STATE LAW LITIGATION OF INTERNATIONAL NORMS

This panel was convened at 9:00 am, Saturday, April 12, by its moderator, Simona Grossi of Loyola Law School, Los Angeles, who introduced the panelists: Cassandra Burke Robertson of Case Western University Law School; Zachary Clopton of the University of Chicago Law School; Anthony Colangelo of Southern Methodist University Dedman School of Law; and Beth Stephens of Rutgers University School of Law.

State Law Litigation of International Norms: Horizontal and Vertical Dimensions

By Zachary D. Clopton[*]

For decades, scholars of international litigation focused their attention on the federal courts. The combination of diversity, alienage, federal question, and Alien Tort Statute (ATS) jurisdiction largely justified this focus, opening multiple avenues for litigants to prosecute claims in federal courts. In recent years, however, the federal courts have closed some doors to international litigation. In response, international litigators have turned their gaze to state courts. This panel is but one example of this new direction. For an excellent earlier treatment of this topic, the *University of California Irvine Law Review* published a symposium issue in 2013 dedicated to human rights litigation in state courts and under state law.[1]

Within this new domain of U.S. states and international law, the focus justifiably has been on causes of action derived from common-law sources (whether in state or federal courts): (1) state law; (2) foreign law, through state choice-of-law rules, and (3) international law, also through state choice of law. What unites these categories is that *courts* are responsible for the relevant lawmaking choices. But state political branches also can engage with international norms. Examining the current and potential roles for state political branches permits an examination of doctrinal and theoretical questions in state litigation. First, I will offer some examples (real and hypothetical) of state political branch involvement. Second, I will discuss two sets of inquiries in these cases: vertical debates about federal versus state actors, and horizontal debates about courts versus political branches. Third, I will discuss federal court doctrines that could limit state-level litigation, but I will do so in light of these horizontal and vertical dimensions. Finally, I will comment briefly on how state political branch involvement could play out with respect to the litigation of international norms.

State Political Branches

Given the shortness of life, I will only briefly summarize some of the ways that state political branches can participate in the instantiation of international norms.

With respect to international agreements, state statutes can implement international treaties, including non-self-executing treaties or even treaties not ratified by the U.S. Senate. To date, these efforts have primarily been in the area of international private law, such as the International Wills Convention. States also can make agreements with foreign governments on their own—the Great Lakes Charter and California's recent efforts on global warming are two

[*] Public Law Fellow, University of Chicago Law School.

[1] 3 U.C. Irvine L. Rev. 1 (2013).

https://doi.org/10.5305/procannmeetasil.108.0433 Published online by Cambridge University Press

examples. Julian Ku has been at the forefront of documenting both of these varieties of state participation in international law.[2]

State statutes also can touch on international norms. The state laws preempted in cases like *Crosby*,[3] *Garamendi*,[4] and the Ninth Circuit's decision in *Movsesian*,[5] for example, touch on these issues. One also could imagine state statutes directly incorporating international law. What about a state alien tort statute providing state-court jurisdiction for violations of the law of nations? State statutes could specify causes of action for violations of certain international norms, and such statutes even could provide a cause of action without requiring the plaintiff to show injury in fact, since Article III standing is only a requirement for *federal* jurisdiction. State criminal or administrative law also could incorporate international norms.

Vertical and Horizontal Dimensions

State-level litigation of international norms asks at least two questions. First, on the vertical dimension, are states (independent of the federal government) proper actors in foreign affairs? Second, on the horizontal dimension, how do courts compare to the political branches on these issues? It may be that responses to both questions are driven by views about international law. One could imagine a judge or scholar hostile to international law in all its forms, just as one could imagine a judge or scholar amenable to expanding the role of international norms in both directions. But the vertical and horizontal dimensions open up room for more nuanced positions.

First, it may be that some opposition to state involvement in international law derives from the vertical concerns of foreign affairs federalism. On this view, international law is the province of the federal government—political branches or courts. Arguments for the federal government as the ''one voice'' in foreign affairs include minimizing externalities and retaliation, concerns with (dis)uniformity, and views about the competence, experience, and expertise of the relevant actors.

Alternatively, horizontal objections translate into arguments that international law is the province of political branches—federal or state. Indeed, John Yoo and Julian Ku take this position in their book, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order*. Arguments in support of the political branches at the expense of the judiciary relate to (1) political accountability; (2) functional expertise and experience; (3) access to information; (4) limits on agenda-setting; and (5) limits on execution, by which I mean that courts have more limited options for resolving disputes than legislatures.

Doctrinal Responses

Discussion of state-level litigation of international norms routinely turns to potential doctrinal limits enunciated by federal courts. How much the federal courts are willing to reach into state litigation should depend on how they respond to the horizontal and vertical dimensions.

If concerns about state-level litigation are vertical, then various doctrines are in play. One option would be to sweep more cases into federal courts. The Southern District of Texas's

[2] *E.g.*, Julian G. Ku, *Gubernatorial Foreign Policy*, 115 Yale L.J. 2380 (2006); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. Rev. 457 (2004).

[3] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[4] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

[5] Movsesian v. Versicherung AG, 670 F.3d 1067 (9th Cir. 2012) (en banc), *vacating* 629 F.3d 901 (9th Cir. 2010).

expansive opinion in *Sequihua*,[6] which found federal subject matter jurisdiction based on the federal common law of foreign relations, could step in where diversity of citizenship, alienage, and ATS jurisdiction are unavailable. Another option would be to treat international law causes of action as federal common law, thus creating federal question jurisdiction for all international claims regardless of party identity or amount in controversy. Of course, these doctrines may only be a weigh station before dismissal. The Class Action Fairness Act, for example, could be understood as taking this approach for class actions generally—broadening federal court jurisdiction in order to take advantage of more restrictive federal rules at the expense of some more expansive state regimes.

Vertically minded federal courts also could announce constitutional or federal common-law rules that apply to, and limit, state courts. With respect to constitutional rules, Professor Robertson's personal jurisdiction cases discussed on this panel and the limited constitutional choice of law rules are two options. The Dormant Commerce Clause and Dormant Foreign Affairs Preemption also may be available. Alternatively, *Sabbatino*[7] stands for a post-*Erie* enclave for federal common law regarding foreign affairs. One could imagine federal common-law rules for choice of law or forum non conveniens, although the Court has rejected these options to date.

All of the doctrines described so far could be used to limit international-law claims in state courts if the federal courts remained hostile. But, interestingly, these approaches require federal judges to police the vertical dimension. In other words, these doctrinal approaches imply some willingness to allow courts to trump political branches, i.e., vertical concerns are more pressing than horizontal ones. Instead, if federal courts are most concerned about the horizontal dimension—if they want to empower political branches—then limits on state law should come from Congress and the President. Preemption decisions like *Garamendi* and *Crosby* fit the bill, as does the panel opinion in *Movsesian*, which adopted a version of presidential preemption. But a horizontally minded judiciary would be more limited in the doctrinal tools available to curb state-level claims.

Concluding Thoughts

What should we make of the role of state political branches in the litigation of international norms? Should those favoring international law in state courts devote some energy to lobbying state legislators and governors?

In some sense, state political branch involvement should make international litigation in state courts easier. This approach would satisfy those who reject judicial lawmaking and those with federalist impulses. And state legislatures also could try to insulate their cases from federal procedural doctrines through exclusive jurisdiction techniques. As a theoretical matter, state political branches have some advantages. Critics of courts are right to note that legislatures have advantages in polycentric disputes that have spillover effects on nonparties. Legislatures have more flexibility than courts in setting agendas and crafting policy responses. And Professor Spiro has persuasively argued that the externality problem is, at best, overstated.[8]

In a more practical sense, however, state legislative activity in international affairs may be more easily attacked in federal courts. Considering the doctrinal responses mentioned

[6] Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).
[7] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
[8] Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 Ohio St. L.J. 649 (2002).

earlier, there does not seem to be much appetite in the federal courts for new federal common-law rules. But preemption doctrines remain obstacles in these cases—although *Medellin*[9] may be read as cutting back on executive preemption, the Roberts Court has shown its willingness to preempt state legislative activity in *Arizona v. United States,*[10] and in *Zivotofsky*[11] the Court overcame traditional horizontal limits to adjudicate an interbranch dispute. It also may be that state legislative activity simply draws more attention to international litigation, animating opposition from courts and interested parties. While state political branch involvement has merit, in practice it may not drastically improve the effectiveness of international law.

An Introduction to International Law in U.S. State Courts: Extraterritoriality and ''False Conflicts'' of Law

By Anthony J. Colangelo[*]

When can plaintiffs bring international law claims arising abroad in U.S. courts? The answer to this question is far from simple; indeed, it is intriguingly multilayered and entangles diverse fields ranging from constitutional law to foreign relations law to statutory construction to conflict of laws and international law. Yet these types of cases have proliferated and show no signs of slowing down. With the Supreme Court recently cutting back the reach of federal jurisdiction over causes of action arising abroad for violations of international law,[1] questions instantly have arisen about the ability of U.S. state law to provide the vessel through which plaintiffs may bring suits alleging such violations.[2] Here litigants and courts must address two key questions: First, to what extent may state law implement or incorporate international law as a rule of decision? And second, to what extent may state law incorporating international law authorize suits for causes of action arising abroad?

The second question is both especially urgent because it involves a potential alternative avenue for litigating foreign human rights abuses in U.S. courts, and especially vexing because it juxtaposes different doctrinal and jurisprudential conceptualizations of the ability of forum law to reach inside foreign territory. On the one hand, the question can be framed as to whether forum law applies extraterritorially, or outside the United States; on the other, it can be framed as a choice of law among multiple laws, of which forum law is one. These different ways of framing the question are not necessarily mutually exclusive, yet they can lead to radically different results. Namely, Supreme Court jurisprudence stringently applying what is called a ''presumption against extraterritoriality'' to knock out claims with foreign elements stands in stark contrast to a flexible cadre of state choice-of-law methodologies that liberally apply state law whenever the forum has any interest in the dispute.

[9] Medellin v. Texas, 552 U.S. 491 (2008).

[10] 132 S. Ct. 2492 (2012).

[11] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

[*] Assistant Professor of Law, Dedman School of Law, Southern Methodist University. An expanded version of this argument appears at Anthony J. Colangelo, *International Law in U.S. State Courts: Extraterritoriality and ''False Conflicts'' of Law*, Int'l Law. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400760.

[1] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[2] *See generally* 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 U.C. Irvine L. Rev. 1, 5 (2013).

https://doi.org/10.5305/procannmeetasil.108.0433 Published online by Cambridge University Press