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The uphill battle to hold US corporations accountable for abuses abroad

Proposed treaty would require nations to regulate conduct of their firms on foreign soil

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by [Lauren Carasik](#) @LCarasik

On July 24, the Court of Appeals for the Eleventh Circuit [dismissed a lawsuit](#) (PDF) against the U.S.-based banana and produce company Chiquita by 4,000 victims of targeted violence during Colombia's bloody civil war. The case was filed in 2007 on behalf of the families of union leaders, laborers, activists and ordinary villagers who claimed that Chiquita provided funding and logistical support to the Colombian right-wing paramilitary group United Self-Defense Forces of Colombia (known by its Spanish acronym AUC) that killed or disappeared their loved ones. The court found that though Chiquita executives in Ohio did make illegal payments to the AUC, the case did not "touch and concern" the U.S., because the harms occurred abroad.

The court applied a narrow interpretation of the jurisdictional standard set by the Supreme Court's decision last year in [Kiobel v. Royal Dutch Petroleum](#) (PDF). Kiobel made it much more difficult for plaintiffs to file lawsuits under the Alien Tort Statute (ATS), which allows victims of human rights abuses committed abroad, to sue the perpetrators in the U.S.

Judge Beverly Martin, who authored a dissenting opinion in the Chiquita case, derided the court's unwillingness to enforce the ATS. By doing so, she wrote, "we disarm innocents against American corporations that engage in human rights violations abroad. I understand the ATS to have been deliberately crafted to avoid this regrettable result."

The [plaintiffs' lawyers are confident](#) that the decision will be reversed [on appeal](#). But the case highlights a glaring gap in the international framework for holding transnational corporations accountable for their conduct and underscores the importance of developing mechanisms to ensure that victims have access to judicial remedies. To that end, the United Nations Human Rights Council [passed a resolution](#) on June 26 creating a working group tasked with developing a legally binding instrument on transnational businesses and human rights. The move is an important — though deeply contested — step toward holding corporations accountable for complicity in human rights abuses across borders, as decisions like the one in Chiquita are closing the door to victims.

Weak domestic mechanisms

In 2007, Chiquita [pleaded guilty](#) to making more than 100 payments totaling more than \$1.7 million to the AUC, a designated terrorist organization, between 1997 and 2004. The U.S. government fined the company \$25 million but whitewashed its admission of wrongdoing, claiming it was extorted by the AUC and derived no benefit from the payments. [Documents](#) released in 2011, however, revealed that Chiquita did benefit, from the AUC's violent suppression of labor and social unrest that could have impinged on the profitability of the company's operations. Chiquita has since moved assets out of Colombia, which, combined with government complicity with the AUC, makes the pursuit of redress in that country futile.

According to a recent study by the International Corporate Accountability Roundtable, victims of transnational corporate abuses face myriad barriers to [accessing judicial remedies](#) (PDF), including the prohibitive costs of litigation across borders, statutes of limitations and corporate structures that are built on legally distinct entities and insulate companies from liability. Observers point to the importance of using national accountability mechanisms, though many countries lack the institutions to legislate, adjudicate and enforce protections. But even in countries with robust rule-of-law traditions, victims face daunting challenges.

Big companies invoke the protections of international law when it suits them, yet they aggressively resist efforts to impose accountability across borders.

The Chiquita case occurs amid rising corporate power in the U.S. and waning political and judicial will to rein it in. The Corporate Accountability Coalition, an advocacy alliance, issues a yearly [report card](#) (PDF) that measures congressional efforts to protect people by promoting corporate transparency and accountability. The 2013 results were discouraging — though, given the massive corporate investment in evading accountability, not surprising. The report found no progress on eroding corporate power and impunity. Last year, the U.S. Chamber of Commerce spent \$75 million on lobbying and the collective lobbying expenditures from the top 10 corporations amounted to \$157 million. During its 2012-13 term, the Supreme Court sided with the Chamber of Commerce 82 percent of the time, with the Kiobel case striking a particularly demoralizing blow to human rights victims trying to hold corporations accountable. The Kiobel decision was followed by the decision earlier this year in [Daimler AG vs. Bauman](#) (PDF), which made it harder for U.S. courts to exercise general jurisdiction over transnational companies.

International accountability

Efforts to develop enforceable international norms on corporate accountability are not new, though globalization has made the need for a new framework all the more urgent.

The first initiative to develop standards started in 1970s with the [Code of Conduct on Transnational Corporations](#), followed by the [Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights](#), neither of which won U.N. approval. In 2011, the U.N. unanimously adopted the [Guiding Principles on Business and Human Rights](#) (PDF), which imposes soft law — i.e., nonbinding — standards and derives its legitimacy from a consensus-based approach. But many civil society organizations [opposed](#) (PDF) the Guiding Principles, in part because the

standards were unenforceable and distracted from demands for real accountability. A coalition of governments continued pushing for a more robust framework, joined by more than 600 civil society organizations that signed a statement calling for a legally binding international instrument on business and human rights.

Although it passed, the resolution did not represent a consensus, failing to garner a majority vote: Twenty members of the Human Rights Council supported the resolution, 14 members voted against it and 13 members abstained. Perhaps predictably, developing countries in Latin America, Asia and Africa generally voted in favor, while the U.S. and the European Union, where most transnational companies are incorporated, were opposed. According to its [statement](#) on the resolution, Washington fears that a move toward such a treaty would divert attention from state initiatives and encompass too broad a mandate to be meaningful. The U.S. has vowed to [boycott the process](#) and is encouraging other governments to follow suit.

Some critics warn that “[corporate capture](#)” at the U.N. — the disproportionate and opaque influence of transnational companies in setting the organization’s agenda and standards — will derail the treaty effort. It also faces formidable opposition beyond the powerful transnational corporations and the governments that protect them. Some human rights advocates and civil society organizations oppose the initiative as well, fearful that the focus on transnational companies will obscure the misconduct of national companies or that contentious treaty negotiations will thwart efforts to solidify the consensus about voluntary international norms that does exist.

Central to the issue is a marked power imbalance: Big companies employ their considerable resources to shield themselves and impose double standards that serve their interests. They invoke the protections of international law when it suits them, taking advantage of international tribunals that protect investors and free trade agreements that grant corporations the right to sue governments. Yet they aggressively resist efforts to impose accountability across borders.

Meanwhile, the victims of the Chiquita-funded AUC paramilitary and other egregious human rights abuses are left without a remedy. While the international community may not possess the institutional capacity or legitimacy to enforce obligations against private actors, developing a framework that requires states to regulate the conduct of their corporate citizens on foreign soil would give victims a fighting chance to pursue justice.

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The views expressed in this article are the author's own and do not necessarily reflect Al Jazeera America's editorial policy.