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INTRODUCTION

For over thirty years, victims and survivors of gross human rights abuses have sought justice in federal courts, filing lawsuits under the Alien Tort Statute (ATS)[1] against former heads of state, other government officials, military commanders, members of death squads, and both U.S. and foreign corporations.[2] In 2004, the Supreme Court affirmed the narrow but potent reach of the ATS in *Sosa v. Alvarez-Machain*, holding that the statute permits human rights claims for violations of a small set of clearly defined, widely accepted international human rights norms.[3]

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1. 28 U.S.C. § 1350 (2006).

2. See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008), for a detailed discussion of ATS litigation.

3. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court is currently considering a challenge that could significantly narrow the reach of the ATS.[4] In February 2012, the Court heard oral arguments on whether the statute permits suits against corporate defendants. Shortly after the argument, the Court asked for rebriefing and reargument on the broader question of whether the statute "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[5] The Court heard argument on that issue on October 1, 2012, and a decision is likely in early 2013. The *Kiobel* decision could have only a minor impact on future ATS claims or, if the Court finds that the ATS does not apply to claims arising out of conduct committed on foreign soil, it could greatly restrict the scope of the statute. The Court is also likely to decide the extent to which corporations and other judicial entities may be sued under the ATS.

But even under the most restrictive outcome of the *Kiobel* decision, human rights cases will continue in both federal and state courts. First, as explained in Part I of this Article, no matter how the Court decides *Kiobel*, significant international human rights litigation will continue in federal courts under the remaining core of the ATS and through supplemental or diversity jurisdiction and other federal statutes.

Second, if the *Kiobel* decision bars claims currently litigated in federal courts under the ATS, some of those claims will be litigated instead in state courts. This is an unsurprising result: courts, commentators, and litigators have long recognized that the ATS affords federal jurisdiction over common law claims that also fall within the jurisdiction of the state courts.[6] In *Filártiga v. Peña-Irala*, the first modern ATS case, the Second Circuit noted that the state courts would have had jurisdiction over the same claim.[7] Moreover, the U.S. government has accepted international law commitments with the understanding that the states will implement some of those obligations. When providing its consent to the

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4. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (mem.) (case argued Feb. 2012 and restored to docket for reargument, 132 S. Ct. 1738 (No. 10-1491) (Mar. 5, 2012) (mem.)).

5. *Kiobel*, 132 S. Ct. 1738 (No. 10-1491) (Mar. 5, 2012) (mem.) (order restoring case to docket for reargument).

6. *See, e.g.*, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filártiga v. Peña Irala, 22 HARV. INT'L L.J. 53, 63–64 (1981) (discussing the eighteenth century view of international law violations as transitory torts over which the states have jurisdiction); *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489–95 (1986) (reviewing the history of the ATS and explaining that its primary goal was to ensure federal control over issues that would otherwise be left to the states).

7. Filártiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980) ("Here, where *in personam* jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law, state court jurisdiction would be proper. Indeed, appellees conceded as much at oral argument.") (footnote omitted).

International Covenant on Civil and Political Rights,[8] for example, the Senate understanding stating that "the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, *and otherwise by the state and local governments* . . . ."[9]

State courts generally have jurisdiction to hear claims based on injuries inflicted outside of the United States, because U.S. courts—both state and federal—can generally hear "transitory torts," claims arising outside their territory, if the court has personal jurisdiction over the defendant.[10] Federal courts are courts of limited subject matter jurisdiction and must rely on a specific grant of jurisdiction—the ATS, for example, or diversity jurisdiction—to justify hearing a claim.[11] But state courts are courts of general jurisdiction, with no comparable subject matter jurisdiction restrictions. Thus, as long as a state court has personal jurisdiction over the defendant, that court will generally have jurisdiction to hear claims arising out of human rights violations in a foreign state—claims such as wrongful death, assault and battery, and false imprisonment.

In practice, human rights claims were litigated in state courts for decades before *Filártiga* inaugurated modern ATS claims; these cases are discussed in Part II. Moreover, as explained in Part III, post-*Filártiga* human rights claims based on state law have been litigated in both federal and state courts on behalf of U.S. citizens and when ATS claims were unavailable for other reasons. Part IV offers an overview of future human rights litigation in state courts or based on state law, discussing some of the differences between such claims and federal ATS claims, differences that will offer litigants both legal and practical advantages and disadvantages.

The rise of human rights litigation under the ATS corresponds with dynamic and rapid developments in international human rights litigation and institutions at the international level in the last several decades. These developments have played an essential role in the formulation of a body of human rights jurisprudence under the ATS. There has been a concomitant rise in the creation and activities of thousands of human rights organizations throughout the world that monitor and challenge human rights violators, including corporate and other private actors.

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8. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171.

9. 138 CONG. REC. S4781–84 (daily ed. Apr. 2, 1992) (emphasis added).

10. *See* Burnham v. Superior Court, 495 U.S. 604, 611 (1990) (quoting JUSTICE STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 543 (1846) ("[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found . . .")) (internal quotation marks omitted). The transitory tort doctrine has been recognized in U.S. courts for more than 200 years. *See, e.g.*, Livingston v. Jefferson, 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8411) (Marshall, Circuit J.) (stating that "an action for a personal wrong . . . is admitted to be transitory").

11. U.S. CONST. art. III, § 2.

The Supreme Court cannot end these developments any more than it can repeal the laws of gravity. If the Court limits the availability of ATS actions in federal courts, it will usher in a new era of human rights litigation in state courts across the United States.

I. POST-*KIOBEL* FEDERAL COURT HUMAN RIGHTS LITIGATION

The *Kiobel* decision will not signal the end of federal court human rights litigation. First, some ATS claims will survive. Even the most extreme Supreme Court decision—rejecting all corporate defendant litigation and all cases arising in foreign territory—would leave untouched claims against individuals for abuses occurring in the United States or at sea. A less extreme, more likely decision might permit claims against some combination of defendants, including, for example, individuals, no matter where the claim arises; U.S. citizens, including corporations; or foreign citizens living in the United States. The Court might also permit claims to proceed when a plaintiff lacks an adequate and available alternative forum in which to litigate their claims.

Second, cases will continue in federal courts under other provisions. If plaintiffs assert a claim under whatever remains of the ATS, federal courts are likely to assert supplemental jurisdiction over claims against additional defendants.[12] If a plaintiff filed an ATS claim against an individual corporate officer, for example, the federal court could assert supplemental jurisdiction over the related tort claim against the corporation. Moreover, many claims will trigger federal diversity jurisdiction.[13] Although the substantive claims might be based on state or foreign law, federal courts would have subject matter jurisdiction if the parties were diverse. Finally, several federal statutes in addition to the ATS authorize federal claims for international human rights violations, including the Torture Victim Protection Act (TVPA),[14] the Anti-Terrorism Act,[15] and the Trafficking Victims Protection Act.[16] Again, a valid claim under any of these

12. *See* 28 U.S.C. § 1367 (2006).

13. *See* 28 U.S.C. § 1332 (2006). Many ATS cases involve claims between non-citizen plaintiffs and U.S. defendants. *See, e.g.*, Doe v. Exxon Mobil, 654 F.3d 11, 71 (D.C. Cir. 2011) (holding that the federal court had diversity jurisdiction over tort claims filed by Indonesian citizens against Exxon Mobil, a U.S. citizen).

14. 28 U.S.C. § 1350 (2006) (note) (creating a federal cause of action for torture or extrajudicial execution committed under color of foreign law). After the Supreme Court's recent decision in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), precluding claims against non-natural persons under the TVPA, litigants quickly amended their pleadings to include claims against corporate executives under the TVPA. *See, e.g.*, Order Granting Leave to Amend, *In re* Chiquita Brands Int'l, Inc. Alien Tort Statute Litig., 08-01916-MD-MARRA (S.D. Fla. Sept. 18, 2012).

15. Antiterrorism Act of 1990, 18 U.S.C. §§ 2331, 2333–2338 (2006) (creating a civil cause of action for certain acts of terrorism).

16. 18 U.S.C. § 1595 (2006) (creating a civil cause of action for victims of trafficking); *see, e.g.*, Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009) (upholding a claim that Nepali workers were trafficked into Iraq against their will under the ATS, the Trafficking Victims Protection Act, and common law).

statutes would trigger supplemental jurisdiction over related claims based on state or foreign law. Even the Second Circuit's decision finding no corporate liability under the ATS recognized that ATS claims could be filed against individual corporate officials.[17]

As a result, human rights litigation will continue in federal courts, regardless of the ultimate decision in *Kiobel*. Restrictions on the ATS, particularly strict limits, however, are likely to spur greater interest in state court litigation, as discussed below.

II. PRE-ATS STATE LAW AND STATE COURT HUMAN RIGHTS CLAIMS

Long before the Second Circuit decided the *Filártiga* case, human rights advocates looked to state courts to enforce international human rights norms. In the 1940s, shortly after ratification of the United Nations Charter and adoption of the Universal Declaration of Human Rights (UDHR),[18] several cases sought to enforce human rights protections in state courts.

The early cases relied on the general human rights provisions of the U.N. Charter and the UDHR to address human rights violations within the United States. For example, in *Namba v. McCourt*, a decision holding that a statute preventing Japanese Americans from owning agricultural land violated the Fourteenth Amendment,[19] the Oregon Supreme Court looked in part to the human rights provisions of the U.N. Charter to support that holding:

> When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55c, and see Article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[20]

In *Sei Fujii v. State*, California courts relied on the U.N. Charter and the UDHR to invalidate the Alien Land Law, which prohibited Japanese nationals from owning property in California.[21] The California Supreme Court later rejected this international law argument and affirmed the decision on constitutional

17. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (mem.) (case argued Feb. 2012 and restored to docket for reargument, 132 S. Ct. 1738 (No. 10-1491) (Mar. 5, 2012) (mem.)) ("Nothing in this opinion limits or forecloses suits under the ATS against a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law.").

18. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217 (III) (Dec. 10, 1948).

19. Namba v. McCourt, 204 P.2d 569, 583 (Or. 1949).

20. *Id.* at 579.

21. Sei Fujii v. State, 217 P.2d 481, 488 (Cal. App. 1950), *vacated*, 242 P.2d 617 (1952) (striking down the Alien Land Law, relying explicitly on the U.N. Charter and the UDHR).

grounds.[22] In these and similar cases, international law had a significant impact on the litigation of equality claims in the postwar years.[23]

In later decades, state courts continued to use international norms to interpret the reach of rights protected by domestic law.[24] In 1981, for example, the Oregon Supreme Court relied on several international treaties as guides to interpretation of the rights of prisoners under the state constitution.[25] A few years later, the California Court of Appeal applied the UDHR to help interpret a state law obligation to assist the poor.[26]

Even after the 1980 *Filártiga* decision, international human rights cases that did not fit within the ATS were litigated as state law claims. A case involving the political assassination of an activist from the Philippines, for example, was litigated as a tort claim; the federal court asserted pendant jurisdiction over the state tort law claims.[27] In *Linder v. Calero Portocarrero*, the family of Benjamin Linder, a U.S. citizen executed in Nicaragua, sued the leaders of the Nicaraguan organization responsible for his death.[28] As U.S. citizens, the Linders could not sue under the ATS.[29] Instead, they filed a claim in federal court under diversity jurisdiction, alleging the common law domestic tort of wrongful death. Similarly, a U.S.-citizen plaintiff in the consolidated cases against the estate of Ferdinand Marcos obtained a judgment based on state law claims.[30] And in *Martinez v. City of Los Angeles*, an elderly Mexican man sued two Los Angeles police officers and the City of Los Angeles for providing Mexican authorities with false information.[31] That information led to the man's imprisonment in Mexico for two months for a crime in Los Angeles that he did not commit.[32] Although his ATS claims were dismissed on the merits, he prevailed on his state tort claims, which were ultimately settled out of court.[33] The *Martinez* case demonstrates that state common law tort claims

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22. *Sei Fujii*, 242 P.2d at 630.

23. *See generally* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation, 1946, 1955*, 69 IOWA L. REV. 901, 902 (1984).

24. *See* Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 164–94 (2006) (analyzing state law cases invoking international law norms).

25. *See* Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981) (en banc).

26. *See* Boehm v. Superior Court, 223 Cal. Rptr. 716, 721 (Cal. App. 1986).

27. Estate of Domingo v. Republic of the Phil., 694 F. Supp. 782, 784 (W.D. Wa. 1988); *see also* Liu v. Republic of China, 892 F.2d 1419, 1434 (9th Cir. 1989) (reversing the district court's dismissal of a wrongful death claim based on assassination of the plaintiff's husband); Letelier v. Republic of Chile, 488 F. Supp. 665, 674 (D.D.C. 1980) (denying a motion to dismiss state and federal claims, including assault and battery, arising out of the assassination of Orlando Letelier and Ronni Moffitt).

28. Linder v. Calero Portocarrero, 963 F.2d 332, 333–34 (11th Cir. 1992).

29. *See* 28 U.S.C. § 1350 (2006) (affording jurisdiction over claims by aliens, not U.S. citizens).

30. *See* Hilao v. Estate of Marcos, 103 F.3d 789, 793–94 (9th Cir. 1996) (discussing claims filed by U.S. citizen Jaime Piopongco).

31. Martinez v. City of Los Angeles, 141 F.3d 1373, 1376 (9th Cir. 1998).

32. *See id.* at 1376–77.

33. *Id.* at 1378–82.

arising outside the United States can be litigated in U.S. courts in the absence of ATS claims.

In an early human rights claim against a corporation, several Palestinian families whose family members died after exposure to tear gas sued a tear gas manufacturer for negligent sale of its product to Israel for use by Israeli security forces.[34] The federal case was dismissed, and plaintiffs refiled in state court, where the claims eventually settled.

In the sixty years since the California Supreme Court rejected a lower court's reliance on the U.N. Charter in *Sei Fujii*, there has been a sea change in the landscape of international human rights law. The United States has been a significant participant in these developments. Federal courts have continued to cite and rely on international human rights principles, as in Justice Kennedy's majority opinion invalidating the juvenile death penalty in *Roper v. Simmons*.[35] Major domestic human rights organizations have formally incorporated international human rights into their advocacy and litigation.[36] Many domestic lawsuits are based on facts that would support an ATS claim, and domestic groups are increasingly recognizing that adding international law claims may strengthen their work.[37] If the ATS is restricted, it is likely that international human rights arguments and claims will become more common in state court litigation.

III. ATS CASES WITH STATE LAW CLAIMS

Since *Filártiga*, ATS cases have routinely included parallel state law claims. Thus, a complaint alleging summary execution generally includes a state claim for wrongful death, and a complaint alleging torture generally includes assault and battery. The state law claims often drop out when plaintiffs obtain a judgment on the international human rights claim. In some cases, however, the state law claims have featured prominently in the course of litigation.

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34. *See* Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of* Abu-Zeineh v. Federal Laboratories, Inc., 11 AM. U. J. INT'L L. & POL'Y 195, 198 (1996) (discussing the federal case and its dismissal for lack of diversity jurisdiction).

35. Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

36. For example, the American Civil Liberties Union created an active international human rights program in its national office in the last decade, and the Center for Constitutional Rights has continued to press international law claims in both domestic and international cases. The Bringing Rights Home network was formed specifically to "domesticate" international human rights norms. The work of these organizations and many others has led to increased domestic international human rights litigation and other efforts at the international level. *See* FORD FOUND., CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 38–42 (2004).

37. *See generally* Paul Hoffman & Adrienne Quarry, *The Alien Tort Statute: An Introduction for Civil Rights Lawyers*, 2 L.A. PUB. INT. L.J. 129, 139–48, 152 (2009–10) (suggesting to domestic civil rights lawyers several areas of domestic litigation where ATS claims might be beneficial, including trafficking, sweatshops, and prison litigation).

For example, in *Doe v. Unocal Corp.*,[38] a case alleging Unocal's complicity in forced labor, torture, and extrajudicial execution in connection with a natural gas pipeline project in Burma, the plaintiffs refiled their pendent state claims in the state trial court after the ATS claims were dismissed. While an appeal of the dismissal of the ATS claims was pending, plaintiffs completed discovery in state court and prepared for trial.[39] The case settled several months before the state court trial was scheduled to begin and shortly before an en banc oral argument before the Ninth Circuit.[40] The *Unocal* plaintiffs were able to assert all of their ATS claims as state common law tort claims in the state court case. The same will be true in virtually every ATS case.

Similarly, in *Doe v. Exxon Mobil Corp.*, the plaintiffs' tort claims may proceed regardless of what ultimately happens to their ATS claims.[41] In July 2011, a divided panel of the D.C. Circuit decided that the ATS claims in that case could proceed to trial and also reversed the district court's dismissal of the state law tort claims.[42] As a result, no matter what the Court decides in *Kiobel*, the plaintiffs will have viable claims on remand in the *Exxon* case.

In *Bowoto v. Chevron*, the district court allowed the plaintiffs to proceed on both their ATS and state law claims, although the jury ruled against the plaintiffs and an appeal was unsuccessful.[43] State law claims in *Abdullahi v. Pfizer, Inc.*, a case

38. Doe v. Unocal Corp., 963 F. Supp. 880, 883–84, 892 (C.D. Cal. 1997) (denying a motion to dismiss); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1312 (C.D. Cal. 2000) (granting defendants' motion for summary judgment), *aff'd in part*, *rev'd in part*, 395 F.3d 932, 962–963 (9th Cir. 2002) (reversing summary judgment and remanding for trial), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003). The Ninth Circuit granted Unocal's petition for rehearing en banc and held one en banc argument. While the case was pending, the Supreme Court granted certiorari in *Sosa* and the Ninth Circuit stayed the *Unocal* appeal pending the *Sosa* decision. In December 2004, before a scheduled post-*Sosa* re-argument of the rehearing en banc, the parties announced a settlement and dismissed all claims for an undisclosed amount. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

39. The trial court held a hearing on choice of law and decided that California law applied to the plaintiffs' claims. Doe v. Unocal Corp., Nos. BC 237980, BC 237679, 2002 WL 33944506 at *13–14 (Cal. Super. Ct. June 11, 2002). Although the court, after a trial, refused to allow the plaintiffs to pierce the corporate veil of the defendant parent corporations, the court allowed the plaintiffs to proceed to trial on the theory that the parent corporations were liable for the actions of their subsidiaries, inter alia, on an agency theory. *Id.* at *10, *13.

40. *See Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6; *see supra* note 38.

41. Doe v. Exxon Mobil Corp., 654 F.3d 11, 71 (D.C. Cir. 2011). Exxon filed a petition for rehearing en banc concerning the ATS claims in the case, but the Circuit deferred decision until the Supreme Court rules in *Kiobel*. Doe v. Exxon Mobil, Order Deferring Petition for Rehearing En Banc Pending Decision in *Kiobel*, No. 09-7135 (D.C. Cir. Nov. 14, 2011). For this reason there have been no further proceedings in the case at the district court level.

42. *Exxon Mobil*, 654 F.3d at 69–70 (holding that Indonesian law applied to the plaintiffs' claims).

43. Bowoto v. Chevron Corp., 621 F.3d 1116, 1121–31 (9th Cir. 2010).

involving medical experimentation on Nigerian children,[44] were settled after the Second Circuit's ruling in *Kiobel*.[45]

There may also be statutory bases for human rights claims in state courts. For example, California Business and Professions Code section 17200, California's basic unfair competition statute, was found to apply to a claim that Nike misrepresented its human rights record.[46] However, an attempt by employees of Wal-Mart suppliers in China, Bangladesh, Indonesia, Swaziland, and Nicaragua to hold Wal-Mart accountable for working conditions in the factories of these foreign suppliers was unsuccessful, notwithstanding the code of conduct that Wal-Mart requires its suppliers to meet.[47] The Ninth Circuit rejected an array of state law claims, including third-party beneficiary, unjust enrichment, and state law tort claims.[48]

IV. HURDLES AND ADVANTAGES TO STATE LAW CLAIMS AND STATE COURT LITIGATION

State law claims, whether litigated in state or federal courts, offer litigants both advantages and disadvantages as compared to federal claims litigated in federal courts. This Part starts by discussing some of the substantive and procedural implications of litigating such cases in state courts or bringing state law claims in federal courts. The Part then responds to questions about whether such cases belong in state courts.

A. Substantive and Procedural Ramifications of State Law and State Court Human Rights Litigation

The procedural rules governing state court litigation are different in each state, which creates obvious difficulties for human rights plaintiffs; by comparison, federal court procedure is uniform around the country. These state-to-state differences may lead plaintiffs to an analysis of the most favorable procedural forum for a human rights case. Because defendants will engage in the same analysis, personal jurisdiction and forum non conveniens motions will likely be the initial battleground in state court human rights cases.[49] Each state will have its

44. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169–70 (2d Cir. 2009).

45. *See* Sue Reisinger, *Pfizer Settles Lawsuits over Drug Trials on Children in Nigeria*, CORP. COUNS. (Feb. 23, 2011), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202482854504.

46. *See* Kasky v. Nike, Inc., 45 P.3d 243, 247–49 (Cal. 2002). In 2004, California voters imposed standing restrictions on section 17200 plaintiffs that make the statute harder to use in human rights cases. *See, e.g.*, *In re* Tobacco II Cases, 46 Cal. 4th 298, 315–21 (2009).

47. *See* Doe v. Wal-Mart Stores, Inc., 572 F.3d 677, 680 (9th Cir. 2009).

48. *Id.* at 682–85.

49. Defendants have filed forum non conveniens (FNC) motions in several ATS cases. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99–108 (2d Cir. 2000) (denying an FNC motion). In a case for environmental damage filed by indigenous Ecuadorans, Texaco (now Chevron Texaco) won an FNC motion after agreeing not to contest jurisdiction if the case was refiled in

own standards for personal jurisdiction,[50] bounded by constitutional requirements, and its own forum non conveniens jurisprudence.[51] Similarly, each state will have its own pleading requirements, although these are likely to be less demanding than the Supreme Court's requirements in *Iqbal*.[52] Indeed, *Iqbal* may drive at least some human rights claimants to state court no matter what the Supreme Court decides in *Kiobel*.

State court litigation will usually be based on state tort law, as will state claims litigated in federal court pursuant to supplemental or diversity jurisdiction.[53] The elements of state tort claims will vary from state to state, as will the defenses and immunities available to defendants. Each state will also have different rules regarding duty, causation, proximate cause, and other traditional tort concepts. Some of these rules may narrow the opportunity for human rights litigation, but state tort claims may also be significantly broader than ATS claims. For example, most tort claims are not restricted by the need to show state action. In general, state tort law should offer broader coverage than ATS claims, which are limited by the historical paradigm test in *Sosa*.[54]

Moreover, some of the controversial issues in ATS litigation in recent years will not be controversial in state human rights litigation. There is no state (or foreign country that we are aware of) that does not impose tort liability on corporations and other non-natural persons. Thus, the corporate liability issue initially argued in *Kiobel* is simply not an issue in state court tort litigation. Corporate liability for torts is assumed to be part of the bargain corporations enter

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Ecuador. Aguinda v. Texaco, Inc., 303 F.3d 470, 476–80 (2d Cir. 2002). In 2011, a judge in Ecuador issued an $8.6 billion judgment for damages and clean up costs, with the damages increasing to $18 billion if Chevron does not issue a public apology; the judgment was upheld on appeal. Chevron is now engaged in complex legal battles in multiple fora around the world to avoid paying the judgment. For a detailed history of the case, see *Ecuador Case Overview*, http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador (last visited Nov. 20, 2012). The corporation's experience may lead future defendants to prefer to litigate in U.S. courts, state or federal, rather than face litigation in foreign fora.

50. Compare California, which allows personal jurisdiction to the full extent permitted by the U.S. Constitution, CAL. CIV. PRO. § 410.10 (West 2003), with New York, which provides for a narrower conception of personal jurisdiction, N.Y. C.P.L.R. § 302 (McKinney 2011) (listing specific acts that give rise to personal jurisdiction).

51. In addition, there is no doctrine of exhaustion of domestic remedies in state court tort litigation as there might be in ATS litigation. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 754–55 (9th Cir. 2011) (en banc) (applying the doctrine of prudential exhaustion of domestic remedies in an ATS case).

52. Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009) (specifying that the "plausibility" standard for assessing whether a complaint states a claim, established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies to all federal court civil litigation).

53. State law might also permit courts to recognize common law torts based on international human rights law or to use international law obligations to interpret state common law, statutes, or constitutional norms. If the Supreme Court significantly narrows the ATS, plaintiffs are likely to test these common law theories in state courts.

54. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

into for corporate existence.[55] Similarly, there is little doubt that state tort law recognizes aiding and abetting and civil conspiracy liability.[56] Overall, theories of liability in state court tort cases are likely to be more expansive and less contested than they have been in ATS litigation.

State claims will trigger conflict of laws issues in cases where the conduct occurs on foreign soil. Conflict of laws rules, which vary from state to state, turn in part on whether the defendants and plaintiffs are citizens or residents of the forum state and whether relevant decisions or other acts took place in the state. The greater the connection to the forum state, the more likely it is that the state will apply its own laws. Although transitory tort cases involving foreign litigants and foreign events will generally apply the law of the place of injury,[57] a state court may apply the law of the forum with respect to particular issues where there is no actual conflict between that law and local law.[58] Further, state courts applying state conflict of law principles could decide to apply forum law based on a balance-of-interests analysis.[59]

At a more practical level, the statutes of limitations applicable to most state tort claims will be much shorter than the ten-year statute applicable to ATS claims.[60] This may present insurmountable difficulties. Human rights cases are complicated, with plaintiffs who are often traumatized and unaware of their legal options. If plaintiffs take too long to obtain counsel willing to shoulder the burden of litigating claims arising abroad, it may be too late to file a claim. However, generous tolling doctrines available in state courts may ameliorate the time pressure, although these too will vary by state.

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55. See Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2011) (Posner, J.) ("[I]n the United States the liability of a corporation for torts committed by its employees in the course of their employment is strict, on the theory that strict liability for employees' torts gives corporations (and other employers) incentives to police their employees that are needed because the employees themselves will usually be judgment proof and hence not responsive to tort sanctions.").

56. See Halberstam v. Welch, 705 F.2d 472, 477–78 (D.C. Cir. 1983) (citing RESTATEMENT OF TORTS (SECOND) § 876(a)–(b) (1979), for conspiracy and aiding and abetting, respectively).

57. *See, e.g.*, Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 127 (1904); Doe v. Exxon Mobil Corp., 654 F.3d 11, 69–70 (D.C. Cir. 2011) (holding that Indonesian law applied to claims arising in Indonesia). Application of local law to a case having no connection at all to the forum state could raise constitutional issues. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (suggesting due process limits on a state's ability to apply its own law to a claim with no contacts to the state and as to which the state has no interest).

58. In *Bowoto v. Chevron Corp.*, a California district court applying California choice-of-law rules held that California law applied to a claim arising in Nigeria because there was no conflict and because California and Nigeria both had interests in the claim. Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455761, at *7 (N.D. Cal. Aug. 22, 2006).

59. There are complicated choice-of-law issues in ATS cases too, but courts generally apply either international standards or federal common law principles to resolve most issues. *See generally* STEPHENS ET AL., *supra* note 2, at 36–41.

60. The ATS contains no statute of limitations, but all courts to consider the issue have applied the ten-year statute included in the TVPA. *See* STEPHENS ET AL., *supra* note 2, at 386.

At an even more practical level, state judges and state juries deciding human rights cases may (or may not) differ from federal court judges and juries. In some parts of the country, plaintiffs' attorneys prefer state court juries, who are generally drawn from a smaller geographic area. But it is impossible to generalize about the impact of a state court jury on a particular case. There may also be differences between federal and state court judges. Because they have life tenure, federal judges may be more willing to challenge important local corporations facing such serious allegations. State court judges without such tenure who must run for re-election may be more vulnerable to pressure, even if it is self-imposed. Although these differences are not unique to human rights litigation, they may be of significance in high profile human rights cases.

Finally, some defendants in ATS litigation have argued that state law claims are barred by the doctrine of foreign affairs preemption. The only ATS case where this argument has been accepted with respect to state court tort claims is *Mujica v. Occidental Petroleum Corp.*[61] The doctrine ordinarily applies only where state statutes conflict with specific federal policies or foreign affairs decisions or actions.[62] Such preemption does not usually apply in areas of traditional state authority, such as state tort law. However, if ATS cases shift to state court, defendants are likely to push expansive notions of preemption to avoid such cases.

B. Are International Law Claims a Bad Fit in State Courts?

Some commentators question both whether state law is an appropriate tool by which to evaluate international human rights violations and whether state court judges and juries will be open to litigation of international human rights claims in local courts. We agree that international human rights violations should be identified and remedied as such. One of the great benefits of ATS litigation is that these violations have been addressed within an international human rights framework. This is a great advance in international efforts to hold human rights violators accountable. However, state courts can also function as effective fora for human rights accountability.

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61. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1187–88 (C.D. Cal. 2005). An appeal in the case has been pending since 2005 and has now been stayed pending the Supreme Court's decision in *Kiobel*. This argument was specifically rejected in *Doe v. Exxon Mobil Corp*, No. Civ. A. 01-1357(LFO), 2006 WL 516744, at *3 n.2 (D.D.C. Mar. 2, 2006), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007). *See also* Beaty v. Republic of Iraq, 480 F. Supp. 2d 60 (D.D.C. 2007) (holding that children of U.S. citizens allegedly tortured in Iraq stated claims under Florida and Oklahoma law), *vacated on jurisdictional grounds*, 2009 U.S. App. LEXIS 17034 (D.C. Cir. 2009).

62. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421 (2003) (finding a California statute extending statute of limitations for Holocaust insurance claims preempted due to conflict with "exercise of the federal executive authority"); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000) (finding a Massachusetts state law placing sanctions on Burma preempted); Zschernig v. Miller, 389 U.S. 429, 432 (1968) (finding an Oregon state law preempted because it intruded into foreign affairs).

1. The "Garden Variety" Tort Problem

The word "torture" captures the horror of the calculated infliction of severe pain by state actors for a specific purpose, usually to gain political advantage. The very government officials who should protect against evil turn instead against their people and inflict immeasurable harms. In a thoughtful decision in *Xuncax v. Gramajo*,[63] District Court Judge Douglas Woodlock concluded that it was far preferable to label such conduct a violation of international law, rather than "reduc[e] it to no more (or less) than a garden-variety municipal tort."[64] He found state tort law to be "an inadequate placeholder" for the values protected by international human rights law.[65]

Judge Woodlock, however, was writing in 1995, at a time when the ATS was available to the plaintiffs before him. Faced with the option of applying local tort law or no law at all, he surely would have applied domestic law to the horrors suffered by the plaintiffs in the *Xuncax* case. Tort law, of course, addresses not just minor ("garden-variety") car accidents and slip-and-falls, but also heartbreaking wrongs, including intentional torts, with catastrophic impacts on their victims. State courts can apply municipal tort law without diminishing the gravity of the abuses alleged and without converting the cases into insignificant tort cases. Moreover, state common law may encompass violations of the law of nations, so that it might be possible in some states to sue for torture under state law.

It is also likely that international human rights issues will become a part of such state court cases, even if the cause of action sounds in tort. For example, a torture victim bringing a state court tort claim might introduce expert testimony about the impact of torture on the victim. The same may be true of claims such as disappearance or extrajudicial killing. Moreover, the human rights context of a state tort claim will almost certainly be presented in some fashion to the jury. In particular, evidence that defendants (corporations, for example) had notice of human rights violations but continued to be complicit in them would be relevant both to any mental element of a tort and also to impose punitive damages. Similarly, the demanding requirements for the tort of intentional infliction of emotional distress would be met by proof of universal human rights norms of the kind recognized under *Sosa*. And, the existence of human rights reports about the facts at issue in a case might be relevant in opposition to a motion to dismiss, to satisfy the *Iqbal* pleading standards[66] in federal court, or to defend against a motion for summary judgment.

63. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

64. *Id.* at 183.

65. *Id.*

66. Ashcroft v. Iqbal, 556 U.S. 662 (2009) (requiring a "plausibility" standard for assessing whether a complaint states a claim).

2. The Comfort Factor: Why Should This Case Be in a State Court?

Federal court litigators often assume that state court judges will be more skeptical of international cases than federal judges. Early ATS cases, however, were hardly smooth going in federal courts, where it took many years and many decisions before federal judges became familiar with the premise underlying the statute. As more state law claims are filed and decided, a similar process may occur in state courts as well.[67] Perhaps more importantly, most ATS cases involve local defendants, and many involve local plaintiffs. State court judges and juries should be perfectly comfortable deciding cases in which a local resident is accused of having tortured and killed civilians, even if the events took place in a different country. Similarly, local judges and juries may be very interested in holding accountable local corporations accused of wrongdoing, even if those wrongs occurred outside the United States.

In a few instances, when judges, jurors, or members of the public ask why a case is in a local state court, the answer may be that the claims involve universal wrongs. But far more often the answer will strike closer to home: the case is in a local court because the defendant lives in the neighborhood; because the corporation is a citizen of the state, with local headquarters; or because local residents are among the victims of the human rights abuses.

CONCLUSION

An assessment of the likelihood of state court litigation for human rights violations must start with an understanding of the tenacious commitment of the many, many people who have been injured by such abuses. People whose lives have been so badly scarred by genocide, torture, summary executions, and disappearances will pursue every available option to obtain some measure of justice. Benjamin Linder's father, David Linder, never gave up the fight to hold someone liable for his son's murder. Dolly Filártiga, sister of Joelito Filártiga, still breaks into tears when she talks about the night that she saw her brother's badly tortured body. But she also remembers clearly that she vowed that night to hold her brother's murderer accountable for what he had done.[68]

Motivated plaintiffs will continue to search for any means to hold accountable those responsible for the abuses they and their family members have suffered, and human rights lawyers will look for ways to represent them in that struggle. Survivors have filed civil and criminal complaints in countries around the

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67. Given that there are many more state court judges than federal judges, the process in state courts is likely to develop more slowly. However, when *Filártiga* was decided in 1980, very few lawyers or judges had any understanding of international law. Today, most law students are exposed to international law in law school, so judges (and their clerks) at all levels have a much greater background on which to draw when faced with a case involving international human rights.

68. *See* Dolly Filártiga, *Foreword* to BETH STEPHENS ET AL., *supra* note 2, at xvii.

world, administrative claims with domestic governments, and complaints and petitions with countless international regulatory bodies. Here in the United States, if the Supreme Court further restricts access to federal courts, victims of human rights abuses will increasingly file their claims in state courts.

From the perspective of plaintiffs, the future of state law human rights litigation is simple: if such litigation is a viable option, even if a difficult one, and it is better than the alternatives, plaintiffs will make every effort to use it in their search for justice.