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ARTICLES

With the Supreme Court set to hear *Kiobel v. Royal Dutch Petrol. Co.*, a principal means of seeking redress for corporate complicity in egregious international law violations under the Alien Tort Statute hangs in the balance. This Article examines the doctrine of superior responsibility, otherwise known as command responsibility, as a functional theory of liability in filling some of the gaps potentially left by *Kiobel* or by adding another arrow to the quiver if the Supreme Court refuses to grant corporations immunity. The doctrine of superior responsibility imposes liability on superiors when they knew or should have known about their subordinates' violations of international law, but fail to prevent such acts or punish the perpetrators. After reviewing the application of criminal superior responsibility historically, this Article argues that Alien Tort Statute suits against individual corporate officers for international law violations as superiors will face a wide array of obstacles, allowing human rights victims to obtain civil remedies in only a very narrow set of circumstances.

This Article argues that there is an [a]ccountability gap within the legal frameworks that apply to private military security contractors (PMSCs) that has led to widespread impunity and human rights violations. Recent legal efforts to address the problem have been unsuccessful because they fail to consider and reflect the larger transformations taking place in international relations. This failure is, in essence, the [A]ccountability gap: international law no longer accurately reflects the nature of the realities it is meant to regulate, allowing those organizations which now hold power in global politics, yet are unrecognized by international law, to escape accountability. Thus, I propose a remedy to the [a]ccountability gap for PMSCs that is grounded in addressing, and narrowing, the larger [A]ccountability problem. I suggest a normative framework for the expansion of human rights obligations to PMSCs. This can be done by expanding the existing rigid concepts of "legal personality" under international law to consider non-state actors, specifically, PMSCs, when they are engaging in actions that are "inherently governmental." In addition, this normative framework can be carefully bounded, so as to avoid concerns that it might expand beyond current realities, to recognize only those obligations that reflect a careful balancing of individual rights and legitimate PMSC interests, and to incorporate only those claims that are sufficiently connected to the actions of the PMSC via the theoretical "all-subjected" principle of international justice.

COMMENTARY

This brief introduction outlines the premises of a conference entitled "Litigating Palestine: Can Courts Secure Palestinian Rights?" where two articles from this issue of the *Hastings International and Comparative Law Review* were first presented. The conference premises were: first, that Palestinians have human, civil, and collective national rights; second, that Israel has a lengthy and well-documented record of violating Palestinian rights; and third, that it is an empirical fact that a number of efforts have been launched to protect Palestinian rights in a number of court systems throughout the world. This being the case, it seems appropriate to evaluate these efforts, and to identify ways in which Palestinian rights can be advanced via legal and peaceful means. Many questions may be raised concerning the use of law to advance Palestinian rights, among them: can Palestinians get a fair hearing in courts? If so, where? What strategies are likely to be most effective? What are the costs of litigation, beyond actual fees and tangible expenses of trying cases? How can success in litigation be accurately measured? What if litigation proves futile? What other means exist to advance Palestinian rights for those who are committed to legal and peaceful means of resolving disputes? And what does the use of courts to protect Palestinian rights contribute to broader theoretical discussions either about the use of courts to effect social or political change, or the circumstances under which lawyers working for justice and human rights can hope to succeed?

The Political Question Doctrine is a problematic and an often misused doctrine that prevents courts from fulfilling their

Article III responsibilities. Nowhere is this misuse more prevalent than in human rights cases involving Palestine, and in particular, human rights cases alleging misconduct by the Israeli government or officials. This Article discusses in detail courts' decisions regarding the Political Question Doctrine raised in human rights litigation, and analyzes courts' decisions in such cases involving Palestine. It notes the stark difference in both outcome and analysis regarding cases against the PLO, Arab Bank, or others acting in Palestinian interests – all of which have been allowed to proceed where the Political Question Doctrine has been raised – and cases alleging abuses by Israel or Israeli officials. Part I provides the framework by discussing the origins of the Political Question Doctrine. Part II summarizes the doctrine's emergence and applicability in human rights litigation in the United States, noting in particular the cases discussions of the doctrine when it has arisen as a defense in cases involving the individuals, corporations, and groups, such as the PLO. Part III describes how the courts have dismissed all cases involving Israeli's alleged illegal actions on, *inter alia*, political question grounds, and describes why and how these decisions are analytically contradictory and problematic. The Article concludes that only when the Political Question Doctrine is reformulated, narrowed, and clarified will cases arising in clearly political contexts be adjudicated with less contradiction and more analytical consistency so that biases and prejudices – conscious or unconscious – will not seep into these decisions.

This Article examines the claim that United Nations (UN) membership will improve Palestine's ability to have recourse to international courts and tribunals. With the exception of seeking an advisory opinion from the International Court of Justice (ICJ) upon a referral from the UN General Assembly or as a result of a request from a specialized agency, Palestine must be a state in order to become a party to the ICJ in a contentious case and in order to accede to the Statute of the International Criminal

Court (ICC). Because admission to the UN is based on the assumption that the entity seeking membership is already a state, should Palestine succeed with becoming a member of the UN, it would greatly enhance its capacity to challenge Israel's frequent transgressions of international law. This is because UN membership would provide compelling evidence that Palestine is a state. And as a state, Palestine would be able to accede to the statutes of both the ICJ and the ICC.

NOTES

In 2010, Jorge Luis Aguirre became the first known journalist from Mexico to receive asylum in the United States. Aguirre, like many of his colleagues, had received several threats to his life for reporting on the drug-related violence and government corruption in Mexico. In fact, since Felipe Calderon assumed the presidency in Mexico in December 2006, more than thirty journalists in the country have been murdered or have disappeared. Faced with the possibility of becoming the next casualty in the ongoing drug war, several Mexican journalists have fled to the United States to apply for asylum.

Although the United States asylum system has historically failed to protect journalists facing persecution, United States asylum laws can and should provide relief for threatened journalists in Mexico, either under the "political opinion" or "particular social group" category, which are two of the five grounds under which a person can gain asylum or withholding of deportation under the refugee definition. This Note examines current United States interpretations of and requirements for the "particular social group" category for asylum, and argues that this category can and should be used to grant asylum to threatened journalists from Mexico. This Note concludes that granting asylum to journalists facing a well-founded fear of persecution is consistent with the language of the Refugee Act, as well as the humanitarian purposes of refugee protection, and is in the best interest of the United States in its quest to end the

Netherlands, Norway, Spain, and several states of Australia have introduced similar measures. Syria, Egypt and Sweden have all passed laws banning face-veils in public schools. Many other nations and more local governments have considered anti-veil legislation or upheld the denial of basic services to citizens who cover their faces.

This Note begins with a historical approach to the practice of covering the face in public, demonstrating that face-veiling and masking of various kinds were common practices in European and Muslim societies since antiquity, and these practices are not anathema to a free society. It reviews the development of United States anti-mask laws, generally enacted to combat the Ku Klux Klan, as a close analogue to the more recent veil bans. Lastly, it reviews the history, construction and rationale of modern laws and initiatives that restrict the wearing of Islamic nuqub or face-veils.

Although recent niqab bans have emerged in the context of a broader campaign against Muslim expression, they represent new legislative strategies that raise distinct issues of fundamental rights. Rather than defending face-veils in relation to freedom of religion or minority rights, this Note advocates defending the right to cover the face as a right of expression and privacy. Adopting the frameworks of the Universal Declaration of Human Rights, the European Declaration of Human Rights and the United States Constitution, it rejects claims that state interests in uncovering the face are compelling or necessary to democracy.

Over the past decade, a growing number of American and European women have begun to travel to other countries, often developing countries, in search of surrogates. The surrogates are usually "gestational surrogates," meaning that the children to whom they give birth are conceived via in vitro fertilization. The

children are thus genetically related to the commissioning parents, or to the commissioning men and third-party women who provide eggs, but not to the surrogate birth mothers. Uncertainty about the legality of such surrogacy contracts in the United States, and outright bans on the contracts in some European countries, fuel the "reproductive tourism" market in countries, such as India, that have minimal or no regulations on the practice.

The complicated nature of the technology and economics at work in the surrogacy markets has led to a general deferral to professional bioethics analysis. The modern principles of bioethics, however, are not well suited to creating policy. The Universal Declaration on Bioethics and Human Rights (UDBHR), which blends bioethics procedure with substantive human rights policy, attempts to remedy this problem but fails because of its fatal contradiction between respect for diversity of opinion and a mandate for social justice via uniform regulation. This Note argues that for biotechnologies that affect fundamental elements of the human experience, civil society groups that base their opinions on community impact data and give a voice to the currently underrepresented must be involved in the regulatory deliberation via a process called "biopolitics." This will help ensure that the international community creates a fully informed governing structure that prevents international surrogacy from exacerbating existing, and creating new forms of social disparities and discrimination.