

courts are reluctant to touch—but by the time those questions have been decided, the enforcement issue becomes a mere individual monetary claim. This is not to say that there won't be exceptions—the Chevron/Ecuador *Lago Agrio* litigation being an obvious one<sup>20</sup>—but that case is unusual in many ways. At least at the present time, the countries that are the most likely to engage in the litigation of international norms are also the countries whose judgments are most likely to be enforced by U.S. courts. Over time, the validity and importance of human rights litigation may itself become a solid enough international norm that the litigation of such cases will no longer be controversial, even in the United States. Until we reach that point, however, advocates of human rights litigation may find more success by engaging in merits litigation outside the United States, even when they intend to enforce the judgment inside the United States.

### STATE LAW CLAIMS: THE NEXT PHASE OF HUMAN RIGHTS LITIGATION

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The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>1</sup> did not signal the end of human rights litigation in U.S. courts. Human rights litigation will continue in federal courts, under what remains of the ATS and/or as authorized by several other federal statutes. In addition, victims of human rights abuses will increasingly file their claims in state courts, a result that should be neither surprising nor novel in the post-*Kiobel* world.<sup>2</sup>

*Kiobel* foreclosed one set of ATS claims: “foreign-cubed” cases brought by foreign plaintiffs against foreign corporations and involving conduct outside the United States. The decision left unclear the viability of the many ATS lawsuits with ties to the United States: claims against U.S. citizens, claims addressing conduct in the United States, or claims against individuals residing in the United States. These issues may not be fully resolved until the Supreme Court reviews another ATS case, and Justice Anthony Kennedy—the key fifth vote in *Kiobel*—explains his views on the issues *Kiobel* did not address.

Several additional statutes authorize human rights litigation in federal courts, none of which are impacted by *Kiobel*. Claims for torture and summary execution can be filed under the Torture Victim Protection Act (TVPA).<sup>3</sup> Although the Second Circuit recently applied *Kiobel* to reverse a jury verdict on an ATS claim arising in Bangladesh, it affirmed the TVPA judgment based on the same facts.<sup>4</sup> Similarly, federal claims under the Anti-Terrorism Act,<sup>5</sup> the Trafficking Victims Protection Act,<sup>6</sup> and the “state sponsors of terrorism” exception to the Foreign Sovereign Immunities Act<sup>7</sup> will all continue. In addition, federal courts will continue to have diversity jurisdiction over human rights claims, when, for example, a foreign plaintiff sues a U.S. corporation for the tort of wrongful death.

<sup>20</sup> *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 (2d Cir. 2012).

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<sup>1</sup> 133 S. Ct. 1659 (2013).

<sup>2</sup> For a more detailed discussion of these issues, see Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013). For an analysis of the thirty-year history of modern human rights litigation, see Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014).

<sup>3</sup> 28 U.S.C. § 1350 (note) (2006).

<sup>4</sup> *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

<sup>5</sup> 18 U.S.C. §§ 2331, 2333–38 (2006).

<sup>6</sup> 18 U.S.C. § 1595 (2006).

<sup>7</sup> 28 U.S.C. § 1605A (2006).

State law human rights litigation has a long pedigree. In the 1940s and 1950s, civil rights litigants sought to enforce newly adopted international human rights norms in state courts.<sup>8</sup> In the 1980s, relatives of activists assassinated in the United States filed state law wrongful death claims against the foreign states behind the killings.<sup>9</sup> And, in the years before enactment of the TVPA, U.S. citizens filed state law human rights claims for torture or wrongful death.<sup>10</sup>

Federal courts have long recognized that the state courts have concurrent jurisdiction over ATS claims. In *Filártiga*, for example, the Second Circuit noted that state court jurisdiction would be proper.<sup>11</sup> State courts can assert jurisdiction over a claim arising in a foreign territory just as they would for any transitory tort, under the doctrine that a person subject to personal jurisdiction in a state can be sued for any tort, no matter where it was committed. Many ATS claims have also asserted parallel state law torts such as wrongful death, assault and battery, and kidnapping. In *Doe v. Unocal*, for example, the state law case was set for trial at the time that the parties settled.<sup>12</sup> In *Pfizer*, state law claims were eventually settled.<sup>13</sup>

State law claims may offer plaintiffs advantages over ATS claims. In some states, specific statutes imposing disclosure requirements offer additional means to hold local corporations liable. Most states have lesser pleading requirements than those recently imposed by the Supreme Court.<sup>14</sup> Substantive state tort law is unlikely to require state action, and state courts generally recognize common-law aiding and abetting standards, civil conspiracy, and corporate liability—all issues on which the federal ATS law is contested. Finally, many litigators insist that state court juries are more plaintiff-friendly than federal court juries.

State law claims are likely to raise choice-of-law issues very different from those in federal ATS claims, where the substantive violations are defined by international law. The key initial question will be whether the claims are governed by state law or the law of the place where the abuses occurred. Application of foreign law will not necessarily prejudice plaintiffs: in a recent decision, a New York appellate court agreed with plaintiffs that the law of Israel, the place of injury—rather than New York or Chinese law—governed claims by Israelis against the Bank of China.<sup>15</sup>

Procedural hurdles such as personal jurisdiction and forum non conveniens are likely to be similar in both federal and state courts. While the Supreme Court has made it more difficult to assert general personal jurisdiction over corporations,<sup>16</sup> that will not impact cases filed against U.S. corporations in their home state or against individuals served while present in the United States. And forum non conveniens has been an issue in very few human rights cases, usually because the plaintiffs are unable to receive due process in the place where the abuses took place.

One persistent question facing state court human rights litigation is whether preemption doctrines might bar state law claims for human rights violations committed in foreign states. The *Kiobel* decision held only that the federal courts should not recognize a common-law

<sup>8</sup> See Stephens, *Curious History*, *supra* note 2, at 1477–78.

<sup>9</sup> See, e.g., *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 784 (W.D. Wa. 1988).

<sup>10</sup> See, e.g., *Linder v. Calero Portocarrero*, 963 F.2d 332, 333–34 (11th Cir. 1992).

<sup>11</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

<sup>12</sup> *Doe v. Unocal Corp.*, Nos. BC 237980, BC 237679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002). See *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

<sup>13</sup> 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>.

<sup>14</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009).

<sup>15</sup> *Elmaliach v Bank of China Ltd.*, 2013 NY slip. op. 05858 [110 AD3d 192] (Sept. 17, 2013).

<sup>16</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

cause of action without congressional guidance. Absent a preemptive statute or executive branch action, it seems unlikely that preemption would bar state courts from addressing claims of wrongful deaths or assaults committed abroad, merely because those acts also constituted violations of international law.

State court judges may share the impatience of some commentators and federal court judges who seem to view ATS claims as a burden on the federal courts and an interference with the foreign policy of the executive branch. But it is a mistake to think that human rights litigation is typified by “foreign-cubed” cases, the category of cases that raised the most concerns. Where a state human rights case is filed against a local corporation, local judges should recognize that the claim is properly litigated in the defendant’s home state. Similarly, local courts have historically been open to non-residents who find a tortfeasor in the state and file suit where she or he lives. Moreover, foreign policy concerns may actually favor litigation of human rights claims in U.S. courts. Foreign states often support or remain neutral in U.S. human rights litigation. And, as the executive branch said in its *Kiobel* brief, allowing human rights litigation against individuals who have come to the United States to escape accountability at home “is consistent with the foreign relations interests of the United States,” which include “the promotion of human rights . . . .”<sup>17</sup>

Ironically, the *Kiobel* decision will push some international claims into state court—exactly the result that the ATS was intended to avoid. But a diminished role for the federal courts has been a goal of many advocates of stronger state rights and a less intrusive federal government. In ratifying human rights treaties, the Senate has repeatedly explained that enforcement of human rights will often be left to the states. In an “understanding” attached to the International Covenant on Civil and Political Rights, for example, the Senate declared that state and local governments would implement the Covenant to the extent that the issues fell within their jurisdiction.<sup>18</sup> State law litigation seeking to hold accountable those who violate international human rights may be the next frontier in the enforcement of international law.

<sup>17</sup> Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at \*13, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290.

<sup>18</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171; 138 CONG. REC. S4781-84 (daily ed. Apr. 2, 1992) (Understanding 5).