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The Cost of Territoriality: *Jus Cogens* Claims Against Corporations

Ursula Tracy Doyle[*]

Introduction

In *Jesner v. Arab Bank, PLC*, the United States Supreme Court held that "foreign corporations may not be defendants in suits brought under the [Alien Tort Statute ("ATS")]," a U.S. federal statute.[1] The ATS states that "[t]he 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."[2] In *Jesner*, foreign nationals sought jurisdiction over a claim against a Jordanian financial entity, with a New York office, pursuant to the ATS, alleging that the entity's agents effectively financed terrorist groups in the Middle East.[3] These plaintiffs further alleged that this conduct caused or facilitated their injuries or their decedents' deaths, which occurred abroad.[4] In reaching its holding, the Court concluded that the text of the ATS does not evidence Congress's intent for the statute to confer jurisdiction over claims against corporations;[5] international law does not recognize corporate liability;[6] little authority exists at international law to hold corporations accountable for the acts of their agents;[7] and judicial recognition of corporate

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1. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018). The Court's exclusion of foreign corporations from the ambit of the ATS was five years in coming. The Court was first poised to answer the question of corporate liability under the statute in *Kiobel v. Royal Dutch Petroleum.* However, despite two rounds of argument and briefing in the case, the Court did not answer the question of the statute's jurisdiction over corporations but rather of its jurisdiction over claims largely regarding foreign conduct. *See* Kiobel, 133 S. Ct. 1659, 1663 (2013).

2. 28 U.S.C.A. § 1350 (1948).

3. Jesner, 138 S. Ct. at 1393.

4. Id.

5. Id. at 1402-1403.

6. Id. at 1400-1402.

7. Id. at 1402.

liability would invade the province of the legislative branch[8] and improvidently frustrate U.S. foreign relations.[9]

The Court expressly limited its holding to foreign corporations,[10] but made clear that it saw no reason to use the ATS to confer subject matter jurisdiction over a claim against a U.S. corporation given the ability of diversity jurisdiction to do the same.[11] Moreover, it observed that Congress's choice not to include corporate liability in the Torture Victim Protection Act of 1991, a companion statute to the ATS (which creates a cause of action for torture and extrajudicial killing)[12] was "all but dispositive of the present case."[13] This logic would also apply, of course, to U.S. corporations.

Nonetheless, given the express limitation of the Court's holding, whether a U.S. corporation will be subject to ATS jurisdiction continues to be determined by the parameters set in *Kiobel v. Royal Dutch Petroleum*[14] and *RJR Nabisco v. European Community*, which appear to require a territorial connection between the underlying claim and the United States for ATS jurisdiction to lie.[15] Accordingly, rather than enter the debate on the soundness of the Court's rationales for excluding foreign corporations from ATS jurisdiction, this essay will consider the apparent disjunction between the Court's effective limitation of liability for the U.S. corporation, pursuant to *Kiobel* and *RJR Nabisco*, for perhaps even the most heinous acts, and the more expansive liability for the natural person, pursuant to the same cases, for the same acts.

Congress enacted the ATS, in 1789, to provide jurisdiction for a limited set of international law violations, including infringements against ambassadors, denials of safe travel, and piracy.[16] Although rarely invoked during its first 167 years,[17] in 1980, the United States

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8. Id. at 1402-1403.

9. Id. at 1403, 1406-1408.

10. Id. at 1437, note. ("Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS.").

11. Id.

12. *See* 28 U.S.C.A. § 1350, note.

13. Jesner, 138 S. Ct. at 1404.

14. 133 S. Ct. 1659.

15. 136 S. Ct. 2090 (2016).

16. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2759 (2004) (explaining that, at the time that Congress enacted the ATS, Congress intended the ATS to furnish jurisdiction for a small set of international law violations).

17. *See* Kiobel, 133 S. Ct. at 1663 (asserting that the ATS was only invoked twice in the late 18th century, and once more in the next 167 years).

Court of Appeals for the Second Circuit, in *Filartiga v. Pena-Irala*,[18] allowed *foreign* plaintiffs, whose decedent was tortured and killed by a *foreign* defendant in a *foreign* country, to use the statute as a conduit to recovery.[19] The success of that "foreign-cubed" case transformed the statute from yesteryear's relic to today's innovative human rights tool.

Historically, the foreign-cubed claim, brought pursuant to the ATS, alleged the most egregious of human rights abuses, the *jus cogens* violation. In *Kiobel*, the Court clearly rejected jurisdiction over the foreign-cubed claim before it, which alleged indirect liability against a corporation for *jus cogens* violations, because the claim lacked sufficient connection to the territorial United States.[20] It is less clear but certainly arguable that both *Kiobel* and *RJR Nabisco* preclude ATS jurisdiction, as well, over the claim which alleges direct liability against a corporation for a *jus cogens* violation, barring sufficient connection between the claim and the territorial United States.

By contrast, there is reason to believe that *Kiobel* and *RJR Nabisco* do not preclude a foreign-cubed claim from being brought under the ATS, if that claim alleges direct liability[21] for a *jus cogens* violation against a natural person, as these cases do not concern a claim of this kind[22] and do not, in any meaningful way, speak to a claim with this structure.[23] This disjunction would result in higher accountability for the natural person who violates a *jus cogens* norm than for the juridical one, a distinction that defies doctrinal explanation and warrants future action by the Court.[24]

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18. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

19. Id. at 890.

20. *See generally* Kiobel, 133 S. Ct. 1659.

21. A claim of indirect liability for a *jus cogens* violation against a natural person is unlikely to sustain jurisdiction because it is too close to that which the Court rejected in *Kiobel*. *See generally id.* Moreover, in his *Kiobel* concurrence, Justice Breyer indicated that the plaintiffs' case was weak in part because it only alleged indirect liability. *See* 133 S. Ct. at 1678 (Breyer, J., concurring in judgment) ("And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.").

22. *See generally* Kiobel, 133 S. Ct. 1659; RJR Nabisco, Inc., 136 S. Ct. 2090.

23. *Id.* Of course, the *Jesner* holding would be irrelevant to this claim as this holding concerned foreign corporations. *See* Jesner, 138 S. Ct. at 1407.

24. *See* Ursula Tracy Doyle, *The Whole Wide World: Recognizing Jus Cogens Violations Under the Alien Tort Statute*, 24 BUFF. HUM. RTS. L. REV. (forthcoming 2018).

I. *JUS COGENS* NORMS

The *jus cogens* norm prohibits genocide,[25] torture[26] and other egregious conduct. It surpasses all other international law norms,[27] protects basic values,[28] commits every State[29] and allows no derogation.[30] Because this norm reflects the commitment of the international community to protect against the very worst human rights atrocities, its breach affronts every State and triggers universal jurisdiction.[31] Although settled and sacred at the international level, this norm is of unclear value to the United States Supreme Court.[32]

Indeed, in *Kiobel*, the Court did not even attempt to evaluate the significance of the plaintiffs' claims that the defendant corporations aided and abetted the *jus cogens* violations of genocide and torture (as opposed to less egregious conduct).[33] The Court, instead, focused on a matter of statutory interpretation to the exclusion of addressing the meaning, at international law, of such grievous allegations.[34] While this essay does not suggest that the Court should have refrained from considering matters of form,[35] it does suggest that the underlying allegations--foreign-cubed though they were—warranted detailed examination to better evaluate the circumstances that might rebut the canon of statutory interpretation that the Court interposed known as the "presumption against extraterritoriality."[36] In other

25. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 217 (AM. LAW INST. 2016) [hereinafter *Foreign Relations*].

26. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (agreeing that official acts of torture are a *jus cogens* violation).

27. *See* Int'l Law Comm'n, Second Rep. on *Jus Cogens* by Dire Tladi, Special Rapporteur Sixty-ninth Session, UN. Doc. A/CN.4/706, at 12 (Mar. 16, 2017) (explaining that the view that *jus cogens* norms are superior to other rules is a generally accepted idea).

28. *See id.* at 10.

29. *See id.* at 15.

30. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

31. Foreign Relations, *supra* note 25, at § 217.

32. *See* Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. J. INT'L HUM. RTS. 149, 155 (2011) (describing current U.S. court view regarding state immunity in cases of human rights violations.).

33. *See generally* Kiobel, 133 S. Ct. 1659.

34. Kiobel, 133 S. Ct. at 1664-67.

35. *See* Anthony Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AM. J. INT'L L. UNBOUND, 51-52 (2016) [http://perma.cc/Q8W2-APS4].

36. Kiobel, 133 S. Ct. at 1665.

words, given the purpose of the ATS, namely to provide jurisdiction for causes alleging torts in violation of the law of nations, the gravity of the allegation is relevant to the jurisdictional analysis.[37]

II. THE MEANING OF *KIOBEL* AND *RJR NABISCO* TO ALLEGED *JUS COGENS* VIOLATIONS BY CORPORATIONS

In *Kiobel*, the plaintiffs, Nigerian nationals, alleged that the defendants, foreign corporations, provided compensation and other property to the Nigerian military, which the military used to commit the violations noted above.[38] The plaintiffs sought jurisdiction pursuant to the ATS. In elaborating on the application of the presumption against extraterritoriality to the statute, the Court stated:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[39]

Here, the Court repeatedly privileges territoriality in claims brought against the corporation, suggesting that "relevant conduct" must occur in the United States; the claim must "touch and concern" the United States; and something more than "mere corporate presence" must occur in the United States to sustain ATS jurisdiction.[40]

Given this emphasis on territoriality and the *Kiobel* facts, one must broadly assume that any allegation of indirect liability for a *jus cogens* violation against a corporation, where the claim does not "touch and concern the United States," is insufficient to rebut the presumption of extraterritoriality.[41] This limitation on liability over indirect commission of *jus cogens* violations, barring the requisite U.S. connection, excises a vast swathe of corporate defendants from human rights cases.[42]

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37. 28 U.S.C.A. § 1350 (1948).

38. Kiobel, 133 S. Ct. at 1662-63 (Breyer, J., concurring in judgment).

39. *Id.* at 1669.

40. *Id.*

41. *Id.* at 1660-64.

42. *See* Kiobel, 133 S. Ct. at 1671 (Breyer, J., concurring in judgment) (expressing the opinion that limitations on jurisdiction would prevent the U.S. from becoming a safe harbor).

Perhaps one must also assume that this holding forbids ATS jurisdiction over claims alleging direct liability for a *jus cogens* violation against a corporation, where the claim does not "touch and concern the United States," although the Court has not explicitly made this point.[43] Theoretically, however, a *jus cogens* violation, because of its disapprobation at international law, touches and concerns all States. Perhaps it would especially touch and concern the United States if the alleged perpetrator is both a U.S. corporation and accused of directly committing the atrocity. The incapacity of ATS jurisdiction to sound over corporations in this category would exempt an already outsized class of defendants from accountability for unambiguous international law breaches.

RJR Nabisco furthers the notion that territoriality governs the question of ATS jurisdiction, although, like *Kiobel*, it did not decide the question for all claims brought pursuant to the ATS.[44] In this case, the European Community sued RJR Nabisco, pursuant to the Racketeer Influenced Corrupt Organizations Act (RICO), for alleged money-laundering in the European Union.[45] Primed to determine whether RICO had extraterritorial application, the Court prescribed a two-step framework for analyzing whether *any* federal statute had extraterritorial application.[46]

The Court opined that, when confronted with this question, courts must first determine "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[47] If the statute gives such an indication, stated the Court, then it can be applied abroad.[48] If the statute does not give such an indication, then courts must proceed to the second prong of the framework and determine if "conduct relevant to the statute's focus occurred in the United States."[49] The Court continued that "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad."[50] However, the Court observed that "if the conduct

43. *See* Daniel Prince, *Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute,* 8 SETON HALL CIR. REV. 43, 47-50 (2011) (citing cases in which the court has refused to apply the ATS or dismissed ATS claims against corporations).

44. RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100-01 (2016) (discussing two-step framework for analyzing extraterritoriality issues).

45. *Id.* at 2090.

46. *Id.* at 2093.

47. *Id.* at 2101.

48. *Id.*

49. *Id.*

50. *Id.*

relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[51] While this formulation raises questions—namely regarding the identification of the ATS "focus" and the meaning of "relevant conduct" and "other conduct"—it also furthers the notion that the Court deems important a significant territorial connection with the United States for the statute at issue to apply extraterritorially.[52] When read together, *Kiobel* and *RJR Nabisco* certainly appear to require such a connection for ATS jurisdiction to lie over a *jus cogens* claim alleging indirect liability of a corporation. They may also require this connection for this jurisdiction to lie over the direct liability claim as well.

III. THE INCONSISTENCY OF PRECLUDING *JUS COGENS* CLAIMS AGAINST CORPORATIONS ABSENT TERRITORIALITY

As suggested above, it is somewhat of an open question whether the Court's holding in *Kiobel* and its two-step framework in *RJR Nabisco* apply to foreign-cubed claims alleging direct liability for a *jus cogens* violation against a natural person.[53] *Kiobel* did, after all, concern a foreign-cubed claim alleging indirect liability for *jus cogens* violations against a juridical person. Additionally, the letter of the Court's holding seemed restricted essentially to claims against corporations when it held that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[54] This holding suggests that there is a territoriality requirement for ATS jurisdiction over corporations that may not exist for such jurisdiction over a natural person.[55] Similarly, *RJR Nabisco* concerned the application of RICO to the extraterritorial conduct of a corporation and the Court's two-part framework arose within the corporate context.[56]

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51. *Id.*

52. *Id.* at 2106.

53. *See supra* note 24; David Nersessian, *International Human Rights Litigation: A Guide for Judges*, INT'L HUM. RTS. LITIG., 42-43 (2016) (stating that the federal courts of appeals are divided over when private actors can be held liable in violating international law).

54. Kiobel, 133 S. Ct. at 1669.

55. *Id.*

56. *See* RJR Nabisco, 136 S. Ct. at 2100-2101. The circumstances that informed and gave rise to the Court's framework are the application of § 10(b) of the Securities Exchange Act of 1934 to the overseas conduct of the corporate defendant in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), the application of the ATS to the overseas conduct of the corporate defendant in *Kiobel* and the application of

The apparent difference in standards for each class of defendant undermines the goal of the ATS—to provide jurisdiction over torts in violation of the law of nations.[57] Corporations can commit these violations—even of *jus cogens* norms.[58] Indeed, in her *Jesner* dissent, Justice Sotomayor states that "[i]mmunizing corporations that violated human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose. It allows these entities to take advantage of the benefits of the corporate form and enjoy fundamental rights, without having to shoulder attendant fundamental responsibilities."[59] *Kiobel*, *RJR Nabisco* and *Jesner*, collectively, make patent, however, the Court's view that ATS jurisdiction is most appropriately conferred over claims against the natural person.

Conclusion

Jesner plainly precludes ATS jurisdiction over foreign corporations for even the most egregious human rights violations (regardless of the type of liability alleged). While, in that decision, the Court did not answer the question of ATS jurisdiction over the

RICO to the overseas conduct of the corporate defendant in *RJR Nabisco*.

58. Jesner, 138 S. Ct. at 1397 (quoting Sosa,124 S. Ct. at 2759 (2004) ("The history teaches that Congress drafted the ATS 'to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.'").

58. *See* Robert C. Thompson, Anita Ramasastry, & Mark B. Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 871 (2009) (discussing attachment of criminal liability to corporations through its officers, directors, employees, or agents); *see also* Brief of Amici Curiae Nuremberg Scholars in Support of Petitioners at 3, Jesner, et al., v. Arab Bank, PLC, No. 16-499 (2017) ("What this history teaches is that the diplomats and jurists of the era understood that juridical persons can violate international law and can be held legally accountable for doing so through criminal, civil or any other type of remedy depending on the operative jurisdictional framework."); *see also* Human Rights Council, Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, at 6, U.N. Doc. A/HRC/8/5 (2008) (observing that, in a recent study of "all industry sectors," respondents alleged that corporations were "directly" responsible for roughly sixty percent of the human rights violations).

59. Jesner, 138 S. Ct. at 1437 (Sotomayor, J., dissenting) (citations omitted) Although specifically directing her attention to the Court's holding concerning foreign corporations, Justice Sotomayor makes a point with broad application.

U.S. corporation, this jurisdiction continues to be subject to the constraints of *Kiobel* and *RJR Nabisco*. *Kiobel* clearly limits the liability of the corporation accused of indirect commission of a *jus cogens* violation, if the claim does not "touch and concern the United States."[60] Both *Kiobel* and *RJR Nabisco*--together, if not separately—perhaps also limit the liability of the corporate defendant accused of direct commission of this act, if that claim is not sufficiently connected to the territorial United States. If territoriality is the linchpin for ATS jurisdiction over the U.S. corporation, then perhaps its steepest cost is the claim of direct liability for a *jus cogens* violation that lacks this precondition, a result at severe odds with the treatment of the *jus cogens* norm at international law and the appropriate treatment of this norm when the defendant is a natural person.

60. Kiobel, 133 S. Ct. at 1669.