Customary International Law as the Rule of Decision in Human Rights Litigation in the US Courts

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1 Introduction

Roger Clark has devoted a lifetime to the promotion and advancement of the international law of human rights, both in his scholarship and other work. One feature of the legal landscape within which he has worked was the possibility of invoking national court jurisdiction to develop and enforce such rights, including courts in the United States. While the Supreme Court of the United States and Congress have made it more difficult to bring such suits in an American court, that possibility still remains. Such suits, for example, might be sustainable as ordinary tort suits in state or federal court. That possibility...


3 See, eg Filártiga v Peña-Irala, 630 F2d 876 (Filártiga v Peña-Irala) 879 2nd Cir. 1980.

4 Most recently in Kiobel v Royal Dutch Petroleum Corp., 133 S. Ct. 1659 (2013) (‘Kiobel’).

5 See eg 28 USC § 2242(e) (barring suits by aliens detained as a possible enemy combatant from suing on any other basis than a petition for habeas corpus), upheld: Hamad v Gates, 732 F3d 990 (9th Cir 2013), cert denied, 134 S. Ct. 2866; Ameur v Gates, 950 F Supp 2d 905 (ED Va 2013) (dicta allowing suit under international law but finding the torture claims to be barred by the immunity of the US federal government).

6 See eg, Samantar v Yousuf, 560 US 305 (2010) (construing the Foreign Sovereign Immunities Act to allow a suit against a former Minister of Defense of Somalia for human rights abuses); Licci ex rel Licci, Lebanese Canadian Bank, sal 732 F3d 161 (2d Cir 2013) (allowing suit under state law and the federal Anti-Terrorism Act); Vance v Rumsfeld, 653 F3d 591
leaves the admittedly narrow question of what legal rule courts should apply in deciding litigation in American courts over human rights claims—in other words, what particular rule of law provides the rule of decision in human rights litigation in American courts. While this is a narrow question, it depends upon important issues regarding the role of international law in American courts as well as broader questions regarding the choice of the rule of decision generally in American legal practice. Without a correct resolution of such questions, national courts cannot be an effective tool for enhancing and enforcing internationally based human rights.

2 Choice of Law Generally

I begin with the legal principles that US courts apply to determine the outcome of civil litigation. Today, choice of law in the United States for the most part remains a matter of state law. As a result, three different choice of law theories compete in American courts for acceptance depending on the state in which the court sits:


For the most part, federal courts in the United States apply the choice of law rules of the state in which the court sits. Klaxon Co. v Stentor Elec. Mfg. Co., 313 US 487 (1941). The exceptions