

What will *Kiobel*'s Impact be on Alien Tort Statute Claims?

What follows is also posted at SCOTUSBlog:

After two rounds of briefing, two oral arguments, and a significant wait for an opinion, what do we know about the future of Alien Tort Statute (ATS) litigation in light of the *Kiobel* decision? I think at least three things: (1) plaintiffs' ability to file ATS claims in federal court is now substantially limited; (2) plaintiffs will likely try to file such cases under U.S. state and foreign law, in some cases in U.S. state and foreign courts in the first instance; and (3) this will help usher in a brave new world of transnational litigation where federal, state, and foreign courts compete to regulate international human rights claims.

First, according to the Court in the *Kiobel* decision, ATS cases are subject to the presumption against extraterritoriality recently rearticulated in *Morrison v. National Australia Bank*. For an ATS claim to survive a motion to dismiss, it must "touch and concern" activities occurring in the "territory of the United States." ATS claims that seek relief for violations of the law of nations occurring wholly outside of the United States are now barred. Note that *Kiobel* is an easy case for the Court to apply this rule because "all the relevant conduct took place outside of the United States." The federal courthouse doors are now shut for these cases.

However, the keys may still be in the door if plaintiffs can creatively plead around the presumption. For instance, a plaintiff might argue that a major portion of the tortious activity occurred in the United States even though the injury was caused in a foreign country. Yet, according to the Court, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." But, what would such cases be? Much is still left unanswered by the Court when it comes to ATS litigation.

So, let's start with what is clear. A foreign plaintiff suing a foreign defendant for acts or omissions occurring wholly *outside* of the United States that allegedly violate the law of nations (a so-called "F-cubed case" as presented in *Kiobel*)

cannot bring suit under the ATS, even when there is personal jurisdiction in the United States. Conversely, a foreign plaintiff suing a defendant (foreign or domestic) for acts or omissions occurring wholly *inside* of the United States that allegedly violate the law of nations can bring suit under the ATS. Although, we know nothing from the Court's opinion about how the ATS should be applied in such a case, except that lower courts should remain acutely sensitive to foreign policy implications. As noted by Justice Kennedy in his concurring opinion, "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Let's take a look at some of those questions and where their answers might lead us.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *wholly outside* of the United State that allegedly violate the law of nations?

According to the opinion by Chief Justice Roberts, which was joined by Justices Scalia, Kennedy, Thomas, and Alito, the answer is "no." Even though the United States would have prescriptive jurisdiction under international law, as the case involves a U.S. defendant domiciliary, this too would be an extraterritorial application of the ATS. Note that this would be a case that Justices Ginsburg, Breyer, Kagan, and Sotomayor would allow to go forward under the ATS. This could also be an example of a case where, as noted by Chief Justice Roberts, "the claims touch and concern the territory of the United States" and "do so with sufficient force to displace the presumption against extraterritoriality." But, I doubt it, because "the claims" themselves have nothing to do with "the territory of the United States," and "mere [] presence" is not enough. So, it appears that escaping the presumption against extraterritoriality in the ATS context is not about "who" the defendant is but about "where" the tortious conduct took place.

Can a foreign plaintiff sue a foreign defendant for acts or omissions occurring *in part in* the United States that lead to an injury in a foreign country that allegedly violates the law of nations? For instance, what if the plaintiff alleges that an officer of a foreign corporation gives directions from an office in New York that directly lead to a foreign tort that allegedly violates the law of nations?

This is a closer question, but I think the answer is "no." I also think that reasonable judges interpreting the Court's *Kiobel* opinion might disagree on this. To get to "no," one has to look closely at Justice Alito's concurrence, joined by Justice Thomas, which has the potential to serve as a model for lower court judges

writing future opinions in the area, even if it could not command a majority at the Court. According to Justice Alito, the answer to this question requires one to look at the “focus” of the ATS. In light of the Court’s opinion in *Sosa*, not just any domestic conduct will be enough to escape the presumption. In Justice Alito’s view, “unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations,” the ATS claim will fail.

Here is the multi-million dollar question: What would such a case look like where the injury occurs abroad but some of the tortious conduct occurs in the United States and that U.S. conduct itself violates the law of nations? Does Justice Alito mean to say that individuals or corporations in the United States aiding and abetting or conspiring to commit a tort in violation of the law of nations in a foreign country might still be sued under the ATS? If so, the ATS might not be dead yet. Such cases would be rare.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *in part in* the United States that lead to injury in a foreign country? For instance, what if the plaintiff alleges that a U.S. corporate official directed corporate agents in a foreign country to take action that allegedly violates the law of nations? I think the answer here would also be “no” for the reasons given in the prior paragraphs, unless, assuming lower courts follow Justice Alito, that conduct itself violates an international law norm. These cases would also be rare.

At bottom, foreign plaintiffs will only be able to proceed under the ATS when they are injured in the United States or when substantial activities occur in the United States that violates the law of nations, even though the injury is ultimately felt abroad. As such, the Court has substantially limited the ability of plaintiffs to file ATS cases in federal court.

Second, assuming these answers are correct, what will happen next? We should expect many ATS cases to be refiled in federal court to conform to the Court’s new rule. As discussed above, we should expect some cases to be filed alleging that the tortious activity was planned or directed from the United States. However, in light of the fact that nearly all post-*Morrison* cases that tried to escape the presumption by pleading some U.S. conduct have failed, one might similarly expect significant obstacles to federal ATS cases, especially if courts follow Justice Alito’s reasoning and in light of plausibility pleading requirements.

In light of this and as I have argued in the *Georgetown Law Journal*, the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts. There is also every reason to believe that foreign law and foreign courts may become another battleground for such cases. Courts and commentators must now focus on the appropriate role of transnational human rights litigation in U.S. courts generally. In what circumstances should state law reach transnational human rights claims? Should preemption, due process, and related doctrines constrain the ability of plaintiffs to raise such claims under state law? Should forum non conveniens be robustly applied when cases are filed under foreign law in the United States? Should courts be concerned that forcing such cases to be filed abroad may bring these cases back to the United States in later enforcement of judgment proceedings where the U.S. court has only limited review? Should Congress step in and resolve these issues?

Finally, the *Kiobel* decision raises a significantly broader institutional and normative question: What happens when U.S. federal courts close their doors to transnational cases? As I explain in a new draft piece that will be looking for a law review home shortly, recent Supreme Court decisions regarding the Alien Tort Statute, extraterritorial application of U.S. federal law, plausibility pleading, personal jurisdiction, class action certification, and forum non conveniens pose substantial obstacles for transnational cases to be adjudicated by U.S. federal courts. As noted, the result of this is that plaintiffs are now seeking other law – U.S. state and foreign law – and other fora – including U.S. state and foreign courts – to plead transnational claims. When U.S. federal courthouse doors close, other doors open for the litigation of transnational cases.

In my view, we are at the beginning of a brave new world of transnational litigation where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases and regulate transnational activities. Maybe it is time for increased regulatory cooperation between the federal government and the states as well as between the United States and other countries to resolve these transnational legal issues.