On Corporate Responsibility, Human Rights, and Transitional Justice: *Quo Vadis*?

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*By Ruti Teitel**

The 2018 ASIL panel on the question of corporate responsibility and human rights, and in particular, my remarks on corporate responsibility and transitional justice, preceded a long-awaited United States Supreme Court decision on the question of whether foreign corporate responsibility for human rights abuses belonged in United States courts ending in a closely decided vote—dividing sharply along political lines, with the Court conservatives in splintered opinions deciding against such liability. A forceful dissent by the four liberals on the Court would have allowed the Alien Tort Claims Act (ACTA) claim to go forward.

The case involved a for centuries little-known statute associated with the First Congress allowing aliens to bring actions in U.S. federal courts where violations "of the law of nations" were at stake. In *Jesner*, Israeli victims sued the Arab Bank, which they alleged had financed the terror of Hamas and other terrorist organizations.

The current period of international human rights litigation began with an ACTA claim against Paraguayan torturer, *Filartiga*, in 1980. Since then, there have been a number of successful suits against other foreign torturers and genocidaires, for example, Balkans henchman Radovan Karadzić and Imelda Marcos, to name just a few.

Yet decades on, with personnel and other changes on the United States Supreme Court, there seemed to be more and more questioning of the Court about the basis for hearing foreign human rights violations in U.S. courts; and related moves in the direction of limiting such human rights suits. Last year, the U.S. Supreme Court ruled in a case called *Kiobel v. Royal Dutch Petroleum* that such human rights suits should be limited to cases where the defendant has a connection to the United States. In that same case, the issue of the extent of corporate liability in U.S. courts was raised but not decided.

With *Jesner*, a plurality opinion offered a revisionist history of the evolution of corporate liability, a concept which may have had few analogs in the founding period. Therefore, according to Justice Kennedy, it should be left for Congress and not the Court to determine whether corporations can be liable under the ATCA. On this point, Justice Sotomayor, writing for the four dissenters, plainly disagreed. Justice Sotomayor found that the relevant issue was *normative*—a matter of federal common law—and well within the Court's power to decide: "Nothing about the corporate form in itself justifies categorically foreclosing corporate liability." For the dissent, the relevant question just depended on whether the relevant *norm* at issue under international law bound only state actors or also private actors. Justice Sotomayor saw no norm of international law accepted by civilized nations distinguishing between natural and juridical actors. In any event, the critical issue in the case was norm-specific: whether certain conduct contemplated liability under international law for private actors. Beyond the confusion about whether there was any relevant international law on the jurisdiction in this case involving a foreign bank, there was the added judicial caution about taking such cases at all.

Indeed, contra Kennedy's odd and narrow history, my ASIL remarks herein focused on reviewing the history where even in the last century in many jurisdictions, corporations—as such—have been held responsible in a variety of ways, sometimes complicity via natural persons, through their

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directors, even criminally for human rights wrongs, particularly in periods following military incursions, repression, and periods of political violence.

From the end of the post-war period, consider that at the International Military Tribunal (IMT) at Nuremberg, three corporations were held criminally responsible—alongside the SS, the Gestapo, and the Leadership Corps of the Nazi Party. Indeed, because of their recognized corporate criminal purpose at Nuremberg, a follow-on procedure known as "Bernay's rule," contemplated holding members liable with proof of knowing membership, under criminal conspiracy law—all in light of the earlier IMT judgments regarding organizational criminal liability.

Fast forwarding to the post-Cold War transitions throughout Latin America and in South Africa, among other places, business played a crucial role in supporting past repression, and benefitted from it. Consider Argentina: there has been sustained litigation over human rights violations often committed a long time ago (i.e., in the late 1970s and early 1980s). But in recent years, following on early investigations into the policies of the military dictatorship (i.e., its truth commission), we have seen cases more recently involving corporate complicity. There was an upsurge in civil society activism against corporations for crimes against humanity which lack any statutes of limitations. So, for example, we see initiatives to hold companies like Ford Motor and Mercedes Benz to account for facilitating kidnapping and torture. Indeed, given the passage of time since dictatorships in the region, corporate accountability has promoted legal innovations on issues of complicity and individual responsibility.

Consider post-Apartheid South Africa: from the very beginning of its transitional justice processes (i.e., in its Truth and Reconciliation Commission processes and Report), there was investigation and findings of businesses regarding the role of corporate complicity in Apartheid's human rights abuses. There were also recommendations in the way of reparations, such as a wealth tax proposal which was never acted upon. Years later, and building on these findings, the so-called *Khulumani* litigation—class action brought by victims of the prior racial policies for reparatory and other measures—raised anew in South Africa the hitherto unmet demand for corporate accountability for grave human rights abuses. These attempts at "naming and shaming" deployed largely by civil society with some results. These succeeded in getting back on the government agenda the issue of transitional justice for corporate actors.

Other pioneering litigation is occurring in Nigeria, Iraq, and elsewhere—a variety of places where there has been documentation and investigation of the role of corporations in complicity with human rights violations. This trend is the subject of an International Commission of Jurists report on corporate complicity and legal accountability. It has also been the subject of UN investigations, giving rise to the creation of a new rapporteur on the topic of "Foreign Debt and Human Rights," investigating the effects of illicit financial flows. There are also significant developments in the ideas of related international criminal liability: starting with the International Criminal Tribunal for the former Yugoslavia and the notion of "joint criminal enterprise" to address corporate crime. Moreover, the Rome Statute contemplates variety of related liabilities, i.e., such as "aiding and abetting." Of course, the nature of the response and sanctions depends on the level of involvement along a continuum. But these developments are part of a broader trend for accountability generally, but especially for private sector actors. Most recently consider France's' prosecution of Lafarge Cement for crimes against humanity.

All of which makes the stance of the U.S. Supreme Court in *Jesner* at odds with overall international trends to corporate accountability. After all, the relevant question of the issue is whether foreign courts should keep their doors open when it comes to cases involving serious human rights violations affecting persons and peoples. Where the majority focused unduly on the defendant corporations juridical form—instead of the *foreignness* of the corporations—which is just another way of again raising the question of whether the case offered enough of a nexus to the United

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States—an issue which had already been decided in *Kiobel.* While the Arab Bank had a branch in the United States, the plurality did not find this to be enough of a connection. In his opinion, Kennedy went on to make even broader statements—citing the administration and implying that allowing a basis for human rights litigation would somehow be considered interventionist or meddling vis-à-vis other countries. Yet, on the other hand, Kennedy also found that the notion of carving out a diplomatic immunity for corporations would be threatening to the rule of law.

An underlying policy concern here seemed to be the potentially global reach of many U.S. multinationals. Would this mean that if the Court kept the door open to ATCA liability that the liability of U.S. multinationals with presence in so many jurisdictions would in principle be unlimited? This seemed to be the underlying plurality view for leaving the issue to Congress to let them decide how to balance concern for U.S. international economic interests and the availability of redress in the human rights context.

It follows, and one can readily see, that the notion of a dichotomous or zero-sum approach between the domestic and foreign simply fails to account for the reality of accountability when it comes to crimes against humanity with universal jurisdiction, especially for private actors. After all, in many instances what we see is that foreign litigation involving human rights perpetrators, particularly corporate multinationals, has drawn needed attention to human rights violations that have elided diplomatic or other political attention. Transnational litigation rarely displaces the actions of local actors. Rather, what we can observe is that there has been more of a dialogue here: often such litigation has been critical in promoting human rights abroad. Consider for example that it was only after U.S. judicial intervention in the so-called *Khulumani* cases—mentioned above, involving pursuit of redress for suffering and confiscation under apartheid originally brought under the ATCA—that South Africa reconsidered these plaintiffs' claims and went on to find some corporate liability. Something very similar happened in number of jurisdictions in Latin America as a result of the doctrine of the Inter-American Court of Human Rights consolidating rights for victims to repair. Perhaps most notable, General Pinochet, Chile's strong man and human rights abuser, was brought to account only after Spain's extradition attempt whereupon a series of events were set in motion whereupon he returned to domestic judgment.

In recent years, the mounting number of transitional justice cases has shed light on the extent of corporate complicity in past repression. Especially of late, these cases go some way toward informing broader principles of corporate responsibility for human rights violations. Greater knowledge about the corporate role in past wrongs can help advance accountability efforts in transition and can also help promote social awareness and even legislative reform to turn these private actor forces in a direction for good in the future.

Remarks by Julian Ku*

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I want to thank ASIL and Professor Jill Goldenziel, for inviting me to participate in today's panel.

My contribution to this panel will focus on the regulation of overseas corporate conduct affecting human rights via the litigation under the Alien Tort Statute (ATS) in U.S. federal courts. This is hardly a new topic, but it is timely as the U.S. Supreme Court is currently considering in *Jesner*

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