Chapter 20

PRIVATE INTERNATIONAL LAW AND HUMAN RIGHTS

20.1 Introduction.................................................................................................................. 949

20.2 An obligation to deny effect to foreign laws and judgments.................................................. 951
  20.2.01 The private international law standard: public policy.................................................. 951
  20.2.02 The international human rights standard........................................................................... 953
  20.2.03 Potential for conflict between the two standards.............................................................. 953

20.3 A right of access to the New Zealand court........................................................................ 956
  20.3.01 The international human right of access to justice......................................................... 957
  20.3.02 Where the New Zealand court is closely connected to the claim..................................... 958
  20.3.03 Where the New Zealand court has universal jurisdiction................................................ 959
  20.3.04 Where the New Zealand court is forum non conveniens............................................... 961
  20.3.05 Conclusion.................................................................................................................. 962

20.4 The right of access: grounds of personal jurisdiction......................................................... 963
  20.4.01 Existing grounds of personal jurisdiction.......................................................................... 963
  20.4.02 Potential denial of access to justice.................................................................................. 964
  20.4.03 Forum non conveniens as a ground of personal jurisdiction.......................................... 965
  20.4.04 Corporate liability: an area of particular concern............................................................. 967

20.5 The right of access: limits on jurisdiction.......................................................................... 968
  20.5.01 State immunity............................................................................................................... 969
  20.5.02 Foreign act of state doctrine............................................................................................ 970
  20.5.03 Limitations on the lex fori............................................................................................... 971

20.6 Forum (non) conveniens.................................................................................................. 972

20.7 Conclusion.................................................................................................................... 973

20.1 Introduction

Private international law has been described as “that part of the law … which deals with cases having a foreign element”.¹ It has three main functions. First, it identifies the circumstances in which a New Zealand court has jurisdiction to determine a civil claim that has a foreign element (i.e., a contact with a foreign system of law). Second, it identifies the law applicable to such a claim. Third, it provides for the recognition and enforcement of foreign judgments in New Zealand. The burden of this chapter is to

¹ The author would like to thank Professor Campbell McLachlan Q.C. for peer reviewing this chapter.

949
evaluate the extent to which New Zealand private international law may be inconsistent with New Zealand’s international human rights obligations.2

One of the principal rationales for private international law is to recognise a party’s status or rights acquired under foreign law.3 For example, a New Zealand court will recognise a marriage that was celebrated overseas in accordance with the foreign country’s cultural or religious practices, even if the marriage would be formally invalid had it been celebrated in New Zealand.4 Yet there is also a clear tension between the functions of private international law and human rights norms. Private international law identifies the applicable law and forum by way of objective connecting factors that, for the most part, are unconcerned with the substance of the law or the substantive merits of the parties’ claims. Value-neutral rules on jurisdiction, choice of law and the recognition and enforcement of judgments enable courts to resolve cross-border issues in a manner that respects comity and meets the reasonable expectations of the parties.5 Human rights, on the other hand, are about fundamental rights of individuals.6 In this sense, they are all about substance.

This tension is most pronounced in the context of jurisdiction, where private international law may not meet a claimant’s right of access to the New Zealand court. The relationship between the right of access to justice and private international law rules of jurisdiction will be the main focus of this chapter. Another question to be explored is whether private international law may lead a court to give effect to a foreign law or judgment that raises human rights concerns, in circumstances where it would be contrary to New Zealand’s international human rights obligations to do so. There has been limited authority on these questions that is of direct relevance to New Zealand, but developments in Europe and in the United Kingdom in particular, are a useful source of guidance.

These two areas of potential conflict – jurisdiction and access to justice, and the recognition and enforcement of foreign laws or judgments that raise human rights concerns – raise questions that are of general importance to private international law. But they are by no means the only ones.7 For example, it has been argued that a court may have a duty to recognise the status of a relationship or individual acquired pursuant to foreign law, even if it is not the law that is identified as being applicable by the conflict of laws, if this is necessary to protect the right to respect for private and family life.8 There may also be inconsistencies between international human rights and some areas of international family law (such as the Hague Convention on the Civil Aspects of

2 See also [1.6.02].
4 See also [7.4.02] and [10.10.07].
5 On these two goals of the conflict of laws, see Lord Collins (ed) Dicey, Morris & Collins on the Conflict of Law (15th ed, Sweet & Maxwell, London, 2012) at 1-005–1-017.
6 See also [1.1.03].
7 See also [12.2.94].
International Child Abduction (Hague Convention), and it has even been suggested that some connecting factors may fail to give due recognition to parties' cultural rights or rights of autonomy. These issues are, however, beyond the scope of this chapter.

20.2 An obligation to deny effect to foreign laws and judgments

Private international law has the effect of opening up the forum to foreign laws and foreign judgments. Choice of law rules, which serve to identify the law applicable to a claim, may point to foreign law being applicable, with the result that the court will apply foreign law to the claim before it; and rules on the recognition and enforcement of judgments ensure that foreign judgments can be enforced within New Zealand, or that they can create an issue or judgment estoppel in New Zealand proceedings.

This openness of private international law to foreign legal systems introduces a possible tension with international human rights. What if the content of the foreign applicable law or judgment breaches international human rights? Or what if there were serious deficiencies in the foreign court’s procedure? In these circumstances, does the New Zealand court have an obligation, as a matter of international human rights law, to refuse application of the foreign law, or to refuse recognition or enforcement of the foreign judgment? The answer to this question may very well vary depending on the particular human right that is engaged. But it is still useful to explore generally whether there is a risk that a New Zealand court could breach New Zealand’s international human rights obligations by applying foreign law, or by recognising or enforcing a foreign judgment.

20.2.01 The private international law standard: public policy

A mechanism that reduces this risk significantly is the so-called rule of order public, which operates to exclude the application of foreign law or judgments on the grounds of public policy. Thus, a New Zealand court will not give effect to a foreign law or judgment if it is contrary to “fundamental public policy”. This is a high threshold. In Reiners v OneWorld Challenge LLC, the test adopted by the Court of Appeal was whether enforcement would “shock the conscience of the reasonable New Zealander” or whether it would be “contrary to our view of basic morality”. The reason for imposing such a high threshold is one of necessity: the very purpose of the conflict of laws is to open up the

---

11 On these functions of private international law within a New Zealand context, see D Goddard and C McLachlan “Private International Law – Litigating in the trans-Tasman context and beyond” (New Zealand Law Society seminar, 2017).
12 Lord Collins (ed) Dicey, Morris & Collins on the Conflict of Laws (15th ed, Sweet & Maxwell, London, 2012), Rules 2 and 51; Reciprocal Enforcement of Judgments Act 1934, s 60(6). Another defence to the recognition and enforcement of judgments is natural justice: see, for example, Korea Resolution and Collections Corp v Lee [2003] NZHC 985; Reciprocal Enforcement of Judgments Act 1934, s 60(6).
forum to foreign legal systems, so the fact that New Zealand law would have provided a
different solution, or the fact that a New Zealand court would have approached matters
differently, cannot be a sufficient ground for invoking the public policy exception.

The public policy exception is clearly capable of taking account of human rights
concerns. In Oppenheimer v Catarrmule (Inspector of Taxco), the House of Lords considered
that a Nazi law depriving German Jewish emigrants of their nationality and property was
contrary to public policy, because "a law of this sort constitutes so grave an infringement
of human rights that the courts of this country ought to refuse to recognise it as a law at
all". The more difficult question is whether the public policy exception will necessarily
be engaged where, as a matter of international human rights law, the court would be
wrong to give effect to a foreign law or judgment. To answer this question, it is necessary
to consider the kind of human rights infringement that would be sufficient to trigger the
public policy exception, and to compare it to the standard imposed by international
human rights law.

There is limited New Zealand authority on the public policy exception and its application
to human rights breaches. The Court of Appeal in New Zealand Banking Ltd v Brown held
that the public policy exception was not engaged where an employment contract between
two pilots and an airline provided for a compulsory retirement age of 55 and the
applicable law, the law of Hong Kong, did not provide for protection against age
discrimination. According to the Court of Appeal, the right to be free from age
discrimination was not an "absolute value", and the absence of protection against age
discrimination would not shock the conscience of a reasonable New Zealander or violate
an essential principle of our justice or moral interests. International human rights law was
"largely silent on age discrimination", so the case did not meet "the established test", which was that:

"... the policy infringement must be of a fundamental or universal value,
not simply the result of a ranking within a spectrum of relative values which
are recognised in one legal system but not the other."

In Oppenheimer v Catarrmule (Inspector of Taxco), the House of Lords spoke of "so grave an
infringement of human rights" that the court ought to disapply the applicable law. In
Kauai Airways Corp v Iraqi Airways Co (Nos 4 and 5), Lord Nicholls referred to "gross
infringements" of human rights and international law as a basis for invoking the public
policy exception. More recently, the English High Court in Empresa Nacional de
Telecomunicaciones SA v Deutsche Bank AG considered that the public policy exception
"exists within very narrow limits" and is concerned with "violations of international law
and/or very grave breaches of fundamental universal human rights".

---

14 Barr v OneWorld Challenge LLC [2006] 2 NZLR 184 (CA) at [50], adopting Canadian authority to this
effect; see also New Zealand Banking Ltd v Brown [2016] NZCA 525, [2017] 2 NZLR 93 at [62] and [67].
15 Oppenheimer v Tobacco Corporation of America (Inspector of Taxco) [1976] AC 249 (HL) at 278.
16 New Zealand Banking Ltd v Brown [2016] NZCA 525, [2017] 2 NZLR 93, overturning the decision of the
Employment Court. See also [7A.05:06].
17 New Zealand Banking Ltd v Brown [2016] NZCA 525, [2017] 2 NZLR 93 at [74].
18 New Zealand Banking Ltd v Brown [2016] NZCA 525, [2017] 2 NZLR 93 at [74].
19 New Zealand Banking Ltd v Brown [2016] NZCA 525, [2017] 2 NZLR 93 at [86].
20 Oppenheimer v Tobacco Corporation of America (Inspector of Taxco) [1976] AC 249 (HL) at 278.
21 Kauai Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 AC 883 at [18] and [29].
Is such a high threshold – a grave infringement of a fundamental or universal human right – consistent with international human rights law? This would be the case only if international human rights law imposes an attenuated standard – that is, a lower or minimal standard of compliance – to the application of foreign laws or judgments.25 Implicit in the concept of an attenuated standard is the recognition that international human rights law may not be uniform across all countries.

20.2.02 The international human rights standard

There is differing authority on this point in the European context. In *Government of the United States of America v Montgomery (No 2)*, the House of Lords considered that enforcement of a foreign confiscation order could give rise to responsibility under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)26 provided the defendant had suffered a “flagrant” denial of justice in the foreign court.27 Mrs Montgomery sought to oppose the registration of a United States confiscation order on the basis that the United States court had applied the fugitive disentitlement doctrine when determining her appeal against the order. The effect of this doctrine was that the United States court refused to hear Mrs Montgomery’s appeal on the basis that she was a fugitive from justice. The English court could register a foreign confiscation order if, pursuant to s 97(1)(c) of the Criminal Justice Act 1988 (UK), “it is of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice”. Mrs Montgomery argued that registration of the order would be contrary to the interests of justice because application of the fugitive disentitlement doctrine was inconsistent with art 6 of the European Convention on Human Rights on the right to a fair trial.

The House of Lords rejected Mrs Montgomery’s argument on the basis that the application of the fugitive disentitlement doctrine had not resulted in a flagrant denial of her art 6 rights. A high standard was necessary because any breach of the forum court would be merely “indirect”.28 This was consistent with the European jurisprudence on extradition and deportation, where it was only in “exceptional” cases that applicants would be able to resist removal from the forum by contesting that the foreign jurisdiction would violate their human rights.29 Thus, in *Saering v United Kingdom*, the European Court of Human Rights (ECHR) said that “an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has

---

26 *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 1 WLR 2241 at [22] and [29].
suffered or risks suffering a flagrant denial of a fair trial in the requesting country.39 A
similar approach is followed in New Zealand.40

But the House of Lords’ position is arguably inconsistent with another decision by the
ECHR. In Pellegrini v Italy, the ECHR concluded that the Italian courts were under an
obligation to check that proceedings before the ecclesiastical courts of the Vatican
satisfied the guarantees in art 6 before affirrnng or executing their orders.41

Commentators have relied on Pellegrini as authority that the recognition or enforcement
of foreign judgments requires full compliance with European Convention rights. Hence,
a simple rather than a flagrant breach of human rights would be sufficient to prevent
recognition or enforcement.42 Unlike in the extradition and deportation cases, where the
court is asked to predict and restrain a violation by the foreign state, the foreign state
here has already violated the defendant’s human rights, reducing the need for a highly
attenuated standard.43

The House of Lords in Montgomery (No 2) (above) rejected the proposition that Pellegrini
introduced an obligation for enforcing states to refuse enforcement to judgments that are
not fully compliant with the European Convention on Human Rights. Instead, it
concluded that the decision in Pellegrini was dependent on the particular facts of the case,
namely the special relationship between Italy and the Vatican. This reasoning has been
criticised.44 More generally, it is not obvious why cases of recognition or enforcement
ought to be conceptualised as cases involving “indirect” breaches of human rights.
Where the forum court applies foreign law that is contrary to human rights, or where it
recognises or enforces a foreign judgment that is contrary to human rights, the court
itself is acting in a way that may be contrary to human rights, and it is the court’s act of
giving effect to the foreign law or judgment that ought to be scrutinised.45 An attenuated
standard would seem both unnecessary and unhelpful in these circumstances. Neither are
the principle of comity and the reasonable expectations of the parties a sound basis for
imposing an attenuated standard.46 It is now well established that “there is no rule against
passing judgment on the judiciary of a foreign country”47 and it would be strange if

---

29 Bijenkorf v Minister of Justice [2005] NZCA 570 at [43], where the Court of Appeal endorsed a “stringent
test”:

“[T]he Minister would not be entitled to deny the requesting state the ability to
try a person for offences committed within its territory on the basis of human
rights or humanitarian concern unless they were sufficient to meet a very high
standard, or, as the Canadian Supreme Court put it, unless the suspected
offender’s return would shirk the conscience.”

Compare Kim v Minister of Justice [2016] NZHC 1490, [2016] 3 NZLR 425 at [107]–[112].
30 Pellegrini v Italy (2001) 35 EHRR 44 (ECHR).
31 See J Fawcett, MN Shalshashbeh and S Shah, Human Rights and Private International Law (Oxford
121 LRQR 185 at 188.
33 See J Fawcett, MN Shalshashbeh and S Shah, Human Rights and Private International Law (Oxford
34 J On dra “Public Policy and Human Rights” (2015) 11 J of Ppr int L 542 at 552–553, compare

954
20.2 An obligation to deny effect to foreign laws and judgments

Parties could reasonably expect the court to give effect to a foreign law or judgment that, if it had been made in New Zealand, would not meet New Zealand’s international human rights obligations.

20.2.03 Potential for conflict between the two standards

In some cases, therefore, it may be unclear whether application of the public policy exception would necessarily meet New Zealand’s international human rights obligations. There is certainly the potential for conflict if the public policy exception, but not international human rights law, requires an attenuated standard in the form of a grave or gross infringement of human rights.

New Zealand courts have not yet had occasion to consider this issue head-on. In Distanu v Deputy Solicitor-General, a case that shared factual similarities with Government of the United States of America v Montgomery (No 2), Ellis J refused to strike out a claim for judicial review on the basis that a failure to follow due process by the foreign court may provide grounds to refuse registration of a foreign confiscation order. The claimants sought review of the Deputy Solicitor-General (Criminal)’s decision to authorise registration of United States forfeiture orders that were obtained on the basis of the fugitive disentitlement doctrine. Ellis J considered that the facts of Montgomery (No 2) were potentially distinguishable. More importantly, she concluded that, on a purposive interpretation of the relevant legislation, a person in the claimants’ position could seek to oppose registration “if the foreign forfeiture order has been obtained in circumstances that the New Zealand courts would consider would amount to a breach of natural justice.”

This approach may suggest that, in the context of forfeiture orders at least, New Zealand courts would not require a gross, grave or flagrant breach of natural justice before refusing registration. It remains to be seen whether New Zealand courts will adopt a similar approach in relation to foreign law and judgments more generally. Ultimately, the question that needs to be resolved is about the content of the human right that is said to be engaged vis-à-vis the court. What is the content of this right in circumstances where the court is asked to enforce a foreign law or judgment that, had it been made or rendered in New Zealand, would breach New Zealand’s human rights obligations? It may well be that the terminology of “attenuation” only serves to obscure this question. Rather than conceptualising the New Zealand court’s obligations as indirect or attenuated, it may be more useful to inquire into the nature and effect of the court’s

---

35 Vukan Capital Sart v Office of Revenue Offs Corn (No 2) (2012) DCWA Cr 853, [2014] QB 458 at [91], and see [97]; see also Allison Holdings and Investments Ltd v Epping Forest Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804 at [101].
37 Government of the United States of America v Montgomery (No 2) [2004] UKHL 37, [2004] 1 WLR 2241 (discussed at [20.2.02] above).
38 Distanu v Deputy Solicitor-General (2015) NZHIC 1197, [2016] NZAR 229 at [110]-[112]. Notable differences included that Mr Montgomery had been held to be in contempt of court in the United States; that he had fled the jurisdiction to evade enforcement action, unlike the claimants in this case, who were exercising their right to resist extradition; and that registration of the confiscation order in this case would deprive the claimants of their means to pursue an appeal against the order in the United States and defer the extradition proceedings.
actions (as opposed to those of the foreign state). The public policy exception in fact provides a mechanism for such an inquiry, because it is the application of the foreign law in the particular case that must be incompatible with public policy — not the foreign law in the abstract (unless the foreign law is so fundamentally inconsistent with human rights that no court could ever recognise it).\(^{41}\)

20.3 A right of access to the New Zealand court

One of the key functions of private international law is to identify circumstances in which the forum has, and should exercise, jurisdiction to determine claims with foreign elements. Private international law has developed a range of mechanisms to perform this function: there are rules of personal jurisdiction, which provide defined grounds of jurisdiction over the defendant; there are particular limitations that are placed on the court's jurisdiction, relating to the subject-matter of the claim or immunities specific to the defendant; and there is the doctrine of forum (non) sequiturs, which fine-tunes the court's exercise of jurisdiction.

These mechanisms implicate in a direct way the concept of access to justice. On the face of it, private international law rules of jurisdiction are all about access to justice: they regulate access to the courts of the forum in a cross-border setting. Yet there is a possible tension between these rules and the right of access to justice.\(^{42}\) The overall aim of the forum is to allocate adjudicatory authority to the forum, and to do in a way that respects the comity of nations and the legitimate expectations of the parties. The primary vehicle to achieve these ends is the principle of connection.\(^{43}\) A court will exercise jurisdiction over a cross-border claim if the forum is sufficiently closely connected to it; and the court will use rules of jurisdiction to work out what amounts to a sufficient connection in each case.

The idea of access to justice, on the other hand, may demand something quite different. It may require the court to hear a claim even though the forum is not sufficiently closely connected to it pursuant to the ordinary rules of jurisdiction, in circumstances where the claim could not be determined, or could not be determined fairly, in the foreign forum with the closest connection (what is usually referred to as the "natural" forum).\(^{44}\) In light of this potential tension, the question arises whether private international law rules of jurisdiction pay due regard to litigants' access to justice.

This question could be asked purely as a question of private international law. After all, private international law is in the business of allocating jurisdiction — access to justice is a familiar consideration in this context. But access to justice, in some forms at least, is also an international human right; and the purpose of this book is to examine the extent to which New Zealand law accords with international human rights law.

The issue to be considered here, therefore, is how well New Zealand’s private international law rules of jurisdiction align with individual rights of access to justice. This issue will be considered separately in relation to each of the three jurisdictional mechanisms identified above: grounds of personal jurisdiction, subject-matter limitations on jurisdiction and immunities, and the doctrine of forum (non) conveniens. But first, it will be necessary to outline the international human right of access to justice and its relevance to civil jurisdiction.

20.3.01 The international human right of access to justice

Rights of access to justice are protected by a number of international human rights instruments and, according to some authors, form part of customary international law. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), for example, provides that:

"In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Tied to the right to a fair hearing is the, logically anterior, right to a hearing – the right to adjudication of the claim.

This right is particularly well established in the context of human rights claims, but it also plays a role in civil proceedings that do not allege violations of human rights. The ECHR has held in relation to art 6 of the European Convention on Human Rights (which is in similar terms to art 14 of the ICCPR).

"The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognised fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. ..."

"... [Article 6] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only."

---


46 New Zealand ratified the ICCPR in 1978. See also [12.2.04] and [12.4.02].


49 Goldar v United Kingdom (1975) 1 ECHR 524 (ECHR) at 535–536. See also [12.2.04] above.
However, claimants do not possess an unqualified right to bring proceedings wherever they wish. According to the Human Rights Committee of the United Nations (HRC),

"The failure of a State party to establish a competent tribunal to determine rights and obligations or to allow access to a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right." This means that a claimant's access to local courts is necessarily subject to jurisdictional limitations. A person does not have "an unfettered choice of tribunal in which to pursue or defend his civil rights". Indeed, states may be barred as a matter of general international law from exercising unlimited civil jurisdiction over claims involving foreign facts. Some connection will ordinarily be required. The converse question — whether states have an obligation to exercise civil jurisdiction over claims involving foreign facts — is far from straightforward. Broadly speaking, there are three (potentially overlapping) scenarios where the right of access to justice could conceivably trigger such an obligation.

20.3.02 Where the New Zealand court is closely connected to the claim

First, a case may be so closely connected to the forum that a court's refusal to hear the claim is inconsistent with the claimant's right of access to justice — especially, but perhaps not necessarily, if there is no other forum that will hear the claim. The obvious example would be a court that is unable or unwilling to exercise jurisdiction on the basis that the claim has connections with other jurisdictions, even though the connections are tenuous or merely incidental to the claim. Where the claimant is a foreign national, a failure to hear the claim might amount to a denial of justice — that is, it may violate the principle of international law that requires states to provide aliens with a minimum standard of justice. So it would be surprising if, more generally, the right of access to justice had nothing to say about such cases.

A recent decision by the ECHR offers support for this proposition. In Arslan v Sweden, the Court held that a Swedish citizen's right of access to justice had been violated when the Swedish Constitutional Court determined it did not have jurisdiction to hear his defamation claim against the chief executive of a Swedish television show. The

50 ECHR, General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32 (2007) at [18].
52 See FA Mann "The Doctrine of International Jurisdiction Revisited after 20 Years" (1994) 186 Recueil des Cours 9 at 21; A Mills "Rethinking Jurisdiction in International Law," (2014) 84 British Yearbook of International Law 187 at 200–201; but see M Akhundov "Jurisdiction in International Law" (1972–1973) 46 British Yearbook of International Law 145 at 177.
television show was produced and aired in Sweden, and was made for a Swedish audience. But it was transmitted via a broadcasting company that had its seat in the United Kingdom. The substance of the applicant’s claim was based on Chapter 6 of the Swedish Constitutional Law, which provided for limitations on freedom of expression. The Swedish courts held that the Constitutional Law applied only to TV programmes emanating from Sweden, and that this requirement was not satisfied here because the show was broadcast from the United Kingdom.

The ECHR, however, decided that the scope of Chapter 6 was unduly limited and interfered with the applicant’s right of access to justice under art 6. Sweden had an obligation to provide the applicant with a regulatory framework that made it possible to hold the chief executive of the TV show liable. It was no answer to say that, under the Brussels I Regulation, the United Kingdom had jurisdiction to hear the claim and that the applicant could bring his claim there instead. That was because “the content, production and broadcasting of the television programme as well as its implications had very strong connections to Sweden”, and “except for the technical detail that the broadcast was routed via the United Kingdom, the programme and its broadcast were for all intents and purposes entirely Swedish in nature”. Instituting proceedings in the British courts was not a reasonable and practicable alternative for the applicant.

20.3.03 Where the New Zealand court has universal jurisdiction

The second scenario where the right of access to justice could trigger positive obligations of jurisdiction involves cases that may have no or only minimal connection to the forum state but that allege breaches of peremptory norms. In particular, there is disagreement on whether the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires states to exercise universal jurisdiction over civil claims alleging torture and, if so, whether the UNCAT reflects a more general obligation to exercise universal jurisdiction in relation to peremptory norms. Article 14(1) of the UNCAT provides that “[e]ach State Party shall ensure in its
legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.\textsuperscript{62}

The conservative, apparently more established view\textsuperscript{63} is that this obligation to provide access to justice is confined to cases where the torture took place within the forum. Often the defendant to a claim in tort or will be a state or state official, so this view sits well with the doctrine of state immunity.\textsuperscript{64} There is little point in providing for universal jurisdiction over civil claims alleging torture if the defendant is protected from such claims by state immunity. This was the position taken by the Court of Appeal for Ontario in Bazargi v Iran when it held that neither art 14 nor customary international law required Canada to provide a civil remedy for torture committed by a foreign state abroad.\textsuperscript{65} There was no torture exception to state immunity, which made it unnecessary to determine whether the court would have had jurisdiction pursuant to ordinary rules of civil jurisdiction. International law may permit but does not require universal civil jurisdiction.\textsuperscript{66}

Yet there is also support for the competing view, that art 14 does (or at least should) establish an obligation to exercise universal jurisdiction over civil torture claims.\textsuperscript{67} After the decision in Bazargi the Committee against Torture (CAT), in its report on Canada’s compliance with the UNCAT, noted as a subject of concern "[t]he absence of effective measures to provide civil compensation to victims of torture in all cases" and recommended that "[t]he State party should 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{68} A number of arguments have or may be made why the conservative view is misconceived, including that it is based on an erroneous interpretation of the treaty; that the victim might well be unable to bring a claim in the place where the torture occurred (as was the case in Bazargi);\textsuperscript{69} that there is no basis for distinguishing

---

\textsuperscript{62} See also [6.3.05] and [6.7].

\textsuperscript{63} For example, Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270; Bazargi v Iran [2004] 71 OR (3d) 675 (CA); Nabi Liman v Switzerland App No. 51357/07, 23 June 2016 (BAILR) (the case has been referred to the Grand Chamber); A Byrne “Civil Remedies for Torture Committed Abroad: an Obligation under the Convention against Torture?” in C Scott (ed) Torture as Tort (Hart Publishing, Oxford, 2011) 537 at 543-544; K Parlett “Universal Civil Jurisdiction for Torture” [2007] EJILR 365.

\textsuperscript{64} Provided it is also accepted that the doctrine of state immunity does not recognize an exception for acts of torture see Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270.

\textsuperscript{65} Bazargi v Iran [2004] 71 OR (3d) 675 (CA).


between universal civil jurisdiction and universal criminal jurisdiction, which already exists, and that state immunity is not necessarily a bar to claims alleging torture. However, the House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* dismissed the CAT report on art 14 as largely irrelevant.

The 2015 Resolution by the Institut de Droit International in *Universal Civil Jurisdiction with regard to Reparation for International Crimes* may suggest a trend towards a more active role for civil courts in providing redress for international crimes. Article 2(1) provides that a court “should exercise jurisdiction over claims for reparation” by victims of international crimes provided “no other State has stronger connections with the claim” or, “even though one or more other States have such stronger connections, such victims do not have available remedies in the courts of any such other State”. Under art 2(2), courts are considered to provide an available remedy “if they have jurisdiction and if they are capable of dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress”. Article 5 controversially states: “The immunity of States should not deprive victims of their right to reparation.”

20.3.04 Where the New Zealand court is *forum necessitatis*

The third scenario involves cases where the forum may be required to act as *forum necessitatis* because there is no other jurisdiction where the claimant could bring, or could reasonably be expected to bring, his claim. Perhaps the plaintiff would be unable to bring his claim in the natural forum because of the unavailability of legal aid or funding; or because the legal infrastructure in the natural forum is such that the plaintiff would have to wait an inordinate amount of time before his claim is heard; or there is no other forum that would have jurisdiction pursuant to its own rules of private international law to hear the claim. In other words, there may be cases where the home forum, although it has a limited or very limited connection to the case, is the only forum that would provide access to justice (or effective access to justice).

If there is no obligation under international law to exercise universal jurisdiction in relation to breaches of peremptory norms, and this is the case even if the natural forum is unavailable, then there is unlikely to be a general obligation on states to act as *forum necessitatis*. In relation to art 6 of the European Convention on Human Rights, it has been noted that it cannot be correct “that a Contracting State ... is under some sort of obligation to allow itself to become courthouse to the world.” More generally, as has

---

73 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (2008) UKHL 26, [2007] 1 AC 270 at 239.
75 For example, *Labbé v Capco* [2006] 1 WLR 1345 (15).
76 See 20.3.10 above.
already been pointed out, the requirement of connection is usually considered to be a justifiable and reasonable limitation on the court’s cross-border jurisdiction.78

Yet there may be some situations where the forum’s connection to the claim is sufficiently strong to require it to act as forum necessitatis even though it is not the natural forum.79 In England, the prevailing opinion seems to be that art 6 could well be triggered by a refusal to exercise jurisdiction where the court has jurisdiction over the defendant as of right.80 So while a requirement of connection is a legitimate restriction of the plaintiff’s access to justice, it is at least arguable that the requirement of connection must be proportionate to the purpose it secures, and that it “must not be of such an extent that the very essence of the right is impaired”.81 In some cases, then, the fact that the forum is not the natural forum may not be inconsistent with an obligation to provide access to justice pursuant to art 6; and it is conceivable that a similar argument could be made about art 14 of the ICCPR.

But what is not entirely convincing is that this reasoning should be reserved for stays of action (where the court has jurisdiction over the defendant as of right) and should not also apply to cases where the defendant must be served out of the jurisdiction. Some authors have suggested that art 6 cannot require a court to exercise jurisdiction over an overseas defendant if the natural forum is elsewhere. For example, it has been said that:82

“Granting permission to serve out of the jurisdiction when England is not the natural forum involves the exercise of an extraordinary jurisdiction and it is seriously questionable whether the [European Convention on Human Rights] could compel the exercise of such a jurisdiction.”

The basis for the distinction must be that an exercise of jurisdiction over overseas defendants is generally more difficult to justify,83 but a more principled approach would be to assess the forum’s obligations by reference to its connection to the claim in each particular case.84

20.3.05 Conclusion

This brief survey of the international right of access to justice demonstrates that there are some situations in which states may be under an obligation to exercise cross-border jurisdiction over civil matters, but that the overall scope of this obligation is limited. The

78 See [20.3.01] above; see, for example, Nabi-Linar v Switzerland App No 51357/07, 21 June 2016 (ECtHR) (this case has been referred to the Grand Chamber).
84 See [20.4.01] and [20.4.02] below.
85 Thus, the exercise of jurisdiction on the basis of a defendant’s temporary presence in the jurisdiction may be considered excessive: J Powe, MN Shalilehshahin and S Shah Human Rights and Private International Law (Oxford University Press, Oxford, 2016) at [6.14].
task ahead is to examine the implications of this analysis for New Zealand law. The primary question is whether New Zealand’s rules of jurisdiction could lead to a breach of New Zealand’s obligations to provide civil claimants with access to justice. Even if the answer is “no,” it is still useful to ask whether the right of access to justice should lead to an assumption of jurisdiction where the claim may not satisfy the ordinary rules of jurisdiction.

20.4 The right of access: grounds of personal jurisdiction

Before a court can hear an in personam claim with foreign elements, it has to have jurisdiction over the defendant, which means that there has to be an available ground of personal jurisdiction. There are other jurisdictional requirements or steps that the plaintiff may have to satisfy, but establishing a ground of personal jurisdiction is a necessary ingredient of any in personam claim. All grounds of personal jurisdiction require a degree of connection between the forum and the defendant or subject-matter of the claim.

20.4.01 Existing grounds of personal jurisdiction

Personal jurisdiction depends on service. There has to be a legal basis for serving the proceedings on the defendant. Service does not pose any problems where the defendant is present in New Zealand. If the plaintiff can serve the defendant within the jurisdiction, the court has jurisdiction over the defendant as of right. In other words, presence is a valid ground of personal jurisdiction.

Where the defendant is outside of the jurisdiction, the plaintiff will have to bring his claim within one of the recognised grounds of personal jurisdiction in r 6.27 and 6.28 of the High Court Rules 2016 as well as satisfy a number of additional hurdles before the court will assume jurisdiction over the defendant. Rule 6.27 contains a list of specified heads of jurisdiction. Rule 6.27(2)(a), for example, provides that a claim in tort may be served out of New Zealand when “any act or omission in respect of which damage was sustained was done or occurred in New Zealand” or when “the damage was sustained in New Zealand”. Rule 6.28(5)(a), on the other hand, contains a residual ground of jurisdiction in relation to claims that have “a real and substantial connection with New Zealand”.

What unites all of these grounds of jurisdiction – the defendant’s presence in New Zealand, specific heads of jurisdiction linked to the subject-matter of the claim, and the residual requirement of “a real and substantial connection” – is the recognition that the forum should not exercise exorbitant jurisdiction over foreign-based defendants. There has to be some connection with New Zealand to justify an assertion of authority in the form of personal jurisdiction. Assertions of exorbitant jurisdiction would run counter to considerations of comity and fairness, and, more controversially, public international
law.99 So in Buchanan v Rucker, where the defendant successfully resisted enforcement of a judgment by a court of Tobago in England on the basis that the court lacked personal jurisdiction, Lord Ellenborough CJ asked rhetorically: "Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"100 The defendant had never been to Tobago and had not submitted to the court's jurisdiction, and service had been effected by mailing the writ on the door of the court house.

These rules of jurisdiction apply even if the claimant alleges breaches of peremptory norms. In other words, New Zealand law does not specifically provide for universal jurisdiction over civil claims alleging torture or other breaches of fundamental human rights.101

20.4.02 Potential denial of access to justice?

In light of r 6.28(5)(a) of the High Court Rules 2016, which contains a residual ground of jurisdiction in relation to claims that have “a real and substantial connection with New Zealand”, there is no risk that a claimant will be unable to establish a valid ground of personal jurisdiction even though his claim is closely connected to New Zealand. So to the extent that the right of access to justice entails a right to bring proceedings in a closely connected forum, New Zealand’s grounds of personal jurisdiction should not raise any concerns.

But what if there is no connection – or only a minimal connection – between the forum and the claim, and yet the plaintiff would face substantial difficulty in bringing the claim somewhere else? There are a multitude of reasons why the natural forum might not afford the plaintiff a ready opportunity to bring his claim. Perhaps the country has been affected by war or a natural disaster, or its legal system is plagued by corruption. As has been demonstrated above, a requirement of connection is usually considered to be a justifiable and reasonable limitation on the court’s cross-border jurisdiction. It is unlikely, therefore, that rr 6.27 and 6.28 would infringe a claimant’s right of access to justice. Rules 6.27 and 6.28 may require the claim to have a real connection with New Zealand even though there is no other available or effective forum to hear the claim. This appears to be the position even if the claimant alleges breaches of peremptory norms.102

So the requirement of connection inherent in rr 6.27 and 6.28 is unlikely to result in a breach of the claimant’s right of access to justice, but it still raises concerns that, arguably, ought to be addressed. These concerns are particularly acute where the claim alleges human rights abuses. For example, the plaintiff may be the victim of human


100 For example, FA Mann “The Doctrine of International Jurisdiction Revisited after 20 Years” (1984) 186 Recueil des Cours 9 at 21; A Mills “Rethinking Jurisdiction in International Law” (2016) 4 British Yearbook of International Law 187 at 200–201; but see M Alkhas “Jurisdiction in International Law” (1972–1973) 46 British Yearbook of International Law 145 at 177.

101 Buchanan v Rucker (1980) 9 East 192, 103 ER 546 (KB) at 194, 547.

102 For example, the Crimes of Torture Act 1989 does not provide for universal civil jurisdiction.

93 See [20.3.02] above.

94 See [20.3.03] and [20.3.04] above.

964
rights abuses by a foreign company in a developing country, wishing to sue the company in tort. But he may be unable to do so because the host state, dependent on the company’s investment, shields the company from accountability. There may be no connection with New Zealand, or the only connection to New Zealand may be that the company is a subsidiary of a New Zealand company or that the victim now lives in New Zealand.

In these circumstances, a New Zealand court would not usually have jurisdiction over the foreign subsidiary, even if the parent company is based in New Zealand, unless it were willing to stretch the meaning of “real and substantial connection”. A company is only “present” in New Zealand if it is incorporated or carries on business in New Zealand; the alleged wrongs all occurred and caused damage in the host state, so s 6.27(2)(a) does not apply, and the mere fact that the parent company is based in New Zealand could not be enough to create a “real and substantial connection”, established by reference to territorial and personal connecting factors, as long as the existence of the parent company is of no legal relevance to the substance of the claim. The victim would have to be resident in New Zealand (although it is likely that the plaintiff’s residence in the forum would be considered an exorbitant ground of jurisdiction). The only remaining option would be to argue that s 6.28 leaves room for a doctrine of forum necessitatis that, in circumstances where New Zealand is the only forum that is reasonably available to the claimant, the kind of connection required by s 6.28 must be flexible enough to go beyond territorial and personal connecting factors – particularly where the alleged wrongs are so serious as to amount to human rights abuses. No doubt this argument would face substantial difficulties.

Here, the court’s inability to exercise jurisdiction would deal a double blow for human rights, bringing into relief the tension between access to justice and the principle of connection. The plaintiff would be denied the ability to bring his claim and the defendant’s human rights abuses would go unpunished, all because New Zealand is not sufficiently closely connected to the claim to enable the court to assume jurisdiction over the foreign company. So should New Zealand introduce a forum necessitatis rule in order to address these concerns (see [20.4.03])? Alternatively, would it be appropriate to widen the grounds of jurisdiction in relation to corporate liability (see [20.4.04])?

20.4.03 Forum necessitatis as a ground of personal jurisdiction

The purpose of a rule of forum necessitatis is to allow “proceedings to be brought when there would otherwise be no access to justice”. It may recognise two forms of impediment to access to justice: practical reasons why the plaintiff cannot reasonably bring his claim in the natural forum (for example, because the country is affected by war

97 See [20.4.04] below.
99 See Van Benda v Villingens-Rem/http://onca84.or3b.721 at [100].
or a natural disaster, or because the costs of bringing proceedings in that country are excessive; and legal reasons why the plaintiff is unable to do so (for example, because the foreign court has declined jurisdiction, or because the foreign court is corrupt and the plaintiff will not receive a fair hearing).\textsuperscript{101}

There are a number of jurisdictions that have adopted a rule of \textit{forum necessitatis}. It is well established in civil law jurisdictions, such as Switzerland, Germany, France and the Netherlands,\textsuperscript{102} although the specific requirements vary. In some jurisdictions, the forum may only act as \textit{forum necessitatis} if the natural forum lacks or has declined jurisdiction.\textsuperscript{103} Other countries adopt a wider approach and enable courts to exercise jurisdiction if the plaintiff cannot reasonably be expected to pursue proceedings in the natural forum.\textsuperscript{104} Most rules require that the forum have some connection with the claim, which will usually be satisfied if the plaintiff is resident in the forum.\textsuperscript{105} Article 7 of the European Maintenance Regulation,\textsuperscript{106} for example, provides that a Member State may, “on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible” in the natural forum, but provides also that the dispute “must have a sufficient connection” with the Member State. Preamble 16 refers to the nationality of one of the parties as a sufficient connection. It is likely that the recast Brussels I Regulation,\textsuperscript{107} too, would have included a \textit{forum necessitatis} rule if the Regulation had been extended to non-European Union domiciled defendants.\textsuperscript{108}

In the common law world, Canada is the main jurisdiction to have embraced the concept. A rule of \textit{forum necessitatis} is included in the Civil Code of Quebec (in art 3136) as well as the Uniform Law Conference of Canada’s model \textit{Court Jurisdiction and Proceedings Transfer Act}.\textsuperscript{109} Section 6 of the model Act provides for jurisdiction if there is no other forum “in which the plaintiff can commence the proceeding” or if the commencement of the proceeding in another forum “cannot reasonably be required”. This section applies in British Columbia and Nova Scotia. In Ontario, the rule of \textit{forum necessitatis} has been adopted by way of common law and is generally narrowly construed.\textsuperscript{110}

\textsuperscript{101} A Noorty \textit{Study on Residual Jurisdiction} (European Commission, General Report, 3 September 2007) at [84].
\textsuperscript{102} A Noorty \textit{Study on Residual Jurisdiction} (European Commission, General Report, 3 September 2007) at 64ff.
\textsuperscript{103} A Noorty \textit{Study on Residual Jurisdiction} (European Commission, General Report, 3 September 2007) at [84].
\textsuperscript{104} A Noorty \textit{Study on Residual Jurisdiction} (European Commission, General Report, 3 September 2007) at [64].
\textsuperscript{105} A Noorty \textit{Study on Residual Jurisdiction} (European Commission, General Report, 3 September 2007) at [85].
\textsuperscript{108} A Mills “Rethinking Jurisdiction in International Law” (2014) 84 British Yearbook of International Law 187 at 222. See also art 11 of Regulation 1215/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] O J L201/107.
The idea of access to justice has clearly been behind the recognition of the concept of forum necessitatis.\textsuperscript{110} Evidently, there is growing support for the concept — although, as noted above, it would go too far to say that the right of access to justice imposes a general obligation on states to act as forum necessitatis.\textsuperscript{112} The concept represents a departure from the principle of close connection. It is the natural forum — and not the forum necessitatis — that has the primary burden of affording access to justice. But a good argument can be made that, in some circumstances, rules of personal jurisdiction should exceed minimum standards of access to justice. Arguably, the usual rationales that underpin the principle of close connection no longer apply where the forum is called upon to act as forum necessitatis. The defendant’s reasonable expectation that the claim be heard in a closely connected forum may be considered less important than the plaintiff’s expectation that the claim be heard at all; and the principle of comity, too, holds less weight if the closely connected forum fails to provide the claimant with access to justice.

A possible compromise would be to offer claimants a carefully circumscribed forum necessitatis jurisdiction that is designed to avoid the risk of judicial imperialism or neo-colonialism.\textsuperscript{113}

20.4.04 Corporate liability: an area of particular concern

There has long been a growing concern that corporations are able to shield themselves from liability by shifting operations to countries that are unwilling or unable to hold them to account.\textsuperscript{114} A forum necessitatis rule goes some way to address this gap in access to justice.\textsuperscript{115} For example, a victim of corporate misconduct in country X may be able to bring a claim in country Y if country X does not provide a reasonable opportunity for access to justice, even if country Y has no more than a marginal connection to the claim. It may be sufficient that the claimant is present in country Y, or that the corporate defendant has assets in country Y, or that the defendant is a subsidiary of a parent company located in country Y.

Yet the principle of forum necessitatis is not the only reason why the court’s inability to assume jurisdiction in such circumstances may be perceived as inconsistent with the notion of access to justice. If the defendant is a subsidiary of a parent company located in country Y, there is an obvious factual connection between the claim and country Y. But ordinarily it is not a connection that is of legal relevance, unless the parent company

\textsuperscript{110} West Van Inc v Daddie 2014 ONCA 252, 119 OR (3d) 481 at [21]; Van Bruck v Village Resorts Ltd 2010 ONCA 84, 98 OR (3d) 721 at [190] (on appeal the Supreme Court did not address the question of the forum of necessity doctrine, except to refer to its “possible application”; Club Resorts Ltd v Van Bruck 2012 SOC 17, [2012] 1 SCR 572 at [100].

\textsuperscript{111} A Niyons Study on Residual Jurisdiction (European Commission, General Report, 5 September 2007) at [22]; Van Bruck v Village Resorts Ltd 2010 ONCA 84, 98 OR (3d) 721 at [100].

\textsuperscript{112} See [20.3.03] and [20.3.04] above.


can be held to be independently liable, and so it is not a connection that will support personal jurisdiction over the defendant. The parent company, protected by the corporate veil, may take advantage of weak legal infrastructures through foreign subsidiaries (or through outsourcing), and there will be no legal basis for holding the parent company to account.

The question arises, therefore, whether there is a need for increased access to justice in a substantive sense — whether the law ought to provide for stricter control over the extraterritorial activities of companies located within the jurisdiction. This is an issue of prescriptive rather than personal jurisdiction; and it has received increasing attention. Principle 2 of the United Nations’ Guiding Principles on Business and Human Rights (Ruggie Principles, aka UNGP), for example, asks that states “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

In the absence of reform, the best strategy for claimants may be to make use of the parent company’s presence in the forum as a “hook” for jurisdiction over the subsidiary. This means that claimants advance their claim against both the parent company and its subsidiary, even though the claim against the parent company may face significant hurdles, to ensure that the forum of the parent company has jurisdiction to determine the claim. Rule 6.27(2)(b)(i) of the High Court Rules 2016 provides that proceedings may be served out of the jurisdiction if the defendant is “a necessary or proper party to proceedings properly brought against another defendant served or to be served (whether within New Zealand or outside ...)” So claimants may be able to establish jurisdiction over a foreign subsidiary if the subsidiary is a necessary or proper party to a claim against the parent company, provided the claim against the parent company is not so weak as to be struck out.

20.5 The right of access: limits on jurisdiction

Even where there are grounds for serving the defendant with proceedings, it is possible that a New Zealand court may not have jurisdiction to hear the claim. This is because the law sometimes imposes additional limitations on the court’s cross-border jurisdiction that go beyond the ordinary rules of personal jurisdiction, in the form of subject-matter limitations and immunities. For example, a court may not have jurisdiction to determine a question of title to foreign land, even if it has jurisdiction over the defendant to the claim.

The same question arises here as above, in relation to grounds of personal jurisdiction: do these limitations interfere unduly with the claimant’s right of access to justice? This question depends largely on the nature and content of the relevant limitation. For example, it is likely that the Mozambique rule, which is the common law rule that limits

---


jurisdiction over foreign land, is a justifiable limit on a claimant’s right of access to justice because the forum is not sufficiently closely connected to a claim relating to foreign land. There are three jurisdictional limitations, in particular, that give rise to access to justice concerns, which will be discussed in turn below.

20.5.01 State immunity

The doctrine of state immunity provides that municipal courts do not have jurisdiction over claims against foreign states unless they fall within established exceptions to state immunity. State immunity is a rule of customary international law. In New Zealand, it is given effect by way of common law. An important purpose of the doctrine is to recognise the sovereignty of foreign states, particularly insofar as the claim relates to the foreign state’s actions within its own territory. The doctrine is subject to a number of exceptions, including an exception for commercial transactions, and an exception for certain torts committed within the forum state.

However, the exceptions do not currently include claims for breaches of peremptory norms, which has raised concerns about access to justice. In Fang v Jiang, Randerson J held that state immunity applied to bar a claim against Chinese officials for the alleged torture of members of the Falun Gong movement in China. His Honour relied on Jones v Ministry of the Interior of the Kingdom of Saudi Arabia, where the House of Lords had held that there was no tort exception to state immunity at international law, and that a grant of state immunity would not infringe the claimants’ right of access to a court under art 6. The ECHR later confirmed that the House of Lords’ decision did not amount to a violation of art 6. In Fang the result was that the Court did not have jurisdiction even though “...it was not suggested the plaintiffs could conveniently or justly bring their claim in any forum other than New Zealand”. State immunity trumped access to justice.

Commentators have expressed concern about the failure of international law to recognise a torture exception. It is true that, in principle, a grant of immunity should not lead to

---

120 Compare J Fawcett, MN Shuilleabhain and S Shah Human Rights and Private International Law (Oxford University Press, Oxford, 2016) at [6.284]–[6.285], where it is argued that the Mozambique rule is a justifiable limit on art 6 of the European Convention on Human Rights because it is concerned with the effective administration of justice, but that its blanket application may still lead to a violation of art 6 where the alternative forum does not provide adequate access to justice.
125 Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270 at [28].
126 Jones v United Kingdom (2014) 59 ECHR 1 (ECHR).
127 Fang v Jiang [2007] NZAR 420 (HC) at [13].
128 See, for example, C Whytrock “Foreign State Immunity and the Right to Court Access” (2013) 93 BUL Rev 2033.
impunity, because it will simply convert the state’s liability in the municipal sphere to state responsibility at international law. But does the state’s responsibility on the international plane really make up for the claimant’s lack of access to a court? These and other arguments suggest that there may be a trend towards recognition of a torture exception, which would have even greater effect when combined with a rule of forum nonessetatis. But for now, New Zealand’s approach to state immunity is consistent with the established rules on the right of access to justice.

20.5.02 Foreign act of state doctrine

The foreign act of state doctrine operates so as to exclude jurisdiction over claims that require adjudication of the acts or transactions of foreign states.\(^{129}\) The scope of the doctrine is notoriously unclear. On one view, the doctrine serves an allocative function for claims testing foreign governmental acts, excluding claims that must be resolved on the plane of public international law, or that must be determined by the courts of the foreign state because they do not found a cause of action in the forum.\(^{130}\) But parties have also relied on the foreign act of state doctrine in circumstances that do not seem to fit this paradigm, which may result in significant limitations on the claimant’s access to justice.

The most recent example of such a case is Belhaj v Straw.\(^{131}\) The plaintiffs, a former opponent of Colonel Gaddafi and his wife, alleged that they were abducted and unlawfully taken from China to Libya, where they were detained and tortured. They alleged that these acts were carried out by officials of China, Malaysia, Thailand, Libya and the United States, but that the defendants participated in these acts. The defendants were departments, officials and agents of the United Kingdom. The English High Court had found that determination of the claim had “the potential to jeopardise this country’s international relations and national security interests”,\(^{132}\) and that the act of state doctrine operated as a bar to the claims to the extent that they depended upon allegations that agents or officials of foreign states acted toriously.\(^{133}\) But if the right of access to justice is taken seriously, then why should the doctrine be engaged in a case like Belhaj, where there was no more appropriate forum to hear the claim against the defendants than the English court?

The United Kingdom Supreme Court rejected the plea of foreign act of state for a number of reasons. In relation to access to justice, Lord Mance considered it at least relevant that a successful plea would mean that the claim could not be pursued “anywhere in the world” (since the defendants would be protected by state immunity in a foreign court).\(^{134}\) This demonstrates that the right of access to justice could inform and restrict the way the foreign act of state doctrine is applied. Should a New Zealand court be faced with a similar issue, the right of access to justice may assist it in crafting a carefully circumscribed, functional approach to the foreign act of state doctrine.

---


\(^{132}\) Belhaj v Straw [2013] EWHC 4111 (QB) at [145].

\(^{133}\) Belhaj v Straw [2013] EWHC 4111 (QB) at [146].

\(^{134}\) Belhaj v Straw [2017] UKSC 3, [2017] 2 WLR 456 at [76] and [102].
However, the Court also emphasised that art 6 was not engaged because the plea operated as a substantive bar to liability.  

20.5.03 Limitations on the *lex fori*

Courts do not ordinarily have unlimited subject-matter jurisdiction over claims that are governed exclusively by the law of the forum. For example, a New Zealand court will apply New Zealand law – and only New Zealand law – to matters of divorce, but the claim will have to satisfy certain connecting factors before the court can assume jurisdiction. Section 37 of the Family Proceedings Act 1980 provides that an application for an order dissolving a marriage or civil union may be made only where at least either of the parties is domiciled in New Zealand at the time of the application. The purpose of the connecting factor of “domicile” is to limit the scope of the law of the forum. Without the connecting factor, any applicant wherever domiciled could come to New Zealand and get divorced pursuant to New Zealand law.

While there is a clear need for connecting factors in these circumstances, there is also a risk that narrow connecting factors will unduly impede a claimant’s access to New Zealand courts. It is conceivable that a claimant’s right of access to justice would be breached if New Zealand was the natural forum to hear the claim but lacked jurisdiction to do so – particularly if there is no other forum that has jurisdiction.  

So in *Mark v Mark*, the English Court of Appeal concluded that the applicant, who had applied for divorce under the Domicile and Matrimonial Proceedings Act 1973 (UK), satisfied the Act’s connecting factor of “habitual residence” even though her residence in the United Kingdom had been unlawful. A requirement of unlawfulness would have deprived the applicant of access to the English court, with which she had the closest connection. Such a conclusion, according to the Court of Appeal, risked infringing art 6. The House of Lords affirmed the decision on different grounds but the case demonstrates that connecting factors that impose wide-reaching limitations on the court’s subject-matter jurisdiction can pose a threat to claimants’ access to justice.

A similar concern may arise in relation to territorial limitations more generally, where a claim fails to satisfy the territorial requirements of the *lex fori* and of any other law connected to the claim. For example, s 3 of the Fair Trading Act 1986 provides that the Act applies to conduct outside New Zealand by any person carrying on business in New Zealand, as long as the conduct relates to the supply of goods or services within New Zealand. A person carrying on business outside of New Zealand but targeting New Zealand consumers may not fall within the scope of s 3. Yet the equivalent consumer legislation in the place where the defendant carries on business, and where the conduct occurred, may provide that it only applies to consumers who are resident in that location.
impunity, because it will simply convert the state’s liability in the municipal sphere to state responsibility at international law. But does the state’s responsibility on the international plane really make up for the claimant’s lack of access to a court? These and other arguments suggest that there may be a trend towards recognition of a torture exception, which would have even greater effect when combined with a rule of *forum necessitatis*. But for now, New Zealand’s approach to state immunity is consistent with the established rules on the right of access to justice.

20.5.02 Foreign act of state doctrine

The foreign act of state doctrine operates so as to exclude jurisdiction over claims that require adjudication of the acts or transactions of foreign states.\(^{129}\) The scope of the doctrine is notoriously unclear. On one view, the doctrine serves an allocative function for claims testing foreign governmental acts, excluding claims that must be resolved on the plane of public international law, or that must be determined by the courts of the foreign state because they do not found a cause of action in the forum.\(^{130}\) But parties have also relied on the foreign act of state doctrine in circumstances that do not seem to fit this paradigm, which may result in significant limitations on the claimant’s access to justice.

The most recent example of such a case is *Belhaj v Straw*.\(^{131}\) The plaintiffs, a former opponent of Colonel Gaddafi and his wife, alleged that they were abducted and unlawfully taken from China to Libya, where they were detained and tortured. They alleged that these acts were carried out by officials of China, Malaysia, Thailand, Libya and the United States, but that the defendants participated in these acts. The defendants were departments, officials and agents of the United Kingdom. The English High Court had found that determination of the claim had “the potential to jeopardise this country’s international relations and national security interests”,\(^{132}\) and that the act of state doctrine operated as a bar to the claims to the extent that they depended upon allegations that agents or officials of foreign states acted tortiously.\(^{133}\) But if the right of access to justice is taken seriously, then why should the doctrine be engaged in a case like *Belhaj*, where there was no more appropriate forum to hear the claim against the defendants than the English court?

The United Kingdom Supreme Court rejected the plea of foreign act of state for a number of reasons. In relation to access to justice, Lord Mance considered it at least relevant that a successful plea would mean that the claim could not be pursued “anywhere in the world” (since the defendants would be protected by state immunity in a foreign court).\(^{134}\) This demonstrates that the right of access to justice could inform and restrict the way the foreign act of state doctrine is applied. Should a New Zealand court be faced with a similar issue, the right of access to justice may assist it in crafting a carefully circumscribed, functional approach to the foreign act of state doctrine.

---


\(^{131}\) *Belhaj v Straw* [2017] UKSC 3, [2017] 2 WLR 456.

\(^{132}\) *Belhaj v Straw* [2013] EWHC 4111 (QBD) at [145].

\(^{133}\) *Belhaj v Straw* [2013] EWHC 4111 (QBD) at [146].

\(^{134}\) *Belhaj v Straw* [2017] UKSC 3, [2017] 2 WLR 456 at [76] and [102].
However, the Court also emphasised that art 6 was not engaged because the plea operated as a substantive bar to liability.\textsuperscript{135}

20.5.03 Limitations on the \textit{lex fori}

Courts do not ordinarily have unlimited subject-matter jurisdiction over claims that are governed exclusively by the law of the forum. For example, a New Zealand court will apply New Zealand law – and only New Zealand law – to matters of divorce, but the claim will have to satisfy certain connecting factors before the court can assume jurisdiction. Section 37 of the Family Proceedings Act 1980 provides that an application for an order dissolving a marriage or civil union may be made only where at least either of the parties is domiciled in New Zealand at the time of the application. The purpose of the connecting factor of “domicile” is to limit the scope of the law of the forum. Without the connecting factor, any applicant wherever domiciled could come to New Zealand and get divorced pursuant to New Zealand law.

While there is a clear need for connecting factors in these circumstances, there is also a risk that narrow connecting factors will unduly impede a claimant’s access to New Zealand courts. It is conceivable that a claimant’s right of access to justice would be breached if New Zealand was the natural forum to hear the claim but lacked jurisdiction to do so – particularly if there is no other forum that has jurisdiction.\textsuperscript{136} So in \textit{Mark v Mark}, the English Court of Appeal concluded that the applicant, who had applied for divorce under the Domicile and Matrimonial Proceedings Act 1973 (UK), satisfied the Act’s connecting factor of “habitual residence” even though her residence in the United Kingdom had been unlawful.\textsuperscript{137} A requirement of lawfulness would have deprived the applicant of access to the English court, with which she had the closest connection. Such a conclusion, according to the Court of Appeal, risked infringing art 6.\textsuperscript{138} The House of Lords affirmed the decision on different grounds,\textsuperscript{139} but the case demonstrates that connecting factors that impose wide-reaching limitations on the court’s subject-matter jurisdiction can pose a threat to claimants’ access to justice.

A similar concern may arise in relation to territorial limitations more generally, where a claim fails to satisfy the territorial requirements of the \textit{lex fori} and of any other law connected to the claim.\textsuperscript{140} For example, s 3 of the Fair Trading Act 1986 provides that the Act applies to conduct outside New Zealand by any person carrying on business in New Zealand, as long as the conduct relates to the supply of goods or services within New Zealand. A person carrying on business outside of New Zealand but targeting New Zealand consumers may not fall within the scope of s 3. Yet the equivalent consumer legislation in the place where the defendant carries on business, and where the conduct occurred, may provide that it only applies to consumers who are resident in that

\textsuperscript{135} \textit{Belhaj v Straw} [2017] UKSC 3, [2017] 2 WLR 456 at [110] per Lord Mance and [282] per Lord Sumption.

\textsuperscript{136} See [20.3.02] above.


\textsuperscript{138} \textit{Mark v Mark} [2004] EWCA Civ 168, [2005] Fam 267 at [40] per Thorpe LJ (who concluded that art 6 would have been infringed in this particular case), and at [71] and [73] per Waller LJ.

\textsuperscript{139} \textit{Mark v Mark} [2005] UKHL 42, [2006] 1 AC 98.

particular jurisdiction. Hence, a consumer resident in New Zealand wishing to bring a claim against a trader in relation to conduct outside New Zealand may fall through the territorial cracks of all consumer laws that otherwise would have some connection to the claim.

20.6 Forum (non) conveniens

Integral to New Zealand rules of personal jurisdiction is the doctrine of forum (non) conveniens, which allows the court to assume or decline jurisdiction on the basis that New Zealand is, or is not, the appropriate forum to hear the claim. Where the defendant has been served in New Zealand as of right, it is up to the defendant to show that New Zealand is not the appropriate forum.141 Where the defendant is served out of the jurisdiction pursuant to rr 6.27 or 6.28 of the High Court Rules 2016, it is up to the claimant to show that New Zealand is the appropriate forum.142 In the latter case, the court will not have jurisdiction over a defendant unless New Zealand is the appropriate forum.

When determining the appropriate forum, courts follow the general approach laid down by the House of Lords in Spilka Maritime Corp v Cansulec Ltd.143 A court will assume, or refuse to decline, jurisdiction unless there is “some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action”.144 The appropriate forum is the forum “in which the case may be tried more suitably for the interests of all the parties and the ends of justice”.145 Prima facie, this is the “natural forum”, the forum “with which the action [has] the most real and substantial connection”.146 However, the New Zealand court will still assume or exercise jurisdiction even if it is not the natural forum, if the circumstances are such that the plaintiff will not obtain justice in the foreign jurisdiction.147

The doctrine of forum (non) conveniens is capable of accommodating access to justice concerns in at least two ways. First, it ensures that the court will hear the claim unless there is “some other available forum” (provided, of course, that all other jurisdictional requirements are satisfied). A forum is not “available” if it lacks jurisdiction to hear the claim,148 and it may also be considered unavailable if it lacks a “developed infrastructure within which the rule of law can be confidently and consistently upheld”.149

Second, the doctrine gives effect to the concept of forum necessitatis. It recognises that New Zealand will be the more appropriate forum to hear the claim if justice cannot be done in the natural forum. The principle of justice overrides the principle of closest

141 High Court Rules 2016, rr 6.29(3) and 15.1.
142 High Court Rules 2016, r 6.29(1)–(2).
144 Spilka Maritime Corp v Cansulec Ltd [1987] AC 460 (HL) at 476.
145 Spilka Maritime Corp v Cansulec Ltd [1987] AC 460 (HL) at 476.
146 Spilka Maritime Corp v Cansulec Ltd [1987] AC 460 (HL) at 476.
147 Spilka Maritime Corp v Cansulec Ltd [1987] AC 460 (HL) at 476.
149 889457 Alberta Inc v Kitanga Mining Ltd [2008] EWHC 2679 (Comm), [2009] 1 BCLC 189 at [33].
20.7 Conclusion

This chapter considered whether New Zealand private international law is consistent with New Zealand’s international human rights obligations. It examined two questions in particular: whether rules of choice of law, and rules on the recognition and enforcement of foreign judgments, could lead a court to give effect to a foreign law or judgment, in circumstances where it would be contrary to New Zealand’s international human rights obligations to do so; and whether New Zealand’s rules of civil jurisdiction are consistent with the international human right of access to justice.

Although, on the whole, there appears to be limited cause for concern, there are some areas of uncertainty. In relation to the first question, private international law provides for a public policy exception to the application of foreign laws or judgments; and foreign laws or judgments that are inconsistent with international human rights may well fall within the exception. Yet there is potential for conflict if the public policy exception, but not international human rights law, imposes an attenuated standard (i.e., a grave or gross infringement of human rights). While a grave or gross infringement is usually said to be necessary to trigger the public policy exception, the international human rights position is less clear.

In relation to the second question, private international law rules of jurisdiction are generally based on the principle of connection, and a requirement of connection is usually considered a justifiable and reasonable limitation on a claimant’s right of access to justice. In other words, access to justice concerns are already incorporated into the doctrine of forum (non) conveniens. In Lubbe v Cape plc, for example, the House of Lords refused to stay personal injury proceedings against an asbestos company in England, even though the natural forum was South Africa, because the impecunious plaintiffs had funding to pursue their claim in England but not in South Africa. In the circumstances of that case, grant of a stay would have amounted to “a denial of justice”. The plaintiffs would not have obtained access to justice in South Africa, so South Africa could not be the more appropriate forum to hear the claim.

Importantly, the House of Lords did not think it necessary to consider the matter under art 6 because art 6 did not “[support] any conclusion which is not already reached on application of Spilliaert principles”. This conclusion may suggest that the standard of “justice” applied under the doctrine of forum (non) conveniens is the same as, or more claimant-friendly than, the standard imposed by the right of access to justice. But this need not be the case. According to a leading commentator in this area, “the idea of injustice in private international law may not be coterminal with that of a fair trial under Article 6”. There may be a potential conflict, therefore, between the forum (non) conveniens test and New Zealand’s international human rights obligations.

150 Lubbe v Cape plc [2000] 1 WLR 1545 (HL).
151 Lubbe v Cape plc [2000] 1 WLR 1545 (HL) at 1559.
152 Lubbe v Cape plc [2000] 1 WLR 1545 (HL) at 1561.
justice. The doctrine of forum (non) conveniens also allows courts to override the principle of closest connection if justice cannot be done in the natural forum, and hence incorporates access to justice concerns into the court’s decision on jurisdiction. However, there is still room for conflict. In particular, it has been argued that the standard of “justice” applied under the doctrine of forum (non) conveniens may not be as exacting as that imposed by international human rights law. It is also possible that subject-matter limitations pose an unlawful threat to a claimant’s right of access to justice if they are interpreted too widely. This may be the case, in particular, where New Zealand is closely connected to the claim and the claimant is unable to obtain access to justice in another forum. Finally, it is conceivable that international human rights law may develop an obligation to act as forum necessitatis. This is most likely to occur for cases that allege breaches of peremptory norms. If such an obligation was to crystallise, New Zealand’s rule of personal jurisdiction requiring “a real and substantial connection” would likely be too restrictive.