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Corporate Liability Under Customary International Law

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The Alien Tort Statute (ATS) grants U.S. district courts jurisdiction over "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."[1] In *Sosa v. Alvarez-Machain*,[2] the Supreme Court held that the ATS allows U.S. courts to recognize federal common law causes of actions "based on the present-day law of nations [that] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized," specifically, infringement of the rights of ambassadors, violations of safe-conducts, and piracy.[3] *Sosa* involved claims against a natural person. Now, eight years later, in *Kiobel v. Royal Dutch Petroleum Co.*,[4] the Court has taken up the question of whether a corporation can be held liable under the ATS.

In the decision below, the Second Circuit answered "no" to that question. "Because corporate liability is not recognized as a 'specific, universal, and obligatory' norm," the majority concluded, "it is not a rule of customary international law that we may apply under the ATS."[5] In an amicus brief on corporate liability filed with the Supreme Court, the United States argued to the contrary that a corporation can be held liable in a suit under the ATS for violating the law of nations. According to the United States, the Second Circuit approached the international law question in the wrong way. That court should not have "examined the question of corporate liability in the abstract," but should have looked instead to see "whether any of the particular international-law

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1. 28 U.S.C. § 1350 (2006).

2. 542 U.S. 692 (2004).

3. *Id.* at 725.

4. 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (No. 10-1491), *argued* Feb. 28, 2012, *restored to calendar for reargument*, 132 S. Ct. 1738 (2012) (No. 10-1491). The Court is expected to decide *Kiobel* in the 2012 Term.

5. *Kiobel*, 621 F.3d at 145 (quoting *Sosa*, 542 U.S. at 732).

norms [at issue] . . . exclude corporations from their scope."[6] It is these fundamentally different ways of looking at corporate liability under customary international law that are the subject of this piece.

From the outset, the Second Circuit majority framed the question of corporate liability under the ATS as turning on "the existence of a *norm of corporate liability* under customary international law."[7] In concluding that no such norm exists, the court found it "particularly significant . . . that no international tribunal of which we are aware has *ever* held a corporation liable for a violation of the law of nations."[8] The court also observed "that the relatively few international law treaties that impose particular obligations on corporations do not establish corporate liability as a 'specific, universal, and obligatory' norm of customary international law."[9] After noting that the works of publicists are relevant "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is,"[10] the court concluded that "corporate liability is not recognized as a 'specific, universal, and obligatory' norm."[11] As these passages make clear, the Second Circuit majority was searching for a general norm of corporate liability: a trans-substantive rule that would apply regardless of the particular international law violation alleged.

International law does not work that way. It does not contain general norms of liability or non-liability applicable to categories of actors. International law does, of course, include doctrines of immunity. For example, states are generally immune from suit in the courts of other states unless an exception applies, as are certain high-ranking officials (like heads of state) during their tenure in office. However, as the International Court of Justice has reaffirmed only recently in the *Jurisdictional Immunities* case, "rules of State immunity are procedural" and "do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[12] Thus, "immunity can have no effect on whatever responsibility [a state]

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6. Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *Kiobel*, No. 10-1491 (U.S. filed Dec. 21, 2011) [hereinafter U.S. *Kiobel* Brief].

7. *Kiobel*, 621 F.3d at 131 (emphasis added).

8. *Id.* at 132.

9. *Id.* at 141 (quoting *Sosa*, 542 U.S. at 732).

10. *Id.* at 142 (quoting *Sosa*, 542 U.S. at 734).

11. *Id.* at 145 (quoting *Sosa*, 542 U.S. at 732).

12. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, ¶ 93 (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf.

may have."[13] In other words, a state that is immune from suit is still capable of violating international law and, despite its immunity, remains responsible for such violations. Corporations generally have no immunity under international law,[14] much less benefit from a trans-substantive rule of non-liability that even states do not enjoy.

On the other hand, particular norms of customary international law *do* sometimes apply to some actors and not to others. The norm against torture, for example, is commonly said to apply to state actors but not to non-state actors, though in fact the formal distinction in international law is between those who act with a sufficient connection to the state and those who do not. Historically, the seizure of a ship, which would constitute piracy, was instead considered privateering (and therefore lawful under the law of nations) if the captor carried a valid commission.[15] Violations of the law of nations on neutrality depended on the actor being the citizen of a neutral nation.[16] Thus, as the U.S. brief explained, "a court must conduct a norm-by-norm assessment to determine whether the actor being sued is within the scope of the identified norm."[17]

Looking at the norms that are actionable under *Sosa*, the United States noted that none of these norms "requires, or necessarily contemplates, a distinction between natural and juridical actors."[18] These norms focus on acts without regard to the identity of the perpetrator. The Torture Convention, for example, defines "torture" to include "*any act* by which severe pain or suffering . . . is intentionally inflicted on a person" for particular purposes,[19] the Genocide Convention defines "genocide" to include "any of the following *acts*" committed

13. *Id.* ¶ 108. *See also* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 14) ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.").

14. Under the U.S. Foreign Sovereign Immunities Act, a foreign corporation is entitled to immunity if it is majority-owned by a foreign state, unless an exception applies. *See* 28 U.S.C. § 1603(b) (2006).

15. *See* The Palmyra, 25 U.S. 1, 16 (1827).

16. *See* Talbot v. Jansen, 3 U.S. 133, 153-54 (1795) (Patterson, J.).

17. U.S. *Kiobel* Brief, *supra* note 6, at 18.

18. *Id.* at 20.

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, 113-14 (emphasis added).

with the intent to destroy a group,[20] and Common Article 3 prohibits as war crimes "the following *acts*."[21]

To be sure, these Conventions sometimes refer to natural persons. However, the references to "he" and "him" in Articles 5, 6, and 7 of the Torture Convention relate to a state party's treaty obligation to prosecute or extradite, not to the customary international law definition of the prohibition against torture reflected in Article 1. A similar point applies to Article IV of the Genocide Convention, which obligates states parties to ensure that "[p]ersons committing genocide or any of the other acts enumerated in [A]rticle III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Article IV provides who *shall* be punished, not who shall *not* be punished, and its purpose was to confirm that the prohibition against genocide applies to both government officials and private persons. Nothing in Article IV limits to particular actors the applicability of the customary international law norm against genocide reflected in Article II of the Convention.

It is true that some norms of international law (though not genocide or war crimes) require state action. However, as the U.S. brief points out, "[b]oth natural persons and corporations can violate international-law norms that require state action. And both natural persons and corporations can violate international-law norms that do not require state action."[22]

The corporate defendants in *Kiobel* take a somewhat different approach from the Second Circuit. They argue that it is the plaintiffs' burden to "show that international law *recognizes* corporate liability under the international norms at issue."[23] Of course, that argument begs the question of what evidence would be sufficient to meet such a burden. As the *Restatement (Third) of Foreign Relations Law* notes, international agreements like the Torture, Genocide, and Geneva Conventions "may lead to the creation of customary international law when such agreements are intended for adherence by states generally and

20. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added).

21. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, 136 (emphasis added).

22. U.S. *Kiobel* Brief, *supra* note 6, at 21.

23. Brief for Respondents at 3, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. filed Jan. 27, 2012).

are in fact widely accepted."[24] In *Sosa*, the Court held that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights did not "*themselves* establish the relevant and applicable rule of international law," because the former does not impose binding obligations and the latter is non-self-executing.[25] However, the Court also noted that the Universal Declaration "has nevertheless had substantial indirect effect on international law."[26]

Even if one were to limit the evidence of customary international law to state practice *applying* a particular norm, state practice applying a norm to natural persons can generate customary international law that binds juridical persons. To see why this is so, consider the analogy that Justice Kagan drew at oral argument between corporations and Norwegians. She posited a case in which the defendant argued that "this norm of international law does not apply to Norwegians" because "there's no case about Norwegians."[27] Most people would reject that argument out of hand. Because there is no relevant difference between Paraguayans and Norwegians, one may rely on state practice applying the norm against torture to Paraguayans to generate a rule of customary international law that binds Norwegians.

In the corporate context, the question is whether there is a relevant difference between natural persons and juridical persons, such that state practice applying a particular norm to natural persons would not establish a rule of customary international law binding juridical persons. The norms that are actionable under *Sosa* prohibit acts that are both specifically defined and universally condemned—acts like torture, genocide, and war crimes. Such differences as exist between natural and juridical persons are simply irrelevant to these norms, which categorically prohibit all such *conduct*. At oral argument, Justice Kagan answered her hypothetical about international law and Norwegians by observing that "of course, [the norm against torture] applies to Norwegians because it prevents everybody from committing a certain kind of

24. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(3) (1987). *See also id.* cmt. i (noting that "[i]nternational agreements constitute practice of states and as such can contribute to the growth of customary law").

25. *Sosa*, 542 U.S. at 735 (emphasis added).

26. *Id.* at 735 n.23. *See generally* Chimène I. Keitner, *"Cheap Talk" about Customary International Law*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 496-98 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (discussing *Sosa*'s treatment of customary international law evidence).

27. Transcript of Oral Argument at 27, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. argued Feb. 28, 2012).

act."[28] The same is true of corporations.

This point finds confirmation in the laws of the Netherlands and the United Kingdom, the *Kiobel* defendants' home countries. Following the adoption of the Rome Statute creating the International Criminal Court (ICC), both countries passed domestic legislation criminalizing genocide, crimes against humanity, and war crimes—the offenses subject to the jurisdiction of the ICC.[29] The Dutch act additionally criminalized torture, which was already an offense under U.K. law.[30] Significantly, both countries provide that, as a general matter, criminal law prohibitions apply to corporations as well as to natural persons,[31] and neither the Netherlands nor the United Kingdom has exempted corporations from their statutes criminalizing violations of these fundamental norms of customary international law.[32]

As the U.S. brief noted, "[o]nce it is established that the international norm applies to conduct by an actor, it is largely up to each state to determine for itself whether and how that norm should be enforced in its domestic law."[33] This means that it is permissible for the Netherlands and the United Kingdom to impose criminal liability on corporations for torture, genocide, crimes against humanity, and war crimes. It also means that it is permissible for the United States to impose civil liability on corporations for the same violations of customary international law.

In sum, the question of corporate liability under customary international law does not depend on finding a norm of customary international law in the abstract, but rather on whether the particular norms at issue reach corporations. None of the norms that are actionable under *Sosa* distinguish between natural and juridical persons; all of them

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28. *Id.*

29. *See* Wetsvoorstel Internationale Misdrijven [International Crimes Act of 2003] Stb. 2003, p. 270 § 2, arts. 3-7 (Neth.); International Criminal Court Act, 2001, c. 17, § 51 (U.K.).

30. *See* International Crimes Act of 2003 § 2, art. 8; Criminal Justice Act, 1988, c. 33, § 134(1) (U.K.).

31. *See* SR [Criminal Code] § 51(2) (Neth.) (providing that "[i]f a criminal act is committed by a legal person, prosecution can take place"); Interpretation Act, 1978, c. 30, § 5, sch. 1 (U.K.) (stating that "unless a contrary intention appears" the word "'person' includes a body of persons corporate or unincorporated").

32. *See generally* ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW—A SURVEY OF SIXTEEN COUNTRIES—EXECUTIVE SUMMARY 13-16, 30 (2006), *available at* www.fafo.no/pub/rapp/536/536.pdf.

33. U.S. *Kiobel* Brief, *supra* note 6, at 19.

prohibit certain *acts* irrespective of the perpetrator. Nor is it necessary to find state practice applying these norms specifically to corporations. State practice applying a norm to natural persons generates customary international law binding juridical persons, unless there is some difference between natural and juridical persons relevant to the norm. With respect to the norms actionable under *Sosa*, there is none. Torture by a corporation is still torture.