Human rights, colonialism and post-colonial conflict resolution: historical justice litigation

by Tom Frost and Sascha-Dominik Bachmann

Human rights campaigners, activists and litigators have been seeking ways and means to hold accountable those responsible for gross human rights abuses and violations. These measures have included seeking the criminal prosecution of the individual human rights perpetrator, as well as seeking civil damages against individual actors.

The rationale and means of human rights protection can be found in the international legal system. International law plays two critical roles in relation to the protection of human rights. First, it establishes acceptable norms of conduct, such as the prohibition of torture. Second, it provides, where possible, enforcement mechanisms that aid and support the domestic enforcement of these norms (Tyler Giannini and Susan Farbstein, “Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights,” (2010) 52 Harvard International Law Journal 119, 124).

The protection of human right reflects on the hybrid nature of its origin, rationale and raison d’etre, which holistic nature can be best summarised in the words of the Inter-American Court of Human Rights (IACtHR), which said that whereas:

“the international protection of human rights should not be confused with criminal justice. […] The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible” (see the Velasquez Rodriguez decision of 1988 (Ser C No 4 reported in (1988) 9 Human Rights Law Journal 212, para 134)).

However, at present there seems to be a lack of an effective international enforcement mechanism for human rights abuses. The existing UN Charter and treaty-based human rights systems suffer in general from an absence of strong and effective inter- and intra-state accountability mechanisms. Consequently, the existing human rights protection regimes are “weak” in terms of available sanctions and remedies against a violating state and even weaker in respect to the eventual enforcement of such sanctions (G) Bachmann, Civil Responsibility for Gross Human Rights Violations – the need for a global instrument, monograph published by Pretoria University Law Press (PULP)).

Measures to ensure compliance and redress for human rights violations have often focused solely upon the domestic sphere. The reasons for this are due to the perceived relationship between national and international law. The prevailing view of Anglo-American jurisprudence views national law as having primacy over international law: international laws apply when the nation state passes treaties or statutes which make clear their applicability. (Hans Kelsen, “Sovereignty and International Law”, (1960) 48 The Georgetown Law Journal 627, 630).

There are generally two routes for the restitution of human rights violations: the domestic, territorial, and the transnational, extraterritorial litigation approach. The domestic route allows for citizens who have suffered wrongs from their government or other private actors to bring cases in the courts of their own state. The transnational route allows for victims of human rights abuses to bring actions in other states. Both approaches have their weaknesses.

The national approach relies upon the nation state itself to provide justice in its court system and court procedure. The transnational approach could lead to the nation state being inundated with transnational claims and seeking to foreclose any future claims. After a state allows for the redress of violations of international law in its courts, that state can become a focus for the global human rights movement. Such a move has occurred most famously in the United States. Developed as litigation against the individual perpetrator and the corporate aider and abettor of human rights violations, it is known by the shorthand of human
The decision in Kiobel marks a significant shift in international human rights litigation, particularly with respect to extraterritorial actions. In this case, the Supreme Court had to address the question of whether corporations could be held accountable for human rights violations committed abroad under the Alien Tort Statute (ATS). The Court ruled that corporations could indeed be sued for such violations, a decision that has far-reaching implications for international law.

The case of Filártiga v. Peña-Irala, which the Court referenced in its ruling, set a precedent for individual aliens to bring claims for violations of the law of nations occurring in another country. The ATS provides a legal framework for these claims, empowering courts to address violations of the law of nations.

The Court’s decision in Kiobel is significant because it extends the scope of ATS litigation. Prior to this ruling, corporations were generally immune from civil liability for extraterritorial actions. The decision in Kiobel thus expands the reach of the ATS, allowing for greater accountability for corporations implicated in human rights abuses.

The decision in Kiobel is a reflection of broader trends in international law, which are increasingly recognizing the need for corporate accountability for human rights violations. As international legal systems evolve, it becomes clear that traditional legal frameworks must adapt to address the complexities of globalized business practices.

The decision in Kiobel is also a testament to the enduring relevance of international human rights law. The rule of law, as a foundational principle, continues to guide legal decision-making, both domestically and internationally. As we navigate the challenges of the 21st century, the rule of law remains a critical touchstone, providing a framework within which human rights can be protected and enforced.

In conclusion, the decision in Kiobel is a landmark ruling that expands the scope of ATS litigation and underscores the importance of accountability for human rights abuses. It is a reminder that legal systems must remain responsive to the evolving challenges of our time, ensuring that justice is done for all.

extraterritorial commission of breaches of international law in direct and indirect liability will have to be seen.

Irrespective from *Kiobel*, the aim of human rights litigation of bringing human rights violators to court seeks to provide justice to the individual victims. It can achieve redress where other remedies fail, provide recognition for “crimes which men can neither punish nor forgive” (Hannah Arendt, cited in Jeremy Sarkin, *Germany’s Genocide of the Herero*, 1) serving as a tool of corrective justice, addressing a moral obligation and need. Such litigation can also serve the aim of retribution and deterrence through its high damages available, or it can serve the idea of reconciliation.

All these remedial ideas have to be seen, however, against more practical questions, such as to how much a financial settlement will actually recompense for human rights violations. What do the claimants want? Do they want a monetary sum, or official recognition and apportionment of blame for the wrongs that they suffered?

This short submission ends with the recognition of the important role which historical justice litigation can play in the context of human rights atrocities – past and present. US transnational litigation acknowledges the victim of human rights abuses as an individual claims holder and allows him a right to participate in the remedial process by recognising the independent right of *ius standi* of the victim. This right to remedial justice has been recognised in another jurisdiction, namely the United Kingdom, when the High Court allowed, at least in part, Kenyan victims of UK’s counter insurgency measures during the Mau Mau emergency in Kenya during the 1950s, to sue the British government for alleged human rights violations (*Ndiku Mutua and others v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB)).

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