A Glass at Least Half Full: The Dutch Court Ruling on Akpan v Royal Dutch Shell/Shell Nigeria

Posted by Nadia Bernaz on 26th Feb, 2013 in Human Rights | 1 comment

It is a pleasure to welcome Dr Evelyne Schmid as a guest poster on 'Rights as Usual'. Evelyne is a lecturer at Bangor University and is writing a book on the overlap between socio-economic and cultural rights violations and international criminal law. This post is hers.

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The Hague District Court recently issued a ruling on Shell's operations in Nigeria. Mr. Akpan, a Nigerian farmer affected by oil spills, and Milieudefensie, a Dutch NGO, brought a number of civil proceedings against Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC). In a class action, the plaintiffs alleged that Shell damaged the farmers' lands and fishponds and interfered with the local population's livelihoods. On 30 January 2013, the Hague District Court found that SPDC was liable to pay compensation for loss resulting from two specific oil spills from an abandoned wellhead. The Court found that SPDC failed to take appropriate preventative and remedial action against spills from pipelines and was liable for resulting damages.

At the same time, the Court dismissed many other claims. Based on the evidence, the Dutch Court concluded that it was at least plausible that the oil spills might have been caused by sabotage. Applying Nigerian tort law, the Court concluded that no general duty of care could be imposed on SPDC to prevent other parties from suffering damage as a result of the practices of third parties (i.e. the saboteurs). The Dutch Court also concluded that 'parent companies like RDS in general have no obligation under Nigerian law to prevent their (sub-)subsidiaries such as SPDC from inflicting damage on others through their business operations' (para. 4.26). There would have had to be exceptional grounds to impose a duty of care on the parent company domiciled in the Netherlands. Not finding any such exceptional grounds, the Court dismissed the claims against Royal Dutch Shell.

A lot of media attention (see for instance here or here) has focused on the outcome of the case and those claims that the Court dismissed. From a legal point of view, the Court's reasoning is interesting for at least three other reasons:

1. Jurisdiction

Notwithstanding the ultimate outcome against the parent company, it is crucial to note that jurisdiction was upheld for both entities, the parent company (RDS) and the Nigerian subsidiary (SPDC). This is remarkable. After all, it was 'solely' a matter of Nigerian domestic tort law that that the plaintiffs didn't succeed on the merits against RDS and no duty of care was imposed on the RDS. In other words, had Nigerian tort law been different on this point of law, the parent company would have been in more trouble.

To justify its groundbreaking stance on jurisdiction, the Hague District Court explained that it was 'foreseeable' for RDS *and* SPDC 'that they might be summoned in the Netherlands in connection with the alleged liability for the oil spills' (para. 4.5). This should be some food for thought for those home state policymakers who continue to believe that they have no reason to regulate the extraterritorial behaviour of companies registered in their jurisdiction. If it is foreseeable that Dutch domestic courts might establish jurisdiction over Dutch parent companies and their foreign subsidiaries, then surely other domestic courts might potentially do the same.

The Hague District Court's explanations on the establishment of jurisdiction are especially relevant for member states of the European Union given that the Court discussed a ruling of the European Court of Justice (ECJ) and the Brussels Regulation on the allocation of jurisdiction. *Painer* (C-145/10) dealt with the event of a difference in the basis of claims initiated against various defendants. The ECJ in 2011 found that what matters is that the defendants 'could foresee that they might be sued in the Member State where at least one of them was domiciled' (*Painer*, para. 81). In light of this ruling and the Dutch Court's stance in *Akpan*, the trend to summon parent companies of multinationals together with their foreign (sub-)subsidiaries in the country of the parent company may well continue and rely on a solid basis in European law.

2. Disclosure: Procedure is Substance

On a cautionary note, the case also illustrates the importance of the role of domestic law – both substantively and procedurally. It was a combination of the Dutch Code of Civil Procedure and Nigerian tort law which resulted in the outcome of the decision – not international law. This raises issues for many, if not most, domestic legal systems. In particular, restrictive procedural rules on disclosure of company-held documents can play a crucial role in hindering the success of civil proceedings against companies alleged of causing damages. In the present case, the plaintiffs state that they would have been able to support all of their claims if Shell had to disclose key documents with data on oil spills. Under the Dutch Code of Civil Procedure (Art. 21 and 22), it is difficult to obtain the disclosure of key company documents and claimants are generally obliged to adduce all facts. Similar rules exist in many other European jurisdictions. Procedure then easily becomes substance.

3. Beyond Local Interests

On a side note, another notable legal aspect of the judgment concerns the Hague District Court's rebuttal of what seems an almost disingenuous argument by the corporate defendants. The defendants argued that the Dutch NGO had no standing to bring a class action in the case because the proceedings of the Nigerian farmer would 'involve a purely local interest'.

The Court was quick to refute this challenge. The three judges maintained that 'a number of Milieudefensie et al.'s claims clearly rise above the individual interest of (only) Akpan, because remediating the soil, cleaning up the fish ponds, purifying the water sources and preparing an adequate contingency plan for future responses to oil spills (…) will benefit not only Akpan but the rest of the community and the environment (…) as well' (para. 4.12). This statement might well be useful for future human rights work or litigation in class actions and sends a strong signal that courts recognise the broader human rights dimensions of such cases.

At the end of the judgment, the Dutch Court also made somewhat disappointing comments about human rights law. In a single paragraph, the Court said that the Nigerian Shell subsidiary can't have violated human rights law (approached exclusively under Nigerian domestic law) because the case deals with negligent omissions rather than active conduct (para. 4.56). The Court failed to provide any analysis of international human rights law to support this idea and the statement would raise many fundamental legal debates about human rights law and non-state actors not addressed in the judgment.

That said, *Akpan v Royal Dutch Shell/Shell Nigeria* is a highly significant case for future litigation and it is certainly worth staying tuned for the appeal. The English translation of the full text of the judgment is available here.

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1. *Victor Okotie* says:
   April 12, 2013 at 10:55 am

   Beautiful digest of the case.

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About Me

My name is Nadia Bernaz and I am Associate Professor of Law and Governance at Wageningen University in the Netherlands. My main area of research is business and human rights. I look at how corporations and businesspeople can be held accountable for their human rights impact through international, domestic and transnational processes.

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