In *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Apr. 17, 2013), the U.S. Supreme Court held that the presumption against extraterritoriality applies to claims under the Alien Tort Statute (ATS). Consequently, there is no federal court jurisdiction under the ATS for torts in violation of the law of nations that occur in a foreign country.

*Kiobel* signals a major retreat from the expansion over the last 30 years of federal court jurisdiction to hear overseas human rights abuse cases. Although multinational companies may cheer this ruling, human rights advocates will likely be chagrined by the new limitations imposed on ATS claims. Lower federal courts will undoubtedly be relieved to hear that they will not have to write more lengthy discourses on the history of this ancient statute, yet there remain many unanswered questions about its reach.

**Background**

Passed as part of the Judiciary Act of 1789, the ATS provides jurisdiction to the federal courts for aliens’ tort claims involving violations of international law. Until a landmark Second Circuit decision in 1980, the ATS had virtually been forgotten. In *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit allowed a Paraguayan citizen to sue in tort under the ATS for the alleged torture and murder in Paraguay of her brother, by a Paraguayan police officer. The defendant had left Paraguay and moved to New York, where the suit was brought. *Filartiga* was therefore a “foreign cubed” case in that it involved a foreign tort, and both a foreign defendant and a foreign plaintiff, without any connection to the United States except that the defendant was found in New York.

In *Kiobel*, the number of ATS suits exploded. These cases have involved claims by foreign plaintiffs against banks and other financial services business, the extractive industry, transportation and telecommunications businesses, and a pharmaceutical company, for aiding and abetting human rights abuses overseas. These cases have typically involved torts arising from terror organizations, foreign armed conflicts, corporate defendants’ international business operations and overseas development projects.

**Kiobel Ruling**

*Kiobel*, a “foreign cubed” case, involved allegations by Nigerian plaintiffs that Royal Dutch Petroleum (RDP) had aided and abetted Nigerian government security forces in murder, rape, and other offenses against Nigerian civilians in connection with RDP’s oil exploration in Nigeria. After the dismissal of certain of the plaintiffs’ claims, the Second Circuit ruled *sua sponte* that RDP was not a proper defendant for an ATS suit, because corporations could not be liable for torts under the law of nations.

In its turn, the Supreme Court in *Kiobel* avoided the question of corporate liability under international law and chose to address a different issue under the ATS: the “lurking” issue of extraterritoriality, identified after the Supreme Court’s decision regarding the foreign reach of the federal securities laws and implicit in cases where a tort was committed outside the U.S.

**Assessing Kiobel**

In *Kiobel*, the majority found that nothing about the ATS supported a conclusion that the First Congress had intended to include torts committed in foreign lands. The breadth of the
Court’s ruling is a surprise: the Department of Justice, for example, had urged the Court to hold that an American corporation could be liable for violation of the law of nations for a foreign tort. Many others thought that the Court might only rule out “foreign cubed” and perhaps “foreign squared” cases.

The Court’s majority opinion, including the concurrences of Justices Alito and Thomas, is careful to anticipate future arguments that a tort may not be extraterritorial if any aspect of the tort’s commission (such as its planning) is done here. Justices Alito and Thomas stated that “a cause of action falls outside the scope of the presumption [against extraterritoriality] only if the event or relationship that was ‘the focus of the congressional concern’ under the relevant statute takes place within the United States.” The majority held that the U.S. nexus must be of “sufficient force to displace the presumption against extraterritorial application.” This is vague, to be sure, but it provides fertile ground for dismissal of ATS cases where the tort injury does not occur here.

In any event, the Court’s ruling that foreign torts may not be reached under ATS will likely return the ATS to the obscurity it had in the first 200 years of its history. Our national experiment with universal jurisdiction in the federal courts for torts in violation of the law of nations seems to be at an end, at least for now. As construed by the Court in Kiobel, ATS jurisdiction is now limited to cases brought by an alien for international law torts that occur in the United States (or perhaps on the high seas and not within the jurisdiction of another sovereign). It will be a rare case indeed in which a plaintiff will choose to resort to international law to secure federal court jurisdiction for a tort case, given that state courts (and possibly even federal courts sitting in diversity) would be able to hear the claim based on established state statutory and common law causes of action.

Many questions about the ATS remain unanswered after Kiobel. For example, we do not know who an “alien” is, whether a corporation is a proper ATS defendant, or what torts are included as part of the law of nations. It is also not clear when there is a sufficient U.S. nexus, such that the tort may be said to have been committed here for ATS purposes. Without Congressional action that extends the ATS extraterritorially, however, the ATS is likely to be a rarely used vehicle for federal court jurisdiction in the future.

Endnotes

1 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”)