The impact and potential of a curious and unique discipline

About PIL, Shell Nigeria, European and global competition and social justice

On 14 July 2015 the Hague Court of Appeal will pass judgement in the Shell-Nigeria case.[1] The Shell-Nigeria case has been able to count on world-wide interest in the past years: in this case legal action has been instituted against a European multinational in a Dutch court in respect of liability for oil pollution in Nigeria.

In the Shell-Nigeria proceedings rules of private internal law (hereinafter "*PIL*") have been used as legal weapons. The importance of PIL rules for the settlement of cases like Shell-Nigeria must therefore in no way be ignored: it is certainly so that (the interpretation of) PIL rules can make a difference for the outcome in cases such as Shell-Nigeria, both as regards the "international competence" of European courts (the question to what extent a Dutch or European court can assume jurisdiction in such cases) and as regards "applicable law" (the question which law a Dutch or European court should apply in such cases). In this way a curious and unique discipline like PIL appears (to be able) to play a crucial role in what currently is widely called "transnational corporate social responsibility."

Also in other "hot issues" it appears that PIL is (or can be) of prominent importance, e.g. in current debates on the legal position of East-European employees. As FNV's Edwin Atema formulated it in the Dutch newspaper NRC Handelsblad of 20 June when speaking about the situation of East-European lorry drivers in Europe[2]: "We move labour to low-wage countries (…) but since road transport cannot be moved, they bring the low wages to here." Well then, in cases instituted in this area, it appears that the manner in which PIL instruments like the Rome Convention on the Law applicable to Contractual Obligations, the

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[1] For the legal documents so far in this case see https://milieudefensie.nl/english/shell/courtcase/documents

[2] Eppo König, "De Roemeense truckersroute" (*The Romanian lorry drivers' route*), NRC Handelsblad 20-21 June 2015. Competition in respect of employment conditions occurs currently in various ways, both in Europe and in a global context. For a recent ruling of the Court of Justice in a case which concerned another type of competition within Europe in respect of employment conditions (whereby work was contracted out in particular to Poland), see the ruling of 18 September 2014 in the Bundesdruckerei case (C-549/13).

Rome I Regulation and the Posting Directive are involved and interpreted is (or can be) of crucial importance when answering the question to what extent indeed "low wages can be brought to here".

I cite the Shell-Nigeria case and the subject of the East-European labour migration as examples: both are illustrative for the impact which PIL *de facto* now already has, as well as for the further potential impact on the regulation of "global issues". That impact and that potential of PIL begin to be recognised at places. A few years ago Muir-Watt, professor at the Paris Sciences Po, wrote[3]: "*Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distribution of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. (…) it does mean that private international law as the constitution of private transnational governance needs to abandon the conceit of political neutrality – to the extent that neutrality is understood as an apology or a screen that prevents it from dealing head-on with the global expressions of non-state power –, and harness its tools to the protection of the planetary commons*", after which the so-called "Pilagg program" was established – reflecting on and studying "Private International Law as Global Governance".[4]

PIL as "Global Governance"? For those who wonder whether PIL partly lies on the basis of the "unequal distribution of wealth and power in the world" or on the contrary helps "protect the planetary commons", the subjects of the liability of multinationals and international labour migration are manifestly rewarding case studies. When studying the PIL aspects of the two subjects a glimpse of PIL's impact on and its potential for the regulation of "global issues" can for sure be seen. Is there a task here for promoters of transnational social justice interested in PIL?

"Social justice", "regulating function of the law", … in legal discussions questions are currently often raised about the role of the discipline of *private law*

[3] H. MUIR WATT, "Private International Law Beyond the Schism", *Transnational Legal Theory* 2011, 347–427.
[4] See http://blogs.sciences-po.fr/pilagg/

in achieving social justice, as well as about the regulating function of this discipline. In debates about social justice and regulating functions of the law the discipline of *private international law* must in my view not be ignored. The impact of PIL in regulating a number of "hot issues" as well as the potential of PIL for safeguarding or achieving a particular level of social justice might be surprisingly high.