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The future of corporate liability for extraterritorial human rights abuses

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Conclusion

The *Song Mao* case demonstrates that transnational human rights litigation, if carefully calibrated, vigorously pursued, and made to comport with regional human rights standards and commitments—even if unconnected with the ATS—can remain a powerful tool for legal advocacy. More specifically, in response to advocacy campaigns by the CSOs, Ve Wong Corporation said in July 2012 that KKS and KKP “have promised that if there is any evidence proving that [KKS and KKP] illegally acquired the land from residents, the companies are willing to return [the Land] and compensate all relocation costs of all affected families.”⁴⁶ In April 2013, a KSL manager met with the villagers and announced that the company will consider returning some of the disputed Land to villagers to resolve the villagers’ grievances.⁴⁷

Such litigation need not be rooted in jurisdictional statutes, such as the ATS, which are confined to narrow grounds. Claims should be commenced in the courts of a state with a connection to the corporation and should be used for torts routinely actionable in that jurisdiction. Transnational human rights litigation should be reinforced by regional and UN human rights institutions and procedures. As appealing as an ATS-based fundamental human rights cause of action may seem, in domestic courts a more pedestrian cause of action may be more attractive to courts concerned with respecting international comity, avoid act of state complications, and provide injured parties with an effective remedy.

THE FUTURE OF CORPORATE LIABILITY FOR EXTRATERRITORIAL HUMAN RIGHTS ABUSES: THE DUTCH CASE AGAINST SHELL

By Nicola Jägers, Katinka Jesse, and Jonathan Verschuuren*

The U.S. Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*¹ limits the potential of the Alien Tort Statute (ATS)² as a means of legal redress for victims of human rights abuses caused by transnational companies. Interestingly enough, almost simultaneously with the *Kiobel* decision by the U.S. Supreme Court, a Dutch court issued its rulings in five cases concerning Nigerian individuals, supported by a Dutch environmental nongovernmental organization (NGO), in their claims against Royal Dutch Shell (RDS), headquartered in the Netherlands, and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC). These cases relate to oil spills for which the plaintiffs believed Shell should be held liable.³ Although these decisions cannot be hailed as a complete victory for the Nigerian

⁴⁶ Statement by Ve Wong Corporation in Response to the Business & Human Rights Resource Centre’s Inquiry Regarding Alleged Human Rights Abuses and Land Seizure by Sugar Companies in Cambodia (July 18, 2012), available at <http://www.business-humanrights.org/Documents/CambodiaCleanSugar2012>.

⁴⁷ Roundtable Discussion: Investment Projects and Land Concessions (Koh Kong City Hotel, Apr. 12, 2013) (on file with author).

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

² 28 U.S.C. §1350.

³ On January 30, 2013, the District Court of The Hague rendered separate judgments in five cases brought by four Nigerian farmers and fishermen, supported by the Dutch branch of Friends of the Earth (*Milieudefensie*), against the Nigerian subsidiary of Shell and its former and current parent companies in the United Kingdom and

citizens, the Dutch court rendered a remarkable judgment that shows the way forward in attempts to hold multinational corporations accountable for environmental harms and human rights abuses committed abroad. In this article, after briefly addressing the importance of the ATS post-*Kiobel*, we explore possible options offered by the Dutch courts for victims of corporate harms abroad.

The Kiobel Ruling: The Beginning of the End or the End of a Beginning?

Since the mid-1990s, over 150 cases have been brought under the ATS before U.S. federal courts against multinationals for alleged harms suffered by non-U.S. nationals outside the United States. The ATS has frequently been hailed as the most promising avenue offering legal redress for victims of corporate human rights violations. The decision of the U.S. Supreme Court in *Kiobel*, however, severely limits the extraterritorial reach of this statute, and the decision has consequently been met with great disappointment by human rights advocates. However, we argue that *Kiobel* does not put an end to all transnational human rights litigation against corporations; rather, it turns the spotlight to other potential promising avenues for victims to seek legal redress elsewhere. Moreover, when discussing the implications of *Kiobel*, some caveats are in order.

It should be noted that the ascribed potential of the ATS as a mechanism for providing effective legal remedies to victims of corporate conduct has always been somewhat inflated. Plaintiffs in such cases have faced significant procedural obstacles, and most cases have been dismissed at their preliminary stages. In the handful of cases where plaintiffs overcame these obstacles, the corporate defendants frequently decided to settle. While a settlement might be deemed a positive outcome from the perspective of victims, the dearth of merits decisions has left the actual role of the ATS in corporate human rights litigation unclear.⁴ Even after *Kiobel*, it remains to be seen whether the Supreme Court has actually left the door slightly ajar for transnational human rights litigation before U.S. courts and, if so, to what extent. For instance, in concluding that the reach of the ATS is limited due to the presumption against extraterritorial application, the Supreme Court stated that, even where claims touch and concern the territory of the United States, they must do so with “sufficient force” to displace this presumption.⁵ What “sufficient force” means is left open and will depend on the interpretation given by district courts and appellate courts in subsequent litigation.⁶

Notwithstanding the fact that the ruling of the Supreme Court may have left prospective plaintiffs some room to maneuver, it seems clear that after *Kiobel* it will no longer be possible,

the Netherlands. In this article, we focus on the most important one: *Akpan v. Royal Dutch Shell PLC*, Arrondissementsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854). An (unofficial) English translation of this and the other four judgments is available from *Milieudefensie*'s website, <http://www.milieudefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case>. Information about this and other Dutch cases is available online at <http://www.rechtspraak.nl>.

⁴ See Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 *AJIL* 601, 601–03 (2013).

⁵ *Kiobel*, 133 S.Ct. at 1669. Anupam Chander points out that *Kiobel* does not put an end to U.S. transnational human rights litigation, but rather an end to transnational human rights litigation against foreign corporations; hence American corporations are disadvantaged over foreign corporations. See, in this Agora, Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*.

⁶ For more on the outstanding issues concerning the ATS post-*Kiobel*, see Wuerth, *supra* note 4.

under the ATS, to bring “foreign-cubed cases,” that is, cases in which foreign plaintiffs sue foreign companies over conduct outside the United States. This result turns our attention to other possibilities to hold corporations liable for human rights abuses committed abroad.⁷ While the spotlight has been on the ATS litigation, courts in, inter alia, Australia, Canada, the Netherlands, and the United Kingdom have increasingly been confronted with civil claims brought under ordinary tort law against corporations for alleged harms committed abroad to the environment or to people.⁸

The Netherlands: Fertile Ground for Transnational Human Rights Litigation?

Before turning to the recent Dutch court ruling in a case brought by Nigerians against RDS and SPDC, we briefly introduce the current state of affairs regarding transnational human rights cases in the Netherlands. It is conceivable that cases similar to *Kiobel* would be recognized by Dutch courts.⁹

The ATS is a unique statute, and there is no foreign equivalent. Nevertheless, several recent rulings in the Netherlands suggest that Dutch courts may accept jurisdiction with extraterritorial scope,¹⁰ including even foreign-cubed cases. Under Dutch law, it is possible to hold corporations liable for human rights violations under domestic tort law.¹¹ The focus of the regime governing jurisdiction for Dutch courts is first and foremost on the domicile of the defendants. However, in the recent *Palestinian Doctor* case,¹² the only connection to the Netherlands was the plaintiff’s presence there. That case was brought before the District Court of The Hague

⁷ The United States provides subject matter jurisdiction for some human rights claims that now fall outside the ATS. For instance, U.S. courts have jurisdiction over so-called transitory torts: torts committed in other countries that are unlawful under the law of that country. The most famous transitory tort claim is the litigation concerning the Union Carbide Corp. gas plant disaster in Bhopal, India, in 1984.

⁸ For some of these cases, see, in this Agora, Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*; Mahdev Mohan, *The Road to Song Mao: Transnational Litigation from Southeast Asia to the United Kingdom*; Andrew Sanger, *Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts* (focusing on English cases). However, as noted in this Agora, Anne Herzberg appears to see an opposite trend based on, most notably, jurisprudence regarding consequences of the Israeli/Palestinian conflict on the (alleged) occupied territories. Anne Herzberg, *Kiobel and Corporate Complicity—Running with the Pack*.

⁹ This point was brought forward in an amicus curiae brief dated June 13, 2012, submitted by five Dutch professors of law (including Nicola Jägers) to the U.S. Supreme Court in the *Kiobel* case in support of the plaintiffs. Supplemental Brief of Professor Alex-Geert Castermans (Leiden University) et al. as Amici Curiae in Support of Petitioners, *Kiobel v. Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioneramcu5_professorspdf.authcheckdam.pdf.

¹⁰ In two recent cases, the Dutch courts have asserted jurisdiction over cases in which the conduct took place outside the Netherlands. In these cases, the government of the Netherlands was held liable for the damages that occurred elsewhere. In one case, the Dutch Supreme Court held the Netherlands liable for damages caused to Bosnian families after their family members were expelled from the Dutch UN compound in Srebrenica and later executed by Serbian troops. *Nuhanovic v. The Netherlands*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], Sept. 6, 2013, Case No. 12/03324 (ECLI:NL:HR:2013:BZ9225). In the other case, the Dutch government was held liable to the family of those killed by summary executions in a village in Indonesia by the Dutch army in 1947. *Ass’n Dutch Debt of Honor v. The Netherlands*, Arrondissementsrechtbank Den Haag, Sept. 14, 2011, Case No. 354119/HA ZA 09-4171 (ECLI:NL:RBSGR:2011:BS8793).

¹¹ Burgerlijk Wetboek [Dutch Civil Code], Art. 6:162; see also Nicola M. C. P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT’L L. 833 (2008). Under Article 51 of the Dutch Criminal Code [Wetboek van Strafrecht], corporations may also be held criminally liable. This topic will not be explored further here.

¹² *El-Hojouj v. Unnamed Libyan Officials*, Arrondissementsrechtbank Den Haag, Mar. 21, 2012, Case No. 400882/HA ZA 11-2252 (ECLI:NL:RBSGR:2012:BV9748).

by a Palestinian doctor who claimed to have suffered damages following unlawful imprisonment for eight years in Libya for allegedly infecting children with HIV/AIDS. The defendants' place of residence was unknown: the defendants were unidentified Libyan government officials working at prisons in Libya. In that case, the court relied on the *forum necessitatis* rule that allows Dutch courts to exercise jurisdiction over civil claims that would not normally fall under the ordinary bases for jurisdiction but where bringing those claims outside the Netherlands is simply impossible, either legally or practically (e.g., due to natural disasters or war). While the *forum necessitatis* rule is very rarely applied, it has the potential to bring foreign-cubed cases before the Dutch courts. In sum, in the Netherlands, cases can be brought against a defendant for alleged human rights violations or environmental harms, regardless of the location of the harms or the domicile or nationality of the victims, as long as the defendant has a domicile or its headquarters in the Netherlands. Yet, as noted in the *Palestinian Doctor* case where the defendants' place of residence was unknown, a defendant's connection to the Netherlands may have little relevance.

Transnational Litigation Against Shell in the Netherlands

Whether the *Palestinian Doctor* case ruling offers a fruitful ground for foreign direct liability cases against corporations was put to the test for the first time in another Dutch case, *Akpan v. Royal Dutch Shell PLC*, which was brought against RDS and SPDC. In *Akpan*, the plaintiff was a Nigerian farmer whose livelihood depended on the land and fishponds near the Nigerian village Ikot Ada Udo. He alleged that, following two oil spills that occurred from SPDC's oil well near his village, he suffered damages to his means of subsistence. SPDC's legal predecessor drilled the well in 1959, but subsequently abandoned it. The well was capped above ground by a so-called Christmas tree cap (an assembly of valves, spools, gauges, and chokes that control the well's flow) that can be opened or closed with a large wrench. In 2006, a single barrel of oil was spilled from the well, followed by a larger oil spill in 2007. After reporting the 2007 oil spill to SPDC, members of the local community initially refused to grant a joint investigation team access to the well for about two months. Shortly after consent was finally obtained, SPDC stopped the oil spill by closing the Christmas tree cap with a few turns of a wrench. By then, 629 barrels of oil had been spilled. After the remediation work required as a result of the oil spill from 2007, SPDC further secured the well, but only after the lawsuit was already pending.

The Dutch court's assessment started with a review of its jurisdiction. It upheld its 2010 interlocutory judgment that, by virtue of section 7 of the *Wetboek van Burgerlijke Rechtsvordering* (Civil Procedure Code), it had jurisdiction, not only over the claims initiated against RDS but also over the claims against SPDC. First, the court found that, as the claims initiated against both companies were intertwined, efficiency justified a joint hearing under Dutch law. Second, it found that these claims had (in part) the same legal basis, namely the tort of negligence under Nigerian law.¹³ According to the court, it was therefore "foreseeable" for SPDC to be summoned, together with RDS, to the Dutch court in connection with the alleged liability for the oil spills. The court supported this conclusion by referring to the international trend of holding a parent company of a multinational corporation liable in its own country for harmful practices by its foreign (sub-)subsidiaries. Third, the court dismissed the defense's

¹³ In this case, the Dutch court had to apply Nigerian law because European and Dutch law required application of the law of the jurisdiction where the damages occur.

argument that the claims against RDS would clearly fail, a defense that implied that the plaintiffs had abused procedural law by initiating the proceedings. According to the court, it could be argued under Nigerian law that the parent company of a (sub-)subsidiary may be held liable for the tort of negligence against people who suffered damages as a consequence of the activities of that (sub-)subsidiary. The court also explained that the jurisdiction of the Dutch court in the case against SPDC does not cease if the claims against RDS are subsequently dismissed, even in the absence of a *de facto* connection with the Netherlands.

The wording of the judgment indicates that the district court's decision has great relevance beyond this specific case. The judgment provides the opportunity for victims of corporate transnational environmental harms or human rights violations to sue a foreign subsidiary of a Dutch multinational corporation where a parent company *might* be held liable under the applicable foreign law (in this case, Nigerian law). The court found it irrelevant whether liability of the parent company is eventually established, the only restriction being that the claims against the parent company and its subsidiary need to be connected and be based at least in part on the same legal claim.

The district court also upheld its interlocutory judgment regarding the admissibility of the claims of NGO Friends of the Earth Netherlands (*Milieudefensie*), which supported Akpan. According to the court, some of those claims clearly went beyond Akpan's individual interests because remediating the soil, cleaning up the fishponds, purifying the water sources, and preparing an adequate contingency plan for future responses to oil spills—if ordered—would benefit not only Akpan but also the rest of the community and the environment in the vicinity of the village. Moreover, as many people may be involved, the court found that litigating in the name of the interested parties was problematic, hence the opportunity for the NGO to start a public-interest case. Furthermore, *Milieudefensie* met the formal requirements under Dutch law for starting such a case: for example, it is involved in campaigns to stop environmental pollution related to oil production in Nigeria, and the case fit within the NGO's statutory objective of global environmental protection.

Whereas the procedural considerations acknowledge the basis for extraterritorial human rights and environmental liability against corporations, the court's substantive assessment shows that further hurdles need to be overcome. The court dismissed all claims against RDS. Pursuant to Nigerian law, a parent company, in principle, is not obliged to prevent its (sub-)subsidiaries from harming third parties abroad. The court found that no special grounds existed to deviate from this general rule. Pursuant to Nigerian law, it dismissed the claims of *Milieudefensie* because the Nigerian oil spills did not infringe on its rights: the rights of this Dutch NGO were in no way affected by the oil spills in Nigeria (as Nigeria does not allow NGOs to sue on behalf of general interests).

Yet, the judgment is a victory for Akpan. The court determined that, pursuant to Nigerian law, SPDC violated a duty of care and was liable for negligence. It found that SPDC could have—and should have—prevented the sabotage of the Christmas tree cap by installing a concrete plug before legal proceedings were initiated. The court ordered SPDC to pay damages to Akpan, the amount to be determined in a separate “damages assessment” proceeding.

This modest victory for the plaintiffs indicates the potential for transnational litigation in the Netherlands. At the same time, other hurdles in the Dutch legal system may explain why this case is the first of its kind in that country. Due to the absence of a contingency fee system, “no win, no fee” arrangements are not allowed. As a consequence of the Dutch “loser pays”

principle and substantial attorney fees, restraint prevails. Furthermore, only compensatory damages can be awarded; the Netherlands does not have a system of punitive damages. Moreover, although Dutch law provides standing for NGOs litigating on behalf of public interests, it generally does not facilitate class actions, not even for transnational human rights and environmental claims that may involve many victims.

Conclusion

The U.S. Supreme Court's ruling in the *Kiobel* case limits the ATS as an instrument for victims of human rights abuses and environmental pollution caused by multinational corporations abroad, and the case necessitates the exploration of other legal pathways. One such pathway has been offered by the Dutch court ruling in *Akpan* against the same companies that were sued in *Kiobel*.¹⁴ The Dutch court held a Nigerian company liable for damages suffered by Nigerian farmers, following an oil spill from a sabotaged well, because of violations of Nigerian environmental law. The sole reason for this extraterritorial reach by the court is the fact that the parent company has its headquarters in the Netherlands. Despite the eventual dismissal of all claims against the parent company, the decision shows the *possibility* that, in other circumstances, the parent company could be held liable.

The Dutch approach offers advantages for victims of human rights abuses in developing countries. First of all, victims may bring claims against both the local subsidiary and the parent company at the same time, and the court must then assess their liability. Second, the legal infrastructure of developed countries usually offers access to justice in a faster and more reliable manner than that of most developing countries. Third, in many developed countries, class action suits may be initiated, and NGOs may be available for assistance.

One of the weaknesses of the approach taken by the Netherlands, however, is that its courts must rely on the local law where the tort occurred, in this case Nigerian law. This mandate proved to be a stumbling block for holding the parent company liable. Nevertheless, the *Akpan* case demonstrates that, depending on applicable (foreign) law, (sub-)subsidiaries of Dutch multinationals can be held liable in Dutch courts. It is also conceivable that, in the future, Dutch courts might also hold a parent company responsible for harms that occur abroad.

KIOBEL AND CORPORATE COMPLICITY— RUNNING WITH THE PACK

*By Anne Herzberg**

Many human rights activists have lamented the outcome of *Kiobel v. Royal Dutch Petroleum Co.*¹ Reacting to the opinion, Human Rights Watch expressed concern that *Kiobel* “significantly reduce[s] the possibility that corporations can be held accountable in US courts for

¹⁴ This Dutch pathway may be considered an illustration of a wider European trend. See, in this Agora, Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*.

* Anne Herzberg is the Legal Adviser of NGO Monitor, the Jerusalem-based research institute.

¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).