# Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands

Nollkaemper, A.

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# Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands

ANDRÉ NOLLKAEMPER*

## INTRODUCTION

In this article I will examine the prospects and problems for Dutch courts when they are called upon to apply norms of public international law in transnational litigation, that is: litigation involving one or more private parties and involving one or more foreign jurisdictions. This question is located at the intersection between public international law, private international law and constitutional law. The interplay between these fields of law raises grand theoretical questions concerning the wisdom and validity of the separation of legal fields – the issues examined below provide support for the view of Philip Jessup that the proper unit of analysis should be 'transnational law' in which these once separated fields are merged.[1] It also raises thorny technical legal issues that only to a very limited extent have been addressed by courts or that otherwise have been resolved. This article will provide a survey of the prospects and problems involved in the application of public international law in transnational litigation.

The examination of the question as phrased above is set against the backdrop of the legal questions that have inspired the book of which this article is part: can a corporation registered in the Netherlands and operating in a foreign country be held liable if it breaches certain norms of public international law, particularly international human rights law, labour law and environmental law? Cases in which such norms allegedly have been breached have been reported, Royal Dutch Shell in Nigeria perhaps being the most famous example. The possibility that a case against such a corporation may end up in a Dutch Court is a real one. In the case of *Ken Wiwa v. Royal Dutch Petroleum Company*, filed at the US District Court for the Southern

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* Professor of Public International Law, University of Amsterdam.

1 P.C. Jessup, *Transnational Law* (1956), Chap.1. *See also* H.H. Koh, 'Transnational Legal Process', 75 *Neb. L. Rev.* (1996), p. 181.

M.T. Kamminga and S. Zia-Zarifi (eds.), Liability of Multinational Corporations Under International Law, 265-281.

District of New York, experts for the defendants argued that the Netherlands is an available forum in which plaintiffs could file the lawsuit.[2] At the time of writing, the possibility that eventually this cases might be transferred to a Dutch court still appears to exist. One could also conceive of the possibility that the often alleged violations of environmental law by the same corporation in Nigeria could form the basis of a complaint in a Dutch court. As yet, very few cases have been brought against multinational corporations registered in the Netherlands. However, in view of the possibility that this may be done in the future, it is pertinent to examine the applicable legal techniques that may be relevant to determining liability in this type of situation.

One qualification is in order. The article is only concerned with the direct liability of private parties under international law – that is, with findings of liability of private parties based in whole or in part on a finding of a breach of international legal norms. The analysis excludes findings of liability based exclusively on national law – even when that incorporates, or is inspired by, international law. As a practical matter, this is an important restriction. In many cases national law – either Dutch law or the applicable foreign law – will be more than adequate to determine wrongfulness in cases of gross violations of human rights, labour standards or environmental standards, and there will be no need to examine international standards. Of course, the applicable national law may be influenced by international law. If may be said, following Kelsen, that if Dutch courts apply national law that incorporates and gives effect to international law, they *indirectly* give effect to international law. However, I will leave that construction aside, and focus on the narrow set of cases where application of international law would offer more protection to the injured parties than the applicable norm of national law, and the question arises whether these norms can be applied in a civil case.

The article shows that Dutch constitutional law and the system of private international law as it applies in the Netherlands leave much room for Dutch courts to give effect to public international law where the applicable national law – as determined by rules of private international law – is either incompatible with international law or offers less protection than the rules of public international law. However, in various contexts exceptions apply that limit the practical use of this general principle, the most important one being that few norms of public international law are suited to determine directly the lawfulness of acts of private parties.

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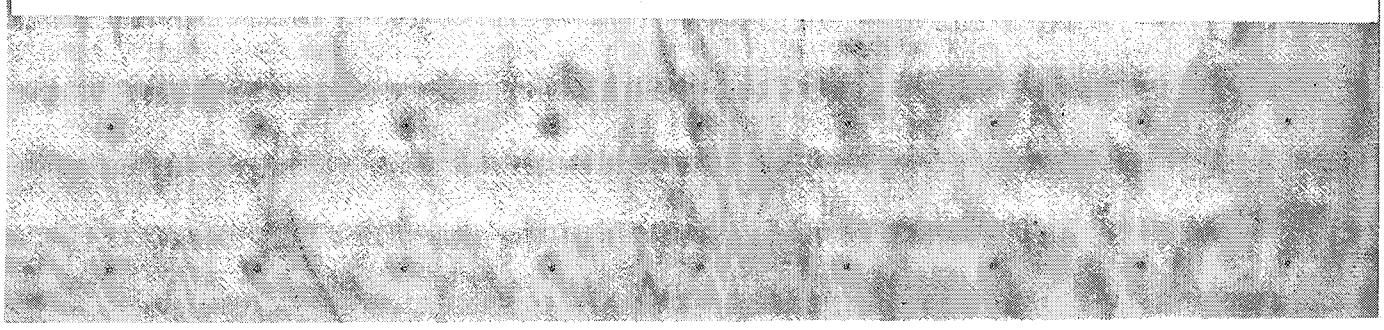
2 Declaration of J.K. Franx, 21 Mar. 1997, on file with author.



When a claim is presented to a Dutch court and the court, under international private law, qualifies the claim as a tort, the Court has to decide on the basis of what law it has to determine whether a tort was committed. Normally the court then will determine that either Dutch law or foreign law is applicable. The principle that guides the court's decisions on this point is the principle of the *lex loci delicti*: The place where the harm has occurred determines the applicable law.[3] In the type of cases with which this book is concerned, it can readily be seen that in and by itself this principle does not give us an answer as to what rules are applicable. In case of a corporation registered in the Netherlands and causing harm in a foreign country, the *lex loci delicti* can, depending on the case, be either Dutch law or the law of the foreign country. Dutch law may be the *lex loci delicti* to the extent that the activities in question are planned or otherwise initiated in the Netherlands. Dutch law also may extend to certain isolated parts of the claim that have little connection to the foreign jurisdiction involved, such as the release of documents or other information by a Dutch corporation to plaintiffs seeking relief in a Dutch court. On the other hand, foreign law may apply as the actual effects of the activities takes place in the foreign country – that is: if the persons whose international rights are allegedly violated or the environment that has been damaged are located in that country. Thus, in particular circumstances, either Dutch law and foreign law, or a combination thereof will be applicable to the types of claims with which we are concerned. In both cases the question arises under what circumstances *international* law can, in conjunction with the applicable national law, be applied in this transnational litigation. I will proceed below (sections 3 and 4) to examine the application of public international law when either Dutch law of foreign law is the applicable law.

Before that, however, we need to examine why one would need to turn to national law at all at this stage, and whether we could not *directly* determine the legality of the contested activity on the basis of international law. There are good arguments for an affirmative answer.[4] In cases of transnational litigation public international law appears more neutral and fairer to the parties than application of the law of one state. Applying national law has the inevitable consequence that one party is subjected to laws of another state, in the making of which its own country has played no role. Public international law is the more objective law – assuming that the rule

3 See, e.g., HR 19 Nov. 1993, *NJ* 1994, 622, *Stg. COVA* v. *Banque Generale du Luxembourg (Suisse) SA*, m.nt. JCS and PvS, para. 4.2.

4 E.g.: A. d'Amato, in: A. d'Amato (ed.), *International Law Anthology* (1994), p. 405.

of international law in question is binding on all jurisdictions involved. Application of public international law would also prevent the somewhat arbitrary choice of law in the type of cases indicated above – where an act is initiated in one country, but the effects are felt in another country. Application of the laws of both states is possible, and the choice for one over the other, that may lead to different outcomes, is to some extent arbitrary. Applying rules of public international law accepted by all states involved can prevent this. Moreover, in certain cases public international law may be the *only* relevant rules of decision. This is in particular true when national norms are tied to the national legal context, and cannot easily be applied abroad. For instance, many environmental standards are specifically made for national context, e.g., through links with zoning plans, etc., and cannot out of legal context be applied to foreign territory.[5] This too would plead against application of these norms, and norms of public international law then may prove more proper.

Yet, these considerations are not generally accepted in the case law. The somewhat arbitrary and on its face unfair application of national law to subjects for whom that law has no legitimacy is generally accepted as a necessary part of the co-ordinating function of international private law in cases involving different jurisdictions. When the national law of one of the parties is considered inappropriate, parties turn to the national law of the other jurisdiction involved rather than to international law. The one exception concerns cases where a tort allegedly is committed outside the national jurisdiction of any state. Courts have accepted that in these cases public international law is the proper rule of decision. Consider the following example. A dispute arose between the State of the Netherlands and the United Kingdom Post Office on the one hand, and the owner of a fishing vessel, *GO4*, on the other, concerning damages caused to telephone cable on the North Sea outside territorial waters allegedly caused by the vessel. The District Court of Rotterdam held that:

> Since the event occurred on the high seas, no system of national law can be identified, on the basis of which it can be determined whether this event constitutes a tort and what legal relationship between parties would result therefrom. However, at the place where the event occurred norms of public international law do apply, on the basis of which the aforementioned determination

5 Cf., HR 5 June 1953, *NJ* 1953, 613, *Melchers* v. *Nationale Handelsbank NV* (holding that provisions of Dutch labour law concerning dismissal are not applicable on a labour contract that is governed by Dutch law but is to be performed abroad – whether or not Dutch law was applicable, the labour relationship was outside the scope of the provision concerned).

can be made. In particular is applicable the 'Agreement for the protection of submarine telegraph-cables', signed at Paris on 14 March 1884 (*Stb.* 1888, 74).[6]

In this case, the Court recognized that public international law could provide an acceptable neutral normative sphere to determine legality of private acts. Note that in this case the treaty expressly laid down liability rules to be applied to private parties. This construction is extremely rare for treaties applicable to the disputes in which multinational corporations may be involved. In any case, for cases not involving areas outside national jurisdiction, this practice is not followed, and courts do turn to the applicable national law,[7] and only subsequently, and in the context of the applicable national law, refer to public international law.

One other option exists for applying public international law at this early stage in the legal decision-making. Even when public international law itself is not the rule of decision, but a court proceeds on the basis of national law, it might be argued that the *choice* of the applicable national law should be determined by public international law. This obviously is the case when the states concerned are party to a treaty that lays down the applicable law. But the question I raise here is a more fundamental one: Should the court let the choice of law be determined by the question whether one of the possible systems of law is more or less acceptable in the light of public international law? For instance: in case of an alleged environmental tort in state X, a Dutch court would consider whether to apply Dutch law or the law of state X. Assume that the law of state X is totally deficient from the point of view of public international law. Should, then, the Dutch court *for that reason* opt for Dutch law? There is no case law on this matter. Apart from choice-of-law treaties, the choice of law largely is withdrawn from the directions of public international law. In any case, the question seems a theoretical one. Even if courts do not use international law to determine the choice of law, they can, once a particular national law has been chosen on the basis of private international law criteria, 'disapply' particular rules of state X's national law if these violate international law. International law thus can enter in the stage of application of foreign law, rather than in the choice of that law. This issue will be further discussed below in Section 4. The result is the same, and it seems that from the point of view of public international law that option is equally acceptable.

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6 Rb. Rotterdam 20 Nov. 1978, *Schip & Schade* 1984, 18, *'t Mannetje-van Dam* v. *Staat der Nederlanden (PTT)* (my translation, A.N.).

7 The same is true for cases located in areas outside national jurisdiction when no international law is applicable: see HR 16 Mar. 1979, *NJ* 1979, 540, *Townsend Car Ferries Ltd.* v. *Nederland.*

## 2 APPLICATION OF PUBLIC INTERNATIONAL LAW THROUGH DUTCH LAW

When Dutch law is the applicable law, enforcement of public international law in transnational litigation in principle is not different from application of public international law in 'normal' litigation that is wholly confined to the domestic sphere. Two questions therefore need to be addressed: what are the normal rules determining the application of public international law between private parties, and should these rules be adjusted when they are applied to transnational legal relationships?

### *2.1 General Rules On the Application of Public International Law Between Private Parties*

As to the normal rules determining the application of public international law between private parties, the situation can be summarized as follows. In terms of Dutch tort law, a tort has been committed by a corporation when (1) the activities of the corporation in question are directly in violation of an international legal right or duty, or (2) the activities violated a duty of care, as interpreted with reference to international law (Article 6:162 Civil Code). The distinction is one between the application of public international law as a direct or an indirect basis for decision. I will review these situations separately.

For direct application, two conditions need to be fulfilled. First, the norms in question must have direct effect; and, second, the norms must have horizontal effect – that is: they must be capable of producing legal effect in the relations between two private parties. The requirement of direct effect stems from Article 93 of the Dutch constitution. Article 93 provides that: 'Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published'.

International legal norms that satisfy the criterion set forth in Article 93 have both direct effect and, in appropriate circumstances, horizontal effect, and as such can be the basis of a civil action. The criterion for direct effect has been interpreted by the Dutch Supreme Court, the *Hoge Raad*, in terms of intent of the parties and the question whether the norm in question can function objectively in the domestic legal order. As to this latter criterion, the question is whether courts can apply the norm as such, or whether the norm requires further elaboration by the legislature.[8] The direct effect of

8 See, e.g., HR 18 Apr. 1995, *NJ* 1995, 619, *E.O.* v. *Openbaar Ministerie*, para. 6.2; 28 *Neth. Y.B. Int'l L.* p. 336.

an international norm also is a minimum condition for a norm to have horizontal effect and to apply in the legal relationship between two private parties. However, it is not a sufficient condition – courts have held that not all norms that produce direct effect also apply between private parties. Whether a norm has horizontal effect depends primarily on the intention and text of a provision, but courts have much leeway (as will appear from the examples below) to determine that although a norm may only have been written with regard to the relationships between a state and an individual, or even between two states, it also is relevant in the relationship between two private parties. If so, violation of that norm then violates written law in terms of Dutch tort law. Hence, if plaintiffs that have suffered injury as a result of activities of corporations can base their claim on a directly effective rule of international law, the court will evaluate the activities of the corporation on the basis of international law and may, if the norm is violated, hold on that basis alone for the plaintiffs.[9]

The subsequent question is whether the type of norms that have been said to be implicated by alleged abusive behaviour by certain corporations in certain parts of the world pass the tests that courts have formulated for direct and horizontal effect. I will confine myself here to four categories of norms: international criminal law, international human rights law, international labour law and international environmental law.

It has been said that corporations might engage in behaviour that is criminalized by international law, such as torture or crimes against humanity (I do not express myself here on the question whether these claims are really plausible, but the claims are out there). It seems that if international norms criminalize individual behaviour of private persons (which is not the case for torture), they are directly binding for individuals in terms of the Constitution. Although there is little practice on this point, it is believed to be consistent with the Constitution – and not to violate the *nulla crimen* principle – to prosecute and convict individuals or corporations directly on the basis of international criminal norms, even if they have not been incorporated in Dutch law.[10] If so, it would seem acceptable to apply such norms in civil cases, and determine that a violation of, say, the prohibition of torture by or on behalf of a corporation constitutes a tort against victims

9 *A contrario*, this can be concluded from HR 1 June 1956, *NJ* 1958, 424, *Mettes* v. *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie*, and HR 23 Sept. 1988, *NJ* 1989, 743, *Mines de Potasse d'Alsace SA (MDPA)* v. *Onroerend Goed Maatschappij Bier BV*, para. 3.2.

10 A.J.P. Tammes, 'Een ieder verbindende' verdragsbepalingen, 37 *Nederlands Juristenblad* (1962) p. 71.

(assuming of course that all other conditions are satisfied). I am not aware of any Dutch case-law that affirms this proposition, though.

It has been said that also international human rights law can be relevant to, and violated by, multinational corporations. Dutch courts have accepted that for a narrow category of international human rights norms the conditions of direct effect and horizontal effect can be fulfilled, in particular for Articles 8 of the European Convention on Human Rights (privacy) and Article 26 of the International Covenant on Civil and Political Rights (non-discrimination). In a case where the plaintiff alleged her right to privacy was violated by a neighbour, the Hoge Raad held that the contents of the right to privacy was in part determined by Article 8 of the European Convention, 'of which it must be accepted that it also applies between citizens. A violation of this right results in principle in a tort under article 1401 (old) of the Civil Code'.[11]

In a case involving alleged age discrimination of a private employer, the *Hoge Raad* held that 'It is not excluded that unequal treatment on the ground of age is in violation of Article 1 of the Constitution and Article 26 of the ICCPR'.[12]

Having, in these cases, accepted the fundamental principle that international human rights norms that can have direct effect also can have horizontal effect, there does not seem to be a principle reason why not other international human rights norms that are capable of having direct effect also are capable of having horizontal effect. Large parts of the norms contained in the ECHR and the ICCPR –that have been accepted as having direct effect– then could pass the test. In addition to the rights of privacy and non-discrimination, this could apply to freedom of speech or freedom from torture.

Dutch courts have also accepted certain treaties in the sphere of labour law as directly determinative of the legal relationship between private parties. In a dispute between a transport company and its employers concerning the right of the latter to strike, the *Hoge Raad* held that:

> If a strike in principle is governed by art. 6, introduction and par. 4, of the European Social Charter, then it must, despite harmful effects for the employer and third parties, in principle also by the employer be accepted as a lawful exercise of the fundamental rights protected by this article.[13]

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11 HR 9 Jan. 1987, *NJ* 1987, 928, *A.H.J.G.* v. *B.K.*, para. 4.4 (my translation, A.N.).

12 HR 13 Jan. 1995, *NJ* 1995, 430, *Codfried* v. *ISS Servicesystem*, para. 3.4 (my translation, A.N.).

13 HR 21 Mar. 1997, *NJ* 1997, 437, *Vervoersbond FNV* v. *Verenigd Streekvervoer Nederland*, para. 4.3 (my translation, A.N.).

On the other hand, large numbers of international standards that may be relevant to policies of corporations do *not* have direct effect. For instance, courts have determined that a variety of provisions of the European Social Charter and the International Covenant on Economic, Social and Cultural Rights do not produce direct effect.[14] Also not determinative for the legal relationship between private parties is the 1930 Forced Labour Convention. The *Hoge Raad* determined this when a registered conscientious objector who performed labour as an alternative to military service refused to perform the part of the alternative labour that exceeded the duration of the military service. In his defence, he argued that the statutory obligation to perform labour would be contrary to the 1930 Convention Concerning Forced or Compulsory Labour.[15] The Convention obliged the Netherlands to 'suppress the use of forced or compulsory labour in all its forms within the shortest possible period'. The *Hoge Raad* rejected the argument and held that the pertinent treaty provisions did not have direct effect. It held:

> Article 1 of the Convention merely contains a declaration that the members of the International Labor Organisation that have ratified the Convention – one of which is the Netherlands – undertake to suppress the use of forced or compulsory labor within the shortest possible period. Neither this provision nor Article 2 of the Convention.... contain norms that are so precisely defined as to be eligible by virtue of their contents for direct application and hence to be capable of being binding on all persons. It follows that these provisions cannot function as objectively applicable law in the Netherlands.[16]

And finally, international environmental law also seems to lack horizontal effect. Only in one case it has been held otherwise. This was the decision of the District Court of Rotterdam (overturned on appeal) in the well-known dispute concerning the pollution of the river Rhine by chlorides. When Dutch horticulturists sued the French mining company *Mines de Potasse d'Alsace* for damages, the District Court found that there was no applicable rule of national law that it could use to decide the case. It then turned to unwritten international law and found and applied the so-called *'sic utere tuo'* principle: No state can use its territory for activities that cause harm to another state. The Court held that this rule also applies in the relations

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14 HR 17 Oct. 1980, *NJ* 1981, 141, *Mühren* v. *Koninklijke Nederlandsche Voetbal Bond (KNVB).*

15 39 U.N.T.S. 56, entered into force 1 May 1932.

16 HR 18 Apr. 1995, loc. cit. n. 8, at para. 6.2.

between citizens.[17] The Court of Appeals of The Hague overturned this ruling. The Court considered it incorrect to apply unwritten rules of international law that had 'no direct effect but which apply exclusively to States as subjects of law, in a dispute between private persons as is the case here'.[18] It must be said that the opinion of the Court of Appeals was only concerned with unwritten rules of international law that apply 'exclusively to States as subjects of law'. The judgement does not tell us whether this would apply in the case of treaty law that, at least according to the Constitution, *can* bind individuals. However, in no case has environmental treaty law been accepted as having direct and horizontal effect.

Because many rules of international law appear incapable of having direct horizontal effect, the doctrine of *indirect effect* is of particular importance. As noted above, under Dutch tort law a tort is committed not only in case an act or omission violates a statutory duty or a right is violated, but also when 'an act or omission violates a rule of unwritten law pertaining to proper social conduct'. This offers a separate avenue for applying international law to the actions of corporation: It might be argued that international law – whether directly effective or not – can be relevant in constructing what is 'proper social conduct'.

Some older case-law has expressly rejected the possibility of applying provisions of treaties that do not have direct effect in the construction of a tort, holding that as long as Parliament has not adopted implementing legislation a treaty can not be considered to lay down a standard of due care.[19] Also constitutional history does not provide authority as far as non-self executing treaty provisions are concerned. It has been said that the drafters of the constitution did not wish application of non-self-executing treaties in the context of tort law because this would give virtually unlimited powers to the courts.[20] Nonetheless, in certain cases courts have employed a more flexible construction that, by analogy, appears relevant for the issues under consideration here. Particularly relevant for the context of corporations is the following case. The company Batco Nederland closed its factory in Amsterdam. The labour unions objected to the decision and argued that the policies of Batco should be considered as 'mismanagement'.

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17 Rb. Rotterdam 18 Jan. 1979, *NJ* 1979, 113, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 11 *Neth. Y.B. Int'l L.* (1980) p. 326; 28 *Neth. Int'l L. Rev.* (1981) p. 63, and Rb. Rotterdam 16 Dec. 1983, *NJ* 1984, 341, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 15 *Neth. Y.B. Int'l L.* (1984) p. 471.

18 Hof Den Haag 10 Sept. 1986, 19 *Neth. Y.B. Int'l L.* (1988) p. 496, *Mines de Potasse d'Alsace SA (MDPA)* v. *Onroerend Goed Maatschappij Bier BV*, para. 5.4.

19 Hof Den Haag 9 Feb. 1942, *NJ* 1942, 371, *Bally Schuhfabriken AG* v. *Dungelmann.*

20 See J.G. Brouwer, *Verdragsrecht in Nederland: Een studie naar de verhouding tussen internationaal en nationaal recht in een historisch perspectief* (1992), p. 215.

The court then had to determine whether that qualification was appropriate. In this context the court attached weight to the OECD Guidelines for multinational enterprises. These Guidelines included the following:

> Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate, 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 co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects.

The Chairman of the company had expressly noted that 'The standards they set are very much in line with our own established policies in these matters and we certainly support their efforts to have them widely applied'. The Court held:

> 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 principles, therefore is to be considered as mismanagement and should be annulled.[21]

This shows that the breach of the OECD Guidelines can be relevant for a finding of mismanagement in terms of Dutch law. The same finding appears possible for a tort. There is similar practice, that need not be cited here, where courts have concretized the due care norm with reference to non-binding national or private sector norms. In view of the cited case on the OECD Guidelines, *a fortiori*, it would seem that treaties that have been approved as law by Parliament should be relevant in determining 'due care' and thereby wrongfulness. One critical difference, though, between the OECD Guidelines and most treaties on for example environmental protec-

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21 Hof Amsterdam 21 June 1979, *NJ* 1980, 71, *Batco*, para. 6.

tion that have not been accepted as having direct horizontal effect, is that the Guidelines expressly were intended for corporations. Courts may be more reluctant to determine what is 'due care' for a corporation on the basis of a treaty that only imposes certain obligations for furture behaviour on the legislature. Much will depend on the nature of the provisions that in any given case apply.

### *3.2 Application of Public International Law Between Private Parties in Transnational Situations*

Having thus summarized the prospects of applying public international law as part of national law in tort case, the question now must be considered whether these observations also apply to transnational litigation – that is, cases where the activities of the defendant were located in a foreign jurisdiction. It seems that these circumstances should not make any difference. International law does not appear to pose any restrictions.

It might be thought that this should be different when the foreign jurisdiction involved is not itself bound by the norms of public international law. For instance: a Dutch court would examine under a norm of treaty law, applied through Dutch law, the legality of a activities of a corporation, registered in the Netherlands, that took place in a country that itself is not bound by that rule. Would, in these circumstances, the application of a norm of public international law *vis-à-vis* the foreign jurisdiction not amount to a violation of the principle that states cannot extent treaties to third parties, and thereby violate the public international legal rights of that foreign jurisdiction? That question should be answered in the negative. Public international law is incorporated in Dutch law, and as such applied to an activity involving foreign jurisdiction. There is no principle difference between the application of Dutch law to that activity (which as a matter of private international law is considered unobjectionable) and the application of public international law through Dutch law, even if that international law as such is not binding on that jurisdiction. It may even be argued that there is not only a discretion but a duty involved for Dutch courts: From the point of view of public international law the Netherlands, including its courts, are bound to give effect to rules of public international law in matters under their jurisdiction. Restrictions do apply under Dutch constitutional law, but where no such restrictions apply it does not seem that separate restrictions flow from the fact that the factual situation involves a foreign element. This matter is discussed more fully below in the context of application of public international law in connection to foreign law.

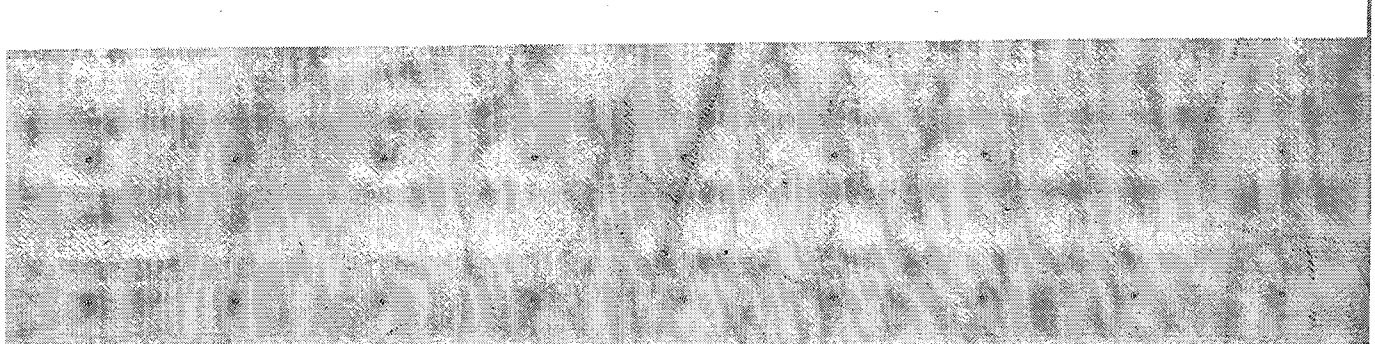
The question whether Dutch courts can apply international law when the *lex loci delicti* is *foreign* law presents quite different issues. Three separate dimensions should be distinguished: (1) what is the basis for applying public international law in such cases, (2) what is the possibility of applying public international law limited to cases when the foreign jurisdiction involved has accepted the norms of public international law at issue, and (3) what are the consequences of applying international law in such cases?

### *4.1 Basis for the Application of Public International Law*

The first question is what legal system determines whether in such cases a Dutch court can apply international law. One might think that this question determined by the foreign law. Just as in the case examined in section 3 above, where Dutch constitutional law determined whether Dutch courts applied international law, in these cases the applicable foreign law would be determinative. The argument then would be that in a tort case, the applicable foreign law is not only foreign *tort* law, but also the *entire* system of foreign public law, including the foreign constitutional law, that may be relevant to the case. The foreign constitutional law then would determine whether international law is part of the foreign law in question. Thus, for instance, if the contested actions of a corporation would have caused injury in India, and Indian law would apply to the claim, the Dutch court would have to determine according to Indian law whether international law could be applied. The question whether that law is binding on the forum state then would not necessarily be relevant. If a court can apply, say Indian law, in a dispute involving a Dutch firm, why not also international law that is part of the law of the land in India but that does not bind the Netherlands?

An alternative approach would be to argue that this question is governed by the law of the forum – in our case the Netherlands. Thus, even when a court would find foreign law to be the applicable law, Dutch constitutional law would determine the interjection of public international law into that law.

There is little case-law on the matter. However, I believe both constructions to be too narrow in their approaches to the question. The question whether a Dutch court – or for that matter any national court – should apply international law in a case involving foreign law is not governed by that foreign law or by the constitutional law of the forum but *by international law itself* to the extent that it is binding on the forum. If the court of the forum is bound by rules of international law, it is, as an organ of the



state obliged to give effect to relevant rules of international law. Whether the foreign law allows for the application of international law then is not relevant. Whether the constitutional law of the forum allows for it likewise would not seem relevant. The constitutional restrictions that limit application of international law in case Dutch law is the applicable law are not relevant here. These limitations are related to separation of powers and protection of parliamentary supremacy in the forum. These concerns are immaterial if the international law is not applied to supplement or trump or supplement the law of the forum, but foreign law. The parliamentary supremacy is not at stake when a court applies public international law in connection with foreign law. Where no constitutional restrictions apply, courts are at liberty to apply international law and indeed are, as matter of public international law, compelled to give effect to international law.

That position seems accepted in case-law. In *United States* v. *Bank voor Handel en Scheepvaart,* the Hoge Raad accepted that Dutch courts could examine the legality of foreign acts under public international law. It did not make the permissibility of such examination dependent on the question whether the rule of public international law in question was part of either the applicable foreign law or the law of the Netherlands.[22] The application of public international law would seem to be not determined by the foreign law or Dutch law, but by international law itself.

It has nonetheless been argued that courts should not apply public international law directly, but do so as part of the Dutch 'public order'. The public order concept as applied in the Netherlands then is as interpreted with reference to international law – what is in violation of a norm of international law could be considered in violation of the Dutch public order. There is some support in case-law for this proposition. The Hoge Raad overruled a Dutch court that had prohibited a strike in the Netherlands, in a context relating to the Netherlands' legal order, by applying rules of foreign law that prohibit that strike. The Hoge Raad argued that the lower court's prohibition

> violated the international public order ('ordre public') as understood in the Netherlands.... In this regard it is relevant that the social and legal convictions that have emerged in the Netherlands, and that have been reflected in jurisprudence, the right to strike has been accepted as a fundamental legal principle, and the Netherlands also has acceded to the European Social Charter (*Trb.* 1962, 3; 1963, 90; 1980, 65), that Article 6 of that treaty recognizes the right of employees and employers on collective action in case of conflicts of inter-

22 HR 17 Oct. 1969, *NJ* 1970, 428, *Verenigde Staten* v. *Bank voor Handel en Scheepvaart NV.*

ests, including the right to strike, and that the Netherlands has declared upon ratification that it considers itself bound by the article in regard of employees not in public service.[23]

However, making application of public international law contingent on the concept of public order seems to be a too narrow construction. As F.A. Mann pointed out, the public policy concept is an 'inadequate guide on account of the relativity of the conception'. Public international law provides the more uniform and precise standard for the evaluation and, where relevant, the disapplication, of foreign law.[24] This is particularly so since in Dutch courts the application of public policy exceptions generally is restricted by the 'closeness of the contact' of the facts with the forum.[25] If a foreign statute would be considered in terms of public order as interpreted in view of international law, this could result in application of foreign law in case of lack of contact, even when the foreign law would be an international illegality. A judicial decision then would assist performance of an illegal act, and indeed implicate the responsibility of the Netherlands as the forum State.[26] For these reasons, by virtue of public international law itself the courts can examine the legality of foreign law under international law.[27] It must be added though, that generalizations should be treated with caution. Much depends on the circumstances of a case, and cases can be envisaged where the facts have insufficient connection to the national legal order to justify application of international law *vis-à-vis* a State that itself is not bound by that rule.[28]

### *4.2 Significance of the Acceptance of the Relevant Rules of Public International Law by the Foreign Jurisdiction*

The second question is whether in these circumstances it is relevant whether the State whose law is to be applied was bound by the international norms in question. For instance: a Netherlands court applies the law of State X,

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23 HR 16 Dec. 1983, *NJ* 1985, 311, *International Transport Workers Federation* v. *Ocean Trade Company* (my translation, A.N.).

24 F.A. Mann, *Studies in International Law* (1973), pp. 377-378. Similarly: A.P.M.J. Vonken, 'De reflexwerking van de mensenrechten op het IPR', in: P.B. Cliteur and A.P.M.J. Vonken (eds.), *Doorwerking van mensenrechten* (1993), p. 153 at pp. 182-183.

25 See HR 12 Feb. 1960, *NJ* 1960, 170, *Schwab* v. *Bondsrepubliek Duitsland.*

26 Mann, op. cit. n. 24, at p. 380.

27 Similarly: Vonken, op. cit. n. 24, at p. 172.

28 A.L.G.A. Stille, 'Enkele opmerkingen over de werking van mensenrechten en van de openbare orde in verband met het Erfrechtverdrag', in: G E. Schmidt, J. A. Freedberg-Swartzburg (eds.), *Het NIPR Geannoteerd* (1996), p. 57 at p. 61.

and finds that that law is incompatible with the European Convention on Human Rights, to which the Netherlands is a party, but State X is not a party. The court then would apply to that State a norm to which that State perhaps intentionally did not wish to be bound. Should this restrict application of the rule of international law by a Dutch court? Similar to what was noted at the end of section 3, it seems that this question should be answered in the negative.[29] The court is obliged to apply public international law in matters under its jurisdiction – as expressly provided for in the European Convention. Whether the foreign State involved is a party to the treaty is immaterial. A Dutch court would breach the treaty by applying a foreign law that violates a treaty to which the court, as organ of the Dutch State, is to give effect with regard to a plaintiff that is properly within the court's jurisdiction. By applying foreign law that violates international law, a Dutch court would import the wrong into the national legal order – even if the other State is not a party to he treaty establishing that particular norm.[30] The *Soering* Case of the European Court on Human Rights provides relevant precedent here – the United Kingdom would have violated the European Convention if it would have extradited a US national who would face death row to the United States, even if the United States itself was not a party to the European Convention.[31]

### *4.3 Consequences of Application of Public International Law*

The third question is: If a Dutch court applies international law in transnational litigation otherwise governed by foreign law, what consequences the court should give to applicable rules of international law? In cases where the applicable foreign law violates international law, it seems that the correct consequence should be to disapply the foreign law. The *Hoge Raad* has accepted this consequence.[32] A hypothetical case can illustrate the relevant issue. A foreign state has a law in force that would expressly support or even direct policies by corporations that violated international labour standards or environmental standards. Dutch courts then should review the compatibility of such laws with international law. Where appropriate, they should 'disapply' foreign law to the extent incompatible with international law. The foreign statute then is not to be applied in determining the ques-

29 For a more cautious approach, see: C.W. Dubbink, 'Mensenrechten en de openbare orde in het internationaal privaatrecht', in: S.C.J.J. Kortmann, et al. (eds.), *Op recht* (1996), p. 51 at p. 55.

30 Vonken, op. cit. n. 24, at p. 174.

31 *Soering* v. *the United Kingdom*, 161 Eur. Ct. H.R. (series A) [1989].

32 HR 17 Oct. 1969, loc. cit. n. 22.

tion whether a wrong has been committed. If the norm is disapplied, Dutch law may be applied. Whether norms of public international law can be applied directly to determine the legality of the contested activity depends on whether these norms are proper for determination of legality between two private parties. This requirement may not often be fulfilled – what was observed in section 3 on the application of norms of public international law in 'horizontal relationships' is relevant here.

## CONCLUSION

The above survey displays that there is little case law on the possibilities of Dutch courts to apply public international law in transnational litigation. It is difficult to speculate why this is so – it may be due to a combination of the only recently emerging awareness of a possible tension between transnational activities of certain corporations and international law, the fact that in some cases national law offers an adequate basis for decision, and a general unawareness of the possibilities to apply international law in national courts. It appears, though, that the courts of the Netherlands have significant opportunities for giving effect to rules of public international law in cases of transnational litigation, either on the basis of public international law as incorporated into national law, or as part of the applicable foreign law, and that in certain circumstances they are, as a matter of public international law, compelled to do so. The most important limitation to the application of public international law as a direct basis for decision will be that for many norms in the sphere of human rights law and environmental law, courts have not accepted that they allow for direct judicial application or that they allow for application at all in a dispute between private parties. To that extent, the limitations in judicial application of public international law in transnational litigation are not caused by the legal techniques of giving effect to public international law in national courts, but by objective, structure and contents of the rules of public international law at issue.