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The Politics of Corporate Alien Tort Cases

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The Politics of Corporate Alien Tort Cases

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The Alien Tort Statute (ATS) provides U.S. federal courts with subject matter jurisdiction over violations of certain universally recognized international legal norms.[1] In recent years, courts have confronted cases brought under the ATS against accomplices to international law violations (as opposed to direct perpetrators), and against corporations (as opposed to individuals). The paradigmatic corporate alien tort case seeks money damages for injuries caused by a multinational corporation's provision of assistance that had a substantial effect on the perpetration of an international law violation, with knowledge that the assistance would have such an effect. The recipient of that assistance (generally a foreign government or paramilitary organization) is often immune from suit or otherwise beyond the personal jurisdiction of U.S. courts. However, under certain circumstances, the provision of assistance itself violates international law and may therefore give rise to subject matter jurisdiction under the ATS.

Since juridical entities, including both states and corporations, are not themselves literally capable of acting, courts must determine what rules to use to attribute the conduct of individual human beings to these juridical entities. When an individual acts, legal responsibility might be borne solely by the juridical entity, both by the juridical entity and the individual, or solely by the individual. For example, various forms of corporate organization may serve to shield individuals from legal responsibility for certain debts acquired or actions performed in the name of the corporate entity. At the same time, just as corporations do not always shield individuals from legal responsibility, individual officials have increasingly been recognized as sharing concurrent legal responsibility with states for certain internationally unlawful conduct. On a literal level, rules regulating conduct always govern the behavior of individuals because only individuals can actually act. Rules of attribution determine the allocation of legal responsibility for an individual's conduct, and other rules (such as those governing jurisdiction and immunities) determine whether a particular

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1. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).

domestic or international tribunal can adjudicate the lawfulness of that conduct and impose legal consequences on the individual, the juridical entity, or both. U.S. courts confronting ATS cases must often identify and apply these various kinds of rules.

Some large corporations rival states for their capacity to affect the lives of individuals around the world. Those concerned with protecting and promoting individual well-being have thus naturally focused on the behavior of individuals acting on behalf of corporations, in addition to the behavior of individuals acting on behalf of states. This focus has spread to the realm of ATS litigation. At least two key features distinguish corporate ATS cases from those brought against individual perpetrators of international law violations who enter U.S. territory. First, in terms of shaping behavior, the goal of these corporate cases is not to deter individual human rights violators from entering or remaining in U.S. territory; rather, their behavioral goal is to deter individuals acting on behalf of corporations from engaging in certain forms of harmful conduct in countries whose own judicial systems are often ill-equipped to regulate such conduct. Second, because multinational corporations generally have assets that are within the reach of U.S. enforcement jurisdiction, corporate ATS cases have been defended much more vigorously than many of the earlier cases brought against individual defendants. They have thus generated greater controversy among constituencies concerned about impunity for harmful conduct, on the one hand, and the distortionary effects of excessive liability on the other.

Judges adjudicating corporate ATS cases are certainly aware of these debates. In theory, their role is to apply governing doctrine to the allegations at hand, leaving it to the legislature to modify that doctrinal framework if necessary in light of its policy consequences. In practice, as in many areas of the law, this division of labor is more easily articulated than achieved. In part because of the terse nature of the ATS itself, certain judicial interpretations may appear to be driven largely by exogenous policy considerations.

In 2010, the Second Circuit decided two issues of importance to the future of corporate ATS cases: the standard for aiding and abetting liability, and the availability of ATS jurisdiction over corporate defendants, as opposed to natural persons. The questions of accessorial liability and corporate liability are often, although not necessarily, intertwined.[2] In the Second Circuit, the same three-judge panel (consisting of Chief Judge Jacobs, Judge Cabranes, and Judge Leval) answered both questions. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the members of the panel agreed that, under international law, corporations are only liable for aiding and abetting an international law violation if they provide substantial assistance to the principal tortfeasor with the purpose of facilitating the

2. *See* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 63 (2008).

underlying offense.[3] The plaintiffs in that case alleged that Talisman knowingly aided and abetted an armed campaign of ethnic cleansing against the non-Muslim Sudanese living in the area of Talisman's oil concession in southern Sudan. The Second Circuit dismissed their claims, and the U.S. Supreme Court denied review.

Although there remains some room for interpretation in establishing a defendant's "purpose" going forward, the *Talisman* decision is widely perceived as narrowing the category of accomplices who can be held liable under the ATS. This is particularly true given the obstacles to evidence-gathering in many of the situations out of which ATS cases arise, which may further complicate efforts to establish a defendant's purpose.[4] The *Talisman* standard arguably presents a higher threshold for claims against individuals and corporations for aiding and abetting international law violations than existed under previous case law.[5]

Talisman was argued on the same day and before the same panel as *Kiobel v. Royal Dutch Petroleum*, a case involving support allegedly provided by a Nigerian subsidiary of Shell to the Nigerian government's violent suppression of protests against oil exploration and development activities in the Ogoni region of the Niger Delta.[6] The question of whether corporations are appropriate defendants in ATS cases—that is, whether the conduct of individual directors, officers, and employees can appropriately be attributed to a corporation for the purpose of imposing legal consequences on the corporation under the ATS—was not briefed in *Kiobel*. However, Chief Judge Jacobs and Judge Cabranes focused on this question in their majority opinion. They held that the absence of corporate criminal liability under customary international law means that ATS suits against corporations (as opposed to their individual officers, directors, and employees) cannot

3. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 263 (2d Cir. 2009), *cert. denied* 131 S. Ct. 122 (2010). Agreement on this question had eluded a different three-judge panel of the Second Circuit in *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2d Cir. 2007).

4. I have argued elsewhere that international law supports a knowledge standard. *See* Keitner, *supra* note 2, at 90 (indicating that "[t]he most legally sound [judicial] opinion on the question of accomplice liability has yet to be written: one that identifies international law as the appropriate source for defining accomplice liability under the ATS, and that correctly defines aiding and abetting as providing assistance that had a substantial effect on the commission of the underlying violation, with knowledge that these acts [would] assist or facilitate the commission of the violation").

5. Earlier cases establishing the accomplice liability of individuals include *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158–59 (11th Cir. 2005), *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148–49 (E.D. Cal. 2004), and *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002).

6. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010). For summary and analysis, see Chimène I. Keitner, *Introductory Note to U.S. Second Circuit Court of Appeals:* Kiobel v. Royal Dutch Petroleum Co., 49 I.L.M. 1510 (2010); Chimène I. Keitner, Kiobel v. Royal Dutch Petroleum*: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute*, ASIL INSIGHT, Sept. 30 2010, http://www.asil.org/insights100930.cfm.

proceed.[7] Judge Leval, concurring in the result, would have dismissed the claims in *Kiobel* under the standard for aiding and abetting liability established in *Talisman*, while preserving the possibility of ATS cases against corporations for conduct that meets the *Talisman* standard.

The majority found the absence of international criminal tribunals with jurisdiction over corporations significant in determining the scope of civil jurisdiction under the ATS. This is because the ATS gives U.S. federal courts subject matter jurisdiction over violations of international law. The majority reasoned that U.S. courts can only have jurisdiction over corporations under the ATS if corporations themselves are universally recognized as being capable of violating customary international law. For Judge Leval, by contrast, the absence of an established practice among international tribunals of holding corporations liable for international law violations does not preclude U.S. courts from doing so as a matter of domestic law.

My own approach would be to ask whether the attribution of individual conduct to a corporate entity for the purpose of ascribing legal liability is a "conduct-regulating rule."[8] If it is, then the question is properly governed by international law. If it is not (which is my inclination), then domestic law properly supplies the answer. Under this approach, international law supplies the elements of the violation, including both the elements of the underlying offense (such as genocide) and the elements of accessorial liability (such as aiding and abetting). Domestic law supplies other elements, such as the rules for attributing conduct of the corporation's (and its foreign subsidiaries') directors, officers, and employees to the corporation for the purpose of legal liability.

The question then arises: Whose domestic law? With respect to most matters, the answer will be the law of the forum state. The ATS represents an exercise of adjudicatory jurisdiction, not prescriptive jurisdiction (because the conduct-regulating rules are supplied by international law). Seen in this light, it seems that the most interesting questions raised by corporate ATS cases have yet to be explored, including how the concept of corporate personhood operates when litigation involves the intersection of international laws governing individual conduct and domestic laws governing the attribution of that conduct to juridical entities.

In *Kiobel*, the plaintiffs unsuccessfully sought a rehearing by the panel on the question of corporate liability. Chief Judge Jacobs and Judge Cabranes each wrote a separate concurring opinion denying the motion for rehearing, and Judge Leval responded in dissent. While Chief Judge Jacobs

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7. *Kiobel*, 621 F.3d at 145.

8. *See* Keitner, *supra* note 2, at 72 (arguing that "the most coherent approach would look to U.S. law on the question of personal jurisdiction, including the type of entity against which a claim can be asserted" while "international law would supply the substantive, conduct-regulating rules that apply to private actors").

commended the "scholarly force" of Judge Leval's original opinion, he also emphasized the need to "subject Judge Leval's conclusion to some tests of reality."[9] In particular, he expressed concern that, if *Talisman* were the only obstacle to corporate ATS cases, attempts by plaintiffs to "plead around" *Talisman* could "delay dismissal of ATS suits against corporations," and that "the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits."[10] This brutally honest account of Chief Judge Jacobs's policy concerns prompted responses from both of his colleagues. Judge Leval seized the opportunity to criticize the majority for "arrogat[ing] to itself a power [to make foreign and domestic policy] that might appropriately be exercised by the Congress or by the Executive Branch, but does not properly belong to the courts."[11] Judge Cabranes, intent on reclaiming the mantle of judicial agnosticism with regard to matters of policy, insisted that the *Kiobel* majority's distinction between juridical persons and natural persons was dictated by "fidelity to the law, not a 'policy agenda.'"[12] Judge Cabranes's disclaimer seems premised on the notion that law and policy are distinct categories, and that the legitimacy of judicial opinions depends on remaining firmly within the closed domain of "the law." Although doctrinal arguments are generally substantively distinguishable from policy arguments, law and policy (and, hence, politics, which involves contestation among policy choices) are deeply intertwined. In acknowledging this, Chief Judge Jacobs helped to move the judicial discussion more explicitly towards weighing the social costs and benefits of corporate ATS cases. It remains unclear, however, whether federal judges are either empowered or equipped to do this weighing.

Ultimately, the political branches bear responsibility for weighing competing considerations and developing a regulatory framework (or lack thereof) that takes into account multiple intersecting policy goals. In the meantime, federal judges will continue to grapple with the implications of corporate ATS cases in their courtrooms. In so doing, they should be wary of modifying doctrine in response to policy considerations in corporate ATS cases that could have unintended negative consequences for ATS cases against individuals, or for other cases involving the interpretation and application of international law.

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9. Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800-CV, 06-4876-CV, 2011 WL338048, at *1 (2d Cir. Feb. 4, 2011) (Jacobs, C.J., concurring).

10. *Id*. at *3.

11. *Id*. at *4 (Leval, J., dissenting).

12. *Id*. at *9 (Cabranes, J., concurring).

The impulse to use litigation as a tool for effectuating social change is engrained in U.S. legal culture. That said, advocates concerned with modifying future corporate behavior might achieve better overall outcomes by focusing on strategies beyond ATS litigation. Advocates concerned with seeking reparations for past misconduct might increasingly seek to do so, when possible, in the courts of the state where the misconduct occurred, rather than in U.S. courts. To the extent that other countries' courts become more involved in adjudicating alleged corporate complicity in international law violations, the emphasis in U.S. courtrooms might shift from questions of jurisdiction and justiciability to questions of recognition and enforcement. It will be interesting to see whether U.S. judges who have emphasized the importance of foreign remedies for foreign harms are more willing to enforce judgments rendered abroad against U.S. corporations than they have been to issue such judgments themselves.