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Remarks on the GJIL Symposium on Corporate Responsibility and the Alien Tort Statute

Vivian Grosswald Curran
University of Pittsburgh School of Law, vcurran@pitt.edu

REMARKS ON THE *GJIL* SYMPOSIUM ON CORPORATE RESPONSIBILITY AND THE ALIEN TORT STATUTE

VIVIAN GROSSWALD CURRAN*

I. OVERVIEW

Early in the Supreme Court oral arguments in *Kiobel v. Royal Dutch Petroleum Co.*,[1] Justice Kennedy alerted the plaintiffs' lawyer that, for him, "the case turns on this: . . . '[n]o other nation in the world permits its court[s] to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection."[2] That statement, in which Justice Kennedy quoted from a defendant's amicus brief, is true when taken literally. It is misleading, however, inasmuch as it fails to take into account that analogous actions are allowed in the civil law world of Continental Europe when one transcends a literal understanding, as required when transposing meaning from one legal system onto another. Universal jurisdiction for *jus cogens* violations has found a footing in the criminal, but not civil, law of civilian states for reasons tied to deep systemic attributes not shared by the U.S. legal order.

The Second Circuit in *Kiobel* might have been hesitant to immunize corporations from liability under international law had it been more familiar with the outlook of the civil law world that not only separates criminal from tort law, but that through a long history has constructed innumerable associations and connections in each of those two areas of law that U.S. legal, historical, social and political associations and connections do not replicate. The differences which separate criminal and tort law emerge principally from their different treatment of public and private (here, criminal and tort) law, and not—as the Second Circuit majority concluded in *Kiobel*—from their treatment of juridical and natural persons.

The Continental European countries of Western Europe are in a period of legal transition. The law of the European Union is maturing

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* Professor of Law, University of Pittsburg.

1. 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.

2. Transcript of Oral Argument at 3, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. argued Feb. 28, 2012).

and its legal actors, from lawyers to judges, are increasingly aware of each others' legal systems, as well as the legal practices of the United States. The tort lawsuit has not been integrated into civilian law as a remedy for grave violations of human rights, but civilian litigants have knocked at that door, and on occasion European courts have allowed it to open.

Most recently, a court in The Hague granted a civil recovery of one million Euros to a Palestinian physician who sued the Libyan government for torture he suffered at the hands of Colonel Moammar Gadhafi's regime in Libya.[3] Other cases in civilian systems have met with initial success, only to be reversed on appeal.[4] Such cases are particularly illuminating for the common law lawyer, as they illustrate those attributes that carry legal significance in civilian systems, and why.

II. FOREIGN LAW MATTERS

A Ninth Circuit judge described the current state of judicial opinions—to which one might add secondary literature—on the question of corporate responsibility under the Alien Tort Statute (ATS)[5] as "a plethora of opinions that cannot agree on what 'the law of nations' prohibits."[6] A striking amount of formalism and deductive reasoning characterizes the analysis, to a degree unusual in common law legal reasoning. The tight, Cartesian style of logical rigor has not, however, prevented the proliferation of an array of differing approaches and solutions. In a role reversal, recent civil law commentary on the ATS has tended to be more normative than formalistic.

The ATS creates a peculiar encounter with foreign law that goes beyond the conflict issues of whether to opt for foreign law applicability, and the challenge of applying a foreign state's law. It requires consideration of foreign legal concepts concurrently and in intertwined fashion with U.S. legal concepts. Accomplishing this feat involves scrutinizing legal conclusions lest they result from unwarranted U.S. legal projections, and therefore constitute "illusions of validity."[7] It also suggests that the categories being used to delineate analysis in circuit court opinions are porous. Thus, while it is true that a character-

3. *See, e.g.*, Rb. Gravenhage [Court of First Instance of The Hague] 21 maart 2012 [Mar. 21, 2012], m nt.Van der Helm, Case 400882/HA ZA 11-2252 (El Hojouj/Derbal) (Neth.).

4. *See* Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: the* Lipietz *Case*, 56 AM. J. COMP. L. 363 (2008).

5. 28 U.S.C. § 1350 (2006).

6. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 797 (9th Cir. 2011) (Kleinfeld, J., dissenting).

7. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 209 (2011).

ization of "remedy" or "method" as opposed to "substance" would warrant differing results under ATS analysis, those categories are not neatly separable. Similarly, the categories of "jurisdiction" and "cause of action," typically opposed to each other in ATS analysis, are also enmeshed within one another. These categories, debated in the secondary literature as well as in the parties' briefs, also were the subject of disagreement at the *Kiobel* oral argument in the Supreme Court.[8] Part of the issue in delineating categories stems from the ATS's connection to foreign law.

U.S. federal courts have not been eager to examine foreign law in recent years. Among the reasons for avoiding foreign law are the natural propensity of courts to favor the law of the forum, a propensity not limited to the United States, and the difficulty for judges to decipher the appropriate legal principles. The plaintiffs in *Kiobel* argued that the Supreme Court did not need to examine foreign law because corporate liability was an issue on the merits, and, as such, arose under U.S. federal common law.[9] According to Judge Leval in his substantive dissent from the reasoning of the Second Circuit's *Kiobel* opinion[10]—as well as the majority opinions in *Doe v. Exxon*[11] and *Flomo*[12]—plaintiffs' ATS allegations of crimes against humanity are claims regarding incontrovertible international law violations, while the corporate liability issue is merely one of *method* or *remedy,* rather than *substance.* State domestic law controls questions of method under principles of international law. Although my own suggestion is that corporate tort liability for crimes against humanity needs to be viewed as the United States' way of handling an issue from its common law perspective, I do not mean by that to suggest that it is not also a substantive matter.

The risk inherent in reducing the corporate liability issue strictly to a matter of method, which does not involve other countries or their law, is the risk of ignoring the necessary overlap and interconnection between method and substance, and the risk that what one state considers method another may consider substance. For instance, if every foreign "civilized state" held that immunizing corporations from liability was contrary to its public policy as a matter of its substantive law,

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8. Transcript of Oral Argument, *supra* note 2, at 45.

9. *Id.* at 21.

10. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring in judgment only).

11. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 23-24 (D.C. Cir. 2011).

12. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011).

the U.S. Supreme Court would not be likely to impose an entirely iconoclastic solution on the rest of the world, even if U.S. domestic law viewed it as a remedial matter, especially when the legislative intent of the ATS was to increase the United States' harmonious relations with other countries by removing jurisdiction from state courts more likely to cause difficulties in the United States' relations with other nations. ATS analysis in the absence of foreign law analysis thus risks undermining the statute's purpose.

A recurrent thread throughout the appellate court ATS decisions, from *Kiobel* through *Rio Tinto*, concerns the nature of the ATS as a tort statute existing within the confines of civil law, while the Nuremberg trials dealt with criminal law and penalties.[13] The *Kiobel* majority explained that it applied criminal law standards to ATS acts, though in tort law.[14] While such statements sound straightforward, their application may be fraught with difficulty in practice, because the criminal law standards against which U.S. courts must affix ATS issues are deeply embedded in other socio-historico-legal traditions and in the associations those systems have constructed between criminal and civil (i.e., tort) law divisions.[15]

III. A LOOK ABROAD

Each particular civilian country has its own national criminal law, influenced by its particular historical context and evolving circumstances. Nevertheless, underlying differentiating characteristics are widespread between the codified countries of Continental Europe (the civilian states to which the four appellate courts in and since *Kiobel* have looked) and the common law legal system of the U.S. Some of these differences become apparent in *Lipietz*, a case brought in France in 1994 by Remi Rouquette, a lawyer who was very familiar with U.S. cases that had been filed by victims of persecution in France during the Second World War.[16]

Like the plaintiffs in the U.S. cases, Mr. Rouquette asserted a claim

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13. *See Doe v. Exxon*, 654 F.3d at 23-24; *Flomo*, 643 F.3d at 1019; *Kiobel*, 621 F.3d at 150.

14. *Kiobel*, 621 F.3d at 117.

15. *See* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L. L. 1 (2002).

16. Tribunal administratif [TA] [Administrative Court] Toulouse, June 6, 2006, *available at* http://helene.lipietz.net/IMG/pdf/jugement.pdf. An English translation by Anne Witt, as revised by Vivian Grosswald Curran, is available at http://www.acaccia.fr/IMG/pdf/Judgment Lipietzenglish.pdf. The subsequent reversal by the Bordeaux Administrative Court of Appeal (*Cour d'Appel de Bordeaux*) was upheld by the Supreme Court (*Conseil d'État*), whose decision of

under tort law theory for crimes against humanity on behalf of his clients (one of whom was his father-in-law, Georges Lipietz) in a French court. The facts of the case concerned two cousins who had been arrested during WWII under the anti-Semitic laws of France's collaborationist government. The plaintiffs sued the French government as well as the railroad company that had transported them to an internment camp under inhumane conditions.[17]

Remarkably, the lower court ruled in favor of plaintiffs, finding a tort violation, although the underlying allegations concerned crimes against humanity, there had been no criminal proceeding, and none was contemplated. In doing so, the court broke dramatically with tradition. However, the case was reversed on appeal,[18] with the reversal affirmed by the Supreme Court (*Conseil d'État*).[19] Similar suits had been brought for wartime crimes in France, with convicted defendants in the past obliged to remunerate victims financially, but this case was controversial because it had been brought entirely outside of a criminal law context. Matters normally within the public domain were seen as having been privatized by a plaintiffs' lawyer because he managed the case, rather than the state. In the French system, a privately-hired lawyer is the institutional actor seen as the least neutral, and as suspect for wanting to win rather than to promote an understanding of the truth. The problem, in short, was the transposition to France of the Anglo-American legal concept of tort liability for a grave human rights violation.

The increasingly blurred line between public and private law that was criticized in *Lipietz* is a serious concern in civilian states today. If punitive damages have long been anathema to civilian states because punishment is seen as belonging to criminal, not tort, law, it is because the appropriation of punitive measures by tort law is considered to be the privatization of justice, and hence, an impingement on the domain of the State.

In *Lipietz*, although critics denounced the case for having been

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Dec. 21, 2007 is available in French at http://www.conseil-etat.fr/ce/jurispd/index_ac_Id0743.shtml.

17. The government did not appeal its loss in the lower court, so the appellate case concerned only the railway company.

18. Cour d'Appel [CA] de Bordeaux [Court of Appeals of Bordeaux], Mar. 27, 2007, *available at* http://www.asser.nl/upload/documents/20120510T060724-Lipietz%20et%20al.%20v.%20SNCF%20-%20Decision%20-%2027-03-2007.pdf.

19. Conseil d'État [CE Sect.] [highest administrative court], Dec. 21, 2007, Rec. Lebon 139, *available at* http://www.conseil-etat.fr/ce/jurispd/index_ac_Id0743.shtml.

brought by a private lawyer, the plaintiffs and their lawyer in fact were bringing the action in tort law very much in the spirit of U.S. tort law cases. More specifically, it was modeled on the common law tort cases that *are* meant to address matters of public concern, in order to give plaintiffs a public voice, and to generate public discussion that eventually can lead to the very legal developments that initially may have been raised prematurely. One indication that the *Lipietz* lawyer was similarly motivated is suggested by the plaintiffs' having presented some legal theories which might have hurt their own case, in order to preserve legal options for future, similarly situated plaintiffs.

Criticism of the plaintiffs came from many quarters and focused on repugnance at the implicit message that human misery can be compensable by monetary awards. Critics also decried the trial's alleged swiftness as preclusive of deliberative judgment, in contrast to the recent criminal trial of wartime collaborator Maurice Papon that had gone on for many months.[20] Finally, the case's critics saw as problematic that the plaintiffs' lawyer only made legal arguments that served his clients, rather than address the important historical problems at issue.

French law allows victims of crimes to pursue financial redress by joining the criminal law trial as a *partie civile*, or "civil party," a procedure duly noted by the Second Circuit in *Kiobel*.[21] But a French criminal trial has significant differences in both form and substance from its common law counterpart. A first clue comes from the very word English speakers translate as "trial": the French word is "*procès*." The French trial is, as the etymology of its name would suggest, a veritable "process," of which only the final phase is oral. Thus, a frequent incorrect association is to conflate the oral phase of the French trial with the Anglo-Saxon concept of "trial."

Most importantly, the principal players in the French and, generally, civilian criminal trial are the judges, and their role extends beyond judging the guilt of defendants. One of their important tasks is pedagogical: educating the public on behalf of the state. Judges in France, as in most civil law states, are endowed with didactic powers unshared by the U.S. tort law judge. Indeed, non-criminal cases take place through writings, by means of *mémoires* (submissions), without witness or other testimony, except for final, oral lawyer statements. One French scholar believes that the "triangular relationship among the public authority,

20. Tribunal administratif [TA] [Administrative Court] Paris, Apr. 12, 2002, *available at* http://www.asser.nl/upload/documents/20120612T021301-papon_conseil_Etat_decision_12-04-02.pdf.

21. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 137 (2d Cir. 2010).

the defendant[,] and the *partie civile* victim"[22] is the hallmark of the criminal law and also the reason that crime victims should not be able to seek financial redress outside of the criminal law context.

A great French scholar once explained that criminal trials are part and parcel of political statements, stating that a "Frenchman knows that [criminal law] is not and cannot be law in the strict sense[,]"[23] and "[he] will allow the government a degree of . . . even arbitrariness[] that is hard to reconcile with the certainty characteristic of legal principles."[24] The French criminal trial, as is also the case in other civil law states, puts the presiding judge in charge of "a symbolic process that involves conveying a social message."[25] The French criminal law judge has been called a "republican monarch,"[26] the very voice of the state, analyzing the import of historically valuable trials and explaining them to the citizenry in the name of the nation. If the judge can focus on so many issues collateral to the defendant's guilt, it is because issues of guilt and innocence generally have been resolved, often through confession, at some earlier point in the "process."

The United States does not endow its judges with the formidable powers of the French criminal law judge, in large measure because the role of the state is different in its relation both to its courts and to the governed. Although the U.S. may be influenced by Rousseau, in France the theoretical foundational idea has been the Rousseauist one of a citizenry which by means of a social contract cedes its individual interests when operating as citizens in a public space, and of a government which embodies the general will of that citizenry, and therefore merges with it at the same time that it leads the citizenry to virtue.

One understands better now some of the domestic criticisms leveled at the first instance court in the *Lipietz* case, such that it decided too rapidly, despite the fact that the lower court had taken more than five years from the date of plaintiffs' formal filing to render its decision in 2006. What perturbed many was, no doubt, the contrast with the

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22. Yves Strickler, *Après la Crise de l'Affaire d'Outreau: l'Émotion et la Procédure Pénale* [*After the Crisis of the Outreau Affair: Emotion and Criminal Procedure*], 249 PETITES AFFICHES [OFFICIAL NOTICES] 7, 10 (Dec. 14, 2006).

23. RENE DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY 119 (Michael Kindred trans., 2011).

24. *Id.* at 120.

25. Curran, *supra* note 4, at 377. *See also* Stewart Field, *State, Citizen, and Character in the French Criminal Process*, 33 J. L. & SOC'Y 522, 527, 537 (2006).

26. Field, *supra* note 25, at 540 (citing P. Le Quinquis, *Le Président de la Cour d'Assises* [*President of the Court of Assizes*], 10 REVUE GENERAL DE DROIT PROCESSUEL [GENERAL REVIEW OF PROCEDURAL LAW] 99, 100 (1998)).

criminal trials of Vichy collaborators such as Touvier[27] or Papon.[28] The trial in *Lipietz* was not conducted in public, as those two had been, nor could it be, precisely because *Lipietz* was not heard by a criminal law court. As a tort case, the party memoranda and filings constituted the entirety of the case, and even those filings were outside of the public domain, because, under French law, they are the intellectual property of their authors.

Thus, however wrong the critics may have been not just concerning the rapidity of the case, but also plaintiffs' motives in bringing the case, when they accused the plaintiffs and their lawyer of seeking only to win, the case was not played out in public because it was asserted under tort theory. In the United States, by contrast, all of the filings would have been public, and an oral jury trial would have, or could have, occurred, so that the issues would have been aired in a public forum.

IV. CONCLUSION

Tort law in the United States fulfills many of the functions of criminal law in civilian states in the context of the grave violations of human rights that are the subject of the ATS. Both offer a forum in which to publicize the defendant's criminal acts and the victim's suffering; both represent a search for justice; and both offer a means for financial redress. These are, however, similarities but not identical features. In particular, the degree to which the state legitimates criminal law trials in France is not paralleled by the public aspects and punitive damages of U.S. tort trials. Accordingly, it would not be accurate to equate the functions of civilian criminal law with those of U.S. tort law, as each retains significant distinctions linked to different histories and traditions. On the other hand, it now is clear why civilian states that adopt universal jurisdiction for crimes against humanity do so in a criminal law context, and why civil liability for the same underlying acts in the United States may be considered an equivalent cause of action.

27. Cour de cassation [Cass.] crim., June 1, 1995, Bull. crim., No. 42.

28. TA Paris, Apr. 12, 2002, *available at* http://www.asser.nl/upload/documents/20120612T021301-papon_conseil_Etat_decision_12-04-02.pdf