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Kiobel Case: Corporate Accountability for Human Rights Abuses

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Will the US Supreme Court strike a blow to corporate accountability for human rights abuses?

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The US is not alone in grappling with the liability of transnational corporations for human rights abuses [Reuters]

The United States Supreme Court is poised to issue a ruling in the case of ***Kiobel v Royal Dutch Petroleum***. The stakes are enormous - the case will determine whether victims of human rights abuses on foreign soil, who often lack any other viable legal remedy, can bring suit against corporations in US courts.

The underlying facts of the Kiobel case are deeply disturbing. In the 1990s, the Movement for the Survival of the Ogoni People was comprised of a group of activists advocating for environmental and social justice surrounding oil exploration by Royal Dutch Shell and its subsidiaries in the Ogoni region of the Niger Delta. Amid severe repression, nine members of the movement, including Dr Barinem Kiobel, were arrested, charged with specious crimes, tortured and summarily hanged. Dr Kiobel's widow Esther and 11 other plaintiffs, all either victims of torture or relatives of victims residing in the US brought a class action suit in the US District Court.

According to **the plaintiffs**, Royal Dutch Petroleum, parent company of Shell, was complicit with the brutal Nigerian dictatorship in "a widespread and systematic campaign of torture, extrajudicial executions, prolonged arbitrary detention, and indiscriminate killings constituting crimes against humanity to violently suppress this movement".

The suit was brought under the Alien Tort Statute (ATS), a law enacted in 1789 to confer jurisdiction on the federal courts to hear claims brought by non-US citizens alleging violations of international law. The ATS was an obscure statute that had been dormant for almost two centuries until a pioneering lawsuit filed by the family of Joelito Filartiga - the 17-year-old son of a Paraguayan activist who was tortured and killed by a police inspector, who was by then a resident in the US.

In 1980, the Second Circuit Court of Appeals held in ***Filartiga v Pena Irala*** that the ATS conferred jurisdiction for violations of universally accepted human rights norms committed by actors vested with official authority.

Several decades passed before the next ground-breaking development in ATS litigation, when victims of the Burmese military junta sued **Unocal** for its complicity with widespread and egregious abuses committed during construction of a transnational oil pipeline, including murders, rape, violent evictions and forced labour. After years of legal posturing, the case ultimately settled in 2004 for an undisclosed sum, and plaintiffs were compensated for the abuses they suffered. The case's success prompted dozens of other victims of human rights abroad to seek justice from corporations under the ATS.

Human rights violations

The Kiobel case is the first time the issue of corporate liability under the ATS has reached the Supreme Court. In 2010, the Second Circuit Court of Appeals, the same court that created the Filartiga precedent, held in Kiobel that the ATS did not apply to corporations. On appeal, the Supreme Court initially heard arguments on the threshold jurisdictional issue of the statute's applicability to corporations, and then requested supplemental briefs on whether the ATS allowed for the extraterritorial application of US laws, which many observers considered to be settled law.

The Court held in ***Sosa v Alvarz Machain*** that the ATS applies to foreign violations of international that are recognised as "specific, universal and obligatory", and courts have applied the ATS to violations such as such as genocide, crimes against humanity, torture and summary execution. Kiobel plaintiffs argued that the violations they suffered are universally recognised and condemned harms under customary international law. In its defence, **Shell argued** that "the law of nations" does not recognise corporate liability for human rights abuses and that the ATS does not apply extraterritorially. Legal observers expect a decision in the Kiobel case at any time.

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In justifying its position against the extraterritorial application of US laws, Shell underscored the "adverse consequences to US trade and foreign policy of a liberal expansion of private causes of action against corporations under international law". It also posited that the costs associated with potential liability "may lead corporations to reduce their operations in the less-developed countries from which these suits tend to arise, to the detriment of citizens of those countries who benefit from foreign investment".

The assertion that all citizens of developing countries in which corporations act benefit from their activities is the subject of withering critique, and not only from the expected critics from the left. Former Republican **US Senator Richard Lugar acknowledged** the "resource curse" on the floor of the Senate in the debate on the **Cardin-Lugar**

Amendment of the **Dodd-Frank Act**, arguing:

> "Oil, gas reserves, and minerals frequently can be a bane, not a blessing, for poor countries, leading to corruption, wasteful spending, military adventurism, and instability. Too often, oil money intended for a nation's poor ends up lining the pockets of the rich or is squandered on showcase projects instead of productive investments."

The US State Department has also supported the law, noting that it advances rather than undermines US foreign policy interests.

Many human rights abuses are associated with the extractive industries, but also occur in the areas of **forced labour**, **environmental degradation**, **the involuntary displacement of indigenous peoples** from their ancestral lands and others violations. In many of these cases, domestic remedies are wholly unattainable for those harmed, for a variety of reasons. The US is not alone in grappling with the liability of transnational corporations for human rights abuses: in path-breaking litigation, **Hudbay Minerals** stands accused in Canadian courts of complicity in human rights abuses in Guatemala.

The countries, industries and harms vary widely in terms of scope and severity, but they share a disturbingly common theme: the lack of consistent, effective and accessible remedies for the human rights harms associated with the activities of transnational corporations.

Complicating efforts to hold transnational corporations accountable is the fact that companies often construct a series of **subsidiary companies** that mask their true ownership, make it hard to impost corporate liability. Imposing corporate accountability is further impeded by other factors.

Logistically, many countries in the Global South where many transnational corporations operate lack the institutional and judicial capacity to manage complex litigation. Moreover, subsidiary companies often funnel profits to the parent corporations, leaving them with inadequate cash reserves to satisfy legal liabilities. Lastly, as noted above, governments may be reluctant to send a message of corporate accountability because those in power are often the most direct beneficiaries of corporate activity.

Establishing standards of liability

International human rights norms have evolved over the past 50 years, though the primary focus has been on the conduct of state actors. Establishing standards of liability for non-state actors must follow suit. The rise of **corporate economic power** is highlighted by staggering statistics: 51 out of the world's 100 largest economic entities are corporations and the remaining 49 are countries.

In the US, **the wealth owned by the Walton family**, of Walmart fame, is equivalent to the worth of the bottom 40 percent of Americans. **If Walmart's revenue was listed as GDP**, it would rank 25th in the world, ahead of the economies of 157 countries. Given the unprecedented level of globalisation and the ascent of corporate economic might, the development of international norms and enforcement mechanisms for the accountability of non-state actors is essential to advancing justice and long overdue.

Various multi-stakeholder initiatives indicate a global concern about the potentially destructive impact of corporate activities on human rights. The **UN-backed Guiding Principles on Business and Human Rights** represents an acknowledgement by some corporations that they should adhere to the "protect, respect and remedy" framework for safeguarding human rights in their operations.

Concern over the abuses often associated with the extractive industries in the Global South motivated the creation of the **Extractive Industries Transparency Initiative** (EITI), now implemented by 37 countries. EITI's strategic goals include minimising risk for investors and "strengthening accountability and good governance, as well as promoting greater economic and political stability. This, in turn, can contribute to the prevention of conflict based around the oil, mining and gas sectors". But absent effective access to judicial remedies, these standards are purely aspirational and therefore, unenforceable

In the US, it seems disingenuous for corporations to argue that they are not natural persons for the purposes of liability under the ATS, while invoking the protections attaching to corporate personhood to justify their desired outcome in the **Citizens United** case. Citizens United generated a storm of controversy for holding that the government could not regulate the political speech of corporations by limiting their contributions to political campaigns. Juxtaposing these positions reveals that corporations are attempting to have it both ways: they want to enjoy rights of corporate personhood while avoiding its attendant responsibilities.

In effect, transnational corporations want to be immunised from liability for their conduct beyond the borders of the US, irrespective of whether a remedy is available elsewhere.

The corporations that voluntarily adhere to principles of Corporate Social Responsibility are likely not the vociferous opponents of accountability, and are arguably at a competitive disadvantage when others are permitted to violate human rights with impunity. Given corporate complicity in egregious abuses around the world, respect for human rights should not be a function of voluntary compliance but instead a matter of enforceable legal rights. The international community must demand accountability, and reinforce and reaffirm the practices of corporations that do take seriously the impact of their behaviour.

The Supreme Court's decision in the Kiobel case should advance global justice by categorically rejecting impunity for human rights abuses in which transnational corporations are complicit.

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