War and armed conflict — Terrorism — Hostage-taking — Whether taking of hostages ever justifiable — Attempt to establish independent State in the South Molucca Islands — Supporters of independence hijacking train in the Netherlands to draw attention to their cause — The law of the Netherlands

PUBLIC PROSECUTOR *v.* EJH

The Netherlands, District Court of Assen. 26 *March* 1976

SUMMARY: *The facts:*—On 2 December 1975 the accused, together with six other South Moluccans, hijacked a train within the municipality of Beilen and held the train crew and passengers hostage until 14 December. In the action of 2 December the engine driver lost his life and one hostage was killed. On 4 December a second hostage was killed. The accused was charged with complicity in murder, unlawful detention (resulting in death) and unlawful possession of weapons.

Held:—The accused was found guilty and sentenced to a term of imprisonment of fourteen years, the time spent in custody pending trial counting towards the sentence.

Regardless of whether the ideological or political aim, the drawing of public attention to the claim for an independent Republic of the South Moluccas, was justifiable, the means used, involving the hijacking of a train, the holding hostage of its crew and passengers and the murder of some of them, were inadmissible. In fixing the sentence, the Court took into account its effect on the tension between, on the one hand, the Dutch authorities, charged with doing everything possible to understand the position of the South Moluccan population resident in the Netherlands, and, on the other hand, the supporters of an independent Republic of the South Moluccas, who had to recognize the limitations to the recognition and furtherance of their ideal of independence.

The following is the text of the relevant part of the judgment of the Court:

As to criminal responsibility

The accused has not relied on grounds of justification or exculpation, but, like the others accused in this case, he claims to have acted in order to draw public attention to their aspiration for an independent Republic of the South Moluccas. In the opinion of the accused this struggle, notwithstanding the use of legal means over a period of many years, and notwithstanding an earlier action (at Wassenaar), was still being ignored. So, in order to capture public attention, the plan to hijack a train was carried out. In the course of the hijacking the driver was killed and a number of passengers were unlawfully

detained for twelve days, two of whom—arbitrarily designated—were consciously and intentionally done to death in gruesome circumstances. The accused and his accomplices have set themselves against the legal order.

As each of them declared in his own words at the hearing, they primarily wished to compel the Dutch Government's recognition of, and understanding for, their ideals and their political aspirations. For an accurate evaluation of the ensuing offences the Court should therefore examine whether and to what extent there are factors within the Dutch legal order which are so related to the goal pursued by the accused that the aim of their action against this legal order ought to be seen against this background.

It is known to the Court . . . that, on 25 April 1950, the *Republik Maluku Selatan* was proclaimed at Ambon. Until then, Ambon and the other South Moluccan Islands had been a part of East Indonesia, a constituent state of the *Republik Indonesia Serikat* (Republic of the United States of Indonesia). The Netherlands transferred sovereignty to this federal State on 27 December 1949. The official proclamation of the unitary State *Republik Indonesia* followed on 17 August 1950. It incorporated all the previous constituent states of the federation.

At the same time, those South Moluccans who had been serving in the Royal Netherlands-Indies Army and who refused to transfer to the Indonesian Army were transported with their families to the Netherlands.

Regardless of whether the ideological or political aim pursued by the accused and his accomplices is justifiable, they could and should have understood that the means used are absolutely inadmissible. They wilfully acted against the norms and values which find expression in the criminalization of the proven acts. They opted for violence. They are criminally responsible for it.

As to the grounds of punishment

The Court, called to punish the violation of the norms and values referred to, is required to do this in such a manner as to express the generally held feelings of shock among the members of the Dutch legal order and in particular those suffering directly. This may reasonably be expected of the courts in a constitutional State.

In fixing the punishment, the Court will have to consider its meaning for and its effect on this particular offender in this particular case.

As appears from the declarations of each of the accused, the motive for their action was their ideal of a free Ambon, free South Moluccas. The Court has no doubts about the sincerity of this motive or the high

priority given by the accused to the realization of this ideal. With the benefit of information from discharged prisoners' aid officers as well as from the numerous publications on this matter, the Court is aware that large numbers of South Moluccans resident in the Netherlands are convinced that they must continue their pursuit of an independent existence of their own on the islands of their fathers within a constitution of their own choice. J. A. Manusama, when heard as an expert witness, declared:

> The South Moluccan people is a proud people; it is an independent people. We do not ask. South Moluccans claim, they claim their rights.

In respect of these loyal nationals the Netherlands was not able to satisfy their yearning for freedom and independence in a former Dutch colony. The Court definitely refrains from answering the question whether and to what extent the Netherlands Government could or should have taken a different course in the constitutional and international relationships of that time. The above-mentioned awareness is sufficient for the Court to reach a decision relevant in the present case, that in the historical perspective there is a clear relationship between the frustrated ideal of freedom, with the South Moluccans striving for their own independence, and the involvement of the Dutch legal order.

On the basis of this involvement the members of the Dutch legal order, and in particular the Government, will have to do whatever it can to understand and relieve the position of the South Moluccan population resident in the Netherlands. On the other hand this population, in particular those in favour of an independent Republic of the South Moluccas, will have to recognize the limitations which now bar the recognition and furtherance of their ideal of independence.

These are the two poles, between which the spark of aggression may easily jump. It is in this field of tension that the actual events, including the offences proven by the evidence, have taken place.

Over-sanguine expectations on the South Moluccan side as to what is feasible, and utterances showing a lack of understanding on the Dutch side for the position of the South Moluccans in the Netherlands, have contributed considerably to the events which resulted in the loss of three lives.

The Court considers that, in this situation, punishment cannot serve to settle the conflict underlying the offences committed within this framework . . .

[Reports: *NJ* (1976) No. 263 (in Dutch); 8 *Netherlands Yearbook of International Law* (1977), p. 262 (English translation).]

Diplomatic relations — Immunity — Diplomatic staff — Whether diplomatic immunity a complete bar to the jurisdiction of the courts in proceedings instituted by or against diplomat — Proceedings brought by diplomat — Whether defendant may invoke diplomatic immunity of plaintiff as a bar to jurisdiction — Purpose of diplomatic immunity — The law of the Netherlands

HART *v.* HELINSKI

The Netherlands, Supreme Court. 25 *November* 1977

SUMMARY: *The facts:*—Helinski, who was employed as a member of the official staff of the American Embassy in the Hague, rented a house from 't Hart as from 1 November 1973. On 23 June 1976 the Local Court of the Hague found that Helinski had, until 1 January 1976, been paying a rent in excess of the rent limit. Since 't Hart refused to reimburse the excess payments of his own free will, Helinski levied provisional attachment upon the future rent, and summonsed 't Hart to appear before the District Court of the Hague in an action in which he requested the Court to order the reimbursement of the excess payments, and to confirm the attachment. 't Hart pleaded that Dutch courts were not competent to hear Helinski's claim, since they had no jurisdiction over the case, in the light of Dutch obligations under international law. The District Court rejected this contention in a judgment of 28 April 1977 and 't Hart then instituted an appeal in cassation to the Supreme Court.

Held:—The appeal was dismissed.

No rule of international law denied Dutch courts jurisdiction when a diplomat instituted proceedings. The fact that the diplomat enjoyed immunity from civil jurisdiction was irrelevant. Such immunity was intended to prevent the efficient performance of the functions of a diplomatic mission from being hindered by legal measures directed against its members. When a diplomat himself instituted proceedings this could in no way be seen as a legal measure against him.

The following is the text of the relevant part of the judgment of the Court:

In his main plea 't Hart takes the view that Dutch courts are not competent to hear the claim, since they have no jurisdiction in this case in the light of the State's obligations under international law. 't Hart relies in particular on the provisions of Article 32 of the Vienna Convention on Diplomatic Relations. Although the Convention has not yet been ratified by the Netherlands, the District Court took the view that the provisions of the Convention can be regarded as codified international law or at least as customary law for international law purposes.

In contrast to 't Hart's view in respect of the intention of Article 32, however, the District Court was of the opinion that a diplomat can bring a civil action in the receiving State, certainly in cases such as the present one, which exclusively relates to his personal interests. Under Article 32, paragraph 3, he is then precluded from invoking immunity from jurisdiction in respect of a counter-claim.

Lack of consent by the sending State of the diplomat who institutes civil proceedings in a case in which he is personally involved in the receiving State is exclusively relevant to the internal relations between the sending State and the diplomat.

The opposing party in the proceedings in question can in no way rely on the lack of consent. Therefore, 't Hart's subsidiary plea must be dismissed.

. . .

't Hart further advanced . . . as a ground of appeal against the decision of the District Court, violation of the law and/or violation of procedural rules, in that the findings of the District Court and accordingly its decision as set out in the judgment referred to were wrong for the following reasons:

(A) The District Court found, *inter alia,* that a diplomat abroad can bring a civil action in the receiving State, a judicial finding which [in 't Hart's view] was formulated too widely, since, although a diplomat can bring a claim as a plaintiff, this requires the previous consent of (waiver of immunity by) his Government.

(B) After the Court had found that exclusively personal interests of Helinski were involved in this case, the Court found that Helinski could bring this civil claim without any evidence of waiver of immunity and, further, wrongly considered as follows:

> lack of consent by the sending State of the diplomat who institutes civil proceedings in a case in which he is personally involved in the receiving State is exclusively relevant to the internal relations between the sending State and the diplomat. The opposing party in the proceedings in question can in no way rely on the lack of consent.

't Hart takes the opposite view, that no distinction should be drawn between proceedings concerning the diplomat in his personal capacity and not in his personal capacity.

(C) The District Court further found that Helinski could not, in this case, invoke immunity from jurisdiction in the event of 't Hart making a counter-claim.

Although Article 32(3) does contain this rule on counter-claims, 't Hart thinks this rule should be construed as follows:

When the sending State has waived immunity from jurisdiction in proceedings instituted by the diplomat, such waiver also applies to any counter-claim.

(D) Consequently 't Hart contends that his subsidiary plea was wrongly dismissed by the District Court.

[The Supreme Court holds as follows, on this ground of the appeal:]

With regard to (A):

This part of the appeal is intended to demonstrate that Dutch courts are not competent to hear Helinski's claim. This contention is based on the proposition that Helinski, as a diplomatic agent, enjoys immunity from the jurisdiction of civil courts in this country.

However, no rule of international law denies Dutch courts jurisdiction in this case. In particular, it does not follow from the fact that Helinski enjoys such immunity. Such immunity is intended to prevent the efficient performance of the functions of a diplomatic mission from being hindered by legal measures being directed against its members. In this case there is no question of any legal measure against Helinski. Therefore this part of the appeal must fail.

It follows from the foregoing that (B) need not be discussed.

Point (C) must fail for the sole reason that it concerns a superfluous consideration [an *obiter dictum*].

Point (D) has no independent meaning ...[1]

[Reports: *NJ* (1978) No. 186 (in Dutch); 9 *Netherlands Yearbook of International Law* (1978), p. 317 (English translation).]

NOTE.—The following is the text of the relevant part of the judgment of the Local Court of the Hague of 23 June 1976:

... It has been established that 't Hart let the house to Helinski as from 1 November 1973 at an index-linked rent of Dfl. 1500 a month. The rent included a reimbursement for fittings and furniture. This rent considerably exceeded the legal rent limit, though the parties say they lacked knowledge of this. The house was let through an agency which obviously failed to give sufficient information to the parties. On taking possession of the house,

[1] In his comprehensive advice to the Supreme Court (reported in *NJ*), L. Erades, the acting Solicitor-General, also concluded that the appeal should be dismissed. Unlike the District Court, Erades held the view that the grounds of appeal ought not to be judged by the Vienna Convention, which contained a high degree of "progressive development", that had not (yet) been accepted by the Netherlands, but rather on the basis of the "Draft Articles on Diplomatic Intercourse and Immunities" of the International Law Commission, where this was the case to a lesser extent (*ILC Yearbook*, 1958, II, pp. 89 *et seq.*). Erades recommended that Article 29(1) of the Draft, which provides that a diplomat cannot invoke immunity from jurisdiction in the case of a real action relating to private immovable property situated in the territory of the receiving State (*cf.* Article 31(1)(a) of the Convention), be construed in a manner to include disputes on tenancy agreements made by diplomats for private purposes and relating to immovable property situated in the receiving State.]

Helinski found its condition to be unsatisfactory, and considered that he was entitled to deduct the cost of some repairs done by him from the payable rent. 't Hart, the landlord, did not accept this, and obtained a judgment from this Local Court, dated 8 January 1975, which allowed his claim, while Helinski, who had counter-claimed, was awarded a small sum, much smaller than the amount he was ordered to pay to 't Hart. Helinski refused to pay, whereupon 't Hart served a writ of execution upon him. At the very moment of attachment, however, Helinski invoked his diplomatic status for the first time, and relied on the rule of international law prohibiting the enforcement of judgments against diplomats. Helinski's diplomatic status was not disputed by 't Hart. The question was submitted to the Ministry of Justice which, in a letter of 12 June 1975, informed the bailiff that the execution should be discontinued since it conflicted with the international obligations of the Netherlands State. The execution was stopped, though Helinski finally complied with the Court order, after adjustment of the amounts payable by each party.

The history of this case is of importance for the present adjudication. Evidently as a result of events subsequent to the initial proceedings, the parties came to realize the difficulties and possibilities flowing from Helinski's diplomatic status. Helinski further discovered that, probably from the commencement of his tenancy, he had been paying a rent in excess of the rent limit, and referred the tenancy to the Rent Tribunal. 't Hart, on the other hand, discovered that his house fulfilled the requirements for a declaration under Article 8 of the Rent Act, which would exempt the house from the provisions on rent limits. The Rent Tribunal actually issued a declaration on 30 December 1975. Further, on 8 January 1976, the Tribunal gave an advice (subsequently back-dated to 1 January 1976) on the rent limit, in which considerably lower amounts were indicated than those which Helinski had actually been paying.

Helinski applied to this Court to establish his financial obligations under the Rent Act. 't Hart has pleaded that Helinski has diplomatic immunity which he cannot personally waive, and thus cannot institute civil proceedings in the Netherlands without the consent of his own Government. Such consent has not been produced. On this ground, 't Hart considers that this Court should find that it has no jurisdiction. In Helinski's opinion, however, no rule of international law prohibits a diplomat, even without the express consent of his Government, from using the legal remedies of the receiving State, in this case the Netherlands, in a dispute with a Dutch national.

This is the first point to be decided. The Court considers Helinski's view to be correct. There is no rule of international law recognized by the Netherlands to prohibit him from acting as a plaintiff or petitioner in the Netherlands without first getting the express consent of his own Government. Such a rule cannot be found in either Dutch or foreign literature. Reliance on the 1961 Vienna Convention on Diplomatic Relations would also be of no avail. Neither the text of the Convention nor its history give sufficient pointers. Although the Convention has been signed by the Netherlands it has still not been ratified, nor even submitted to the States-General for approval. We are informed that a Bill requesting such approval may be expected soon. Whether the explanation which will accompany it would give a definite

answer on the present issue is still open to question. In the meantime, it must be assumed that the Convention, although not yet formally in force in the Netherlands, has to be regarded as a consolidation of customary international law. Should it give a clear answer, this answer would be of particular importance. This is, however, not the case. It would seem that the authors of the text have not always drawn a sharp distinction between those cases in which the diplomat must be protected against the acts of other persons—in penal law, against the authorities of the receiving State which may institute criminal proceedings against him or, in civil law, against private individuals who may bring a civil action against him—and those in which the diplomat himself wishes to go to court in the receiving State to protect his interests. Thus Article 32 of the Convention is a mixture of provisions, and it cannot be said definitely if they apply to both categories of cases. What is clear is that, in the event of waiver of diplomatic immunity, both in criminal proceedings and in civil actions against the diplomat, an express declaration is required to grant jurisdiction to the court of the receiving State. Para. 3 of this Article would, however, rather suggest the contrary in cases where a diplomat has instituted civil proceedings against a private individual. He is then precluded from invoking immunity from jurisdiction in respect of any counter-claim made by the opposing party. This provision thus proceeds on the assumption that the diplomat has the power to initiate proceedings. The intention is that, in such a case, he is not allowed both to use this power of initiating proceedings against another and to prevent this person from making a counter-claim. In other words, the diplomat cannot have it both ways. But even this provision gives no explicit answer to the question with which we are here concerned.

In the absence of an express and unambiguous provision, it will be the purport of the rules of customary international law concerned with the protection of diplomats which has to be considered. This purport has traditionally found expression in the principle of *ne impediatur legatio,* but this principle should be strictly applied. It must result in protection of the diplomat (in the interests of his country), but it is not intended to protect others against acts of the diplomat. Therefore it cannot, in the Court's view, be advanced by other persons against the diplomat. This was most clearly expressed by Roberto Ago during the discussion in the International Law Commission, which made a draft for the Vienna Convention; see *ILC Yearbook,* 1957, I, p. 114:

> Enjoying immunity from jurisdiction meant simply enjoying the right not to be the object of judicial proceedings, in other words, not being bound to appear as defendant in the courts in consequence of proceedings instituted against him. The immunity in question had never meant the inability to appear as plaintiff before the same courts.

But, again, this statement was not in so many words included in the Convention itself.

No doubt, any State has the power to deny its diplomats the right to initiate civil proceedings in the receiving State. In that case it is an internal instruction that cannot be invoked by the opposing party.

Generally speaking, a court should not decline jurisdiction in the absence of an unambiguous rule to that effect. Since, in this case, there is no such rule, the plea that this Court should decline jurisdiction must fail ... [Report: 8 *Netherlands Yearbook of International Law* (1977), p. 279 (English translation).]

Jurisdiction — Personal — Over nationals fishing on the high seas — Law adopted to give effect to obligations under the Convention on Fisheries in the North-East Atlantic Ocean, 1959

Sea — High seas — Fisheries — National legislation restricting amount of fish which may be caught — Netherlands Fisheries Act 1963 — Sea Fisheries Regulations 1973 — The law of the Netherlands

PUBLIC PROSECUTOR *v.* JG (1)

The Netherlands, Supreme Court. 29 November 1977

SUMMARY: *The facts:*—JG was charged before the District Court of Rotterdam with fishing for sole and plaice in the North Sea in August 1976 without the authorization required under the 1976 Decree on the Limitation of Sole and Plaice Catches in the North Sea. The District Court found him guilty of the charge and imposed a fine of Dfl. 251. He appealed to the Court of Appeal of the Hague, which allowed the appeal. Although the Court found conclusive evidence of the facts, it held that there was no question of a criminal offence. The Minister had exceeded his powers when taking the measures laid down in the Decree, so that the Decree was not binding. Even though the Minister could take general administrative measures under Article 4 of the Fisheries Act 1963,[1] in order to ensure the application of the provisions of the Recommendation made in May 1975 by the North-East Atlantic Fisheries Commission, this Recommendation was only to limit the amount of the total catch for each Member State. Any regulation of the type laid down in the Decree, which amounted to the distribution amongst individual Dutch fishermen of the quota allocated to the Netherlands, had to be laid down either in the Act itself or in clear delegated legislation. In the Court's view this was not the case here. The Public Prosecutor appealed in cassation.

[1] Article 4(1) provides:
By or by virtue of a general administrative measure regulations may be made in the interests of sea fisheries, to ensure the application of international conventions or the decisions of international organizations.

Held:—The appeal was allowed and the case was remitted to the Court of Appeal for judgment.

The Minister had not acted *ultra vires* in fixing individual quotas. The Fisheries Act 1963 was designed to give the Minister the necessary powers to fulfil Dutch obligations under the North-East Atlantic Fisheries Convention.

The following is the text of the relevant part of the judgment of the Court:

It appears from the parliamentary history of the Fisheries Act 1963 that Article 4 of this Act is intended to provide a legal basis for *inter alia* the fulfilment by the Netherlands of its obligation as a Contracting Party to Article 13 of the North-East Atlantic Fisheries Convention, namely to take appropriate measures to ensure the application of the provisions of *inter alia* the recommendations referred to in Article 7 of the Convention which have become binding on the Contracting States.

Therefore Article 4 of the Act, combined with the 1971 Sea Fisheries Regulations[2] based on this Article, empowers the Minister of Agriculture and Fisheries to take appropriate measures to ensure the application of the provisions of *inter alia* the recommendations just mentioned.

The distribution amongst individual Dutch fishermen of the quota allocated to the Netherlands for the year 1976, viz. 9,200 tons of sole and 35,600 tons of plaice, whereby the Minister established norms to determine quotas for each operator per exploited vessel in the manner indicated in the 1976 Decree on the Limitation of Sole and Plaice Catches, can be regarded as a measure which may result in, and may reasonably be deemed necessary by the Minister to ensure, that the total catch of all Dutch fishermen in the year 1976 shall not exceed the quota referred to. It therefore amounts to an appropriate measure to ensure the application of the present Recommendation.

Consequently the Minister, by issuing the Decree in question, has not exceeded the powers conferred on him by Article 4 of the 1963

[[2] The Regulations are based on Article 4 of the Fisheries Act. As appears from the Preamble, the 1976 Decree on the Limitation of Sole and Plaice Catches in the North Sea is based on Article 7 of the Regulations. Article 7 reads:

1. Fishing for species of fish designated by the Minister, in seasons designated by him, in areas designated by him of the waters covered by this Decree, is prohibited. 2. Fish of a species covered by the prohibition in the first section of this Article and caught during a closed season within the meaning of the first section, in a closed area within the meaning of that section should, immediately the nets have been drawn in, be put back into the sea. 3. The Minister may grant exemption from the provisions in the preceding sections. Such exemption may be subject to certain rules and restrictions.]