Returning the Alien Tort Statute to Obscurity

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The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*[1]—imposing a territorial limit on claims under the Alien Tort Statute (ATS)[2]—seems to leave little room for the ATS to operate. For some, that may be grounds for criticism. But the better view is that *Kiobel* largely returns the ATS to the modest role its drafters envisioned for it.

This essay makes three quick points about *Kiobel* and its implications. First, *Kiobel* does not limit ATS jurisdiction directly; it limits the extraterritorial reach of U.S.-law causes of action. Where all parties are aliens (as in *Kiobel*), that limit also precludes federal jurisdiction, because there is no source of jurisdiction under Article III of the Constitution. But where the defendant is a U.S. citizen, there should be no objection to ATS jurisdiction even if the alleged conduct is extraterritorial; the court simply cannot apply a federal common law cause of action to it.

Second, as a limit on extraterritorial causes of action, *Kiobel* is consistent with the background assumptions of the time the ATS was drafted. The traditional common law rule was that tort claims were governed by the place they arose. Aliens suing in U.S. court for injuries abroad would not expect their claims to be governed by U.S. substantive law (though under appropriate circumstances, they would expect U.S. courts to resolve their claims).

Third, within the 1789 Judiciary Act, the language that has come to be called the ATS played only a secondary role. Section 11 gave jurisdiction over alien claims in excess of $500 to federal circuit courts. In general, other alien claims would have had to be brought

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

2. 28 U.S.C. § 1350 (2006). Specifically, the Court in *Kiobel* held that as a result of the presumption against extraterritoriality, Nigerian plaintiffs could not sue non-U.S. corporations for actions that took place in Nigeria. *Kiobel*, 133 S.Ct. at 1662–63.

in state court. But section 9 allowed claims for torts in violation of international law to be brought in federal district courts even if they did not meet the amount in controversy required by section 11. As explained below, that approximates the situation after *Kiobel*, if *Kiobel* is read correctly. Alien-vs.-U.S.-citizen ATS claims should be allowed (though with a foreign-law cause of action if arising abroad); however, those claims could also be brought under diversity jurisdiction unless they fail to meet the modern amount-in-controversy requirement.

I. *KIOBEL* AND JURISDICTION

Some loose language in the *Kiobel* opinion might be read to say that ATS jurisdiction does not extend to any claims based on conduct in a foreign country. That reading, however, seems doubtful for reasons sketched below. Rather, the decision is better read as saying that U.S. federal common law causes of action cannot exist under the ATS for conduct occurring in a foreign country. The distinction, while subtle, reconciles *Kiobel* with existing law and has important implications for its future application, especially to U.S. citizen defendants.

There are at least four difficulties with reading *Kiobel* as a limit on jurisdiction. First, other federal jurisdictional statutes written in equally general language do not have a territorial limit; in particular, federal diversity jurisdiction, originally provided in 1789 as part of the same statute that contained the ATS,[3] does not. Federal courts exercising diversity jurisdiction routinely resolve claims based on conduct in foreign nations. There seems little ground for applying a territorial presumption to ATS jurisdiction and not to diversity jurisdiction. The cases *Kiobel* invoked to support a territorial presumption, such as *Morrison v. National Australia Bank Ltd.*[4] and *EEOC v. Arabian American Oil Co.*,[5] limit the reach of substantive U.S. law to foreign territory—what international law calls the exercise of "prescriptive" jurisdiction;[6] they are not about courts' ability to hear

3. *See* Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76, 78. Section 11 provided for circuit court jurisdiction over claims where an alien is a party and the amount in controversy exceeds $500; section 9 provided for district court jurisdiction where an alien sues for a tort in violation of a treaty or the law of nations.

4. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

5. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

6. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 240–56 (2006) (discussing prescriptive jurisdiction).

claims based on foreign law.

Second, at the time the ATS was enacted and for many years after, the general understanding in England and America likely was that courts had common law authority to resolve claims arising abroad, especially tort claims. In particular, the well-known English case *Mostyn v. Fabrigas* recognized "transitory" jurisdiction over foreign tort claims.[7] Under common law, as explained in *Mostyn* and its successors, if the defendant was present in the jurisdiction, the court could entertain tort claims based on foreign conduct (although other sorts of claims, such as those involving real property, could be brought only where the property was located).[8] Thus, the background assumption in 1789 probably was that a grant of tort jurisdiction, if not expressly limited, would include claims based on foreign conduct. As a result, the non-application of a presumption against extraterritoriality in diversity jurisdiction comports with the common historical understandings about jurisdiction. The presumption against extraterritoriality reflects the longstanding concern about applying the law of one sovereign in the territory of another;[9] that concern is not at stake when the question is merely one of jurisdiction.

Third, because federal diversity jurisdiction has no territorial limit, aliens can sue U.S. citizens in federal court for foreign conduct (including conduct that violates international law) so long as they meet diversity jurisdiction's amount-in-controversy requirement.[10] But if *Kiobel* forecloses all extraterritorial ATS jurisdiction,[11] aliens could not sue U.S. citizens in federal court for international law torts involving lower dollar amounts unless the conduct occurred in the United States. That arrangement seems hard to explain on any conventional explanation of concerns about extraterritoriality. If the presumption is driven by worries over infringement of foreign nations'

7. Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.); 1 Cowp. 160.

8. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, §§ 543–55 (1st ed. 1834).

9. *See id.* §§ 18–23.

10. *See* 28 U.S.C. § 1332 (2006) (authorizing, inter alia, suits between aliens and U.S. citizens where the amount in controversy exceeds $75,000).

11. Particularly in light of Justice Kennedy's concurrence, there may be some doubt whether all suits based on extraterritorial conduct are foreclosed. It would be odd, however, to say that the presumption does not apply to the conduct of U.S. citizens and entities. In other contexts, the Court has applied the presumption to the conduct of U.S. defendants. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (applying presumption to bar extraterritorial claim against U.S. corporation). *See also* Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013) (holding that *Kiobel* bars extraterritorial ATS claims against U.S. defendants).

sovereignty, it makes little sense to limit aliens' low-dollar claims against U.S. citizens to ones arising in the United States, when aliens' high-dollar claims against U.S. citizens would not be so limited.

Fourth, as to claims against U.S. citizens, it is especially hard to understand why U.S. jurisdiction would be limited to territorial claims. U.S. citizens' conduct abroad seems central to the concerns of the First Congress. Most scholars agree that the motivation of the ATS was to protect U.S. foreign policy by providing a federal forum for alien claims that might lead to tensions with foreign governments if mishandled by state courts.[12] But the overseas torts of U.S. citizens in particular were likely to do just that—as the 1790s' experience with neutrality violations showed. Attorney General William Bradford's 1795 memorandum, responding to British complaints about violations of neutrality committed by U.S. citizens abroad, specifically invoked the ATS as a potential remedy.[13]

In sum, thinking of *Kiobel* as a limit on ATS jurisdiction makes little sense. As discussed in the next section, however, it is easily understood as a limit on U.S. common law causes of action.

II. *KIOBEL* AND EXTRATERRITORIAL CAUSES OF ACTION

Kiobel's central concern was not jurisdiction, but rather the possibility of a U.S.-law cause of action governing foreign conduct. The Court stressed the difficulties that might arise if U.S. courts used the ATS to resolve disputes in foreign sovereign territory.[14] But that concern does not arise simply because a U.S. court takes *jurisdiction* over a case involving foreign conduct. As noted, U.S. courts routinely do so in diversity cases (although doctrines such as *forum non conveniens* may block claims more appropriately heard elsewhere).

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12. *E.g.*, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 641–42 (2002).

13. Breach of Neutrality, 1 Op. Atty. Gen. 57 (1795). Bradford opined that a remedy for U.S. citizens' participation in an attack on the British colony at Sierra Leone might be available under the ATS. The *Kiobel* Court argued that Bradford might have been talking about injuries on the high seas. That seems unlikely, though, since (a) the principal injuries in the Sierra Leone incident occurred on land, see Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AMER. J. INT'L L. 509 (2012); and (b) if the claims had arisen on the high seas, U.S. courts would have had admiralty and maritime jurisdiction and reference to the ATS would have been unnecessary. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76.

14. *See, e.g.*, *Kiobel*, 133 S. Ct. at 1664–65 (invoking "the danger of unwarranted judicial interference in the conduct of foreign policy").

And, as *Mostyn* illustrates, that was an accepted practice as well in the time of the 1789 Judiciary Act. So long as the U.S. court applies the law *of the foreign sovereign*, there should not be material concern about infringements of sovereignty (or at least, that has been the longstanding view). It is only when the United States imposes *its own* rules that the conflict of sovereignty is unduly sharpened. The problem is the assertion of jurisdiction to prescribe, not the assertion of jurisdiction to adjudicate. Because of this concern, the *Kiobel* Court thought the ATS should not be read to authorize U.S. courts to develop their own U.S.-law causes of action for injuries in foreign sovereign territory.[15]

Ordinarily, the question of jurisdiction should be separate from and precede the question of a cause of action. Jurisdiction does not imply a cause of action; they are separate inquiries. For example, if a foreign plaintiff sues a U.S. defendant in federal court under diversity jurisdiction, a court would properly look first at whether the requirements of diversity were satisfied and then would ask what law, if any, provided a cause of action (and the diversity statute would not be thought to have significance for the second inquiry).

In *Kiobel*, though, lack of a federal cause of action would also mean a lack of jurisdiction—not as a statutory matter but as a constitutional matter. All parties were aliens. Article III jurisdiction would exist only if the claims arose under the "laws of the United States,"[16] and although the Court's prior decision in *Sosa v. Alvarez-Machain*[17] left room for courts in ATS cases to create federal common law causes of action for some international law violations, it did not fully outline all the parameters for doing so.[18] As a result, in *Kiobel* the question of jurisdiction and the question of a cause of action ran together.

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15. *See id.* at 1664:

> [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. But we think the principles underlying the [presumption against extraterritoriality] similarly constrain courts considering causes of action that may be brought under the ATS.

16. *See* U.S. CONST. art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under ... the Laws of the United States...").

17. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

18. The Court in *Sosa* appeared to assume (without making the assumption clear) that federal common law causes of action applied in ATS cases "aris[e] under" a "Law[ ] of the United States" and thus give jurisdiction under Article III. That assumption may well be incorrect as a matter of the ATS' original meaning, see Bradley, *supra* note 12, and in any event neither *Sosa* nor *Kiobel* had to confront it directly. In the absence of a federal common law cause of action, there would surely not be "arising under" jurisdiction in either case.

There could be Article III jurisdiction only if there were a U.S. federal cause of action. Thus, the Court can be understood to be asking whether there was a federal cause of action that would support jurisdiction and finding that there was not. (Admittedly, the Court did not make this reasoning as clear as it might have.)

Viewed as a question about the existence of a U.S. cause of action, *Kiobel* makes sense. Even if the First Congress thought federal courts acting under the ATS would sometimes recognize a U.S. common law cause of action, it is highly unlikely that the First Congress thought these causes of action would extend to torts committed in foreign territory. The common law rule for torts in that era was that they were governed by the law of the place of the injury. As Joseph Story noted, under common law the "universal principle [is] . . . that, in regard to the merits and rights involved in actions, the law of the place, where they originated, is to govern."[19] Absent specific statutory direction, the First Congress would not have expected U.S. courts to develop their own rules for extraterritorial tortious conduct. Rather, Congress would have expected courts to apply the common law's choice of law (thus choosing foreign law).

In the general case that would not be the same as saying U.S. courts did not have jurisdiction. State courts and federal courts exercising diversity jurisdiction recognized that they might have jurisdiction over claims arising in foreign countries and yet apply the common law's law-of-the-place rule to supply the cause of action. But in federal alien-vs.-alien suits, an Article III source of jurisdiction is needed. Because the only possible candidate in *Kiobel* would have been for cases arising under the laws of the United States, the absence of a U.S.-law cause of action was fatal to federal jurisdiction.

As a result, the Court in *Kiobel* sometimes seems to speak in terms of jurisdiction (or to say generally that the plaintiffs could not bring a claim under the ATS). But that conclusion is derivative of the core holding that no substantive U.S. law governed the alleged foreign misconduct. Because the plaintiffs were all aliens, the Constitution did not allow federal courts to act without a governing U.S. law, even though the plaintiffs might have had claims based on some other source of law.

That means there is no tension between *Kiobel* and the longstanding assumption that the diversity jurisdiction statute encompasses cases arising abroad. Diversity jurisdiction does not require the existence of a U.S.-law cause of action when an alien sues

19. *See* STORY, *supra* note 8, § 558.

because one party is a U.S. citizen and thus Article III is satisfied.[20] Because *Kiobel* limited the extraterritorial reach of a U.S.-law cause of action under the ATS, it is unrelated to the jurisdictional aspects of the diversity statute. And, as the *Kiobel* Court said, there is no tension with *Mostyn* and the common law idea of transitory jurisdiction, because *Mostyn* was not about creating substantive extraterritorial rules of conduct. Most importantly, alien claims against U.S. citizens can be based on foreign conduct that violates international law—either under diversity jurisdiction if they meet the amount in controversy or under ATS jurisdiction if they do not. *Kiobel* is not a barrier to jurisdiction in those cases: it is only a barrier to a U.S.-law cause of action. In cases against U.S. defendants, because Article III jurisdiction exists on other grounds, there is no constitutional objection to a federal court applying a foreign law cause of action. Viewed this way, *Kiobel* is simply a routine application of the presumption against extraterritoriality to hold *substantive* U.S. law to its presumed territorial limits; it does not say anything (except indirectly) about the limits of U.S. jurisdiction.

Thus *Kiobel* is notable in only two respects, though neither should be troubling. First, it applies the presumption against extraterritoriality to common law causes of action as well as statutory causes of action.[21] That seems reasonable and indeed inevitable: the presumption does not arise from anything peculiar to statutory law, but rather from the idea that substantive U.S. law (however created) is presumed to have only territorial effect. While some commentators object to this idea, their objections are to the presumption as a whole, not to anything unique to common law actions.[22] Since in the U.S. system, both courts and legislatures can create substantive legal obligations of similar effect, there is little justification for treating them differently in this regard. Second, *Kiobel* understands a tort claim based on actions that violate international law to be a claim arising under the law of a particular nation. Again, that seems correct[23] (al-

20. *See* U.S. CONST. art. III, § 2, cl. 2 (providing jurisdiction over "[c]ontroversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

21. *See Kiobel*, 133 S. Ct. at 1664.

22. Another objection might be that the presumption should have been overcome for the ATS because of Congress' interest in providing a forum for overseas torts of U.S. citizens. As discussed above, however, reading the ATS not to endorse extraterritorial U.S. law should not deny a forum for overseas torts of U.S. citizens; it just requires that the cause of action be based on foreign law.

23. *See* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 297–300 (2009) (discussing this point).

beit disputed by some commentators).[24] In most cases, international law does not provide any particular way of enforcement. That is especially true in tort law: there is no international law of tort claims. Different nations may choose to redress international torts in different ways (including redress that does not include private claims at all, or does not include some types of private claims that the United States recognizes).

III. *KIOBEL* AND THE JUDICIARY ACT OF 1789

There remains, though, the core objection to *Kiobel* that it renders the ATS largely meaningless. Aliens are unlikely to injure other aliens in the United States in ways that violate international law.[25] Aliens injured by U.S. citizens can invoke diversity jurisdiction (assuming they meet the amount in controversy requirement) or federal question jurisdiction (if there is an issue of a treaty or of U.S. federal law). What then, one may ask, is the point of the ATS?

One answer is that, contrary to the enormous energy invested in the ATS by courts, litigators, and commentators after the *Filartiga* decision in 1980, the ATS was not intended to be a major factor in international litigation and the decision in *Kiobel* returns it in large part to its modest purpose. After *Kiobel*, it seems, the main effect of the ATS would be to provide federal jurisdiction for aliens' international law tort claims against U.S. citizens that do not meet the amount in controversy for diversity. (As discussed above, if these claims arise overseas they are not governed by U.S.-law causes of action, but they can be resolved under foreign-law causes of action, with constitutional jurisdiction arising from Article III and statutory jurisdiction arising from the ATS.)

This may not seem like much of a role—but in fact it appears to be the role the ATS played in the broader scheme of the Judiciary

24. William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35 (2010) (arguing that enforcing international law does not involve an exercise of prescriptive jurisdiction).

25. A notable exception involves assaults on ambassadors. As the ATS literature has discussed, an early incident involved a French citizen, de Longchamps, who assaulted the French ambassador, Marbois, in Philadelphia in 1784. Though many discussions have seen the Marbois incident as central to the ATS' purposes, that seems doubtful, since under the 1789 Judiciary Act, § 13, the Supreme Court had original jurisdiction over suits "brought by ambassadors, or other public ministers." It is possible that an alien might violate a safe conduct given by the United States to another alien. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

Act of 1789. Under section 11 of the Act, the ancestor of modern diversity jurisdiction, claims by aliens in excess of $500 could be tried in the federal circuit courts.[26] Under the Act, the circuit courts were not only courts of appeal, as they are today, but also had trial (original) jurisdiction over certain categories of claims, usually based on their importance to federal interests. Circuit courts were more prestigious than district courts, both because they heard appeals from district courts[27] and because they (unlike district courts) included Supreme Court Justices.[28] Thus the Act's framers likely assumed that high-dollar claims by aliens would go to the circuit courts.[29]

In general, under the First Congress' design, aliens' low-dollar claims would go to state court. The Judiciary Act left state courts in place and created federal jurisdiction as a forum only for specified types of cases, with state court jurisdiction being the default.[30] However, section 9 of the Act created two relevant exceptions to the circuit court/state court allocation of alien claims. First, the first sentence of section 9 gave the district courts exclusive original jurisdiction over admiralty and maritime claims.[31] Thus, for high seas claims, aliens would go first to the district courts, regardless of the amount in controversy. Second, the second sentence of section 9 provided what is now called the ATS—that is, district court jurisdiction for alien tort claims that violated international law.[32] But given

26. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; *see* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 512 (2011) (indicating that the $500 amount in controversy would have denied section 11 jurisdiction for most torts at the time).

27. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

28. *Id.* § 4 (circuit courts "shall consist of any two justices of the Supreme Court, and the district judge of [the applicable] district, any two of whom shall constitute a quorum").

29. Whether the First Congress thought section 11 extended to *all* high-dollar alien claims, or only to high-dollar alien claims against U.S. citizens, is a matter of some doubt. *See* Charles Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). The statutory language is not limited to claims against U.S. citizens. In several early decisions, the Supreme Court held that Congress could not extend the constitutional bases of jurisdiction in Article III, and thus (at least in the general case) in a section 11 case, a U.S. citizen had to be a party. *E.g.*, Mossman v. Higginson, 4 U.S. 12 (1800); Hodgson v. Bowerbank, 9 U.S. 303 (1809). These decisions leave it somewhat ambiguous whether section 11 jurisdiction would exist where an alien sued another alien under section 11 and some other basis of Article III jurisdiction could be found.

30. *See* Warren, *supra* note 29, at 53–54 (discussing the Act as a compromise between advocates of federal jurisdiction and advocates of state jurisdiction).

31. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76.

32. *Id.*

the structure of the Judiciary Act, this only really mattered for alien claims below the $500 amount in controversy, because section 11 allowed higher-dollar claims to go to the circuit courts. True, section 9 jurisdiction here was concurrent, so higher-dollar claims *could* go to the district courts (or the state courts), but the assumption was likely that they would generally go directly to the higher-prestige circuit courts. The principal point of section 9, then, was to allow low-dollar alien claims to be brought in federal rather than state court if they encompassed torts in violation of international law.[33]

That allocation in turn makes perfect sense given the drafters' concerns. The Judiciary Act was a compromise that gave federal courts limited jurisdiction over claims with important federal interests. High-dollar alien claims met that description, regardless of their subject, because their monetary importance made them likely issues of national foreign policy if they were not resolved fairly. Low-dollar alien claims were generally thought not important enough to justify federal jurisdiction and so were left to the states—except that where a violation of international law was alleged, national foreign policy interests were likely at stake regardless of the amount in controversy.

As a result, *Kiobel* largely returns the modern ATS to the core role of its predecessor, the second sentence of section 9 of the Judiciary Act: the ATS moves low-dollar alien tort claims against U.S. citizens involving international law violations from state court to federal court. It is, indeed, a modest role. But that was the First Congress' principal goal in enacting section 9.

[33] *See* Bellia & Clark, *supra* note 26, at 512 (suggesting this conclusion).