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Business and human rights after Kiobel

*Jernej Letnar Čerňič*¹

ABSTRACT

Corporations have so far had a troublesome relationship with human rights. Transnational corporations are paying ever more attention to human rights in relation to the employees and residents of the countries in which they operate. Unfortunately, there are still cases where corporations are directly or indirectly involved in human rights violations. The main question concerns whether and where victims can claim any kind of responsibility for corporate human rights violations

Key words: business and human rights, Kiobel, transnational corporations, victims of human rights violations

Podjetja in človekove pravice po odločitvi v zadevi Kiobel

POVZETEK

Večina korporacij si doslej ni prizadevala za spoštovanje in varovanje človekovih pravic. Transnacionalne korporacije posvečajo vse več pozornosti človekovim pravicam v zvezi z delavci in prebivalci držav, v katerih delujejo. Žal pa še vedno obstajajo primeri, ko so družbe posredno ali neposredno vpletene v kršenje človekovih pravic. Med glavna nerešena vprašanja sodi, kje lahko

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žrtve uveljavljajo kakršnokoli odgovornost za kršitve človekovih pravic s strani podjetij.

Ključne besede: podjetja in človekove pravice, Kiobel, transnacionalne korporacije, žrtve kršitev človekovih pravic

Introduction

Corporations have so far had a troublesome relationship with human rights. Transnational corporations are paying ever more attention to human rights in relation to the employees and residents of the countries in which they operate. Unfortunately, there are still cases where corporations are directly or indirectly involved in human rights violations. The main question concerns whether and where victims can claim any kind of responsibility for corporate human rights violations. This short note examines the decision of the United States Supreme Court in *Kiobel v Royal Dutch Petroleum*² from the perspective of the field of business and human rights.

Background and Kiobel Decision

The US Alien Tort Statute (ATS) has provided one of the few channels for an individual to bring an action for damages against corporations for alleged human rights violations by having knowledge of or directly assisting in such violations. The US Congress enacted the ATS as part of section 9 of the Judiciary Act of 1789. The relevant section provides as follows: “the district courts 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.”³ International non-governmental organizations in the field of human rights have therefore put their hopes in domestic legal systems, particularly in the legal system of the United States which has so far been a relatively favorable forum for claims against transnational corporations for human rights violations. More specifically, the ATS has been of the few forums to allow also non-

² *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, slip op. at 5 (U.S. Sup. Ct. April 17, 2013).

³ Alien Torts Claims Act of 1789, 28 U.S.C. § 1350. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Human rights claims against corporations can also be brought in the United States under the Torture Victims Protection Act, 28 USC, Section 1350.

US victims of human rights violations to enforce the accountability of transnational corporations for violations committed outside US territory. All that has been necessary is that a corporation is established in US territory or does business there.

US courts have so far dealt more than 100 ATS cases brought against corporations. Several claims are currently pending against several corporations for, *inter alia*, alleged involvement in crimes against humanity, war crimes, torture and forced labor and, to date, 13 claims against corporations have been settled.⁴ In two cases the victims were successful.⁵ US courts have dealt with a number of cases against corporations. However, most of them have not resulted in a positive outcome for the victims.⁶

The ATS was hit with a powerful punch when on April 17, 2013 the US Supreme Court delivered its long-awaited decision in the case of *Kiobel et al. v Royal Dutch Petroleum Co.* In this case, a group of Nigerian citizens claimed that a subsidiary of the Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., was responsible due to its alleged cooperation with the Nigerian military forces in human rights violations in the province of Ogoniland. More specifically, the petitioners alleged that “throughout the early 1990’s, ..., Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property...” and that the “respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents’ property as a staging ground for attacks.”⁷ The US Court of Appeals of the Second Circuit in New York ruled that international law does not allow for corporate liability for human rights violations outside of US territory.⁸ The complaint was then transferred to the United States Supreme Court. At the hearing, the following major issues emerged: whether the ATS allows for corporate liability and whether the same law allows for the enfor-

⁴ See MD Goldhaber, Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard, UC Irvine Law Review, 2013, Vol. 3:127, at 128-129.

⁵ *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D.Fla. 2008), *Aguilar v. Imperial Nurseries*, No. 3-07-cv-193 (JCH), 2008 WL 2572250. Cited in Michael D. Goldhaber, Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard, UC Irvine Law Review, 2013, Vol. 3:127, at 128.

⁶ See, for instance, *Khulumani v. Barclay Nat. Bank Ltd.*, United States Court of Appeals, Second Circuit, October 12, 2007, 2007 WL 2985101.

⁷ *Kiobel*, at 2.

⁸ 621 F. 3d 111 (2010). See also *Kiobel*, at 3.

cement of accountability for violations been committed outside US territory.⁹

The US Supreme Court primarily focused on the second question. It confirmed the presumption against the extraterritorial validity of the ATS. Moreover, they noted that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”¹⁰ The judges agreed that US courts cannot be responsible for processing the claims of victims of alleged human rights violations outside of US territory. American courts will now only in exceptional cases consider actions against a company, and then only when the actions “and even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application... Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices”.¹¹ In this instance, it is not perfectly clear what kind of claims “can displace the presumption against the extraterritorial application”. Judge Breyer resorted in his concurring opinion to foreign relations law and noted that jurisdiction can only be established if “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor ... for a torturer or other common enemy of mankind.”¹² In short, in the future plaintiffs will need to demonstrate a genuine link of the respective corporations with US territory.

While some commentators have described the decision as a shock to the international community in the field of human rights¹³ and the possible death knell for claims against corporati-

⁹ See Business & Human Rights Resource Centre, <http://www.business-humanrights.org/Documents/SupremeCourtATCARReviewBkgrd>; See also Curtis A. Bradley, Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries, ASIL Insight, April 18, 2013, <http://www.asil.org/insights130418.cfm>.

¹⁰ *Kiobel*, at 12.

¹¹ *Ibid.*, at 14.

¹² Concurring opinion of Justice Breyer, at 1-2.

¹³ Earthrights International, April 17, 2013, <http://www.earthrights.org/media/kiobel-v-shell-supreme-court-limits-courts-ability-hear-claims-human-rights-abuses-committed>. Also see Human Rights First, *Kiobel Ruling Undermines U.S. Leadership on Human Rights*, April 17, 2013, <http://www.humanrightsfirst.org/2013/04/17/kiobel-ruling-undermines-u-s-leadership-on-human-rights/>. See also Human Rights Watch, *Supreme Court Limits Suits against Rights Abusers Abroad*, <http://www.hrw.org/news/2013/04/29/us-supreme-court-limits-suits-against-rights-abusers-abroad>, April 23, 2013.

ons as the US legal system has been one of the few to allow victims' actions for damages for extraterritorial violations of human rights, others have welcomed it as refreshing.¹⁴ The decision is in fact neither of these. Victims' options were already quite limited before this decision as only a handful of forums exist where they can bring cases against corporations for alleged human rights violations. What is more, the US Supreme Court has not ruled on the possibility to bring claims against corporations, even though some commentators have argued that the court at least implicitly recognized corporate liability.¹⁵ Such possibilities seem to remain open. Nor is the decision somehow different from other jurisdictions where victims also struggle to enforce any kind of responsibility for corporate conduct. For instance, on January 30, 2013 the District Court of the Hague dismissed an action against Royal Dutch Shell for alleged violations of its subsidiary in Nigeria.¹⁶ Nonetheless, the Kiobel decision will have the greatest impact on individuals from countries with inoperative and inefficient legal systems as they are left empty-handed with regard to a potential forum for their claims. Domestic legal systems of the countries where violations are committed should primarily be responsible for their legal redress, yet they are for those most in need unable to deal with such cases. Proving the corporate liability for extraterritorial violations of human rights has thus so far been a difficult and thankless task.

International and National Human Rights Law

International human rights law currently does not provide a mechanism whereby individuals can protect their rights vis-à-vis corporate conduct.¹⁷ In most cases the victims therefore remain without the right to effective judicial protection at the international level, leaving victims to seek recourse in the domestic courts. National enforcement mechanisms play a vital role in protecting

¹⁴ US Council for International Business, Business Hails Supreme Court Ruling on Alien Tort Statute, April 17, 2013.

¹⁵ J. Wells, Kiobel Insta-Symposium: Is Corporate Liability Jurisdictional?, May 8, 2013,

<http://opiniojuris.org/2013/05/08/kiobel-insta-symposium-is-corporate-liability-jurisdictional/>

¹⁶ District Court of the Hague, C/09/337050/ HA ZA 09-1580, January 30, 2013, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BY9854&vrije_tekst=nigeria.

¹⁷ Larissa Van den Herik, Jernej Letnar Čerňič, Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again (2010) 8 *Journal of International Criminal Justice* 725.

human rights. National constitutional courts have in the past reaffirmed the importance of human rights, including against corporations.¹⁸ Several national jurisdictions have upheld human rights claims against corporations.¹⁹ A number of national legal orders provide for corporate criminal responsibility for crimes against humanity and war crimes. In the French legal order, “legal persons may incur criminal liability for crimes against humanity pursuant to the conditions set out under Article 121-2.”²⁰ Similarly, corporations can be held criminally liable for international crime under Dutch law.²¹ However, it is true that it is very difficult to prove such cases.²² Further, the National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises may provide an avenue for the enforcement of some rights against corporations. A number of cases against corporations have so far been brought before respective NCPs.²³ However, such examples are only a few, whereas monitoring mechanisms in most national legal orders are at best ineffective and at worst only hold symbolic significance for the enforcement of human rights against corporations.

An alternative way forward: A bottom-up approach

The traditional understanding of international law generally precludes the protection of human rights by actors other than a territorial state. However, giving real meaning to business and human rights asks for a novel approach, an approach which would not only take the rights of corporations and their owners into consideration, but also the human rights of ordinary people living ordinary lives. In order to achieve this, it is pertinent to break with the traditional paradigm of international law which has been created by states for state and non-state actors, and take the thorny road

¹⁸ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (October 8, 2009).

¹⁹ See, for example, Comisión Estatal de Derechos Humanos, Nuevo Leon, Mexico, CEDH/242/2011, December 31, 2012.

²⁰ French Criminal Code, Article 213 (3).

²¹ Nicola Jägers, Fafo study, The Netherlands, <<http://www.fafo.no/liabilities/CCCSurveyNetherlands06Sep2006.pdf>>, at 16.

²² See, for example, V. Azarov, Investigative or Political Barriers? Dutch Prosecutor Dismisses Criminal Complicity Case against Riwal, Rights as Usual, <http://rightsasusual.com/2013/05/investigative-or-political-barriers-dutch-prosecutor-dismisses-criminal-complicity-case-against-riwal/>, May 29, 2013.

²³ European Center for Constitutional and Human Rights, A Comparison of National Contact Points – Best practices in OECD complaints procedures, Berlin, November 2011, <http://www.ecchr.de/index.php/ecchr-publications/articles/a-comparison-of-national-contact-points-best-practices-in-oecd-complaints-procedures-1333.html>.

of creating international law from the lowest possible point. In order to develop the right medicine for the relationship between business and human rights, one has to look at the bottom – and employ a bottom-up approach also taking the needs of ordinary people into account is required.²⁴ Levit notes that “bottom-up lawmaking at once debunks the perceived hegemony of official, top-down international lawmaking – lawmaking that often occurs beyond the physical and metaphysical reach of its subjects – and showcases an alternative route to law that is inherently grounded and pluralist.”²⁵ Namely, law that is not created far away from ordinary people’s lives in different ivory towers, but which arises from various private and public initiatives. What may arise as problematic is that the stakeholders of business and human rights are different and fall into different categories. Human rights stakeholders most often include non-governmental organizations, public interest groups, victims’ organizations, trade unions, student organizations, consumer groups, academics and international organizations. On the other hand, the business sector includes organizations of employers, privately and state-owned corporations. Not only do states create international law, but indirectly by applying pressure so too do non-state actors such as non-governmental organizations, corporations and various other groups.²⁶ Such an order includes obligations on corporations to observe the human rights of individuals in home and host state. Such obligations may derive from soft law documents, yet they can include “hard” norms.²⁷ For example, paragraph 11 of the United Nations Guiding principles on business and human rights notes that corporations should respect human rights, which “means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”²⁸ Some may argue that such an approach could create

²⁴ S. Deva, *Regulating Corporate Human Rights Violations*, Rutledge, 2012.

²⁵ J. Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law* (2007) 32 *Yale Journal of International Law* 393, at 409. Also see Janet Koven, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments* (2005) 30 *Yale Journal of International Law* 125.

²⁶ See, for instance, Steve Charnovitz, *Non-governmental organizations and international law*, 100 *American Journal of International Law* 348 (2006).

²⁷ J. Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law* (2007) 32 *Yale Journal of International Law* 393, at 414.

²⁸ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011) (by John Ruggie), para. 11.

practical problems. However, there are several examples, for instance the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights²⁹, the UNCTAD principles on promoting responsible sovereign lending and borrowing³⁰ and the Guiding principles and business and human rights³¹, that have been developed from the bottom up or at least with some involvement of civil society. Such actions could include internal and external pressure on corporations but also on states in the form of demonstrations, boycotts, pressure on social media, lobbying in public administration structures and other forms of social pressure. For example, a good example of a bottom-up approach would be obligation to secure the prior consent of an indigenous community in order for a corporation to invest in areas where a community lives.³² Such methods would also enforce from the bottom up corporate obligations to observe human rights. The latter informal methods could later turn into formal pressure on domestic and international institutions.

Conclusion

The overall aim of this note was to examine the *Kiobel* decision from the perspective of the wider field of business and human rights. The field of business and human rights remain after *Kiobel* unchanged as possibilities to bring claims against corporations in any legal forum were already quite low. Nonetheless, the enjoyment of human rights is crucial for the survival and well-being of an individual. Not only states but also corporations are obliged to respect them. They should not infringe upon human rights when they invest and do business. Corporations and human rights are not two mutually exclusive notions. Suggesting that corporations have human rights obligations does not contradict the fundamen-

²⁹ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, September 28, 2011.

³⁰ UNCTAD principles on promoting responsible sovereign lending and borrowing, April 2012, <http://www.unctad.info/en/Debt-Portal/Project-Promoting-Responsible-Sovereign-Lending-and-Borrowing/About-the-Project/Principles-on-Responsible-Sovereign-Lending-and-Borrowing/>.

³¹ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (March 21, 2011) (by John Ruggie).

³² Piplinks, Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector, 2013, <http://www.piplinks.org/report%3A-making-free-prior-%2526amp%3B-informed-consent-reality-indigenous-peoples-and-extractive-sector>.

tal notion of corporate enterprise that corporations only exist to make a profit. On the contrary, it reinforces the core objective of corporations. Corporations must be held accountable for the failure to meet their human rights obligations. Yet it appears that those corporate obligations with respect to human rights are more or less without teeth as they do not provide clear sanctions in the event of violations. Therefore, the bottom-up approach could be realized by enabling the participation of civil society in drafting sources on corporate human rights obligations or enabling the participation of workers and victims' organizations in drafting internal policies. All in all, corporations must primarily ensure that they will not violate the human rights of individuals when doing business at home and abroad, with the result that human rights should be considered when already evaluating the economic and also human feasibility of a project.

