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The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights

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**The legal liability of Dutch parent companies
for subsidiaries' involvement in violations of
fundamental, internationally recognised rights**

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Leiden, 15 December 2009

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Summary

This report describes the questions a Dutch civil court will ask in assessing the liability of a Dutch legal person for involvement in the violation of fundamental, internationally recognised rights. It focuses more specifically on the liability of a Dutch legal person for subsidiaries operating abroad.

Background

The report was commissioned by the Minister for Foreign Trade and is intended to serve as a basis for debate on:

- * the conclusions of a study to be commissioned by the European Commission into the legal framework on human rights and the environment, applicable to European enterprises operating outside the EU;
- * the operationalisation of the framework put forward by Professor John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

For this reason, we have tried to adopt an accessible style and to avoid a technical description of statutory provisions, case law and dogmatics under Dutch law and that of neighbouring countries. The report deals solely with legal issues. Non-legal alternatives such as access to the National Contact Points for the OECD Guidelines for Multinational Enterprises are not discussed.

The report is partly based on specific legislation, such as certain offences defined in the criminal law, the competence of the civil courts and the applicable private law. In some cases, it elaborates on openly formulated statutory provisions.

There are no national or international examples of legislation providing for explicit liability applicable to legal persons for the harmful effects of the actions of their foreign subsidiaries or suppliers. Nor are there many court rulings on this issue. In the Netherlands the first three cases in this field are now pending, so we have to wait and see whether the Dutch courts consider themselves competent to hear these claims. The report is therefore largely based on the authors' own assessment of the situation, based

on a very small number of foreign examples or on legislation, judgments and legal literature in other fields.

Questions

Can a Dutch legal person be held liable for the involvement of a subsidiary in the violation of fundamental, internationally recognised rights abroad? Who can hold the Dutch parent company liable? In using the term 'liability', this report is talking about liability under private law.

Procedure

In deciding whether victims of violations of fundamental, internationally recognised rights can claim compensation from a Dutch parent company, the Dutch courts follow a tried and tested procedure.

- * First, the court determines whether it is competent to decide on the claim.
- * Next, it ascertains which law is applicable: Dutch law, or the law of another country.
- * Only then does it assess the claim and the facts underlying the claim.

Jurisdiction of the court

As explained above, the court first assesses whether it is competent. Precisely because the claim for compensation is directed against a Dutch legal person, it may consider itself competent – in accordance with Council Regulation (EC) No 44/2001, or Brussels I (see section 4.2). In view of the court's jurisdiction, it is not inconceivable that the foreign subsidiary may also be involved in the same proceedings.

Applicable law

The Dutch court will in principle have to base the substantive part of its judgment on the law of the country where damage was suffered. In most cases therefore, it will not be based on Dutch law. This applies both to the liability of the subsidiary and to that of the parent company (due to failure of supervision). This rule is derived from Council Regulation (EC) No. 864/2007, or Rome II.

In exceptional cases the Dutch court will be able to apply Dutch law, especially if Dutch public policy is at issue. In other words, if according to the law of another country a

violation of fundamental, internationally recognised norms is not recognised as such, it might be assumed that public policy is at issue, and on this basis the court would have to apply Dutch law. Partly for this reason, the report devotes considerable attention to the procedure the Dutch courts have to follow in deciding whether a parent company is liable for the involvement of a subsidiary in the violation of fundamental, internationally recognised norms (see section 4.3).

Liability: duty of care

Dutch law contains no exhaustive codification of liability on the part of companies for involvement in the violation of fundamental, internationally recognised rights. Although a large number of rules are elaborated in criminal law – on the basis of treaties – these mostly apply to offences committed within national borders. The few exceptions to the territoriality rule are e.g. in the case of crimes against humanity, such as genocide and slavery, committed by a natural person or a company, and corruption. A company which commits such an offence may be sued by interested parties in the civil courts, either in order to halt the commission of the offence or to claim compensation for the victims (see section 2.2).

But even beyond the provisions of criminal law, there are rules based on fundamental, internationally recognised rights. In the Netherlands and elsewhere in Europe, the civil law system works with open standards that can be elaborated to focus on a specific situation. Liability vis-à-vis injured parties already exists – quite apart from criminal liability – if the company in question acted in breach of the duty of care that rests on all members of society. Whether the company can be accused of such a breach depends on the seriousness of the harm, the size of the risk and how difficult or onerous it is to take precautionary measures (see sections 2.3 to 2.6).

The extent of the duty of care also depends on developments in the relevant branch of industry. Current progress on the issue of corporate social responsibility is highly relevant here. Companies are increasingly required to be alert to the risks of violations of fundamental, internationally recognised norms by suppliers or other partners in the supply chain. The more that codes of conduct and business practice insist that companies exercise due diligence with regard to corporate social responsibility, the sooner companies that ignore such demands can be held liable (see section 2.4 to 2.6).

Liability for failure of supervision

As independently operating legal persons, the subsidiaries of Dutch parent companies are responsible for their own actions. One legal person cannot in principle be held liable for the actions of another. But in case law – in the Netherlands and elsewhere in Europe – it has been assumed that a parent company may have a duty of care vis-à-vis the creditors of its subsidiary, although the rulings on this issue are largely concerned with subsidiaries that cannot meet their financial obligations in relation to creditors. If a subsidiary acts unlawfully vis-à-vis the injured parties, the parent company's degree of liability will be greater according to the amount of influence it exercised or could have exercised on the policy adopted and pursued by the subsidiary (see section 3.3). In this connection too, developments in the field of corporate social responsibility are relevant. Codes of conduct can influence standard practice: they can help persuade parent companies to shoulder their responsibilities in situations where according to the code, they are expected to encourage awareness within the firm of the risk of violations of fundamental, internationally recognised norms by subsidiaries or suppliers (see section 3.4).

Evidence

The court must subsequently ascertain whether the claimant has put forward sufficient facts, and where necessary proof, to enable it to allow the claim. On a number of points Dutch law (which the Dutch courts may also apply in international disputes) allows the court to play an active role in obtaining evidence. The court may for example order a party – possibly at the request of the other party – to submit certain documents. The procedure is different if there are doubts as to the policy pursued by a company established in the Netherlands. At the request of certain parties, the Enterprise Division at the Amsterdam Court of Appeal may launch an inquiry which may include the issue of the company's attitude to corporate social responsibility (see section 5.4).

The writing of this report

The draft version of this report was discussed in Leiden on 26 November 2009 with representatives of a number of companies and civil society organisations. General references were constantly made to violations perceived by all to be extremely serious: slavery, child labour and exposure to hazardous substances. The way the procedure

discussed is followed will admittedly depend on the norm that has been violated and the context in which the legal person operates. Nevertheless, detailed discussion per country and per fundamental right would have complicated this report to such an extent, without affecting the core of the procedure, that we decided against such a detailed treatment. The report does conclude, however, that the greater the harm and the bigger the risk, the earlier liability will come into being if the company in question does not take appropriate precautionary measures.

The question arose of where the report was talking about hard and fast rules and where it was describing the authors' assessment of the situation. The remarks about the competence of the courts and the applicable law are based on international provisions leaving little scope for interpretation. But there are practically no hard and fast, substantive rules concerning liability itself. Our findings in this respect are based on general rules of liability law and corporate law. And our interpretation of them is based on experience in the administration of law in other fields.

Finally, various participants referred to questions that have now been put to The Hague district court in three cases brought by the *Vereniging Milieudefensie* (Friends of the Earth Netherlands) and some members of the Nigerian Oruma community against Shell for damage caused by oil spills (Oguru and others v. Shell). We did not discuss these proceedings, mainly because the court still has to establish the facts. The legal questions raised in these proceedings are, however, dealt with in general terms in our report.

The authors

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significance of the growing interest in corporate social responsibility, with a view to the interpretation of open statutory norms in contract law and liability law.

Jeroen van der Weide studied notarial law and Dutch private law at the VU University Amsterdam. He then worked as a notary-designate at De Brauw Blackstone Westbroek (attorneys and notaries in Rotterdam), followed by a lectureship in private law and private international law at the VU University Amsterdam. In 2006 he obtained his doctorate in the field of international property law. Since 2007 he has lectured in civil law at Leiden University.

1 Introduction

Can a Dutch company be held liable for the involvement of a subsidiary in a violation of fundamental, internationally recognised rights such as human rights and rights guaranteed under employment or environmental norms? And, if so, who can hold the Dutch parent company liable?

Hitherto these questions have been regulated only partially in Dutch legislation and no answer has yet been provided by the Dutch courts. The same applies in neighbouring countries. Much uncertainty exists about the answers, and the difficulties are compounded by the fact that the issues are not confined to one area of law but involve aspects of constitutional, criminal and private law.

The involvement of a private legal person with fundamental, internationally recognised rights is not something that happens as a matter of course. Traditionally, rights of this kind, such as the right to life, the prohibition of slavery and discrimination and the right to a clean environment, have been the subject of relations between the state and its citizens. But some of these rights must also be observed by private parties, for example because this is expressly required by law. Dutch law provides that companies may not discriminate against their staff or customers on the grounds of sex, faith or race. And they are required to provide safe working conditions: a company may not expose its employees to a hazardous substance such as asbestos.

The uncertainty is also connected with the fact that the question extends across national borders. If a Dutch company becomes involved in some way in a violation of fundamental, internationally recognised rights not in the Netherlands but abroad, the question arises of whether responsibility can be determined in accordance with Dutch criteria and by a Dutch court. And if a foreign subsidiary of a Dutch parent company uses asbestos, the responsibility of the parent company is not so clear. Was it aware of the risks and, if not, should it have been? Could it have done anything to minimise the risks?

These questions and answers are the subject of various national and international discussions and initiatives. This report is intended to make a contribution to this process and to serve as the basis for a public debate on:

- the conclusions of a study to be commissioned by the European Commission into a legal framework on human rights and the environment to be applicable to European enterprises operating outside the EU;¹
- the implementation of a framework proposed by Professor John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.²

The report identifies the ways in which a parent company could be held legally liable before the Dutch courts for the involvement of its subsidiary in violations of internationally recognised right outside the European Union and the obstacles to such liability. It covers:

- basic rules of company law and liability law: on what grounds and to whom is a company responsible or liable?
- general rules enabling Dutch courts to determine whether they have jurisdiction to hear disputes and, if so, what law they should apply: Dutch law or the law of another state?
- application of these rules to specific situations in which a foreign subsidiary of a Dutch parent company is involved abroad in a violation of fundamental, internationally recognised rights.

An enterprise may encounter all fundamental, internationally recognised rights. What rights it should focus upon depends on the setting in which it operates. This is why this report does not distinguish between the various norms and deals generally with fundamental, internationally recognised rights. This is in keeping with the approach taken in the *Protect, Respect and Remedy* report by Professor Ruggie, the Special

¹ Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union. The University of Edinburgh (School of Law) has been commissioned to carry out this study. See <<http://www.law.ed.ac.uk/euenterpriseslf>>.

² For his terms of reference and reports, see: <<http://www.business-humanrights.org/SpecialRepPortal/Home>>.

Representative of the UN Secretary-General, although he makes no express reference to environmental norms.³

In other countries, specific cases have already been referred to the courts. Here are three examples, to which reference will repeatedly be made in the report in order to illustrate the application of the rules:

- The British company Cape operated asbestos mines and factories in South Africa through various subsidiaries. Employees and persons in the vicinity suffered harm as a result of exposure to asbestos. Cape was held liable as the company was aware of the risks to its workforce and persons in the vicinity and controlled the affairs of its subsidiaries. In this action it was necessary first of all to determine whether the English courts had jurisdiction to adjudicate on the claim, as it was ultimately about events that had taken place in South Africa. The House of Lords held on 20 July 2000 that the English courts did have jurisdiction as the injured parties in South Africa might otherwise be deprived of adequate legal representation. As the parties subsequently reached a settlement the courts did not in the end have the opportunity to rule on the merits of the case.⁴
- A lawsuit was filed in the United States on account of the use of child labour by a foreign subsidiary of Bridgestone. Firestone Plantation Company was the Liberian subsidiary of Firestone Natural Rubber Company, part of the Bridgestone group. Employees of the Liberian subsidiary who worked on a rubber plantation in Liberia were forced to meet high production quotas: each worker had to tap 1,175 trees daily, failing which their daily pay of \$3.19 was halved. To achieve this quota their children worked with them. The case, which was supported by UN reports, was filed by the employees before the federal court in Indiana (USA). On 26 June 2007 the court denied the defendants' motion to dismiss and allowed the case to move forward to trial.⁵ A collective bargaining

³ Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2009, para. 52.

⁴ Lubbe v. Cape Plc. [2000] 1 WLR 1514; 20 July 2000; as regards the settlement, which was long delayed owing to Cape's parlous financial situation, see Richard Meeran, *Cape Plc: South African Mineworkers' Quest for Justice*, International Journal of Occupational and Environmental Health 2003, pp. 224-226.

⁵ 492 F.supp. 2d 988 (US District Court of Indiana), John Roe v. Bridgestone Corporation; 26 June 2007.

agreement has now been concluded – out of court – and arrangements made for the schooling of the children.

- A case against the Union Oil Company of California (Unocal) concerned its involvement in the actions of a third party, namely the Myanmar military. From 1992 onwards Unocal had participated, through two subsidiaries, in a project of the French oil company Total. This concerned the extraction of gas from the Yadana field in Myanmar and the construction of a pipeline for its transport to Thailand. The Myanmar military took security measures for the benefit of the project and arranged for the construction and maintenance of roads and helicopter landing pads. The army forced civilians to work on the construction and maintenance. Attempts at escape were punished by murder and arson. There were also rapes. The question was whether Unocal could be held liable in the United States for its complicity – and the complicity of its subsidiaries – in forced labour, murder and rape by the army. The District Court held at first instance that it could not be, but the Federal Court of Appeals in California reversed this decision on 18 September 2002 and ruled that it could not exclude the company's liability.⁶ The case was settled in 2005.

These situations are central to this report. We take them as an example of violations of fundamental, internationally recognised rights, without distinguishing between the different rights. The first two examples (Cape and Bridgestone) concerned the responsibility of parent companies for subsidiaries within a group. The third can be regarded as an example of responsibility in a supply chain (responsibility for a supplier).

Below we deal successively with:

- the conditions under Dutch law on which a company can be held liable for violations of internationally recognised rights committed in the course of its business operations (chapter 2);

⁶ 395 F3d 932 (9th Cir. 2002) John Doe v. Unocal Corporation, 18 September 2002. The claimants had to prove the influence of the parent company on its subsidiary; Superior Court of California, County Court of Los Angeles, case no. 136 237 980 and 6793; 14 September 2004. In 248 F.3d 915 (9th Cir. 2001) John Doe v. Unocal Corporation, 27 April 2001 The claim against Total was held to be inadmissible.

- the conditions under Dutch law on which a company can be held liable for involvement of its subsidiary in such violations (chapter 3);
- where a Dutch company – or a foreign subsidiary of a Dutch company – operates abroad, how this affects the jurisdiction of the Dutch courts and the applicability of Dutch or foreign law (chapter 4);
- the possibilities for a foreign injured party to sue a Dutch parent company in the Netherlands (chapter 5).

In dealing with these questions we make comparisons on several occasions with other countries. In particular we deal with the Alien Tort Claims Act (28 U.S.C. § 1350). Under this Act, courts in the United States consider that they have jurisdiction to hear cases involving situations in countries such as Myanmar and Liberia. No other comparable statute exists elsewhere.

The draft version of this report was discussed in Leiden on 26 November 2009 with representatives of a number of companies and civil society organisations. The main topic was the general tenor of the report. The focus was on violations perceived by all to be extremely serious such as slavery, child labour and exposure to hazardous substances, since it was acknowledged that the general tenor would depend on the norm that had been violated and the context in which the legal person operated. It was decided not to deal in detail with individual countries and individual fundamental rights as this would have complicated the report unnecessarily, without affecting the general tenor.

The question was also raised of where the report was talking about hard and fast rules and where it was describing the authors' assessment of the situation. The remarks about the jurisdiction of the courts and the applicable law are based on international provisions leaving little scope for interpretation. But there are practically no hard and fast, substantive rules concerning liability itself. Our findings in this respect are based on general rules of liability law and company law. And our interpretation of them is based on experience in the administration of justice in other fields.

Finally, various participants pointed out that questions had now been put to the Dutch courts (Oguru and others v. Shell). We have disregarded these proceedings, mainly because the court still has to establish the facts. The legal questions raised in these proceedings are, however, dealt with in general terms in our report.

2 Responsibility under Dutch law

2.1 Criteria to be satisfied by a Dutch company in the Netherlands

This chapter forms the basis of this report. What responsibility can a Dutch company have for violations of internationally recognised rights in its own production process?

Various statutory rules designed to promote compliance with fundamental rights in the Netherlands exist under administrative, criminal and private law.⁷ For example, an employer may not expose his employees to hazardous substances. If he does so, he will fall foul of the law in all kinds of ways. The Labour Inspectorate may take administrative action because such exposure is contrary to the Working Conditions Act. The Public Prosecution Service can also investigate whether a breach of the Working Conditions Act constitutes a criminal offence. In addition, the civil courts may, at the request of the employee, consider whether the employer has discharged his duty of care. If not, the employee may be entitled to compensation for breach of contract. A breach of the Working Conditions Act also constitutes an unlawful act by the employer against the employee.

The prohibition of child labour too is contained in various items of legislation in the Netherlands (the Working Hours Act, the Child Labour Regulations and the Compulsory Education Act). The same is true of the prohibition of discrimination, which is regulated in the Equal Treatment Act and similar legislation. Here too the legislation is of varying kinds: administrative law, criminal law and private law.

In this chapter we first of all describe the criminal liability of companies for human rights violations. The rest of the chapter is devoted to private law. We will not touch on administrative law.

2.2 Criminal offences and penalties

⁷ This Dutch legislation is largely based on European legislation and on conventions of the United Nations and the International Labour Organisation (ILO).

Dutch legislation has various provisions based on the need to protect fundamental rights. The Criminal Code contains the most fundamental provisions: murder, manslaughter, theft and discrimination are naturally prohibited. Both natural and legal persons can be prosecuted. Moreover, a person's criminal liability is not confined to his or her own acts. This is not only about a person's own acts. It is also an offence to procure or intentionally permit the commission of an act by another person or to fail to take measures to prevent an employee or subordinate from committing an offence. However, under article 2 of the Criminal Code, the basic rule is that the criminal law applies only to offences committed in the Netherlands.

An important exception to this basic rule is formed by what are known as international crimes. The Dutch criminal courts may hear such cases even if the offences were committed abroad (extraterritorial jurisdiction). The Dutch International Crimes Act of 2003 covers involvement in:

- genocide
- crimes against humanity such as enslavement, deportation or apartheid
- war crimes, and
- torture.

War crimes and torture committed before the International Crimes Act entered into force on 1 October 2003 can be prosecuted under other legislation, subject to certain conditions.⁸

Article 4 of the Criminal Code creates extraterritorial jurisdiction in the case of terrorism-related offences, crimes against the security of the Dutch State, public service corruption and so forth. Article 5 of the Criminal Code concerns certain offences committed outside the Netherlands by Dutch nationals, such as involvement in people smuggling, sexual abuse of minors and genital mutilation. It also provides that Dutch criminal law is applicable to Dutch nationals who have committed abroad an act treated as an indictable offence under Dutch law and constituting a punishable offence under the law of the other country. The decisive factor is whether the act constitutes a criminal offence, not

⁸ Legal persons may also be prosecuted for offences of this kind in Australia, Belgium, Canada, France, India, Japan, Norway, South Africa, the United Kingdom and the United States. See Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (Faf Report 536, Oslo 2006), p. 13.

whether a legal person can be the perpetrator of such an offence under foreign law. Finally, section 13 of the Sanctions Act 1977 provides that Dutch law is applicable to breaches of the Sanctions Act and provisions based upon it. On this basis The Hague Court of Appeal has ruled on a case involving arms supplies to Liberia.⁹

Where a violation of fundamental, internationally recognised rights takes place abroad, Dutch criminal law generally allows for prosecution of Dutch parent companies only in the case of the criminal offences listed above. It is debatable whether a Dutch legal person can be prosecuted before the Dutch courts on this basis for offences committed by its subsidiary abroad. In addition, behaviour that does not expressly constitute a criminal offence cannot be the subject of a criminal prosecution.

Finally, the position of the victim is not the central factor. It is, in principle, up to the Public Prosecution Service to decide whether or not to prosecute. The penalty is generally limited to imprisonment or a fine. Although both types of sanction can be of great importance to injured parties, these sanctions are not geared to their specific situation. Monetary compensation may be awarded to victims or interested parties only to a very limited extent in criminal proceedings: although the law does not prescribe a maximum amount, any award is conditional upon the claim being of a straightforward nature. For example, a Dutch businessman, Van Anraat, was sentenced by The Hague Court of Appeal in 2007 to a term of imprisonment of seventeen years for complicity in war crimes. In the criminal proceedings victims lodged a civil claim for compensation. But the Court of Appeal held that the civil case was too complicated to be dealt with in the criminal proceedings. This judgment was upheld on appeal in cassation.¹⁰

Injured parties are reliant on the civil courts for satisfaction in the case of corporate acts not defined in the criminal law and for monetary compensation.

2.3 Compliance and compensation under civil law

The civil courts may order a company that violates fundamental rules to comply with the rules and to compensate an injured party for damage suffered.

⁹ The Hague Court of Appeal, 10 March 2008, NJ 2008, 469; the verdict in favor of the accused party did not hold; Supreme Court 20 April 2010, LJN: BK 8132.

¹⁰ Supreme Court 30 June 2009, NJ 2009, 481, with note by N. Keijzer.

Injunctions prohibiting or ordering certain acts

Injunctions are issued by the courts on the application of an injured party or his representative. The basis for such a claim can differ from case to case. There is one general provision in the Civil Code which can serve as a basis for situations not expressly regulated by law. A claim for performance of obligations can be brought under article 296, paragraph 1 of Book 3 of the Civil Code.¹¹

A company may be ordered to perform an obligation with which it has a duty to comply. This may involve performance not only of a contractual but also of a statutory obligation, for example under the Criminal Code or the Working Conditions Act. Where civil proceedings are brought by an interested party, the company can be ordered to end situations that are contrary to the law or to cease and desist from acts that might otherwise result in a violation of the law.

This may also involve an unwritten rule. In such a case, the court must first decide whether there is a general duty of care in the case submitted to it. Next, it must determine whether the company is required to comply with this duty. To compel the company to comply with the duty the court may issue an injunction prohibiting or ordering certain action by the company. For example, a company that breaches environmental rules in the Netherlands can be compelled by the civil courts to halt the polluting activity on the application of employees or persons in the vicinity, if and in so far as they have an interest in securing compliance with the rules.

Compensation

Instead of or in addition to an injunction prohibiting or ordering certain acts, an injured party may also claim compensation. Under article 162 of Book 6 of the Civil Code, anyone who commits an unlawful act (tort/delict) against another person must – where this is attributable to him - compensate such damage. What constitutes an unlawful act is defined in paragraph 2 of that provision:

¹¹ ‘Unless it otherwise follows from the law [...], a person obliged to give something to – or to do or not do something in relation to – another person may be ordered to do so by the court, on the application of the person to whom the obligation is owed.’

[...] a violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law concerning what is deemed to be acceptable social behaviour constitutes an unlawful act.¹²

The first group consists of violations of specific rights of the injured party himself. Examples are the right to life, the right to physical integrity and the right to liberty. The second group consists of acts in breach of statutory rules. These include the infringement of international rules that have direct effect in Dutch law, for example in relationships governed by civil law.¹³ Infringements of the law constitute unlawful acts against the injured party, provided that his interests are protected by law. What interests are, for example, protected by the Working Conditions Act? An employee who has fallen ill as a result of poor conditions at work can claim compensation for the damage he has suffered. But if he also happens to be an accomplished goalkeeper and his team misses out on prize money because of his absence, the other members of the team have no right of action under the Working Conditions Act.

It is recognised internationally that criminal law standards have a bearing on corporate liability. This is evident from the report of Professor Ruggie, Special Representative of the Secretary-General of the United Nations:

‘The jurisdiction of ad hoc international criminal tribunals, such as the War Crimes Tribunals after the Second World War, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) has applied only to natural persons, not legal persons such as companies. The permanent International Criminal Court (ICC) also has this feature. Caution should be exercised, therefore, when analogising standards from individuals to companies. Nevertheless, international criminal law standards discussed in these cases are important for considerations of corporate complicity for at least two reasons. First, these standards can provide guidance to domestic criminal courts, some of which allow for criminal prosecution of companies.

¹² ‘Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt [...].

¹³ Nicola M.C.P.J. Jägers and Marie-José van der Heijden, *Corporate human rights violations: the feasibility of civil recourse in the Netherlands*, Brooklyn Journal of International Law 2008, p. 855 ff.

Second, international criminal law can directly influence domestic non-criminal legal proceedings involving companies'.¹⁴

For example, a recent judgment concerning a claim under the US Alien Tort Claims Act (see section 4.4) was closely linked to international criminal law standards. It was held that a company could be liable if it had aided and abetted a violation by another person of fundamental, internationally recognised standards. The court stipulated as a requirement that the defendant company must have acted with the purpose of supporting the other party. Mere knowledge of the violation was considered insufficient.¹⁵

Duty of care

The third group is the hardest: contrary to a rule of unwritten law (article 6:162, paragraph 2 Civil Code). What is meant by this?

What constitutes right and proper conduct is [...] provided for in a number of special rules of unwritten law. It would be humanly impossible to provide a full list of these norms. It will have to be determined from case to case whether a rule exists which has been violated. [...] A court which considers an act to be unlawful on the basis of the present criterion often concludes that the action of which the defendant is accused is contrary to the generally accepted duty of care or is contrary to unwritten law, without formulating the exact norm. Provided the court gives a detailed explanation of how it has arrived at its decision, it cannot be expected in each case to formulate the rule in abstract terms in advance. After all, the court must often take account of countless circumstances that have a bearing on the decision. As the case law shows, even a small difference in the facts can sometimes result in a different ruling.¹⁶

¹⁴ Clarifying the Concepts of 'Sphere of Influence' and 'Complicity' (2008), VN Document A/HRC/8/16, 15 March 2008, p. 10.

¹⁵ The Presbyterian Church of Sudan v. Talisman Energy, Inc, no. 07-0016-cv (2d Cir Oct. 2, 2009).

¹⁶ Asser-Hartkamp-Sieburgh 4-III, Deventer: Kluwer 2006, no. 44: 'Wat in het maatschappelijk verkeer betaamt, is [...] neergelegd in een ongekend aantal bijzondere regels van ongeschreven recht. Een volledige opsomming te geven van deze normen ligt buiten het menselijk vermogen. Van geval tot geval zal moeten worden nagegaan of een regel bestaat die is geschonden. [...] De rechter die op grond van het onderhavige criterium een handeling onrechtmatig acht, bepaalt zich dikwijls tot het oordeel dat de aan de gedaagde verweten handeling indruist tegen de maatschappelijk betamende zorgvuldigheid c.q. in strijd is met het ongeschreven recht, zonder daarbij de toegepaste norm te formuleren. Mits hij nauwkeurig motiveert waarom hij tot dat oordeel komt, kan van de rechter niet worden gevergd dat hij daarbij steeds vooropstelt hoe in abstracto de geschonden regel luidt. Veelal moet hij immers rekening houden met talrijke

Are there unwritten rules in the Netherlands requiring a company to take account of the need to observe fundamental rights? No definite answer can be given to this question, as the law does not stipulate what circumstances and interests should be taken into account. The rules can differ according to context and may even change over time.¹⁷ This can be illustrated by the assessment of a claim brought by a woman suffering from mesothelioma. The sickness was caused by exposure to asbestos in 1971 during the construction of a machine shed on land belonging to her parents, when asbestos cement sheets supplied by Eternit were cut up. Was Eternit liable for the injury suffered by the plaintiff? The Supreme Court defined the general duty of care as follows:

The lawfulness of Eternit's conduct must be assessed in the light of social attitudes at the time of the acts or omissions for which it is blamed. It should be noted at the outset that from the moment when companies such as Eternit can be deemed to have known that working with asbestos posed health dangers they had an increased duty of care to protect the interests of those in the immediate vicinity of a place where asbestos was being used. What safety measures Eternit could have been expected to take from that moment onwards depends on the circumstances of the case and the knowledge and attitudes existing at that time. Factors that play a role are the degree of certainty that working with asbestos entails health risks and the nature and seriousness of these risks.¹⁸

omstandigheden die bij het nemen van de beslissing van belang zijn. Zoals de jurisprudentie aantoont, kan een kleine nuance in de feiten soms voldoende zijn voor een andersluidend oordeel.'

¹⁷ The Advisory Council on Government Policy based itself on this case law in its report entitled *Uncertain Safety* (2008) on responsibilities for physical safety: the Council recommends that when open standards are defined account should be taken of 'whether the legal person, given its position in society, has taken sufficient account of the vulnerability of persons, society and the natural environment and of the uncertainties that are involved in this connection' (pp. 170-171).

¹⁸ Supreme Court 25 November 2005, *NJ* 2009, 103, with note by I. Giesen (Eternit v. Horsting): 'De rechtmatigheid van het handelen van Eternit moet worden beoordeeld in het licht van de maatschappelijke opvattingen ten tijde van de aan Eternit verweten gedragingen of nalatigheden. Daarbij verdient opmerking dat vanaf het moment waarop binnen de maatschappelijke kring waartoe Eternit behoort, bekend moest worden geacht dat aan het werken met asbest gevaren voor de gezondheid zijn verbonden, een verhoogde zorgvuldigheidsnorm had te gelden met het oog op de belangen van diegenen die zich bevinden in de directe nabijheid van een plaats waar met asbest wordt gewerkt. Het is afhankelijk van de omstandigheden van het geval en van de toentertijd bestaande kennis en inzichten, welke veiligheidsmaatregelen vanaf dat moment van Eternit konden worden verwacht. In dat verband zijn mede van belang de mate van zekerheid dat het werken met asbest gezondheidsrisico's meebracht en de aard en ernst van die risico's' The judgment is one in a long line stretching back to Supreme Court 5 November 1965, *NJ* 1965, 136, with note by G.J. Scholten (Kelderluik). See Asser-Hartkamp-Siebrugh 4-III, Deventer: Kluwer 2006, nos. 45-47 and Cees van Dam, *European Tort Law*, Oxford: Oxford University Press 2006, p. 196 ff.

In European countries it is normal for liability to be based on so-called 'open standards', which can be defined by the court from case to case. In some countries, for example Germany and Austria, liability for unlawful acts is formulated in rather less open terms.¹⁹ There the actions must involve a violation of a person's life, body, health, freedom or property.²⁰ Generally, this difference is largely immaterial if the assessment concerns fundamental, internationally recognised standards, precisely because they relate anyway to the protection of other people's life, physical integrity, freedom, property or personal dignity. Basically, the test is about what may be expected of a person who acts reasonably. When applied to companies the question is always what would a careful officer of the company, acting normally, have done in comparable circumstances. What may be expected of the company? The Dutch system is comparable to that of neighbouring countries.

In civil law, unlike criminal law, the application of an open standard means that the rule to be observed by a company can be adjusted to take account of the special circumstances of the case. This causes uncertainty for those concerned. A company is put in the position of having to comply with rules whose scope cannot be determined in advance. And anyone disadvantaged by the actions of a company is just as much in the dark: to what extent is such a person entitled to protection? This poses a challenge for the court since it must do its best, without the assistance of the legislator, to determine what, as article 6:162 of the Civil Code provides, can be deemed 'right and proper conduct in accordance with unwritten law'.

What can be expected of a company if it finds that a trading partner has not been particularly scrupulous in observing fundamental rights? When applying this so-called 'open statutory standard' the courts try to identify public attitudes about what may be expected of a natural or legal person acting reasonably.²¹ A relevant factor in this

¹⁹ Van Dam concludes, however, that there are no major substantive differences between European legal systems in this respect; C.C. van Dam, *Aansprakelijkheidsrecht* (Liability law), The Hague: Boom Juridische uitgevers 2000, no. 604 (p. 148). Nieuwenhuis defends the position that the different systems of liability law have the same basic form; J.H. Nieuwenhuis, *Onrechtmatige daden* (Unlawful acts), Deventer: Kluwer 2008, pp. 12-23.

²⁰ C.C. van Dam, *Aansprakelijkheidsrecht* (Liability law), The Hague: Boom Juridische uitgevers 2000, no. 403.

²¹ See also P.C.J. De Tavernier & J.A. van der Weide, *De maatman in het onrechtmatige daadsrecht: onderzoek naar enkele regels van soft law* (The reasonably careful person in tort law. In search for some

connection is what is considered common in the sector concerned.²² The court is reliant on the parties for this information. The greater the detail in which the interests of the parties concerned are described in fundamental, internationally recognised standards, the easier it will be for the court to hold that an infringement of these interests is in breach of the duty of care.

Examples of interests that are described in detail are the right to protection from slavery and the slave-trade, which are prohibited in all their forms (article 8, paragraph 1 of the International Covenant on Civil and Political Rights). Another example is the prohibition of direct discrimination by race or colour, in particular with regard to the rights to equal pay for equal labour (article 5 (i) of the International Convention on the Elimination of All Forms of Racial Discrimination).

Often, these fundamental, internationally recognised standards must themselves be defined in more detail. For example, the prohibition on child labour is at first sight clear and precise: children must be protected 'from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development' (article 32 of the Convention on the Rights of the Child). But what are appropriate working hours or working conditions in this connection? Ideas about this differ from country to country.

In such a case there are various avenues open to the Dutch courts. They can obtain information about the local requirements and take them into account in formulating what constitutes right and proper conduct. They can also attach importance to codes of conduct or other standards that draw attention to the need for corporate social responsibility (CSR). Such codes can reflect what is regarded as appropriate or inappropriate conduct either generally or in a particular industry or sector. In this way they help to articulate the duty of right and proper conduct (see section 2.4). What is also important is what customers expect of their suppliers on the basis of these codes and

rules of soft law), in: A.G. Castermans et al. (ed.), *De maatman in het burgerlijk recht* (The reasonably careful person in private law), BWKJ vol. 24, Deventer: Kluwer 2008, pp. 119-148.

²² Relevant but not decisive, according to C.C. van Dam, *Aansprakelijkheidsrecht*, The Hague: Boom Juridische uitgevers 2000, p. 177 and Asser-Hartkamp-Sieburgh, 4-III, Deventer: Kluwer 2006, no. 51k. *It's not about an average* Cees van Dam, *Onderneming en mensenrechten* (Corporations and human rights), inaugural lecture, Utrecht 2008, The Hague: Boom 2008, p. 56.

standards (see section 2.5). Whether these are also important to the duty of care which a company owes to the injured parties themselves is discussed in section 2.6.

2.4 The role of ‘corporate social responsibility’ and codes of conduct

In defining open standards the Dutch courts can therefore attach importance to the usual practice in a given industry or sector. In doing so, they can take account of developments in corporate social responsibility (CSR) and codes of conduct.

Codes of conduct

The Dutch Corporate Governance Code serves as a guideline for the courts in relation to listed companies, first and foremost as regards problems within a company and the company’s legal relationship with its shareholders. The Dutch Corporate Governance Code played a role, for example, when the management board of ABN AMRO Holding failed to consult the general meeting of shareholders about the sale of LaSalle, the bank’s US arm. A takeover bid had been made by a consortium which was interested in acquiring ABN AMRO as a whole, including LaSalle. Neither the articles of association of the holding company nor the law provided that the general meeting of shareholders had a right of approval. The Supreme Court then looked at what it termed the ‘prevailing legal view’ in the Netherlands, as reflected for example in the Dutch Corporate Governance Code. This too made no provision for a role for the general meeting of shareholders.

It can be inferred from this judgment and other decisions that the provisions of the code help to determine how the directors of a company should act.²³ The code appears to represent the prevailing legal view in the Netherlands and evidently lays down on a

²³ Supreme Court 13 July 2007, *NJ* 2007, 434 with note by J.M.M. Maeijer (ABN AMRO). See also Supreme Court 10 February 2006, *NJ* 2006, 241 (KPN v. SOBI) and Supreme Court 14 September 2007, *NJ* 2007, 611 and 612, with note by J.M.M. Maeijer (Versatel), who considers that in view of the intention of the code it would be going too far to equate it with statutes and articles of association. Compares also Haarlem District Court (Provisional Relief Judge), 16 July 2009, *LJN*: BJ3060: ‘If the surveillance is carried out by a private investigation agency, the actions of that agency should be in keeping with what may be expected of a private investigation agency according to generally accepted views.’ Private investigation agencies may be expected to observe a high degree of care in the course of carrying out their duties. The District Court considered that not only the general duty of care provided for under article 6:162 of the Civil Code but also other provisions such as the Privacy Code for Private Investigation Agencies was important in assessing the actions of a private investigation agency.

mandatory basis the standards of reasonableness and fairness that apply between the different organs of the company (article 2:8 Civil Code).²⁴

As a corporate governance code is a factor in determining what a listed company should or should not do and the latest Dutch code requires companies to take due account of corporate social responsibility, this clearly has a bearing on how companies should approach these responsibilities.

Corporate social responsibility

According to the Dutch Corporate Governance Code, the management board of a company is responsible for the corporate social responsibility issues relevant to the enterprise. The management board is accountable for this to the supervisory board and must report to it annually.²⁵ The management board must also make provision for this in a code of conduct, as part of the internal risk management and control system. Clearly, therefore, a listed company must do *something* in the way of corporate social responsibility.

It is primarily up to the company to decide how far it wishes to go in practising corporate social responsibility. The first question is what it could do, and the second is what are the consequences if it does not do so. The second question is dealt with below in sections 2.5 and 2.6.

Policy guidelines

What could this policy entail? The Organisation for Economic Cooperation and Development (OECD) has developed corporate social responsibility guidelines for multinational enterprises.²⁶ These are designed to ensure that multinationals respect the

²⁴ See S.M. Bartman in his note to Supreme Court 14 September 2007 *JOR* 2007, 238 and 239 (Versatel) and most recently P. Memelink, *Invloed van de Corporate Governance Code op het vermogensrecht*, (Influence of the Corporate Governance Code on the private law), *MvV* 2010, p. 42-49. See also: S.J.H.M. Berendsen & S.C.M. van Thiel, *De Nederlandse corporate governance code. Van leidraad naar norm?* (The Dutch Corporate Governance Code. From guideline to standard?), *Tijdschrift voor de ondernemingsrechtpraktijk* 2007-8, pp. 335-339.

²⁵ Corporate Governance Code, Principles II.1 and III.1.

²⁶ On this point see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press 2006, p. 201 ff.

rights of those affected by the consequences of their activities, consistent with the host government's international obligations and commitments. Observance of these guidelines, which have been endorsed by the Dutch government, is expressly stated to be voluntary. But once a company has voluntarily accepted the guidelines, it may be held liable for any breach of them.²⁷

There are also initiatives such as the Global Compact, a network of international companies established to promote corporate citizenship in collaboration with various UN agencies. These companies expressly agree to support and respect the protection of human rights and to make sure that they are not complicit in human rights abuses. They undertake to take active steps to mitigate the risk of violating fundamental, internationally recognised rights.²⁸ According to the Global Compact, the responsibility of a company is not limited to internal working relationships or to its own acts but also extends to its suppliers, consumers, local communities and so forth. This is not to say that such companies can automatically be held responsible for the actions of others, but if a company finds out through due diligence that human rights are being violated by other parties, it can decide against indirect involvement in order to avoid complicity.

Influence

A company which has based its policy on, say, the OECD guidelines and incorporated this specific form of corporate social responsibility into its own code but then wholly or partly fails to implement the policy can in any event be held accountable by its own shareholders or supervisory directors.

Whether it can also be held accountable by third parties, through the intermediary of the courts, depends on the identity of the third parties: whether they are customers or persons who have themselves been adversely affected by a violation of fundamental

²⁷ Amsterdam Court of Appeal (Enterprise Division) 21 June 1979, NJ 1980, 71 (Batco); on this subject see Bartman/Dorresteyn, *Van het concern (On groups of corporations)*, Deventer: Kluwer 2009, pp. 332-333; Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate human rights violations: the feasibility of civil recourse in the Netherlands*, Brooklyn Journal of International Law 2008, pp. 857-859.

²⁸ See <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>. Also: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press 2006, p. 218 ff; Cornelis de Groot, *Can Corporate Governance Contribute to Sustainable Development?*, and Tineke Lambooy, *Sustainability reporting by Companies is Necessary for Sustainable Globalisation*; both in Eva Nieuwenhuys (ed.), *Neo-Liberal Globalism and Social Sustainable Globalisation*, Leiden: Brill 2006, pp. 195-214 and pp. 215-235 respectively.

standards. The following sections deal first with the position of customers (section 2.5) and then with the position of injured parties themselves (section 2.6).

2.5 Obligations to customers

The steps taken by the state to avoid buying products made in breach of fundamental, internationally recognised standards is a good example of how companies can be forced to take responsibility by means of contractual arrangements. Suppliers to the public sector are required to influence the supply chain of production companies and subcontractors wherever possible.

For example, the province of Groningen sought a supplier of hot drink dispensers, including ingredients such as coffee, tea, cocoa and hot water. One of the requirements was that the coffee should bear the Max Havelaar or EKO label or another fair trade certified label. One of the guarantees required from the supplier was that the coffee would be obtained directly from farmer cooperatives at a minimum price that would cover the costs of social and eco-friendly production. The question arose of whether this condition was in keeping with European tendering rules. Groningen District Court held that this was the case.²⁹

During a meeting on 27 March 2008 with the relevant parliamentary standing committee, the Minister of Housing, Spatial Planning and the Environment undertook to introduce a checklist containing general criteria for sustainable procurement. A first draft was produced on 23 May 2008. This provides that government bodies should try to avoid buying products produced in violation of fundamental standards. Priority should be given to combating forced labour, slavery and child labour. Wherever possible, suppliers are expected to use their influence over production companies and subcontractors further back in the supply chain.³⁰ On 9 October 2009 the government decided that sustainable procurement would be introduced for projects in which the European tendering limits are exceeded. The relevant letter to the House of Representatives contains an annexe setting out the criteria and the procedure to be followed.³¹

²⁹ Groningen District Court, 23 November 2007, LJN: BB8575.

³⁰ Letter of 23 May 2008, Parliamentary Papers II, 2007/08, 30 196, no. 33.

³¹ Letter of 16 October 2009, Parliamentary Papers II 2009/10, 30 196, no. 82.

In the private sector companies are making demands on their suppliers too. Indeed, some have introduced a code of conduct setting out the corporate values to be observed by the suppliers. Unilever, for example, has broken off its ties with an Indonesian supplier of palm oil which may have breached Unilever's Business Partner Code through involvement in illegal logging in the tropical rainforest.³²

Such requirements affect the legal relationship between the parties to the contract, in other words between the supplier and his customer. A supplier that accepts this challenge in his dealings with customers moves beyond the bounds of voluntariness. By agreeing to observe the guidelines, he at least raises his customer's expectations.³³ The customer will be entitled to demand compliance with the specified course of action, certainly if this expressly forms part of the agreement. The supplier may find support in his own code: by referring to the course of action prescribed in this code he can account to his customer for his actions and show that he has fulfilled his contractual obligation.

Although contracts are traditionally regarded as regulating matters between the parties to them, Professor Wilhelmsson from Finland argues that they certainly provide scope for taking account of the interests of third parties:

'The need to protect human rights and to defend poor people in developing countries may be brought in as a relevant factor for example, in a consumer contract relationship. The fact that an article brought by a consumer is revealed to be made by child labour can be understood as a situation of non-conformity that gives the consumer the right to cancel the contract. Examples of such provisions and rulings are, however, usually very scarce.'³⁴

In the Netherlands national and local governments and companies refer to f.e. the Universal Declaration of 1948, The absence of rulings is hardly surprising once parties have established that the absence of childlabour is part of the deal.

³² NRC Handelsblad, 11 December 2009.

³³ In the case of contracts of sale the supplier can do this pursuant to article 7:17 of the Civil Code. On this subject see A.G. Castermans, *De burger in het burgerlijk recht* (Citizens in private law), inaugural lecture Leiden University 2008, The Hague: Boom 2009, pp. 46-49 and 55-57.

³⁴ Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, European Law Journal 2004, p. 723.

Suppose that in the case referred to above Bridgestone had supplied tyres to the Dutch government. In that case it would have had to supply information about how it monitored what was going on at Firestone's rubber plantation. If Bridgestone had painted an unduly rosy picture, various lines of action would have been open to the government as customer. For example, it could insist that Bridgestone perform the agreement or it could rescind the contract for non-performance and possibly claim damages as a consequence of the rescission. The same would apply if Dutch consumers were entitled to expect, as a consequence of Bridgestone advertisements, that the winter tyres they purchase have been manufactured without child labour.

Suppliers who publicly claim a commitment to corporate social responsibility – for example by asserting that they are bound by a code of conduct, comply with the ISO 26000 guidelines or have SA 8000 certification³⁵ – raise expectations among consumers as well. If they fail to meet these expectations by not complying in practice with the code of conduct, this may constitute a misleading commercial practice. Such practices have been designated by the legislator as unlawful acts against the consumer, and the Consumer Authority too can take action in such cases (article 6:193a ff of Book 6 Civil Code). Under article 6:193c, paragraph 2 (b) of Book 6 of the Civil Code – which is based on an EU directive – a commercial practice is deemed to be misleading if the trader fails to perform an obligation included in a code of conduct in situations where he indicates that he is bound by that code of conduct and, as a result of this assertion, the average consumer takes or may take a decision on an agreement which he would not otherwise have done.

2.6 Obligations to third parties

Here the question is whether a company can be held liable for a violation of fundamental rights by the people harmed by such a violation, in other words not the shareholders or customers but third parties, that is: victims, not party to the contract. The answer is in the affirmative if there is a violation of a specific statutory rule applying to Dutch companies

³⁵ See: <<http://www.sa-intl.org>>. As regards the effectiveness of this certification, see: Michael J. Hiscox, Claire Schwartz & Michael W. Toffel, *Evaluating the Impact of SA 8000 Certification*, working paper no. 08-097, Harvard Business School 2008, <<http://www.hbs.edu/research/pdf/08-097.pdf>>. As regards ISO 26000, see: <<http://www2.nen.nl/nen/servlet/dispatcher.Dispatch?id=252438>>.

which is intended to protect the interests of the injured party (section 2.3). The answer is less certain in the absence of a specific rule. This is particularly so where fundamental, internationally recognised standards are breached not by the company itself but by another partner in the supply chain.

In principle, a company is not liable for the actions of third parties other than its own personnel, representatives or contractors. However, if it becomes involved in a situation in which internationally recognised rights may be violated by another party the company can be expected to do something about this in the interests of the injured parties. As the law stands at present, Dutch courts are reliant on unwritten law when assessing such situations. They will rely on the standard formula from the case law on unlawful acts which they apply in assessing whether in a dangerous situation a particular course of action entails more risks than inertia (see section 2.3).

Cases in which a company could become caught up in violations of internationally recognised rights by doing business with given parties in a given country will be approached by the Dutch courts in the following way. They examine how great is the chance that fundamental, internationally recognised rights will be violated and then determine the seriousness of the consequences of such a violation and the degree of difficulty involved in measures to prevent such a violation. The crucial factor is what the company knew or should have known of the situation locally and what it did about the situation. What could have been expected of the company is decided by the court on the basis of the answers to these questions.

In Dutch case law, a major consideration is the seriousness of the consequences if the danger materialises.³⁶ The duty of care will be stricter in cases where the activities may result in physical injury. The same applies in the case of human rights violations. The worse the consequences, the more the courts are inclined to hold that the company concerned is liable, possibly in addition to the 'real offenders', as occurred in the case of Unocal and its cooperation with Myanmar's military. In general, no more can be said on this point. In each case, the test will have to be applied to the specific circumstances of the case, if for no other reason than that the factual and legal situation in the other country and the possibility of monitoring this must be taken into account. A familiar

³⁶ C.C. van Dam, *Aansprakelijkheidsrecht* (Law of liability), The Hague: Boom 2000, pp. 179-180.

problem in this connection is how violations of fundamental rights are dealt with in the country in which the activities take place (see section 4.4 below).

The question arises of what the company should have done in a specific case. What were the alternatives and which of them were practicable and which not? Indications of what companies should do in the interests of potential injured parties (such as employees of their subcontractors or people living in the vicinity of a factory) can be derived from their own codes of conduct or their own references to guidelines such as ISO 26000 or the SA 8000 certificate. Such facts and circumstances can shed light on what is deemed to be 'right and proper conduct according to unwritten law'. These codes have two functions. First, they provide guidance as to what can be expected of a company in a given situation.³⁷ And, second, they can serve as a justification for the actions of the company. The company can then argue that it exercised due care according to the criteria of its own industry and did what was practicable in the circumstances.

The courts will determine by reference to the circumstances of the case what standard of right and proper conduct the company should fulfil. It would be going too far to assume that third parties should be automatically able to invoke such rules. After all, it would be patently absurd if a well-intentioned company that interprets its corporate social responsibilities more broadly than is strictly required by law were more likely to be held liable by third parties than a company that adheres strictly to the statutory minimum. It would therefore seem logical for the courts not only to take account of the codes and certificates referred to above but also to ascertain whether there is an established practice either within the industry concerned or between companies in that industry and the public sector.

As matters stand at present, the limits of responsibility cannot be translated into hard and fast rules. This much is certain: the more a particular course of action is regarded in a particular industry or in society generally as being right and proper (in other words, the

³⁷ This kind of procedural approach to the right and proper conduct criterion is advocated by Olivier de Schutter in: *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, p. 45. This report served as a background paper to the seminar organised in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3-4 November 2006 within the terms of reference of Prof. John Ruggie, the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other enterprises.

more often companies apply a code with a given content or the more customary it becomes for customers to make certain demands of their suppliers) the more likely it is that this will be seen as a specific standard of right and proper conduct. If companies question their suppliers more and more about the social aspects of the production process (as suggested in the report of UN Special Representative Professor Ruggie, and as described in more detail on the website of SenterNovem³⁸ or in the checklist of the Danish Institute for Human Rights³⁹), it will at some point become wrong not to ask these questions.

2.7 Conclusion

Dutch law does not have exhaustive provisions governing corporate liability for violations of fundamental, internationally recognised rights. Although many such violations constitute criminal offences under Dutch law, this applies above all to crimes committed in Dutch territory. An exception is made only for serious crimes against humanity, such as genocide and slavery committed by a natural or legal person. But no matter what the crime, there can be no prosecution for acts that have not been expressly defined beforehand as criminal offences.

Civil law applies open standards that can be adjusted to take account of the specific situation. This can be done in relation to various legal relationships:

- managing directors versus supervisory directors and shareholders: managing directors have a responsibility to their supervisory directors and shareholders; as a result of developments relating to corporate social responsibility, the responsibility of managing directors can also extend to involvement in the violation of fundamental rights;
- suppliers and customers: parties to a contract can make agreements about measures to prevent involvement in violations, thereby removing uncertainty about the scope of the liability.

³⁸ See <<http://www.senternovem.nl/duurzaaminkopen/Criteria/index.asp>>.

³⁹ See <<http://www.csr-kompaset.dk/media/60.pdf>>.

Whether liability exists outside this context, for example in relation to injured parties, depends on the seriousness of the harm, the degree of risk and how difficult it is to take precautionary measures. What can be expected of a company in a specific case, in the interests of those who themselves suffer harm as a result of the violation, depends in part on developments in the industry concerned. The more codes of conduct and business practice insist that companies exercise due diligence with regard to corporate social responsibility, the sooner companies that ignore such demands can be held liable.

3 Responsibility of a parent company

3.1 Introduction

The liability of a Dutch parent company for the involvement of a subsidiary in a violation abroad of fundamental, internationally recognised rights is noteworthy for various reasons. This chapter examines the first of these reasons, namely that it is not the legal person itself but another, associated legal person that is involved.⁴⁰ This is noteworthy because two different legal persons cannot simply be lumped together, even where they are parent and subsidiary. As independently operating legal entities, subsidiaries are responsible for their own acts. If the subsidiary violates fundamental, internationally recognised rights, it is itself liable for any resulting damage.

Treating different legal persons as one and the same – and hence the liabilities of a parent and a subsidiary as identical – is a remedy of last resort in Dutch law. Only in very exceptional cases may a parent and subsidiary be treated as one and the same. This question arose in the case of *Lorimar and Citco Bank*. *Lorimar*, a firm of contractors, owed a debt to *Citco Bank*. The bank attached a claim of *Lorimar* against *Krijger*, for whom *Lorimar* was building a house. *Lorimar* and *Krijger* then terminated the building contract, as a result of which *Krijger* no longer owed money to *Lorimar*. At the same time, *Krijger* concluded a contract with *Intervorm*, a company run by the same persons as *Lorimar*, for the completion of the house. The bank was thus being duped. The different identities of the two companies were being misused to frustrate the attachment of the debt to the detriment of the bank. The court held that it was not bound to honour this arrangement in law and that *Intervorm*'s claims could be treated as though they belonged to *Lorimar*.⁴¹

A parent company is liable for the debts of a subsidiary if it has used the group structure in a specific case purely in order to frustrate the claims of creditors, as *Lorimar* did. A parent company may conceivably modify the structure of a group in order to ensure that

⁴⁰ By 'Dutch parent company' we mean a company which is incorporated under Dutch law and has its registered office in the Netherlands (article 2:66, paragraph 3 in conjunction with article 2:177, paragraph 3 of the Civil Code) and which has a controlling interest within the meaning of article 2:24a of the Civil Code – and is thus able to exercise decisive control – in a company that is incorporated under Dutch or some other law and carries on all or part of its business activities abroad.

⁴¹ Supreme Court, 9 June 1995, *NJ* 1996, 213.

a foreign subsidiary bears liability for any expected involvement in violations of fundamental, internationally recognised rights. In such a case the parent company cannot circumvent liability by invoking the group structure and can itself be deemed to bear the same liability as the subsidiary.

Courts will not lightly treat parents and subsidiaries as one and the same. In a case involving a ship arrested in the port of Rotterdam the question arose of whether three Italian shipping companies could be treated as one and the same. On the basis of the Italian law applicable to the shipping companies, the District Court held (a) that the three shipping companies should be treated as separate legal entities; (b) that each was, in principle, liable only for its own debts; (c) that under Italian law as well they could be treated as one and the same company only in very special circumstances.⁴²

As a rule, it is therefore necessary to examine the actions of the parent company itself in order to determine whether it bears responsibility for the actions of its subsidiary. We have elaborated this as a general principle in section 3.2 below. In section 3.3 we apply this principle specifically to the violation of fundamental, internationally recognised rights. We have referred throughout to parent and subsidiary companies in the belief that this will be understood to cover grandparents and great grandparents as well.

3.2 Parent company's own unlawful act

Clearly, the mere existence of a family relationship under company law is insufficient to hold a parent company liable for damage caused by a subsidiary. What is therefore necessary in order to be able to assume such liability?

Different answers are given throughout Europe. Belgian, French, German, Dutch and Spanish law were the subject of a recent study.⁴³ What the different national provisions have in common is that for liability to exist there must be a form of abuse of power by the

⁴² Rotterdam District Court, 4 March 1999, *NIPR* 2002, 197.

⁴³ Adriaan Dorresteyn, Tiago Monteiro, Christoph Teichmann & Erik Werlauff, *European Corporate Law*, Austin: Wolters Kluwer Law&Business 2009. See M.L. Lennarts, *Concernaansprakelijkheid* (Group liability) Deventer: Kluwer 1999, p. 276, who argues that a parent company will not generally be assumed to have a duty of care. By contrast, Karen Vandekerckhove sees indications of the existence of a duty of care in her comparative survey entitled *Piercing the Corporate Veil. A Transnational Approach* (European Company Law Series, Volume 2), Alphen aan den Rijn: Kluwer Law International 2007, pp. 71-74.

parent company, for example because it has provided insufficient capital for the subsidiary, has failed to intervene in loss-making activities over a long period or has engineered transactions within the group designed to work to the detriment of creditors. Only in Germany is there a special arrangement – the *Aktiengesetz* – which contains various provisions regulating the form and content of the control exercised by the parent company, whether or not by means of a group agreement. Basically, under this scheme a parent company that issues instructions to a subsidiary must guarantee any debts of that subsidiary. In other countries such as the Netherlands, the liability of the parent company is determined by reference to the general rules of liability.

One of the first Dutch cases concerned a parent company which provided credit to its subsidiary and arranged for almost the entire assets of the subsidiary to serve as collateral for this debt. The question arose of whether this was not unlawful in relation to the other creditors of the subsidiary, since there were practically no assets of the subsidiary against which they could recover? The court held that this depended on the extent to which the parent company was familiar with and controlled the business operations of the subsidiary. Was the parent company aware or could it have foreseen to what extent it was prejudicing the creditors of the subsidiary?⁴⁴ The rule is clear: the more the parent company can and does interfere in the affairs of the subsidiary, the more likely it is that it will be held to have acted without due care towards the creditors, for example by failing to warn them, by not guaranteeing the debts of the subsidiary to them or by failing to intervene on their behalf with the subsidiary.⁴⁵ If the parent company enters into obligations on behalf of the subsidiary in the knowledge that the latter will be unable to discharge these obligations or unable to do so correctly, the parent company will be liable for the damage suffered by the creditors as a result of its actions.⁴⁶

⁴⁴ Supreme Court, 25 September 1981, *NJ* 1982, 443 with note by J.M.M. Maeijer (Osby). For a survey of landmark cases, see Bartman/Dorresteyn, *Van het concern*, Deventer: Kluwer 2009, pp. 275-293.

⁴⁵ For information on how the duty of care is evolving, see, inter alia, Supreme Court 19 February 1988, *NJ* 1988, 487 with note by Van der Grinten (Albada Jeldergersma II) and Supreme Court 21 December 2001, *NJ* 2005, 96 (SOBI v. Hurks). For a survey of landmark cases, see Bartman/Dorresteyn, *Van het concern*, Deventer: Kluwer 2009, pp. 275-293.

⁴⁶ In its judgment of 11 September 2009, *NJ* 2009, 565, with note by H.J. Snijders and P. van Schilfgaarde (Comsys), the Supreme Court continued the approach described above. A parent company had structured its group in such a way that there was essentially a single enterprise. The parent company was therefore responsible for its decision to continue a subsidiary's activities, even though it knew that creditors would be prejudiced once it terminated the subsidiary's funding. See also the annotated version of the judgment by S.M. Bartman in *Ars Aequi* 2010, pp. 102-105.

The more close-knit the structure of the group – for example, where the parent company is not only majority shareholder but also managing director – the more the parent company must actively take account of the interests of the creditors in making and implementing policy decisions. In such cases the parent company can be held liable simply for letting the affairs of the subsidiary slide.⁴⁷ Just knowing the risks for the creditors and being able to intervene can then be a sufficient basis for liability.

Below we use the term ‘failure of supervision’ to describe this concept. This term is used in this report to cover two situations. First, situations in which a parent company adopts a passive approach by not intervening in the affairs of its subsidiary. And, second, situations in which a parent company plays an active role in its subsidiary’s affairs, for example in its capacity of managing director, by initiating human rights violations (such as the use of child labour) or infringements of environmental regulations by its subsidiary.

3.3 Failure of supervision

Cases that have been decided on the liability of a parent company to the creditors of its subsidiary almost invariably relate to the pecuniary debts of the subsidiary. However, a case heard in the United Kingdom concerned the liability of a parent company for the correct implementation by its subsidiary of its policy on health, safety and the environment:

‘The first [issue] concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to

⁴⁷ According to Jägers and Van der Heijden, this would be an incentive for the parent company to maintain its distance. Nicola M.C.P. Jägers and Marie-José van der Heijden, *Corporate human rights violations: the feasibility of civil recourse in the Netherlands*, Brooklyn Journal of International Law 2008, p. 842.

employees of group companies overseas and whether, if so, that duty was broken.⁴⁸

The question whether a duty of care had been violated by the parent company remained unanswered for the time being as the case was settled out of court.⁴⁹

How should the liability of the parent company be assessed? Here too the basic premise is that the parent and subsidiary should be liable only for their own actions. But the closer the relationship between the two the more likely it is that the parent will be liable for the involvement of the subsidiary in violations of internationally recognised rights. It can be liable for failure of supervision. This liability must be assessed in the same way as liability in connection with the financial position of the subsidiary in relation to creditors. Indeed, this is only logical. If a company can be liable for its involvement in human rights violations by a legal person outside the group (such as a supplier) on the grounds that it has insufficiently checked what risks are attached to the involvement of the supplier (section 2.6), this should apply all the more in the case of a legal person within the group.

The activities at Bridgestone's rubber plantation in Liberia, a subsidiary of an American parent company, are a case in point. According to the plantation workers, the parent company was aware of the connection between the daily rates of pay and the production quotas. It knew that children had to be used to help achieve the quotas. The greater the influence which the parent company has over the affairs of its subsidiary the more likely it is (under Dutch law as well) to be held liable for the situation that has arisen. Here the courts are likely to apply the same criteria as in the case of debts, namely knowledge and control of the business affairs of the subsidiary.

⁴⁸ Lubbe v. Cape Plc. [2000] 1 WLR 1514; 20 July 2000. In a different case, *Adams v. Cape Industries plc* employees of a subsidiary of Cape in Texas, USA, suffered injury as a consequence of working with asbestos. The subsidiary went bankrupt. Until 1979 Cape had been involved with the operations in America. Employees filed claims in respect of their work before 1979. The American courts held that Cape was liable. But the judgments could not be recognised in the UK as in 1989 the English courts still held that the corporate veil between parent and subsidiary could not be pierced. On this point, see M.L. Lennarts, *Concernaansprakelijkheid* (Group liability) Deventer: Kluwer 1999, pp. 151-154 and Karen Vandekerckhove, *Piercing the Corporate Veil. A Transnational Approach* (European Company Law Series, Volume 2), Alphen aan den Rijn: Kluwer Law International 2007, p. 69.

⁴⁹ Karen Vandekerckhove, *Piercing the Corporate Veil. A Transnational Approach* (European Company Law Series, Volume 2), Alphen aan den Rijn: Kluwer Law International 2007, p. 73, footnote 226.

The Unocal case was about the activities of third parties rather than of a subsidiary. The Myanmar military had constructed a pipeline and helicopter landing pads for a project undertaken locally by a Unocal subsidiary. It was alleged that the American parent company had, by its conduct, aided and abetted perpetration of the crimes of murder, rape and forced labour by the Myanmar military, precisely because it must have been aware of the violation and its help or encouragement had a 'substantial effect' on the perpetration of the crime.⁵⁰

If the part played by the parent company in the events in Myanmar were to be assessed under Dutch law, its knowledge of the violations and the foreseeable effect of its own actions and those of its subsidiary would contribute to its liability. Although two different legal persons were involved, this would pose few problems in view of the parent company's direct involvement in the business operations locally.

3.4 The role of corporate social responsibility and codes of conduct

Codes of conduct and commercial practices contain rules and recommendations on parental supervision of a subsidiary. These rules and recommendations thus also influence the responsibility of the parent company; they help to determine the scope of this responsibility, just as they are important in assessing the duty of care in respect of the parent's own actions (see section 2.4).

Under the Dutch Corporate Governance Code, the management board of a listed parent company is responsible for managing risks associated with the activities of the company and for financing the company. It must also report on this. Principle II.1 of the Dutch Corporate Governance Code includes the following passage:

⁵⁰ It should be noted that in a follow-up judgment the Superior Court of California, County of Los Angeles (case nos. BC 237 980 and 6793; 14 September 2004) held that there was insufficient evidence in the Unocal case that the parent and subsidiary could be treated as one and the same and that the subsidiary had acted as the 'alter ego' of the parent company: 'To pierce the corporate veil the court must find, among other things, that the parent so controlled the subsidiary as to deprive it of its independent personality.' However, the court did leave open the possibility that either the parent or the subsidiary had acted as the agent of the other. 'To establish liability under an agency or enterprise theory, however, plaintiffs must prove, among other things, only a lesser level of control: that defendants controlled the undertaking at issue.' The case was settled in March 2005 when Unocal agreed to pay damages.

The management board is responsible for complying with all relevant primary and secondary legislation, for managing the risks associated with the company activities and for financing the company. The management board shall report related developments to and discuss the internal risk management and control systems with the supervisory board and the audit committee.⁵¹

This responsibility concerns not only the financial but also the operational risks associated with carrying on the business, including compliance with all legislation and regulations at all levels within the group.⁵²

The OECD Guidelines also refer to a responsibility which extends beyond the limits of individual legal persons. These guidelines are intended for multinational enterprises and are based on the premise that the various entities within the enterprise should cooperate and assist one another in order to facilitate their observance, depending on the actual division of responsibilities among these entities.

These codes and guidelines can influence the substance of the open standard on which the liability of a parent company for the involvement of subsidiary in violations of fundamental, internationally recognised rights is based. They indicate what responsibilities a parent company should bear, in addition to the responsibility which it has under its own internal arrangements.

3.5 Conclusion

What is generally true of natural and legal persons is also true of people and organisations that form part of a group: subsidiaries of a Dutch parent company are responsible, as independently operating legal persons, for their own actions. However,

⁵¹ 'Het bestuur is verantwoordelijk voor de naleving van alle relevante wet- en regelgeving, het beheersen van de risico's verbonden aan de ondernemingsactiviteiten en voor de financiering van de vennootschap. Het bestuur rapporteert hierover aan en bespreekt de interne risicobeheersings- en controlesystemen met de raad van commissarissen en de auditcommissie.'

⁵² The responsibility under this principle goes further than that of listed companies in the United States, as provided for in the Sarbanes-Oxley Act. This exists only in respect of the financial risks; see Bartman/Dorresteijn, *Van het concern*, Deventer: Kluwer 2009, p. 9.

deliberate circumvention of liability in specific cases through the abuse of group structures is not rewarded by the courts.

The first question is whether the actions of the subsidiary constitute unlawful acts in respect of injured parties. This subject was examined in chapter 2. The next issue is whether a parent company has special liability for the actions of its subsidiary. Generally speaking, the greater the control which the parent company exercises or could exercise over the policy of the subsidiary and the implementation of that policy the more likely it is to be liable. Here too, codes of conduct can provide a basis for the criterion to be applied: they can help to ensure that parent companies bear responsibility in cases where they are deemed to have a duty to ensure observance of fundamental, internationally recognised standards. If they fail to supervise they can be held liable.

4 Operating abroad

4.1 Introduction

As explained in chapter 3, the liability of a Dutch parent company for the involvement of a subsidiary in a violation abroad of fundamental, internationally recognised rights is noteworthy for various reasons. This chapter examines the second of these reasons, namely that the act for which the Dutch parent company is liable – i.e. the involvement directly or indirectly (for example through suppliers) of its subsidiary in violations of fundamental, internationally recognised rights – takes place abroad and not in the Netherlands. Does a Dutch court have jurisdiction in such cases to rule on the liability of the parent company for the damage which its subsidiary has caused abroad? And if so, what law will the Dutch courts apply? Will it be Dutch law because the parent company is incorporated in the Netherlands, or will it be foreign law because the subsidiary has violated fundamental, internationally recognised rights abroad? Before it can deal with the substance of the case, a court will first have to answer these questions by reference to the rules of private international law.

If Bridgestone had been a Dutch company and Firestone Plantation its Liberian subsidiary, the Dutch court would first have had to determine whether it had jurisdiction to decide on the dispute between the Dutch parent company and the employees of its Liberian subsidiary, as the violation of labour rights occurred not in the Netherlands but abroad. Afterwards, the Dutch courts would have had to determine what law was applicable to the compensation claims by the Liberian employees against the Dutch parent company. Should that be Dutch law because Bridgestone was a Dutch company which supervised its Liberian subsidiary from the Netherlands? Or should it be Liberian law because the human rights violations occurred in Liberia?

Whatever the case, the basic premise continues to be that the subsidiary, as an independent legal person, is responsible for its own acts. The courts of the country where the subsidiary operated and where the violation of fundamental, internationally recognised rights occurred naturally have jurisdiction to rule on compensation for injured parties. For example, the Liberian employees of Firestone Plantation could have claimed

damages from their own employer. In that case, the Liberian court would have been the most appropriate court to hear the dispute and would have applied Liberian law.

But the injured parties may have an interest in suing the Dutch parent company, for example because the foreign subsidiary provides insufficient recourse or because no fair and accessible legal system is available locally. Section 4.2 examines whether the Dutch courts could entertain such a claim and, if so, whether the foreign subsidiary could be included in the same proceedings.

4.2 International jurisdiction of the Dutch courts

The Dutch parent company before the Dutch courts?

Usually a Dutch parent company will be a public company (NV) or private company (BV) incorporated under Dutch law. Under article 2:66, paragraph 3 and article 2:177, paragraph 3 of the Civil Code Dutch public and private companies are obliged to have their statutory seat in the Netherlands. Under articles 2 and 60 (a) of the Brussels I Regulation,⁵³ the Dutch courts then have jurisdiction – as the court of the domicile of the defendant – to hear claims for compensation brought by foreign victims against a Dutch parent company. The same is true of foreign parent companies which do not have their statutory seat in the Netherlands but do have their central administration or principal place of business or both in the Netherlands. In this situation too, the Dutch courts have jurisdiction (articles 2 and 60 (b) and (c) of the Brussels I Regulation). If Bridgestone had been a Dutch public company, the Dutch courts would therefore have had jurisdiction to hear the claim brought by the Liberian employees of Firestone Plantation against Bridgestone since a Dutch public company has its statutory seat in the Netherlands. The Dutch courts would also have had jurisdiction if Bridgestone had been an American corporation that had its central administration or principal place of business or both in the Netherlands.⁵⁴

⁵³ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJEC 2001, L 12/1).

⁵⁴ Under the Brussels I Regulation, the Dutch courts could not declare themselves to be *forum non conveniens* on account of an insufficient connection with the Dutch legal system. On this point see EC Court of Justice, 1 March 2005, case C-281/02, *NJ* 2007, 369 with note by P. Vlas (Owusu v. Jackson). For further comment on this judgment, see, inter alia, F. Ibili, *At Last: The EC Court of Justice on Forum Non Conveniens*, NILR 2006, pp. 127-139, and F. Ibili, *Gewogen rechtsmacht in het IPR. Over forum (non) conveniens en forum necessitatis* (Weighted jurisdiction in PIL. On *forum (non) conveniens* and forum of

From the point of view of the jurisdiction of the Dutch courts it makes no difference whether the Dutch parent company's liability is due to its own unlawful act in the form of a failure of supervision (see sections 3.2 and 3.3) or, in exceptional cases, to the fact that parent and subsidiary can be treated as one and the same (see section 3.1). In both cases the basis for compensation is an unlawful act committed either by the foreign subsidiary (violation of fundamental, internationally recognised rights) or by the Dutch parent (failure of supervision). In each case the Dutch courts have jurisdiction to adjudicate under the Brussels I Regulation.

The parties to compensation proceedings (i.e. the parent company and the injured parties) may decide not to submit their dispute to the competent Dutch court, and instead prorogate another court by choosing a forum. If, for example, the Dutch parent company has its statutory seat in the Netherlands but its central administration or principal place of business or both in England, the parties to the proceedings could agree that the English courts should have jurisdiction and prorogate jurisdiction to them under article 23 of the Brussels I Regulation. However, the requirement of express *consensus ad idem* between the parties concerned is strictly construed.⁵⁵ If this is absent, the Dutch courts would retain jurisdiction to hear the case.

A foreign subsidiary before the Dutch courts?

Are the Dutch courts also competent to hear a claim brought directly against a foreign subsidiary of the Dutch parent company? In principle, the Dutch courts do not have jurisdiction if the foreign subsidiary does not have its statutory seat in the Netherlands and has its central administration and principal place of business outside the borders of the European Union (cf. article 4, Brussels I Regulation). As a rule, the injured parties would therefore have to sue the subsidiary before the courts of the country where the violation of the fundamental, internationally recognised rights took place. In exceptional cases, the Dutch courts may nonetheless have jurisdiction under article 9 of the Code of Civil Procedure as forum of necessity. For example, proceedings abroad may be

necessity) (Recht en Praktijk series, volume 148), Deventer: Kluwer 2007, in particular p. 205 ff. For criticism of the rejection of the instrument of *forum non conveniens*, see the British Ministry of Justice in its Review of the Brussels I Regulation (EC 44/2001), paragraph 12 et seq. (3 September 2009). See: <http://ec.europa.eu/justice_home/news/consulting_public/0002/contributions/ms_governments/united_kingdom_en.pdf>.

⁵⁵ See EC Court of Justice 14 December 1976, case 24/76, *NJ* 1977, 446, with note by J.C. Schultsz (RUWA v. Colzani).

impossible because there is no foreign court with jurisdiction or because access to the foreign court is not possible in practice due to natural disasters or war (article 9 (b) Code of Civil Procedure). Another possibility is that due process may not be guaranteed, for example because the plaintiff belongs to a particular population group which suffers social and legal discrimination in the country of the competent court (article 9 (c) Code of Civil Procedure).⁵⁶ Unlike article 9 (b), article 9 (c) of the Code of Civil Procedure stipulates as a strict requirement that the case must have a sufficient connection with the Dutch legal system.⁵⁷ The presence of a Dutch parent company will be an important connecting factor in this connection.

Under article 7, paragraph 1 of the Code of Civil Procedure it is also possible for a foreign subsidiary to be sued before the Dutch courts by means of a 'joint hearing': if the Dutch court has jurisdiction in respect of the Dutch parent company, it also has jurisdiction in respect of the foreign subsidiary even if it would not have had jurisdiction if the foreign subsidiary had been served with a separate writ of summons.⁵⁸ Under article 7, paragraph 1 of the Code of Civil Procedure, however, this is conditional on the existence of a sufficient connection between the claims brought against the parent and the subsidiary to warrant joint treatment for reasons of efficiency. Whether such a connection exists will depend first on the facts of the case and, second, on whether both claims serve the same purpose. The parent/subsidiary relationship, the identical nature of the claims (compensation) and the common basis (involvement in violation of fundamental, internationally recognised rights) are relevant factors in this connection.⁵⁹

⁵⁶ See also Parliamentary Proceedings II 1999/2000, 26 855, no. 3, pp. 40-43 (Explanatory Memorandum), and F. Ibili, *Gewogen rechtsmacht in het IPR. Over forum (non) conveniens en forum necessitatis* (Weighted jurisdiction in PIL. On *forum (non) conveniens* and forum of necessity) (Recht en Praktijk series, volume 148), (Deventer: Kluwer 2007, chapter 5).

⁵⁷ According to the Explanatory Memorandum (Parliamentary Proceedings 1999-2000, 26 855, no. 3, pp. 41-42), this condition is not imposed in article 9 (b) of the Code of Civil Procedure because in the cases covered by this provision there is no alternative court with jurisdiction ('impossibility').

⁵⁸ In a similar sense, see L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht* (Introduction to Dutch private international law), Deventer: Kluwer 2008, p. 222. See also Supreme Court 16 May 1986, *NJ* 1987, 456, with note by W.H. Heemskerk (*Stonestar v. Javeri and others*); Supreme Court 23 February 1996, *NJ* 1997, 276, with note by Th.M. de Boer (*Total Liban v. Blue Aegean*), and The Hague District Court 30 December 2009, *LJN*: BK 8616 (*Oguru and others v. Shell*). The first two actions related to article 126, paragraph 7 of the Code of Civil Procedure, which was in force until 31 December 2000, whereas the last relates specifically to article 7, paragraph 1 of the Code of Civil Procedure.

⁵⁹ See also The Hague District Court 30 December 2009, *LJN*: BK 8616 (*Oguru and others v. Shell*). As regards this lawsuit, see also Liesbeth Enneking, *Aansprakelijkheid via 'foreign direct liability claims'* (Liability through foreign direct liability claims), *NJB* 2010, pp. 400-406; R.G.J. de Haan, *JOR* 2010, 41.

However, the argument that the possibility of a joint hearing can result in an abuse of procedural law is defended in the Dutch legal literature.⁶⁰ In the case of a joint hearing the jurisdiction of the Dutch courts over a foreign subsidiary is, after all, based on their jurisdiction over the Dutch parent company. Abuse of procedural law is held to occur only very exceptionally before the Dutch courts. Such abuse has not yet been found to have occurred in cases involving a parent/subsidiary relationship.⁶¹

If the foreign subsidiary has already been sued for compensation before a foreign court, the Dutch court may stay the case against the foreign subsidiary pursuant to article 12 of the Code of Civil Procedure (*lis pendens*) until the foreign court has delivered judgment. However, the Dutch court is not obliged to do so. If the foreign victims of human rights violations have a reasonable interest in having their cases heard before the Dutch courts as well, for example because of unacceptable delays in the foreign proceedings, the Dutch court may decide to hear the case after all.⁶²

4.3 Applicable law

If the Dutch court has international jurisdiction, it will then have to determine what law is applicable to: a) the involvement of the subsidiary in violations of fundamental, internationally recognised rights, and b) the parent company's failure to supervise the affairs of the subsidiary. Should this be Dutch law because the parent company is incorporated in the Netherlands? Or should it be foreign law because the subsidiary has violated fundamental, internationally recognised rights abroad?⁶³

⁶⁰ Most recently, see Maurice Polak, *Inspiration From Above: Making and Interpreting Dutch Law on Jurisdiction in Civil and Commercial Matters in Light of European Law*, in: Henk Snijders & Stefan Vogenauer (eds.), *Content and Meaning of National Law in the Context of Transnational Law*, Munich: Sellier 2009, pp. 113-131. See also the Opinion of Advocate General Strikwerda, no. 18, delivered before the Supreme Court judgment of 23 February 1996, NJ 1997, 276 (Total Liban v. Blue Aegean).

⁶¹ Rejection of Shell's claim that there was an abuse of procedural law, The Hague District Court 30 December 2009, LJN: BK 8616 (Oguru and others v. Shell).

⁶² Cf. Supreme Court 3 July 1995, NJ 1997, 54 with note by Th.M. de Boer; The Hague Court of Appeal 23 December 1998, NIPR 1999, 235.

⁶³ As in most legal systems two or more legal persons may be treated as one and the same only as a last resort (see section 3.1), no further consideration will be given to this possibility here. For more information about this subject in private international law, see P. Vlas, *Rechtspersonen* (Legal Persons) (Praktijkreeks IPR, volume 9), Antwerp: Maklu 2009, no. 324.

Involvement of a foreign subsidiary in violations

First of all, it is important to examine by what law the involvement of a subsidiary in violations of fundamental, internationally recognised rights must be assessed. Under article 4, paragraph 1 of the Rome II Regulation,⁶⁴ which entered into force on 11 January 2009, the questions of whether a foreign subsidiary acted unlawfully and what legal consequences should be attached to this are governed, in principle, by the law of the country where the damage occurs (*lex loci damni*).⁶⁵ In accordance with article 15 of the Rome II Regulation, this law determines, among other things, the extent of the damage, the manner of compensation and who is entitled to compensation. If a French subsidiary of a Dutch company were to dump toxic waste in Egypt, thereby causing damage to Egyptian residents, the question of whether the French subsidiary had acted unlawfully would be governed, in accordance with article 4 (1) of Rome II, by Egyptian law as the law of the place where the damage occurred. The same would be true if the subsidiary was an Egyptian company and not a French company. In that case, all the connecting factors would point in the direction of Egyptian law.

Under article 14 (1) of the Rome II Regulation, the parties to the dispute (parent, subsidiary and injured parties) may agree on a law of their choice.⁶⁶ They are free to choose any legal system they wish. However, for a valid choice of law *consensus ad idem* is required between all the parties (see article 14 (1) (a) Rome II: 'by agreement'). If the Egyptian victims of the French subsidiary were to sue the Dutch parent company before a Dutch court the parties could, for example, choose Dutch law.

However, the choice of law under article 14 (1) of the Rome II Regulation is subject to a number of limitations. For example, paragraph 2 of article 14 provides that where all the elements relevant to the situation at the time when the event giving rise to the damage

⁶⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJEU 2007, L 199/40).

⁶⁵ The Unlawful Acts (Conflict of Laws) Act (Bulletin of Acts and Decrees 2001, 190) must be applied to unlawful acts (torts/delicts) that occurred before 11 January 2009. The basic rule under the Act is that the law of the country where the tort/delict occurs is applicable (*lex loci delicti*). The Act will be disregarded below since it is broadly similar to the Rome II Regulation. See also J.A. van der Weide, *Het verwijzingsrecht voor niet-contractuele verbintenissen Europees geregeld. Een analyse van de Verordening Rome II* (Law on designation of applicable law in the case of non-contractual obligations regulated at European level. An analysis of the Rome II Regulation), *NTER* 2008, pp. 214-225.

⁶⁶ The choice of law under article 14 of the Rome II Regulation is, it may be assumed, a conflict-of-law choice: both the additional and the mandatory provisions of the objectively applicable law of article 4 of the Rome II Regulation are set aside by the choice of law.

occurs are located in a country other than the country whose law has been chosen, the choice of the parties will not prejudice the application of provisions of the law of that other country, which cannot be derogated from by agreement. In short, a purely internal case cannot be 'internationalised' simply by a choice of law. If, in the above example, the company illegally dumping the waste that causes damage to Egyptian residents is not a French company but a Cairo-based Egyptian company, allowance would have to be made for the fact that mandatory provisions of Egyptian law could not be set aside by the choice of a different legal system.

The possibility of a choice of law is also limited by the rules of safety and conduct set out in article 17 of the Rome II Regulation. Under this provision, the Dutch court would, when assessing the conduct of the person claimed to be liable, have to take account 'as a matter of fact and in so far as is appropriate', of the rules of safety and conduct (whether or not with public law overtones) which were in force at the place and time of the event giving rise to the liability. In the example of the illegal dumping of waste in Egypt, the Dutch courts would therefore take account of the safety regulations in Egyptian environmental law in deciding whether the subsidiary acted unlawfully. And in cases of child labour there will be a role, in both a positive and a negative sense, for local working conditions law.

Finally, in cases of cross-border environmental damage article 7 of the Rome II Regulation contains a separate provision dealing specifically with the situation in which the physical act (the dumping of waste) takes place in one country (Egypt) and the harmful consequences, for example through the groundwater, occur in another country (Libya). In that case the Libyan victims would be given a (unilateral) choice of having the case concerning the damage suffered by them dealt with under Egyptian or under Libyan law. Recital 25 of the Rome II Regulation justifies this possibility of choice by stating that in the case of environmental offences, the victim should be protected and his interests should take precedence over those of the polluter.

Failure of supervision by a Dutch parent company

Once it has been established that a foreign subsidiary is liable for its unlawful actions, the next question is whether the Dutch parent company is liable for failure of supervision

(see section 3.3). As this occurs within an international context (Dutch parent/foreign subsidiary) the question of what law is applicable must be answered here too.

The question of whether a parent company has failed in its supervision of its foreign subsidiary and, if so, whether it is liable to the injured parties is answered, in principle, by reference to the law applicable to the subsidiary (*lex societatis*).⁶⁷ If the parent company is not only a shareholder but also a director of its foreign subsidiary, the two can be said to be intermeshed to some extent. Under section 2 of the Corporations (Conflict of Laws) Act (Bulletin of Acts and Decrees 1997, 699), foreign legal persons are, according to Dutch private international law, governed by the law of the country where they have been incorporated and have their statutory seat (the law of incorporation). If, in the above example of the dumping of toxic waste in Egypt, the subsidiary had been a French company, the question of whether the Dutch parent would be liable to the Egyptian victims would be governed by French law. If, however, the subsidiary were an Egyptian legal person, Egyptian law would be applicable. It should be noted that court rulings on the applicable law in international cases of failure of supervision are an exception rather than the rule. It is possible that many cases are settled out of court at an early stage (see section 3.3).

There is no consensus on whether the law applicable to the subsidiary (*lex societatis*) should also govern the liability of the parent company in an international context. One position defended in the literature is that in cases of failure of supervision it is not the *lex societatis* which is decisive but the law of the place where the failure of supervision (i.e. the unlawful act) occurs. This view is generally accepted in the Dutch literature. This is because, under Dutch private international law, the liability of the parent company for a failure of supervision is viewed more as an unlawful act than as a company law problem.⁶⁸

⁶⁷ R.C. van Dongen, *Identificatie in het rechtspersonenrecht* (Identification in the law of legal persons) (IVO series, vol. 22), Deventer: Kluwer 1995, chapter 3; Karen Vandekerckhove, *Piercing the Corporate Veil. A Transnational Approach* (European Company Law Series, Volume 2), Alphen aan den Rijn: Kluwer Law International 2007, Chapter 8.

⁶⁸ See also M.L. Lennarts, *Concernaansprakelijkheid* (Group liability), Deventer: Kluwer 1999, no. 229 et seq.; P. Vlas, *Rechtspersonen* (Legal persons) (Praktijkreeks IPR, vol. 9), Antwerp: Maklu 2009, chapter 3, § 11.

The question which then arises is where the unlawful act of the parent company actually occurred. Where did the failure of supervision take place? Was it where the parent took its management decisions? Or where the subsidiary took its decisions? Or where the actual damage occurred? In the example of the illegal dumping of toxic waste, should the liability of the Dutch parent company be governed by Dutch law as the place where the parent company took its decisions or by Egyptian or French law as the place where the Egyptian or French subsidiary took its decisions? Or is Egyptian law applicable as the law of the place where the damage occurred?

This is a classic problem which occurs where the unlawful act and its consequences (damage) cannot be placed at a single location (*locus*), but have been separated as a result of the facts of the case. The descriptive term for this in German private international law is the *Tatort*, which breaks down into a *Handlungsort* (place of the act) and an *Erfolgort* (place where the damage occurs).⁶⁹ This phenomenon of a multiple *locus* tends to occur, above all, in cases of cross-border environmental pollution.

In the 1970s, for example, the French potassium mines poured waste salts into the River Rhine over a long period, thereby making the water saline and causing damage to Dutch horticultural businesses, which were unable to use the water for spraying the land. Where did the unlawful act (*Tatort*) occur? Was it in France where the waste was discharged into the river (*Handlungsort*)? Or was it in the Netherlands where the growers suffered damage (*Erfolgort*)?⁷⁰ Another case concerned the German manufacturer Benckiser, which arranged through an intermediary for toxic waste (gypsum containing cyanide) to be transported to the Netherlands to be dumped there illegally. Where did Benckiser commit the unlawful act (*Tatort*)? Was it in Germany where the transport of the gypsum began (*Handlungsort*)? Or was it in the Netherlands where the waste was dumped (*Erfolgort*)?⁷¹ In both cases the Dutch Supreme Court was unable to resolve the issue for procedural reasons.

⁶⁹ For specific consideration of this problem in international company law, see Karen Vandekerckhove, *Piercing the Corporate Veil. A Transnational Approach* (European Company Law Series, Volume 2), Alphen aan den Rijn: Kluwer Law International 2007, p. 658 ff. Compares also M.L. Lennarts, *Concern-aansprakelijkheid* (Group liability), Deventer: Kluwer, 1999, no. 229 ff.

⁷⁰ Supreme Court 23 September 1988, *NJ* 1989, 743, with note by J.H. Nieuwenhuis and J.C. Schultsz (Mines de Potasse d'Alsace v. Bier and others). See also EC Court of Justice 30 November 1976, case 21/76, with note by J.C. Schultsz (Bier and others v. Mines de Potasse d'Alsace).

⁷¹ Supreme Court 14 April 1989, *NJ* 1990, 712, with note by C.J.H. Brunner and J.C. Schultsz (Benckiser v. State of the Netherlands and others).

However, the multiple *locus* issue was resolved in the Rome II Regulation. Unless a different law has been chosen, article 4 (1) of Rome II provides that the law applicable is not the law of the country where the act giving rise to the damage occurred but the law of the country in which the damage occurred (*lex loci damni*). As a rule, this is also the country where the claim will be settled.⁷² If the Dutch parent company has failed in its supervision of its Egyptian or French subsidiary, as a result of which Egyptian residents have suffered damage, its liability will therefore be governed (under article 4 (1) of the Rome II Regulation) by Egyptian law as the law of the place where the damage occurs. The law of the country where the parent or subsidiary has taken its management decisions is not relevant in this respect.

However, if it is clear from all the circumstances of the case that the failure of supervision by the parent company is manifestly more closely connected with the country where it took its management decisions, the law of that country may be applied pursuant to article 4 (3) of the Rome II Regulation. In the case of Dutch parent companies, this would mean that the claim would be settled under Dutch rather than foreign law. However, it is clear from the development of the Rome II Regulation that this provision may be invoked only in exceptional cases, as the question of which law is applicable would otherwise cease to be predictable.⁷³

If the foreign subsidiary of a Dutch parent company uses local suppliers that are involved in violations of fundamental, internationally recognised rights, the victims of these violations may sue not only the supplier and the actual perpetrator but also the foreign subsidiary and the Dutch parent company for failure of supervision. The Dutch parent company could, after all, be blamed for having insufficiently supervised the commercial policy of its subsidiary, while the foreign subsidiary has in turn failed in its supervision of the commercial activities of its local suppliers. In all cases, the claim will be settled in accordance with the law of the place where the damage occurred (i.e. where the rights were violated).

⁷² See the recitals of the Rome II Regulation, nos. 15-16.

⁷³ See COM(2003) 427 def., p. 13.

Finally, it has been argued in the literature, with specific reference to cases involving international environmental damage, that article 7 of the Rome II Regulation (environmental damage) can also be applied in cases of failure of supervision by the parent company.⁷⁴ The foreign victims of, say, the illegal dumping of waste would then be able to choose between the law of the place where the parent company made the decision to dump the waste (Dutch law in the case of Dutch parent companies) and the law of the country where the damage occurred. However, such a broad interpretation of article 7 of the Rome II Regulation would, in our view, be at odds with the nature of the provision, which appears primarily intended to deal with the classic cases of environmental damage cases in which the actual act (e.g. the discharge of the potassium waste or the explosion of a nuclear power station) occurs in one country and the harmful consequences (salinisation of the spraying water or radioactive fallout) in another country.

Correction mechanisms

The liability of a Dutch parent company is, in principle, assessed by reference to foreign law and not Dutch law. Nonetheless, pursuant to article 16 of the Rome II Regulation, the Dutch court may apply provisions of Dutch law (including treaty law) which are of a mandatory nature. These so-called 'priority provisions' need not take any account of the law that ultimately governs the unlawful act (the violation of fundamental, internationally recognised rights). Priority provisions are generally of a semi-public law nature, for example provisions on minimum pay, foreign exchange regulations and import and export provisions. There are no obvious mandatory provisions in (internal) Dutch law which might qualify as priority rules in the context of violations of fundamental, internationally recognised rights.⁷⁵

Situations are also conceivable in which the foreign law to be applied by the Dutch court is so at odds with fundamental principles and values of the Dutch legal order that its application is unacceptable. For example, the Dutch courts could be confronted by a rule of foreign law that it is not unlawful for children under the age of 6 to dig for coal. Could

⁷⁴ Liesbeth F.H. Enneking, *Crossing the Atlantic? The political and legal feasibility of European foreign direct liability cases*, The George Washington International Law Review 2010, p. 928

⁷⁵ In this connection compare Aukje A.H. van Hoek, *Transnational corporate social responsibility – some issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers*, 2008, <<http://ssrn.com/abstract=1113843>>.

the Dutch courts refuse to apply such a rule? Under article 26 of the Rome II Regulation, the application of a provision of foreign law may be refused by the Dutch courts if such application is manifestly incompatible with the public policy of the Netherlands (i.e. the fundamental values and principles of the Dutch legal order). However, this public policy ground is intended as an emergency brake and may be applied only in exceptional cases. In Dutch private international law such cases usually occur in the context of family law and the law of persons. Specific examples are bigamy (Rotterdam District Court 30 June 2000, NIPR 2000, 276), talaq divorce (Supreme Court 9 November 2001, NJ 2002, 279) and unilateral denials of paternity (Amsterdam District Court 23 November 2005, NIPR 2006, 14). But the possible award of punitive damages may also be contrary to public policy. This would in any event appear to follow from the recitals (no. 32) of the Rome II Regulation.⁷⁶

Needless to say, a country may treat fundamental human rights and children's rights too as public policy issues.⁷⁷ For example, a separate provision has been included in article 6 of the German *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Law introducing the Civil Code) stating that German public policy includes not only German fundamental rights but also human rights formulated in international conventions to which the Federal Republic is a party.⁷⁸

'Eine Rechtsnorm eines anderen Staates ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist.'

⁷⁶ Cf. The Hague District Court 15 September 2004, NIPR 2005, 33 in which a claim instituted by Philippine victims of child abuse against a Dutchman for the payment of punitive damages was rejected by the District Court as being contrary to public policy.

⁷⁷ See, inter alia, P. Hammje, *Droits fondamentaux et ordre public*, *Revue Critique de Droit International Privé* 1997, pp. 1-31; A.P.M.J. Vonken, *De reflexwerking van de mensenrechten op het ipr* (The reflex effect of human rights on PIL), in: P.B. Cliteur & A.P.M.J. Vonken (eds.), *Doorwerking van mensenrechten*, Groningen: Wolters-Noordhoff 1993, pp. 153-185; C.W. Dubbink, *Mensenrechten en de openbare orde in het internationaal privaatrecht* (Human rights and public policy in private international law), in: S.C.J.J. Kortmann et al. (ed.), *Oprecht* (Struycken essays), Zwolle: Tjeenk Willink 1996, pp. 51-56; Aukje A.H. van Hoek, *Transnational corporate social responsibility – some issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers*, 2008, <<http://ssrn.com/abstract=1113843>>. See also the Opinion of Advocate General Franx, no. 18, delivered before the Supreme Court judgment of 23 February 1996, NJ 1985, 311, with note by J.C. Schultsz (Saudi Independence), and the Opinion of Advocate General Strikwerda delivered before the judgment of the Supreme Court of 15 April 1994, NJ 1994, 576 (Braga de Oliveira v. Mooijman and others).

⁷⁸ Jan Kropholler, *Internationales Privatrecht*, Tübingen: Mohr Siebeck 2006, p. 251 ff.

Any gap left in the foreign law by the application of the public policy exception will be filled by the Dutch courts through the application of Dutch law (*lex fori*).⁷⁹ In this way the Dutch courts could then also possibly make use of provisions from human rights or environmental conventions to which the Netherlands is party or of rights whose violation carries criminal penalties under provisions having extraterritorial effect, as in the case of the International Crimes Act. For the time being, however, the precise operation of the public policy exception in the case of human rights violations and environmental offences remains *terra incognita* in Dutch law.

4.4 The Alien Tort Claims Act and international relations

The international element is not confined to the jurisdiction of the courts and the choice between different national legal systems. International relations too are at issue. These were raised in an important American judgment based on the Alien Tort Claims Act, a law which is often cited in Europe as a model for legislation on liability for violations of fundamental, internationally recognised norms.

The Alien Tort Claims Act has been on the American statute book since 1789. In a single sentence this Act confers jurisdiction on the federal courts to hear claims for compensation of damage caused by the violation of certain fundamental rights.

‘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’ (28 U.S.C. § 1350).

In Europe, it is regularly cited with approval as a way of enabling violations abroad of fundamental, internationally recognised rights to be raised before the national courts.

The Act lay dormant for almost two centuries. Only at the end of the last century did it come to life. Two important questions arise in connection with its application. First, do the federal courts have jurisdiction irrespective of the nationality of the plaintiff and

⁷⁹ See also L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (Introduction to Dutch private international law), Deventer: Kluwer 2008, no. 66.

defendant and irrespective of their connection with the United States? And, second, can the courts assess the claim in its full scope on the basis of international law?

Both questions must be answered in the negative following various judicial pronouncements in the United States. Although the Act admittedly does not specify that the parties should have a link with the United States, in practice a sufficient nexus with the American legal system is required. This is based on sources other than the Alien Tort Claims Act itself.⁸⁰ For example, the federal courts in California held that although the claim against Unocal was admissible, the claim against Unocal's partner, the French company Total, was not.⁸¹

In another case *Alvarez*, a man of Mexican nationality, was alleged to have tortured and murdered an agent of the American Drug Enforcement Administration (DEA). With the consent of the DEA he was kidnapped by Sosa, also of Mexican nationality, and taken to the United States to stand trial. Alvarez was acquitted. Subsequently he sued Sosa for a 'violation of the law of nations'. Initially this suit was successful, as he was awarded compensation on appeal. However, the Supreme Court reversed this decision.⁸²

The Supreme Court limited the substantive scope of the Alien Tort Claims Act by describing the type of cases for which the 1789 Act was intended and what was meant by the 'common law' then and now. According to the Supreme Court, the courts today should take account of this and exercise great restraint in accepting claims of liability based on violations of international law. In 1789, judge-made law was regarded as settling what had already existed for centuries. As the Supreme Court pointed out, nowadays there is a larger role for the legislator as law is seen as the result of a choice made by people. The courts should exercise great caution in adapting the law of nations to private rights:

⁸⁰ See inter alia Jan Wouters & Leen De Smet, *Civielrechtelijke schadeclaims tegen multinationale ondernemingen wegens mensenrechtenschendingen elders in de wereld: lessen van de Alien Tort Claims Act?* (Civil law compensation claims against multinational enterprises for human rights violations elsewhere in the world: lessons from the Alien Tort Claims Act), NJCM-Bulletin 2003, pp. 979-993; Bahareh Mostajeleian, *Foreign alternatives to the alien tort claims act: the succes (or is it failure?) of bringing civil suits against multinational corporations that commit human rights violations*, The George Washington International Law Review 2008, pp. 497-525; George P. Fletcher, *Tort liability for human rights abuses*, Oxford: Hart 2008.

⁸¹ *John Doe v. Unocal and Total*, 248 F3d 915 (9 Cir. 2001).

⁸² Supreme Court 29 June 2004, 542 U.S. 692, 124 S.Ct. 2739 in the case of *Sosa v. Alvarez-Machain*.

‘(T)here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.

Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th century paradigms we have recognised’ (pp. 2761-2762).

They should base their choice on the type of claims envisaged in 1789, i.e. ‘violations of safe conducts, infringements of the rights of ambassadors, and piracy’.

The Supreme Court went on to mention some modern examples. These would be ‘heinous actions, each of which violates definable, universal and obligatory norms’. Today’s torturers are equated with yesterday’s pirates and slave traders. But this does not in itself mean that liability exists.

This is because the Supreme Court also held that account must also be taken of the consequences of any liability held to exist by the US courts, for example in cases where a plaintiff has not exhausted all remedies in the country where the damage was suffered or in international forums. What should be the relationship between the different sets of proceedings in such a case? It is also necessary for the courts to avoid frustrating policy in the country concerned. A case in point is South Africa and the work of the Truth and Reconciliation Commission (p. 2766). Courts must also be wary of involvement in cases which can affect international relations; the government and the legislature must be allowed a degree of discretion in this respect. In keeping with the position of the then US administration, the Supreme Court expressly held that the courts should give serious weight to the views of the executive and legislative branches on the case’s impact on foreign policy.

The Unocal case is an important example of a successful attempt to hold an American corporation liable for activities abroad. The courts were able to rely on a ‘statement of interest’ supplied by the US State Department, which stated that ‘at this time adjudication of the claims based on allegations of torture and slavery would not prejudice

or impede the conduct of U.S. foreign relations with the current government of Burma'. The federal Court of Appeals endorsed the view of the District Court:

'We agree with the District Court's evaluation that "[g]iven the circumstances of the instant case, and particularly the Statement of Interest of the United States, it is hard to imagine how judicial consideration of the matter will so substantially exacerbate relations with [the Myanmar Military] as to cause hostile confrontations.'

However, the exact limits of the Alien Tort Claims Act are not clear as regards either the jurisdiction of the US courts or the basis of liability. Whereas the courts in the Unocal case were satisfied with the criterion that fundamental, internationally recognised rights had been violated, the court hearing the later Talisman Energy case required, in a reference to the Sosa case, that the company concerned should itself have had intended to commit the violation:

'We hold that ...the standard for imposing accessorial liability under the ATS must be drawn from international law; and that under international law, a claimant must show that the defendant provided substantial assistance with purpose of facilitating the alleged offences. Applying that standard, we affirm the district court's grant of summary judgment in favour of Talisman, because plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan.'⁸³

The Alien Tort Claims Act does not itself limit the jurisdiction of the courts, but the consideration given by the Supreme Court to the effects of liability in the country concerned and the impact on relations with that country may result in certain violations (for example apartheid) being excluded from the operation of the Act. Although the Supreme Court admittedly suggests that there is a role for the courts in combating manifestly unlawful, heinous practices (this could possibly limit the findings of chapter 2 of this report), it cannot be seen as a decisive criterion in view of the possibility that any

⁸³ The Presbyterian Church of Sudan v. Talisman Energy Inc, United States Court of Appeals for the Second Circuit, 07-0016-cv, 2 October 2009. See also section 2.3.

liability for apartheid may not be allowed to interfere with the work of the Truth and Reconciliation Commission.

The points raised by the Supreme Court will also be relevant for the Dutch courts. When hearing litigation between private parties, the courts will ascertain whether they are able to identify and weigh all the different competing interests or whether this should be left to the legislator or the government.

4.5 Conclusion

If a foreign subsidiary is involved in the violation abroad of fundamental, internationally recognised rights, the Dutch courts will have jurisdiction to adjudicate on whether the Dutch parent company is liable for the damage caused by its subsidiary abroad. The foreign subsidiary could conceivably be joined in the same proceedings.

The Dutch courts will, in principle, have to base their judgment on the law of the country where the damage has been suffered. This applies to the liability of both the subsidiary and the parent company. In exceptional cases the Dutch courts may take account of Dutch law in their ruling. This is especially true of cases that give rise to issues of Dutch public policy. If the violation of fundamental, internationally recognised norms is not recognised as such by the law of another country, this could be deemed (following the example set by Germany) to be a matter of public policy that justifies the application of Dutch law after all.

The US Alien Tort Claims Act does not offer much more. Once examined in the light of other legal principles, it does not leave the US courts free to adjudicate human rights violations regardless of such matters as the nature of the violated rights and where and under whose responsibility the violation occurred. One of the limitations is the importance of American international relations. It seems obvious that the Dutch courts too would examine whether they are able to take into account interests other than those of the litigants themselves, such as international relations and developments relating to fundamental rights in the country in which the subsidiary operates. In applying the Alien Tort Claims Act the federal courts appear to wish to remain close to the criminal law provisions and have therefore raised the threshold for liability; in a recent judgment it

was held that the mere fact that a company knew of the violations and of the effect of its own actions on these violations was insufficient to establish liability. Instead, the purpose of the company's actions must have been to commit the violations (see section 2.3).

5 Litigation

5.1 Obstacles?

Foreign nationals injured by the unlawful acts of subsidiaries of a Dutch company will not always have the financial means to sue the parent company in the Netherlands.

Moreover, there often may be a large number of injured parties, particularly in cases involving child labour, violation of other fundamental employment rights or environmental pollution.

These obstacles are not unique. Dutch law has various ways of facilitating access to the courts where the individual lacks such opportunities. First of all, certain organisations can sue in their own name, although they may not claim compensation (section 5.2). In addition, the law has an arrangement for the settlement of mass damage claims (section 5.3).

Once a case is before the court, the question arises of who has the burden of evidence and the burden of proof (section 5.4). Finally, we briefly examine the subject of costs (section 5.5).

5.2 Collective actions

Some organisations may bring claims before the courts even if they themselves have not suffered harm as a result of the violations concerned. These are foundations or associations that have full legal capacity and have been established, according to their constitution, for the purpose of representing the interests which they wish to submit to the courts. The interests may not solely be of a general, abstract nature, such as the interests of 'people', 'animals' or 'the environment'. The organisations concerned are instead required to make specific efforts to ensure observance of fundamental rights or promote the interests of groups of persons who are harmed by violations of fundamental rights.⁸⁴

⁸⁴ Parliamentary Papers II 1992/93, 22 486, no. 5, p. 9 (Memorandum of Reply).

The right to institute a collective action is regulated in article 3:305a of the Civil Code. Paragraph 2 of this article states that the organisation concerned must first have made an attempt to resolve the matter through consultation. The defendant company is given little opportunity to drag its feet: two weeks after it receives written notice requesting consultations and clearly stating the objective of the action, the plaintiff can bring an action before the courts.⁸⁵

This right of action is ideally suited for obtaining either an injunction prohibiting or ordering a particular act or a ruling that there has been a violation of fundamental, internationally recognised norms. However, the right does not entitle the plaintiff to seek monetary compensation (article 3:305a, paragraph 3). The idea behind this is that only those who have actually suffered damage are entitled to compensation. But where an organisation reaches a settlement with one or more companies about liability, application may be made to Amsterdam Court of Appeal for an order declaring the settlement to be binding in respect of the individual interested parties under the Class Action (Financial Settlement) Act (Bulletin of Acts and Decrees 2005, 340).

5.3 Mass damages claims

Cases of environmental pollution are particularly likely to affect large numbers of people in a similar way. It can be very onerous for all concerned if all these different people have to pursue individual lawsuits. The willingness of the defendant to reach a practical solution will not be great, particularly if it is not certain that the solution will also apply in all other cases.

Dutch law provides for the following alternative (article 7:907 Civil Code). Organisations of injured parties and the defendant corporation can conclude an agreement for settlement of the compensation out of court. They can then apply to the courts (Amsterdam Court of Appeal) to have the settlement declared universally binding. This means that all injured parties are bound by the agreement. To ensure that injured parties are not bound by the settlement or kept away from the courts against their will, they may notify the court within a specified period if they do not wish to be bound by the

⁸⁵ This rule is in line with the European rules on consumer protection; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJEC 1998, L 166/51).

agreement. This alternative procedure has been tried out on a number of occasions. Well-known examples are the Dexia case (securities leasing)⁸⁶ and the recent collective action against Shell (reclassification of oil and gas reserves).⁸⁷

An interest group could also join with foreign victims to start proceedings against a Dutch parent company for violation of human rights by its foreign subsidiary. In such a case the interest group could exercise its right of collective action under Dutch law and seek a competent Dutch court pursuant to articles 2 and 60 of the Brussels I Regulation. After all, as the Dutch parent company has its statutory seat in the Netherlands, in the final analysis the Dutch courts have international jurisdiction (see section 4.2).⁸⁸

As a rule, the Dutch courts (i.e. Amsterdam Court of Appeal) will also be competent to declare a settlement universally binding in cases where it relates to mass damages claims based on violations of human rights or infringements of environmental norms. It is sufficient for one of the parties to the settlement, including the Dutch parent company, to be domiciled or have its statutory seat in the Netherlands.⁸⁹

The question of which law is applicable to an international settlement in the case of international collective actions is still unclear. Pursuant to article 3 (1) of the Rome I Regulation⁹⁰ the parties to the settlement can choose the law applicable. Although the parties are completely free in this respect, the most obvious course of action would be to choose Dutch law. This is, after all, the law of the country in which the parent company is established and where the court that will be asked to declare the settlement binding has its seat. If the parties concerned have not made a choice of law, the settlement will be governed (pursuant to article 4 (4) of the Rome I Regulation) by the law of the country

⁸⁶ Amsterdam Court of Appeal 25 January 2007, LJN: AZ7033.

⁸⁷ Amsterdam Court of Appeal 29 May 2009, LJN: BI5744. This case is special because for the first time the Dutch courts were called upon to consider the international scope of an order declaring a settlement to be binding.

⁸⁸ The British House of Lords has likewise held that the English courts have jurisdiction to take cognizance of a 'multi-plaintiff group action' brought by people who had worked for or lived in the vicinity of Cape subsidiaries and persons in the vicinity for exposure to asbestos. An additional factor in this case was the absence of any real possibility of taking collective action in South Africa (House of Lords 20 July 2000, [2000] 4 All ER 268 (Lubbe and others v. Cape)).

⁸⁹ By virtue of article 2 Brussels I Regulation, article 2 of the Lugano Convention of 16 September 1988 (Dutch Treaty Series 1989, 58) or article 3 Code of Civil Procedure. See also Amsterdam Court of Appeal 29 May 2009, LJN: BI5744, and M.V. Polak, *Iedereen en overal? Internationaal privaatrecht rond 'massaclaims'* (Everyone and everywhere? Private international law on mass claims), NJB 2006, pp. 2346-2355.

⁹⁰ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJEU 2008, L 177/6). By virtue of article 28 the Rome I Regulation is applicable to all agreements concluded after 17 December 2009.

with which it is most closely connected, having regard to all the circumstances. This may be Dutch law, because the party who must pay the compensation (the Dutch parent company) is established in the Netherlands. But it may also be the law applicable to the unlawful act (the environmental infringement or the human rights violation).

If Cape had been a Dutch company which operated asbestos mines and factories in South Africa through various South African subsidiaries, a Dutch interest group representing the interests of the South African employees and persons in the vicinity could have exercised its right of collective action (together with the interested parties) to apply to the Dutch courts for a judgment declaring the actions of Cape to be unlawful and holding it liable (article 2, Brussels I Regulation). In addition, the Dutch courts would also have had jurisdiction pursuant to article 2 of the Brussels I Regulation to make an order declaring any settlement reached with Cape to be universally binding. In accordance with article 3 (1) of the Rome I Regulation, the interested parties (i.e. Cape, the South African employees and persons in the vicinity and the Dutch interest group) could declare Dutch law to be applicable to the settlement agreement.

Recently, the Research and Documentation Centre (WODC) of the Ministry of Justice made a study of the private international law aspects of the settlement of collective actions.⁹¹ The results of this study are not yet available.

5.4 Evidence

In many legal systems civil litigation is governed by detailed rules about all aspects of the procedure, from the institution of proceedings to the principle of *audi alteram partem* and up to and including the judgment and ways of enforcing it.

Burden of proof

The parties' burden of evidence and burden of proof deserve special attention. A basic rule of procedural law is that a party invoking a particular legal consequence (as a basis for its claim or defence) must allege and, if necessary, prove the facts. Basically, if you allege something you must prove it. Sometimes exceptions to this basic principle have

⁹¹ See www.wodc.nl.

been laid down by law or formulated by the courts. These rules can differ from country to country. This is why it is important to know whether the Dutch law of evidence is applicable or the law of evidence of another country. As a rule, it is the law of evidence designated according to the chosen law as referred to in section 4.3. If the law of another country is applicable to an assessment of whether fundamental, internationally recognised rights have been violated, this will also be true of the law of evidence.

However, the rules of the country of the court hearing the case will apply to certain questions of evidence. These rules relate to the powers of the court to require parties to provide information. In the Netherlands this is regulated in the Code of Civil Procedure.⁹²

Article 22 Code of Civil Procedure:

The court may in all cases and at any stage of the proceedings direct the parties or one of them to explain certain submissions or submit certain documents relating to the case. The parties may refuse if they have compelling grounds for doing so. The court will decide whether the refusal is justified, and, if it is not, may draw whatever conclusions it deems advisable.⁹³

Article 162, paragraph 1 Code of Civil Procedure:

1. In the course of an action the court may, either on request or of its own motion, direct the parties or one of them to make available for inspection the books, papers and documents which they are required by law to keep, make or save.⁹⁴

Article 843a, paragraph 1 Code of Civil Procedure:

‘Any person with a lawful interest may, at his expense, require another person who has at his disposal or in his possession documents concerning a relationship to which the former or his legal predecessors is/are a party, to allow him to inspect such documents or to

⁹² For a detailed account of evidential questions in a private international law context, see B.J. van het Kaar, *IPR-bewijsrecht en bewijsverkrijging* (PIL – law of evidence and obtaining evidence) (Recht en Praktijk series, vol. 163), Deventer: Kluwer 2008.

⁹³ ‘De rechter kan in alle gevallen en in elke stand van de procedure partijen of een van hen bevelen bepaalde stellingen toe te lichten of bepaalde, op de zaak betrekking hebbende bescheiden over te leggen. Partijen kunnen dit weigeren indien daarvoor gewichtige redenen zijn. De rechter beslist of de weigering gerechtvaardigd is, bij gebreke waarvan hij daaruit de gevolgtrekking kan maken die hij geraden acht’.

⁹⁴ ‘De rechter kan in de loop van een geding, op verzoek of ambtshalve, aan partijen of aan een van hen de openlegging bevelen van de boeken, bescheiden en geschriften, die zij ingevolge de wet moeten houden, maken of bewaren.’

obtain a copy of or extract from them. For this purpose documents are deemed to include data on a data carrier.⁹⁵

If the Dutch courts have jurisdiction, they can therefore direct the parties (by virtue of article 22 of the Code of Civil Procedure) to allow inspection of documents that are important to an assessment of the claim. The other provisions elaborate this power. The courts can in any event order a party to hand over documents which it is required to keep by law, for example everything concerning the activities of the legal person, and which are needed in order to determine its rights and obligations (article 2:10 Civil Code). The other party's right to request production of these documents, in so far as necessary for the proceedings, is evident from article 843a of the Code of Civil Procedure. The other party must have a 'lawful interest' and may request only 'certain documents'. These restrictions are intended to prevent fishing expeditions.

Witnesses and experts

Evidence can also be obtained by hearing witnesses or consulting experts before or during the proceedings. Whether witness testimony or expert opinion will be admitted in a specific case is decided according to the law designated in the manner described in section 4.3. If, for example, the law of another country is applicable to the assessment of whether fundamental, internationally recognised rights have been violated, that law will also apply to the witness testimony or expert opinion. However, the value of the testimony or opinion must be assessed by reference to the law of the country of the court hearing the dispute. If this is the Dutch courts, they must apply the Dutch criteria in deciding whether a fact did or did not occur and whether evidence of this has or has not been provided. This also applies to the question of the extent to which the Dutch courts must be convinced before they can issue a judicial finding of fact.⁹⁶

Special procedure in cases of doubt about corporate policy

⁹⁵ 'Hij die daarbij rechtmatig belang heeft, kan op zijn kosten inzage, afschrift of uittreksel vorderen van bepaalde bescheiden aangaande een rechtsbetrekking waarin hij of zijn rechtsvoorgangers partij zijn, van degene die deze bescheiden te zijner beschikking of onder zijn berusting heeft. Onder bescheiden worden mede verstaan: op een gegevensdrager aangebrachte gegevens.'

⁹⁶ For more information see B.J. van het Kaar, *IPR-bewijsrecht en bewijsverkrigging* (PIL – law of evidence and obtaining evidence) (Recht en Praktijk series, vol. 163), Deventer: Kluwer 2008, chapter 3.

Where there are doubts about the policy of a company incorporated in the Netherlands, the right of inquiry regulated in Title 8, Book 2 of the Civil Code may be exercised. The purpose of the right of inquiry is to obtain disclosure. Only certain parties may apply to the Enterprise Division of Amsterdam Court of Appeal for an inquiry. Besides the shareholders of the company concerned, these are the Advocate General at Amsterdam Court of Appeal, who acts in the public interest (as in the case of the well-known Ogem inquiry),⁹⁷ and trade unions that have members among the employees of the company concerned.

Here too, questions arise about the relationship between parent companies and subsidiaries. Under Dutch law an application for an inquiry into the affairs of a parent company can also extend to those of the subsidiary. The converse is also possible in certain cases, provided that there is a reasonably close relationship between the parent company and its subsidiaries. The Supreme Court considers the economic reality to be more important than the legal partitions between the different companies.⁹⁸ This also applies if the subsidiary is established abroad: an investigator conducting an inquiry into the policy of a Dutch company may gather data on the policy of a subsidiary which is established abroad and has relations with the parent company, if he considers this useful for the purposes of the inquiry.⁹⁹

Codes and guidelines are also relevant to the investigation of mismanagement. Batco Nederland was a company that decided to close its Amsterdam factory. However, it failed to hold proper consultations with the works council and the trade unions as required by law. The Enterprise Division held that this constituted mismanagement, taking into account that the parent company – BAT Industries – had endorsed the OECD Guidelines. In these circumstances, the decision by the subsidiary to break off the prescribed consultations with unions and in the works council constituted a serious breach of its obligation to hold these consultations. It was held that Batco Nederland and thus acted contrary to the basic principles for responsible business conduct.¹⁰⁰

⁹⁷ Enterprise Division 3 December 1987, *NV* 1988, p. 78. See also Supreme Court 10 January 1990, *NJ* 1990, 466 with note by J.M.M. Maeijer (OGEM II).

⁹⁸ Supreme Court 4 February 2005, *NJ* 2005, 127 with note by J.M.M. Maeijer (Landis).

⁹⁹ Supreme Court 13 May 2005, *NJ* 2005, 298 (Zeelandia).

¹⁰⁰ Enterprise Division 21 June 1979, *NJ* 1980, 71.

Can the right of inquiry also play a role when the question arises of whether a company is not taking its policy on corporate social responsibility seriously? This question is answered in the affirmative in the legal literature. A positive attitude on the part of a parent company (evidenced by the endorsement of guidelines, ethical codes or other statements of values) can have an effect on the criteria used in an inquiry to gauge whether the company has acted in breach of basic principles of responsible business conduct.¹⁰¹ However, the application must be made by one of the specified parties: the shareholders, the Advocate General at Amsterdam Court of Appeal or the trade union organisations concerned.¹⁰²

5.5 Costs of civil proceedings

Bringing an action before the Dutch civil courts costs money. A party must allow not only for the fees of his own counsel but also for the following costs:

- fixed court (registry) fees, which can vary from €63 to €6,174 depending on the amount of the pecuniary interest involved in the action (Civil Cases (Fees) Act);
- bailiff's fee (for serving the writ of summons): around EUR 70 to 80 (Bailiffs' Fees Decree);
- disbursements (expenses), including the costs of witnesses (these costs can rise substantially if witnesses have to be heard abroad);
- order for costs: the losing party is ordered to bear the costs of the other party, including part of the latter's costs of legal advice and assistance (determined in accordance with a court-approved scale).

Natural or legal persons of limited means can obtain legal aid in the Netherlands in order to conduct legal proceedings. However, under section 12 of the Legal Aid Act, this is granted only for legal interests within the Dutch legal sphere. Although there are

¹⁰¹ Bartman/Dorresteijn, *Van het concern*, Deventer: Kluwer 2009, p. 333. Cf. also Marie-José van der Heijden & Katinka Jesse, *Corporate Environmental Accountability as a Means for Intragenerational Equity: 'Hidden' Environmental Impacts in the North-South Conflict*, in: Hans Christian Bugge & Christina Voigt (eds.), *Sustainable Development in International and National Law*, 2008, pp. 348-349-74.

¹⁰² S.M. Bartman & M. Holtzer, *Enquête-recht voorzichtig onder het mes* (Right of inquiry cautiously dissected), *Ondernemingsrecht* 2010, p. 78. The authors advocate that organisations that represent other collective interests besides those of investors should also be allowed to apply for an inquiry. Specifically, they mention foundations or associations that represent environmental interests or promote corporate social responsibility.

exceptions, they apply only, in brief, to residents of the European Union who are involved in a cross-border dispute.¹⁰³

5.6 Conclusion

A party alleging that his interests have been harmed may bring an action before the civil courts. Foundations or associations which, under the terms of their constitution, represent interests which they wish to bring before the courts also have access to the courts, although they cannot apply for monetary compensation. However, the subject of compensation may be raised collectively if an interest group has reached agreement with a defendant company on a settlement that can be declared universally binding. All these parties are, in principle, responsible for their own costs and, if they lose the case, for those of the opposite party as well.

In principle, the plaintiff bears the burden of evidence and burden of proof. The courts have various instruments for obliging parties to produce documentary evidence in an action. At the request of specific parties, a special inquiry may be ordered by the Enterprise Division of Amsterdam Court of Appeal into the policy of Dutch companies (and their subsidiaries) in the field of corporate social responsibility.

¹⁰³ In Europe legal aid is organised differently from country to country. The differences have been identified and recorded by C.M.C. van Zeeland & J.M. Barendrecht, *Gefinancierde rechtsbijstand vergeleken. Een rechtsvergelijkend onderzoek naar drie rechtsbijstandstelsels (2004)* (Comparison of subsidised legal aid, legal advice and assistance. A comparative survey of three legal aid systems). See also the report of the UN Commission on Legal Empowerment for the Poor, *Making the Law Work for Everyone* (3 June 2008), which includes a section on legal aid on p. 62 <<http://www.undp.org/legalempowerment/reports/concept2action.html>>. On this subject, see J.M. Barendrecht, P. Sluijter & C.M.C. van Zeeland, *Duurzame rechtsbijstand, legal empowerment en microrecht* (Sustainable legal aid, legal empowerment and micro law), NJB 2008, p. 2685-2694. Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate human rights violations: the feasibility of civil recourse in the Netherlands*, Brooklyn Journal of International Law 2008, pp. 860-861. The authors regard the time and fees of Dutch lawyers to be a disincentive for victims to bring their claim in the Netherlands.

6 Summary

Can a Dutch company be held responsible for the involvement of a subsidiary in a violation of fundamental, internationally recognised rights such as human rights or employment or environmental norms abroad? If so, who can hold the Dutch parent responsible? The report deals basically with the issue of responsibility, in the sense of liability under private law. A Dutch court assessing the issue of liability will deal with the following points:

1 *Jurisdiction*

- 1.1 The Dutch courts have jurisdiction to adjudicate on these matters precisely because the Dutch parent company is incorporated in the Netherlands (section 4.2). In view of this jurisdiction, it is not inconceivable that a foreign subsidiary can also be joined in the same proceedings.

2 *Locus standi*

- 2.1 A party has the right to bring an action before the civil courts if its rights have been harmed.
- 2.2 This also applies to foundations or associations that have full legal capacity if, in accordance with their constitution, they represent interests which they wish to bring before the court, provided that they have first tried to resolve the matter through consultation with the defendant corporation (section 5.2). The organisations referred to are those established to promote observance of fundamental rights or to represent the interests of groups or persons harmed by the violation of fundamental rights. The exercise of this power is ideally suited to seeking an injunction prohibiting or ordering a particular act or a ruling that there has been a violation of fundamental, internationally recognised norms. However, the right does not entitle an interest group to seek monetary compensation for the injured parties.
- 2.3 Under the Class Action (Financial Settlement) Act, application can be made to the Amsterdam Court of Appeal for an order declaring that a settlement reached between the defendant corporation and one or more interest groups is universally binding (section 5.3).

3 Applicable law

- 3.1 The Dutch courts will, in principle, have to base their decision on the law of the country where the damage has been suffered (usually not Dutch law). This applies to the liability of both the subsidiary and the parent company. This is based on the EU's Rome II Regulation.
- 3.2 In exceptional cases the Dutch courts may apply Dutch law. This is especially true of cases that give rise to issues of Dutch public policy. If the violation of fundamental, internationally recognised norms is not recognised as such by the law of another country, this could be deemed (following the example set by Germany) to be a matter of public policy that justifies the application of Dutch law after all. Partly for this reason, the report devotes considerable attention to the procedure the Dutch courts have to follow in deciding whether a parent company is liable for the involvement of a subsidiary in the violation of fundamental, internationally recognised norms (section 4.3).
- 3.3 In applying the American Alien Tort Claims Act the US Supreme Court held in 2004 that the courts in the United States are not free to adjudicate human rights violations abroad regardless of such matters as the nature of the rights violated and where and under whose responsibility the violation occurred. One of the limitations is the importance of American international relations. It seems obvious that the Dutch courts too would examine whether they are able to take into account interests other than those of the litigants themselves, such as international relations and developments relating to fundamental rights in the country in which the subsidiary operates (section 4.4).

4 Liability under Dutch law - general

- 4.1 Dutch law contains no exhaustive codification of liability on the part of companies for involvement in the violation of fundamental, internationally recognised rights. Although a large number of rules are elaborated in criminal law – on the basis of conventions – these mostly apply to offences committed within national borders. The only exception to the territoriality rule is in the case of crimes against humanity, such as genocide and

slavery, committed by a natural or legal person. A company which commits such an offence may be sued by interested parties in the civil courts, either in order to halt the commission of the offence or to claim compensation for the victims (see section 2.2).

- 4.2 But even beyond the provisions of criminal law, there are rules based on fundamental, internationally recognised rights. The civil law system works with open standards that can be elaborated to focus on a specific situation. These can apply in various legal relationships: internally within the company, between the company and its suppliers and customers (the supply chain) and between the company and the victims of the violation.
- 4.3 Internally: managing directors have a responsibility to their supervisory directors and shareholders; as a result of developments in corporate governance, this responsibility may also relate to involvement in violation of fundamental, internationally recognised standards (section 2.4).
- 4.4 In the supply chain: parties to contractual legal relationships may make agreements about the manner in which involvement in violations is to be prevented, thereby removing uncertainty about the scope of the liability (sections 2.3/2.5).
- 4.5 Whether liability also exists in relation to victims of human rights violations – quite apart from criminal liability – depends on the seriousness of the harm, the extent of the risk and how difficult or onerous it is to take precautionary measures (section 2.3/2.6).

5 *Liability under Dutch law – duty of care*

- 5.1 What can be expected of a company in a specific case – besides compliance with an injunction prohibiting or ordering a particular act – depends on the facts of the case (section 2.3).
- 5.2 This report outlines the approach to be adopted by the Dutch courts in the case of violations of fundamental, internationally recognised norms. The obvious course of action is to explain this approach in more detail by reference to the norm violated and its seriousness and the context in which the violation occurred (section 2.6).
- 5.3 The extent of the duty of care depends in part on developments in the industry or sector concerned. The more codes of conduct and commercial

practice insist that companies exercise due diligence with regard to corporate social responsibility, the more likely it is that companies that ignore such demands can be held liable (sections 2.4/2.6).

- 5.4 What is generally true of natural and legal persons is also true of people and organisations that form part of a group: subsidiaries of a Dutch parent company are responsible, as independently operating legal persons, for their own actions. One legal person cannot, in principle, be held liable for the actions of another (section 3.3).
- 5.5 However, deliberate circumvention of liability in specific cases through the abuse of group structures is not rewarded by the courts. It is also assumed in the case law that a parent company may have a duty of care towards the creditors of its subsidiary, although the judgments in question relate mainly to subsidiaries that are unable to discharge their financial obligations to creditors (section 3.3).
- 5.6 The first question is whether the actions of the subsidiary are unlawful in relation to the injured parties. The next question concerns the special liability of the parent company for the actions of its subsidiary. The greater the parent company's influence over the policy of the subsidiary and the implementation of that policy the more likely the parent company is to be held liable (section 3.3). Here too codes of conduct can influence the criterion: they can help to ensure that parent companies bear responsibility in cases where they are deemed to have a duty to ensure observance of fundamental, internationally recognised standards (section 3.4).

6 *Evidence*

- 6.1 If the law of another country is applicable in assessing whether fundamental, internationally recognised rights have been violated, that law will also, in principle, apply to the evidence. The Dutch courts will therefore have to apply the foreign law with regard to the law of evidence as well (section 5.4).
- 6.2 As a rule, a person who alleges facts or circumstances also has the burden of proving them. Anyone who alleges that a parent company is liable for the damage suffered as a consequence of the involvement of its

subsidiary in violations will have to adduce evidence of the facts and circumstances in order to prove liability (section 5.4).

- 6.3 The rules of the country of the court hearing the case apply to certain questions of evidence, such as rules governing the power of the court to require parties to produce certain information (section 5.4).
- 6.4 If the Dutch courts have jurisdiction, they will be able to instruct the parties to provide disclosure of matters of importance to the assessment of the claim. The courts may in any event direct a party (possibly at the request of the other party) to produce documents which it is already required by law to possess, such as everything concerning the legal person, and which are required in order to determine the rights and obligations of the legal person (section 5.4).
- 6.5 Where there are doubts about the policy of a company incorporated in the Netherlands, the right of inquiry may be exercised. This may extend to the manner in which the company deals with the subject of corporate social responsibility. Specific parties may apply to the Enterprise Division of Amsterdam Court of Appeal for an inquiry. Besides the shareholders of the company concerned, these are the Advocate General at the Amsterdam Court of Appeal and trade unions that have members among the workforce of the company concerned. Under Dutch law an inquiry into the affairs of a parent company may also extend to the affairs of the subsidiary. The converse is also possible in certain cases, provided that there is a fairly close relationship between the parent company and its subsidiaries (section 5.4).

7 Costs

- 7.1 In principle, each party bears its own costs. The party against whom judgment is given must also bear part of the costs of the other party (section 5.5).