2015

The Three C's of Jurisdiction Over Human Rights Claims in U.S. Courts

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INTRODUCTION

The legal aftermath of the Holocaust continues to unfold in U.S. courts. Most recently, the Seventh Circuit dismissed claims against the Hungarian national railway and Hungarian national bank for World War II-era crimes against Hungarian Jews on the grounds that the plaintiffs had not exhausted available local remedies in Hungary or provided a "legally compelling" reason for not doing so.[1] More broadly, heated debates about the role of U.S. courts in enforcing international human rights law have not abated since the Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*, which restricted but did not eliminate federal jurisdiction over violations of certain well-established rules of international law.[2]

In doctrinal terms, debates about the proper role of U.S. courts in transnational human rights cases have focused on whether "universal civil jurisdiction" exists over the most egregious forms of internationally wrongful conduct.[3] This Essay urges courts and scholars to resist this all-or-nothing approach. Instead, we should conceptualize the transnational enforcement of human rights norms as part of an emerging regime of "bounded universality" delineated by three basic principles: consensus on conduct, connection to the forum, and complementarity ("the three c's").

Descriptively, viewing human rights litigation through the lens of bounded universality reveals that the current role of U.S. courts is both narrower than some advocates might like and broader than some critics allege. Normatively, using the three c's as a touchstone for the assertion of U.S. jurisdiction over human rights claims arising in other countries can

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1. Fischer v. Magyar Államvasutak Zrt., Nos. 13–3073 & 14–1319, 2015 U.S. App. LEXIS 1092 (7th Cir., Jan. 23, 2015).

2. *See* 133 S. Ct. 1659, 1669 (2013); *see also* Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 607–09 (2013).

3. *See, e.g.*, Julian G. Ku, Kiobel *and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT'L L. 835 (2013).

help strike a balance between concerns about U.S. legal imperialism, on the one hand, and providing a safe haven for human rights violators, on the other. The rest of this Essay illustrates how the three c's have been, and can be, invoked to delineate this middle ground.

I. Consensus on Conduct

International law identifies several bases upon which nation-states can legitimately prescribe conduct-regulating rules. Not surprisingly, the two main bases are territory (the location of the conduct) and nationality (the citizenship of the actor).[4] But as the American Law Institute's Restatement (Third) of Foreign Relations Law recognizes, prescriptive jurisdiction may reach conduct that does not have one of these traditional links to the regulating state if "the community of nations" has recognized that conduct as being "of universal concern."[5] Accordingly, countries may prescribe rules defining and punishing conduct "such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the [other] bases of jurisdiction . . . is present."[6] The Restatement specifies that, although universal jurisdiction to prescribe has generally been exercised in the form of criminal law, "international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."[7]

Transnational (or "horizontal") enforcement of human rights norms by domestic courts can be conceptualized as an exercise of jurisdiction to prescribe, jurisdiction to adjudicate, or both.[8] The scope of a particular domestic court's authority to adjudicate claims for extraterritorial harm caused by a violation of universally recognized norms depends on the relevant national legislative authorization, as well as applicable limits under domestic and international law. In the United States, the Alien Tort Statute (ATS), a provision in the 1789 Judiciary Act, provides federal courts with jurisdiction over civil actions for "a tort only, committed in violation of the

4. Rest. (Third) of Foreign Relations Law § 402 cmt. b (1987). The American Law Institute, of which the author is a member, is currently in the process of revisiting these provisions with the goal of producing a Fourth Restatement.

5. *Id.* § 404.

6. *Id.*

7. *Id.* § 404 cmt. b.

8. *See, e.g.*, Chimène I. Keitner, *Transnational Litigation: Jurisdiction and Immunities*, *in* The Oxford Handbook of International Human Rights Law (Dinah Shelton ed., 2013); William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 38–44 (2010).

law of nations or a treaty of the United States."[9] Absent clarification by Congress, the task of interpreting this provision has fallen to courts.

In *Sosa v. Alvarez-Machain*, the Supreme Court adopted an approach to ATS jurisdiction based on the degree of consensus proscribing the alleged misconduct—the first of the three c's.[10] The majority constructed a benchmark for consensus based on the degree of specificity and universality that characterized the eighteenth-century prohibitions on piracy, offenses against ambassadors, and violations of safe conducts. It then held that the ATS authorizes judges to create a common law cause of action for violations of those international law norms that exhibit the requisite degree of specificity and universality—in other words, the requisite degree of *consensus*.

The majority in *Sosa* focused on the nature of the alleged misconduct, not its location. Because the arbitrary detention alleged in *Sosa* was not prolonged, the majority found that the plaintiff had failed to state a claim upon which relief could be granted. The territorial scope of jurisdiction under the ATS, which had been briefed,[11] was not specifically addressed by the Court.

The *Sosa* standard focuses on the degree of substantive consensus regarding the prohibited conduct. Such consensus can manifest itself in the form of treaties, which express states' explicit consent, or customary international law, consisting of near-uniform state practice accompanied by a belief that such practice is legally required. Although using an eighteenth-century benchmark for the required degree of consensus seems somewhat convoluted (if perhaps justifiable in doctrinal terms for a 1789 statute), the basic idea that horizontal enforcement presupposes a significant degree of substantive agreement on conduct-regulating rules makes sense. The greater the degree of consensus, the less international opposition horizontal enforcement is likely to provoke,[12] and the less susceptible a country will be to charges that it is imposing its own idiosyncratic view of acceptable conduct on the rest of the world.

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9. 28 U.S.C. § 1350.

10. 542 U.S. 692, 732 (2004).

11. *See* Brief for Petitioner, Sosa v. Alvarez–Machain, 542 U.S. 692 (2004), 2004 WL 182582 at *27–*41; Nicholas W. Van Aelstyn & William S. Dodge, *Brief of Professors of Federal Jurisdiction and Legal History As Amici Curiae in Support of Respondents*, 28 HASTINGS INT'L & COMP. L. REV. 99, 116–17 (2004).

12. *Accord* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for [a domestic] judiciary to render decisions regarding it.").

II. Connection to the Forum

Consensus on conduct has not proved sufficient, on its own, to quell concerns about potential legislative and judicial overreaching. Consequently, it is a long-standing principle that controversies must have some connection to the forum state in order to warrant a court's exercise of adjudicatory jurisdiction. In the United States, this intuition has been implemented in part through judicial interpretations of the "due process" requirement of the U.S. Constitution.

The Supreme Court has not, however, left "due process" to do all the work in transnational cases brought under the ATS. This became clear in *Kiobel v. Royal Dutch Petroleum*, a case involving civil claims brought against a foreign corporation for aiding and abetting the Nigerian military in internationally unlawful attacks on civilians.[13] The question ultimately decided in *Kiobel* was whether a claim brought under the ATS "may reach conduct occurring in the territory of a foreign sovereign,"[14] even assuming that the conduct was performed by an individual or entity that subsequently came within the personal jurisdiction of a U.S. court.[15]

The shift toward a territorial focus in *Kiobel*—prompted by a question issued by the Court sua sponte[16]—evidences a resurgence of geographically-based reasoning in the Court's approach to defining the reach of its remedial powers. This focus is captured by the second "c," *connection*, which has been invoked to circumscribe the exercise of both prescriptive (legislative) and adjudicative (judicial) jurisdiction. For example, in *Morrison v. National Australia Bank*, the Court determined that section 10(b) of the Securities Exchange Act of 1934 does not provide a cause of action to "foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[17] The Court found that it had subject matter jurisdiction, but that plaintiffs had failed to state a claim because section 10(b) does not prohibit conduct overseas. In international law terms, the *Morrison* Court determined that Congress had not exercised its prescriptive jurisdiction to reach conduct outside U.S. territory.

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13. 133 S. Ct. 1659, 1662 (2013).

14. *Id.* at 1664.

15. After *Kiobel*, the Supreme Court continued its trend of tightening up standards for the exercise of personal jurisdiction over multinational corporations domiciled outside of the United States. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (finding, in an ATS case, that California does not have general jurisdiction over a German company for claims relating to conduct engaged in by its Argentinian subsidiary).

16. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (Mar. 5, 2012) (reargument order).

17. 561 U.S. 247, 247 (2010).

Because the ATS does not itself prohibit conduct, it seems odd to analogize it to the statute at issue in *Morrison*. But that is what the *Kiobel* majority did, by applying the presumption against extraterritoriality to the judicial creation of a cause of action under the ATS,[18] thereby curbing the remedial reach of this jurisdictional statute.

Whether the majority's opinion allows judges to create causes of action for *Sosa*-qualifying conduct occurring exclusively in the territory of a foreign sovereign remains contested. The somewhat cryptic fourth part of the majority's opinion, coupled with a brief concurrence by Justice Kennedy (who supplied the fifth vote), provides that judges may still create causes of action under the ATS for claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[19]

Four justices concurred in the judgment of dismissal but not in the majority's rationale. In an opinion authored by Justice Breyer, these justices stated that "just as we have looked to established international substantive norms to help determine the statute's substantive reach [in *Sosa*], so we should look to international jurisdictional norms to help determine the statute's jurisdictional scope."[20] This internationalist approach echoes points Justice Breyer made in his opinion for the Court in *F. Hoffmann-La Roche Ltd. v. Empagran*, in which he indicated that "construe[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations . . . . reflects principles of customary international law."[21]

In *Kiobel*, Justice Breyer would have recognized three scenarios in which the exercise of U.S. jurisdiction (by creating a federal common law cause of action) would be appropriate under the ATS: the first based on the principle of territoriality (if the tort occurred on American soil), the second based on the principle of nationality (if the defendant is an American national), and the third based on U.S. national interest, including "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of

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

19. *Id.* at 1668. Based on the Court's reasoning, some federal courts have dismissed ATS claims when the injurious conduct occurred abroad. *See*, *e.g.*, Balintulo v. Daimler AG, 727 F.3d 174, 192 (2d Cir. 2013) ("In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign."); *but cf.* Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (holding that an ATS suit resulting from bombing of the U.S. Embassy in Nairobi could proceed under the ATS); Al Shimari v. CACI Premier Tech., 2014 WL 2922840 (4th Cir. June 30, 2014) (holding that a claim against a U.S. corporation executing a contract with the U.S. government was sufficient to displace the presumption).

20. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring).

21. 542 U.S. 155, 165 (2004).

mankind."[22] To the extent that the universality principle is premised on a shared international interest in promoting accountability regardless of an alleged perpetrator's geographic location, Justice Breyer's third scenario is consistent with the rationale for universal jurisdiction, manifested here as support for a bounded version of universality.

Both the majority and concurring opinions situate U.S. courts within a global network of courts, but from different perspectives. The majority resists interpretations of the ATS that would "make the United States a uniquely hospitable forum for the enforcement of international norms."[23] The concurrence, by contrast, emphasizes the importance of not "harboring 'common enemies of all mankind.'"[24] These remarks illustrate judicial awareness that U.S. courts form part of a transnational legal system in which claimants and defendants may cross geographic borders in search of both redress and refuge. Individual judges' views of which vision is more troubling—providing a haven for plaintiffs or a haven for perpetrators—may make them more or less receptive to competing accounts of Congress's intent in enacting statutes such as the ATS.

Whereas *Sosa* emphasized consensus on conduct, *Kiobel* emphasized connection to the forum state. From the perspective of a bounded universality approach, the consensus and connection requirements could be assessed on a sliding scale, such that the degree of connection required (beyond the threshold needed to assert personal jurisdiction) might appropriately be viewed more flexibly in cases involving alleged conduct that indisputably meets or exceeds the *Sosa* standard of universality and specificity. Conversely, a court might appropriately refuse to create a cause of action where the conduct-regulating norm at issue does not fall squarely within the *Sosa* rationale, and the connection between the claim and the United States is only marginally greater than it was in *Kiobel*. An excessively rigid application of the *Kiobel* standard in cases alleging universally proscribed conduct, such as piracy, slavery, or genocide, could deprive plaintiffs of a forum that international law would consider unobjectionable.

III. Complementarity

The Supreme Court has not addressed definitively whether prudential or mandatory exhaustion of local remedies applies to ATS claims; by contrast, the Torture Victim Protection Act, which provides a cause of action for torture and extrajudicial killing committed under color of foreign law, does

22. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

23. *Id.* at 1668.

24. *Id.* at 1672–73 (Breyer, J., concurring).

require exhaustion of "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[25] The international law principle of exhaustion has operated *vertically* between domestic courts and international tribunals, such as the European Court of Human Rights.[26] Similarly, the International Criminal Court (ICC) exercises its jurisdiction on the basis of complementarity, meaning that states with jurisdiction have priority in adjudicating cases over which the ICC has concurrent jurisdiction.[27]

Some consideration of the principle of *complementarity*—the third "c"—also makes sense in the context of *horizontal* enforcement of international law by other states. A U.S. court should be more willing to adjudicate claims for international law violations when there is little chance of meaningful redress in the courts of other countries with a greater connection to the claims, a principle also reflected in *forum non conveniens* doctrine. The complementarity principle informed the Seventh Circuit's recent decision in *Fischer*, which reiterates the court's earlier holding (invoking the principle of *vertical* complementarity) that "domestic remedies for expropriation [must] be exhausted before international proceedings may be instituted."[28] The Seventh Circuit appropriately emphasized that "[i]f plaintiffs choose to pursue their claims in Hungary but find the way barred by inaction or hostility, the U.S. courts may be available to consider their claims."[29]

This emerging principle of "horizontal complementarity" can help allocate adjudicatory authority among domestic tribunals with an overlapping interest in transnational disputes. That said, like the c's of consensus and connection, complementarity should not pose an insurmountable barrier to horizontal adjudication of human rights claims by U.S. courts.[30]

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25. 28 U.S.C. § 1350 note.

26. European Convention on Human Rights art. 35, June 1, 2010, 4.XI. 1950, http://www.echr.coe.int/documents/convention_eng.pdf [http://perma.cc/Y89G-U659].

27. Rome Statute of the International Criminal Court art. 17, July 17, 1998, A/CONF.183/9, http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [http://perma.cc/96Y8-CLRG] (providing that a case is inadmissible if the case "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.").

28. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 679 (7th Cir. 2012).

29. *Id.* at 682.

30. *See, e.g.*, William Dodge, *International Comity Run Amok*, JUST SECURITY (Feb. 3, 2013, 9:22 AM), http://justsecurity.org/19640/international-comity-run-amok/ [http://perma.cc/JMM3-FRA8] (criticizing the Ninth Circuit's recent articulation of a broad and unsupported principle of "international comity abstention").

CONCLUSION

Under a bounded universality approach to jurisdiction, claims involving foreign parties and foreign conduct are suitable for adjudication in U.S. courts if they have an appropriate combination of *consensus* on conduct, *connection* to the forum, and due regard for *complementarity*. Under this regime, a claim presenting a very high degree of substantive agreement on the applicable conduct-regulating rule, a connection to the forum sufficient for personal jurisdiction purposes, and little chance of meaningful recovery abroad would be suitable for adjudication in U.S. courts; whereas a claim presenting only a moderate degree of substantive agreement and tangential connections to the forum would not be suitable.

As Robert Cover reminds us, "*every* denial of jurisdiction on the part of a court is an assertion of the power to *determine* jurisdiction and thus to constitute a norm."[31] In a world of bounded universality, territorial borders play an important role—but they are not, and should not be, the sole factor—in allocating adjudicatory authority over universally proscribed conduct.

31. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 n.23 (1983).