UC Irvine Law Review

Volume 3
Issue 1 *Human Rights Litigation in State Courts and Under State Law*
Article 3

2-2013

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Foreword: After *Kiobel*—International Human Rights Litigation in State Courts and Under State Law

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Litigation in domestic courts is only one of many ways to promote and protect international human rights, but it has received much attention from lawyers, scholars, governments, and nongovernmental organizations.[1] Attention has focused above all on litigation in the U.S. federal courts under the Alien Tort Statute (ATS),[2] which provides that "[t]he 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."[3] Originally adopted by the U.S. Congress as part of the Judiciary Act of 1789,[4] it was not until the Second Circuit's

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1. *See generally* RALPH G. STEINHARDT ET AL., INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS (2009) (providing an overview of human rights advocacy not only in domestic courts, but also in other domestic institutions, as well as through intergovernmental organizations, nongovernmental organizations, and the media). *See also* Owen C. Pell et al., *The Alien Tort Statute at a Crossroads: The High Court Revisits Extraterritorial Jurisdiction in* Kiobel v. Royal Dutch Petroleum *in a Rare Reargument*, WHITE & CASE ALERTS (Sept. 2012), http://www.whitecase.com/alerts-09272012; Erica Razook, *Corporate Accountability Comes Before the U.S. Supreme Court*, AMNESTY INT'L HUM. RTS. NOW BLOG (Mar. 2, 2012, 1:06 PM), http://blog.amnestyusa.org/justice/corporate-accountability-comes-before-the-u-s-supreme-court.

2. 28 U.S.C. § 1350 (2006).

3. *Id.*

4. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (noting that "[t]he first Congress passed [the ATS] as part of the Judiciary Act of 1789").

landmark decision in *Filártiga v. Peña-Irala* in 1980 that the ATS became a basis for litigating human rights claims in the U.S. federal courts.[5] According to one recent estimate, well over 100 human rights suits have been filed under the ATS since that decision.[6]

However, plaintiffs face growing barriers to ATS human rights litigation in the U.S. federal courts.[7] Some of these barriers are substantive. In its 2004 decision in *Sosa v. Alvarez-Machain*,[8] the U.S. Supreme Court narrowed the range of international law violations for which the ATS could provide subject matter jurisdiction, holding that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted,"[9] namely, "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[10] In addition, the Court observed, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[11] After *Sosa*, some courts of appeal have dismissed prominent ATS claims for failure to show violations of specific and widely accepted rules of international law, including with respect to secondary liability.[12]

Other barriers are procedural. For instance, some circuits have applied the forum non conveniens doctrine in ATS cases, including the Second Circuit in *Türedi v. Coca-Cola Co.*, a case involving Turkish citizens injured and imprisoned allegedly in violation of international law due to a labor dispute,[13] and the Eleventh Circuit in *Aldana v. Del Monte Fresh Produce N.A., Inc.*, a case concerning a lawsuit by Guatemalan labor unionists against the owner of a Guatemalan banana plantation claiming that the defendant participated in torture and other human

5. Filártiga v. Peña-Irala, 630 F.2d 876 (1980); *see also* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS, at xxii (2d ed. 2008) (noting that the *Filártiga* case was "the first successful use of the [ATS] to enable victims of international human rights violations to sue in U.S. courts").

6. 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, 357 (2011) (noting that since 1980, "U.S. courts have issued 173 opinions in cases brought, at least in part, under the ATS").

7. *See generally* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 728–32 (2012) (describing a contraction of ATS litigation by the U.S. federal courts).

8. *Sosa*, 542 U.S. 692.

9. *Id.* at 732.

10. *Id.* at 724.

11. *Id.* at 732–33.

12. *See, e.g.*, Aziz v. Alcolac, Inc., 658 F.3d 388, 398 (4th Cir. 2011) (adopting the mens rea standard for aiding and abetting liability in ATS actions from Talisman Energy); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (holding that "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone").

13. Türedi v. Coca-Cola Co., 343 F. App'x 623, 626 (2d Cir. 2009).

rights violations.[14] Some circuits are also requiring heightened pleading standards in ATS cases. In *Sinaltrainal v. Coca-Cola Co.*, a case involving allegations of corporate collaboration with Colombian paramilitary forces to murder and torture trade union leaders and employees, the Eleventh Circuit relied on heightened plausibility pleading standards enunciated recently by the Supreme Court in *Ashcroft v. Iqbal*[15] and *Bell Atlantic Corp. v. Twombly*[16] to require ATS plaintiffs to plead a claim that is plausible on its face by showing that a defendant violated a specific international law norm.[17] Some courts have also suggested that plaintiffs must exhaust local remedies before proceeding with their claims in the U.S. federal courts.[18] Accordingly, plaintiffs will not only face significant hurdles in pleading their claims but may also lose access to the tools of discovery for obtaining evidence of wrongdoing. Moreover, when matters of foreign policy are implicated—as is often said to be the case in ATS cases—the court may dismiss a suit on the basis of the political question doctrine, the act of state doctrine, or international comity.[19]

In addition, because the doctrines of foreign state immunity, head of state immunity, and foreign official immunity limit the range of defendants against whom plaintiffs may bring ATS suits,[20] plaintiffs often sue corporate defendants instead.[21] However, the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, an ATS lawsuit by Nigerian plaintiffs against an oil company for allegedly aiding and abetting human rights violations by the Nigerian government, held that corporations are not subject to suit under the ATS because corporate liability has

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14. Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1286, 1300 (11th Cir. 2009).

15. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

16. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556–57 (2007).

17. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1266–69 (11th Cir. 2009), *abrogated by* Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012). Courts in other circuits have employed heightened pleading standards to dismiss ATS claims for lack of plausibility. *See, e.g.*, Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1098, 1110 (C.D. Cal. 2010).

18. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011) (suggesting that "a U.S. court might, as a matter of international comity, stay an Alien Tort suit that had been filed in the U.S. court, in order to give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed willing and able to do that").

19. *See generally* Brief for Professors of Civil Procedure and Federal Courts as Amici Curiae on Reargument Supporting Petitioners at 10–19, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. argued Oct. 1, 2012), 2012 WL 2165339, at *11–19 [hereinafter Civil Procedure Brief] (providing an overview of these doctrines).

20. *See* STEPHENS ET AL., *supra* note 5, at 365–84 (providing an overview of immunities defenses to ATS suits).

21. Estimates of the number of ATS suits filed against corporations vary. *Compare* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 814 (2008) (estimating that there have been approximately eighty-five ATS suits filed against corporations from 1960 through the article's publication), *with* 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) (estimating that there have been approximately 155 such suits).

not been established specifically as part of international law.[22] Because other circuits reached a different conclusion,[23] the U.S. Supreme Court agreed to review the *Kiobel* case and heard arguments in 2012.

Although the Supreme Court initially granted certiorari in *Kiobel* to decide the issue of corporate civil tort liability under the ATS, it subsequently ordered reargument on the broader question of "[w]hether and under what circumstances the [ATS] 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."[24] In addition, comments by the justices in the *Kiobel* oral arguments raise the possibility that the Court may require exhaustion of local remedies in ATS litigation.[25] At the time this issue of the *UC Irvine Law Review* went to press, the Supreme Court had yet to announce its decision in *Kiobel*. However, it is likely that the Court will limit ATS litigation—perhaps substantially.[26]

All of this raises an important question: What will human rights litigation look like after *Kiobel*? Put differently, "[i]f the federal courthouse doors that were opened by the Second Circuit's *Filártiga* decision are now being closed, what other windows remain open for human-rights activists and plaintiffs?"[27] The *Kiobel* decision is unlikely to end ATS litigation in the federal courts,[28] but it is likely that many post-*Kiobel* human rights claimants will consider alternative strategies.

However, alternative approaches in federal courts appear to be quite limited. Relatively few federal statutes provide express private causes of action for international human rights violations. The most prominent of these, the Torture Victim Protection Act,[29] applies only to torture and extrajudicial killing, and the Supreme Court recently limited it (in accordance with its text) to individual

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22. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117, 145 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 279 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011) (No. 10-1491), *argued* Feb. 28, 2012, *and restored to calendar for reargument*, 132 S. Ct. 1738 (2012) (No. 10-1491).

23. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011) (en banc); *Flomo*, 643 F.3d at 1025; Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011).

24. Order in Pending Case, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Mar. 5, 2012), available at http://www.supremecourt.gov/orders/courtorders/030512zr.pdf.

25. Transcript of Oral Argument at 13–15, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Oct. 1, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf (exchanges between counsel for petitioners and Justices Ginsburg and Kagan regarding the amicus brief of the European Commission, which proposed an exhaustion requirement).

26. *See* Lyle Denniston, *Argument Recap: In Search of an ATS Compromise*, SCOTUSBLOG (Oct. 1, 2012, 2:35 PM), http://www.scotusblog.com/2012/10/argument-recap-3 (arguing that "[a] compromise seem[s] in the offing" in *Kiobel* between justices wishing to limit the ATS's reach and a majority that "did not seem inclined to narrow the [ATS] nearly into non-existence").

27. Childress, *supra* note 7, at 739.

28. *See* Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 10 (2013) (arguing that "even under the most restrictive outcome of the Kiobel decision, human rights cases will continue in both federal and state courts").

29. Pub. L. No. 102-256, 106 Stat. 73 (1992).

defendants, rather than corporations and other entities.[30] The Court generally has been reluctant to find an implied right of action where none is expressed,[31] and indeed some federal legislation in the area, such as the Genocide Convention Implementation Act,[32] specifically forecloses private claims. Further, the Court has sharply limited the extraterritorial effect of generally worded federal statutes through a strict presumption against extraterritoriality, making them difficult to apply to human rights violations abroad.[33] Finally, federal courts have been reluctant to find common law rights of action for international law violations under jurisdictional statutes other than the ATS, such as the statute providing for federal question jurisdiction.[34] As a result, international human rights litigation under U.S. federal law apart from the ATS may be viable only in a few specific areas.[35]

Another alternative is human rights litigation in state courts or under state law. This is not a new strategy.[36] Indeed, if substantive and procedural barriers to human rights litigation under U.S. federal law in the U.S. federal courts continue to grow, plaintiffs alleging human rights violations are increasingly likely to consider pursuing their claims in state courts or under state law. This may be part of the next wave of transnational litigation.[37]

Among the potential attractions of state courts and state law, human rights claimants might be able to avoid application of the federal forum non conveniens doctrine and strict federal pleading standards, and in some cases they may find a more sympathetic judge or jury.[38] Since "[t]he same conduct that constitutes a

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30. Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1705 (2012).

31. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

32. 18 U.S.C. §§ 1091–1092 (2006).

33. Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869, 2883 (2010).

34. *See, e.g.*, McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1076 (D.C. Cir. 2012) (holding that international law claims are not cognizable under the commercial activity exception to the Foreign Sovereign Immunities Act); Serra v. Lappin, 600 F.3d 1191, 1197 n.7 (9th Cir. 2010) (holding that international law claims are not cognizable under the statute granting federal question jurisdiction).

35. For example, in addition to the Torture Victim Protection Act, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605A (Supp. II 2008), provides an express cause of action for some acts of terrorism, and, arguably, the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3) (2006), supports international law causes of action for expropriation. For an assessment of non-ATS options for human rights litigation in the federal courts, see STEPHENS ET AL., *supra* note 5, at 75–128.

36. *See generally* Paul L. Hoffman, *The Application of International Human Rights in State Courts: A View from California*, 18 INT'L L. 61 (1984) (discussing human rights litigation in state courts); Hoffman & Stephens, *supra* note 28, at 13 ("Long before the Second Circuit decided the *Filártiga* case, human rights advocates looked to state courts to enforce international human rights norms.").

37. Childress, *supra* note 7, at 757.

38. *See* STEPHENS ET AL., *supra* note 5, at 121 (noting that "[t]o date, state litigation has generally been a course of last resort," but that "litigation in state court may be a reasonable option in some cases, if litigants and their lawyers are more familiar with state procedure or predict a more sympathetic judge or jury in the state system").

violation of international human rights norms usually also violates the law of the place where it occurred and the law of the forum state,"[39] plaintiffs might be able to avoid *Sosa*'s limitations on the types of international law violations over which the ATS provides jurisdiction by pleading their claims under state or foreign law.[40] Moreover, by pleading human rights claims as domestic tort claims rather than violations of international law—for example, assault and battery or intentional infliction of emotional harm rather than torture, or wrongful death instead of extrajudicial execution—plaintiffs might be able to avoid limits on corporate liability for international law violations such as those imposed by the Second Circuit (and perhaps eventually by the Supreme Court) in *Kiobel*.[41]

But even if state courts and state law hold promise, they will not be a simple panacea for human rights claimants.[42] Some limits, such as personal jurisdiction,[43] foreign sovereign immunity, and the act of state doctrine, apply equally in state court.[44] Further, defendants sued in state court for human rights violations may be able to remove the case to federal court and thus invoke the protections of federal procedural law.[45] Even in suits that are not removed, states have their own versions of the forum non conveniens doctrine,[46] and it remains to be seen whether state courts will use the doctrine more or less aggressively than federal

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39. *See id.* at 120.

40. *See* Childress, *supra* note 7, at 740 (discussing this possibility).

41. *See* Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 48–49 (2013) (discussing this potential advantage); Hoffman & Stephens, *supra* note 28, at 18 (same).

42. *See generally* Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25 (2013) (discussing potential drawbacks of litigation in state courts and under state law for the advancement of human rights goals).

43. Notably, the Supreme Court's 2011 decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), limits the scope of general personal jurisdiction, potentially making it more difficult for plaintiffs to establish personal jurisdiction in human rights cases, especially over non-U.S. defendants in suits alleging human rights violations that occurred outside U.S. territory. *See id.* at 2851 ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."); *id.* at 2853–54 ("[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home," such as its place of incorporation or principal place of business).

44. As a constitutional rule derived from the Due Process Clause, personal jurisdiction requirements govern all courts in the United States. The Foreign Sovereign Immunities Act governs the immunity of foreign states in both U.S. state courts and federal courts. *See* 28 U.S.C. § 1604 (2006). In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court held that the common law act of state doctrine, although not constitutionally required, applied equally in state and federal courts, and the same would seem to be true of non-statutory immunity doctrines. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964).

45. *See* 28 U.S.C. § 1441 (2006) (setting forth the statutory framework for removal of actions from state to federal court).

46. *See* Borchers, *supra* note 41, at 59 (discussing application of forum non conveniens doctrine in state human rights litigation); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315–16 (2002) (discussing state forum non conveniens doctrines).

courts to dismiss human rights suits. There are also difficult issues surrounding the application of international law in state courts.[47] Moreover, state choice-of-law principles might point toward the application of foreign rather than state law, and although the U.S. Supreme Court has recently attempted to clarify the limits on the extraterritorial application of U.S. federal statutes,[48] the limits on the extraterritorial application of state statutes and state common law are unsettled.[49] Federal foreign affairs preemption and other constitutional limits on state involvement in international matters are yet further potential barriers to human rights litigation under state law.[50] Many of these issues remain incompletely explored because the focus of litigation in this area has been on federal courts' application of federal law, and in particular on the ATS—a focus that may now be shifting. We are, in short, only beginning to encounter and assess the diverse and difficult issues raised by international human rights litigation in state courts and under state law.

When assessing these issues, there are good reasons to take a comparative perspective. There are potentially valuable insights to be gained from an understanding of similar legal strategies in other contexts,[51] as well as from strategies in jurisdictions outside the United States.[52] Moreover, an overly U.S.-centric perspective risks missing the relationship between litigation trends inside and outside the United States and the possibility that the less open the United States becomes to human rights litigation, the more courts in other countries will

47. For discussions of some of these issues, see Hoffman & Stephens, *supra* note 28, at 20–22, and David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95 (2013).

48. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869, 2883 (2010) (holding that section 10(b) of the Securities Exchange Act of 1934 does not provide a cause of action to foreign plaintiffs suing foreign and U.S. defendants for misconduct in connection with securities traded on foreign exchanges).

49. For explorations of these and related issues of choice of law and extraterritoriality, see Borchers, *supra* note 41, at 49–52 (discussing choice-of-law issues related to both substantive tort law and damages); Anthony J. Colangelo & Kristina A. Kiik, *Spatial Legality, Due Process, and Choice of Law in Human Rights*, 3 U.C. IRVINE L. REV. 63 (2013) (using concept of spatial legality to elucidate choice-of-law and extraterritoriality issues); Hoffman & Stephens, *supra* note 28, at pt. IV (discussing choice-of-law issues in state court human rights litigation); and Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81 (2013) (discussing transitory torts).

50. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003) (finding foreign affairs preemption of state law). For discussion of the preemption issues potentially raised by human rights litigation in state courts and under state law, see Hoffman & Stephens, *supra* note 28, at 20; Kaye, *supra* note 47, at 122–24.

51. *See* Parrish, *supra* note 42, at 35–39 (drawing insights about human rights litigation in state courts from similar strategies in environmental litigation and the state constitutionalism movement).

52. *See* Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127 (2013) (analyzing human rights litigation in non-U.S. jurisdictions).

become forums for human rights litigation.[53] We may be on the verge of a new world of transnational human rights litigation where U.S. state courts and courts outside the United States will increasingly overshadow U.S. federal courts as forums for the adjudication of human rights claims.

On March 2, 2012, some of the nation's leading practitioners and scholars of human rights, international law, and conflict of laws came together at the UC Irvine School of Law for the symposium, Human Rights Litigation in State Courts and Under State Law, where they discussed these and other important and difficult questions raised by this alternative method of human rights promotion and protection—questions that heretofore have received little attention compared to those raised by human rights litigation in federal courts under the ATS. The contributions to this issue of the *UC Irvine Law Review*, written by participants in the symposium, provide a valuable resource for those who will be grappling with these questions in the years to come.

53. *See id.* (discussing human rights litigation in the United Kingdom, the Netherlands, Australia, and Canada); *see also* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 32–35 (2011) (presenting evidence suggesting that at the same time U.S. courts are decreasingly open to transnational litigation, other countries' courts are increasingly attracting it).