The Alien Tort Statute and the Corporate Defendant: A Missing Link in the Analysis

by

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Abstract

Early in the Supreme Court oral arguments in *Kiobel v. Royal Dutch Petroleum Co.*, Justice Kennedy alerted the plaintiffs’ lawyer that, for him, “the case turns on this: … ‘No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection.’”¹ That statement, quoting an amicus brief filed for one of the defendants, is true when taken literally, but is misleading inasmuch as it fails to take into account that analogous suits are allowed in the civil-law world of Continental Europe if one knows how to go beyond the literal, as transposing from one legal system into another requires. Universal jurisdiction for *jus cogens* violations has found a footing in the criminal law of civilian States for reasons tied to deep systemic attributes not shared by the United States legal order.

The sources of international law, known in the eighteenth century as the “law of nations,” include “general principles of law

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recognized by civilized nations” in their domestic law. One such general principle today in both the civil- and common-law world is that corporations are legally responsible for the harms they cause. 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 United States legal, historical, social and political associations and connections do not replicate. The differences which separate the two legal orders emerge principally from their respectively different treatment of public and private (here, criminal and tort) law, and not, as the Second Circuit majority concluded, from their treatment of juridical and natural persons.

The Continental European countries of Western Europe are in a time of legal transition as European Union law matures and as its legal actors, from lawyers to judges, increasingly become aware both of each others’ legal systems and of United States legal practices. The tort lawsuit for grave violations of human rights has not been integrated into civilian law, but civilian litigants have knocked at that door, and some of their courts on occasion have agreed, although so far they have been overturned. Such cases can be particularly illuminating for the common-law reader in illustrating those attributes which carry legal significance in civilian systems, and why. Accordingly, this article discusses one such case, as the French courts and public reacted to an American-style legal action, and deals with the ATS as an influence on other systems.

It also briefly discusses adjudications of the European Court of Justice and the International Court of Justice. Both decisions concern jus cogens violations and immunity issues and

2 Art. 38, Statute of International Court of Justice; see Exxon, 654 F.3d at 54 (“a general principle becomes international law by its widespread application”).
are analyzed in terms of their appropriate bearing on ATS corporate defendant liability.

I. Introduction

A. The Intercircuit Conflict

A complicated and contradictory web of reasoning has emerged around the issue of corporate liability under the Alien Tort Statute (“ATS”). Since the Second Circuit’s decision in *Kiobel v. Royal Dutch Petroleum Co.* that ATS liability does not include corporate liability because it does not extend beyond natural persons, three federal courts of appeal in rapid succession have rejected the Second Circuit’s stance, two with dissenting opinions. *Kiobel* itself included a powerful dissent on that issue.

A Ninth Circuit judge has described the current state of judicial opinions, to which one might add, secondary literature, as “a plethora of opinions that cannot agree on what ‘the law of nations’ prohibits.” A striking degree of formalism and deductive reasoning characterize the

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4 621 F.3d 111 (2d Cir. 2010), cert. granted (17 October 2011).
5 Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011); Doe VIII v. Exxon Mobil Corp., No. 09-7125 (D.C. Cir. 2011); Sarei v. Rio Tinto, PLC, Nos. 02-56256, 02-56390, 09-56381, slip. op., (9th Cir. 2011).
6 Judge Leval’s opinion technically is a concurrence because he agreed with the majority’s decision to dismiss, but his opinion consists in principal part of his dissent with respect to the majority’s conclusion of corporate immunity. See *Kiobel*, 621 F.3d at 150.
7 Sarei v. Rio Tinto, at 12429 (9th Cir. 2011) (Kleinfeld, J. dissenting)(slip op.).
analysis, to a degree unusual in common-law legal reasoning. In a role reversal, civilians often emphasis the normative when discussing the ATS, in the tradition of the internationalist Hersch Lauterpacht’s injunction that “[t]he well-being of the individual is the ultimate object of all law.” The tight, Cartesian style of logical rigor among United States judges and commentators has not, however, prevented an array of differing approaches and solutions, which suggests that some missing links remain in the analysis. It is one such link that this article addresses, in furtherance of the invitation Professor Stephens extended in her illuminating article, aptly titled *Translating Filartiga.*

B. Background

The Alien Tort Statute is an old and a new statute. It is an old statute because it was enacted in the eighteenth century. The statute aimed to allow aliens access to federal courts in

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8 In the civilian legal systems of Continental Europe, an unresolved and irresolvable debate about formalism has persisted since the nineteenth century concerning the proper way to approach legal reasoning. The Second World War renewed this debate and caused it to shift its points of reference, due to the fundamental challenges some courts and judges had failed to meet during that time. See Vivian Grosswald Curran, *Fear of Formalism,* ... Cornell J. Int’l L.


the United States for certain limited causes of action: “The district court 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.”\textsuperscript{11} The First Congress sought to wrest jurisdiction from state courts where foreigners were victims of torts, so that such plaintiffs might avoid the biases of local courts, and so that the country might avoid international crises that resulted from state court contravention of federal foreign policy.\textsuperscript{12}

The ATS also is a new statute because it lay dormant for close to two centuries until it was resuscitated in 1980 in a case involving an alien who successfully sued another alien in federal court for jus cogens violations that had occurred in Paraguay.\textsuperscript{13} In this manner, it became a statute asserted for plaintiffs claiming civil damages for breaches of fundamental human rights. It no longer was associated with foreign ambassadors or pirates, as it had in its original incarnation, but, rather, with jus cogens violations: those obligations deemed universal and peremptory under international law, which one scholar has dubbed “super-norms.”\textsuperscript{14}

\textsuperscript{11} ATS, supra note --.
\textsuperscript{13} Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
In 2004, the United States Supreme Court adjudicated an ATS case for the first time in *Sosa v. Alvarez-Machain.*\(^\text{15}\) In October, 2011, after *Sosa* had been interpreted by different federal appellate courts both as including and excluding corporate liability, the Supreme Court granted certiorari to plaintiff petitioners in *Kiobel.*\(^\text{16}\) The long hiatus and changed order of cases in the 170 years that followed the first wave of ATS cases and preceded *Filartiga* are part of the difficulty in current ATS adjudication in creating “something like a faithful reinvention” of the original law.\(^\text{17}\) As Judge Cardozo wrote in *MacPherson v. Buick,* “the principle … does not change, but the things subject to the principle do ….”\(^\text{18}\) Determining the principle can be difficult when contexts change dramatically.

Many have noted that multinational corporations in the globalized era strain the capacity of existing legal mechanisms to cope with the challenges they create.\(^\text{19}\) Professor Delmas-Marty has analyzed how economic interests were able to take full advantage of the forces of

\(^{15}\) 542 U.S. 692 (2004).
\(^{16}\) At the time of the Second Circuit’s decision, *Kiobel* created an intercircuit conflict with the Eleventh Circuit. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) and *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).
\(^{17}\) The phrase is from *PIERRE ASSOULINE, LE DERNIER DES CAMONDO* 40 (2011) (referring to neoclassical architecture in early twentieth-century Paris).
\(^{18}\) MacPherson v. Buick, … (explaining the dramatic shifts that had taken place in New York state law as it had evolved from requiring privity of contract, to allowing third-party plaintiff tort suits only if the underlying product was inherently dangerous, to opening the third-party cause of action to all negligently produced product situations).
\(^{19}\) For a sociological point of view, see Zygmunt Bauman, ….; for legal commentaries, see …
globalization, establishing efficient transnational bodies to handle transnational commercial issues, while at the same time human rights, despite their foundations in a theory of universalism, have remained rooted in national court systems.\textsuperscript{20}

The ATS raises challenges of extraterritoriality and national sovereignty. For many reasons, including the civilian legal principles against American-style contingency fees and class action lawsuits, as well as the public-private law distinction that will be discussed at greater length, civil-law legal systems are not able to adopt models very similar to the ATS. Increasing consideration is being given, however, to ways of finding civilian approximations both at national and supranational levels.\textsuperscript{21}

C. The Look to the Other

The ATS constrains the United States judge to examine law external to that of the United States, and in so doing is characteristic of an increasing number of cases that, for a multitude of reasons, must analyze U.S. statutory, case, or procedural law cheek by jowl with foreign law. Moreover, the ATS not only juxtaposes, but also intermingles, United States legal concepts with foreign legal concepts, creating a particularly challenging analytical framework. The various court opinions reaching conclusions about ATS corporate liability tend to rely on particular

\textsuperscript{20} MIREILLE DELMAS-MARTY, GLOBALISATION ECONOMIQUE ET UNIVERSALISME DES DROITS DE L’HOMME (2004).

\textsuperscript{21} See infra, notes --- to ---, and surrounding text.
theoretical frameworks or conceptual grids that justify and require the conclusions those courts reached. These frameworks vary, sometimes obviously,\textsuperscript{22} sometimes subtly.\textsuperscript{23}

This article offers a comparative law perspective that hopes to simplify or at least clarify some of the pertinent analysis. It also suggests that the categories being used to delineate analysis in the circuit court opinions are porous. Thus, while it is true that a characterization of “remedy” or “method,” as opposed to “substance,” would warrant differing results under ATS analysis, those two categories are not neatly separable. Similarly, the categories of “jurisdiction” and “cause of action,” opposed to each other in ATS analysis, also are enmeshed within each other.\textsuperscript{24}

By looking at some civilian legal concepts, this article also suggests a shift in categories. In this manner, it may be seen as a further complication, potentially generative of further

\textsuperscript{22} See supra ... [E.g., does the “universal” standard mean that there must be many precedents of corporate responsibility for similar acts? (Flomo: no; Kiobel maj: yes, etc)]; most centrally: does the statute require defendants to be individuals as a matter of substantive law [rajouter ici]; etc....] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011).
\textsuperscript{23} See infra ... [although the majority in Kiobel says it applies criminal standards, its analysis suggests that it is applying civil standards to criminal law, precluding the possibility of a finding of liability for any acts under the ATS because the law of nations can have no such precedents. Other courts look to criminal law standards, Flomo et al., but only public international law.]
\textsuperscript{24} The oral arguments contained lively disagreement between justices and lawyers as to these categorizations, each perspective taking a binary approach of “in” or “out.”
confusion. Its aspiration is the opposite, however, inasmuch as a change of optic may obviate
the need for some of the current analysis.\textsuperscript{25} By implication, this article also demonstrates an
urgent need for United States courts to hone skills in dealing with foreign law, for the law
relevant to deciding \textit{Kiobel}, and many ATS cases, is that accepted by other nations.

The ATS is not a unique example of the need for American courts to understand and deal with
foreign law, but it is a particularly illustrative one, and perhaps no ATS issue is more illustrative
of this need than corporate liability. Notwithstanding the above, the ATS creates a peculiar
encounter with foreign law that goes beyond conflicts issues of whether to opt for foreign law
applicability, or even the challenge of applying a foreign State’s law. It requires application of
foreign legal concepts concurrently and in intertwined fashion with U.S. legal concepts.\textsuperscript{26}

Accomplishing this feat involves scrutinizing legal conclusions lest they result from unwarranted
United States legal projections, and therefore constitute what the scientist Daniel Kahneman calls
“illusions of validity.”\textsuperscript{27} It requires becoming familiar with delineations peculiar to the civil-law

\textsuperscript{25} \textit{Cf.} Chimene Keitner, urging a “reconceptualization.” \textit{Conceptualizing Complicity in ATS
Cases,} ....

\textsuperscript{26} In this, ATS analysis brings to mind federal diversity jurisdiction, especially to the extent
that issues of procedure in United States law often require extensive legal analysus, the
latter constituting another aspect of common-law systems which differentiates them from
traditional civilian legal systems.

\textsuperscript{27} \textsc{Daniel Kahneman, Thinking, Fast and Slow} (2011).
world to compensate for “congenital [i.e., national systemic] biases when making [legal] judgments.”

This article suggests that civil-law legal systems would not support the different treatment of corporations that the Kiobel majority and Rio Tinto dissent would espouse. Rather, they would preclude recovery against both individuals and corporations in tort law, where no criminal trial had taken place, or even was being contemplated for the defendants. In other words, if we look to the law of other “civilized nations,” what we will find is that civilian nations do not offer precedents because the ATS differs from them in granting civil recovery for the gravest of all human rights violations outside of any criminal context whatsoever, even that of contemplated criminal charges.

Thus, to follow the model of most of the world, and specifically of those countries the courts in Kiobel, Flomo, Rio Tinto and Exxon looked to, the ATS could not contemplate tort recovery unless it first required some criminal law adjudication for the grave jus cogens violations that have become the ATS’ post-1980 subject matter. The Supreme Court’s

28 Freeman Dyson, How to Dispel Your Illusions, N.Y. REV. BKS. 40 (Dec. 22, 2011).
29 See supra, note 3.
30 Most interesting is to see the evolution in recent years in Continental European States towards growing appreciation of our ATS and its benefits. See e.g., former Dutch P.M.; Horatia Muir-Watt. The difficulties of equivalent statutes are explained in this article.
endorsement of *Filartiga* in *Sosa*, however, is an endorsement of the tort cause of action under the ATS for jus cogens violations. Thus, the analogies to other States’ practices and legal understandings when seeking the solutions of “civilized nations” will have to be less than exact equivalences between ATS causes of action and existing precedents in continental Europe, the area of the world to which the appellate courts primarily looked in the ATS corporate liability cases of *Kiobel, Flomo, Exxon* and *Rio Tinto* appeals.

Part II briefly outlines the United States courts’ attitude towards foreign law before considering the subject in the context of the ATS, and then comparing United States common-law standards to French civilian standards in order to explain the challenges American courts face when adjudicating ATS cases.

II. Civil and Criminal Law in Continental Europe: Some Different Categories

A. Corporate Liability and Foreign Law

United States federal courts have not been eager to examine foreign law in recent years, although that was not always the case. Among the reasons for avoiding foreign law are the

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31 See *Sosa*, supra not --, at .... Justice Scalia did not join this endorsement, but recognized that the majority had done so. See *id.* at --.

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 on appeal to the Supreme Court that it did not need to examine foreign law. Their argument was that corporate liability was an issue on the merits, and, as such, arose under U.S. federal common law. Since it was an issue of federal common law, so their reasoning went, foreign legal standards were irrelevant. While this conclusion might appeal to the reluctance of courts to explore foreign legal standards, it seems difficult to reconcile with the need to determine the law of nations. Indeed, the bulk of the oral argument involved questions by the justices concerning the domestic law of other nations.

Judge Leval had a different line of reasoning in his concurring opinion in *Kiobel* from the approach plaintiffs took on appeal. According to Judge Leval, the answer is not that the issue arises under substantive federal common law, but that the *Kiobel* plaintiffs’ allegations of crimes

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33 Symeon Symeonides,
34 One such reason is that foreign law generally is derived from party experts who testify against each other as to the relevant foreign law. See *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 634 (7th Cir. 2010).
36 Sosa, *supra* note --, at ...
37 See Transcript, *supra* note --.
against humanity are claims regarding incontrovertible international law violations, while the
corporate liability issue is merely one of *method* rather than substance. State domestic law
controls questions of method under principles of international law.\(^{38}\) Although my own
suggestion is that corporate tort liability for crimes against humanity should 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 matter of substance. The risk 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 the very issues one State considers to be methodological another may consider
substantive.

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, it would not be likely
that the United States Supreme Court would impose an entirely iconoclastic solution on the rest
of the world in ATS cases. This is especially so, given that 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 States.

\(^{38}\) Kiobel (Leval, J. conc), supra note --, at.
At oral argument, Justice Alito emphasized this intent.\textsuperscript{39} Indeed, Justice Breyer’s concurring opinion in \textit{Sosa} specified as an additional criterion that “the exercise of jurisdiction under the ATS [be] consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help ensure that ‘the potentially conflicting laws of different nations’ will ‘work together in harmony,’ a matter of increasing importance in an ever more interdependent world.”\textsuperscript{40} ATS analysis in the absence of foreign law analysis risks undermining the statute’s purpose.

A particular obstacle to understanding foreign law is that many legal categorizations and legal associations we take for granted will be different in other systems. A comparative legal framework may suggest in ATS analysis that some of the rubrics with which the various appellate court opinions reason may be difficult to apply when dealing with the legal concepts of civil-law legal systems.\textsuperscript{41}

The majority in \textit{Kiobel} held that corporations cannot be liable under the ATS because, among others, no international tribunal has held them liable for a crime against humanity.\textsuperscript{42} In so

\begin{itemize}
  \item \textsuperscript{39} Transcript, \textit{supra} note --, at 12.
  \item \textsuperscript{40} \textit{Sosa}, \textit{supra} note --, at 2782 (Breier, J. conc.) (\textit{citing} F. Hoffmann-LaRoche Ltd., v. Empagran S.A., 542 U.S. 155, 164 (2004))
  \item \textsuperscript{41} See infra, ...
  \item \textsuperscript{42} \textit{Kiobel}, 621 F.3d at 121.
\end{itemize}
doing, it was looking to a forum that was international in nature, rather than to the domestic law of other nations. Focusing in particular on the Nuremberg Tribunal, the great paradigm shifter towards international individual culpability for the commission of crimes against humanity, the court underscored that no entity had been indicted at Nuremberg.\(^{43}\) As posed by the \textit{Kiobel} court, the issue was whether corporations come within the meaning of “individuals” for purposes of ATS liability.\(^{44}\) The majority concluded that only natural persons can have the mens rea necessary for ATS law of nations violations.\(^{45}\) By contrast, in its decision explicitly rejecting \textit{Kiobel}, the Seventh Circuit stated that Nuremberg’s failure to do so did not entail that its logic would not have permitted it to do so.\(^{46}\)

The Nuremberg trials were a watershed phenomenon in modern international law, and the source of individual culpability for modern international law crimes; however, one of their

\(^{43}\) Cite. Cite here also dissenters in other cases, agreeing with Kiobel majority and mentioning this point. \textit{Id.} at 167, dissenting. Note, however, the nuanced account in Jonathan Bush, ..... As the majority noted in \textit{Exxon}, the Allies did dissolve insurance companies and seize some German corporate assets under Control Council Laws 39 and 47. \textit{Id.} at 56. \textit{Accord}, Flomo, \textit{supra} note --, at 1017.

\(^{44}\) The \textit{Kiobel} defendants had not raised the issue themselves. See [cite to Leval and majority]. \textit{Id.} at 121.

\(^{45}\) \textit{See id.} at 152, 153.

\(^{46}\) Cite. That court also cites to Jonathan Bush’s article, ..... detailing the political and other considerations at play, as well as those, including Justice Jackson, who wanted to indict corporate entities. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011) \textit{Id.} at ...
salient features was their thoroughly American legal nature. They were American-created, and the result of common-law thinking. On the other hand, for the concurrence in Kiobel, and majorities in Exxon and Flomo, the issue of corporate liability was resolved in an entirely different manner: it was subsumed under the category of remedy, and therefore was not one to subject to substantive international or foreign-law analysis, since under international law States may choose remedies according to domestic law practices. How do ATS liability issues tally with Nuremberg principles and with what significance? Do issues of substance and remedy divide so sharply that they need not be examined together? How does the interface with the legal practices of other nations affect such an issue? Sometimes issues may seem eminently amenable in the abstract to resolutions that are more categorical than their translation into everyday permits.

A recurrent thread throughout the appellate court 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. Moreover, while the

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48 Kiobel, *supra* note --, at 153. [Refer also to J. Leval’s noting widespread agreement in civilian States re corporate criminal responsibility. *Id.* at 168, 169.]
Nuremberg tribunals dealt with international law in terms of the traditional law among States, the general principles of law emerge from the domestic practices of States. Even this distinction may be too abstract to hold water in practice since the concrete understanding of traditional international law also depends on internal conceptions of law. The Kiobel majority explained that it applied criminal law standards to ATS acts, though in tort law. While such statements sound straightforward, their application may be fraught with difficulty in practice, because the criminal law standards against which United States 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. The next section examines some of those differences.

B. The Intertwining of Criminal and Civil-Law Concepts

1. A French Case

In this part, I describe ways in which the French legal system conceives of criminal and tort law, and the role of its legal actors. I compare these to their United States counterparts, in

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49 For further explanation of the general principles, see Brief for Amici Curiae International Human Rights Organizations and International Law Experts in Support of petitioners in Kiobel, No. 10-1491 (U.S.)

50 Id. at --. The plaintiffs strenuously argued on appeal that the Second Circuit’s examination of criminal alw was error because the ATS is limited to torts only. Pl.s Brief at 21.
order to provide a basis for assessing the ATS issue of corporate liability. 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
United States.

Some of these differences become apparent from a case brought in France in 1994 by a
lawyer who was very familiar with United States cases that had been filed by victims of
persecution in France during the Second World War.\textsuperscript{51} Like those plaintiffs in the United States
cases, he asserted on behalf of his clients (Georges Lipietz and a cousin of another name who
wished to remain anonymous) a claim in France under tort law theory, in this instance French
tort law, for crimes against humanity.\textsuperscript{52} The facts of the Lipietz case concerned two cousins who
had been arrested during the Second World War under the anti-Semitic laws of France’s
collaborationist government, known as “Vichy.”\textsuperscript{53} The cousins sued the French government as

\textsuperscript{51} The cases filed in the U.S. were Bodner [and other French WW II case in U.S. – Meyer, etc.]
\textsuperscript{52} I describe and analyze the case at greater length in Vivian Grosswald Curran, 
Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case, 
\textsuperscript{53} Cite
well as the Société nationale des chemins de fer (‘‘SNCF’’), the railroad company that had transported them to an internment camp under inhumane conditions.\textsuperscript{54}

Remarkably, the lower court ruled in favor of plaintiffs, finding a tort violation, although the underlying allegations concerned crimes against humanity. In so doing, the court broke dramatically with tradition, but the case was reversed on appeal by the Court of Appeals of Bordeaux, with the reversal affirmed by the Supreme Court (\textit{Conseil d’État}).\textsuperscript{55} While similar suits had been brought for war-time crimes in France, and convicted defendants in the past had been obliged to remunerate victims financially, this case was controversial because it had been brought entirely outside of a criminal law context. Objectionable to the French, among others, was that a plaintiffs’ lawyer had managed the case, rather than the State, and consequently that matters normally within the public domain were being privatized.\textsuperscript{56}

The privately hired lawyer is the only institutional actor in the French system who is not deemed neutral,\textsuperscript{57} and therefore is suspect for wanting foremost to win the case rather than to promote an understanding of the truth.\textsuperscript{58} The problem, in short, was the transposition to France

\begin{itemize}
\item \textsuperscript{54} Cite
\item \textsuperscript{55} Cite to three decisions, incl my transl of \textit{trib de Toulouse}.
\item \textsuperscript{56} VGC, Lipietz , III, A.
\item \textsuperscript{57} \textit{See infra}, notes – to --, and surrounding text on the role of the French and, generally, civilian prosecutor.
\item \textsuperscript{58} The financial motive would be that of the client, since contingency fees are not allowed. \textit{See} ...
\end{itemize}
of the Anglo-American legal concept of tort liability for a grave human rights violation. The increasingly blurred lines 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 they deem punishment to belong to criminal, not tort, law, it is precisely because tort law’s appropriating punitive measures is considered to be part of this privatization of justice; hence, an impingement on the domain of the State. One sees today a greater receptivity in civilian nations to features of United States law that previously offended their ideas of acceptable legal practices. For example, in a remarkable reversal, the French Supreme Court of private law (Cour de cassation) ruled last year that, in theory at least, punitive damages awarded by a foreign court need not be contrary to French public policy (“ordre public”).

In Lipietz, although critics denounced the case for having been brought by a private party’s lawyer, and therefore someone who was not obliged to do more than present arguments to win his case, the plaintiffs and their lawyer in fact were bringing their action in tort law very much in the spirit of United States tort law cases that are meant to address matters of public concern. This attribute in United States tort cases is the subject of a book by Jules Lobel,

60 Cite. In the case in question the Court held that they were against French ordre public. For Germany and Italy’s handling of U.S. punitive damage awards, see, respectively, ... See also [n. 96, Lipietz at 379: many other countries][Baumgartner].
discussing the tort law tradition as one in which plaintiffs’ lawyers always have brought cases they do not expect to win in order to give plaintiffs a public voice, and to voice in public matters that will generate public discussion today and eventually lead to the legal developments that were raised prematurely. 61 One indication that the Lipietz lawyer was similarly motivated is suggested by plaintiffs’ having included some legal theories which actually might have hurt their own case in order to preserve legal options for future, similarly situated plaintiffs. 62

Criticism of the plaintiffs came from many within the legal community and the French Jewish community, including other survivors of the war and prominent legal authorities such as Simone Veil and Robert Badinter, 63 as well as respected historians of the period such as Annette Wievorka. 64 Criticism focused, inter alia, on repugnance at the implicit message the case allegedly conveyed of human misery’s being compensable by monetary awards; the alleged swiftness of the trial as preclusive of deliberative judgment, in contrast to the recent criminal trial

61 JULES LOBEL, SUCCES WITHOUT VICTORY (year). Cite also to NYT art re ATS cases of 1st generation. For the still incomparably incisive description of the evolution of the common law that corresponds to this pattern, see Edward Levy, ...

62 Curran, 56 Am J Comp L at 366. Note also that class actions in the United States style also are precluded in France, such that each such similarly situated plaintiff would have to sue on his or her own. After the lower court decision, some two thousand plaintiffs sought to file complaints. The Lipietz lawyer opened an Internet page to offer free legal advice to all, and did not represent any himself.

63 Cite

64 Cite
of war-time collaborator Maurice Papon that had gone on for many months; and, finally, the problem that the plaintiff’s lawyer was interested only in making legal arguments which would win the case, rather than in addressing the important historical problems at issue.

French law, like its United States counterpart, does allow victims of crimes to pursue financial redress. In France, they do so by joining the criminal-law trial as a *partie civile*, or “civil party” to it, a procedure duly noted by the Second Circuit in *Kiobel*. But the 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 first frequent incorrect

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65 Cite affaire Papon
66 Sources cited in Lipietz art 374, 375. Another source of criticism that is indirectly germane to the ATS analysis because also somewhat linked to the concern about privatizing justice, and cannot be discounted as a major motivator of the indignation expressed publicly with respect to the Lipietz case, concerns widespread opposition to plaintiffs’ tarnishing the reputation of the SNCF, whose railway workers had saved many deportees by acts of resistance during the war. This source of criticism was not primarily related to the privatization of justice, however; it was more closely a function of concern that Vichy France not be incorrectly and unjustly portrayed as equivalent to Nazi Germany. See interview with Badinter [biographie?]; generally, SIMONE VEIL, UNE VIE.

67 Cite. [Also some of the other circuits]. Other civilian States, like Germany, follow a somewhat different model for victim compensation. See ...
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 civilian States, are specialized in the fields they adjudicate, and it is the criminal-law judge who is endowed with didactic powers unshared by the tort-law judge. Indeed, non-criminal cases take place through writings, by means of a series of mémoires, without witness or other testimony, except for final, oral lawyers’ statements. It is the view of one French scholar that the “triangular relationship among the public authority, the defendant and the partie civile victim” that is the hallmark of the criminal law also is the reason that crime victims should not be able to seek financial redress outside of the criminal-law context.

68 Cite

69 Cite. It should be noted that constitutional courts generally also have this attribute. One thinks especially of the German Federal Constitutional Court in this respect, as well as of the French Conseil constitutionnel and Conseil d'État, the Constitutional Council and Supreme Court of public law.

70 Cite

71 Yves Strickler, Après la crise de l’affaire d’Outreau: l’émotion et la procédure pénale, 249 Petites affiches 7, 10 (14 dec. 2006)
René David, one of the great figures of French comparative law, once explained that
criminal trials are part and parcel of political statements: “A Frenchman knows that [criminal
law] is not and cannot be law in the strict sense[,]”\(^72\) and “[a] Frenchman will allow the
government a degree of . . . even arbitrariness, that is hard to reconcile with the certainty
characteristic of legal principles.”\(^73\) The French criminal trial, as also is the case in other civil-
law States, puts the presiding judge in charge of “a symbolic process that involves conveying a
social message.”\(^74\) The French criminal law judge has been called a “republican monarch,”\(^75\) 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,”\(^76\) well before the final, oral phase,
although ultimate judgment remains subject to change in the trial’s oral phase.\(^77\)


\(^{73}\) *Id.* at 120. CF. **David Bell**.

\(^{74}\) **VGC**, Lipietz at 377. *See also* Stewart Field, *State, Citizen and Character in the French

\(^{75}\) *Id.* at 540, citing P. le Quinquis, *Le Président de la cour d’assises*, 10 REV. GEN. DR.

\(^{76}\) Cite [rule that aucun jugement avant l’audience .]

\(^{77}\) SEE, E.G., **Jacqueline Hodgdon**, ... Note that a “dossier” is conveyed to the judges sitting at
the oral phase of all that has transpired in the preceding 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. Influenced although the United States may be by Rousseau, in France the theoretical foundational idea has been the Roussseauistic 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.78

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 criminal trials of Vichy collaborators such as Touvier79 or Papon.80 The trial in Lipietz was not conducted in public, as those two had been, and could not be, precisely because Lipietz was not heard by a criminal law court. As a

78 See Jean-Jacques Rousseau, Du contrat social ( ). My brief description here hardly does justice to the far more complex and mutli-sourced influences of the French public space. One can hardly conceive of the foundations of the French legal system and the role of its judiciary without Montesquieu’s influence, and its development has been rich in contributions from brilliant theoreticians and legal philosophers in the intervening two centuries.
79 Cite
80 See supra, note --.
tort case, the party memoranda and filings constituted the entirety of the case, and even those filings were outside of the public domain, since, under French law, they are the intellectual property of their authors.\textsuperscript{81}

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 and of being greedy for monetary gain,\textsuperscript{82} 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.

Although French defense lawyers have earned a well-deserved reputation throughout history for admirable courage and selfless dedication, the privately hired lawyer is the least respected member of the court. By contrast, the prosecutor is considered a neutral figure. This is true in most civil-law countries. In France in particular, a measure of the accuracy of prosecutorial neutrality is reflected in demands by accused persons today that their cases be handled by prosecutors rather than judicial police.\textsuperscript{83} By contrast with United States counterparts, in France, prosecutors have no professional interest in obtaining a large number of convictions.

\textsuperscript{81} The plaintiffs’ lawyer gave access to many of his filings; the defendants’ did not.
\textsuperscript{82} See ...
\textsuperscript{83} Cite
Technically, prosecutors are magistrates, the “standing magistrates” as opposed to the judges who are the “sitting” magistrates.\textsuperscript{84} By professional association, they are members of the bench, not the bar. They are appointed civil servants, as are judges and when they are promoted, they usually move to a different part of the country. Thus, they are affected minimally by local reactions.

In the United States, prosecutors are elected, adversarial and are motivated to obtain convictions for the sake of professional advancement. The public has less reason to feel confidence than the public in France to know that a matter is in the hands of the State since the State itself is a party, and the United States system, unlike the civilian inquisitorial order, is adversarial.

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; both offer a means for financial redress.\textsuperscript{85} These are, however, similarities but not identities. 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 the United

\textsuperscript{84} “La magistrature debout et assise.”

\textsuperscript{85} See sources cited in Lipietz, n. 115.
States tort trial.\footnote{Curran, supra note --, at 383.} 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.

Using the basic division between public and private law that Lipietz illustrates and that typifies civilian law, one can better interpret European and international court decisions vis-à-vis the ATS. In the next part, I discuss two cases dealing with tort, thus civil, damages against a nation-state for war-time atrocities committed by its army.

2. A European Court of Justice and an International Court of Justice Case

a. \textit{Kiobel} and the ECJ

As Lipietz was wending its way through the French courts, and later, unsuccessfully, to the European Court of Human Rights, the European Court of Justice ("ECJ") ruled that a tort suit brought for crimes against humanity was not a "civil or commercial matter" within the meaning of the Brussels Convention.\footnote{Case C-292/05, Lechouritou v. State of the Federal Republic of Germany, OJ C 243 (15 Feb. 2007).} The Brussels Convention ensures the mutual recognition and enforcement of judgments within the European Union.\footnote{Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; replaced by Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, known as the Lugano Convention, both of which have been replaced by Council Regulation (EC) No
interpretant of the meaning of the Brussels Convention. Article 1 of the Convention specifies that the Convention “shall apply in civil and commercial matters …” Article 5 refers to “matters relating to tort …”

In Lechouritou, Greek plaintiffs had sought to enforce a judgment against Germany for war-time atrocities committed in Greece. A factually similar case now also has been adjudicated by the International Court of Justice.\(^{89}\) *Lechouritou* concerned an action originally brought in Greece by descendants of civilians the German army had massacred in a Greek municipality in 1943. The court found that, despite being brought in tort for monetary damages, and outside of the context of any criminal law suit, the case did not fall within the meaning of “civil and commercial matters,” a term the Convention, like its subsequent replacements, did not define.\(^{90}\)

So far as it goes, it might seem on the surface as though the decision is a simple application of the principles discussed in *Lipietz*, inasmuch as it consists of a holding that a suit brought for a

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\(^{89}\) Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), ICJ, 3 Feb. 2012.

\(^{90}\) The failure to define the term originated in an assumption that its meaning was obvious, a situation that changed once common-law States acceded to the Convention. Veronika Gärtner, *The Brussels Convention and Reparations – Remarks on the Judgment of the European Court of Justice in Lechouritou v. the State of the Federal Republic of Germany*, 8 GER. L. J. 417, 420 (2007).
crime against humanity cannot couch itself in the form of a civil law tort suit if its subject is a crime against humanity and therefore belongs in criminal court.

That was not the case, however. Sensitive to the presence of both common- and civil-law States within its jurisdiction, the ECJ in fact had held the opposite: that, in principle, where a suit was brought in tort law, all other things being equal, it would be deemed a tort suit even if its underlying subject-matter were a criminal act.\(^\text{91}\) Moreover, in *Lechouritou*, The ECJ emphasized that the enforcement of civil and commercial judgments did not include judgments concerning *State* acts carried out in the exercise of a State’s authority (“*acta iure imperii*”), such as by a defendant State’s army during wartime.\(^\text{92}\) As such, it is not easily comparable to an ATS lawsuit against a corporate entity, where the defendant is not a nation-state. Indeed, in *Sosa*, the United States Supreme Court signaled that, while the ATS refers only to the identity of the plaintiff, requiring that the plaintiff be an alien, a defendant’s identity might be of relevance where it was a question of a public (*i.e.*, State) defendant, as opposed to a private one.\(^\text{93}\)

b. *Kiobel* and the ICJ


\(^{92}\) Lechouritou, *supra* note --, at para. 45.

\(^{93}\) See *Sosa*, *supra* note --, at --. On this issue, see also [Kiobel et al., citing to it]
The most recent case to give rise to suggestions international law forbids ATS recovery in *jus cogens* violations cases is a February, 2012 judgment by the International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*. That case was brought by Germany against Italy for allowing Greek citizens to file a lien to attach German property located in Italy as part of enforcement in Italy of a Greek court judgment against Germany for war-time atrocities Germany had committed in Greece. The ICJ specifically refused to recognize superior legal status to *jus cogens* rights than to sovereign immunity.

However, the court emphatically restricted its reasoning to defendants which are nations, as well as to crimes that are committed as part of wars. Notably, the ICJ looked to the United States for examples of its legal practices in terms of the practices of other nations, and nowhere cited to the ATS with disapproval, or to the United States as having violated international legal practice, or as varying in its practice from the rule the ICJ endorsed. On the contrary, its references to the United States courts suggest that it looked to it for indications of accepted principles in international legal practice.

In holding that a State is immune where its acts were within its public sovereignty, the ICJ was confirming an established principle in international law, “the distinction drawn by an

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94 The Greek courts had granted recovery, but a special Greek Supreme Court holding had blocked enforcement in Greece of the Greek Supreme Court’s decision that tort damages could be assessed against Germany.
increasing number of States between the acts of a Stare in its sovereign capacity \((\text{acta jure imperii})\) and those of a private law or commercial character \((\text{acta jure gestionis})\), immunity not being granted for the latter."\textsuperscript{95} The \textit{Kiobel} plaintiffs asserted allegations concerning crimes against humanity by the Nigerian army, aided and abetted by the defendant corporation. The Second Circuit \textit{Kiobel} majority, in citing the Nuremberg trials, maintained that only natural persons could be held liable \textit{qua} individuals, because only they can have the requisite \textit{mens rea}. Under general principles of law, and keeping in mind the operations of translation from civil-law systems to common-law systems that ATS analysis demands, corporate liability, for the reasons discussed in Part --, is not distinctive from individual liability. What we have seen, rather, is that the civilian system of law distinguished criminal from civil liability and that international law proper distinguishes State acts from individual acts. Justice Breyer summarized the defendants’ argument at one point during oral arguments by characterizing it as a claim that a corporation is not a “moral person.”\textsuperscript{96} Ironically, the literal translation of the term for corporations in French is “moral persons:” \textit{“personnes morales.”}

III. Evolutions in Europe

A. Corporate Criminal Liability: National Laws and the EU

\textsuperscript{95} \textsc{Oppenheim's International Law} 355 (ed.s, Robert Jennings & Arthur Watts KCMG QC, 9\textsuperscript{th} ed., 2008).

\textsuperscript{96} \textit{See} Transcript, \textit{supra} note --, at --.
Today, there is a compelling trend towards corporate criminal responsibility in civilian States. When France enacted its new code of criminal procedure in 1992, it made explicit the equivalence between corporations and individuals in criminal matters.\footnote{Art. 121-2 C. Pr. Pén. (1992) [French Penal Code].} Penalties include a corporation’s dissolution. With tongue in cheek, this has been called a “return of the death penalty,” for corporations, in light of the fact that capital punishment was abolished some time ago for individuals in France, and is outlawed today in all European Union Member States.\footnote{Voir ouvrage à la maison, 2e ét.}

The twentieth century has seen a “fundamental shift” towards embracing corporate criminal liability in West European States,\footnote{Sara Sun Beale & Adam G. Safwat, \textit{What Developments in Western Europe Tell Us About Critiques of Corporate Criminal Liability}, 8 \textit{Buffalo L.Rev.} 1, 105 (April 2004).} as, in addition to France, Belgium, Denmark, Finland, The Netherlands, Norway and Portugal have adopted it, with Germany, Italy and Spain opting for quasi-criminal administrative liability.\footnote{\textit{Id. But see}, [art Yale L.]. – I think 2008]} This shift has been attributed to “primarily, the increasing economic influence of corporations in Western Europe and the unique threats posed to society from unregulated corporate conduct.”\footnote{Beale & Safwat, \textit{supra} note --, at 107. \textit{See also} [from several articles found from West L. search “Corporate criminal liability Europe”]}

The European Union also recognizes criminal responsibility for corporations. Under the Framework Decision on Human Trafficking, EU Member States must hold corporate entities

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criminally liable in sexual and forced labor human trafficking situations. Moreover, corporate liability can be in the nature of accessory as well as principal liability.

B. Civil Damages for Catastrophes in a Globalized World

The ATS’ influence on other nations should not be underestimated. The efficiency of the ATS as a means of alerting corporations to the consequences of committing grave violations of human rights anywhere in the world, and particularly where they may be able to escape local legal retribution, as well as a means of effecting redress for victims, has attracted growing attention.

A new offense has been advocated in France that would join tort and crime under the concept of a “délit à grande échelle” (“high-scale delictual offense”), a term coined by J. Calais Auloy. Its hallmark is the focus on effect: namely, catastrophic-level harm. Unique to this offense is indifference as to whether its origin is a criminal or tortious act. Cases that would


\[\text{103 Ruggie Report, supra last note, at 88.}


\[\text{105 See ANNE GUEGAN-LECUYER, DOMMAGES DE MASSE ET RESPONSABILITE CIVILE 37 (2006).}
come within its purview would include, to name two, the Exxon-Valdez oil spill and a case of French physicians found responsible for disseminating HIV-tainted blood widely.\textsuperscript{106}

In civilian legal systems, the principle against privatizing justice is coupled with the principle that justice must be individual, an impediment to class action lawsuits. In France, the Supreme Court of private law, the \textit{Cour de cassation}, has insisted that legislation is needed to enable any association to represent more than one individual,\textsuperscript{107} a principle it has reiterated ever since it so ruled in 1923.\textsuperscript{108} Legislation has permitted certain groups to be appointed by the government as entitled to represent their members in specific areas, but only individuals who request representation in a particular case can be represented. Of particular interest to the present discussion is that these groups seek civil damages by means of a civil action.\textsuperscript{109} Sometimes the damages are high.

As noted by Calais-Aubry, “[o]ne wonders if the amounts these groups recover are not, really, private penalties disguised as damages and interest. As others have often remarked, the civil action of groups is not really a civil action; it approaches the public action exercised by the ministère public [governmental authority ?] with the one difference that the governmental

\textsuperscript{106} See \textit{id}.
\textsuperscript{108} See Calais-Aubry, supra at 385, n. 23.
\textsuperscript{109} Id. at 386.
authority represents the general interest, while these groups represent only collective interests.”

Thus, we see the struggle of the civilian world to find within its own structures a way to handle the sorts of harm, here massive damage, that is a hallmark of our time. Another method, and the one used in the above-mentioned tainted blood case, has been for the State to assume the responsibility for civil damages towards victims of large-scale crimes in such cases, with the perpetrators then responsible to the State. Perhaps most telling is that Calais-Aubry’s proposal for the “grand-scale delict,” while framed as a plea for a tort action for civil responsibility, concedes that such a cause of action is not part of French law’s legal categories. Accordingly, while he insists on the urgency of adapting current French law to accommodate the catastrophic dangers the public encounters today, he also says: “What is debatable is the use in doing this of rules of civil responsibility.”

IV. Conclusion

In the final analysis, the ATS remains a common-law remedy, like the trust in property law has proven to be a stubbornly common-law idea. The ATS is able to address universally

110 Id.
111 See supra note --; Calais-Aubry, supra note --, at 383.
112 Id. at 387.
113 Id. at 386.
acknowledged crimes by a tort law redress because of the common law’s historical use of tort law for addressing matters of vital interest to the public realm. The fact that the civilian world historically has made use of criminal law for such matters means that it will evolve according to its legal orders. In the meantime, it is to be hoped that honing inter-systemic understanding through increased examination of each others’ legal orders will enhance transnational harmony, in accordance with the principal aim of the First Congress when it enacted the ATS in 1789.