

This article is published in a peer-reviewed section of the Utrecht Law Review

The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria Case*

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1. Introduction: a trend towards foreign direct liability cases

Over the past two decades, Western societies around the world have witnessed a growing trend towards so-called foreign direct liability cases. Increasingly, courts in Western societies are being confronted with transnational civil liability claims against multinational corporations for harm caused to people and planet in developing host countries.¹ The main impetus for this trend has long been provided by a long-forgotten 1789 US federal statute, the Alien Tort Statute (ATS).² This statute was ‘rediscovered’ in the 1980s as providing a legal basis for non-US-citizens (‘aliens’) to bring transnational tort claims before the US federal courts in relation to international human rights violations perpetrated anywhere in the world. It has been hailed by human rights activists as a much-needed accountability mechanism for human rights violations perpetrated in developing societies where victims’ chances of obtaining (enforceable) remedies may be compromised by poorly functioning legal systems, corruption and/or favouritism.³

Initially, the ATS was mainly used as a basis for civil claims against individual perpetrators of international human rights violations or international crimes, like Karadzic and Marcos. From the late 1990s onwards, however, it has also become a popular basis for civil liability claims against corporate actors in relation to their alleged involvement in human rights violations perpetrated in host countries.⁴ The result of this development so far is that around 150 foreign direct liability claims have been brought before the US federal courts on the basis of the ATS against a wide range of multinationals with a basis or at least a presence in the US, for their alleged involvement in international human rights violations perpetrated in countries such as Burma, South Africa, Ecuador, Nigeria and Sudan.⁵ High-profile examples include claims against a large group of multinationals including General Motors, IBM and DaimlerChrysler for

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1 See, for a detailed study of the contemporary trend towards foreign direct liability cases and its legal and socio-political aspects: L.F.H. Enneking, *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability*, 2012.

2 28 United States Code §1350. This statute, which has famously been referred to as a ‘legal Lohengrin’, since ‘no one seems to know whence it came’ (or, more particularly: what exactly the 1789 framers had in mind when they enacted it), provides: ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. See for a quote: *IT v. Vencap, Ltd.*, 519 F.2d 1001 (2nd Cir. 1975) (Friendly, J., at 1015).

3 See in more detail, for example: Enneking, *supra* note 2, pp. 77-87, 277-278.

4 See, in more detail: Enneking, *supra* note 2, pp. 77-83.

5 See, for instance: J.C. Drimmer & S.R. Lamoree, ‘Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions’, 2011 *Berkeley Journal of International Law* 29, no. 2, pp. 456-527, at p. 465.

their alleged involvement in the human rights violations perpetrated by the South African Apartheid regime, and the claims against Texaco (now Chevron) for the detrimental environmental and health impacts resulting from the pollution allegedly caused by Texaco's oil operations in Ecuador and Peru between 1964 and 1992.⁶

The trend towards these foreign direct liability cases has not remained confined to the US; similar claims have been brought in other Western societies such as Australia, Canada and the UK, albeit in far smaller numbers. Due to the lack of an ATS equivalent, these non-US foreign direct liability claims have typically been pursued on the basis of general principles of tort law and the tort of negligence in particular. As a consequence, the claims in these non-ATS-based cases tend to revolve not around alleged violations of international (human rights) norms, but around alleged violations of non-written norms pertaining to proper societal conduct and due care.⁷ Well-known examples include the civil claims that were brought before the London High Court by a large group of Ivorians following the Probo Koala toxic waste dumping incident, and the claims against Shell by 11,000 Nigerians from the Bodo community in relation to two serious oil-spill incidents in the Niger Delta that are currently pending before that same court.⁸

In the first half of 2013, judgments were rendered in two separate foreign direct liability cases involving the Anglo-Dutch multinational oil corporation Shell. The first case, which will be referred to here as the *Dutch Shell Nigeria* case, involved a number of civil liability claims that had been brought before The Hague District Court in the Netherlands in 2008 and 2009 by four Nigerian farmers and the Dutch NGO *Milieudéfensie*, who sought to hold both the parent company Royal Dutch Shell and its Nigerian subsidiary liable for the damage caused by a number of oil spills in the vicinity of three Nigerian villages.⁹ The second case, the so-called *Kiobel* case, involved civil liability claims that had been brought before the New York District Court in 2002 by a number of Nigerians from the Ogoniland region of the Niger Delta, who sought to hold Royal Dutch Shell liable for its alleged involvement, through its Nigerian subsidiary, in human rights violations perpetrated by the Nigerian military regime in the 1990s against local activists protesting against the environmental degradation caused by oil exploration activities in the Niger Delta.¹⁰

These two cases and the recent judgments rendered in them by The Hague District Court and the US Supreme Court, respectively, are bound to have a significant impact on the future course of the trend towards foreign direct liability cases. This article will further explore the issues raised in and the outcome of the first of these cases, the *Dutch Shell Nigeria* case, and consider its international relevance, also in light of the international debates on corporate accountability and business & human rights, and the Supreme Court's judgment in the *Kiobel* case.

2. The *Dutch Shell Nigeria* case: outline

In January 2013, The Hague District Court in the Netherlands rendered a final judgment in the foreign direct liability claims against Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC) that had been pending before it since late 2008 / early 2009. These claims formed part of a total of five procedures that had been initiated by four farmers from the Nigerian villages of Oruma, Goi and Ikot Ada Udo, together with the Dutch NGO *Milieudéfensie*, in

6 See for details and further references on these two cases (and on a large number of other, similar, cases), the website of the Business & Human Rights Resource Centre: <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases>> (last visited 4 November 2013).

7 See, in more detail: Enneking, *supra* note 2, pp. 87-91.

8 See for details and further references on the *Trafigura* case, the website of the Business & Human Rights Resource Centre: <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>> (last visited 4 November 2013). See for details on the *Bodo* case, for instance: '11,000 Nigerians sue Shell in London courts' (22 March 2012), <<http://www.leighday.co.uk/News/2012/March-2012/11,000-Nigerians-sue-Shell-in-London-Courts>> (last visited 4 November 2013).

9 See for details and further references on this case, the website of *Milieudéfensie* (Friends of the Earth Netherlands): <<http://www.milieudéfensie.nl/english/shell/oil-leaks/courtcase/press>> (last visited 4 November 2013).

10 See for details and further references on this case, the website of the Business & Human Rights Resource Centre: <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShellawsuitreNigeria>> (last visited 4 November 2013).

reaction to four incidents in which oil had spilled from SPDC-operated pipelines in the Nigerian Niger Delta, causing damage to the neighbouring farmers' lands and fishponds, thereby compromising their livelihoods.¹¹

The core allegation made by the plaintiffs against the Nigerian subsidiary was that it had not exercised due care in preventing the oil spills from occurring, by failing to take adequate measures to prevent the spills and/or to mitigate their consequences, and by failing to properly clean up the contaminated sites afterwards. The core allegation against the parent company was that it had failed to exercise due care by not using its influence over the group's environmental policies to ensure that the local oil extraction activities engaged in by its Nigerian subsidiary were undertaken with due care for people and planet locally. On the basis of these allegations, the plaintiffs asked the court, among other things, for a declaratory judgment holding that the defendant companies had acted unlawfully towards them and were jointly and severally liable for the resulting damage. They also requested the court to issue injunctions ordering the defendants, among other things, to carry out overdue maintenance to the pipelines, to complete sanitation of the lands and fishponds affected by the oil spills in dispute, and to draw up contingency plans that would allow for a more adequate response to future oil spills.¹²

The district court's January 2013 ruling was preceded by a number of interlocutory rulings. Already in December 2009, the court determined that it had jurisdiction to hear not only the claims against the parent company RDS, which has its head office in The Hague, but also the claims against the Nigeria-based subsidiary SPDC.¹³ This in itself was already an interesting development, considering the fact that although the court's jurisdiction over the claims against the parent company was a given,¹⁴ the claims against the foreign subsidiary had only limited (if any) points of contact with the Dutch legal order. The court, however, based its assumption of jurisdiction over the latter claims on a rule of international jurisdiction that allows Dutch courts to exercise jurisdiction over claims against co-defendants in proceedings in which they have jurisdiction with respect to one of the defendants, if the causes of action against the different defendants are connected in such a way that a joint consideration is justified for reasons of efficiency.¹⁵

In another interlocutory ruling in September 2011, the court determined, among other things, that the applicable law on the basis of which the claims were to be adjudicated was Nigerian tort law. In the same ruling, it also dismissed a request made by the plaintiffs for Shell to provide exhibits of certain key evidentiary documents pertaining to, for instance, the condition of the oil pipelines involved and Shell group's internal policies and operational practices.¹⁶ This ruling, which evidences the relatively restrictive Dutch approach to discovery and the disclosure of documents, dealt a painful blow to the plaintiffs. They had hoped to be able to use the requested documents in order to further substantiate their claims that the oil spills in dispute were a result of faulty maintenance rather than sabotage (as had been claimed by the defendants), and that both the parent company and its subsidiary had violated their respective duties of care owed to the plaintiffs in not preventing the oil spills from occurring.¹⁷

In its final ruling in January 2013, the court, on the basis of the evidence presented to it, came to the conclusion that the oil spills were the result of sabotage, and not the result of faulty maintenance as had been argued by the plaintiffs. This, in combination with the fact that under Nigerian law the operator of an oil pipeline is not liable, in principle, for harm resulting from oil spills caused by sabotage, led the

11 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9845* (re oil spill near Goi), *ECLI:NL:RBDHA:2013:BY9850* (re oil spill near Oruma), *ECLI:NL:RBDHA:2013:BY9854* (re oil spills near Ikot Ada Udo).

12 See the court documents, some with English translations, on the *Milieudéfensie* website, supra note 9. See also Enneking, supra note 2, pp. 104-107.

13 The Hague District Court, 30 December 2009, *ECLI:NL:RBSGR:2009:BK8616* (re oil spill near Oruma).

14 Arts. 2(1) and 60(1) Brussels I Regulation.

15 Art. 7(1) Dutch Code of Civil Procedure. The court held that a joint adjudication of the claims would indeed be justified for reasons of efficiency. In doing so, it passed over the defendants' argument that the plaintiffs' claims against the parent company were evidently without prospect and meant only to bring about jurisdiction over the claims against the subsidiary, and that as such they constituted an abuse of procedural law.

16 The Hague District Court, 14 September 2011, *ECLI:NL:RBSGR:2011:BU3529* (re oil spills near Ikot Ada Udo), *ECLI:NL:RBSGR:2011:BU3535* (re oil spill near Oruma), *ECLI:NL:RBSGR:2011:BU3538* (re oil spill near Goi).

17 See, in more detail on the issue of multinationals and transparency, with a focus on transparency in foreign direct liability cases, L.F.H. Enneking, 'Multinationals and transparency in foreign direct liability cases', 2013 *Dovens Schmidt Quarterly* 2, no. 3, pp. 134-147. See also Enneking, supra note 2, pp. 259-262.

court to dismiss the majority of the claims against the Nigerian Shell subsidiary SPDC.¹⁸ It also dismissed all of the claims against the parent company RDS, finding that under Nigerian tort law a parent company does not in principle have a legal obligation to prevent its subsidiaries from causing harm to third parties except under special circumstances, which the court did not find to exist.¹⁹ Unsurprisingly, this judgment by The Hague District Court was hailed as a victory by the defendant companies.²⁰

Still, the court did not send the plaintiffs home completely empty-handed, as it did grant their claims against SPDC in one of the procedures, which related to two oil spills in 2006 and 2007 from an abandoned wellhead near the village of Ikot Ada Udo, ordering SPDC to pay compensation for the resulting loss. Although starting, also here, from the assumption that the immediate cause of the oil spills had been sabotage, the court in this specific case decided that SPDC was liable for the damage caused to the plaintiffs' crops and fishponds as a result of the oil spills. According to the court, SPDC had been negligent in leaving behind the wellhead without adequately securing it, thus making it simple for saboteurs to unscrew its valves. This led the court to conclude that in failing to take sufficient precautions against the risk of sabotage, SPDC had violated the duty of care it owed to the neighbouring farmers.²¹

3. The *Dutch Shell Nigeria* case: international context

As is clear from what has been discussed in the introduction, the *Dutch Shell Nigeria* case forms part of a worldwide trend towards foreign direct liability claims: transboundary civil liability claims brought before the courts in Western societies against multinational corporations in relation to harm caused to people and planet as a result of their activities in (mostly developing) host countries. This trend is set against the background of the contemporary debates on international corporate social responsibility and accountability that are gaining an ever stronger foothold in Western societies around the world.²²

In an era characterized, at least in Western societies, by liberalization, deregulation and privatization, companies rather than governments are increasingly the ones to set the rules of the game. At the same time, in a world characterized by globalization and an accompanying rise in transnational trade, investment and production, but also by vastly divergent levels of development in different societies, the question arises as to who is to step in when international business practices lead to socially unacceptable – and harmful – results. This question ties in with the more general issue of global business regulation: how can internationally operating business enterprises be effectively regulated in an international order featuring political, regulatory and legal structures that still take as their point of departure traditional notions of state sovereignty, territoriality and national interest?²³

It is against this broader legal and socio-political background that the contemporary trend towards foreign direct liability cases should be understood. Internationally operating business enterprises are finding themselves faced with growing media scrutiny about the impacts of their operations overseas, which in turn increases public pressure, especially in Western societies, to ensure that similar (minimum) standards are adopted throughout their worldwide operations, including their production and retail chains. A recent and vivid example of this is the wave of public outrage around the world brought about by the collapse in April 2013 of a Bangladesh factory building that killed more than a thousand factory workers. The outrage was directed not just at the owner of the factory, but also and perhaps even more so at the dozens of Western retailers who in the eyes of the general public had failed to take adequate steps to ensure the safety of the Bangladeshi factory workers making the goods the companies were selling.²⁴

18 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9845* (oil spill near Goi), Paras. 4.43-4.58, *ECLI:NL:RBDHA:2013:BY9850* (oil spill near Oruma), Paras. 4.45-4.60.

19 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9845* (oil spill near Goi), Paras. 4.30-4.39, *ECLI:NL:RBDHA:2013:BY9850* (oil spill near Oruma), Paras. 4.32-4.41, *ECLI:NL:RBDHA:2013:BY9854* (oil spills near Ikot Ada Udo), Paras. 4.26-4.34.

20 See also, for instance (albeit critically): C. Van Dam, 'Shell's victory and embarrassment in the Dutch court', *Huffington Business online*, 26 February 2013, <http://www.huffingtonpost.co.uk/cees-van-dam/shells-victory-and-embarrassment_b_2764258.html> (last visited 4 November 2013).

21 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9854* (re oil spills near Ikot Ada Udo), Paras. 4.38-4.46.

22 See, for an in-depth discussion of the contemporary debates on international corporate social responsibility and accountability, and the role that foreign direct liability cases may play in this context: Enneking, *supra* note 2, pp. 343-648.

23 Enneking, *supra* note 2, p. 6.

24 See, for instance: J.A. Manik et al., 'Western firms feel pressure as toll rises in Bangladesh', *The New York Times*, 25 April 2013.

At the same time, incidents like this one increase the already mounting socio-political pressure on Western society policymakers to search for ways to adequately regulate the transboundary activities of internationally operating business enterprises operating out of their territories, with a view to promoting international corporate social responsibility and accountability. A paradigm shift has been taking place in this field over the past decade, a shift that has largely been brought on by the work of Prof. John Ruggie, the erstwhile UN Representative on Business and Human Rights. He developed an authoritative policy framework on business and human rights,²⁵ along with guiding principles on its implementation,²⁶ outlining the duties of states and the responsibilities of companies to prevent and, where necessary, to redress corporate human rights abuse.²⁷ The framework fundamentally rests on three pillars: the state duty to protect against human rights abuses by third parties, including corporate actors, through policies, regulation and adjudication; the corporate responsibility to respect human rights, which among other things means that companies must exercise due diligence to avoid infringing the rights of others; and the need for (better) access for victims of corporate human rights abuse to effective remedies, both judicial and non-judicial.²⁸

The UN 'Protect, Respect and Remedy' policy framework has found broad support by states, business enterprises, international organizations and NGOs around the world. It has also encouraged Western society policymakers to replace their long-held views of corporate social responsibility as something best left to corporate discretion with the idea that certain regulatory measures may be needed to ensure that business enterprises, especially those operating internationally, do not always put their profits before people and planet-related interests. In 2011 the European Commission, for example, promulgated a new CSR strategy in which it departed from its previous, long-held understanding of corporate social responsibility as a purely voluntary concept, stating, inter alia, that '[c]ertain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility'.²⁹ One of the areas in which regulatory action by the EU in this context may be forthcoming is that of conflict minerals, as the Commission is currently considering the need to introduce legislation along the same lines as Section 1502 of the US Dodd-Frank Act, aimed at increasing the transparency of EU-based multinationals in relation to their involvement in the mining and use of conflict minerals.³⁰

In the meantime, local individuals, groups and communities that have been detrimentally affected by the local operations of internationally operating business enterprises are resorting, increasingly often, to Western society civil courts, usually with the help of one or more of an increasingly widespread, well-informed and experienced global network of NGOs, in order to address and find redress for the harm suffered. As much as they seem to be on the crest of a wave, however, those seeking to pursue foreign direct liability claims generally still face an uphill battle. As is also clear for instance from the *Dutch Shell Nigeria* case, it is especially the procedural and practical circumstances in the forum country that may pose a significant threshold for the host country plaintiffs in these cases.³¹ It comes as no surprise, therefore, that by far the majority of foreign direct liability claims have so far been pursued in the US, where a particular combination of procedural and practical circumstances, including contingency fee arrangements, class actions, liberal rules on the disclosure of documents and a tradition of public interest litigation, together create what is generally considered to be a particularly plaintiff-friendly litigation culture.³²

25 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5 (7 April 2008).

26 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 (21 March 2011).

27 See the website of the Business & Human Rights Resource Centre for more details on the UN Policy Framework on business and human rights and the accompanying Guiding Principles, and further references: <<http://www.business-humanrights.org/UNGuidingPrinciplesPortal/Home>> (last visited 4 November 2013).

28 See, for more detail and further references: Enneking, *supra* note 2, pp. 425-440.

29 EU Commission Communication 'A renewed strategy 2011-2014 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011). See, in more detail: Enneking, *supra* note 2, pp. 417-440.

30 See, for instance: A.L. Vytopil, 'The Conflict Minerals Rule – Private Alternatives?', 2013 *Dovens Schmidt Quarterly* 2, no. 3, pp. 152-159.

31 See, for instance: Enneking, *supra* note 2, pp. 136-137, 187-202, 256-265, 352-356.

32 See, in more detail: Enneking, *supra* note 2, pp. 191-194, 500-502.

4. The *Dutch Shell Nigeria* case: international counterpart

For over more than a decade, the Alien Tort Statute has provided the most popular legal basis for foreign direct liability claims. The use of the ATS as an international corporate accountability mechanism has not remained undisputed, however. Those emphasizing the statute's importance in providing a much-needed instrument to address and provide redress for corporate human rights violations perpetrated anywhere in the world were increasingly contradicted by those emphasizing its potential detrimental impacts on US foreign trade, US foreign relations, and the international competitiveness of US-based multinationals.³³ One of the main concerns voiced by those opposing ATS-based foreign direct liability cases related to the statute's 'geoambiguous' nature.³⁴ It was already noted in 2005 that '[t]here is a growing awareness and growing debate regarding the appropriateness of using US courts to extraterritorially enforce supposedly internationally accepted norms and impose liability for violations of such norms by overseas actors, in overseas venues, and otherwise subject to overseas laws and regulations.'³⁵ Concerns such as these, in combination with a persistent lack of clarity regarding the exact scope and limitations of the ATS despite a 2004 ruling by the Supreme Court on this matter in the case of *Sosa v. Alvarez-Machain*,³⁶ led a number of US federal courts to slowly close the door to ATS-based foreign direct liability claims by adopting increasingly restrictive interpretations of the statute.³⁷

The controversy surrounding the ATS and its use in transnational civil liability claims against corporate actors came to a head in the case of *Kiobel v. Royal Dutch Petroleum Co.* This case on the alleged involvement of Shell in human rights violations perpetrated in Nigeria in the 1990s was dismissed in September 2010 by the Second Circuit Court of Appeals for lack of subject-matter jurisdiction. In its judgment, the court held that corporate actors cannot be held liable at all under the ATS for their involvement in international human rights violations, as the idea that corporations may be held liable for violations of international human rights norms has, according to the court, not found general acceptance within the international community of states.³⁸ The Appeals Court's decision, which seemed to close the door to ATS-based foreign direct liability cases, gave rise to much controversy and was strongly rejected by courts in a number of other circuits.³⁹ The *Kiobel* plaintiffs petitioned the US Supreme Court, which in October 2011 agreed to hear their appeal on the issue of corporate liability under the ATS. In a somewhat unusual turn of events, in March 2012 the Supreme Court itself raised the broader question of whether the Alien Tort Statute allows US federal courts to hear lawsuits in relation to alleged international human rights violations that have occurred outside of the territory of the United States.

In April 2013, the US Supreme Court came with a ruling in the *Kiobel* case which seemed to express a preference for a more restrictive approach to the ATS. In a judgment that addressed only the extraterritoriality issue, the court dismissed the case on the basis of the US presumption against extraterritoriality, arguing that since those drafting the Alien Tort Statute in 1789 did not explicitly provide that its reach should extend beyond US territory, it should be assumed that the statute only applies to norm violations perpetrated within the US (or on the high seas).⁴⁰ But although the court was unanimous in holding that the case should be dismissed, it split 5-4 on the rationale for doing so, with

33 See, in more detail: Enneking, *supra* note 2, pp. 275-284.

34 J.A. Meyer, 'Dual illegality and geoambiguous law: A new rule for extraterritorial application of U.S. law', 2010 *Minnesota Law Review* 90, no. 1, pp. 110-186.

35 D.J. Kochan, 'No longer little known but now a door ajar: An overview of the evolving and dangerous role of the Alien Tort Statute in human rights and international law jurisprudence', 2005 *Chapman Law Review* 8, no. 1, pp. 100-129, at p. 106.

36 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The *Sosa* case concerned claims against individual perpetrators rather than against a legal entity, which meant that the Supreme Court did not address any issues that might arise in the specific context of corporate ATS claims. The Court did however mention in a footnote that: 'A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual' (footnote 20 at 732).

37 See, in more detail, for instance: D.E. Childress III, 'The Alien Tort Statute, federalism and the next wave of international law litigation', 2012 *Georgetown Law Journal* 100, pp. 709-757.

38 See, in more detail: L.F.H. Enneking, 'Multinational corporations, human rights violations and a 1789 statute: A brief exploration of the case of *Kiobel v. Shell*', 2012 *Nederlands Internationaal Privaatrecht*, no. 3, pp. 396-400.

39 See, for instance, with further references: Enneking, *supra* note 2, p. 124.

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

the five Republican justices adopting a significantly more restrictive approach than the four Democratic justices.

The majority opinion seemed to be largely motivated by concerns over the potential foreign policy consequences of allowing ATS-based claims that have only few connecting factors with the US legal order, like the *Kiobel* case (which involved foreign plaintiffs, foreign defendants and conduct occurring outside the US), to be dealt with by US federal courts. Still, it did seem to leave some room for manoeuvre, as it also indicated that the presumption against extraterritorial application may be displaced where the claims '(...) touch and concern the territory of the United States (...) with sufficient force'; under what circumstances this would be the case remained unclear, however.⁴¹ The minority opinion, which concurred in the judgment but not in the majority's reasoning, seemed much less restrictive, as it did not invoke the presumption against extraterritoriality but rather argued that US federal courts should have jurisdiction under the ATS where:

'(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind'.⁴²

The judgment by the US Supreme Court in the *Kiobel* case has clarified that it will no longer be possible to bring before the US federal courts so-called 'foreign-cubed' ATS-based foreign direct liability cases like the *Kiobel* case, which involve foreign plaintiffs, foreign defendants and conduct occurring outside the US and as such have only few connecting factors with the US legal order. It seems that the new point of departure is that the ATS cannot provide a legal basis for foreign direct liability claims that pertain to norm violations perpetrated outside the US (as will generally be the case), unless the claim can be proven to have a strong connection to (interests within) the territory of the United States. How much leeway this leaves plaintiffs seeking to bring ATS-based foreign direct liability claims before the US federal courts against US multinationals (as opposed to multinationals that only have a 'mere presence' in the US, such as Shell) remains to be seen; it does not seem altogether unlikely that human rights activists will seek to explore the boundaries set by the Supreme Court's ruling in the *Kiobel* case in future cases against such multinationals.⁴³

However, developments taking place after the Supreme Court's April 2013 decision in the *Kiobel* case do make it seem increasingly unlikely that the ATS will remain a viable avenue for those seeking to hold multinationals accountable for harm caused to people and planet in developing host countries. In August 2013, the Second Circuit Court of Appeals dismissed another ATS-based foreign direct liability case, the one that was brought against Daimler, Ford and IBM in relation to their alleged involvement in the international human rights violations perpetrated by the South African Apartheid regime, holding that the claims were barred by the Supreme Court's decision in the *Kiobel* case as they related to conduct occurring in the territory of another sovereign state.⁴⁴ Similarly, the DC Circuit Court of Appeals in July 2013 vacated a previous decision upholding the right of a group of Indonesian villagers to proceed with ATS-based claims against Exxon Mobil for its alleged involvement in international human rights violations perpetrated by Indonesian security forces in the province of Aceh, and remanded the case for a decision on whether the Supreme Court's decision in the *Kiobel* case requires the plaintiffs' ATS-based claims to be dismissed.⁴⁵

41 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013), opinion of the court delivered by Chief Justice Roberts; see also the concurring opinions of Justice Kennedy, and of Justices Alito and Thomas.

42 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013), opinion of Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, concurring in the judgment (but not in the majority opinion's reasoning).

43 Similarly, for instance: R. Samp, 'Supreme Court observations: *Kiobel v. Royal Dutch Petroleum* & the future of Alien Tort litigation', *Forbes Business online*, 18 April 2013, <<http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>> (last visited 4 November 2013).

44 *Sakwe Balintulo et al. v. Daimler AG, Ford Motor Company, and International Business Machines Corporation*, 09-2778-cv(L), NYLJ 1202616551432, at *1 (2nd Cir. August 21, 2013).

45 *Doe v. Exxon Mobil Corp.*, 09-7125, 2013 WL 3970103 (D.C. Cir. July 26, 2013).

These developments indicate that the *Kiobel* decision may turn out to act as a bar not only to ‘foreign-cubed’ ATS-based foreign direct liability claims (involving foreign plaintiffs, conduct occurring outside the US and foreign (non-US) defendants), but also to similar claims against US multinationals. This makes it seem like the role of the ATS in foreign direct liability cases may have truly been played out, although much still depends, of course, on whether the courts in other US federal districts and circuits will come to similar conclusions in similar cases.

5. The *Dutch Shell Nigeria* case: international relevance

It is against the background of the international debates on corporate accountability and business & human rights and the Supreme Court’s judgment in the *Kiobel* case that the international relevance of the *Dutch Shell Nigeria* case and The Hague District Court’s January 2013 decision should be seen. Notwithstanding the fact that the majority of the claims instigated by the Nigerian farmers and *Milieudefensie* in this case were dismissed, including all of the claims against the parent company RDS, The Hague District Court’s ruling is groundbreaking for a number of reasons.⁴⁶

First of all, the *Dutch Shell Nigeria* case is the first foreign direct liability claim to have been brought before a court in the Netherlands. As has been mentioned before, in 2009 the district court had already issued a ruling stating that it had jurisdiction not only over the Netherlands-based parent company but also over the Nigerian subsidiary, due to the close connection between the claims against both entities. Even regardless of its outcome, the fact that the plaintiffs succeeded in bringing their foreign direct liability claims against RDS and SPDC before a Dutch court is a novelty that may signal to other plaintiffs in potential future cases that it is possible to bring this type of claim in the Netherlands against Netherlands-based corporate entities and their foreign affiliates. This is especially important now that the possibility of relying on the ATS as a basis for foreign direct liability claims against non-US multinationals that merely have a corporate presence in the US (like Shell) seems to have been ruled out by the US Supreme Court’s decision in the *Kiobel* case.

What is also novel is the fact that The Hague District Court has rendered a ruling on the merits of the claims brought against RDS and SPDC. Of all of the foreign direct liability cases that have been brought in other Western societies so far, only a mere handful have reached the trial stage; the vast majority have either been dismissed at a preliminary (pre-trial) stage or settled out of court.⁴⁷ There are virtually no judgments in which a comprehensively reasoned judicial assessment is made of the legal obligations to exercise due care that may rest upon group entities vis-à-vis people and planet in the host countries in which the group operates, even where local norms set relatively low standards and/or remain unenforced. The ruling by The Hague District Court creates some clarity, albeit on a very limited scale and with a strong focus on the particular circumstances of the case at hand and on the hard law edges that soft law standards and unwritten norms pertaining to socially responsible corporate behaviour may have, also in an international context.

At the same time, the district court’s ruling in the *Dutch Shell Nigeria* case shows that globalization is not a one-way street; in the same way it allows business enterprises to transfer some or even most of their activities to foreign countries with (more) favourable investment climates, it also allows those suffering harm as a result of those activities to seek a higher level of protection than that afforded locally in the courts of the Western societies in which the business enterprises involved are based. The barriers created by traditional notions of sovereignty and of separate juridical personality and limited liability, which seem increasingly out of date in today’s globalizing world, may be problematic for those seeking to hold internationally operating business enterprises accountable for harm caused to people and planet elsewhere, but they are not insurmountable. And although the ideal solution to the accountability gap that

46 For further background information on the issues discussed in this section, see Enneking, *supra* note 2, Enneking, *supra* note 17 and Enneking, *supra* note 38. See also L.F.H. Enneking, ‘Breaking new ground: the The Hague district court’s ruling in the Shell Nigeria case’, *Invisible College Blog*, 4 February 2013, <<http://invisiblecollege weblog.leidenuniv.nl/2013/02/04/breaking-new-ground-the-the-hague-district-courts-ruling-in-the-shell-nigeria-case/>> (last visited 4 November 2013), and (in Dutch) L. Enneking, ‘Zorgplichten van multinationals in Nederland – Second best zo slecht nog niet’, 2012 *Nederlands Juristenblad*, no. 12, pp. 744-750.

47 See, for instance: Drimmer & Lamoree, *supra* note 5, p. 465; Enneking, *supra* note 2, pp. 117-121.

currently exists when it comes to the detrimental impacts that the transnational activities internationally operating business enterprises may have would undeniably be a comprehensive regime of international norms that may be enforced at the international level, foreign direct liability claims provide a much-needed interim solution.⁴⁸

Of course, what makes this case particularly salient is the fact that SPDC, Shell's Nigerian subsidiary, has been held liable by the court for having failed to exercise proper care towards (one of) the plaintiffs, and has been ordered to pay compensation for the damage suffered. The exact amount of the compensation that is to be paid, which will have to be established in follow-up proceedings for the determination of damages, is not likely to be very high. Still, even though this may not seem like such a sweeping result, it is one of the very first instances in which a corporate entity within a multinational group, albeit a subsidiary, has been held liable in a foreign direct liability claim. What should also be noted is that the Dutch system of civil procedure has allowed the court to reach a decision on the merits in this case in 'just' four years, which is significant considering the fact that many of the foreign direct liability claims that have been brought before the US courts so far have dragged on for many years before even reaching the trial phase.

As regards the issue of parent company liability, an issue that is particularly interesting from a legal perspective as it is a relatively novel and uncharted concept, The Hague District Court has left the door ajar. It has explicitly rejected Shell's contention that the plaintiffs' claims against the parent company RDS were manifestly without prospect.⁴⁹ According to the court, a parent company may under certain circumstances be held liable under Nigerian (and English) tort law for harm caused to third parties by the activities of its subsidiaries on the basis of a duty of care owed by the parent company to those third parties. It refers to the case of *Chandler v. Cape*, a recent English case in which a parent company of a corporate group was held liable, both at first instance and on appeal, for asbestos-related injuries suffered by an employee of one of its subsidiaries as it was considered to have breached a duty of care owed to the employee.⁵⁰ The Hague District Court also considers, however, that under the particular circumstances of the *Dutch Shell Nigeria* case (including the court's conclusion that the spills were caused by sabotage), there is no reason to depart from the general principle in Nigerian (and English) tort law that there is no general duty of care to prevent others from suffering harm as a result of the activities of third parties.⁵¹ It is interesting to note that if the case had been decided on the basis of Dutch tort law, which is less restrictive than English tort law when it comes to assuming a duty to act in civil liability cases pertaining to omissions, the court might have decided differently on the issue of parent company liability.⁵²

Notwithstanding everything that has been said here with respect to the international relevance of The Hague District Court's January 2013 judgment in the *Dutch Shell Nigeria* case, a few marginal notes have to be made here. First of all, it should be noted that the ruling does not necessarily set a precedent in a strictly legal sense, due to the fact that it has been rendered by a Dutch court on the basis of Nigerian tort law. At the same time, it is important to note that both parties have appealed against the decision, which means that the case will now be brought before The Hague Court of Appeal for reconsideration.⁵³ Furthermore, although providing comprehensively reasoned answers to most of the questions raised in the *Dutch Shell Nigeria* case, The Hague District Court's January 2013 judgment also leaves some questions unanswered. One example is the court's consideration that an omission, as opposed to an act, cannot amount to a human rights violation in the horizontal relationship between two private parties, a consideration that is difficult to understand in the absence of further explanation and/or substantiation.⁵⁴

48 See, in more detail: Enneking, *supra* note 2, pp. 363-648.

49 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9845* (oil spill near Goi), Paras. 4.2-4.8, *ECLI:NL:RBDHA:2013:BY9850* (oil spill near Oruma), Paras. 4.2-4.8, *ECLI:NL:RBDHA:2013:BY9854* (oil spills near Ikot Ada Udo), Paras. 4.1-4.7.

50 *Chandler v. Cape plc* [2012] EWCA Civ 525.

51 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9845* (oil spill near Goi), Paras. 4.30-4.39, *ECLI:NL:RBDHA:2013:BY9850* (oil spill near Oruma), Paras. 4.32-4.41, *ECLI:NL:RBDHA:2013:BY9854* (oil spills near Ikot Ada Udo), Paras. 4.26-4.34.

52 See, for more detail: Enneking, *supra* note 2, pp. 332-346.

53 See, at the *Milieudéfensie* website: 'Nigerians and Milieudéfensie appeal in Shell case', 1 May 2013, available at <<https://www.milieudéfensie.nl/english/shell/news/nigerians-and-milieudéfensie-appeal-in-shell-case>> (last visited 4 November 2013). See also: 'Milieudéfensie surprised by Shell's appeal against Nigerian victim', 3 May 2013, *Milieudéfensie* website, <<http://www.milieudéfensie.nl/english/pressreleases/milieudéfensie-surprised-by-shell2019s-appeal-against-nigerian-victim>> (last visited 4 November 2013).

54 The Hague District Court, 30 January 2013, *ECLI:NL:RBDHA:2013:BY9845* (oil spill near Goi), Para. 4.60, *ECLI:NL:RBDHA:2013:BY9850* (oil spill near Oruma), Para. 4.62, *ECLI:NL:RBDHA:2013:BY9854* (oil spills near Ikot Ada Udo), Para. 4.56.

Finally, the district court's ruling also shows that for all the progress that is being made in the context of foreign direct liability cases, there are still serious hurdles to overcome for those seeking to hold internationally operating business enterprises accountable for harm caused to people and planet abroad. As was mentioned before, one of the main obstacles so far for the plaintiffs in the *Dutch Shell Nigeria* case has turned out to be the relatively restrictive Dutch approach to the discovery of evidence. It will be interesting to see whether the consideration of the case by The Hague Court of Appeal will shed more light on this stumbling block and/or reveal yet other procedural or practical barriers that may keep the plaintiffs in the *Dutch Shell Nigeria* case and others like them from (successfully) bringing their foreign direct liability claims before the courts in the Netherlands. It should be noted in this respect that in September 2013 the plaintiffs filed a renewed request with the Court of Appeal for Shell to provide exhibits of evidentiary documents pertaining to the Shell group's internal policies and operational practices.⁵⁵

It will also be interesting to see whether and to what extent Dutch policymakers will prove willing to, where necessary, address any procedural or practical obstacles that may structurally impair the chances of those suffering harm as a result of the transnational activities of Netherlands-based corporate actors to address and seek redress for their detriment before the Dutch courts. Despite calls from civil society actors to take action in the specific context of foreign direct liability with respect to the issue of litigation costs,⁵⁶ and, more recently, with respect to the issue of disclosure and the discovery of evidence, they have so far managed to keep their distance.⁵⁷ In fact, the only real action that has been taken by the Dutch Government in this context, except for the commissioning of a study on the legal liability of Dutch multinationals for norm violations perpetrated abroad in 2009,⁵⁸ has been the submission of two *amicus curiae* briefs in the *Kiobel* case, in which the Government urged the US Supreme Court to adopt a restrictive interpretation of the scope of the Alien Tort Statute.⁵⁹ It will be interesting to see how long Dutch policymakers can maintain this relatively dissuasive stance in light of the mounting socio-political pressure to promote international corporate social responsibility and accountability.

6. Conclusion: the future of foreign direct liability

All in all, even though The Hague District Court's ruling in the *Dutch Shell Nigeria* case does not necessarily set a precedent in a strictly legal sense, it is likely to have a broad impact, especially in view of the momentous developments that are currently taking place in the international context in which it is set. These developments include the growing demand for adequate mechanisms through which internationally operating business enterprises can be held accountable for harm caused to people and planet abroad, and of course the narrowing scope of the Alien Tort Statute as a consequence of the Supreme Court's ruling in the *Kiobel* case. Against this background, the judgment by The Hague District Court represents an important next step on a path that leads from soft law standards concerning the social responsibilities of internationally operating business enterprises towards hard law consequences. At the same time, it will provide a signal to legal practitioners, legal academics and especially Western society courts dealing with this type of claim that the trend towards these foreign direct liability cases is a real one. After all, the judgment shows that both subsidiaries and parent companies of Western

55 See, at the *Milieudefensie* website: 'Nieuw bewijs voor betrokkenheid Shell Nederland bij misstanden Nigeria', 10 September 2013, available at <<https://www.milieudefensie.nl/oliewinning/nieuws/nieuw-bewijs-voor-betrokkenheid-shell-nederland-bij-misstanden-nigeria>> (last visited 4 November 2013).

56 See, for instance, with further references: Enneking, supra note 2, pp. 257-258, 328-329. Note that a small-scale study was also commissioned by the Dutch Ministry of Economic affairs with respect to the question whether a legal aid fund should be established for victims of human rights and environmental norm violations perpetrated in the course of the activities of Dutch multinationals abroad (for further references see Enneking, supra note 2, p. 258).

57 See, in more detail and with further references: Enneking, supra note 17.

58 A.G. Castermans & J.A. Van Der Weide, 'The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights', Report of a study prepared for the Dutch Ministries of Economic Affairs and Foreign Affairs, 15 December 2009, original version (in Dutch) available at <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2009/12/21/2-rapport.html> (last visited 4 November 2013), English version available at <<http://ssrn.com/abstract=1626225>> (last visited 4 November 2013).

59 See, in more detail and with further references: Enneking, supra note 38 and Enneking, supra note 17. See also (in Dutch): T. Scheltema & F. Vuijst, 'Juridische blanco cheque voor Shell', 2013 *Vrij Nederland* 74, no. 6 (9 February 2013), pp. 36-43.

society-based multinationals may be held accountable before the courts in their home countries, not only in principle but also in practice. And it also shows that there is a future for foreign direct liability also beyond the Alien Tort Statute. This message is likely to strike a note not only among lawyers, but also among multinationals, NGOs, policymakers and the general public in both developing host countries and Western society home countries. ¶