State Courts and Transitory Torts in Transnational Human Rights Cases

Chimène I. Keitner*

INTRODUCTION

On February 28, 2012, the U.S. Supreme Court heard oral argument in *Kiobel v. Royal Dutch Petroleum*, a case brought in U.S. federal court by Nigerian plaintiffs seeking to hold a Dutch company liable for human rights abuses committed in Nigeria.[1] The plaintiffs brought this suit under the Alien Tort Statute (ATS),[2] a statute that gives U.S. federal courts jurisdiction over certain international law violations. This brief symposium contribution explores some early cases involving state court jurisdiction over common law tort claims for personal injuries that occurred on foreign soil. It suggests that, although the *existence* of jurisdiction over such "transitory tort"[3] claims is relatively undisputed, the *exercise* of such jurisdiction might not be warranted in certain transnational human rights cases that have the potential to disrupt foreign relations, or that duplicate other countries' efforts to enforce applicable conduct-regulating rules within their own borders. It concludes that, following the model of transitory torts, U.S. courts are most justified in exercising jurisdiction over non-frivolous allegations that the defendant (or the defendant's agents) violated universally recognized prohibitions

* Professor of Law, University of California, Hastings College of the Law. My thanks to Bill Dodge for comments and to Kara Slack for research assistance.

1. Transcript of Oral Argument at 3, Kiobel v. Royal Dutch Petroleum Co. (2012) (No. 10-1491), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf. For more background on the litigation, see Chimène I. Keitner, Kiobel v. Royal Dutch Petroleum*: Another Round in the Fight over Corporate Liability Under the Alien Tort Statute*, AM. SOC'Y INT'L LAW (Sept. 30, 2010), http://www.asil.org/insights100930.cfm.

2. 28 U.S.C. § 1350 (2006).

3. *See infra* Part I.

on conduct when the claimant cannot seek meaningful redress against the defendant in the state where the conduct occurred.

The central question presented in *Kiobel* was whether corporations could be sued for international law violations under the ATS.[4] Although plaintiffs regularly name corporations as defendants in tort suits brought under U.S. state and federal law, some questioned whether the same was possible in suits brought under the ATS's peculiar grant of federal jurisdiction. Plaintiffs seek to bring suits against corporations because it may be easier to secure personal jurisdiction over multinational corporations than over individual human rights violators or foreign states themselves. It may also be easier to obtain and enforce damages awards against corporations, and corporations may be more affected by the deterrent effect of tort suits than foreign government actors.[5] However, the oral argument in *Kiobel* revealed that the justices were not concerned solely about the question of corporate liability.[6] One week following oral argument, the Court ordered additional briefing and argument on the question of whether the ATS allows U.S. federal courts to recognize a cause of action for international law violations that took place in another country.[7] The Court scheduled the second oral argument for October 1, 2012.[8]

Most suits brought under the ATS involve conduct outside the territorial United States. Plaintiffs may pursue claims in U.S. courts precisely because they are unable to obtain redress in the courts of the country where the conduct occurred. One effect of recent challenges to the ATS's grant of federal jurisdiction has been renewed interest in pursuing human rights claims in U.S. state courts and under state law. Royal Dutch Petroleum's defense counsel Kathleen Sullivan concluded oral argument in *Kiobel* by stating:

> Your Honor, we do not urge a rule of corporate impunity here. Corporate officers are liable for human rights violations and for those they direct among their employees. There can also be suits under State

---

4. Transcript of Oral Argument, *supra* note 1, at 3 ("The principal issue before this Court is the narrow issue of whether a corporation can ever be held liable for violating fundamental human rights norms under the Alien Tort Statute.").

5. For more on the functions and effects of corporate ATS cases, see Chimène I. Keitner, *Optimizing Liability for Extraterritorial Torts: A Response to Professor Sykes*, 100 GEO. L.J. 2211 (2012); Chimène I. Keitner, *Some Functions of Alien Tort Statute Litigation*, 43 GEO. J. INT'L L. 1015 (2012); Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161 (2012).

6. Transcript of Oral Argument, *supra* note 1, at 11–13.

7. For more on the reargument order, see Chimène I. Keitner, *The Reargument Order in* Kiobel v. Royal Dutch Petroleum *and Its Potential Implications for Transnational Human Rights Cases*, AM. SOC'Y INT'L LAW (Mar. 21, 2012), http://www.asil.org/insights120321.cfm.

8. *Monthly Argument Calendar for the Supreme Court of the United States, October Term 2012*, U.S. SUPREME CT. (Aug. 13, 2012), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOct2012.pdf.

> law or the domestic laws of [other] nations, but there may not be ATS Federal common law causes of action against corporations.[9]

Kiobel's counsel Paul Hoffman agreed about the role of state courts, although he disagreed about the reach of the ATS:

> These plaintiffs could bring this case in State court. What the Alien Tort Statute does is provide a Federal forum when these torts are in violation of the law of nations. And that's really what it—what the Founders intended and what—and what it does.[10]

If the U.S. Supreme Court's decision in *Kiobel* further restricts federal jurisdiction under the ATS, state court judges could start seeing more human rights cases in their courtrooms. Whether or not *Kiobel* narrows the federal jurisdictional grant, domestic courts will continue to confront the question of whether and on what basis to assert jurisdiction over human rights claims with little or no connection to the forum state. Early cases based on the transitory tort theory show that U.S. judges took for granted that jurisdiction existed over claims based on extraterritorial conduct.[11] The question was whether to exercise such jurisdiction, based on factors including the availability of redress in the place where the conduct occurred.[12] Examining these early cases can inform the U.S. Supreme Court's reasoning about the extraterritoriality question in *Kiobel*, as well as state courts' ability and willingness to exercise jurisdiction in transnational human rights cases.

I. JURISDICTION OVER TRANSITORY TORTS IN EARLY U.S. CASES

Those who advocate keeping U.S. state and federal courts open to claims for human rights violations committed by foreigners on foreign soil often invoke the common law notion of "transitory torts."[13] Paul Hoffman referred to the transitory tort model in the first oral argument in *Kiobel*, citing the 1774 English case *Mostyn v. Fabrigas* for the proposition that U.S. jurisdiction exists over tortfeasers found within the United States, even if the injurious conduct occurred

---

9. Transcript of Oral Argument, *supra* note 1, at 52.

10. *Id.* at 14.

11. *See infra* note 17 and accompanying text.

12. *See id.*

13. *See, e.g.*, Daniel Bodansky, Advisor, U.S. Dep't of State, Remarks on the Role of International Law in Human Rights Litigation in the United States (Apr. 22, 1988) *in* 82 AM. SOC'Y INT'L L. PROC. 456, 471 (1988); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 487, 520 (1986); Kenneth Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 62, 68–69 (1986); Ralph G. Steinhardt, *Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality Check*, 16 ST. THOMAS L. REV. 585, 587–89 (2004); 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 (2005).

elsewhere.[14] Hoffman argued that U.S. courts could hear cases involving extraterritorial conduct under the ATS and as a matter of common law.[15]

Because state courts are courts of general jurisdiction, plaintiffs often filed early claims involving transitory torts in state court. While some of these common law claims for injuries sustained outside the forum involved parties from, and conduct in, other U.S. states,[16] others involved non-U.S. parties and non-U.S. conduct. Records have survived from at least four cases that were brought in state court in the 1790s by U.S. plaintiffs against foreigners for conduct that occurred outside of the United States, including *Waters v. Collot* (Pennsylvania, 1794), *Rose v. Cochrane* (New York, 1794), *Dunant v. Perroud* (Pennsylvania, 1796), and *Parnell & Stewart v. Sinclair* (Virginia, 1797).[17] Two of the suits (*Collot* and *Perroud*) involved conduct in French colonies by French colonial officials, one (*Cochrane*) involved conduct by a British captain on board a British ship during the evacuation of Charleston, and one (*Sinclair*) involved conduct by a British privateer on the high seas.[18] In each of these cases, the state court had jurisdiction by virtue of the foreign defendant's transitory presence in the United States at the time of the suit.[19]

The Pennsylvania court's opinion in *Waters v. Collot* is the only opinion from these four early state court cases that seems to have survived. In that case, plaintiff Waters relied in part on the English case *Mostyn v. Fabrigas*.[20] Waters cited *Mostyn* primarily for the proposition that an individual official can be held personally liable for acts performed on behalf of the state,[21] while Paul Hoffman recently cited *Mostyn* in oral argument for the proposition that torts committed in one jurisdiction can be heard in the courts of another.[22]

---

14. Transcript of Oral Argument, *supra* note 1, at 8 (citing Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.)).

15. *Id.* at 9, 14.

16. *E.g.*, Ackerson v. Erie Ry. Co., 31 N.J.L. 309, 310–12 (1865) (in a suit brought in New Jersey for an injury sustained in New York, indicating that "[i]t is, in the international code, the well established doctrine, that every nation may rightfully exercise jurisdiction over all persons within its domains, with regard to matters purely personal," and that transitory actions "are universally founded on the supposed violation of rights, which, in contemplation of law, have no locality").

17. I recount this litigation in greater detail in Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012). Not all records relating to these cases have been preserved; while it is clear that *Waters* and *Parnell* were brought in state court, it is most likely but not absolutely certain that *Rose* and *Dunant* were brought in state court. *Id.* at 713–45.

18. *Id.*

19. *Id.* at 742.

20. *See* Waters v. Collot, 2 Yeates 26, 28 (Pa. 1795); *see also* Keitner, *supra* note 17, at 718–19. A version of the *Waters* opinion is also reported at 2 U.S. (2 Dall.) 247 (Pa. 1796).

21. *Waters*, 2 Yeates at 27 (citing Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.)).

22. Transcript of Oral Argument, *supra* note 1, at 8.

Even though defendants *could* be sued where they were found, U.S. judges retained the discretion to decline to exercise transitory tort jurisdiction.[23] They were particularly loath to expend U.S. judicial resources in cases involving a foreign (rather than a U.S.) claimant, when the claimant could just as easily obtain redress in his or her home jurisdiction.[24] For example, in *Gardner v. Thomas*, a British sailor sued the British master of a British ship for an assault and battery allegedly committed aboard the vessel.[25] On appeal to the Supreme Court of Judicature, the parties argued about whether a New York court had jurisdiction over the sailor's claim.[26] Justice Yates concluded that there was "concurrent" jurisdiction with British courts over the "private remedy" for assault and battery, but that a New York court could justifiably "refus[e] to take cognizance" of the claim on prudential grounds.[27]

> It must be conceded that the law of nations gives complete and entire jurisdiction to the courts of the country to which the vessel belongs, but not exclusively. It is exclusive only as it respects the public injury but concurrent with the tribunals of other nations as to the private remedy. There may be cases, however, where the refusal to take cognizance of causes for such *torts* may be justified by the manifest public inconvenience and injury which it would create to the community of both nations; and the present is such a case.[28]

Justice Yates concluded,

> It is evident, then, that our courts may take cognizance of *torts* committed on the high seas, on board of a foreign vessel where both parties are foreigners; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case.[29]

In this case, Justice Yates held that the trial court should not have entered a judgment for the sailor because the ship was en route back to the United Kingdom, and the sailor could seek redress there.[30]

In a later case involving a British sailor who did not intend to return to the United Kingdom, the New York Supreme Court exercised jurisdiction over an assault and battery claim by a British master on board a British vessel; the court reasoned that "[i]f the plaintiff was legally discharged from the vessel, the principle, which declines jurisdiction, ought not to be carried so far as to compel

---

23. *E.g.,* Gardner v. Thomas, 14 Johns. 134, 135 (N.Y. 1817). The presiding judge was likely Joseph C. Yates, who later became Governor of New York. *See id.* at 136.
24. *E.g.*, *id.* at 138.
25. *Id.* at 136–37.
26. *Id.* at 136.
27. *Id.* at 137.
28. *Id.*
29. *Id.* at 137–38.
30. *Id.* at 138.

the plaintiff to return with his witnesses to England, to obtain redress for the assault committed."[31] The court observed that "[u]nder such circumstances, to send the plaintiff to a foreign tribunal, would be a denial of justice."[32] These opinions underscore the difference between the existence of jurisdiction and a court's decision to exercise that jurisdiction—a theme that surfaces in other opinions involving transitory torts from this period.

Justice James of the New York County Supreme Court expressed a similar view when confronted with a suit for an alleged assault and battery committed in Canada.[33] Both parties resided in Canada, but the defendant happened to "casually" be in New York when served with process.[34] In dicta, the court expressed skepticism about the wisdom of adjudicating the case, as a matter of policy.[35] Nonetheless, Justice James declared that, "as a question of law this court has jurisdiction of torts committed in a foreign country, between non-resident foreigners; but as a matter of policy will only exercise it in its discretion, in exceptional cases."[36] Such exceptional cases included attempts by the defendant to evade justice: "[I]f a foreigner flee[s] to this country, he may be pursued and prosecuted here."[37] The policy in favor of discretionary dismissal of transitory tort actions where an adequate alternative forum exists is consistent with dismissal on the grounds of forum non conveniens, and with a prudential requirement to exhaust available local remedies in certain types of cases.

These early U.S. cases indicate that jurisdiction over transitory tort claims exists, but that courts may, under certain circumstances, decline to exercise it. Joseph Story observed the following in his 1834 *Commentaries on the Conflict of Laws*:

> There are nations, indeed, which wholly refuse to take cognizance of controversies between foreigners, and remit them for relief to their own domestic tribunals, or to that of the party defendant; and, especially, as to matters originating in foreign countries. . . . But this is a matter of mere municipal policy and convenience, and does not result from any principles of international law. In England, and America, . . . suits are maintainable, and are constantly maintained between foreigners, where

31. Johnson v. Dalton, 1 Cow. 543, 549–50 (N.Y. 1823).

32. *Id.* at 550.

33. Dewitt v. Buchanan, 54 Barb. 31, 33 (N.Y. 1868). The presiding judge was likely Amaziah B. James. *Id.* at 34.

34. *Id.* at 33.

35. *Id.*

36. *Id.* at 34. Justice James explicitly discounted *Molony v. Dows*, 8 Abb. Pr. 316 (N.Y. 1859), in which the New York Court of Common Pleas had declined jurisdiction over an assault committed in California by a citizen of the state of California, on the grounds that the "case [was] not regarded as authority in this court," and that its holding was inconsistent with other decisions by New York state courts in cases involving personal injuries committed abroad. *Dewitt*, 54 Barb. at 32.

37. *Dewitt*, 54 Barb. at 33.

> either of them is within the territory of the state, in which the suit is brought.[38]

In sum, state court adjudication of claims between foreigners relating to foreign conduct was often disfavored as a matter of policy, but it was not precluded as a matter of law.[39]

II. THE ATS AND FEDERAL COURTS

The Second Circuit's opinion in *Filártiga v. Peña-Irala* invoked the idea of transitory torts in order to justify adjudicating human rights claims in U.S. courts.[40] In *Filártiga* the family of a Paraguayan victim sued a former Paraguayan official for torture and extrajudicial killing that took place in Paraguay.[41] The Second Circuit cited Lord Mansfield's 1774 decision in *Mostyn v. Fabrigas* and the U.S. Supreme Court's 1843 decision in *McKenna v. Fisk* to support the proposition that

> [i]t is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.[42]

As in *Kiobel*, the dispute in *Filártiga* came down to the proper interpretation of the ATS as a basis for suit in federal court; Peña-Irala "conceded" that he could have been sued in New York state court for the same conduct because "in personam jurisdiction [had] been obtained over [him], the parties agree[d] that the acts alleged would violate Paraguayan law, and the policies of the forum [were] consistent with the foreign law."[43]

It is not difficult to understand why the Filártigas sued Peña-Irala in New York rather than in Paraguay; one Paraguayan lawyer who attempted to help them was threatened and subsequently disbarred, two other lawyers withdrew from the case after they were threatened, and Paraguayan authorities refused to prosecute

---

38. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 542 (Boston, Little, Brown, and Co., 8th ed. 1883).

39. The judicial discretion to decline to adjudicate claims involving transnational transitory torts stands in contrast with the judicial obligation to exercise jurisdiction under a federal jurisdictional grant (despite concurrent state court jurisdiction), or to exercise jurisdiction over a constitutional question entrusted to the courts. *Cf.* Cohens v. Virginia, 29 U.S. (6 Wheat.) 264, 404 (1821); Wadleigh v. Veazie, 28 F. Cas. 1319, 1320 (C.C.D. Me. 1838) (No. 17,031).

40. Filártiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

41. *Id.* at 878.

42. *Id.* at 885 (citing Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.) 1024, and McKenna v. Fisk, 42 U.S. 241, 247–48 (1843)).

43. *Id.*

Peña-Irala.[44] As Justice Kennedy remarked in the *Kiobel* oral argument: "[T]he only place [the Filártigas] could sue was in the United States. [Peña-Irala] was an individual. He was walking down the streets of New York, and the victim saw him walking down the streets of New York and brought the suit."[45] Justice Kennedy wondered whether the same jurisdictional principles should permit suits against multinational corporations.[46]

In *Filártiga*, there was no doubt that the U.S. court had personal jurisdiction over Peña-Irala since he was physically present in the United States, having overstayed a tourist visa.[47] The question was whether the court also had subject-matter jurisdiction over the claims.[48] The Filártigas' complaint alleged that Peña-Irala's conduct violated international treaties, customary international law, and New York state law.[49] The complaint named several bases for federal jurisdiction, including the ATS.[50]

As the U.S. Supreme Court later explained in *Sosa v. Alvarez-Machain*, the First Congress enacted the ATS to provide aliens with a federal forum to bring suits for violations of the law of nations, which could previously be brought only in state court.[51] The cause of action came from "the common law of the time," which included customary international law.[52] Accordingly, several years after the ATS was enacted, Attorney General William Bradford opined that there was federal jurisdiction for a civil suit against Americans who had aided and abetted a French attack on a British colony in Sierra Leone.[53]

In *Sosa*, the U.S. Supreme Court clarified the scope of the ATS's jurisdictional grant and held that the ATS allows federal courts to "recognize private claims under federal common law" for violations of international norms with as least as much "definite content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted" in 1789.[54] Because the alleged violation in that case did not meet this threshold, the Court did not need to consider other aspects of ATS cases.[55]

---

44. *See* WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA 23 (2007).

45. Transcript of Oral Argument, *supra* note 1, at 13–14.

46. *See id.* at 5.

47. *See* ACEVES, *supra* note 44, at 30.

48. *Filártiga*, 630 F.2d at 878–80.

49. *See* ACEVES, *supra* note 44, at 215–16 (showing a copy of the Verified Complaint in *Filártiga v. Peña-Irala*).

50. *Id.* at 215.

51. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 716–18 (2004).

52. *Id.* at 714 (holding that "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time").

53. Breach of Neutrality, 1 Op. Att'y. Gen. 57, 58–59 (1795).

54. *Sosa*, 542 U.S. at 732.

55. *Id.* at 738.

When a human rights case involves conduct outside the forum state's territory, there are at least three potential sources of applicable law: the domestic law of the place where the conduct occurred (lex loci), the domestic law of the forum state (lex fori),[56] and international law. Different sources of law may govern different aspects of the same case.[57] In *Sosa*, amici professors of federal jurisdiction and legal history took the position that "the ATS did not provide for the extraterritorial application of United States law. Instead, it provided jurisdiction to adjudicate disputes under a law that was already binding everywhere in the world—the law of nations."[58]

International law differentiates between a country's jurisdiction to *prescribe* rules regulating conduct and its jurisdiction to *adjudicate* disputes[59]—the international law analogs of legislative and judicial jurisdiction, respectively. When a U.S. court applies foreign law, it arguably exercises only adjudicatory jurisdiction, because the applicable conduct-regulating rule has been prescribed by the foreign state. Scholars disagree about whether ATS cases involve the exercise of prescriptive or adjudicatory jurisdiction, since the relevant conduct-regulating rules come from international law, while the cause of action is supplied by federal common law.[60]

According to the brief of amici professors of federal jurisdiction and legal history (other aspects of which the *Sosa* court explicitly adopted[61]):

> A district court hearing a suit based on a tort in violation of the law of nations that occurred in Sierra Leone would not be prescribing rules of conduct for parties in a foreign country but would rather be enforcing rules of law that were as binding in Sierra Leone as they were in the United States.[62]

Like the Second Circuit in *Filártiga*, amici professors cited *Mostyn v. Fabrigas* for the proposition that "[i]n the late-18th Century, tort actions were considered to be transitory and could be brought wherever the tortfeasor was found."[63] According to this view, the ATS is not an instance of jurisdictional overreaching because it reflects the well-established model of transitory torts.

---

56. BLACK'S LAW DICTIONARY 993, 995 (9th ed. 2009).

57. For a discussion of the choice of law question in ATS cases, see Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Litigation*, 60 HASTINGS L.J. 61, 73–74 (2008).

58. Van Aelstyn & Dodge, *supra* note 13, at 116–17; *see also* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. 35, 37–44 (2010).

59. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (1986).

60. *See* Dodge, *supra* note 58, at 38–44 (disagreeing with Professor Michael Ramsey's view that U.S. courts exercise prescriptive jurisdiction in ATS cases and arguing that such cases instead involve the exercise of adjudicative jurisdiction); Keitner, *supra* note 57, at 80–81.

61. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) (citing and agreeing with the position advanced in the amicus brief).

62. Van Aelstyn & Dodge, *supra* note 13, at 117.

63. *Id.* at 116.

Some have argued that the transitory tort model "does not provide an apposite analogy" in transnational human rights cases,[64] because the transitory tort model contemplates applying foreign law (lex loci). Proponents of the transitory tort model counter that customary international law is lex loci, because it applies to conduct everywhere.[65]

Disagreement persists about the substantive law governing ATS claims. The district court grappled with this question on remand in *Filártiga*.[66]

> Does the "tort" to which the statute refers mean a wrong "in violation of the law of nations" or merely a wrong actionable under the law of the appropriate sovereign state? The latter construction would make the violation of international law pertinent only to afford jurisdiction. The court would then, in accordance with traditional conflict of laws principles, apply the substantive law of Paraguay. If the "tort" to which the statute refers is the violation of international law, the court must look to that body of law to determine what substantive principles to apply.[67]

Ultimately, the district court determined that international law applied, reasoning that "[b]y enacting Section 1350 Congress entrusted that task [of enforcing the prohibition of torture] to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into U.S. common law."[68]

In exercising this power, the court found it appropriate to "consider the interests of Paraguay to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States."[69] The court emphasized that "the written Paraguayan law prohibits torture,"[70] making the choice between Paraguayan law and international law a false conflict. Finally, the court found that, although punitive damages would not be available under Paraguayan law, it was "essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture."[71]

The idea that the forum state might afford a remedy that is different from the one provided by the place of injury is consistent with the transitory tort model. In *Mexican Central Railway Co. v. Gehr*, the court explained,

> The right to obtain redress for false imprisonment being given by the laws of Mexico, where the injury was committed, the forms of remedy

64. David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J. INT'L L. 121, 138 n.108 (2010).

65. *See* Van Aelstyn & Dodge, *supra* note 13, at 117.

66. Filártiga v. Peña-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

67. *Id.*

68. *Id.* at 863.

69. *Id.* at 863–64.

70. *Id.* at 864.

71. *Id.* at 865.

> afforded by the law of this State, where the action is brought, will control in affording the redress guaranteed by both jurisdictions. And whether our forms or remedy correspond with theirs or not, is immaterial.[72]

Similarly, in *Herrick v. Minneapolis & St. Louis Railway Co.* (an interstate case), the court indicated that "the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought."[73] That said, in *Slater v. Mexican National Railroad Co.*, the U.S. Supreme Court held that a wrongful act done in a place foreign to the forum court's jurisdiction is not subject to the lex fori in regards to its "quality or consequences."[74] Chief Justice Fuller, writing in dissent, would have applied the general rule that the remedy is procedural in nature and thus governed by lex fori.[75]

The ability to adjudicate a claim and provide a remedy for a transitory tort presupposes a legally binding restriction on the defendant's conduct that gives an injured plaintiff the right to seek redress. International law does not fit this model neatly because it contains conduct-regulating rules that are translated into "causes of action" by domestic legal systems and by international courts. However, this does not mean that a transitory tort claim can never be based on a violation of international (as opposed to municipal) law; it simply means that the policies animating the transitory tort model should be borne in mind when this model is deployed to enforce international law. As Justice Holmes noted in *Cuba Railroad Co. v. Crosby*, "The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."[76] Under the ATS, the federal jurisdictional grant depends on an international law prohibition of sufficient universality and specificity to avoid making U.S. tort suits "a cover for injustice to . . . defendants" who are subject to the personal jurisdiction of U.S. courts.[77]

The substantive law governing pendent state law claims brought in ATS cases will generally be determined by following the choice-of-law rules of the forum state.[78] State courts may be even more willing than federal courts to apply lex fori to both the substantive and remedial aspects of cases involving extraterritorial conduct.[79] State courts may also fail to distinguish between their jurisdiction to hear a case and their jurisdiction to define the applicable rules of

---

72. Mexican Cent. Ry. Co. v. Gehr, 66 Ill. App. 173, 193 (1896).
73. Herrick v. Minneapolis & St. Louis Ry. Co., 31 Minn. 11, 13 (1883).
74. Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904).
75. *Id.* at 132 (Fuller, C.J., dissenting).
76. Cuba R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912).
77. *Id.*
78. Sosa v. Alvarez-Machain, 542 U.S. 692, 709–12 (2004).
79. *See* Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 563 (2012).

conduct.[80] From an international law perspective, the application of lex fori in the form of state law constitutes an exercise of prescriptive, as well as adjudicatory, jurisdiction. The question then becomes whether such an exercise is justified.

III. TRANSITORY TORTS AND INTERNATIONAL LAW

In the first *Kiobel* oral argument, Chief Justice Roberts expressed concern about the exercise of federal jurisdiction in response to Paul Hoffman's reliance on the transitory tort theory to support U.S. jurisdiction over foreign conduct.[81] The Chief Justice asked: "If—if there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?"[82] Hoffman emphasized that "international law, from the time of the Founders to today, uses domestic tribunals, domestic courts, and domestic legislation, as the primary engines to enforce international law."[83] The international law rules that Chief Justice Roberts were referring to are *structural* principles of international law that govern the horizontal allocation of authority among sovereign states.[84] The international law rules that Hoffman was referring to involve *substantive* rules governing the conduct of states, individuals, and other actors.[85]

From the perspective of a forum non conveniens motion, an injured party's inability to bring a claim where the conduct occurred weighs *in favor* of the forum state exercising jurisdiction; paradoxically, in *Kiobel*, some of the justices wondered whether the lack of a viable alternative remedy counseled *against* the exercise of U.S. jurisdiction over conduct that occurred outside the United States.[86]

From an international law perspective, the exercise of universal jurisdiction to prescribe legal rules is considered acceptable for particular types of conduct.[87] According to the principle of universal jurisdiction, the United States may authorize its courts to entertain proceedings for violations of certain conduct-regulating rules committed by non-U.S. nationals outside of the territorial United States.[88] The United States has done so in recent decades for conduct including torture, genocide, acts of international terrorism, war crimes, and the recruitment or use of child soldiers.[89]

---

80. *Id.* at 560.

81. Transcript of Oral Argument, *supra* note 1, at 8.

82. *Id.*

83. *Id.* at 6.

84. I propose and explain this distinction between substantive and structural rules in Chimène I. Keitner, Germany v. Italy *and the Limits of Horizontal Enforcement: Some Reflections from a U.S. Perspective*, 11 J. INT'L CRIM. JUST. 167 (2013).

85. *Id.*

86. Transcript of Oral Argument, *supra* note 1, at 8.

87. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986).

88. *Id.*

89. Federal Courts Administration Act of 1992, 18 U.S.C. § 2333 (2006) (establishing jurisdiction for district courts to hear suits brought by American citizens victimized by international

Disagreement persists about whether the principle of universal jurisdiction entitles domestic courts to entertain civil claims as well as criminal prosecutions. To the extent that countries are engaging in an exercise of prescriptive jurisdiction, it seems that the core issue is whether a country may establish a prohibition on conduct absent a "traditional" jurisdictional nexus such as territory (location of the conduct) or nationality (citizenship or residence of the offender),[90] irrespective of the type of proceeding used to enforce that prohibition. The transitory tort paradigm assumes that the forum state is not exercising prescriptive jurisdiction. The principle of universal jurisdiction, by contrast, specifically envisions that the forum state *will* prescribe rules prohibiting certain types of conduct;[91] if such a prescription exists (for example, under the U.S. Torture Victim Protection Act[92]), additional constraints on universal jurisdiction come from limits on its exercise rather than its existence.

CONCLUSIONS

Transnational human rights claims brought in U.S. courts based on universal jurisdiction norms should not be dismissed for lack of subject-matter jurisdiction, whether the cause of action comes from federal common law or from state law. Similarly, transnational human rights claims brought for violations of foreign law should not be dismissed for lack of subject-matter jurisdiction where a court of general jurisdiction has personal jurisdiction over the defendant. That said, in addition to being subject to the usual pleading standards and other threshold constraints, certain transnational human rights cases may have the potential to disrupt foreign relations, or may duplicate other countries' efforts to enforce applicable conduct-regulating rules within their own borders. As a general matter, one would expect that U.S. courts will be more willing to exercise their jurisdiction in cases that have a connection to the United States.

There are, however, exceptions to this general rule. As New York Supreme Court Justice James wrote in 1868, a U.S. court may exercise its "jurisdiction of torts committed in a foreign country, between non-resident foreigners . . .

---

terrorism); Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340–2340B (2006); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (codified as amended in scattered sections of 18 U.S.C.); Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006); Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (codified as amended in 18 U.S.C. § 1091 (2006 & Supp. IV 2010)).

90. *See, e.g.*, Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 745 (2004) ("In positive and slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.").

91. The list of "universal jurisdiction" norms is generally thought to include torture, genocide, crimes against humanity, and war crimes. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

92. 28 U.S.C. § 1350 (2006).

in exceptional cases."[93] Justice James recognized that such "exceptional cases" include cases in which "a foreigner flee[s] to this country"[94] and would not face justice elsewhere, as exemplified by the *Filártiga* case. The U.S. Supreme Court should have faith in lower courts' discretionary power to limit the exercise of their jurisdiction, rather than declare categorically for the first time in *Kiobel* that such jurisdiction does not exist.

93. Dewitt v. Buchanan, 54 Barb. 31, 34 (N.Y. 1868).
94. *Id.* at 33.