

Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction

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INTRODUCTION

This brief symposium Essay addresses whether and in what ways the Alien Tort Statute (ATS)¹ constitutes an exercise of prescriptive jurisdiction by the United States to regulate conduct or an exercise of adjudicative jurisdiction by U.S. courts to entertain suit, as well as the implications of that classification. The Essay begins with a central and hotly contested focal point in ATS suits—most prominently, in *Kiobel v. Royal Dutch Petroleum Co.*² recently decided by the Supreme Court. Namely: how to conceptualize the applicable law in ATS suits and, more specifically, whether courts apply international law directly or some form of U.S. common law that may or may not reflect international norms. The Essay explains that the Court in *Kiobel* basically answered this question correctly by finding that international law supplies the applicable conduct-regulating rule under the statute; and therefore, the ATS does not constitute an exercise of prescriptive jurisdiction.

But, the Essay argues, the Court then misguidedly applied a novel presumption against extraterritoriality to the ATS. As the Essay contends, the Court couldn't apply the presumption to the conduct-regulating rule authorized by the statute since, as noted, that rule comes from international law, which applies everywhere. Because the conduct-regulating rule comes from international, not national, law there is no uniquely *U.S.* law to which the presumption could apply. International law, on the other hand, prescribes conduct-regulating

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1. 28 U.S.C. § 1350 (2006).

2. 133 S. Ct. 1659 (2013).

rules the world over and thus its application is never really *extra-territorial* since it covers the globe, particularly with respect to universal jurisdiction violations.

Unable to apply a presumption against extraterritoriality to the conduct-regulating rule under the ATS, the Court in *Kiobel* seized upon the cause of action authorized by the ATS as the relevant creature of U.S. law to which the presumption applied. This move was not only novel, but also problematic. The presumption has traditionally applied only to exercises of U.S. jurisdiction to prescribe conduct-regulating rules over persons or things abroad. Jurisdictional statutes are not, as the *Kiobel* Court itself noted, conduct-regulating rules;³ instead, they go to a court's jurisdiction to entertain suit. As such, these statutes relate principally to adjudicative, not prescriptive, jurisdiction. A presumption against extraterritoriality has not traditionally applied to these statutes because, simply put, they aren't extraterritorial—and, crucially, this is so even when the activity underlying the claims authorized by the statute take place abroad.

To be sure, the Supreme Court recently went out of its way to make precisely this point in another case involving the presumption against extraterritoriality: *Morrison v. National Australia Bank Ltd.*⁴—the very case on which *Kiobel* overwhelmingly relies for both its reasoning and its result. Yet *Kiobel* directly contradicts *Morrison*'s explicit finding of district court jurisdiction in that case over claims involving activity abroad.⁵ *Morrison* explained that the presumption against extraterritoriality—as a canon that regulates prescriptive conduct-regulating rules—did not operate upon the jurisdictional statute, 15 U.S.C. § 78aa.⁶ Like § 78aa, and as the *Kiobel* Court openly acknowledged, the ATS is also a “strictly jurisdictional” statute.⁷ If the ATS does not contain sufficient indicia of extraterritorial application, certainly neither does § 78aa, which simply provides: “The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder”⁸ In sum, *Kiobel*'s extension of

3. *Id.* at 1664.

4. 130 S. Ct. 2869, 2878 (2010).

5. *See infra* Part III.

6. *Morrison*, 130 S. Ct. at 2876–77.

7. *Kiobel*, 133 S. Ct. at 1664.

8. 15 U.S.C. § 78aa (2006).

a presumption against extraterritoriality to the ATS is not only conceptually misguided and doctrinally unsound, it also contradicts the Court's own most recent pronouncements about the presumption against extraterritoriality. *Kiobel* may now be the law, but with it the Court has rendered that law contradictory and, thus, incoherent.

I. THE ADJUDICATIVE VERSUS PRESCRIPTIVE JURISDICTION DISPUTE

The question whether the ATS authorizes application of international law directly or international law reflected in some form of common law was always a red herring. It basically misapprehended what it purported to answer—namely, the questions for reargument in *Kiobel*: “Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”⁹ The answers to these questions did not depend on whether the applicable law in ATS suits was conceptualized as the direct application of international law or U.S. common law that reflects international law. Rather, the crucial question for whether ATS claims arising in foreign territory were actionable under traditional canons of statutory construction was whether the conduct-regulating rule of decision in ATS suits—however it is conceptualized—accurately reflects extant rules of international law, including as to the scope of liability.

The “law of nations,” or what the Supreme Court considers to be modern-day international law for ATS purposes,¹⁰ prohibits certain universal jurisdiction violations everywhere. These violations include serious human rights abuses like torture and genocide, certain acts of terrorism, and other universally condemned offenses like piracy.¹¹ The international law prohibiting these offenses does not care how it is implemented in any given domestic legal system; for example, it could be applied directly by courts or via statutory or common-law incorporation.¹² When U.S. courts apply the substance of

9. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

10. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (“[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

11. *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT’L L. 149 app. (2006) (detailing the current universal jurisdiction offenses under international law).

12. *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31–33 (5th ed. 1998).

international law imposing liability for universal jurisdiction violations—however that international law is conceptualized within the U.S. domestic legal system—U.S. courts are effectively applying an international law that covers the globe. In turn, the exercise of jurisdiction does not involve the projection of uniquely national law abroad, but rather the decentralized enforcement of an international law that already applied to the conduct where and when it occurred. Thus, if the conduct-regulating rule courts apply in ATS cases accurately reflects extant international law governing the activity in question, including as to liability, there is no exercise of extraterritorial jurisdiction by the United States.

It is important to appreciate the perceived doctrinal and litigation stakes of the adjudicative versus prescriptive jurisdiction dispute for *Kiobel*—a suit by foreigners, against foreigners, alleging wrongful conduct abroad, or what some now call a “foreign-cubed” suit.¹³ Petitioners wanted the law applied in ATS suits to be conceptualized as international law so they could claim that all the ATS does is authorize what’s called “adjudicative jurisdiction” for U.S. courts sitting in U.S. territory.¹⁴ Respondents, on the other hand, wanted the law to be conceptualized as U.S. common law so that the ATS constitutes an exercise of what’s called “prescriptive jurisdiction” by the United States inside foreign territory.¹⁵ For those unfamiliar with these terms, “adjudicative jurisdiction” is generally regarded as the authority of courts to entertain suits, while “prescriptive jurisdiction” is the authority to make and apply law to persons or things.¹⁶

The importance of this conceptual distinction should start to become apparent: if the applicable law is international law, the ATS can be said to create only adjudicative jurisdiction for U.S. courts to entertain suits involving foreign elements and simply doesn’t involve

13. See, e.g., Supplemental Brief for Respondents at 9, 37, 38, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) (referring to *Kiobel* as a “foreign-cubed” case). The term has been used for some time in the securities litigation context and has more recently migrated to the international law area. However, “foreign-cubed” suits have been around in international law at least as long as universal jurisdiction, which was well-established at the time of the founding. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820).

14. See Petitioners’ Supplemental Opening Brief at 39–40, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

15. See Supplemental Brief for Respondents, *supra* note 13, at 47–48.

16. For a recent explication of these types of jurisdiction, see Anthony J. Colangelo, *Spatial Legality*, 107 NW. U. L. REV. 69, 73 (2012).

extraterritorial application of U.S. national conduct-regulating rules (or prescriptive jurisdiction). What courts do under the ATS is thus directly analogous to—indeed it is conceivably the same as—what U.S. courts do when they apply the foreign conduct-regulating rules of, say, the place where a harm occurred, which U.S. courts have been doing since the founding, including in so-called “foreign-cubed” cases. In fact, there’s an entire course in law school devoted largely to the subject, called Conflict of Laws.

On the other hand, if the applicable law under the ATS is some variety of U.S. common law, then the United States may be engaged in the extraterritorial application of its conduct-regulating rules to persons or things abroad—*i.e.*, prescriptive jurisdiction. And if that’s right, then the longstanding¹⁷ and recently reinvigorated¹⁸ presumption against extraterritorial application of U.S. national law kicks in to block the projection of the conduct-regulating rule, along with the presumption’s motivating rationales like avoiding clashes between overlapping U.S. and foreign conduct-regulating laws.¹⁹ In addition, the separate *Charming Betsy* canon of construction requiring that ambiguous statutes be construed not to violate international law would constrain the reach of U.S. law²⁰ since it would likely violate international law to extend purely U.S. laws inside foreign territory to regulate conduct with no U.S. connection.²¹

II. WHY THE CATEGORIZATION DOES NOT REALLY MATTER

In my view, the heuristic value of the “adjudicative” and “prescriptive” jurisdiction categories has basically run out in this context. As far as conduct-regulating rules go, it doesn’t really matter on the extraterritorial jurisdiction question how we conceptualize the

17. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (holding that the application of the Piracy Act of 1790 is confined “to any person or persons owing permanent or temporary allegiance to the United States,” not to foreigners).

18. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

19. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (explaining that the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”).

20. *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”); see also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (relying on *Charming Betsy* in order to hold that the National Labor Relations Board did not have proper jurisdiction because Congress must affirmatively express an intention to apply U.S. law extraterritorially in order for such law to apply).

21. See Colangelo, *supra* note 11, at 150.

law courts apply in ATS suits—whether it is international law or some form of U.S. common law reflecting international law. The key question, instead, is whether that law, however it is conceptualized, indeed accurately reflects extant rules of international law, including as to liability.

(Before explaining why, a brief aside on how this last requirement that international law provides for liability also can guide whether to recognize a private right of action under the statute—something respondents and their amici have seized upon as a limitation in ATS suits.²² In short, if international law provides for individual liability, there is a private right of action. The Supreme Court in *Sosa v. Alvarez-Machain*²³ repeatedly explained that an ATS cause of action lies not for any international law violation, but instead only “for the modest number of international law violations with a potential for personal liability”²⁴—that is, “rules binding individuals for the benefit of other individuals . . . [under] the law of nations, admitting of a judicial remedy.”²⁵ And there is no doubt that “the current state of international law”²⁶ imposes personal liability for some (limited) violations, but not for most others.)

Now to why it doesn't matter whether the ATS is conceptualized as authorizing the application of international law directly or international law incorporated into common law when it comes to the conduct-regulating rule of decision. As noted above, international law itself doesn't care about how it is conceptualized or implemented within any given domestic legal system, so *Charming Betsy* is silent on this question. Depending on the country, some national justice systems may require implementing legislation to apply international law as a domestic rule of decision, others may not; but that's a matter for a nation's internal law, not international law. Of course, if states pretend to implement international law and don't, or exaggerate it, that's a problem—including for the ATS. Applying idiosyncratic or extravagant domestic definitions of international law would

22. See Supplemental Brief for Respondents, *supra* note 13, at 15–16, 42; Supplemental Brief of Amici Curiae BP America et al. in Support of Respondents at 14–15, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

23. 542 U.S. 692 (2004).

24. *Id.* at 724.

25. *Id.* at 715.

26. *Id.* at 733

constitute extraterritorial application of domestic law abroad if the cause of action arises in foreign territory.

Next, and perhaps more importantly for ATS purposes, if international law is implemented accurately into U.S. domestic law such translation to domestic law does not somehow strip that international law of its universal jurisdiction powers to apply the world over. To be absolutely clear, this is so regardless of how international law is implemented in U.S. law, it could be implemented by statute or through the common law. Either way, the United States is applying a substantive international law that governs everywhere.

In turn, when U.S. courts apply substantive international law proscribing universal jurisdiction violations—however that law came to be the applicable rule of decision in U.S. courts—the United States is not projecting uniquely national law abroad, but acts as a decentralized enforcer of an international law that already applied in the territory where the conduct at issue occurred. For example, all of our U.S. criminal laws implementing universal jurisdiction under international law are legislatively enacted statutes—whether of the sort like the much-litigated 1819 act prohibiting piracy against the law of nations, which simply invokes the definition of the offense under “the law of nations,”²⁷ or more recent laws like federal statutes against torture and terrorism, which replicate the elements of the offenses laid out in widely ratified international treaties or just incorporate the treaties by reference.²⁸

III. *KIOBEL*'S APPLICATION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY TO THE ATS

The Supreme Court's decision in *Kiobel* is consistent with everything that has been said so far. The Court unambiguously explained that the ATS “does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”²⁹ Indeed the Court framed the relevant question under the ATS as “whether the court has authority to recognize a cause of action under

27. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (current version at 18 U.S.C. § 1651 (2006)).

28. See Colangelo, *supra* note 11, at 186–98.

29. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

U.S. law to enforce a norm of international law.”³⁰ In short, the cause of action is a creature of U.S. law and the conduct-regulating norm comes from international law.

A presumption against extraterritoriality makes no sense when it comes to conduct-regulating norms of international law, which by their nature apply everywhere. Because conduct-regulating norms of international law cover the globe, using them as the conduct-regulating rules of decision under the ATS does not constitute an exercise of extraterritorial prescriptive jurisdiction. From the quotes above, the Court seems to have accepted this view.

But here’s the twist. The Court then went on to locate another creature of U.S. law to which the presumption against extraterritoriality could, and did, apply. And in this respect, the Court did something new and strange: it applied the presumption to the cause of action authorized by the ATS—traditionally a creature of forum law, or *lex fori*, under principles of both international and U.S. law.³¹ This is, in fact, the whole basis behind the traditional approach to conflict of laws under which the forum crafts causes of action to allow foreigners to sue under foreign laws.³² It may be true that, generally speaking, the forum will not create a cause of action if there is no cause of action under the law of the place of the tort.³³ And for this point, the Court in *Kiobel* cited Justice Holmes’ opinion in *Cuba Railroad Co. v. Crosby*.³⁴ But at the very least, that would require some evaluation of whether the law of the place of the harm, or *lex loci delicti*, provides a cause of action for, among other things, harms like crimes against humanity, torture, and arbitrary arrest and detention.³⁵ At most, we might even take Holmes’ opinion in *Crosby* at its word. There, the Court explained that “[U.S.] courts would assume a liability to exist if nothing to the contrary appeared” when dealing with torts that “are likely to impose an obligation in all civilized countries.”³⁶ This language suggests that in such cases the

30. *Id.* at 1666 (emphasis added).

31. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 557 (Little, Brown & Co., 5th ed. 1857) (1834).

32. See RESTATEMENT OF CONFLICT OF LAWS § 384(1) (1934).

33. *Id.* § 384(2).

34. 222 U.S. 473 (1912).

35. See *Kiobel*, 133 S. Ct. at 1663 (listing the violations of the law of nations alleged by the *Kiobel* plaintiffs).

36. *Crosby*, 222 U.S. at 478.

burden would fall on *the defendant* to show no liability under the law of the place of the harm. And if nothing else, the concept of universal jurisdiction stands for the proposition that there are some acts that “impose an obligation in all civilized countries.”³⁷

But that’s not all. What makes *Kiobel*’s extension of the presumption against extraterritoriality to the ATS doubly strange is that the Court had just went out of its way to make clear that the presumption applies to exercises of prescriptive—as opposed to adjudicative—jurisdiction. In *Morrison v. National Australia Bank Ltd.*,³⁸ the Court devoted an entire section of its opinion to clarify precisely this point.³⁹ The question in *Morrison* was “whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.”⁴⁰ This question, in turn, boiled down to whether and how a presumption against extraterritoriality applied to the Exchange Act.⁴¹

According to the Supreme Court, the Second Circuit had, mistakenly, “considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction.”⁴² To correct this “threshold error,” the Court clarified the difference between prescriptive jurisdiction to regulate conduct on the one hand, and the “quite separate” issue of the district court’s adjudicative jurisdiction to entertain suit on the other.⁴³ In *Morrison*, the presumption applied to the former but not the latter. To be sure, the Court explicitly observed that “the District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies.”⁴⁴ The Court elaborated:

Section 78aa provides: “The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty

37. *Id.*

38. 130 S. Ct. 2869 (2010).

39. *See id.* at 2876–77.

40. *Id.* at 2875.

41. *Id.* at 2877.

42. *Id.*

43. *Id.*

44. *Id.*

created by [the Exchange Act] or the rules and regulations thereunder.⁴⁵

Like § 78aa, the ATS is—as the Court in *Kiobel* openly acknowledged—“strictly jurisdictional.”⁴⁶ And like § 78aa, the ATS authorizes U.S. courts with “jurisdiction.”⁴⁷ Under the ATS, that “jurisdiction” encompasses “any civil action by an alien for a tort only, committed in violation of the law of nations.”⁴⁸ If the ATS does not sufficiently indicate extraterritorial application, certainly neither does § 78aa. And if the district court in *Morrison* “had jurisdiction under 15 U.S.C. § 78aa” over claims involving extraterritorial activity—as the Supreme Court explicitly said it did⁴⁹—then the district court in *Kiobel* also should have “had jurisdiction under [the ATS]” over claims involving extraterritorial activity. Thus, the Court’s decision in *Kiobel* contradicts not only longstanding principles of U.S. and international law, but also its own most recent precedent on the presumption against extraterritoriality and, in the process, renders that law incoherent.

CONCLUSION

Whether the applicable law in ATS suits involves the direct or indirect application of international law was always a red herring. Neither U.S. nor international law cares how international law is incorporated into a domestic rule of decision for prescriptive jurisdictional purposes. All that matters is that the conduct-regulating rule is the same: international substantive law, including as to liability. Accordingly, whether the conduct-regulating rule in ATS suits is conceptualized as the direct or indirect application of international law via U.S. common law does not matter. Instead, what really matters is whether the applicable conduct-regulating rule faithfully and accurately reflects extant international law, including as to liability. Only if it does, could the exercise of jurisdiction over entirely foreign activity have stood under prevailing canons of statutory construction before *Kiobel*.

45. *Id.* at 2877 n.3.

46. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

47. 28 U.S.C. § 1350 (2006).

48. *Id.*

49. *Morrison*, 130 S. Ct. at 2877.

Kiobel recognized that international law is the applicable conduct-regulating rule under the ATS and acknowledged that a presumption against extraterritoriality did not apply to conduct-regulating rules under the statute.⁵⁰ But the Court then extended a new presumption against extraterritoriality to the only part of the case left governed by U.S. law: the cause of action authorized by the ATS.⁵¹ This novel use of the presumption against extraterritoriality contradicts not only longstanding principles of U.S. and international law, but also the Court's own most recent opinion on the presumption, rendering the law contradictory and incoherent. Having decided, correctly in my view, that the conduct-regulating rule under the ATS comes from international law, the Court essentially painted itself into a corner. It wanted to apply the presumption, but had only a jurisdictional statute left to construe. The problem with construing the ATS in light of the presumption (apart from the fact that the ATS was enacted well before the presumption ever came into existence) is there was no U.S. conduct-regulating rule to which the presumption could apply and the Court had just found the presumption inapplicable to a jurisdictional statute in *Morrison*. I tend to agree with those who have suggested that the Court in *Kiobel* was likely making a merits-based, rather than a subject matter jurisdiction, determination. But why be so cagey about this point? *Morrison* certainly wasn't. Perhaps the reason is that *Kiobel* contradicts not only longstanding principles of U.S. and international law, but also the Court's own most recent precedent.

50. *Kiobel*, 133 S. Ct. at 1664.

51. *See id.*