

The Alien Tort Statute as Transnational Law

Jaye Ellis

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>

 Part of the [Corporation and Enterprise Law Commons](#), [International Law Commons](#), [Jurisdiction Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Jaye Ellis, *The Alien Tort Statute as Transnational Law*, 28 Md. J. Int'l L. 90 (2013).
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/7>

This Articles & Essays is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

The Alien Tort Statute as Transnational Law

JAYE ELLIS[†]

INTRODUCTION

*Kiobel v. Royal Dutch Petroleum Co.*¹ presented the U.S. Supreme Court with the opportunity to examine two of the most fraught issues regarding the Alien Tort Statute (ATS):² the question of corporate responsibility, and the suitability of U.S. courts as fora for cases in which the plaintiff and defendant are foreign and the acts complained of took place in another jurisdiction—the so-called “foreign-cubed” cases.³ It also presented the Court with the opportunity, which was not taken up, to position itself as a transnational actor speaking to a series of publics located both within and outside of the United States. More specifically, the ATS could be regarded as a point of intersection between domestic and international law, and the nature of the relationship between these two bodies of law could have been analyzed anew.

This Essay will begin with an analysis of recent literature on transnational law, focusing in particular on the contributions of scholars associated with International Institutional Law (IIL) and Global Administrative Law (GAL).⁴ After a brief discussion of the unusual history of the ATS, notably its long period of dormancy, the issues of corporate liability and foreign-cubed cases will be

[†] Associate Professor, Faculty of Law, McGill University. The author wishes to thank Michael Belecky and Dominic DiFruscio for their invaluable research assistance and Frédéric Bachand, Fabien Gélinas, Michael J. Kelly, Geneviève Saumier, and the editors for their helpful suggestions and comments.

1. 133 S. Ct. 1659 (2013).

2. 28 U.S.C. § 1350 (2006).

3. See Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, in CORPORATE LAW AND PRACTICE HANDBOOK SERIES (Number B-1442) 91, 96 (Practising L. Inst. ed., 2004) (using the term “foreign-cubed” to describe suits involving a foreign plaintiff, a foreign defendant company, and a foreign market).

4. See *infra* Part I.

examined, primarily from the point of view of international and transnational law.⁵ I conclude that, though trying the *Kiobel* case in the United States would be problematic from the point of view of international law rules on extraterritorial exercises of jurisdiction, literature on transnational law suggests other means of protecting some of the most important interests that international rules on extraterritorial jurisdiction were crafted to promote.⁶

I. APPROACHES TO PUBLIC AUTHORITY IN TRANSNATIONAL LEGAL SPACE

The various bodies of scholarship associated with transnational law deny a sharp rupture between the national and the international. The space with which these scholars are concerned is not defined by state borders, though these are taken into account. Actors and issues cross these borders, and therefore legal rules, and the decision-making instances that interpret and apply them must attempt to follow. The arguments have descriptive and normative aspects: it is observed that actors, fora, or bodies of rules straddle or move across international boundaries, limiting the utility of heavily state-centric, jurisdiction-based accounts of law and politics. As a result, it is argued, boundaries and borders should be made more porous, and the movement of legal norms across jurisdictional boundaries should be accepted or even encouraged.⁷ The bodies of scholarship with which this Essay is concerned, GAL and IIL, observe the increasing impact of international law and foreign domestic law on actors that may not be well positioned to prepare for and respond to these impacts, as well as conflicts between different bodies of law and different administrative authorities. Perhaps the most notorious example is the Sanctions Committee of the United Nations Security Council, which is responsible for identifying potential or actual terrorists.⁸ Actors are increasingly subject to rules and procedures that arise and operate in unexpected places. The standards to which these procedures are

5. See *infra* Parts II–III.

6. See *infra* Part III.

7. See, e.g., PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 10 (2012) (arguing for the creation of a shared legal space that would allow for the interaction of domestic legal norms across borders to resolve transnational problems).

8. See Clemens A. Feinäugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW* 101 (Armin von Bogdandy et al. eds., 2010).

subject, particularly at the international level, are often not particularly robust, and may be applied with little rigor. In many jurisdictions, domestic courts, tribunals, and administrative agencies strive to meet very high standards of rigor and fairness, and foreign actors subject to their jurisdiction often have little cause for complaint on this score. However, when the decision-making instance takes too parochial a view, not seeking to understand the difficulties that foreign parties before it may face, and failing to appreciate the risks inherent in applying laws across borders, significant problems may be encountered.

Armin von Bogdandy, Philipp Dann, and Matthias Goldmann have developed the concept of the international public authority, which they define as “any kind of governance activity by international institutions, be it administrative or intergovernmental, . . . if it determines [identifies and enforces the rights and obligations of] individuals, private associations, enterprises, states, or other public institutions.”⁹ They point to two important features of public law: first, public authority must always be exercised in virtue of public law (constitutional or administrative); second, the exercise of public authority is subject to substantive and procedural standards found in public law.¹⁰ A public authority is *international*, according to the authors, if it is “exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest.”¹¹ The authors accept that a non-governmental actor can, under certain conditions, act as a functional equivalent of an international public authority, and therefore should be included in the definition on this basis.¹²

A similar approach is adopted by Benedict Kingsbury, Nico Krisch, and Richard Stewart, who argue for the existence of a global administrative space in which emerging principles of global administrative law operate.¹³ Bogdandy does not adopt the

9. Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GER. L.J. 1375, 1376 (2008).

10. *Id.* at 1380.

11. *Id.* at 1383.

12. *See id.* at 1384.

13. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 26 (2005).

boundaries around either the relevant space, type of governmental activity, or type of legal rule imposed by the term “administrative,”¹⁴ and these limitations are unnecessary for my purposes as well. However, the definition of a global administrative body adopted by Kingsbury et al. is in important respects broader, encompassing not just international bodies, but also informal networks and coordination arrangements, national and public-private regulatory bodies, and, in some cases, private regulatory bodies.¹⁵

A third source of inspiration is Jeremy Waldron’s approach to “publicness,” which is developed at the international level by Kingsbury and Donaldson.¹⁶ Waldron describes this public character of law as lying in “the fact that law presents itself not just as a set of commands by the powerful [or] a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public . . . that ordinary people can in some sense appropriate as their own, *qua* members of the public.”¹⁷ Kingsbury and Donaldson acknowledge the difficulties of transposing this approach to publicness to the international level, where law-making is democratic in only a very thin sense, and where the identification of a public to which a given rule is addressed is extremely difficult.¹⁸ They do, however, find utility in the concept.¹⁹

My own approach to public authority in transnational legal space borrows heavily from those described above. I refer to transnational rather than international public authority; I define transnational space and transnational law as encompassing global administrative law, but not only that law. I include in my definition of transnational public authorities domestic actors such as regulatory agencies and courts, and some private actors. On this definition, U.S. courts applying the ATS most certainly qualify as transnational public authorities.

Two implications will be discussed in this Essay. First, the audience to which U.S. courts ought to address themselves when

14. See von Bogdandy et. al, *supra* note 9, at 1914–15.

15. Kingsbury et al., *supra* note 13, at 17.

16. Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 79 (Ulrich Fastenrath et al. eds., 2011) (adopting the ideas of publicness espoused by Jeremy Waldron). See generally Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 *EMORY L.J.* 675 (2009) (discussing the concept of publicness).

17. Waldron, *supra* note 16, at 684.

18. See Kingsbury & Donaldson, *supra* note 16, at 84.

19. See *id.*

interpreting and applying the ATS will be a transnational audience made up of multiple publics that are implicated or stand to be affected by the courts' decisions. Second, the rules which U.S. courts ought to regard as relevant to the resolution of the case will not be limited to international and U.S. rules, but may well include a range of procedural and substantive rules that operate in transnational space to discipline the exercise of transnational public authority.

II. LOHENGRIN IN TRANSNATIONAL SPACE

The ATS emerged in a very different legal, social, and cultural environment than that of the current day, and it points in the direction of a possible future environment that is also very different. Little is known about the intent of the drafters of the ATS, though certain fairly reliable conclusions can be reached based on the contemporary state of international law, diplomacy, and relations, among other factors.²⁰ We have a fairly good idea of the evil that the statute was intended to address, namely the prospect of foreign victims of wrongful acts abroad—probably committed by American citizens or agents—having their reasonable expectation of access to U.S. courts to seek redress denied, thus leading to potential diplomatic incidents and reputational damage to the United States.²¹ As with any legal instrument, we would not be surprised to see this statute being used for different purposes and in different contexts as society changes over time. However, because of the long period of dormancy of the statute, we do not have the benefit of a gradual evolution in the manner in which and the purposes for which the statute was used.²² The statute is, in many respects, even more of a foreign body than a rule imported from another jurisdiction: when foreign rules are imported, observers have access to extensive information regarding the reasons why the law takes the form that it does, including the manner in which it evolved over time. Interpreting and applying the ATS in the present day therefore allows—indeed requires—a good deal of creativity.

20. See generally William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1995) (providing an overview of the history of the ATS and various theories on its historical roots).

21. See *id.* at 231.

22. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) (noting that prior to 1960, the statute had been invoked just once in the previous 167 years).

The ATS presents an excellent opportunity to connect U.S. law with both international and transnational law. Regarding international law, the statute can be seen as an invitation to U.S. courts to make good on the proposition in the *Charming Betsy* and *Paquete Habana* cases regarding the status of international law within the United States.²³ As Harold Koh has argued, reference by U.S. courts to foreign and international law—transnational jurisprudence—serves many important purposes, which he summarizes as “advanc[ing] the broader development of a well-functioning international judicial system.”²⁴ Koh describes transnational jurisprudence as an expression of U.S. sovereignty through “vigorous participation in the various regimes that regulate and order the international system.”²⁵ This appears to be very closely aligned with at least some of the purposes behind the ATS when it was originally adopted.

In a case like *Kiobel*, the impact of the Supreme Court’s decision will be felt as much abroad as at home, if not more so. A question raised by this and other foreign-cubed cases is whether U.S. courts should play the role of enforcers at large of international law. There are many good reasons, even from the point of view of transnational law, why the courts should hesitate to do so, as I discuss below.²⁶ On the positive side of the ledger, the ATS has the potential to provide to transnational society a potentially useful and effective implementation tool, something that public international law, and particularly international human rights law, is lacking.²⁷ The statute has the effect of transforming U.S. courts from domestic to transnational fora, whether they see themselves in this light or not.

23. *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”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”).

24. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 53–54 (2004); see also Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 195 (2001); Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT’L L. 751, 753 (2004).

25. Koh, *supra* note 24, at 56 (quoting ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

26. See *infra* note 73–74 and accompanying text.

27. See *infra* notes 51–53 and accompanying text.

III. CORPORATE LIABILITY UNDER THE ATS

Two main questions arise regarding corporate liability under the ATS. (1) Is the question whether corporations can be sued in virtue of the ATS to be decided in light of domestic or international law? (2) What does the relevant body of law have to say on the matter? Even if one concludes that U.S. law does or should determine the matter, the position in international and comparative law, given the peculiar nature of the ATS, remains highly relevant. The audience that U.S. courts ought to have in mind when framing their judgments in ATS cases is a transnational one, and, with respect to the *Kiobel* case, a very broad and diverse one.²⁸ As a result, it seems appropriate for the Supreme Court to seek either to explain how its conclusion accords with broader trends in international and foreign law, or why it takes a different tack. More specifically, the Court needs to explain why (1) corporations are proper defendants in cases like *Kiobel*, and (2) why *foreign* corporations are proper defendants before U.S. courts in such cases. This second question will be discussed below in the section on foreign-cubed cases;²⁹ I now turn to the first.

With respect to the first question, two factors seem pertinent. First, the proposition that an individual could hold obligations under international law and be subject to the jurisdiction of an international court became a widely-recognized international rule through a series of decisions made by a collection of scholars and government officials at Nuremberg.³⁰ It was not a feature of international law before this moment. It entered into the corpus of international rules in a highly unorthodox fashion, and it became available as a result of the extraordinary set of circumstances in place at the close of World War II. To put it simply, the argument was made, and accepted, that individuals should face criminal liability before the courts at Nuremberg and others like them.³¹ The reasons why corporations

28. See *infra* note 64 and accompanying text.

29. See *infra* Part IV.

30. See Brief of Amici Curiae Nuremberg Scholars in Support of Plaintiffs-Appellants-Cross-Appellees' Petition for Rehearing and for Rehearing En Banc, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (Nos. 06-4800-cv, 06-4876-cv); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1098 (2009); Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL'Y REV. 339, 343-44 (2012).

31. See Brief of Amici Curiae Nuremberg Scholars, *supra* note 30, at 2-3.

were not seen as appropriate defendants at Nuremberg are historically contingent, and ought not to be seen as standing for the proposition that corporations *cannot* be liable at international law. It is true that no corporate entities were tried at Nuremberg, but such trials were contemplated and some indictments carefully prepared, as Jonathan A. Bush demonstrates in his sweeping study of corporate liability and liability for conspiracy at Nuremberg.³² Among the reasons which Bush identifies to explain the fact that no corporations (and few business leaders, for that matter³³) were indicted include the impact of the larger issue of reinvigorating the German economy;³⁴ assumptions about the division of labor between the Allied trial effort and German courts;³⁵ the difficulties that the charge of conspiracy encountered;³⁶ perceptions that indictments against individuals would send a stronger message than indictments against corporations;³⁷ practical difficulties of disentangling often deliberately complicated corporate structures;³⁸ and lack of time and resources.³⁹ Bush, in summarizing his findings, states “corporate and associational criminal liability was seriously explored, and was never rejected as legally unsound.”⁴⁰

Another argument in favor of the proposition that corporations can owe obligations at international law and can be held responsible for their breach is that they already do, in some measure.⁴¹ Contracts between corporations and governments generally contain choice-of-law clauses, and in some cases one of the bodies of law that is identified as governing the contractual relations between the parties is international law.⁴² In international arbitrations, for instance,

32. Bush, *supra* note 30, at 1150–58, 1199–200.

33. *Id.* at 1233.

34. *Id.* at 1117–23.

35. *Id.* at 1133–34.

36. *Id.* at 1162–63.

37. *Id.* at 1168–69.

38. *Id.* at 1176–77, 1198.

39. *Id.* at 1215.

40. *Id.* at 1239.

41. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 232 (2007) (discussing how contracts between developing states and corporations endow corporations with international legal personality); see also *Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic*, 53 I.L.R. 389 (1977) (finding an arbitral clause between Texaco and Libya Arab Republic enforceable).

42. While parties choose state law to govern the vast majority of contracts, the International Chamber of Commerce identified that “national rules or principles” were chosen as the governing body of law in two percent of contracts in 2011. 23 INT’L CHAMBER OF COMMERCE, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 14 (2012); see also

corporations have benefitted from the application of the international legal standard regarding the payment of compensation for expropriation. They have also avoided the application of domestic legislation, adopted in the context of nationalization of certain industry sectors, that establishes the criteria and standards for the payment of compensation. One can argue that these cases are different from the present case. For example, full subjects of international law are able to participate, at least in theory, in the crafting of legal rules; corporations do not have this ability, so they have no influence over the content of international human rights and other norms that may come to be imposed on them. In the commercial setting, although corporations do not participate in the drafting of international legal rules, they do have some control over the law to which they are subject in the context of the negotiation of the terms of the contract.⁴³ If they deem international law to be highly unfavorable to their interests, they can propose to their contractual partner that another body of law be identified to govern their relations.⁴⁴ Finally, these contracts are not subject to the control of *public* international courts and tribunals, but rather arbitral tribunals, so one might take issue with the proposition that corporations are already subject to international law.⁴⁵ It nevertheless remains true that corporations benefit from the application of international norms in certain cases; fairness would suggest that they also be bound by norms of international law.

Similar arguments, based on democratic principles, are made in the context of international criminal law. Defendants are subject to *international* rules, despite the fact that they have no access to

PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 183 (2d ed. 2007).

43. See *Commission Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation*, at 22, COM (2002) 654 final (Jan. 14, 2003) (“It is common practice in international trade for the parties to refer not to the law of one or other state but direct to the rules of an international convention such as the Vienna Convention of 11 April 1980 on contracts for the international sale of goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts.”).

44. See JOACHIM G. FRICK, *ARBITRATION AND COMPLEX INTERNATIONAL CONTRACTS* 45 (2001).

45. See JOHN H. CURRIE, *PUBLIC INTERNATIONAL LAW* 75 (2d ed. 2008); TIBOR VÁRADY ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* 97 (4th ed. 2009).

international law-making processes.⁴⁶ However, these international rules are well entrenched internationally and domestically. Great care is taken to ensure that defendants will not be subject to rules which did not exist at the time they were alleged to have committed a violation.⁴⁷ An identical safeguard exists in the ATS, reinforced by jurisprudence: the international norm whose violation is complained of must be “specific, universal, and obligatory.”⁴⁸ Because of the notoriety of the international norms to which the ATS applies, ATS defendants cannot claim ignorance of the law.

IV. FOREIGN-CUBED CASES: CAN U.S. COURTS BE FORUM CONVENIENS?

There are many other reasons why a transnational audience might be highly skeptical of the ATS, particularly in foreign-cubed cases. Some of these arguments can be dismissed out of hand. For example, there is the proposition that courts should not steal a march on public authorities responsible for the conduct of foreign relations, and should therefore not take positions on breaches of international law that foreign actors commit.⁴⁹ This argument applies with somewhat more force when courts are commenting, directly or indirectly, on the conduct of foreign governments, as opposed to private actors. It has been difficult for the courts that have considered *Kiobel* to avoid sustained analysis of the actions of government officials in Nigeria.⁵⁰ Arguably, it is better to leave such matters to the U.S. government, which may have reasons of its own for staying silent in the face of these alleged violations of international law.⁵¹

46. See Paola Gaeta, *The History and the Evolution of the Notion of International Crimes*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 170 (Roberto Bellelli ed., 2010).

47. Cf. Rome Statute of the International Criminal Court art. 11, July 17, 1998, 2187 U.N.T.S. 90 (establishing that the International Criminal Court “has jurisdiction only with respect to crimes committed after the entry into force of this Statute”).

48. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

49. See Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 62–78 (2010); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 516 (1997).

50. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662–63 (2013) (discussing the alleged actions of the Nigerian government).

51. See Bradley, *supra* note 49, at 516. *But see* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1036 (2011) (“The assumption that Congress generally legislates with only domestic concerns in mind may comport with common sense when Congress uses unilateral sources of lawmaking power. But it does not have the same intuitive strength when Congress uses multilateral sources rooted in

However, this kind of argument flies in the face of the rule of law, which requires that courts be able to freely identify the failings of government. If the U.S. government chooses not to take up the plaintiffs' cause, that is no reason for the court to decide not to make itself available to the plaintiffs. It can be argued that the rule of law is not implicated in cases involving international law and foreign plaintiffs, defendants, and/or acts. The international realm might be seen not as a realm for the rule of law, but rather for *Realpolitik*; governments need to be left significant margins of maneuver to pursue the national interest without being unduly hampered by rule of law or democratic principles. However, a transnational law approach resists a clear division between a realm of law (the domestic sphere) and a realm of politics (the international sphere). There is, rather, transnational space, which is host to both law and politics. Furthermore, a transnational law approach resists the notion that law is contained within jurisdictional boundaries. These boundaries are not unimportant, but they are highly porous and, in many cases, of limited relevance.

The foreign-cubed cases do raise genuine concerns, however, relating to rule of law, democratic principles, self-determination, and similar concepts and principles. Democratic principles demand that subjects of rules have some means of influencing the content and nature of those rules, if not directly, then indirectly through the exercise of democratic rights.⁵² Principles of fair procedure demand that parties before decision-making bodies or adjudicative instances have adequate opportunities and means to gather information for the purposes of representing their interests, to respond to arguments or charges, to understand the proceedings and operate within procedural frameworks, to receive advice or be represented by an advocate, and to overcome language barriers.⁵³ These types of problems can be encountered in any number of domestic settings, of course, but they are most likely to arise in transnational cases. The risks in *Kiobel* are probably fairly low, both because the defendant is a transnational

international law, which by its nature deals with relations with foreign nations and norms shared with those nations." (footnote omitted)).

52. See Waldron, *supra* note 16, at 688 ("[A democrat] believes that in principle everyone who stands to be governed by a given norm if it is adopted has the right to participate on equal terms in determining whether it should be adopted [and] that every society should set up political institutions that embody this principle and should seek to reform or subordinate decision-making institutions that operate on any other basis.").

53. See Kingsbury et al., *supra* note 13, at 37–39.

actor *par excellence*, well equipped to move from one jurisdiction to another, and because much of the law to which it is subject is universally applicable international law. Nevertheless, the manner in which the case proceeds ought to be measured against a set of transnational standards, such as those that GAL and ILL scholars have begun to identify. The application of such standards need not lead to the conclusion that foreign-cubed cases should never be tried. Rather, the principle might be that, where the transnational standards are likely not to be met, courts should decline to exercise jurisdiction, unless no other suitable forum seems to present itself and reasonable efforts are made to protect the interests of foreign parties.

The rules whose breach is alleged in *Kiobel* are extremely well-recognized rules of customary international law, applicable to all states.⁵⁴ They are also reflected in domestic law around the world—not, unfortunately, on a universal basis, and, as this case evidences, often more honored in the breach than in the observance. It is true that subjecting an actor to rules adopted through processes over which it had no influence or control poses difficulties from the point of view of democratic principles.⁵⁵ But rules of customary international law do not suffer as much from this democratic deficit due to their gradual emergence through the convergence of practice and opinion, and their closer relationship with developments in domestic law.⁵⁶ I have argued elsewhere that the extraterritorial application of a highly complex regulatory regime may be in tension with democratic principles,⁵⁷ but the international norms at play in *Kiobel* are of a very different nature.

Seizure of jurisdiction by a U.S. court in a foreign-cubed case is not consonant with the rules of public international law governing the extraterritorial exercise of jurisdiction.⁵⁸ U.S. courts, however, very

54. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 256 (5th ed. 2003); ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 53–60 (2006). See generally Lisa Yarwood, *Jus Cogens: Useful Tool or Passing Fancy? A Modest Attempt at Definition*, 38 *BRACON L.J.* 16 (2006) (examining the historical development of *jus cogens* norms).

55. See Waldron, *supra* note 16, at 688.

56. This is due to the very nature of custom, which represents the gradual accretion of state practice. See ANTONIO CASSESE, *INTERNATIONAL LAW* 157–69 (2d ed. 2005).

57. See Jaye Ellis, *Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns*, 25 *LEIDEN J. INT'L L.* 397 (2012).

58. These principles are: (1) the territoriality principle (the state on whose territory the alleged act, or part of the act, occurred has jurisdiction); (2) the nationality principle (the state whose national carried out an act has jurisdiction); (3) the passive personality principle (the state whose national was the victim of an act has jurisdiction); (4) the protective principle (states have jurisdiction acts of counterfeiting or treason that directly affect their

rarely refer to these principles. Instead, U.S. courts have developed a peculiarly U.S. approach to the question, even though judges generally claim to be applying international and not domestic rules.⁵⁹ The only principle that permits the exercise of jurisdiction where there is no nexus to the forum is the principle of universal jurisdiction, which applies to a narrow category of international norms.⁶⁰ Two of the norms invoked in *Kiobel*, crimes against humanity and torture, fall within this category; the others probably do not.⁶¹ The ATS is restrictive as to the international rules that can be pleaded in U.S. courts, but not as restrictive as the principle of universal jurisdiction would require. The question then arises whether the United States should prefer the restrictive approach currently in place in international law, or whether the international rules on extraterritoriality are too narrow and ought to be rethought.

Rules governing the extraterritorial exercise of jurisdiction were developed to protect the sovereignty of states,⁶² which is in turn one means—a rather blunt instrument, it is true—for preserving self-determination, democratic principles, and pluralism. States are meant to refrain from imposing their own legal and political frameworks on other states or on foreign nationals, and the rules on extraterritoriality exist, at least in part, to make it more difficult for states to do so.⁶³ The appropriate means for imposing rules on states is seen to be the development of international law, with the participation and consent of states. In a context in which transnational interactions come to be the norm, however, the rules on extraterritoriality require re-examination. In particular, their *raison d'être* must be subject to

national interest). RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmts. c, e–g (1987).

59. Ellis, *supra* note 57.

60. See Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150–51 (2006).

61. Plaintiffs also brought claims of extrajudicial killing; arbitrary arrest and detention; violation of the rights to life, liberty, security, and association; forced exile; and property destruction. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013). For a discussion of what constitutes a “universal crime,” see Colangelo, *supra* note 60, at 151.

62. See SHAW, *supra* note 54, at 574–75; SIR HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 3–4 (Oxford Univ. Press, 2011) (1933). See generally Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 3–8 (2007) (discussing the historical development of extraterritorial jurisdiction).

63. See Colangelo, *supra* note 60, at 157–61 (examining the interplay between jurisdiction and state sovereignty).

critical appraisal, and we must ask whether there are other means to achieve some or all of the purposes of these rules in a manner better adapted to law in a transnational setting. Space does not permit a thorough discussion of these questions here; instead, I will outline some of the key questions that the *Kiobel* case raises.

I have already discussed the fact that the substantive rules being invoked are international, not U.S., law, as well as the fact that the defendant has the necessary resources to adequately defend itself before U.S. courts. The procedural rules to which the defendant was subject are part of U.S. law, and one would need to inquire whether this would lead to unfairness or hardship for the defendant. However, there are stakeholders beyond the parties to this case, notably the Ogoni and other groups in Nigeria; the Nigerian government; corporations operating offshore, particularly in states with weak democratic and rule of law frameworks; and the governments and populations of those states.⁶⁴ The facts alleged in this case took place far away from U.S. courts, in a context with which U.S. lawyers and judges are not likely to be familiar. Practical problems of gathering and analyzing evidence, including witness testimony, were present.⁶⁵ Lack of knowledge of factors such as law, politics, culture, geography, language, and economic conditions, would have hampered efforts to understand what happened, how, and why. The current rules on extraterritoriality do not permit the avoidance of such problems in that they do permit transnational cases under a range of circumstances. The difficulties, practical and sociological, that these cases present must be taken in stride and addressed to the extent that it is possible to do so.

One strategy for bringing the ATS into line with public international law as it currently stands would be to push for a broadening of the violations for which universal jurisdiction is accepted. The success of this venture is highly uncertain, however, and points to a subtle difference between international and transnational law. Under international law, state consent is generally

64. See *Kiobel*, 133 S. Ct. at 1162–63 (describing the factual background of the case).

65. Cf. Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1062–63 (2001) (noting the burdens that foreign cases pose for U.S. courts, including the difficulties in ruling on documentary evidence written in a foreign language and producing witnesses from foreign countries); Matthew R. Skolnik, Comment, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self After Wiwa*, 16 EMORY INT'L L. REV. 187, 189, 202 (2002) (discussing the private interest factors, such as availability of evidence, that courts consider in determining whether forum non conveniens should be invoked).

regarded as fundamental to the creation and modification of international norms, though there are various problems with this position from both practical and normative perspectives. In the context of transnational law, however, pluralism is the order of the day.⁶⁶ Scholars associated with transnational law either accept or embrace fragmentation in international law, acknowledging that the multiple sites of decision-making and dispute resolution operating in transnational space will often be in tension, if not in conflict, with one another.⁶⁷ Fragmentation and decentralization mean that, in a great many cases, there will be no higher authority available to resolve such conflicts by deciding which authority has jurisdiction and under which body of rules. The resolution of these tensions and conflicts must be addressed locally, through mutual observance and interactions. At first, public authorities are likely to proceed on a case-by-case basis, seeking approaches that address the main issues raised in a particular context. Over time, particularly where public authorities interact frequently, a body of rules that Andreas Fischer-Lescano and Gunther Teubner describe as “inter-systemic conflict laws”⁶⁸ will emerge, in an incremental, inductive fashion.⁶⁹

In more concrete terms, U.S. courts interpreting and applying the ATS could act in cases in which international law would not necessarily recognize its jurisdiction without offending against the broader aims of international (and transnational) law. This would involve, as discussed above, an assumption of the role of transnational public authority, speaking to a range of publics that are concerned with or affected by the range of issues raised in *Kiobel* and cases like it. It would also involve taking seriously the objectives that

66. See BERMAN, *supra* note 7, at 10–11 (proposing a pluralist approach to transnational law as opposed to approaches which seek universality or the reimposition of “territorial insularity”).

67. See Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 247, 258–61 (2006) (describing how tension between WTO regulation and the Biosafety Protocol’s competing regime has led to fragmentation).

68. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1000 (2004) (citing GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 100 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., Blackwell 1993)).

69. See Krisch, *supra* note 67, at 278 (explaining that stability in a pluralist order is created over time); see also Nico Krisch, *Pluralism in Global Risk Regulation: The Dispute over GMOs and Trade* 8–16 (LSE Legal Studies, Working Paper No. 17/2009, 2009) (describing the development of such conflict laws in the context of laws relating to Genetically Modified Organisms).

lie behind the international law principles on extraterritorial exercises of jurisdiction, and seeking to mitigate some of the disadvantages of litigation before a foreign court. An excellent starting point in this respect is the *Restatement (Third) of the Foreign Relations Law of the United States*, which focuses on prescriptive jurisdiction, but which nevertheless provides a highly pertinent set of considerations that courts could usefully take into account.⁷⁰ Among these considerations are links between the activity and regulated actors, on the one hand, and the regulating state, on the other. It is generally acknowledged that these links are weak in the *Kiobel* case.⁷¹ It then falls to be considered whether there are other factors that might overcome this problem. The *Restatement* makes reference to the “character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulations is generally accepted.”⁷² Here, the argument in favor of exercise of jurisdiction is much stronger. When one also takes into consideration the *Restatement*’s reference to justified expectations that might be affected by the regulation, and the importance of the regulation internationally,⁷³ the case for the exercise of jurisdiction seems stronger. Regarding a further factor, compatibility of the regulation “with the traditions of the international system,”⁷⁴ there are arguments in both directions. On one hand, as noted, many of the allegations made in *Kiobel* do not refer to norms for which universal jurisdiction is generally recognized, so the exercise of jurisdiction in this case could be in tension with international norms.⁷⁵ On the other hand, the substantive international rules that are invoked here are all well recognized and well entrenched in international law, and in many domestic legal systems as well.⁷⁶

70. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

71. Paul Hoffman, who argued the case on behalf of the petitioners, acknowledged during the second oral argument, “the only connection between the events in Nigeria and the United States is that the plaintiffs are now living in the United States and have asylum because of those events, and the defendants are here. There’s no other connection between the events that took place . . . in Nigeria and the forum.” Transcript of Oral Reargument at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

72. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c) (1987).

73. *Id.* § 403(2)(d)–(e).

74. *Id.* § 403(2)(f).

75. See *supra* note 61 and accompanying text.

76. See *supra* text accompanying notes 54–55.

What can be done about the inevitable strong disagreement within and among the many publics interested in or affected by the *Kiobel* case? How might the Supreme Court react to the many and varied voices who will claim that it got the case wrong? The Justices could learn a good deal from the arguments that will inevitably be expressed about the Court's decision, and they should watch carefully how other transnational legal authorities address similar questions.⁷⁷ There is no reason to believe that these processes of mutual observation and these attempts by public authorities to influence one another will lead to consensus, or even an agreement to disagree. But this process has some potential to guard against excessively generous or restrictive interpretations about the appropriate scope of jurisdiction under the ATS.

CONCLUSION

The *Kiobel* case, and the ATS more generally, are important points of contact between U.S. and international law, and provided an excellent opportunity for U.S. courts to adopt a more open, collaborative rapport with international and foreign law. The power and influence exercised by the U.S. and its institutions in the world cannot be ignored, and the ATS provides opportunities for U.S. courts to promote, perhaps in a punctual and rather haphazard fashion, the implementation and enforcement of international legal norms. It also creates the risk of the imposition of uniquely U.S. approaches to international legal issues on various actors in transnational space. The concept of the transnational public authority provides a potential framework within which to think through both the potential dangers and possible avenues to their mitigation.

77. See generally Iman Prihandono, *Barriers to Transnational Human Rights Litigation Against Transnational Corporations (TNCs): The Need for Cooperation Between Home and Host Countries*, 3 J.L. & CONFLICT RESOL. 89, 92-96 (2011) (surveying transnational litigation against corporate actors in Canada, United Kingdom, European Union, and Australia).