Chapter 1 : Transnational Tort Litigation - Campbell McLachlan; Peter Nygh - Oxford University Press

The scope and application of the rules of civil jurisdiction is of immense practical importance in the conduct of transnational tort cases. The incidence of transborder harms is on the increase.

Severe abuses, reported by non-governmental organisations, range from murder to the violation of socio-economic rights. To date there has been only modest success in developing theoretical and practical solutions for legal enforcement of international corporate accountability. In the absence of an international legally binding instrument addressing human rights obligations of private corporations and the various regulatory problems in host states, a few jurisdictions have evidenced a growing trend of civil liability cases against TNCs. These cases are examples of private claims brought by the victims of overseas corporate abuse against parent companies in the courts of the home states. While US courts continue to debate issues of jurisdiction over extraterritorial human rights corporate abuses, the UK courts have recently being consistent in allowing claims against local parent companies of TNCs. The case against Vedanta is the most recent example of this trend. Facts of the case On 31 July , 1, Zambian citizens, residents of four communities in the Chingola region, commenced proceedings against Vedanta and KCM in the Technology and Construction Court of the High Court of England, alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land. The majority of the claimants are farmers who rely on the land and local rivers as their primary source of livehood. They also rely on the local waterways as the main source of clean water for drinking, washing, bathing and irrigating farms. The mine commenced operations in , but Vedanta acquired a controlling share in KCM in KCM operates a mine as a holder of a mining licence in accordance with the local legislative requirements that operations be run through a locally domiciled subsidiary. They allege that the discharge of harmful effluent in the waterways has endangered their livelihoods and physical, economic and social wellbeing. In September and October , both defendants applied for a declaration that the English court does not have jurisdiction to hear the claims. The defendants argued that Zambia was an appropriate forum to try the claims since it is the place where the claimants reside and where the damage is said to have occurred. In the course of a three-day hearing in April both parties presented their arguments. The judgement allowing a legal claim against both defendants to be tried in England was delivered on 27 May Vedanta claimed that the court should apply the forum non conveniens argument and stay proceedings in favour of Zambia. The judicial response to the arguments of the parties was straightforward and explicit. Jurisdiction over the foreign subsidiary KCM KCM also challenged jurisdiction of the UK court by applying for an order setting aside service of the claim form on it out of the jurisdiction. In response, the claimants argued that it was reasonable to try claims against both companies in the UK and, alternatively, the claimants would not have access to justice in Zambia para Once again the decision of the court did not leave any ambiguity about the jurisdiction of an English court to hear the case about Zambian operations. It was first held that the claim against KCM undoubtedly had a real prospect of success para It was then established that the claim against Vedanta was arguable under both English and Zambian law para Therefore, it was concluded that KCM was a necessary and proper party to the claim against Vedanta para Finally, the court unconditionally established that England is the proper forum in which to bring the claim against KCM in accordance with the tests established by The Spiliada decision and Connelly v RTZ case. The judge decided that the assessment of England as the appropriate forum should be considered in light of the claims against Vedanta para Following this conclusion, and the earlier finding of the real issue to be tried between the claimants and Vedanta, it was held that England is an appropriate place to hear the claims against two legal entities of the major international company para Moreover, it was established that the claimants would not obtain access to justice in Zambia should the trial take place there para In particular, the judge took into account evidence that the Zambian legal system is not well developed para ; that the vast majority of the claimants would be unable to afford legal representation para ; that there was an insufficient number of local lawyers able to proceed with a mass tort action of such scale para ; and that KCM will be likely to prolong the case para Significance of the decision The Vedanta decision represents another significant achievement for

foreign victims and their lawyers struggling with the jurisdictional hurdles of foreign direct liability cases in the courts of the home states. First, the decision clearly confirmed the mandatory application of Article 4 in tort litigation concerning extraterritorial abuses of TNCs. The first tort liability claims in England were intensely litigated for several years on the forum non conveniens issue. Secondly, although at this stage of the proceedings the judge did not consider the case on the merits, there is nonetheless acceptance that the parent company may be held responsible for the human rights abuses committed to the members of the community at the place where the subsidiary runs its operations. The acknowledgement of the economic reality of the TNCs and the decisive role of the parent corporation in the overseas operations of the subsidiary speaks in favour of the increasing awareness about the legal gaps in the international corporate accountability. However, a final determination of the liability of TNCs awaits in future decisions. Despite the fact that the case did not have any foreign element, some commentators have already concluded that the ruling may have an influence in the context of TNCs. The reasoning of Mr Justice Coulson has left no doubts that Chandler should be considered as an authority for the resolution of the tort liability cases involving foreign operations of UK-based parent companies. Moreover, it was once again confirmed that invoking duty of care is strategically beneficial for the claimants since: The judgement also provides interesting material for the analysis with respect to the evaluation of the patterns of corporate behaviour in the host states and weak remedies available for the victims of abuses in their states of residence. Evidence submitted by the claimants provided that there was a real risk that KCM on its own would be unable to meet the claims para Indeed, undercapitalisation of the subsidiary remains a significant risk for claimants in the tort litigation against TNCs. The limited liability principle in corporate law creates an incentive for shareholders to engage in high risk projects, which plausibly have the possibility to result in moral hazard. Specifically for mass tort actions involving TNCs, the obtainment of final judgment against a subsidiary with no real assets will effectively mean losing the case. By establishing the case against the parent company, the claimants automatically target a pool of assets that would not otherwise be available were litigation to be commenced against the subsidiary in the host state. The compensational nature of the foreign direct liability claims is what makes them most valuable for the claimants To date English courts have been consistent in treating the parent company and the subsidiaries as distinct legal entities in the context of allocating responsibility within the corporate groups. Similarly, the case law did not derogate from the conventional concept of corporate legal form. Finally, the decision in Vedanta case to restrain from the policy judgement on the assessment of the Zambian legal system para is in line with the previous practice of the UK courts. First, in Connelly v RTZ , the House of Lords avoided making any assessment on the ability of the South African justice system to guarantee the claimants access to justice. Instead, its judgment focused on the personal ability of the claimant to obtain financial assistance of pursuing complex and expensive litigation. Later, in the Lubbe v Cape the House of Lords again decided to refrain from considering the influence of such public interest factors in the private interests of the parties and the ends of justice. Nevertheless, findings on the court about weak remedies available for the claimants in Zambia have been already questioned by Zambian President Edgar Lungu, which again raises the issue of judicial imperialism of the developed states through exercise of the extraterritorial jurisdiction over overseas operations of local TNCs. Whether the English courts will take the ground breaking decision to rule that the parent company should be held liable for the overseas operations of its subsidiary is open to debate. It may not even be answered in this case, with settlement remaining a real possibility. An out-of-court settlement will again leave legal practitioners, academics and human rights activists without a single UK precedent on parent company liability in tort litigation against TNCs.

Chapter 2 : Gibson Dunn | Transnational Litigation

Ekaterina Aristova, PhD in Law Candidate, University of Cambridge authored this post on 'Tort litigation Against Transnational Corporations: UK court will hear a case for overseas human rights abuses'. She welcomes comments. On 31 July , 1, Zambian citizens, residents of four communities.

They include structural complexities within business entities such as the doctrine of separate legal personality ; difficulties in establishing jurisdiction and navigating foreign civil liability regimes including time limitations and the allocation of the burden of proof ; non-justiciability and immunity doctrines; and obstacles in enforcing judgments and obtaining satisfactory remediation. Private international lawyers examine how tort litigation against MNCs can contribute to vindicating interests and values protected by human rights. Public international lawyers, by contrast, focus on obligations imposed on states to ensure access to justice and effective remedies for victims of corporate-related human rights violations. At the same time, these different approaches intersect in their joined interpretation of the legal space of human rights as co-extensive with state territory. However, the challenges raised through the discussion are also pertinent to other attempts to ensure transnational corporate accountability for human rights violations. In a nutshell, the compartmentalisation of human rights bears out the assumption that, as a general rule, perpetrators and victims of corporate-related human rights violations will reside in the same territory and be subject to the authority of the same state. For that reason, it fails to satisfactorily address a core concern in the business and human rights domain, namely human rights obligations of the home state of the parent or controlling company of MNCs to prevent and redress human rights violations committed in the host state of corporate investment. Section 2 shows how private international law that allocates jurisdiction to domestic courts in transnational tort litigations for corporate-related human rights violations is constrained by rules of public international law that allocate jurisdiction in the relationship between states inter se. Section 3 argues that the ensuing territorialisation of corporate human rights accountability is corroborated by the European Court of Human Rights which has traditionally confined human rights obligations to a qualified territorial relationship between public authorities and victims of corporate-related human rights violations. Private international law determines the competence of domestic courts to hear disputes involving a foreign element on the basis of a nexus between the parties, the subject matter and the state in which the case is brought. On the one hand, while domestic courts generally have jurisdiction over parent companies domiciled in an EU member state, it proves difficult to establish liability of these companies in substantive law for human rights violations committed by their subsidiaries and contractors in third countries. On the other hand, while third-country victims often encounter obstacles in obtaining effective redress in their own states that is, the host countries of EU corporate investment , member state courts will as a general rule decline jurisdiction in cases directly brought against these foreign subsidiaries and contractors in the European Union. The requirement that the corporate defendant must be domiciled in an EU member state is often justified in view of the function of private international law to regulate cross-border legal relations between private parties in an equitable way. The nexus between the corporate defendant and the forum serves the legitimate commercial interest of private litigants, ensures an economical juridical process, and avoids conflicting judgments in different states. One way to overcome legal barriers in cases brought against constituent parts of MNCs not domiciled in the forum state is the doctrine of forum necessitatis that allows domestic courts to assert jurisdiction when there is no other forum available in which the plaintiffs could pursue their claims. The most publicised case in this regard is currently pending in the Netherlands. Not only were the claims against both companies connected and had the same legal basis tort of negligence under Nigerian law , it was also foreseeable for the Nigerian subsidiary that it might be sued in the Netherlands in connection with the alleged oil spills. At the same time, the Court held that the mere possibility of the Dutch parent company being liable was sufficient to attract a foreign subsidiary to the Dutch jurisdiction. They are also an expression of the delimitation of jurisdiction in public international law that protects the sovereign authority states wield over their territory and people therein. When viewed through the lens of public international law, the territorialisation of corporate human rights accountability is a consequence

of the way in which the international order of states imposes itself on the global political economy. While from an economic perspective, MNCs operate as globally integrated business entities, from a legal perspective they are made up of a plurality of independent companies. Yet, in another sense, these different approaches intersect in their joined interpretation of the legal space of human rights as co-extensive with state territory. If the previous section discussed how public international law frames the allocation of jurisdiction to domestic courts in transnational private litigation, the focus of the present and the following section is on state obligations incurred through international human rights law to prevent and redress corporate-related human rights violations. The text of the European Convention on Human Rights does not suggest that it would directly impose obligations on non-state actors, including corporations. Correspondingly, Article 34 of the ECHR only permits applications to the Court by individuals claiming to be a victim of a violation by a state. It entails, on the other hand, that the ECHR ensures corporate compliance with human rights only indirectly via negative and positive state obligations. Negative obligations require states to abstain from unjustified interference with, and thereby to respect, human rights. Positive obligations require states to ensure the effective protection of human rights even in the face of events for which they do not bear direct responsibility. Negative and positive state obligations come to bear on corporate-related human rights violations via the doctrines of direct attribution and third-party responsibility. Negative obligations require states to respect human rights in relation to corporations acting as state agents; positive obligations require states to protect human rights in relation to corporations acting as third parties. While, in the first case, acts of corporations are attributed to the state so that the latter is considered to directly interfere with human rights, in the second case the state violates its human rights obligations by failing to take all reasonable and appropriate measures to protect individuals against corporate abuse. For negative human rights obligations to arise, corporate conduct must be directly attributable to the state so that the act of a private business entity can be treated as an act of the state itself. Under the domestic law of many EU member states and under EU law, corporate conduct is attributed to the state by virtue of state ownership or by virtue of the corporation exercising public functions. In Fadeyeva, the ECtHR elaborates the distinction between negative and positive state obligations and the conditions under which states are required to secure human rights against corporate abuse. Pollution levels from the plant had for many years exceeded permitted levels and were found to cause the applicant severe health problems. The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the state. As de Schutter says: Although we may be trained, as international lawyers, to think that the international responsibility of a state may not be engaged by the conduct of actors not belonging to the state apparatus unless they are in fact acting under the instructions of, or under the direction or control of, that state in carrying out the conduct, the private-public distinction on which this rule of attribution is based is mooted though not contradicted by the imposition of positive state obligations. In the standard business and human rights scenario, in contrast, the extraterritorial human rights violation is committed by a non-state actor operating in the host state of corporate investment. Moreover, it has been argued that positive extraterritorial obligations to protect human rights in the relationship between private actors should be limited to situations in which the state is in full and effective control of the area where the putative violation takes place. One important rationale behind this limitation is a concern with the effectiveness of international human rights law. As Milanovic puts it: In order to be realistically complied with, the obligation to respect human rights [i. It is the positive obligation to secure or ensure human rights which requires a far greater degree of control over the area in question, control which allows the state to create institutions and mechanisms of government, to impose its laws, and punish violations thereof. The applicant and his family found themselves targeted by Al-Qaeda for having offered construction and transport services to American clients in Iraq. Rantsev concerned the death of a woman who had been illegally trafficked by a non-state actor from Russia to Cyprus to work as a prostitute. The Russian Government submitted that the application was inadmissible ratione loci because the relevant events took place outside its borders. International human rights law, by contrast, focuses on a qualified territorial relationship of authority and control between the state and the individual victim of corporate-related human rights violations. While this approach does not easily lend itself to establishing extraterritorial state obligations to prevent corporate-related human rights violations, it can be of help to

third-country victims seeking redress in EU member state courts. As public institutions of the state, domestic courts adjudicating cases between private parties are directly bound by the European Convention on Human Rights. The applicants in Khurshid Mustafa and Tarzibachi v Sweden, for example, had been involved in a private law dispute with their landlord corporation over the installation of a satellite dish on their tenancy building. The Swedish government submitted that there had been no interference by a public authority as the case concerned a dispute between private parties over a contractual obligation. In Ben El Mahi, the Morocco-based applicants complained about the publication of Muhammed cartoons in privately owned Danish newspapers. The ECtHR declared the application inadmissible for lack of jurisdiction: Here the applicants are a Moroccan national resident in Morocco and two Moroccan associations which are based in Morocco and operate in that country. The Court considers that there is no jurisdictional link between any of the applicants and the relevant member state, namely Denmark, or that they can come within the jurisdiction of Denmark on account of any extraterritorial act. The applicant lived in Mozambique and complained that two publications in Swedish newspapers associating him with various crimes including the murder of Prime Minister Olof Palme violated his right to private and family life Article 8 ECHR. Different from the applicants in Ben El Mahi, Mr White had brought a private prosecution for defamation against the newspapers in Sweden before turning to the Strasbourg Court. The responsible editors were acquitted by a Swedish District Court, a judgment that was upheld on appeal. Of particular relevance for third-country victims of corporate-related human rights violations seeking redress in European home states of MNCs are Article 6 of the ECHR that requires states to ensure that individuals have access to court to vindicate their civil rights protected under domestic law 64 and Article 13 of the ECHR that guarantees an effective remedy before a national authority to everyone who claims that their rights under the Convention have been violated. In , the applicants had brought a civil action for damages against the Italian government in the Italian courts. The Italian Court of Cassation eventually dismissed the action for lack of jurisdiction because the claimants were not entitled under Italian law to seek reparation from the Italian state for damages incurred as a result of an alleged violation of public international law. The Grand Chamber first distinguished Markovic from Bankovic: If the domestic law recognises a right to bring an action and if the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction ratione loci and ratione personae of the state concerned. The Strasbourg Court agreed: CONCLUSION Ensuring access to justice and effective remedies for third-country victims of corporate-related human rights violations has been of particular concern to the more recent business and human rights debate. This compartmentalisation bears out the assumption that, as a general rule, perpetrators and victims of corporate-related human rights violations will reside in the same territory and be subject to the authority of the same state. Section 2 showed how European private international law that allocates jurisdiction to domestic courts in transnational tort litigations for corporate-related human rights violations is constrained by the rules of public international law that allocate jurisdiction in the relationship between states inter se. The interpretation of the legal space of human rights as co-extensive with state territory fails to satisfactorily address a core concern in the business and human rights domainâ€”namely, human rights obligations of the home state of the parent or controlling company of MNCs to prevent and redress human rights violations committed in the host state of corporate investment. First of all, human rights could be cited as the direct cause of action such that, for instance, a company could be sued for a violation of the human right not to be tortured. Secondly, human rights could be indirectly pleaded in that, while they could be the purpose or object of the litigation, other legal categories [such as the tort of battery] would be invoked to vindicate the substance of human rights protections.

Chapter 3 : Tort Litigation against TNCs in the English Courts

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I predicted as much in October, but I was uncertain whether the Supreme Court would deliver a mortal blow and by what means it would deliver it. The presumption against extraterritoriality, combined with a narrow interpretation of territoriality, means that the Filartiga human rights revolution is essentially over. Other posts this week will discuss whether the ATS has a future after Kiobel , but that is simply a search for a silver lining in what is, for plaintiffs, otherwise a dark and ominous thunderstorm that has destroyed an entire cottage industry. But per Mohamed v. Palestinian Authority , such causes of action are only available against natural persons. Others will argue that the ATS survives as long as there is some territorial nexus. This may mean that the old American Banana and Sisal Sales standard applied in the antitrust context is now applicable to human rights litigation. The search is on for some constituent act that occurred within the forum to satisfy the territorial nexus. But if territoriality is the new standard, why rely on international law instead of a panoply of more favorable domestic laws that capture the same conduct? Good luck finding that conduct. More promising than these options is transnational tort litigation. As I discuss in a forthcoming article now more relevant than ever and as Trey Childress discusses here and a recent Irvine Law Review symposium features here , the future of human rights in domestic courts is transnational tort litigation. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. In the quest to provide relief for victims of grave abuse, international human rights violations will now be reframed as transnational torts. Virtually every complaint pleading an ATS violation could allege a traditional domestic or foreign tort. Indeed, many complaints routinely add pendent state tort claims. What does this mean in practice? Now more than ever, human rights lawyers must become experts on choice of law and comparative tort law. It is a trend that already has been applied for over a decade in the terrorism context, but no one has been paying attention. They typically have done so by invoking choice of law principles to apply domestic tort laws to redress foreign terrorist attacks. Thus, when a suicide bomber kills Americans in Israel, or Lebanon, or Nigeria, it is Illinois, Louisiana, or Nebraska law that is applied to hold the perpetrators accountable. Going forward, human rights lawyers must consider whether choice-of-law standards of the several states will authorize recourse to state or foreign tort laws. That means forum shopping with an eye toward choice of law. Who knows, for it will depend on the facts of each case. In some cases i. In other cases i. If I were a law student who aspired to become a human rights lawyer, after today I would be enrolling in courses that teach conflict of laws and comparative torts. What does a choice-of-law analysis for human rights abuses typically mean? More often than not, it means the application of foreign tort laws. That is to say, if one analyzes the major choice-of-law approaches and applies them to the facts of prominent human rights cases, courts will typically apply foreign tort laws to resolve claims alleging foreign conduct that causes foreign injuries. Under the specific facts of Kiobel, for example, a state court would apply Nigerian, English, or Dutch law under every choice-of-law approach. Lest one think that transnational tort litigation is a poor second to ATS litigation, it is fairly clear that this option has numerous advantages over the alternatives. First, tort laws are almost universal. To the extent a foreign country does not have effective tort laws, then a choice of law public policy exception may result in the application of domestic tort laws. Second, transnational torts have much lower thresholds than the standards applied under international law, allowing claims to be brought for intentional torts, simple negligence, strict products liability, or any other harmful or offensive conduct that constitutes a legal wrong. Human rights litigation is about grave public wrongs; transnational tort litigation is about redressing simple private wrongs. If the choice is between proving simple negligence instead of a paradigmatic international law violation with a territorial nexus, which would you prefer? Third, corporate accessorial liability for aiding and abetting human rights abuse is largely irrelevant when pursuing claims for transnational torts a question left unresolved in Kiobel with respect to international law. Establishing that a corporate defendant aided and

abetted government abuse with the requisite intent is likewise irrelevant. What matters is whether the defendant knew or should have known that its conduct would cause harm. If so, under most jurisdictions of the world a corporation is liable. Fourth, pleading a violation of transnational torts in most state courts may avoid heightened federal pleading standards. Fifth, forum non conveniens does not have the same force or favor in state courts as in federal courts. Many defendants may surmise that it is better to fight in state court rather than gamble with the vagaries and corruption common in many foreign courts. Sixth, under almost every choice-of-law approach, concerns for international comity and foreign sovereign interests are built into the analysis. For example, under the approach adopted by most states, the needs of the international system and the policies of other interested states are part and parcel of the choice-of-law determination. The sovereignty concerns expressed in Kiobel are built into the system, and often result in the application of foreign laws. Seventh, state tort laws may apply extraterritorially. As noted, typically this is done on a case-by-case basis after the full implications for such application are taken into account. Thus, virtually every terrorism case pursuant to the Flatow amendment did just that, with the paramount government interest in combatting terrorism trumping foreign interests. Think back to the major foreign terrorism events of recent decades: All resulted in the application of domestic wrongful death tort laws based on the domicile of the decedent victim. Transnational tort litigation cannot replace the old version of ATS litigation. But after Kiobel, human rights lawyers have precious few alternatives. If there is a silver lining to Kiobel, it is that human rights lawyers will wake up to what transnational tort litigation has to offer.

Chapter 4 : Transnational | Institute for Legal Reform

The impact of the human right to a remedy on access to justice in transnational tort litigation offers an important and often neglected avenue for exploring the cross-fertilisation between 'torture' and 'tort'.

The Transnational Litigation group has represented clients in some of the highest-profile cases around the world. This includes obtaining a landmark U. Human Rights Litigation for Chevron v. Donziger and Global Dispute of the Year: Financial Litigation for NML v. Cross-border discovery, including 28 U. In addition to assisting clients with anticipated or ongoing litigation at the trial and appellate level in international jurisdictions, our lawyers have also represented clients before numerous tribunals in international arbitrations, including those pursuant to bilateral investment treaties. Experience Recent representations include: Gibson Dunn obtained a trial verdict in favor of Chevron, in which the district court held that the scheme constituted racketeering in violation of RICO and federal laws prohibiting attempted extortion, wire fraud, money laundering, witness tampering, obstruction of justice, and the Foreign Corrupt Practices Act. After securing judgments, attachments and injunctions against Argentina, the tide turned with two decisive U. Successfully represented Daimler AG before the U. Supreme Court in a transnational case, in which the Court held that it violates due process for a U. Transformed a high-risk toxic tort litigation against Dole Food Company, Inc. Represented Yukos Capital S. Months later, a global settlement was reached between the Yukos claimants and Rosneft pursuant to which all proceedings between the parties were terminated. Secured Delaware Supreme Court affirmance of the forum non conveniens dismissal, also won by Gibson Dunn, of Philip Morris USA and Philip Morris Global Brands in a case filed by hundreds of Argentine citizens in Delaware alleging exposure to pesticides used on Argentine tobacco farms and seeking compensatory and punitive damages. The Court held that where defendants demonstrate that litigating in Delaware would result in an overwhelming hardship to them, Delaware courts may dismiss suits under the doctrine of forum non conveniens even if no alternative forum for the lawsuit is available. The decision was a significant development in transnational law given the large number of multinational corporations subject to suit in Delaware, and the challenges they face presenting a meaningful defense where the key documents, witnesses and evidence reside overseas. Scored a decisive victory for Dole Food Company, Inc. Dole Food was one of several U.

Chapter 5 : Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation

*Transnational Tort Litigation: Jurisdictional Principles [Campbell McLachlan, Peter Nygh] on theinnatdunvilla.com *FREE* shipping on qualifying offers. The scope and application of the rules of civil jurisdiction is of immense practical importance in the conduct of transnational tort cases.*

I greatly appreciate the assistance from research librarian Trezlen Drake and my research assistant Gregory Bohan Ge. Abstract The Supreme Court in Kiobel v. Royal Dutch Petroleum Co. As such, international human rights litigation as currently practiced in the United States is dead. The demise of the ATS will signal the rise of transnational tort litigation. Virtually every complaint pleading a human rights violation could allege a traditional domestic or foreign tort violation. With transnational tort claims, there is no presumption against extraterritoriality. Instead, courts apply state or foreign tort laws based on traditional choice-of-law principles. The purpose of this Article is to outline the future of human rights litigation in the United States by reframing human rights as international wrongs resolved through transnational tort litigation. It then describes how these choice-of-law approaches have been applied in the international terrorism context and likely would be applied in the human rights context. This Article concludes with a detailed analysis of the virtues of transnational tort litigation, with specific emphasis on extraterritoriality, universality, liability thresholds, corporate liability, damages, notice pleading, forum non conveniens, and preemption. Introduction Human rights violations are transnational torts. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. Henceforth, the only claims that may go forward under the ATS are those that touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality. The overwhelming majority of ATS claims will not satisfy this test. As such, human rights litigation as currently practiced in the United States is dead. When one compares facts and considers remedies, virtually every complaint pleading an ATS violation could allege a traditional domestic or foreign tort violation. It is perhaps unseemly to treat grave human rights abuses as garden-variety torts. In the quest to provide relief for victims of grave abuse, international human rights violations should be reframed as transnational torts. With common law tort claims, there is no presumption against extraterritoriality. Instead, there is a decision to apply state or foreign tort law based on choice-of-law principles. Reframing human rights as transnational torts is not novel in practice, but it has been ignored by the legal academy. In the terrorism context, plaintiffs have used this tactic to secure billions of dollars in judgments against state sponsors of terrorism. They typically have done so by invoking choice-of-law principles to apply domestic tort laws to redress foreign terrorist attacks. A similar approach could be undertaken with respect to other human rights violations. Rather than pursuing claims for wrongful conduct under the ATS, those same victims could plead violations of domestic or foreign tort laws. Courts seized with such claims would apply choice-of-law principles to assess the appropriate tort law to resolve the dispute. If the United States has a paramount interest in addressing the human rights violation, then that likely will result in the application of domestic tort law. Otherwise, traditional choice-of-law analysis applied in the international human rights context will often result in the application of foreign tort law. As a practical matter, transnational tort litigation allows state and federal courts to continue to adjudicate international human rights claims. But claims based on the same facts can continue in state and federal courts pursuant to either state or foreign tort laws. Accordingly, human rights litigation will survive the demise of the ATS by reframing the facts, pleading tort violations, and applying either state or foreign tort laws. As a normative matter, transnational tort litigation is preferable to human rights litigation because it avoids the uncertainties and concerns typically raised about ATS litigation. With human rights litigation in the United States, courts will favor the commonplace over the exotic. Firestone Natural Rubber Co. It is also familiar to the relevant stakeholders in transnational tort litigation. Choice-of-law analysis accommodates the interests of other nations, the expectations of the parties, and the needs of the interstate system. It applies the law one would expect: As such, the routine application of choice of law in the transnational torts context avoids many of the controversial questions raised by ATS litigation. For plaintiffs, transnational tort litigation in state courts has many virtues when compared to ATS litigation in federal courts, including the

extraterritorial application of common law tort claims, lower pleading standards and liability thresholds, corporate responsibility for tortious conduct, fewer dismissals on the basis of preemption or forum non conveniens, and universal acceptance of a private right of action for intentional torts. Choice of law will feature as the key question for the future of transnational tort litigation. Although there are other relevant issues that arise when human rights litigation is reframed as transnational tort litigation, choice of law is the most salient, unsettled, and underappreciated. There is neither scholarly literature that attempts to reframe human rights violations as transnational torts nor any scholarship that systematically analyzes international terrorism and human rights violations through a choice-of-law lens. Because the presumption against extraterritoriality severely limits the reach of the ATS, plaintiffs have few alternatives other than alleging violations of domestic or foreign tort laws. Part II of this Article briefly introduces the choice-of-law approaches applied in the United States, particularly as applied to the transnational context. After Kiobel, the choice of the appropriate tort law will be critical for resolving claims alleging international wrongful conduct. Unfortunately, choice of law in the United States is confusing, with fifty-two jurisdictions adopting several different choice-of-law approaches. Understanding transnational tort litigation requires an appreciation of these different approaches. This Article then outlines the past and future of human rights litigation reframed as transnational tort litigation. Part III provides a detailed analysis of how choice-of-law principles have been successfully applied to redress international terrorism. Because terrorism triggers paramount governmental interests, more often than not courts have applied domestic tort laws to resolve international terrorism disputes. Part IV addresses how the divergent choice-of-law approaches might be applied in the human rights context, with specific reference to how courts might determine the appropriate law when faced with the facts of well-known human rights cases. Unlike in terrorism cases, a choice-of-law analysis of human rights violations committed on foreign soil typically results in the application of foreign law. That is to say, if one analyzes the major choice-of-law approaches and applies them to the facts of prominent human rights cases, courts will typically apply foreign tort laws to resolve claims alleging foreign conduct that causes foreign injuries. Finally, Part V concludes with a discussion of the virtues of transnational tort litigation. Lest one assume that transnational tort litigation is a poor alternative to human rights litigation, this Article outlines the numerous advantages of this approach over traditional human rights litigation. First, state tort laws have no presumption against extraterritoriality. Second, tort laws are universal, with almost every jurisdiction providing civil remedies for negligent or intentional conduct that harms others. Third, tort laws have much lower liability thresholds than the standards applied under international law, allowing claims to be brought for intentional torts, simple negligence, and strict products liability. Fourth, tort laws recognize corporate liability without the need to show that the entity aided and abetted government abuse with the requisite intent. Fifth, choice-of-law rules are sufficiently nuanced to apply one law to determine liability and another law to determine damages. Sixth, tort claims pursued under state law in state court permit notice pleading, obviating the need to satisfy the heightened pleading standard applicable in federal court. Seventh, forum non conveniens does not have the same force or favor in state courts as in federal courts. Eighth, preemption will rarely be an issue where a court applies state or foreign tort laws to resolve the dispute. Some Observations on Text and Context, 42 Va. Lamoree, Think Globally, Sue Locally: The ATS became one of the most important litigation vehicles for victims of human rights abuses. Contingency and pro bono lawyers well-versed in international law could sue deep-pocket corporations for aiding and abetting grave foreign governmental misconduct. For over two decades, interpretation of the ATS developed without the benefit of U. Estate of Marcos, F. Libyan Arab Republic, F. Finally in , the Court in Sosa v. Since that time, lower courts struggled to answer the many questions Sosa left unresolved. Among the open questions were whether claimants were required to exhaust local remedies, 20See Sarei, F. Short-Term Justice, but at What Cost? In Brief 15, 16 , http: Confusion in the Courts, 6 Nw. On April 17, , the Supreme Court in Kiobel issued a landmark decision that signals the end of this Filartiga human rights revolution. The Court concluded that nothing in the text, history, or purpose of the statute negated a presumption against extraterritoriality. The text provides no evidence that Congress intended causes of action to have extraterritorial reach. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality. The history of the statute offers

instances in which the statute was applied within the United States and on the high seas, but little to no support for its application on the territory of another sovereign. The La Jeune Eugenie, 26 F. Therefore, the Court held the presumption against extraterritoriality applied to limit the reach of the ATS. As applied to the facts in Kiobel, the case had almost no connection to the United States: Nigerian plaintiffs were suing Dutch, British, and Nigerian corporations for alleged human rights violations that occurred in Nigeria. The Kiobel decision is complex and confusing, offering scant guidance as to how lower courts should proceed when claims touch and concern U. However, the purpose of this Article is not to analyze Kiobel, but rather to consider the future of human rights litigation in the United States in light of Kiobel. Colangelo, What Is Extraterritorial Jurisdiction? Dodge, Alien Tort Litigation: The Evolving Role of the Judiciary in U. Foreign Relations, 89 Notre Dame L. Vazquez, Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum Co.: The old Filartiga paradigm of using the statute to redress human rights violations of foreign defendants committed against foreign plaintiffs on foreign soil 36See Filartiga v. To be sure, future litigation will clarify how sufficient the territorial nexus to the United States must be to rebut the presumption.

Chapter 6 : UK court on Tort litigation Against Transnational Corporations

The analysis has implications for a number of areas of legal doctrine, including the construction of the Alien Tort Statute, the rules governing choice of law in transnational tort cases, and the doctrine of forum non conveniens.