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).

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[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).

The result is a counterintuitive disparity: state law enjoys potentially greater extraterritorial reach than federal law. The disparity is counterintuitive because the federal government, not the states, is generally considered the primary actor in foreign affairs.[3] Indeed, the presumption against extraterritoriality springs directly from foreign affairs concerns. Its main purpose is to avoid unintended discord with other nations that might result from extraterritorial applications of U.S. law. If the federal government is the primary actor in foreign affairs, and if the presumption operates to limit the reach of federal law on a foreign affairs rationale, it follows that state law should have no more extraterritorial reach than federal law. Yet at the same time there is a long and robust history stretching back to the founding of state law providing relief in suits with foreign elements through choice-of-law analysis. Hence, not only does the disparity between the reach of federal and state law bring into conflict federal versus state capacities to apply law abroad (or entertain suits arising abroad), it also brings into conflict the broader fields that delineate those respective capacities. On the one hand, foreign affairs and federal supremacy argue in favor of narrowing the reach of state law to U.S. territory; on the other hand, private international law and conflict of laws argue in favor of allowing suits with foreign elements to proceed in state court under state law.

Against this backdrop, I want to make a few points. First, there is nothing wrong as a general matter with state law incorporating international law. Second, the idea of state law having broader extraterritorial reach than federal law is nonetheless in tension with federal foreign affairs preemption. And third, this tension basically disappears when the state law incorporating international law presents what is called a ''false conflict'' of laws among the relevant jurisdictions' laws. Here the fields of private international law and conflict of laws gain salience and supply a doctrinally and historically grounded mechanism for entertaining claims arising abroad in U.S. courts. More concretely, if state law incorporating international law is fundamentally the same law as that operative in the foreign jurisdiction, there is no conflict of laws and the sole applicable law applies.

Taking into account the myriad conflict methodologies, we can posit a variety of false conflicts along these lines:

One type of false conflict might latch onto the international law character of the norm at issue, particularly if it is a jus cogens or peremptory international law norm—for example, the prohibition on torture—to argue that by force of international law that norm applies everywhere, and therefore necessarily presents a false conflict of laws. A weakness of this type of false conflict argument is that while *jus cogens* clearly contains prohibitions on certain violations of international law, it does not clearly contain private rights of action to enforce those norms via civil litigation. In other words, while *jus cogens* clearly prohibits torture, it does not clearly state that anyone who has been tortured has a private right of action and is entitled to relief through civil litigation. In turn, there may not, in fact, be a false conflict of laws if the foreign law does not also provide a private right of action.

A second variety of false conflict might look to the result that application of foreign law would produce and conclude that if the defendant would also be liable under foreign law, there is no conflict with forum law. This type of false conflict could open up the possibility that U.S. law incorporating international law wouldn't need to match up exactly with foreign law; so long as some foreign law would impose liability, there is no real conflict of laws. For example, if foreign tort law would hold a defendant liable for battery, a U.S. suit seeking

[3] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–14 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (invalidating Massachusetts statute for obstructing the foreign policy objectives of the federal government).

liability for torture would not create a true conflict of laws since the result is the same: the defendant is liable.

A self-evident weakness with this type of false conflict reasoning, of course, is that battery and torture are not the same, even though the laws against both would impose liability. While plaintiffs may wish to pursue claims for torture as opposed to battery for important symbolic reasons, defendants and foreign governments may resist such classifications for mirror-image reasons of stigma. In this connection, it is worth mentioning that any weakness deriving from the different symbolic and stigma characteristics of serious international law violations vanishes where plaintiffs are content to classify their claims as garden-variety torts under a forum law that matches up with foreign law. That would constitute a classic false conflict in the private international law sense, and there is no problem with forum law imposing liability for a tort where foreign law also would impose liability for that same tort.

A third variety of false conflict, and one I elaborate upon elsewhere,[4] is where forum law and foreign law incorporate norms of international law. For example, suppose both forum law and foreign law would hold the defendant liable for torture. This is the strongest false conflict scenario. To be sure, it is even stronger than the classic false conflict mentioned above where forum law and foreign law are separate laws but match up. Here forum law and foreign law are vehicles for application of fundamentally the same law—international law—as far as the conduct-regulating aspect of the rules go. If the involved jurisdictions also both provide a private right of action, we are back to the classic false conflict scenario for that aspect of the suit. And because procedures and remedies are generally deemed creatures of forum law, there would be little, if any, aspects of the suit left to generate a true conflict of laws among jurisdictions.

In sum, there is at least one surefire false conflict scenario that should enable foreign claims alleging international law violations to move forward under U.S. state law: forum law and foreign law both incorporate international law prohibiting the conduct and afford private rights of action. Plaintiffs have other routes too, particularly if they are willing to abandon dressing their claims in international law garb and instead classify them as garden-variety torts. Torture may, for instance, become battery in order to obtain relief where forum and foreign law both impose liability for that tort.

How do these false conflict variations interact with recent Supreme Court jurisprudence? *Kiobel v. Royal Dutch Petroleum* held that a presumption against extraterritoriality applies to claims authorized by the Alien Tort Statute (ATS), and therefore claims arising in Nigeria were not actionable under the statute.[5] In the process, the Court brushed aside with barely any analysis the longstanding and widely held transitory tort doctrine of conflict of laws, observing only that ''[u]nder the transitory torts doctrine, however, 'the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place.'''[6] This remarkably question-begging statement quotes Justice Holmes' opinion in *Cuba R. Co. v. Crosby*.[7] There the Court explained that when dealing with torts that ''are likely to impose an obligation in all civilized countries . . . [U.S.] courts would assume a liability to exist if nothing to the contrary appeared.''[8] If nothing else, one would think that universal international legal

[4] *See* Colangelo, *supra* note *.
[5] 133 S. Ct. at 1665 (2013).
[6] *Id.* at 1666 (quoting Cuba R. Co. v. Crosby, 222 U.S. 473, 479 (1912)).
[7] *Cuba,* 222 U.S. at 479.
[8] *Id.* at 478.

prohibitions on offenses like torture stand for the proposition that its commission ''impose[s] an obligation in all civilized countries.''[9]

But even if one is not willing to make the assumption *Crosby* seems to command, *Kiobel* has now squarely raised the issues it failed to address: Is there in fact a cause of action for torture, extrajudicial killing, and arbitrary arrest in the foreign jurisdiction? How about battery, wrongful death, and false imprisonment? If so, we have a false conflict of laws and a clear avenue for relief under either U.S. or foreign law in domestic courts.

Global Litigation, Local Judgment Enforcement

By Cassandra Burke Robertson[*]

When we talk about the litigation of international norms, we are generally talking about litigating human rights abuses such as torture cases, official violence and repression, forced labor, and environmental devastation—''negative norms''[1] that are universally condemned. I would expand that discussion to look at the very concept of human rights litigation—specifically, the idea that individual lawsuits can and should be used as a tool of both rights enforcement and social change—as a positive norm that is gaining traction internationally.

Steven Yeazell points to the case of *Brown v. Board of Education*[2] as one of the defining moments for the growth of the idea of litigation-as-social-norm within the United States, writing that:

> *Brown* and the civil rights litigation movement helped create a renewed belief, not just in the law, but more specifically in litigation as a noble calling and as an avenue for social change. . . . [W]hether or not it is well-founded, this belief, with roots traceable to *Brown* and civil rights litigation, has endured for several generations.[3]

The idea of litigation as an agent for social change has become firmly grounded in the American psyche over the last half-century.[4] In the 1980s and 1990s, the idea of change-oriented litigation expanded beyond the sphere of domestic civil rights, as the Alien Tort Statute was dusted off and became a powerful tool of international litigation.[5] It was no coincidence that the ''rediscovery'' of the ATS coincided with a solidifying belief in the power of litigation to protect rights at a societal or global level, and not merely to redress individual wrongs.

In the last decade, however, the current Supreme Court has grown increasingly skeptical of the judiciary's role as an agent of change, preferring to defer to the political branches on matters of policy. Procedurally, the Court has increased barriers to civil rights litigation, beginning with the heightened pleading requirements of *Twombly*[6] and *Iqbal*[7] that have had

[9] *Id.*; *see also* Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992) (''All of the authorities agree that torture and summary execution—the torture and killing of wounded non-combatant civilians—are acts that are viewed with universal abhorrence.'').

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[1] John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va. L. Rev. 333, 344 (1998) (''While the negative norm does the work of restriction, the positive norms contain most of the information.'').

[2] Brown v. Board of Educ., 347 U.S. 483 (1954).

[3] Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 Vand. L. Rev. 1975, 1976 (2004).

[4] Cassandra Burke Robertson, *Due Process in the American Identity*, 64 Ala. L. Rev. 255 (2012).

[5] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

[6] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[7] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

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