in* (n 20) [296].

³¹ Ibid.

³² Ibid [297-8].

³³ *Tolofson* (n 3) [35].

³⁴ Ibid.

³⁵ Jennifer A Orange, 'Torture, Tort Choice of Law and *Tolofson*' in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 291, 301-2.

Jus cogens refers to norms of such degree of inviolability and primordial importance that they are regarded as peremptory and non-derogable.³⁶ Such norms are found mostly in the realm of international human rights law. 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 need to provide of remedies to redress violations of *jus cogens* may affect the choice of law decision. Citing Cheshire, FA Mann argues, albeit in the context of contract, 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.³⁷

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 tort law would be to delegitimize the inclusion of those norms in domestic statutes such as Article 3081 of the CCQ that proscribes the application of a foreign law that is ‘manifestly inconsistent with public order as understood in international relations’.

La Forest J hinted at the reasonableness of supplanting the *lex loci* where some ‘overriding norm’ is implicated. He wrote: “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.³⁸ 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 Investments Ltd v De Savoye*, the court regarded comity as the ‘informing principle’ stimulating Canadian private international law.³⁹ In *R v 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.⁴⁰ Here the court considered the question of the extraterritorial applicability of the Canadian Charter of Rights and Freedoms.⁴¹ 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.’⁴² In *Khadr v Canada* reiterated its holding in *Hape*:

[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 [in *Hape*] that the deference required by the principle of comity ‘ends where clear violations of international law and

³⁶ See Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM 679 (1969), Article 53.

³⁷ FA Mann, ‘The Proper Law of the Contract’ (1950) 3:1 Int’l LQ 60, 62.

³⁸ *Tolofson* (n 3) [36] (italics added for emphasis).

³⁹ [1990] 3 SCR 1077 [29].

⁴⁰ [2007] 2 SCR 292 [47].

⁴¹ Constitution Act 1982, Part I, (29 March 1982).

⁴² *Hape* (n 40) [52].

fundamental human rights begin'.⁴³

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 rules of private international law, namely, choice of law. Where 'clear violations of international law and fundamental human rights' are the subject of a dispute, courts must accord comity a back seat.

In formulating the *lex loci* rule, La Forest J referred to The Hague Convention on Traffic Accidents⁴⁴ 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 demand.

It follows from the foregoing analyses 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 violated norm is 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.

It is true that customary international law may not contain concrete elements necessary for determining liability in specific cases involving violations of customary international law. 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.'⁴⁵ 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, etc. The practical effect is that any law that would reject the application of customary international law would not be applied regardless of whether or not it is the *lex loci*. The existence of treaties regulating the legal field presented by a certain international case, especially where those treaties have been extensively ratified, may guide the choice of law determination. 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 laws 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 any process in private international law. 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 rights treaties. A look at which country has most ratified and domesticated the relevant treaties would be a useful place to start. In sum, therefore, Canadian choice of law rule contains reasonable flexibility to fairly address violations of international fundamental norms.

III. THE UNITED STATES

⁴³ [2008] 2 SCR 125.

⁴⁴ 26 October 1968, 8 ILM 34 (1969).

⁴⁵ Beth Stephens et al, *International Human Rights Litigation in U.S. Courts*, (2nd edn, Martinus Nijhoff Publishers 2008) 36-37.

US choice of law jurisprudence has considered a panoply of theories over a span of a century. Broadly speaking, the courts have considered the *lex fori*, the doctrine of comity, the *lex loci*, the vested rights theory, the rule in *Babcock v Jackson*,⁴⁶ governmental interest analysis and its variant the comparative impairment approach, the Restatement (Second) of the Conflict of Laws,⁴⁷ the better law theory, and hybrid approaches. This assortment of approaches emerged as a result of the influence of legal commentators⁴⁸ 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.⁴⁹ This is in keeping with the nature of private international law, whereby each unit of a federating state is regarded as a distinct legal system. At the same time, the assortment of approaches reflects the inherent difficulty of choosing a substantive rule to govern choice of law determinations. Lawyers, judges and litigants are left with ‘Hobson’s choice’ as to which of the rival themes and policies to choose.⁵⁰ Benjamin Cardozo bemoaned this difficulty when he referred to choice of law as ‘one of the most baffling subjects of legal science’,⁵¹ a view re-echoed in England by Lord Denning when he described tort choice of law as ‘one of the most vexed questions in conflict of laws.’⁵²

A detailed description of the theories mentioned above is impossible within the limits of a law review article. It should suffice to say that, generally, US courts take a largely functional approach to choice of law. They 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, which is the gravamen of the operative rule in Canada. The rule in *Babcock*, for instance, propounds 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. Governmental interests analysis sees conflict of laws essentially as a conflict of interests between the competing states and aims to recognize and respect the policy interests of a jurisdiction in a particular issue, requiring the court to consider the governmental policy underlying the laws of its forum.⁵³ The Restatement (Second) 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.’⁵⁴ And 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

⁴⁶ 12 NY 2d 473, 481-482 (1963).

⁴⁷ Rest 2d Conf (1968) (Restatement (Second)).

⁴⁸ Friedrich Juenger, ‘Choice of Law in Interstate Torts’ (1969) 118 U Penn L Rev 202, 203 (arguing that the ‘conflicts revolution was motivated by the pronouncements of legal scholars’ like Cook, Lorenzen, Yntema, Cavers, Ehrenzweig and Currie).

⁴⁹ The court has, however, through its interpretation of the Full Faith and Credit Clause placed ‘modest restrictions’ on the freedom of a state court to adopt choice of law principles. See Michael E Solimine, ‘The Impact of *Babcock v Jackson*: An Empirical Note’ (1993) 56 Alb L Rev 773, 776, footnote 20 (citing *Philips Petroleum Co v Shutts*, 472 US 797, 818 (1985)).

⁵⁰ Alan Reed, ‘The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora’s Box?’ (2001) 18:3 Ariz J Int’l & Comp L 867, 879.

⁵¹ Benjamin N Cardozo, *The Paradoxes of Legal Science* (Columbia University Press 1928) 67.

⁵² *Boys v Chaplin* [1968] 2 QB 1.

⁵³ Brainerd Currie, ‘Notes on Methods and Objectives in the Conflict of Laws’ (1959) 8:2 Duke LJ 171, 190.

⁵⁴ Restatement (Second) (n 47) s 145.

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.⁵⁵ The factors are in no particular order, but the weight they carry depends on the legal field involved.⁵⁶

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 some states,⁵⁷ the other approaches look more or less to the substance of the competing laws. Jurisdiction-selecting rules are overlooked in favour of result-oriented approaches that look at the insides of the competing laws. However, of all the theories, it is the Restatement (Second) and the better law theory that are potentially oriented towards addressing international interests. The extent of their orientation is considered below. But it is in the context of the Alien Tort Statute that US courts have looked to international law in the resolution of disputes between private parties. What is quite significant about the courts' jurisprudence is that the courts have not relied on any of the above-mentioned theories in their reference to international law when applying the statute. ATS jurisprudence is therefore considered as a third possible basis for the consideration of international policies in US tort choice of law.

A. The Restatement (Second)

Choice of law determination under the Restatement 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.'⁵⁸ As one scholar has loosely put it, it is 'a process of balancing relationships in order to identify the most significant one.'⁵⁹

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

⁵⁵ Robert Lefflar, 'Choice Influencing Considerations in Conflict of Laws' (1966) 41 NYULR 267, 282 ('Choice Influencing Considerations').

⁵⁶ *Ibid.*

⁵⁷ A 2011 survey shows that twenty-four states now practice the Restatement (Second) in torts, ten practice the *lex loci*, six practice a hybrid model, five practice the better law, three practice significant contacts, two practice interest analysis, and another two still practice the *lex fori*. 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. See Symeon C Symeonides, 'Choice of Law in American Courts in 2011: Twenty-Fifth Annual Survey' (2012) 60 Am J Comp L 291 at 309.

⁵⁸ Roger C Cramton, David P Currie & Herma Hill Kay, *Conflict of Laws: Cases, Comments, and Questions* (4th edn, West Publishing Co 1987) 302.

⁵⁹ Mo Zang, 'Party Autonomy in Non-Contractual Obligations: Rome II and Its Impact on Choice of Law' (2009) 39 Seton Hall L Rev 861, 885.

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.
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. Twenty-four states have adopted the *Restatement (Second)*⁶⁰ although they diverge in their interpretation of the ‘most significant relationship’.⁶¹

The relevant part of the Restatement is section 6(2)(a) which provides that in the absence of a statutory directive concerning the applicable law, a court should consider ‘the needs of the interstate and international systems’. The first step therefore is for the court to examine the Restatement to see whether any specific section stipulates the application of the law of a particular state to the issue in dispute. It is only in the absence of such stipulation that the court can venture into a section 6 analysis to determine which state has the most significant relationship with the dispute.

It is remarkable that the ‘needs of the interstate and international systems’ is listed as the first factor to be considered. A comment attached to section 6 gives insight into the relevance of this factor. The comment states that the most important function of choice-of-law rules is probably to make ‘the interstate and international system work well.’⁶² The comment states that choice-of-law rules should promote ‘harmonious relations between states’ and ‘facilitate commercial intercourse between them.’⁶³ It was the belief of the drafters of the Restatement that if courts develop

⁶⁰ Symeonides (n 57).

⁶¹ Holly Sprague, ‘Choice of law: A Fond Farewell to Comity and public Policy (1986) 74 Cal L. Rev 1447, 1453.

⁶² Restatement (Second) (n 47) s 6 cmt d.

⁶³ Ibid.

choice of law rules that meet these needs, other states will be disposed to adopt them, thus ensuring ‘the values of certainty, predictability, and uniformity of result.’⁶⁴

While the Restatement urges a consideration of the needs of the interstate and international systems, it fails to mention the types of such needs. Subject to due process constraints and the provisions of some treaties, US courts are free to pursue local policies at the expense of the policies of the international community.⁶⁵ The pursuit of local policies in international cases often creates frictions between the US and other States. The task of the court considering section 6(2)(a) of the Restatement is to pursue policies that will reduce friction and promote a spirit of cooperation among States. Such an international policy does not necessarily reject the application of forum law, but urges a consideration of the application of some other law if that law will best serve the overall interest of the international community. Cases where international considerations would weigh against the application of forum law have been said to include cases where the cause of action occurred in a foreign State but the injured party has access to US courts.⁶⁶ The legitimate expectations of the parties would be that the law of the foreign State where the events took place would apply. But since the interests of the international community are what is at issue, such interests would be engaged not only where the events occurred in another State, but also where the alleged violated norm is an international fundamental norm, such as the prohibition against torture.

B. The Better Law Theory

Robert Leflar, who propounded the theory, believes that instead of weighing interests or contacts, courts should consider a set of ‘choice-influencing considerations’⁶⁷ in their choice of law analysis. This approach calls for the consideration of five principles in the determination of the applicable law: (1) the predictability of results, (2) the maintenance of interstate and international order, (3) the simplification of the judicial task, (4) the advancement of the forum’s governmental interests, and (5) the application of the better rule of law.⁶⁸ The factors are in no particular order, but the weight each carries depends on the legal field involved.⁶⁹ What Leflar sought to do was to reduce the multitude of factors found in the conflicts literature to a ‘manageable number and identity.’⁷⁰

The most distinctive feature of Leflar’s 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.⁷¹ In Leflar’s words, ‘[a] state’s governmental interests in the choice-of-

⁶⁴ Ibid.

⁶⁵ Luther L. McDougal III, ‘Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases under the Second Restatement and Leflar’s Choice-Influencing Considerations’ (1996) 70 Tul L Rev 2465, 2480.

⁶⁶ Ibid 2481.

⁶⁷ Leflar (n 55) 267.

⁶⁸ Ibid 282.

⁶⁹ Ibid.

⁷⁰ Ibid 281.

⁷¹ Herma Hill Kay, ‘Theory into Practice: Choice of Law in the Courts’ (1983) 34 Mercer L Rev 521, 563.

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.⁷² Thus governmental interests are a less salient factor in Leflar's world than in Currie's world.

The 'most controversial' of these factors is the fifth factor – the better rule of law.⁷³ 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.'⁷⁴ By the better rule of law, Leflar intends 'a weighing of the quality of the rules of law' in competition.⁷⁵ Thus, a judge that find's forum law "anachronistic, behind the times, [or] 'a drag on the coat tails of civilization,'" would apply foreign law.⁷⁶ 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.⁷⁷ 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.⁷⁸ '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].'⁷⁹ 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. New Hampshire was the first state to adopt the theory.⁸⁰ Four other states have since joined: Arkansas, Minnesota, Rhode Island and Wisconsin.⁸¹ A few other states have cited Leflar approvingly without quite adopting it while some have mingled it with other approaches.⁸²

The factor relevant to our purpose is the second factor: 'the maintenance of interstate and international order'. This factor is identical with section 6(2)(a) of the Restatement (Second). According to McDougal, Leflar 'envisions this consideration as primarily a counterbalance to the tendency of courts to want to apply forum law to resolve choice-of-law cases.'⁸³ Thus, the same arguments supporting the Restatement apply fully to Leflar's theory.

C. The ATS

The ATS grants Federal District Courts original jurisdiction to hear and determine

⁷² Leflar, 'Conflicts Law: More on Choice-Influencing Considerations' (1966) 54 Cal L Rev 1584, 1587.

⁷³ *Ibid.*

⁷⁴ Kay (n 71) 564.

⁷⁵ Leflar, 'Choice Influencing Considerations', (n 55) 295.

⁷⁶ *Ibid* 299-300 (internal citations omitted).

⁷⁷ *Ibid* 295.

⁷⁸ *Ibid* 296-7.

⁷⁹ *Ibid* 297.

⁸⁰ Kay (n 71) 564.

⁸¹ Symeonides (n 60) 19-20.

⁸² 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, *supra* note 71 at 564.

⁸³ McDougal (n 65) 2472.

‘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’.⁸⁴ The reference to the law of nations is arguably the main reason for the courts’ recourse to international law.

In *Abdullahi v Pfizer*,⁸⁵ 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 in 1996. US Pharmaceutical company Pfizer requested and received approval from the Nigerian government to administer its new antibiotic Trovan to 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 various ailments. In 2001 a group of parents/guardians filed a class action 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 to enforce the norm’ under the ATS.⁸⁶

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 upon which the court could hold that nonconsensual drug experimentation was a violation of customary international law. Discussing that issue is beyond the scope of this article.

In *Presbyterian Church v Talisman*,⁸⁷ the allegation was that Talisman Energy Inc (a Canadian corporation operating in Southern Sudan) aided and abetted the Sudanese military in an ethnic cleansing that occurred in Southern Sudan in the 1990s. The issue was whether customary international law or US law should govern the determination of the proper *mens rea* for aiding and abetting liability. The Second Circuit Court of Appeals held that the scope of ATS violations should be determined by reference to international law.⁸⁸ It 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 that the defendant knew that his conduct would assist in the commission of the crime (knowledge) and that the defendant intended to give such assistance (purpose). This was contrary to the standard under US federal common law, which required only knowledge.

*Kiobel v Royal Dutch Petroleum*⁸⁹ was another landmark ATS choice of law

⁸⁴ ATS (n 2).

⁸⁵ 562 F 3d 163 (2nd Cir 2009).

⁸⁶ Ibid 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 191.

⁸⁷ 582 F 3d 244 (2d Cir 2009).

⁸⁸ Ibid 258.

⁸⁹ 10-1419, 17 October 2011 (US).

decision. Some 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 the ATS. As the Second Circuit put it, the action would proceed only if the ATS provides jurisdiction over tort actions brought against corporations for violations of customary international law.⁹⁰ The critical issue then was where to look for the answer to the question of whether the ATS 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?

Writing for the court, Judge Cabranes stated:

[T]he 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. By conferring 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.⁹¹

Having determined that the answer lay 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 subject of international law, the scope of other subjects has been limited to natural persons.⁹² An appeal to the US Supreme Court is still pending at the time of this writing.

In *Flomo v Firestone*,⁹³ children at the defendant's rubber plantation in Liberia claimed that they worked in such hazardous conditions that the work violated customary international law. The Seventh Circuit 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, but stated that 'corporate liability is possible' under the ATS.⁹⁴ Judge Posner found 'the factual premise of the majority opinion in the *Kiobel* case ... incorrect.'⁹⁵ In his view, '[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them.'⁹⁶

In *Doe v ExxonMobil*,⁹⁷ 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

⁹⁰ Ibid 5.

⁹¹ Ibid 5-6.

⁹² Ibid 7.

⁹³ 643 F3d 1013 (7th Cir 2011).

⁹⁴ Ibid 1021.

⁹⁵ Ibid 1017.

⁹⁶ Ibid 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.").

⁹⁷ No 09-7125, 8 July 2011 (DC Cir).

District of Columbia Circuit explicitly rejected the *Kiobel* premise, 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.’⁹⁸ 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 ATS cases, US domestic law governs the remedies.⁹⁹ 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 US federal common law, sufficient for aiding and abetting liability.¹⁰⁰

And in a 7–4 majority opinion in *Sarei v Rio Tinto*,¹⁰¹ the Ninth Circuit held that claims of 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’.¹⁰² The decision had six separate opinions. A dissent from Senior Judge Kleinfed, joined by Judges Bea and 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.’¹⁰³ Reacting to the decision, however, one scholar declared that ‘[t]his opinion reiterates that *Kiobel* is an outlier.’¹⁰⁴

Whether these courts’ findings regarding the state of customary international law were accurate is not the concern here. Indeed, some uncertainty still exists, for instance, as to the appropriate aiding and abetting liability standard in customary international law – the issue in both *Talisman* and *Sarei*. And regarding *Kiobel*, while it is generally believed that corporations have no international accountability, that belief is not based on customary international law. To say there is such a rule in customary international law is to ignore the process of customary international law-making. While not the only route to customary international law, State practice remains the most significant route. The absence of State practice in favour of corporate accountability for violations of international law does not constitute evidence of the existence of customary international law to the contrary effect. Positive State practice demonstrating that prohibition is required. This means that a State that holds corporations liable for violations of customary international law is not thereby breaching its international law obligations. It is thus fair to say that customary international law is silent on the point.

The purpose here, however, is to demonstrate that US choice of law jurisprudence recognizes the applicability of customary international law to address violations of international fundamental norms. Indeed, the US Supreme Court in *Sosa v Alvarez Machain*¹⁰⁵ did affirm this when it decided that the ATS authorized the

⁹⁸ Ibid 4.

⁹⁹ Ibid 71.

¹⁰⁰ Ibid 50.

¹⁰¹ No 02-56390, DC No CV-00-11695-MMM (9th Cir, 25 October 2011).

¹⁰² Ibid 19372.

¹⁰³ Ibid 19431.

¹⁰⁴ Ginny LaRoe, ‘Splinter Circuit Oks Alien Tort Case Against Rio Tinto’, *The Recorder*, 25 October 2011, referring to a statement by Susan Farbstein, a director at the International Human Rights Clinic, Harvard Law School.

¹⁰⁵ 542 US 692 (2004).

recognition of causes of action that were ‘specific, universal, and obligatory.’¹⁰⁶ In that case, though, the court rejected the norm of “arbitrary detention” as insufficiently universal as applied to the facts of that case.¹⁰⁷

And the specific point being made here is that where an issue is settled under customary international law, domestic common law must yield. 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.¹⁰⁸

Courts would therefore be breaching the international obligations of their States if they apply a standard different from that established in customary international law.

IV. MAINTENANCE OF ORDER, PREDICTABILITY AND CERTAINTY IN PRIVATE INTERNATIONAL LAW

The drafters of the Restatement (Second) emphasized ‘the values of certainty, predictability, and uniformity of result’ in the choice of applicable law.¹⁰⁹ In Canada, order and certainty were ‘front and centre in *Tolofson*’.¹¹⁰ In *Hunt v T & N Plc*, the Supreme Court of Canada stated that the overriding principle of private international law is order and fairness, and that order comes before fairness and is ‘a precondition to justice.’¹¹¹ While the significance of order and certainty may be more intensified in the context of federating units than in the relations among States, 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.¹¹²

¹⁰⁶ Ibid 730.

¹⁰⁷ Ibid 736.

¹⁰⁸ Gib van Ert, *Using International Law in Canadian Courts*, (2nd edn, Irwin Law 2008) 215.

¹⁰⁹ Restatement (Second) (n 64).

¹¹⁰ Joost Blom & Elizabeth Edinger, ‘The Chimera of the Real and Substantial Connection Test’ (2005) 38 UBCL Rev 373, 389.

¹¹¹ (1993), 109 DLR (4th) 16.

¹¹² *Tolofson* (n 3) [43].

It is instructive that in laying down *Tolofson*, the Supreme Court of Canada turned to ‘the underlying reality of the international legal order... to structure a rational and workable system of private international law.’¹¹³ As Orange notes, the underlying realities to which the Court turned were ‘the global economic order and related transactions’ and the reality of ‘easy travel’.¹¹⁴

The need for certainty and predictability cannot be overstressed whether in the domestic context or in the international context. But the adamantine superimposition of order over fairness is too rigid and does not fully appreciate the reality of the international legal order. Professor 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.¹¹⁵

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 presented in *Tolofson* was incomplete. On closer examination ‘it will emerge 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.’¹¹⁶ The Supreme Court of Canada did not 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. 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, thus as an important factor in choice of law determinations in international cases. It is therefore with a sense of agreement that one must view the following critique of *Tolofson*: ‘Choice of law issues do not seek to

¹¹³ Ibid [37].

¹¹⁴ Orange (n 35) 307.

¹¹⁵ Janet Walker, “‘Are We There Yet?’ Towards a New Rule for Choice of Law in Tort” (2000) 38:2 Osgoode Hall LJ 331, 363-4.

¹¹⁶ Ibid.

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 the court to give effect to an important feature of the context in which the cause of action arose.¹¹⁷

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’.

V. CONCLUSION

As noted early on, ‘the smooth functioning of the interstate and international systems in private law matters should be the basic consideration in the decision of every choice of law case.’¹¹⁸ While the jurisdictions examined here do not have tort choice of law rules tailored to address violations of international fundamental norms, the Canadian approach in particular contains reasonable flexibility to address such cases if only Canadian courts take a functional approach to choice of law. In the case of the US, the specific language of the ATS makes resort to international law almost unavoidable. 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 bar the application of customary international law where the norms allegedly violated are international fundamental norms. Granted that international law does not provide with specificity the substantive issues that arise in the litigation of norm violations, it is sufficient that the substantive violation of the norm be prohibited by well-established principles of international law. Moreover, if the universal condemnation of a norm violation is a key factor justifying the assumption of jurisdiction in a particular case, such as under the ATS, there is no reason why choice of law theory applicable to those disputes should not point to a law that best promotes those values. The goal of choice of law should be to advance the prohibition of the violations. One merit 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. This approach has the merit of forum-neutrality.

¹¹⁷ Ibid 351.

¹¹⁸ Cheetam & Reese (n 1).