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Does the *Kiobel* Close the Door for Apartheid Reparations?

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On 17 April this year the US Supreme Court handed down the long awaited *Kiobel* decision. The decision is considered to be a blow to human rights victims resorting to the Alien Tort Claims Act (ATCA) to seek redress from corporations that commit human rights violations. The decision also has profound implications for South African apartheid victims seeking redress. The South African interest in these cases is particularly evident in the *Khulumani* case and *Turkcell* case.

The Alien Tort Claims Act is a US Statute, enacted in 1789, that provides US federal courts with extraterritorial jurisdiction. This means that ATCA allows foreign victims to sue foreign individuals or companies for violations of international law in US Courts. This Statute was originally designed to prosecute piracy but developed into a tool for victims of human rights abuses in many parts of the world who failed to obtain redress in their national legal systems. As statutes go, ATCA is a *rara avis*.

The litigants in *Kiobel* were members of the persecuted Ogoni community in Nigeria. They accused Shell of aiding and abetting crimes against humanity, torture and arbitrary execution committed by the Nigerian military against the Ogoni people. The Nigerian military committed these acts while protecting Shell's oil interests.

The Supreme Court decision in *Kiobel* reached the court from the Second Circuit of Appeal. The Second Circuit decided that corporations cannot be held liable under civil law. In *Kiobel* the judges asked two questions. Firstly they asked whether ATCA had extraterritorial application and secondly they asked whether ATCA applies to corporations. In answering the first question the judges of the Supreme Court decided that the presumption against extraterritoriality applies to ATCA claims. This means that ATCA can no longer be used by foreign plaintiffs who suffer injustice outside the US. The Supreme Court decided not to answer the second question on whether US Courts have jurisdiction to hear ATCA claims against corporations if a corporate defendant was domiciled or headquartered in the United States. This means that the Second Circuit decision in *Kiobel* stands and that for the purposes of litigation in the Second Circuit, corporations cannot be sued under ATCA.

The effects of *Kiobel* can be felt in South Africa. Most dramatically, the *Kiobel* case affects the fate of the victims in the *Khulumani* case. In *Khulumani* a group of apartheid victims tried to obtain reparations from multinational companies by suing them in a class action suit under ATCA. The litigation started a decade ago in the Southern District Court of New York and progressed all the way to the Second Circuit of Appeal. According to the plaintiffs the defendant companies, including such powerful multinationals as IBM and General Motors, aided and abetted the apartheid government in the commission of human rights violations during apartheid and profited from apartheid. The case drew intense interest from US and international scholars and practitioners. George Fletcher described the case as the most ambitious ATCA litigation to date.

The *Khulumani* case is currently pending before the Second Circuit Court of Appeal. Because of the decision in *Kiobel* the *Khulumani* case will now not succeed in the Second Circuit. The *Kiobel* case is almost certain to result in the dismissal of ATCA cases pending before the lower courts. The door to success is however not entirely closed. The *Khulumani* plaintiffs could re-file the case in another Circuit court in the US. In light of the protracted nature of the litigation so far it seems unlikely that *Khulumani* will be resuscitated in this way.

The *Khulumani* case is not the only ATCA case affecting South Africa. It became clear last week that *Kiobel* also has implications for litigation in the Turkcell case, a case in which Turkcell, Turkey's largest cell phone provider sued Johannesburg-based MTN for using bribery to win a mobile license in Iran. MTN stated that ATCA should not have been applied in this case since it is not a case involving grave issues of universal international concern such as piracy and genocide that ATCA, in its modern incarnation, was aimed at.

The conservative judgment in *Kiobel* shows disregard for the growing international movement towards recognising international criminal justice, a movement that culminated in the creation of the International Criminal Court in 2002. ATCA provided an important and exciting forum to plaintiffs who could not find relief in their home countries. In light of the fact that the US has not ratified the Statute of the International Criminal Court the liberal interpretation of the Alien Tort Claims Act provided one way for the US to recognise that it was part of the international struggle against impunity. With the Supreme Court choosing an interpretation of the Act that denies its extraterritorial application it reverts to isolationism. With *Kiobel* the US once again snubs the international criminal justice movement and the great strides it has made in creating a new normative framework that prioritises human rights over national sovereignty.

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