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

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HUMAN RIGHTS AFTER *KIOBEL*: CHOICE OF LAW AND THE RISE OF TRANSNATIONAL TORT LITIGATION

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ABSTRACT

The Supreme Court in Kiobel v. Royal Dutch Petroleum Co. *held that the presumption against extraterritoriality applied to the Alien Tort Statute. 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. This Article analyzes Kiobel*'s impact on the future of human rights litigation and introduces transnational tort litigation as a viable alternative, with particular focus on the competing choice-of-law approaches. 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.*

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INTRODUCTION

Human rights violations are transnational torts. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. Federal law concedes as much, vesting federal courts with jurisdiction over "any civil action by an alien for . . . *tort*[*s*] only, committed in violation of the law of nations or a treaty of the United States."[1] Until the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*,[2] foreigners could rely on this statute—commonly known as the Alien Tort Statute (ATS)[3]—to sue individuals or entities for human rights violations that occurred anywhere in the world. The Supreme Court's decision in *Kiobel* applied the presumption against extraterritoriality to severely limit the territorial reach of the ATS,[4] the most important human rights statute in the United States. 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.[5] 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.

The demise of the ATS will signal the rise of transnational tort litigation. 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.[6] But with the Supreme Court's recent decision in *Kiobel*, reframing human rights violations as transnational torts may be the only viable alternative for redressing international wrongs through U.S. litigation. 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.

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1 28 U.S.C. § 1350 (2012) (emphasis added).

2 133 S. Ct. 1659 (2013).

3 The ATS is also sometimes referred to as the Alien Tort Claims Act (ATCA) or the Alien Tort Act (ATA).

4 *Id.* at 1669.

5 *Id.*

6 *See* Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) (explaining that municipal tort law is an inadequate placeholder for the kinds of wrongs meant to be addressed by the ATS); Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC IRVINE L. REV. 9, 21 (2013) (citing *Xuncax*, 886 F. Supp. at 183).

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.[7] They typically have done so by invoking choice-of-law principles to apply domestic tort laws to redress foreign terrorist attacks.[8] The United States' interest in combatting international terrorism has been the decisive factor leading to the application of domestic law, which typically results in the application of state tort law of the plaintiffs' domicile.[9]

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. *Kiobel*'s territorial limitations will result in the dismissal of most ATS 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.[10] With human rights litigation in the United States, courts will favor the commonplace over the exotic. Even prior to *Kiobel*, courts were skeptical of ATS litigation,[11] but routinely employed choice-of-law rules

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[7] *See* Jeewon Kim, Note, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 524 (2004); *infra* text accompanying note 176.

[8] *See infra* text accompanying notes 107–75.

[9] *See* Dammarell v. Islamic Republic of Iran (*Dammarell II*), No. Civ.A. 01-2224JDB, 2005 WL 756090, at *20 (D.D.C. Mar. 29, 2005).

[10] *See infra* text accompanying notes 19–24.

[11] *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 770 (9th Cir. 2011) (Reinhardt, J., concurring), *vacated*, 133 S. Ct. 1995 (2013); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 71–73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part),

to resolve cross-border tort claims.[12] Courts' familiarity with choice-of-law analysis is one of its greatest virtues. 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: the law that advances legitimate governmental interests and that has the closest connection to the dispute and the parties. 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.

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. 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.

Part I of this Article summarizes the Supreme Court's decision in *Kiobel* with particular attention to the consequences that decision has for the demise of ATS litigation and the rise of transnational tort litigation. 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.

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vacated, 527 F. App'x 7 (D.C. Cir. 2013); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 255 (2d Cir. 2009); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 201–02 (2d Cir. 2009) (Wesley, J., dissenting); Yousuf v. Samantar, 552 F.3d 371, 384 (4th Cir. 2009), *aff'd*, 560 U.S. 305 (2010); Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116–17 (2d Cir. 2008); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 296 (2d Cir. 2007), *aff'd sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

[12] *See infra* note 41.

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.

I. *KIOBEL* AND THE DEMISE OF THE ALIEN TORT STATUTE

The history of international human rights litigation under the ATS is well-known.[13] Since *Filartiga v. Pena-Irala*,[14] such litigation has become something of a cottage industry, with over 150 cases filed alleging the commission of a tort in violation of the law of nations.[15] 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

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[13] There is extensive commentary on both the history of the ATS and the litigation that it has spawned. *See generally, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (discussing the history and meaning of the ATS); Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509 (2012) (explaining debates over the ATS and the reliance by participants in those debates on a 1795 opinion by U.S. Attorney General William Bradford); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (detailing the history of the ATS); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007) (analyzing the Court's *Sosa* decision within the context of its *Erie* decision and considering several areas of likely debate concerning the ATS); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002) (arguing, among other things, that "the Framers wanted to give the federal courts jurisdiction over suits involving the law of nations"); Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 466 (1997) (discussing *Filartiga*, "[t]he break-through ATCA case"); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112 (2004) (noting a debate concerning the ATS: whether it merely grants jurisdiction or allows suits to be brought on the basis of "customary international law"); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 353 (2011) (challenging the common perception that the ATS "imposes liability on private corporations for violations of customary international law"); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) (advancing the "safe-conduct theory," which posits a new role for the ATS—it would permit redress of common law torts that private actors commit so long as there is a U.S. nexus); Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531 (2012) (observing that most scholarly debate on customary international law has focused on litigation over the ATS).

[14] 630 F.2d 876 (2d Cir. 1980).

[15] *See* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011); Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473215797 (citing Jonathan C. Drimmer, *Corporate ATCA Cases*, AM. LAW. DAILY, http://amlawdaily.typepad.com/ATS%20Cases.pdf (last visited May 4, 2014).

of U.S. Supreme Court review.[16] Finally in 2004, the Court in *Sosa v. Alvarez-Machain* limited the scope of the ATS, but left the door ajar to further litigation, "subject to vigilant doorkeeping."[17] The central holding of *Sosa* was that the ATS was a jurisdictional statute that nonetheless permitted common law causes of action for torts committed in violation of "the present-day law of nations," provided those claims rested on accepted international norms and were defined with sufficient specificity.[18]

Since that time, lower courts struggled to answer the many questions *Sosa* left unresolved.[19] Among the open questions were whether claimants were required to exhaust local remedies,[20] alien claims against aliens were cognizable federal questions,[21] corporations were amenable to suit under

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[16] *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 242 (2d Cir. 2003); Doe I v. Unocal Corp., 395 F.3d 932, 944–56 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–06 (2d Cir. 2000); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 166 (5th Cir. 1999); Hilao v. Estate of Marcos, 103 F.3d 767, 771–73 (9th Cir. 1996); Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995); Siderman de Blake v. Republic of Arg., 965 F.2d 699, 716 (9th Cir. 1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

[17] 542 U.S. 692, 729 (2004).

[18] *Id.* at 725. The Court stated that the modern-day international norms must be "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," namely "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715, 724–25.

[19] *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 743–44 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 17 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174 (2d Cir. 2009); Yousuf v. Samantar, 552 F.3d 371, 374–75 (4th Cir. 2009), *aff'd*, 560 U.S. 305 (2010); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116–17 (2d Cir. 2008); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 262 (2d Cir. 2007), *aff'd sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

[20] *See Sarei*, 671 F.3d at 743; *Flomo*, 643 F.3d at 1024–25; *Exxon*, 654 F.3d at 27; Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1096–97, (N.D. Cal. 2008), *aff'd*, 621 F.3d 1116 (9th Cir. 2010); Rosica (Rose) Popova, Sarei v. Rio Tinto *and the Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, but at What Cost?*, 28 HAMLINE J. PUB. L. & POL'Y 517, 518 (2007).

[21] *See Sarei*, 671 F.3d at 752–54; *Khulumani*, 504 F.3d at 309–10; Taveras v. Taveraz, 477 F.3d 767, 782–83 (6th Cir. 2007); Anthony J. Bellia, Jr., Response, Sosa, *Federal Question Jurisdiction, and Historical Fidelity*, 93 VA. L. REV. IN BRIEF 15, 16 (2007), http://www.virginialawreview.org/sites/virginialawreview.org/files/bellia.pdf.

international law,[22] corporations were liable for aiding and abetting governmental misconduct,[23] and the ATS applied extraterritorially.[24]

On April 17, 2013, the Supreme Court in *Kiobel* issued a landmark decision that signals the end of this *Filartiga* human rights revolution. It did so by embracing the presumption against extraterritoriality, a presumption designed to avoid "unintended clashes between our laws and those of other nations which could result in international discord."[25] The Court concluded that nothing in the text, history, or purpose of the statute negated a presumption against extraterritoriality.[26] The text provides no evidence that Congress intended causes of action to have extraterritorial reach.[27] 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.[28] The purpose of the statute was not to transform the fledgling country into "the custos morum of the whole world,"[29] but rather to provide a means for "judicial relief to foreign officials injured in the United States."[30] Therefore, the Court held the presumption against extraterritoriality applied to limit the reach of the ATS.[31]

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[22] *See Flomo*, 643 F.3d at 1015; Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116–17 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013); *Viet. Ass'n*, 517 F.3d at 108; Ku, *supra* note 13, at 354–55; Julian Ku, *Response: Rethinking the Direction of the Alien Tort Statute*, 100 GEO. L.J. 2217, 2219–21 (2012).

[23] *See Sarei*, 671 F.3d at 748–49; *Abdullahi*, 562 F.3d at 188; *Romero*, 552 F.3d at 1315; *Khulumani*, 504 F.3d at 260; Corrie v. Caterpillar, Inc., 503 F.3d 974, 979 (9th Cir. 2007); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 306 (2008).

[24] *See* Velez v. Sanchez, 693 F.3d 308, 318 n.6 (2d Cir. 2012); *Exxon*, 654 F.3d at 18–20; Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 621 (S.D.N.Y. 2012); *Bowoto*, 557 F. Supp. 2d at 1088.

[25] *Kiobel*, 133 S. Ct. at 1664 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)) (internal quotation mark omitted).

[26] *Id.* at 1661.

[27] *Id.* at 1666 ("The reference to 'tort' does not demonstrate that the First Congress 'necessarily meant' for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality."); *see* 28 U.S.C. § 1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[28] *Kiobel*, 133 S. Ct. at 1666–67 ("Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign.").

[29] *Id.* at 1668 (quoting United States v. The La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)) ("[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. . . . The ATS ensured that the United States could provide a forum for adjudicating such incidents.").

[30] *Id.*

[31] *Id.* at 1669.

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.[32] Given that all the relevant conduct occurred outside the United States, the Court concluded that the statute did not reach the plaintiffs' claims.[33] As for other claims that "touch and concern the territory of the United States," the Court concluded that "they must do so with sufficient force to displace the presumption against extraterritorial application."[34]

The *Kiobel* decision is complex and confusing, offering scant guidance as to how lower courts should proceed when claims touch and concern U.S. territory. 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*.[35] The effective result of *Kiobel* is to severely limit ATS litigation in the United States. The old *Filartiga* paradigm of using the statute to redress human rights violations of foreign defendants committed against foreign plaintiffs on foreign soil[36] is dead. Because "[m]odern ATS litigation almost always involves conduct that took place outside the United States,"[37] the presumption against extraterritoriality will foreclose the vast majority of ATS cases. To be sure, future litigation will clarify how sufficient the territorial nexus to the United States must be to rebut the presumption. Thus

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[32] *Id.* at 1662, 1669.

[33] *Id.* at 1669.

[34] *Id.*

[35] For detailed analysis of the Court's decision in *Kiobel*, see generally, for example, Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. (forthcoming 2014); Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. (forthcoming 2014); Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. (forthcoming 2014); William R. Casto, *The ATS Cause of Action Is* Sui Generis, 89 NOTRE DAME L. REV. (forthcoming 2014); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2363695; William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. (forthcoming 2014); Eugene Kontorovich, Kiobel *Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. (forthcoming 2014); Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. (forthcoming 2014); Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. (forthcoming 2014); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. (forthcoming 2014); Carlos M. Vazquez, *Things We Do with Presumptions: Reflections on* Kiobel v. Royal Dutch Petroleum, 89 NOTRE DAME L. REV. (forthcoming 2014); Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601 (2013).

[36] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[37] Bradley, *supra* note 13, at 512.

far, lower courts have required substantial contact with the territory of the United States to rebut the presumption.[38]

If the ATS as we know it is dead, what avenues will human rights victims pursue going forward? At least for claims filed in the United States, the answer is transnational tort litigation.[39] In virtually every instance, conduct that constitutes an international human rights violation is also cognizable as wrongful conduct under domestic or foreign tort laws. Invoking state law in pursuit of human rights is not novel.[40] As discussed below, there are dozens of

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[38] *See, e.g.*, Balintulo v. Daimler AG, 727 F.3d 174, 189–93 (2d Cir. 2013); Adhikari v. Daoud & Partners, No. 4:09-CV-1237, 2014 WL 198305, at *3 (S.D. Tex. Jan. 15, 2014); *In re* S. African Apartheid Litig., No. 02 MDL 1499(SAS), 2013 WL 6813877, at *1–2 (S.D.N.Y. Dec. 26, 2013); Tymoshenko v. Firtash, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *3–4 & n.5 (S.D.N.Y. Aug. 28, 2013); Adhikari v. Daoud & Partners, No. 09-cv-1237, 2013 WL 4511354, at *7 (S.D. Tex. Aug. 23, 2013); Kaplan v. Cent. Bank, No. 10-483(RCL), 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013); Sexual Minorities Uganda v. Lively, No. 12-cv-30051-MAP, 2013 WL 4130756, at *13–15 (D. Mass. Aug. 14, 2013); Giraldo v. Drummond Co., No. 2:09-CV-1041-RDP, 2013 WL 3873960, at *5–6 & n.4, *8–9 & n.6 (N.D. Ala. July 25, 2013); Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 858, 865–67 (E.D. Va. 2013); *see also* Roger Alford, Kiobel *Insta-Symposium: Interpreting "Touch and Concern,"* OPINIO JURIS (Apr. 19, 2013, 9:59 AM), http://opiniojuris.org/2013/04/19/kiobel–insta–symposium–interpreting–touch–and–concern/ (discussing *Kiobel*'s reliance on *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), in interpreting when claims touch and concern the territory of the United States with sufficient force to displace the presumption). *But see* Ahmed v. Magan, No. 2:10-cv-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013) (holding the presumption against extraterritoriality was overcome by the defendant's status as a permanent resident of the United States), *report and recommendation adopted*, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013).

[39] Another possibility is the Torture Victim Protection Act, but that statute is of limited use because it applies only to torture and extrajudicial killings and because it precludes claims against governments, corporations, and nongovernmental entities. *See* 28 U.S.C. § 1350 note (2012) (Torture Victim Protection); Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710–11 (2012) (holding that claims against an "individual" within the meaning of the statute are limited to natural persons). For a discussion of the limits of pursuing human rights under other federal or state statutes, see Alford, *supra* note 35; Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After* Kiobel*—International Human Rights Litigation in State Courts and Under State Law*, 3 UC IRVINE L. REV. 1, 4–5 (2013). For a discussion about pursuing human rights claims as either federal or state common law causes of action, see Colangelo, *supra* note 35; Roger Alford, *Does the Presumption Against Extraterritoriality Apply to the ATS or the Underlying Federal Common Law Claims?*, OPINIO JURIS (Jan. 24, 2014, 12:11 AM), http://opiniojuris.org/2014/01/24/presumption-extraterritoriality-apply-ats-federal-common-law-claims/; Anthony Colangelo, Kiobel *and Conflicts of Law*, OPINIO JURIS (Jan. 28, 2014, 4:10 PM), http://opiniojuris.org/2014/01/28/guest-post-colangelo-kiobel-conflicts-law/; and William S. Dodge, *The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), http://opiniojuris.org/2014/01/28/guest-post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/.

[40] Even at the time the ATS was enacted, Congress recognized that redress in state courts was available for intentional torts, including claims by aliens against aliens. *See* Bellia & Clark, *supra* note 13, at 450–51, 520; *see also* Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 UC IRVINE L. REV. 81, 84–86 (2013) (discussing transitory tort claims filed in state courts in the late eighteenth century).

human rights cases that have alleged common law tort violations.[41] Indeed, the facts of *Kiobel* represent an example of plaintiffs alleging state and foreign tort law violations in addition to ATS claims.[42] This practice of relying on state tort laws to press human rights claims has been almost completely ignored by the legal academy,[43] and no scholarship has analyzed the choice-of-law questions presented by such human rights litigation. The predicate question for the application of tort laws is which law should be applied? That question depends on the forum's application of choice-of-law principles.

II. THE CHOICE-OF-LAW MAZE

The future of human rights litigation in the United States requires the reframing of human rights violations as common law torts. Plaintiffs are already signaling their embrace of state tort laws in lieu of the ATS,[44] and corporate defendants are anxiously wondering, "If the ATS cannot rule the world, how can state law rule the world?"[45] The answer is that state law will not "rule the world," assuming courts undertake a proper choice-of-law analysis. After *Kiobel*, whether to apply state or foreign tort law will be a central question, perhaps *the* central question, in future human rights litigation in the United States. With the demise of the ATS, the choice of the appropriate

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[41] In addition to the terrorism cases alleging common law tort violations discussed in Part III, there are dozens of ATS cases that have alleged common law tort claims. *See, e.g.*, Al Shimari v. CACI Int'l, Inc., 679 F.3d 205, 209 (4th Cir. 2012); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013); Saleh v. Titan Corp., 580 F.3d 1, 3 (D.C. Cir. 2009); Aldana v. Del Monte Fresh Produce N.A., 578 F.3d 1283, 1287 (11th Cir. 2009); Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169, 171, 172 n.5 (3d Cir. 2009); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1258 (11th Cir. 2009), *abrogated by Mohamad*, 132 S. Ct. 1702; Sahu v. Union Carbide Corp., 548 F.3d 59, 61 (2d Cir. 2008); Abagninin v. Amvac Chem. Corp., 545 F.3d 733, 735 (9th Cir. 2008); Arias v. DynCorp, 928 F. Supp. 2d. 10, 14 (D.D.C. 2013); Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1064 (C.D. Cal. 2010), *vacated sub nom.* Doe I v. Nestle USA, Inc., 738 F.3d 1048 (2013); *In re* Chiquita Brands Int'l, Inc., 690 F. Supp. 2d 1296, 1300 (S.D. Fla. 2010); Hoffman & Stephens, *supra* note 6, at 10. *See generally* Drimmer & Lamoree, *supra* note 15 (discussing the ATS and the increasing number of transnational tort cases).

[42] *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 93–94 (2d Cir. 2000) (arising from the same set of facts as *Kiobel* and alleging both state and foreign tort law violations).

[43] For a recent symposium (in which the author presented a draft of this Article) on human rights in state courts and under state law, see Symposium, *Human Rights Litigation in State Courts and Under State Law*, 3 UC IRVINE L. REV. 1 (2013).

[44] *See, e.g.*, Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 858 (E.D. Va. 2013); Class Action Complaint at 55–64, Georges v. United Nations, No. 1:13-cv-07146-JPO (S.D.N.Y. Oct. 9, 2013); *cf.* Hoffman & Stephens, *supra* note 6, at 18 (noting that "state tort claims may . . . be significantly broader than ATS claims").

[45] DONALD EARL CHILDRESS III, U.S. CHAMBER INST. FOR LEGAL REFORM, SHOULD STATE LAW RULE THE WORLD? A CALL FOR CAUTION IN APPLYING STATE LAW TO TRANSNATIONAL TORT CASES 15 (2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/StateLawRuletheWorld.pdf.

tort law will be the fulcrum for resolving claims alleging transnational wrongful conduct.

Unfortunately, choice of law is one of the more complex subjects of transnational law, presenting a maze of confusing passages, wrong turns, and intersecting paths.[46] In the torts context, it is one of the few areas of law that requires an annual spreadsheet to simply comprehend the subject.[47] Rigid rules create harsh results, so in their place courts have adopted a labyrinth of confusing choice-of-law principles for the exercise of sound judgment.

The principal reason for this complexity is that the different approaches reflect different priorities.[48] Most jurisdictions focus on *relationships*, such that the law governing a dispute will be that of the jurisdiction that has the most significant relationship to the events or the parties.[49] Other jurisdictions focus on *territory*, so that the substantive law governing the dispute will be the law of the place of the wrong: *lex loci delicti*.[50] A few jurisdictions focus on *governmental interests*, with one version balancing competing interests[51] and the other focusing on the forum's interests.[52] Still fewer jurisdictions focus on *outcomes*, so that the law governing the dispute will be that which produces the best result.[53] Finally, a handful of jurisdictions do not focus on any one theme, but adopt an *eclectic* approach that combines elements of the other approaches.[54]

It should come as no surprise that choice of law is in such a state of confusion. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, federal courts defer to state choice-of-law rules, and state courts are free to balance

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[46] Writing over a half century ago, one scholar described the discipline as "a dismal swamp . . . inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

[47] *See, e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 309 tbl.1 (2012).

[48] For a detailed discussion of the various approaches, see PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS §§ 2.1–.27 (5th ed. 2010).

[49] *See infra* text accompanying notes 57–68.

[50] *See infra* text accompanying notes 69–75.

[51] *See infra* text accompanying notes 82–85.

[52] *See infra* text accompanying notes 86–89.

[53] *See infra* text accompanying notes 92–100.

[54] *See infra* text accompanying notes 101–06.

competing concerns as they see fit.[55] If state courts in fifty-two jurisdictions are free to pick and choose among various priorities, the possible solutions to the choice-of-law conundrum are almost immeasurable. With so many inputs, probability analysis would reveal literally hundreds of available outcomes. It is little wonder that even the most sophisticated jurists find it difficult to untie the Gordian knot.

Despite this invitation to Bedlam, courts have settled on a smaller menu of choices, such that today one can discern a distinct majority approach and a handful of minority positions. The remainder of this section briefly outlines the five choice-of-law approaches, an appreciation of which is essential before one can invoke choice of law to resolve transnational tort disputes.[56] Each approach has its own unique emphasis that determines whether foreign or domestic tort law should apply to resolve transnational human rights violations.

A. Majority Approach: Most Significant Relationship

A majority of states have adopted some version of the *Restatement (Second)* approach, applying the law of the jurisdiction that has the most significant relationship to the dispute.[57] Twenty-four jurisdictions have adopted this approach,[58] three other states have a truncated version of it,[59] and several others adopt an eclectic approach that incorporates elements of it.[60] As such, the majority approach is unmatched in its influence on modern choice-of-law jurisprudence.

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[55] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 74–77 (1938)) (holding that, in a diversity case, the district court must apply the choice-of-law rules of the state in which it sits).

[56] While there are choice-of-law summaries available, *see* HAY ET AL., *supra* note 48, §§ 2.01–.27; *see generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (6th ed. 2010), this Article focuses on the international application of these approaches.

[57] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

[58] These jurisdictions are Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, and Washington. *See* Symeonides, *supra* note 47, at 309 tbl.1.

[59] These jurisdictions—Indiana, North Dakota, and Puerto Rico—embrace the general rules of section 145 but not the principles of section 6. *See* Bonn v. P.R. Int'l Airlines, Inc., 518 F.2d 89, 91–92 (1st Cir. 1975); Simon v. United States, 805 N.E.2d 798, 800 (Ind. 2004); Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073–74 (Ind. 1987); Issendorf v. Olson, 194 N.W.2d 750, 755 (N.D. 1972); Fernández v. Am. Sur. Co. of N.Y., 93 P.R. 28, 46 (1966). *See generally* HAY ET AL., *supra* note 48, § 2.22 (discussing how Indiana, North Dakota, and Puerto Rico have adopted the so-called significant contacts approach).

[60] *See infra* text accompanying notes 101–06.

Under this approach courts combine almost a dozen incongruent ingredients to achieve a palatable result. Seven disparate factors are considered in the analysis:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[61]

After mixing these together, courts combine other ingredients, considering a nonexhaustive list of contacts:

> (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.[62]

Finally, the *Restatement (Second)* suggests that courts apply various rebuttable presumptions. With torts involving personal injury or wrongful death, courts give presumptive weight to the place of injury.[63] Thus, if torture or extrajudicial killings are reframed as transnational torts, the presumption is that the *lex loci delicti* should control.[64]

Many courts emphasize the general sections over the presumptions, with the result that factors other than *lex loci delicti* often control.[65] This is particularly so when the parties share common domiciles but the injuries occur

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[61] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6(2). Not all of these factors require equal emphasis, particularly in the torts context. *Id.* § 145 cmt. b (explaining that the four factors of particular relevance in the torts context "are the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied").

[62] *Id.* § 145(2).

[63] *Id.* §§ 146, 156, 175.

[64] *See id.*

[65] *See, e.g.*, Jaiguay v. Vasquez, 948 A.2d 955, 973–76 (Conn. 2008); Veasley v. CRST Int'l, Inc., 553 N.W.2d 896, 897–99 (Iowa 1996); Collins v. Trius, Inc., 663 A.2d 570, 572–73 (Me. 1995); *In re* Estate of Blanton, 2001-CA-00264-SCT (¶¶ 11–15) (Miss. 2002); Burhenn v. Dennis Supply Co., 2004 SD 91, ¶¶ 24–28, 685 N.W.2d 778, 784–85; Gutierrez v. Collins, 583 S.W.2d 312, 318–19 (Tex. 1979); Forsman v. Forsman, 779 P.2d 218, 219–20 (Utah 1989); Myers v. Langlois, 721 A.2d 129, 132 (Vt. 1998); Miller v. White, 702 A.2d 392, 394–97 (Vt. 1997); Rice v. Dow Chem. Co., 875 P.2d 1213, 1217–19 (Wash. 1994).

elsewhere.[66] Other courts take the presumptions quite seriously, and typically apply the *lex loci delicti*.[67] In the international context in particular, courts favor the territorial presumption to limit the debilitating legal uncertainties that result if individuals carry their domiciliary law wherever they go.[68]

B. First Minority Approach: Lex Loci Delicti

The majority approach is the dominant methodology, but there are notable minority positions, and none is more significant than *lex loci delicti*. The focus of this approach is on territory, not relationships. Ten jurisdictions retain this traditional approach for torts.[69]

Under this traditional approach, adopted by the *Restatement (First)*, "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."[70] Because injury is necessary for liability, the traditional rule "applie[s] the law of the place where the injury occurred."[71] In most human rights cases—torture, extrajudicial killings, slavery, and terrorism—the place of wrongful conduct and injury will coincide.[72] Where the tort and injuries occur abroad, jurisdictions adopting the territorial test will resolve the dispute by applying the foreign law where the injuries occurred.[73]

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[66] *See, e.g.*, *Myers*, 721 A.2d at 132; *Miller*, 702 A.2d at 393, 397.

[67] *See, e.g.*, Clinton v. Enter. Rent-a-Car Co., 977 A.2d 892, 895–96 (Del. 2009); Bishop v. Fla. Specialty Paint Co., 389 So.2d 999, 1001 (Fla. 1980); Grover v. Isom, 53 P.3d 821, 824 (Idaho 2002); Townsend v. Sears, Roebuck & Co., 879 N.E.2d 893, 905 (Ill. 2007); Phillips v. Gen. Motors Corp., 2000 MT 55, ¶¶ 31–35, 298 Mont. 438, 995 P.2d 1002; Malena v. Marriott Int'l, Inc., 651 N.W.2d 850, 856–58 (Neb. 2002); P.V. v. Camp Jaycee, 962 A.2d 453, 461, 468 (N.J. 2008); Morgan v. Biro Mfg. Co., 474 N.E.2d 286, 289–90 (Ohio 1984).

[68] *See* Spinozzi v. ITT Sheraton Corp., 174 F.3d 842, 846 (7th Cir. 1999); *see also* Jack L. Goldsmith & Alan O. Sykes, Lex Loci Delictus *and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 HARV. L. REV. 1137, 1147 (2007) ("*Lex loci* eliminates . . . distorting economic effect by ensuring that all firms are subject to the same standard of liability for torts committed in a particular place.").

[69] These jurisdictions are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. *See* Symeonides, *supra* note 47, at 309 tbl.1.

[70] RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

[71] Sosa v. Alvarez-Machain, 542 U.S. 692, 705 (2004) (citing Richards v. United States, 369 U.S. 1, 11–12 (1962)). This rule occasionally will have curious results, particularly when the location of injury is fortuitous.

[72] In some cases, the wrongful conduct will be in one jurisdiction whereas the injuries will occur elsewhere. In such cases, the law of the place of injury usually will apply. *See* RESTATEMENT OF CONFLICT OF LAWS § 377 cmt. a, note 1.

[73] *See, e.g.*, Baker v. Booz Allen Hamilton, Inc., 358 F. App'x 476, 481 (4th Cir. 2009) (applying Kyrgyz law for injuries suffered in Kyrgyzstan); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 866 (S.D.N.Y. 1986) (explaining that where tort and subsequent injuries

To blunt the harsh results of a strict adherence to the *lex loci delicti* rule, jurisdictions apply various "escape devices," most notably an exception that precludes the application of foreign law if doing so offends the public policy of the forum.[74] When *lex loci delicti* dictates the application of foreign law, a court may refuse "to enforce a right of action which accrued under the law of another state" if the court concludes that "it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."[75] By grafting a public policy exception onto the traditional test, courts guarantee that the forum's fundamental interests are protected.

C. Second Minority Approach: Governmental Interests

The second minority approach focuses on the governmental interests at stake in the dispute. Interests flow out of the intersection of governmental policies and governmental relationships with the parties, events, or litigation.[76] As articulated by Brainerd Currie, choice of law is about balancing competing interests among jurisdictions that have a legitimate basis to effectuate their policies.[77] Under this approach, courts determine whether the forum has a

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occurred in India, jurisdictions adopting the traditional *lex loci delicti* test would apply Indian law), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987); Grimandi v. Beech Aircraft Corp., 512 F. Supp. 764, 780 (D. Kan. 1981) ("Under *lex loci delicti* the law of the place of accident (France) would govern."); Raskin v. Allison, 57 P.3d 30, 32 (Kan. Ct. App. 2002) ("We have no hesitation in finding that the *lex loci delicti* rule would apply in tort cases notwithstanding the injuries were incurred in a foreign country.").

[74] Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 4 (2002) ("[T]he remaining traditional states . . . continue to live with the traditional rules—by disingenuously evading them through trite and transparent escape devices."); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 1001–02 (1994) (explaining that, because the traditional approach did not produce predictability and ease of administration, courts developed escape devices, including the public policy exception).

[75] Rauton v. Pullman Co., 191 S.E. 416, 422 (S.C. 1937) (internal quotation mark omitted). For the most celebrated expression of the public policy exception, see Loucks v. Standard Oil Co., 120 N.E. 198, 201–02 (N.Y. 1918) ("We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.").

[76] A state has a governmental interest if it has "*(a)* a governmental policy and *(b)* a concurrent relationship with the parties, the events, or the litigation such as to provide a reasonable basis for application of the policy." BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 737 (1963). Because interests flow out of relationships, this approach overlaps with the majority approach.

[77] *See id.* at 177–87; *see also* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 952–56 (1994).

legitimate policy that would be advanced by application of its law.[78] If so, then they typically will apply forum law, whether or not another jurisdiction has a legitimate interest in the dispute.[79]

In practice, the governmental interest approach has at least two major variants. The *lexi fori* version, adopted by Kentucky and Michigan, gives presumptive weight to the forum's interests.[80] The other version, adopted by California and the District of Columbia, espouses an interest-balancing approach without an explicit forum preference.[81]

The *lex fori* version applied in Kentucky and Michigan presumes that forum law should apply unless there are valid reasons to do otherwise.[82] As long as the forum has "significant contacts—not necessarily the most significant contacts"—forum law should apply.[83] This presumption dictates the outcome in most cases, unless the connection is simply too remote to justify application of forum law.[84] However, where the tort occurs in another country and no party has a connection to the forum at the time of the tort, the presumption typically is overcome, resulting in the application of foreign law.[85]

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78 *See* CURRIE, *supra* note 76, at 183–84.

79 *See id.*

80 *See infra* text accompanying notes 82–85.

81 *See infra* text accompanying notes 86–89.

82 *See* Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972) ("When the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law."); Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 471 (Mich. 1997) ("[W]e will apply Michigan law unless a 'rational reason' to do otherwise exists."); *see also* Arnett v. Thompson, 433 S.W.2d 109, 113–14 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259, 260 (Ky. 1967).

83 *Foster*, 484 S.W.2d at 829; *see also* Brewster v. Colgate-Palmolive Co., 279 S.W.3d 142, 145 & n.8 (Ky. 2009) (applying Kentucky law because of significant contacts with Kentucky even though contacts with other jurisdictions were more significant); Bonnlander v. Leader Nat'l Ins. Co., 949 S.W.2d 618, 620 (Ky. Ct. App. 1996) (explaining that courts applying Kentucky's choice-of-law rule found that "any significant contact with Kentucky was sufficient to allow Kentucky law to be applied"), *abrogated by* State Farm Mut. Auto. Ins. Co. v. Marley, 151 S.W.3d 33 (Ky. 2004) *and* Phila. Indem. Ins. Co. v. Morris, 990 S.W.2d 621 (Ky. 1999). Michigan courts are less explicit in their preference for forum law, stating that courts should "apply the law of the forum unless important policy considerations dictate otherwise." *Sutherland*, 562 N.W.2d at 470–71; *see* Olmstead v. Anderson, 400 N.W.2d 292, 304 (Mich. 1987); *see also* Ammend v. BioPort, Inc., 322 F. Supp. 2d 848, 874–76 (W.D. Mich. 2004); Marks v. W. Side Unlimited Corp., 60 F. Supp. 2d 716, 718–21 (E.D. Mich. 1999).

84 *See* Sheldon v. PHH Corp., 135 F.3d 848, 852, 854 (2d Cir. 1998); Custom Prods., Inc. v. Fluor Daniel Can., Inc., 262 F. Supp. 2d 767, 771 (W.D. Ky. 2003); Radeljak v. DaimlerChrysler Corp., 719 N.W.2d 40, 46 (Mich. 2006) (per curiam); Hall v. Gen. Motors Corp., 582 N.W.2d 866, 868 (Mich. Ct. App. 1998).

85 *See* McGinnis v. Taitano, 3 F. Supp. 2d 767, 768–69 (W.D. Ky. 1998) (explaining where a tort occurred in Germany and the tortfeasor moved to Kentucky after the tort occurred, *lex loci delicti*, rather than *lex fori*, applied to the dispute); *cf.* Rutherford v. Goodyear Tire & Rubber Co., 943 F. Supp. 789, 792 (W.D.

The other variant engages in explicit interest balancing. Under California's comparative impairment approach, courts consider whether there is a true conflict between affected states and apply "the law of the state whose interest would be the more impaired if its law were not applied."[86] Courts favor forum law when (1) the forum has an interest in the dispute and the laws of other affected jurisdictions are not different or (2) when the laws are different and the interests of the forum would be more impaired than the interests of the other jurisdiction.[87] Similarly, the District of Columbia applies forum law when the forum has an interest in the dispute and the foreign state does not have a greater interest in the controversy.[88] The focus of both is not which law manifests the "'better' or the 'worthier' social policy," but rather "'which state's interest would be more impaired if its policy were subordinated to the policy of the other state.'"[89]

Under either variant, courts have officially eschewed a strict preference for forum law. The *lex fori* approach requires more than a passing interest, while the comparative impairment approach will apply forum law only if the forum's interests are greater than the interests of other relevant jurisdictions. Of course, the primacy to be given any particular interest at any particular time is ad hoc and idiosyncratic. The forum court is free to subjectively identify and compare governmental interests and base those interests on virtually any nexus to the forum.[90] Moreover, in many cases "false conflicts" will result in the

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Ky. 1996) (finding that Kentucky had a minimal interest in the dispute between the non-domiciliary plaintiff and defendant arising from an accident that occurred in Indiana), *aff'd mem.*, 142 F.3d 436 (6th Cir. 1998).

86 Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 922 (Cal. 2006) (quoting Bernhard v. Harrah's Club, 546 P.2d 719, 723 (Cal. 1976)) (internal quotation marks omitted).

87 *See id.* ("[T]he governmental interest approach generally involves three steps. First, the court determines whether the relevant law of each of the potentially affected jurisdictions . . . is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest . . . to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction . . . and then ultimately applies 'the law of the state whose interest would be the more impaired if its law were not applied.'" (quoting *Bernhard*, 546 P.2d at 723)); *see also* Hurtado v. Superior Court, 522 P.2d 666, 669–74 (Cal. 1974). Conversely, courts will apply the law of the other affected jurisdiction if that law is different from California law and its interest would be comparatively more impaired. *See* Reich v. Purcell, 432 P.2d 727, 729–31 (Cal. 1967).

88 *See* Biscoe v. Arlington Cnty., 738 F.2d 1352, 1360 (D.C. Cir. 1984); *In re* Air Crash Disaster near Saigon, S. Viet. on Apr. 4, 1975, 476 F. Supp. 521, 526 (D.D.C. 1979); Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman, 491 A.2d 502, 509 (D.C. 1985); Williams v. Williams, 390 A.2d 4, 5–6 (D.C. 1978).

89 McCann v. Foster Wheeler LLC, 225 P.3d 516, 533 (Cal. 2010) (quoting *Kearney*, 137 P.3d at 922).

90 *See, e.g.*, Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 469–70 (Mich. 1997) ("[C]ourts may not be doing what they purport to do, that is, employing the modern choice-of-law theories in a neutral way to determine what law applies. Rather, . . . courts employing the new theories have a very strong preference for forum law that frequently causes them to manipulate the theories so that they end up applying forum law."); Hall v. Gen. Motors Corp., 582 N.W.2d 866, 869 (Mich. Ct. App. 1998) (explaining that, in

application of forum law.[91] The practical result is the frequent application of forum law.

D. Third Minority Approach: The Better Law

The third minority approach focuses on preferred outcomes, pursuing the better law to achieve individual justice in particularized cases.[92] This approach allows courts in these jurisdictions to avoid archaic and unfair laws by choosing the law that "make[s] good socio-economic sense for the time when the court speaks."[93] The best way to achieve the right result is to choose the right set of rules. As Robert Leflar put it, "[t]he urge to do justice in the individual case is amply cared for by a wise choice of the better law to govern the parties' claims."[94]

Courts occasionally downplay the search for the better law, concluding that "[s]ometimes different laws are neither better nor worse in an objective way, just different."[95] Moreover, courts routinely apply laws that do not achieve

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cases involving foreign torts and forum domiciliary defendants, Michigan had no interest in affording greater recoveries to the North Carolina residents than those afforded under the other jurisdiction's law).

[91] For a discussion of false conflicts, see DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 64 (1965); SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 21 (2006); Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 892–94 (2009); Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177, 1188–89 (2005); and Peter Kay Westen, *False Conflicts*, 55 CALIF. L. REV. 74, 76–78 (1967).

[92] This approach has been adopted in five jurisdictions: Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. *See* Symeonides, *supra* note 47, at 309 tbl.1.

[93] Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966) [hereinafter Leflar, *More on Choice-Influencing Considerations*]; *see also* Hughes v. Wal-Mart Stores, Inc., 250 F.3d 618, 621 (8th Cir. 2001); Klimstra v. Granstrom, 95 F.3d 686, 690–91 (8th Cir. 1996); Nesladek v. Ford Motor Co., 46 F.3d 734, 741 (8th Cir. 1995); Bourgeois v. Vanderbilt, 639 F. Supp. 2d 958, 964 (W.D. Ark. 2009), *aff'd*, 417 F. App'x 605 (8th Cir. 2011); Med. Graphics Corp. v. Hartford Fire Ins. Co., 171 F.R.D. 254, 263 (D. Minn. 1997); Schubert v. Target Stores, Inc., 201 S.W.3d 917, 923 (Ark. 2005); Gomez v. ITT Educ. Servs., Inc., 71 S.W.3d 542, 548 (Ark. 2002); Schlemmer v. Fireman's Fund Ins. Co., 730 S.W.2d 217, 219 (Ark. 1987); Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 457–58 (Ark. 1977); Jepson v. Gen. Cas. Co. of Wis., 513 N.W.2d 467, 473 (Minn. 1994); Bigelow v. Halloran, 313 N.W.2d 10, 13 (Minn. 1981); Ferren v. Gen. Motors Corp. Delco Battery Div., 628 A.2d 265, 269 (N.H. 1993); Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1195–97 (N.H. 1988); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 302 (1966) [hereinafter Leflar, *Choice-Influencing Considerations*]. *See generally* Robert A. Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 ARK. L. REV. 199 (1974) (discussing "choice-influencing considerations," including the consideration of the "better law").

[94] Leflar, *Choice-Influencing Considerations*, *supra* note 93, at 302.

[95] *Jepson*, 513 N.W.2d at 473; *see also Nesladek*, 46 F.3d at 741; Kenna v. So-Fro Fabrics, Inc., 18 F.3d 623, 627 (8th Cir. 1994); Schiele v. Charles Vogel Mfg. Co., 787 F. Supp. 1541, 1554 n.13 (D. Minn. 1992).

individualized justice when other considerations are weighed in the balance.[96] Thus, where an American citizen domiciled in the United States is injured by a Brazilian airline on a flight in Brazil, concerns for the maintenance of international order ordinarily will trump a state court's conclusion that forum law is superior.[97] As such, "better law" approaches incorporate themes present in other approaches, often resembling the majority or eclectic approaches.

The "better law" approach allows courts to identify and apply emerging trends and forgo the application of laws that are in decline.[98] Courts—particularly lower state courts or federal courts applying state law—can do justice in the individual case and nod in the direction of change without actually changing the common law.[99] This approach strikes a middle path between ossified rules and boundless principles, giving courts a narrow window to pursue justice within the confines of the best available laws.[100]

E. Fourth Minority Approach: Eclecticism

The final minority approach is an eclectic one that combines previous approaches in various permutations.[101] The most notable example of this eclectic approach is New York's choice-of-law analysis, which is a fact-intensive examination of governmental interests and significant contacts. As articulated in *Neumeier v. Kuehner*, New York courts divide torts into cases of

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[96] Other "choice-influencing" factors include "A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; [and] D. Advancement of the forum's governmental interests." Leflar, *Choice-Influencing Considerations*, *supra* note 93, at 282; *see also, e.g.*, *Klimstra*, 95 F.3d at 690–91; *Gomez*, 71 S.W.3d at 548; *Ferren*, 628 A.2d at 269.

[97] *See* Leflar, *More on Choice-Influencing Considerations*, *supra* note 93, at 1596–98 ("The forum court probably will not really prefer Brazil's law, but the balance of considerations will nevertheless impel it to apply the disliked law.").

[98] *See* Hunker v. Royal Indem. Co., 204 N.W.2d 897, 906 (Wis. 1973).

[99] *See* Gravina v. Brunswick Corp., 338 F. Supp. 1, 6 (D.R.I. 1972) (deciding, under Rhode Island's "better law" approach, to apply Illinois law to recognize the emerging tort of invasion of privacy because such a tort "[was] destined for universal recognition" because it was "founded in the most basic concepts of human rights").

[100] *See* Heath v. Zellmer, 151 N.W.2d 664, 671 (Wis. 1967) (holding that in adopting the "better law" approach, the court is "obliged to avoid those that represent the Scylla of new jurisdiction selecting rules and the Charybdis of those whose latitude is so boundless as to be no guide at all. The latter, while philosophically sound, are of little help to the busy judge or lawyer, and the former, though tranquilizing in their assuring certainty, are perilously close to the ossified rules of *lex loci* that we have so recently rejected").

[101] Six jurisdictions—Hawaii, Louisiana, Massachusetts, New York, Oregon, and Pennsylvania—embrace a combined modern approach that incorporates elements of the other approaches. *See* Symeonides, *supra* note 47, at 309 tbl.1.

common and split domiciles.[102] When the parties have the same domicile, the court pronounces a categorical rule that the law of the common domicile should control the outcome of the case.[103] Where the plaintiff and defendant have different domiciles, however, the center of gravity shifts and the courts apply a presumption favoring *lex loci delicti*, which may be overcome by balancing various governmental interests.[104] Grafted onto this territorial presumption and interest analysis is a public policy escape, which may preclude enforcement of foreign law where the forum has sufficient interest in the outcome of the case.[105]

In practice, the *Neumeier* approach means that, with split domiciles, the locus of the tort and resulting injury is presumptively appropriate, but courts can pick and choose among available governmental interests as well as New York public policy to apply a different law.[106] In the international human rights context, courts applying this eclectic approach will rarely encounter common domiciliaries committing wrongful conduct outside their common jurisdiction. Most human rights cases default to *Neumeier* rules that presume *lex loci delicti*.

Having briefly summarized these six distinctive choice-of-law approaches, the next Part examines notable instances in which these approaches have been applied in the international terrorism context. The success of transnational tort

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[102] *See* 286 N.E.2d 454, 457–58 (N.Y. 1972); *see also* Gould Elecs. Inc. v. United States, 220 F.3d 169, 184 (3d Cir. 2000); Edwards v. Erie Coach Lines Co., 952 N.E.2d 1033, 1037 (N.Y. 2011); Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 281 (N.Y. 1993); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684 (N.Y. 1985).

[103] *See Neumeier*, 286 N.E.2d at 457 ("When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest." (quoting Tooker v. Lopez, 249 N.E.2d 394, 404 (N.Y. 1969) (Fuld, C.J., concurring)) (internal quotation mark omitted)).

[104] *See id.* at 457–58 ("2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense. 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." (quoting *Tooker*, 249 N.E.2d at 404) (internal quotation marks omitted)).

[105] *See Edwards*, 952 N.E.2d at 1043–44; *Schultz*, 480 N.E.2d at 687–88.

[106] *See Schultz*, 480 N.E.2d at 687–89. For an instance in which application of New York public policy controlled the result, see *Begley v. City of New York*, 878 N.Y.S.2d 770, 771 (N.Y. App. Div. 2009).

law to resolve international terrorism cases portends the likelihood of similar success with respect to other human rights claims. If international terrorism can be treated as garden-variety torts, there is nothing to prevent human rights victims of other international violations from following the example.

III. TERRORIST ATTACKS AS TRANSNATIONAL TORTS

The most notable example of the application of choice-of-law principles to the human rights context is with respect to international terrorism. These cases illustrate the different choice-of-law approaches, and how those approaches have applied domestic and foreign tort laws to secure dozens of successful judgments.

This Part begins with a detailed analysis of the District of Columbia's choice-of-law approach in resolving dozens of international terrorism cases. The governmental interests at stake with international terrorism invariably dictate the choice of applicable law. It then contrasts that approach with New York's eclectic approach.

The terrorism cases are unusual in that the vast majority have been adjudicated in either the District of Columbia or New York, thereby limiting the analysis to two minority approaches. They also are unusual in that the governmental interests at stake are paramount and unlikely to be replicated with other human rights claims. Nonetheless, these cases exemplify the efficacy of using choice-of-law analysis and garden-variety tort laws to redress grave human rights abuses.

A. Terrorism and the Governmental Interest Analysis

In the past fifteen years, federal courts in the District of Columbia have applied the governmental interest analysis to award billions of dollars to victims of terrorism.[107] They typically have done so by invoking choice-of-law

[107] *See infra* note 176 and accompanying text. While most of these cases resulted in default judgments, under the Foreign Sovereign Immunity Act's terrorism exception, "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e) (2012); *see also* Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 838–39 (D.C. Cir. 2009); Taylor v. Islamic Republic of Iran, 811 F. Supp. 2d 1, 6 (D.D.C. 2011); Belkin v. Islamic Republic of Iran, 667 F. Supp. 2d 8, 20 (D.D.C. 2009). Plaintiffs have the burden of establishing all elements of their claim and courts must consider all relevant defenses. Although Iran often does not appear as a defendant, claims have been dismissed in a number of these cases. *See, e.g.*, Roeder v. Islamic Republic of Iran, 333 F.3d 228, 230 (D.C. Cir. 2003); Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 359 (D.D.C. 2006).

principles to apply domestic tort law to redress foreign terrorist attacks. In most cases, the state tort law of the decedents' domicile has controlled. Thus, when a suicide bomber kills Americans in Israel, Lebanon, or Nigeria, it is Illinois, Louisiana, or Nebraska law that is applied to hold the perpetrators accountable.

The catalyst for terrorism litigation was a federal statute permitting civil suits against state sponsors of terrorism when that terrorism causes personal injury or death "by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act."[108] Another statute—the "Flatow Amendment"—conferred a private right of action against any official, employee, or agent of a state sponsor of terrorism.[109] These statutes were a watershed moment, creating the first human rights exception to sovereign immunity, thereby removing the most important impediment to successful litigation against state sponsors of terrorism.

For years, federal courts assumed that these statutes created a federal cause of action.[110] In 2004, the D.C. Circuit in *Cicippio-Puelo v. Islamic Republic of Iran* found that the amendment "merely waives the immunity of a foreign state without creating a cause of action against it."[111] The court went further and held that "action[s] against officials, employees, and agents of foreign states . . . [were] limited to claims against those officials in their *individual*, as opposed to their official, capacities."[112] Having found that federal law only waived immunity and granted jurisdiction against the state, the court remanded the case "to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law."[113]

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[108] 28 U.S.C. § 1605(a)(7) (2006) (repealed 2008).

[109] *See* 28 U.S.C. § 1605 note (2012); Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 269 (D.D.C. 2003).

[110] *See, e.g.*, *Campuzano*, 281 F. Supp. 2d at 269; Dammarell v. Islamic Republic of Iran (*Dammarell I*), 281 F. Supp. 2d 105, 193 (D.D.C. 2003), *vacated*, 404 F. Supp. 2d 261 (D.D.C. 2005); Regier v. Islamic Republic of Iran, 281 F. Supp. 2d 87, 98 (D.D.C. 2003), *abrogated by* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004), *superseded by statute*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, *as recognized in* Gates v. Syrian Arab Republic, 646 F.3d 1 (D.C. Cir. 2011); Kilburn v. Republic of Iran, 277 F. Supp. 2d 24, 36–37 (D.D.C. 2003), *abrogated by Cicippio-Puleo*, 353 F.3d 1024; Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 230–31 (D.D.C. 2002), *abrogated by Cicippio-Puleo*, 353 F.3d 1024.

[111] 353 F.3d at 1033.

[112] *Id.* at 1034.

[113] *Id.* at 1033, 1036.

Several months later, the D.C. Circuit in *Acree v. Republic of Iraq* clarified the *Cicippio-Puleo* ruling, emphasizing that pleading "generic common law torts," such as assault and battery or wrongful death, was insufficient, and that a plaintiff "must identify a particular cause of action arising out of a specific source of law."[114]

Following *Cicippio-Puleo* and *Acree*, claimants in dozens of cases amended their complaints to plead violations of state or federal law. The federal law claims were unsuccessful because courts could not apply relevant federal statutes[115] and were reluctant to create federal common law tort claims.[116] The only viable alternative was to invoke choice-of-law principles and apply state or foreign tort law.

The first decision following *Cicippio-Puleo* and *Acree* to address this choice-of-law question arose out of the 1983 bombing of the U.S. Embassy in Beirut, Lebanon, the first large-scale terrorist attack against the United States. In *Dammarell v. Islamic Republic of Iran*, over eighty U.S. citizens sued Iran and the Iranian intelligence agency for their role in the embassy bombing.[117] The court applied the District of Columbia's governmental interest analysis to determine whether to apply District of Columbia, Lebanese, or plaintiffs' domiciliary law.[118] Among those options, the court concluded that the interests

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[114] Acree v. Republic of Iraq, 370 F.3d 41, 59 (D.C. Cir. 2004), *abrogated by* Republic of Iraq v. Beaty, 556 U.S. 848 (2009).

[115] The ATS foreclosed American claims and the Torture Victim Protection Act foreclosed claims against sovereign defendants. *See, e.g.*, 28 U.S.C. § 1350 (2012); Holland v. Islamic Republic of Iran, 496 F. Supp. 2d 1, 17–19 (D.D.C. 2005) (citing Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003)).

[116] *See, e.g.*, *Holland*, 496 F. Supp. 2d at 19–20.

[117] *See Dammarell II*, No. Civ.A. 01-2224JDB, 2005 WL 756090, at *1 (D.D.C. Mar. 29, 2005); *see also* Dammarell v. Islamic Republic of Iran (*Dammarell III*), 370 F. Supp. 2d 218, 220 (D.D.C. 2005); Dammarell v. Islamic Republic of Iran (*Dammarell IV*), 404 F. Supp. 2d 261, 270 (D.D.C. 2005). The original *Dammarell* decision was rendered before, and vacated by, *Dammarell IV*. *See Dammarell I*, 281 F. Supp. 2d 105 (D.D.C. 2003), *vacated*, 404 F. Supp. 2d 261. *Dammarell II* was an unpublished opinion, but its reasoning was expressly adopted in *Dammarell III*, *Dammarell IV*, and several other published opinions. *See, e.g.*, Nikbin v. Islamic Republic of Iran, 517 F. Supp. 2d 416, 426 (D.D.C. 2007); Bennett v. Islamic Republic of Iran, 507 F. Supp. 2d 117, 126 (D.D.C. 2007); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 54 (D.D.C. 2006); Greenbaum v. Islamic Republic of Iran, 451 F. Supp. 2d 90, 101–02 (D.D.C. 2006); Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74, 83 (D.D.C. 2006); Prevatt v. Islamic Republic of Iran, 421 F. Supp. 2d 152, 159 (D.D.C. 2006); *Holland*, 496 F. Supp. at 23–24; Price v. Socialist People's Libyan Arab Jamahiriya, 384 F. Supp. 2d 120, 132–33 (D.D.C. 2005); Salazar v. Islamic Republic of Iran, 370 F. Supp. 2d 105, 113–14 (D.D.C. 2005).

[118] *See Dammarell II*, 2005 WL 756090, at *18. While the District of Columbia has adopted a governmental interest approach, courts often add a "most significant relationship" gloss to the governmental interest analysis. *See* Drs. Groover, Christie & Merritt, P.C. v. Burke, 917 A.2d 1110, 1117 (D.C. 2007) (quoting Hercules & Co. v. Shama Rest. Corp., 566 A.2d 31, 41 & n.18 (D.C. 1989)) (internal quotation marks

of the domiciliary state should prevail.[119] The District of Columbia had little interest in the case, the court reasoned, with almost all of the plaintiffs residing outside the District of Columbia, the attack occurring overseas, and the defendants having no particular connection with the forum.[120] As between Lebanese law and domiciliary law, the court had to balance "the strong and recognized interest of the domicile state in ensuring that its citizens are compensated for harm, and the intrinsic interest of the lex loci in deterring attacks within its jurisdiction."[121] The governmental interests at stake in the terrorist attack were decisive:

> [T]he particular characteristics of this case heighten the interests of a domestic forum and diminish the interest of the foreign state. The injuries in this case are the result of a state-sponsored terrorist attack on a United States embassy and diplomatic personnel. The United States has a unique interest in its domestic law, rather than the law of a foreign nation, determining damages in a suit involving such an attack. . . . [T]hese considerations . . . elevate the interests of the United States to nearly its highest point. . . . In the circumstances of this case . . . domestic law, and not the law of Lebanon, should control.[122]

Other courts have followed *Dammarell*'s reasoning, emphasizing that state-sponsored terrorism that targets U.S. citizens raises paramount governmental interests.[123] These courts justify the projection of state tort law overseas based on the protective principle of international law, which authorizes the

omitted); *see also* District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995). The law of the defendants' domicile was not considered. *See Dammarell II*, 2005 WL 756090, at *19. As to the possible application of Iranian law, see Reed v. Islamic Republic of Iran, 439 F. Supp. 2d 53, 65 n.5 (D.D.C. 2006) ("It is implausible to conclude that Congress would have passed § 1605(a)(7) to grant jurisdiction to federal courts over foreign . . . state sponsors of terrorism, only to require application of the law of such states . . . .").

119 *See Dammarell II*, 2005 WL 756090, at *19–20.

120 *Id.* at *19. Other courts depart from this reasoning and conclude that, while the District of Columbia shares with other U.S. jurisdictions concerns about protecting the United States' interests abroad, the jurisdiction with the most significant interest is the plaintiff's state of domicile. *Reed*, 439 F. Supp. 2d at 66.

121 *Dammarell II*, 2005 WL 756090, at *19.

122 *Id.* at *20.

123 *See, e.g.*, Kirschenbaum v. Islamic Republic of Iran, 572 F. Supp. 2d 200, 210 (D.D.C. 2008) ("[T]he law of the United States applies rather than the law of the place of the tort or any other foreign law. This is because the United States has a 'unique interest' in having its domestic law apply in cases involving terrorist attacks on United States citizens."); Price v. Socialist People's Libyan Arab Jamahiriya, 384 F. Supp. 2d 120, 133 (D.D.C. 2005) ("Like the embassy bombings that gave rise to the claims in *Dammerell* [sic], the state-sponsored torturing of plaintiffs . . . is the kind of harm that the United States has a state interest in discouraging.").

extraterritorial application of laws to redress the foreign conduct of foreign nationals directed against the state.[124]

There are several important aspects of these decisions. First, application of the District of Columbia's governmental interest analysis is unusually complex. As the District of Columbia Court of Appeals has emphasized, its choice-of-law analysis is a modified governmental interest approach.[125] That approach uses the governmental interest analysis but presumes that the jurisdiction whose policy would be most advanced by application of its law will be the forum with the most significant relationship.[126] With a terrorist attack, almost all of the contacts point toward the application of foreign law: the defendants are domiciled abroad, the injury and conduct occurred abroad, and the parties' relationship is centered there. Thus, to the extent the most significant relationship is a gloss on the governmental interest analysis, one would think it would have received greater attention. This is particularly so in some contexts, such as terrorist attacks in Israel, when the interests of the *lex loci* in combating terrorism are aligned with the interests of the United States.[127]

Second, in the typical domestic context, choice of law requires balancing the competing governmental interests of the several states. In these cases, by contrast, the courts compare the United States' interests in applying domestic law with a foreign state's interest in applying its law. The paramount governmental interest of the United States controls the choice-of-law outcome.[128] The courts aggregate the national interests rather than the individualized interests of the several states, and conclude that those interests prevail over competing foreign interests. As one court noted, each of the several states is "part of a larger jurisdiction—the United States—and share its interests in an internationally-oriented choice-of-law analysis."[129] This

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[124] *See Dammarell II*, 2005 WL 756090, at *20 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) (1987)); *see also* Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 266 (D.D.C. 2006); Wyatt v. Syrian Arab Republic, 398 F. Supp. 2d 131, 139 n.6 (D.D.C. 2005); *Price*, 384 F. Supp. 2d at 133.

[125] *See* Drs. Groover, Christie & Merritt, P.C. v. Burke, 917 A.2d 1110, 1117 (D.C. 2007); District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995); Hercules & Co. v. Shama Rest. Corp., 566 A.2d 31, 40–41 (D.C. 1989).

[126] *Drs. Groover, Christie & Merritt*, 917 A.2d at 1117; *Hercules*, 566 A.2d at 41.

[127] *See generally, e.g.*, Beer v. Islamic Republic of Iran, 574 F. Supp. 2d 1 (D.D.C. 2008) (involving a suicide bombing of a bus in Jerusalem); Greenbaum v. Islamic Republic of Iran, 451 F. Supp. 2d 90 (D.D.C. 2006) (involving a suicide bombing in a restaurant in Jerusalem).

[128] *See Dammarell II*, 2005 WL 756090, at *20.

[129] Reed v. Islamic Republic of Iran, 439 F. Supp. 2d 53, 66 (D.D.C. 2006).

approach would suggest that choice of law in the international context may require a different governmental interest analysis than that applied in the domestic context, on the theory that state tort laws are designed to protect national interests from foreign threats.

Third, if the paramount governmental interest is to prevent terrorism directed against the United States, one would think courts would distinguish between terrorist attacks directed at U.S. targets from other attacks.[130] Yet for years courts rarely distinguished between the two, applying domiciliary state tort law in cases involving terrorist attacks targeting the United States,[131] as well as terrorist attacks targeting other countries such as Lebanon,[132] France,[133] or Turkey.[134]

Courts finally began to recognize this distinction in 2008, concluding that foreign law should apply in the absence of a U.S. nexus.[135] For example, the

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[130] This is not to suggest there are no American interests at stake in such attacks. Courts could apply domestic tort law in such cases based on the "passive personality principle" that authorizes the regulation of foreign acts by foreign nationals that injure American nationals. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987).

[131] *See generally, e.g.*, *Beer*, 574 F. Supp. 2d 1 (applying Virginia and Ohio law to claims arising from a Hamas suicide bombing in Jerusalem); Rimkus v. Islamic Republic of Iran, 575 F. Supp. 2d 181 (D.D.C. 2008) (applying Missouri law to claims arising from the bombing of a U.S. military base in Saudi Arabia); Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229 (D.D.C. 2006) (applying state law to claims arising from the bombing of a U.S. military base in Saudi Arabia); *Greenbaum*, 451 F. Supp. 2d 90 (applying New Jersey and California law to claims arising from a restaurant bombing in Jerusalem).

[132] *See generally, e.g.*, *Dammarell IV*, 404 F. Supp. 2d 261 (D.D.C. 2005) (applying domiciliary state law to claims involving a vehicle explosion at a U.S. embassy in Lebanon); Salazar v. Islamic Republic of Iran, 370 F. Supp. 2d 105 (D.D.C. 2005) (applying Illinois tort law to claims arising from an embassy bombing in Lebanon).

[133] *See generally, e.g.*, Bakhtiar v. Islamic Republic of Iran, 571 F. Supp. 2d 27 (D.D.C. 2008) (granting, under domiciliary state tort law, damages following the assassination of an Iranian dissident in Paris).

[134] *See generally, e.g.*, Wyatt v. Syrian Arab Republic, 398 F. Supp. 2d 131 (D.D.C. 2005) (applying domiciliary state tort law to claims arising from the torture of tourists in Turkey to harm Turkish tourism, embarrass the Turkish government, and lure Turkish personnel into ambush).

[135] *See, e.g.*, Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 843 (D.C. Cir. 2009); Estate of Botvin *ex rel.* Ellis v. Islamic Republic of Iran, 772 F. Supp. 2d 218, 225 (D.D.C. 2011) ("[T]he court declined to give dispositive weight to the victim's nationality, as the plaintiffs and victim were domiciled in Israel at the time of the attacks, the attacks occurred in Israel, California's interest arose solely from the fact that the plaintiff was born and briefly resided there and the plaintiffs had produced 'no evidence that the terrorist attack was targeted specifically at U.S. nationals or was otherwise intended to affect the United States.'"); Wachsman *ex rel.* Wachsman v. Islamic Republic of Iran, 537 F. Supp. 2d 85, 95–96 (D.D.C. 2008) ("[T]he United States has a unique interest in applying its own law . . . to determine liability involved in a state-sponsored terrorist attack on one of its citizens, particularly when such an attack is directed against its national interests. . . . But with respect to wrongful death claims, Israel has a unique interest as well. . . . Here, the decedent suffered injury and death in Israel and lived his entire life in Israel. Thus, whether this court applies the law where decedent

D.C. Circuit in *Oveissi v. Islamic Republic of Iran* concluded that where (1) the victim assassinated in Paris was not an American national, (2) the object of the attack was an Iranian dissident living in France, (3) there was no evidence that the defendants knew the victim had any American connections, and (4) there was no evidence that the defendants were targeting the United States, "all of the relevant choice-of-law factors point to the application of French law to the plaintiff's claims."[136]

Finally, this analysis begs the question of which law should apply when terrorist attacks target the United States but the victims are foreign nationals. Beginning in 2011, federal courts addressing cases involving attacks on U.S. embassies in Lebanon, Kenya, and Tanzania applied District of Columbia choice-of-law principles and concluded that forum law should govern.[137] Several arguments supported this conclusion.[138] First, there was no "true conflict" between District of Columbia law and the laws of Lebanon, Kenya, and Tanzania, permitting the application of forum law.[139] Second, where an attack targets U.S. embassies, the United States has a "unique interest" in having domestic law instead of foreign law apply.[140] Third, the interests of

was domiciled at the time of his death, or the state where the injuries leading to death occurred, the law of Israel applies." (citations omitted)).

136 *Oveissi*, 573 F.3d at 843.

137 *See, e.g.*, Owens v. Republic of Sudan, 826 F. Supp. 2d 128, 154–57 (D.D.C. 2011) (involving attacks in Kenya and Tanzania); Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 22–23 (D.D.C. 2011) (involving an attack in Lebanon). In 2008, Congress amended the Foreign Sovereign Immunities Act to provide a cause of action for U.S. nationals and certain foreign nationals who were employees of the United States. 28 U.S.C. § 1605A(a)(2) (2012); *see also* Estate of Heiser v. Islamic Republic of Iran, 659 F. Supp. 2d 20, 23–24 (D.D.C. 2009); *In re* Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 58–60 (D.D.C. 2009); Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 65 (D.D.C. 2008), *aff'd*, 646 F.3d 1 (D.C. Cir. 2011). Some plaintiffs, such as foreign-national family members of victims, fell outside the scope of this new federal cause of action and therefore continued to pursue state tort claims. *See* Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 562, 568–69 (7th Cir. 2012) (applying Israeli law to a suit brought by the foreign-national family members of a U.S. citizen arising from a terrorist attack in Israel); *Owens*, 826 F. Supp. 2d at 151–53; *Estate of Doe*, 808 F. Supp. 2d at 20.

138 Many of these same arguments could be applied to claims brought by U.S. nationals in cases such as *Dammarell*, with the result that District of Columbia tort law could have been applied as the rule of decision in those cases as well.

139 *See Owens*, 826 F. Supp. 2d at 154–55 ("[N]o clear conflict of law is present between the laws of the forum (District of Columbia) and the laws of Kenya and Tanzania."); *Estate of Doe*, 808 F. Supp. 2d at 20–21 ("[N]o clear conflict of law is present between the forum (District of Columbia) and Lebanon.").

140 *See Owens*, 826 F. Supp. 2d at 155 ("The United States has a unique interest in its domestic law, rather than the law of a foreign nation, determining damages in a suit involving such an attack [on a U.S. embassy]." (quoting *Dammarell II*, No. Civ.A. 01-2224JDB, 2005 WL 756090, at *20 (D.D.C. Mar. 29, 2005)) (internal quotation mark omitted)); *Estate of Doe*, 808 F. Supp. 2d at 22 ("[T]he 'governmental interest' prong of the District of Columbia choice of law analysis counsels against applying the law of Lebanon, or other foreign laws, and suggests that domestic law should control.").

uniformity and efficiency supported reliance on forum law over the domiciliary laws of the foreign nationals.[141] Finally, a "unifying factor" favoring the application of forum law was that "all of plaintiffs' claims derive from employment with a federal agency headquartered in the District of Columbia, the seat of the federal government."[142]

In sum, courts applying the District of Columbia's modified governmental interest analysis have reached three distinct results. While these are not categorical rules,[143] Table 1 below represents the general parameters of the District of Columbia's terrorism choice-of-law jurisprudence. First, with respect to U.S. nationals, courts apply the state tort law of the plaintiff's domiciliary, whether or not an attack targeted the United States.[144] Second, courts apply forum law to foreign national claims arising from a terrorist attack targeting the United States. Third, courts apply foreign law to foreign national claims arising from an attack targeting other countries.

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[141] *See Owens*, 826 F. Supp. 2d at 156 ("[A]pplying District of Columbia law will provide greater uniformity of result, as individual plaintiffs domiciled in different states and foreign nations will all be subject to the same substantive law."); *Estate of Doe*, 808 F. Supp. 2d at 22–23 ("[T]he interests of uniformity of decision among the foreign national family members points to the application of the law of the forum. . . . [E]fficiency and uniformity are appropriate and meaningful factors in a choice of law analysis.").

[142] *Owens*, 826 F. Supp. 2d at 156; *Estate of Doe*, 808 F. Supp. 2d at 23.

[143] Estate of Botvin *ex rel.* Ellis v. Islamic Republic of Iran, 772 F. Supp. 2d 218, 225 (D.D.C. 2011).

[144] If a U.S. national does not have a U.S. domicile, courts have occasionally applied forum law, *see* Ben-Rafael v. Islamic Republic of Iran, 540 F. Supp. 2d 39, 54 (D.D.C. 2008); Haim v. Islamic Republic of Iran, 425 F. Supp. 2d 56, 69 (D.D.C. 2006), and have occasionally applied foreign domiciliary law, *see Botvin*, 772 F. Supp. 2d at 223–26; Wachsman *ex rel.* Wachsman v. Islamic Republic of Iran, 537 F. Supp. 2d 85, 95–96 (D.D.C. 2008).

Table 1

	UNITED STATES NATIONAL	**FOREIGN NATIONAL**
ATTACK TARGETING UNITED STATES	PLAINTIFF DOMICILIARY LAW	FORUM LAW
ATTACK TARGETING OTHER COUNTRIES	PLAINTIFF DOMICILIARY LAW	FOREIGN LAW

B. Terrorism and the Eclectic Approach

The District of Columbia's approach is the most important example for choice-of-law principles applied to adjudicate international terrorism. There are, however, a few terrorism cases that have been filed elsewhere, particularly New York, and these cases offer a useful prism for examining how other courts have resolved terrorism cases using other choice-of-law approaches.

The most sophisticated application of New York choice of law in the terrorism context arose from the bombing of Pan Am Flight 103 over Lockerbie, Scotland.[145] In the case of *Pescatore v. Pan American World Airways, Inc.*, the Second Circuit had numerous laws to choose from in resolving the dispute: (1) Pan Am's improper screening of luggage occurred in Germany or England, (2) the crash and resulting deaths occurred in Scotland, (3) the defendant was domiciled in New York, and (4) the plaintiff and decedent were domiciled in Ohio.[146] It thus presented an ideal laboratory for testing New York's choice-of-law approach in the terrorism context.

145 *See* Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1 (2d Cir. 1996).
146 *See id.* at 13–14.

Applying New York's eclectic approach, the Second Circuit recognized that where the injured party and the defendant had split domiciles "and the accident occurred in a third jurisdiction, the law of the place of the accident presumptively applie[d]."[147] But citing *Babcock v. Jackson*, the court concluded that this presumption made no sense where "the place of the crash is often random . . . and the sovereignty in which the accident occurs has little interest in applying its substantive law to the case."[148] This is particularly so when the question was one of allocating loss rather than the regulation of conduct. "[W]here no negligence or misconduct took place in Scotland, and where no damages were incurred in Scotland, there is really no reason . . . why the compensability of the plaintiff's damages should be governed by Scottish law."[149]

As between New York and Ohio law, the Second Circuit concluded that both jurisdictions had an interest in the case, but Ohio's interests were greater.[150] New York's interest in limiting a New York corporation's financial exposure was not significant in this case given an applicable federal law prohibiting punitive damages.[151] Ohio had an obvious interest in ensuring that its residents were fully and adequately compensated for tortious harm—loss of society, loss of financial support, and loss of services—occurring in Ohio. Applying New York's choice of law, Ohio tort law therefore governed.[152]

A different analysis applied where the concern was to regulate conduct instead of allocate losses. In *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, the Second Circuit addressed claims that American Express Bank Ltd., a correspondent bank of Lebanese Canadian Bank, SAL, provided wire transfer services to Hezbollah that facilitated the financing of terrorism in Israel.[153] Applying New York choice-of-law principles, the Second Circuit concluded that it should "give controlling effect to the law of the jurisdiction which,

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147 *Id.* at 13 (citing Neumeier v. Kuehner, 286 N.E.2d 454, 458 (N.Y. 1972)).

148 *Id.* (citing Babcock v. Jackson, 191 N.E.2d 279, 284 (1963)) (noting the "place of accident has little interest where it was a 'purely adventitious circumstance that the accident occurred there'" (quoting *Babcock*, 191 N.E.2d at 284)).

149 *Id.* at 14. Neither German nor English law was applied because those jurisdictions were not the "place of the wrong," which is determined by considering the last event necessary to make the actor liable, namely the injuries in Scotland. *See id.* at 13–14 (internal quotation marks omitted).

150 *Id.* at 14 (finding Ohio's "important and obvious interest in ensuring that its residents are fully and adequately compensated for tortious harm" outweighed New York's minimal "interest in regulating the extent to which New York-centered corporations may be held liable for excessive or punitive damages").

151 *See id.*

152 *See id.*

153 *See* 672 F.3d 155 (2d Cir. 2012).

because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[154] Under New York's eclectic approach, the court concluded that New York had the greatest interest in the litigation.

> All of the challenged conduct undertaken by AmEx occurred in New York, where AmEx is headquartered and where AmEx administers its correspondent banking services. Although the plaintiffs' injuries occurred in Israel, and Israel is also the plaintiffs' domicile, those factors do not govern where, as here, the conflict pertains to a conduct-regulating rule.[155]

Lower courts have followed suit. In *Wultz v. Bank of China Ltd.*, a federal district court addressed a Chinese bank's alleged financing of terrorism in Israel.[156] Relying on *Licci*, the district court concluded that Chinese law should be applied to resolve the dispute. Because under *Licci* it is the locus of defendant's conduct and not the locus of injury that controls, the court concluded that "China's interest in regulating bank conduct within its borders is dispositive."[157]

Licci and *Wultz* are in tension with other cases applying New York choice of law to resolve claims against owners and operators of the Twin Towers arising from the September 11 terrorist attacks.[158] The court concluded "that the state in which the tort took place ha[d] the strongest interest in applying its conduct-regulating rules."[159] New York law governed the question of whether owners negligently designed and maintained the Twin Towers because "New York ha[d] the strongest interest in applying its substantive law to define the issues of duty, proximate causation, and governmental immunity."[160]

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[154] *Id.* at 158 (quoting Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 337 (2d Cir. 2005)) (internal quotation marks omitted).

[155] *Id.* at 158.

[156] *See* 865 F. Supp. 2d 425 (S.D.N.Y. 2012).

[157] *Id.* at 429. The court noted that the locus of injury may still control in the absence of a third party's intervening criminal act. *See id.* at 429 n.28.

[158] *See In re* September 11 Litig. (*September 11th Litig. I*), 280 F. Supp. 2d 279 (S.D.N.Y. 2003). The court did not exclusively apply the forum's choice of law because federal law consolidated September 11 litigation in New York but mandated that the substantive law "be derived from the law, including choice of law principles, of the State in which the crash occurred." *See id.* at 287–89 (quoting Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001) (codified at 49 U.S.C. § 40101)) (internal quotation mark omitted).

[159] *Id.* at 289.

[160] *Id.* at 299.

In a subsequent ruling in the same case, the court applied New York choice of law to determine whether punitive damages were available against the airline carriers and security screening companies.[161] The court concluded that New York's interests were predominant:

> New York was the target of the terrorists. As long as it remains the commercial center of . . . the world, New York will be a target for terrorists. . . . The attack on the World Trade Center was an attack on the City of New York, the State of New York, and the United States . . . New York . . . has the greatest interest in applying its conduct-regulating law.[162]

Thus, although New York's conduct-regulating choice-of-law analysis ordinarily might point to the application of Massachusetts law (where the defendants failed to properly screen the terrorists), the court concluded that New York's interests in combatting terrorism prevailed over any other governmental interest.[163]

C. Terrorism and Various Other Approaches

Beyond the District of Columbia and New York, there have been a small handful of other cases that hint at how other jurisdictions might resolve terrorism cases. A federal court applying Virginia choice of law to the September 11 attacks on the Pentagon concluded without analysis that Virginia tort law should govern claims arising from the crash of American Flight 77 into the Pentagon.[164] Although offering little analysis, the result comports with Virginia's traditional *lex loci delicti* reasoning, focusing on the place of injury as the last event necessary to render the defendants liable.

With respect to Pennsylvania's choice-of-law approach, the court in an early September 11 case focused on "the substantive law of the state having the most interest in the outcome of the case."[165] Applying that standard led the

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[161] *See In re* September 11th Litig. (*September 11th Litig. II*), 494 F. Supp. 2d 232, 239 (S.D.N.Y. 2007).

[162] *Id.* at 239–40. It is not clear that a choice between the law of the place of the wrong (Massachusetts) and the place of the injury (New York) was necessary, given that neither jurisdiction allowed for punitive damages in this circumstance. *See id.*; *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243, 255 (2008). It appears, however, that the court was comparing not simply those two jurisdictions, but also the various jurisdictions where the plaintiffs and defendants were domiciled. *See September 11th Litig. II*, 494 F. Supp. 2d at 241.

[163] *See September 11th Litig. II*, 494 F. Supp. 2d at 240.

[164] *See September 11th Litig. I*, 280 F. Supp. 2d at 290, 305; *see also September 11th Litig. II*, 494 F. Supp. 2d at 240.

[165] *September 11th Litig. I*, 280 F. Supp. 2d at 305.

court to rely on Pennsylvania tort law to resolve claims relating to the crash of United 93 in Shanksville, Pennsylvania.[166]

In a subsequent case applying Pennsylvania choice of law to the question of whether compensatory damages were available, the court concluded that the law of the plaintiffs' domicile should apply.[167] Pennsylvania law should not govern that question because the location of the crash of United 93 was wholly "fortuitous."[168] While the defendants' domicile had an interest in maintaining the health and vitality of its companies and protecting those companies from undue and unpredictable liability, the court concluded that the governmental interest of the plaintiffs' domiciliary was predominant: "The interest of a plaintiff's domicile state in protecting the well-being of surviving dependents will be fully vindicated by application of its own law."[169]

Jurisdictions that apply the most significant relationship test have addressed a handful of terrorism cases. That test was applied in three terrorism cases arising in Florida and Illinois.[170] In *Leibovitch v. Islamic Republic of Iran*, the Seventh Circuit applying Illinois choice of law concluded that Israeli law should govern Israeli national claims against Iran for terrorism occurring in Israel.[171] In *In re Chiquita Brands International, Inc.* and *Saludes v. Republica de Cuba*, federal courts in Florida concluded that the plaintiffs' domiciliary law (Nebraska and Florida) should apply to claims of alleged Colombian and Cuban terrorism in Colombia and Cuba.[172] Finally, in *Estates of Ungar ex rel. Strachman v. Palestinian Authority* a federal court in Rhode Island applying Rhode Island choice of law concluded that Israeli law should resolve claims involving terrorist attacks in Israel against American nationals domiciled in Israel.[173] Although a "better law" jurisdiction, the court did not address which

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166 *Id.*

167 *See September 11th Litig. II*, 494 F. Supp. 2d at 241. There was no true conflict regarding the availability of punitive damages among the jurisdictions with an interest in regulating defendants' conduct. *See id.* at 241–42.

168 *Id.* at 243 (internal quotation marks omitted).

169 *Id.*

170 *See* Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 570–73 (7th Cir. 2012); *In re* Chiquita Brands Int'l, Inc., 690 F. Supp. 2d 1296, 1315–17 (S.D. Fla. 2010); Saludes v. Republica de Cuba, 577 F. Supp. 2d 1243, 1254 (S.D. Fla. 2008).

171 *See Leibovitch*, 697 F.3d at 570–73.

172 *See In re Chiquita Brands*, 690 F. Supp. 2d at 1315–17; *Saludes*, 577 F. Supp. 2d at 1254.

173 153 F. Supp. 2d 76, 82, 98–99 (D.R.I. 2001). After amending the complaint to incorporate Israeli law claims, the court subsequently concluded that the plaintiffs had asserted valid claims under Israeli law for, *inter alia*, negligence, assault, and various statutory violations. Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 228 F. Supp. 2d 40, 47–48 (D.R.I. 2002).

jurisdiction had the better law, or whether other "choice-influencing considerations" would have altered the result.[174]

Summarizing the approaches applied by other choice-of-law jurisdictions, these cases suggest that courts apply the *lex loci delicti* presumption subject to several caveats. Courts will apply plaintiffs' domiciliary law if the location of the attack was fortuitous or if the terrorism occurred in a jurisdiction complicit in the attack.[175] With respect to conduct-regulating rules, courts in New York ordinarily will apply the law of the place of wrongful conduct, but will apply the law of the place of injury if New York was the target of the attack. Finally, it remains unclear whether these courts will apply the *lex loci delicti* presumption to foreign terrorist attacks targeting the United States.

The complexity inherent in applying these choice-of-law approaches to international terrorism does not alter the simplicity of the central idea: grave human rights abuses have been litigated in domestic courts using conventional tort laws. The same approach is available for human rights abuses that heretofore have been resolved through ATS litigation.

IV. HUMAN RIGHTS VIOLATIONS AS TRANSNATIONAL TORTS

Recourse to state or foreign tort law has led courts to award billions of dollars in judgments to victims of terrorism.[176] With the demise of the ATS and the success of terrorism litigation, this Article posits that the time is ripe to reframe human rights violations as transnational torts. If so, how should choice of law be undertaken in the human rights context? This Part analyzes that question by considering how the divergent approaches might resolve choice-of-law questions in notable human rights cases.

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[174] A proper analysis of Rhode Island choice of law also would have considered Leflar's "choice-influencing considerations": "A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; D. Advancement of the forum's governmental interests; [and] E. Application of the better rule of law." Leflar, *Choice-Influencing Considerations*, *supra* note 93, at 282; *see* Victoria v. Smythe, 703 A.2d 619, 620–21 (R.I. 1997); Cribb v. Augustyn, 696 A.2d 285, 288 (R.I. 1997).

[175] This conclusion can only be inferred from *Saludes* and *In re Chiquita Brands*, because neither decision explains why it applied plaintiff domiciliary law instead of Cuban or Colombian law.

[176] *See* Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1122 (9th Cir. 2010) (discussing a multibillion dollar judgment against Iran); *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009) (discussing "10 billion dollars in currently outstanding" terrorism judgments against Iran); Bennett v. Islamic Republic of Iran, No. CV 11-80065 MISC CRB (NJV), 2011 WL 3157089, at *7 (N.D. Cal. July 26, 2011) (reporting a "staggering 9.6 billion dollars in outstanding judgments entered against Iran in terrorism cases as of August 2008").

A. Human Rights Test Cases

To test how choice-of-law questions might be resolved in other human rights contexts, we will apply the divergent approaches outlined in Part II to the facts of well-known human rights cases. These cases were chosen based on their particular nexus to the United States. Each scenario highlights how, depending on the circumstances, different choice-of-law approaches would result in the application of foreign or state tort law.

1. No Nexus. The first scenario arises from the facts alleged in *Kiobel v. Royal Dutch Petroleum Co.*, discussed above. Nigerian victims alleged human rights abuses, including torture, arbitrary detention, and crimes against humanity, perpetrated in Nigeria by the Nigerian government with the aid and assistance of non-American corporate defendants.[177] The *Kiobel* scenario assumes *no connection to a U.S. forum*, with foreign plaintiffs, foreign defendants, foreign misconduct, foreign injury, foreign governmental interests, and little or no forum interests at stake in the outcome of the proceedings.[178]

2. After-Acquired Plaintiff Nexus. The second scenario arises from the facts alleged in *Licea v. Curaçao Drydock Co*.[179] Cuban nationals domiciled in Florida alleged human rights abuses, including physical abuse, human trafficking, and forced labor, perpetrated in Curaçao by a Curaçaoan corporate

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[177] 133 S. Ct. 1659, 1662–63 (2013). There is ambiguity as to the residency status of the *Kiobel* plaintiffs. The case is a putative class action in which the named plaintiffs acquired U.S. residency after the alleged human rights abuses occurred, but the unnamed plaintiffs apparently remain Nigerian residents. *See id.*; Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013). For purposes of this Article, we treat the plaintiffs' status as nonresidents because that is the status of the majority of the plaintiffs, and choice-of-law analysis must be applied to all members of a class action. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–23 (1985). *See generally* Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008) (discussing how choice of law may influence forum selection in putative class actions).

[178] *See Kiobel*, 133 S. Ct. at 1662–63. There are numerous ATS cases that fit this pattern. *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 742, 744 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009); Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1063–64 (C.D. Cal. 2010) (noting that the defendants were foreign, with the exception of one corporate defendant, an American subsidiary), *vacated sub nom.* Doe I v. Nestle USA, Inc., 738 F.3d 1048 (2013); Chowdhury v. WorldTel Bangladesh Holding, Ltd., 588 F. Supp. 2d 375, 378 (E.D.N.Y. 2008); Roe I v. Bridgestone, 492 F. Supp. 2d 988, 990–92 (S.D. Ind. 2007) (noting that the defendants were foreign, with the exception of one corporate defendant, an American subsidiary); Doe v. Saravia, 348 F. Supp. 2d 1112, 1117 (E.D. Cal. 2004).

[179] *See* 584 F. Supp. 2d 1355, 1356–57 (S.D. Fla. 2008); *see also* Licea v. Curacao Drydock Co., 870 F. Supp. 2d 1360, 1362–63 (S.D. Fla. 2012); Licea v. Curacao Drydock Co., 794 F. Supp. 2d 1299, 1301 (S.D. Fla. 2011); Licea v. Curacao Drydock Co., 537 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008).

defendant.[180] The *Licea* scenario assumes a *plaintiff-based connection to a U.S. forum*, with foreign plaintiffs domiciled in the forum, a foreign defendant, foreign misconduct, foreign injury, and both foreign and forum interests in the outcome of the proceedings.[181]

3. Defendant Nexus/Deficient Law. The third scenario arises from the facts alleged in *Doe v. Unocal Corp*.[182] Burmese victims alleged human rights abuses, including extrajudicial killings, torture, and forced relocation, perpetrated in Burma by the Burmese government with the aid and assistance of an American corporation and its officers.[183] The *Unocal* scenario assumes a *defendant-based connection to a U.S. forum*, with foreign plaintiffs, American defendants, foreign misconduct, foreign injury, and both foreign and forum interests in the outcome of the proceedings.[184] The *Unocal* scenario further assumes a foreign law that is seriously deficient or unknowable, and that foreign governmental interests are illegitimate or contrary to traditional norms for wrongful conduct applied by the community of nations.[185]

4. Defendant and Conduct Nexus. The fourth scenario arises from the facts alleged in *Abagninin v. Amvac Chemical Corp*.[186] Ivory Coast victims alleged human rights abuses, including genocide and crimes against humanity, perpetrated by American corporations by knowingly designing, developing,

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[180] *Licea*, 870 F. Supp. 2d at 1362–63.

[181] *See id.* There are other ATS cases that fit this pattern. *See, e.g.*, Sikhs for Justice v. Nath, 850 F. Supp. 2d 435, 438 (S.D.N.Y. 2012). In some respects *Kiobel* fits this pattern because the named plaintiffs are Nigerian refugees located in the United States. *See supra* text accompanying note 177. In other cases, including well-known cases such as *Hilao* and *Filartiga*, both the plaintiffs and defendants acquired residency in the United States after the torts occurred. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 791 (9th Cir. 1996); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[182] *See* Doe I v. Unocal Corp., 395 F.3d 932, 936–97 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

[183] *See id.*

[184] There are numerous ATS cases that fit this pattern, at least with respect to a defendant-based nexus to the United States. *See, e.g.*, Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 14–15 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168–69 (2d Cir. 2009); Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 (2d Cir. 2003); Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002); Bigio v. Coca-Cola Co., 239 F.3d 440, 443 (2d Cir. 2001); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999); Bowoto v. Chevron Corp., 577 F. Supp. 2d 1080, 1083 (2008), *aff'd*, 621 F.3d 1116 (9th Cir. 2010). *Unocal* differs from most of these other cases in that Burmese law is seriously deficient or unknowable. *See infra* text accompanying note 185. *Unocal* is similar to some of these other cases in that the foreign government's interests may be illegitimate and out of step with the community of nations.

[185] *See Unocal*, 395 F.3d at 959.

[186] *See* 545 F.3d 733, 735–36 (9th Cir. 2008); *see also* Tanoh v. Dow Chem. Co., 561 F.3d 945, 950–51 (9th Cir. 2009) (concerning the same allegations of misconduct by the Dow Chemical Company in Ivory Coast).

and manufacturing in the United States various toxic pesticides that were banned in the United States and that caused sterility when used in banana and pineapple plantations in Ivory Coast.[187] The *Abagninin* scenario assumes a *defendant-based and conduct-based connection to a U.S. forum*, with foreign plaintiffs, domestic defendants, domestic misconduct, foreign injury, and both foreign and forum interests in the outcome of the proceedings.[188]

5. Plaintiff and Defendant Nexus. The fifth scenario arises from the facts alleged in *Corrie v. Caterpillar, Inc.*[189] American and Palestinian nationals alleged human rights abuses, including war crimes and extrajudicial killings, perpetrated by the Israeli Defense Forces and an American corporation following the demolition of Palestinian homes in Gaza using custom-made armored bulldozers manufactured in the United States.[190] The *Corrie* scenario assumes a *plaintiff-based and defendant-based connection to a U.S. forum*, with at least one domestic plaintiff, a domestic defendant, foreign misconduct, foreign injury, and both foreign and forum interests in the outcome of the proceedings.[191]

6. Conduct, Injury, and Defendant Nexus. The sixth scenario arises from facts alleged in *Jama v. Esmor Correctional Services, Inc.*[192] Foreign nationals alleged human rights abuses, including torture and cruel and inhumane treatment, perpetrated by an American corporation at an immigration deportation detention facility in New Jersey.[193] The *Jama* scenario assumes a

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[187] *Abagninin*, 545 F.3d at 735–36.

[188] *Id.* Although less common than other fact patterns, there are other ATS cases that fit this pattern. *See, e.g.*, Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 108 (2d Cir. 2008); Bano v. Union Carbide Corp., 361 F.3d 696, 702 (2d Cir. 2004).

[189] *See* 503 F.3d 974, 977 (9th Cir. 2007).

[190] *Id.*

[191] *See id.* There are other ATS cases that fit this pattern. *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., 578 F.3d 1283, 1286–87, 1293 (11th Cir. 2009); Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006); Jean v. Dorélien, 431 F.3d 776, 777–78, 783 (11th Cir. 2005); Hilao v. Estate of Marcos, 103 F.3d 789, 790–91 (9th Cir. 1996); Abebe-Jira v. Negewo, 72 F.3d 844, 845–46 (11th Cir. 1996); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). *Aldana* is unusual in that the plaintiffs and defendants had a common domicile in Florida, although the plaintiffs acquired it after the torts occurred. *See Aldana*, 578 F.3d at 1293, 1303. In *Arce*, *Jean*, *Hilao*, *Abebe-Jira*, and *Filartiga*, the plaintiffs and defendants acquired residency in the United States after the torts were committed. *See Arce*, 434 F.3d at 1256; *Jean*, 431 F.3d at 779; *Hilao*, 103 F.3d at 791; *Abebe-Jira*, 72 F.3d at 846; *Filartiga*, 630 F.2d at 878. In *Jean*, *Hilao*, and *Abebe-Jira*, that after-acquired jurisdiction was common between the parties, namely Florida, Hawaii, and Georgia, respectively. *See Jean*, 431 F.3d at 783; *Hilao*, 103 F.3d at 791; *Abebe-Jira*, 72 F.3d at 846.

[192] *See* 577 F.3d 169, 171–72 (3d Cir. 2009); *see also* Jama v. U.S. INS, 343 F. Supp. 2d 338, 345–46 (D.N.J. 2004); Jama v. U.S. INS, 334 F. Supp. 2d 662, 666 (D.N.J. 2004); Jama v. U.S. INS, 22 F. Supp. 2d 353, 358 (D.N.J. 1998).

[193] *See Jama*, 577 F.3d at 171.

conduct-based, injury-based, and defendant-based connection to a U.S. forum, with foreign plaintiffs, a domestic defendant, domestic misconduct, domestic injury, and both foreign and forum interests in the outcome of the proceedings.[194]

These six factual scenarios highlight typical facts in current human rights litigation. In each scenario, the nexus to the forum adjudicating the dispute is different, allowing one to test how each choice-of-law approach might assess the appropriate application of substantive tort law.[195] The tentative summary that follows suggests how complicated such a choice-of-law analysis might be. The result is the application of either domestic or foreign tort law, depending on the approach applied to the given facts.

These fact patterns are necessarily incomplete. They do not address some of the fact patterns discussed in traditional domestic choice-of-law commentary.[196] This omission is deliberate, reflecting the absence of such fact patterns in typical international human rights litigation. It is rare in human rights litigation, for example, that the plaintiff and defendant will have a common domicile but that the wrongful conduct and injury will occur outside their common domicile. Nor do these fact patterns fit the typical scenarios outlined in the terrorism context above. It is rare in human rights litigation for the defendant to commit human rights violations with the political objective of injuring the United States.

B. Human Rights and the Most Significant Relationship Approach

The most significant relationship test gives courts significant flexibility. To the extent courts apply the *lex loci delicti* presumption seriously, most of the six factual scenarios are easily resolved.[197] As discussed below, *lex loci delicti* results in the application of foreign tort law in at least four of the six factual

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[194] *See id.* There are other ATS cases that fit this pattern. *See, e.g.*, Velez v. Sanchez, 693 F.3d 308, 314–15 (2d Cir. 2012); Swarna v. Al-Awadi, 622 F.3d 123, 128–30 (2d Cir. 2010); Taveras v. Taveraz, 477 F.3d 767, 769–70 (6th Cir. 2007); Doe I v. Reddy, No. C 02-05570 WHA, 2003 WL 23893010, at *1 (N.D. Cal. Aug. 4, 2003). In some respects *Sosa* is similar to this fact pattern, although the events occurred both abroad and within the United States and the defendants were government officials, thereby raising federal question jurisdiction under the Federal Tort Claims Act. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 697–98 (2004).

[195] In terms of nomenclature, I will use "foreign law" to refer to tort laws outside the United States and "domestic law" to refer to tort laws within the United States.

[196] *See, e.g.*, SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 138–39 (2008) (outlining "Typical Fact–Law Patterns" in interstate disputes).

[197] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146, 156, 175 (1971).

scenarios, and perhaps a fifth depending on whether a court would refuse to apply Burmese law based on a public policy exception.[198]

Of course, the territorial presumption is only the starting point. That presumption may be overcome based on balancing the various *Restatement (Second) of Conflict of Laws* "contacts" and "factors."[199] As applied, the contacts set forth in *Restatement* section 145 generally favor the application of *lex loci delicti* in all six scenarios. With the exception of *Jama*, all the injuries occurred abroad. With the exception of *Abagninin* and *Jama*, all the wrongful conduct occurred abroad. In none of the six scenarios do the parties have common domiciles, although the plaintiffs and defendants in *Corrie* and *Licea* have domestic (albeit split) domiciles.[200] The parties' relationship in all six scenarios was centered in the same place where the tort occurred. Thus, the balance of contacts under *Restatement* section 145 does not alter the territorial presumption.

Reliance on *Restatement* section 6 factors is more complicated. These factors permit governmental interests and other principles to weigh in the balance, with no particular guidance as to the balance among the factors. As discussed in Part III, courts may rely on governmental interests to apply domestic laws to resolve disputes involving foreign torts.[201] Unlike the terrorism context, the United States is not the target of abuse in any of the six factual scenarios, and therefore the governmental interests will flow from each jurisdiction's relationship to the conduct, injury, and parties.

The other *Restatement* section 6 factors are more nebulous, focusing on the needs of the international system; the policies of the particular field of law;

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198 *See infra* text accompanying notes 200–14.

199 The nonexhaustive list of contacts includes the following: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971). The seven factors are the following:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

200 The domestic connection is attenuated in *Licea* because the plaintiffs moved to Florida after the tort occurred. *See* Licea v. Curacao Drydock Co., 537 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008).

201 *See supra* text accompanying notes 107–44.

certainty, predictability and uniformity of result; and ease of determination of the applicable law.[202] Based on these factors, courts may overcome the *lex loci* presumption by relying on *Restatement* section 6 factors rather than the *Restatement* section 145 contacts.

Under the facts of *Kiobel*, there is no connection to any U.S. forum and no forum interest in the dispute. None of the parties or events have a nexus to the forum, making it difficult to discern a forum interest. Other jurisdictions—particularly Nigeria, the United Kingdom, and the Netherlands—all have legitimate interests in the outcome of the dispute.[203] The needs of the international system favor outcomes that "further harmonious relations between states and [that] facilitate commercial intercourse between them."[204] Holding a foreign corporation accountable under Nigerian law for conduct in Nigeria that injures Nigerians advances those concerns. Tort law is designed to deter accidents and pursue corrective justice,[205] and those policies are advanced by the choice of a sophisticated and robust torts regime. Predictability and uniformity of results favor the application of Nigerian law, in that the outcome of claims by Nigerians for torts committed in Nigeria should not depend on the nationality of the tortfeasor. The ease of determination and application of the law to be applied might favor domestic law over foreign law, but as among Dutch, English, or Nigerian law, the burden is not dissimilar. Thus, while not every factor favors Nigerian law, the *Restatement* section 6 factors, on balance, support the *lex loci* presumption.

The analysis in *Unocal* adds a number of new factors to the analysis. The defendant is an American corporation based in California, which generates

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202 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

203 Nigeria's interests relate to regulating conduct within its territory, remedying harms occurring within its territory, protecting its residents from wrongful conduct, and potentially immunizing corporations acting in concert with government tortfeasors. The Dutch and English interests flow out of those jurisdictions' relationships with the defendant corporation.

204 SYMEONIDES, *supra* note 196, at 104 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. d) (internal quotation mark omitted).

205 *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26–31 (1970) (identifying the reduction of the cost of accidents as the primary goal of tort law); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1 (1987) (emphasizing efficient resource allocation as the primary goal of tort law); Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 68 (2010) (highlighting the compensation of harm caused as the primary goal of tort law); *see also* JULES L. COLEMAN, RISKS AND WRONGS 325 (1992) (discussing corrective justice and the duties it imposes); Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1243 (1988) (book review) (emphasizing deterrence as a function of tort law).

governmental interests not present in *Kiobel*.[206] Burma's governmental interests are complicated because historically the authoritarian regime has displayed little concern for its people and the wrongful conduct relates to alleged corporate collusion with government abuse.[207] Burma's interests may favor corporate immunity over accountability, but a court is unlikely to credit such interests. The content of Burmese law is unknowable,[208] making its application difficult, and any results uncertain and unpredictable. The absence of any discernible Burmese tort law does nothing to advance the policies that underlie modern tort law. Finally, given Burma's status in the international order (at least until recently), the choice of a particular law will not measurably alter the difficult relationship that Burma has with the outside world. On balance, the *Restatement* section 6 factors favor the application of domestic law over Burmese law, with forum law or the defendant's home jurisdiction (California) the most plausible candidates.

As for *Licea*, the plaintiffs have an attenuated connection to Florida based on their current residency,[209] but no other *Restatement* section 6 factor is sufficient to overcome the territorial presumption. Applying Curaçaoan law advances the needs of the international system. The result in the case should not depend on where the plaintiffs reside following the commission of the tort, and the application of Florida law would openly invite forum shopping. On balance these factors do not favor displacement of the *lex loci delicti*.

Corrie presents the additional factor of whether a forum's nexus to the plaintiff or defendant should heighten the governmental interest analysis.[210] Both Corrie's domicile (Washington) and Caterpillar's domicile (Illinois) have a legitimate interest in the outcome of the dispute, but those interests are advanced by the application of Israeli law. Israeli law represents a

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206 *See* Doe I v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

207 For a general description of the history of Burma's authoritarian regime, see MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY (1991).

208 *See* Doe I v. Unocal Corp. (*Ruling on Defendants' Choice of Law Motions*), Nos. BC 237980, BC 237679, slip op. at 8 (Cal. Super. Ct. July 30, 2003) ("[T]his court agrees . . . that the law of Burma is 'radically indeterminate.'"); Doe I v. Unocal Corp., Nos. BC 237980, BC 237679, 2002 WL 33944505 (Cal. Super. Ct. June 10, 2002) (ruling on Defendants' Motion for Summary Judgment); Doe I v. Unocal Corp., Nos. BC 237980, BC 237679 (Cal. Super. Ct. June 7, 2002), *available at* http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/Unocal-Tort-Liability-MSA-Ruling.pdf (ruling on Defendants' Motion for Summary Judgment); Andrew Huxley, Note, *Comparative Law Aspects of the* Doe v. Unocal *Choice of Law Hearing*, 1 J. COMP. L. 219, 220–21 (2006).

209 *See* Licea v. Curacao Drydock Co., 537 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008).

210 *See* Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007).

sophisticated common law tort system with British roots that would achieve the same results as the application of Washington or Illinois law.[211] Unless a court focuses on the common nationality of the parties,[212] no other *Restatement* section 6 factor would alter the territorial presumption favoring Israeli law.

The *Restatement* section 6 analysis in *Abagninin* is complicated by the fact that the commission of the tort occurred in California and the resulting injuries occurred in Ivory Coast.[213] A *Restatement (Second)* jurisdiction would likely recognize California's legitimate interest in regulating a California corporation's wrongful conduct within its borders. Ivory Coast has a strong interest in remedying injuries caused to its citizens within its borders, but those interests may be advanced by the application of California's robust products liability law. The forum would also find California law easier to determine and apply, and it would find that California's products liability laws are well suited to advance the objectives of modern tort laws. While other *Restatement* section 6 factors may favor Ivory Coast law, the balance of factors would likely result in a court's preference for California over Ivory Coast law.

With *Jama*, none of the *Restatement* section 6 factors favor displacement of the territorial presumption. The smooth functioning of the international system is enhanced by the application of New Jersey law to regulate New Jersey–based conduct that caused New Jersey–based injuries. New Jersey has a strong governmental interest in regulating wrongful conduct within its borders. General tort policies are advanced by the application of a sophisticated torts regime, which creates incentives for avoiding accidents but also immunizes government contractors acting within the scope of their authority.[214] Application of New Jersey law to all the parties promotes predictable, uniform results. There is no difficulty in discerning the content of New Jersey law. All the factors point toward the application of New Jersey law.

In sum, a jurisdiction applying the majority approach would result in the application of foreign law in *Kiobel*, *Licea*, and *Corrie*, and the application of domestic tort law in *Unocal*, *Abagninin*, and *Jama*.

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211 *See* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1030–31 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007).

212 *See* Miller v. White, 702 A.2d 392, 396 (Vt. 1997) ("In the international sphere, it is generally considered appropriate to apply the laws of the domiciliary forum to tort claims that involve the residents of a single country, regardless of where the tort took place.").

213 *See* Abagninin v. Amvac Chem. Corp., 545 F.3d 733, 735–36 (9th Cir. 2008).

214 *See* Jama v. U.S. INS, 334 F. Supp. 2d 662, 686–88 (D.N.J. 2004).

C. Applying the Lex Loci Delicti *Approach*

With *lex loci delicti*, there must be an *injury-based* connection to the forum for forum law to apply.[215] The ten jurisdictions that apply *lex loci delicti*[216] would have little difficulty applying the appropriate choice of law under five of the six models outlined above. In *Kiobel*, *Licea*, *Unocal*, *Abagninin*, and *Corrie*, the injuries occurred abroad and therefore foreign substantive tort law should be applied to resolve the dispute. Consequently, Nigerian, Curaçaoan, Burmese, Ivory Coast, and Israeli law, respectively, would apply to resolve the disputes. Given the all-important question of the place of injury, it is irrelevant that tortious conduct in *Abagninin* occurred in the United States. Conversely, in *Jama* the resulting injuries occurred in New Jersey, and therefore the applicable substantive tort law would be New Jersey law.

The only significant question in applying the *lex loci delicti* approach is whether a public policy exception might preclude the application of foreign law. Doing so would require a showing that the application of foreign law would violate good morals or natural justice, or offend fundamental principles of justice in the forum.[217] Such a public policy invocation would be a rare event among the civilized nations of the world.[218] Under the facts alleged in *Unocal*, for example, applying Burmese law to resolve claims against corporate collusion with the Burmese government may foreclose any remedy and offend the forum's public policy.

However, the public policy exception typically is used negatively to refuse enforcement of a foreign right, not offensively to create a cause of action that does not exist at the place of the wrong.[219] There are, of course, exceptions,[220]

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[215] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. c (1971) ("The rule of this Section calls for application of the local law of the state where the injury occurred unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties.").

[216] The ten jurisdictions are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. *See supra* text accompanying notes 69–75.

[217] *See, e.g.*, Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201–02 (N.Y. 1918); Rauton v. Pullman Co., 191 S.E. 416, 422 (S.C. 1937).

[218] *See* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1015–16 (1956) ("If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, the law should not be applied. . . . Yet such cases, between countries of the civilized world and certainly between the states, will be few indeed."); *see also* Bethlehem Steel Corp. v. G.C. Zarnas & Co., 498 A.2d 605, 617 (Md. 1985).

[219] *See Loucks*, 120 N.E. at 200–02 ("A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental

and a court that is willing to use the public policy exception offensively may conclude that forum law should prevail. In the actual facts of *Unocal*, a state court judge did precisely that, concluding that "to the extent Burma law precludes Plaintiffs' tort claims in this case, specifically the forced labor claims, this court invokes the public policy exception to the traditional choice of law rules."[221]

If courts use the public policy exception both offensively and defensively, then recourse to the *lex loci delicti* approach would result in the application of foreign law in four of the scenarios—*Kiobel*, *Licea*, *Abagninin*, and *Corrie*—and domestic law in two of the scenarios—*Unocal* and *Jama*.

D. Applying the Governmental Interest Approach

With the governmental interest approach there are two major variants: the comparative impairment version that balances competing governmental interests, and the *lex fori* version that gives presumptive weight to the forum's interest.[222]

1. Comparative Impairment. With the comparative impairment approach applied in California and the District of Columbia, forum law will apply (1) if the forum has an interest in the dispute and the laws of the other jurisdiction are not different or (2) when the laws are different and the forum's interests would be more impaired than the interests of the other jurisdictions.[223] As noted above, the focus with comparative impairment is not which law manifests the "better or the worthier social policy," but rather "which state's interest would be more impaired if its policy were subordinated to the policy of

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principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."); SYMEONIDES, *supra* note 196, at 84; Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 339–40 (1999); James Audley McLaughlin, *Conflict of Laws: The Choice of Law* Lex Loci *Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 984 (1990).

220 *See, e.g.*, Torres v. State, 894 P.2d 386, 390 (N.M. 1995); Willey v. Bracken, 719 S.E.2d 714, 721 (W. Va. 2010).

221 *See Ruling on Defendants' Choice of Law Motions*, Nos. BC 237980, BC 237679, slip op. at 10 (Cal. Super. Ct. July 30, 2003). The judge also stated that"[f]oreign laws will not be given effect when contrary to the public policy of California." *Id.* (quoting Severn v. Adidas Sportschuhfabriken, 33 Cal. App. 3d 754, 763 (1973)). Furthermore, the judge noted that "[t]his public policy exception applies where the 'foreign law is so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens.'" *Id.* (quoting Wong v. Tenneco, Inc., 39 Cal. 3d 126, 135 (1985)) (internal quotation marks omitted).

222 *See supra* text accompanying notes 82–89.

223 *See supra* text accompanying notes 86–89.

the other state."[224] This test is particularly difficult to apply in the human rights context, given that in some circumstances the foreign government's interests are an illegitimate attempt to avoid the consequences of its own misconduct.

In all six of the factual scenarios, the governmental interests at stake are not as paramount as the interests at stake in the terrorism cases outlined in Part III above. Neither the United States, nor any of the several states, are the target of the human rights violations. By definition, terrorism is intended to influence government conduct or policies.[225] Other human rights violations, by contrast, typically do not target governments. A court is unlikely to subordinate the interests of the United States in the international terrorism context, whereas in other human rights contexts the governmental interest of the United States or the several States will be more limited.

Applying this approach to the facts in *Kiobel*, the forum has no governmental interest in applying its law because there is no nexus whatsoever to the forum. In the absence of such an interest, there is a false conflict[226] and therefore no need to analyze whether the laws of the affected jurisdictions are different, or to undertake a comparative impairment analysis. Accordingly, courts would apply British, Dutch, or Nigerian law.

With the other five scenarios, the forum has some interest in the dispute, and therefore an initial inquiry is required as to whether the forum's law differs from the laws of other affected jurisdictions. If not, then forum law would apply; if so, then a comparative impairment analysis would be required.

In *Licea*, because the plaintiffs were not domiciliaries at the time of the tort,[227] Florida's interests are diminished, although one could argue that Cuban mistreatment of its citizens creates harmful effects within Florida resulting from Cuban mass migration. Cuba's interests are to avoid liability, with Cuban nationals alleging corporate collusion with the Cuban government to commit

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[224] McCann v. Foster Wheeler LLC, 225 P.3d 516, 533 (Cal. 2010) (quoting Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 922 (Cal. 2006)) (internal quotation marks omitted).

[225] *See, e.g.*, 18 U.S.C. § 2331 (2012) (defining "international terrorism" in part as violent acts intended "to influence the policy of a government by intimidation or coercion . . . or . . . affect the conduct of a government by mass destruction, assassination, or kidnapping").

[226] *See Kearney*, 137 P.3d at 924 (suggesting a "false conflict" to be a situation where "there is . . . no problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied" (quoting Hurtado v. Superior Court, 522 P.2d 666, 670 (Cal. 1974)) (internal quotation mark omitted)).

[227] *See* Licea v. Curacao Drydock Co., 537 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008).

human rights abuses.[228] A court is unlikely to credit such concerns. With the forum having no other interest at stake, Curaçaoan law would apply based on that jurisdiction's paramount interest in curtailing human trafficking within its borders.

With the facts of *Unocal*, California's principal governmental interest is regulating the behavior of a California corporation, which likely would be sufficient to apply California law.[229] A California court is unlikely to take cognizance of Burma's interest in protecting corporations that aid and abet Burmese government abuse, or prioritize that interest over California's interests. In addition, the inability to determine the content of Burma's tort law would likely preclude the application of Burmese law.[230]

As for *Corrie*, the decedent was a Washington resident, the defendant is an Illinois domiciliary, and all the relevant conduct and injuries occurred in Israel.[231] A comparative impairment jurisdiction would have the unenviable task of determining whether Israel's interests in regulating its affairs in Gaza are a legitimate effort to shield government contractors from liability and if so, whether those interests should be subordinated to Washington's interest in protecting its residents or Illinois's interest in regulating its corporate defendants. In the actual facts of *Corrie*, the federal court resolved the question by concluding that under any applicable tort law Corrie's claim would fail.[232] A false conflict would avoid the need for a choice-of-law analysis. In the absence of a false conflict, a court would likely conclude that Israel's interest in controlling its affairs in Gaza during the second *intifada* should not be subordinated to the governmental interests of either Washington or Illinois.

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228 *See* Licea v. Curacao Drydock Co., 794 F. Supp. 2d 1299, 1302 (S.D. Fla. 2011).

229 *See* Bowoto v. Chevron, Corp., No. C 99-02506 SI, 2006 WL 2455761, at *10 (N.D. Cal. Aug. 22, 2006) (noting "California has an interest in ensuring that its corporation behave in an appropriate manner. This interest is magnified by the seriousness of the allegations brought against defendants" (citation omitted)); *Hurtado*, 522 P.2d at 672 ("[W]hen the defendant is a resident of California and the tortious conduct giving rise to the wrongful death action occurs here, California's deterrent policy of full compensation is clearly advanced by application of its own law."); Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 UC IRVINE L. REV. 45, 50 (2013) ("The best hope for applying the forum state's law would be if one or more of the parties were a citizen of the forum state—perhaps a corporate defendant with its headquarters in the forum state. In such a case, one could make a reasonable argument that applying the forum state's tort law would serve a deterrent interest and thus justify application of forum law.").

230 *See supra* note 208 and accompanying text.

231 *See* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1022–23 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007).

232 *See id.* at 1030–31.

With *Abagninin*, California has a strong interest in regulating the conduct of its corporate citizens that occurs in whole or in part within its borders.[233] Ivory Coast has a strong interest in regulating foreign investment and protecting its citizens from toxic pesticides, but those interests are unlikely to be impaired by the application of California law, which generally would favor plaintiffs in disputes relating to product design and manufacturing defects. Applying a comparative impairment approach would result in the application of California law.

The strongest governmental interest would arise from facts similar to *Jama*, with the government's interest triggered by the defendant's domicile, the tortious conduct, and the resulting injury.[234] The only other potential jurisdictions that have an interest in the dispute are the plaintiffs' domiciles, but those interests would be advanced by the application of robust New Jersey tort law. Under the facts of *Jama*, a comparative impairment analysis would require the application of New Jersey tort law.

Thus applying the comparative impairment variant, in almost all of the factual scenarios a law other than forum law would apply to resolve the dispute. In some cases—*Kiobel*, *Licea*, and *Corrie*—this likely would result in the application of foreign law. In other cases—*Abagninin*, *Unocal*, and *Jama*—some version of domestic tort law would apply, based on a nexus to the plaintiff, defendant, conduct, or injury.

2. Lex Fori. The *lex fori* variant requires either a *defendant-based*, *plaintiff-based*, *conduct-based*, or *injury-based* connection to the forum to create the requisite governmental interest in applying forum law. With the *lex fori* version applied in Kentucky and Michigan, forum law is presumptively applied unless the forum's connection to the dispute is simply too remote.[235] Where the tort occurred outside the jurisdiction and no party had a connection to the forum, the presumption favoring forum law typically will be overcome. In the absence of forum interest, a court would apply the law with the greatest governmental interest in the dispute.

Applying this approach, there is no reason to apply *lex fori* in the *Kiobel* scenario because the connection to the forum is simply too remote, none of the constituent acts occurred in the forum, and none of the parties have any

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233 *See Bowoto*, 2006 WL 2455761, at *10; *cf. Hurtado*, 522 P.2d at 669–74.

234 *See* Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169, 171 (3d Cir. 2009).

235 *See supra* text accompanying notes 82–85.

connection to the forum. Therefore, the choice-of-law analysis would require the application of another substantive law, presumably British, Dutch, or Nigerian law.

The other scenarios require further explanation. Under the *lex fori* approach, as long as there is some significant connection with the forum, then its law should apply, even if other jurisdictions have a closer connection to the dispute. Thus, assuming the American defendants in the *Unocal*, *Abagninin*, *Corrie*, or *Jama* scenarios were incorporated, had their principal places of business, or resided in the forum, the *lex fori* law should apply. Likewise, if the plaintiffs in *Corrie* or *Licea* resided in the forum, that too would be sufficient.[236] Further, if some of the tortious conduct in *Abagninin* or *Jama* occurred within the forum—the detention facility in *Jama* was located there, or the pesticides in *Abagninin* were designed and manufactured there—that likely would be sufficient to apply the *lex fori* law. Finally, if the resulting injury in *Jama* occurred within the forum, that almost certainly would be sufficient to apply forum law.

In the actual facts of these cases, none of the parties or events had any connection to either Michigan or Kentucky that would trigger the forum's interests. Therefore these *lex fori* jurisdictions would apply the law of the jurisdiction that had the greatest interest in the case. As with the comparative impairment approach, the result would be the application of foreign law in *Kiobel*, *Licea*, and *Corrie* and the application of domestic law in *Abagninin*, *Unocal*, and *Jama*.

E. Applying the "Better Law" Approach

With the "better law" approach, courts may pursue individual justice in particular cases by choosing the right set of rules.[237] Courts are free to consider the quality of the available laws and apply the law that achieves the desired outcome.[238] But the "better law" approach is complex and considers other factors besides which law achieves individual justice. These factors include the "A. Predictability of results; B. Maintenance of interstate and international

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[236] To the extent plaintiffs established domicile in the forum after the tort occurred, as was the case in *Licea*, that likely will be perceived as a more distant and insufficient connection to the forum. *See supra* text accompanying notes 179–81.

[237] The states that use this approach are Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. *See supra* text accompanying notes 92–100.

[238] *See supra* text accompanying notes 92–94.

order; C. Simplification of the judicial task; [and] D. Advancement of the forum's governmental interests."[239]

Applying the "better law" approach to the factual scenarios, a court engaging in a "better law" analysis in *Kiobel* would likely conclude that there is no significant connection between the forum and the dispute, such that a false conflict exists and forum law is not among the choices available. Although forum law is clearly better in certain respects,[240] the absence of a nexus between the dispute and the forum would preclude recourse to forum law.[241] That would leave either Nigerian law or the law of the defendants' domicile, the Netherlands or the United Kingdom. Under any "better law" scenario, in a case such as *Kiobel* the forum will be forced to decide among competing foreign laws.

As for the facts of *Licea*, Curaçaoan law is based on the Netherlands' civil law system, which recognizes intentional and negligent torts.[242] Thus, a claim of torture or arbitrary detention would be actionable as unlawful conduct attributable to corporate or individual tortfeasors.[243] Because both Curaçaoan law and forum law provide effective relief for the claims alleged in *Licea*, it is

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239 Leflar, *Choice-Influencing Considerations*, *supra* note 93, at 282.

240 Nigerian tort law requires that a plaintiff prove the charge of battery beyond a reasonable doubt, while intentional torts in the United States require proof by a preponderance of the evidence. *See* Okuarume v. Obabokor, [1965] NSCC 286, 287 (Nigeria), *discussed in* Bowoto v. Chevron Corp., 621 F.3d 1116, 1128–29 (9th Cir. 2010).

241 *See* Gomez v. ITT Educ. Servs., Inc., 71 S.W.3d 542, 548 (Ark. 2002) (applying the "better law" approach, where the forum did not have a sufficient relationship to the dispute, the Arkansas Supreme Court declined to apply Arkansas law with a longer statute of limitations period to resolve a dispute between non-domiciliary plaintiff and non-domiciliary defendant involving death that occurred outside the forum).

242 *See* Brief for Professor Alex-Geert Castermans et al. as Amici Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co. at 8–10, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312828 [hereinafter *Amicus Curiae*] (citing C. ASSERS, A.S. HARTKAMP & C.H. SIEBURGH, C. ASSERS HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT, DEEL 6–IV: VERBINTENISSENRECHT. DE VERBINTENIS UIT DE WET §§ 38–166 (A.S. Hartkamp & C.H. Sieburgh eds., 13th ed. 2011); C.C. VAN DAM, AANSPRAKELIJKHEIDSRECHT §§ 801–923 (2000)); *see also* THE CIVIL CODE OF THE NETHERLANDS 677 (Hans Warendorf et al. trans., 2009) (translating bk. 6, tit. 3, art. 162 of the code to mean that "[a] person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof"); THE CIVIL CODE OF THE NETHERLANDS ANTILLES AND ARUBA 295 (Peter Haanappel et al. trans., 2002) (translating bk. 6, tit. 3, art. 162 of the code to provide for the same tort liability as the Netherlands' code).

243 *See Amicus Curiae*, *supra* note 242, at 10–11 (noting that civil courts in the Netherlands assert jurisdiction over cases concerning international human rights violations) (citing Hof 's-Gravenhage 5 juli 2011, 200.020.174/01 (Mothers of Srebrenica/ Netherlands) (Neth.); Rb. 's-Gravenhage 21 maart 2012, 400882/HA ZA 11-2252 (El-Hojouj/Derbal) (Neth.); Rb. 's-Gravenhage 14 september 2011, NJF 2011, 427 (Silan/Netherlands) (Neth.) Rb. 's-Gravenhage 24 februari 2010, 337050/HA ZA 09-1580, BM 1469 (Akpan/Royal Dutch Shell) (Neth.)).

doubtful that a "better law" jurisdiction would conclude that either is better. Other factors, such as predictability and maintenance of international order, likely favor application of Curaçaoan law, while factors such as the simplification of the judicial task and advancing the forum's governmental interests likely favor forum law. Given the other relevant connections to Curaçao, a "better law" jurisdiction would likely apply Curaçaoan law.

The facts of *Unocal* raise the distinct possibility that the "better law" approach would lead to the application of domestic law. As noted above, Burmese tort law is difficult to identify, with few primary or secondary materials outlining the basic contours of the law. One can scarcely have confidence in the proper application of Burmese law if that law is indecipherable. Moreover, there are few cases interpreting the law. The State Department's *Burma 2012 Human Rights Report* depicts a judicial system that is "seriously flawed," with "no reported examples of successful attempts" to use either criminal or civil law to remedy human rights violations.[244] This comports with a California state court judge's findings in *Unocal* that Burmese law is inaccessible.[245] As such, it is highly unlikely that a court applying the "better law" approach would find chimerical foreign law superior to forum law.

The "better law" approach as applied to the facts of *Abagninin* presents the difficult question of whether international human rights law might directly apply to resolve the dispute because Ivory Coast is a monist state.[246] As such, international treaties are automatically incorporated in the domestic order with a status above national legislation.[247] In the absence of applicable international

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[244] U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, 2012 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BURMA 8–10 (2013), http://www.state.gov/documents/organization/204400.pdf.

[245] *See supra* note 208 and accompanying text.

[246] Monism is the view "that international and domestic law are part of the same legal order, international law is automatically incorporated into each nation's legal system, and international law is supreme over domestic law." Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999).

[247] *See* CONSTITUTION DE LA CÔTE D'IVOIRE July 23, 2000, tit. 6, art. 87 ("Les Traités ou Accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque Traité ou Accord, de son application par l'autre partie."), *translated in* WORLD CONSTITUTIONS ILLUSTRATED: CONSTITUTION OF THE REPUBLIC OF CÔTE D'IVOIRE, 2000, at 15 (Jefri Jay Ruchti ed., 2010) ("The Treaties or Agreements regularly ratified have, on their publication, an authority superior to that of the laws, provided, for each Treaty or Agreement, that it is applied by the other party."); *see also* Armand Tanoh & Horace Adjolohoun, *International Law and Human Rights Litigation in Côte d'Ivoire and Benin*, *in* INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA 109, 110–14 (Magnus Killander ed., 2010).

law, Ivory Coast follows the French Civil Code with respect to torts.[248] Thus, a court applying the better law would be forced to decide whether French-based tort law, together with international human rights law incorporated into Ivory Coast law, might serve the ends of justice better than California law. Given the centrality of the products liability claims in *Abagninin*, combined with other choice-influencing factors, a court is likely to determine that California law should apply as the better law.

The choice of the better law in *Corrie* is fact intensive, based on disputed questions relating to contributory negligence, proximate causation, comparative fault, assumption of risk, and joint and several liability. A "better law" analysis would weigh such legal elements to reach the proper conclusion as to the just result.[249] A court in a "better law" jurisdiction is unlikely to determine that Israeli law is inferior or antiquated compared to the forum's tort law.[250] As with *Licea*, the other factors likely will not consistently favor one law over the other, but given the relevant connections to Israel, a "better law" jurisdiction would likely apply Israeli law.

Finally, with *Jama* the central legal question would be whether the government contractors deserve sovereign immunity in the context where the defendants acted outside the scope of their authority in abusing the plaintiffs. A court applying the better law would likely apply forum law in the absence of any substantive conflict with New Jersey law. But in any case, domestic tort law would prevail.

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[248] *Compare* CODE CIVIL [C. CIV.] art. 1382 (Fr.), *available at* http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20060406 ("Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer," which when translated provides, "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it." (Georges Rouhette & Anne Rouhette-Berton trans., 2006), http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf), *with* CODE CIVIL art. 1382 (Côte d'Ivoire), *available at* http://www.loidici.com/Codecivilcentral/codecivilcontratquasidelits.php (providing the same); *see also* Geneviève Viney, *Tort Liability*, *in* INTRODUCTION TO FRENCH LAW 237 (George A. Bermann & Etienne Picard eds., 2008) (providing an overview of French tort law). The confluence of these two systems is unclear but presumably would permit the application of international law for torts that violated human rights treaties and the application of traditional tort claims for lesser malfeasances.

[249] Israeli tort law, like its counterpart in the United States, is well developed and sophisticated. For commentary on Israeli tort law, see, for example, Israel Gilead, *Israel*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF LAWS: TORT LAW (Sophie Stijns ed., 2003); Israel Gilead & Tamar Gidron, *Tort Law in Israel: An Overview*, *in* XVIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW § II.A.5 (2006).

[250] As noted above, the federal court in *Corrie* avoided the question of choosing an applicable tort law by concluding that plaintiff's claim would fail under any applicable law. *See* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1030–31 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007).

The "better law" approach likely would result in the application of foreign law in *Kiobel*, *Licea*, and *Corrie*, and the application of domestic law in *Unocal*, *Abagninin*, and *Jama*.

F. Applying the Eclectic Approach

An eclectic choice-of-law approach would combine various elements of the previous approaches with unpredictable results for our factual scenarios.[251]

With all six of the factual scenarios, the parties have split domiciles, leading to a presumption favoring *lex loci delicti* with respect to loss-allocating rules.[252] Thus, in *Kiobel* the presumption favors the application of Nigerian law, while in *Licea*, *Unocal*, *Abagninin*, *Corrie*, and *Jama*, the presumption favors the application of the laws of Curaçao, Burma, Ivory Coast, Israel, and New Jersey, respectively. In none of these factual scenarios was the place of the tortious behavior fortuitous, which might obviate the territorial presumption.[253]

Under the *Neumeier* rules, the territorial presumption applicable in split domiciles may be overcome to "advance the relevant substantive law purposes."[254] This eclectic approach incorporates governmental interests into the analysis, interests such as protecting New York residents injured in foreign states or shielding New York defendants.[255] But with no New York plaintiffs or defendants, there are no obvious New York interests justifying a departure from the territorial presumption. In addition, "the number and intensity of contacts is relevant when considering whether to deviate" from the territorial presumption,[256] and in all six scenarios those contacts favor the maintenance of the *lex loci delicti* presumption.

Abagninin raises the difficult question of the appropriate loss-allocating rule when the parties have split domiciles and the wrongful conduct occurred in the defendants' home jurisdiction while the injury occurred in the plaintiffs' home jurisdiction. Assuming the place of wrongful conduct and defendants'

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[251] As the most important of the eclectic jurisdictions, this analysis will focus on New York's eclectic approach as discussed above. *See supra* text accompanying notes 102–06.

[252] *See* Neumeier v. Kuehner, 286 N.E.2d 454, 457–58 (N.Y. 1972).

[253] *See* Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 13 (2d Cir. 1996); *supra* text accompanying notes 145–52.

[254] *Neumeier*, 286 N.E.2d at 458.

[255] *See id.* at 456–58.

[256] Edwards v. Erie Coach Lines Co., 952 N.E.2d 1033, 1044 (N.Y. 2011).

domicile (California) has a pro-defendant law, and the place of injury and plaintiffs' domicile (in this case, Ivory Coast) has a pro-plaintiff law, a court would be faced with a factual scenario outside the traditional *Neumeier* paradigm.[257] In such a scenario, the application of Ivory Coast law would be appropriate if the defendants foresaw the resulting injury in Ivory Coast.[258] If, on the other hand, California law seeks to regulate its corporations' wrongful conduct[259] and Ivory Coast law seeks to protect its citizens from wrongful conduct,[260] the interests of both jurisdictions would align and California law would apply.

To the extent the choice-of-law question concerns conduct-regulating rules, New York courts are to give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[261] In the conduct-regulating context, the governmental interest will focus on the locus of the defendant's wrongful conduct, not the locus of the plaintiff's injuries.[262] In *Licci* and *Wultz*, this led to the application of New York and Chinese law, respectively, to resolve claims arising from terrorist attacks in Israel.[263] Assuming a court would apply conduct-regulating rules in a similar fashion, the focus should be on the locus of the defendants' wrongful conduct. In most of the six factual scenarios, this would not alter the result because the place of the tort and injury coincide. But in *Abagninin*, California law would apply to the design and manufacture of the toxic chemicals.

Finally, any analysis of New York's eclectic approach is not complete without a public policy analysis, precluding the application of foreign law that is contrary to New York public policy.[264] Provided there are sufficient contacts with New York,[265] such a public policy exception would likely apply in factual

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257 *See* HAY ET AL., *supra* note 48, § 17.44.

258 *See id.*

259 *See* Bowoto v. Chevron, Corp., No. C 99-02506 SI, 2006 WL 2455761, at *10 (N.D. Cal. Aug. 22, 2006).

260 *See* CODE CIVIL art. 1382 (Côte d'Ivoire) ("Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.").

261 Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 672 F.3d 155, 158 (2d Cir. 2012) (quoting Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 337 (2d Cir. 2005)) (internal quotation marks omitted).

262 *See id.*; Wultz v. Bank of China Ltd., 865 F. Supp. 2d 425, 429 (S.D.N.Y. 2012).

263 *See supra* text accompanying notes 153–58.

264 *See* Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687–89 (N.Y. 1985).

265 *See* Barkanic v. Gen. Admin. of Civil Aviation of China, 923 F.2d 957, 964 (2d Cir. 1991) (noting that "a party seeking to invoke a public policy exception to the application of foreign law must establish that there

scenarios such as *Doe v. Unocal*, leading to the application of New York law where Burmese law is unknowable or violates fundamental principles of justice.[266]

The result under New York's eclectic approach is the application of foreign law in most of the factual scenarios except in *Unocal*, where New York public policy would favor New York over Burmese law, and in *Abagninin*, where conduct-regulating rules would favor the application of California law as the place of wrongful conduct.

G. Summary of the Competing Approaches

The application of these choice-of-law approaches to the six factual scenarios underscores the critical distinction that key facts play in the decision as to the appropriate choice of law. This analysis is preliminary and subject to correction based on more detailed analysis of the particular law and facts. But this exercise illuminates the general contours of how choice of law would be undertaken in the human rights context. Table 2 summarizes the results of our analysis.

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are enough important contacts between the parties, the occurrence and the New York forum to implicate [New York's] public policy and thus preclude enforcement of the foreign law." (alteration in original) (quoting *Schultz*, 480 N.E.2d at 688) (internal quotation marks omitted)). In the absence of sufficient contacts, New York law would not apply.

[266] *See* Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918). For a California court's application of public policy in this *Unocal* context, see *Ruling on Defendants' Choice of Law Motions*, Nos. BC 237980, BC 237679, slip op. at 10 (Cal. Super. Ct. July 30, 2003); and *supra* note 221 and accompanying text.

Table 2

	Most Significant Relationship	***Lex Loci Delicti***	**Comparative Impairment**	***Lex Fori***	**Better Law**	**Eclecticism**
No Nexus (*Kiobel*)	Foreign Law	Foreign Law	Foreign Law	Foreign Law	Foreign Law	Foreign Law
After-Acquired Plaintiff Nexus (*Licea*)	Foreign Law	Foreign Law	Foreign Law	Foreign Law	Foreign Law	Foreign Law
Defendant Nexus/Deficient Foreign Law (*Unocal*)	Domestic Law	Domestic Law	Domestic Law	Domestic Law	Domestic Law	Domestic Law
Defendant and Conduct Nexus (*Abagninin*)	Domestic Law	Foreign Law	Domestic Law	Domestic Law	Domestic Law	Domestic Law
Defendant and Plaintiff Nexus (*Corrie*)	Foreign Law	Foreign Law	Foreign Law	Foreign Law	Foreign Law	Foreign Law
Defendant, Conduct, and Injury Nexus (*Jama*)	Domestic Law	Domestic Law	Domestic Law	Domestic Law	Domestic Law	Domestic Law

As Table 2 indicates, where there is no nexus to the United States, as in the case of *Kiobel*, all six approaches are likely to apply foreign law. Where there is only a plaintiff-based connection to the United States based on after-acquired domicile, as in the case of *Licea*, all six approaches are likely to apply foreign law. Where there is a plaintiff-based and defendant-based connection to the United States but the parties have split domiciles, as in the case of *Corrie*, all six approaches are likely to apply foreign law. Where there is a defendant-based and conduct-based connection to the United States, as in *Abagninin*, five of the six approaches are likely to apply domestic law, and one approach (*lex loci delicti*) is likely to apply foreign law. Where there is a defendant-based connection to the United States and the alternative foreign law is seriously deficient, as in the case of *Unocal*, all six approaches are likely to apply domestic law. Finally, where there is a defendant-based, conduct-based, and injury-based connection to the United States, as in the case of *Jama*, all six approaches are likely to apply domestic law.

Our prediction of how the different choice-of-law approaches might resolve human rights cases comports with empirical studies showing that courts do not favor domestic law when confronted with international choice-of-law scenarios. The results of one well-known study articulated the following predictive rule:

> [A] judge is most likely to apply domestic law when the locus of the underlying activity is mostly or all inside U.S. territory and the parties are mostly or all domestic, and she is least likely to do so when the locus of activity is mostly or all outside U.S. territory and the parties are mostly or all foreign. This . . . prediction decreases . . . as territoriality and personality become more balanced.[267]

This prediction mirrors the results of our own analysis, with territoriality and personality strongly affecting the outcome under all of the choice-of-law approaches. The one significant caveat is that our analysis predicts that public policy considerations in *Unocal* would lead to the application of domestic law when other considerations would predict the choice of foreign law.

Diagnosing how choice-of-law principles might apply to human rights claims does not answer the question of whether this approach is attractive. The next Part outlines the virtues of transnational tort litigation as compared to litigation under the ATS. From the perspective of human rights victims, transnational tort litigation has numerous virtues over international human rights litigation.

V. THE VIRTUES OF TRANSNATIONAL TORT LITIGATION

Transnational tort litigation has numerous distinctions from international human rights litigation under the ATS. First, such litigation permits the extraterritorial application of common law tort claims in appropriate circumstances. Second, reliance on foreign laws typically will be available given the universality of a cause of action for intentional torts. Third, tort litigation provides lower thresholds for liability based on a wide range of behavior, including intentional and negligent conduct. Fourth, tort laws hold both individual and corporate actors liable for tortious conduct. Fifth, choice-of-law rules are sufficiently nuanced to apply one law to determine liability and another law to determine damages. Sixth, transnational tort litigation permits actions in state court, thereby avoiding the heightened pleading standards applicable in federal courts. Seventh, for suits filed in state court under state law, forum non conveniens dismissals do not have the same force or favor as in federal courts. Finally, preemption will rarely be an issue where a court applies state or foreign tort laws to resolve the dispute.

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[267] Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 777 (2009).

This is not to suggest that transnational tort litigation does not face obstacles similar to human rights litigation under the ATS. For example, limits on personal jurisdiction, sovereign immunity, head of state immunity, the act of state doctrine, and the political question doctrine should apply with equal force to tort and human rights claims.[268] These limits ensure that state and federal courts do not violate defendants' minimum due process rights, do not sit in judgment on the sovereign acts of other nations, and do not encroach on matters reserved for the political branches.

A. Extraterritorial Application

State tort laws routinely are applied extraterritorially. There are constitutional limits, but those limits are rarely meaningful.[269] Under the Due Process Clause, a state may apply its own laws if it has any "significant contact or significant aggregation of contacts, creating state interests," with the parties and the occurrence or transaction.[270] State choice-of-law principles incorporate these constitutional limitations and refrain from applying state tort laws in the absence of sufficient contacts or interests.[271]

Beyond these constitutional limits, there is no presumption against the extraterritorial application of state tort laws. "[I]n contrast to federal courts considering the reach of U.S. law abroad, courts generally do not regard the decision to apply state law to events abroad in terms of the extraterritorial

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[268] *See* Whytock, Childress & Ramsey, *supra* note 39, at 6–7.

[269] *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1075–82 (2009); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992).

[270] Sun Oil Co. v. Wortman, 486 U.S. 717, 735 (1988) (Brennan, J., concurring in part and concurring in the judgment) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)) (internal quotation marks omitted). A different, more stringent standard under the dormant Commerce Clause applies to the extraterritorial application of state legislation. *See* Healy v. Beer Inst., 491 U.S. 324, 337 (1989); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–84 (1986); Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982). *See generally* Florey, *supra* note 269, at 1084–94 ("In a series of cases in the 1980s, the Supreme Court articulated a strong . . . prohibition on extraterritoriality under the rubric of the dormant Commerce Clause.").

[271] The Court has declared that another constitutional limitation, the Full Faith and Credit Clause, must be "interpreted against the background of principles developed in international conflicts law," *Wortman*, 486 U.S. at 723, perhaps suggesting that the state laws that are consistent with international principles would satisfy constitutional limitations. *See* C. Steven Bradford, *What Happens If* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 120–21 (1993). While both the Due Process Clause and the Full Faith and Credit Clause limit the application of state law, only the Due Process Clause limits a state's application abroad. *See* Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1552 n.161 (2011).

reach of the state's power to assert legislative jurisdiction."[272] Instead, questions as to the appropriateness of applying state tort law to foreign conduct are embedded in the choice-of-law analysis, resulting in the balancing of interests, accommodations to the international system, and presumptions that *lex loci delicti* will apply.[273] In other words, the extraterritorial application of state tort law is "independently regulated by each state's choice-of-law rules."[274] In this sense, choice of law adopts a reasonableness test for prescriptive jurisdiction akin to the multifactor balancing approach recommended by the *Restatement (Third) of Foreign Relations Law*.[275]

Importantly, to the extent constitutional or other limits circumscribe the extraterritorial application of state tort laws, these limitations will not divest a state court of general jurisdiction (or a federal court sitting in diversity jurisdiction) from adjudicating the claim; they will simply require the parties to plead, and the court to apply, foreign tort law. Under the transitory tort doctrine, courts of general jurisdiction are empowered to enforce tort obligations arising under foreign law, and those obligations follow the person and may be enforced wherever the person is found.[276] "[S]ince a personal tort claim is transitory in nature, it is . . . the general rule that . . . it may be sued upon wherever the defendant is subject to suit . . . ."[277] Thus, once personal jurisdiction is established, the transitory tort doctrine presumes a court of general jurisdiction is authorized to resolve claims based on causes of action that arise in other jurisdictions.[278] Even if state tort laws may not regulate the foreign conduct of foreign defendants, state courts may adjudicate claims alleging violations of foreign law.

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[272] Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 552 (2012).

[273] *See supra* text accompanying notes 57–68.

[274] Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad*, 102 GEO. L.J. 301, 306 (2014).

[275] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–03 (1987). This also approximates the approach of Justice Breyer's concurring opinion in *Kiobel*. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1673–77 (2013) (Breyer, J. concurring).

[276] *See Kiobel*, 133 S. Ct. at 1666 (quoting Cuba R.R. v. Crosby, 222 U.S. 473, 479 (1912)); Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904).

[277] Richardson v. Pac. Power & Light Co., 118 P.2d 985, 991 (Wash. 1941); *accord* Mendoza v. Neudorfer Eng'rs, Inc., 185 P.3d 1204, 1209 (Wash. Ct. App. 2008).

[278] *See Kiobel*, 133 S. Ct. at 1665–66.

B. Universal Norms

Transnational tort claims are universal. One need not invoke international law or domestic tort laws to find a violation of human rights. Almost all the international norms that are the subject of human rights litigation find their corollary in municipal law. A retreat from international law litigation is not an invitation to impunity.

In public law, constitutions increasingly are generic in their guarantees. The prohibition on arbitrary arrest and detention is reflected in 94% of all constitutions, the prohibition on torture in 84% of all constitutions, and the right to life in 78% of all constitutions.[279] Over twenty-five rights are common to over 70% of all constitutions, and they may therefore be described as a collection of generic bills of rights.[280] Guarantees of life and liberty are a common norm in global constitutionalism.

As far as private law, a comparative analysis of tort laws likewise finds a move toward harmonization, particularly with respect to intentional torts. Liability for intentional torts is common in virtually every tort system in the world.[281] According to the International Commission of Jurists, "[i]n every jurisdiction, despite differences in terminology and approach, an actor may be held liable under the law of civil remedies if through *negligent* or *intentional conduct* it *causes harm* to someone else."[282] Regardless of the distinctions between civil and common law, "in all jurisdictions the law of civil remedies can be invoked to remedy harm to *life, liberty, dignity, physical* and *mental integrity* and *property*."[283] Moreover, a comparison of choice-of-law rules suggests that *lex loci delicti* is the approach applied in most countries.[284]

The harmonization of norms across legal systems has important ramifications for transnational tort litigation. If one assumes a fair and impartial adjudicator, remedies for harm to life and liberty are the law

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279 David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 773–74 (2012).

280 *Id.* at 776–79.

281 *See* J. Limpens, R.M. Kruithof & A. Meinertzhagen-Limpens, *Liability for One's Own Act*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS ch. 2, at 3–12 (André Tunc ed., 1983).

282 3 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 10 (2008), *available at* http://www.icjcanada.org/fr/document/doc_2008-10_vol3.pdf.

283 *Id.* at 11.

284 *See id.* at 52.

throughout the civilized world.[285] Therefore, a decision to apply foreign law to remedy wrongful conduct should provide, under most legal systems, a legal basis for liability. There will be exceptions and important distinctions, but the starting point of liability for intentional harm is common across almost all legal systems.

The similarity among the tort laws of different countries increases the likelihood that domestic tort law will be applied under the doctrine of false conflicts. In essence, this doctrine holds that if the competing laws are the same, there is no need to choose among them.[286] For example, under the New York choice-of-law principles that would have applied in *Kiobel*, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved."[287] Laws are in conflict where "the applicable law from each jurisdiction provides different substantive rules."[288] Where the laws of competing jurisdictions are not in conflict and "New York law is among the relevant choices, New York courts are free to apply it."[289]

C. Lower Liability Thresholds

The threshold for establishing an actionable international law violation under the ATS is incredibly high. According to the Supreme Court's reasoning in *Sosa*, for a claim to be actionable under the ATS, "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that Blackstone defined, viz., "violation of safe conducts, infringement of the rights of

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[285] Indeed, when the problem is the quality of the adjudicator, not the foreign law, a state court may refuse to transfer the case to a foreign jurisdiction under forum non conveniens and resolve the dispute by applying foreign law. *See infra* text accompanying notes 322–38.

[286] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 838 n.20 (1985) (Stevens, J., concurring in part and dissenting in part); Wachsman *ex rel.* Wachsman v. Islamic Republic of Iran, 537 F. Supp. 2d 85, 94 (D.D.C. 2008); Gulf Grp. Holdings, Inc. v. Coast Asset Mgmt. Corp., 516 F. Supp. 2d 1253, 1271 (S.D. Fla. 2007). A variation of this false-conflict analysis that is applied in the governmental interest approach to conflict of laws looks to whether all competing states have an interest in applying their own laws. If only one involved state has an interest in applying its law, there is a false conflict. *See* Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958). For an analysis of the false-conflict doctrine, see *supra* note 91.

[287] Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936, 937 (N.Y. 1993).

[288] Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005) (quoting Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)) (internal quotation marks omitted); *accord* Elson v. Defren, 726 N.Y.S.2d 407, 411 (App. Div. 2001).

[289] Int'l Bus. Machs. Corp. v. Liberty Mut. Ins. Co., 363 F.3d 137, 143 (2d Cir. 2004).

ambassadors, and piracy."[290] In *Sosa*, the act of kidnapping and false imprisonment did not give rise to an actionable claim under international law.[291] As the Court put it, "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law."[292]

This high threshold has led lower courts to routinely dismiss ATS claims for torts relating to the environment, sexual misconduct, child labor, business fraud, defamation, and the like.[293] Instead, the ATS standard typically requires conduct such as extrajudicial killings, torture, genocide, prolonged arbitrary detention, nonconsensual human experimentation, crimes against humanity, or systematic racial discrimination.[294] "The common theme among these offenses is that they contravened the law of nations, admitted of a judicial remedy, and simultaneously threatened serious consequences in international affairs."[295]

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. "Tort law provides victims with an avenue of *civil recourse* against those who have committed relational and injurious wrongs against them. Tort law is thus plainly private law in the sense that it is about empowering *private parties* to initiate proceedings designed to hold tortfeasors accountable."[296] As

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290 Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

291 *See id.* at 698.

292 *Id.* at 738.

293 *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021–24 (7th Cir. 2011); Mora v. New York, 524 F.3d 183, 192 (2d Cir. 2008); Cisneros v. Aragon, 485 F.3d 1226, 1231 (10th Cir. 2007); Flores v. S. Peru Copper Corp., 414 F.3d 233, 236–37, 254 (2d Cir. 2003); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 168 (5th Cir. 1999); Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995); Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2264–65 (2004).

294 *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 256 (2d Cir. 2009); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009); *In re* Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980); Garcia v. Chapman, 911 F. Supp. 2d 1222, 1234 (S.D. Fla. 2012); Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1074–79 (C.D. Cal. 2010), *vacated sub nom.* Doe I v. Nestle USA, Inc., 738 F.3d 1048 (2013); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1093–94, (N.D. Cal. 2008), *aff'd*, 621 F.3d 1116 (9th Cir. 2010); Roe I v. Bridgestone, 492 F. Supp. 2d 988, 1014 (S.D. Ind. 2007); Steinhardt, *supra* note 293, at 2264–65.

295 *Abdullahi*, 562 F.3d at 173.

296 John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 946–47 (2010).

such, transnational tort litigation encompasses a wide range of legally wrongful conduct, including conduct that is not morally blameworthy. By lowering the threshold for actionable claims, a transnational tort system provides an effective mechanism for private citizens to regulate dangerous and harmful activities that fall below the human rights threshold.

Convincing a jury that a multinational corporation was negligent in its overseas activities is far easier than convincing a jury that a corporation intentionally aided and abetted torture or extrajudicial killings.[297] If plaintiffs embrace this lower threshold and pursue transnational torts, they increase the chances that tortfeasors will become accident avoiders.

This is true regardless of whether domestic or foreign tort law is applied. In tort systems around the world the standard of care owed to the public under traditional tort law encompasses a broader range of conduct than the standard owed under international human rights law.[298] In some cases foreign tort laws are broader than domestic tort laws, providing remedies for affronts to dignity.[299] Therefore, by reframing human rights violations as traditional torts, the universe of protected interests expands significantly.

D. Corporate Liability

One of the most difficult aspects of international human rights litigation has been the obligation to establish that corporate defendants aided and abetted government abuse. There is an extensive debate regarding the standard for accessorial liability under international law, with some circuit courts arguing the standard should be purposeful intent, and others arguing that the standard should be mere knowledge that an international-law violation would occur.[300]

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[297] *Compare Bowoto*, 621 F.3d at 1122–26 (discussing a jury trial in favor of the corporation on all claims of aiding and abetting torture and extrajudicial killings), *with* Rb. 's-Gravenhage 30 januari 2013, NJF 2013, 99 (Akpan/Royal Dutch Shell PLC) (Neth.) (finding the corporation guilty of negligence in failing to maintain pipelines that third parties sabotaged), *and* Roger Alford, *Dutch Court Issues Mixed Ruling on Shell's Liability for Nigerian Environmental Claim*, OPINIO JURIS (Feb. 5, 2013, 11:22 AM), http://opiniojuris.org/2013/02/05/dutch-court-issues-mixed-ruling-on-shells-liability-for-nigerian-environmental-claim/.

[298] *See generally* INTERNATIONAL ENCYCLOPAEDIA FOR TORT LAW (Ingrid Boone ed., 2001).

[299] Borchers, *supra* note 229, at 51; Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 ARIZ J. INT'L & COMP. L. 303, 310–11 (2009).

[300] *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 765–66 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013) (noting that at least purposeful aiding and abetting is sufficient); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (discussing the knowledge test); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (requiring a purposeful aiding and abetting test); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 272–77 (2d Cir.

Transnational litigation applying domestic or foreign tort laws avoids this problem. With civil liability applying foreign or domestic tort laws, evidence that the corporate actor intended to commit an international-law violation is simply irrelevant. 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.[301]

Corporate liability is an accepted principle of tort law throughout the world.[302] "Corporations have been subject to suit for centuries, and the concept of corporate liability is a well-settled part of our 'legal culture.'"[303] The question is not whether juridical entities may be liable for wrongful conduct under domestic or foreign tort laws, but under what circumstances.[304]

E. Damages

As discussed above,[305] an analysis of choice of law in the typical human rights scenario will result in the application of foreign tort law. One of the consequences of applying foreign law to resolve transnational torts is that the available remedies often will be lower than those available under domestic law. One prominent choice-of-law scholar has argued that the great risk of human rights litigation in state courts is that those courts would feel "bound to apply the damage law of the foreign country" and "[i]n practical terms, this risks making actions unsustainable."[306]

It is not apparent that this will be the result for transnational torts. Courts routinely separate the choice-of-law analysis for liability and damages,

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2007), *aff'd sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (requiring a purposeful aiding and abetting test); Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 52 (2003). *See generally* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008) (discussing the two standards).

301 INT'L COMM'N OF JURISTS, *supra* note 282, at 12–13.

302 *See Exxon*, 654 F.3d at 48 ("[F]rom the earliest times to the present day, corporations have been liable for torts." (quoting JOSEPH K. ANGEL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 222–23 & n.1 (1832)) (internal quotation marks omitted)); *see also* INT'L COMM'N OF JURISTS, *supra* note 282, at 10.

303 Brief for the United States as Amicus Curiae Supporting Petitioners at 7, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_unitedstates.authcheckdam.pdf.

304 *See* INT'L COMM'N OF JURISTS, *supra* note 282, at 28–41, 45–49.

305 *See supra* text accompanying notes 176–267.

306 Borchers, *supra* note 229, at 52.

resulting in the application of one law to determine liability and another law to determine damages.[307] Quantification of damages typically is considered a procedural question, resulting in the application of forum law.[308] Moreover, numerous cases have found that limitations on liability are false conflicts when the defendant is a nonresident corporation. For jurisdictions that apply a governmental interest analysis, for example, defendants invoking damage limitations pursuant to foreign law must show that doing so will further the interests of the foreign state.[309] But "foreign states are generally presumed to have absolutely no interest in reducing recovery by their residents against non-resident tortfeasors."[310] Accordingly, where a foreign jurisdiction has no interest in protecting the financial exposure of the defendant, damage limitations under foreign law will be ignored in favor of more liberal damage standards applied under domestic law.

To the extent courts would apply the lower damage amounts applicable in foreign countries, this is not necessarily a problem. In many respects this limitation actually is a virtue of the transnational torts regime. Choice-of-law analysis safeguards the uniform application of law by minimizing the impact that forum shopping will have on the outcome of a case. If differential damages applied depending upon the forum, then corporations subject to suit in the United States would face discriminatory liability standards that other competitors not amenable to suit would avoid.[311] The result would be a potential "tort tax" for doing business in the United States.

By this reasoning, pursuing transnational torts in the United States pursuant to foreign liability standards strikes an appropriate balance. It provides an effective forum for relief, but places defendants amenable to suit in the United States on a comparatively equal footing with defendants amenable to suit in

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[307] *See* Eric Lasker & Rebecca Womeldorf, *Prescription Drug Products Liability Litigation and Punitive Damages Preemption*, 80 DEF. COUNS. J. 123, 126–27 (2013); Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 959 (2004); Christopher G. Stevenson, Note, *Depecage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 IND. L. REV. 303, 311–12 (2003).

[308] *See* Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 168–75 (1999).

[309] *See In re* Aircrash in Bali, Indon. on Apr. 22, 1974, 684 F.2d 1301, 1307 (9th Cir. 1982) (citing Hurtado v. Superior Court, 522 P.2d 666, 670 (Cal. 1974)).

[310] Marsh v. Burrell, 805 F. Supp. 1493, 1498 (N.D. Cal. 1992); *accord* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1006 (9th Cir. 2001).

[311] *See* Goldsmith & Sykes, *supra* note 68, at 1146–47; Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2194 (2012).

other jurisdictions. Corporate defendants amenable to suit in the United States should face liability risks for transnational torts similar to the risks faced by corporations sued in other jurisdictions.[312] The objective of a transnational torts regime should encourage tortfeasors to avoid committing foreign torts, without subjecting particular tortfeasors to discriminatory liability standards.

F. Notice Pleading

Filing state or foreign law claims in state court has distinct procedural advantages. With *Ashcroft v. Iqbal*[313] and *Bell Atlantic Corp. v. Twombly*,[314] the Supreme Court has announced that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[315] This new pleading standard "demands that the nonconclusory factual allegations reach a level of plausibility that justifies the likely discovery expense."[316] Yet plaintiffs face significant hurdles in pleading plausible human rights claims precisely because they do not have access to discovery to determine questions such as whether a corporate officer had the requisite purposeful intent to aid and abet human rights abuses.[317] Not surprisingly, this heightened pleading standard has

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[312] Corporate defendants have lost significant human rights cases applying foreign tort laws in jurisdictions such as Australia, the Netherlands, and the United Kingdom. *See, e.g.*, *Dagi v Broken Hill Proprietary Ltd. (No.2.)* (1997) 1 VR 428 (Austl.); Hof 's-Gravenhage 5 juli 2011, 200.020.174/01 (Mothers of Srebrenica/ Netherlands) (Neth.); Rb. 's-Gravenhage 30 januari 2013, NJF 2013, 99 (Akpan/Royal Dutch Shell PLC) (Neth.); Rb. 's-Gravenhage 21 maart 2012, 400882/HA ZA 11-2252 (El-Hojouj/Derbal) (Neth.); Rb. 's-Gravenhage 14 september 2011, NJF 2011, 427 (Silan/Netherlands) (Neth.); Chandler v. Cape PLC, [2012] EWCA (Civ) 525, [1], [82] (appeal taken from Q.B.); Motto v. Trafigura Ltd., [2011] EWCA (Civ) 1150, [145] (appeal taken from Q.B.); Guerrero v. Monterrico Metals Plc, [2010] EWHC (QB) 3228, [57], [59] (U.K.); Guerrero v. Monterrico Metals Plc, [2009] EWHC (QB) 2475, [31] (U.K.); *Amicus Curiae*, *supra* note 242, at 7–15; Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 UC IRVINE L. REV. 127, 130 (2013); Michael D. Goldhaber, *U.K. Shell Deal Spotlights Value of Common Law Model for Human Rights Litigation*, CORP. COUNS. (Aug. 31, 2011), http://www.corpcounsel.com/id=1202512820360.

[313] 556 U.S. 662, 678 (2009).

[314] 550 U.S. 544, 556–57 (2007).

[315] *Iqbal*, 556 U.S. at 678 (citation omitted).

[316] Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 62 (2010). There is some empirical evidence suggesting that the heightened pleading standard in *Iqbal* and *Twombly* has not led to a greater incidence of dismissals of tort claims. *See* JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 14 tbl.4 (2011) (reflecting a dismissal rate of 30.0% before *Iqbal* and 28.2% after *Iqbal*), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

[317] *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 730, 738 (2012). For an example of insufficient pleading of corporate *mens rea*,

resulted in federal courts dismissing many international human rights claims.[318]

Pleading a violation of transnational torts in most state courts faces no such hurdles. The notice pleading standard applied in the majority of state courts is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[319] Pursuing state law tort claims in state courts is more likely to overcome a motion to dismiss than if the same claim were filed in federal court. Thus, plaintiffs struggling with the heightened federal pleading standard may wish to pursue state tort law claims in state court, and file in the defendant's home state to avoid removal to federal court on diversity grounds.[320] This is particularly so given that filing in the defendant's home state also minimizes the likelihood that the case will be dismissed for lack of personal jurisdiction.[321]

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see *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266–69 (11th Cir. 2009), *abrogated by* Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

318 *See, e.g.*, Abelesz, v. Magyar Nemzeti Bank, 692 F.3d 661, 686–87 (7th Cir. 2012); Bigio v. Coca-Cola Co., 675 F.3d 163, 173–75 (2d Cir. 2012); Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011); Mamani v. Berzain, 654 F.3d 1148, 1153–56 (11th Cir. 2011); *Sinaltrainal*, 578 F.3d at 1266–69; Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1098, 1110 (C.D. Cal. 2010), *vacated sub nom.* Doe I v. Nestle USA, Inc., 738 F.3d 1048 (2013).

319 *Twombly*, 550 U.S. at 577–78 (Stevens, J., dissenting) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)) (internal quotation marks omitted) (identifying twenty-six states and the District of Columbia that follow the *Conley* standard repudiated in *Twombly*); *see also* Mark W. Payne, *The Post-*Iqbal *State of Pleading: An Argument Opposing a Uniform National Pleading Regime*, 20 U. MIAMI BUS. L. REV. 245, 259–65 (2012) (summarizing pleading practices in state courts following *Iqbal* and *Twombly*); Z.W. Julius Chen, Note, *Following the Leader:* Twombly, *Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432 (2008) (summarizing history of pleading standards in state courts); Edwin W. Stockmeyer, Note, *Challenging the Plausibility Standard Under the Rules Enabling Act*, 97 MINN. L. REV. 2379, 2385–86 (2013) ("[A] majority of state appellate courts have either rejected the plausibility standard or declined to apply it." (footnote omitted)); A. Benjamin Spencer, Pleading in State Courts After *Twombly* and *Iqbal* 14–18 (2010) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038349 (summarizing pleading practices in state courts following *Iqbal* and *Twombly*).

320 *See* 28 U.S.C. § 1441(b) (2012) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."); Childress, *supra* note 317, at 741.

321 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] bases for general jurisdiction.'" (alteration in original) (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988))); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (noting that general jurisdiction requires affiliations "so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State"); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786–90 (2011) (discussing constitutional limits on specific jurisdiction).

G. Forum Non Conveniens

Transnational litigation claims are often dismissed in federal court on the basis of the federal common law doctrine of forum non conveniens.[322] Claims brought by foreign plaintiffs against foreign defendants for conduct on foreign soil are ripe for dismissal because the forum is inconvenient.[323] For suits filed in state court under state law, however, dismissal on the basis of forum non conveniens does not have the same force or favor as in federal court.[324]

Almost every state has established state standards for forum non conveniens.[325] The majority of states follow the federal standard set forth in *Gulf Oil Corp. v. Gilbert*[326] and *Piper Aircraft Co. v. Reyno*,[327] but others freely define their own standard.[328] States that choose to depart from the federal standard often make forum non conveniens dismissals impossible or substantially more difficult. For example, Colorado, Louisiana, and Virginia prohibit dismissal on forum non conveniens grounds if the plaintiff is a state resident.[329] Montana prohibits a forum non conveniens transfer outside the state.[330] Delaware requires a defendant to show overwhelming hardship in order to succeed on a motion.[331] Connecticut courts strongly disfavor such dismissals, finding that the plaintiffs' choice of forum "should rarely be

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[322] *See* Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 169–70 (2012); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1095–97 (2010).

[323] *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 517–28 (2011).

[324] *See* Childress, *supra* note 322, at 171–72.

[325] *See* Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1180 n.9 (R.I. 2008) (citing source of forum non conveniens standard in forty-six states).

[326] *See* 330 U.S. 501, 508–09 (1947).

[327] *See* 454 U.S. 235, 257 (1981).

[328] *See* Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315 & n.17 (2002) (identifying states that follow the federal standard); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 518–25 (1993) (discussing state forum non conveniens standards); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950 & n.74 (1990) (identifying the states that follow the federal standard); Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*, 90 TEX. L. REV. 743, 748–58 (2012) (discussing the divergent approaches of states).

[329] *See* COLO. REV. STAT. ANN. § 13-20-1004 (West 2004); LA. CIV. CODE ANN. art. 123 (2012); VA. CODE ANN. § 8.01-265 (West Supp. 2013).

[330] Cook v. Soo Line R.R., 2008 MT 421, ¶ 16, 347 Mont. 372, 198 P.3d 310.

[331] Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 837–38 (Del. 1999); Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship, 669 A.2d 104, 105 (Del. 1995); Gen. Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 684 (Del. 1964); *see also* Smith, *supra* note 328, at 756–57.

disturbed" and that dismissal on forum non conveniens is a "drastic remedy which the trial court must approach with caution and restraint."[332]

As for states that follow the federal standard, they are not uniform in the manner in which they apply it, providing plaintiffs with opportunities to use those subtle differences to their advantage.[333] For example, the Washington Supreme Court has adopted the federal standard, but rejected *Piper*'s "lesser deference" rule with respect to foreign plaintiffs.[334] The Georgia Supreme Court has adopted the federal standard for nonresident aliens, but not for foreigners who reside within the United States.[335] The Alaska Supreme Court has held that where the "plaintiff is a bona fide resident of the forum state, the doctrine of forum non conveniens has only an extremely limited application."[336] New York forecloses forum non conveniens dismissals where the parties to a contract agreed to be bound by New York law.[337] Thus, despite otherwise following *Piper*, many state standards are less solicitous to foreign plaintiffs than the federal standard.

Given the frequency with which federal courts dismiss transnational tort claims, state courts may be a preferred option for transnational claims. One factor in the calculus of where to sue will be the state court vagaries in applying forum non conveniens. But one should not make too much of these differences. The balance of public and private interest factors common under both federal and state standards promotes the policy of dismissing claims that have an insufficient nexus to the forum. A court's discretion in balancing the various factors often makes it almost impossible to predict the outcome of a forum non conveniens motion to dismiss.[338]

H. Preemption

Reliance on state tort laws such as wrongful death or assault and battery to resolve disputes arising from foreign conduct may implicate foreign-affairs concerns, particularly when the defendant acted in concert with foreign or U.S.

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[332] Picketts v. Int'l Playtex, Inc., 576 A.2d 518, 524–25 (Conn. 1990) (italics removed) (citation omitted) (internal quotation marks omitted).

[333] *See* Note, *Cross-Jurisdictional Forum Non Conveniens Preclusion*, 121 HARV. L. REV. 2178, 2194 (2008).

[334] *See* Myers v. Boeing Co., 794 P.2d 1272, 1281 (Wash. 1990).

[335] *See* AT&T Corp. v. Sigala, 549 S.E.2d 373, 377–78 (Ga. 2001).

[336] Crowson v. Sealaska Corp., 705 P.2d 905, 908 (Alaska 1985).

[337] N.Y. C.P.L.R. LAW § 327(b) (McKinney 2010).

[338] Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994).

government officials. But state tort laws represent a quintessential exercise of traditional state prerogatives, and courts will be reluctant to invoke preemption doctrines to dismiss traditional tort claims.[339]

As transnational tort litigation begins to address international human rights abuses with greater frequency, there is a growing risk that state tort laws will be applied extraterritorially and will conflict with federal laws or foreign affairs concerns. In a few instances courts have held that state tort claims in the transnational tort context must be dismissed under federal preemption.[340]

State laws designed to engage in foreign policy or interfere with foreign affairs are particularly vulnerable to foreign affairs preemption.[341] Conversely, state laws of general applicability that are not designed to influence U.S. foreign relations are unlikely to be dismissed under foreign affairs preemption.[342] Occasionally, as with allegations of tortious conduct by U.S. government contractors during wartime, traditional state tort claims may be dismissed under foreign affairs preemption.[343] Preemption also is more likely with traditional tort claims where state interests in the dispute are weak and the claim implicates strong federal policies with respect to foreign affairs.[344] Thus, state tort claims may in rare circumstances face preemption issues, but typically traditional tort laws of general applicability will avoid this fate.

Choice of law adds an additional wrinkle to the preemption analysis. In many cases involving foreign conduct, the proper application of choice-of-law principles will obviate preemption concerns. For example, in *Doe VIII v.*

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339 *See* Wos v. E.M.A. *ex. rel.* Johnson, 133 S. Ct. 1391, 1400 (2013) ("In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984))). For a discussion of preemption in the context of states' traditional competencies, see *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003); and *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000).

340 *See* Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1171, 1183–88 (C.D. Cal. 2005). State laws may be preempted under dormant preemption doctrines, such as foreign affairs preemption or statutory preemption doctrines. *See* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203–08; Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2097–12 (2000).

341 *See* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1072 (9th Cir. 2012); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 964–65 (9th Cir. 2010); Deutsch v. Turner Corp., 324 F.3d 692, 708–11 (9th Cir. 2003).

342 *See Movsesian*, 670 F.3d at 1075; *Von Saher*, 592 F.3d at 964–65.

343 *Saleh*, 580 F.3d at 9 ("During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted."); *cf.* Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 11–14 (1st Cir. 2010).

344 *Mujica*, 381 F. Supp. 2d at 1187–88.

Exxon Mobil Corp., the D.C. Circuit held that "[b]ecause Indonesian law applies under District of Columbia choice of law rules, the court need not address Exxon's federal preemption argument regarding District of Columbia and Delaware law."[345] When foreign law is applied, there is no application of state law to be preempted. Foreign affairs preemption does not preempt a state court's exercise of its choice-of-law rules to apply foreign tort laws.[346]

CONCLUSION

The demise of the ATS following *Kiobel* will signal the rise of transnational tort litigation. The presumption against extraterritoriality severely limits the territorial reach of the ATS, requiring plaintiffs to establish that claims touch and concern the territory of the United States with sufficient force to displace the presumption.[347]

No such presumption applies to state tort claims. Instead, courts examine the appropriateness of applying state tort laws through choice-of-law analysis. The likelihood that state tort laws will be applied to regulate foreign torts depends on the choice-of-law approach employed and the manner in which courts employ it. Some approaches will rarely result in the application of state tort laws to regulate foreign torts. For example, jurisdictions that maintain the traditional *lex loci delicti* approach will rarely apply state tort laws to regulate foreign torts. Other approaches that focus on factors and interests afford courts significant discretion to apply state tort laws extraterritorially. For example, given the governmental interests at stake, courts in the District of Columbia routinely have applied domestic state tort laws to regulate overseas terrorism.

Human rights litigation in state courts under state law requires careful choice-of-law analysis. To test how leading ATS cases might fare in state court under state law, this Article examines a number of human rights test cases from a choice-of-law perspective. The results are not surprising: territoriality and personality strongly affect the outcome under all the choice-of-law approaches. The stronger the forum's nexus to the conduct, injury, or parties, the more likely it will apply forum law. Conversely, a weak nexus to the

345 654 F.3d 11, 70–71 (D.C. Cir. 2011).

346 For a discussion of federal statutory tort laws preempting state laws but not foreign laws in the context of death on the high seas, see *Jackson v. N. Bank Towing Corp.*, 201 F.3d 415, 416–18 (5th Cir. 2000); *Oyuela v. Seacor Marine (Nigeria), Inc.*, 290 F. Supp. 2d. 713, 724 (E.D. La. 2003); *Heath v. Am. Sail Training Ass'n*, 644 F. Supp. 1459, 1467 (D.R.I. 1986); and *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 434–35 (Tex. 1999).

347 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

territory or the parties will almost invariably result in the application of foreign law.

This Article concludes with a brief analysis of the virtues of transnational litigation in state court compared with federal court litigation of international law claims under the ATS. First, unlike the ATS, state tort laws apply extraterritorially. Subject to constitutional limits, there are no presumptions that limit the extraterritorial application of state tort laws. Second, civil liability for wrongful conduct is universal. In almost every jurisdiction, a tortfeasor will be held civilly liable for tortious conduct that causes harm to others. Third, tort claims have much lower liability thresholds than the standards applied under international law. By lowering the threshold, transnational tort claims regulate harmful activities that fall below the human rights threshold of grave public wrongs. Fourth, the uncertainties relating to corporate liability under international law are nonexistent with transnational torts. Corporate liability is an accepted principle of tort law throughout the world. Fifth, applying choice-of-law principles minimizes the risk of discriminatory liability for corporations amenable to suit in the United States. Sixth, pursuing human rights claims in state court allows plaintiffs to avoid the heightened pleading standards of federal courts. Seventh, suits filed in state court are less likely to be dismissed on the basis of forum non conveniens because state court standards are often less stringent. Eighth, reframing a human rights claim as a traditional state law tort decreases the likelihood that the claim will be dismissed on preemption grounds. Pleading the claim under foreign law dramatically decreases this likelihood.

Transnational tort litigation cannot replace the old version of ATS litigation. Pursuing human rights violations in state court under state law has merits and demerits. But after *Kiobel*, human rights lawyers have precious few alternatives. If human rights lawyers are looking for a silver lining to *Kiobel*, they will find it in the opportunities that transnational tort litigation offers.