Conflict-of-Laws Considerations in State Court Human Rights Actions

Patrick J. Borchers*

INTRODUCTION

Most of the time, federal statutes do not go unnoticed for 170 years. An exception, however, is the cryptic Alien Tort Statute (ATS),[1] which was enacted as part of the Judiciary Act of 1789.[2] The ATS provides in its entirety 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] Judge Henry Friendly's oft-repeated description of the ATS is as a "legal Lohengrin . . . no one seems to know whence it came."[4]

Perhaps the explanation for the ATS's long slumber is that the text of the statute suggests that it doesn't do much, at least on its own. By its terms, the ATS seems to just create federal court jurisdiction, but not any cause of action that would not otherwise exist. Moreover, since another part of the Judiciary Act creates federal subject matter jurisdiction between aliens and U.S. citizens,[5] the practical effect of an overlapping jurisdictional statute might be expected to be minimal.

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* Vice President for Academic Affairs at Creighton University, Professor of Law and former Dean of Creighton Law School.

1. Alien Tort Statute, 28 U.S.C. § 1350 (2006).
2. Ch. 20, §9(b), 1 Stat. 73, 77; *see also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115–16 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).
3. 28 U.S.C. § 1350.
4. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
5. 28 U.S.C. § 1332(a)(2) (2006).

The ATS awoke in 1980 with the famous Second Circuit case of *Filártiga v. Peña-Irala*.[6] In *Filártiga*, the plaintiffs were citizens of Paraguay who alleged that they were longstanding opponents of their nation's government.[7] They claimed that the defendant—a police official in Paraguay—kidnapped their seventeen-year-old son and tortured him to death in reprisal for their political views.[8] When one of the plaintiffs brought a Paraguayan criminal action against the defendant and his police agency for the murder of the plaintiff's son, the plaintiff alleged that his attorney was brought to police headquarters, shackled, and threatened with death.[9]

Upon learning that the defendant was in the United States, the plaintiffs had him served with process in a civil action.[10] The complaint alleged a variety of theories, including wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, and a variety of other international declarations.[11] Several international law scholars submitted affidavits opining that the alleged torture violated the law of nations, even when committed by a government against one of its own citizens.[12]

The Second Circuit held that the ATS provided federal court jurisdiction. The court decided that the near-universal repudiation of torture by nations led to the conclusion "that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[13] Critically, the court found that international law must be evaluated by current standards, not by the state of the law in 1789 when the ATS was enacted.[14]

The unmistakable implication of *Filártiga* and the cases that followed in its wake was that a good number of common law tort claims, if pled in terms of an international law violation, could proceed to the merits in federal court.[15] As a result, a wide variety of cases proceeded under the ATS alleging genocide, widespread torture, and other horrendous acts.[16] But then came the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*.[17]

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6. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
7. *Id.* at 877.
8. *Id.*
9. *Id.*
10. *Id.* at 878–79.
11. *Id.* at 879.
12. *Id.*
13. *Id.* at 880.
14. *Id.* at 881.
15. *See* Carolyn A. D'Amore, Note, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 603 (2006).
16. *Id.* at 603, n. 60 (collecting cases).
17. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

In *Sosa*, the plaintiff was a Mexican national believed by the U.S. government to have participated in the torture of a Drug Enforcement Agency (DEA) agent.[18] Unable to obtain the cooperation of the Mexican government, the DEA hired Mexican nationals to capture the plaintiff in Mexico and forcibly bring him to the United States to stand trial.[19] His criminal trial ended in an acquittal.[20] The plaintiff then brought an action under the ATS against various individuals involved in his abduction.[21] The Supreme Court rejected—just barely—the defendants' argument that the ATS was purely jurisdictional and thus did not create any sort of liability. The Court concluded instead that the ATS imported a class of substantive tort claims, which it described as a "very limited category defined by the law of nations and recognized at common law."[22]

The Court was able to identify only three causes of action that the law of nations would have recognized as giving rise to personal liability. Those were "offenses against ambassadors," "violations of safe conduct," and "individual actions arising out of prize captures and piracy."[23] Thus, the majority held: "[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."[24] The Court concluded that the plaintiff's detention and transport to the United States did not violate any rule of customary international law that would fit within the Court's paradigm. As the Court summarized: "[A] single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[25]

Sosa creates a high hurdle for ATS cases brought by human rights victims because they must be able to allege—and ultimately prove—that the customary international law norm for which they seek redress is defined with great precision and gives rise to personal liability. But even if they can clear that hurdle, another awaits. In two recent human rights cases—one under the ATS and another under the related Torture Victim Protection Act (TVPA)[26]—federal circuit courts have held that liability does not extend to corporations, as they are not persons within

18. *Id.* at 697.
19. *Id.* at 698.
20. *Id.*
21. *Id.*
22. *Id.* at 712.
23. *Id.* at 720.
24. *Id.* at 725.
25. *Id.* at 738.
26. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

the meaning of those statutes.[27] The Supreme Court has granted certiorari in both cases, and if it affirms it will remove from the scope of potential defendants the entities most likely to be able to pay a judgment.

So, what about pursuing such cases in state court? For purposes of discussion, let us assume the same sorts of facts alleged in *Filártiga*, or those alleged in *Kiobel v. Royal Dutch Petroleum Co.*,[28] the case in which the Supreme Court has granted certiorari to decide whether corporate liability will lie under the ATS. As recounted by the district court in one of the eventually consolidated *Kiobel* cases:

> Ken Saro-Wiwa was the leader of the Movement for the Survival of the Ogoni People ["MOSOP"]; John Kpuinen was the deputy president of MOSOP's youth wing. MOSOP formed in opposition to the coercive appropriation of Ogoni land without adequate compensation, and the severe damage to the local environment and economy, that resulted from Royal Dutch / Shell's operations in the Ogoni region.
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> Defendants, operating directly and through Shell Nigeria, recruited the Nigerian police and military to suppress MOSOP and to ensure that defendants' and Shell Nigeria's development activities could proceed "as usual." The corporate defendants, through Anderson, provided logistical support, transportation, and weapons to Nigerian authorities to attack Ogoni villages and stifle opposition to Shell's oil-excavation activities. Ogoni residents, including plaintiffs, were beaten, raped, shot, and/or killed during these raids. Jane Doe was beaten and shot during one raid in 1993, and Owens Wiwa was illegally detained.
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> In 1995, Ken Saro-Wiwa and John Kpuinen were hanged after being convicted of murder by a special tribunal. Defendants bribed witnesses to testify falsely at the trial, conspired with Nigerian authorities in meetings in Nigeria and the Netherlands to orchestrate the trial, and offered to free Ken Saro-Wiwa in return for an end to MOSOP's international protests against defendants. During the trial, members of Ken Saro-Wiwa's family, including his elderly mother, were beaten.[29]

Bringing such a case in state court apparently obviates the need to consider several important obstacles to pleading the matter as a federal court case under the ATS. First, because state courts are common law courts equipped to redress the full array of tortious actions, the plaintiffs would avoid the need to attempt to squeeze their allegations into one of the *Sosa* categories. Second, because

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27. *See* Mohamad v. Rajoub, 634 F.3d 604, 607 (D.C. Cir. 2011) (holding that no cause of action exists against corporations under the TVPA), *cert. granted*, 132 S. Ct. 472 (2011); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010) (holding that because corporate liability is not a rule of customary international law, it is not applicable under the ATS), *cert. granted*, 132 S. Ct. 472 (2011).

28. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2011).

29. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 U.S. Dist. LEXIS 3293, *4–5 (S.D.N.Y. Feb. 28, 2002) (footnotes omitted).

corporate actors are invariably subject to tort liability through the actions of their agents,[30] the possibility of corporate non-liability disappears. So too do questions of other sorts of liability, such as liability for acting in concert.[31]

While state courts may offer relief that is unavailable under federal theories, state courts are likely to prove to be no panacea. At least four different conflict-of-laws issues may come into play in such cases. First is the question of choice of law as to tort liability. In many cases, the substantive tort law of a foreign country will apply. This will require the plaintiffs to prove the content of foreign law to the state court, usually through expert testimony. Even if proven, foreign law may ultimately be less plaintiff friendly than U.S. law. Second are questions of choice of law both as to the quantification and types of damages allowed. In many cases, foreign law may apply as to the damage remedies available to plaintiffs, which may be less plaintiff friendly than those in the United States. Third is the difficulty of obtaining personal jurisdiction over the defendants. Individual defendants would be subject to jurisdiction if found in the United States and served with process,[32] but for corporate defendants, in-state service of a corporate officer does not automatically confer jurisdiction.[33] Recent U.S. Supreme Court decisions on the constitutional limits of personal jurisdiction will make assertions of personal jurisdiction by state courts difficult or impossible in many cases.[34] Fourth—and related to the prior issues—such cases are likely to prove to be tempting targets for forum non conveniens dismissals. State courts may find the urge to dismiss such cases in favor of foreign forums irresistible when faced with complicated facts taking place on foreign soil and requiring the application of foreign law. I address these questions in turn.

I. TORT CHOICE-OF-LAW CONSIDERATIONS

For purposes of discussion, let us assume the basic facts of a paradigmatic ATS human rights case along the lines of *Filártiga* or *Kiobel*. In such a case, foreign nationals oppose the activities of their government. In retaliation for their activities, the government—acting through or in concert with private actors—subjects the foreign nationals to unspeakable acts, such as torture, rape, and extrajudicial killings. These private actors might be individuals, as in *Filártiga*, or corporations, as in *Kiobel*. The foreign nationals, or their families, come to the United States and bring tort suits against the private actors. Because of the

30. RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006).

31. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

32. *See, e.g.*, Filártiga v. Peña Irala, 630 F.2d 876, 879 (2d Cir. 1980). The constitutionality of the in-state service rule was upheld by the U.S. Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990).

33. *See* Goldey v. Morning News of New Haven, 156 U.S. 518, 526 (1895).

34. *See infra* Part III.

limitations placed on ATS suits, let us further assume that the tort plaintiffs have chosen a U.S. state court.

This choice of venue has some obvious advantages from the perspective of the applicable law. A number of well-established common law torts—battery, assault, intentional infliction of emotional distress, and wrongful death[35]—clearly apply, and the potential limitation on corporate liability is not an obstacle under the common law.[36] However, unless the defendants choose not to raise the choice-of-law issue—which would result in the application of forum law[37]—the law of the foreign country where the actions took place will surely apply.

For the ten or so states that still apply the old lex loci delicti rule,[38] the law of the place of the wrongful actions will govern. The same result will almost surely obtain under the newer methodologies. A majority of states now follow the *Second Restatement of Conflicts*.[39] Under section 146 of the *Second Restatement*, the law of the place of the wrong usually applies in personal injury cases, and the presumption is especially heavy if the wrongful activity and the injury both take place in the same jurisdiction.[40] For states that follow some variant of interest analysis, such cases would almost be surely classified as false conflicts, with the U.S. jurisdiction not having any interest.[41] Thus, regardless of the conflicts methodology employed by a U.S. state court, on facts such as those in *Filártiga* and *Kiobel*, a tort action would very likely result in the laws of Paraguay and Nigeria being applied respectively. The best hope for applying the forum state's law would be if one or more of the parties were a citizen of the forum state—perhaps a corporate defendant with its headquarters in the forum state. In such a case, one could make a reasonable argument that applying the forum state's tort law would serve a deterrent interest and thus justify application of forum law.[42] But in cases that lack a forum state

35. RESTATEMENT (SECOND) OF TORTS §§ 13, 18, 21, 46 (1965).

36. RESTATEMENT (THIRD) OF AGENCY § 7.03 (2006).

37. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 607 (5th ed. 2010).

38. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 331 (2011).

39. *Id.*

40. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146, cmt. d (1971).

41. HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 553 (stating that the lack of a local party usually results in the conclusion that the forum lacks an interest).

42. Perhaps the best known example of such an argument succeeding is *Hurtado v. Superior Court*, 522 P.2d 666, 672 (Cal. 1974), in which the California Supreme Court held that California's more liberal damage law acted as a deterrent to unsafe driving by California drivers. *See also* Gantes v. Kason Corp, 679 A.2d 106, 116 (N.J. 1996) (finding that a New Jersey rule of not allowing a "repose" defense to product manufacturers applied against a New Jersey manufacturer because of the rule's purpose of deterring the manufacture of unsafe products). Some courts, however, have taken precisely the opposite view and held that tort law serves no meaningful deterrent purpose and that plaintiffs accept the tort law of their home jurisdiction, even if it is less favorable to them. *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687 (N.Y. 1985).

citizen, application of the forum state's common law would be extremely unlikely and probably unconstitutional.[43]

While this would be a hurdle for plaintiffs, it would not necessarily be insurmountable. Almost all states have now repudiated the "fact" view of foreign law,[44] whereby the plaintiff, under pain of dismissal, must plead and prove foreign law as a fact. Nevertheless as a practical matter, plaintiffs would be under an obligation to inform the state court of the content of the foreign law by expert testimony.[45] In some ways, the relevant tort laws of foreign jurisdictions might be favorable to plaintiffs. Both civil law, which prevails in Latin America,[46] and African customary law, recognize tort remedies for affronts to dignity—including affronts to the dignity of a group.[47] Because many human rights violations involve affronts to the dignity of a group, foreign law may provide a relatively robust scope of liability. Moreover, although the *Sosa* Court took a narrow view of the sorts of customary international law violations that federal courts redress by private tort actions,[48] no similar disability attends state courts, which remain free in a post-*Erie Railroad Co. v. Tompkins* world to shape the common law as they see fit.[49]

State courts would also presumably apply the TVPA.[50] That statute gives rise to a tort claim for plaintiffs who can prove the substantive elements of torture, as defined in the TVPA. Although a federal enactment, the TVPA is binding on state courts, as are other federal statutes.[51] However, there are difficulties, even if the action is brought in state court. The most prominent difficulty is the possibility

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43. On facts such as those in *Filártiga* and *Kiobel*, application of the forum state's law almost surely would be unconstitutional. The Supreme Court decision of *Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981), sets the modern constitutional limitations on the application of forum law. In order for a state to validly apply its own law, there must be "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 313. In *Allstate*, the Supreme Court put some weight on the plaintiff's subsequent move to the forum state. *Id.* at 317. This might arguably be a factor on facts such as those in *Filártiga*, but it seems doubtful that this alone would make the application of the forum state's tort law constitutional. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 181.

44. HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 602–04.

45. *Id.* at 604.

46. Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1844 & n.99 (2009).

47. Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 ARIZ. J. INT'L & COMP. L. 303, 310–11 (2009).

48. Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).

49. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also Sosa*, 542 U.S. at 739–40 (Scalia, J., concurring) (discussing the impact of *Erie* on the ability of federal courts to recognize customary international law violations as common law torts).

50. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

51. *See, e.g.*, Brown v. W. Ry. of Ala., 338 U.S. 294, 296 (1949) (finding that a state rule of procedure impermissibly burdened the state court's application of the Federal Employers' Liability Act).

that the TVPA will be limited to individual, and not corporate, defendants.[52] Second, although written universally, the Supreme Court has recently taken a narrow view of the extraterritorial application of federal statutes and might construe the TVPA to apply only in cases in which there is some substantial link with the United States.[53] Third, the relatively exacting definition of torture under the statute might well leave out some highly reprehensible conduct.

In sum, substantive tort choice-of-law issues would not be trivial for human rights cases brought in state court, but neither would they be insurmountable. Because of the relatively narrow scope of torts recognized by federal courts under the ATS as construed by *Sosa*, state courts may offer an advantage on this score.

II. CHOICE-OF-LAW CONSIDERATIONS RELATIVE TO DAMAGES

The truly problematic choice-of-law issues for plaintiffs actually center on the law applicable to damages. Conflicts law regarding damages is notoriously byzantine and unstable, with the murky boundary between "procedure" and "substance" continuing to shape much of the debate.[54] The traditional rule has been that so-called "heads"—or types—of damages allowed are a matter of substance, and thus potentially governed by foreign law, while the quantification of damages within those heads is a matter of procedure and thus governed by forum law.[55] The Second Conflict of Laws Restatement endorses this view in a roundabout way, stating that damages law should be chosen by the same principles that apply to substantive tort issues,[56] except as to excessiveness of the award, which it regards as a matter of procedure.[57]

The great risk, then, that plaintiffs bringing state court actions would run is that state courts would hold themselves bound to apply the damage law of the foreign country. In practical terms, this risks making actions unsustainable in U.S. courts. African customary law, for instance, emphasizes non-monetary damages—such as apologies—and minimizes the importance of money damages.[58]

The situation may be slightly better for victims of torts that take place in Latin America. Traditionally, Latin American damages have often been subject to limits that are very low by U.S. standards,[59] and limitations on damages are

52. Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 148 (2005–06).

53. *See, e.g.*, Sarei v. Rio Tinto, PLC, 625 F.3d 561, 563 (9th Cir. 2010) (Klienfeld, J., dissenting) (citing Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2878 (2010), and suggesting that the ATS does not apply without some connection to the United States).

54. *See, e.g.*, Kilberg v. Ne. Airlines, 172 N.E.2d 526, 529 (N.Y. 1961).

55. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 85–86 (6th ed. 2010).

56. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971).

57. *Id.* cmt. f.

58. *See* Davies & Dagbanja, *supra* note 47, at 315–16.

59. *See* Figueroa, *supra* note 52, at 148.

generally treated as substantive tort matters and thus would likely result in the application of foreign law.[60] In general, U.S. courts will apply the punitive damage law of the place in which the wrongful actions took place,[61] and punitive damages—in the sense of damages payable to a private plaintiff solely for the purpose of deterring wrongful conduct—are allowed only in limited types of actions in non-U.S. common law jurisdictions and are unknown to the civil law.[62]

In response to frustration with forum non conveniens dismissals from U.S. courts, several Latin American legislatures have adopted a "Model Law on International Jurisdiction and Applicable Law to Tort Liability," which allows for the damage law of a connected foreign country to be applied.[63] Recently this resulted in a huge judgment against U.S.-based Chevron in a pollution case brought in Ecuador.[64] Conceivably, U.S. state courts might view such laws as a sort of statutorily imposed *renvoi* and allow them to apply their own damage laws. However, because the law requires the application of the law of a connected foreign country, this argument is likely to be successful only if a U.S. (probably corporate) defendant is among those sued.[65]

As with choice of law as to liability, human rights plaintiffs would be well served to find at least one defendant with substantial connections to the forum. State courts might take the view that they have an interest in applying their damage rules to deter bad conduct by forum-connected defendants.[66] The case for applying the forum's damages law would be further enhanced if it could be shown that some critical decision leading to the tortious human rights violations was made in the forum. But barring such a confluence of facts, human rights plaintiffs

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60. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 806–07 (criticizing *Kilberg* for treating a damage cap as procedural because "[e]xisting authority would have called for [the] opposite conclusion[] . . . ."); WEINTRAUB, *supra* note 55, at 432 (*Kilberg*'s characterization of the damage limitation "was made to appear an unfortunate step backward that relied upon the labels 'procedural' and 'public policy' to avoid applying a rule different from that of the forum."); *see also* Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415, 430–31 (1996) (treating a New York state rule requiring stringent review of damage awards as substantive for *Erie* purposes).

61. *See* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 547 (2010).

62. *See* John Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396–97 (2004).

63. Ley Modelo Sobre Competencia Internacional y Derecho Aplicable a la Responsabilidad Extracontractual [Model Law on International Jurisdiction and Applicable Law to Tort Liability] art. 1 (Latin Am. Parliament 1998), *available in English at* http://www.iaba.org/LLinks_forum_non_Parlatino.htm; Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1083 (2010).

64. *Id.*

65. Of course, if one of the defendants is headquartered in, for example, a European country, the plaintiffs could make the argument under the model law that the law of the corporate defendant's headquarters applies, which may be more advantageous to the plaintiffs than the tort law of their home country.

66. *See supra* note 42.

run a large risk of state courts applying foreign law as to the types and categories of damages available.

Realistically, the best hope for human rights plaintiffs in state courts would be to attempt to conceptualize their tort actions as common law tort actions to redress rules of customary international law that are viewed as nearly universally binding. Here again, the TVPA may prove helpful, because it appears to state a universal rule of liability for torture inflicted under the color of any government.[67] Thus conceived, such torts would probably not be tied to the damage law of the place in which the wrongful activity took place, because the torts would not be based upon the internal law of any nation. The TVPA seems to reinforce this notion by referring generally to "damages" being available to such tort victims, without specifying what law of damages applies.[68] If state courts can be persuaded to conceptualize torts in this fashion—acting essentially as pre-*Erie* federal courts did—they are more likely to fashion their own remedies for these torts, given the lack of well-established norms for the tort redress of such injuries, even if the substantive tort norms are drawn from well recognized rules of customary international law. State courts would thus probably turn to the well-established litany of categories of tort damages available under U.S. law: economic damages, damages to redress physical and emotional suffering, and perhaps even punitive damages.[69]

Soft factors, however, may make it difficult to persuade state courts to apply customary international law and fashion remedies for human rights violations. Intuitively, I suspect, state courts will view cases with "international law" and "human rights" labels as being matters of federal concern, and thus be reluctant to embark on what they might view as a road of adventure. Indeed, the Supreme Court has struck down even modest state law ventures into these realms. In *American Insurance Ass'n v. Garamendi*,[70] the Supreme Court struck down—as unconstitutionally interfering with the federal government's exclusive right to conduct foreign affairs—California's Holocaust Victim Insurance Relief Act. That statute, by the Court's own description, merely required "any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one 'related' to it."[71] Nonetheless, the Court held that California overstepped its boundaries in enacting the Act. Of course, *Garamendi* may well be distinguishable from state court efforts to fashion remedies on facts such as those in *Filártiga* and *Kiobel*, but *Garamendi*—

67. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

68. *Id.*

69. *See, e.g.*, *In re* Xerox Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 595–96 (E.D. Va. 2009) (holding, based in part on the RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1997), that punitive damages are available to remedy torts based on activities that constitute international law crimes).

70. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 428–29 (2003).

71. *Id.* at 401.

and some of its predecessors such as *Zschernig v. Miller*[72]—created a mood in which, even in suits between private parties, state courts had best tread lightly (or not at all). Confirming this suspicion is the fact that state court cases of recent vintage using the terms "customary international law" or "law of nations" in civil cases are extremely uncommon and rarely result in any extended discussion of international law.[73]

Somewhat counterintuitively then, the struggle for state court plaintiffs bringing human rights cases may not be in finding an applicable norm of liability that judges the conduct against them to be tortious. Rather, the larger issue may well be persuading state courts to apply a sufficiently robust damage remedy.

III. PERSONAL JURISDICTION

The U.S. law of personal jurisdiction may also present enormous practical challenges for human rights victims wishing to file in state courts. As is well known, the modern constitutional foundation for state-court jurisdiction is the "minimum contacts" test first articulated by the U.S. Supreme Court in *International Shoe Co. v. Washington*.[74] Although I have long argued that the test is both ahistorical and unwieldy in practical application,[75] I have yet to make any converts on the Supreme Court.

For individual defendants, the best practical chance of obtaining jurisdiction would be to serve them with process while within the borders of the state. The

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72. *See* Zschernig v. Miller, 389 U.S. 429, 440–41 (1968) (holding a state statute prohibiting inheritances to nationals of countries that had confiscatory property laws unconstitutional).

73. Looking at two of the United States' most influential state courts, the California Supreme Court and the New York Court of Appeals, discussion in civil cases of customary international law or the law of nations is extremely rare and almost always cursory. For example, in *Ex rel. State Lands Comm'n v. Superior Court*, 900 P.2d 648, 656 (Cal. 1995), the California Supreme Court briefly quoted an old U.S. Supreme Court case that had looked to the law of nations on property acquisition due to avulsion of rivers. Aside from that case, I could find only one other post-1940 California Supreme Court civil case that used either the terms "customary international law" or "law of nations." That case is *Wong v. Tenneco*, 702 P.2d 570, 575 (Cal. 1985), and it contains one brief reference in the context of a choice-of-law issue involving Mexican land. New York decisions were no more common. In *Republic of Arg. v. City of N.Y.*, 250 N.E.2d 698, 704 (N.Y. 1969), the New York Court of Appeals concluded that under customary international law it lacked the authority to tax real estate owned by a foreign government. In *French v. Banco Nacional de Cuba*, 242 N.E.2d 704, 716 (N.Y. 1968), the New York Court of Appeals held that the act of state doctrine excused a Cuban bank from fulfilling its contractual obligations. In *Rosenbaum v. Rosenbaum*, 130 N.E.2d 902, 904 (N.Y. 1955), the New York Court of Appeals refused under international norms of comity to attempt to enjoin a Mexican divorce action. No other New York Court of Appeals decision since 1940 has used the terms "law of nations" or "customary international law." Of course, this is not to say that state courts never discuss international norms. *See, e.g.*, Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1553 n. 69 (2009) (citing some state court decisions discussing torture).

74. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

75. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

plaintiffs obtained personal jurisdiction in this manner in *Filártiga*.[76] Although the constitutionality of asserting jurisdiction over an individual defendant merely by in-state service without minimum contacts was in some doubt after the U.S. Supreme Court's decision in *Shaffer v. Heitner*,[77] the practice was upheld in *Burnham v. Superior Court*.[78] Of course, the theoretical possibility of asserting jurisdiction in this way runs up against a practical difficulty: finding the defendant quickly enough to be served in the forum.

For defendants for whom the assertion of jurisdiction depends on showing minimum contacts with the forum—most notably here corporate defendants—two recent Supreme Court decisions make the task more difficult. In *J. McIntyre Machinery Ltd. v. Nicastro*[79] and *Goodyear Dunlop Tire Operations, S.A. v. Brown*[80] the U.S. Supreme Court refused to find state court jurisdiction over foreign corporations. In the first case, the defendant—a United Kingdom manufacturer of an industrial machine alleged to have caused injury to the plaintiff in the forum state of New Jersey—was held not to be subject to jurisdiction because the manufacturer had sold the machine through a U.S. distributor and not directly to the forum state purchaser.[81] The second case involved allegedly defective tires manufactured by foreign subsidiaries of the U.S. tire giant, Goodyear. The tires were alleged to have failed on a bus trip in France, killing two North Carolina boys.[82] Their families sued in their home state and were able to prove that the foreign subsidiaries sold between 40,000 and 50,000 tires to customers in the forum state from 2004 to 2007.[83] The Supreme Court ruled unanimously that the sales were insufficient to create minimum contacts with North Carolina.[84] For unrelated contacts to be sufficient to support the exercise of jurisdiction, the Court held that they must be sufficiently pervasive so as to make the corporate defendant "essentially at home in the forum state."[85] The Court rejected the

76. Filártiga v. Peña-Irala, 630 F.2d 876, 879 (2d Cir. 1980).

77. Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). After *Shaffer*, a few courts held that this language rendered in-state service of process insufficient by itself to confer jurisdiction. *See, e.g.*, Nehemiah v. Athletics Cong. of U.S.A., 765 F.2d 42, 46–47 (3d Cir. 1985); Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 310–14 (N.D. Ill. 1986); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079, 1088–91 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979); Duehring v. Vasquez, 490 So. 2d 667, 671 (La. Ct. App. 1986); Bershaw v. Sarbacher, 700 P.2d 347, 349 (Wash. Ct. App. 1985). The cases were specifically repudiated by the Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604, 615 (1990).

78. *Burnham*, 495 U.S. at 615.

79. J. McIntyre Machinery Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

80. Goodyear Dunlop Tire Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

81. *J. McIntyre Machinery*, 131 S. Ct. at 2790.

82. Brown v. Meter, 681 S.E.2d 382, 384 (N.C. Ct. App. 2009), *rev'd sub nom.* Goodyear Dunlop Tire Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

83. *Id.* at 385.

84. *Goodyear*, 131 S. Ct. at 2851.

85. *Id.*

plaintiffs' efforts to pierce the corporate veil and treat all the Goodyear corporations as a unitary enterprise, at least for jurisdictional purposes, as having been raised too late.[86]

Goodyear, in particular, leaves state court human rights plaintiffs in a precarious spot. In the typical case in which the plaintiff alleges corporate complicity with a corrupt foreign government to foster human rights violations, all of the relevant events likely will have taken place abroad. Thus, the only realistic means of obtaining jurisdiction would be to show that it has pervasive contacts with the forum. *Goodyear*'s "essentially at home" test, however, makes that a steep uphill climb. To return to the facts of *Kiobel*, in an earlier related case, the Second Circuit found minimum contacts between the non-U.S. corporations and the forum state of New York based upon the defendants' having located a so-called "Investor Relations Office" in New York.[87] It is extremely difficult to see how this holding could survive *Goodyear*. In *Goodyear*, the Supreme Court pointed to *Perkins v. Benguet Mining Co.*[88] as being the paradigmatic case for basing jurisdiction on unrelated contacts.[89] While not so explicitly holding, the Court might have been saying with its "essentially at home" test that corporate defendants are subject to jurisdiction based on unrelated contacts only if their connection to the forum fairly closely mirrors that of *Perkins*, in which the defendant corporation had temporarily relocated its headquarters to the forum state.[90]

It is possible that in some cases plaintiffs may be able to avoid the effect of *Goodyear*. Their best chance of doing so would be to show that some related contacts took place in the forum. For instance, if a human rights plaintiff could prove that executive decisions led to the foreign human rights violations and took place in the U.S. forum, those decisions would create related contacts and take the issue out of the realm of general jurisdiction into specific.[91] In cases of specific

86. *Id.* at 2857.

87. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 96 (2d Cir. 2000).

88. Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) (discussed in *Goodyear*, 131 S. Ct. at 2856).

89. *Goodyear*, 131 S. Ct. at 2856.

90. Patrick J. Borchers, J. McIntyre Machinery*,* Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1266 (2011).

91. *See* Helicopteros Nacionales de Colom. v. Hall, 466 U.S. 408, 414 (1984) (explaining that specific jurisdiction may be asserted when "a controversy is related to or 'arises out of' a defendant's contacts with the forum"). Because the Supreme Court has never defined what constitutes a "related" contact, a variety of tests have arisen in the lower courts. The broadest test is the so-called "but for" test in which the defendant's forum activities need only bear a causal relationship to the events that ultimately create liability. More commonly, however, courts demand that the defendant's forum activities bear a closer nexus to the liability-creating conduct before counting as related. The most demanding of these tests is the so-called "substantive relevance" test in which some portion of the actionable events must take place in the forum. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 362–64. In the hypothetical situation posed, in which corporate executives make a decision in the forum that ultimately leads to human rights abuses abroad, the contact with the forum would count as related under any of the lower courts' tests.

jurisdiction, even a single, isolated contact can create minimum contacts if purposeful.[92] However, proving the locus of the corporate decisions is likely to be a time-consuming and expensive matter, requiring considerable jurisdictional discovery.

Of course, human rights plaintiffs could engage in a more concerted effort to press the argument found to be untimely in *Goodyear*, which is that interlocking parents and subsidiaries that form worldwide enterprises like Goodyear Tires (or Shell Oil, one of the corporate enterprises alleged to have been complicit in human rights violations in *Kiobel*) ought to be treated as unitary enterprises and the corporate separateness of their interlocking parts should be ignored. This, however, is a difficult argument to make successfully. Sophisticated corporate enterprises have strong incentives—for reasons ranging from the limitation of liability, to taxes, to controlling where they are sued—to assiduously maintain the corporate separateness of their constituent parts, leading to most such attacks by plaintiffs being unsuccessful.[93] Moreover, the willingness of the U.S. Supreme Court in *McIntyre* to allow the United Kingdom manufacturer of the industrial machine to "Pilate-like wash its hands of [its] product by having [an] independent distributor[] market it"[94] suggests strongly that the Court is willing to accord foreign corporations extraordinary deference in structuring their affairs.

State court plaintiffs also lose an important jurisdictional weapon available to federal plaintiffs suing on federal theories. Federal Rule of Civil Procedure 4(k)(2) allows for jurisdiction to the limits of the Fifth Amendment's Due Process Clause in cases in which no state court forum would have jurisdiction.[95] Usually the Fifth Amendment's boundaries are held to be more relaxed than those of the Fourteenth, which limit state court jurisdiction.[96] In general, federal courts have held that under the Fifth Amendment, contacts within the United States as a whole may be aggregated together.[97] Post-*Goodyear*, the inability to aggregate contacts may prove to be a crippling disability for state court actions.

Of all of the hurdles that state court plaintiffs may face, personal jurisdiction may be the highest in a large number of cases. With regard to individual defendants, the best route is for plaintiffs to follow the playbook of *Filártiga* and

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92. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 364–68.

93. *See id.* at 515–17. In the leading case of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925), the Supreme Court held that the presence of a wholly owned subsidiary in the forum did not confer jurisdiction over the parent, even though the parent as a practical matter completely controlled the subsidiary, because the "existence of the [subsidiary] as a distinct corporation is, however, in all respects observed."

94. J. McIntyre Machinery v. Nicastro, 131 S. Ct. 2780, 2795 (2011) (Ginsburg, J., dissenting) (quoting Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).

95. FED. R. CIV. P. 4(k)(2).

96. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 479–84.

97. *Id.*

personally serve the defendant while in the forum. With regard to foreign corporations, probably the best hope for plaintiffs is to bring the action in the state in which the corporate defendant has its most extensive business contacts. In many cases, as in the *Kiobel* cases, this will be New York, where the corporation's stock is likely traded and may have its strongest U.S. corporate presence. Such plaintiffs would have to then persuade a court that the defendant's contacts are pervasive enough to meet the *Goodyear* test, or perhaps show that some or all of the critical corporate decisions were made in the forum. Alternatively, for corporations that are subsidiaries of U.S.-based parents, state court plaintiffs might attempt to show that the foreign subsidiaries are part of a unitary enterprise and that the jurisdictional contacts of the parent should be attributed to the subsidiary. This, however, is a highly fact intensive inquiry involving extensive and expensive discovery into the corporate affairs of the related corporations, all in an effort to simply beat back a jurisdictional motion. In sum, state court plaintiffs—and the attorneys who represent them—need to make a sober judgment about the realistic possibility of obtaining jurisdiction in a state court over at least one defendant able to satisfy a substantial judgment.

IV. FORUM NON CONVENIENS

A final tactical weapon available to defendants is the common law doctrine of forum non conveniens. In theory, the doctrine can vary from state to state. Texas even briefly abolished the doctrine[98] before it was restored by statute.[99] In practice, however, the factors applied by state courts are quite uniform and drawn from the U.S. Supreme Court's leading decisions of *Piper Aircraft v. Reyno*[100] and *Gulf Oil Co. v. Gilbert*.[101] Supposedly, courts weigh a combination of private and public factors to decide whether to dismiss the case in favor of a foreign forum, but in actuality cases that involve foreign plaintiffs—even if brought against a U.S. defendant—have a very high dismissal rate under the doctrine.[102]

Because human rights cases of the sort we are considering inevitably involve this deadly combination of foreign plaintiffs and events, the likelihood of facing a serious motion to dismiss is high. A good number of ATS cases have been dismissed on this ground.[103] Dismissal, however, is not inevitable. In one of the

98. *See* Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 679 (Tex. 1990).

99. *See* TEX. CIV. PRAC. & REM. CODE § 71.051 (West 2008).

100. Piper Aircraft v. Reyno, 454 U.S. 235 (1981); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 559 ("[S]tate and federal application of *forum non conveniens* is generally identical.").

101. Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947).

102. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 37, at 553; Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 503 (2011) (in a randomly selected data set of international forum non conveniens cases, courts dismissed sixty-three percent of the cases in which the plaintiffs were foreign nationals).

103. *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1300 (11th Cir. 2009); Türedi v. Coca-Cola Co., 343 Fed. App'x 623, 696 (2d Cir. 2009).

predecessors to the case that ultimately became the consolidated *Kiobel* cases, the Second Circuit reversed the District Court's forum non conveniens dismissal, though in part based on the fact that the plaintiffs had become lawful residents of the United States,[104] a factor not often present in such cases. It is well established that the burden is on the defendant to show that the plaintiff has an adequate alternative forum in which to pursue the case.[105] For many human rights plaintiffs, the realities of attempting to litigate in their home nation's courts against governmental officials, quasi-governmental officials, and those who have close relationships to the government foreclose any meaningful relief in the foreign forum, leading courts to refuse to dismiss such cases.[106]

Latin American countries, whose citizens have often had the doors of U.S. courthouses slammed on their fingers, are taking measures to attempt to blunt the force of the doctrine. One measure, mentioned above, is to pass statutes that allow for the imposition of damages on the same scale as those available in the corporate defendant's home.[107] Another has been to pass statutes directing their courts to not hear cases that have been dismissed by a foreign court, which may show that no alternative forum exists.[108] In any event, forum non conveniens will remain a powerful weapon for defendants in human rights cases.

CONCLUSION

In many cases, state courts may not offer a better alternative than their federal counterparts for human rights tort plaintiffs. It is true that state courts will not be bound to the small range of torts allowed to be pursued under the ATS post-*Sosa*. However, in many circumstances the tradeoffs will not favor plaintiffs. State courts usually will be directed to the tort law and remedies of the foreign nation, which are unlikely to provide the robust damage remedies necessary to make such cases economically viable in a U.S. court. In theory, state courts could develop customary-international-law tort law and remedies as did pre-*Sosa* federal courts, but in practice this seems unlikely to happen on a broad scale. Culturally, state courts are less familiar with, and thus less likely to invoke, international law principles, and the U.S. Supreme Court's jurisprudence declaring unconstitutional

104. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000).

105. *Piper*, 454 U.S. at 254 n. 22.

106. *See, e.g.*, Fidelity Bank PLC v. N. Fox Shipping N.V., 242 F. App'x 84, 91–92 (4th Cir. 2007) (reversing dismissal because the defendants failed to establish that Nigerian courts would hear the plaintiffs' claim); *In re* Xerox Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 602 (E.D. Va. 2009) (the shield of liability of governmental contractors in the foreign forum meant that the foreign forum was not realistically available as an alternative).

107. *See supra* notes 63–65 and accompanying text.

108. *See* GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 447–49, 447 n.16 (5th ed. 2011); Henry Saint Dahl, *Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 47 (2004).

even modest state law intrusions into foreign affairs may cause state courts to shy away from the subject.

Beyond the substantive law difficulties lie some significant procedural ones as well. Recent Supreme Court minimum contacts jurisprudence has considerably limited the reach of state courts over foreign corporations, the most promising source of defendants with the assets to pay substantial judgments. Jurisdiction over individual defendants will generally depend on the good fortune of finding those defendants in the forum state and serving them with process. Even if the jurisdictional obstacles can be overcome, the possibility of a forum non conveniens dismissal awaits, as it has for many ATS plaintiffs in federal court.

This is not to say that state courts will never be a viable alternative for human rights tort plaintiffs. However, having a realistic prospect of pursuing such a case in state court will depend upon a confluence of circumstances. First, an evaluation of the choice-of-law considerations must yield a realistic prospect that the tort law that will be ultimately applied will be robust enough both in the scope of liability and the remedies to make the case viable. Second, the plaintiff must have a realistic prospect of obtaining jurisdiction over the critical defendants. In the case of corporate defendants, this will mean showing that the defendants have contacts with the forum state that are sufficiently pervasive so as to make them essentially at home in the forum, or that critical decisions leading to the human rights violations were made in the forum. For individual defendants this will mean having some realistic prospect of finding them in the forum state and being able to physically serve them with process. Third, the prospective human rights plaintiff must have some strong arguments to negate a likely forum non conveniens motion to dismiss. The most promising route will be showing that the foreign forum offers no realistic prospect for relief. Some human rights cases will surely proceed successfully in state court, but not without a careful evaluation, in advance of filing, of the conflicts issues.