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The Dismissal of Khulumani, the Dismissal of a Dream?

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21 August was a sad day for many human rights activists and for Apartheid victims. It marked the end of a long road for a group of Apartheid victims who, frustrated by government inaction on reparations, turned to US courts for relief in 2002. On 21 August the Second Circuit Court of Appeal in New York dismissed the Apartheid lawsuit, also known as the Khulumani litigation. From a procedural legal point of view the dismissal came as no surprise. The case nevertheless represents a major setback for human rights law and for the international right to reparations.

In the Khulumani suit, victims of apartheid sued multinational corporations alleged to have profited from investments in pre-1994 South Africa and, in so doing, aided and abetted violations of human rights committed by the Apartheid government and violated international sanctions against doing business with South Africa. At the initial District Court stage of the case, the plaintiffs sued more than thirty multinational companies including banks such as UBS, Barclays Bank and weapons manufacturers such as the German company Rhein metall. Later in the life of the case the number of plain tiffs was reduced to three defendant companies: Daimler, Ford and IBM. In short, it was claimed that these companies sold cars and computers to the South African government thereby facilitating the Apartheid regime's innumerable race-based injustices. The Khulumani case, along with other pending Alien Tort Statute (ATS) suits were stayed, pending the outcome of the Kiobel decision.

The Second Circuit in Kiobel held that corporations cannot be sued under the Alien Tort Claims Act. On appeal, the US Supreme Court in Kiobel was confronted with two questions: it had to decide whether the ATS applied extraterritorially, in the sense that corporations with no U.S. nexus – like the defendants in Kiobel, and some of the Khulumani defendants-could be sued with respect to alleged violations committed wholly outside the U.S. Second, whether multinational corporations could be liable for human rights violations at international law.

The Kiobel Court did not need to reach the second question, having decided the first question in the negative. On 17 April this year the Court held that the framers of the ATS could not have intended to vest U.S. federal courts with universal jurisdiction. In other words, the ATS did not vest jurisdiction over foreign defendants in matters brought by aliens with respect to extraterritorial conduct. Because the defendants in Kiobel are Dutch and British, that case will not survive.

To overcome the extraterritoriality hurdle, the Khulumani plaintiffs before the Second Circuit argued that affirmative steps were taken within the United States to circumvent the sanctions regime. Dismissing this claim, the Second Circuit held that the 'relevant conduct that violates the law of nations' must have occurred in the US and that this was not the case in Khulumani. This position of the Court does not clarify whether lawsuits involving foreign nationals who committed violations abroad but who are now living in the US can be sued.

Before Kiobel the Alien Tort Claims Act of 1789, once considered as a highly unusual, possibly antiquated statute came to represent a philosophy and approach that has become more mainstream from the perspective of the modern international criminal justice movement. By restricting the application of ATCA, the judges in Kiobel unanimously showed support for those who resist the international justice movement.

The door of justice is not entirely closed for the Khulumani plaintiffs. The plaintiffs have the option of starting de novo in another Circuit of the US (for example the 9th Circuit in California) or to initiate a new case against the directors of the companies in their personal capacities. It is not yet clear what the plaintiffs' lawyers will decide. What is clear is that post Kiobel and post Khulumani the dream of Nuremberg, that there should be no impunity for serious human rights violations has been deferred. The plaintiffs in the Apartheid litigation lawsuit heavily referred to the Nuremberg cases against major industrialists such as Krupp. The hopes of international law scholars that ATCA could 'revive the Nuremberg ideal' by expanding norms of accountability to encompass violations by U.S.-based corporations, have been dashed.

IBM was accused of the helping to create the population registration system that facilitated racial persecution and discrimination during Apartheid. In his groundbreaking book IBM and the Holocaust Edwin Black writes of IBM's complicity in the counting, classifying, persecution and elimination of European Jews during the Nazi regime. Post-war attempts to hold IBM responsible for these acts before domestic courts in Europe failed. The dismissal of the Khulumani case fits neatly into a tradition of impunity and inaction. It is a dramatic reminder of the limits of the law and the triumph of profit over principle.

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