# Justice in a Globalised Economy: A Challenge for Lawyers

## Corporate Responsibility and Accountability in European Courts

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Avocats Sans Frontières

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CORPORATE RESPONSIBILITY AND ACCOUNTABILITY IN EUROPEAN COURTS

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## Introduction

With an estimated total of 82,000 transnational corporations, 810,000 foreign subsidiaries and millions of suppliers, the process of globalisation is nowhere more apparent than in economy.[1] Some global economic actors, when operating overseas, fail to assess the social and environmental impact of their activities and correlatively, fail to demonstrate adequate respect for human rights. Vulnerable people living in countries where the rule of law is weak or deficient are particularly at risk. Transnational corporations may negatively affect their lives, their health and may hamper their access to essential resources such water thus provoking large scale social and environmental injustice, poverty and social conflict. The massive problem of oil spillage and gas flares in the Niger Delta is one example where the behaviour of transnational corporations has highly contributed to violence and social tension.
Despite the multitude of international human rights instruments and the growing recognition of social and economic rights, transnational corporations are rarely held legally accountable for their irresponsible actions. The enforcement of their legal responsibility and accountability remains an area to be explored. Lawyers, as part of the legal profession, are in the privileged position to take action and get engaged to make international law works in practice. By bringing cases of global injustices before courts, lawyers may contribute to more fair and just society.

Alerted by the worrisome social and environmental impact of globalisation, Avocats Sans Frontières (ASF) launched its "Globalisation and Justice" programme. This programme calls lawyers and other members of the legal profession around the globe to work in a creative and innovative way and use their respective legal tool boxes to challenge and step up corporate responsibility and accountability. In addition to the creation of a mobile photo exhibition, as presented in various European courts, ASF organized a series of seminars, lectures and debates on the theme of "Globalisation and Justice". This series of lectures aimed to inform lawyers of the wide spectrum of legal instruments available in the area of International Corporate Social Responsibility and Accountability. During these events, American case law (e.g. the Doe vs Unocal case) and jurisprudence from Continental Europe (e.g. the Clemenceau case in France or the Shell Case in the Netherlands) have been analysed by legal experts, including lawyers directly involved in these cases. The present analysis of the selected cases, brought before European jurisdictions, is partly the fruit of the work delivered during the series of lectures and debates which has subsequently been completed by two young researchers. The overall work is presented in this publication.

As developing countries, hosting transnational corporations,[2] are often unable or unwilling to protect their populations or the environment against

1 UNCTAD, World Investment Report 2009, UN Doc. UNCTAD/WIR/2009 (2009), p. xxi.

2 For the purpose of this publication, "host state" refers to a state in which (a branch of) the transnational corporation operates and "home state" refers to the state under the laws of which the transnational corporation is incorporated or the state where the transnational corporation is headquartered.

corporate abuse, victims may have no other option when it comes to claiming their rights than to address those courts and tribunals based in the home state of the transnational corporation which are, more often than not, based the Western part of the world. John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, noted in his 2006 report an increased demand for greater corporate responsibility and accountability. He underlined that this demand reflects a hesitant but slightly growing trend among national courts to accept jurisdiction in cases involving companies abroad[3].

Nevertheless, annotated national case law on transnational corporate complicity and legal accountability remains scarce in Europe. While case law on corporate abuse is often well known and documented within the home jurisdiction, the lack of communication, including the existence of different languages and (legal) cultures, seems to impede the rapid and smooth propagation of national case law within the European Union.

Through this publication, ASF aims to overcome this impediment by discussing case law from various Member States, thus providing lawyers with inspiration in the search for new legal perspectives and opportunities for future litigation. The cases studied in this publication were carefully selected on the basis of their transnational element and, most importantly, their ability to be translated into other European jurisdictions. Although the outcome of transnational cases largely depends on the legislation within each jurisdiction, it is inspiring to examine foreign national cases, especially when they are based on international regulations[4] or legal principles[5].

The concern that European judges are reluctant to exercise jurisdiction over transnational corporations in fear of appearing hostile towards the court of the host state or encouraging corporations to incorporate under foreign jurisdictions is not supported by the studied cases. On the contrary, this publication shows that national European courts – in contrast to some national legislators[6] - are increasingly willing to deal with corporate accountability and are not afraid of adjudicating transnational cases, including foreign defendants.

3 John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97 (2006), para. 15.

4 See for example the Van Anraat case.

5 For example, the plaintiffs in the Dutch Shell case used the theory of the duty of care – first established by the plaintiffs in the UK tort case, in their subpoena. See Dutch Shell case.

6 Legislation on universal jurisdiction has recently been reduced in scope in countries such as Belgium and Spain.

# 1 UK Personal Injury Cases: Parent Corporations' Direct Liability for Asbestos-Related Damages Incurred Abroad

Between 1994 and 2000, several personal injury cases were brought before British courts by employees of overseas subsidiaries of British companies and inhabitants of the areas surrounding the plants (mining and/or processing mercury, uranium and asbestos by-products) of these subsidiaries. The plaintiffs sued the British parent companies for damages incurred abroad. The British courts eventually declared themselves to be territorially competent. However, the liability of any of the parent companies has not been placed under the scrutiny of the courts as each of the discussed cases was settled out of court, before a judgment on the merits could be handed down. Nevertheless, the facts and legal issues permit to draw valuable conclusions.

## Keywords

- Direct negligence - Duty of care - Parent corporations' foreign direct liability for damages incurred at their overseas subsidiaries - Piercing the corporate veil
- International jurisdiction in personal injury cases
- 1968 Brussels Convention - Brussels I Regulation - *forum non conveniens* doctrine
- (Un) availability of legal aid
- Mass action: abuse

## Legal Issues

- Territorial jurisdiction. The doctrine of *forum non conveniens* was rejected in the discussed cases. More recently, the European Court of Justice held that UK courts do not have jurisdiction to grant a stay of proceedings against UK-domiciled corporations for damages incurred abroad on grounds of *forum non conveniens*.
- Mass Action. In Lubbe v. Cape, the Courts found that a mass action may still be initiated after the first preliminary judgment.
- Foreign direct liability of parent corporations

## 1.1 Facts and proceedings

In this chapter, several UK cases with similar backgrounds are discussed:

- Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others[7]
- Moses Fano Sithole & Others v. Thor Chemicals Holdings Ltd[8]
- Connelly v. R.T.Z. Corporation Plc & Others [9]
- Lubbe & Others v. Cape Plc[10]

Each of the cases involves a personal injury claim against a British parent company for damages incurred abroad, at their overseas subsidiaries. The claims were based on violations of health and safety standards that led to poisoning, serious illness and even death. So far, the United Kingdom is the only European country where personal injury-related negligence claims have been brought against multinational companies in relation to damages incurred abroad.

The overseas subsidiaries in question were mining companies and companies which processed mercury, uranium and asbestos by-products. The plaintiffs were employees of the overseas subsidiaries of British companies and people living in the surrounding areas of these subsidiaries.

### 1.1.1 The Thor cases [11]

Thor Chemicals UK was a Manchester-based company that manufactured mercury chemicals in Margate, England. During the 1980's, high levels of mercury were found in the air and in the urine of its workers. Health and safety at the plant came under considerable criticism and between 1985 and 1987, operations were moved to the South African subsidiary, Thor

7 Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others, High Court of Justice, Queen's Bench Division, 11th April 1995; Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others, Court of Appeal, Civil Division, 9th October 1995.

8 Moses Fano Sithole & Others v. Thor Chemicals Holdings Ltd, High Court of Justice, Queen's Bench Division, 31st July 1998;
Moses Fano Sithole & Others v. Thor Chemicals Holdings Ltd, Court of appeal, Civil Division, 3rd February 1999.

9 In 1997, the RTZ Corporation became Rio Tinto plc. Connelly v. R.T.Z. Corporation Plc. & Others, High Court of Justice, Queen's Bench Division, 1st March 1995; Connelly v. R.T.Z. Corporation Plc. & Others, Court of Appeal, 18th August 1995;
Connelly v. R.T.Z. Corporation Plc. & Others, High Court of Justice, Queen's Bench Division, 27th October 1995;Connelly v. R.T.Z. Corporation Plc. & Others, Court of Appeal, 2nd May 1996; Connelly v. R.T.Z. Corporation Plc. & Others, House of Lords, 24th July 1997, available at http://www.bailii.org; Connelly v. R.T.Z. Corporation Plc. & Others, High Court of Justice, Queen's Bench Division, 4th December 1998.

10 Lubbe & Others v. Cape Plc, High Court of Justice, Queen's Bench Division, 12th January 1998; Lubbe & Others v. Cape Plc, Court of Appeal, 30th July 1998, available at http://*www*.bailii.org; Lubbe & Others v. Cape Plc, House of Lords, 14th December 1998; Group Action Africa, High Court of Justice, Queen's Bench Division, 30th July 1999; Lubbe & Others v. Cape Plc, Court of Appeal, 29th November 1999; Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000, available at http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm.

11 M. Butler, "Lessons from Thor Chemicals: The links between health, safety and environmental protection", in L. Bethlehem and M. Goldblatt (eds.), *The Bottom Line – Industry and the Environment in South Africa* (Rondebosch: UCT Press; Ontario: IDRC, 1997), available at http://www.idrc.ca/en/ev-138117-201-1-DO_TOPIC.html; R. Meeran, "Liability of Multinational Corporations: A Critical Stage", Autumn 1999, http://www.labournet.net/images/cape/campanal.htm.

Chemicals South Africa. Thor Chemicals South Africa and Thor Chemicals UK were wholly-owned subsidiaries of Manchester-based Thor Chemicals Holdings Ltd.
In 1992, the poisoning of South African workers came to light. The employees of the plant had been exposed to unsafe quantities of mercury. Many of the plant's employees were poisoned, three of whom died as a result.

### Criminal Proceedings in South Africa

In August 1993, Thor Chemicals was charged with multiple criminal offences in South Africa including culpable homicide. The company pleaded guilty to a single charge and was fined approximately US$ 3,800 by the Pietermaritzburg Magistrates Court - the reasons for this plea bargain are still unclear.

### First Civil Proceedings in the U.K.: Ngcobo v. Thor

In 1994, three South African residents[12] - affected workers - decided to take legal action against Thor Chemicals Holdings Ltd, Thor Chemical UK and the chairman of both companies, Desmond Cowley in the English courts. The plaintiffs alleged that the harmful exposure to mercury was caused by Thor's negligence in the UK and in South Africa. "The claims alleged that the English Parent Holding was liable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process".[13]

Civil proceedings were brought in the UK as the domiciliary forum of the defendants. They were prevented from suing their employer, Thor Chemicals South Africa, in South Africa by the South African Workmen's Compensation Act 1941, which prohibits the taking of legal action by an employee against his or her employer for injuries sustained at work.[14]

Thor sought a stay of proceedings[15] arguing that the UK was not the appropriate forum for the action and rather, that the case should be heard in South Africa. The application was dismissed by Deputy Judge James Stewart.[16] The subsequent appeal was struck out by the Court of Appeal as Thor was deemed to have submitted to the jurisdiction of the English court through the serving of a defence.[17]

12 E. NGCOBO, A. DLAMINI and P. CELE.
13 Meeran, "Liability of Multinational Corporations: A Critical Stage".
14 Article 7 South African Workmen's Compensation Act 1941, available at http://www.erisa.co.za/index.php?section=showhtml&doctype=employmentlegislation&doc=workmen_comp.html. Instead of legal action, the Act provides for "Workmen's Compensation".
15 A stay of proceedings is an order of a court made during the course of litigation to postpone or suspend all or any part of the proceedings. In certain circumstances, however, a stay may mean discontinuance or permanent suspension of the proceedings.
16 Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others, High Court of justice, Queen's Bench Division, 11th April 1995.
17 Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others, Court of Appeal, Civil Division, 9th October 1995.

In the meantime, seventeen other plaintiffs had commenced proceedings on the same grounds in the UK. This action was consolidated in 1996 in the Ngcobo case.
In April 1997, Thor settled the claim for £1.3 million.

**Second Civil Proceeding in the U.K.: Sithole v. Thor**

In January 1998, twenty-one additional claims, similar to the initial actions, were brought in the UK against Thor in response to continued poor safety practices.

Once again, Thor argued that the case should be heard in South Africa and sought a stay of proceedings. The claim was rejected by Judge Garland J.[18] and leave to appeal was refused by the Court of Appeal. [19]

The action was eventually settled in 2000. Thor Chemical Holdings agreed to pay in the region of US$ 353,000 in settlement.

### 1.1.2 The Connelly v. RTZ case

Mr. Connelly worked for five years in Namibia at a uranium mine operated by RUL (Rossing Uranium Ltd), a Namibian subsidiary of RTZ (R.T.Z. Corporation Plc) which is an English company. In 1983, Mr. Connelly returned to Scotland, his home country. In 1986, it was discovered that he was suffering from cancer of the larynx.

In 1994, Mr. Connelly brought an action for damages in the U.K. against RTZ Corporation Plc. and RTZ Overseas Services Ltd, both English companies, claiming that his cancer was the result of inhaling silica uranium at the Namibian mine. The plaintiff held the English companies responsible for defects in the health and safety measures at the mine which was operated by their Namibian subsidiary. According to Mr. Connelly, key strategic technical and policy decisions relating to RUL were taken by RTZ.

RTZ applied to the High Court of London for a stay of proceedings arguing that Namibia was the appropriate forum for the action. According to RTZ, its subsidiary was present and available to be sued in Namibia and Namibia was a forum that was available to the plaintiff.[20]

On 1 March 1995, the judge granted a stay of proceedings.[21] In his opinion, Namibia was the jurisdiction in which the claim should be heard in the interests of all the parties and in the interest of justice.

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18 Moses Fano Sithole & Others v. Thor Chemicals Holdings Ltd, High Court of justice, Queen's Bench Division, 31st July 1998.

19 Moses Fano Sithole & Others v. Thor Chemicals Holdings Ltd, Court of appeal, Civil Division, 3rd February 1999.

20 Mr. Connelly later conceded that Namibia was *prima facie* the jurisdiction with which the claim had the most real and substantial connection (Connelly v. R.T.Z. Corporation Plc. & Others, House of Lords, 24th July 1997).

21 Connelly v. R.T.Z. Corporation Plc. & Others, High Court of justice, Queen's Bench Division, 1st March 1995.

Subsequently, the argument was limited to the relevance of Mr. Connelly's inability to obtain funding to bring a claim in Namibia as it was impossible for his case to be presented without substantial financial assistance.

The Court of Appeal dismissed his appeal on 18 August 1995. Mr. Connelly then applied to the Queen's Bench Division to lift the stay but his application was dismissed on 27 October 1995. The Court of Appeal, in a judgment dated 2 May 1996, allowed the appeal on the grounds that the interest of justice weighed strongly in favour of the jurisdiction where the plaintiff could assert his rights, i.e. England.

RTZ petitioned the House of Lords for leave to appeal. The House of Lords held that Mr. Connelly's inability to litigate in Namibia meant that the case must be allowed to proceed in England.[22]

Later, a further claim was brought by the widow of Mr. Carlson, another cancer victim, who had been employed at RUL, RTZ's Namibian subsidiary. In December 1998, the High Court[23] struck out Mr Connelly's claim on limitation grounds and dismissed RTZ's application for a stay of proceedings in the Carlson case on the grounds that his widow could not obtain funding to achieve substantial justice in Namibia.[24]

### 1.1.3 The Lubbe v. Cape case[25]

Cape plc, an English company, was involved in mining asbestos in South Africa. The operations were carried out directly through wholly-owned subsidiaries until 1979, when Cape left the country.

In 1997, writs were issued in the London High Court against Cape plc on behalf of five South African residents who claimed damages for personal injuries[26] suffered as the result of the exposure to asbestos which had occurred in the course of their employment, or as a result of living in a contaminated area.

The plaintiffs alleged that Cape plc, despite knowing of the harmful effect of exposure to asbestos, had failed to take appropriate steps to ensure the adoption of proper working practices and safety precautions throughout its subsidiaries and had thereby acted in breach of a duty of care it owed to its subsidiaries' workers and to those living in the surrounding area. [27]

22 Connelly v. R.T.Z. Corporation Plc. & Others, House of Lords, 24th April 1997.
23 Connelly v. R.T.Z. Corporation Plc. & Others, High Court, 4th December 1998.
24 Carlson v. Rio Tinto Plc. & Others, Queen's Bench Division, 4th December 1998.
25 Meeran, "Liability of Multinational Corporations: A Critical Stage"; H. Ward, "Corporate accountability in search of a treaty? Some insights from foreign direct liability", Briefing Paper No. 4 of MAC, 15 May 2002, available at http://www.minesandcommunities.org/article.php?a=738.
26 Asbestosis, mesothelioma and in some cases death.
27 Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000.

Cape applied for a stay of proceedings on forum grounds and on 12 January 1998, the Queen's Bench Division granted their application, concluding that everything pointed towards South Africa as the natural forum.

This decision was reversed by the Court of Appeal of London on 30 July 1998 and the House of Lords dismissed Cape's petition on 14 December 1998.
In January 1999, two further actions, comprising almost 2000 claims, were commenced by South African citizens. The cases were ordered to proceed as a group action and Cape applied again for a stay of all proceedings on forum grounds.

On 30 July 1999, Judge Buckley granted a stay of proceedings, holding that South Africa was clearly and distinctly the more appropriate forum for the group action.[28] Appeals were dismissed by the Court of Appeal on 29 November 1999. However, the House of Lords overruled this decision and rejected Cape's arguments on 20 July 2000.

On 21 December 2001, the (by then) 7,500 claimants agreed on the terms of a settlement with Cape. The claim was settled in the sum of £21 million. In August 2002, Cape was facing financial difficulties and its bankers were no longer ready to release the set amount of money.

Consequently, the litigation was re-launched. In March 2003, three settlement agreements were eventually signed.[29]

### 1.2 Parent corporations' foreign direct liability

As a result of the principle of separation of legal identity between different limited companies, the parent company of a wholly-owned subsidiary is no more legally responsible for the harmful conduct of its overseas subsidiary than a shareholder who owns a single share.

The obstacle presented by this "corporate veil" and the difficulties in obtaining access to justice before local jurisdictions against (often insolvent) local subsidiaries, imply that multinational companies often escape responsibility and victims go without redress.[30]

In most jurisdictions, there are only two ways to establish parent company liability in parallel to subsidiary company liability: by lifting the corporate veil (imputing the subsidiary's conduct to the parent) or holding the parent liable on the basis of its own faulty conduct.[31]

28 Group Action Africa & Others v. Cape Plc, High Court of Justice, Queen's Bench Division, 30 July 1999.

29 The lawsuit had actually then been joined to the Gencor lawsuit in South Africa.

30 Meeran, "Liability of Multinational Corporations: A Critical Stage"*;* Leigh Day & Co., "Richard Meeran gives evidence to JCHR", 15 June 2009, available at http://www.leighday.co.uk/news/news-archive/richard-meeran-gives-evidence-to-jchr..

31 International Commission of Jurists, Report of the Expert Legal Panel on Corporate Complicity in International Crimes - Volume 3 Civil Remedies (Geneva: ICJ, 2008), p. 46 ff.

When the doctrine of vicarious liability of the parent corporation for the acts of its agents abroad is applied, courts are asked to 'pierce' or 'lift' the corporate veil, i.e. look behind the corporate structure. The courts can impute the subsidiary's conduct to the parent and hold the parent company liable for the acts of its subsidiary if the principle of separate legal personality is being abused by the parent company to perpetrate fraud or avoid legal obligations.

### 1.2.1 Breach of a duty of care, direct negligence, foreign direct liability: same principles[32]

In the present cases, the plaintiffs' lawyers have used an approach focusing on the direct wrongdoing of the parent company itself. They argued before the courts in the UK that the parent company had violated its duty of care[33] instead of a liability doctrine which located the defendants' violations in South Africa or Namibia.

The holding of parent companies accountable in their home country to those people affected by the environmental, social or human rights impacts of their subsidiary abroad, implies that the parent company owes a duty of care to the workers of the subsidiary or other persons residing in the vicinity of the overseas subsidiary's site.

The general principles of common law negligence are to be applied, which involves the principles of knowledge, foreseeability, precautionary measures and causation. The subsidiary's operations may not subject people to a significant risk of injury which the parent company knows or should know. If the parent company is or ought to be aware of this risk, it is required to take sufficient precautionary measures. The level of those precautionary measures depends on the level of control the parent company exercises over its subsidiary and whether it is materially able to intervene in its subsidiary's conduct.

#### The cases

In all three cases, the plaintiffs decided to highlight the breaches of the duty of care that had occurred in the UK, even though the alleged injuries took place in South Africa or Namibia. The alleged negligence of the English parent companies was central to the cases.

32 R. Meeran, "The unveiling of transnational corporations: a direct approach", in M.K. Addo (ed.), *Human Rights standards and the responsibility of transnational corporations* (The Hague: Kluwer law international, 1999); J. Wouters and C. Ryngaert, "Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction", KUL Institute for International Law, working paper n° 124, July 2008, 10; International Commission of Jurists, Report of the Expert Legal Panel on Corporate Complicity in International Crimes - Volume 3 Civil Remedies, p. 46 ff.

33 It has been argued that EU courts are more at ease with establishing corporate liability on the basis of neglecting a duty of care in the home state because of sovereignty concerns and the international law principle of nonintervention. J. Wouters and C. Ryngaert, "Litigation for Overseas Corporate Human Rights Abuses in the European Union: the Challenge of Jurisdiction" (2009) 40 *Geo. Wash. Int'l L. Rev.*, 951-955.

### The Thor cases

Victims argued that "since Thor is British-owned and since there is an apparent continuity between the problems experienced at the old plant in Margate [England][34] and the one set up at Cato Ridge [South Africa], by Thor, the parent company owes a duty of care and is liable for damage and loss suffered by Thor employees at the South African plant". [35]
Central to their argument was the allegation that the "plant and a system of work which was hazardous and unsafe were transferred from Margate to Cato Ridge".[36] As Deputy Judge James Stewart pointed out, "the Margate evidence is crucial to the Plaintiffs' case: it demonstrates that the third Defendant knew the problems".[37]

### The Connelly v. RTZ case

In Connelly v. RTZ, it was alleged that RTZ had devised its subsidiary's (RUL's) policy on health, safety and the environment (or advised RUL as to the contents of the policy) and that employees of RTZ implemented the policy and supervised health, safety and/or environmental protection at the mine. [38]

### The Lubbe v. Cape case

In Lubbe v. Cape, the House of Lords clearly summarized the victims' approach as follows:
*"The central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)". [39]*

Assessing the potential responsibility of Cape, as a parent company, for ensuring the observance of proper standards of health and safety by its South African subsidiary, Lord Bingham of Cornhill further stated:
*"Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken"*.

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34 In the UK, see above.
35 Butler, "Lessons from Thor Chemicals".
36 Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others, High Court of Justice, Queen's Bench Division, 11th April 1995.
37 Ibid.
38 Connelly v. R.T.Z. Corporation Plc. & Others, House of Lords, 24th April 1997.
39 Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000.

### Assessment of the approach

The question whether the English parent companies actually had a duty of care remains unanswered in the three cases. The victims' approach never came under the scrutiny of the UK courts because the cases were all settled before any decision on the merits could be handed down.

As one of the plaintiffs' lawyers highlighted, the real issue – whether there was negligence that resulted in injury – is thus relegated to the status of a sideshow. However, the solicitor remains convinced that settlements were for the best. "Setting legal precedents is usually the goal of campaigners and politicians, not victims". [40]

A similar approach to parent liability has been used by the plaintiffs in the Shell case (discussed below).

## 1.2.2 Duty of care and territorial jurisdiction

In 2008, in a detailed article[41], Jan Wouters and Cedric Ryngaert drew attention to the fact that the use of *the foreign direct liability doctrine*, linking liability to corporate negligence within the home state, is not trivial in the context of the European legal culture.

From their research, it appears that European courts seem to be more at ease with establishing corporate liability on the basis of negligence of the parent company in its home State than with establishing liability for violations committed by the corporation abroad (vicarious liability standard as above discussed).

They note that the transnational tort cases that have been brought in UK courts revolve around territorial violations of a duty of care by the parent company and imply that those courts would hear the case only if some wrongful behaviour in the UK could be identified.

If the duty of care-based liability standard now seems to be the most appropriate one, it is because it derives from two other important standards i.e. the public international law principle of non-intervention in the domestic legal order and the locus delicti rule.
Indeed, in Lubbe v. Cape, the Court of Appeal[42] appears to have closely linked the debate on territorial jurisdiction with the one on negligence:
"the Court paid particular heed to the fact that "the alleged breaches of … duty of care … took place in England rather than South Africa"". The Court held that the judge of first instance "had failed to give weight to the fact that

40 R. Meeran, "Cape Plc: South African mineworkers' quest for justice", 9 *International Journal of Occupational and Environmental Health* 3.

41 Wouters and Ryngaert, "Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction", 8-10, 12 and 19.

42 Lubbe & Others v. Cape Plc, Court of Appeal, 30th July 1998.

the negligence alleged was against the defendant company as opposed to those persons or companies responsible for running its South African businesses from time to time". [43]

The same reasoning was followed by Deputy Judge James Stewart in the Thor case (see hereunder).

### 1.3 Territorial jurisdiction – forum non conveniens and (un)availability of legal aid

It must first be recalled that since Thor, RTZ and Cape were all domiciled in the UK, jurisdiction was founded there as of right.

#### 1.3.1 Forum non conveniens

Thor, RTZ and Cape - each of them domiciled in the UK - sought to stay proceedings on forum grounds. They argued that since the plaintiffs were foreign nationals working for a foreign company in a foreign country having had an accident abroad, the UK was not the appropriate forum for the action.

According to the doctrine of *forum non conveniens*, the English courts may decline jurisdiction on the grounds that there is a court in another jurisdiction which is clearly a more appropriate forum to deal with the case, in the interests of all the parties and in the interest of justice. [44]

If the court agrees to decline jurisdiction under this doctrine, it will grant a stay of proceedings so that they are provisionally suspended but can be resumed should it be proved that the foreign forum has no jurisdiction to hear the case or that the plaintiff has no access to effective justice in that forum.
The principles of the *forum non conveniens* doctrine have been laid down in the leading case Spiliada Maritime Corporation v Cansulex Ltd[45] which establishes a two-pronged test. In order to obtain a stay of proceedings on the grounds of *forum non conveniens*, the defendant must show that there is another natural forum, which is clearly more appropriate for the hearing of the case in the interests of all the parties and in the interest of justice. Usually, this is the forum in which the damage occurred. Secondly, once the defendant satisfies the first stage, the burden falls on the plaintiff to prove that regardless of the fact that the natural forum lies elsewhere, nonetheless, justice requires that the matter be heard in the prevailing court. The plaintiff has to show that substantial justice will not be done in the appropriate forum.

Thor, RTZ and Cape argued that one of the only reasons why the claimants were suing in the UK was to receive higher damages and because they were granted legal aid. The victims responded that even if the parent companies

43 Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000.
44 Spiliada Maritime Corporation v Cansulex Ltd., House of Lords, 19 November 1986. .
45 Ibid.

succeeded in showing that the more appropriate forum was South Africa or Namibia, they could not obtain justice there. Indeed, they would not get legal aid, nor could third parties fund their claims. It was notable that these were complex proceedings which could not be effectively prosecuted without legal representation and adequate funding, both of which were available in England. The English courts had then to examine whether a stay of proceedings should be refused on these grounds, in the interest of justice.

The issue of the (un)availability of legal aid became central in the Connelly and Lubbe cases, not only from a *forum non conveniens* perspective, but also for the plaintiffs' lawyers, since the possible termination of legal aid made handling the cases much riskier.

### 1.3.2 The cases – impact of the (un) availability of legal aid

#### The Thor cases

In the case initiated by Englebert Ngcobo, Deputy Judge James Stewart rejected Thor's application and motivated his decision as follows:
*"The defendants have failed to satisfy me that this case would be tried more suitably in the interests of all the parties and the ends of justice in South Africa and that South Africa is clearly or more distinctly the more appropriate forum. The plaintiffs have, in my judgement, formidable evidence available to demonstrate a nexus between negligence in England and the damage which occurred in South Africa.*
*I accept Mr. Stewart's submission that at the end of the day the toxicologists will play a major role in this case upon liability and that South Africa is not a clearly more appropriate forum for their evidence than England.*
*If I granted a stay, the plaintiffs may have difficulty in mounting their case in South Africa insofar as it relates to negligence in England, and there is a grave danger that justice would not be done".* [46]

In the Sithole case[47], the Court of Appeal[48] confirmed the refusal to grant the stay application, applying the reasoning of the trial judge i.e. the fact that the victims wished to call English expert evidence and that they alleged that the parent company had moved its factory from England to South Africa because the Health and Safety Executive had been alerted to the lack of safety regulations and procedures in the English factory.

The availability of legal aid in South Africa was not a crucial argument in any of the Thor cases. However, Deputy Judge James Stewart, in the Ngcobo case, decided to examine this issue, even though his decision to refuse to grant a stay of proceedings did not rely on the answer given:
*"Even if it were right that these Plaintiffs would not obtain legal aid in South*

46 Englebert Ngcobo & Others v. Thor Chemicals Holdings Ltd & Others, High Court of Justice, Queen's Bench Division, 11th April 1995.
47 Moses Fano Sithole is one of the plaintiffs who introduced further claims against Thor in January 1998 – see above.
48 Moses Fano Sithole & Others v. Thor Chemicals Holdings Ltd, Court of appeal, Civil Division, 3rd February 1999.

*Africa, I cannot see that Lord Goff [Judge in the Spiliada case on forum non conveniens] ever envisaged that a plaintiff's impecuniosity would of itself constitute a basis for refusing a stay"*.

### The Connely v. RTZ case

In the Connelly case, the link between the victim and Namibia was obvious. In line with the Spiliada case, Nambia was the forum with which the action had the closest connection. However, Mr. Connelly argued that the stay should, nevertheless, not be granted since he would not obtain justice in Namibia, because of the unavailability of legal aid.

Sir John Wood[49], while agreeing that Mr. Connelly would be unable to obtain legal aid in Namibia whereas it was available to him in England, held that by virtue of the Legal Aid Act 1988 the court was precluded from taking the availability of legal aid into consideration.

The Court of Appeal did not share this reasoning and instead allowed the appeal:
*"(…) I find it hard to think that the availability of legal assistance could ever lead the court to make an order which would lead to trial in a jurisdiction in which there was a significant risk that justice might not be done. But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights"*.[50]

The House of Lords subsequently refused to grant a stay of proceedings in view of the exceptional circumstances regarding the funding issue. Lord Goff of Chieveley stated:
*"(…) As a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance (…) will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. (…) It is clear that the nature and complexity of the case is such that it cannot be tried at all without the benefit of financial assistance. There are two reasons for this. The first is that (…) there is no practical possibility of the issues which arise in the case being tried without the plaintiff having the benefit of professional legal assistance; and the second is that his case cannot be developed before a court without evidence from expert scientific witnesses. It is not in dispute that in these circumstances the case cannot be tried in Namibia"*.[51]

Lord Hoffmann's dissenting opinion - the only one - calls into question the role of western jurisdictions themselves in trying western multinational companies for damages incurred abroad:

49 Connelly v. R.T.Z. Corporation Plc. & Others, High Court, Queen's Bench Division, 1st March 1995.
50 Connelly v. R.T.Z. Corporation Plc. & Others, Court of Appeal, 2nd May 1996.
51 Connelly v. R.T.Z. Corporation Plc. & Others, House of Lords, 24th July 1997.

"*I do not think that the refusal of a stay on this ground [unavailability of legal aid in the foreign forum] can be based upon any defensible principle. (…) It means that the more speculative and difficult the action, the more likely it is to be allowed to proceed in this country with the support of public funds. Such distinctions will do the law no credit.*
*Apart from the fact that his employer formed part of a multinational group of companies with its headquarters in England, the transaction had no connection with England.*
*(…) The defendant is a multinational company, present almost everywhere and certainly present and ready to be sued in Namibia. I would therefore regard the presence of the defendants in the jurisdiction as a neutral factor. If the presence of the defendants, as parent company and local subsidiary of a multinational, can enable them to be sued here, any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world"*.

### The Lubbe v. Cape case

Unlike the previous cases, Cape plc. was no longer present in South Africa when the proceedings commenced. The mines and factories operated by its subsidiaries were closed and Cape did not own any assets in South Africa anymore. The South African courts only acquired jurisdiction by virtue of Cape's offer to submit to the jurisdiction which made the Court of Appeal comes to the conclusion that "to grant a stay would effectively be allowing Cape to *"forum shop in reverse"*.[52]
The House of Lords[53] followed the same logic as had been adopted in the Connelly case. It stated that the plaintiff must, in principle, take a foreign forum as he finds it, but if he can establish that substantial justice will not be done in the appropriate forum then the stay will be refused. However, for the court to decide that the stay will be refused, it is not necessarily enough that

the plaintiffs show that legal aid is available in England but not in the more appropriate foreign forum. It then stated the following:
*"If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the Spiliada test, for refusing to stay the proceedings here"*.
The plaintiffs brought forward the argument that to stay the proceedings on forum grounds in favour of the South African jurisdictions would violate their rights guaranteed by article 6 ECHR[54] (unfair trial due to the unavailability of legal aid and thus proper representation).

52 Lubbe & Others v. Cape Plc, Court of Appeal, 30th July 1998.
53 Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000.
54 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, available at http://www.echr.coe.int.

Unfortunately, the House of Lords did not elaborate its analysis on the subject matter further, stating:
*"For reasons already given, I have concluded that a stay would lead to a denial of justice to the plaintiffs. I do not think Article 6 supports any conclusion which is not already reached on application of Spiliada principles"*.

Another question raised before the House of Lords regarding the territorial jurisdiction concerned the applicability of article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 1968.[55] According to this article, persons domiciled in a contracting State shall, whatever their nationality, be sued in the courts of that State.

The plaintiffs' lawyers maintained that article 2 precluded the English courts from granting a stay of proceedings. They invited the House of Lords to seek a ruling from the European Court of Justice if deemed necessary. However, Lord Bingham of Cornhill decided that since he was already determined to refuse to stay the proceedings, it was unnecessary to seek a ruling from the European Court of Justice to decide *"whether the effect of Article 2 is to deprive the English court of jurisdiction to grant a stay in a case such as this."* [56]

Such a ruling was handed down five years later by the European Court of Justice in a completely different case, namely Owusu v. Jackson. [57]

### 1.3.3 Owusu v. Jackson. The end of forum non conveniens?

The Owusu case halted further year-long debates on the question of territorial jurisdiction in CSR cases where UK-based multinational companies are sued before British courts.

Even if this lawsuit did not have a direct link with CSR, it did address two issues of importance for CSR litigation, namely the territorial scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and the (in)compatibility of the *forum non conveniens* doctrine with that convention.

In 1997, Mr. Owusu, a British citizen domiciled in the UK, suffered a very severe accident during a holiday in Jamaica, which rendered him quadriplegic. He brought a legal action in the UK for breach of contract against Mr. Jackson, the British resident who had let a holiday villa in Jamaica to him, and against several Jamaican companies.[58]

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55 Convention on Jurisdiction and the Enforcement of Judgments in civil and commercial matters, Brussels, 27 September 1968, in force 1 February 1973, 1262 UNTS 153; 8 ILM 229 (1969). (Brussels Convention). Available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm.

56 Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000.

57 Owusu v. Jackson & Others, ECJ, 1st March 2005, Case C-281/02, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0281:EN:HTML – see hereunder.

58 Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd and Town & Country Resorts Ltd.

The defendants applied for a stay of proceedings on forum grounds, submitting that the Jamaican court was the most appropriate forum. The first judge rejected the application, explaining that he was unable to grant a stay in so far as the Brussels Convention precluded him from granting a stay of proceedings in the action against Mr. Jackson. *"Otherwise, there would be a risk that the courts in two jurisdictions would end up trying the same factual issues upon the same or similar evidence and reach different conclusions"*.[59]

On appeal, the Court of Appeal decided to refer to the European Court of Justice for a preliminary ruling.
The following questions were asked:
*"Is it inconsistent with the Brussels Convention, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:*
*(a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;*
*(b) if the proceedings have no connecting factors to any other Contracting State?"*[60]

The ECJ first rejected the argument that the domicile rules in Article 2 of the Brussels Convention could only apply if several Contracting States are involved:
*"Of course, (…) for the jurisdiction rules of the Brussels Convention to apply at all the existence of an international element is required.*
*However, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature".*

The ECJ then had to consider whether the Brussels Convention precludes a court of a contracting State from applying the *forum non conveniens* doctrine. The court decided that the Brussels Convention *"precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State".*

59 Owusu v. Jackson & Others, ECJ, 1st March 2005, Case C-281/02.
60 Ibid.

The European Court of Justice emphasized that Article 2 of the Brussels Convention is mandatory in nature and stated that the principle of legal certainty, as one of the convention objectives, would not be fully guaranteed if the court having jurisdiction under the Convention was allowed to apply the *forum non conveniens doctrine*.

### 1.3.4 Impact and consequences of the ECJ decision in the Owusu case

The Owusu case puts an end to the controversy: UK courts clearly do not have the power to stay proceedings commenced against a UK-domiciled corporation, on the grounds of *forum non conveniens*. The ECJ decision is a welcome development given the resources and time wasted on this issue in the litigation against Thor, RTZ and Cape.[61] It ensures that the victims will no longer be asked to prove that their chosen forum is the only one which offers them access to justice.[62]

In order to assess the impact of the ECJ judgement, it must be recalled that contrary to the US – where defences of *forum non conveniens* are often successfully made in ATCA claims – in Europe, the doctrine of *forum non conveniens* is almost unknown. This doctrine is a common law doctrine, which is not used in continental Europe. Therefore, the Owusu judgment will mainly have practical consequences in the UK.[63]

The Owusu case has the potential to bring the link between CSR cases and the Brussels Convention / Brussels I Regulation to the attention of the European lawyers.[64] As the ECJ interprets it, the Brussels I Regulation system allows anybody, whether an EU national or not, to sue EU-based multinational corporations in their home State for violations of human rights committed abroad.[65]

This decision has been widely criticised. While Mr. Jackson was a UK resident, the other defendants were Jamaican companies. According to the ECJ, it is sufficient that one defendant is domiciled in an EU-country to allow the case to be tried before a European jurisdiction. Consequently, non-EU defendants may find themselves "dragged" into proceedings

61 "Memorandum submitted by Leigh Day", Joint Committee on Human Rights: Evidence, April 2009, http://www.parliament.uk/documents/upload/BHRevidence210509.pdf.

62 International Commission of Jurists, Report of the Expert Legal Panel on Corporate Complicity in International Crimes, p. 51.

63 Wouters and Ryngaert, "Litigation for overseas corporate human rights abuses in the European Union", p. 19-20; Meeran, "The Unveiling of transnational corporations: a direct approach", footnote 11; In Europe, only the courts of the UK and Ireland applied the principle of *forum non conveniens*.

64 The Brussels Convention of 1968 has been replaced, with no material differences in this respect, by the so-called Brussels I Regulation, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

65 Wouters and Ryngaert, "Litigation for overseas corporate human rights abuses in the European Union", 7. But as they underline it, very few tort cases have so far been brought in Europe (*Ibid,* 4).

before EU courts, even where neither of them nor the subject matter of the proceedings have any material connection with a European Member State. [66] Moreover, it might then prove very difficult to have the judgement delivered in such circumstances recognised and enforced outside the EU.[67]

Five years after the judgement in the Owusu case, the discussion on the doctrine of *forum non conveniens* and its implication for CSR cases is still very vivid. In its answer to the 2009 Green paper on the review of the Brussels I Regulation[68], the UK government proposed to enable proceedings properly initiated before a European jurisdiction to be halted on the grounds that the jurisdiction of the developing country, where the multinational company is operational, is a more appropriate venue for the case.[69] In other words, the UK would like to reintroduce the *forum non conveniens* doctrine bared by the ECJ judgement in Owusu.

According to the plaintiffs' lawyers in Thor, Connelly and Cape, and numerous NGOs[70], the proposition submitted by the UK government may be regarded as a retrograde step, *"a denial of justice especially for impoverished developing country victims who are frequently subjected to standards of health and safety that are lower than in the UK"*.

### 1.4 Mass action not considered as an abuse of process

Following the decision of the Court of Appeal in the Lubbe v. Cape case in 1998, where the application for a stay of proceedings was rejected, almost 2,000 additional claims were initiated against Cape. [71] At that time, Cape advanced the argument that the proceedings were launched in an abusive manner.

Cape argued that the plaintiffs' lawyers misled the Courts by failing to disclose their intention to launch a multi-plaintiff group action if jurisdiction in England was established and that the bringing of a group action was oppressive and an abuse. Even if some of the judges who subsequently handed down decisions expressed criticism of the lawyers representing the plaintiffs, none of them deemed it necessary to strike out the proceedings as an abuse of process.

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66 X, "Court has no jurisdiction to stay proceedings in favour of a non-contracting state", Herbert Smith litigation e-bulletin, 24 March 2005, available at http://www.herbertsmith.com/NR/rdonlyres/7E0897CB-A89E-4DEB-ADE4-4DF602BA941F/923/Litigation_e_bulletin_23_march_05.html.

67 The ECJ's decision in the Owusu case raised other questions to be resolved, but they are beyond the scope of this contribution. See S. Garvey, "The reform of the Brussels regulation – extending the scope?", Allen & Overy, 20 October 2009, available at http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=53505&prefLangID=410 .

68 House of Lords – European Union Committee, *Green paper on the Brussels I regulation - report with evidence* (London : The Stationery Office Limited, 2009), available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/148/148.pdf.

69 X, "Proposal to change EU Law would deny justice to multinationals' human rights victims", Leigh Day & Co., 13 January 2010, available at http://www.leighday.co.uk/news/news-archive-2010/uk-govt-proposal-to-change-eu-law-would-deny .

70 *Ibid*.

71 See above.

However, once the territorial jurisdiction issue was solved and parties started debating on the merits, the plaintiffs had to deal with the other side of the coin. The investigation of the personal injury issues relevant to each individual involves the evidence and medical examination of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived and the period for which he did so.[72] Cape required every single claimant's file to be analysed, refusing to use data collected about a few hundreds of plaintiffs that could have been statistically broadened to the whole group of claimants. This meant that by the time the case was eventually settled, 5,000 cases had been reviewed - *"a very expensive and time-consuming exercise"*.[73]

## 1.5 Conclusion

The three landmark cases discussed in this chapter pioneered the liability of European multinational companies for damages incurred at their overseas subsidiaries' plants.
The plaintiffs dared to test a new approach, i.e. *foreign direct liability – duty of care of the parent companies*. Even if the British courts did not eventually get the opportunity to hand down a judgment on this issue, the conclusion of settlement agreements in all cases highlights that the defendant companies were not in a comfortable position in this respect and that years of proceedings had also put them under pressure. The plaintiffs' legal actions will definitely benefit future cases, as they have triggered the reflection of scholars and lawyers on the approach they used and its efficiency.[74]

Secondly, the cases demonstrate that engaging in corporate accountability litigation was highly time-consuming. In all three cases, plaintiffs fought for years to have the jurisdiction of the British courts established – many of those plaintiffs died before the final decisions were reached. Eventually, this issue of territorial jurisdiction proved to be the only one to be addressed by the different courts. However, the battle against the application of the *forum non conveniens* doctrine was finally won in the interest of the most vulnerable parties. The opinion of the different judges on this issue of territorial jurisdiction has clearly evolved over time. While in the Thor case, Deputy Judge James Stewart thought it doubtful that a plaintiff's impecuniosity would of itself constitute a basis for refusing a stay of proceedings, in the Cape case the House of Lords described the situation as a *"denial of justice"* if the case had to be heard in South Africa, given the unavailability of legal aid.

Thirdly, corporate accountability is not only a matter of strengthening the legal framework. It also requires innovative ways to implement existing legislation. The judges in the Connelly and Cape cases dared to be innovative. While the general principles of *forum non conveniens* provided, at first sight, that the unavailability of legal aid is not sufficient to refuse the granting of a

72 Diagnosis, prognosis, causation (including the contribution made to a plaintiff's condition by any sources of contamination for which the defendant was not responsible) and special damage (Lubbe & Others v. Cape Plc, House of Lords, 20th July 2000).
73 Meeran, "Cape Plc: South African mineworkers' quest for justice".
74 See for example, a similar approach in "Shell", hereunder.

stay, they interpreted the principles otherwise and let the interest of the most vulnerable people prevail, refusing to let the cases be heard in a forum where they did not have substantial or adequate access to justice.

Fourthly, the influence of European Union law and jurisprudence should be highlighted. Lawsuits, like those of Owusu, which at first sight are not related to the debate on the transnational responsibility of corporations, may, nevertheless, have a decisive impact on future corporate accountability litigation in the EU Member States.

## 2 Clemenceau Case: Preventing The Unsave Dismanteling of a French Asbestos Ship on Indian Territories

On 15 February 2006, the French Council of State (Conseil d'Etat – highest administrative court) suspended the French government's decision to send Le Clemenceau, a ship containing high levels of asbestos, to the Indian beach of Alang for dismantling.[75] The suspension was requested by several French civil society organisations defending the health and environmental interests of Indian workers and people living near the Indian dismantling site. The decision of the Council of State was based on serious doubts concerning the compliance of the decisions with EU waste movement regulations. No more than one hour after the Council of State's decision, the French President announced that the Clemenceau would be towed back to France.

### Keywords

- Administrative proceedings - Suspension of export authorisation
- Aarhus Convention - Collective interests - Legal standing (Locus standi) of civil society organisations - Memorandum of association
- Danger to public health and the environment - Foreign interest - Urgency
- Basel Convention - EU waste movement regulations

### Legal issues

- *Locus standi* or legal standing of civil society organisations - Civil society organisations have access to justice in matters concerning their field of interest, as described in their articles of association.
- Foreign interests - Interests defended by civil society organisations before national jurisdictions do not have to be national interests.
- EU waste movement regulations - The EU waste movement regulations can be applied to ships destined for dismantling.

75 Council of State, 15 February 2006, N° 288801 and 288811, *Association Ban Asbestos France et autres*, available (in French) at http://arianeinternet.conseiletat.fr/arianeinternet/getdoc.asp?id=89180&fonds=DCE&item=1.

## 2.1 Facts and proceedings: the long and winding road to dismantling the Clemenceau

The French aircraft carrier *Le Clemenceau* was decommissioned in 1997 and partially dismantled in the harbour of Toulon, France. In 2005, France sold the ship to SDI, a company registered in Panama, which planned to tow the carrier to India and break it up on the beach of Alang.[76]

According to a 2006 GREENPEACE International report, the ship, presumably, carried an estimated cargo of 760 tons of asbestos after the first stage dismantling in Toulon.[77] Concerned about the environmental and health problems that the removal of the asbestos would cause in India, several civil society organisations legally opposed the departure of the ship before the court.[78]

### 2.1.1 Civil proceedings in France

In February 2005, two civil society organisations, ANDEVA[79] and BAN ASBESTOS FRANCE[80], brought the case before the Tribunal of First Instance in Paris (Tribunal de Grande Instance de Paris). The tribunal declared itself lacking in jurisdiction and found the administrative courts to be the more appropriate venue for the matter. The organisations unsuccessfully appealed this decision before the Paris Court of Appeal (Cour d'Appel de Paris).[81]

### 2.1.2 Administrative proceedings in France, Administrative Tribunal of Paris *(Tribunal Administratif de Paris)*

On 26 December 2005, several civil society organisations, including BAN ASBESTOS FRANCE and GREENPEACE France[82], applied to the Administrative Tribunal of Paris *(Tribunal Administratif de Paris)* for the suspension and annulment of three governmental decisions (1) the export authorisation for war materials delivered on 29 November 2005 concerning the *Clemenceau*, (2) the implicit rejection by the Prime Minister of the request to dismantle the *Clemenceau*

76 J. McCulloch and G. Tweedale, *Defending the Indefensible: The Global Asbestos Industry and Its Fight for Survival* (Oxford: Oxford University Press, 2008), p. 273.

77 A. B. Andersen, *The Clemenceau case – Potential Hazardous Materials Assessment*, report commissioned by Greenpeace (2006), available at http://www.greenpeace.org/international/press/reports/the-clemenceau-case-potentia.

78 BAN ASBESTOS FRANCE, «Le Clemenceau - comme tous les bateaux réformés français - doit être désamianté en France», 17 May 2005, available at http://www.ban-asbestos-france.com/communique_5.htm.

79 ANDEVA (Association Nationale de Défense des Victimes de l'Amiante) is a French organisation that strives to defend asbestos victims in France. For more information see http://andeva.fr/.

80 BAN ASBESTOS FRANCE is part of an international network of organisations aiming to contribute to the international fight against asbestos. For more information see http://www.ban-asbestos-france.com/.

81 BAN ASBESTOS FRANCE, «Le Clemenceau: La Cour d'appel refuse d'ouvrir le débat sur le fond», 10 October 2005, available at http://www.ban-asbestos-france.com/communique_11.htm.

82 GREENPEACE France is one of the 28 national and regional offices that represent GREENPEACE International worldwide. For more information see http://www.greenpeace.org/france/.

in France and (3) the decision of the Minister of Defence to transfer the carrier to India, announced by his spokesperson on 22 December 2005.[83]

French administrative law allows administrative jurisdictions to suspend a decision, by means of emergency proceedings, on the fulfilment of certain conditions: (1) the administrative decision must be the object of a request to annul or reform the decision, (2) the suspension must be justified by urgency and (3) one of the arguments raised must be capable of casting serious doubt on the legality of the decision.[84]

In a series of rulings of 30 December 2005, the Administrative Tribunal of Paris rejected the application for the suspension of the three contested decisions. According to the Administrative Tribunal of Paris, none of the petitioners' arguments were capable of generating serious doubt about the legality of the contested decisions.[85]

In January 2006, the *Clemenceau* left French territorial waters.[86]

### 2.1.3 Proceedings in India

In December 2005, the Research Foundation for Science, Technology and Natural Resource Policy[87] brought a public interest petition before the Indian Supreme Court to prevent the *Clemenceau* from entering India's territorial waters.[88]

On 6 January 2006, the Supreme Court Monitoring Committee on Hazardous Waste[89] proclaimed that transporting the *Clemenceau* to India would be considered a serious violation of the Basel Convention on hazardous waste.[90]

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83 Council of State, 15 February 2006, N° 288801 and 288811.

84 Article L. 521-1 of the French Law on Administrative Proceedings (*Code de Justice Administrative*): «Quand une décision administrative, même de rejet, fait l'objet d'une requête en annulation ou en réformation, le juge des référés, saisi d'une demande en ce sens, peut ordonner la suspension de l'exécution de cette décision, ou de certains de ses effets, lorsque l'urgence le justifie et qu'il est fait état d'un moyen propre à créer, en l'état de l'instruction, un doute sérieux quant à la légalité de la décision.»

85 Council of State, 15 February 2006, N° 288801 and 288811.

86 BBC News, «Asbestos ship on its way to India», 3 January 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4577198.stm.

87 The Research Foundation for Science, Technology and Natural Resource Policy is an informal network of researchers working in support of people's environmental struggles. The network was founded by Shiva Vandana. For more information see http://www.vandanashiva.org/ .

88 Legal correspondent, «Clemenceau will not enter India till court makes decision», The Hindu, 17 January 2006, available at http://www.hinduonnet.com/2006/01/17/stories/2006011713330100.htm.

89 The Supreme Court Monitoring Committee on Hazardous Waste was established by the Indian Supreme Court to oversee the compliance with the law, rules and regulations and directions of the Supreme Court regarding hazardous waste.

90 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, 22 March 1989, in force 5 May 1992, 1673 UNTS 126; 28 ILM 657 (1989).

Taking this into account, the Indian Supreme Court, in an interim ruling, ordered that the *Clemenceau* could not enter Indian territorial waters.[91]

### 2.1.4 Administrative proceedings in France, Council of State *(Conseil d'Etat)*

Pending the decision in India, the civil society organisations ANDEVA, BAN ASBESTOS FRANCE, COMITE ANTI-AMIANTE JUSSIEU[92], GREENPEACE FRANCE and FÉDÉRATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME (FIDH)[93] applied to the highest administrative court of France, the Council of State, (1) for the annulment of the judgment of the Administrative Tribunal of Paris of 30 December 2005 which rejected the suspension of the contested governmental decisions and (2) for the suspension of the contested decisions.

In its judgment of 15 February 2006, the Council of State reversed the judgment of the Administrative Tribunal of Paris. The Council of State stated that serious doubt existed regarding the compliance of the contested decisions with EU waste movement regulations, which do not allow the export of certain types of waste to India.[94] Therefore, the Council of State overruled the judgment of the Administrative Tribunal of Paris and suspended the contested decisions.[95]
This suspension procedure forms part of emergency proceedings whereby the court does not judge the merits of the case. On 15 February 2006, the Council of State did not judge whether or not the *Clemenceau* should have been exported, it merely decided that the contested decisions should be suspended until a judgment on the merits is rendered.

### 2.1.5 Follow-up

A judgment on the merits of the case was never rendered. Merely one hour after the Council of State's decision, the then French President, Jacques Chirac, announced that the *Clemenceau* would be towed back to France.[96]

Having towed the aircraft carrier to the French harbour of Brest, the French Ministry of Defence – in accordance with the EU waste movement regulations –

91 Legal correspondent, «Clemenceau will not enter India till court makes decision», The Hindu, 17 January 2006, available at http://www.hinduonnet.com/2006/01/17/stories/2006011713330100.htm..

92 COMITE ANTI-AMIANTE JUSSIEU is an organisation that strives to advance the prevention of asbestos risks. For more information see http://amiante.eu.org/.

93 FIDH (Fédération internationale des ligues des droits de l'homme / International Federation for Human Rights) is an international organisation which strives to protect and implement the principles of the 1948 Universal Declaration of Human Rights. For more information see http://www.fidh.org/.

94 See infra (Waste Regulations).

95 Council of State, 15 February 2006, N° 288801 et 288811.

96 P. Cassia, «Désamiantage et réglementation des déchets» (2006) 4 *Europe*, comm. 123, 24.

decided to export the carrier to the United Kingdom. The British company ABLE UK Ltd, was awarded with a contract to dismantle the former warship.[97]

## 2.2 Legal standing of civil society organisations

### 2.2.1 The relevance of a specified statutory mission

In the *Clemenceau* case, five civil society organisations launched the legal action before the French Council of State.[98]

The Council of State's judgment of 15 February 2006 establishes that these organisations have legal standing to defend *collective interests*. Civil society organisations may obtain legal standing if they may demonstrate requisite interest in the matter. The organisation's articles of association must indicate involvement in the field in which the contested decision has been taken. This shall be deemed sufficient proof of a requisite interest.

The Council of State granted ANDEVA, BAN ASBESTOS FRANCE, COMITE ANTI-AMIANTE JUSSIEU and GREENPEACE FRANCE legal standing because the contested decisions related to the transfer of waste, a field in which all these non-governmental organisations are involved according to their articles of association.[99]
*"Considering that it follows from the articles of association (…) that the prescribed purpose of these organisations is (…) to achieve the definitive prohibition of all use of asbestos (…), to protect the environment (…), to prevent asbestos risks (…); that therefore the decisions, the suspension of which is requested, are not taken in an unrelated domain to that of the purposes of the organisations; thus, that these [organisations] possess the necessary interest to request an annulment."*[100]

97 The permission of the British Health and Safety Executive to dismantle the *Clemenceau* in the United Kingdom was unsuccessfully challenged by a member of 'Friends of Hartlepool', a town close to the British dismantling site. *The Queen on the Application of Kennedy v. The Health and Safety Executive, Able UK Ltd* [2009] WL 6427; [2009] EWCA Civ 25 CA (Civ Div).

98 BAN ASBESTOS France, GREENPEACE France, COMITE ANTI-AMIANTE JUSSIEU, ASSOCIATION NATIONALE DE DEFENSE DES VICTIMES DE L'AMIANTE (ANDEVA) and the Fédération internationale des ligues des droits de l'homme (FIDH).

99 The Council of State also specified that the fact that the memorandum of association of the organisation does not state that it will take legal action to protect the general interest of its members, does not deprive the organisation of the possibility to engage in legal action.

100 Council of State, 15 February 2006, N° 288801 and 288811. Unofficial translation, original text: « Considérant qu'il ressort des statuts (…), que ces associations ont pour objet social, (…) de parvenir à l'interdiction définitive de toutes les utilisations de l'amiante (…) la protection de l'environnement (…) la prévention (…) du risque amiante (…); qu'ainsi les décisions dont la suspension est demandée (…) n'ont pas été prises dans un domaine étranger à celui de l'objet social des associations requérantes; que celles-ci ont donc intérêt à en demander l'annulation ».

The French Supreme Court (Cour de Cassation) made a similar decision in 2007 by stating that "an organisation can obtain legal standing to defend collective interests in court, if these [interests] fall within their [prescribed] purpose".[101]
In this case, the International Federation for Human Rights (FIDH) was denied such legal standing due of its lack of interest. This decision was in alignment with the conclusion of the Commissaire du Gouvernement[102] who stated that the FIDH should not be granted legal standing given the extremely general character of its field of interest, namely the defence of human rights.[103] The Council of State stated:
"Considering that the contested authorisation was granted in a field unrelated to the prescribed purpose of the International Federation for Human Rights; that, consequently, the International Federation for Human Rights does not have an interest and therefore does not have legal standing to intervene (...)"[104]

### 2.2.2 The Aarhus Convention

As demonstrated in the *Clemenceau* case, "an interest" is interpreted in relatively broad terms by the French courts in environmental matters. This is described as an advantage by a 2007 study on access to justice in environmental matters ordered by the European Commission in the context of the implementation of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[105]

Most European States[106] are parties to the Aarhus Convention[107] and have therefore undertaken to ensure access to justice in environmental matters

101 Supreme Court, 26 September 2007, Bulletin 2007, III, N° 155. Original text: « Mais attendu qu'une association peut agir en justice au nom d'intérêts collectifs, dès lors que ceux-ci entrent dans son objet social ».

102 The *Commissaire du Gouvernement* is a member of the court who gives his independent legal opinion concerning the relevant case. He makes his position public before the deliberation of the court, in which he does not take part. Currently, the *Commissaire du Gouvernement* is called the *Rapporteur Public*.

103 M. Yann AGUILA, Conclusions preceding the decision of the Council of State of 15 February 2009, available at http://amiante.eu.org/Autres/Clem/aguila.pdf.

104 Council of State, 15 February 2006, N° 288801 and 288811. Unofficial translation, original text: « *Considérant que l'autorisation contestée a été prise dans un domaine étranger à celui de l'objet social de la Fédération internationale des ligues des droits de l'homme ; que, par suite, la Fédération internationale des ligues des droits de l'homme est sans intérêt et, dès lors, sans qualité, pour intervenir (…) ».*

105 Milieu Ltd., *Inventory of EU Member States' measures on access to justice in environmental matters*, study commissioned by the European Commission (2007), available at http://ec.europa.eu/environment/aarhus/study_access.htm. This study gives an excellent overview of access to justice issues such as costs, availability of interim measures and legal standing in twenty-five member states.

106 As of 2 November 2009, there are 44 Parties to the Aarhus Convention, including the EU and all EU member states, except Ireland.

107 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 28 June 1998, in force 30 October 2001, 2161 UNTS 447; 38 ILM 517 (1999).

as described in its Article 9 (3).[108] The Compliance Committee of the Aarhus Convention has determined that Article 9 (3) allows the Parties to "employ some sort of criteria (e.g. being affected by or of having an interest in the matter) to be met by members of the public in order to be able to challenge a decision"[109], however, it may not be used "as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment".[110]

Compliance with the convention is reviewed by the aforementioned Compliance Committee which makes non-binding recommendations to the Parties. The compliance mechanism may be triggered by any member of the public through a "communication" with the Compliance Committee concerning a Party's compliance with the Convention.[111] Thus, if a European court refuses to allow a member of the public (or a civil society organisation) to obtain access to justice in an environmental matter in which he has an interest, this may be challenged before the Compliance Committee of the Aarhus Convention.

### 2.3 Foreign interests: defending Indian interests before a French court

By commencing administrative proceedings in France, French organisations are attempting to protect the health and environment of the people of India. In other words, French civil society organisations are defending *foreign interests*.

The issue of *foreign interests* was only addressed in passing when the Council of State discussed the *urgency* requirement for suspension of the contested decisions.[112] The requirement of *urgency* is met whenever the execution of an administrative act would cause damage, in a sufficiently serious and immediate way, to "a public interest, to the situation of the applicant, or to the interests that the applicant seeks to defend".[113]

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108 Article 9 (3) Aarhus Convention: "In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

109 Compliance Committee, Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organisations to have access to justice, UN Doc. ECE/MP.PP/C.1/2006/4/Add.2 (2006), para. 36.

110 *Ibid* , para. 35.

111 Decision I/7 on Compliance, Report of the first session of the Meeting of the Parties to the Aarhus Convention, UN Doc. ECE/MP.PP/2/Add. 8, paras. 18-24; For more information see Compliance Committee, *Information sheet on communications from the public*, available at http://www.unece.org/env/pp/compliance/Pubcom1109.doc.

112 Supra (Administrative Proceedings in France).

113 Council of State, 15 February 2006, N° 288801 and 288811.

The Council of State found that the danger to public health and the environment that could materialize once the dismantling in India begins, is of such nature as to pose a serious and immediate threat to the interests defended by the applicants:

*"(…) the risks regarding the environmental and public health protection arising from the fact that, after the approval of the Indian authorities, which may be granted in the near future, the hull of the Clemenceau could enter the waters under the sovereignty of that country, for dismantling operations of which the commitment would be irreversible, are likely to sufficiently seriously and immediately undermine the interests defended by the petitioning associations."*

The French Council of State rendered the extraterritorial interests of Indian workers and people living close to the scrapping-beaches defensible in a French court through a broad interpretation of the legal standing of civil society organisations and their interests.[114]

This may create a valuable precedent for future cases involving the interests of foreign populations brought before national jurisdictions, especially if strict legal provisions on standing and interests are lacking.

## 2.4 Waste regulations: how the pride of a nation becomes hazardous waste

The *Clemenceau* case clarifies that the EU waste movement regulations[115] can be applied to ships, even ships outside the European Union, under certain conditions. Taking into consideration that forty percent of the world merchant ships are owned by European corporations,[116] this case presents numerous possibilities to ensure the environmentally sound recycling of ships, especially those containing materials prohibited in Europe, such as asbestos.

### 2.4.1 Definition of waste

The Council of State found that the *Clemenceau*, due to its high level of asbestos, must be considered as "waste" in the sense of Council Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community[117], which is directly applicable since 6 May

114 J. Bomhoff, «Retour au Port pour 'Le Clemenceau' : Council of State Decision on French Aircraftcarier», 17 February 2006, available at http://comparativelawblog.blogspot.com/2006_02_01_archive.html.

115 Council Regulation 259/93/EEC of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1993 No. L30, 6 February 1993; replaced by Regulation 1013/2006/EC of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ 2006 No. L190, 12 July 2006.

116 Council of the European Union, *Council Conclusions on an EU Strategy for better ship dismantling*, 2968th Environment Council meeting, Luxembourg, 21 October 2009, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/110626.pdf .

117 Council Regulation 259/93/EEC.

1994. The court recalls that, in defining "*waste*", Council Regulation 259/93 refers to Article 1 of Council Directive 75/442 on waste.[118] This article states that *"waste means any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force"*.[119]

The alternative requirements of Article 1 of Council Directive 75/442 are both fulfilled in the case of the *Clemenceau*. Firstly, Annex I of the 1975 Directive identifies as waste: *"(...) Any materials, substances or products whose use has been banned by law"*, and French national law prohibits the use of asbestos since 1996.[120] Secondly, the Council of State looked at the action of the French State and found that the decision to remove the asbestos and demolish the airport carrier was explicitly made in the call for tenders and in the sales contract concerning the Clemenceau. The Council of State thus concluded that the intention of the State to dispose of the carrier was sufficiently shown.

### 2.4.2 Export of waste

Having qualified the asbestos-containing aircraft carrier as "*waste*", the Council of State investigated whether the EU waste movement regime[121] allows the export of this waste to India. Depending on the aim of the exportation, Council Regulation 259/93 lays down various export prohibitions. [122]

If the aim is disposal, Article 14 of the Council Regulation 259/93 states that *"all exports of waste for disposal shall be prohibited, except those to EFTA countries which are also parties to the Basel Convention"*. If recovery of the waste is the goal of the exportation, Article 16 of the Regulation prohibits the export of waste described in Annex V with the exception of export to those countries that fall within the scope of the OECD decision of 30 March 1992 on the Control of Transfrontier Movements of Wastes Destined for Recovery Operations.[123]

By prohibiting export to third countries, the EU waste movement regime strives to protect the environment of those countries.[124] Exceptions are made for EFTA countries which are Parties to the Basle Convention and countries that fall within the scope of the 1992 OECD Decision. These countries are

118 Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 No. L194, 25 July 1975.

119 Emphasis added.

120 French Decree No. 96-1133 of 24 December 1996 regarding the prohibition of asbestos. (*Décret n°96-1133 du 24 décembre 1996 relatif à l'interdiction de l'amiante*.)

121 Council Regulation 259/93/EEC of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1993 No. L30, 6 February 1993; replaced by Regulation 1013/2006/EC of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ 2006 No. L190, 12 July 2006.

122 For an in-depth analyses see F. Braud and A. Moustardier, «Le Clemenceau: jusqu'où l'Etat français aura tenté d'éluder la législation sur les déchets» (2006) 3 *Environnement*, étude 5.

123 OECD Decision on the Control of Transfrontier Movements of Wastes Destined for Recovery Operations, C(92)39/FINAL (1992).

124 Council Regulation 259/93/EEC, preamble.

subjected to specific provisions that guarantee the environmentally sound management or recovery of waste.

As India is neither a party to the EFTA nor to the OECD, the Council of State found that, whatever the aim of the exportation (whether disposal or recovery), the Administrative Tribunal of Paris wrongly decided not to recognize the serious doubt concerning the legality of contested decisions by ignoring Regulation 259/93.
*"(...) in finding that none of the methods used was of a nature, given the available information, to create a serious doubt regarding the legality of those decisions for which the suspension was requested, whereas (...) the method employed through the ignoring of the regulation of 1 February 1993 is of a nature to create such doubt, the judge [of the Administrative Tribunal of Paris] has made an error in law, that therefore, the plaintiffs have grounds to demand the annulment of the contested rulings."* [125]

### 2.4.3 New EU regulations and the Hong Kong Convention

After 15 February 2006, some changes have occurred in the European waste movement regime. In an attempt to streamline and reinforce the existing waste regime, Council Regulation 259/93 and Council Directive 75/442 have been replaced respectively by Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste[126] and Directive 2006/12 of the European Parliament and of the Council of 5 April 2006 on waste.[127] However, these new instruments contain similar provisions to the instruments discussed in the Clemenceau case and therefore do not diminish the value of this case in view of future litigation.

As demonstrated by the Clemenceau case, the waste movement regime of the EU is considered to be applicable to ships destined for dismantling.[128] Although the Council Regulation of 1 February 1993 is seen as the transposition of the Basel Convention, some non-European Parties to the Basel Convention do not consider the Convention to apply to end-of-life vessels. In an attempt to address this lack of regulation in international law the International Maritime Organisation adopted The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships in

125 Unofficial translation. Original text : « (…) en jugeant qu'aucun des moyens soulevés n'était de nature, en l'état de l'instruction, à créer un doute sérieux sur la légalité des décisions dont la suspension était demandée, alors (…) que le moyen tiré de la méconnaissance du règlement du 1er février 1993 est de nature à créer un tel doute, le juge des référés a commis une erreur de droit ; que, dès lors, les associations requérantes sont fondées à demander l'annulation des ordonnances attaquées. »

126 Regulation 1013/2006/EC.

127 Directive 2006/12 of the European Parliament and of the Council of 5 April 2006 on waste, OJ 2006 No. L144, 27 April 2006.

128 For another national application of the EU regulation on waste movement to the scrapping of ships see the Dutch Otapan case (Council of State, 21 February 2007, N° 200606331/1, *Stichting Greenpeace Nederland and others v. State Secretary for Housing, Spatial Planning and the Environment*, available at http://ec.europa.eu/environment/waste/ships/pdf/otapan.pdf.)

May 2009.[129] However, this Convention has been heavily criticized by civil society organisations for its failure to represent an equivalent level of control to the Basel Convention.[130]

## 2.5 Conclusion

The case establishes that civil society organisations can obtain access to justice to defend *collective interests* in matters concerning their field of interest. To determine whether the matter falls within the field of interest of the organisation the Council of State takes into account the articles of association of the organisation, including its prescribed purpose. While not all EU Member States offer such broad legal standing to organisations, the Aarhus Convention offers access to justice in environmental matters when national criteria are fulfilled. If the effect of these criteria is to bar (almost) all environmental organisations to obtain access to justice, this may be challenged before the Compliance Committee of the Aarhus Convention.

Secondly, this case shows that the *collective interests* defended by civil society organisations before national jurisdictions do not exclusively need to be *national interests*. By allowing civil society organisations to obtain legal standing in national proceedings to defend *foreign interests*, national jurisdictions bring foreign interests within their range of influence. This situation presents new potential for future litigation in European national jurisdictions concerning the defence of victims of corporate abuse outside Europe.

Finally, the *Clemenceau* case opens up the scope of the application of EU waste movement regulations, which aim to ensure the environmentally sound recycling of waste, by applying them to ships destined for dismantling. This jurisprudence also contributes, in broad terms, to the prevention of the exportation of hazardous waste, including ships, to poor countries in the South.

129 International Convention for the Safe and Environmentally Sound Recycling of Ships, Hong Kong, 9 May 2009, IMO Doc. SR/CONF/45, available at http://ec.europa.eu/environment/waste/ships/pdf/Convention.pdf.

130 NGO platform on shipbreaking, "Statement of Concern on the new I.M.O. Convention on shipbreaking", 27 April 2007, available at http://www.shipbreakingplatform.com/dmdocuments/submissions/Statement_of_Concern_IMO_Convention.pdf.

# 3 The Van Anraat Case: Individual Criminal Liability for the Supply of Raw Materials Used for the Production of Chemical Weapons

On 9 May 2007, the Court of Appeal of The Hague (Gerechtshof's-Gravenhage) held Frans Van Anraat, a Dutch national, personally complicit in the commission of war crimes committed by Saddam Hussein and his accomplices.[131] Van Anraat supplied raw materials for chemical weapons that were used during the war with Iran and caused the deaths of thousands of civilians. Basing its decision on the fact that Van Anraat was fully aware of the use that would eventually be made of these materials and the consequences thereof, the Court of Appeal of The Hague sentenced him to seventeen years of imprisonment.

## Key words

- Complicity in war crimes - Criminal liability of an individual
- Active nationality principle - Universal jurisdiction
- Causality - Chemical Weapons Convention - Complicity in genocide - Complicity in war crimes - Mens rea
- General prevention - Increased vigilance

## Legal issues

- Active nationality principle. By applying the principle of active nationality, a Dutch court is able to convict a Dutch national for complicity in crimes committed abroad.
- Mens rea element in complicity. The Court of Appeal of The Hague does not explicitly reject the application of a domestic, less strict, standard of intent in the assessment of an international crime.
- General prevention. People and companies that conduct international trade can be held liable if they do not exercise vigilance.

131 Court of Appeal of The Hague (*Gerechtshof 's-Gravenhage*), 9 May 2007, N° 2200050906-2, LJN: BA6734, available (Official translation in English) at http://www.rechtspraak.nl/ljn.asp?ljn=BA6734.

## 3.1 Facts and proceedings

Frans Van Anraat, a Dutch businessman born in 1942, sold chemical supplies - such as thiodiglycol, an industrial chemical which can be used to make mustard gas - to Iraqi companies directly linked with Saddam Hussein's regime.[132] Van Anraat sold these supplies through his company, *FCA Contractor,* which was liquidated in 1992.[133] The chemicals provided by Van Anraat were used during several mustard-gas attacks, including the attacks against the Iranian town of Sardasht in 1987 and the attacks against the Kurdish city of Halabja in 1988.[134] The poison gas killed and maimed tens of thousands of civilians. [135]

### 3.1.1 Criminal investigations in the U.S.

Some of the thiodiglycol was delivered to Van Anraat by Alcolac Inc., a company based in Baltimore. Alcolac Inc. pleaded guilty in 1989 to knowingly violating export laws in the case of a shipment of thiodiglycol that ultimately went to Iran.[136] Criminal investigation by U.S. Immigration and Customs Enforcement found that Van Anraat had been involved in organizing the shipments of thiodiglycol delivered by Alcolac Inc. Consequently, Van Anraat, who was living in Italy at the time, was arrested by the Italian authorities in 1989 at the request of the U.S. government.[137]

Pending the Italian proceedings regarding his extradition to the United States, Van Anraat fled to Iraq, where he managed to stay clear of American justice.[138] During the American invasion of Iraq in March 2003, Van Anraat returned to The Netherlands. [139]

### 3.1.2 Criminal proceedings in The Netherlands: District Court of The Hague *(Rechtbank 'S-Gravenhage)*

In The Netherlands, Van Anraat presumably lived as a protected informer of the Dutch Intelligence Service. After discovering Van Anraats plans to secretly leave The Netherlands, Dutch authorities arrested him on 6 December 2004.[140]

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132 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2.

133 "Dutchman tied to gas attack", The Washington Times, 7 December 2004, available at http://www.washingtontimes.com/news/2004/dec/07/20041207-095553-3769r/.

134 *Ibid*.

135 Human Rights Watch, «Whatever Happened To The Iraqi Kurds?», 11 March 1991, available at http://www.hrw.org/legacy/reports/1991/IRAQ913.htm#24.

136 Eric Rich, "Baltimore Firm Part of Probe Of Poison Gas Dutch Authorities Tracking Chemicals Used by Iraq", Washington Post, 9 November 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801703.html.

137 *Ibid.*

138 H. Van der Wilt, "Genocide, Complicity in Genocide and International v. Domestic Jurisdiction – Reflections on the Van Anraat case" (2006) 4 *Journal of International Criminal Justice*, 240.

139 *Ibid.*

140 *Ibid.*

Van Anraat was charged with complicity in war crimes and complicity in genocide.[141] Prosecutors intended to prove that he knew that the chemicals he had shipped would be turned into poison gas and used against Saddam's enemies, including civilians.[142]

On 23 December 2005, the District Court of The Hague *(Rechtbank 's-Gravenhage)* found that the diverse attacks against the Kurdish population between May 1985 and 6 September 1988, constituted acts of genocide.[143] Nevertheless, Van Anraat was acquitted of the charge of genocide, as it could not be proven that he knew of the genocidal intent of the regime.[144]

The District Court of The Hague did, however, find that Van Anraat's deliveries facilitated the attacks and as such, constituted serious war crimes.[145]
*"It has been established that the suspect, knowingly and out of pure greed, made an essential contribution to Iraq's chemical weapons programme in the eighties. His contribution has allowed, or at least facilitated, a large number of mustard gas attacks on defenceless civilians. These attacks constitute very serious war crimes."*[146]

The court imposed a sentence of fifteen years of imprisonment and accorded 680 Euros to each of the fifteen Kurds, who joined the trial as civil parties and claimed this symbolic amount in compensation for their losses suffered.[147]

### 3.1.3 Criminal proceedings in The Netherlands: Court of Appeal of The Hague *(Gerechtshof 'S-Gravenhage)*

Both the defendant and the public prosecutor lodged an appeal against this sentence to the Court of Appeal of The Hague.

In its judgment of 9 May 2007, the Court of Appeal of The Hague partly upheld the decision of the District Court. The Court of Appeal confirmed that Van Anraat was innocent of complicity in genocide but guilty of complicity in war crimes. The court raised Van Anraat's sentence to seventeen years holding that he was motivated by greed and repeatedly sold chemicals knowing they were being turned into mustard gas.[148]
*"The defendant has made an essential contribution to these violations – at a time when many, if not all other suppliers 'pulled out' with regard to the increasing international pressure – by supplying many times in the course of*

141 District Court of The Hague, 23 December 2005, LJN: AU8685, available (only in Dutch) at http://www.rechtspraak.nl/ljn.asp?ljn=AU8685.
142 *Ibid.*
143 *Ibid.*, s. 7.
144 *Ibid.*, s. 8.
145 *Ibid.*, s. 17.
146 Unofficial translation. Original text: "Vast is komen te staan dat verdachte bewust en uit louter winstbejag een essentiële bijdrage heeft geleverd aan het chemische wapenprogramma van Irak in de jaren tachtig van de vorige eeuw. Zijn bijdrage heeft een groot aantal met mosterdgas uitgevoerde aanvallen op weerloze burgers mogelijk gemaakt, althans vergemakkelijkt. Deze aanvallen vormen zeer ernstige oorlogsmisdrijven."
147 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2., s. 21.
148 *Ibid*. s. 16.

*several years (among other matters) very large quantities of a precursor for mustard gas; in doing so the defendant made significant profits. Those supplies enabled the Iraqi regime to (almost) continue their deadly (air) attacks in full force during a number of years. Apparently, the defendant did not give his deliberate support to the aforementioned gross violations out of sympathy for the targets of the regime, but – as it should be assumed – the defendant acted exclusively in pursuit of large gains and fully neglected the consequences of his actions."*

The Court of Appeal of The Hague reversed the decision of the District Court on damages. Dutch law only allowed civil claims within the framework of a criminal case if the principle of simplicity[149] is not violated. Finding that the civil claims brought by the Kurdish victims were not of a simple nature, the Court of Appeal did not allow the claims.[150] The victims consequently claimed compensation in a separate civil proceeding.[151]

### 3.1.4 Criminal proceedings in The Netherlands: Supreme Court *(Hoge Raad)*

Both Van Anraat and the civil parties appealed the decision of the Court of Appeal to the Dutch Supreme Court *(Hoge Raad)*. The Supreme Court does not reinvestigate the facts of an appealed case. Instead, it annuls a judgment if the judgment constitutes a violation of the law or a violation of formal requirements.[152]
In its decision of 30 June 2009, the Supreme Court stated that it would not annul the decision of the Court of Appeal of The Hague, as none of the arguments put forward by the parties established that a violation of the law or a violation of formal requirements had occurred. [153] Concerning the civil claims, the Supreme Court stated that the criminal court did not act contrary to the law when it declined to deal with these claims.[154]
The Supreme Court did, however, decrease the length of Van Anraat's sentence by six months due to the lengthy duration of the proceedings before the Supreme Court.[155] Frans Van Anraat is currently serving a sixteen and a half year prison sentence in the prison of Zoetermeer, The Netherlands.

### 3.1.5 Civil proceedings in The Netherlands

On 23 December 2009, the hearing of an action filed by the fifteen aforementioned Kurdish victims commenced before a Dutch civil court. Their claim is

149 Unless the claims are of a simple and transparent nature, they cannot be treated within the framework of criminal proceedings.
150 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2., s. 18.
151 Infra (Civil proceedings in The Netherlands).
152 Article 79 Dutch Act of the Composition of the Judiciary and the Organisation of the Justice System (*Wet op de Rechtelijke Organisatie - Wet RO*).
153 Supreme Court, 30 June 2009, N° 07/10742, LJN: BG4822, available (in Dutch) at http://www.rechtspraak.nl/ljn.asp?ljn=BG4822, s. 16.
154 Ibid., s. 13.
155 Ibid, s. 14.

for compensation in the sum of 25 000 Euros each for their losses suffered.[156] In The Netherlands, victims largely depend on the prosecutor - who has the exclusive right to prosecute - in criminal cases.[157] Therefore, victims often start civil proceedings after the criminal liability of the perpetrator has been established by a criminal court.[158]

### 3.2 Active nationality principle: the national conviction of international crimes

Although the crimes in which Van Anraat was found complicit could not be localized to the territory of The Netherlands, the Dutch prosecutor was able to bring Van Anraat to trial due to the *principle of active nationality*.[159] This principle implies that States can exercise extraterritorial criminal jurisdiction over offences which did not occur on their own territory, if the offender is one of their nationals.[160] Another application of this principle can be found in the prosecution of Guus Kouwenhoven, a Dutch entrepreneur who is accused of smuggling arms and committing war crimes in Liberia and Guinea.[161]

The Netherlands and other European countries, such as Belgium, Germany, Norway and the United Kingdom apply domestic international criminal law statutes to grave breaches committed by their nationals abroad.[162]

In the Van Anraat case, the District Court of The Hague based its jurisdiction on Article 3, 3° of the Dutch Criminal Law in Wartime Act *(Wet Oorlogsstrafrecht - WOS)*

156 ANP, AP, RNW, "Iraqi Kurd gas victims sue Dutchman for damages", NRC Handelsblad, 23 December 2009, available at http://www.nrc.nl/international/article2444520.ece/Iraqi_Kurd_gas_victims_sue_Dutchman_for_damages/.

157 Victims do have the right to complain in cases of non-prosecution and there is a limited possibility to testify in court and to obtain damages.

158 For a detailed analysis concerning civil remedies in The Netherlands see N. Jägers and M.-J. van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2007-08) 33 *Brooklyn Journal of International Law*, 3, 833.

159 Another application of this principle can be found in the prosecution of Guus Kouwenhoven. This Dutch businessman was accused of war crimes in Liberia and Guinea and of violation of the Dutch arms embargo, but was fully acquitted by the Court of Appeal of The Hague. L. van den Herik, "The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia" (2009) 9 *International Criminal Law Review*, 215; Court of Appeal of The Hague, 10 March 2008, N° 22-004337-06V, LJN: BC7373, available (in English) at http://www.rechtspraak.nl/ljn.asp?ljn=BC7373.

160 A. Ramasastry and R. Thompson, *Commerce, crime and conflict: legal remedies for private sector liability for grave breaches of international law: a survey of sixteen countries: executive summary* (Oslo: FAFO, 2006), available at http://www.fafo.no/pub/rapp/536/536.pdf, p. 16.

161 On 20 April 2010, the Dutch Supreme Court overturned the acquittal of Guus Kouwenhoven by the Court of Appeal of The Hague. Court of Appeal of The Hague, 10 March 2008, N° 22-004337-06V, LJN: BC7373, available (in English) at http://www.rechtspraak.nl/ljn.asp?ljn=BC7373; Supreme Court, 20 April 2010, N° 08/01322, LJN: BK8132, available (in Dutch) at http://www.rechtspraak.nl/ljn.asp?ljn=BK8132.

162 Ramasastry and Thompson, Commerce, crime and conflict, p. 16.

which implements the *principle of active nationality* for certain (international) crimes committed abroad. [163]

The *principle of active nationality* may not be confused with the principle of universal jurisdiction. Some European countries exercise criminal jurisdiction over all persons whose alleged crimes were committed anywhere in the world - irrespective of their nationality or country of residence.[164] Since 1 October 2003, the Dutch International Crimes Act (Wet Internationale Misdrijven - WIM), which implements the Rome Statute of the International Criminal Court[165], allows the Dutch courts to exercise universal jurisdiction over genocide, crimes against humanity, war crimes and torture.[166]

Both the principles of active nationality and of universal jurisdiction can be applied to natural persons, as in the Van Anraat case, as well as to legal persons. In The Netherlands, no distinction is made between the criminal liability of individuals and the criminal liability of legal persons.[167] Other European countries, such as Belgium, France, Norway and the United Kingdom also allow the criminal prosecution of legal persons for certain international crimes.[168]

### 3.3 Complicity in genocide, complicity in war crimes

Most countries consider complicity, or aiding and abetting, a crime in itself.[169] To establish complicity, two elements must be proven: (1) the *mens rea*, criminal intent of the suspect, and (2) the *actus reus*, the suspect's act in assisting the commission of the crime.

#### 3.3.1 Intent: national standards for international crimes?

In regard to the mens rea required to establish complicity in genocide, the Court of Appeal of The Hague allows room for a lenient interpretation.

According to the Court of Appeal of The Hague:
*"(...) international criminal law is still in a stage of development and does not seem to have crystallized out completely. The main question, which has not yet been answered unanimously in all respects, is whether the accessory*

163 The Dutch Criminal Law in Wartime Act (*Wet Oorlogsstrafrecht – WOS,* 10 July 1952) was partly replaced by the Dutch International Crimes Act (*Wet Internationale Misdrijven – WIM*, 1 October 2003). However, Article 1.2 of the Dutch Penal Code (*Wetboek van Strafrecht*) obliges the court to use the criminal law most favorable to the suspect (if the law has changed), in this case the Criminal Law in Wartime Act. (District Court of The Hague, 23 December 2005, LJN: AU8685, s. 16).
164 Ramasastry and Thompson, Commerce, crime and conflict, p. 16; Examples are the United Kingdom and The Netherlands.
165 Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.
166 Under Dutch law u*niversal jurisdiction* is premised on the presence of the suspect on Dutch territory.
167 Article 5 Dutch Penal Code (*Wetboek van Strafrecht*).
168 Ramasastry and Thompson, Commerce, crime and conflict, p. 16.
169 Ramasastry and Thompson, Commerce, crime and conflict, p. 17.

*must have "known" that the perpetrator acted with a genocidal intention or that a lesser degree of intention is sufficient, compared to or similar to the conditional intention as accepted in the Dutch legal system, or in other words: willingly and knowingly accepting the reasonable chance that a certain consequence or a certain circumstance will occur. The Court wishes to add that it holds the opinion that the legal history of the International Crimes Act does not provide an unambiguous answer for this matter either. (...)*
*The Court believes that it has not been legally and convincingly proven that his intentional act, not even in a conditional way, was also targeted at the genocidal intention of the perpetrators."*[170]

The Court of Appeal does not state that the *mens rea* for complicity in genocide can only be established if the accomplice has *positive knowledge* of the genocidal intentions of the main offender[171], and by negating to do so, the Court has opened the door for a less strict requirement of *mens rea - dolus eventualis*, foreseeability.[172]

International criminal law and case law do not unambiguously establish whether an accomplice must have actual, *positive knowledge*[173] or conditional intent, *dolus eventualis*.[174] Dutch criminal law explicitly accepts *dolus eventualis*; it is sufficient that the accomplice was aware of the considerable chance that the principal would plan to commit genocide and that his assistance would aid the accomplishment of this goal.[175]

The Court of Appeal of The Hague does not hold it as legally and convincingly proven that, at the time of delivery of the substances, Van Anraat was aware of the chance that Saddam Hussein and his accomplices would plan to commit genocide and that his assistance would aid the accomplishment of this goal.[176] Given this conclusion, the court finds it redundant to investigate whether the main offence of genocide was committed.[177]

When considering whether the *mens rea* requirement for war crimes was fulfilled in the present case, the Court of Appeal found that the stricter standard of *positive knowledge* was met. Taking into account Van Anraat's knowledge of the political situation, his expertise in the properties of thiodiglycol and his

170 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2, s. 7. (emphasis added)
171 Awareness that one is engaging in certain conduct and practical certainty regarding the occurrence of a given result (dolus directus).
172 For a more detailed analyses see van der Wilt, "Genocide v. War Crimes in the Van Anraat Appeal", 560-562.
173 This approach was adopted by the ad hoc tribunals in *Bagilishema* (ICTR-95-1A-T), Trial Chamber, 7 June 2001, para. 71; *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003, para. 388; *Tadic* (IT-94-1-A), Trial Chamber, 16 November 1998, para. 229; For a definition of positive knowledge see glossary.
174 Dolus eventualis was accepted by an ICTR Trial Chamber in *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 541; For a definition of dolus eventualis see glossary.
175 Van der Wilt, "Genocide, Complicity in Genocide and International v. Domestic Jurisdiction", 249.
176 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2, s. 7.
177 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2, s. 7.

efforts to conceal the nature and destination of his merchandise, the court concluded that Van Anraat was aware that the chemical weapons for which he provided the raw materials would be used by Iraq in the war against Iran.[178] *"From the defendant's awareness of the fact that his supplies of [thiodiglycol] served for the production of mustard gas in a country that was involved in a long lasting war with a neighbouring country and of the efforts to conceal the supplies of a precursor of that gas and the production of the poison gas itself, follows defendant's awareness that the mustard gas was going to be used by Iraq in the war that Iraq fought against and in Iran and against the allies, and/or those states which were considered as such in the sense that they were involved in an armed conflict with the Iraqi regime, and that this use of mustard gas has actually taken place"*.[179]

As shown by the Van Anraat case, national courts cannot rely on unambiguous international standards to interpret domestic international criminal law statutes. Given that domestic international criminal law statutes remain relatively untested in most countries[180], domestic standards of interpretation are yet to be developed and there remains room for - a more or less strict - interpretation of the mens rea requirement by domestic courts.

### 3.3.2 Causality: linking the merchandise with the crime

The conviction of Van Anraat was based on his complicity in war crimes. The prosecutor established (1) that the chemicals provided by Van Anraat were the same chemicals Iraq used to produce chemical weapons and (2) that those chemical weapons were used to commit the proven war crimes.

The Court of Appeal of The Hague stated that:
*"As of 1985, the supplementation of the essential precursor [thiodiglycol] to the Iraqi regime depended completely on those supplies made by the defendant.(...) For that reason, the unwholesome policy that was continuously carried out by the regime from 1984 onwards seemed to find it necessary to deploy hundreds of tons of this poison gas during combat, depended to a decisive extent if not totally, on those supplies. Taking into consideration the crucial significance that the shipments of [thiodiglycol] supplied by the defendant since 1985 had for the chemical weapon program of the regime, the Court finds the defendant (together with his co-perpetrators) guilty of being an accessory to providing the opportunity and the means for the proven attacks with mustard gas in the years 1987 and 1988."*[181]
The Court established the necessary causal link between the substances delivered by Van Anraat and the chemical weapons used to commit war crimes thanks to the fact that the supplies by other companies of thiodiglycol to Iraq stopped no later than 1984.[182]

178 For a more detailed analyses see van der Wilt, "Genocide v. War Crimes in the Van Anraat Appeal", 562-563.
179 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2, s. 11.16.
180 Ramasastry and Thompson, Commerce, crime and conflict, p. 21.
181 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2, s. 12.5.
182 *Ibid.*

Proving *causality* may constitute a much higher hurdle in cases were several companies deliver weapons or precursors to weapons.

#### Chemical Weapons Convention (1997)[183]

The Chemical Weapons Convention - which aims to eliminate the use of chemical weapons - considers the provision of chemicals to produce chemical weapons equally condemnable as the use of chemical weapons.[184]
The Netherlands ratified the Chemical Weapons Convention in 1995 and on 29 April 1997, the Implementation Act Chemical Weapons[185] came into force. Article 2 of the Implementation Act prohibits the trade in chemical weapons and precursors of chemical weapons.[186] Due to this act, the sales contracts between the two parties could have been sufficient evidence to hold Van Anraat criminally liable, even if the shipment had never caused any damage (Van Anraat supplying chemical weapon precursors to a State which had been documented by the United Nations as using chemical weapons).[187]
The correct implementation of the Chemical Weapons Convention by all 188 State Parties[188], will, therefore, prevent major suppliers of chemical weapons from escaping criminal liability in cases where causality is impossible to prove.

### 3.4 General prevention: vigilance required

In deciding on the appropriate punishment, the Court of Appeal referred to the *principle of general prevention*. The Court of Appeal stated that:
*"People or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that – if they do not exercise increased vigilance – they can become involved in most serious criminal offences. It should be made clear to them that they will have to face prosecution and long-term prison sentences, in accordance with the seriousness of the crimes they committed."*[189]

The cited paragraph has a very wide scope; it could even imply that persons who deliver conventional weapons might be complicit in the commission of war crimes.[190] According to this interpretation, the Van Anraat case could set

183 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, in force 29 April 1997, 1974 UNTS 45; 32 ILM 800 (1993).
184 Article 1 (1) Chemical Weapons Convention.
185 *Uitvoeringswet Chemische Wapens*.
186 Violations of this law are prosecuted as economic offenses and may lead to an imprisonment of six years and fifth category fine. (Article 1 Dutch law on Economical Offenses – *Wet Economische Delicten*).
187 Tweede Kamer, *Vergaderjaar 2008–2009* ('s-Gravenhage: Sdu Uitgevers, 2009), p. 2697-2699; *contra* R. Buisman, "Voorkomen dat grote vissen door de mazen van de wet zwemmen – De gevolgen van een niet volledige implementatie van het Chemisch Wapenverdrag en de Van Anraat zaak" (2008) 38 *Nederlands Juristenblad*, 2426-2430.
188 As of 21 May 2009, for more information see http://www.opcw.org/chemical-weapons-convention/.
189 Court of Appeal of The Hague, 9 May 2007, N° 2200050906-2, s. 16.
190 G. den Dekker, "Het arrest Van Anraat, het gebruik van chemische wapens tegen de eigen burgerbevolking en generale preventie" (2009) 27 *Nederlands Juristenblad*, 1734.

an important precedent for holding all persons, who transfer arms that are likely to be used to commit gross violations of human rights law or serious violations of international humanitarian law, criminally liable.[191]
The reference to the *principle of general prevention* demonstrates that the court favours criminal liability of people and companies that conduct international trade and will impose punishment.

### 3.5 Conclusion

The criminal proceedings against Frans Van Anraat demonstrate the usefulness of the *active nationality principle*. Due to this principle, the Court of Appeal of The Hague is able to convict a person of the international crimes he committed abroad, on the sole basis of his Dutch nationality. Future prosecution of international crimes in The Netherlands, and in other countries which have implemented the Rome Statute, can be based on the principle of universal jurisdiction. However, the exercise of jurisdiction on the basis of active nationality is much more accepted internationally than universal jurisdiction.[192]

Secondly, the Van Anraat case demonstrates that international criminal law remains relatively untested before both international and national courts. This leaves room for national courts to interpret international crimes using their domestic principles of criminal law. In this case, the Court of Appeal of The Hague leaves the door open for a lenient, *dolus eventualis*, interpretation of the *mens rea* required for complicity in genocide. Lenient domestic interpretations of this *mens rea* may increase corporate accountability in national courts and may influence the international standard - that has yet to be developed - of the International Criminal Court.[193]

Thirdly, the Van Anraat case shows that, in The Netherlands, individuals as well as companies conducting international trade can be held criminally liable if they become involved in criminal offenses. Moreover, the court explicitly stresses that they should exercise increased vigilance. This indicates the willingness of the court to deal with corporate complicity cases in the future.

191 M. Brehm, “War Crimes: Providing the Means”, Disarmament Insight, 10 July 2009, available at http://disarmamentinsight.blogspot.com/2009/07/war-crimes-providing-means.html.
192 See van den Herik, “The Difficulties of Exercising Extraterritorial Criminal Jurisdiction”, 215.
193 Cases similar to the Van Anraat case may now be brought before the International Criminal Court, (Article 6 in conjunction with Article 25 of the Rome Statute) however, given its limited resources, it is more likely that the Court will focus on main actors rather than accomplices.

# 4 The Dutch Shell Case: Home State Corporate Accountability for Oil Spillage in the Host State

On 7 November 2008, Nigerian people suffering from the detrimental consequences of oil spillages – allegedly caused by Shell in Nigeria - together with a Dutch non-governmental environmental organisation, Milieudefensie194, initiated civil proceedings in The Netherlands against the Shell Petroleum Development Company of Nigeria (Shell Nigeria), based in Port Harcourt, Nigeria, and its parent company, Royal Dutch Shell plc, based in The Hague. The plaintiffs alleged that both companies were liable for the damage caused by oil leaking from a pipeline operated by Shell Nigeria. In a preliminary decision of 30 December 2009, the District Court of The Hague (Rechtbank 's-Gravenhage) held that the Dutch court has jurisdiction over Shell Nigeria as well as over Royal Dutch Shell.195

### Key words

- Civil proceedings against legal persons - Negligence claim
- Jurisdiction over a parent company and its subsidiary - EC Regulation 44/2001 - Joint hearing
- Applicable law - Exceptions - Lex loci damni - Rome II regulation
- Collective interest - Foreign interest - Legal standing (Locus standi) of civil society organisations
- Duty of care - Liability of subsidiary - Parent corporations' liability

### Legal issues

- Jurisdiction. If a Dutch court has jurisdiction over the parent company by law, it also has jurisdiction over the foreign subsidiary if a joint hearing of the parent and the subsidiary is justified by reasons of efficiency. The Dutch court can hold a joint hearing if the claims against the parent and the claims against the subsidiary concern the same damage(s) and fact(s).
- Applicable law (to be decided).
- Legal Standing (Locus standi) of civil society organisation (to be decided).
- Liability of Royal Dutch Shell - parent company - and Shell Nigeria - subsidiary (to be decided).

194 Milieudefensie is the Dutch branch of Friends of the Earth International.

195 District Court of The Hague (*Rechtbank 's-Gravenhage)*, 30 December 2009, LJN: BK8616, available (only in Dutch) at www.rechtspraak.nl/ljn.asp?ljn=BK8616.

### 4.1 Facts and proceedings

On 26 June 2005, oil began to leak from an oil pipeline operated by Shell Nigeria near Oruma[196], a village in the oil-rich Niger Delta.[197] Shell Nigeria is the Nigerian subsidiary of Royal Dutch Shell, which (indirectly) holds all the shares of Shell Nigeria through various holding companies. [198]

The leaked oil flowed into the farmland and fishponds of the plaintiffs where it caused severe damage.[199] Having inspected the oil spill on 29 June 2005, Shell Nigeria sealed off the hole in the pipeline on 7 July 2005. [200]

#### 4.1.1 Civil proceedings in The Netherlands

On 9 May 2008, Milieudefensie together with two Nigerian victims of the oil spill, Mr. Oguru and Mr. Efanga[201], sent Shell Nigeria and Royal Dutch Shell a notice of liability. A subpoena followed on 7 November 2008.[202]

According to the plaintiffs, the oil spill of 26 June 2005 was caused by the failure of Shell Nigeria to properly maintain the pipeline. Further, it is alleged that Shell Nigeria did not react in a timely manner to the spill and failed to clean the environment properly after repairing the pipeline.[203] Moreover, the plaintiffs argued that a *duty of care* rested on Royal Dutch, the parent company, to prevent the foreseeable damage to the plaintiffs as a result of oil leaked from an oil pipeline operated by Shell Nigeria.[204]

196 Royal Dutch Shell and Shell Petroleum Development Company of Nigeria, Motion for the Court to decline jurisdiction and transfer the case, also conditional statement of defence in the main action, 13 May 2009, available at http://www.milieudefensie.nl/english/publications/P090513%20CvA%20Shell%20Oruma%20ENGELS%20-incl.%20incid.%20concl.%20onbevoegdheid.pdf, paras. 28-29 (hereinafter Royal Dutch Shell and Shell Nigeria, Motion for the Court); Royal Dutch Shell is a holding company that owns all the shares of several sub-holding companies, one of those sub-holdings holds shares of Shell Nigeria.

197 For information on the consequences of oil exploitation in the Niger Delta see Amnesty International, *Nigeria: Petroleum, pollution and poverty in the Niger Delta* (London: Amnesty International Publications, 2009), available at http://www.amnesty.org/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf.

198 Royal Dutch Shell and Shell Nigeria, Motion for the Court, para. 15.

199 Oguru, Efanga and Milieudefensie, Subpoena, 7 November 2008, available at http://www.milieudefensie.nl/globalisering/publicaties/infobladen/Scan%20dagvaarding%20Oruma%20Engels.pdf (hereinafter Ogura, Efanga and Milieudefensie, Subpoena).

200 Royal Dutch Shell and Shell Nigeria, Motion for the Court, para. 31.

201 Chief Fidelis A. Oguru is one of the village chiefs of Oruma. His main income depends on fishery and agriculture. He suffered serious damage to his livelihood due to the oil spill. Alali Efanga inherited fishponds from his father, the oil spill rendered his ponds useless. (Milieudefensie, The plaintiffs and their lawyers, available at http://www.milieudefensie.nl/english/shell/documents-shell-courtcase.)

202 Ogura, Efanga and Milieudefensie, Subpoena.

203 *Ibid.*, para. 362.

204 *Ibid.*, para. 366.

In their joint reply to court, Royal Dutch Shell and Shell Nigeria requested that a judgment first be delivered on the jurisdiction of the Dutch court to rule on the activities of Shell Nigeria, before the merits of the case were addressed.[205]

On 30 December 2009, the District Court of The Hague *(Rechtbank 's-Gravenhage)* delivered a judgment on its jurisdiction. Basing its decision on the arguments put forward by the plaintiffs[206], the Court found that it possessed the necessary jurisdiction to rule on the activities of Royal Dutch Shell as well as Shell Nigeria.[207] The case will be tried on the merits in 2010.[208]

The discussed case is the first of three civil suits brought before the court in The Hague. On 6 May 2009, two other cases concerning the activities of Shell in Nigeria were initiated by Mr. Barizaa M.T. Dooh from the village of Goi in Ogoniland and Mr. Friday A. Akpan from the village of Ikot Ada Udo, in conjunction with Milieudefensie. In February 2010, the District Court of The Hague held that it has jurisdiction to rule on the activities of Royal Dutch Shell and Shell Nigeria in these cases.[209]

### 4.1.2 Other proceedings in the U.S.

This is not the first time Shell has been sued for its activities in Nigeria before non-Nigerian jurisdictions.[210]
In 1996, Ken Wiwa (son of the late Ogoni activist, Ken Saro-Wiwa, who was sentenced to death by the Nigerian military government in 1995) and other members of the Movement for the Survival of the Ogoni People (MOSOP) brought a claim against Shell in the U.S.[211] based on the Aliens Tort Statute.[212] The plaintiffs alleged that the Nigerian military government and security forces committed human rights violations to suppress MOSOP's activities and that Royal Dutch Shell was complicit in the commission of these abuses. The plaintiffs won several pre-trial rulings, including the defeat of motions by the defendants to dismiss the case.[213] In early June 2009, on the eve of the trial, the parties agreed to a settlement for a total of fifteen and a half million dollars - the largest settlement on corporate abuse ever.[214]

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205 Royal Dutch Shell and Shell Nigeria, Motion for the Court.
206 See infra "Competence over parent and subsidiary".
207 District Court of The Hague, 30 December 2009.
208 The parties agreed not to appeal against the judgment of 30 December 2009; District Court of The Hague, 30 December 2009, para. 3.9.
209 For more information see http://www.milieudefensie.nl/english/shell/the-people-of-nigeria-versus-shell.
210 Nigerian judgements concerning the liability of Shell in Nigeria are often not executed.
211 Business and Human Rights Resource Centre, Case profile: Shell lawsuit (re Nigeria), for more information see http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria.
212 28 U.S.C.§ 1350: US Code – Section 1350: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."
213 For documents – decisions in this case see http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum.
214 Business and Human Rights Resource Centre, Case profile: Shell lawsuit (re Nigeria), for more information see http://www.business humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria.

The Wiwa v. Shell case demonstrates that overcoming preliminary objections in court may ultimately have the effect of pressuring the defendants to settle the matter out of court in favour of the plaintiffs.

## 4.2 Jurisdiction over parent and subsidiary: a joint hearing

### 4.2.1 Jurisdiction over the parent company - Royal Dutch Shell

In their joint motion before the District Court of The Hague, Royal Dutch Shell and Shell Nigeria did not contest the jurisdiction of the Dutch courts to deliver a judgment on Royal Dutch Shell, a company registered in the United Kingdom and having its headquarters in The Netherlands.[215]

The issue of jurisdiction in transnational litigation is partially harmonized by EC Regulation 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[216] Article 2, sub 1, in conjunction with Article 60, sub 1, of EC Regulation 44/2001 clearly provides that companies having their statutory seat, central administration or principal place of business in a Member State shall be sued in the courts of that Member State.[217]

*Article 2 (1) EC Regulation 44/2001*
*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
*Article 60 (1) EC Regulation 44/2001*
*For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:*
*(a) statutory seat, or*
*(b) central administration, or*
*(c) principal place of business.*

### 4.2.2 Jurisdiction over the subsidiary - Shell Nigeria

In regard to defendants, such as Shell Nigeria, who are not domiciled in a Member State, Article 4 sub 1 of the EC Regulation 44/2001 stipulates that the jurisdiction of the courts of each Member State shall be determined by the law of that Member State.

215 District Court of The Hague, 30 December 2009.
216 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 012/1.
217 The rules are mandatory. National courts do not have discretion in claims that fall within the remit of the regulation. See the ECJ Owusu case in "UK cases". For more information on jurisdiction see N. Jägers and M.-J. van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands" (2007-08) 33 *Brooklyn Journal of International Law*, 3, 844-849.

Dutch procedural law offers three possibilities to sue a non-European subsidiary of a Dutch parent company in The Netherlands.[218] The Dutch Court possesses the necessary jurisdiction: (1) if proceedings abroad are impossible, for example due to disaster or war (Article 9 sub b DCCP[219]); (2) if due process is not guaranteed, for example because the defendant will be discriminated against (Article 9 sub c DCCP) or (3) if efficiency justifies a joint hearing (Article 7 sub 1 DCCP).

The third of these arguments was put forward by the plaintiffs. Article 7 sub 1 of the Dutch Code of Civil Procedure stipulates that
*"If (…) the Dutch judge has jurisdiction over one of the defendants, he has jurisdiction over the other defendants involved in the same case, if such a link exists between the claims against the different defendants that reasons of efficiency justify a joint hearing. "*[220]

Similar provisions can be found throughout the European Union. At least twenty Member States give plaintiffs the opportunity to bring a defendant - domiciled in a non-European state - before the Member State's courts if the defendant is a co-defendant in proceedings brought against another defendant - domiciled in the Member State.[221]

Whether a sufficient connection exists under Dutch law largely depends on the factual circumstances and the objective of the claim. The parent-subsidiary relationship, the nature of the claim (compensation) and the common grounds (violations of the same rights) are important factors.[222] In its judgment of 30 December 2009, the District Court of The Hague held as follows:
*"In essence, [Royal Dutch Shell] and Shell Nigeria] are held liable for the same damage by Oguru (…) with respect to the claims regarding both [Royal Dutch Shell] and [Shell Nigeria] the same events in Nigeria must be judged. In the opinion of the Court, this alone creates such a connection that reasons of efficiency justify a joint treatment of the claims against [Shell Nigeria] and [Royal Dutch Shell]. That the facts and circumstances have occurred partly or wholly*

218 A.G. Castermans en J.A. van der Weide, *De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van fundamentele, internationaal erkende rechten*, Leiden, 15 December 2009, available at http://www.ez.nl/pv_obj_cache/pv_obj_id_DA1578214F94540B5E76A59E09BCF008D4913E00, p. 35. (summary available - in English - at http://www.reports-and-materials.org/Castermans-van-der-Weide-liability-Dutch-parent-cos-28-Jan-2010.pdf)

219 Dutch Code of Civil Procedure - DCCP (*Wetboek van Burgerlijke Rechtsvordering*).

220 Unofficial translation. Original text: "Indien (…) de Nederlandse rechter ten aanzien van een van de gedaagden rechtsmacht heeft, komt hem deze ook toe ten aanzien van in hetzelfde geding betrokken andere gedaagden, mits tussen de vorderingen tegen de onderscheiden gedaagden een zodanige samenhang bestaat, dat redenen van doelmatigheid een gezamenlijke behandeling rechtvaardigen."

221 A. Nuyts et al., *Study on Residual Jurisdiction* (Review of the Member States Rules concerning the Residual Jurisdiction of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), report ordered by the European Commission, 3 September 2007, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

222 Castermans and van der Weide, De juridische verantwoordelijkheid van Nederlandse moederbedrijven, p. 35.

*outside The Netherlands is not extraordinary in the Dutch case law and does not lead to a different conclusion (…).*[223]*"*

In its judgment of 30 December 2009, the District Court ruled only on the matter of its jurisdiction to hear the case. Though a decision on the merits of the case has yet to be handed down, certain observations may be made concerning the applicable law and the liability of the defendants.

### 4.3 Applicable law: the principle of lex loci damni infecti

For non-contractual obligations that arose after 11 January 2009 and are brought before a European national court, EC Regulation 864/2007 (Rome II) [224] determines which law is applicable. However, the alleged damage, in this matter, occurred before the entry into force of this regulation and is, therefore, governed by national law.

Under Dutch international private law, the question whether the foreign subsidiary, Shell Nigeria, acted unlawfully is governed by the law of the country where the damage occurred, the *lex loci damni infecti*.[225] In this case, Nigerian law is - in principle - applicable. The question whether Royal Dutch Shell, the parent company, failed in the supervision of its subsidiary and whether it can be held liable, is equally governed by the law of the country where the damage occurred, Nigeria.[226]
However, a Dutch court can apply certain Dutch legal rules if the application of the relevant foreign legal rules is contrary to Dutch *public order* - the fundamental values and principles of the Dutch legal order.[227]

223 Unofficial translation. Original text: "In de hoofdzaak worden RDS en SPDC door Oguru (...) aansprakelijk gehouden voor dezelfde schade (...) ten aanzien van de vorderingen van zowel RDS als SPDC hetzelfde feitencomplex in Nigeria ter beoordeling voorligt. Reeds hiermee is naar het oordeel van de rechtbank sprake van een zodanige samenhang, dat redenen van doelmatigheid een gezamenlijke behandeling van de vorderingen tegen RDS en SPDC rechtvaardigen. Dat die feiten en omstandigheden zich geheel of deels niet in Nederland hebben voorgedaan is in de Nederlandse rechtspraak niet uitzonderlijk en leidt niet tot een ander oordeel (…)"

224 Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

225 Article 3 (1) and (2) of the Dutch Law on Conflict of Laws regarding Unlawful Acts (*Wet Conflictenrecht Onrechtmatige daad - WCOD*): "Obligations arising from tort are governed by the laws of the State on whose territory the act is committed. Contrary to the stipulation in the first sub-section, if an act has harmful effects on a person, a good or the natural environment in a place other than in the State on whose territory this act is committed, the law of the State on whose territory these effects occur will be applied, unless the perpetrator was reasonably unable to foresee the effects in that place."

226 *Ibid.*

227 Public order may be invoked, even if the regulation in question does not contain a provision to this effect (See *European Judicial Network in civil and commercial matters*, Applicable law, The Netherlands, available at http://ec.europa.eu/civiljustice/applicable_law/applicable_law_net_en.htm.)

The EC Regulation 864/2007 (Rome II Regulation) contains similar provisions to Dutch national law.[228] However, the Rome II Regulation offers more possibilities for applying the national law of the country where the parent company holds its seat in cases of corporate liability for damages abroad.[229] Future litigation could benefit from these opportunities to apply the liability standards of the national law governing the parent company, as those standards often prescribe a stricter standard of corporate liability.

When forming a decision on the merits of the case, the District Court of The Hague will have to determine whether Nigerian and/or Dutch law is applicable. In this contribution, both possibilities will be considered.

### 4.4 Legal standing of civil society organisations: can a Dutch civil society organisation defend a foreign interest?

The defendants contested Milieudefensie's legal standing *(locus standi)*. As mentioned above, the judgment of 30 December 2009 did not hand down a decision on this issue.
Dutch courts generally accept that the locus standi of a legal person is determined by the law applicable to that legal person, i.e. the law under which the legal person is established.

However, some case law defines legal standing as a matter of procedural law to which the *lex fori* is applicable.[230] In this case both theories would lead to the same conclusion, namely the applicability of Dutch national law. Article 3:305a of the Dutch Civil Code (DCC)[231] provides that *"a foundation or association with full legal capacity is entitled to an action for the purpose of protecting interests of a similar nature of other persons [than the foundation, the association or its members], to the extend it promotes those interests according to its articles of association".*[232]
According to the defendants, the l*ex loci damni infecti*[233] should apply to the

228 Article 4 Rome II Regulation states that the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs. Article 26 Rome II Regulation leaves the Member States the possibility to refuse the application of foreign law if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

229 Veerle Van Den Eeckhout, "International Environment Pollution and some other PIL–Issues of Transnational Corporate Social Responsibility. A case-study of the instrumentalisation of Private International Law in the year 2010: developments at the beginning of a new decade", 11 February 2010, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=919707; Van Den Eeckhout discusses the applicability of the national law of the country where the parent company holds its seat by virtue of Article 4 sub 3 (manifestly more closely connected); Article 7 (environmental damage); Article 16 (overriding mandatory provisions); Article 17 (rules of safety and conduct ) and Article 26 (public policy of the forum) of the Rome II Regulation.

230 P. Vlas, "Rechtspersonen" (Apeldoorn: Maklu, 2009), p. 55-57.

231 Dutch Civil Code – DCC (*Burgerlijk Wetboek*).

232 Unofficial translation. Original text: "Een stichting of vereniging met volledige rechtsbevoegdheid kan een rechtsvordering instellen die strekt tot bescherming van gelijksoortige belangen van andere personen, voorzover zij deze belangen ingevolge haar statuten behartigt."

233 See supra "Applicable law".

issue of legal standing and Nigerian law does not allow Milieudefensie to obtain legal standing. [234] Alternatively, the defendants argue that the interest represented by Milieudefensie in the proceedings is a local Nigerian interest and Article 3:305a DCC is not intended to enable a Dutch interest group, to ask protection for a very limited, *foreign interest*.[235] A similar provision has, however, been interpreted by the French Council of State *(Conseil d'Etat)* to allow a national interest group to defend *foreign interests* in the *Clemenceau* case.[236]

## 4.5 Liability: did parent and/or subsidiary act negligently?

### 4.5.1 Liability of Shell Nigeria

If Nigerian tort law is applicable to the claim against Shell Nigeria, the burden of proof rests, in principle, on the plaintiffs. They must prove negligence to establish the liability of SPDC. To prove negligence, the plaintiffs must establish that (1) SPDC was under a duty of care, (2) SPDC breached that duty of care and (3) the alleged damage occurred as a result of that breach.[237] To determine the duty of care, the plaintiffs will have to establish what the accepted standard of behaviour is for a Nigerian oil company, taking into account environmental and technical standards.[238]

In some cases, the burden of proof rests on the defendant. Nigerian courts have accepted the principle of *res ipsa loquitur*. This implies that negligence does not have to be proven by the plaintiffs if "the facts speak for themselves". For example, one company was held liable in Nigeria for damages that resulted from an escape of oil which the company should have kept under control.[239]

If Dutch law is applicable, the plaintiffs will have a similar burden of proof. To establish liability the plaintiffs will have to prove that Shell Nigeria violated a law, a legal duty or a rule of unwritten law pertaining to proper social conduct.[240]

### 4.5.2 Parent liability of Royal Dutch Shell

According to Shell Nigeria, the plaintiffs abused procedural law by initiating claims against Royal Dutch Shell on an evidently inadequate basis, for the exclusive purpose of creating competence of the Dutch Court over Shell Nigeria.[241] The District Court of The Hague rejected this defence, stating that the claims of the plaintiffs concerning Royal Dutch Shell were not fundamentally flawed. According to the Court, even Shell Nigeria acknowledges that,

234 Royal Dutch Shell and Shell Nigeria, Motion for the Court, paras. 86-92.
235 RDS and SPDC, Motion for the Court, para. 93-98.
236 See "The Clemenceau Case".
237 Supreme Court of Nigeria, Abubakar v. Joseph (2008) 13 NWLR 307.
238 J.G. Frynas, "Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria" (1999) 43 *Journal of African Law*, 124.
239 *Ibid*.
240 Article 6:162(2) Dutch Civil Code - DCC (*Burgerlijk Wetboek*).
241 Royal Dutch Shell and Shell Nigeria, Motion for the Court, para. 80.

in certain circumstances, a parent company can be held directly or indirectly liable for its subsidiaries.[242]

In principle, a parent company will be shielded from accountability on the basis of the doctrine of limited liability.[243] However, plaintiffs can overcome this hurdle in two ways.

They can try to *pierce the corporate veil* by proving that the parent is responsible for the damage caused by the subsidiary. [244] Or they can rely on the *direct liability* of the parent and try to establish that the omission or act of the parent company is in violation of a domestic liability standard.[245] The latter approach was taken by the plaintiffs.[246]

It will be interesting to see whether the District Court of The Hague accepts such direct liability of a parent company in a case regarding damages abroad.

### 4.6 Conclusion

Although the discussed decision concerns only the preliminary stage of the proceedings, a significant legal hurdle has already been overcome. The District Court of The Hague grounded its jurisdiction over Royal Dutch Shell on Article 2 of EC Regulation 44/2001 and found that, since the claims against Royal Dutch Shell and Shell Nigeria concern the same facts and damage, a joint hearing is justified. Under Dutch law, the court has jurisdiction over all defendants if it has jurisdiction over one defendant – in this case Royal Dutch Shell – and a joint hearing is justified. By giving such a broad interpretation of the principle of joint hearing, the Dutch court demonstrated its willingness to hand down a judgment on European parent companies as well as foreign subsidiaries.
When the time comes to judge the case on its merits, the District Court of The Hague will have to deal with several legal issues. The Court will have to determine which law is applicable to the core issues of the case. In principle, this will be Nigerian law, however, the Court may exceptionally apply Dutch law if Nigerian law is perceived as contravening the *public order* of The Netherlands.

Secondly, the court will have to decide whether Milieudefensie has the requisite legal standing to participate in such proceedings. In this issue, much will depend on the applicable law and the willingness of the court to allow a national organisation to defend *foreign collective interests*.

Thirdly, and most importantly, if a judgment on the merits is handed down, a European court will finally scrutinize if, and how, domestic liability standards may be utilised to hold a parent company liable.

242 District Court of The Hague, 30 December 2009.
243 See “UK cases” for a more detailed analysis.
244 Piercing the corporate veil is hardly possible in Dutch law, it is restricted to insolvency matters. Moreover, the law applicable to the subsidiary will determine whether or not the parent company can be held liable, in many cases this is foreign law.
245 See “UK cases” for a more detailed analysis.
246 Ogura, Efanga and Milieudefensie, Subpoena, para. 237.

# Glossary

## Courts and tribunals

### France

- Conseil d'Etat
  Council of State. Highest administrative court of France, administrative court of last resort.
- Cour d'Appel
  Court of Appeal. Jurisdiction that is empowered to hear an appeal against a decision of the Tribunal of First Instance.
- Cour de Cassation
  Supreme Court. Jurisdiction of last resort in civil and criminal matters, the court does not judge facts; it decides whether the law and procedural rules were respected.
- Tribunal administrative
  Administrative Tribunal. Jurisdiction of first instance in administrative matters.
- Tribunal de Grande Instance
  Tribunal of First Instance. Jurisdiction competent to deal in first instance with civil matters that are not explicitly attributed to other jurisdictions.

### The Netherlands

- Gerechtshof
- Court of Appeal. Jurisdiction competent to hear appeals against decisions of the District Court in civil, criminal and certain administrative matter.
- Hoge Raad
  The Supreme Court. Highest court in civil, criminal and administrative matters. Court of last resort that judges whether the law and procedural rules were respected, the Supreme Court does not judge facts.
- Rechtbank
  District Court Jurisdiction that hears civil, criminal and administrative matters in first instance.

## Doctrines, concepts and procedures

- Active nationality principle
  Principle of personal jurisdiction meaning that a State has jurisdiction over its nationals, regardless of whether the offence has been committed within the own country or abroad (as opposed to the passive nationality principle, where jurisdiction is assumed by the country of which a person suffering injury or civil damage is a national).

- Appeal as of right
  Appeal that is guaranteed by statute or some underlying constitutional or legal principle. The appellate court cannot refuse to listen to the appeal.

- Appeal by leave or permission
  Appeal that requires the appellant to move for leave to appeal; in such a situation either or both of the lower court and the appellate court may have the discretion to grant or refuse the appellant's demand to appeal the lower court's decision.

- ATS
  The Alien Tort Statute is a section of the United States Code that allows United States district courts to hear cases brought by foreign citizens for conduct committed outside the United States.

- Corporate veil
  Fundamental principle of Company Law, a company must be regarded as a legal entity with a separate legal personality, distinct from its members and its eventual parent company and/or subsidiaries. This separate corporate existence is represented as a 'veil'.

- *Forum non conveniens* doctrine
  According to this common law doctrine, the courts may decline jurisdiction on the ground that there is a court in another jurisdiction which is clearly a more appropriate forum to deal with the case, in the interests of all the parties and in the interests of justice.

- Application to stay the proceedings on forum grounds
  See Stay of the proceedings

- Forum shopping
  When multiple courts have concurrent jurisdiction over a claim, some litigants adopt this practice i.e. get their legal case heard in the court thought most likely to provide a favorable judgment.

- International crimes
  Breaches of international rules entailing the personal criminal liability of the individuals concerned. International crimes include war crimes, crimes against humanity, genocide, torture, aggression and some extreme forms of terrorism[247]. As for the definitions of the first three ones, please refer respectively to articles 8, 7 and 6 of the Rome Statute of the International Criminal Court - even if the Statute is not intended to codify international customary law.

247 Antonio Cassese, « International criminal law », Oxford University Press, 2003, p. 23-24

- Jurisdiction founded as of right
  I.e. where in this country the defendant has been served with proceedings within the jurisdiction.

- Legal standing
  Ability of a person to show a sufficient legal interest in a matter to allow him or her to bring a case to court. The status of being qualified to assert or enforce legal rights or duties in a judicial forum because one has a sufficient and protectable interest in the outcome of a controversy and has suffered or is threatened with actual injury.

- Lex loci delicti commissi
  Rule of conflict of laws. “Law of the place where the tort was committed”.

- Lex loci damni infecti
  Rule of conflict of laws. “Law of the place where the effect of the wrongfulness showed itself”.

- Mens rea
  Subjective or mental element of the offence, as opposed to the actus reus i.e. the physical element of the offence.

- Dolus eventualis – recklessness
  State of mind where the person foresees that his action is likely to produce its prohibited consequences and nevertheless takes the risk of so acting. The actor only envisages a certain result as possible or likely and deliberately takes the risk; however he does not necessarily desire the result.[248]

- Dolus directus – direct intent
  Awareness that one is engaging in certain conduct and practical certainty regarding the occurrence of a given result. The perpetrator foresees and desires the consequences of an action.

- Service
  In common law, the official delivery of legal documents such as a summons, subpoena, complaint, order to show cause, writ (court order), etc. as well as delivery by mail or in person of documents to opposing attorneys or parties, such as answers, motions, points and authorities, demands and responses. Ex: ‘serving a defence’.

- Stay of the proceedings
  In common law, ruling by the court in civil and criminal procedure, halting further legal process in a trial. The court can subsequently lift the stay and resume proceedings. However, a stay is sometimes used as a device to postpone proceedings indefinitely.

248 Antonio Cassese, « International criminal law », Oxford University Press, 2003, p. 168.

- Suspension procedure
  Before administrative courts in civil law systems, procedure where the administrative court is asked to suspend an administrative act or regulation, the immediate execution of which must cause a serious and difficult to repair prejudice. The suspension is subordinate to the procedure in nullification; the contested act must be susceptible to be annulled. The suspension will cause the execution of the act or regulation to be suspended.

# Links

## Case law

- EU (links): www.legifrance.gouv.fr/html/sites/sites_membres.htm
- International: comparativelawblog.blogspot.com
  www.haguejusticeportal.net
- France: www.conseil-etat.fr - www.legifrance.gouv.fr
- Netherlands: www.rechtspraak.nl
- UK: www.westlaw.co.uk - www.bailii.org

## Other

- Association Nationale de Défense des Victimes de l'Amiante:
  andeva.fr
- Avocats Verts (DRC): www.avocatsverts.cd
- Ban Asbestos France: www.ban-asbestos-france.com
- Business and Human Rights Resource Centre:
  www.business-humanrights.org
- Colectivo de abogados José Alvear Restrepo:
  www.colectivodeabogados.org
- Comité Anti-Amiante Jussieu: amiante.eu.org
- CORE: corporate-responsibility.org/
- EarthRights International: www.earthrights.org
- ESCR-net: International Network for Economic: Social and Cultural Rights: www.escr-net.org
- European Coalition for Corporate Justice (ECCJ):
  www.corporatejustice.org
- European Judicial Network in civil and commercial matters:
  ec.europa.eu/civiljustice
- European Union law database: eur-lex.europa.eu
- FAFO: www.fafo.no
- Fédération internationale des ligues des droits de l'homme:
  www.fidh.org
- Global Reporting: www.globalreporting.org
- Global Witness: www.globalwitness.org
- Greenpeace: www.greenpeace.org
- Human Rights Watch: www.hrw.org
- International Alert: www.international-alert.org
- International Bar Association: www.internationalprobono.com
- International Business Leaders Forum: www.iblf.org
- International Commission of Jurists: www.icj.org
- International Criminal Bar: www.bpi-icb.org
- International Peace Information Service: www.ipisresearch.be
- Kimberley Process: www.kimberleyprocess.com
- Leigh Day & Co: www.leighday.com
- Milieudefensie: www.milieudefensie.nl
- MVO Platform: www.mvo-platform.nl
- Office of the High Commissioner for Human Rights: www.ohchr.org
- Organisation for Economic Co-operation and Development (OECD):
  www.oecd.org

- Public Interest Law Institute (PILI): www.pili.org
- Sherpa: www.asso-sherpa.org
- SOMO: www.somo.nl
- Trial Watch: www.trial-ch.org
- United Nations Global Compact: www.unglobalcompact.org

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