

**MINUTES OF THE SPRING MEETING OF THE KNVIR
ON MONDAY 3 JUNE 2013 AT THE INSTITUTE FOR GLOBAL JUSTICE, THE HAGUE**

BUSINESS AND HUMAN RIGHTS: ISSUES OF LEGAL ACCOUNTABILITY

The annual Spring Meeting of the Royal Netherlands Society of International Law was attended by about 70 members and non-members. The Chairman opened the meeting at 7:00 P.M. and announced that the meeting would have to end at around 9:00 P.M. He then introduced the three speakers and invited them to give their respective presentations, to be followed immediately by a discussion.

The Presentations

The first speaker was **dr. Liesbeth F.H. Enneking**, post-doctoral research fellow at UCALL, Utrecht University's Centre for Accountability and Liability Law and co-author of one of the *amicus curiae* briefs in the Kiobel case before the U.S. Supreme Court.

From time to time the activities of multi-national corporations in developing countries cause harm and people in these countries affected by it have been looking for the means to sue these corporations in their home countries and elsewhere. The resulting "foreign direct liability cases" have urged lawyers to explore the boundaries of the fields of tort law, civil procedure, private international law and public international law.

In the 1980s, in the U.S., a 1789 statute, the Alien Tort Statute, was 'rediscovered' as a basis for non-U.S. citizens ('aliens') to bring civil claims against individuals, such as Marcos and Karadzic, for international human rights violations, perpetrated anywhere in the world. From the mid-1990s onwards, claims were filed also against corporations for their involvement in such violations in countries like Burma, South-Africa and Nigeria. Similar cases have been brought in other jurisdictions like the U.K., Australia, Canada and The Netherlands on the basis of general principles of tort law, albeit on a much smaller scale so far.

The ATS-based line of case law in the U.S. sparked off a major dispute between those who see the ATS as a much-needed enforcement mechanism for corporate human rights violations perpetrated around the world, on the one hand, and those who see the ATS as a threat to U.S. foreign trade, U.S. foreign relations and the international competitiveness of U.S.-based multinationals, on the other. Matters were further complicated by the lack of clarity regarding the modern-day scope and limitations of this 18th century statute. The resulting controversy was one of the reasons why over the past few years a number of U.S. federal courts slowly started to close the door to foreign direct liability claims on this basis. This tendency culminated in a pivotal ruling by the Second Circuit Court of Appeal in the Kiobel case. The Court held that international human rights norms do not give rise to legally enforceable duties for corporations and that for that reason corporations cannot be held liable for international human rights violations under the Alien Tort Statute.

When this decision was appealed to the U.S. Supreme Court a large number of *amicus curiae* briefs was filed. Some of those, like the brief filed by the Dutch Government expressed concern over the perceived extraterritorial nature of the Kiobel case and others like it based on the Alien Tort Statute. This led the Supreme Court to shift its focus away from the issue of corporate liability under the Alien Tort Statute and onto the question whether civil liability

claims related to international human rights violations perpetrated outside the U.S. can be brought before U.S. federal courts on the basis of this statute.

In its April 2013 ruling, which was split along ideological lines, the Supreme Court answered this last question in the negative, holding that the Alien Tort Statute had not been intended to have extraterritorial reach and that for that reason it cannot be applied to modern-day international human rights violations perpetrated outside the U.S. Although, according to the 5-4 (Republican) majority in *Kiobel*, there is a “presumption against extraterritoriality”, it remains possible to override this presumption if the violations “touch and concern the territory of the U.S. with sufficient force”. This means that the Supreme Court has not completely closed the door for claims against corporations for human rights violations committed abroad, but it remains unclear under what circumstances such claims may succeed. What the ruling does make clear, however, is that so-called ‘foreign cubed’ cases like the *Kiobel* case, which have very few connections to the U.S. legal order(?) as they involve not only foreign plaintiffs and conduct that occurred outside the U.S., but also foreign (non-U.S.) defendants, cannot be brought before U.S. federal courts anymore on the basis of the Alien Tort Statute.

Even so, plaintiffs may pursue their claims in other jurisdictions, as was done in the cases filed by four Nigerian farmers and the Dutch NGO Milieudefensie in The Hague against Shell and its Nigerian subsidiary. The court in first instance not only assumed jurisdiction over both companies, but also held the Nigerian subsidiary liable for the damage caused by one of the oil spills, holding that the subsidiary had failed to exercise proper care towards the plaintiffs by not doing more to prevent sabotage. In addition, the court clearly stated that the claims against the parent company were not manifestly without prospect, even if in this case the Dutch Shell company was not held liable. This is in line with developments in the U.K. where it has been decided that, under certain circumstances, a parent company may be held liable for harm caused to third parties by the activities of its subsidiaries.

Dr. Enneking concluded that both the *Kiobel*-decision and the decisions in the Shell-cases in The Hague are significant in light of the contemporary trend towards foreign direct liability. The U.S. Supreme Court’s ruling in the *Kiobel* case seems to have limited the feasibility of such claims before U.S. federal courts on the basis of the Alien Tort Statute, at least where these claims are pursued against foreign (non-U.S.) multinational corporations. At the same time, other cases, like the Dutch Shell-Nigeria case reveal the potential of similar cases brought before courts in other Western societies (and U.S. state courts) on the basis of general principles of tort law. Interesting times lie ahead on both sides of the Atlantic as more of these cases are likely to arise, testing the boundaries of the fields of tort law, civil procedure, private international law and public international law.

The second speaker, **prof.dr. René J.M. Lefeber** is professor of international environmental law at the Amsterdam Centre for Environmental Law and Sustainability of the University of Amsterdam. He also co-authored the joint *amicus curiae* briefs in the *Kiobel*-case that were filed by the Kingdom of the Netherlands and the United Kingdom. Dr. Lefeber started by referring to a recent U.S. Ninth Circuit Court of Appeals decision in *Cetacean Research v. Sea Shepherd*. The case concerned a claim, based on the Alien Tort Statute, of Japanese whale researchers, whose ship had been attacked by environmental activists belonging to Sea Shepherd, an Oregon-based organisation. Several vessels of Sea Shepherd fly the Dutch flag. The Court of Appeals found that Sea Shepherd had engaged in piracy, which is explicitly

mentioned in the Alien Tort Statute. Dr. Lefeber pointed out that the decision of the Court of Appeals implies that The Netherlands condoned piracy and, therefore, that The Netherlands might wish to consider filing an *amicus curiae* brief if the U.S. Supreme Court agrees to hear the case.

He went on to point out what had *not* been stated in the joint Kiobel-briefs filed by The Netherlands and the U.K. Firstly, it had not been argued that corporations cannot be held liable in tort or for criminal offences. It was argued that international human rights law only imposes obligations on states and U.N. human rights conventions were not intended to have any effect on relationships between private parties. Secondly, it had not been argued that corporations cannot be subjects of international law. It was argued that customary international law does not impose obligations on, or attribute rights to, corporations and, hence, does not exclude that such obligations or rights can be derived from treaties. Finally, it had not been argued that international law does not recognise extraterritorial or universal civil jurisdiction. It was argued that international law requires a sufficiently close nexus of a case to the forum asserting jurisdiction.

Returning to Kiobel, dr. Lefeber confirmed that the Supreme Court decision left open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute and thereby the possibility of further litigation in the U.S. What remains unclear at this time, however, is how and when exactly the “presumption against extraterritoriality” may be overcome. It would appear that, according to the U.S. Supreme Court, under the Alien Tort Statute, U.S. federal courts do not have subject matter jurisdiction over any torts that took place outside the U.S. Although the decision of the Supreme Court was unanimous in dismissing the case against Shell, it was stated in one of the concurring opinions that torts of American companies that took place outside the United States should be subject to the Alien Tort Statute. This opinion of Justice Breyer, joined by three justices, referred to the joint Dutch/U.K. briefs when it said that many countries permit foreign plaintiffs to bring suit against their own nationals based on unlawful conduct that took place abroad.

To end with, dr. Lefeber referred to a recent case filed in federal court in New York by Lisette Muntslag, a woman from Surinam, residing in the state of New York, on the basis of the Alien Tort Statute. Ms. Muntslag had brought a claim against several Dutch defendants, namely the Partij van de Arbeid, former minister Jan Pronk and the Municipality and the Mayor of Amsterdam, for non-material damage suffered as a result of the social and economic policies pursued by the defendants, including facilitating the independence of Surinam. The Netherlands filed a letter in which argued that there was no close nexus between the case and the forum and, hence, that the Court should decline jurisdiction. In November last year, the district court dismissed the claim as being frivolous, but an appeal is pending. Dr. Lefeber concluded that the Alien Tort Statute has become the basis of many questionable claims, such as in the case of the Sea Shepherd, or claims with no connection with the United States, such as in the cases of Kiobel and Muntslag. To protect the rights of its nationals, The Netherlands had seized the opportunity in the Kiobel case to present to the United States Supreme Court its views on the rules of international law concerning the exercise of civil jurisdiction. In this respect it is immaterial for The Netherlands whether the defendant is a citizen, a corporation, a political party or a non-governmental organisation.

The third and last speaker was **mr. Bastiaan Pries**, associate general counsel in the legal department of Shell International B.V., who worked on the Dutch court cases between Milieudefensie and several Nigerian farmers and fishermen as plaintiffs and Shell and Shell Nigeria as defendants. By way of introduction mr. Pries briefly described the background against which Shell's subsidiary operates in Nigeria. While Nigeria is rich in natural resources, there is poverty and a general lack of infrastructure, utilities such as power and water, and health care. Crime is widespread and the daily loss of oil through theft roughly equals half the daily oil consumption in The Netherlands. About 95% of the amount of oil lost is due to theft and sabotage. The remaining 5% is caused by operational failures. In short, Nigeria is not an easy country in which to operate.

Mr. Pries went on to compare the "Nigerian" cases against Shell in the U.S. and The Netherlands. In both cases plaintiffs sought to hold Shell liable for what had been done by third parties and in both cases Shell's Nigerian subsidiary had to defend itself in a foreign court. Esther Kiobel demanded damages because her husband had been executed by Nigeria's military regime and the plaintiffs in The Hague claimed to have suffered a loss through oil pollution caused by theft and sabotage.

In the remainder of his presentation mr. Pries focused on the Dutch cases in which both Royal Dutch Shell, headquartered in The Hague, and its Nigerian subsidiary were defendants. There is no question that the Hague District Court had jurisdiction over Royal Dutch Shell. Pursuant to Art. 7 Dutch Code of Civil Procedure the Court also had jurisdiction over the foreign defendant in the same case, provided that the various claims were so closely connected that it would be expedient to hear and determine them together. In order for this provision to apply, however, the Court would have to determine there was a prima facie case against Royal Dutch Shell. The Court decided there was, because according to Nigerian law, in theory, a parent company could be liable in negligence for the activities of its subsidiary. Although the Court determined that, on the basis of this theoretical possibility of liability, it was able to assume jurisdiction over Royal Dutch Shell and thereby over its subsidiary, in the end the Court concluded none of the plaintiffs had a valid claim against the Dutch parent company.

Shell's Nigerian subsidiary operates in an area roughly the size of The Netherlands with more than 1,000 producing oil wells and more than 6,000 kilometres of pipelines and flow lines. Royal Dutch Shell is active in more than 90 countries and it is only one of the many multinationals headquartered in The Netherlands. If the (theoretical) test applied by the Court was correct, it means Royal Dutch Shell and these other companies may be subjected to an endless number of lawsuits in The Netherlands based on activities abroad by their respective foreign subsidiaries. It could be worse still, because the test could be applied, not only to the ultimate holding company, but also to intermediate holdings and other subsidiaries of the ultimate holding company. According to mr. Pries the Court should have determined if in this particular case this parent company could be liable based on the facts alleged by these plaintiffs. Only if that was the case, should the Court have applied the close connection test of Art. 7 Dutch Code of Civil Procedure. In the absence of liability of Royal Dutch Shell the Court should have declined liability over Shell Nigeria.

If the Dutch cases are, once again, compared with the U.S. case, it would appear that in Kiobel the U.S. Supreme Court decided that claims in the U.S. courts against foreign companies should be discouraged, while the court in The Hague did the exact opposite. Shell has filed an

appeal, however, in the one Dutch case it has lost and, no doubt, the jurisdiction issue will be heavily debated on appeal.

The Discussion

The difference in approach between the court in The Hague and the U.S. Supreme Court formed a good starting point for the discussion. In this context, dr. Lefeber pointed out that in The Netherlands there was a close connection with one of the parties, Royal Dutch Shell, while in the U.S. the only link was the fact that Royal Dutch Shell had an investor relations office because of its listing at the New York Stock Exchange. Mr. Erik E.V. Koppe (Leiden University) asked if there is not a general presumption against territoriality, to which dr. Enneking answered that there is not, except in enforcement cases. Ms. Daniëlla A. Dam (Leiden University) stated that in the U.S. there is an increasing tendency towards extra-territoriality and in this context mentioned the Dodd-Frank Act. Mr. Pries commented that this is happening in many countries, which makes it difficult for multi-nationals, especially if each country has its own rules. He referred to the problems related to complying with revenue transparency rules. Clearly, harmonisation is needed there.

On the subject of jurisdiction again prof. Menno Kamminga (Maastricht University) referred to the International Crimes Act, which provides that a defendant must reside in The Netherlands for the Dutch courts to have jurisdiction, but does not deal with corporate defendants.

In response to a question from the audience dr. Enneking stated that even with the restrictive ruling in Kiobel it still will be possible to bring cases in the U.S. state courts.

According to prof.dr. Aukje van Hoek (Amsterdam University) the case before the Dutch court was one of joint and several liability against a Dutch defendant, Royal Dutch Shell, and a connected foreign defendant, but mr. Pries maintained that even if one assumed that all facts were correct, the court should not have assumed jurisdiction.

Prof.dr. Nicola M.C.P. Jägers (Tilburg University) asked if states are trying to remove obstacles for plaintiffs to bring human rights cases. According to dr. Enneking we already have Art. 6 European Human Rights Convention (right to a fair trial), which could be used on appeal in the Dutch cases. This prompted mr. Pries to comment that this would not make a fishing expedition something other than that. For example, the plaintiffs requested Shell to produce documents to prove lack of maintenance, even though Shell could prove that all the damage had been caused by sabotage.

In response to a question from Ms. Zvezdana Martić (PwC) mr. Pries stated that the Nigerian government is not in favour of compensation being paid to victims of sabotage, because this is likely to promote sabotage. Should Shell not work with the farmers to prevent sabotage, Ms. Martić then asked. Mr. Pries agreed and explained that Shell Nigeria is in fact employing local people for the surveillance of pipelines, but this has not always proven to be effective.

At this point the meeting was closed and the chairman invited everyone present to continue the discussion informally with a glass of wine.