Can corporations be held legally responsible for serious human rights violations?

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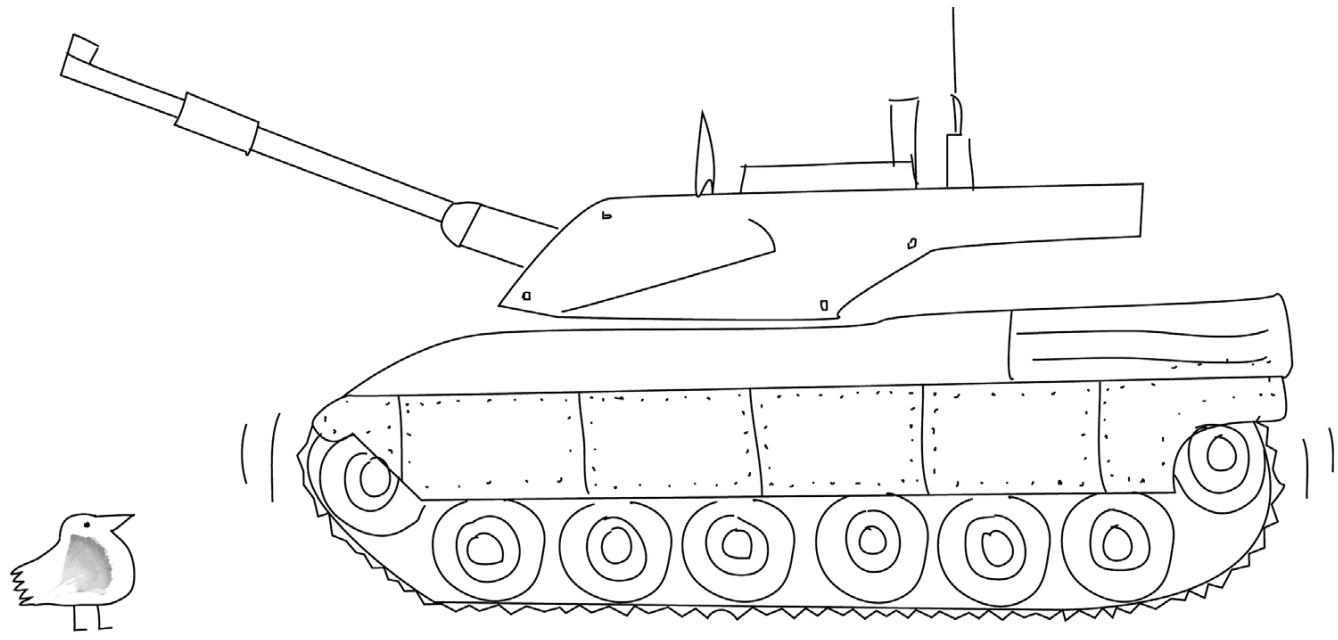

Can corporations be held legally responsible for serious human rights violations?

Ilaria Bottigliero

Yes, according to two landmark decisions of 2006. In January, the High Court of South Korea ordered Dow Chemical and Monsanto, US producers of Agent Orange used during the Vietnam War, to compensate South Korean troops affected by the agents. In June, a French court ordered both the French government and the state railway company SNCF to compensate two families of Jews deported during the Nazi occupation. Will these rulings have any effect on similar cases pending elsewhere? How might they affect law governing the responsibility of non-state actors for crimes under international law?

Breakthrough decisions

A 26 January 2006 High Court ruling in South Korea held, for the first time, that Dow Chemical and Monsanto had manufactured chemical agents containing dioxin that exceeded legally permitted levels, and had caused long-term damage to the health of persons exposed to them. In their defense, the two American companies argued that the US government should be responsible for any damages, on the grounds that it – and not they – decided how, when and where to use the chemical defoliants. The court, however, rejected the defendants' arguments and ordered Dow Chemical and Monsanto to pay US$85 million in medical compensation. The money will be distributed between 6,800 South Korean former troops exposed to the agent between 1965 and 1973, who were among the 320,000 troops South Korea sent to Vietnam – the largest foreign contingent to fight alongside the US in the conflict. The beneficiaries are to receive compensation ranging from US$6,180 - $47,400. Dow Chemical and Monsanto announced their intention to appeal the decision.

The decision was a major success for victims of Agent Orange. Prior to this judgment, some 20,000 South Korean veterans had filed a series of unsuccessful lawsuits before South Korean courts against manufacturing companies including Monsanto, Dow Chemical and Hercules Incorporated, while a US federal court had dismissed the legal action of Vietnamese plaintiffs in March 2005. But while Asian victims of Agent Orange were not successful until 2006, American Vietnam War Veterans had already reached a US$180 million out-of-court settlement with manufacturers, including Monsanto and Dow Chemical, in 1984.

The June 2006 ruling by a French court found both the French government and the state railway company Société Nationale Chemins de Fer (SNCF) to have been accomplices in crimes against humanity for their role during the Nazi occupation. Relatives of the two plaintiffs had been taken by SNCF trains to a transit camp in Drancy, near Paris. From this transit camp, known as the 'antechamber of death', an estimated 70,000 French Jews were transported to death camps in Germany. The court found that the government's allowing of state railways to transport the Jews to the transit camp was an 'act of negligence of the state's responsibilities' as the government must have known that death camps were the final destination. For its part, SNCF was found liable as a corporation for never having raised objections to transporting these individuals. The court ordered the French government and SNCF to pay €62,000 to the two families of the deported Jews.

As in the Agent Orange case in South Korea, survivors and families of victims had long fought for redress from SNCF in French civil courts. Prior to the June 2006 ruling, courts had consistently rejected victims' claims on grounds which echoed the defence's argument: SNCF had been commandeered by Nazi forces and the railway company had had to co-operate under duress. For this it could not be held responsible. The June 2006 judgment, however, recognized the legal liability of both the French government and SNCF based on the plaintiffs' argument that involvement in the deportation process went far beyond what the Nazis requested. Victims' relatives pointed out, for instance, that SNCF continued billing the French government for the transfers even after France was liberated by the Allies. SNCF announced its plans to appeal the decision.

These events highlight how the full realisation of victims' right to redress, even when it involves the liability of non-state actors, depends on political will to fully recognise past violations and to move forward in redressing wrongs. The 2006 judgment in France followed government efforts to officially recognise its responsibility for acts committed during the Nazi occupation, including President Chirac's acknowledgment in 1996 of the French government's responsibility for crimes against humanity committed during the Vichy regime.

Hope for the future?

These two key decisions on the liability of non-state actors for serious human rights violations raise a number of important questions. First, will these decisions have any positive effect on similar cases currently pending before domestic courts, for example, those of the comfort women of Southeast Asia or the victims of Germ Warfare Unit 731? Second, how will these decisions affect law governing the responsibility of non-state actors for crimes under international law more generally? Third, should the companies not abide by the judgments, will victims ever be able to get hold of the compensation money?

As for the first question, a number of high-profile cases involving instances of war crimes allegedly perpetrated by Japanese troops during the second world war have long been pending before Japanese domestic courts. In these cases, large numbers of victims, mostly of Chinese nationality, but also, as in the case of the comfort women, of various East Asian nationalities, filed class action suits against the Japanese government for sexual slavery, torture, human experiments and violations of the laws and customs of war more generally. So far, the Japanese government has refused to admit any legal responsibility for the suffering of victims, consistently arguing that all compensation claims were settled by the 1951 San Francisco Peace Treaty. Given the Japanese government's position on this issue, can victims reasonably hope Japanese courts will follow the example set by the courts in the recent Korean and French decisions? The first element one needs to consider is that, unlike the Korean case and to some extent, the French case discussed above, in most of the cases pending against Japan, victims have been seeking remedies for damages attributable to the state, rather than to non-state actors. This means that the South Korean and French judgments are likely to be only partially relevant to those cases involving state responsibility. The South Korean and French cases, however, at least seem to reflect greater international recognition of victims' rights in judicial fora, including the right to receive adequate compensation. Therefore, should the government of Japan, or other governments implicated in serious human rights violations elsewhere, decide to unequivocally acknowledge responsibility (perhaps even issuing official apologies to victims), courts might follow up with some form of judicial recognition such as compensation awards, even where this could involve re-opening the issue of state liability for violations.

Looking at the question from a different angle, victims' lawsuits brought against

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companies can pressure governments to take more concrete steps to compensate victims, for example, through the establishment of state-sponsored trust funds. Germany established a joint US-German trust fund in 2000 to compensate victims of slave labour during the Nazi regime, under the pressure of some 55 class actions brought against German firms in US courts. In this instance, half of the US$4.8 billion fund for the compensation of some 900,000 victims was financed by some 3,000 German companies.

Whether these recent judicial developments will advance the law on non-state liability for international crimes needs to be addressed in relation to the evolution of victims' rights both internationally and domestically. Attempts to determine the international liability of non-state actors for international crimes are not new. Courts have often established that a non-state actor, such as an individual, or even a company or a corporation, can be held responsible for serious human rights violations. In March 2000, a South Korean plaintiff received ¥4.1 million in compensation from a Japanese steel company, NKK, for slave labour during the second world war.

Individuals in the United States over the past decade have begun to sue companies for human rights violations with various degrees of success invoking the Alien Tort Claims Act (ATCA). In 1996, Burmese villagers filed a lawsuit in US courts against the oil company UNOCAL for acts of torture, rape, forced labour, and forced relocation committed in Myanmar in connection with the construction of an oil pipeline. Initially, a federal district court in California rejected UNOCAL's motions to dismiss the case, ruling that the company could be held liable under the ATCA. A further judgment by the district court ultimately dismissed the case on the grounds that the government, rather than corporation agents, had committed the alleged violations. Irrespective of the final outcome, all of these attempts at establishing corporate and individual liability for serious human rights violations form part of a growing practice establishing that first, non-state actors can be sued successfully, and second, that they can be held liable and ordered to pay compensation to the victims.

A question of enforcement

As evidenced in a number of cases, there seems to be a growing recognition of victims' rights, both on the part of political players and the courts. Ironically, the real difficulties for victims often arise when they succeed in getting an award for compensation. The enforcement of compensation judgments against non-state actors, especially foreign individuals or companies, has always been a weak link in victims' access to justice. There have been countless cases where victims were awarded huge exemplary compensation awards, but could never retrieve the actual money from the tortfeasor's assets. This weakness has been especially evident in the history of serious human rights violations litigated in US courts under the ATCA. In the famous 1984 *Filártiga* v. *Peña-Irala* case, the courts awarded damages of more than US$10 million, but the complainants to date have not been successful in enforcing the judgment in Paraguay because the assets, apparently, are located abroad. Similarly, in the *Marcos Litigation* – another high-profile case before US courts – Filipino victims of human rights abuses during the Marcos regime filed a class action against the Marcos estate. In 1995, the court awarded damages for around US$2 billion, but more than ten years later the money remains in the hands of the Philippine government. Victims are currently trying to enforce the judgment in the Philippine courts.

The next step towards the effective realisation of victims' basic right to redress is the prompt enforcement of reparation orders. In the Korean case against the manufacturers of Agent Orange, neither Monsanto nor Dow Chemical seem to own registered property in Korea. Ultimately, whether victims actually receive the compensation they won in the courts will likely depend upon the responsibility of Dow Chemical, Monsanto or SNCF to honour their legal obligations. If corporations fail to pay compensation as the courts have ordered, the likelihood that victims actually get their money will depend upon the degree of inter-state co-operation in ensuring the judgments are enforced. <

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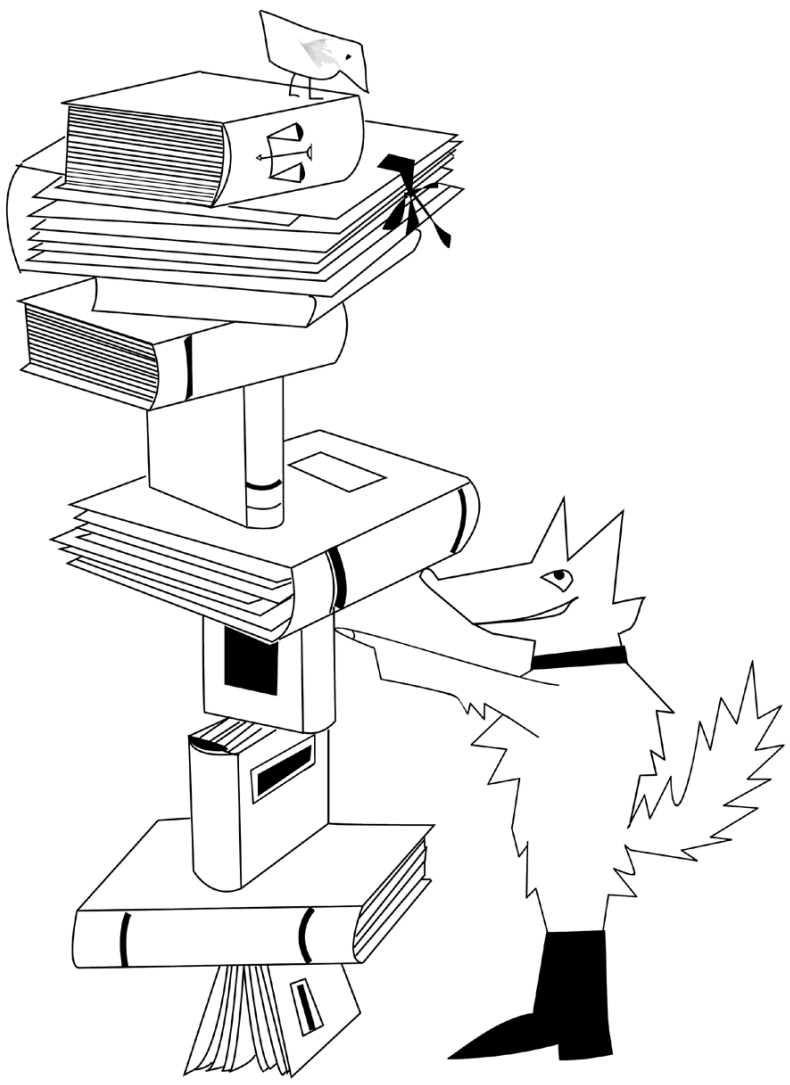
Human rights between Europe and Southeast Asia

Human rights are a source of friction between Southeast Asian and European governments. Southeast Asian politicians generally emphasise principles of sovereignty and non-interference in internal matters, while their European counterparts tend to champion democracy, human rights and good governance beyond their borders. The differences in approach, however, do not seem as daunting today as they once did.



Simone Eysink

Relations between Europe and East Asia have been institutionalised since 1996 in the Asia-Europe Meeting (ASEM), a forum for dialogue between heads of state established by the then 15 member states of the European Union, the seven member states of the Association of South East Asian Nations (ASEAN), China, Japan and the Republic of Korea. ASEM is informal, without official institutions or a secretariat; its main aim is to build trust among its members and to create a framework for future co-operation.

The first ASEM summit in 1996 addressed general aspirations, trade and investment; it was considered a success as it avoided controversial issues. The second summit in 1998 was more problematic – ASEAN had expanded the previous year and now included Vietnam, Cambodia and Myanmar; human rights violations by Myanmar's military government became a particular source of friction between the European and Asian sides. EU member states, consistent with their policy of an arms embargo and economic sanctions against Myanmar, were unwilling to accept it as a participant. In contrast, most Asian states considered Myanmar's political instability and human rights record an internal matter that should not interfere with its participation in multi-lateral meetings or its membership of ASEAN: silent diplomacy and 'constructive engagement' were the way forward. This difference in approach almost derailed the ASEM project: meetings between senior officials and ministers were cancelled, and the summit only went ahead at the last moment due to Thai mediation.

Only seven of the ten ASEAN countries attended the second, third and fourth summits in 1998, 2000 and 2002. Myanmar's participation became an issue again before the fifth ASEM summit in 2004 as the ten new states of the enlarged European Union were automatically accepted. A compromise was reached where Myanmar could attend, but not at the presidential level. This solution, considered far from ideal by many, is again causing trouble in the run up to the sixth summit in Helsinki this November.

EU, ASEAN and the 'Asian way'

The controversy over Myanmar's participation within ASEM points to deeper differences in opinion regarding state sovereignty, regional co-operation and the realization of national society between – generally speaking – ASEM's European and Asian member states. The historical context is crucial. The European states, after a 20th century of unprecedented carnage and human rights abuses, have transferred some of their law-making powers to a supra-national organization that legislates on human rights standards. ASEAN, in contrast, was set up in 1967 by states varying enormously in politics, economy and culture. What they shared was their recently won post-colonial status and the priority of nation-building. ASEAN, far from being an ambitious project for regional co-operation, was a cautious attempt to maintain friendly relations between states. The association was based on the non-binding Bangkok Declaration, where the principle of non-interference in internal matters, or state sovereignty, was considered the cornerstone for co-operation.

Southeast Asian states' greater emphasis on national sovereignty is reflected in their approach to conceptualising and implementing human rights. The focus has been on protection by the states themselves, according to their own 'cultural' norms. Critics of this approach have accused certain Southeast Asian leaders of misusing the argument of cultural differences and sovereignty to hide rights-violating behaviour. Former Malaysian Prime Minister Mahathir Mohamad, a prominent advocate of 'Asian values', proclaimed that human rights privileged 'western values' – most notably individual freedom – and was not suitable for Asia where commu-