

Back to the Basics: Public Adjudication of Corporate Atrocities Torts

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The editors of this online symposium invited me to contribute to the subject of an argument I have recently advanced. This argument is that the world needs a permanent International Court of Civil Justice (ICCJ) to adjudicate cross-border mass torts.¹ A common reaction to this proposal has been to suggest that the function of such an international court be assumed by one of the existing arbitration institutions or filled by a new one.² I'd like to take this opportunity to argue against that idea.

Corporate atrocities, which are the symposium's focus, may be crimes, but they also have a tort dimension. If corporations, for example, aid and abet the Argentine state torture apparatus or the Nigerian paramilitary campaign against protesters, they are also engaged in the torts of, respectively, battery and wrongful death.³ The crime-tort connection in this context in particular provides an opportunity to reflect on why the resolution of corporate international mass torts should be the province of public rather than private adjudication.⁴

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¹ See generally Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (Dec. 2014) which previews a book by the same name (forthcoming, Cambridge University Press) (presenting both justice-based, and economics-based arguments in favor of an ICCJ as well as a procedural and institutional blueprint for a fair, legitimate, and efficient process for both victims and corporations).

² This idea is also reflected in the introductory essay to this symposium, Juan Pablo Calderón-Meza et al., *An International Jurisdiction for Corporate Atrocity Crimes*, 57 HARV. INT'L L.J. (ONLINE SYMPOSIUM) 1 (2016). An example of this arbitration-expansionist view can be found in Sebastian Perry, *Kiev: BITs, BATs and Buts*, 8 GLOBAL ARB. REV. (Jan. 28, 2013) (recounting a speech by Gary Born).

³ See generally Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1751–52 (2014); Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505 (2016).

⁴ For a comprehensive analysis of mass atrocity accountability mechanisms see MARK J. OSIEL, *AFTER ATROCITY: NEW APPROACHES TO THE RESTRAINT AND REDRESS OF MASS KILLING* (forthcoming).

The basic argument in favor of the public adjudication of mass torts is a simple one, anchored in basic notions of democratic legitimacy.⁵ The adjudication of corporate atrocity torts involves not only the resolution of liability between two private parties but also the public interest in punishing and deterring such torts. The adjudicators of such disputes determine not only extremely high-stakes disputes between classes of victims and corporations, but they also provide persuasive interpretations of the law and, to the extent their decisions are regarded as having any precedential effect (even if only within the arbitral institution), they make the law as well. The fora in which such law-making and interpretation occur, therefore, fulfill the public function of law development as well as the enforcement of public law.

It is difficult to think of a persuasive theory of democratic legitimacy that can support the notion that these functions should be entrusted in the hands of the invisible college of international arbitrators⁶ (also referred to sometimes as the international arbitration “mafia”),⁷ which is comprised predominantly of litigators in prominent corporate law firms⁸ and which is largely devoid of popular participation, public accountability, and electoral supervision. In other words, the call to privatize the public function of adjudicating corporate atrocity torts is a call to entrust it to the private hands of attorneys who compete for work provided by the pool of potential defendants in international corporate atrocity tort cases and who are (properly) immersed in the ethics of private practice and private gain rather than the ethos of public service. The suggested system will also ensure that adjudicators will be drawn exclusively from within the ranks of the richest members of world society.

An example of the democratic legitimacy problems of private arbitration of corporate atrocity torts is the notoriously unrepresentative nature of the invisible college of international arbitrators:

“In 249 known investment treaty cases until May 2010... just 6.5% of all appointments [were of women]. Worse, of the 247 individuals appointed as arbitrators across all cases, only 10 were women. Women thus comprised 4% of those serving as arbitrators. . . . The

⁵ See, e.g., M. Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EJIL 907 (2004). See also, generally, THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS*, (1998). Similar arguments—which apply *a fortiori* to mass torts that accompanying atrocity crimes—are part of the growing discourse of discontent surrounding the privatization of the adjudication of other public disputes: investment disputes. See e.g., *EU Calls for Global Investment Court*, FINANCIAL TIMES (May 5, 2015); Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (February 25, 2015); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 5* (Vaughan Lowe ed., 2007).

⁶ I am alluding to Oscar Schachter’s famous identification of an ‘invisible college of international lawyers.’ See Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977). See also, Santiago Villalpando, *The ‘Invisible College of International Lawyers’ Forty Years Later*, (ESIL 2013 5th Research Forum: International Law as a Profession Conference Paper No 5/2013), <http://ssrn.com/abstract=2363640>.

⁷ GARTH & DEZELAY, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

⁸ *Id.* at 34–41 (discussing how “Grand Old Men” of arbitration—European men based in academia—were increasingly supplanted by “young technocrats”—mostly-male, mostly-white American mega-firm partners).

story is also almost entirely that of two women. . . who together captured 75% of appointments of women... [In contrast], women made up 32% of European Court of Human Rights appointees. . . and 19% of Appellate Body members. . . in WTO history. Incidentally, on a perusal of the data, the system's record on racial and regional representation also appears poor."⁹

In contrast to the opaque and unaccountable process for appointing arbitrators, basic notions of democracy, legitimacy, and justice demand that private attorneys exercising the public function of judges submit to a basic set of checks and balances. For example, their selection to any given panel should be conducted via a public deliberative process, not unlike the appointment of federal judges. Candidates should be required to allow the public, including journalists and NGOs, to scrutinize their list of current and past clients and matters to ferret out conflicts and generally to carry out the functions of the Fourth Estate vis-à-vis courts of law. Such arbitrators should also be required to disclose their assets and their financial and other ties. Their communications with respect to their public function should be discoverable via FOIA-like¹⁰ procedure. They should be required to make their public arbitration proceedings a top priority so as not to delay justice; private engagement should take a back seat. They should also be required to attend relevant trainings and engage in public outreach to the same extent as does the judiciary. It is hard to see how adjudication of public disputes can comply with basic notions of fairness, justice, and legitimacy without such measures. Private parties can, in their contracts, opt out of such protections *ex ante*. But victims of crimes and torts should not be forced to forgo them *ex post*. It is, of course, difficult to envision private practitioners submitting themselves and their firms to such measures of transparency and accountability. Simply stated, the private sector is not set up (nor should it be) to fulfill the public function of adjudicating public law disputes.¹¹

⁹ See, e.g., Gus van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, 59 Columbia FDI Perspectives (Feb. 6, 2012). See also Julianne Hughes-Jennett & Rashida Abdulai, *Barriers to Entry—the Lack of Diversity in International Arbitration*, Lexis PSL Arbitration (2015) (“There is similarly a lack of ethnic diversity in international arbitration: despite 32.3% of the parties to the International Chamber of Commerce (ICC) arbitration in 2013 being from Africa, Asia and the Pacific, less than 15% of the arbitrators appointed in 2013 were from these geographical regions.”). While China and India comprise 33% of the world’s population and 30.4% of global GDP, they represent less than 3% of arbitrators. *Id.* Africa represents only 0.4%. *Id.* Meanwhile, Europe (representing 10.37% of the world’s population but 48.2% of the arbitrators) and the United States and Canada (representing 4.93% of the world’s population but 27.9% of the ICCA arbitrators) are overrepresented. *Id.* There is also a lack of socioeconomic diversity. *Id.* at 462 (“none of the ICCA subjects were arbitrators or counsel from Low Income states.”). The public sector, by comparison, has done better. Several European countries have more than 50% female judiciaries. *Id.* Women represent 40% of judicial positions in Germany and 33% in Canada. *Id.* 39% of United States federal judgeships are occupied by women. See Philip Rucker, *Obama Pushing to Diversify Federal Judiciary Amid GOP Delays*, WASH. POST (Mar. 3, 2013).

¹⁰ Freedom of Information Act, 5 U.S.C. § 552.

¹¹ Whether tort law is private, as traditionally viewed, or public, as many contemporary jurists hold, is a matter of some debate. See, e.g., Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1771 (2012) (“state tort law today ha[s] actually taken on a compound nature, often blending private law and public law features”).

The forgoing arguments in favor of adjudication, rather than arbitration, of corporate atrocity torts can be further bolstered by pointing out the public policies behind the core features of the American tort system, which provides a constitutionally enshrined right to a jury trial, extensive truth-finding via discovery, and punitive damages both as a deterrent to would-be tortfeasors and as an incentive for private enforcement of the law.¹² All these would be forgone if corporate atrocity torts were channeled into arbitration.¹³

The inescapable conclusion is that, despite the well-documented problems characteristic of international courts,¹⁴ such courts, just like our flawed domestic court system, remain the most defensible way forward for international mass tort litigation arising from corporate atrocity crimes.

¹² For a review of the evolution of the American mass tort system and the policy considerations underlying its various features see JOHN COFFEE, *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL AND FUTURE* 95–118 (2016).

¹³ Indeed, arbitration has increasingly—and in the face of great political resistance—been used precisely in this way by a U.S. Supreme Court intent on sending entire categories of cases away from courts, judges, and juries into domestic arbitration. However, even the U.S. Supreme Court has not forced the kind of tort cases contemplated herein into arbitration. See the recent New York Times series of articles on the the rise and misuse of domestic arbitration. See Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration*, NY TIMES (April 27, 2011); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NY TIMES (Oct. 31, 2015); Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES, (Nov. 2, 2015).

¹⁴ See generally S. Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. OF INT'L AND COMP. L. 93 (2012) (arguing the court is ill-equipped to handle international disputes in the 21st century); Michelle Kwon, *The Inefficiency of International Justice*, GEO. J. INT'L AFF. BLOG (Apr. 18, 2012), <http://journal.georgetown.edu/2012/04/18/the-inefficiency-of-international-justice-by-michelle-kwon/> (discussing the failures of post-war, international tribunals); Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1 (2014) (asserting that international criminal tribunals are not cost or time-efficient).