No. 10-1491

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In The

Supreme Court of the United States

ESTHER KIOBEL, et al.,
Petitioners,
v.
ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PROFESSOR ALEX-GEERT CASTERMANS (LEIDEN UNIVERSITY), PROFESSOR CEES VAN DAM (UTRECHT UNIVERSITY), DR. LIESBETH ENNEKING (UTRECHT UNIVERSITY), DR. NICOLA JÄGERS (TILBURG UNIVERSITY), PROFESSOR MENNO KAMMINGA (MAASTRICHT UNIVERSITY), AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FOREIGN AND INTERNATIONAL CASES

U.S. STATUTES

NETHERLANDS STATUTES

INTERNATIONAL REGULATIONS AND TREATIES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE

Amici curiae are law professors at four leading universities in the Netherlands. They have each published scholarly works on the obligations of corporations under customary international law and on holding multinational corporations liable in the Netherlands for violations of international human rights norms committed abroad. Amici curiae respectfully submit this brief in support of Petitioners, pursuant to Supreme Court Rule 37.[1]

Alex-Geert Castermans is Professor of Law, Vice-Dean and Member of the Faculty Board at the Law Faculty of Leiden University in the Netherlands. He is also deputy-judge at the The Hague District Court, and former chairman of the Dutch Equal Treatment Commission. In 2009, he co-authored a report on the liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognized rights, which was commissioned by the Dutch Ministries of Economic Affairs and Foreign Affairs.

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Petitioners and Respondents have consented to the filing of this brief and filed a letter of consent with the Clerk of the Court.

of Law of King's College London and at the School of Law of Queen Mary, University of London. He is an expert on European tort law and former director of the Regulation Forum and of the European and Comparative Law Programme at the British Institute of International and Comparative Law in London. He was invited to act as an advisor to the International Commission of Jurists' report on "Corporate Complicity and Legal Accountability, Volume 3: Civil Remedies." He has published extensively on the issue of business and human rights.

Liesbeth F.H. Enneking is a Postdoctoral Research Fellow at the Molengraaff Institute for Private Law of Utrecht University in the Netherlands. She has published several scholarly works, including books and articles in European and United States journals, on the handling of transnational human rights claims in the courts of the European Member States and in the Netherlands in particular. She has been invited to provide expert advice in legal and policy fora, including at Dutch Parliamentary hearings on this topic.

Nicola M.C.P. Jägers is an Associate Professor at the Department of European and Public International Law of Tilburg University in the Netherlands. She has published extensively on the international human rights responsibilities of corporate actors. She is a Board Member of the Dutch Association for International Law and currently participates in a project on private transnational regulatory regimes funded by the

The Hague Institute of the Internationalisation of Law.

Menno T. Kamminga is Professor of International Law at Maastricht University in the Netherlands and Director of the Maastricht Centre for Human Rights. He is the former Chair of the Netherlands Government's Advisory Committee on Questions of Public International Law and Chair of the Netherlands School of Human Rights Research. He has published extensively on human rights law including a volume on the liability of multinational corporations under international law.

The amici's interest in the present case is twofold. First, they wish to ensure that the amicus brief filed by the Governments of the United Kingdom of Great Britain and the Kingdom of The Netherlands does not cause any misperceptions.[2] That brief criticizes certain practices by United States courts under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), which are in fact commonplace in the Netherlands as well. Secondly, amici are concerned that a finding by the United States Supreme Court that corporations have no obligations under customary international law or that it would be contrary to international law for United States courts to hold corporations accountable for extraterritorial

[2] *See* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 28, *Kiobel v. Royal Dutch Petroleum* (No. 10-1491), February 3, 2012 (hereinafter "British & Dutch Amicus Brief").

misconduct would set a terrible precedent. It would be a major setback for victims of human rights abuses in their quest for justice.

SUMMARY OF ARGUMENT

The ATS is an American statute. There is no identical provision in Dutch law but nevertheless private actors, including both individuals and corporate entities, may incur criminal liability as well as civil liability in the Netherlands for their involvement in international human rights violations perpetrated abroad. Dutch courts would recognize and have in fact recognized claims similar to those pursued by the Petitioners here.

ARGUMENT

I. IN THE NETHERLANDS, BOTH INDIVIDUALS AND CORPORATIONS MAY INCUR CRIMINAL LIABILITY AND BE BROUGHT TO JUSTICE FOR HUMAN RIGHTS VIOLATIONS COMMITTED ABROAD.

The British & Dutch Amicus Brief correctly points out that the International Criminal Court does not have jurisdiction over legal persons. However, it does not follow *a contrario* that legal persons have no obligations under international law and even less that states are prohibited from holding legal persons accountable for breaches of international law.

In the Dutch system of criminal law, no principled distinction is made between the criminal liability of natural and legal persons. Legal persons may be prosecuted under the same conditions as natural persons.[3] This approach also applies to the prosecution of international crimes.

The International Crimes Act of June 19, 2003, as amended on November 4, 2010, Stb. 2010, p. 773, identifies a range of international crimes that may be prosecuted before Dutch courts. These are the crimes that are contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, and the International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, U.N. Doc. A/RES/61/177. Suspects may accordingly be prosecuted for complicity in genocide, crimes against humanity, war crimes, torture and enforced disappearance. While strictly speaking the legal basis for such prosecutions is the crime as defined under domestic law, the definitions of the criminal offences contained in the Act are in fact derived directly from the definitions of the crimes contained in the above-mentioned treaties. The International Crimes Act was adopted specifically to implement the Netherlands' obligations as a state party to these treaties.

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[3] Dutch Criminal Code (*Wetboek van Strafrecht*) of 1881 as amended in 2010, art. 51.

While the three conventions do not require states to criminalize corporate conduct on the same basis as conduct by private individuals, the Netherlands in common with states such as Australia[4] and Canada[5] has chosen to do so.[6]

So far, prosecutors in the Netherlands have chosen to prosecute private businessmen rather than their companies for international crimes. For example, Dutch businessman Frans van Anraat was convicted for war crimes for having supplied chemicals to the Government of Saddam Hussein for the production of chemical weapons that were employed against the Kurds.[7]

Under the International Crimes Act, suspects may be prosecuted irrespective of the nationality of the perpetrator or the victims and irrespective of the location of the crime. A requirement for prosecutions under the Act is that the suspect be "present" in the Netherlands.[8] The foreign nationals convicted under the Act so far have all been asylum seekers residing in the Netherlands. The Congolese national Sebastien

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[4] Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. Int'l Crim. Just. 809 (2007).

[5] W. Cory Wanless, *Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. Int'l Crim. Just. 201 (2009).

[6] *See also* Robert C. Thompson, Anita Ramasastry and Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International crimes*, 40 Geo. Wash. Int'l L. Rev. 841 (2009).

[7] *Prosecutor/ Van Anraat*, The Hague Court of Appeal, May 9, 2007, LJN: BA4676 (Neth.).

[8] International Crimes Act (*Wet Internationale Misdrijven*) 2003, art. 2(1)(a).

Nzapali[9] was convicted of torture in Congo; the Rwandese national Joseph Mpambara[10] was convicted of torture in Rwanda; and the Afghan nationals Habibullah Jalalzoy[11] and Hesamuddin Hesam[12] were convicted of war crimes and crimes against humanity in Afghanistan.

Because there have been no prosecutions of legal persons yet under the Act, it is not yet known how the courts will interpret the "presence" requirement *vis-à-vis* legal persons. It seems likely, however, that this requirement will be interpreted similarly as for natural persons, *i.e.* that any corporation with a presence in the Netherlands is liable to prosecution for the crimes contained in the International Crimes Act irrespective of where these crimes were committed.

II. IN THE NETHERLANDS, CIVIL CLAIMS FOR EXTRATERRITORIAL VIOLATIONS OF THE LAW OF NATIONS ARE ACTIONABLE PURSUANT TO THE TORT LAW PROVISIONS OF THE DUTCH CIVIL CODE.

The laws of the Netherlands do not have a specific counterpart to the United States ATS.

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[9] *Prosecutor/Nzapali*, Rotterdam District Court, April 7, 2004, LJN: AO7178 (Neth.).
[10] *Prosecutor/Mpambara*, The Hague District Court, March 23, 2009, LJN: BI2444 (Neth.).
[11] *Prosecutor/Jalalzoy*, The Hague Court of Appeal, January 29, 2007, LJN: AZ9366 (Neth.).
[12] *Prosecutor/Hesam*, The Hague Court of Appeal, January 29, 2007, LJN: AZ9365 (Neth.).

Neither does Dutch law contain specific statutory provisions with respect to civil liability for violations of the law of nations as such. However, this is not to say that Dutch law does not provide for causes of action for acts constituting breaches of the law of nations or does not allow courts to exercise jurisdiction over such claims. On the contrary, Dutch law provides for multiple bases of jurisdiction for cases alleging breaches of the law of nations — although not necessarily termed as such — not only in statutory criminal laws, *supra* Part I, but also on the basis of Article 162 of Book 6 of the Dutch Civil Code (*Burgerlijk Wetboek*).

It is immaterial and irrelevant to this analysis that the breaches in question are not described in a manner identical to the ATS as "violations of the law of nations." As the brief of the British and Dutch Governments explains: "it is for each individual State to decide whether and how to regulate corporate activity . . . subject to its jurisdiction. . . . including . . . . [by] creat[ing] legal rules that make companies liable to pay compensation . . . for individuals injured by reasonably specified human rights abuses (whether or not described as such)." British & Dutch Amicus Br. at 28.

(a) In the Netherlands, claims for violations of the law of nations are actionable under domestic tort law, particularly under Article 162 of Book 6 of the Dutch Civil Code.

Claims for violations of the law of nations other than those provided for under international treaties, including claims against non-State

actors, are actionable in the Netherlands under long-standing tort law principles. Such claims are cognizable under the general provision of Article 162 of Book 6 of the Dutch Civil Code as "unlawful acts." This provision in the 1992 Dutch Civil Code is materially similar to its predecessor, Article 1401 of the Dutch Civil Code of 1838 (*Burgerlijk Wetboek 1838*), which in turn was inspired by the Napoleonic Civil Code of 1804.

For a successful claim for damages under Article 162, five requirements must be satisfied:[13]

(i) the defendant's conduct must have been *unlawful*: this includes the infringement of a right, the violation of a written rule, and the violation of an unwritten rule pertaining to proper societal conduct; the latter includes acting below the standard of the reasonable person;
(ii) this unlawful conduct needs be *attributed* to the defendant: the relevant ground for attribution for the purposes of this brief is *culpa*. Dutch tort law has no specific rules for intentionally caused damage. Such cases are subsumed under Article 162;
(iii) *damage* suffered by the victim such as personal injury, property damage and pure economic loss;

[13] C. Assers, A.S. Hartkamp, C.H. Sieburgh, *C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht, Deel 6-IV: Verbintenissenrecht. De verbintenis uit de wet* (Kluwer, 2011), nr. 38-166; C. van Dam, *Aansprakelijkheidsrecht* (Boom Juridische uitgevers, 2000), nr. 801-923.

(iv) a *causal connection* between the victim's damage on one hand and the attributable unlawful conduct of the defendant;
(v) *relativity*: this requirement implies that the violated rule must aim to protect the plaintiff and the damage he has suffered; it mainly plays a role when unlawfulness is based on the violation of a written rule.

These requirements can be illustrated as follows: a claim for torture would fall within the definition of Article 162, incorporating as it does the constituent elements of the tort, namely unlawful conduct (infringement of a right, conduct violating written rules such as provisions in an international treaty, and unwritten rules) that can be attributed to the tortfeasor. Similarly, allegations of arbitrary and prolonged detention and claims for slave or forced labor fall within the scope of this general provision.

Dutch courts have asserted jurisdiction over such cases on the basis of domestic tort law even where the abuse took place outside Dutch territory. *See, e.g.*, *Shell cases*:[14] claims from Nigerian farmers and fishers against Shell Nigeria and its Dutch parent company for environmental damage caused in the Niger Delta (cases still

[14] *Akpan/Royal Dutch Shell and Shell Petroleum Dev. Co. of Nigeria*, The Hague District Court, February 24, 2010, LJN: BM1469 (Neth.); *Dooh/Royal Dutch Shell and Shell Petroleum Dev. Co. of Nigeria*, The Hague District Court, February 24, 2010, LJN: BM1470 (Neth.); *Oguru/Royal Dutch Shell and Shell Petroleum Dev. Co. of Nigeria*, The Hague District Court, December 30, 2009, LJN: BK8616 (Neth.).

pending); *Srebrenica case*:[15] Dutch state held liable for damage caused to Bosnian families when their relatives were expelled from the Dutch United Nations compound and later killed by Serb troops; *Rawagede case*:[16] Dutch State held liable to the next of kin for the summary executions of a large part of the male population of a village in Indonesia by the Dutch army during a military operation in 1947; *Palestinian doctor case*:[17] Libyan officials held liable for damage suffered by a Palestinian doctor for unlawful imprisonment for eight years for allegedly infecting children with HIV/AIDS.

(b) The unlawfulness of the defendant's conduct may be directly based on the violation of an applicable provision of an international treaty. However, this is not necessary as the violation of an unwritten rule may also serve as a basis for unlawfulness.

Article 162 of Book 6 of the Dutch Civil Code provides for a flexible system when it comes to the basis for unlawful conduct. Unlawfulness can be based on the violation of a written rule, such as a provision of an international treaty or a criminal law provision.[18] Article 162 also covers

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[15] *Mothers of Srebrenica/The Netherlands*, The Hague Court of Appeal, July 5, 2011, LJN: BR0133 (Neth.).

[16] *Silan/The Netherlands*, The Hague District Court, September 14, 2011, LJN: BS8793 (Neth.).

[17] *El-Hojouj/Unnamed Libyan Officials*, The Hague District Court, March 21, 2012, LJN: BV9748 (Neth.) [Palestinian doctor case] (the defendants did not appear).

[18] On the limited role of not directly applicable international treaties and decisions, see Gerrit Betlem and André

situations in which the plaintiff alleges that the defendant has violated the law of nations. Other states on the European continent, including Bosnia and Herzegovina, have similar laws.

The Court of Appeal in the The Hague in the *Srebrenica* case[19] recently held the Dutch State liable for the killing of three Bosniak men who were expelled from the Dutch United Nations compound and were subsequently killed by Serb troops.

The plaintiffs alleged that Dutchbat, the Dutch United Nations peacekeeper battalion, had acted contrary to the national law of Bosnia and Herzegovina as well as contrary to international law, including, inter alia, articles 2, 3 and 8 of the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222; articles 6 and 7 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; and article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

In concluding that the Dutch State had acted unlawfully according to the applicable law of Bosnia and Herzegovina, the Court of Appeal

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Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts*, 14 Eur. J. Int'l L. 569, 572-82 (2003).

[19] *Mothers of Srebrenica*, *supra* note 15, LJN: BR0133. For a more detailed analysis, see Cees van Dam, *The Netherlands Found Liable for Srebrenica Deaths*, 15 Am. Soc'y Int'l L. Insights (Sept. 19, 2011), http://www.asil.org/insights 110919.cfm.

deemed the rules of customary international law relevant to construct the State's unlawful conduct:

> In the first place the Court will test the alleged conduct of Dutchbat against the provisions of national Bosnian law. Apart from the State's opinion - which has been considered to be incorrect in the above - that the Court should judge Dutchbat's conduct strictly in accordance with international law, it is not disputed that based on Dutch international private law the alleged wrongful act must be tested against the law of Bosnia and Herzegovina. Additionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound. The Court assumes that, by advancing the argument in its defense that these conventions are not applicable, the State did not mean to assert that it does not need to comply with the standards that are laid down in art. 2 and 3 ECHR and art. 6 and 7

> ICCPR in peacekeeping missions like the present one.[20]

Although the law of Bosnia and Herzegovina was the applicable law, the reasoning of the Court would not have been different if Dutch law had applied to the facts because the laws are materially similar. Hence, a violation of the law of nations would be deemed a legal basis for liability under Dutch law, in particular Article 162 of Book 6 of the Dutch Civil Code.

(c) Whether the defendant was negligently or intentionally involved in a grave violation of international human rights law is immaterial. It is sufficient that the defendant act negligently. Intention is not required.

Whether or not the tort in question involved a grave violation of international human rights law has no bearing on a claim pleaded before Dutch courts. If an applicable written rule requires "intention" and intention cannot be proven, such a rule may not serve as a basis for unlawfulness. However, in such a case the plaintiff will be able to base his claim on the violation of an unwritten rule pertaining to proper societal conduct, using the written rule as evidence of such conduct. Negligent conduct of the defendant will then be deemed sufficient.[21]

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[20] *Mothers of Srebrenica*, *supra* note 15, LJN: BR0133, at ¶ 6.3.

[21] Assers et al., *supra* note 13, at 98-107; van Dam, *supra* note 13, at 903-16.

If the defendant acted intentionally that factor may, however, impact upon the assessment of damages awarded against the defendant in a successful tort action as it may lead to a slightly higher level of compensation for non-pecuniary loss. Unlike common law jurisdictions, Dutch law does not provide the victim with a right to aggravated or exemplary damages (although part of these may be tacitly included in the compensation for non-pecuniary loss).

As the above examples demonstrate, civil claims in the Netherlands for violations of international law may be premised on the negligent failure to prevent human rights abuses, as well as on intentional acts.

III. DUTCH COURTS MAY ASSUME JURISDICTION OVER CIVIL CLAIMS AGAINST INDIVIDUALS AND CORPORATE ACTORS FOR EXTRATERRITORIAL VIOLATIONS OF THE LAW OF NATIONS.

(a) The Brussels I regulation permits jurisdiction over Netherlands-based defendants and defendants domiciled in one of the other EU Member States.

The main regime on international jurisdiction pertaining to civil and commercial cases that are brought before courts in the EU Member States is laid down in Council Regulation (EC) No 44/2001 of December 22, 2000 on Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And

Commercial Matters, 2001 O.J. (L 12) 1 (hereinafter "Brussels I Regulation").[22] Apart from certain well-defined exceptions not relevant here, the rules on international jurisdiction set out in this regime apply in principle to all types of civil and commercial matters that are brought before courts in the EU Member States,[23] including civil claims for extraterritorial violations of the law of nations.[24]

The general rule under the Brussels I regime is that courts in an EU Member State will assume jurisdiction over civil and commercial claims brought against persons domiciled there.[25] Accordingly, on the basis of the Brussels I regime, Dutch courts will assume jurisdiction over civil claims brought against defendants domiciled in the Netherlands. Under this regime, a company or

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[22] Formally, the Brussels I regime consists of: the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (C 27) 1; the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (L 319) 9; and the Brussels I Regulation, which entered into force on March 1, 2002 and largely supplants the two earlier conventions. It should be noted that the ECJ judgments referred to below hold relevance under the Brussels I Regulation, even if some have been pronounced under the Brussels Convention.

[23] Brussels I Regulation, Recital 7 and art. 1.

[24] See, in more detail and with a focus on transnational civil liability claims against multinational corporations, Liesbeth Enneking, *Foreign Direct Liability and Beyond* 145-50 (Eleven International Publishing, 2012). *See also* Liesbeth Enneking, *Crossing the Atlantic? The political and legal feasibility of European foreign direct liability cases*, 40 Geo. Wash. Int'l L. Rev. 903 (2009).

[25] Brussels I Regulation, art. 2(1).

other legal person is domiciled at the place where it has its statutory seat, its central administration or its principal place of business.[26] Consequently, Dutch courts will assume jurisdiction over civil claims against corporate actors that have their statutory seat, their central administration or their principal place of business in the Netherlands.

In addition, Dutch courts may, under the Brussels I regime on the basis of a limited number of special jurisdiction rules, assume jurisdiction over civil claims against corporate actors that are domiciled not in the Netherlands but in one of the other EU Member States.[27] For example, jurisdiction may be extended over a civil claim that relates to a dispute arising out of the operations of a Netherlands-based branch, agency or other establishment of an EU-based company,[28] and the situation in which the harmful event giving rise to a tort claim against an EU-based company can be localized in the Netherlands.[29]

It should be noted that the Brussels I Regulation in essence provides a regime of personal jurisdiction that is applicable to civil and commercial claims brought before courts in the EU Member States; the focus is on the domicile of the defendants. Whether the claims involved pertain to conduct, events or activities that have taken place within the forum country or within

[26] *Id.*, art. 60.
[27] *Id.*, art. 5-7.
[28] *Id.*, art. 5(5).
[29] *Id.*, art. 5(3).

EU territory, or not, is largely irrelevant under the Brussels I regime. So is the nationality and/or domicile of the plaintiffs; the European Court of Justice held in the case of *Group Josi Reinsurance Company SA v. Universal General Insurance Company* that the regime applies to civil claims brought against defendants domiciled in an EU Member State, regardless of where the plaintiffs are domiciled.[30]

At the same time, the Brussels I regime grants EU Member State courts jurisdiction as of right over civil claims against defendants domiciled in the forum country. This means that there is no room for subsequent dismissal of the claims on the basis of prudential doctrines like *forum non conveniens*. In the case of *Owusu v. Jackson and Others*, the European Court of Justice explicitly confirmed that the Brussels I regime precludes an EU Member State court from declining jurisdiction conferred on it by the Brussels I regime's general rule even where a non-Member-State court would provide a more appropriate forum for the trial of the action.[31]

(b) Dutch courts will under various circumstances have jurisdiction over civil claims against defendants that are based outside the Netherlands and outside the territory of the EU Member States.

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[30] Case C-412/98, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, 2000 E.C.R. I-5925 §§ 57-59.

[31] Case C-281/02, *Owusu v. Jackson and Others*, 2005 E.C.R. I-1383 §§ 37-46.

The Brussels I regime does not apply to civil claims brought before EU Member State courts against defendants that are not domiciled in an EU Member State; in such cases, the matter of jurisdiction is to be determined by the law of the forum country.[32] Whether or not Dutch courts will assume jurisdiction over civil claims against non-EU-based defendants is determined by the Dutch rules on international jurisdiction that are laid down in the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).[33] The Dutch regime applies in principle to all types of civil claims that are brought before Dutch courts and that fall outside the scope of the Brussels I regime.[34] This includes civil claims against individuals and/or corporate actors for extraterritorial violations of the law of nations that fall outside the Brussels I regime, for instance because they are brought against non-EU-based defendants.[35]

Much like the Brussels I regime, the general rule under the Dutch regime on international jurisdiction is that Dutch courts have jurisdiction over civil claims against defendants that are domiciled or have their permanent address or

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[32] Brussels I Regulation, art. 4(1).

[33] Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) of 1838, as amended in 2002, art. 1-14. See, in more detail and with a focus on transnational civil liability claims against multinational corporations, Enneking, *Foreign Direct Liability*, *supra* note 24, at 208-14.

[34] *See* Dutch Code of Civil Procedure, art. 1.

[35] See, in more detail and with a focus on transnational civil liability claims against multinational corporations, Enneking, *Foreign Direct Liability*, *supra* note 24, at 145-50.

habitual residence in the Netherlands.[36] According to Dutch law, a legal person is domiciled at the place where it has its statutory seat.[37] The Dutch regime also features a number of provisions, however, on the basis of which Dutch courts may assume jurisdiction over civil claims against foreign defendants.

Examples include, again, the situation in which a civil claim relates to a dispute arising out of the operations of a Netherlands-based office or branch of a foreign company,[38] and the situation in which the harmful event giving rise to a tort claim against a foreign defendant can be localized in the Netherlands.[39] In addition, Dutch courts may have jurisdiction over civil claims against foreign defendants based on a forum selection agreement between the parties to the dispute, even where the dispute has only limited connections with the Dutch legal order.[40]

Another basis for jurisdiction over civil claims against foreign defendants under the Dutch regime is provided by the rule on joinder of claims against multiple defendants. This rule allows Dutch courts to assume jurisdiction over civil claims against foreign defendants when those

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[36] Dutch Code of Civil Procedure, art. 2.

[37] Dutch Civil Code (*Burgerlijk Wetboek*) of 1992, art. 1:10(2).

[38] Dutch Code of Civil Procedure, art. 2; Dutch Civil Code, art. 1:14.

[39] Dutch Code of Civil Procedure, art. 6(e).

[40] Dutch Code of Civil Procedure, art. 8(1). Note that the parties do need to have a "reasonable interest" in bringing the claim before the Dutch courts, however.

claims are so closely connected with civil claims in the same case against other defendants that do fall within their jurisdictional ambit that the joint adjudication of the various claims is justified for efficiency reasons.[41]

In late 2009 and early 2010, this rule provided a basis for the assumption of jurisdiction by the The Hague civil court over a number of tort claims against Nigeria-based Shell Petroleum Development Company of Nigeria Ltd. for damage caused by oil spills in the Niger Delta. The district court held these claims to be sufficiently connected to tort claims brought against Netherlands-based Royal Dutch Shell by the same plaintiffs for damages caused by the same oil spills that joint adjudication of the claims was warranted. With the The Hague district court's jurisdiction over the latter claims against the Netherlands-based defendant being a given under the Brussels I regime's general rule, the court assumed jurisdiction over the claims against the foreign defendant on the basis of the Dutch joinder rule.[42]

A further basis for jurisdiction of Dutch courts over civil claims against foreign defendants under the Dutch regime on international jurisdiction is provided by the *forum necessitatis*

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[41] Dutch Code of Civil Procedure, art. 7.

[42] *Oguru*, *supra* note 14, LJN: BK8616; *Akpan*, *supra* note 14, LJN: BM1469; *Dooh*, *supra* note 14, LJN: BM1470; *see also* Enneking, *Foreign Direct Liability*, *supra* note 24, at 104-07, 208-10.

[42] Dutch Code of Civil Procedure, art. 9(b) and 9(c); *see also* Enneking, *Foreign Direct Liability*, supra note 24, at 210-12.

rule. This rule allows Dutch courts to exercise jurisdiction over civil claims that would normally not fall within one of the other bases for jurisdiction if effective opportunities to bring those claims in foreign fora are absent.[43] A well-known example of the application of this rule was the assumption of jurisdiction by a Dutch court over civil claims brought against Kuwait Airways Corporation by Iraqi pilots, who asserted that they would not receive a fair trial if forced to bring their claims before the courts in Kuwait.[44]

The Dutch *forum necessitatis* provision is closely connected with the access to justice requirement of Article 6 of the European Convention on Human Rights. It allows Dutch courts to exercise jurisdiction over civil claims with no connections to the Dutch legal order if bringing those claims outside the Netherlands is impossible, either legally (for instance where no foreign court exists that has jurisdiction to hear the claims) or factually (for instance due to natural disasters or acts of war locally).[45] As such,

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[43] Dutch Code of Civil Procedure, art. 9(b) and 9(c).

[44] *Saloum/Kuwait Airways Corp.*, Amsterdam Subdistrict Court, April 27, 2000, 2000 Nederlands Internationaal Privaatrecht 315, at 472 [Kuwait Airways case II]; *Abood/Kuwait Airways Corp.*, Amsterdam Subdistrict Court, January 5, 1996, 1996 Nederlands Internationaal Privaatrecht 145, at 222 [Kuwait Airways case I].

[45] Dutch Code of Civil Procedure, art. 9(b); *see also, e.g.*, *Unnamed Parties*, The Hague Court of Appeal, January 12, 2011, LJN: BP9606 (Neth.) (in which case the court assumed jurisdiction over a case in which the petitioner in an international family matter did not have an alternative forum for lack of information of the whereabouts of his child or the mother of his child); *Unnamed Parties*, The Hague

it allows Dutch courts to exercise, under certain circumstances, what is in effect a form of universal civil jurisdiction. It also allows Dutch courts to assume jurisdiction over civil claims if it would be unacceptable to require the plaintiffs to have their claims adjudicated by a foreign court (for instance where they cannot expect to receive a fair trial there due to discriminatory legal or societal rules and practices), provided the claims have sufficient connections to the Dutch legal order.[46]

In March 2012, this rule provided a basis for the assumption of jurisdiction by the The Hague civil court over a civil claim brought by a foreign plaintiff in relation to his unlawful

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Court of Appeal, December 21, 2005, LJN: AU9650 (Neth.) [Malta divorce case] (in which case the court assumed jurisdiction over a divorce case between two Maltese residents considering the fact that Maltese laws prevented the alternative court in Malta from granting a divorce under any circumstances).

[46] Dutch Code of Civil Procedure, art. 9(c); *see, e.g.*, *Solvochem/Rasheed Bank*, The Hague Court of Appeal, November 30, 2010, LJN: BO6529 (Neth.) (in which the court of appeal confirmed the assumption of jurisdiction considering that at the time the claim was initiated in the first instance, the Dutch plaintiff in the dispute could not have been expected to turn to the courts in Iraq). Note that this second application of the Dutch *forum necessitatis* rule tends to be interpreted restrictively; financial impediments alone, for example, are not sufficient to warrant an exercise of jurisdiction on this basis. *Compare, e.g.*, *Mourant & Co. Retirement Trustees Ltd.*, Zutphen District Court, January 16, 2008, LJN: BC9336 (Neth.) (in which an appeal to this article on the basis of an assertion that the litigation costs in the alternative forum (Jersey) would be prohibitively high, was turned down).

imprisonment and torture in Libya by defendants without any known place of residence either within or outside the Netherlands. The court found that in light of the situation in Libya at the time the claim was initiated in July 2011, the plaintiff could not be expected to submit his claim to the Libyan courts. The court held in a default judgment that the defendants, jointly and severally, are to pay the plaintiff € 750,000 in material damages and € 250,000 in immaterial damages for the harm he suffered as a result of his unlawful imprisonment and torture in Libya.[47] This case bears a significant resemblance to civil claims brought in United States courts under the ATS.

Like the Brussels I regime, the domestic Dutch regime on international jurisdiction in essence provides a regime of personal jurisdiction in which the focus is first and foremost on the domicile of the defendants. Whether the claims involved pertain to conduct, events or activities that have taken place within the Netherlands is largely irrelevant under this regime, as is the nationality and/or domicile of the plaintiffs. Another similarity is the fact that the Dutch domestic regime on international jurisdiction leaves no room for dismissal of claims over which a Dutch court may exercise jurisdiction under one of its provisions on the basis of prudential doctrines like *forum non conveniens*.

[47] Palestinian doctor case, *supra* note 17, LJN: BV9748.

IV. CONCLUSION: DUTCH COURTS WOULD RECOGNISE CLAIMS SIMILAR TO THOSE PURSUED BY THE PETITIONERS.

Dutch courts may exercise criminal and civil jurisdiction over both individuals and corporate actors for extraterritorial violations of the law of nations and they have done so in a number of recent cases.

The location of the alleged misconduct in such cases is largely irrelevant, as are the domicile and nationality of the victims or plaintiffs. What is relevant is the defendant's presence (for criminal law purposes) or his domicile (for civil law claims). Dutch courts may also under certain circumstances assume jurisdiction over civil claims against foreign defendants not domiciled in the Netherlands.

Dutch courts may therefore assume jurisdiction over so-called "foreign cubed" civil claims involving foreign claimants, foreign defendants and conduct, events or activities that have taken place abroad. They have done so recently with respect to a number of ATS-like claims. In late 2009 and early 2010, the The Hague District Court held with respect to a number of tort claims pertaining to oil pollution in the Niger Delta brought by Nigerian farmers that it had jurisdiction not only over the claims against the Netherlands-based parent company Royal Dutch Shell but also over claims against the Nigeria-based subsidiary. In March 2012, the The Hague District Court assumed jurisdiction over and sustained a civil claim brought by a foreign

plaintiff regarding his unlawful imprisonment and torture in Libya by Libyan officials not resident in the Netherlands.

Dutch case law is therefore incompatible with any alleged rule of customary international law prohibiting the exercise of jurisdiction by domestic courts over claims such as those pursued by the Petitioners here. To the contrary, recent Dutch case law suggests that such claims are indeed recognized by the courts.

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