Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v Shell Litigation in the Netherlands

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On 17 April 2013, the US Supreme Court rendered its keenly awaited judgment in *Kiobel v Royal Dutch Petroleum*.¹ The court relied on the presumption against extraterritoriality to bar relief for violations of the law of nations occurring outside the United States under the Aliens Tort Statute ("ATS").² Victims of overseas human rights violations and human rights activists had pinned their hopes for recourse (particularly against corporations) to this statute.

The *Kiobel* litigation has somewhat eclipsed other litigation avenues for victims of human rights or environmental law abuses, avenues which, after the *Kiobel* judgment, might prove more viable. In particular, tort litigation on the basis of domestic law and private international law, rather than on the basis of public international law (the law of nations, which was at issue in *Kiobel*), may hold hopes for victims. The aim of this note is not to exhaustively examine the promise of such litigation. Rather, the note discusses a specific judgment rendered by the District Court of The Hague (the Netherlands) on 30 January 2013 in *Akpan v Shell*.³ This judgment illustrates the promises and the challenges of public interest tort litigation in domestic courts, and the defendants in this case belong to the same corporate group as the defendants in *Kiobel*—although the cases were unrelated. *Kiobel* concerned violations of physical integrity rights of Kiobel and others by the Nigerian Government, allegedly aided and abetted

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¹ *Kiobel et al v Royal Dutch Shell Petroleum Co et al*, 569 US __ (2013) [*Kiobel*].
² 28 USC § 1350 (2011) [*Alien Tort Statute*].
by the Anglo-Dutch corporation,\textsuperscript{4} Shell. In contrast, \textit{Akpan 2013} was a tort case brought by a Nigerian farmer, Akpan, and the Dutch NGO Milieudefensie (Environmental Defense) against Shell and its Nigerian subsidiary.\textsuperscript{5} The plaintiffs in \textit{Akpan 2013} alleged that both corporations had failed to prevent oil spills from a wellhead in Nigeria, causing environmental damage to Akpan’s land.\textsuperscript{6} The court eventually held Shell’s Nigerian subsidiary responsible towards Akpan for violating its duty of care to prevent oil spills.\textsuperscript{7}

\textit{Akpan 2013} may constitute an important precedent for future transnational tort cases against multinational corporations for overseas environmental harm. It demonstrates that victims of foreign torts can overcome a number of impediments that had previously hampered their chances of successful extraterritorial tort litigation, especially in Europe. This case addresses: (1) the vexing question of whether a forum state’s courts have jurisdiction over violations committed abroad; (2) the question of which substantive law would apply; and (3) the practical issue of generating resources to bring a claim. At the same time, \textit{Akpan 2013} shows that challenges remain, notably the challenge of holding domestically incorporated parent corporations liable for the wrongful acts and omissions of their foreign subsidiaries (“piercing the corporate veil”).

The structure of this note is as follows. The introductory section (Section 1) gives a brief overview of American and European approaches to domestic tort litigation in cases concerning corporate violations of human rights and environmental law. In the following sections, the facts of \textit{Akpan 2013} are set out (Section 2), the grounds on which the Dutch court had jurisdiction over the case are discussed (Section 3), and the merits are analyzed, in particular the application of the Nigerian common law of negligence to the case (Section 4). The note ends with an exploration of the role of human rights in transnational tort litigation, a role rejected by the Dutch court, at least in respect of negligence claims (Section 5), and a conclusion (Section 6).

2. DOMESTIC TORT LITIGATION REGARDING OVERSEAS CORPORATE VIOLATIONS OF HUMAN RIGHTS AND ENVIRONMENTAL LAW: COMPARING AMERICAN WITH EUROPEAN APPROACHES

\textit{Akpan 2013} is part of a broader trend of several domestic courts, notably in Western states, exercising tort jurisdiction over multinational corporations for violations of norms related to public values such as human rights, the environment, and labor conditions in foreign—typically developing—states. This note will not provide an in-depth overview of the rules of which plaintiffs can avail themselves to initiate tort litigation in various jurisdictions. However, a brief overview of the basic norms regarding jurisdiction and liability applicable to such litigation in the United States and the EU will be provided. This comparison is useful because the legal issues in \textit{Akpan 2013} will be compared with those in \textit{Kiobel}, and because the Dutch judgment may set the stage for future judgments in similar cases before domestic courts of EU member

\textsuperscript{4} Kiobel, supra note 1 at 2-3.
\textsuperscript{5} Akpan 2013, supra note 3.
\textsuperscript{6} Ibid at para 3.1.
\textsuperscript{7} Ibid at para 5.1.
states, which are bound by directly applicable EU regulations on jurisdiction and applicable law in transnational tort cases.  

Considering the American approach to tort litigation regarding human rights violations and environmental harms is merited as tort cases against multinational corporations were pioneered by the ATS. Under the ATS, US federal 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.” The examination of the American approach is further justified in light of the momentous Kiobel judgment, to which many may have looked for guidance concerning extraterritorial human rights and environmental tort litigation.

The ATS only provides a cause of action for violations of international law (the law of nations). After the setback suffered by victims of foreign harm in Kiobel, these victims could turn to US state law for recourse. US state law may provide a cause of action in state courts for violations of state tort law, even in respect of extraterritorial events. Each state has its own rules on subject-matter jurisdiction (i.e., jurisdiction over the claim) and applicable law, and rules on personal jurisdiction (i.e., jurisdiction over the defendant) are relatively liberal. However, the promise held by state law has yet to be fulfilled.

Considering the European approach is justified because the Netherlands, where the Akpan 2013 case was brought, is a member state of the EU. As a result, the relevant (binding) EU regulations on jurisdiction and applicable law apply before Dutch courts. The relevant regulations are the Brussels I Regulation ("Brussels I") and the Rome II Regulation ("Rome II"). For our purposes, the most relevant jurisdictional provision of Brussels I is article 2, which provides that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” This article requires that EU member states allow plaintiffs, including foreign plaintiffs alleging foreign harm, to sue corporations registered in an EU

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8 Pursuant to article 288(2) of the Treaty on the Functioning of the European Union, EU regulations are directly applicable in EU member states (EC, Consolidated Version of the Treaty on the Functioning of the European Union, [2010] OJ, C 83/47 at 171).


10 28 USC § 1350 (2011) (extending the jurisdiction of the US District Courts to “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”).


13 Int'l Shoe Co v Washington, 326 US 310, at 316 (1945) [Int'l Shoe Co] ("due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'").


member state, such as the Netherlands. The most relevant jurisdictional provision of Rome II is article 4(1), which provides that the lex loci delicti (the law of the state where the damage has occurred) is the applicable law in transnational tort cases, “irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.” Ordinarily, as the cases discussed in this note relate to foreign harm, foreign law will apply in pertinent cases brought before EU member states’ courts.

3. THE FACTS OF AKPAN V SHELL

Akpan v Shell concerned environmental harm suffered by Akpan, a farmer in Nigeria. This case was litigated in the Netherlands, where the defendant Royal Dutch Shell Plc (RDS) was headquartered.

Akpan, a farmer and fisherman living in the village of Ikot Ada Udo in Akwa Ibom State in Nigeria, claimed that his livelihood had been harmed as a result of oil leaks in 2006 and 2007 from an oil installation operated by Shell Petroleum Development Company of Nigeria, Ltd (SPDC), a wholly-owned subsidiary of RDS incorporated in Nigeria. After approximately 629 barrels of oil had leaked from the installation, an employee of SPDC stopped the leak. A joint investigative team, consisting of representatives of SPDC and the Nigerian authorities, established that the cause of the leak was sabotage of the wellhead of the “Christmas tree,” a massive steel construction with hollow pipes that regulates the flow of oil and gas from the well. After negotiations with the local community, Nigerian contractors, at the expense of SPDC, carried out clean-up operations. In 2010, SPDC further secured the installation against sabotage by closing off the wellhead from the oil reservoir using a cement plug.

SPDC may have precluded future acts of sabotage. Nonetheless, it failed to compensate Akpan for the losses suffered as a result of the earlier oil spills. In 2008, Akpan filed a lawsuit before the District Court of The Hague against both RDS and SPDC. He was supported in his

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16 Under article 60(1) of Brussels I, supra note 14, a person “is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business.”
17 Rome II, supra note 15 at art 4, s 1.
18 Akpan 2013, supra note 3 at paras 2.2-2.3, 3.1.
19 Ibid at para 2.7.
20 Ibid at para 2.7.
21 Ibid at para 2.8.
claim by Milieudefensie, a Dutch environmental NGO. Akpan claimed that: (1) SPDC had not breached its duty of care to prevent oil leaks and thus had committed a tort of negligence under Nigerian law, and (2) RDS, the Dutch parent company, had violated the law by failing to enact guidelines instructing SPDC to prevent and adequately react to oil leaks.

The case does not indicate why Akpan did not file suit before a Nigerian court. Perhaps he lacked resources to do so (a Dutch NGO supported his case in the Netherlands). Perhaps he had no confidence in the Nigerian legal system, or perhaps he believed that—possibly more favourable—Dutch substantive law would apply in Dutch proceedings. Alternately, perhaps he believed that it would jurisdictionally be easier to target the financially more powerful Shell parent corporation RDS in its home state (alongside its Nigerian subsidiary SPDC).

4. THE COURT’S CONSIDERATIONS REGARDING JURISDICTION

In transnational tort proceedings, the issue of jurisdiction appears challenging since plaintiffs ask the court to adjudicate torts committed outside the forum. For the purposes of establishing jurisdiction, corporations incorporated in the forum state are distinguished from corporations incorporated elsewhere. The establishment of jurisdiction over the former category of corporations (“home state regulation”), even in respect of foreign harm, is often not problematic, at least not in the EU. In the EU, as discussed above, article 2 of Brussels I provides that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” Accordingly, Dutch jurisdiction was easily established over the Dutch-incorporated RDS.

The establishment of jurisdiction over Shell’s Nigerian subsidiary, SPDC, appeared more problematic, however, as SPDC is a foreign corporation that had no branch, agency or other establishment in the forum state. Although it is a subsidiary of the Dutch company RDS, SPDC was incorporated in Nigeria.

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23 This NGO had standing in the case on the basis of art 3:305(a) Civil Code of the Netherlands, pursuant to which a foundation or association with legal personality can file a legal action that pertains to the protection of similar interests of other person, provided that it protects these interests on the basis of its bylaws. In an earlier interim decision (District Court of the Hague, 14 September 2011, Akpan et al v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd, LJN BU3529 (Netherlands) at 3 [Akpan 2011]) the court had ruled that said provision was a rule of Dutch civil procedure law, and applied as such to the proceedings, regardless of whether Nigerian (applicable) law recognized collective actions or not. In its judgment of 30 January 2013 (supra note 3 at para 4.12), the court further justified the NGO’s standing on the grounds that a number of actions of the NGO exceeded the individual interest of only Akpan, that the NGO organized campaigns aimed at bringing a halt to environmental pollution due to oil exploitation in Nigeria, and that the NGO had indicated in its bylaws that the protection of the environment at a global level was one of its purposes.

24 Akpan 2013, supra note 3 at para 3.1.

25 Brussels I, supra note 14 at art 2, s 2.

26 Note also under article 5(5) of Brussels I, supra note 14. “[a] person domiciled in a Member State may, in another Member State, be sued … as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.”
However, by interim decision of 24 February 2010, the District Court of Amsterdam held, on the basis of the application of Dutch rules of civil procedure, that it had jurisdiction over the claims against both RDS and SPDC. Grounds for this decision were that the claims against both corporations were closely related, reasons of expediency warranted joint treatment, and that this treatment did not constitute an abuse of procedural law. The claims against RDS and SPDC were indeed closely related as the plaintiffs sought a judgment declaring that both corporations failed to take the required due diligence measures to prevent environmental harm. However, a close connection is a necessary but not sufficient requirement for establishing jurisdiction. As such, joint treatment broadens the jurisdictional basis, Dutch courts require that the claims against the latter corporation are not spurious. In the 2010 decision, the court held that the claims against RDS were not absolutely unsound or unviable, and accordingly treated the claims against RDS and SPDC together.

This jurisdictional decision is important, as it implies that a forum court may hear a complaint filed by a foreign plaintiff against a foreign corporation for foreign harm. At first glance, such jurisdiction approaches universal jurisdiction, which requires no territorial, personal or other link to the forum state. Still, the court’s jurisdiction over SPDC was only of a derivative nature: the court’s extended jurisdiction over SPDC hinged on its indisputable jurisdiction over RDS on the basis of the latter’s incorporation in the Netherlands, and on the nature of the claims against both SPDC and RDS. Nevertheless, this court’s decision may embolden courts elsewhere to hear complaints against domestic parents and foreign subsidiaries alike in relation to foreign harm, although much will depend on the application of domestic rules of civil procedure on joint treatment of complaints.

At the request of RDS, the court revisited the jurisdictional issue in its decision of 30 January 2013. The court justified its earlier decision by clarifying that it was foreseeable for SPDC that the court would have jurisdiction over the claim brought against it, given the connection between the claim against SPDC and the claim against RDS. The foreseeability

27 District Court of Amsterdam, 24 February 2010, Akpan et al v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria, Ltd, LJN BM1469 (Netherlands) [Akpan 2010].
28 Art 7(1) Code of Civil Procedure of the Netherlands [Dutch CCP].
29 Note that this joint treatment for jurisdictional purposes has no bearing on the separate legal personality of both corporations. Issues regarding the piercing of the corporate veil only come into play in the liability analysis, when the court analyzes whether RDS’s liability was engaged in respect of acts of its subsidiary SPDC.
30 Pursuant to the new jurisdictional regime aimed at revisiting Brussels I, recently unveiled by the European Commission, “it seems unlikely” that courts in EU member states will, “be able to exercise jurisdiction over foreign direct liability claims against non-EU-based corporate defendants that are so closely connected to related claims against EU-based corporate defendants as to warrant their joint adjudication” (Liesbeth Enneking, Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (The Hague: Eleven International Publishing, 2012) at 300 [Enneking]).
31 Akpan 2013, supra note 3. Under Dutch law, interim decisions of courts are binding, but courts can reconsider these decisions in their final judgments provided that it is established that the former decisions rest on a wrong legal or factual basis. See Dutch Supreme Court, Judgment of 25 April 2008 (2008) LJN BC2800, NJ 553 (Netherlands).
32 Akpan 2013, supra note 3 at para 4.5.
criterion reflects a recent decision of the European Court of Justice regarding the scope of the Brussels I Regulation.\textsuperscript{35} Both Akpan 2013 and Painer stand for the principle that a court has jurisdiction over a foreign defendant to the extent that the latter could have anticipated being sued before that court jointly with another defendant over which the court had jurisdiction on the basis of domestic incorporation.\textsuperscript{34}

This plaintiff-friendly approach might encourage prospective plaintiffs to attempt transnational tort litigation. However, this approach is still a far cry from the liberal rules of personal jurisdiction in the United States, where minimal contacts between the defendant and the United States suffice for the courts to assert jurisdiction, regardless of whether the claim is connected to another claim against a US-incorporated defendant.\textsuperscript{35} But the US Supreme Court’s Goodyear decision in 2011\textsuperscript{36} suggests that European rules of judicial jurisdiction with respect to foreign subsidiaries may, at least in some states like the Netherlands, be more liberal than the US rules. In Goodyear, the Supreme Court held that in order to establish general jurisdiction over a foreign subsidiary of a US parent corporation on claims unrelated to any activity of the subsidiary in the forum state, the foreign corporation's contacts with the forum state must be “so continuous and systematic as to render [it] essentially at home in the forum State.”\textsuperscript{37} In contrast, in the Netherlands, a mere “connection” between a claim against a domestic parent and a foreign subsidiary needs to be established.

Once jurisdiction has been established in a transnational tort case, courts in the EU cannot relinquish this jurisdiction. Indeed, the common law concept of \textit{forum non conveniens}, pursuant to which a court chooses not to exercise its jurisdiction if the case appears to be better connected to another forum, is largely unknown in continental Europe.\textsuperscript{38} In 2005, the European Court of Justice decided that application of \textit{forum non conveniens} by courts of EU member states violates Brussels I, which, as pointed out earlier, contains rules of adjudicatory jurisdiction that are binding on EU member states.\textsuperscript{39} Thus, courts in the EU either have jurisdiction and exercise it, or do not have jurisdiction and do not exercise it. Unsurprisingly, the Dutch court in Akpan 2013 rejected application of the \textit{forum non conveniens} doctrine, on

\textsuperscript{35} Eva-Maria Painer v Standard Verlag GmbH and Others, C-145/10, [2011] ECR I-0007 [Painer]. As the court in Akpan 2013 correctly noted, it can be contested whether Painer would fully apply to the case before it, as Painer concerned complaints brought on other legal grounds (whereas both Akpan complaints concerned the tort of negligence). The court went on to point out, however, without citing applicable case-law, that there is “an international trend to hold parent companies liable in their home state for injurious acts of their foreign subsidiaries,” and that “on various occasions the parent company was sued jointly with its relevant foreign subsidiary.” (Akpan 2013, supra note 3 at para 4.5) In the court’s view, this satisfied the foreseeability criterion.

\textsuperscript{36} Akpan 2013, supra note 3 at paras 4.4-4.5; Painer, supra note 33 at para 81.

\textsuperscript{37} Int'l Shoe Co, supra note 13.

\textsuperscript{38} Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S Ct 2846 (2011), 180 L Ed (2d) 796.


\textsuperscript{40} F Ibili, “Civil Jurisdiction and Enforcement of Judgments in Europe. At Last: the EC Court of Justice on \textit{Forum non Conveniens},” (2006) 53:1 Netherlands International Law Review 127.

\textsuperscript{41} Owusu v Jackson, C-281/02, [2005] ECR I-1383.
the ground that this restriction “no longer plays a role in current private international law.”\footnote{Akpan 2013, supra note 3 at para 4.6.} Since this court had already established jurisdiction over SPDC on the basis of the connected claims principle, this implied that, even if the complaint against RDS were dismissed (and it indeed was, as discussed below), the court could not relinquish its jurisdiction on the \textit{forum non conveniens}-ground that the case against SPDC had a weak nexus with the Netherlands, and should rather be heard by Nigerian courts.\footnote{Ibid.}

Dutch and European courts may, under some circumstances, apply a “reverse” \textit{forum non conveniens} principle, the \textit{forum necessitatis} (or forum of necessity) principle.\footnote{For an overview of states exercising jurisdiction on the basis of the forum of necessity principle, see Arnaud Nuyts, \textit{General Report: Study on Residual Jurisdiction (Review of the Member States’ Rules Concerning the “Residual Jurisdiction” of their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)} (Brussels: Service Contract with the European Commission, 2007).} Under Dutch law, forum of necessity allows a Dutch court to assert jurisdiction where there is a sufficient connection with the Dutch legal sphere and where it would be unacceptable to require the plaintiff to submit the case to the judgment of a foreign court.\footnote{\textit{Dutch CCP, supra} note 28 at arts 9(b), 9(c). Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as \textit{Amici Curiae} in Support of Neither Party at 22, \textit{Kiobel, 569 US} (2013) (No 10-1491) [Dutch & UK Brief]. The Dutch government cited the example of the plaintiff having his or her habitual residence in the Netherlands at the time an action is brought before the court. \textit{C.f.} Switzerland: art 3 \textit{Federal Code of Private International Law of Switzerland} allows for the establishment of a forum of necessity provided that legal proceedings are not possible in foreign forums where clear and sufficient links exist, and there is a genuine link between the case and Switzerland.} Under proposed EU law, EU member states’ courts would be allowed to exercise jurisdiction “if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned.”\footnote{EC, \textit{Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters}} This jurisdictional rule of forum of necessity could have provided an alternative legal basis to establish judicial jurisdiction over SPDC in the \textit{Akpan 2013} litigation. However, this principle was ultimately not relied on, as the court had earlier established its jurisdiction on the basis of the connected claims principle.

Forum of necessity obviously opens up opportunities to bring cases in EU member states against non-EU-based corporations, including subsidiaries of EU corporations, where no other jurisdictional ground exists, and where proof of connected claims is lacking. Still, forum of necessity is far from a rule of universal tort jurisdiction, since proof of sufficient connection with the forum is still required.\footnote{For Dutch cases in which \textit{forum necessitatis} was successfully invoked, see \textit{Kantongerecht Amsterdam 5 January 1996, NIPR 1996} at para 5; District Court of the Hague (Rb. Gravenhage), 21 March 2012 (2012) LJD BV794 (El-Hojouj/Derbal) (in the latter case the connection was not expressly established). See for cases in which the connection requirement was held not to be satisfied: \textit{Kantongerecht Amsterdam 27 April 2000, NIPR 2000} at 315; \textit{Decision of the Swiss Federal Tribunal of 22 May 2007, Case No 4C:379/2006} at para. 3.5.}
In fact, there is little European support for a principle of universal tort jurisdiction, either under domestic law or under public international law. This is evidenced by the amicus curiae briefs filed by the United Kingdom, the Netherlands, Germany, and the European Commission in the Kiobel case before the US Supreme Court. In their brief, the United Kingdom and the Netherlands argued that broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little or no connection to the forum state “are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict.”46 Allowing such claims would interfere with other nations’ sovereignty and, in a human rights context, could “interfere with and complicate efforts within the territorial State to remedy human rights abuses that may have occurred within its own territory.”47 Germany suggested limiting the exercise of jurisdiction in cases brought by foreign plaintiffs against foreign corporate defendants concerning foreign activities to cases “where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus.”48 Germany believed the exhaustion of domestic remedies in the claimant’s or opponent’s legal system, or an international tribunal, was mandated by international law.49 The European Commission similarly emphasized that exhausting domestic and international remedies is required by international law. The European Commission also argued that universal civil jurisdiction should be limited to the most grave violations of the law of nations over which universal criminal jurisdiction can be exercised, so as to ensure respect for comity and other nations’ sovereignty.50 This overview shows that European states are reluctant to embrace universal civil jurisdiction under international law. Instead, they put a premium on the exhaustion of judicial remedies in other forums, and the existence of some connection with the forum state. In their domestic law and practice, however, as discussed above, European states, including the Netherlands, are remarkably liberal with regard to the establishment of jurisdiction in foreign tort cases.

In summary, Dutch and other European courts are willing to establish jurisdiction in respect of foreign tort claims not only over domestically incorporated defendants, but also over foreign-incorporated defendants, provided that the claim against the latter is closely connected

46 Dutch & UK Brief, supra note 43 at 2.
47 Ibid at 6. Note that in ATS cases, which concern violations of the law of nations, the likelihood that the territorial states’ interests may be negatively affected is greater than in Akpan-style cases. Indeed, the former cases, although brought against private persons/corporations, typically concern those persons’ complicity in violations of international law committed by government actors. Kiobel, for instance, concerned Shell’s complicity in violations of physical integrity rights allegedly committed by Nigerian government troops. Passing judgment on the role of private persons then almost inevitably implies passing judgment on the government’s conduct. Akpan-style cases often do not relate to the complicity of a corporation in a government violation, but rather concern a corporation’s liability in tort for its own conduct/omission, without the territorial state being involved in the violation. Therefore, such cases are less likely to raise sovereignty concerns. In any event, there is no evidence that Nigeria believed that its interests or rights were trampled on by the Akpan litigation, and at no point in the procedure did it intervene to stress the need to have the case tried in Nigerian courts.
49 Ibid at 14.
to a claim against the former, or provided that no alternative forum is available and a connection with the forum state is established.

5. MERITS OF THE CASE

In an interim decision on 14 September 2011, the Dutch court held that Nigerian law would apply to the Akpan dispute against Shell, as SPDC’s allegedly wrongful act had occurred on the territory of Nigeria, and RDS’s allegedly wrongful act had caused harm in Nigeria.\(^51\) This decision was based on the now defunct Dutch act on conflict of laws, the Wét Conflictenrecht Onrechtmatige Daad (2001) (“Dutch Act”),\(^52\) rather than on Rome II,\(^53\) because the events took place before the latter regulations entered into force on 1 January 2009.

This choice of legal basis—the Dutch Act or Rome II—is by no means a neutral one. Under Rome II, Dutch law might have been considered to be the applicable tort law. Article 7 of Rome II provides that:

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\text{[t]he law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1) [i.e., the law of the country in which the damage occurs], unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.}^{54}\]

Dutch law could arguably apply on the basis of this escape clause, at least in respect of RDS, as RDS’s allegedly tortious act—its alleged failure to prevent damage in Nigeria—took place in the Netherlands.\(^55\) If Dutch law, rather than Nigerian law, applied, the Dutch parent company RDS could have been held liable for not preventing or reacting to the risks created by its Nigerian subsidiary SPDC.\(^56\)

However, on the basis of the Dutch Act, the court, in its 2013 decision, applied Nigerian common law to the case. The court concluded that, in the circumstances, it would not be just, fair and reasonable to hold that RDS assumed a duty of care to the population living in the neighborhood of SPDC’s oil installation.\(^57\) Accordingly, in the court’s view, RDS did not commit a tort of negligence towards Akpan or Milieudefensie.\(^58\)

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\(^{51}\) Akpan 2011, supra note 23 at 3.


\(^{53}\) Rome II, supra note 15.

\(^{54}\) Ibid at art 7.

\(^{55}\) For a forceful defense of such a reading, see Enneking, supra note 30 at 216-18.

\(^{56}\) See also Marie-José van der Heijden, “Unique Case Against Shell–The First Dutch Foreign Direct Liability Case” (8 February 2013), online: Invisible College Blog <http://invisiblecollege.weblog.leidenuniv.nl/> (“whether the result would have been different if Dutch law applied remains one of the yet unanswered questions”).

\(^{57}\) Akpan 2013, supra note 3 at para 4.33.

\(^{58}\) Ibid at para 4.34.
In reaching this conclusion, the court applied a number of leading English tort law cases. The court distinguished Akpan 2013 from Chandler v Cape plc, a 2012 case in which the Court of Appeal of England and Wales decided that a parent company owed a duty of care to an injured employee of its subsidiary. The Dutch court, however, considered that the special relationship of proximity between a parent company and the employees of its subsidiary operating in the same country, highlighted in Chandler v Cape, cannot be equated with the bond between a parent entity of an international oil company and individuals living near the oil installations of its subsidiaries in foreign nations. The court reached this conclusion because the duty of care of a parent company in the former case only concerns a relatively small group of people, whereas a possible duty of care of a parent company in the latter case would apply to an almost unlimited group of people in many countries. The court’s conclusion that there was insufficient proximity thus appears reasonable.

While it refrained from holding RDS (the parent company) liable for violating its duty of care, the court held SPDC (its subsidiary) liable under Nigerian tort law. SPDC had violated its duty of care to Akpan by failing to take measures to prevent the sabotage of the “Christmas tree”. In particular, SPDC should have closed the wellhead using a concrete plug before 2006 (the date the damage occurred). This decision appears to be a correct application of the applicable law, as a Nigerian court had earlier held that an oil installation operator is liable for sabotage if it could have anticipated the sabotage and hence was in a position to take preventive measures.

In contrast, American courts do not apply the law of foreign states when claims are brought under ATS. Indeed, on the basis of the ATS text, US federal courts may apply only international law (law of nations). Nevertheless, applicable law issues may arise regarding modes of liability, such as, in particular, the standard of accomplice liability. US federal courts are split, even internally, on the following issue: should international criminal law or US common law

60 Chandler v Cape Plc [2012] EWCA Civ 525.
61 Akpan 2013, supra note 3 at para 4.29.
62 Note that the ‘piercing of the veil’ was most recently addressed, albeit obliquely, by the UK Supreme Court in VTB [2013] UKSC 5, a case concerning misrepresentations made with respect to a facility and interest rate swap agreement. In this case, the court reaffirmed that, given the individual legal personalities of a parent corporation and its subsidiary, the presumption must be against piercing the corporate veil. The court did not elaborate on the relevant criteria for such piercing, nor on what law should apply; however, thanks to Geert Van Calster for drawing my attention to this case.
63 Akpan 2013, supra note 3 at para 4.43-4.46. The court will at a later stage decide on the damages to be awarded to Akpan by SPDC (ibid at para 4.46).
65 Alien Tort Statute, supra note 2.
standards of accomplice liability apply when corporations are accused of aiding and abetting crimes committed by foreign governments? *Kiobel* did not clarify this issue.

6. **HUMAN RIGHTS**

While *Akpan 2013* primarily concerned as torts of negligence causing environmental damage, the NGO Milieudefensie also claimed that SPDC had violated Akpan’s human rights. Milieudefensie claimed that, by polluting the environment, SPDC violated Akpan’s human right to physical integrity.\(^67\) However, the court dismissed this claim in its 2013 decision on the ground that, in horizontal relationships, a tort of negligence cannot be characterized as a violation of human rights.\(^68\)

*Akpan 2013* is a principled decision, even though it may appear to be a setback to advocates of international human rights law in private law claims. In the literature, it has been argued that human rights violations can be characterized as torts under domestic law, and that international human rights law could inform the exact scope of the duty of care in negligence claims.\(^69\) The court’s conservative position is unsurprising, however. Analyzing foreign direct liability cases like *Akpan 2013*, Liesbeth Enneking concluded that:

> [Even] where [norms of] public international law may be applied directly in the domestic legal order, they are unlikely to play a role of importance in these non-ATS-based foreign direct liability cases since such norms are typically aimed at state actors and will thus only rarely be suitable for direct application (without intervention by the domestic legislator) in the horizontal relationships between private actors.\(^70\)

John Knox has similarly explained in his seminal article on horizontal human rights law that “human rights law does not impose many correlative duties directly”. Correlative duties are meant here as private duties to respect the human rights of others. Knox further noted that human rights law “merely contemplates that governments should protect many human rights from violation by private actors.”\(^71\) In fact, Knox defended this approach on the ground that new horizontal duties might “open the door to converse vertical duties that would restrict human rights,” and inadvertently weaken the existing system of human rights law.\(^72\)

The court’s decision in *Akpan 2013* on the human rights issue is a narrow one, however, and leaves the door ajar for adjudication of at least some horizontal human rights obligations. The decision only pertains to omissions and not to commissions. Corporate violations of horizontal human rights obligations that are the result of *active* interference with the enjoyment of an individual’s human rights may possibly, even under the Dutch court’s standard, be litigated in domestic courts.

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\(^67\) *Akpan 2013*, supra note 3 at para 4.56.
\(^68\) *Akpan 2013*, supra note 3 at para 4.56.
\(^70\) Enneking, supra note 30 at 156-57.
\(^72\) ibid at 47.
In terms of ATS litigation, the Dutch judgment may seem to have limited value, as (only) violations of norms of public international law are expressly actionable under the ATS. The Dutch Akpan 2013 decision merely addressed the question of characterizing domestic torts under Dutch or Nigerian law as human rights violations, without referring to international law. Still, one of the issues in Kiobel was whether corporations have correlative duties vis-à-vis other private actors under public international law, including human rights law. As this Supreme Court did not answer the question, disposing of the case on jurisdictional grounds, it remains open. US courts addressing this question in the limited number of ATS cases over which they may still assert jurisdiction may rely on legal principles common to the world’s major domestic legal systems. In this context, the Dutch court’s decision that in horizontal relationships, corporations’ torts cannot be considered human rights violations may—regrettably perhaps—be cited as evidence of a lack of international support for a general principle pursuant to which corporations are bound by human rights in horizontal relationships.

7. CONCLUSION

Akpan 2013 is a fine example of partly successful transnational environmental public interest litigation in a multinational parent corporation’s home state. Akpan 2013 shows that legal impediments to the assertion of home state jurisdiction can be overcome and that people harmed by multinational corporate negligence can be legally empowered on the basis of the currently applicable principles of jurisdiction, conflict of laws, and tort law. Indeed, in Akpan 2013, the court ruled that victims of tortious acts committed overseas by subsidiaries of corporations incorporated in the forum state can file suit against the parent company and its subsidiary alike, and that these companies can be held liable for environmental harm on the basis of tort law, even if the applicable law is foreign law.

The relative success of the Akpan 2013 litigation for the plaintiffs may inspire other victims of overseas environmental harm to bring tort claims in the state where the multinational corporation responsible for the harm is headquartered. Such claims under domestic law appear to more viable than environmental claims under the much-vaunted but idiosyncratic US ATS. Even before the US Supreme Court sounded the near-death knell of the ATS in Kiobel, private

73 Kiobel, supra note 1 at 2-3.

74 See art 38(1)(c) of the Statute of the International Court of Justice, 24 October 1945, 33 UNTS 993, Can TS 1945 No 7 [ICJ Statute], citing “the general principles of law recognized by civilized nations” as one of the sources of international law to be applied by the ICJ. For a discussion of the nature of general principles, see Johannes G Lammers, “General Principles of Law Recognized by Civilized Nations” in Frits Kalshoven, Pieter Jan Kuyper & Johan G Lammers, eds, Essays on the Development of the International Legal Order (Leiden: Sijthoff and Noordhoff, 1980) at 53.

75 Note that reliance on customary international law may not be apt, as there is no evidence that the Dutch court’s ruling on horizontal human rights obligations was informed by international law considerations. As a result, the ruling may not contribute to the formation of opinio juris, (a constitutive element of customary international law). See art 38(1)(b) of the ICJ Statute, ibid, referring to “international custom, as evidence of a general practice accepted as [international] law.”

76 The legitimacy of such litigation has been forcefully defended by Sarah Seck in a recent piece in which she argues that the exercise of home State jurisdiction over transnational environmental and human rights torts could fill governance gaps and may “serve to empower the very people for whom sovereignty as a construct was imagined to exist” (Sarah Seck, “Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance” (2012) 13 German Law Journal 1363 at 1385).
claims for violations of norms of environmental law might in all likelihood not have satisfied the requirement, set out by the US Supreme Court in *Sosa v Alvarez Machain* (2004), that they have definite content and acceptance among civilized nations comparable to the historical paradigms when the ATS was enacted.77

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