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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a disproportionate effect on civil rights cases.[8] The requirement of plausibility pleading makes it much more difficult for plaintiffs' claims to reach discovery, which is often fatal to civil rights claims that depend on information about the defendants' state of mind. Without the ability to use the tools of discovery, the plaintiffs cannot gather the information needed to meet the plausibility pleading requirements. Likewise, the Court has imposed procedural hurdles on measuring the commonality of claims needed to sustain class treatment in litigation—again moving away from a vision of litigation as a protector of societal rights, and moving back to a more limited conception of litigation as a mean of individual redress.[9] The Court has expressed its skepticism of litigation as an agent of change even more strongly in the international sphere. The Court's decisions in *Morrison*[10] and *Kiobel*[11] created a strong presumption against extraterritoriality and significantly limited lower court interpretations of the Alien Tort Statute.

In the immediate aftermath of the *Kiobel* decision, it looked as if state court litigation might provide a viable alternative.[12] After all, state courts are courts of general jurisdiction, not bound by the jurisdictional limitations of federal courts. Structurally, the Court's ATS cases do not forbid state courts from asserting jurisdiction over transnational tort claims.[13] Nonetheless, the idea that state courts could provide a more hospitable forum for transnational tort and human rights litigation was largely quashed by the Supreme Court's recent opinion in *Daimler AG v. Bauman*, which sharply curtailed the ability of courts—both state and federal—to exercise personal jurisdiction over foreign defendants for acts that occurred abroad.[14]

Daimler involved international human rights litigation; the plaintiffs in the case were Argentinian nationals who sought damages for the actions of Mercedes-Benz Argentina during that country's so-called ''Dirty War'' of the late 1970s. The Court could have simply applied its prior decision in *Kiobel* to conclude that the plaintiffs' claims could not overcome the presumption against extraterritoriality. Instead, however, the Court addressed the question of personal jurisdiction, holding that general (or ''dispute blind'') jurisdiction over a corporation would, except in very rare circumstances, exist only where a corporation is domiciled—meaning its state of incorporation and the state where it maintains its principal place of business. The Court assumed for the sake of argument that defendant Mercedes-Benz USA (MBUSA) was indeed ''at home'' in California and also assumed for the sake of argument that all of MBUSA's contacts could be imputed to its parent corporation, Daimler AG. Even if both these things were true, the Court concluded, Daimler would not be ''at home'' in California because it was ''neither . . . incorporated in California, nor [has] its principal place of business there.''

[8] Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 599 (2011).

[9] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[10] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

[11] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

[12] Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013); 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 (2013).

[13] Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public Law Litigation After* Kiobel (Mar. 14, 2014), *available at* http://ssrn.com/abstract=2409838.

[14] Daimler AG v. Bauman, 134 S. Ct. 746 (2014); see also Charles W. ''Rocky'' Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 UC DAVIS L. REV. 207, 216-22 (2014).

The Supreme Court made it clear in *Daimler* that it intended to limit domestic courts' authority to hear cases not directly connected with a U.S. forum. The Court quoted the Solicitor General's brief, which had highlighted the objection of a number of foreign governments to ''some domestic courts' expansive views of general jurisdiction,'' and the Court concluded that ''[c]onsiderations of international rapport'' meant that Daimler could not constitutionally be subject to general jurisdiction in California. Because the case was decided on the basis of constitutional personal jurisdiction, the Court's opinion is equally binding on state courts and federal courts alike. The case makes it clear that the Court's retreat from extraterritorial human rights claims is not merely a matter of convenience or efficiency; instead, it is a deliberate choice intended to limit the global reach of domestic courts—both state and federal.

Thus, neither state nor federal courts in the United States are likely to provide a hospitable forum for international rights litigation in the near future. At the same time, however, international rights litigation has expanded outside the United States, and other countries may offer viable alternative forums. In England, the law firm of Leigh Day specializes in human rights litigation; one of its partners, Richard Meeran, has recounted a number of recent successes, including a £30 million settlement for injuries allegedly caused by toxic waste dumped off the coast of Abidjan.[15] Canadian courts are also taking a greater role in international human rights litigation, as plaintiffs have been filing a growing number of international cases in Canadian courts; those cases are now wending their way through the courts.[16] The Netherlands has also served as a forum to hear transnational tort claims involving Shell, a Dutch MNC; the court in that case ultimately held a Shell subsidiary responsible for oil spills in Nigeria—although it dismissed claims against the parent company.[17] Thus, international tort and human rights cases may find more favorable tribunals outside the United States.

If these cases are litigated elsewhere, United States courts may still have a role to play in judgment enforcement. Many of the largest corporations have significant assets in the United States. Interestingly, the jurisprudence limiting litigation-as-norm-enforcement does not extend to the judgment enforcement realm. Historically, U.S. courts are among the most willing to enforce the judgments of other nations' courts.[18] This is particularly true when looking at the judgments of countries that U.S. judges are likely to be comfortable and familiar with—particularly English-speaking democracies with a common-law system, such as England, Canada, and Australia.[19] Judgments from these countries are rarely subject to significant challenges, and courts enforce them easily.

And in spite of narrowing federal remedies in other areas, it is unlikely that federal judgment enforcement policies will become less generous in the future. Judgment enforcement, after all, fits very comfortably within the paradigm of litigation as individual remedy. The underlying merits litigation may include broader questions of policy and human rights that U.S.

[15] Richard Meeran, *Tort Litigation Against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3 City U. H.K. L. Rev. 1, 26, 34, 39, 41 (2011).

[16] John Terry & Sarah Shody, *Could Canada Become a New Forum for Cases Involving Human Rights Violations Committed Abroad?*, 1(4) Com. Litig. & Arb. Rev. 63, 64 (2012), *available at* http://www.torys.com/Publications/Publications/AR2012-36.pdf.

[17] Ivana Sekularac & Anthony Deutsch, *Dutch Court Says Shell Responsible for Nigeria Spills*, Reuters (Jan. 30, 2013), *at* http://www.reuters.com/article/2013/01/30/us-shell-nigeria-lawsuit-idUSBRE90S16X20130130.

[18] Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444, 1462 (2011).

[19] Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 Wm. & Mary L. Rev. 1159 (2007).

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[20]—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

By Beth Stephens[*]

The Supreme Court's decision in Kiobel v. Royal Dutch Petroleum Co.[1] 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.[2]

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).[3] 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.[4] Similarly, federal claims under the Anti-Terrorism Act,[5] the Trafficking Victims Protection Act,[6] and the ''state sponsors of terrorism'' exception to the Foreign Sovereign Immunities Act[7] 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.

[20] Chevron Corp. v. Naranjo, 667 F.3d 232, 246 (2d Cir. 2012).

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[1] 133 S. Ct. 1659 (2013).

[2] 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).

[3] 28 U.S.C. § 1350 (note) (2006).

[4] Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42 (2d Cir. 2014).

[5] 18 U.S.C. §§ 2331, 2333–38 (2006).

[6] 18 U.S.C. § 1595 (2006).

[7] 28 U.S.C. § 1605A (2006).