



THE NETHERLANDS

SURVEY QUESTIONS & RESPONSES¹

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- **material civil litigation?**
- **Risk factors that would impact a shareholder's investment in the company?**
- **Any reported violations of law or pending proceedings arising from such violations?**
- **Revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

Multiple disclosure provisions, legally binding and non-binding, can be found in Dutch law, especially in the realm of the protection of the financial interests of debtors, creditors

¹ The initial responses to this survey of Dutch law were provided by Nicola Jägers, Lecturer, Public International Law, Schoordijk Institute, Tilburg University, the Netherlands. Comments on the responses have been provided by Professor Menno T. Kamminga, Director, Maastricht Centre for Human Rights, Faculty of Law, Maastricht University, the Netherlands. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of the Netherlands (Nicola Jägers), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

and shareholders. These provisions are spread out over many different sources. Here, I will concentrate on the most important provisions in light of the topic of this survey.

Dutch Civil Code

Disclosure provisions are provided for in, *inter alia*: Book 2, title 9 of the Dutch civil code which deals with annual accounts. The annual accounts contain a range of information. The larger the company, the more information it is required to publish. According to article 2:391:

‘the annual report should provide an accurate overview of: the situation at the time when the balance sheet is concluded; the development during the financial year and the results of the corporation (...). The report shall, in accordance with its size and the complexity of the corporation provide a balanced and comprehensive analysis of the situation at the time of conclusion of the balance sheet, the development during the financial year and the results. If necessary for a good understanding of the development, the results or the position of the corporation, this analysis will include both financial and non-financial² performance indicators including the environment and issues concerning personnel. The annual report will also include a description of the most important risks and uncertainties a corporation faces.’

The annual accounts comprise the following sections:

- balance sheet (A balance sheet reflects the position of the company at a given time. This is usually 31 December, but other dates are possible. The entrepreneur will then look at the entire situation of the company at that moment. Debts, assets, outstanding accounts everything is added up to create the balance sheet.)
- profit and loss account (A profit and loss account indicates what has been earned throughout the accounting year and what costs have been incurred. When one is set off against the other, this reveals whether the company has made a profit or loss.)
- notes (The amount of detail contained in the notes depends on the size of the company. For a small company, the notes may simply be a brief indication of how the balance sheet was compiled, together with a statement as to the number of employees. For a large company, the notes may form a complete book, including details of directors' remuneration, for instance)

A small legal entity is only required to file a limited balance sheet and notes with the Chamber of Commerce. A middle-sized legal entity must file a profit and loss account in addition to the balance sheet, together with simplified versions of the annual report and auditor's report. Finally, a large legal entity must file the same documents as a middle-sized one, except in more detailed form. The precise criteria are set out in the Civil Code (Articles 2:396 and 2:397). The annual accounts have to be checked by a registered auditor. I have not come across a specific provision that obliges corporations to inform

² This requirement has been added as a result of the so-called European Modernization Directive. See under next heading.

shareholders of pending proceedings. However, if the cases possibly might involve fines or financial compensation the registered auditor will probably require the company to report this under the heading of financial risks that are not apparent from the balance sheet.

Reports are not submitted to the government. The requirements for annual reports etc. are mostly aimed at shareholders. The accounts of most companies are accessible for the public as they have to be filed for inspection with the Chamber of Commerce within 13 months. The *Staatscourant* (Gazette) is notified once the annual accounts have been filed. The European Company Guidelines determine what information is required to be published in the press. In the Netherlands, publication in the *Staatscourant* constitutes the fulfilment of this statutory requirement. The information in these documents is therefore available to the public and can be inspected by anyone anonymously for a small fee. This can be done via the website of the Chamber of Commerce. Companies which must file accounts are:

- *BVs* (private limited liability companies, whether active or not)
- *NVs* (public limited companies, whether active or not)
- Cooperatives
- Mutual insurance societies
- Banks
- The *VOF* (partnership under common firm) and *CV* (limited partnership) only if all managing partners are foreign equity partners.
- Foreign legal entities with offices in The Netherlands (if they are required to publish their annual accounts in the country of incorporation)
- Companies formally registered abroad (formally foreign companies where actual business takes place almost entirely within The Netherlands without any actual connection with the country of incorporation.)
- Associations and societies with business activities and a net annual turnover in excess of 3,5 million euros in two consecutive accounting years.

Exceptions:

Some companies are not required to file their annual accounts for inspection:

- Sole proprietor businesses
- Associations and societies which either have no business activities or whose business activities generate less than 3,5 million euros net turnover.
- Companies which are not registered in the trade register such as partnerships and governmental bodies.
- Group companies whose parent company files consolidated accounts. Instead of annual accounts, the subsidiary company must file a statement of agreement and declaration of liability. The parent company must file annual accounts on behalf of the whole group.
- Companies which have only existed for a short time and have not yet operated throughout an entire accounting year.
- Companies with so-called 'extended first accounting year'. An extended accounting year may not exceed a 24-month period and is only possible

during the first year following incorporation or following amendment to the articles of association.

- Foreign companies (not ‘companies formally registered abroad’. See above.) which do not have to file accounts in their country of incorporation.

The annual accounts do not have to state in any detailed manner the sources of revenues. This however, will be the case in the bookkeeping of the company (article 2:10 civil code: management is obliged to good bookkeeping regarding the financial situation of the legal person).

An obligation to disclose information on pending litigation can possibly also be inferred from article 2:377 paragraph 7 civil code which requires corporations to disclose information on the profit and loss account regarding those profits and loss that are not the result of regular corporate activities.

In general, it would seem that the disclosure laws in the Netherlands are not geared towards controlling businesses in the field of the abuses that this survey deals with. There have been several initiatives in the past to come to a law obligating corporations to disclose information in the field of corporate social responsibility. So far, however, the legislator has opted for a more voluntary approach to the issue. In the final analysis, it will be up to the registered auditor to decide whether all financial risks have been reported adequately.

European Directive

This will to a certain extent change now the European Modernization Directive has been implemented (adopted in 2003). Based on this directive national legislation has been adjusted. The incorporation of this European directive has led to changes in book 2, title 9 of the Dutch civil code which will apply to the annual reports from the financial year of 2005 onwards. Article 2:391 civil code provides what should be in the annual report. This article has been modified resulting from the incorporation of the European Directive. It is now required for the annual reports from 2005 onwards to include ‘a fair review of the development and performance of the company’s business’ and the risks it faces (see also above). This includes non-financial performance indicators (the environment is specifically referred to). This information must enable members of the company to assess the strategies adopted by the company and the potential for those strategies to succeed. This obligation applies to large corporations. Corporations of an average size are exempt from the obligation to provide an overview of non-financial indicators (see article 2:397 par. 7 civil code). Small companies are exempt from the obligation to provide an annual report altogether. These exemptions do not apply if the corporation is stock market listed. It remains to be seen whether involvement in human rights abuses will in the future (this provision is applicable for the financial year of 2005 onwards) be considered to amount to a risk for the corporation that requires any subsequent litigation to be included in the annual report. I would imagine that this could be the case.

The International Financial Reporting Standards

The International Financial Reporting Standards (IFRS) encompass the 'old' International Accounting Standards. Following a Directive of the European Commission all corporations listed on the stock exchange are required as of 1 January 2005 to present their annual report in conformity with the IFRS. Other corporations are required to adhere to national laws. The Dutch national laws on reporting (book 2, titel 9 Civil Code) make it possible for corporations to follow the IFRS. In general, it should be noted that the IFRS are still in the process of being further developed. Currently, the IFRS do not pay attention to issues of corporate social responsibility

The Workers Council Code (*Wet op de Ondernemingsraden; WOR*).

In the Workers Council Code (WOR) some additional provisions can be found regarding information that the company must disclose for the workers council (articles 31, 31 (a) WOR). This code is directed at workers. Workers however, can of course also be shareholders.

Article 31 WOR provides that:

'the management is required to provide the workers council with all information that they need to perform their task. (...)'

Article 31 (a):

'management is required to disclose information regarding the activities and the results of the corporation to the workers council at least twice a year (...)'

Corporate Governance Code (*Code Tabaksblat*)

In 2003 the Government did introduce the so-called Corporate Governance Code (*Code Tabaksblat*) which entered into force in 2004. This code is only applicable to corporations listed on the stock market. The main aim of the Code is to reform the management of corporations. The code especially deals with issues such as remuneration of managers, and possible ways to enhance the power of shareholders. Violation of the Corporate Governance Code or voluntary adopted codes of conduct by the corporations may play a role in coming to the conclusion whether there is misconduct on behalf of the corporation.

Right of Inquiry

A right of inquiry is provided for in articles 2:344 – 2:359 civil code. This right aims at bringing abuses and misconduct to the fore and provides shareholders with the possibility to go to court. Shareholders, or others with an interest such as the 'Advocaat-Generaal in the general interest, can request, *inter alia*, annulment of a decision or the dismissal of a manager. However, as can be deduced from the above, there is no clear provision in Dutch law that obliges a corporation to report on abuses such as those that are the topic of this survey. It is therefore doubtful whether this right to inquiry could be of any use in such a case. To my knowledge there are no instances where workers have initiated inquiries regarding the human rights practices of employers.

Provisions dealing with Bribery of Foreign Officials

The Netherlands ratified the OECD Bribery Convention on 12 January 2001. The law provides for several amendments to Dutch legislation in order to meet the obligations under the Convention and other international instruments. The amendments have brought Dutch law into line with the US 'Foreign Corruption Act'. Amendments relevant to the obligations under the Convention can be briefly summarised as follows:

(1) A new article (article 178a) was added to the Penal Code in order to extend the application of the active bribery offences, which previously only applied to domestic public servants, to

“persons in the public service of a foreign state or an international law organisation”, “former public servants” “persons anticipated to become a public servant” and “judges of a foreign state or an international organisation”.

(2) A new article (article 177a) was added to the Penal Code in order to establish the offence of bribing a public servant in order to obtain an act or omission of him/her that is not in breach of his/her official duties. Article 177, which pertains to the bribery of a public servant, applies only where the purpose of the bribe is to obtain an act or omission in breach of official duties.

(3) The penalty of imprisonment and the fine that apply under article 177 of the Penal Code (i.e. where the bribe is intended to obtain an act or omission in breach of official duties) were increased, for imprisonment from 2 to 4 years and for the fine from category 4 to category 5.

(4) The offences were expanded to cover the case where a person renders or offers a public servant a “service” (articles 177, 177a and 178 of the Penal Code).

(5) Article 51a of the Extradition Act was amended in order that the offences under articles 177 and 177a of the Penal Code are considered extraditable offences.

Other relevant laws, regulations or decrees that have an impact on implementation by the Netherlands of the OECD Convention or the Recommendations:

(1) The relevant tax laws do not expressly deny the tax deductibility of bribes to foreign public officials. Instead, they deny the tax deductibility of expenses related to “crimes” where there has been a conviction by a Dutch court or a settlement by payment of a fine, etc. with the Dutch prosecutor to avoid criminal prosecution. Pursuant to a new bill, pending before parliament, tax officials would be able to refuse the deduction of certain expenses where they are reasonably convinced, based on adequate indicators, that the expenses consist of paid bribes (in the Netherlands or abroad), thus removing the requirements of a conviction.

(2) The “Directive on the investigation and prosecution of corruption of officials”, adopted on 8 October 2002 and entered into force on 15 November 2002 for a period of four years (i.e. 15 November 2006), indicates the factors that will have to be taken into

account in determining whether it is appropriate to prosecute domestic and foreign corruption cases. The directive addresses, among others, the use of facilitation payments/gifts for which no specific monetary value is set.

The Netherlands have signed and/or ratified the following instruments in the field of bribery:

- The EU Convention on the Protection of the European Communities' Financial Interests (PIF-Convention) and its first and second Protocol
- The EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States
- The EU Council Framework Decision against Corruption in the Private Sector
- The Criminal Law Convention on Corruption of the Council of Europe

Signature:

- The United Nations Convention against Transnational Organised Crime
- The United Nations Convention against Corruption
- The Protocol to the Criminal Law Convention on Corruption of the Council of Europe

2. Is there a right to know statute enabling one to obtain information from your government?

Yes, the so-called *Wet Openbaarheid Bestuur* - *WOB* (Access to Public Sector Information). Article 3 provides for the right of every person to request disclosure of documents regarding a public sector issue from the organ responsible. There are however, two escape-clauses: articles 10 & 11.

According to article 10:

Such information does not need to be provided if:

- 1) a) This would endanger the unity of the Crown (the administration of the Kingdom)
b) This would harm the security of the State
c) The information concerns company and manufacturing data that has been submitted to the government by natural or legal persons on the basis of confidentiality.

2) Information will not be provided based on this law if the interests of disclosure does not weigh up against the following interests:

- a) The relations between the Netherlands and other States or international organizations.
- b) The economic and financial interests of the State or other public law organs.
- c) investigation into and prosecution of criminal acts.
- d) inspection, control and surveillance of public law organs
- e) respect for privacy
- f) The interest of the person to whom the information is addressed to be the first to receive this information.
- g) prevention of disproportionate injury or favoritism

According to article 11 WOB:

- 1) a request for information originating from documents which have an internal character will not be granted if the information concerns personal policy views.
- 2) Information regarding personal policy views can be disclosed if the information is made anonymous.

(...)

I. Status of business entities under criminal law

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

Yes, already in 1951 it was recognized that legal persons can commit economic crimes. An act was passed: the so-called *Wet Economische Delicten* (WED). In 1976 this was also provided for in the Dutch criminal code. The code makes no distinction between criminal liability of natural and legal persons. Nor does the criminal code differentiate as to the type of crimes a legal person can commit. Article 5 of the criminal code states that criminal offences can be committed by natural and legal persons and that, in the case of latter, prosecution may be brought against the legal person itself, the agent acting on its behalf who ordered or was instrumental in controlling and directing the commission of the offence, or both. Prosecution of legal persons is not unusual. These cases frequently concern economic or environmental matters.

A very recent example of a case where a corporation is being prosecuted concerns an accident that took place in September 2003 during a cleaning operation in the so-called *Amer centrale*, a power plant in the Netherlands. The collapse of scaffolding resulted in the death of five workers and severely wounded three. The main contractor, *CMI*, hired several subcontractors. The defective scaffolding was built by sub-contractors *Hertel Services* and *Albuko NV*. After construction the scaffolding was not checked. Besides one individual the public prosecutor has focused on the criminal prosecution of the legal persons involved. According to the prosecutor, the accident is the result of deficient coordination between the different corporations and mistakes made during the construction of the scaffolding. The three corporations are being prosecuted for, *inter alia*, “wrongful death” (*dood door schuld*) and the prosecutor has requested the court to fine the subcontractors over half a million euro. The legal claim against the main contractor amounted to 45,000 euro (the requested sentences for the subcontractors are higher as these corporations are also accused of violating the laws on working hours and hiring illegal workers). The court is expected to deliver its judgment on 24 May 2006.

The fact that legal persons are treated in the same manner as natural persons does not imply that a legal person can commit every act as described in the criminal code. The following examples of crimes that cannot be committed by a legal person are mentioned (*inter alia*) in the explanatory note: bigamy, misfeasance, piracy in the sky, vagrancy and public drunkenness. Conceptually, however, no distinction is made between a natural and a legal person. What is to be considered a legal person is provided for in art. 51 (3) of the criminal code (and articles 2:1, 2:3 of the civil code) The central government is exempt from prosecution.

4. What type sanctions are applied to business entities, as opposed to natural persons?

There is no specific type of sanctions designed especially for legal persons. Following from the fact that legal persons conceptually are treated the same as natural persons implies that every sanction provided for by law can also be applied to business entities. Of course prison-sentences are not relevant. Sanctions that can be applied are *inter alia*: fines, withdrawal of certain rights/privileges, forfeiture, public disclosure of the sentence, compensation for the victim. The sanctions and measures can be found in article 9, 36 a-f of the criminal code. Specific sanctions are provided for in the Act on Economic Crimes (WED). For example, art. 7 (c) provides for the complete or partial closure of a business-enterprise and article 8 (b) legal restraint of the enterprise or suspect.

Art. 51 (2) Criminal Code:

‘If a criminal act is committed by a legal person, prosecution can take place and the sanctions as provided for by law, and in so far they are suitable can be applied against:

1. the legal person itself and/or
2. those who in fact have given the orders or those who have in fact given direction to the illegal act.’

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?

In Dutch criminal law, corporations exist as identifiable entities that carry their own moral responsibility, although they act through natural persons. All individuals in a collective enterprise contribute within its complex network of relationships and communications to criminal offences, and hence such offences are to be regarded as committed by the organization itself. The combined acts and mind sets of the human beings working for the corporation must together constitute all of the written elements of the proscribed behaviour. To determine whether the actions of servants of a business enterprise can be attributed to a legal person is usually done in the same manner as is the case with natural persons: the criteria of control and acceptance. These criteria, slightly modified, also apply when attributing the acts of servants to smaller corporations. It has to be proven that the legal person had control over the alleged criminal activity and this activity falls in the normal line of business of the legal person.³ Entirely alien behaviour by employees does not constitute a corporate offence. Specific instructions are not required. For example, discrimination by a doorman can be attributed to the legal person. For larger legal persons this kind of attribution is less evident. Other forms of attribution are then considered to be more suitable. In such a case the focus shifts more towards the legal person itself. One can think in terms of ‘normal company policy’. See the case before the Supreme Court that

³ The so-called *Kabeljauw* case, HR 01-07-1981, NJ 1982, 80

dealt with the question whether a legal person could be considered a perpetrator for acts that it considered to be part of its normal company-policy (the company had illegally dumped waste).⁴

b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present?

As is the case with natural persons, criminal liability of legal persons depends on *mens rea*. For corporate liability in the case of felony, management must be aware of criminal activity or of certain risks (or have potentially been in a position to be aware of them), and must have deliberately accepted those risks (corporate intent), or recklessly neglected to address the problem (corporate negligence). The knowledge that (potentially) risky situations exist must not be confined to one single individual, but may be the aggregate knowledge of different individuals within the corporation. Intent does not have to be present throughout the management.⁵ For corporate liability for misdemeanours, management must fail to foresee a potentially risky situation, even if no reckless faults have occurred. As is the case with felonies, knowledge may be aggregately constructed and need not be attributed to a single individual.

Whether intent/guilt of natural persons can be attributed to the legal person will depend largely on the specific circumstances of the case. In the case of a small corporation the intent of one employee can be sufficient.⁶

c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?

Article 51 (2) of the criminal code provides that “directing” criminal acts of a corporation is punishable. Starting point is that the person that in fact was in command or gave the specific orders for the criminal act, is responsible. This therefore, does not *per se* have to be the management or any person in the top of the organisation. It can even be someone outside of the organisation. For such ‘directing’ to be punishable, however, the legal person must be seen as the perpetrator. It is however, not necessary that the legal person is actually prosecuted or sentenced. Even if the legal person is acquitted, the servant can still be prosecuted as long as it is clear that the legal person has committed the act.⁷ It has to be plausible that there is a causal link between the direction given and the criminal act for the directing to be punishable. A legal relation is not required, but a certain degree of power, influence and responsibility is. Double intent is also required re the criminal act and re the ‘direction given’. The Supreme Court has decided what constitutes ‘giving direction’.⁸ Also when a person, that is in a position to do so and is reasonably speaking

⁴ HR 23-02-1993, NJ 1993, 605

⁵ HR 22-0901987, NJ 1988, 381

⁶ HR. 15-10-1996, NJ 1997, 109

⁷ HR 06-04-1999, NJ 1999, 633

⁸ *Slavenburg* cases HR 19-11-1985, NJ 1986, 125 en HR 16-12-1986, NJ 1987, 321

required to do so, fails to take action to prevent the illegal acts and therefore accepts the risk of the acts taking place, this can fulfil the requirement of 'giving direction'. Concrete knowledge of the illegal act is not required. Knowledge that this type of illegal act is committed regularly is sufficient.⁹

Besides this particular standard for attributing criminal liability to those giving direction or orders, there are also the 'traditional' standards on the basis of which employees can be prosecuted for complicity and aiding and abetting (articles 47 & 48 criminal code) See the answer to question 6 below.

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Title V, articles 47-54 of the Dutch criminal code deal with participation in criminal acts:

To be convicted a person participating in a crime should have the intent to participate. Moreover, (s)he should have intent regarding the most important aspects of the crime itself. The intent regarding the crime itself does not have to be the same intent as that of the perpetrator. However, those involved in a crime should not have totally different intent.

Article 47:

'Punishable as a perpetrator are:

- The perpetrator
- The co-perpetrator
- The person provoking a crime via gifts, promises, abuse of official power, violence, threat or deception or by providing for the possibility, the means or information. One can only be convicted for provocation if there was the intent to do so.'

Art. 48:

'To be convicted for complicity:

One has to have the intent to aid and abet, by providing the opportunity, the means or information, to commit a crime.'

Article 49:

'The maximum penalty for a crime will be reduced with a third in the case of complicity.'

Article 52:

'One can only be an accomplice to a felony not to a misdemeanor.'

To be punished for aiding or abetting the commission of a crime it is necessary that assistance was provided before or during the act. In principle, assisting in a crime after

⁹ HR 16-06-1981, NJ 1981, 586 en HR 22-03-1983, NJ 1983, 502.

the actual crime has taken place, is not punishable. However, it can prove difficult to establish exactly when a crime has been completed. Sometimes, agreements made to provide aid after the crime are considered to amount to complicity.¹⁰

Article 78:

The crime does not have to be completed; complicity in an attempt to commit a crime is also punishable. Aiding and abetting in aiding and abetting is also punishable. This was first accepted by the Supreme Court in the so-called *Exam* case.¹¹ The Supreme Court in this case accepted complicity to the act of provoking an attempt to fraud. These 'composed' forms of participation can be quite far-reaching. For example: the act of provoking the provocation of co-perpetrating an attempt to arson has been found punishable.¹² Someone can also be convicted for different forms of participation. For example: provocation and co-perpetrating.

Article 140 of the criminal code can also be relevant as this deals with participation in a criminal organization. However, this article is not aimed at a legal person that happens to have occasionally committed a crime but deals more with a 'real' criminal organization.

Article 140:

- '(1) Participating in an organization that has the objective to commit crimes is punishable with a maximum prison sentence of 6 years or a fine to a maximum of 45.000 euro.
- (2) Participating in the continuation of the activities of a legal person that has been declared illegal by a court will be punished with a maximum of 3 years in prison or a fine (maximum 4.500 euro)
- 3) The sentences for persons that have established, lead or managed such a criminal organization can be raised with a third.'

On 23 December 2005, for the first time, a Dutchman stood trial for complicity to Genocide in another country. The businessman *Van Anraat* was charged with supplying the raw materials for chemical weapons used in the 1980-1988 war against Iran and Iraqi Kurds. He was arrested for the first time in 1989. After two months he was released and he fled to Iraq where he lived for 14 years. During the American invasion of Iraq in 2003 he fled again, this time to The Netherlands where he was arrested in 2004. The basis for the trial against *Van Anraat* was the Genocide Convention. The judges ruled that the attacks on the Kurds indeed amounted to genocide but that *Van Anraat* was not aware of the genocidal intentions of the Iraqi regime when he sold the materials. He could therefore not be convicted for complicity in genocide. He was nevertheless, sentenced to 15 years in prison for complicity in war crimes as his deliveries facilitated the attacks. As the presiding judge stated: 'He cannot counter with the argument that this would have happened even without his contribution'. The court was of the opinion that, in light of the facts the maximum prison sentence of 15 years was not really adequate. This conviction was based on articles 48 and 57 of the Dutch criminal code, article 8 of the *Wet*

¹⁰ Supreme Court HR 15-12-1987, NJ 1988, 835.

¹¹ HR 24-01-1950, NJ 1950, 287.

¹² The court of Arnhem 26-01-1979, NJ 1979, 357.

Oorlogsstrafrecht (Dutch criminal war code) and the *Uitvoeringswet Genocide* (Act giving effect to the Genocide-Convention). The WIM did not play a role in this case as the facts took place before the adoption of the WIM. Both the lawyers of *Van Anraat* and the prosecution have appealed the decision. The lawyers for *Van Anraat* claim that the direct connection between the deliveries and the actual use of chemical weapons by the Iraqi regime cannot be established. The prosecution has appealed the decision even though the maximum prison sentence has been already been issued. The prosecution however, feels that *Van Anraat* should be sentenced for complicity in genocide.

Also interesting in this respect is the case against the Dutch businessman *Van Kouwenhoven* who, as Director of Operations of the *Oriental Timber Company (OTC)* and of the *Royal Timber Company (RTC)* in Liberia had very close ties with Charles Taylor. He stands accused of facilitating the import of arms for Taylor and thereby infringing UN Security-Council resolutions. Moreover, *Van Kouwenhoven* is accused of personally giving direction to a private militia that committed war crimes in Liberia. He was the first Dutchman to be placed on the international 'freeze list' of banks which blocked his assets. *Van Kouwenhoven* was arrested in the Netherlands on 18 March 2005. His trial started on Monday, 24 April 2006 and a sentence is expected to be delivered on 7 June 2006.

As with the *van Anraat* case this case deals with the prosecution of an individual not a legal person.

In addition to the idea of complicity it is worth considering the option of holding a corporation criminally liable for the handling of stolen goods. This has been suggested in the case of corporations purchasing illegally logged timber. Under Dutch criminal law it is illegal to sell stolen goods (*artts. 416, 417, 417 bis Sr.*). Especially *417bis* is relevant. According to this provision:

'a person (which, as discussed *supra* implies both legal and natural persons) who acquires, holds or transfers goods (...) of which he, in reasonableness, should have suspected that the goods originated from a felony, can be prosecuted for illegally handling stolen goods.'

For this provision to apply it is necessary that the proscribed behaviour (in this case the illegal logging) constitutes a felony both in the Netherlands and in the country where the act took place ('double penalization'). To my, knowledge, so far, such a case has not yet taken place before the Dutch courts.

According to *Article 80* criminal code, if two or more persons decide to commit a crime this constitutes conspiracy (*samenspanning*). Conspiracy is only illegal when it concerns acts threatening the safety of the State or acts of terrorism. In other words, this article has a rather limited scope. If one has knowledge of such a conspiracy and omits to inform the relevant authorities, this is illegal (*article 135 Sr.*).

The concept of conspiracy has a rather limited scope in The Netherlands. More interesting is the more extensive reach of the provision concerning illicit acts of preparation. According to *art. 46* Criminal Code:

‘(1) The preparation of a felony which is punishable with a prison sentence of eight years or more, is illegal if the perpetrator obtains, produces, imports, exports or has goods (..) that apparently are to be used for a felony.’

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

As stated earlier, the legal person has acquired a relatively normal place in the Dutch criminal process. All provisions are applicable to legal persons. Some specific provisions or deviations apply as a result of the specific characteristics of a legal person. Certain punishments are specifically geared towards legal persons. See, for example, the *Wet Economische Delicten (WED)* the Act on Economic Crimes. Legal persons are frequently tried and sentenced. A practical consideration that does need to be taken into account is the multinational setting of some companies. This can present problems regarding the ‘corporate veil’.

II. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8 Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.

International law is part of the law of the Netherlands (monism). Every individual can invoke provisions of international law as long as these provisions are directly applicable:

According to *article 93* of the Constitution:

‘Provision of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their content, shall become binding after they have been published.’¹³

According to *article 94* of the Constitution:

‘National law that is in contradiction with international law cannot be taken into consideration. The same can be said for decisions taken by international organizations. If these decisions are directly applicable they have priority over national law.’

¹³ This is not the same as ‘ratified’. Publication takes place after ratification.

The Netherlands are party to many international treaties which contain international obligations such as the European Convention on Human Rights (ECHR *inter alia* prohibition of torture, forced labour), the International Covenant on Civil and Political Rights (ICCPR: *inter alia*: prohibition of genocide, torture, force labour), Convention Against Torture (CAT), the Genocide Convention and the Rome Statute for the International criminal Court (ICC). The provisions in these treaties and conventions are applicable in the Dutch legal order. This is not the same thing as stating that these provisions automatically lead to *criminal prosecution*. Article 16 Constitution together with article 1 of the Dutch criminal code provide that prosecution can only take place based on a *written provision* in Dutch. This ‘processing’ of international obligations in the Dutch legal order is often done by incorporating the obligations into specific acts such as the one of economic crimes (WED). Transformation of international obligations is therefore, to a certain extent, necessary.¹⁴ However, in the *Bouterse* case (see the answer to question 10), the Court decided that *Bouterse* could not be prosecuted based on an unwritten provision. *A contrario* this implies that a written provision, such as a treaty provision, can be the basis for prosecution. As stated, however, most international obligations have been incorporated into national laws and direct application of international treaty provisions is therefore seldom necessary.

Following the creation of the ICC and the requirements flowing from the principle of complementarity, an act was adopted in 2003 dealing with international crimes, the so-called *Wet Internationale Misdrijven* (WIM) The WIM makes punishable those serious crimes that are of grave concern to the international community, such as genocide (article 3), crimes against humanity (article 4), torture (article 1 (e) and article 8) and war crimes (articles 5,6 and 7). The WIM provides the Dutch courts with a broad extraterritorial jurisdiction based partially on the (limited) principle of universality and partly on the principle of (active and passive) personal jurisdiction (article 2). Persons that have no connection to the Netherlands can be prosecuted based on the WIM. The suspect must however, be present in the Netherlands. A Head of State, government leader or other that enjoy immunity under international law cannot be prosecuted based on the WIM. Furthermore, the WIM provides for necessary provisions concerning procedural law such as which court is competent to deal with a case (the court in The Hague, see article 15).¹⁵

9. Do your country’s laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?

Article 91 of the Dutch Criminal Code states that the provisions in the titles I-VIII A of this code are also applicable to facts that are punishable under other special acts such as the WIM (The act on International Crimes). This implies that legal concepts - such as the fact that one can only be prosecuted based on a written provision of law, *ne bis in idem*, attempt, provocation etc. - as provided for in the Dutch criminal code are applicable to

¹⁴ Supreme Court decision HR 24-06-1997, NJ 1998, 70.

¹⁵ The WIM can be found in the Dutch Bulletin of Acts and Decrees, 270 of 3 July 2003 and entered into force on 1 October 2004.

the WIM. From the explanatory note to the WIM¹⁶ it can be deduced that most of the definitions of international crimes have been literally copied from the ICC statute. This was a deliberate choice not to transform the international descriptions to the Dutch equivalent as this would deduct from the international character. Some of the penalizations in the WIM even directly refer to provisions in the ICC statute. The WIM does contain some additional provisions that are necessary to take new developments after the signing of the ICC Statute into account and in view of other international obligations that the Netherlands have resulting from other treaties (Convention against Torture, the Geneva Conventions etc.). The majority of these international obligations have now been grouped together in the WIM. As stated above, for general legal concepts the national criminal code is applicable to the WIM. This however, does not prove problematic as the Dutch criminal system is fairly similar to the ICC statute. Moreover, according to the explanatory note the Dutch courts must interpret the provisions in accordance with international law. The Dutch system is different from the ICC on the issue of the prosecution of legal persons such as business entities. Article 25 (1) of the ICC statute rules out the possibility of prosecuting legal persons. However, under Dutch criminal law, legal persons can be prosecuted (art. 51 Criminal Code). In the explanatory note to the WIM it is made clear that no exception to this was wanted even under the WIM. So, unlike at the ICC, legal persons can be prosecuted in the Netherlands for crimes as enumerated in the WIM.

10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?

See the answer to question 8. International norms of a customary nature can never be the basis for criminal prosecution. This was affirmed by the Supreme Court in the case against *Desi Bouterse*, the former head of Surinam. *Bouterse* was accused of being involved in the so-called 'December-murders', the torture and murders of 16 members of the opposition in 1982. The question before the Supreme Court was whether *Bouterse* could be prosecuted for the acts of torture. It was decided that *Bouterse* could not be prosecuted in the Netherlands for the act of torture committed outside the Netherlands. The Torture convention and the Dutch law implementing the Torture convention of 1989 had not yet entered into force at the time of the torture and murders. The fact that torture may be considered to constitute an international crime based on customary international law in 1982 does not give the Dutch courts jurisdiction. *A contrario* it can be argued that written provisions do provide jurisdiction to the Dutch courts.

In practice international criminal provisions are very rarely directly applied. The Dutch legislator usually chooses for complete transformation of international criminal provisions (for example WIM).

¹⁶ Vergaderjaar 2001-2002, 28337, nr. 3.

11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?

In principle, yes. However, to my knowledge this has so far never occurred. Under Dutch criminal law a legal person is treated in the same manner as a natural person (article 51 Dutch Criminal Code). This also applies to special codes such as the WIM. As long as the international crimes are part of the Dutch criminal law anyone can be prosecuted. Of course jurisdiction must be established. For example, to prosecute a legal person for a crime as listed in WIM, the conditions in article 2 of WIM must be fulfilled (the perpetrator must be in the Netherlands or have Dutch nationality or the victim must have Dutch nationality). As discussed under question no. 9 article 25 of the Rome Statute rules out the prosecution of legal persons before the ICC. In the Dutch legal order, legal persons can, however, in theory be prosecuted based on WIM.

III. Alternative Mechanisms

12. Can you think of any bases in your country's tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?

In theory it is possible but there has not yet been such a case brought under Dutch civil law. In general, it has been concluded that:

*'Dutch constitutional law and the system of private international law as it applies in The Netherlands leave much room for Dutch courts to give effect to public international law where the applicable national law –as determined by rules of private international law- is either incompatible with international law or offers less protection than the rules of public international law. However (...) few norms of public international law are suited to determine directly the lawfulness of acts of private parties.'*¹⁷

A first prerequisite is that national law recognizes that a corporation is a legal person. In The Netherlands this is the case under article 2:3 of the Dutch Civil Code.

The requirements under Dutch tort law are, in the first place, that the corporation is in direct violation of an international legal right or duty. The subsequent question is whether international law can provide a direct basis for a civil action. Under Dutch law, international norms can be the direct basis of a civil action provided that the norms have

¹⁷ André Nollkaemper, Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the courts of The Netherlands, in: *Liability of Multinational Corporations Under International Law*, M.T. Kamminga and S. Zia-Zarifi (eds.), 2000, Kluwer law International, The Hague, pp. 268-282.

direct¹⁸ and horizontal effect (they must be capable of producing legal effect in the relations between two private parties.) Direct effect is present when courts can apply the norm as such, when the norm requires further elaboration by the legislature direct effect is usually not accepted.¹⁹ Direct effect is also a minimum condition for a norm to have horizontal effect, however it is not a sufficient condition. Not all norms that have direct effect also have horizontal effect, in other words: apply between private parties. As far as horizontal effect is concerned, the courts have significant leeway. Though they look primarily at the intention and text of the provision a norm although written with regard to the relationship between a state and an individual or even between two states, can still have relevance in horizontal relations. International criminal law, international human rights law²⁰ and international labour law can have horizontal effect²¹ According to the Dutch scholar Nollkaemper:

'It seems that if international norms criminalize individual behaviour of private persons (...), they are directly binding for individuals in terms of the Constitution. Although there is little practice on this point, it is believed to be consistent with the Constitution (...) to prosecute and convict individuals or corporations directly on the basis of international criminal norms, even if they have not been incorporated into Dutch law'.²²

Regarding international human rights only a narrow category of rights have been acknowledged as having direct and horizontal effect. Nollkaemper reaches the following interesting conclusion,

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

Secondly, apart from the case of a direct applicability of international law, a tort action could also be brought against a corporation when its activities constitute a violation of a duty of care as interpreted with reference to international law (article 6:162 of the Dutch Civil Code). In such a case international law is applied indirectly.

According to this provision a tort has been committed by a corporation when an act or omission violates a statutory duty or right or when an act or omission violates a rule of

¹⁸ This follows from article 93 of the Constitution. See the answer to question 8.

¹⁹ Hr 18-01-1995, NJ 1995, 619

²⁰ see cases *bijstandmoeder* (NJ 1987, 928) and *Codfried v. ISS Servicesystem* (NJ 1995, 430)

²¹ see *Vervoersbond FNV v. Verenigd Streekvervoer Nederland* (NJ 1997, 437).

²² Nollekemper, p. 271.

unwritten law pertaining to proper social conduct. In the case *Batco*²³ the court used the OECD Guidelines for multinational enterprises for answering what is appropriate. One can assume from this that the court can also use treaty provisions, although as these are, not specifically written for corporations, in contrast to the OECD guidelines, this could be a problem (no horizontal effect). Moreover, since the WIM came into force in the Netherlands, one can base an action on article 6:162 Dutch Civil code on violation of a rule, at least when the action concerned constitutes one of the crimes of this law. This will be a lot easier than showing what is proper social conduct and what isn't.

Parties to the case have to choose to invoke Dutch law or foreign civil law. If they choose Dutch civil law, the connection between the main office of the defendant and the subsidiary will become very important for such a case to be declared admissible. In a civil suit, it would have to be demonstrated that the subsidiary and the head office in fact operate as one unit. It would have to be argued, that the harm resulted from an activity (or lack of activity) at the head office that is situated in the Netherlands. It is currently unclear whether such a line of reasoning would be accepted by Dutch courts.

Art. 6:162 Dutch Civil Code:

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

IV. Jurisdiction and related issues.

Regarding the following it must be kept in mind that The Netherlands does not distinguish between natural persons and legal persons. The remarks made regarding jurisdiction over individuals therefore are also applicable to legal persons.

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

Jurisdiction in criminal cases:

The bases for jurisdiction in criminal law can be found in articles 2-8 of the criminal code. The basic assumption is the principle of territoriality (art. 2 Criminal Code). This is not as straight forward as it might seem. There are several ways how to establish what should be considered to be the *locus delicti*. For example, jurisdiction may be based on

²³ NJ 1980, 71

the location where the consequences of the crime are felt. Already in 1915 the Supreme Court stated that the location where the criminal act takes place is not the exclusive criterion on which jurisdiction may be based.²⁴ In the so-called *Singapore* case²⁵ the Supreme Court ruled that a fact can indeed have several *loci delicti*. The Supreme Court has ruled that in the case of complicity, both the location where the complicity happens as well as the location where the crime actually takes place can be considered as the *locus delicti* for the crime of complicity.²⁶ Regarding joint wrongdoing it can be inferred from case-law that also the location where the acts of joint wrongdoing took place are seen as *locus delicti*.²⁷ In the case of a legal person that commits a crime, the location where the crime is committed is taken as the *locus delicti*. In the case of an attempt to commit a crime or the preparation to commit a crime, the assumption is that the location where these acts take place is the *locus delicti* and not the location where the crime eventually would have taken place. Extraterritorial jurisdiction is based on articles 3-7 of the Dutch criminal code. Article 3 expands Dutch territory to include acts that take place on board of Dutch aircraft.

Article 4 of the Dutch criminal code encompasses the principles of protection and universality. The protection principle aims at situations in which fundamental national interests are at stake. In such cases the Dutch courts have jurisdiction regardless of who or where the crime is committed. The universality principle establishes jurisdiction for the Dutch courts in those situations where fundamental international interests are at stake. These principles are however, applied with great reticence. The universality principle can also be found in the code on war crimes (articles 8-9) and in article 2 WIM. The universality principle is somewhat limited in the WIM. From the case against the former head of State of Surinam *Bouterse*, it can be concluded that the universality principle is not easily applied in The Netherlands.²⁸ In this case it was decided that the suspect should be in The Netherlands or have the Dutch nationality or the victims should be Dutch. These criteria have been laid down in the WIM. Article 4 (a) of the Dutch criminal court provides for derivative jurisdiction. This provision establishes jurisdiction for Dutch courts in those cases where prosecution is taken over from a State with which The Netherlands have signed a treaty granting the Netherlands the right to prosecute.

The passive personality-principle (i.e. jurisdiction for the Dutch courts in those situations where the victim of a crime has the Dutch nationality) is hardly applied in The Netherlands. It has, however, been included in the WIM. The active nationality principle has a broader base in Dutch criminal law. Article 5 of the Dutch criminal code: jurisdiction in based on the nationality of the person that commits the crime. This includes legal persons. The Supreme Court has decided that provisions regarding jurisdiction are also applicable to legal entities.²⁹ Scholarly writing is not completely unambiguous. It has been put forward that one should not only look at whether the legal person has been established under Dutch law but also whether the legal person is

²⁴ *Azewijnze Paard*, 06-04-1915, NJ 1915, 475.

²⁵ HR 06-04-1954, NJ 1954, 368.

²⁶ HR 18-02-1997, NJ 1997, 628.

²⁷ HR 24-01-1995, NJ 1995, 352.

²⁸ HR. 18-09-2001

²⁹ HR. 11-12-1990, NJ 1991, 466)

formally or actually domiciled in The Netherlands.³⁰ There is no legal provision that provides a clear answer to this question.

Most crimes require so-called ‘double penalization’: the act in question must constitute a crime in The Netherlands and in the country where the act took place. Double penalization is enough. The fact that a statute of limitation might apply in the other country does not block prosecution in The Netherlands.³¹ If a legal person is not recognized as such in the other country this also does not bar prosecution in The Netherlands.³² The requirement of double penalization does not entail that the act is punishable in exactly the same way in both countries.

Jurisdiction in civil cases:

Applicable are Dutch national law and the *Brussels Regime*³³ (see below). The *Brussels Regime* is a set of rules regulating the allocation of jurisdiction in international legal disputes of a civil or commercial nature. As long as there are no provisions awarding exclusive jurisdiction, parties are free to come to an agreement regarding the question of jurisdiction in civil cases.

Forum rei: Jurisdiction is unproblematic if the defendant is based in The Netherlands (main rule of art. 2 Brussels Convention³⁴) In The Netherlands this means for corporations the place of incorporation according to its articles of association.

Forum actoris: the possibility of suing before the plaintiff’s domicile also exists. This is only available to natural and legal persons domiciled within the Dutch jurisdiction.

The Brussels Convention and the Brussels I regulation are both subject to the jurisdiction of the European Court of Justice on questions of interpretation. The Lugano Convention lacks a protocol governing references to the ECJ. It should also be noted that the *Brussels Regime* generally allows jurisdiction clauses which preserve the right of parties to reach agreement at the time of contracting as to which court shall govern the dispute.

³⁰ Sjoerda & Orije, p. 63

³¹ HR 18-12-2001

³² HR 12-02-1991, NJ 1991, 528

³³ The Brussels Regime consists of: The Brussels Convention (The Convention 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; The Lugano Convention (The Convention 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters); and the Brussels I Regulation (Council Regulation EC No 44/2001 of 22 December 2000 on jurisdiction and the recognition of Judgments in Civil and Commercial Matters).

³⁴ Article 2 prescribes that a person (natural or legal) may only be sued in the member State in which he or she is domiciled. Domicile is determined by the law of the national courts hearing the case, so that person can be domiciled in more than one State simultaneously.

14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

First and foremost, it should be remarked that, traditionally, for such reasons as legal certainty, The Netherlands are not in favour of extending criminal jurisdiction to encompass activities that take place outside of the country. The Netherlands, for example, opposed the inclusion of the universality principle in the Genocide Convention. And, as mentioned earlier, in the *Bouterse* case the Supreme Court decided that, in principle, the courts had jurisdiction over extraterritorial acts but only when a personal link could be established or if the suspect could be arrested in The Netherlands. In other words, as long as one of the principles of criminal jurisdiction applies (active or passive nationality/territoriality/protection/universality) the courts will be able to hear the case. So, for example, if a Peruvian corporation is caught in the act of producing counterfeit euros this will be beyond the jurisdiction of the Dutch courts based on the protection principle.

As for civil jurisdiction: whether a Dutch court has jurisdiction over a company domiciled outside The Netherlands is governed either by the *Brussels regime* or domestic private international law. Decisive is the seat of the company. If this is located in another EU member State, the *Brussels Regime* will apply. If the company seat is located outside the EU, the company will be sued based on Dutch internal jurisdiction law:

- *forum delicti*: (the forum of the place where the tort has occurred). In the case of corporations this could imply the construction that there has been a lack of supervision by the head office of a multinational corporation over its subsidiary based abroad where the actual harm occurs. If this head office is located in The Netherlands then a Dutch court would have jurisdiction under the rule of *forum delicti*

- Article 4 Brussels Convention preserves the traditional rules for defendants who are not domiciled in a member State. That is, if a defendant is domiciled elsewhere, the *Brussels Regime* does not apply and the national court hearing the case is left to determine jurisdiction based on the traditional rules otherwise governing such questions in their legal system. Article 4 also allows a person domiciled in any member State to take advantage of another Member State's exorbitant bases of jurisdiction on the same basis as a national of that State. This is useful in cases where a member State, such as France, allows its nationals to sue anyone in their courts, so that someone domiciled in a member State like, for example, Finland, may sue someone domiciled in a non-member State such as Canada, in the courts of a third party member State like France where the defendant may have assets.

- the forum of where a branch of the company is based: art. 5 (5) Brussels Convention. The key aspect of this provision is that another entity than the branch itself can be sued before the courts of the location of the branch. In general that would be the parent company. The value of this provision is that where operations of a branch situated in The

Netherlands where the parent company is based in another EU country, cause harm –even where the damage occurs outside the forum State, its parent company can be sued in The Netherlands. The provision does not apply to a branch of a corporation domiciled outside the EU. Where the provision is applicable it is limited to ‘the operations of the branch’. This includes the operations of the branch that take place outside of the country in which it is located.

The so-called *in rem* action that exists in the US, where a defendant in a civil case who owns property in the US, but is otherwise beyond the reach of the courts, can bring an action against the defendant for damages and then ask the courts to force the sale of the property in order to satisfy a civil judgment for damages, does not exist under Dutch law.

Provided there is a proper head of jurisdiction, the domicile of the plaintiffs is irrelevant.

Once it has been established that a Dutch court is competent to adjudicate the transnational dispute the question arises which law the court will apply: Dutch or foreign tort law. First and foremost, it is left up to the parties to decide on the applicable law. Absent of a choice the rule is the *lex loci delicti* (Bill on Conflicts of Law in Tort). There has not been a case before the Supreme Court on what exactly constitutes the *locus delicti*. If the emphasis would fall on the place of loss this would imply that foreign law governs such a case. If the emphasis would fall on the idea that the loss is the result of a lack of supervision by the head office, this could imply that Dutch law would govern the dispute. At this stage it is not possible to draw any definite conclusions regarding this issue.

Finally, it should be mentioned that Dutch courts award default judgments where the defendant has been properly served but refuses to appear.

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?

By piercing the corporate veil the parent company can be held accountable for a tort (article 6:162 of the Dutch Civil Code) committed by one of its subsidiaries. This, however, is not easily accepted in the Netherlands. The Supreme Court has decided in the case of *The Netherlands v. BaTO’S Erf* that the mere fact that a parent company decides what the policy of its subsidiaries will be and manages or influences how this policy is executed resulting from the fact that the management of the parent-company is also the management or the sole shareholder of the subsidiary, does not imply that the acts of the subsidiary automatically become the acts of the parent company for which the parent can be held liable.³⁵ In a case in 2002 the Supreme Court stated, that in the case of abuse, identification of the parent company with its subsidiaries might be the most appropriate form of redress, but this can only happen in exceptional cases that justify the complete taking away of the differences in identity between the parent and the subsidiary. The mounting attention for corporate social responsibility can increase the pressure to pierce the corporate veil as the fact that the parent company in fact has *de jure* and *de facto*

³⁵ HR 16-06-1995, NJ 1995, 136

control over its subsidiaries can be taken to imply that the parent must ensure that its subsidiaries behave in a socially responsible manner. It can be stated that the parent has a direct and independent obligation towards third parties that are exposed to risks as a result of the activities of its subsidiaries. Negligence regarding this obligation may amount to irresponsible or incorrect management and victims can try to get compensation based on tort law. So far such a case has however not taken place.

16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

To my knowledge there has never been such a case in The Netherlands. However, as can be deduced from the preceding answers, in principle, a business enterprise can be prosecuted under Dutch law. This can be based on the articles 4 and 5 Criminal Code or the active or passive nationality principle and the limited universality-principle of article 2 (WIM).

One can also think of the suggestion made in the answer to question 6 concerning the handling of stolen goods. The Dutch authorities could try to prevent the importation of such property by prosecuting those who attempted to bring it in on the basis on art. 417bis criminal code.

Civil liability is also possible if it can be demonstrated that the activities abroad can be attributed to the company in The Netherlands. Again, to my knowledge, a case concerning the issue dealt with in this topic has not occurred in The Netherlands. Some examples do exist where the parent company has been held liable for a violation of the duty of care towards creditors.³⁶ From such cases, guidelines might be deduced for parent companies towards the creditors of subsidiaries. For such a duty of care to be accepted it should be demonstrated that the parent-company has been intensively involved in the policy of the subsidiary. If this is the case than the duty of care that normally rests on the managers of the subsidiary then also lies with the parent company.³⁷ A case that is somewhat relevant for the topic of the present survey is the case of *Salt Holding BV*.³⁸ This case concerned a Dutch parent company with a subsidiary on Curacao that refused to pay a creditor. The creditor subsequently sued the parent company in The Netherlands not for the fact that the subsidiary refused to pay, but for the fact that the parent company had given priority to paying the debts of the subsidiary to other parts of the company resulting in the fact that there was no money left for this particular creditor. The Dutch Supreme Court agreed that the parent company in this case had committed a tort. In general, the Supreme court is very reluctant to attribute the acts of subsidiaries to the parent company. The fact that activities are interwoven in itself is not enough to hold the parent company responsible for the debt of the subsidiary. There are additional

³⁶ Osby arrest 25-09-1981, NJ 1982, 443

³⁷ HR 10-01-1990, NJ 466, HR 19-02-1988, NJ 1988, 487

³⁸ HR 12-06-1998, NJ 1998, 727.

requirements. However, the Supreme Court has failed to list these criteria. The Supreme Court has ruled that if the difference in identity is abused, attribution can occur.³⁹

Finally - in response to the additional questions posed - it is indeed a crime to import illegal drugs into the Netherlands. If so, can persons to actively participate in the importation scheme (although conducting their activities outside of the Netherlands) subject to Dutch criminal prosecution

If a corporation is held liable a full range of sanctions is possible, including damages, injunctions and declaratory relief. Finally, worth mentioning is the fact that, in criminal cases, victims that have suffered directly from the criminal act (or their relatives) have the right to join in the case (article 51a code on criminal prosecution). Based on article 36 (f) Criminal Code the court may decide to sentence the corporation to pay compensation to the victim(s)

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

This is a difficult question to answer. As can be deduced from the answers to the other questions there will be jurisdictional problems.

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

In principle, if the defending party is domiciled in The Netherlands, the Dutch courts are competent. This follows from Dutch law and from international law (*forum rei* principle) See also the answer to question no.13. Dutch courts will be competent to adjudicate a dispute against a multinational corporation by a foreign plaintiff either on the basis of EU regulation or on the basis of Dutch domestic private international law. In both cases the doctrine of *forum non conveniens* does not apply. The EU regulation concerns Regulation No 22/2001 'International Jurisdiction, Recognition and Implementation of Decisions in Civil and Commercial Affairs'. *Forum non conveniens* does seem to play a role in application procedures. If there are not enough links with the Dutch legal order than *forum non conveniens* applies.

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

In the Netherlands the public prosecutor has the exclusive right to prosecute. This right is linked to the right to decline to prosecute a case. Two factors are to be taken into account when deciding whether a case will be prosecuted. Firstly, the public prosecutor must

³⁹ HR 09-06-1995 NJ 1995, 213

estimate how likely it is that prosecution will indeed lead to a sentence. Secondly, the public prosecutor has to take the public interest into account. (see art. 167, para. 2 code on criminal procedure)

Article 12 of the Code on Criminal Procedure provides the possibility to request a review of the decision of the public prosecutor not to prosecute. The party concerned, a foundation or a group representing interests affected by the decision not to prosecute, can initiate this 'article 12 procedure' by submitting a written request to the court. The court can order prosecution or continuation of prosecution and even specific acts of prosecution. In order to support this right to complain, the legislator has obligated the public prosecutor to inform the interested party of its reasons not to prosecute or not to continue prosecution (see article 51 f, para. 3 Code on Criminal procedure). From a guideline issued by the Minister of Justice it can be inferred that this obligation also required that the public prosecutor also has to inform interested parties that are not necessarily disadvantaged by the decision not to prosecute or to discontinue prosecution.

Besides the article 12 procedure, checks and balances on prosecutorial discretion are secured by official supervision within the office of the public prosecutor itself and through external supervision by the Minister of Justice. An interested party that feels affected by the decision not to prosecute or to discontinue prosecution therefore also has the opportunity to seek help from a hierarchically higher placed person within these organizations. Finally, if necessary, one can turn to the Dutch parliament in the hope that it will hold the Minister of Justice to account.