

# Access to Justice: Human Rights Abuses Involving Corporations

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THE NETHERLANDS



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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

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The Dutch legal order allows for victims of corporate human rights abuses to seek remedy through civil or criminal proceedings. The potential for successful litigation in the criminal justice system remains limited. Civil liability is more promising, in part because civil liability may be founded on the breach of international soft-law standards of corporate conduct. In either case, complex corporate structures present a formidable barrier to successful litigation. Jurisdiction barriers are also present, as Dutch courts are generally reserved in claiming authority over foreign subsidiaries of Dutch parent companies. Notable exceptions do exist however. Procedural barriers also confront claimants of human rights abuses, particularly relating to evidence, compensation and costs. Despite these obstacles, there is much room for reform of the Dutch justice system to provide claimants of corporate human rights abuse with timely, accessible and effective adjudication.



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The Netherlands

A Project of the International Commission of Jurists

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# Access to Justice:

## Human Rights Abuses Involving Corporations

The Netherlands

A Project of the International Commission of Jurists



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This study has been drafted by Ivar van Hasselt under the supervision of Dr. Cedric Ryngaert (NJCM and Utrecht University), on behalf of the NJCM, the International Commission of Jurists' Dutch Section. Ruben Moses provided a first draft version of this report. Alec Milne edited it. It is part of a larger ICJ project on Access to Legal Remedies for Human Rights Abuses involving Corporations, under the coordination of Carlos Lopez. Priyamvada Yarnell assisted in the production of the publication.

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## Introduction

Access to legal remedies and justice has become a crucial element in today's work protecting human rights in the context of business activities. It is also an area of primary importance for judges and lawyers who work to promote the rule of law and human rights. Despite its importance, access to remedies is hindered by a number of obstacles that acquire particular dimensions in the context of human rights abuses involving, directly or indirectly, business enterprises and corporations. The study and understanding of state practice in relation to the international legal obligation to provide an effective remedy reveals not only obstacles but also the potential of existing instruments to ensure the realization of this right that may help the international community in its quest for new answers to the challenges of transnational corporate human rights abuse.

To contribute to the understanding of the problem and to assist in the formulation of a new agenda to strengthen access to legal remedies in the context of business abuse, the ICJ carried out a series of country studies and questionnaires. The present study is one of them. This study addresses issues relating to access to justice or legal remedies for human rights abuses committed with the involvement of corporations in The Netherlands. In the absence of an international civil court, or internationally recognized civil law governing the issue of corporate human rights abuse, victims seeking compensation for damage inflicted upon them by human rights abuse of corporations are mainly left to national remedies.<sup>1</sup> This report addresses this issue of access to justice for human rights abuses involving corporations in the Dutch legal system.

The study follows the definitions and methodology adopted by the broader ICJ Access to Justice Project, which involves other country studies. The present study is based on in-country research and consultation with a number of experts and institutions. The study also benefited from discussions during a local seminar organized by the Dutch Section of the ICJ on the issue of companies' duty of due diligence where lawyers and human rights experts contributed. The substantial elements of this report are based on an extensive literature review of some of the most recent sources and cases available, concerning both corporate human rights litigation as well as procedural issues in both criminal and civil law.

The report will first explain the general framework of both civil and criminal liability in the Dutch legal system. An overview of the current status of ratification of the most relevant international human rights instruments will be provided, together with an explanation of the applicability of the norms laid down in

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1. See, amongst others, Cees van Dam, *Onderneming en mensenrechten: Zorgvuldigheidsnormen voor ondernemingen ter voorkoming van betrokkenheid bij schending van mensenrechten*, Boom Juridische Uitgevers, The Hague, 2008. [Business and human rights: Duties of care for corporations to prevent involvement in human rights abuse]

these instruments in the Dutch legal order (section 1.1). Additionally, this section will devote some attention to the fundamental rights provided in the Dutch Constitution. Subsequently, the corporate liability framework under criminal law will be set out and assessed (section 1.2.1). The report will continue by providing an overview of civil liability rules under Dutch law, and assessing the potential of civil liability that may arise from the violation of international binding legal instruments as well as national and international non-binding instruments (section 1.2.2).

The last section will provide an extensive overview of the potential barriers that victims might face when seeking access to the justice system. Considerable attention will be devoted to the obstacles existing for foreign victims in accessing the Dutch legal system (section 2.2). Issues addressed are, *inter alia*, the complex corporate structures (section 2.1), limits to extraterritorial liability (focusing on both jurisdiction and applicable law), and various procedural impediments in both civil (section 2.3) and criminal law (section 2.4).

# 1. Legal Liability for Corporations under National Law

## 1.1 Human Rights Framework

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### 1.1.1 International Human Rights Instruments

The Netherlands has signed and ratified most international human rights treaties, such as the:

- *International Covenant on Civil and Political Rights* (ICCPR)<sup>2</sup>,
- *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD)<sup>3</sup>
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)<sup>4</sup>,
- *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)<sup>5</sup>,
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)<sup>6</sup>,
- *Convention on the Rights of the Child* (CRC)<sup>7</sup>,
- *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>8</sup>.

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2. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976
  3. International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969
  4. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987
  5. Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution of 10 December 1984 18 December 1979
  6. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976
  7. Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990
  8. Convention on the Prevention and Punishment of the Crime of Genocide, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, entry into force: 12 January 1951

Additionally, the Netherlands is a member of the Council of Europe and has ratified the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)<sup>9</sup>. Also, it is a State party to the *Rome Statute*<sup>10</sup> establishing the International Criminal Court.

Adhering to the ‘monist’ doctrine, most provisions of international human rights treaties automatically become part of the Dutch legal order without having to be transposed into national legislation. Early jurisprudence has clearly recognized this doctrine.<sup>11</sup> In this respect, Article 93 of the Constitution reads:

*“Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their content, shall become binding after they have been published”<sup>12</sup>*

As such, publication, as opposed to ratification, determines when an international treaty provision becomes binding in the Dutch legal order. Arguably, this indicates that the principle of monism is applied somewhat moderately in the Netherlands.<sup>13</sup> Additionally, only provisions and resolutions “which may be binding on all persons by virtue of their content” shall become directly applicable after publication. This requires the provision to consist of unequivocal norms that do not require further implementation. Jurisprudence provides that, in establishing whether a provision consists of unequivocal norms, courts will, apart from the wording and content of the provision itself, take into account “the context, character and nature, goal and objective, intent of the parties and the preparatory works”.<sup>14</sup> Judgments of the Dutch Supreme Court have established that only treaties and decisions of international organizations can be directly applicable. Other sources of international law, such as customary law, will normally not be directly applicable in the Dutch legal order.<sup>15</sup> In practice, direct application has mostly been recognized for classic civil and political rights, e.g. those laid down in the European Convention on Human Rights and the International Covenant on Civil and Political Rights, whereas it has mostly been denied for social and economic

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9. European Convention on Human Rights, formally Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in 1950, entry into force 3 September 1953. Established the European Court of Human Rights
  10. Rome Statute of the International Criminal Court, entry into force on 1 July 2002
  11. Derived from Supreme Court (HR), 3 March 1919, NJ 1919, 317 (*Grenstraktaat Aken*)
  12. Dutch Constitution (Gw), art. 93 (English translation of Ministry of Foreign Affairs, available at [http://www.minbzk.nl/contents/pages/6156/grondwet\\_UK\\_6-02.pdf](http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf))
  13. See for an extensive discussion Leonard Besselink, “Internationaal Recht en Nationaal Recht” [International Law and National Law] in Nathalie Horbach, René Lefeber and Olivier Ribbelink (red), *Handboek Internationaal Recht*, TMC Asser Press – The Hague, 2007, pp. 47-80 [Handbook International Law] at p. 64
  14. Supreme Court (HR), 18 February 1986, NJ 1987, 62; Supreme Court (HR), 2 February 1982, NJ 1982, 424 and 475; Supreme Court (HR) 6 December 1983, NJ 1984, 557;
  15. See Supreme Court (HR) 6 March 1959, NJ 1962, 2 (*Nyugat*)



rights, e.g. those provided for in the European Social Charter or the International Covenant on Economic Social and Cultural Rights.<sup>16</sup>

Another provision of the Dutch Constitution concerned with the relationship between national and international law is Article 94, which together with Article 92 provides the basis for the principle of supremacy of international law over national law. This implies that rules of national law are not applicable if such application conflicts with provisions of treaties or resolutions by international institutions. In other words, when a national rule conflicts with an international provision, the latter will prevail. Pursuant to Article 120 of the Dutch Constitution, courts are however not entitled to review the constitutionality of treaties (nor provisions of national law for that matter). Instead, under Dutch law, the assessment of whether a treaty provision is in conformity with the Dutch Constitution is a right exclusively granted to Dutch parliament. Parliament has the power to approve non-conforming treaties with a two-thirds majority.<sup>17</sup>

The reader of this study should keep in mind that direct applicability of international law in the Dutch legal order does not automatically entail that private individuals can automatically invoke these rights in horizontal relationships (e.g., between an aggrieved individual and a corporation). Nor does it necessarily allow for criminal prosecution for violations of these international norms.<sup>18</sup> International human rights have effect in vertical public relationships (the individual versus the State), the government having the duty to respect, protect, and promote those rights. However, the State's duty to protect has indirect horizontal effects in that it requires the State to do its utmost to prevent violations committed by individuals (e.g., by setting up an adequate legislative framework), and to provide remedies for individuals whose rights have been violated.

### 1.1.2 Fundamental Rights in the Dutch Constitution

As the Netherlands adheres to the monist doctrine, international human rights are directly applicable and do therefore automatically constitute part of the Dutch legal order. Consequently, it is in principle not necessary for those rights to be transposed into separate Dutch legislation.

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16. See Constantijn A.J.M. Kortmijn and Paul P.T. Bovend'Eert, *Constitutional Law of the Netherlands: An Introduction*, Kluwer Law International, 2007, p. 143 and Nicola M.C.P. Jägers and Marie-José van der Heijden, "Corporate human rights violations: The feasibility of civil recourse in The Netherlands" in *Brooklyn Journal of International Law*, 33(3), 2008, pp. 833-870 at p. 856

17. Dutch Constitution (Gw), art. 91(3)

18. On the contrary, article 16 of the Dutch Constitution (Gw) and article 1 of the Dutch Criminal Code (Sb) provide that prosecution can only take place based on a written provision empowering the public prosecutor to take action.

Nevertheless, when the Dutch Constitution was revised in 1983, explicit attention was devoted to human rights.<sup>19</sup> Chapter 1, encompassing the first 23 articles, now exclusively deals with the protection of fundamental rights in the Dutch legal order. Regarding civil and political rights, the Constitution recognizes, *inter alia*, the right to non-discrimination (Article 1), freedom of religion (Article 6), freedom of expression (Article 7), right to association (Article 8), right of assembly (Article 9), right of privacy (Article 10), and right to liberty (Article 15). Additionally, the last few provisions of the Dutch Constitution impose an obligation upon the State to promote a number of social and economic rights, such as employment, distribution of wealth, a habitable and clean environment, health and education. These provisions are in principle not enforceable in law by individuals and their realization depends upon socio-economic developments and political choices made by the government.<sup>20</sup>

## 1.2 Framework for Liability Under Criminal and Civil Law

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### 1.2.1 Framework for Criminal Liability

Since the implementation of the Act on Economic Crimes of 1951,<sup>21</sup> it has been recognized that corporations can commit economic crimes and as such are subjects of Dutch criminal law. Today, this concept has been broadened; corporate prosecution is now possible for all crimes.<sup>22</sup> Article 51 of the Dutch Criminal Code provides that when criminal offenses are committed by legal persons, 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.<sup>23</sup> Consequently, corporations can be held criminally liable for the commission of a crime.<sup>24</sup> In addition, the Dutch Criminal Code provides that liability may arise in the event of complicity in or aiding or abetting the commission of a crime.<sup>25</sup> Dutch criminal law does not explicitly distinguish between individuals and legal persons as far as sanctions are concerned. It is clear, however, that not every penal sanction will be suitable for a corporation.<sup>26</sup> The Dutch Criminal Code

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19. See Martijn van Empel and Marianne de Jong, "Constitution, International Treaties, Contracts and Torts" in *Netherlands Reports to the Sixteenth International Congress of Comparative Law* (Ewoud Hondius and Carla Joustra eds, 2002) pp. 283-295 at p. 285 available at <http://www.ejcl.org/64/art64-17.pdf>

20. See Kortmijn and Bovend'Eert (2007), *Op. Cit.* note 14, at p. 149

21. Wet Economische Delicten [Act on Economic Crimes] stb. 1951

22. Wetboek van Strafrecht (Sr) [Dutch Criminal Code] art. 51

23. Dutch Criminal Code (Sr), art. 51

24. What constitutes a legal person for the purposes of criminal law is laid down in art. 52(3) of the Dutch Criminal Code

25. Dutch Criminal Code (Sr), arts. 47-54a

26. Jägers and van der Heijden (2008), *Op. Cit.* note 14, at p. 864

provides for several sanctions that could be appropriate, such as fines, denial or suspensions of certain rights or privileges, or compensation to the victim.<sup>27</sup>

Both the Criminal Code and the Dutch Constitution provide that an act is criminal only if national criminal law explicitly provides for its unlawfulness.<sup>28</sup> This precludes the prosecution of violations of other norms, such as unwritten rules or fundamental rights, which are not protected by national criminal law. Criminal conviction will thus not be possible on the basis of the mere violation of a human right. Definitions of the following crimes as listed in the Dutch Criminal Code lend themselves to application to human rights abuses: murder, manslaughter, wrongful death, battery, theft and destruction of property. These crimes represent violations of the right to life, the right to physical integrity, and the right to property.

Prosecution of legal persons typically concerns economic crimes, such as those found in the Act on Economic Crimes, or environmental crimes,<sup>29</sup> which could be loosely linked with human rights (for example, the right to property, the right to health and occupational safety, and the right to a clean environment). Very few cases have been reported, however. A recent example of a corporate prosecution is the *Amercentrale* case, in which three companies were prosecuted for the wrongful death of five workers during the collapse of scaffolding. All three corporations were found guilty and received fines up to 450.000 euros.<sup>30</sup>

Regarding the prosecution of international crimes, it is noted that the International Crimes Act (2003) incorporated in the Dutch legal order the principal international crimes recognized under the Rome Statute of the International Criminal Court. By virtue of this Act, the crime of genocide, crimes against humanity, war crimes and the crime of torture were all codified as crimes under Dutch law, thereby replacing the dispersed system of separate Acts implementing relevant international conventions.<sup>31</sup> Prosecution of corporations will therefore also be possible on the basis of the commission of genocide, crimes against humanity, war crimes and the crime of torture. In practice, the mode of liability known as complicity will be most relevant in the case of corporations. While it is not readily conceivable that corporations directly commit international crimes, it is well possible that they may supply weapons or chemicals to governments engaging in genocide or war crimes. The International Crimes Act also codified some rules regarding jurisdiction, which will be addressed later in this report.

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27. Dutch Criminal Code (Sr), arts. 9, 36a-f

28. Dutch Criminal Code (Sr), art. 1 and Dutch Constitution (Gw), art. 16

29. See FAFO, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: The Netherlands*, 23 (2006) available at <http://www.fafno.nl/liabilities/CCCSurveyNetherlands06Sep2006.pdf>

30. See District Court in Breda (Rechtbank Breda), 24 april 2006, LJN: AX4375, 811329-05; LJN: AX4430, 4507-04 and LJN: AX4435, 4508-04

31. International Crimes Act (Wet Internationale Misdaden), art. 2(2)

In Dutch criminal law, like in most other legal systems, the public prosecution should not only prove the commission of the criminal act (*actus reus*), but also the required state of mind of the defendant (*mens rea*). This applies to legal persons as much as it does to natural persons. In case of a felony this entails, depending on the charge, that the management must have intentionally engaged in the criminal activity, deliberately accepted certain risks, or negligently failed to observe the existence of those risks.

Whether criminal behaviour can be attributed to a legal person depends on the concrete circumstances of each case. The required *mens rea* can often be attributed to corporations by reference to the *mens rea* of natural persons that work in the organization.<sup>32</sup> Whether the state of mind of employees can be attributed to the legal person depends mainly on the internal organization, as well as the tasks, responsibilities and competences of the natural persons working in the organization.<sup>33</sup> In this respect, attribution is more likely to be based on the states of mind of managers or board members than of subordinate employees.<sup>34</sup> Case law makes clear that it is not necessary for the entire management of the company to have the required intent.<sup>35</sup> Recent case law further suggests that, in the absence of sufficient *mens rea* of the natural persons working in the organization, conviction of the corporation may still occur on the basis of certain business practices from which intent or knowledge may be assumed.<sup>36</sup>

As mentioned, corporations often do not directly engage in criminal activities, but may act as accomplices to criminal activity committed by, for instance, a customer or business party (which could well be a government).<sup>37</sup> Legal persons can, similar to individuals, be prosecuted for complicity to crimes. The substantive rules governing the complicity of legal persons to crimes are similar to those governing natural persons. Article 48 of the Criminal Code provides that in order to be convicted for complicity, one has to have the intent to aid and abet, by providing the opportunity, the means, or information to commit a crime. Complicity in an attempt to commit a crime can also be a basis for conviction.<sup>38</sup>

The *Van Anraat* case before the court of The Hague made clear that one can also be convicted for complicity to war crimes. In this case, not the corporation but the individual businessman was prosecuted for supplying raw materials for chemical weapons that were later used by the Saddam Hussein regime against Iraq's

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32. See A. Mulder and D.R. Doorenbos, *Schets van het economisch strafrecht* (Deventer: Kluwer, 2008) at p. 52-53

33. HR (Supreme Court), 15 October 1996, NJ 1997, 109

34. Kamerstukken II 1975/76, nr. 5, p. 2

35. Supreme Court (HR), 15 October 1996, NJ 1997, 109

36. HR (Supreme Court), 29 April 2008, LJN BB8977

37. See van Dam (2008), *Op. Cit.* note 1, at p. 26

38. Supreme Court (HR), 24 January 1950, NJ 1960, 287

Kurdish minority and in the war against Iran from 1980 to 1988. Van Anraat was charged with both complicity to genocide and complicity to war crimes.<sup>39</sup> Van Anraat held that he was unaware that Iraq intended to use the materials provided by him for chemical weapons and that there was no convincing evidence linking his material to the chemical weapons used by Iraq. Additionally, he argued to have stopped his shipments to Iraq after the Halabja attack. Nevertheless, on 23 December 2005, he was found guilty of complicity to war crimes, but not to genocide, and sentenced to 15 years imprisonment.<sup>40</sup> The verdict was partially based on the testimony of a former business partner of Van Anraat who submitted that the manufacturers had warned Van Anraat that the substances he bought could be used for the production of poison gas. The reason the court did not find Van Anraat guilty of complicity to genocide was that he was not aware of the intention of the Iraqi regime to commit genocide. Van Anraat appealed his verdict, but the court of appeal maintained that Van Anraat was guilty of complicity to war crimes (but not to genocide) and increased the sentence to 17 years of imprisonment.<sup>41</sup> On further appeal, the Supreme Court on 30 June 2009 upheld the previous decision, but shortened the sentence by six months.<sup>42</sup>

This section has explained the basic framework for corporate liability for human rights violations under Dutch criminal law. It has clarified that not all violations of human rights would constitute a criminal act, but only those that have been defined as crimes under Dutch law. Liability may also arise from complicity in international crimes, as is illustrated by the *Van Anraat* case. This case is also illustrative of the complexities arising in criminal cases against corporations, especially regarding the evidence required to secure a conviction. To circumvent those problems, the prosecution may target individual businessmen such as Van Anraat instead of the corporation.

### 1.2.2 Framework for Civil Liability

Under Dutch civil law, corporations have legal personality and, consequently, claims can be filed against them.<sup>43</sup> Article 6:162 of the Dutch Civil Code obliges a person who commits an unlawful act towards another which can be imputed to him to repair the damage suffered by the other person as a consequence thereof.<sup>44</sup> For an act to be imputable to a person, it should result from the person's fault or

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39. Based on Dutch Criminal Code (Sr), arts. 48 and 57 and the *Wet Oorlogsstrafrecht* [Dutch criminal war code] and the *Uitvoeringswet Genocide* [Act giving effect to the Genocide Convention]

40. District Court in The Hague (Rechtbank 's Gravenhage), 23 December 2005, LJN: AV6353, 09/751003-04 (*Van Anraat*)

41. District Court in The Hague (Rechtbank 's Gravenhage), 09 May 2007, LJN: BA4676, 22-000509-06 (*Van Anraat*)

42. Supreme Court (HR), 30 June 2009, 07,10742 (*Van Anraat*)

43. Dutch Civil Code (BW), art. 2:3

44. Dutch Civil Code (BW), art. 6:162 (1)

from a cause for which he is answerable according to law or common opinion.<sup>45</sup> More fundamental in determining to what extent corporations can be held liable for human rights violations, however, is the question of what exactly constitutes an unlawful act. There are three categories of unlawful acts that may give rise to liability within the meaning of Article 6:162:

*“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”<sup>46</sup>*

Regarding the violation of a right, one should think of specific rights of the person harmed, such as the right to life, the right to physical integrity and the right to freedom.<sup>47</sup> The second group refers to acts contrary to specific rules of law, subject to the “principle of relativity”.<sup>48</sup> In the absence of sufficient evidence for the violation of specific rights or statutory rules, a claim can be based on the violation of a rule of unwritten law pertaining to proper social conduct.

### 1.2.2.1 Violation of Right or Statutory Duty

Sometimes, liability may arise where a clear norm of national law has been violated. This could be anything from the failure to fulfill a contractual obligation to a violation of a provision of the Dutch Criminal Code or Act on Labour Conditions.<sup>49</sup> In general, a breach of a statutory duty includes any breach of an act of parliament or of a norm provided in secondary legislation. This refers to Dutch legislation as well as to statutory norms of foreign origin: it follows from the *Interlas* judgment that where a defendant has acted contrary to an obligation of law of a country other than the Netherlands, he may still have breached a statutory duty within the meaning of Article 6:162 of the Dutch Civil Code.<sup>50</sup> This is also codified in the Conflict of Laws Act.<sup>51</sup> An important requirement for the application of foreign law

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45. Dutch Civil Code (BW), art. 6:162 (3)

46. Dutch Civil Code (BW), art. 6:162 (2)

47. A.G. Castermans and J.A. van der Weide. *De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van fundamentele, internationaal erkende rechten*. Report for the Ministry of Economic Affairs, Leiden (15 December 2009) [The legal liability of Dutch parent companies for involvement of its subsidiaries in violations of fundamental, internationally recognized human rights] at p. 17

48. The principle of relativity, providing that there is no obligation to repair damage when the violated norm does not have as its purpose the protection from damage such as that suffered by the victim, finds its legal base in Article 6:163 BW.

49. Arbeidsomstandighedenwet, Stb. 1998 [Act on Labour Conditions]

50. Supreme Court (HR), HR 24 November 1989, NJ 1992, 404

51. Wet Conflictenrecht Onrechtmatige Daad (WCOD) stb. 2001, 19 [Conflict of Laws Act], art. 8

is, of course, the existence of jurisdiction.<sup>52</sup> The issue of extraterritorial jurisdiction will be touched upon later in this report.

Having established that the violation of statutory norms, both of national and foreign origin, can result in civil liability, we will now assess the extent to which *fundamental human rights*, as laid down in both constitutional and international norms, can be invoked by individuals against other private parties. In other words, what are the *horizontal effects of fundamental human rights* in civil proceedings?

It is clear from jurisprudence that for a long period of time Dutch courts have been hesitant in recognizing the horizontal effects of *constitutional rights*.<sup>53</sup> Instead, judges have often referred to general principles and balancing of interests, thereby avoiding specific references to fundamental rights as a basis for civil liability under Article 6:162 of the Dutch Civil Code.<sup>54</sup> This is illustrated by, amongst many others, a case in which the court established that a religious congregation acting as landlord is precluded from refusing to renew a lease contract with a tenant based on the fact that the tenant was no longer part of that congregation.<sup>55</sup> In its judgment, the court did not explicitly refer to Article 6 of the Constitution, but to an equitable balancing of the interests of both sides. Another case in which the court refrained from making explicit references to rights laid down in the Constitution was one concerning a contract containing a provision banning under certain circumstances one of the parties to the contract from certain teaching activities.<sup>56</sup> Instead of recognizing horizontal effect to the freedom of education as laid down in Article 23(2) of the Constitution, the judgment referred to “public order and fairness”.

After the revision of the Constitution in 1983 and the related parliamentary discussion on the issue of horizontal direct effect, courts have been slowly more inclined to recognize the horizontal effect of constitutional rights. Nevertheless, a consistent application is still nowhere to be found. Instead, the courts’ policy seems to vary from case to case, with specific references to fundamental rights in some cases, and the “classic” approach of balancing interests in others.<sup>57</sup>

Having established the pragmatic approach of the courts in recognizing direct horizontal effect of norms laid down in the Dutch Constitution, the following section

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52. See for an extensive discussion of breaches of foreign law as addressed by Dutch courts: Gerrit Betlem, “Transnational Litigation against Multinational Corporations before Dutch Civil Courts”. published in: M. Kamminga and S. Zia-Zari eds, *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, pp. 283-203 at p. 289

53. See Van Empel and De Jong (2002), *Op. Cit.* note 19, at p. 285

54. See Leonard F.M. Besselink, “Voetangels en klemmen: de horizontale werking van burger- en politieke rechten” [Horizontal effect of civil and political rights] in: Cees Flinterman en Willem van Genugten (eds), *Niet-statelijke actoren en de rechten van de mens; gevestigde waarden, nieuwe wegen*, Boom Juridische uitgevers – Den Haag, 2003, pp. 3-18

55. Court of Appeal in Arnhem (Rechtbank Arnhem), 15 November 1958, NJ 1959, 472

56. Supreme Court (HR), 31 October 1969, NJ 1970, 57

57. See Van Empel and De Jong (2002), *Op. Cit.* note 19, at p. 286

turns to the horizontal effect of norms laid down in *international human rights instruments*. As the Netherlands espouses a monist approach to international law, many internationally recognized human rights are not transposed into Dutch legislation, but are only found in international treaties. As explained in the section on the international human rights framework, most international rights are directly applicable in the Dutch legal order. In fact, it has been explained that these international rights are even supreme to provisions of national law. Some international norms have direct effect and are thus primarily enforceable by individuals against the State. This raises the question whether international human rights norms can be enforced by individuals in horizontal relationships. In this respect, the courts have applied the same pragmatic approach as in respect of constitutional rights. Only a few international norms are recognized as being directly effective between individuals. Currently, these are the rules concerning the right to privacy laid down in Article 8 of the ECHR<sup>58</sup>, the right to equal treatment and non-discrimination laid down in Article 26 of the ICCPR<sup>59</sup> and the right to strike in Article 6(4) as enshrined in the European Social Charter.<sup>60</sup> A violation of one of these directly effective provisions of international law constitutes a breach of a statutory duty.<sup>61</sup>

### 1.2.2.2 Violation of a Rule of Unwritten Law Pertaining to Proper Social Conduct

In the absence of a violation of specific and clear rights or statutory rules, a victim is left to build a claim on the basis of the violation of a rule of unwritten law pertaining to proper social conduct. It is claimed that the open formulation of this rule causes legal uncertainty for both corporations and potential victims and offers the court a considerable amount of discretion.<sup>62</sup> At the same time, this makes civil law fundamentally different from criminal law and arguably a promising venue for victims of human rights violations. There have been several interesting developments regarding the interpretation of this rule in the context of human rights violations. An overview is provided in the following section.

In the *Eternit* case<sup>63</sup> the Dutch Supreme Court has provided some guidance on the interpretation of this open provision. The case concerned a woman suffering from a disease that, in her opinion, had been caused by exposure to asbestos released by the construction of a shed in 1971 at her parents' property. The company Eternit was responsible for the supply of the asbestos plates, and was sued by the woman

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58. Supreme Court (HR), 9 January 1987, NJ 1987, 928 (*Edamse bijstandmoeder*) regarding article 6 of the European Convention on Human Rights

59. Supreme Court (HR), 2 February 1982, NJ 1982, 424 and 475 and Supreme Court (HR), 13 januari 1995, NJ 1995, 340 (*Codfried-ISS*) regarding article 26 of the International Covenant on Civil and Political Rights

60. Supreme Court (HR), 20 May 1986, NJ 1986, 688 (*Spoorwegstaking*) regarding article 6(4) of the European Social Charter

61. See also Betlem, (2000), *Op. Cit.* note 52

62. See Castermans and Van der Weide (2009), *Op. Cit.* note 47, at p. 9

63. Supreme Court (HR), 25 November 2005, NJ 2009, 103



before a Dutch court. In its judgment on appeal, the Dutch Supreme Court pointed out that the duty of care and the precautionary measures expected from a corporation depend on the circumstances of the case as well as the knowledge existing at the time the offense was committed regarding the nature and seriousness of potential risks.<sup>64</sup> In the Court's view, in the case before it, account should therefore be taken of the existing knowledge regarding the certainty that construction with asbestos would pose health risks, as well as regarding the nature and seriousness of those risks. Eventually, the court considered that because specialists in the field knew these health risks in the period before the construction, Eternit should have been aware of these risks during the construction. It considered it to be "*ernstig verwijtbaar*" (which may translate as 'seriously reproachable') and incomprehensible that Eternit did not warn the public of the health risks associated with the material it supplied.

It follows that in applying a rule of unwritten law pertaining to proper social conduct judges will especially take into account general social notions of what may be expected from a legal person acting reasonably.<sup>65</sup> In doing so, account shall be taken of what behaviour and duty of care standards are common in the industry in which the corporation operates. This is not always easy to establish, however. For our purposes, it is interesting to note that the judge may also interpret a rule of unwritten law pertaining to proper social conduct in light of pertinent international human rights provisions. While it has been explained in the previous section that few of these norms are recognized as having direct horizontal effect, this does not prevent the application of those norms in an *indirect* matter. Furthermore, non-binding instruments of national, international and corporate origin, *e.g.*, codes of conduct, may also inform the extent of a corporation's duty of care under Dutch law.<sup>66</sup>

On a national level, codes of conduct are increasingly considered to reflect or take into account what society considers proper or improper company behaviour. As such, corporate governance codes could prove a useful tool in interpreting the open provision of Article 6:126 of the Dutch Civil Code. As far as Dutch listed companies are concerned, the Dutch corporate governance code, which devotes a lot of attention to corporate social responsibility, has gained considerable importance in this respect. The Dutch Supreme Court recently ruled, in a case against the Dutch bank *ABN Amro*, that the content of the Dutch corporate governance code is one of the factors determining how board members of a corporation ought to behave, and added that the "*rechtsovertuiging*" (*opinio juris*) in relation to corporate governance in the Netherlands is, amongst others, reflected by the Dutch

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64. See para. 3.3 of Supreme Court (HR), 25 November 2005, NJ 2009, 103

65. Castermans and Van der Weide (2009), *Op. Cit.* note 47

66. Castermans and Van der Weide (2009), *Op. Cit.* note 47, at p. 20

corporate governance code.<sup>67</sup> Therefore, breaches of this code can be qualified as violations of rules pertaining to proper social conduct, and lead to civil liability.

Apart from national instruments, Dutch courts may also take into account international non-binding instruments in respect of corporate behaviour when interpreting a rule of unwritten law pertaining to proper social conduct. This is clear from the *BATCO* case, in which the court referred to, *inter alia*, the OECD Guidelines to find that a corporation had acted unlawfully by closing a factory.<sup>68</sup> The OECD Guidelines, adhered to by the Netherlands, are in essence recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas, including the area relevant in the case before the court:

*“In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular 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, where appropriate, to the relevant governmental authorities, and cooperate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects”<sup>69</sup>*

It should be noted that the chairman of the parent company of BATCO had publicly and expressly accepted the OECD Guidelines as guidelines for the corporation’s policy. This public acceptance is seen as the basis of the court’s reference to the OECD Guidelines with respect to assessing whether the closing of the factory was lawful. The court eventually annulled the decision to close the factory, finding that BATCO had exercised mismanagement by severely neglecting its obligation to consult with employee representatives. The judgment provides that:

*“It is not without significance that BAT Industries has accepted the OECD Guidelines as guideline for its policy. These Guidelines too provide that in a case like the one under consideration “consultations” with the representatives of the employees should take place. Under these circumstances, the termination by BATCO Nederland of the consultations with the unions and the works council is a serious neglect of its obligation to consult. Therefore, BATCO Nederland acted in violation of fundamental principles of responsible entrepreneurship. The decision of BATCO Nederland to close its factory in Amsterdam, taken in violation of these*

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67. Supreme Court (HR), 13 July 2007, NJ 2007, 434

68. Ondernemingskamer [Dutch Companies and Business Court], 21 June 1979, NJ 1980, 71

69. Organisation for Economic Co-Operation and Development, *the OECD Guidelines for Multinational Enterprises* (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> at IV, para 6

*principles, therefore is to be considered as mismanagement and should be annulled.”*<sup>70</sup>

This judgment is interpreted as indicating that non-binding international guidelines, such as the OECD Guidelines, explicitly accepted by the company as basis for its policy, can be used to determine the duty of care required under Dutch civil law.<sup>71</sup>

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70. Translation taken from André Nollkaemper, “Public International law in Transnational Litigation Against Multinational Corporations: Prospects and problems in the Courts of The Netherlands” in M.T. Kamminga and S. Zia-Zarific (eds), *Liability of Multinational Corporations Under International law*, Springer, 2000, at p. 265.

71. See, *inter alia*, Jägers and van der Heijden (2008), *Op. Cit.* note 47 and Nollkaemper (2000), *Op. Cit.* note 70.

## 2. Obstacles to Accessing Justice

The following section will address both legal and procedural barriers that victims of human rights violations committed by corporations may come across when attempting to effectively access the Dutch justice system and demand compensation.

### 2.1 Obstacles in Corporate Structure

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Many cases of corporate human rights violations concern multinational corporations with complex legal structures. Before going into the jurisdictional issues that arise when violations are committed abroad (addressed in the next section on jurisdictional barriers), it may prove useful to first establish the rules of corporate law governing multinational corporate structures and examine to what extent harmful activities of foreign establishments of a Dutch parent company can result in liability for the Dutch company. A considerable number of foreign companies allegedly responsible for human rights abuse are in fact subsidiaries of Dutch parent companies, Shell Nigeria being an interesting example that will be touched upon later in this study. It is often in the interest of the victim to be able to hold the parent company liable for the conduct of its subsidiary, since, as will be explained in the next section, jurisdiction over the activities of the subsidiary might be lacking, and also because the parent corporation may have more resources from which to recover for the harm done.

If a Dutch corporation establishes a branch in a foreign country, the situation is straightforward. In such a scenario, the corporation becomes directly present in the host country. The branch is not considered as a separate legal entity. Consequently, claims can be filed against the Dutch corporation for breaches committed by the foreign branch, leaving aside the jurisdictional question for the moment.<sup>72</sup>

More common for multinationals, however, is the creation of a separate legal entity: a subsidiary incorporated under the law of a foreign country but under the control of a parent company incorporated in the Netherlands. Under Dutch law, a parent company can be defined as a legal entity with its statutory seat in the Netherlands and a controlling ownership of shares, on the basis of which it is competent to exercise decisive control over an enterprise executing part or all of its commercial activities abroad.<sup>73</sup> In general, subsidiaries operate as independent legal persons and are thus responsible for their own acts and omissions. It follows from the doctrine of limited liability that, as a general rule, a parent company cannot simply be held liable for acts of its subsidiaries. Specific circumstances,

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72. Dutch Civil Code (BW), art. 1:5

73. The Dutch Civil Code (BW) actually defines the opposite: the subsidiary, in art. 2:24a

however, may justify setting this general rule aside, by “piercing the corporate veil”.

## Piercing the Corporate Veil

In the Netherlands, unlike many other legal systems, a distinction is made between piercing through the veil of limited liability and piercing through the separate identity of the subsidiary.<sup>74</sup> The latter, more controversial, method of piercing through the separate identity of the subsidiary is also called “*vereenzelviging van rechtspersonen*” or identification. Identification has the practical effect that two corporations, for instance a parent company and subsidiary, are considered to be one legal person, albeit for specific issues only. Consequently, all acts and omissions of the subsidiary are directly attributable to the parent company. Jurisprudence makes clear that factual circumstances that could lead to identification are, *inter alia*, a dominant position of one corporation over another, thorough involvement in the management, exceptions created at third parties or close intermingling.<sup>75</sup> More generally, it is claimed that a court may find identification where treating two legal persons as separate entities would have consequences contrary to good faith, for example where legal separation does not reflect reality or where the corporate structure has been subject to abuse by the parent company.<sup>76</sup> Dutch courts have traditionally been reluctant to find identification of legal persons. The mere existence of a controlling amount of shares and an economic unity is certainly not sufficient for identification. According to the Dutch Supreme Court identification remains an *ultimum remedium*, used in exceptional cases only.<sup>77</sup>

More common is the situation where claimants attempt to “pierce the veil of limited liability”. In other words, while respecting the legal separation between the two entities, the parent company’s limited liability may be set aside and the company be held liable for the acts of its subsidiary if the parent has acted in a tortuous way. The Dutch Supreme Court has established that a parent company can be liable if three conditions are present: the parent company, while being the majority shareholder, knew or should have known that the creditors’ rights were to be infringed by the subsidiary; the infringement resulted from an act or a failure to act on behalf of the parent; and, lastly, the creditors’ interest were

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74. See Karen Vandekerckhove, *Piercing the Corporate Veil*, Kluwer Law International - Alphen a/d Rijn, 2007, at p. 36

75. See for an illustrative case Dutch Supreme Court (HR) 26 January 1994, NJ 1994, 545 (*Heuga*) and more generally Vandekerckhove (2007), *Op. Cit.* note 74, at p. 37

76. See R.C. Van Dongen (1995), *Identificatie in het rechtspersonenrecht. Rechtsvergelijkende beschouwingen over ‘Peircing the coporate veil’ in het interne en international privaatrecht van Nederland, Duitsland, Zwitserland, New York en Texas*, Kluwer – Deventer, 1995, at p. 262 and Jägers and van der Heijden (2008), *Op. Cit.* note 14, at p. 841

77. Supreme Court (HR) 13 October 2000, JOR 2000/238 (*Rainbow*)

not taken into account by the parent company.<sup>78</sup> It has so far remained unclear to what extent these criteria will apply in case of liability for human rights violations committed abroad. Yet in general, it can be predicted that the more a parent company is involved in the decisions and operations of its subsidiary, and the more knowledge it has regarding the infringements, the more likely it is that courts will be willing to pierce the veil of limited liability.

When it proves too difficult to pierce through either the veil of limited liability or through the separate identity of the subsidiary, attention may be devoted to the acts and omissions of the parent *itself* (as opposed to that of the subsidiary) to establish liability. Pursuant to this method, the parent company can be held liable for human rights violations where it has failed in its duty to exercise due diligence in relation to the harmful activities of its subsidiary.<sup>79</sup> As has been explained in the section on civil liability, Dutch courts may interpret open norms regarding the duty of care in the light of non-binding instruments, both national and international. In this respect, codes of conduct and recommendations regarding supervision of the parent to the subsidiary can help establish the extent of responsibility of the parent towards the subsidiary, and whether the duty to exercise due diligence has been breached. For public companies, attention may be given to the Dutch Corporate Governance Code, which holds the board of a public parent company responsible for commercial activities and financing of the enterprise, including both the financial and operational risks and the adherence to the relevant rules on all levels of the group, including subsidiaries.<sup>80</sup> This entails that the due diligence required of parent companies is quite involved, as it possibly leads to liability for both the financial and operational risks of its subsidiaries. Failure to exercise due diligence could result in liability.

Regarding the due diligence-based responsibility of parent companies *vis-à-vis* the activities of their subsidiaries, the OECD guidelines provide that:

*“The reference to occupational health and safety implies that MNEs 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, or 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>81</sup>*

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78. Supreme Court (HR) 21 December 2001, NJ 2005, 96, Supreme Court (HR) 12 June 1998, NJ 1998, 727, Supreme Court (HR) 8 November 1991, NJ 1992, 174, Supreme Court (HR) 25 September 1981, NJ 1982, 443

79. See Jägers and van der Heijden (2008), *Op. Cit.* note 14, at p. 843

80. Dutch Corporate Governance Code (10 December 2008), Principle II.1.

81. *OECD Guidelines for Multinational Enterprises* (2008), *Op. Cit.* note 69, at para. 27

As the *BATCO* case shows, in some circumstances courts can apply the OECD Guidelines in determining the duty of care in a civil claim. This case, together with the above provision, suggests that corporations have a duty beyond mere adherence to the national rules of the host State.

All in all, however, it is clear that holding the parent company liable for the activities of its subsidiary would not be an easy task. It requires much evidence of knowledge and activity by the parent company regarding its relation with the subsidiary. Furthermore, even if sufficient evidence would be available, it is by no means certain that courts will apply the same criteria used to assess debts of subsidiaries to liability for human rights violations.

## 2.2 Barriers for Foreign Claimants: Jurisdiction and Applicable Law

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### 2.2.1 Limitations to Extraterritorial Criminal Liability

As provided for in Article 2 of the Dutch Criminal Code, Dutch criminal law is in principle only applicable to criminal acts committed in Dutch territory. In other words, the relevant connecting factor is the *locus delicti*. Nevertheless, the establishment of jurisdiction on the basis of territory is not always clear since an act can have links with more than one State territory. Judgments of the Dutch Supreme Court indicate that a crime can have several *loci delicti*.<sup>82</sup> Distinct from the location where the crime was initiated, jurisdiction can also be determined by the place where the consequences of the crime are experienced. In case of complicity, both the location of the act of complicity and the location of the actual crime can be considered as *locus delicti*.<sup>83</sup> It is straightforward that if a legal person commits a crime, the location of commission is taken as the *locus delicti*. The rule for attempts is less clear, although it is generally considered that the location of the attempt or preparation is assumed to be the *locus delicti*.<sup>84</sup> In practice, this could mean that even though a crime was planned to be committed abroad, Dutch courts have jurisdiction as long as the preparations took place in Dutch territory.

While territory provides the most important basis for jurisdiction, there are several opportunities for the exercise of extraterritorial jurisdiction under Dutch law. The Dutch Supreme Court has ruled that provisions regarding jurisdiction are also applicable to legal entities.<sup>85</sup> This entails that Article 3-7 of the Dutch Criminal Code, dealing with extraterritorial jurisdiction, also applies to criminal acts committed by corporations.

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82. Supreme Court (HR), 06 April 1915, NJ 1915, 475 (*Azewijnze Paard*); Supreme Court (HR) 06 April 1954, NJ 1954, 368 (*Singapore*).

83. Supreme Court (HR), 18 February 1997, NJ 1997, 628.

84. FAFO (2006), *Op. Cit.* note 29, at p. 20

85. Supreme Court (HR), 11 December 1990, NJ 1991, 466

An important ground for extraterritorial jurisdiction is Article 5 of the Dutch Criminal Code. This provision determines extraterritorial jurisdiction for certain acts committed by Dutch citizens outside Dutch territory, such as human trafficking and sexual abuse of minors.<sup>86</sup> In addition, Article 4 of the Dutch Criminal Code provides for extraterritorial jurisdiction, based on the principles of protection and universality, over, *inter alia*, terrorism and related acts, crimes against the security of the State and corruption. It testifies to the fact that in cases where the national interest is at stake, Dutch courts theoretically have jurisdiction over the defendant. In practice, however, this principle is applied very cautiously.

Another situation where the principle of universal jurisdiction becomes relevant is in the commission of some international crimes. Under the International Crimes Act, Dutch courts can exercise jurisdiction based on the principle of active personality, passive personality and limited universality over genocide, war crimes, crimes against humanity and torture. Jurisdiction on the basis of active and passive personality<sup>87</sup> refers to jurisdiction based on Dutch nationality of the perpetrator and the victim of an international crime within the scope of the Act. Limited universal jurisdiction implies that jurisdiction over these crimes, if committed by a foreigner, only exists if the alleged perpetrator is present in the territory of the Netherlands.<sup>88</sup> An important limitation of the International Crimes Act is that its provisions cannot be applied *ex post facto* and, consequently, only apply to crimes committed after the entry into force on October 1, 2003. Regarding international crimes committed before October 1, 2003, the situation is slightly more complicated. Jurisdiction over international crimes committed before October 1, 2003 can be determined on the basis of the rather dispersed previous laws concerning international crimes, more specifically the *Wet Oorlogsstrafrecht* (War-time Offenses Act), *Uitvoeringswet genocideverdrag* (Genocide Convention Implementation Act), and *Uitvoeringswet folteringverdrag* (Torture Convention Implementation Act).<sup>89</sup> These laws all have different provisions on jurisdiction. Consequently, for crimes committed before 2003, the jurisdiction rules are rather fragmented and limited.

So far, however, there have been no examples of corporations prosecuted for extraterritorial violations of human rights law.<sup>90</sup> One reason is the limited scope of extraterritorial criminal liability. As mentioned, most exceptions are applied cautiously and universal jurisdiction only exists over international crimes. Another reason could be the complicated corporate structures of many multinational cor-

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86. Dutch Criminal Code (Sr), arts. 5(1)(1), 5(1)(3) and 5(1)(4)

87. International Crimes Act (WIM), arts. 2(1)(b) and 2(1)(c)

88. International Crimes Act (WIM), art. 2(1)(a)

89. The WIM modifies the *Wet Oorlogsstrafrecht* (art. 17) and repeals both *Uitvoeringswet genocideverdrag* (art. 19) and the *Uitvoeringswet folteringverdrag* (art. 20). Prosecutions for genocide and torture initiated before October 1, 2003 may continue under the previous legislation (art. 21(1)). Torture committed before October 1, 2003, is still punishable according to provisions of the *Uitvoeringswet folteringverdrag* (art. 21(2)).

90. See Jägers and van der Heijden (2008), *Op. Cit.* note 14 at p. 865



porations. Arguably, the prosecutor has a stronger incentive to prosecute the individual businessman or manager, as opposed to the legal entity, as is illustrated by the *Van Anraat* case.<sup>91</sup>

### 2.2.2 Limitations to Extraterritorial Civil Liability

This section deals with two important issues concerning private international law applied in cases where domestic or foreign corporations are sued in the Netherlands in relation to the alleged commission of human rights violations abroad. The first section will deal with the extent to which a Dutch court has jurisdiction to hear such cases, while the second section will address the situations in which Dutch law is applicable. For victims of human rights violations abroad, the ability to bring a claim in a Dutch court is important when their domestic courts have limited jurisdiction or when they are unlikely to attain a meaningful remedy there. Additionally, in comparison with foreign courts, Dutch law might be more developed to deal with liability for human rights violations and might have stricter standards in terms of duties of care required of companies.

Rules of private international law become especially relevant when the foreign subsidiary of a Dutch parent company commits human rights violations abroad. As has been explained in section 2.1, it may be possible to hold the Dutch parent company liable for acts committed by the subsidiary using two different methods. In both cases, the claim will be directed at the parent company incorporated in the Netherlands. In fact, the parent company should be treated as being itself responsible for the violations. The remaining question in such a case is simply whether there is jurisdiction over human rights violations committed abroad, and if so, whether Dutch law automatically applies.

#### 2.2.2.1 Jurisdiction

##### EC Regulation 44/2001

The most relevant document in relation to ‘extraterritorial’ civil jurisdiction is EC Regulation 44/2001, also called the Brussels Regulation<sup>92</sup>, which is directly applicable in the Member States of the European Union.<sup>93</sup> If the defendant, corporate or otherwise, in a civil procedure is domiciled in a Member State, the Regulation will apply and the jurisdiction will be determined in accordance with its provisions.<sup>94</sup> The Regulation provides as a general rule in Article 2 that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that

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91. Supreme Court (HR) 30 June 2009, LJN BG4822

92. Council Regulation of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, No. 44/2001, 2001 O.J. EUR COMM. (No. L. 12) 1 (2001).

93. EC Regulations are directly applicable in Member States by virtue of Article 249 of the EC Treaty

94. Follows from EC Regulation 44/2001, art. 4(1)

State.<sup>95</sup> This is consistent with the *forum rei* principle. The place of domicile of corporations and other legal persons is determined by the place where they have their statutory seat, central administration, or principal place of business.<sup>96</sup> This entails that Dutch courts have jurisdiction over the foreign activities of companies that are incorporated in the Netherlands, and therefore over most Dutch corporations, as incorporation in the Netherlands is a requirement for both public and private Dutch companies.<sup>97</sup>

Additionally, it follows from the Regulation that Dutch courts have jurisdiction to hear cases brought against foreign parent companies that, despite not having their statutory seat in the Netherlands, conduct their primary management or commercial activities, for instance via a branch, in the Netherlands.<sup>98</sup> Moreover, the Regulation provides for jurisdiction, in matters relating to tort, delict or quasi-delict, for the courts of the place where the harmful event occurred or may occur.<sup>99</sup> The European Court of Justice has held that this place is to be interpreted as including the place where the damage occurred as well as the location of the event giving rise to the damage.<sup>100</sup>

In sum, a Dutch court has jurisdiction to hear claims against Dutch corporations, or those conducting their daily business activities in the Netherlands, irrespective of whether the damage occurred in the Netherlands or abroad. Additionally, even for companies incorporated elsewhere, Dutch jurisdiction may arise if the damage has occurred or has arisen in Dutch territory.

### **Extraterritorial Jurisdiction Over Foreign Subsidiaries of Dutch Corporations**

A more complex situation arises where harmful activities are conducted abroad by a foreign subsidiary of a Dutch parent company. Where a claim is brought directly against the parent company incorporated in the Netherlands for the wrongful behavior of its foreign subsidiary, jurisdiction of a Dutch court can be established by piercing through the corporate veil of limited liability (see section 2.1 of the report) on the basis of Article 2 of EC Regulation 44/2001. This article provides that persons domiciled in a Member State shall be sued in the courts of that Member State. A different scenario exists where no claim is brought against the parent company, for instance because the corporate veil cannot be pierced. In such a situation, victims are left to bring their claim *directly* against the subsidiary. The general rule is that a Dutch court will not have jurisdiction to hear such cases;

95. EC Regulation 44/2001, art. 2(1)

96. EC Regulation 44/2001, art. 60

97. Dutch Civil Code (BW), art. 66(3) and art. 177(3)

98. Follows from EC Regulation 44/2001, art. 5(5) and 60

99. EC Regulation 44/2001, art. 5 (3)

100. See, *inter alia*, ECJ, Case 21/76, *Handelskwekerij Bier v. Mines de Potasse d'Alsace*, 1979 E.C.R. I-735; ECJ Case C-220/88, *Dumes France v Helaba*, 1990 E.C.R. I-49, etc. (Cases drawn from Jägers and van der Heijden (2008), *Op. Cit.* note 14, at p. 846)

victims will have to make use of the domestic legal remedies available in the country where the subsidiary is incorporated.<sup>101</sup> Nevertheless, the Dutch Code on Civil Procedure provides for some exceptional circumstances giving rise to Dutch jurisdiction over the conduct of a foreign subsidiary.<sup>102</sup>

Firstly, as provided for in Article 9 of the Dutch Code for Civil Procedure, jurisdiction can arise if legal proceedings outside the Netherlands are impossible,<sup>103</sup> because of the absence of a competent judge, or because of factual impediments caused by, *inter alia*, natural disasters or situations involving war.<sup>104</sup> Additionally, a Dutch court can be competent if legal proceedings outside the Netherlands are ‘unacceptable’ from the position of the claimant,<sup>105</sup> for instance where the claimant faces factual and legal discrimination in the foreign country. The claimant then still needs to establish a sufficiently proximate link with the Dutch legal system.<sup>106</sup> The presence of a Dutch parent company connected to the subsidiary could in this respect be an important element towards proving this sufficiently proximate link.

Another opportunity to establish Dutch jurisdiction as regards a claim against a foreign subsidiary is found in Article 7 of the Dutch Code for Civil Procedure. This article describes the ‘joint treatment’ procedure, which is based on the assumption that where a Dutch court is competent to hear a case against a Dutch parent company, it will also have jurisdiction over the foreign subsidiary of that parent company. In order to apply this principle, sufficient coherence must exist between the legal actions of both defendants such that joint treatment can be justified by reasons of effectiveness.<sup>107</sup> In a recent judgment on jurisdiction in the case of *Oguru c.s. v. RDS and SPDC* (‘Shell judgment’),<sup>108</sup> the Hague District Court confirmed the possibility to establish Dutch jurisdiction over alleged human rights violations in Nigeria committed by a foreign subsidiary of a Dutch parent company. The plaintiffs in this case had brought their claim against both (Dutch-incorporated) Royal Dutch Shell and its subsidiary in Nigeria. The judgment stipulated that, as both Royal Dutch Shell and Shell Nigeria were sued for the same damage, the court was asked to assess the same factual situation for both

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101. Follows from EC Regulation 44/2001

102. The Brussels Regulation provides in Article 4(1) in conjunction with Article 22 and 23, that if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to some exceptional situations leading to exclusive competence or the choice of forum by the parties themselves, be determined by the law of that Member State. Consequently, to find whether the Dutch court has jurisdiction over the conduct of a foreign subsidiary, attention should be devoted to the relevant provisions of the Dutch Code for Civil Procedure

103. Dutch Code on Civil Procedure (Rv), art 9(b)

104. Castermans and Van der Weide (2009), *Op. Cit.* note 47, at p. 35

105. Dutch Code on Civil Procedure (Rv), art 9(c)

106. Dutch Code on Civil Procedure (Rv), art 9(c)

107. Dutch Code on Civil Procedure (Rv), art. 7(1)

108. District Court in The Hague (Rechtbank ‘s Gravenhage), 30 December 2009, 09-579

actions. This, in the opinion of the court, provided sufficient coherence to justify joint treatment by reasons of effectiveness.

The Shell judgment indicates that Dutch jurisdiction could exist over foreign subsidiaries of Dutch parent companies, if an action based on the same factual circumstances and damage is brought against both the subsidiary itself and the parent company. While, in order to ensure jurisdiction, claimants are required to bring an action against the parent company as well, this seems to be more of a procedural requirement, in which the substantive strength of the claim seems less important than its mere existence.

This does raise the question, however, as to whether this scenario amounts to the abuse of a procedural right,<sup>109</sup> and, consequently, invalidates the claim. In fact, a verdict finding abuse of a procedural right is highly exceptional and requires a claim to be based on facts and circumstances of which the claimants knew or should have known the evident incorrectness, or of which the claimants should have known that they were without any chance of success and therefore defective. In *Oguru c.s. v. RDS and SPDC*, Shell brought up the argument of abuse of a procedural right, but the court considered that the claims against the parent company Royal Dutch Shell were not without any chance of success and therefore not defective. It noted in this respect that finding liability for parent companies for the behaviour of its subsidiaries is, although exceptional, not impossible.

### 2.2.2.2 Applicable Law

Related to the question of jurisdiction is the question as to which substantive law will govern a case brought against a corporation for human rights violations committed abroad. From the perspective of the claimant, it might be beneficial if Dutch substantive law were to govern the case as it might offer more protection than the law of the State in which the harmful event took place.

For events that occurred before 2009, the applicable law in civil cases is determined by the Act on Conflicts of Law in Tort (*Wet Conflictenrecht Onrechtmatige Daad, "WOCD"*)<sup>110</sup>. As a general rule it provides that the law of the country in which the damage has occurred is applicable,<sup>111</sup> although parties are free to explicitly agree upon a different law.<sup>112</sup> The WOCD clarifies that if the harmful effect of a violation is felt in a place different from the place of the initial act, the law applicable will be the law of the country in which the effect is felt, unless the defendant could not have reasonably foreseen this effect. Although there are a few exceptions to this rule, such as a shared primary residency of claimant and defendant or a pre-

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109. Art. 3:13 of the Dutch Civil Code provides for "*misbruik van procesrecht*" which is an abuse of a procedural right or power.

110. Conflict of Laws Act (WCOD) Stb. 2001, 190.

111. Conflict of Laws Act (WCOD), art. 3(1)

112. Conflict of Laws Act (WCOD), art. 6

existing contractual obligation, generally it can be stated that under the WOCD almost all extraterritorial claims will be governed by the law of a foreign country.

For damage sustained after January 11, 2009, the date at which EC Regulation 864/2007<sup>113</sup> (Rome II) entered into force, the WOCD is no longer relevant. In the absence of an agreement between the parties regarding the applicable law, the main rule of Rome II is slightly different from WOCD. Article 4(1) of the Regulation provides that the applicable law 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>114</sup>. In other words, the applicable law is the law of the country in which the initial damage or direct consequences occur. The practical outcomes of this general rule seem similar to the WOCD, however.

The general rule of Article 4(1) of the Rome II Regulation is subject to some exceptions. Similar to WOCD, when the claimant and defendant both have their habitual residence in the same country at the time the damage occurs, the law of that country shall apply.<sup>115</sup> Additionally, if it is clear from all the circumstances of the case that the tort or delict is more closely connected with another country, the law of that country will be applicable.<sup>116</sup> A pre-existing relationship, such as a contract, could be a reason for a court to find such a closer connection. It seems unlikely, however, that foreign victims of human rights violations can use this clause to ensure that Dutch law is applicable. Arguably more suitable for this aim is the opportunity offered in Article 7, which allows a person seeking compensation for environmental damage to base his or her claim on the law of the country in which the event giving rise to the damage occurred.<sup>117</sup> This could serve as a basis for applying Dutch law when attempting to hold a Dutch parent company liable for directing or controlling the environmental damage caused by its foreign subsidiary.

Generally, it seems that under Rome II, most extraterritorial claims will be governed by the law of a foreign country. Still, there remain some limited possibilities for the court to derogate from this rule. First, provisions of the law of the forum may be applied in a situation where they are mandatory irrespective of the law otherwise applicable.<sup>118</sup> In this respect, one could think of regulations regarding minimum wages or trade rules. It is questionable to what extent fundamental

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113. Council Regulation of 11 July 2007 on the law applicable to non-contractual obligations, No. 864/2007, 2007 O.J. EUR COMM. (No. L 199) (2007) (*Rome II*), art. 32

114. EC Regulation No. 865/2007 (Rome II), art. 49(1)

115. EC Regulation No. 865/2007 (Rome II), art. 4(2)

116. EC Regulation No. 865/2007 (Rome II), art. 4(3)

117. EC Regulation No. 865/2007 (Rome II), art. 7

118. EC Regulation No. 865/2007 (Rome II), art. 16

human rights will fall into this category.<sup>119</sup> Second, the court is required to take account of the rules of safety and conduct which were in force at the place and time of the harmful event (as opposed to the place where the damage arose).<sup>120</sup> Arguably, this could be a basis on which a Dutch court may decide to apply Dutch or European norms.<sup>121</sup>

Lastly, the court may also decide to refuse the application of a provision of the law of a country if such application is manifestly incompatible with the public policy of the forum.<sup>122</sup> As an example, the application of a provision of foreign law that would have the effect of causing punitive damages to be awarded could be regarded as being contrary to the public policy of the forum.<sup>123</sup> By the same token, although the exact application of international human rights as part of public policy of the Dutch court is yet to be defined, it seems likely that where a provision of foreign law is evidently in violation of internationally recognized human rights, a Dutch court can choose not to apply this provision and instead apply a norm of Dutch law or of international human rights instruments to which the Netherlands is a party.<sup>124</sup> It should be kept in mind, however, that the public policy exception does not justify the refusal to apply a provision for the mere reason of it being less strict than the law of the forum.<sup>125</sup>

### 2.3 Procedural Obstacles in Criminal Law

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There are several important limitations to the criminal law avenue as a means of holding corporations liable for the violation of fundamental rights. Apart from the limited extraterritorial applicability of the criminal law, which has already been discussed, another important limitation is that conduct not explicitly prescribed as unlawful cannot be a ground for prosecution (the principle of legality). This is different in civil law, where liability can also arise on the basis of conduct in violation of an unwritten rule. Some specific procedural obstacles in criminal law will be explained in this section. Most of these obstacles relate to the weak position of the victim in the criminal justice process. It should be noted, however, that recent developments have somewhat increased victim participation.

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119. Castermans and Van der Weide (2009), *Op. Cit.* note 47, at p. 40

120. EC Regulation No. 865/2007 (Rome II), art. 17

121. See Enneking, Liesbeth. *Corporate Social Responsibility: tot aan de grens en niet verder?*, Wetenschapswinkel Rechten – Utrecht, 2007, at p. 80

122. EC Regulation No. 865/2007 (Rome II), art. 25

123. EC Regulation No. 865/2007 (Rome II), recital 31

124. Castermans and Van der Weide (2009), *Op. Cit.* note 47, at p. 41

125. Enneking (2007), *Op. Cit.* note 122, at p. 92

### 2.3.1 Evidentiary Obstacles

An important drawback of the use of criminal law as a ground for liability for violations of human rights by corporations is the problem regarding evidence. Conviction under criminal law requires that the commission of the criminal act, as well as the state of mind of the defendant, be proven beyond a reasonable doubt. Often, the existence of the required intent (“mind and will”) of the defendant will be particularly difficult to prove,<sup>126</sup> all the more so in case of offences committed by a corporation, proof of which typically takes the form of written documents, letters, and emails. Evidentiary problems are compounded in case of prosecution for crimes committed abroad. Illustrative in this respect is the *Kouwenhoven* case, in which a Dutch appeals court acquitted a businessman of both complicity to illegal delivery of weapons to the regime of Charles Taylor in Liberia and complicity to war crimes committed by that regime, on the grounds that the decisive evidence establishing the facts of the case – witness testimonies – did not suffice for conviction, the testimonies being contradictory and unreliable.<sup>127</sup>

### 2.3.2 Barriers in Victim Participation in the Criminal Process

#### 2.3.2.1 The Victim and the Decision to Prosecute

In Dutch law, the only organ that has the power to prosecute is the public prosecution service, via the prosecuting officer.<sup>128</sup> The public prosecutor will, based on the information from police investigation, decide whether he will start a prosecution against a person suspected of having committed a criminal offense.<sup>129</sup> The public prosecutor has the discretion not to prosecute if he considers this to be against the public interest.<sup>130</sup> This system does not confer many procedural rights on the victim. Nevertheless, the Code on Criminal Procedure allows, in Article 12, a directly interested party to complain before the appeal court about a decision made by the public prosecutor not to prosecute or to terminate prosecution.<sup>131</sup> This procedure is meant as a tool for victims to correct decisions made by the State that are deemed disadvantageous to them.<sup>132</sup> The law prescribes that the right to complain is only conferred on those who have a direct interest in prosecu-

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126. See John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report on the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 9 February 2007 at p. 28

127. Court in The Hague (Rechtbank Den Haag), 10 March 2008, LJN: BC6068 (*Kouwenhoven*)

128. Dutch Code on Criminal Procedure (Sv), art. 9

129. Dutch Code on Criminal Procedure (Sv), art. 167(1)

130. Dutch Code on Criminal Procedure (Sv), art. 167(3)

131. Dutch Code on Criminal Procedure (Sv), art. 12

132. See A.C. Bijlsma, *Handboek benadeelde partij: De rol en positie van het slachtoffer in het strafproces*, Kluwer - Alphen aan den Rijn, 2005 [Disadvantaged party: the role and position of the victim in the criminal procedure] at p. 38

tion. Jurisprudence makes clear that this entails that a reasonable interest of the complainant should be affected due to the absence of prosecution.<sup>133</sup> It is clear that direct victims of crimes will fall within this definition. Less clear is how those indirectly affected by the unlawful act are entitled to complain about a decision not to prosecute.

### 2.3.2.2 Opportunity for Compensation

In 1993, the adoption of the *Wet Terwee* (Victim's Act) addressed the lack of compensation for the victim by allowing the victim to file a claim for compensation as an adjunct to a criminal prosecution.<sup>134</sup> Victims of a criminal offence can now become a party in the criminal procedure by virtue of Article 51 of the Code on Criminal Procedure and can consequently claim damages. This possibility is offered to those persons who have suffered direct damage as a result of the criminal offence. The damage must be of a simple nature and easy to assess by the court. The rationale for this requirement is that, in essence, the court will deal with questions of criminal law and should not have to deal with complex assessments of damage, fault and liability. That criminal courts are not reluctant to reject complicated compensation claims is illustrated by the *Van Anraat* case. In this case, fifteen Kurds from Iraq and Iran participated in the trial as civil parties, claiming the amount of 680 Euros as compensation. While the court of first instance initially honoured the compensation claims, on appeal, the Supreme Court denied them on the ground that these were too complicated. However, when the court considers the assessment of compensation to be too complicated, the victim is of course free to bring an action before the civil courts.

### 2.3.2.3 Right to Speak

Some recent developments have greatly improved the legal rights of victims in Dutch criminal procedure. In 2004, the possibility of submitting written victim impact statements was introduced. Additionally, since 1 January 2005, the Dutch Code on Criminal Procedure was amended to give the opportunity for victims or surviving relatives to orally provide a statement regarding the consequences of the alleged offence for the victim.<sup>135</sup> If the victim wishes to use this right, he should notify the Public Prosecutor of this desire in writing, after which he will be called by the Public Prosecutor to appear in court.<sup>136</sup> The statement of the victim should be limited to the consequences of the alleged criminal act and the victim should

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133. Kamerstukken II 1979/80, 15 831 nrs. 1-3

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

135. Act of 21 July 2004, *Invoering van het spreekrecht voor slachtoffers en nabestaanden*, Stbl. 2004, 382, 582. Right laid down in article 336 of Dutch Code on Criminal Procedure

136. Dutch Code on Criminal Procedure (Sv), art. 260



refrain from making statements regarding the guilt of the defendant or the appropriate sanctions.<sup>137</sup>

An important limitation to the right to speak is that its application is limited to crimes carrying more than eight year imprisonment or those specifically named, such as sexual crimes, assaults, battery, traffic offences causing death or grave bodily injury.<sup>138</sup> In practical terms, this means that only the victims of the most serious human rights violations will have the right to speak in court, whereas the victims of lesser violations, such as environmental damage, will perhaps not have this right.

Another limitation lies in the definition of a victim as set down in the proposed amendment of the Code of Criminal Procedure. A victim is defined as a natural person upon which, as a consequence of a criminal act or omission, has been inflicted physical, emotional or economic damage.<sup>139</sup> This entails that only the victim itself has the right to speak, and not another person or organization on its behalf. An exception to this rule is where the victim itself has deceased as a consequence of the alleged criminal offence. In such a case, one relative of the deceased victim receives the right to speak.<sup>140</sup> The victim or relative has the right to be assisted by a lawyer and, if necessary, to make use of a translator.<sup>141</sup> This last element could be especially important in the case of extraterritorial violations for victims unfamiliar with the Dutch language.

## 2.4 Procedural Obstacles in Civil Law

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Article 6(1) of the ECHR is the fundamental rights provision governing the civil procedure in the Netherlands. It reads:

*“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”<sup>142</sup>*

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137. Dutch Code on Criminal Procedure (Sv), art. 302(1)

138. Dutch Code on Criminal Procedure (Sv), art. 302

139. Kamerstukken II, 2002/2003, 27 632 nr. 104b (MvA) p. 7

140. Dutch Code on Criminal Procedure (Sv), art. 336.

141. Dutch Code on Criminal Procedure (Sv), art. 337(1) and 337(2)

142. Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

This provision confers the obligation upon the Netherlands to ensure effective access to justice. The following section will explain the measures taken in Dutch law to ensure this right, as well as the potential barriers still existing. Those barriers need not necessarily be in violation of Article 6 ECHR, however.

## **2.4.1 Evidentiary Obstacles**

### **2.4.1.1 Evidence Gathering and Disclosure of Company Documents**

According to Article 149 of the Dutch Code on Civil Procedure, a court can base its verdict solely on the facts and evidence provided by the parties.<sup>143</sup> It is added that for facts that are generally known no evidence is required. The direct consequence is that all relevant facts are to be provided (*stelplicht*) and proven (*bewijzen*) by the parties. Article 21 further sets out the obligation for both parties to exhibit all relevant material to the court. Failure to comply with this obligation could carry consequences that are for the court to decide, including possibly attaching more weight to the evidence provided by the other party. The Code on Civil Procedure also provides in Article 843(a) that each party should grant the opposite party access to all relevant files, provided that these files are legally relevant to the case.<sup>144</sup> This provision can be considered as crucial for achieving equality of arms in situations of claims against large and powerful multinationals. The judge can provide an exception to the general rule impeding equality of arms, when compelling reasons disallow the provision of information to the other party or when due process is achieved without the provision of a particular piece of evidence.<sup>145</sup>

### **2.4.1.2 Burden of Proof**

Pursuant to Article 150 of the Dutch Code on Civil Procedure, the general rule is that the claimant invoking the legal effect of a fact or rights possesses the burden of proof. This general rule could be set aside where a specific rule or provision, or reasons of reasonableness and equity, require a shift of the burden of proof. The possession and location of relevant evidence could be a reason to shift the burden of proof. An example of the exception on the basis of reasonableness and equity would be when person A sues Dr. B for malpractice on the basis of wrongful treatment for a particular disease. The burden of proof would then logically lie with the doctor as the doctor is deemed to have the knowledge and the documentation. One can reasonably assume that when an individual sues a multinational company, on many issues the burden of proof will be shifted to the company as the company is in possession of the evidence (e.g. company files, internal documents etc.). Other reasons that would fall within the ambit of reasonableness and equity are reasons of impracticality or impossibility.

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143. Dutch Code on Civil Procedure (Rv), art. 149(1)

144. Dutch Code on Civil Procedure (Rv), art. 843 (a)(1)

145. Dutch Code on Civil Procedure (Rv), art. 843(a)(4)

## 2.4.2 Length of Proceedings

As we have seen, Article 6 of the European Convention on Human Rights requires the action and the judgment to be both fair and speedy. It does not provide for a fixed time limit, however. The right to a trial within a reasonable amount of time is also not explicitly provided in the Dutch Civil Code. Article 20 of the Dutch code on Civil Procedure does stipulate, however, the duty of the court to prevent unreasonable delays.

In 2002, the Dutch parliament adopted an innovative piece of legislation aiming to shorten the average duration of a civil procedure from 23 months to 12 months.<sup>146</sup> The procedural innovations included a simplification of the law of procedure, which meant harmonization of time limits and only one written round in civil proceedings. The 2002 reforms have been successful in shortening the length of the civil procedure to an average of one year. It is noted that several factors might increase the length of a procedure: the hearing of witnesses, the complexity of the case and the workload of the particular court. The terms of appeal vary from one week, four weeks to three months. As such, the length of proceedings does not constitute a serious barrier in the Netherlands.

## 2.4.3 Barriers Regarding Costs of Justice and Legal Aid

### 2.4.3.1 Costs of Justice

Anyone bringing an action before a court is required to pay the court fee (*griffierechten*). This fee depends on the nature of the case and varies from € 63,- for claims for compensation of low value to € 313,- for cases asking for the highest amount of compensation.<sup>147</sup> Court fees for appeal cases are slightly higher, but still modest. It is important that the fees are low enough to prevent persons from not bringing an action out of financial considerations.

The most substantial financial burdens for a claimant in a civil case are the costs associated with legal representation. In almost all civil cases, representation by a lawyer is a mandatory requirement.<sup>148</sup> The question whether it would be desirable for an individual to be able to put his own case before the courts has always been subject to considerable debate. There could be circumstances where access to justice would be facilitated if representation by a lawyer were not compulsory. On the other hand, a mandatory counsel is associated with great advantages by

146. These reforms are summarized in articles 123, 124 and 125 of the Dutch Code on Civil Procedure (Rv)

147. The current (since February, 10 2009) court fees can be found at <http://www.rechtspraak.nl/NR/rdonlyres/316A9D6F-A6AF-4C47-9A5C-992C508DE020/0/Ro16Griffierecht2009.pdf>. See A.W. Jongbloed, "Access to Justice, Costs and Legal Aid", 11, in *Elec. J. Comp. L.* 1,7-8, 1, 2007 available at <http://www.ejcl.org/111/art111-14.pdf> at p. 6

148. See Chapter 2 on access to civil justice in P. Smits, *Artikel 6 EVRM en de civiele procedure*, Serie Burgerlijk Proces & Praktijk, nr. 10, Kluwer – Deventer, 2008) [Article 6 ECHR and the civil procedure] at p. 75

ensuring compliance with many other procedural rights, such as that of a fair trial and impartiality of the judge.

In terms of the rate of a lawyer in the Netherlands, it is noted that until 1997, the Dutch Bar Association recommended fixed rates depending on the experience of the lawyer. This was considered a barrier to competition; presently, the rates are no longer published. Most law firms do, however, apply a base rate which fluctuates between €150 and €200 per hour. Naturally, there are large differences depending on the interest of the case, the quality of the lawyer and reputation of the law firm. As a consequence, rates vary considerably.

Lawyers are not allowed to charge a client on the basis of a ‘no cure, no pay’ principle, which requires the claimant to only pay a fixed fee to his advocate if the case is won. In March 2005, the Dutch Minister of Justice prohibited the proposal by the Dutch Bar Association to introduce ‘no cure, no pay’ on an experimental basis.<sup>149</sup> According to the minister, this could lead to a legal climate in which lawyers would only accept cases with a high chance of success or with which high amounts of compensation are associated.

Additionally, Dutch law of civil procedure supports the general principle that the losing party in a civil case is required to compensate the legal costs incurred by the other party.<sup>150</sup> Often, however not *all* costs made by the losing party will have to be covered by the winner. The judge may consider unnecessary costs made by the winner as outside of the scope of this provision. Additionally, the losing party is not entitled to pay the full amount of legal costs of the winning party, but generally the judge rules for partial payment of those costs,<sup>151</sup> the amount of which is based on the liquidation rate applied by the Dutch courts.<sup>152</sup> On the one hand, this measure could be positive for victims’ access to justice; even in the most unbeneficial scenario, they will never be required to pay for all legal costs of the defendant. On the other hand, it can be seen as an impediment to access to justice; even if the victim would win the case, part of the legal costs incurred by him remain uncovered by the other party.

In general, despite the relatively low court fees, lawyer fees are considerable. This especially holds in complex cases, such as those involving corporate human right abuse, where much research is to be conducted by the attorneys. Fortunately, the Dutch legal system has quite an extensive system of legal aid which aims to limit the financial barriers to access to justice.

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149. Volkskrant of 24 juni 2004, “Donner verbiedt proef ‘no cure no pay’ advocaten”, available at [http://www.volkskrant.nl/binnenland/article182294.ece/Donner\\_verbiedt\\_proef\\_no\\_cure\\_no\\_pay\\_advocaten](http://www.volkskrant.nl/binnenland/article182294.ece/Donner_verbiedt_proef_no_cure_no_pay_advocaten)

150. As laid down in art. 237-245 of the Dutch Code on Civil Procedure (Rv)

151. Dutch Code on Civil Procedure, art. 242(1)

152. For more information on liquidation rates (*liquidatietarieven*) of Dutch courts, see “Liquidatietarief rechtbanken en gerechtshoven” available at <http://www.rechtspraak.nl/Naar+de+rechter/Landelijke+regelingen/Sector+civiel+recht/Liquidatietarief+rechtbanken+en+gerechtshoven.htm>

### 2.4.3.2 Legal Aid

According to Article 6 of the European Convention on Human Rights and Fundamental Freedoms, each contracting State has the obligation to ensure its citizens effective access to justice. More specifically, access to justice must be guaranteed for those persons with low incomes. The implementation, and the way in which the contracting states decide to organize their legal aid system, is left to the discretion of the State and consequently varies across Europe.<sup>153</sup>

In the Netherlands, the right to legal aid finds its basis in the Dutch constitution. Article 17 of the Constitution reads:

*‘No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law’.*

More specifically, Article 18(2) provides that:

*“Rules concerning the granting of legal aid to persons of limited means shall be laid down by Act of Parliament”*<sup>154</sup>

Since 1994 legal aid has been regulated under the Legal Aid Act,<sup>155</sup> which replaced the prior statutory system dealing with the supply of legal aid. Article 12 of the Act determines that legal aid should be provided to both natural and legal persons with inadequate financial resources in relation to legal interests within the Dutch legal sphere of influence. Legal aid is provided for legal information, consultation and advice, as well as legal representation in court. Additionally, depending on the income of the claimant, legal aid could allow for a reduction in the court fees.<sup>156</sup> Recipients of legal aid are always charged a contribution of their own according to the level of their income. It is argued that this ensures that, while guaranteeing access to justice, all individuals consider the necessity and added value of a claim.<sup>157</sup>

In general, the system offers the opportunity for victims who do not have the financial means required to start proceedings, to have recourse to the courts in case their rights have been infringed. At the same time, there are some important limitations to the current system which give rise to situations where the costs of justice constitute a real impediment to effective access to justice. The situations,

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153. See C.M.C. van Zeeland and J.M. Barendrecht, “Legal Aid Systems Compared: A Comparative Research into Three Legal Aid Systems”, *Centre for Liability Law Tilburg University* (December, 2003) available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>

154. Dutch Constitution (Gw), art. 18(2)

155. Legal Aid Act (Wet Rechtsbijstand), Stb. 1994

156. Art. 17 of Wet tarieven in burgerlijke zaken (Wtbz) [Act on Rates in Civil Cases], Stb. 1941

157. A.W. Jongbloed (2007), *Op. Cit.* note 148, at p. 7

as well as the factors giving rise to these limitations, are addressed in the following section.

### **Income Limitations to Legal Aid**

Article 34 of the Legal Aid Act provides that legal aid is linked to the income and financial wealth of the person seeking legal aid. Legal aid is only provided to single persons whose yearly income in 2010 is below 24,500 and cohabitants with a yearly income of maximum € 31,400.<sup>158</sup> Additionally, if the financial wealth of a person is more than € 20,315<sup>159</sup>, he or she will not be eligible for legal aid. It has been estimated that under the current system about 50% of the population benefits from legal aid, leaving a large group of persons with “average” incomes not covered by the Legal Aid Act.<sup>160</sup> Many persons within this category might still lack the means to fulfil the financial commitments of a lawsuit. This problem is especially acute with more complex or unusual cases, such as human rights or extraterritorial claims, which require more preparation by the lawyer and entail a burdensome total fee.

It can be argued that those persons who are not entitled to legal aid should enter into a contract with a private insurer who covers for legal aid. Such persons are indeed expected to have sufficient financial means available for legal aid insurance. Theoretically, this would ensure access to justice also for those persons with average incomes that just miss the income threshold for the entitlement to legal aid. In practice, however, it appears that not all Dutch households are insured for legal costs. One of the reasons for this could be that the discrepancy between the insurance premiums and the insured risk is simply too large to make insurance an attractive option for many persons that do not qualify for legal aid. Additionally, these insurances do not cover all situations, which could constitute an obstacle in specific situations even to those that are insured.

### **Limitations to Legal Aid for Foreign Claimants**

As detailed in other sections of this report, in some cases foreign claimants can bring their case to a Dutch court. The question immediately arises whether such foreign claimants are entitled to legal aid in a way similar to Dutch claimants. In other words, how is the term “for legal interests within the Dutch legal sphere” as laid down in the Act on Legal Aid to be interpreted? As far as EU citizens are concerned, Article 21 of Council Directive 2003/8/EC of 27 January 2003 applies. This directive aimed to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. It has been fully implemented in the Netherlands by the Act of 19 February 2005 to adapt the

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158. The income levels are, by virtue of art. 34(4), each year adapted for wage inflation.

159. The “heffingsvrij vermogen”, the amount of financial wealth each citizens is entitled to possess without having to pay tax

160. Smits (2008), *Op. Cit.* note 1, at p. 66

Legal Aid Directive Implementation Act. As it only covers access to justice for EU citizens, claimants from non-EU States, where the bulk of the world's human rights violations take place, will remain in the cold: their interests may not qualify as legal interests within the Dutch legal sphere.

### Other Exceptions to Legal Aid

The Legal Aid Act further provides that legal aid will not be granted in several specific situations laid down in Article 12 of the Act as well as in the Decision as to Legal Aid and Assignment Criteria.<sup>161</sup> Pursuant to these documents, legal aid would not be provided if, *inter alia*:

- (a) the chance of winning the litigation is considered to be close to zero;<sup>162</sup>
- (b) the costs incurred with the proceedings are not reasonable compared to the interest of the case;
- (c) a mandatory counsel is not required and the appellant can reasonably be required to represent him or herself.<sup>163</sup>

## 2.4.4 Class Actions and Settlements

### 2.4.4.1 Class Actions

In Dutch law, class actions are dissimilar to class actions in certain common law jurisdictions. In the Netherlands, it is impossible for one or more members of a group to claim damages for the entire group of persons who have suffered damages as a consequence of the acts or omissions of the defendant.<sup>164</sup> Arguably, this constitutes a serious barrier to access to justice where large groups of persons are victims of the harmful activities of a corporation.

Since the early days of the Dutch liberal legal system, the right to access to justice has primarily been seen as an individual right.<sup>165</sup> In the last decades, this view has been slightly modified. In 1994, an Act<sup>166</sup> incorporated the possibility for collective litigation by a foundation or association into the Dutch civil code, more specifically in Article 3:305a, which provides that an association or foundation with full legal

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161. Besluit Rechtsbijstand- en Toevoegcriteria (BRT) [Decision Legal Aid Assignment Criteria]

162. Article 3 BRT provides that examples of this can be that the period in which a claim can be brought has expired, the claimant fails to provide an adequate ground for its claim or recent verdicts making clear that there is no chance of winning the litigation.

163. Translation based on translation provided by A.W. Jongbloed (2007), *Op. Cit.* note 148, at p. 7

164. See Marieke van Hooijdonk and Peter Eijssvoegel, *Litigation in the Netherlands: Civil procedure, Arbitration and Administrative Litigation*, Kluwer Law International – The Hague, 2009, at p. 84

165. See A.G. Maris, 'Toegang tot de burgerlijke rechter' in *Verdediging van collectieve belangen via de rechter*, Zwolle, 1988, pp 190-213 at p. 194

166. Wet Vorderingsrecht Belangenrechtorganisaties, Stb. 1994, 269

personality established for the purpose of protecting the interests of a group of persons has a right of action in court for the protection of these interests.<sup>167</sup> This right is exclusive to legal entities; natural persons are unable to bring a claim on behalf of an entire group. Another important limitation is that an organization can only bring a claim for the protection of those interests that are expressed as the purpose of the organization in its statute. The civil code further provides that the organization can only bring its claim where it has made sufficient attempts to achieve a settlement with the defendant before commencing litigation.<sup>168</sup> The judge is responsible for assessing whether sufficient attempts have been made.<sup>169</sup>

The most important limitation of the Act, however, is the exclusion from its scope of claims seeking monetary compensation. Accordingly, it is impossible for the foundation or association to claim damages on behalf of the persons it represents.<sup>170</sup> A recent judgment in the *Vie d'Or* case makes clear, however, that the organization can claim a large part of the expenses incurred during the legal process.<sup>171</sup> Nevertheless, in principle, damages will have to be claimed by the individual victims themselves. In this respect, the drafters of the Act indicated that individual claimants will be supported by the precedent set in the case brought by an organizational claimant declaring the action unlawful. This could make the individual's claim for damages easier, although it should be acknowledged that strictly speaking such a declaration would not have legally binding force.<sup>172</sup>

Overall, it seems that the legislator has attempted to find a balance between the principle of access to justice as an individual right and the practical need for possibilities of collective actions by introducing the option for foundations and associations to bring a claim on behalf of the victims. At the same time, this option remains subject to many limitations.

#### 2.4.4.2 Class Settlements

If an organization and the defendant manage to achieve a settlement agreement regarding the damage that has been inflicted, the possibilities for a class of victims to benefit from this agreement are more important than the potential gains from litigation. Since 2005, the Act on the Collective Settlement of Mass Damages allows for mass settlements, approved by a court, to be binding on the entire group of victims.<sup>173</sup>

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167. Dutch Civil Code (BW), art. 3:305a

168. Dutch Civil Code (BW), art. 3:305a(2)

169. Supreme Court (HR) 17 January 1997, NJ 1997, 434.

170. Dutch Civil Code (BW), art 3:305a(3)

171. See Supreme Court (HR) 13 October 2006, RvdW 2006, 941-943 at para. 9.13

172. See *Memoirandum van Toelichting (MvT)*, TK 22486, No. 3 at p. 26

173. Wet Collectieve Afwikkeling Massaschade (WCAM), Stb. 2005



The procedure of collective settlement consists of four different stages.<sup>174</sup> First, the foundation or association representing the class of victims concludes a settlement agreement with the defendant, specifying the payments made to the victims. In the second stage, the agreement is submitted by both parties through a petition to a special chamber of the Amsterdam Court of Appeal.<sup>175</sup> If the court considers the settlement to be reasonable, it will declare the settlement binding. In assessing whether the settlement is reasonable, the court will among others factors consider the magnitude of the damages, the ease with which the payment stipulated in the agreement is obtainable from the defendant, the costs and efforts that would result from litigation and the potential causes of the damage.<sup>176</sup> The third stage offers the opportunity to any injured party to opt out of the settlement. Sometimes, the settlement agreement provides that the defendant can withdraw from the settlement if a significant number of victims decide to opt out.<sup>177</sup> Once the opt-out period has expired, the settlement payments will be distributed to the victims.

The Act on the Collective Settlement of Mass Damages has in its short history already proven to be an attractive venue for both mass tort and contractual claims. Settlements have been reached for, amongst others, damage caused by defective pharmaceutical products in the *DES* case and for damage resulting from unlawful selling practices of security lease products in the *Dexia* case. Recently, the Amsterdam Court of Appeal declared a settlement with *Shell* binding, resulting from damage inflicted upon both domestic and foreign investors by defective statements of Shell regarding the oil and gas reserves in the period between 1999 and 2004.<sup>178</sup> This case made clear that, as long as one of the parties involved in the settlement has its habitual or statutory residence in the Netherlands, the Dutch collective settlement procedure applies to domestic as well as to foreign victims.<sup>179</sup> This indicates that the Act could offer an opportunity for foreign victims of human rights abuse to reach a collective settlement with the Dutch parent company, even though its subsidiary is primarily responsible for the damage.

Despite the existence of the procedural possibility for collective settlement by foreign victims with a Dutch (parent) company, it has so far remained unclear what law would be applicable to such a settlement.<sup>180</sup> The parties to the settlements are in any case free to agree upon the law applicable to the settlement.<sup>181</sup>

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174. See for an extensive procedural explanation Van Hooijdonk and Eijssvoogel (2009), *Op. Cit.* note 165, at p. 86

175. Dutch Code on Civil Procedure (Rv), art. 1013

176. Dutch Civil Code (BW), art. 7:907

177. Dutch Civil Code (BW), art. 7:908(4)

178. District Court of Amsterdam, 29 May 2009, LJN: BL5744

179. Castermans and Van der Weide (2009), *Op. Cit.* note 47, at p. 47

180. *Ibid.*

181. Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, No. No 593/2008, (*Rome I*), art. 3

In the absence of an agreement on the applicable law, the settlement will be governed by the law of the country that is most relevant, taking all circumstances into account.<sup>182</sup> The most relevant law could be Dutch, for instance, because it is the law of the country in which the company responsible for the violations has its habitual residence; foreign law may also be relevant, in cases where the actual violations and consequential damage have taken place abroad.

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182. EC Regulation 593/2008 (*Rome I*), art. 4(4)

## Conclusions and Recommendations

The aim of this study was to assess the access to Dutch courts for victims of human rights abuse committed by corporations. As such, the study has provided a general framework for both civil and criminal liability in the Netherlands, as well as an overview of the human rights framework. Additionally, an extensive overview of actual and potential barriers to effective justice has been provided in the last sections.

### Framework for Liability

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The Netherlands has signed and ratified most international human rights treaties. Some provisions of international human rights treaties automatically become part of the Dutch legal order without having to be transposed into national legislation. Jurisprudence provides that direct application has been recognized for most classic civil and political rights, e.g. those laid down in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. This does not necessarily entail, however, that private individuals can automatically invoke these rights in horizontal relationships (e.g., between an aggrieved individual and a corporation). Nor does it necessarily allow for criminal prosecution for violations of these international norms.

In Dutch criminal law, companies are subject to criminal law and could be prosecuted for the commission of crimes. Like in most legal systems, the principle of (domestic) legality plays an important role in Dutch criminal law: both the Criminal Code and the Dutch Constitution provide that an act is only criminal if it is explicitly criminalized by national criminal law. Consequently, a violation of human rights does not necessarily constitute a criminal act unless it is defined as a crime under Dutch law, which will not always be possible in case of corporate human rights abuse. In practice, prosecution of legal persons typically does not concern human rights violations, but often concerns economic crimes, such as those found in the Act on Economic Crimes, or environmental crimes. Even in these limited areas, few cases have been reported. Notably, liability of corporations/businessmen may also arise from complicity in the commission of crimes, including international crimes, as is illustrated by the *Van Anraat* case.

In Dutch civil law, a victim of corporate human rights abuse can file a claim for damages against a corporation on the basis of Article 6:162 of the Dutch Civil Code. There are three categories of acts that may give rise to liability within the meaning of this provision: (1) a violation of an explicit right, (2) a violation of a statutory duty (either domestic or foreign), and (3) a violation of a rule of unwritten law pertaining to proper social conduct. As regards the first two categories, it is important to mention that only a few fundamental rights would apply in horizontal relationships. The third category is probably the most relevant for victims of

corporate human rights abuse. Recent developments indicate that claims based on companies breach of national or international soft-law instruments on corporate responsibilities may be allowed in this context.

## **Barriers Owing to the Corporate Structure**

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This study devoted much of its attention to the extraterritorial aspect of corporate human rights abuse. Often it may be the case that the companies allegedly responsible for human rights abuse are in fact foreign subsidiaries of Dutch parent companies. It could then be in the interest of the claimants to claim compensation from the parent company, as opposed to the subsidiary. However, the complex corporate structure of multinationals constitutes an important barrier to the success of such litigation. This report concluded that although case law shows that under certain conditions it will be possible to pierce the veil of limited liability of companies, it is by no means certain that these conditions can also be applied in case of corporate human rights abuse. Additionally, piercing the corporate veil is a complex issue that requires sufficient evidence and, consequently, time and resources. As such, this report concludes that complex corporate structures still form a significant barrier for (mainly foreign) victims of human right abuse.

## **Jurisdictional Barriers**

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Other important barriers for foreign claimants are those constituted by the lack of jurisdiction of Dutch courts and the law applicable to the case (if jurisdiction is established). In criminal law, territory provides for the most important basis for jurisdiction. The exceptions to this general principle are applied cautiously, and, as such, crimes without any link to the Netherlands can generally not be prosecuted. For some specifically mentioned international crimes the opportunities for jurisdiction are somewhat more flexible. Criminal prosecution of corporations for extraterritorial human rights abuse has not yet occurred, however.

Under civil law, if the company is incorporated in the Netherlands, Dutch courts will normally establish jurisdiction. No jurisdiction ordinarily exists over a foreign subsidiary of a Dutch corporation. The most notable exception to this rule is the 'joint treatment' procedure, which was accepted by the court in the (still on-going) case against Shell Nigeria. This procedure is based on the assumption that where a Dutch court is competent to hear a case against a Dutch parent company, it will, under certain conditions, also have jurisdiction over the foreign subsidiary of that parent company, and as such provides an opportunity for claimants to bring an action in a Dutch court directly against a foreign subsidiary.

Regarding the law governing the civil claim, it is worth mentioning that in most extraterritorial cases the law of the foreign country where the wrongful act occurred will be controlling, irrespective of whether the claim is directed against the parent company or the subsidiary. This could present a hurdle to the claimant where the

relevant foreign law is less strict on corporate human rights abuse than the law of the Netherlands.

## **Procedural Barriers in Criminal Law**

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The last section of the study has provided a wide range of procedural barriers in both criminal and civil law. In Dutch criminal law the following potential procedural barriers can be mentioned:

- Evidentiary obstacles, which are compounded in case of prosecution for crimes committed abroad. The decision by the prosecution to prosecute individual businessmen, as opposed to the corporation, as occurred in *Kouwenhoven* and *Van Anraat*, is seen as illustrative of these evidentiary difficulties.
- The public prosecution service is the only organ that has the power to prosecute. A directly interested party can however complain before the appeal court about a decision made by the public prosecutor. This is meant as a tool for victims to correct decisions made by the State that are deemed disadvantageous to them.
- Although the Victim's Act has enabled victims to claim compensation in the framework of the criminal procedure, the requirement that the damage should be of a simple nature and easy to assess excludes this as a possibility in many corporate human rights abuse cases.
- Although recent developments have improved the possibilities for victims to speak and provide statements during the trial, these rights only apply to victims of the most serious human rights violations.

## **Procedural Barriers in Civil Law**

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The main issues addressed in this report pertaining to procedural barriers in Dutch civil law were:

- The Code on Civil Procedure provides that each party should grant the opposite party access to all relevant files, provided that these files are legally relevant to the case. Nevertheless, this requirement may be set aside by the judge.
- After the 2002 reforms, the length of civil proceedings does not seem to constitute a serious obstacle.
- Regarding the costs of justice, lawyer fees constitute the most important barrier, especially for more complex cases. The 'no cure, no pay' principle may not be applied in the Netherlands. There are extensive entitlements to

legal aid, however. Nevertheless, not all victims, especially those of foreign origin, can benefit from those arrangements.

- A second important barrier concerning the costs of justice is the principle that the loser is required to compensate the legal costs incurred by the other party. The amount of compensation could be considerable, and consequently present a disincentive for victims to bring actions.
- Regarding the possibility of class actions, it seems that the legislator has attempted to find a balance between the principle of access to justice as an individual right and the practical need for possibilities of collective actions by introducing the option for foundations and associations to bring a claim on behalf of the victims. At the same time, this option remains subject to many limitations.
- If an organization and the defendant manage to achieve a settlement agreement, the options for a class of victims to profit from this agreement are much larger than in the context of litigation. The Act on the Collective Settlement of Mass Damages makes mass settlements binding on the entire group of victims. It has in its short history already proven to be an attractive avenue for both mass tort and contractual claims.

## Recommendations

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This study makes it clear that access to justice in the Netherlands for victims of corporate human rights abuse is possible and has the potential to effectively provide remedies to victims. Barriers remain, however, and there is a need for improvement.

The following recommendations can be made:

- Concerning corporate criminal liability, it is observed that the prosecutor often decides to prosecute individuals as opposed to corporations themselves because of evidentiary hurdles in respect of corporations. A good analysis of the current evidentiary rules in criminal cases against corporations may be needed to streamline procedures and requirements that are discouraging or obstructing prosecutors in their work to effectively investigate corporate wrongdoing.
- Dutch case law suggests that, at least in some situations, national and international instruments regarding the due diligence or care that is expected from corporations may be considered in defining the exact contours of the duty of care as a liability standard under Dutch civil law. Legal certainty can be enhanced by laying down this judicial practice in civil law provisions.

- Barriers continue to exist in holding the parent company liable for activities of its subsidiary because of a strict interpretation of the doctrine of ‘piercing the corporate veil’. This doctrine has been developed in the context of parent companies’ liability for debts of their subsidiaries (bankruptcy law). Codification of the exact conditions under which the corporate veil can be pierced in different legal contexts, including a human rights context, may be helpful.
- As far as jurisdictional barriers in the criminal law are concerned, consideration can be given to the broadening of the scope of extraterritorial jurisdiction in criminal matters as laid down in Article 5 of the Dutch Criminal Code to include *all* crimes committed by or with the participation of Dutch legal persons outside Dutch territory. As far as jurisdictional barriers in the civil law are concerned, even though the recent Shell judgment has already significantly broadened the scope of extraterritorial civil liability (under the “joint treatment” condition), it would perhaps be more desirable if Dutch courts were to have automatic jurisdiction over a foreign subsidiary of a Dutch parent company.
- The role of the victim in Dutch criminal procedure is, despite some improvements lately, still limited. Victims’ entitlements to compensation could be expanded by allowing the criminal court to award damages in more complicated cases such as instances of corporate human rights abuse. Currently, the courts are somewhat hamstrung by the requirement that that the damage be of a simple nature and easy to assess by a criminal (as opposed to a civil) court.
- Regarding barriers in the civil procedure, three recommendations for improvement can be made. Firstly, foreign claimants could be made eligible for legal aid in transnational cases regarding corporate human rights abuse. Secondly, the legal regime for class actions could be improved by allowing organizations/associations to claim damages on behalf of the persons they represent. And lastly, legal certainty could be enhanced by defining more clearly which law would govern a collective settlement entered into by foreign victims and a Dutch company.

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