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# CORPORATE HUMAN RIGHTS VIOLATIONS: THE FEASIBILITY OF CIVIL RECOURSE IN THE NETHERLANDS

*Nicola M.C.P. Jägers & Marie-José van der Heijden\**

## INTRODUCTION

In August 2006, the oil and cargo ship Probo Koala set sail for the west coast of Africa. Its cargo consisted of, inter alia, a toxic brew of cleaning chemicals, gasoline, and crude oil slop. Under the cover of night on August 19, 2006, the deadly cargo of the Probo Koala was dispersed onto the streets of Abidjan, the capital of the Ivory Coast, in fourteen locations around the city—near vegetable fields, fisheries, and water reservoirs.<sup>1</sup> This resulted in a major environmental disaster and serious human suffering; it is estimated that a dozen people died and over 9000 fell ill.<sup>2</sup>

Before sailing to the Ivory Coast, the Proba Koala had called at ports in Europe, including the port of Amsterdam in the Netherlands. There, Dutch authorities halted the unloading of the waste and suggested that the waste be disposed of at special facilities in Rotterdam for approximately US\$250,000. For executives at Trafigura Beheer B.V. (“Trafigura”)—a multinational oil trading company domiciled in the Netherlands with annual sales of US\$28 billion, which had chartered the Probo Koala—the disposal cost was too high.<sup>3</sup> They decided instead to send the ship on its way and to dump the waste elsewhere: Africa.

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1. The toxic sludge was removed from the ship and dumped by the Ivorian waste handler Société Tommy. Greenpeace News, Toxic Waste in Abidjan: Greenpeace Evaluation, Sept. 15, 2006, <http://www.greenpeace.org/international/news/ivory-coast-toxic-dumping/toxic-waste-in-abidjan-green> [hereinafter Greenpeace Evaluation].

2. Sebastian Knauer, Thilo Thielke & Gerald Traufetter, *Profits for Europe, Industrial Slop for Africa*, SPIEGEL ONLINE INT’L, Sept. 18, 2006, <http://www.spiegel.de/international/spiegel/0,1518,437842,00.html>. Victims have been treated for respiratory problems, nausea, dizziness, vomiting, and burns. Greenpeace Evaluation, *supra* note 1. The waste was eventually cleaned up by a French company. *Ivory Coast Begins Toxic Clean-up*, BBC NEWS, Sept. 17, 2006, <http://news.bbc.co.uk/2/hi/africa/5354530.stm>.

3. Trafigura is incorporated under Dutch law and is consequently domiciled in the Netherlands. Its headquarters are in Lucerne, Switzerland, while its operational center is

The case of the Probo Koala is sadly only part of a growing trend known as toxic waste colonialism, in which underdeveloped states are used as inexpensive disposal sites for waste turned away by developed states. The resulting harm frequently amounts to serious human rights violations. In the case of the Probo Koala, the right to health and the right to life were seriously threatened. As a result, Trafigura, the corporation that chartered the vessel, has been the subject of numerous investigations.<sup>4</sup> Currently, its British subsidiary, Trafigura Ltd., is facing charges of negligence before the High Court in London, where Trafigura's operational center is located.<sup>5</sup> However, beyond the case pending in London, Trafigura's incorporation in the Netherlands raises the interesting question of what possibilities Dutch law offers to address such extra-territorial human rights violations by a corporation. This Article will explore these possibilities from a civil law perspective.

The example of Trafigura illustrates one of many ways in which corporations can be either directly responsible for or contribute significantly to serious human rights violations. Increasingly, the impact (both negative and positive) that corporations have on human rights is being acknowledged. More importantly, the urge to hold corporations accountable for their grave human rights violations is strengthening.

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located in London, United Kingdom. See THE BERNE DECLARATION, NOMINATION FOR THE PUBLIC EYE GLOBAL AWARD 2007: TRAFIGURA BEHEER B.V. 1-2 (2007), [http://www.evb.ch/cm\\_data/Trafigura\\_e.pdf](http://www.evb.ch/cm_data/Trafigura_e.pdf) [hereinafter TRAFIGURA BACKGROUND].

4. The Dutch public prosecutor planned in February 2008 to file criminal charges against Trafigura and the Amsterdam City Council for their conduct in connection with the Probo Koala. Foo Yun Chee & Charles Dick, *Dutch Plan to Charge Trafigura Over Toxic Ship*, REUTERS, Feb. 19, 2008, <http://www.reuters.com/article/latestCrisis/idUSL19884993>. In the Ivory Coast, three Trafigura employees were arrested in connection with the incident. Toby Sterling, *Dutch Trafigura Settles Toxic Waste Case*, WASH. POST, Feb. 16, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/16/AR2007021600707.html>. In February 2007, Trafigura settled the case with the Ivory Coast by paying 152 million euros; however, an investigation conducted by the United Nations ("U.N.") Environmental Programme is still pending. *Trafigura Agrees Probo Koala Payout*, DUTCHNEWS.NL, Feb. 14, 2007, [http://www.dutchnews.nl/news/archives/2007/02/trafigura\\_agrees\\_probo\\_koala\\_p.php](http://www.dutchnews.nl/news/archives/2007/02/trafigura_agrees_probo_koala_p.php); Press Release, U.N. Environment Programme, Donor Assistance Critical to Cote D'Ivoire Clean-up Efforts (Dec. 20, 2006), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=496&ArticleID=5456&l=en>.

5. Trafigura has faced serious allegations before. In May 2006, a Texas court ordered the company to pay penalties and repay profits of close to US\$20 million for violating U.S. laws and the embargo provisions of the "Oil for Food" program in Iraq. Knauer et al., *supra* note 2; Press Release, U.S. Attorney's Office, Southern District of Texas, Swiss Corporation Convicted in "Oil for Food" Case (May 25, 2006), available at <http://www.forensicrisk.com/060525-Trafigura.pdf>.

Traditionally, international law has exclusively addressed states. Nevertheless, it is increasingly recognized that non-state entities, such as individuals, also have rights and duties under international law. Holding corporations accountable for violations of international law, therefore, does not pose a problem conceptually. This can be deduced, *inter alia*, from the number of international conventions that explicitly create obligations for companies in specific areas.<sup>6</sup> Notwithstanding the growing awareness of corporate entities' major involvement in international human rights violations, there is no mechanism at the international level to hold such entities accountable.

As a result, the tendency has been to turn to domestic remedies.<sup>7</sup> This is not unusual since, generally, domestic legal systems are crucial to the enforcement of international human rights norms. In the burgeoning quest for international corporate accountability for violations of international human rights law, attention to the possibilities offered by domestic courts is rising as multinational corporations are confronted with liability claims in their home countries for violations committed abroad. From the perspective of the victims of such violations, the ability to bring a claim in their home countries offers the distinct advantage that they do not have

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6. *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid art. I, Nov. 30, 1973, 1015 U.N.T.S. 243; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (1989); United Nations Convention Against Transnational Organized Crime art. 6(5), opened for signature Dec. 13, 2000, S. TREATY DOC. NO. 108-16 (2004), 2225 U.N.T.S. 275. Furthermore, there are numerous international instruments of a soft law character that address corporations directly. *See, e.g.*, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, para. 6, Int'l Labour Org., 204th Sess., Nov. 16, 1977, 17 I.L.M. 422 (1978); Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises, June 21, 1976, 15 I.L.M. 969 (1976); Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (*prepared by* John Ruggie) (describing various soft law mechanisms). *See also* NICOLA M.C.P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY (2002) (analyzing the accountability of corporations for violations of international human rights law from a conceptual point of view).

7. This is explicitly recognized by the U.N. Special Representative of the U.N. Secretary General on Business and Human Rights John Ruggie in his 2007 report to the U.N. Human Rights Council. Ruggie, *supra* note 6. This trend is also reflected in the survey conducted by the Norwegian research center Fafo, which maps the various ways of holding corporations accountable for international crimes in sixteen different jurisdictions. *See* ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF SIXTEEN COUNTRIES (2006), *available at* <http://www.faf.no/pub/rapp/536/536.pdf>.

to rely on the legal remedies available in the countries where the corporations operate—such remedies often being non-existent or difficult to acquire.

This Article focuses on tort law as an avenue to address corporate violations of international law. Tort law can be employed for several reasons. Tort law can serve a preventive function by discouraging certain unlawful behavior. In this sense, tort liability may act as a regulatory mechanism. Additionally, tort law offers redress for injuries suffered and therefore also serves a compensatory function. It is especially this latter characteristic of tort law that makes it an important tool of human rights enforcement from the perspective of victims of human rights violations.

Research in the area of tort law as a tool for enforcing human rights has so far concentrated mainly on the United States. This is hardly surprising given the eye-catching developments that have arisen under the Alien Tort Claims Act (“ATCA”).<sup>8</sup> Litigation under the ATCA is unique in the sense that it constitutes a category of truly international tort cases. In ATCA litigation, international law is incorporated to define the substance of the tort and to determine the actor who is liable to suit. Individuals and corporations, irrespective of their location, are being held responsible in the United States for violations of international law that occurred elsewhere.<sup>9</sup> However, as Professor Beth Stephens has commented, because of its unique character, the ATCA cannot easily be translated to other jurisdictions.<sup>10</sup> Moreover, outside the United States, domestic remedies for violations of international law are more often sought in the realm of criminal law rather than civil law.<sup>11</sup> Nevertheless, developments in civil litigation before other domestic courts reflect the same international law concerns as the human rights litigation in the United States. For example, a number of high-profile cases in which parent companies have been held responsible in the United Kingdom for

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8. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) (providing that “[t]he 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”).

9. See, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995).

10. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 3, 17–18, 27–34 (2002) (providing an overview of the common procedures in different legal systems around the world that serve as obstacles to civil litigation for human rights abuses).

11. See *infra* Part IV for more on criminal law remedies.

bodily harm inflicted on third parties in host countries<sup>12</sup> have generated a fair amount of scholarly attention to civil law remedies in that jurisdiction.<sup>13</sup> This case law differs from the ATCA litigation insofar as it applies domestic liability standards to actors headquartered in the country, as opposed to the independent ATCA cases against non-resident defendants for international human rights violations committed outside the forum state.

This Article will not deal with the transnational human rights litigation in the United Kingdom, but will instead focus on the feasibility of such litigation in another European country: the Netherlands. Specifically of interest is the use of Dutch tort law as a remedy for corporate human rights abuses.<sup>14</sup>

In the Netherlands, as is the case with corporations in many other (home) countries, the activities of (Dutch) corporations abroad have been subject to increased political attention. Dutch political interest in multinational corporations' activities abroad is evidenced by the numerous questions regarding such activities submitted to the Dutch Parliament over the past few years. These questions have addressed, *inter alia*,

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12. See, e.g., *Lubbe v. Cape PLC*, [2000] 4 All E.R. 268 (Eng. H.L.); *Sithole v. Thor Chem. Holdings Ltd.*, [1999] T.L.R. 110 (Eng. C.A.); *Connelly v. RTZ Corp.*, [1997] 4 All E.R. 335 (Eng. H.L.); *Ngcobo v. Thor Chem. Holdings Ltd.*, [1995] T.L.R. 10 (Eng. C.A.).

13. See generally Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 161–70 (Michael Addo ed., 1999); Richard Meeran, *Liability of Multinational Corporations: A Critical Stage in the UK*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 251 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

14. The Dutch legal system may also provide avenues other than tort law, but given the limited space, these will not be discussed here. See, e.g., 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 SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 348, 349–74 (Hans Christian Bugge & Christina Voigt eds., 2008). Van der Heijden and Jesse suggest that the so-called *enquete-recht* (right of investigation) of the *Ondernemingskamer* (Dutch Companies and Business Court) may be such an avenue. See generally *id.* This Dutch legal doctrine is comparable in some ways to the business judgment rule in U.S. corporate law. Shareholders and other stakeholders can file a complaint, after which the Dutch Companies and Business Court may decide to examine the corporate conduct, i.e., the management and its decisions. The *enquete-recht* can also be used as a disclosure mechanism. So far, no case on corporate violations of human rights abroad has been filed under this mechanism. The whole range of possible legal remedies will be extensively analyzed in van der Heijden's forthcoming dissertation.

Unilever's involvement in child labor practices in India<sup>15</sup> and Shell's activities in Nigeria.<sup>16</sup> The aforementioned incident involving Trafigura, and the illegal dumping of the waste carried by the Probo Koala in particular, led to political commotion during a special parliamentary debate in September 2006.<sup>17</sup> However, scholarly attention to the specific subject of corporate liability in the Netherlands for international human rights violations has remained relatively scarce.<sup>18</sup> One explanation might be that, to date, such claims have not been filed in the Dutch courts against (parent) companies. The Netherlands has no equivalent to the ATCA.

The question this Article seeks to answer is if and how Dutch tort law provides possibilities for transnational human rights litigation. By analyzing the Dutch legal system, this Article seeks to survey the possibilities this system might offer to human rights plaintiffs and litigators and to explore why claims of human rights violations under tort law still have not been brought before the Dutch courts. As part of this analysis, an examination of European law more generally is also required, since a survey of the Dutch legal system on its own is incomplete given the far-reaching harmonization of civil procedures at the European level.

This Article will demonstrate that in light of the increased attention to international civil liability claims and the characteristics of the Dutch civil system, a Dutch corporation will likely be faced with a claim concerning alleged human rights violations in the (near) future. In the 1990s, this seemed likely when Ken Saro-Wiwa and other leaders of the Ogoni

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15. Tweede Kamer der Staten-Generaal [TK] [Dutch House of Representatives] 2003–2004, Aanhangsel van de handelingen [Addendum to the Agenda: Questions Asked by Members of Parliament with Subsequent Answers by Members of the Cabinet], nos. 1453 & 1476, submitted 12 mei 2003.

16. TK 2003–2004, Aanhangsel van de handelingen [Addendum to the Agenda: Questions Asked by Members of Parliament with Subsequent Answers by Members of the Cabinet], no. 2237, submitted 17 juni 2004.

17. See TK 2006–2007, Brief van de Staatssecretaris van volkshuisvesting, ruimtelijke ordening en milieubeheer [Letter from the State Secretary on Environmental Management], no. 143, submitted 31 oktober 2006.

18. *But see* L. ENNEKING, CORPORATE SOCIAL RESPONSIBILITY: TOT AAN DE GRENS EN NIET VERDER? [CORPORATE SOCIAL RESPONSIBILITY: NOT BEYOND THE BORDER?] (2007); Gerrit Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 283–305 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); M.L. Lennarts, *Multinationals en Asbestclaims: Over Forum Non Conveniens, Zorgplichten, 'double standards' en 'soft law'* [*Multinationals and Asbestos Claims: On Forum Non Conveniens, Caretaking, 'Double Standards' and 'Soft Law'*], in *LT VERZAMELDE 'GRONINGER' OPSTELLEN AANGEBODEN AAN VINO TIMMERMAN* [LT COLLECTED 'GRONINGER' DRAFTING OFFERED TO VINO TIMMERMAN] 177–89 (E.E.G. Gepken-Jager & J.N. Schutte-Veenstra eds., 2003).

people challenged the business and environmental practices of various multinational corporations in Nigeria, particularly that of Shell Nigeria. These Ogoni leaders were eventually executed in 1995 by the Nigerian military government after a sham trial.<sup>19</sup> In 1996, the first of a series of cases was filed under the ATCA by the decedents' relatives against the Dutch/British parent company, The Royal Dutch/Shell, for its involvement in gross human rights abuses in Nigeria.<sup>20</sup> The plaintiffs alleged that Shell Nigeria was complicit in the execution of the Ogoni leaders. The Southern District Court of New York dismissed the case on *forum non conveniens* grounds, therefore raising the possibility that the case would be brought before a court in the parent company's home country—the Netherlands (its place of incorporation) or England (its corporate headquarters). The possibility of litigating in the Netherlands was, however, not fully explored, as the district court held that the case should be dismissed and tried in England. In 2000, the case was reversed on appeal and the U.S. Court of Appeals for the Second Circuit decided that “in balancing the interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations.”<sup>21</sup> The case therefore proceeded in the United States, foreclosing any need for an alternative forum, either in the United Kingdom or in the Netherlands.

This Article will show that as a result of certain features of Dutch tort law, the Dutch legal system is not as litigation-friendly as that of the United States. Nevertheless, there are several reasons why it is relevant to analyze the possibilities for civil litigation in the Netherlands. The Netherlands is the home country to a relatively large number of big multinational corporations such as Philips, Shell, and Heineken, to name a few. It is argued that the Netherlands offers an attractive environment to set up businesses, especially from a fiscal point of view, therefore drawing many to establish corporations in its jurisdiction.<sup>22</sup> This abundance of

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19. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d Cir. 2000). For more background on the *Wiwa* case, see Sigrun I. Skogly, *Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria*, 15 NETH. Q. HUM. RTS. 47 (1997).

20. *Wiwa*, *supra* note 19, at 92.

21. *Id.* at 99–100. This reading of the *forum non conveniens* doctrine has been confirmed by the United States Supreme Court, which decided on March 26, 2001 to deny certiorari to an appeal by the defendants. *Id.*

22. See MICHIEL VAN DIJK ET AL., *THE NETHERLANDS: A TAX HAVEN?* 3 (2006), available at [http://www.somo.nl/html/paginas/pdf/netherlands\\_tax\\_haven\\_2006\\_NL.pdf](http://www.somo.nl/html/paginas/pdf/netherlands_tax_haven_2006_NL.pdf) (concluding that the Netherlands is attractive to businesses because it is perceived to be and functions as a tax haven).



well-known corporations and the favorable business climate in the Netherlands means that, should Dutch law provide an avenue for litigation, it would offer a plaintiff enforceable remedies.

In light of the above, it is important to analyze the possible remedies the Dutch legal system has to offer to victims of corporate human rights violations. This is done by addressing the following issues. First, in Part I, the consequences of the complex legal structures of multinational corporations will be addressed. In Part II, this Article will examine the procedural issues that arise when analyzing the feasibility of transnational human rights litigation. The first question one must ask is which court may, or sometimes must, hear such a claim (Part II.A). Part II.B will address the issue of the choice of law. Next, this Article will analyze substantive tort law in the Netherlands in an effort to address the general question of how a court will deal with violations of public law norms in the private sphere (Part II.C). The feasibility of transnational human rights litigation in the Netherlands will not only depend on the issues discussed in these sections but also on the general characteristics of Dutch private law and legal culture, which will be discussed in Part III. Given the general tendency towards using criminal prosecution in Europe as a remedy for international human rights violations, this avenue will be briefly explored in Part IV. The (dis)advantages of employing criminal or civil remedies will be discussed in Part V, followed by the conclusion.

Professor Stephens rightly states that “[a] full understanding of the varied options available in differing legal systems is an essential foundation for the worldwide drive for accountability and redress.”<sup>23</sup> It is hoped that this Article will contribute to that effort.

#### I. THE LEGAL STRUCTURE OF MULTINATIONAL CORPORATIONS

A preliminary issue that must be addressed before determining whether a company can be sued under Dutch law for allegedly harmful activities abroad concerns the difficulties posed by the often complex legal structures of multinational corporations. The most straightforward case is the situation in which a multinational corporation becomes directly present in a host country by establishing a branch in that country. To litigate against that corporation will not present a problem, as the branch and the multinational corporation can be considered parts of one corporate group and a case can be brought under Dutch law against the parent company based on the principle of active nationality.<sup>24</sup>

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23. Stephens, *supra* note 10, at 57.

24. See Burgerlijk Wetboek [BW] [Civil Code] art. 1:5 (Neth.).

However, a more common situation is the one in which a corporation creates a separate legal entity that operates under the laws of the host country but is controlled by the parent company. The doctrine of limited liability, meant to encourage individual entrepreneurship, has resulted in corporations establishing complicated corporate structures consisting of numerous legal entities with multiple layers of limited liability. A parent company cannot simply be held liable for acts of legally separate subsidiaries.<sup>25</sup> A more complicated situation that further limits a corporation's liability results when a corporation enters into contractual relations with partners present in another country. Such a corporation cannot be liable for its foreign partners' acts.<sup>26</sup>

When discussing transnational human rights litigation, it is important to have a clear picture of which legal mechanism is being applied to overcome the potential obstacle of limited liability. Different mechanisms can be discerned, each of which has different consequences in the context of litigation.<sup>27</sup>

In the Netherlands, suits for human rights violations cannot be brought directly against a parent company's legally separate subsidiaries and partners operating abroad. Therefore, in order to bring a claim in the Netherlands, the parent of the foreign subsidiary must be identified and suit brought against this corporation either based on its direct participation in the alleged violations or based on a derivative responsibility for these acts. In principle, the parent company will, however, be shielded from accountability on the basis of the doctrine of limited liability.

Two legal mechanisms can be applied to overcome this hurdle. First, a litigant may try to "pierce the corporate veil" by demonstrating that the parent company should be liable for acts of the subsidiary because the legal separation is not in accordance with reality or because the corporate form has been abused by the parent company. To date, no claim has come before the Dutch courts seeking the accountability of a Dutch parent company for breaches of international human rights law in another country. It is therefore difficult to draw any conclusions as to whether the Dutch courts will pierce the corporate veil in such a case to find the parent company liable. To determine how a Dutch court would approach

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25. See BW art. 2:19 (Neth.).

26. See *id.* art. 2:20.

27. See OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS (2006), available at <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (analyzing different situations in which extraterritorial jurisdiction is exercised to hold transnational corporations accountable for human rights violations).

piercing the corporate veil in tort cases, we need to turn to the case law concerning the accountability of a parent company for the debts of a subsidiary. The prevailing view is that the parent company can be held accountable for the debt of its subsidiary if: (1) the parent is the majority shareholder of the subsidiary; (2) the parent company knew or should have known that the creditors' rights would be infringed;<sup>28</sup> (3) the infringement is the result of an act of the parent company and/or it is a case of a special parent-subsiidiary relationship;<sup>29</sup> and, finally, (4) if the parent company fails to take the creditors' interests into consideration.<sup>30</sup> From this case law, it can be concluded that profound (financial) involvement of the parent company and knowledge of the infringement of rights is required for the courts to allow the corporate veil to be pierced.

If and how these criteria will apply in the case of a claim concerning extraterritorial corporate human rights violations will depend on the specific circumstances and is difficult to predict. Nevertheless, one can conclude that providing the evidence needed for piercing the corporate veil will impose a considerable burden on the plaintiffs. Another consequence, from the litigant's perspective, is that the criteria for piercing the corporate veil are not very clear-cut, especially not when it concerns a case of human rights violations, which has not yet been brought before a Dutch court. It may prove very difficult to establish the factual relation required to pierce the corporate veil in such a case. Moreover, this mechanism may act as a disincentive for parent companies to control their subsidiaries as it is this factual relationship that can give rise to a piercing of the corporate veil. The less a parent company is involved in the politics and operations of its subsidiary, the less likely it is to be held liable for any misconduct.

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28. Such knowledge is presumed to be present if the financial policies are considerably interwoven, the infringement of creditors' rights can objectively be foreseen, and the financial position of the subsidiary is precarious. Knowledge of the infringement is also presumed if the parent company profits from this infringement while being closely involved in the activities of the subsidiary.

29. This refers to a "profound involvement" of the parent company in the policies of the subsidiary.

30. These criteria are drawn from the groundbreaking "piercing of the corporate veil" cases. See *Sobi/Hurks II*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 21 december 2001, NJ 2005, 96 (Neth.); *Coral/Stalt*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 12 juni 1998, NJ 1998, 727 (Neth.); *Nimox*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 8 november 1991, NJ 1992, 174 (Neth.); *Albada Jelgerma II*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 19 februari 1988, NJ 1988, 487 (Neth.); *Osby*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 25 september 1981, NJ 1982, 443 (Neth.).

A second mechanism that plaintiffs in transnational human rights litigation may rely on is the direct liability of the parent for an act or omission by the *parent* in violation of its duty to exercise due diligence in the relationship towards the subsidiary. This approach was used in the previously mentioned transnational human rights cases decided by the British courts.<sup>31</sup> In this situation, acts or omissions of the parent company are considered to be in violation of a domestic liability standard. This mechanism has some advantages for transnational human rights litigation as it will encourage rather than discourage more active involvement by the parent company towards its subsidiaries. Subsequent sections of this Article will consider this last legal mechanism when discussing the possibilities offered by Dutch civil law in cases of corporate breaches of international law. This Article will introduce the general features of the Dutch system of liability law in order to analyze the possibilities it offers for plaintiffs to bring transnational human rights claims before the Dutch courts. This Article will focus more on legal mechanisms that can be used to hold corporations accountable for human rights violations and the resulting procedural issues, and less on the content of the norms and the extent of the obligations to which corporations should adhere.<sup>32</sup>

## II. LITIGATING AGAINST CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL LAW IN THE DUTCH LEGAL SYSTEM

The transnational nature of human rights litigation under consideration in this Article raises jurisdictional questions that are dealt with under the rules of private international law. Before addressing the typical private international law issues concerning the proper legal forum and choice of law,<sup>33</sup> a preliminary remark is in order.

As will be demonstrated, the hard and fast rules of private international law pose a potential obstacle for victims of corporate human rights violations who want to bring suit against a corporation. One may question the appropriateness of a strict application of these rules of private international law in the face of the most serious violations of fundamental

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31. See *supra* note 12 and the authorities cited therein.

32. See JÄGERS, *supra* note 6 (analyzing the human rights obligations of corporations under international human rights law).

33. Private international law typically also addresses a third issue: the execution of judgments. In view of the fact that transnational human rights litigation remains relatively scarce and that such a case has never been brought in the Netherlands, this issue will not be addressed in this Article.

norms of international law.<sup>34</sup> The unification of private international law, necessary from the perspective of legal certainty, curbs judicial creativity and demands self-restraint of domestic legislators and courts when exercising their prescriptive and adjudicative powers. However, given the dependence on domestic courts as the first line of defense in the enforcement of international human rights law, human rights advocates claim that a certain flexibility for judicial activism is required to uphold universal substantive standards. It is beyond this Article's scope to discuss this tension between the distributive function of private international law and the human rights claim of universal application.<sup>35</sup> However, an argument can be made that some room should be allowed for national courts to deal with universally condemned human rights violations.

#### *A. Judicial Competence*

When exploring the issue of whether a Dutch court has jurisdiction, we cannot limit ourselves to Dutch law. A discussion of transnational tort litigation in the Netherlands is incomplete without examining the broader European perspective, given the partial harmonization of the requisites for judicial competence in the European Union ("EU"). The relevant European legislation harmonizing the rules on jurisdiction in the European Community so as to limit any potential conflict between national courts of the various Member States is EC Regulation 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>36</sup> This regulation consolidates for most of the EU Member States the so-called Brussels Convention (1968).<sup>37</sup> In the Netherlands, EC Regulation 44/2001 was expressly

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34. See Upendra Baxi, *Geographies of Injustice: Human Rights at the Altar of Convenience*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 197 (Craig Scott ed., 2001).

35. For more on this emerging conflict, see P.R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 *YALE J. INT'L L.* 211 (2005).

36. Council Regulation 44/2001, 2001 O.J. (L 12) 1 [hereinafter EC Regulation 44/2001].

37. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention]. The Brussels Convention (1968) applied to the members of the European Community. Six additional countries, then forming the European Free Trade Association, were added to the Brussels Convention vis-à-vis the Lugano Convention. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9. However, EC Regulation 44/2001 does not fully replace the Brussels Convention. The latter's provisions still remain in force in the relations between Denmark and the European Union ("EU") Member States bound by EC Regulation 44/2001. This is due to the EC Regulation's general opt-out for Denmark in relation to measures adopted under Title IV of the Treaty Establishing the European Community ("EC Treaty"). See EC Regula-

adopted as a guideline for the recent revision of the Dutch Code of Civil Procedure.

The jurisdictional rules under EC Regulation 44/2001 are mandatory and deprive national courts of any discretion to be more generous in providing a forum. A national court cannot take cognizance of a claim that falls within the reach of the regulation unless it can point to one of the jurisdictional grounds provided by the regulation conferring on the court the authority to do so.

At the time the Brussels Convention was drafted, the *forum rei* principle was recognized as the controlling jurisdictional principle in most European countries. It remains so today, as evidenced by its codification in EC Regulation 44/2001. Under article 2(1) of the regulation, “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”<sup>38</sup> What is to be understood as an individual’s domicile is provided for in article 60(1), which states that “a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business.”<sup>39</sup> This is a broad formulation that allows for multiple fora. Similarly, under Dutch law, domicile is interpreted as the place of incorporation (as opposed to the doctrine of the real seat).<sup>40</sup> In other words, regardless of the place of headquarters, if a corporation, pursuant to its articles of association, is incorporated under the laws of the Netherlands, it will be subject to the jurisdiction of Dutch courts. Despite such a broad formulation, a strict application of the doctrine of incorporation opens the door to abuse. Corporations may avoid Dutch jurisdiction by establishing the corporation in a

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tion 44/2001, *supra* note 36, art. 2(3) (“In this Regulation, the term ‘Member State’ shall mean Member States with the exception of Denmark.”); EC Treaty, *infra* note 51, art. 69 (“The application of this Title shall be subject to . . . the Protocol on the position of Denmark . . .”). The Brussels Convention also continues to apply to the territories of the Member States that fall within the territorial scope of the Convention but are excluded from EC Regulation 44/2001 pursuant to article 299 of the EC Treaty. *See* EC Regulation 44/2001, *supra* note 36, pmb. para. 23 & art. 68; EC Treaty, *infra* note 51, art. 299. Given the need for continuity, there are no textual dissimilarities between the Brussels Convention and EC Regulation 44/2001. Additionally, European Court of Justice case law remains relevant to the interpretation of EC Regulation 44/2001.

38. EC Regulation 44/2001, *supra* note 36, art. 2(1).

39. *Id.* art 60(1).

40. Wetboek van Strafvordering [Sv] [Code of Criminal Procedure] art. 2 (Neth.). The principle of incorporation is also applied in the United Kingdom, Ireland, and Denmark. Most European states—inter alia, Germany, France, Belgium, Spain, Greece, Portugal, and Luxembourg—acknowledge the doctrine of the real seat.

state with lenient rules while they in fact operate elsewhere. Therefore, certain modifications to the doctrine of incorporation have been made.<sup>41</sup>

Besides the *forum rei* principle, EC Regulation 44/2001 provides two additional grounds for jurisdiction (which should be considered as exceptions to the *forum rei* principle) that a plaintiff may wish to rely on in certain circumstances. First, under article 5(3), “in matters relating to tort, *delict* or *quasi-delict*” the plaintiff may sue “in the courts for the place where the harmful event occurred or may occur.”<sup>42</sup> In the case of corporate misconduct, it will not always be easy to establish the place where the harmful event occurred. A distinction will often be made between the place where the actual act occurs (*Handlungsort*) and the place where the harmful effect is felt (*Erfolgort*). In cases of corporate misconduct, the place where the harmful effect is felt will usually be clear. However, establishing the *Handlungsort* can prove more difficult. It can be argued that the *Handlungsort* is the place where the parent company is seated, as this is where decisions were made that resulted in the harmful effect abroad.

In the aforementioned case of *Trafigura* it is clear that the Ivory Coast is the *Erfolgort*, the place where the harm is felt. One could argue that the *Handlungsort* is in Europe as this is the place where the corporation *Trafigura* is incorporated and has its seat. Specifically, the United Kingdom would most likely be considered the *Handlungsort*, as London is *Trafigura*'s operational center.<sup>43</sup> The European Court of Justice (“ECJ”) has held that in such a situation, article 5(3) of EC Regulation 44/2001 must be understood to include both the place where the damage occurred and the place of the event giving rise to such damage, so that the defendant may be sued in the courts of either place at the option of the plain-

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41. In clear cases of abuse, the “public policy” doctrine has been applied. *See, e.g.*, *Engelse Ltd.*, *Rechtsbank Amsterdam* [Rb.] [District Court of Amsterdam], 6 april 1982, WPNR 1985, 5765 (Neth.). This can, however, only be relied on in cases where the foreign rules are in clear violation of fundamental norms and values of the Dutch legal order. Therefore, the public policy doctrine as a remedy against abuse of the doctrine of incorporation will only be relied on in exceptional circumstances. A compromise has been found in the *Wet op de Formeel Buitenlandse Vennootschappen* [Act on Formally Foreign Enterprises], 17 december 1997, Stb. 697 (entered into force Jan. 1, 1998). According to this law, if a corporation fits the definition of a “formally foreign enterprise” as articulated in article 1, certain Dutch provisions will be applicable regardless of the doctrine of incorporation. *Id.* The definition in article 1 refers to a corporation that although having been established in another state, operates almost exclusively in the Netherlands and therefore has no real connection to the country in which it was established. *See generally* P. VLAS, *RECHTSPERSONEN* [LEGAL ENTITIES] 5–44 (2002).

42. EC Regulation 44/2001, *supra* note 36, art. 5(3).

43. *See* *TRAFIGURA BACKGROUND*, *supra* note 3, at 2 (stating that London is *Trafigura*'s operational center).

tiff.<sup>44</sup> In some cases, a plaintiff might decide that it is more convenient to sue in the country where the decision was made. The place of harmful activity (*forum delicti*) can thus provide an additional jurisdictional option.

Second, article 5(5) of EC Regulation 44/2001 states that “a person domiciled in a Member State may, in another Member State, be sued . . . as regards a dispute arising out of the operations<sup>45</sup> of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.”<sup>46</sup> In other words, the legal entity constituting the corporation may be sued not only where its seat is located but also in the place where a branch is situated. This provision is only applicable to a branch of a corporation that is itself domiciled in the EU; it therefore cannot be used with respect to a branch of a non-European corporation. Article 5(5), however, does make available a second special ground for jurisdiction in the Netherlands over a corporation: tortious lack of supervision by a Dutch branch by a European parent corporation.

It has been contended that these two additional grounds for jurisdiction can, together, be seen as a European version of the ATCA.<sup>47</sup> According to this interpretation, Members States’ courts are competent to hear tort actions brought by victims, whatever their nationality, regarding the activities of a multinational corporation domiciled in a Member State or any of its branches. The action can be lodged either in the state where the parent company is domiciled or, where a branch was the base of the act that caused the damage, in the state where that branch is located. Such an interpretation of EC Regulation 44/2001 provides the possibility of opening European courts to lawsuits against corporations registered in the EU for harm occurring in any third country throughout the world.

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44. See, e.g., Case 21/76, *Handelskwekerij Bier v. Mines de Potasse d’Alsace*, 1976 E.C.R. I-1735; Case C-220/88, *Dumez France v. Helaba*, 1990 E.C.R. I-49; Case C-68/93, *Shevill v. Presse Alliance SA*, 1995 E.C.R. I-415, ¶ 19; Case C-364/93, *Marinari v. Lloyds Bank PLC & Zubaidi Trading Co.*, 1995 E.C.R. I-2719, ¶ 10; Case C-51/97, *Réunion Européenne SA v. Spliethoff’s Bevrachtungskantoor*, 1998 E.C.R. I-6511.

45. The ECJ has interpreted “operations” as referring, inter alia, to activities in which the branch “has engaged at the place in which it is established on behalf of the parent body.” Case 33/78, *Somafer v. Saar-Ferngas*, 1978 E.C.R. I-2183, I-2194. The ECJ has further held that these “operations” need not be geographically limited to the State where the Branch is situated. See Case C-439/93, *Lloyd’s Register of Shipping v. Société Campenon Bernard*, 1995 E.C.R. I-961, ¶ 19.

46. EC Regulation 44/2001, *supra* note 36, art. 5(5).

47. See OLIVIER DE SCHUTTER, *THE ACCOUNTABILITY OF MULTINATIONALS FOR HUMAN RIGHTS VIOLATIONS IN EUROPEAN LAW* 33 (2004), available at <http://www.chrgj.org/publications/docs/wp/s04deschutter.pdf>.



At the EU level—which, relying heavily on the mechanisms of self-regulation,<sup>48</sup> has overall been reluctant to impose overly strict requirements on corporations—the European Parliament has proven to be a supporter of opening up the European courts in such a manner. In 1998, the European Parliament called for a study of the feasibility of adopting a “European ATCA.”<sup>49</sup> Prior to that, the European Parliament endorsed the interpretation of EC Regulation 44/2001 as a European ATCA when it adopted the resolution on “EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct” on January 15, 1999.<sup>50</sup>

In comparison to the ATCA, this interpretation of EC Regulation 44/2001 is wider in scope in the sense that the ATCA is only applicable to aliens. The scope of the jurisdiction conferred upon European courts by EC Regulation 44/2001 is not similarly limited. However, the EC Regulation is more limited than the ATCA in that it applies only to corporations registered or domiciled within the EU and it is purely adjudicative and not prescriptive in nature. It is questionable whether the EU has the authority to amend EC Regulation 44/2001 in order to make it truly a European ATCA, as that would seem to go beyond the objectives of the EU.<sup>51</sup>

In sum, in order for a Dutch court to be competent to hear a case against a corporation for human rights abuses committed abroad the defendant corporation must be incorporated in the Netherlands. The Dutch doctrine of incorporation provides a much stricter criterion than under

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48. *See id.* at 58.

49. European Parliament, Committee on Development and Cooperation, *Report on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct*, at 16, A4-0508/98 (Dec. 17, 1998) (prepared by Richard Howitt) (“A study could also be undertaken on drawing up a European version of the American Tort Claims Act . . .”).

50. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, EUR. PARL. DOC. (A4-0508/98) (1999) (emphasizing the EU’s dedication to corporate enterprises playing a role in social development and human rights).

51. Article 65 of the EC Treaty provides that measures concerning cooperation in civil matters may be taken when necessary for the internal market. Consolidated Version of the Treaty Establishing the European Community art. 65, Dec. 24, 2002, 2002 O.J. (C 325) 33, 59 [hereinafter EC Treaty], available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf). That condition would not seem to be met here. *See* JAN WOUTERS & LEEN DE SMET, CIVIELRECHTELIJKE SCHADECLAIMS TEGEN MULTINATIONALE ONDERNEMINGEN WEGENS MENSENRECHTENSCHENDINGEN ELDERS IN DE WERELD: LESSEN VAN DE ALIEN TORT CLAIMS ACT [CIVIL LIABILITY CLAIMS AGAINST MULTINATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS ELSEWHERE IN THE WORLD: LESSONS FROM THE ALIEN TORT CLAIMS ACT] (2003).

the ATCA where jurisdiction can be asserted over individuals temporarily present in the United States or over corporations doing business in the country. In addition, the special fonts of jurisdiction under EC Regulation 44/2001 (*forum delicti* and the possibility to sue in the forum of a branch of a European corporation) provide a means to bring suit against a Dutch or otherwise European-based corporation for tortious lack of supervision.

The plaintiff's domicile in such a case is irrelevant. Victims of corporate misconduct will often be dependent on non-governmental organizations ("NGOs") to bring legal proceedings against the corporation because they lack the resources on their own to do so. Under current Dutch law, an NGO can bring a case where harm occurs to the general interest it is promoting as its objective, according to its articles of association.<sup>52</sup>

### 1. *Forum Non Conveniens*

An important legal hurdle to be overcome by plaintiffs in ATCA litigation is the doctrine of *forum non conveniens*, which generally provides that a case will be dismissed if a defendant can show that an adequate alternative forum exists.<sup>53</sup> Contrary to common law countries such as the United Kingdom<sup>54</sup> and the United States, the *forum non conveniens* doctrine is not applied in the Netherlands. In principle, therefore, the issue of a Dutch court's competence to hear the case will not present claimants with the same problems they face in common law countries. As discussed *supra*, the basic and primary rule of Dutch law is *forum rei*; in

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52. Burgerlijk Wetboek [BW] [Civil Code] art. 3:305a(1) (Neth.) (providing that an association or foundation with full legal capacity is entitled to an action for the purposes of protecting interests of a similar nature of other persons, to the extent it promoted those interests according to its articles of association). For more on the issue of *locus standi* for NGOs in public interest litigation, see Betlem, *supra* note 18, at 300–03. Betlem argues that foreign NGOs also have access to the courts in the Netherlands if the description of the purpose of the NGO matches the interest that has been harmed, and the NGO “can be regarded as an equivalent to ‘an association or foundation with full legal capacity’ within the meaning of article 3:305a [of the Dutch Civil Code].” *Id.* at 302.

53. After determining that an adequate alternative forum exists, the courts must “balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.” *Wiwa*, 226 F. 3d 88, 100 (2d Cir. 2000) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)).

54. Whether there is room for the doctrine of *forum non conveniens* under the Brussels Convention (now EC Regulation No. 44/2001) has been heavily debated. The High Court in England decided that the doctrine could not be applied in cases where the alternative court designated by the Brussels Convention is a court of an EU Member State. *Re Harrods (Buenos Aires) Ltd.*, [1991] 4 All E.R. 334 (Eng. C.A.). This implies, however, that there remains room for *forum non conveniens* arguments when third states are involved. *See* DE SCHUTTER, *supra* note 47, at 35–39.

other words, competent is the court of the place where the defendant is incorporated. Therefore, parent companies can be sued in the Dutch courts concerning activities abroad if the Netherlands is the country where the corporation has been established.

A few words need to be said on whether the European rules on jurisdiction, as laid down in EC Regulation 44/2001, leave any room for *forum non conveniens* considerations. The ECJ's judgment in *Group Josi Reinsurance Company* seems to imply that this is not the case.<sup>55</sup> In this case, the ECJ held that the general rule of jurisdiction being conferred on the courts of the domicile of the defendant may not be followed "only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State."<sup>56</sup>

In other words, the ECJ seems to suggest that applying the *forum non conveniens* doctrine in cases where the national courts have jurisdiction based on the defendants' domicile in that state is incompatible with the requirements of the Brussels Convention—or today with those of EC Regulation 44/2001. The mandatory character of the *forum rei* principle was confirmed by the ECJ in 2005.<sup>57</sup> In other words, the courts of the defendant's domicile have no power to decline to exercise their jurisdiction.

### B. Choice of Law

Having established the grounds on which a Dutch court would be considered the appropriate forum for transnational human rights litigation, we must now address the question of the applicable law. For tort law to be a useful regulatory system in this context, it is of course necessary that the law be applicable to actual tort claims filed against those multinational corporations. After all, if a country wishes to regulate certain transboundary activities of multinational corporations using its tort law, it can only do so if the judge deciding the suit applies that country's law.

EC Regulation 44/2001 is purely adjudicative and not prescriptive. It leaves open the question of which law will be applicable to a tort claim. This directly contrasts with the ATCA in the United States, which is both adjudicative and prescriptive. The question of prescriptive jurisdiction will be settled when the European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II") becomes

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55. See Case C-412/98, *Group Josi Reinsurance Co. v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-05925, available at <http://curia.europa.eu/common/recedoc/convention/gemdoc2000/html/c41298/41298-a-en.htm>.

56. *Id.* para. 61.

57. Case C-281/02, *Michael Owusu v. N.B. Jackson*, 2005 E.C.R. I-1383.

binding.<sup>58</sup> Because Rome II had not yet entered into force as this Article was being written,<sup>59</sup> this Article will first discuss prescriptive jurisdiction based solely on Dutch law. What, according to these rules, will a Dutch court decide is the applicable law if a parent company incorporated in the Netherlands is sued for the allegedly harmful activities of a subsidiary abroad?

First and foremost, it must be noted that under current Dutch private international law, parties are entitled to agree on the applicable law. Plaintiffs and defendant corporations can therefore come to an agreement stating that Dutch tort law is the law that will govern a transnational human rights case. The possibility of a choice of law is confirmed in the 2001 Bill on Conflicts of Law in Tort (*Wet Conflictenrecht Onrechtmatige Daad*) (“WCOD”).<sup>60</sup> This choice of law rule supersedes the main rule regarding the selection of the law governing the dispute, *lex loci delicti*, which provides that the place where the harm occurred determines the applicable law.<sup>61</sup> As stated above, in cases of corporate misconduct, this *lex loci delicti* principle is not always dispositive as to which rules are applicable, for distinguishing between the place of the happening of the event (*Handlungsort*) and the place where the event results in damage (*Erfolgsort*) is not always easy.<sup>62</sup> In such a case, *Handlungsort* and *Erfolgsort* will point to two different locations and WCOD article 3(2) would apply. Article 3(2) provides that when the harmful effect of an act is felt in a place other than where the act takes place, the law of the country in which the effect is felt applies unless the corporation could not reasonably foresee this harmful effect.<sup>63</sup> Consequently, Dutch courts will have to apply foreign law. The purpose of WCOD article 3(2) is to ensure redress in accordance with the expectations of the society where the harm occurs. The result is that the preventive function of tort law is pushed to the background, especially in corporate cases where the laws of the host states are often less strict than the rules in the home state. For example, the law of the host state may have a high tolerance for gender discrimination or environmental harm. It has been ar-

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58. See *Commission of the European Communities, European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations*, at 2, COM (2006) 83 final (Feb. 21, 2006).

59. The Rome II EC Regulation was adopted on July 11, 2007 and will enter into force on January 11, 2009. Council Regulation 864/2007, art. 32, 2007 O.J. (L 199) 40, 48 (EC) [hereinafter Rome II].

60. *Wet Conflictenrecht Onrechtmatige Daad [WCOD] [Unlawful Act (Conflict of Laws) Act]*, art. 6(1), Stb. 2001, 190.

61. *Id.* art. 3(1).

62. See *supra* text accompanying notes 42–44.

63. WCOD, art. 3(2).

gued that in such cases, where foreign law does not comport with the rules of international law, the Dutch courts should not have the authority to apply these foreign rules.<sup>64</sup>

There are several exceptions to the principle of *lex loci delicti*. First, when the defendant and the plaintiff both have their primary residence in the country where the harm occurs the case will be governed by the law of that country.<sup>65</sup> Second, the so-called accessory obligation provides that when the wrongful act is closely connected to a contractual relation between the parties involved, the court may decide that the law that governs the case arising out of the wrongdoing will be the same law that governs the contractual obligation between the parties.<sup>66</sup>

One can therefore conclude that under current Dutch law on the conflicts of law in tort, Dutch courts will most likely apply foreign law in transnational human rights litigation that seeks to hold a parent company accountable for acts or omissions in violation of a duty of care by the parent company itself. Similarly, if the plaintiff seeks to pierce the corporate veil, the applicable law will be the law of the country where the subsidiary is incorporated because this will be considered the *lex societatis* of the subsidiary.<sup>67</sup>

As mentioned above, in the near future European law will settle the question of prescriptive jurisdiction. On June 25, 2007, an agreement was reached in Rome II applying to situations involving a conflict of laws and non-contractual obligations in civil and commercial matters.<sup>68</sup> Similar to the WCOD, Rome II's main rule is that parties are free to choose the applicable law.<sup>69</sup> The difference, however, is that under Rome II, where no choice is made, the principle of *lex loci damni* applies. In other words, "the law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise."<sup>70</sup> Like the exceptions in Dutch law, Rome II provides that when both the plaintiff and the defendant

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64. See Andre Nollkaemper, *Litigation Against MNCs: Public International Law in the Netherlands*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 265, 280 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

65. WCOD, art. 3(3).

66. See *id.* art. 5.

67. For more on piercing the corporate veil, see *supra* text accompanying notes 28–30. For more discussion on the duty of care, see *infra* text accompanying notes 92–98.

68. Rome II, *supra* note 59, art. 1.

69. See *id.* art. 14(1).

70. *Id.* art. 4(1).

have their primary residence in the same country, the law of that country will be applicable.<sup>71</sup>

In addition to establishing a conflict of law principle, Rome II resolves two other jurisdictional issues relevant to this Article's discussion. First, jurisdiction arising from an accessory obligation is mandatory. Article 4(3) of Rome II provides:

[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.<sup>72</sup>

Second, article 7 of Rome II incorporates a new "polluter pays" principle (concerning environmental damage) and reads:

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.<sup>73</sup>

Consequently, when a case concerns damage to the environment, the plaintiff may choose between *lex loci damni* and *lex loci delicti*. The European Commission is of the opinion that this choice reflects "the polluter pays" principle. Applying this to the *Trafigura* case may result in either Dutch or English law being applicable if a plaintiff brought suit against *Trafigura* for the environmental damage caused in the Ivory Coast.

According to Dutch law, bringing suit against a Dutch parent company before a Dutch court for harmful activities abroad will not present major jurisdictional problems. However, at least in theory, a significant stumbling block will be that, generally, the Dutch court will have to apply the law of the host state unless the parties explicitly agree to have the law of the home country govern the dispute. An additional exception worth not-

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71. *Id.* art. 4(2). This provision, contrary to the provision in the WCOD, explicitly states that both parties must live in the same country *at the time the damage occurs* or is likely to occur in order for that country's law to govern the non-contractual obligation. *Id.* This suggests that plaintiffs who move to a particular country *after* they sustain damage will not necessarily enjoy the application of that country's law.

72. *Id.* art. 4(3).

73. *Id.* art. 7.

ing is the rarely invoked doctrine *forum necessitates*, which applies in situations in which no reasonably available alternative forum exists due to, for example, war or a natural disaster. However, practice in civil cases so far demonstrates that recourse is often taken to the *lex fori* for several reasons: a judge may be unfamiliar with foreign law or appropriate application of foreign law would be too time-consuming.<sup>74</sup> Moreover, with the entry into force of Rome II, the law of EU Member States may apply in cases concerning extraterritorial environmental damage caused by corporations incorporated in these states.

### C. Dutch Tort Law

Even if one concedes that Dutch tort law will rarely apply in transnational human rights litigation, it is relevant nonetheless to consider the potential value of Dutch substantive tort law in such cases. This is especially valuable as a source of comparative legal information for parties that agree to let Dutch law govern the dispute. Moreover, when Rome II ultimately enters into force in 2009, Dutch tort law will be applicable to cases involving environmental damage caused by a Dutch corporation. All of these reasons make it worthwhile to examine the legal techniques of Dutch law when dealing with such international disputes.

Under Dutch law, it is possible to file a legal claim against a corporation since corporations have legal personality under the Dutch Civil Code.<sup>75</sup> The focus of this Article is the civil liability of corporations for grave breaches of international law. It is important to note that in such cases national standards give effect to international standards when determining liability in specific cases. Professor Nollkaemper argues that instead of using national standards, it would be better to *directly* determine the legality of the contested activity on the basis of international law.<sup>76</sup> He argues that in cases of transnational litigation, public international law, having already been accepted by all or most states, would be perceived as more neutral and fair to the parties than would national standards. Moreover, he argues that such domestic rules, particularly in cases involving environmental standards, are not always easily applicable to a foreign situation and international law might therefore be the more appropriate law.<sup>77</sup> Nevertheless, as Professor Nollkaemper acknowledges, courts continue to turn to national law for the law that gov-

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74. See generally VOORKEUR VOOR DE LEX FORI [PREFERENCE FOR LEX FORI] (R. Koting, J.A. Pontier & L. Strikwerda eds., 2004).

75. See Burgerlijk Wetboek [BW] [Civil Code] art. 2:3 (Neth.).

76. Nollkaemper, *supra* note 64, at 267.

77. *Id.* at 267–268.

erns such cases, while private international law determines which national standards are applicable.

If Dutch law is the applicable law, the relevant provision in Dutch tort law is article 6:162 of the Dutch Civil Code, which reads:

1. A person who commits an unlawful act towards another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.
2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.<sup>78</sup>

In other words, under Dutch tort law, a tort is committed when (1) an act or omission violates a statutory duty, (2) a right is violated, or (3) an act or omission violates a rule of unwritten duty of care. This differs, for example, from the English system of separate torts. In the Netherlands, the concept of tortious liability is a general principle that must be fleshed out by the courts. The Dutch courts have shown in a handful of cases that they can enforce international law in civil litigation by reading it into the elements of a tort set out in the Dutch Civil Code.

Two situations need to be distinguished. In the first place, the activities of the corporation must directly violate an international legal right or duty to form the direct basis of a civil action. For direct application of international law in Dutch tort cases, two conditions need to be met: direct effect and horizontal effect. First, the international norm in question must have direct effect<sup>79</sup> or, in other words, be self-executing. An individual can only rely on an international norm before the Dutch courts if the relevant treaty provision (or a resolution by an international organization) is considered binding on all persons. This implies that the provision contains unequivocal norms that can be invoked before the courts without any further implementation. Whether a provision has direct effect is

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78. BW art. 6:162 (Neth.).

79. Article 93 of the Dutch Constitution reads: "Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published." GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW.] [CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS] art. 93.



to be decided by the courts.<sup>80</sup> If an international treaty provision or decision of an international organization<sup>81</sup> has direct effect it will take precedence over conflicting national law. The direct effect of international norms has mostly been recognized by the Dutch courts regarding classic fundamental rights such as those laid down in the European Convention on Human Rights (“ECHR”) and the International Covenant on Civil and Political Rights (“ICCPR”).<sup>82</sup> Overall, social and economic rights as laid out in the European Social Charter (“ESC”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) are considered to lack direct effect.<sup>83</sup>

The direct effect of an international norm is the minimum requirement for the direct application of such a norm. The second requirement is that the norm must have a horizontal effect, meaning the norm must be capable of producing legal effect in the relations between two private parties. Dutch courts have been rather hesitant to recognize the horizontal effect of international norms.<sup>84</sup> However, to the extent that Dutch courts have recognized the horizontal effect of international norms, such recognition has, again, been mostly in relation to classic civil and political rights.<sup>85</sup>

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80. In determining whether a provision has direct effect, the courts will look to the wording and content of the provision; moreover, “the context, character and nature, goal and objective, intent of parties and the [*travaux préparatoires*]” are taken into account. Martijn van Empel & Marianne de Jong, *Constitution, International Treaties, Contracts and Torts*, in NETHERLANDS REPORTS TO THE 16TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 283, 295 (Ewoud Hondius & Carla Joustra eds., 2002), available at <http://www.ejcl.org/64/art64-17.pdf> (citing three cases from the Dutch Supreme Court and one case from the Dutch Special Court of Appeals). Beyond the scope of this Article and therefore not considered here is the direct effect of European Community Law in the Netherlands as a Member State. That body of law does not depend on the Dutch Constitution for its effect in the Dutch legal order. The ECJ has laid down the doctrines of autonomy and supremacy. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I-1; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. I-585.

81. The Dutch Supreme Court has decided that only treaties and decisions of international organizations can have direct effect in the Dutch legal order; customary law, principles of international law, and non-directly effective treaty provisions will not take precedence over national law. See *Nyugat*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 6 maart 1959, NJ 1962, 2 (Neth.).

82. See generally L. Erades, *International Law and the Netherlands Legal Order*, in INTERNATIONAL LAW IN THE NETHERLANDS 375, 388–415 (H.F. van Panhuyst et al. eds., 1978).

83. See *id.*

84. See Nollkaemper, *supra* note 64; van Empel & de Jong, *supra* note 80, at 285.

85. The following provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) have been acknowledged as having horizontal effect: the prohibition on slavery and forced labour (article 4); the right to liberty and security (article 5); the right to a fair trial (article 6); the right to respect for private and

Application of economic and social rights to horizontal relations is very rare.<sup>86</sup>

The Dutch Supreme Court has held that, under Dutch tort law, a breach of a statutory duty includes any breach of an act of parliament or of a norm provided in secondary legislation (either of a public or private nature), whether of Dutch or foreign origin. Therefore, where the defendant has acted contrary to the domestic law of a country other than the Netherlands, such an act will also be seen as a breach of a Dutch statutory duty.<sup>87</sup>

Besides the direct application of international norms described above, international law can be applicable to tort cases in an indirect manner. This can occur when the harmful activities violate a rule of unwritten duty of care as interpreted with reference to international law. This route is especially important for the applicability of international norms that lack direct effect. This also includes non-binding international norms, as was illustrated in the 1979 *BATCO* case.<sup>88</sup> The court found in this case that the corporation *BATCO* had acted wrongfully by closing its Amsterdam factory. Among the circumstances relied on by the court were the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (“OECD Guidelines”).<sup>89</sup> The OECD Guidelines provide:

Enterprises should . . . in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees . . . and co-operate with the employee representatives . . . so as to mitigate to the maximum extent practicable adverse effects.<sup>90</sup>

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family life (article 8); the freedom of thought, conscience and religion (article 9); and the freedom of expression (article 10). Convention for the Protection of Human Rights and Fundamental Freedoms arts. 4–6, 8–10, Nov. 4, 1950, 213 U.N.T.S. 221. For an overview of these provisions, see van Empel & de Jong, *supra* note 80, at 288–90.

86. *But see* Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 30 mei 1986, NJ 1986, 688 (Neth.) (discussing the right to strike under article 6(4) of the European Social Charter).

87. *See* Wet Conflictenrecht Onrechtmatige Daad [WCOD] [Unlawful Act (Conflict of Laws) Act], art. 8, Stb. 2001, 190; Betlem, *supra* note 18, at 292 (asserting that “where the defendant has acted contrary to an obligation of the domestic law of another country than the Netherlands, this is still a breach of a statutory duty”).

88. Ondernemingskamer [Dutch Companies and Business Court], 21 juni 1979, NJ 1980, 71 (Neth.).

89. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

90. *Id.* art. IV, para. 6.

The Chairman of BAT Industries, BATCO's parent company, had publicly accepted the OECD Guidelines as a guideline for BAT Industries' policy.<sup>91</sup> BATCO's public acceptance provided the basis for court's decision to use the OECD Guidelines to determine whether BATCO's activities could be characterized as mismanagement. The court stated that BATCO had seriously neglected its obligation to consult with employee representatives, concluded that BATCO's decision to close the factory was mismanagement, and therefore annulled the decision to close the factory. As Professor Nollkaemper has noted, the court's reliance on the OECD Guidelines in this case would seem to indicate that such international standards can also be used to determine the duty of care under Dutch tort law.<sup>92</sup> For corporations to be bound by such standards, international norms will have to be sufficiently evolved before they will be seen as publicly accepted legal standards.<sup>93</sup>

Because as yet no case has been brought against a parent company under Dutch tort law for its allegedly harmful activities abroad, it is difficult to predict how the duty of care will be determined in such cases. However, it seems that, given the accepted relevance of a non-binding international standard like the OECD Guidelines, international treaty norms will certainly be considered relevant to establishing that certain behavior violates the duty of care laid out in article 6:162 of the Dutch Civil Code.<sup>94</sup>

The Dutch Supreme Court has acknowledged that parent companies owe a duty of care to their "stakeholders," referring in these cases to creditors. A parent company must prevent a subsidiary from taking on new debt if it is clear that this debt will not be satisfied.<sup>95</sup> It has been ar-

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91. See van Empel & de Jong, *supra* note 80, at 291.

92. Nollkaemper, *supra* note 64, at 275.

93. See van der Heijden & Jesse, *supra* note 14. This can also be deduced, although it concerned financial reporting principles, from a more recent case where the Dutch Supreme Court ruled that non-binding guidelines on financial reporting had evolved into publicly accepted norms with which the company Koninklijke KPN had to comply. See Koninklijke KPN N.V./Stichting SOBI, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 10 februari 2006, LJV AU7473 (Neth.). The same reasoning was applied by the Court in the case against the company Versatel. Similar to BATCO, Versatel had subscribed to the non-binding Dutch Corporate Governance Code (known as the *Tabaksblat Code*), but did not inform a minority of the shareholders that it had amended its corporate governance policy; this conduct was complained of as mismanagement, and the Court decided to review the corporate decisions. Centaurus Capital Ltd. et al./Versatel Telecom International N.V., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 14 september 2007, NJ 2007, 611 (Neth.).

94. Burgerlijk Wetboek [BW] [Civil Code] art. 6:162 (Neth.).

95. See Albada Jelgerma II, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 19 februari 1988, NJ 1988, 487 (Neth.); Sobi/Hurks II, Hoge Raad der

gued that a broad reading of this rule means that a parent company has a duty of care to prevent foreseeable damage. For example, in terms of injury that may occur when working with hazardous materials, it has been argued that if workers fall ill as a result of working with such materials, this may give rise to direct liability for the parent company if the company had the opportunity to intervene in its subsidiary's activities.<sup>96</sup> In such cases, the first line of defense of the parent company will no doubt be that it ensured that the subsidiary's activities were in conformity with the local laws. The problem is, however, that local laws are often much less stringent than the law of the home state. It can be contended that under Dutch law a parent company cannot hide behind these double standards because Dutch law places high demands on corporations to assess and control risks and therefore they have a duty to intervene if they are aware of harmful activities. This interpretation of the duty of care also follows from the OECD Guidelines. A comment to the OECD Guidelines explains:

The reference to occupational health and safety implies that multinational corporations are expected to follow prevailing regulatory standards and industry norms to minimise the risk of accidents and injury to health arising out of, linked with, and occurring in, the course of employment. This encourages enterprises to work to raise the level of performance with respect to occupational health and safety in all parts of their operation, even where this may not be formally required by existing regulations in countries in which they operate.<sup>97</sup>

This clearly states that corporations have a duty beyond mere adherence to the national rules of the host state.<sup>98</sup> As discussed above, Dutch courts are prepared to consider the OECD Guidelines when determining the duty of care under Dutch tort law.

In sum, Dutch courts will refer both to binding and non-binding international standards to determine whether the unwritten duty of care has been violated. It may be argued that a failure to prevent foreseeable damage will give rise to tortious liability under Dutch law.

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Nederlanden [HR] [Supreme Court of the Netherlands], 21 december 2001, NJ 2005, 96 (Neth.).

96. Lennarts, *supra* note 18, at 184.

97. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMENTARY ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), para. 27, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

98. Lennarts, *supra* note 18, at 187.

### III. THE LIKELIHOOD OF AN ACTIVIST APPROACH TO CIVIL LAW IN THE NETHERLANDS

From the previous discussion, it may be concluded that, despite potential stumbling blocks arising from the rules of private international law, transnational human rights cases are feasible before the courts in the Netherlands. In this Part, some other general procedural features of the Dutch legal system and Dutch legal culture will be discussed. These features may help explain why the use of civil lawsuits as a tool for social reform is not currently common in the Netherlands, and may reduce the attractiveness of the Netherlands as a forum for transnational human rights cases. Professor Stephens identifies certain procedural advantages in the United States that make it an attractive forum.<sup>99</sup> In this Part, some of these procedures will be compared with the procedures in the Netherlands.

First and foremost, there are several potential obstacles from an economic perspective. For one, a serious disincentive to litigate in the Netherlands is the “loser pays” principle. Unlike the “American rule,” in the Netherlands, the losing party can be required to pay the court fees and (part of) the legal fees of the victorious opponent.<sup>100</sup> This no doubt is an important reason why, so far, there has not been a case against a Dutch corporation for human rights violations abroad. In such a test case the chances that the plaintiff will face substantial legal fees and costs is a very real possibility. Moreover, unlike the rule in the United States and despite recent discussion to introduce the principle of “no cure, no pay,” the Netherlands still has not adopted this rule.<sup>101</sup> Substantial attorney fees can therefore pose a considerable disincentive for plaintiffs.<sup>102</sup> The absence of a contingency fees system that permits attorneys to collect fees as a percentage of a successful judgment makes it very unattractive for lawyers from a financial point of view to initiate a test case. Overall, Dutch lawyers will not take a proactive stance. Moreover, the Netherlands does not have a culture of volunteer work among lawyers to the

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99. The practices identified by Professor Stephens have been taken as a starting point for this survey of possible procedural obstacles to civil litigation for human rights violations. See Stephens, *supra* note 10, at 14–17, 27–34.

100. Wetboek van Strafvordering [SV] [Dutch Code of Criminal Procedure] arts. 237–45 (Neth.). However, according to article 242, the court has some room to moderate the potential penalty for the loser. *Id.* art 242.

101. The Dutch Bar Association tried to introduce the principle of “no harm, no pay” in bodily harm cases. This was, however, precluded by the Dutch Minister of Justice in March 2005. See A.W. Jongbloed, *Access to Justice, Costs and Legal Aid*, 11 ELEC. J. COMP. L. 1, 7–8 (2007), <http://www.ejcl.org/111/art111-14.pdf>.

102. Legal aid is provided in cases where the income of the plaintiff is not sufficient. See Wet op de Rechtsbijstand [Bill on Legal Aid] art. 34, Stb. 1993, 775.

same degree as in the United States.<sup>103</sup> A final major financial disincentive is that, unlike the United States, the Netherlands does not award punitive damages but permits only compensatory damages awards. In this sense, the prospect of civil litigation in the United States is a more effective deterrent to corporate malfeasance than is the case in the Netherlands.

In addition to economic obstacles, another factor that makes the Netherlands potentially less hospitable to transnational human rights claims is the manner in which the courts deal with cases involving a large number of victims, a common feature of transnational human rights litigation. Unlike in the United States, the right to bring a class action or a collective action for damages is not available under current Dutch law.<sup>104</sup> A group of claimants is not treated as an entity but as a sum of individuals, thus making legal procedures much more cumbersome. The only other procedure in Dutch law that facilitates civil litigation by large classes of similarly situated plaintiffs is a procedure created in 2005 under the Dutch Bill on the Settlement of Mass Damages (*Wet Collectieve Afwikkeling Massaschade*) (“WCAM”).<sup>105</sup> Under the WCAM procedure, the court can issue a declaration of binding force for a settlement between plaintiffs and defendants. This procedure can be initiated independently from any civil suit. Aggrieved parties not in agreement with the settlement may opt out.<sup>106</sup> This procedure cannot, however, be compared to the class action.<sup>107</sup>

The general features of litigation procedures as outlined here help explain why an activist approach to private law is uncommon in the Netherlands. Private law is highly individualistic and neither judges (who tradi-

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103. See Stephens, *supra* note 10, at 30 (describing the development of U.S. civil litigation of human rights abuses abroad by U.S. public interest attorneys with additional pro bono support from law clinics and private law firms).

104. Article 305a of the Dutch Civil Code provides that an organization may bring a claim on behalf of people whose interests have allegedly been harmed, provided that the organization represents those interests. Burgerlijk Wetboek [BW] [Civil Code] art. 3:305a (Neth.). This article, however, does not address claims seeking monetary compensation. *Id.* para. 3.

105. Wet Collectieve Afwikkeling Massaschade [Dutch Bill on the Settlement of Mass Damages], *Stb.* 2005, 340; Koninklijk Besluit [Royal Decree], *Stb.* 2005, 380. The procedure introduced by this bill can be found in the Dutch Civil Code and the Dutch Code on Civil Procedure. BW arts. 7:907–10 (Neth.); Wetboek van Burgerlijke Rechtsvordering [Rv] [Code of Civil Procedure] arts. 14:1013–18 (Neth.).

106. See BW art. 7:908(2)–(3) (Neth.).

107. The WCAM procedure is a feature of contract law in which the participating victims are still seen as individuals and not as one collective. By contrast, a civil law claim based on tortious misconduct must be brought individually or by a group. In the latter case, however, the group is regarded as a number of individuals.

tionally play a more passive role in the Netherlands) nor lawyers (given the economic disincentives) take an active stance. Victims of human rights violations will therefore have a hard time finding a lawyer willing to take on their case, effectively blocking their access to the courts. This legal culture makes it unlikely that the Dutch legal system will be faced with many transnational human rights cases.

#### IV. CRIMINAL PROSECUTION

As mentioned in the Introduction to this Article, the dumping of toxic waste from the Probo Koala has given rise to various investigations and proceedings.<sup>108</sup> The victims have also turned to civil law remedies, albeit in the United Kingdom—not in the Netherlands. The previous Parts have mapped the feasibility of bringing such a case before the Dutch courts. It should be pointed out, however, that the role played by civil law as a remedy against corporate human rights violations in Europe as compared to the United States is limited. Recourse to civil action has so far been limited to a relatively small number of cases in the United Kingdom. In general, the principal remedy in Europe for extraterritorial human rights violations is criminal prosecution. This is underscored by several highly publicized cases in which individuals accused of committing grave human rights violations have been prosecuted. The case in the United Kingdom against General Augusto Pinochet, former dictator of Chile, serves as an example.<sup>109</sup> Similarly, individuals, both nationals and non-nationals, accused of extra-territorial human rights violations have been subjected to prosecution in the Netherlands. For example, in 2005 two former Afghan military leaders who had fled to the Netherlands were

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108. A similar case involving a ship and environmental damage is still pending in France. See Nick Champeaux, *Who Pays? Oil Spill Responsibility Before the Courts in France*, NETWORK EUROPE, Feb. 16, 2007, available at <http://www.networkeurope.org/Feature/who-pays-oil-spill-responsibility-before-the-courts-in-france> (discussing a criminal case brought before a French court with respect to a 1999 oil spill by the tanker Erika).

109. Pinochet was arrested in 1998 while visiting the United Kingdom. Spanish prosecutors had requested his extradition based on charges of murder, conspiracy to murder, and conspiracy to commit acts of torture during his time as the Chilean head of state. Ultimately, Pinochet was allowed to return to Chile on account of his failing health. See *R v. Bartle and the Commissioner of Police for Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 147, [2000] 1 A.C. 147 (Eng.). Other examples include the cases against Muammar Quaddafi of Libya and Ariel Sharon of Israel. Cour de cassation, *Chambre criminelle* [Cass. crim.] [French high court, criminal chamber] Paris, Mar. 13, 2001, Bull. crim., No. 64, at 218 (Fr.); *Yaron, Amois et Autres v. Ariel Sharon, S.A.*, Cour de cassation [Belgian Supreme Court], No. P. 02.1139.F/1 (Feb. 12, 2003) (Belg.).

sentenced to prison for committing war crimes, notably torture, in Afghanistan.<sup>110</sup>

Perhaps even more relevant to this Article's discussion is the judgment in the case against the Dutch businessman Frans van Anraat.<sup>111</sup> In 2005, van Anraat was put on criminal trial in Dutch district court in The Hague for supplying raw materials for chemical weapons used by Iraq against Iran and Iraqi Kurds in the 1980–88 war.<sup>112</sup> According to the Dutch court, van Anraat was not aware of the genocidal intentions of the Iraqi regime when he sold the materials.<sup>113</sup> He was therefore not found guilty of genocide but was still sentenced to fifteen years' imprisonment for complicity in war crimes, since his deliveries facilitated the attacks.<sup>114</sup> This case concerned an individual who was prosecuted for business activities that were considered to be in violation of international law.<sup>115</sup> As yet, no criminal case has been brought against a *corporation* for grave extraterritorial breaches of international law.

The emphasis in Europe on criminal prosecution as a remedy for extraterritorial human rights violations warrants a brief discussion of the possibilities Dutch criminal law offers for prosecution of a corporation for human rights violations. The prevailing practice is to apply criminal liability to legal persons in the Netherlands.<sup>116</sup> No distinction is made be-

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110. See Rechtsbank [Rb.] Gravenhage [District Court of the Hague], 14 oktober 2205, LJN AU4347 & AU4373 (Neth.).

111. See *generally* Trial Watch: Frans van Anraat, [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/frans\\_van-anraat\\_286.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/frans_van-anraat_286.html) (last visited May 31, 2008).

112. *Id.*

113. Van Anraat, Rechtsbank [Rb.] Gravenhage [District Court of The Hague], 23 december 2005, LJN AU8685 (Neth.).

114. *Id.* This was the first case concerning genocide in the Netherlands; the judgment was confirmed in 2007 and two years were added to the sentence. See Trial Watch: Frans van Anraat, *supra* note 111.

115. Another Dutch businessman, Guus Kouwenhoven, has also been charged, convicted, and sentenced to eight years' imprisonment in relation to his company's business activities. The charges against him concerned complicity in war crimes in Liberia and violation of the U.N. weapons embargo by importing weapons for former Liberian president Charles Taylor during Liberia's civil war. Kouwenhoven was acquitted of the first charge, but was ultimately found liable for breaching the U.N. embargo. See Kouwenhoven, Rechtsbank [Rb.] Gravenhage [District Court of The Hague], 7 juni 2006, LJN AX7098 (Neth.). On appeal, Kouwenhoven was acquitted of all charges due to a lack of evidence. Kouwenhoven, Gerechtshof [Hof] Gravenhage [Appeals Court of The Hague], 10 maart 2008, LJN BC6068 (Neth.).

116. By 1951, the concept of holding legal persons liable for committing economic crimes had already been recognized by Danish courts and was formerly adopted by the so-called *Wet Economische Delicten* ("WED"). In 1976, this concept was also provided for in the Dutch Criminal Code. Today, the criminal cases brought against corporations frequently concern economic and environmental matters.



tween the criminal liability of individuals and legal persons, and corporations are frequently prosecuted for violating provisions in the Dutch Criminal Code.<sup>117</sup> Corporations can be held criminally accountable for the commission of a crime but also for being accomplices or for aiding and abetting the commission of a crime.<sup>118</sup> There is no specific type of sanction designed especially for corporations since no conceptual distinction is made between individuals and legal persons under Dutch criminal law.<sup>119</sup> The equal treatment of individuals and legal entities under Dutch criminal law makes criminal prosecution of corporations for human rights violations an interesting option, especially given the fact that the principal international crimes recognized under the Rome Statute of the International Criminal Court have been fully incorporated under Dutch law in the *Wet Internationale Misdrijven* (Dutch Bill on International Crimes).<sup>120</sup>

An advantage of civil redress for corporate human rights violations is the fact that victims can claim compensation for the harm suffered. In the criminal process, there has traditionally been a lack of attention to compensating the victim, due to the focus on the perpetrator. This was addressed in 1995 with the adoption of the *Wet Terwee* (Victim's Act), which made it possible, inter alia, for a claim for compensation to be filed adjunct to a criminal prosecution.<sup>121</sup> Since the adoption of the Act Terwee, there has been no fixed limit to the amount that may be awarded. Moreover, as is the case in the United States, a criminal prosecution does not bar civil action concerning the same conduct. In other words, criminal proceedings do not preclude the victim from also seeking a civil remedy.

The preceding brief sketch of the main features of Dutch criminal law shows that, from the perspective of holding corporations accountable for an extraterritorial violation of international law, this body of law offers an interesting avenue for victims of corporate misconduct. Nevertheless,

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117. The Dutch Criminal Code provides that criminal offenses can be committed by natural and legal persons, and that, in the case of the latter, prosecution may be brought against the legal person itself, the agent acting on its behalf who ordered or was instrumental in controlling or directing the commission of the offense, or both. See *Wetboek van Strafrecht* [SR] [Criminal Code] art. 5 (Neth.).

118. See SR arts. 47–54 (Neth.).

119. Not every penal sanction (e.g., imprisonment) is suitable for a legal person. Appropriate sanctions such as fines, denial or suspension of certain rights or privileges, or compensation to the victim are provided for in the Dutch Criminal Code. See SR arts. 9, 36a–f (Neth.).

120. *Wet Internationale Misdrijven* [WIM] [Bill on International Crimes], Stb. 2003, 270.

121. *Wet Terwee* [WT] [Victim's Act], Stb. 1993, 29.

to date, no corporation has been prosecuted for extraterritorial violations of international human rights law. It is possible that the complexities of holding multinational corporations accountable for extraterritorial violations of international law resulting, inter alia, from convoluted legal structures, pose such a major obstacle that the Dutch prosecutor has so far been unwilling to initiate criminal proceedings. The public prosecutor has the exclusive right to prosecute. His decision should be based on the likelihood of obtaining a sentence, and public interest should be taken into account.<sup>122</sup> The prosecutor, therefore, might be more inclined to prosecute the individual businessman,<sup>123</sup> as in the case of van Anraat.<sup>124</sup>

The transnational human rights cases in Europe have so far concentrated mainly on situations of torture. A possible explanation of the preference for criminal prosecution in these cases is the existence of an international document establishing the obligation to either extradite or prosecute in cases of torture. In a way, criminal prosecution has therefore proven less problematic in cases concerning torture because prosecution is “mandated” by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>125</sup> The CAT’s inclusion of extraterritorial acts of torture is only made explicit with reference to criminal law enforcement. In other words, the CAT does not require state parties to provide civil law remedies for extraterritorial cases of torture. However, article 14 provides that each state party must “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to a fair and adequate compensation, including the means for as full rehabilitation as possible.”<sup>126</sup> One could argue that a broad reading of this provision requires states to provide for civil redress in the case of torture. However, as Professor Byrnes has observed, although there is some support for this interpretation, the better

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122. See *Wetboek van Strafvordering* [Sv] [Code of Criminal Procedure] art. 167(2) (Neth.).

123. Article 12 of the Dutch Code of Criminal Procedure makes it possible for a concerned party, for example a foundation or a group of persons representing the interests affected by the decision not to prosecute, to request judicial review of the prosecutor’s decision not to initiate proceedings. See Sv art. 12 (Neth.).

124. The van Anraat case is discussed *supra* text accompanying notes 111–15.

125. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1988 U.S.T. 202, 1486 U.N.T.S. 85, available at <http://www2.ohchr.org/english/law/pdf/cat.pdf>. The convention requires, among other things, that state parties ensure all acts of torture are offenses under their criminal laws, extradite or prosecute alleged torturers found within their territory no matter where the alleged torture has occurred, and take necessary measures to ensure that they have jurisdiction to do so. See *id.* arts. 4(1), 5(2), 6–7.

126. *Id.* art. 14(1).

view is that the CAT does not require state parties to make resources available for civil actions concerning torture that occurred outside that state and for which it is not responsible.<sup>127</sup> The CAT's focus on criminal prosecution for extraterritorial acts of torture partly explains the focus on criminal remedies in the European cases. To date, there is no international treaty that clearly obliges courts to take jurisdiction over civil actions in respect to violations of international law committed abroad.<sup>128</sup>

#### V. WHICH AVENUE IS PREFERABLE?

The previous sections have outlined the legal avenues available in the Netherlands to hold multinational corporations accountable for extraterritorial violations of international law. The focus has been on civil remedies even though it has been acknowledged that the tendency will be to first turn to criminal law. In this Part, the advantages and disadvantages of choosing either a civil or criminal route will be briefly explored.

The avenue of civil liability offers a number of advantages. In general, it should not be forgotten that civil remedies in a number of countries may be the only option available to plaintiffs because criminal liability of legal persons and criminal prosecution of corporations for violations of international human rights law is not recognized.<sup>129</sup> This is not the case in the Netherlands, however, where criminal prosecution of legal entities

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127. Andrew Byrnes, *Civil Remedies for Torture Committed Abroad: An Obligation Under the Convention Against Torture?*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 538, 539 (Craig Scott ed., 2001).

128. The failure of the Hague "Judgments Project" demonstrates the difficulties in coming to worldwide agreement on jurisdiction in civil matters. In 1996, negotiations started on a multilateral convention providing for uniform rules of jurisdiction and recognition in civil and commercial matters within the framework of the Hague Conference on Private International Law. Discussion of the Preliminary Draft Convention Text showed a lack of consensus among the parties. One of the issues was that the hard-and-fast rules of the proposed text would seriously curtail judicial activism in view of human rights, as is currently possible under the ATCA. It was eventually decided not to negotiate an all-encompassing convention, but to use a bottom-up approach beginning with the jurisdictional issues on which there was consensus. Whether the project will succeed is currently highly uncertain. *See generally* Knut Woestehoff, *The Drafting Process for a Hague Convention on Jurisdiction and Judgments with Special Consideration of Intellectual Property and E-Commerce* (2005) (unpublished L.L.M. thesis), *available at* [http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1054&context=stu\\_llm](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1054&context=stu_llm).

129. The comparative survey conducted by the Norwegian institute Fafo shows that among the sixteen nations surveyed, the current jurisprudence of five of these countries, in principle, does not recognize criminal liability of legal persons. These countries are: Argentina, Germany, Indonesia, Spain, and the Ukraine. *See RAMASASTRY & THOMPSON, supra* note 7, at 13.

is fully accepted. But victims are dependent on governmental authorities to initiate the proceedings. The advantage of civil law is that victims can themselves set in motion a judicial proceeding. An additional advantage is that the civil route conserves the limited resources of the state's prosecutor. Moreover, the monetary damages that may be awarded in a civil suit are not always possible, or at least not to the same extent, in criminal proceedings. The importance of compensation for victims of human rights violations has been broadly acknowledged in international human rights law<sup>130</sup> and the opportunities offered by tort law in this respect are significant. Transnational tort litigation has, to date, already resulted in some impressive settlements. In several of the cases brought under the ATCA, defendant corporations have decided to settle, providing the victims with substantial financial compensation. At the same time, however, it should be acknowledged that even if a judgment is rendered, it can prove difficult to ensure that it is the victims who receive the bulk of the awarded sums. Nevertheless, the symbolic significance of being awarded compensation should not be underestimated. Professor Terry even goes so far as to state:

In truth . . . it is perhaps more accurate to describe the civil remedy not so much as a mechanism to fill a gap in "enforcement" under international law but as a means for providing a measure of self-respect, vindication and recognition for the victims of serious violations of international human rights.<sup>131</sup>

A substantial point of criticism regarding the use of civil remedies to address international human rights violations is the position that municipal tort law is an inadequate placeholder for the fundamental values under consideration. Dealing with grave violations such as genocide and torture by means of municipal tort invites the criticism that this trivializes such acts.<sup>132</sup> Some wrongful acts deserve not merely economic sanction but also deprivation of liberty. In criminal law cases, there is the penalty of imprisonment and the entire community may be understood to

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130. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [Van Boven/Bassiouni Principles], G.A. Res. 60/147, para. 20, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

131. John Terry, *Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Committed Abroad*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION, 109, 112 (Craig Scott ed., 2001).

132. See, e.g., DE SCHUTTER, *supra* note 47, at 47–48; LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 111–26 (1992).

be represented by the government prosecutor. It may be argued that it is more appropriate to sentence those responsible for corporate decisions that result in grave violations of international law to jail than it is to impose mere economic sanctions on them. This argument holds true especially for the civil litigation discussed in this Article because in these cases, violations of international law are treated as a municipal tort, unlike in the ATCA litigation where the violations of international law give rise to a cause of action.<sup>133</sup>

However, in defense of civil recourse for violations of international law, it may be argued that transnational human rights litigation helps draw attention to human rights violations committed by corporations, thus creating a public record of the events. This type of litigation contributes to identifying corporations as violators of human rights. Such cases may, therefore, also serve to deter future abuses. Even when most corporations escape such litigation and those held accountable in fact do not pay out the required compensation, the negative publicity that these suits generate constitutes an important factor in preventing corporate human rights violations. In addition, private law is flexible, i.e., it is able to incorporate new international developments into corporate human rights obligations. As opposed to criminal law, which, according to the principle of legal certainty, must set forth clear-cut penalties in advance, civil law can take (more) particular circumstances into account, which may increase the amount of compensation significantly.

Moreover, it is important to emphasize that the question is not an “either/or” question. Both criminal and civil law have advantages and disadvantages as remedies and should operate as complements to each other. Finally, as persuasively argued by Professor Stephens, the divide between criminal prosecution and civil liability is not as sharp as is sometimes claimed.<sup>134</sup> For example, the consequences attached to either criminal or civil procedures differ significantly from one system to another. The objectives pursued also differ; in some countries civil law will, much like criminal law, act as a deterrent (one may think of the United States, given the vast financial implications attached to civil litigation there). In other words, in the different legal systems, “civil and criminal remedies intertwine and overlap in unfamiliar ways.”<sup>135</sup>

As long as the international community continues to shape the enforcement of international norms in terms of territorial jurisdiction, mul-

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133. See Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871, 889–96 (2008) (discussing “[w]hy the ‘tort’ in the Alien Tort Statute is not municipal tort law”).

134. Stephens, *supra* note 10, at 44–46.

135. *Id.* at 45.

tinational corporations will generally be able to avoid being held accountable for international human rights violations. Civil liability and criminal prosecution will only provide a partial answer to the problems posed by these elusive entities. The quest for accountability requires a multi-faceted approach consisting of national enforcement techniques, both of a civil and criminal nature as discussed in this Article, and mechanisms of self-regulation, but preferably also an international instrument aimed at holding corporate entities that violate international norms to account.

#### CONCLUSION

The Netherlands is home to a relatively large number of multinational corporations. A number of these corporations, such as Trafigura, have faced considerable criticism for extraterritorial misconduct. This Article aims to provide insight into the legal approach adopted in the Netherlands to assess the feasibility of transnational human rights litigation in this jurisdiction as a remedy for addressing corporate misbehavior. In line with other states in Europe, it would seem that the principal remedy for corporate human rights violations abroad is criminal prosecution. Civil action is, however, an important legal tool, especially considering the value (albeit sometimes symbolic) of awarding compensation to victims of human rights violations. Any opportunities offered by Dutch tort law should be utilized with civil law and criminal law playing complementary roles in preventing and remedying violations of human rights.

It has been demonstrated that Dutch civil law does not leave plaintiffs without remedies. Rules governing adjudicative jurisdiction will generally not pose a major obstacle to bringing transnational human rights cases before the Dutch courts. A significant advantage over common law countries is the fact that the doctrine of *forum non conveniens* will not be applied. However, it will not be easy to hold parent companies liable for harmful activities abroad. Notably, mandatory rules of private international law concerning choice of law may constitute potential stumbling blocks. A major procedural obstacle will be the fact that in most cases the applicable law will not be Dutch tort law, meaning that the Dutch judge will have to implement the foreign law of a host state. Parties may, however, choose to have Dutch law govern the dispute. Moreover, with the entry into force of Rome II, plaintiffs will be able to opt for Dutch law in cases of environmental harm emanating from the operations of a Dutch corporation. It remains to be seen precisely how a Dutch judge will determine whether certain contested corporate behavior indeed gives rise to tortious liability. International law can provide a cause of action directly or indirectly. In the latter situation, soft law instruments have

been applied as a standard to determine the duty of care and therefore it can be concluded that a violation of provisions laid out in international treaties will certainly be taken into consideration.

In sum, taking the procedural and substantive features of Dutch civil law into account, transnational human rights litigation in the Netherlands is certainly feasible. However, compared to the United States, other general features of the private law system in the Netherlands, such as the possible financial burden and the Dutch legal culture in general, make the Netherlands significantly less litigation friendly and may present considerable stumbling blocks for plaintiffs seeking civil recourse. This may explain why, to date, no transnational human rights case against a corporation has been brought before the Dutch courts. In fact, even the victims of the dumping of toxic waste carried by the Trafigura-chartered vessel the *Probo Koala* referred to in this Article, ultimately chose the English and not the Dutch courts to seek redress. Consequently, although transnational human rights litigation before the Dutch courts is feasible, significant hurdles continue to exist that impede the employment of Dutch civil law as a regulatory and preventive tool in the fight against undesirable corporate behavior.