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*By Zachary D. Clopton**

Since 1789, the Alien Tort Statute (ATS) has provided federal court jurisdiction for tort suits by aliens for violations of the law of nations.[1] Though debate certainly exists about the method by which ATS-appropriate torts are identified,[2] the Supreme Court has acknowledged that the substantive content of ATS causes of action is derived from the law of nations.[3] In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court justices addressed not the substance of ATS cases but the reach of that statute.[4]

At least at the time of the Judiciary Act of 1789, the law of nations included not only substantive international law but also international jurisdictional law.[5] Like the substantive law of nations that provides ATS causes of action, international jurisdictional law is an important part of the international legal order. And yet, in a decision about the reach of law-of-nations tort law—and in the search for post-*Kiobel* alternatives—too little attention has been paid to the jurisdictional branch of the law of nations. This essay briefly summarizes an approach to law-of-nations torts that tracks international jurisdictional law, which is broader than current ATS doctrine in some respects and narrower in others.

Prescriptive Jurisdiction

One aspect of international jurisdictional law potentially relevant to law-of-nations cases is the international law of prescriptive jurisdiction. Prescriptive jurisdiction describes the international-law limits of the reach of a state's laws.[6] As others have argued, the limits of prescriptive jurisdiction are not technically the right framework for the ATS. The ATS is a

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[1] 28 U.S.C. §1350 ("The 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.").

[2] The Supreme Court has required that "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 18th-century paradigms we have recognized." Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[3] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1663 (2013); *Sosa*, 542 U.S. at 732. In *Kiobel*, for example, the plaintiffs brought international law claims for crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention. 133 S.Ct. at 1663.

[4] *Kiobel*, 133 S.Ct. 1659.

[5] *See, e.g.*, Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989). For a summary of U.S. interpretation of international jurisdictional law, see 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§401–88 (1987) [hereinafter RESTATEMENT].

[6] Prescriptive (or legislative) jurisdiction is defined as the authority of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." RESTATEMENT, *supra* note 5, §401(a).

jurisdictional statute, not a conduct-regulating one, and ATS causes of action are derived from international law, not domestic law.[7] Yet it is not wholly unreasonable to think about prescriptive jurisdictional limits on law-of-nations causes of action,[8] and the Court treated *Kiobel* as a prescriptive jurisdictional case.

International jurisdictional law provides an internationally accepted set of bases for prescriptive jurisdiction. The *Restatement (Third) of the Foreign Relations Law of the United States* identifies five: (1) territoriality, (2) nationality, (3) objective territoriality, (4) passive personality, and (5) universal jurisdiction.[9] The opinions in *Kiobel*, however, called for narrower limits on the prescriptive reach of law-of-nations torts than international jurisdictional law allows. Chief Justice John Roberts drew his limits from a territorial principle, that is, the presumption against extraterritoriality.[10] While Justice Stephen Breyer referred to "international jurisdictional norms,"[11] his opinion concurring in the judgment defined limits in light of "American interests" rather than international law.[12] In concert with the international division of labor delineated in international jurisdictional law, future courts and legislatures addressing law-of-nations torts should broaden the prescriptive reach of these causes of action to the limits of international prescriptive jurisdiction.

Adjudicatory Jurisdiction

According to the Supreme Court in *Sosa v. Alvarez-Machain*, ATS cases must involve international-law causes of action that are specific and universal.[13] Concern that ATS cases reach too far, therefore, arises not from the content of the rules but from the forum for adjudicating them—when should a U.S. court hear a law-of-nations tort case? International juris-

[7] *E.g.*, William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35, 37–44 (2010), *at* http://www.harvardilj.org/articles/dodge.pdf (arguing that the courts are not subject to prescriptive jurisdictional rules because they are applying (not prescribing) substantive law); Anthony Colangelo, Kiobel *Insta-Symposium:* Kiobel *Contradicts* Morrison, OPINIO JURIS, May 10, 2013, *at* http://opiniojuris.org/2013/05/10/kiobel-insta-symposium-kiobel-contradicts-morrison (arguing that the presumption against extraterritoriality, a prescriptive jurisdictional rule, should not apply to ATS cases because no U.S. conduct-regulating rule exists).

[8] *E.g.*, Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271 (2009). One could treat the ATS as impliedly creating causes of action within the limits established by international jurisdictional law or as authorizing federal courts to define common-law causes of action within the limits established by international law. *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (implied causes of action); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (implied federal common law-making power). Those international law limits could be read into the term *law of nations* in the ATS or applied via the *Charming Betsy* canon. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

[9] RESTATEMENT, *supra* note 5, §402.

[10] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1664–69 (2013) (applying the presumption against extraterritoriality).

[11] *Id.* at 1673 (Breyer, J., concurring).

[12] *Id.* at 1674 ("I would interpret the statute as providing jurisdiction only where distinct American interests are at issue."); *see also* Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES.COM, Apr. 21, 2013, *at* http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction (observing that every justice in *Kiobel* rejected universal jurisdiction).

[13] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

dictional law addresses this question under the heading "adjudicatory jurisdiction."[14] As such, adjudicatory jurisdiction is the natural locus for limits on the reach of a domestic court applying internationally accepted substantive rules.

Applying the international law of adjudicatory jurisdiction to law-of-nations tort cases would narrow current ATS doctrine because international adjudicatory jurisdiction is narrower than personal jurisdiction in U.S. constitutional law. International adjudicatory jurisdiction does not countenance tag jurisdiction[15] and seems less amenable to general jurisdiction than U.S. law, even after *Goodyear Dunlop Tires Operations v. Brown*.[16] The international law of adjudicatory jurisdiction, therefore, could provide meaningful limits on ATS cases, yet the *Kiobel* Court ignored this body of law in its search for limits on the federal courts as fora for law-of-nations torts.[17] Human rights advocates filing amicus briefs in *Kiobel* suggested that the ATS was sufficiently cabined by existing rules from personal jurisdiction to *forum non conveniens* to international comity, but they, too, did not look to the international law of adjudicatory jurisdiction.[18] Should the Court reconsider the reach of the ATS, or should future courts or legislatures (in the United States or abroad) address law-of-nations cases, the law of adjudicatory jurisdiction may help set appropriate boundaries for the domestic-court enforcement of universally accepted norms of international law.[19]

Conclusion

In deciding *Kiobel*, the Supreme Court expressed caution with respect to the international discord that could result from ATS cases that reach beyond the scope of the United States' authority.[20] The justices had access to—but declined to adopt—internationally agreed guidelines on exactly that issue. The international law of adjudicatory and prescriptive jurisdiction is a part of the law of nations that the ATS incorporated into U.S. law, and it should be part of law-of-nations tort law as well. If the Court had applied such limits in *Kiobel*, it would have

[14] Adjudicatory (or judicial) jurisdiction is defined as the authority of a state "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings." RESTATEMENT, *supra* note 5, §401(b); *see id.* §§421–23.

[15] *Compare id.* §421, cmt. e (noting that "'[t]ag' jurisdiction, *i.e.*, jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law"), *with* Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (finding personal jurisdiction on this basis).

[16] *Compare* RESTATEMENT, *supra* note 5, §421 (describing international law of prescriptive jurisdiction), *with* Goodyear Dunlop Tires Operations, SA v. Brown, 131 S.Ct. 2846 (2011) (limiting, but not eliminating, general jurisdiction in U.S. law).

[17] Perhaps the Supreme Court could have limited ATS cases by infusing law-of-nations causes of action with law-of-nations limits on adjudicatory jurisdiction, *see supra* note 8, or by applying some notion of "international due process" to law-of-nations claims, Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 479–81 (7th Cir. 2000) (discussing "international due process" in a judgment recognition case).

[18] *E.g.*, Supplemental Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae on Reargument in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) (No. 10-1491); Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) (No. 10-1491). The *Kiobel* briefs are available online at http://cja.org/section.php?id=509. Perhaps this decision will prove wise—if the Court also adds adjudicatory-jurisdiction requirements to the class of ATS cases that survived *Kiobel*—because the remaining ATS regime would be narrower in both prescriptive and adjudicatory reach.

[19] For a case in which the Supreme Court could entertain limits on adjudicatory jurisdiction, see Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 133 S.Ct. 1995 (U.S. Apr. 22, 2013) (No. 11-965).

[20] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1664–65 (2013).

placed meaningful limits on ATS cases (which it seemed wont to do) and avoided causing international discord (its stated goal), all the while staying true to the words of the ATS and contributing to the rational ordering of the international legal system. In the same way, whether it is through common law, domestic statutes, or international agreements, future regimes of domestic civil enforcement of public international law should not ignore the international jurisdictional rules that have been an important part of the law of nations. In the words of Rosalyn Higgins, former president of the International Court of Justice, "There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances."[21]

"Or a Treaty of the United States": Treaties and the Alien Tort Statute After *Kiobel*

*By Geoffrey R. Watson**

The decision in *Kiobel v. Royal Dutch Petroleum Co.*[1] left open a number of questions about the scope of the Alien Tort Statute (ATS). One such question is the extent to which *Kiobel*'s holding on extraterritoriality applies to the oft-neglected final words of the ATS: "The 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*."[2] What if one such treaty obliged the United States to provide a civil forum for litigation of human rights violations that occurred abroad and did not involve piracy?

Imagine, for example, a hypothetical treaty that obliged states parties not only to exercise universal criminal jurisdiction over accused torturers but also to provide a civil forum for torture victims who wish to sue their torturers in tort, regardless of where the tort occurred and regardless of the nationality of the parties. If the United States signed and ratified such a treaty, would the ATS apply to it? What if the treaty text went so far as to cite the ATS as an appropriate vehicle for implementation of the treaty obligation? Or what if the Senate, in giving advice and consent, expressed its view that the ATS was the appropriate vehicle for implementation of the treaty obligation? Even if the Senate declared that the treaty was otherwise non-self-executing, could its simultaneous declaration that the treaty was already implemented by the ATS have some bearing on the extraterritorial reach of the ATS?

The Supreme Court's opinion in *Kiobel*, like much other writing on the ATS, focuses on the ATS's reference to the "law of nations," which is understood to mean customary international law, or at least something other than treaty law. It is not surprising that the Supreme Court prefers to apply the framers' original understanding of the "law of nations" to ATS litigation; there are reasons to be skittish about incorporating modern norms of customary law into a statute adopted in 1789. As Curtis Bradley and others have observed, customary law is in tension with democratic norms: our Congress has almost no say in its development, and even the president has only a limited power to create or shape customary law given that the United States

[21] Rosalyn Higgins, Problems and Process: International Law and How We Use It 56 (1994).

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

[2] 28 U.S.C. §1350 (emphasis added).