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Should Corporations Have More Leeway to Kill Than People Do?

By **PETER WEISS**

NEXT week, the [Supreme Court](#) will hear a case with many potential ramifications for American and international law, and for corporate responsibility for human rights around the globe. The justices will be asked to decide whether the corporations to which they have been extending the rights of individuals should also be held accountable for crimes against human rights, just as individuals are.

The story behind the case begins in 1980, when my colleagues at the Center for Constitutional Rights and I helped obtain the first semblance of justice to the family of a slain 17-year-old Paraguayan youth named Joelito Filártiga.

A police inspector general in Asunción, the capital, had tortured the boy to death in retaliation for his father's opposition to Paraguay's brutal dictatorship. But the case was decided in New York, far from Paraguay, where the crime had occurred and where justice had proven impossible for the Filártiga family; the boy's murderer was ultimately ordered to pay the family \$10.4 million in damages.

The precedent-setting case was made possible by a remarkable decision by the United States Court of Appeals for the Second Circuit, which allowed it to be brought under a long-obscure law enacted by Congress in 1789. Known as the Alien Tort Statute, the law has been interpreted to mean that foreigners who commit heinous crimes abroad in violation of international law can be held accountable in the United States if they are present or do business here; the Supreme Court upheld its constitutionality in 2004.

Since that decision, dozens of successful alien tort claims have been brought in American courts — at first against individuals, and eventually against corporations. As a result, many foreign victims of egregious crimes — ranging from torture and slave labor to the execution of loved ones — that were sanctioned, endorsed or commissioned by corporations have found justice in our courts.

Yet in September 2010, a divided Second Circuit — the very court that had rendered the Filártiga decision — held that only individuals, and not corporations, can be sued under the statute.

That ruling, in a case known as *Kiobel v. Royal Dutch Petroleum*, came less than a year after the

much more famous — and criticized — Supreme Court decision in *Citizens United*, which removed restrictions on political spending by contributions and wildly expanded the concept of corporate personhood.

Together, these decisions have triggered a wave of outrage among advocates for human rights, which see in them a signal from the courts that corporations have extensive rights but few responsibilities under American law.

On Tuesday, the Supreme Court will hear arguments on the alien torts ruling, which could produce its first decision regarding corporate personhood since *Citizens United*.

The question of whether foreign corporations doing business in the United States can be sued here for crimes committed elsewhere has arrayed international businesses against human rights advocates, with many “friend of the court” briefs filed on both sides. Four governments have also chimed in: Britain, the Netherlands and Germany for the corporate defendant and the United States on the side of the Nigerian plaintiffs.

The story behind the *Kiobel* case is compelling: The plaintiffs are members of the Ogoni people in Nigeria’s Niger Delta, where [Royal Dutch Shell](#) had extensive oil operations in the 1990s through contracts with the brutal military dictatorship that held power at the time. The region is widely considered a zone of calamity, in terms of both environmental and human rights. In the suit, Royal Dutch Shell was accused of assisting the Nigerian government in torturing and, through sham trials, executing Ogoni activists who had threatened to disrupt Shell’s operations because of the devastating health and environmental effects of unregulated drilling practices. The plaintiffs are either victims of torture themselves or had relatives who were executed. Esther *Kiobel*, the plaintiff after whom the suit is named, is the widow of a victim.

If the Supreme Court rules in favor of Royal Dutch Shell and against the plaintiffs, multinational corporations — particularly in mining and other extractive industries — could draw the lesson that it is now safer to forge alliances with autocratic regimes that have poor human rights records because they will not be judged culpable in the way individuals can be.

In fact, many “friend of the court” briefs filed by corporations in this case contend that the companies are committed to voluntarily complying with human rights norms — but that standards set by the United Nations and other public and private organizations are mere guidelines that are not enforceable as legal norms. What they are really saying is that there are legal norms against torture and such, but that they can’t be enforced against corporations because they have never been enforced under international law — a claim the plaintiffs strongly contest.

This leaves the Supreme Court with an extraordinary choice to make, in juxtaposition to its previous ruling in *Citizens United*: whether to accept an argument that, in effect, leaves corporations less culpable than individuals are for human rights violations committed abroad — or

whether to hold that if a 200-year-old law can be used to hold individual violators to account, it can be used against corporate violators as well.

A decision affirming that Shell should go unpunished in the Niger Delta case would leave us with a Supreme Court that seems of two minds: in the words of Justice John Paul Stevens's dissent from *Citizens United*, it threatens "to undermine the integrity of elected institutions across the nation" by treating corporations as people to let them make unlimited political contributions, even as it treats corporations as if they are *not* people to immunize them from prosecution for the most grievous human rights violations.

A more startling paradox is difficult to imagine.

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