IMPLEMENTATION OF THE ROME STATUTE IN THE NETHERLANDS

1. INTRODUCTION

1. Status Of Implementation In The Netherlands

The Netherlands signed the Rome Statute on 18 July 1998 and ratified it on 18 July 2001. Implementing legislation prior to ratification was not necessary. The International Criminal Court Implementation Act (ICC Act 2002) gives the Dutch government among others a statutory basis for transferring, protecting and guarding suspects to and from the Court and makes it possible to furnish the Court with legal assistance. Furthermore, an Amendment Act was passed to provide for specific technical changes to the various Dutch laws that cannot be changed by the Implementation Act (applicable to the entire Kingdom, including Aruba and the Antilles). The two acts entered into force on 8 August 2002.

One of the problems encountered prior to submission of the Rome Statute Ratification Act to the Dutch Second Chamber on 7 November 2002 for parliamentary approval was the fact that a two-thirds majority was needed concerning any possible conflict that might arise with regard to a possible deviation between the Rome Statute and the Dutch Constitution (the Constitution). One aspect of the debate focused on Article 93 (3) stating that the Netherlands cannot become party to a treaty that contains provisions that go against the Constitution without a procedure to amend the article in question with a two thirds majority in parliament.

Changes to the Dutch Penal Code were necessary in order to ensure that the crimes contained in the Statute are also criminalized in the Netherlands. For this purpose, the Act adopting the Rules Concerning Serious Violations of International Humanitarian Law, or International Crimes Act (ICA 2003) was enacted. It was discussed on 16 December 2002, adopted with one amendment concerning penalties on 18 December and entered into force on 19 June 2003. The ICA 2003 lists and criminalizes all international crimes that are within the jurisdiction of the Court.

An advisory board was set up for the implementation of the Statute. It consisted of representatives of several advisory organs such as the Dutch Association for the Judiciary (Nederlandse

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3 This amendment regulates in detail the cooperation of the Dutch authorities with the Court. Not only are the specific technical changes to various laws included, but also the obligations the Netherlands as the Host State is obliged to fulfill.
7 Regels met betrekking tot ernstige schendingen van het internationaal humanitair recht.

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Vereniging voor Rechtspraak), the Public Prosecution Service (Openbaar Ministerie), the Dutch Chamber of Lawyers (Nederlandse Orde van Advocaten), as well as several external experts. A "klankbordgroep" consisting of persons with extraordinary expertise in the area of international criminal and humanitarian law was also set up. Furthermore, several governmental and non-governmental organs and organizations in the field of criminal procedure and human rights were approached for consultation.

2. STATUS OF THE ROME STATUTE IN NATIONAL LAW

In terms of hierarchy, the Statute is of supranational character and therefore stands above national law. In case a national law is in direct conflict with a provision of the Statute, the national law in question will be declared inapplicable. Due to Articles 93 and 94 of the Constitution, who deal with the status of treaties, "self-executing" treaty provisions can be directly called upon in front of a national judge. He will then apply an interpretation in "good faith" (te goeder trouw) that is in accordance with the general meaning of the text, and in light of the context and the object and purpose of the treaty. The domestic legal order should therefore, in principle, respect the decisions and judgments of the Court as if a national court handed them down.

As the Host State of the Court, a distinction will have to be made between the duties of the Netherlands as an 'ordinary' State Party, set out in Chapter 3 of the ICC Act 2002, and its duties as the Host State, set out in Chapter 5 of the ICC Act 2002.

II. COMPLEMENTARITY

1. GENERAL PRINCIPLES OF JURISDICTION

Universal jurisdiction was established in Articles 3 (1), 8 and 9 of the War Crimes Act (Wet Oorlogsmisdrijven), which were meant to implement the 1949 Geneva Conventions. Some elements of the War Crimes Act were later transferred to the ICA 2003, with the addition of certain new crimes (such as crimes against humanity) that were not listed in the previous War Crimes Act.

The Dutch government stipulated that international law and the Statute do not oblige states to introduce universal jurisdiction. The ICA 2003 (and the ICC Act 2002 in Section 2 para. (1) (a)) therefore restricts universal jurisdiction to situations where a person who is suspected of having committed a crime is found on Dutch Territory and where another state with primary jurisdiction for some reason refrains from prosecution. The reasons for making this restriction derive from the difficulties associated with conducting a trial in absentia of an individual with no link to the

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10 Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Kingdom Act of 20 June 2002 to implement the Statute of the International Criminal Court in relation to cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions), Explanatory Memorandum, 28 098, no. 3, at 3 (hereinafter EM 28 098).
12 EM 28 098, no. 3, at 4-5.
13 Regels met betrekking tot ernstige schendingen van het humanitair recht (Rules concerning serious violations of international humanitarian law), Explanatory Memorandum, 28 337, no. 3, at 3 (hereinafter EM 28 337).
14 As it was of the view that the trend in international practice goes towards a more restrictive application of secondary bases of jurisdiction, see EM 28 337, no. 3, at 18.

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Netherlands, as well as the desire to limit jurisdic- tional conflicts.\textsuperscript{15} Nevertheless, if the Netherlands is unable to prosecute an individual due to his or her absence from the territory of the Netherlands, the government will extend its judicial cooperation to the greatest extent possible.

2. CORE CRIMES

2.a Genocide

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide has been adopted by the Netherlands (including the Dutch Antilles and Aruba) on 18 September 1966, entered into force on 20 September 1966 and was implemented into national law through the Genocide Convention Implementation Act\textsuperscript{16}. This act was subsequently repealed by the ICA 2003. The definition of the crime of genocide contained in sections 4 and 5 of the ICA 2003 is almost identical to Article 6 RS which in turn is identical to Article II of the Genocide Convention.\textsuperscript{17}

Since genocide is considered a core crime the sentence for genocide as provided by Dutch law is the highest possible namely life imprisonment.\textsuperscript{18}

2.b Crimes against Humanity

Dutch legislation did not know a criminalization of “crimes against humanity” as such. The ICA 2003 fills this “criminalization gap”. Crimes against humanity are listed in Section 4 (1) (2) and (3) ICA 2003, which is an exact reproduction of Article 7 RS.

One of the deliberations while implementing this Article consisted of whether or not to adopt the requirement that every suspect of crimes against humanity is guilty of actions that can be considered ‘widespread and systematic’. It was decided that in practice a sole act could be prosecuted as a crime against humanity, as long as that act forms part of actions that are widespread and systematic.\textsuperscript{19}

2.c War Crimes

Prior to the ICA 2003, the Dutch War Crimes Act (Wet Oorlogstrafrecht) was applicable to war crimes.\textsuperscript{20} In the ICA 2003, war crimes are criminalized in Sections 5 through 7. In these sections three lists of war crimes are applicable to respectively international armed conflicts, internal armed conflicts and one to both types of conflicts. The reason for maintaining this distinction is that the provisions of international humanitarian law at present still differ for these two categories of conflicts. Although there has been, and continues to be, new developments within this area, the Government of the Netherlands remained within the confines set by the law in its current status.\textsuperscript{21}

\textsuperscript{15} The intention to avoid conflicts of jurisdiction between states is reflected in the cautious approach the Dutch government took in establishing universal jurisdiction. The Dutch government has given several reasons for a ‘secondary universal jurisdiction’, see EM 28 337, no. 3. I.a. the presence of the indicted is required during proceedings, and other States parties might be more severely effected by the committed crime and claim their jurisdiction on grounds of primary bases of jurisdiction.
\textsuperscript{16} http://www.ohchr.org/english/countries/ratification/1.htm (last accessed on 22 February 2006).
\textsuperscript{17} EM 28 337, no. 3, at 6.
\textsuperscript{18} Section 6 ICA 2003.
\textsuperscript{19} This interpretation being consistent with the jurisprudence of the ICTY.
\textsuperscript{21} According to Goran Sluiter, (implementation of the ICC Statute in the Dutch legal order p. 175) the Dutch government has been criticized for maintaining this rigid distinction. A potential unsatisfactory situation may arise when for instance under Dutch law it would be possible to prosecute an individual for the use of poisonous weapons in international conflicts.
3. GENERAL PRINCIPLES OF THE ROME STATUTE

3.a Command Responsibility

Similar to Dutch jurisprudence, Section 9 of the ICA 2003 provides for the possibility of persecution of a person for his or her role as a superior, whether in a military or civilian role, with regard to the crimes described in the Act. “Superior” is defined in Section 1 (b) of the ICA 2003 and has a broader meaning than the “official order” as defined in the Dutch Penal Code which is limited to orders received from Dutch authorities only.

“Negligence” is listed in Section 9 (1) (b) of the ICA 2003, stating that a superior is liable in the situation that he or she intentionally fails to take measures, insofar as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence. In this situation the superior can be held liable to no more than two-thirds of the maximum of the principal sentences.  

3.b Participation

According to the ICC Act 2002, the scope of Articles 47 and 48 of the Dutch Penal Code are similar to the offences listed in 25 (3) (b) - (d) RS. Articles 47 and 48 Penal Code provide four forms of participation in a crime: co-perpetrator, accessory, making another person commit a crime, and incitement. Furthermore the Penal Code lists, like the Statute, an expansion of the elements of the crime. This expansion is listed in Article 140 (1) and (3) of the Penal Code. Hence the Dutch Criminal law in general corresponds to the forms of participation as listed in Article 25 (3) (b) – (d) RS and there is no need for an amendment on this issue.

3.c Defences

Most of the defences listed in Articles 31 and 32 RS are listed in Section 11 of the ICA 2003, and in Articles 39, 40, 41 or 42 and 43 of the Dutch Penal Code.

Intoxication as defined in Article 31 (1) (b) RS is one of the few defences that is not explicitly defined in the Penal Code. Despite not being specifically mentioned, intoxication can lead to an exemption under absolute force majeure, or an absence of all guilt. Even an acquittal belongs to the possibilities if a lack of guilt or intent cannot be proven.

Self-defence, mistake of fact (Article 32 (1) RS) and the mistake of law (Article 32 (2) RS) are among those defences that are mentioned in the Penal code. In case of self-defence, Article 41 Penal Code, provides that a person can reasonably defend himself or another person against an attack. According to the Dutch government, Article 41 of the Penal Code is broad enough to include the protection of goods, if it is a proportional protection that serves a just aim.

armed conflicts (Section 5 (5) (g) ICA 2003), whereas the same conduct committed during an internal armed conflict cannot be prosecuted on the basis of Section 6 ICA 2003.

Therefore, if the maximum sentence constituted life, then the corresponding sentence will be 15 years (Section 9 (2) (3) ICA 2003).

EM 28 337, no. 3, at 28.

Article 41 Penal Code can be compared with Section 31 (1) (c) RS.

It must be noted that war does not justify this provision. However, protection of goods for example can be a just cause if it is proportional and with a legitimate aim. Since this situation can also arise during war, it seems that Article 41 of the Dutch Penal Code does also entail the situation as listed in Article 31 (1) (c) RS.

Including the fulfillment of a military aim.
The mistake of fact and the mistake of law can have an excusable effect. In the case of a mistake of fact, the verdict will most likely be an acquittal or a discharge from further prosecution if the element of guilt is specifically included in the description of the offence (since guilt in that case cannot be proven). A mistake of law will not be able to be proven on the grounds of insufficient evidence or lead to a discharge from further prosecution. In case the suspect makes a successful appeal on the ground that he was acting based on a legal provision or an order given by a superior, it can lead to a discharge from further prosecution.

Section 11 (1) (2) ICA 2003 deals with the issue to what extent an appeal by the suspect – the act was committed based on a legal provision or an order given by an superior - can excuse the suspect. In Dutch Criminal Law this is listed in Articles 42 and 43 of the Penal Code. Section 11 (1) ICA 2003 states that even though a suspect was executing a legal provision or acting according to a superior order, this does not make that act legal. The act itself will remain punishable. However, under Section 11 (2) ICA 2003 a subordinate can be excused for committing such a crime in pursuance of an order if the order was believed by the subordinate in good faith to have been given lawfully and the execution of the order came within the scope of his competence as a subordinate.

The order to commit genocide or a crime against humanity will always be considered unlawful and the execution of such an order can never have an excusable effect by virtue of subparagraph 3.

3.d Mental Element

The Dutch Penal Code lists dolus and culpa as two different forms of mental element. Dolus, in its purest form, is the willful intent with deliberate consciousness. Culpa includes: negligence, willful negligence and recklessness, through which the offences are committed or prepared. In order to constitute a crime, culpa or dolus are necessary requirements. If these are missing, or if there is a possibility for a ground of exemption from criminal liability, this can lead to acquittal or dismissal of criminal charges.

Article 30 RS states that offences listed in the Statute are only punishable if there is a situation of intention and knowledge. In Dutch Criminal Law, the description of the offences contains separate individual elements of guilt. This has been taken into consideration in the ICA 2003. The descriptions of the offences are broad enough to correspond to the jurisdiction of the crimes as listed in the Statute. A Dutch judge from the Netherlands must have a look at international law and jurisprudence when determining the scope and reach of the description of an international offence.

Article 32 (1) RS deals with the mistake of fact, which can only lead to the exclusion of criminal liability when it negates the mental element required by the crime. When an element of guilt exists, according to Article 350 of the Dutch Penal Code, a mistake of fact will in most cases lead to acquittal. The same applies for the ICA 2003, which basically states that when guilt is not an element in the description of the offence, it can lead to exemption from criminal liability if an appeal on ‘absence of all guilt’ is accepted by the judge.

3.e Retroactivity

27 As mentioned before, the term “superior” in Section 11 of the ICA 2003 has a broader meaning than the “official order” as defined in the Dutch Penal Code (which is limited to orders received from Dutch authorities only).
28 With regard to international crimes, the Dutch legislator has limited the application of the Articles 42 and 43 of the Penal Code. The background for this limitation is that these articles were written for the application to the Dutch system, and will not fit properly within the context of international crimes.
29 EM 18 337, no. 3, at 27.
In the view of the Dutch government, the issue of retroactivity is only applicable to crimes against humanity (and those cases of genocide over which the Netherlands did not have previous jurisdiction). The Dutch Supreme Court ruled in the case of D. Bouterse and the December killings in Suriname that Article 16 of the Constitution and Article 1 (1) of the Dutch Penal Code contain an absolute prohibition of the prosecution and punishment of an act that at the time of committing was not punishable under Dutch Criminal Law. This prohibition can only be set aside when a provision that is ‘binding on all’ as referred to in Article 94 of the Constitution, contains the obligation to punish the act retroactively. The Dutch Supreme Court also stated that customary law could not set this prohibition of retroactivity aside.

3.f Statute of Limitation

The Netherlands refrained from ratifying the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The reason for non-ratification was the obligation clause to eliminate statutory limitations with respect to crimes for which time limits had already expired.

However, the 1968 Convention has exerted a considerable influence on Dutch law. It inspired the 1971 Act containing provisions on the elimination of statutory limitations with respect to war crimes and crimes against humanity. The Act effected changes in the existing legislation concerning war crimes, crimes against humanity and genocide. Article 13 of the ICA 2003 contains a deviation from the customary law by including a limitation period on criminal prosecution and execution. Technically, this would be in conflict with Article 29 RS. Therefore the ICA 2003 contains an exception, in as far as, war crimes of a less serious character penalized with a maximum of 10 years imprisonment can have a period of limitation. This limitation is in complete accordance with the international obligations of the Netherlands.

The Netherlands has ratified the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes that also restricts limitation to Genocide, grave breaches of the Geneva Conventions. As of today, the treaty has not yet entered into force. With regard to the Rome Statute, none of the categories of war crimes that could be subject to limitation are mentioned in Article 29 RS.

Torture was already criminalized in Dutch criminal law as a separate crime by means of the Convention Against Torture Implementation Act. By raising the penalty for torture from 15 years or a fine to life imprisonment, 20 years or a fine. The consequences of this penalty expansion was that the statute of limitations was not applicable anymore and automatically excluded.

4. PRECONDITIONS FOR THE EXERCISE OF JURISDICTION

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30 EM 28 098, no. 3, at 24.
31 LJN: AB1471, Hoge Raad Decembermoorden Bouterse, 00749/01 CW 2323 date: 18-09-2001.
32 EM 28 337, no. 3, at 24
35 An exception that is already in place since 1971. At the time, this exception was deliberately enacted in Dutch law. The Dutch government is of the opinion that this exception is still valid since the breaches of law and the use of war form a very broad category of crimes, committed in the context of an armed conflict, among which small crimes, such as theft, are also included.
37 EM 28 337, no. 3, at 32-33.
4.a Ne bis in idem (Article 20 (2) RS)

The Dutch Penal Code has a provision containing the *ne bis in idem* principle (Article 68 Penal Code). With certain exceptions, Article 91 of the Penal Code is applicable to the general rules of customary international criminal law, of which the *ne bis in idem* principle is part.

There is one exception to the rule of *ne bis in idem* as enshrined in Article 68 of the Dutch Penal Code. This exception concerns the special remedy of review, regulated in Article 475 of the Code of Criminal Procedure. There can be a ground for exclusion of prosecution and therefore an inadmissibility of the prosecutor in case of a decision that ended in an acquittal, exemption of criminal prosecution, condemnation or declaration of without applying of a sentence or measure.

With regard to foreign judgments, Article 68 Dutch Penal Code offers a considerable degree of protection against double jeopardy. A system was put into place where prosecution in the Netherlands is impossible, rather than a system that takes the foreign judgment into consideration when imposing the degree of punishment. A foreign conviction will only prevent renewed prosecution in the Netherlands if the sanction imposed has been completely enforced.

A retrial with regard to the Court is not permitted except on the general condition that the person claimed will not be prosecuted, punished or otherwise subjected to restrictions on his personal liberty without the express consent of the Minister of Justice in respect of offences which were committed before the moment of his surrender and those for which he has not surrendered.

4.b Irrelevance of Immunities and Amnesties

Article 42 of the Constitution provides full constitutional immunity for the Dutch monarchy. Furthermore it stipulates that the ministers of government carry executive responsibility within the sphere of their duties. Article 71 of the Constitution attributes immunity to ministers and parliamentarians for their statements made in parliamentary meetings and documents. Thus, a certain immunity with regard to their official capacity is granted.

In order to implement Article 27 RS a deviation from the Constitution is necessary. Initially the Dutch government maintained that there was no deviation from the Constitution due to the fact that the monarch is not considered a political head of state and has therefore no substantive powers. Furthermore they stated that Article 42 of the Constitution addresses the national constitutional context only and has no effect

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38 EM 28 337, no.3, at 25.
40 The protection against double jeopardy goes less far for foreign than for Dutch judgments. The explanation for this difference is that until recently foreign judgments could not be enforced in the Netherlands. Even today this is only the case where this is specifically provided for by treaty.
41 Article 60 of the Penal Code does not oblige Dutch courts to take into account a foreign sentence not completely enforced (nor the reasons behind the incomplete enforcement). No distinction is made between a case in which further enforcement is impossible because the convicted person has evaded it and one in which enforcement has been suspended prematurely by the foreign authorities. As with regard to conditional sentences; they preclude a second trial in the Netherlands only when they have become irrevocable under foreign law.
42 Article 42 of the Constitution reads: „1. The Government shall comprise the King and the Ministers. 2. The Ministers, and not the King, shall be responsible for acts of government.” In the Dutch constitutional framework the ministers are responsible for everything the king does. In that sense, the king cannot commit the crimes as contained in the Statute.
44 “Members of the States General, Ministers, State Secretaries and other persons taking part in deliberations may not be prosecuted or otherwise held liable in law for anything they say during the sittings of the States General or of its committees or for anything they submit to them in writing.”

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outside the scope of the Dutch legal order.\textsuperscript{45} The Council of States, advising the government in respect of proposed legislation, did not agree with this view. Eventually it was decided that if a cabinet minister would be accused of a crime falling under the Statute, he could not invoke the immunity of Article 71 of the Constitution due to the supranational character of Article 27 RS.\textsuperscript{46}

Also, in the hypothetical case of the Dutch monarch committing a crime contained in the Statute, the complementarity jurisdiction would not be used. Instead, if necessary, the monarch would be surrendered to the Court, unless he or she had resigned in the meantime – whether of his own free will or not– and could no longer claim immunity from national prosecution.\textsuperscript{47}

Pardons and amnesties are listed in Article 122 of the Constitution. It provides that the government can grant pardons and amnesties in accordance with the applicable laws and regulations. Since Article 110 RS provides that a state enforcing a sentence is bound by it without the possibility of reducing this sentence and due to the fact that the Netherlands in its capacity as the Host State is obliged to accept prisoners if no other state is willing to accept them (according to Article 103 (4) RS), the government decided to forfeit the constitutional right to grant pardon and amnesty.\textsuperscript{48} This is contained in Section 56 (1) ICC Act 2002.\textsuperscript{49}

5. **Offences against the Administration of Justice (Article 70(4) RS)**

The offences against the administration of justice as embodied in Article 70 (4) RS are of a special importance to the Netherlands as the Host State. Mostly, these offences will take place on the territory of the Netherlands (in The Hague as the seat of the Court). The consequence being that the Netherlands will automatically have jurisdiction due to Article 2 of the Dutch Penal Code (territoriality principle). If the Court, for any given reason, decides not to prosecute but to leave the prosecution to a State Party, it will most likely turn to the Netherlands. Similarly the Court, in the case it does decide to proceed with the prosecution, will for the same reasons turn to the Netherlands for cooperation.\textsuperscript{50}

The active nationality principle is embodied in Article 5 of the Penal Code for a number of specific crimes and for crimes which are equally punishable in the state where they have been committed. Since this may not cover all Article 70 offences, an amendment to this provision was made to include offences against the (international) administration of justice. When the procedural offence is punishable under Dutch law as an ‘ordinary’ offence, such as falsification, the jurisdiction may be expected to already exist under the current wording of Article 5, given the penalization of such offences in most states.\textsuperscript{51}

6. **Discretion of the Prosecution**

\textsuperscript{45} Specifically that the immunity of Article 71 did not apply to international criminal courts and that it was not absolute.


\textsuperscript{47} Hans Bevers, Niels Blokker & Jaap Roording, ‘The Netherlands and the International Criminal Court on the obligations and hospitality’ p. 4.

\textsuperscript{48} The government argued that Article 122 of the Constitution contains a discretionary power, which can, pursuant to Article 92 of the Constitution, be transferred upon an international organization. Therefore, Article 122 of the Constitution and Article 110 RS can be reconciled.

\textsuperscript{49} “No pardon may be requested or granted in respect of sentences of imprisonment which have been imposed by the ICC for one or more of the crimes referred to in Article 5 of the Statute and which are being enforced in the Netherlands. A request for reduction or remission of such a sentence shall be immediately referred by Our Minister to the ICC.”

\textsuperscript{50} All forms of cooperation mentioned in Article 9 RS can play a role in this context.

According to Article 167 of the Dutch Criminal Procedure Code, the Department of Prosecution has the discretion to determine whether or not it will initiate prosecution of a certain case.

A public prosecutor who receives a request for cooperation must make the decision how it is to be executed. He must transmit the request for cooperation to the investigating judge if it involves any of the situations described in Section 50 of the ICC Act 2002. The investigating judge will return the request for cooperation as soon as possible to the public prosecutor, after adding the records of the interviews conducted by him as well as the records of his other actions.

After completing his activities in executing the request for cooperation, the public prosecutor will return the request, together with the accompanying documents, to the Minister of Justice. The Minister will then notify the Court immediately of the manner in which the request has been executed and of the results thereof.²²

III. COOPERATION OF THE STATE PARTY WITH THE ICC

1. IMPLEMENTATION OF THE DUTY TO CO-OPERATE IN GENERAL, COMPETENT NATIONAL AUTHORITIES AND CHANNEL OF COMMUNICATION

1.a Implementation of the duty to co-operate in general

As mentioned earlier, the Netherlands has a special relationship with the ICC as it assumes a dual responsibility: that as a State Party to the Rome Statute, and that as a Host Country for the Court.

The obligations of the Netherlands to offer assistance as an ordinary State Party have been implemented through two separate acts. One is the ICC Act 2002, the other one is the ICA 2003 containing amendments to i.a. the Dutch Penal code and enabling the prosecution of the crimes set out in Article 70 RS in the Netherlands.³³ The ICC Act 2002 contains the following chapters: 1. general provisions, 2. surrender of persons to the ICC, 3. cooperation as referred to in Article 93 RS, 4. enforcement of sentences, 5. assistance provided by the Host State and 6. final provisions. According to the Dutch government, the ICC cooperation regime is of a sui generis, vertical nature. The domestic legal order should therefore, in principle, respect the decisions and judgments of the Court as if a national court handed them down.³⁴

The obligations of the Netherlands as the Host State are laid out in the interim Headquarters Agreement concluded on 19 November 2002.³⁵ Furthermore, the government explained that the detailed RS as well as the RoPE, contrary to those of the ICTY and ICTR, enables states to draw up more complete and detailed cooperation laws.³⁶ With regard to Article 93 RS, Section 3 and 4 of the

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²² Section 49-54 ICC Act 2002.
³⁴ EM 28 098, no. 3, at 4-5.
³⁵ Until the final Headquarters Agreement is concluded, the Headquarters Agreement between the Netherlands and the United Nations ICTY is applied mutatis mutandis to the ICC. The interim Headquarters Agreement can be found at <http://www.minbuza.nl/?CMS_NOCOOKIES=YES&CMS_ITEM=A5B4AA609C384F6C9AD9F3B247FB6DF6X3X43142X43> (accessed on 12 February 2006).
ICC Act 2002 create a centralized system for cooperation requests (as well as other judicial proceedings) in The Hague which is similar to that used with regard to the ICTY.

Finally, on a contractual basis, the Netherlands can offer assistance to the Court for cooperation in a criminal investigation as has been done in relation to the ICTY.

1.b The competence of national authorities regarding requests by the ICC

The central authority with regard to cooperation requests is the Minister of Justice, who either responds to the request himself or forwards it to the public prosecutor of The Hague as prescribed by Section 3 of the ICC Act 2002. The Minister of Justice will be the first to determine whether there is a question of complementarity in a case brought before him.

Requests for criminal cooperation are executed exclusively by the public prosecutor of The Hague. The public prosecutor can, in implementing the request, request help from colleagues elsewhere. He is competent to issue a warrant for an arrest, which may be executed throughout the entire country. Furthermore, the public prosecutor or the assistant public prosecutor is authorized to order the provisional arrest. If the action of the prosecutor or the assistant public prosecutor cannot be awaited any police officer is authorized to arrest the person.

If, during the handling of a request, an opinion of a judge is needed, this falls exclusively within the confines of the District Court in The Hague (one centralized court).

An important provision in the ICC Act 2002 is Section 7 (an elaboration of Article 97 RS), which states that in case of question, ambiguity, insufficient information, and alleged injustice as a result of a request, the procedure must be suspended and the Minister must consult the Court before making any further decisions.

1.c Designation of a channel and a language of communication, Article 87 (1)(a) and (2) of the statute in conjunction with rules 176 and 178, RoPE

As a State Party, the Netherlands has the obligation to designate a channel of communication through which it wishes to receive requests of cooperation from the Court. Four kinds of requests can be identified: cooperation (including the surrender of persons and other forms of cooperation), execution, assistance, and the prosecution of offences against the administration of justice of the Court. The Minister of Justice of the Netherlands deals with all requests for cooperation.

2. General recognition of the ICC

58 EM 28 098, no. 3, at 40-43. As for example complaints against seizure (Article 53 (4) and 64), or civil procedures (Article 64 (2)).
59 Arguments for centralization, as already employed in the case of the ICTY, include: 1. keeping the procedure as short as possible without the possibility of employing other judicial ways and a relatively small expectation of cases; 2. centralization gives the opportunity for special expertise and improves communication and internal contacts with the ICC.
61 The situation might arise that the ICC and another state both make a request for surrender. In these cases Section 31 of the ICC Act 2002 stipulates that the Minister of Justice shall decide.
63 See the Introduction of the ICC Act 2002. Section 4 of the ICC Act 2002 reads as follows: “The Hague District Court has exclusive competence to deal with requests from the ICC for cooperation or assistance and to hear any appeal, complaint or objection in connection therewith, in so far as this is the responsibility of the courts.”
64 EM 28 098, no. 3, Article 3, at 19.
65 EM 28 098, no. 3, Article 3, at 19.
As the Host State of the Court, there are no apparent problems with the general recognition of the Court nor is there a danger that a request for cooperation by the Court will be turned down for lack of legal capacity. As mentioned before, the Netherlands has implemented the duty to cooperate both as a State Party and as the Host State.

3. Duty to co-operate (Article 93 et seq. RS)

3.a. Implementation of the various forms of cooperation under Article 93 et seq.

3.a.(i) Forms of cooperation specified in Article 93 (1) RS

Chapter 3, Sections 45 to 54 of the ICC Act 2002 list the forms of assistance as referred to in Article 93 RS. Mostly, these deal with the collection of evidence and the investigation of crimes. The Sections are divided into a general part, dealing with the scope of assistance to be provided, and a more specific and procedural part, concentrating on the execution of the request by the prosecutorial and judicial authorities. The provisions of the Sections state that the Netherlands will give the widest measure of assistance and that a request will be executed as far as possible in accordance with the provisions of the Court.

(i) Information, Documentation, Evidence, Assets

Before items that are the subject of a seizure order can be located the authorities must have a competence to enter and search certain places. This competence is conferred upon them on the basis of Section 51 (1) (a) of the ICC Act 2002. The taking of evidence, testimony under oath and the hearing of experts are provided for in Section 50 (1) (a), (c) and (d) of the ICC Act 2002. Furthermore the possibility of cooperation by video conferencing in a hearing by the Court of a witness or expert is listed in 50 (1) (b). With regard to physical examination, Section 51 (1) (a) mentions the possibility of DNA tests, including the competence to order the taking of cell material for this purpose. Article 51 (1) (a) of the ICC Act 2002 also deals with the service and provision of records and documents, including judicial documents (Article 93 (1) (d) and (i) RS), in that it provides for the seizure of documentary evidence, the research of records in computerized files, etc. Article 50 (1) (a) (b) (c) and(d) of the ICC Act 2002 stipulates that the public prosecutor must transmit the request for cooperation to the investigating judge if it involves a seizure of documentary evidence with a view of achieving the desired result.

(ii) Suspects, Victims and Witnesses

The district court has to examine the identity of the person claimed, the admissibility of the request for surrender and the scope for granting the request.66 The Minister of Justice may permit persons (including suspects, victims and witnesses) who have been lawfully deprived of their liberty in the Netherlands to be temporarily placed at the disposal of the Court for the purpose of identification, to testify as a witness or with a view to other forms of cooperation. This is only admissible when the individual freely gives his consent after having been properly informed of the consequences.67 Concerning the whereabouts of persons, data may be provided from police files as referred to in the Data Protection (Police Files) Act (Wet politieregisters) even without a request to this effect, if this is necessary for the proper discharge of the Court’s functions. The provision of data is effected through the intermediary of the National Police Services Agency (Korps landelijke politiediensten).68

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67 Section 48 (1) ICC Act 2002.
68 Section 6 ICC Act 2002.
According to Section 50 (1) (a) ICC Act 2002 the public prosecutor must transmit the request for cooperation to the investigating judge if it involves questioning persons who are not prepared to appear voluntarily and give the requested testimony.

The voluntary appearance of persons as witnesses or experts before the Court (or any other form of cooperation) requires the consent of the Minister of Justice and the consent of the person involved.

The only form of cooperation that the Netherlands does not provide to the ICC is the compulsory transfer of witnesses to the ICC as mentioned in Article 93 (1) (f) in conjunction with (7) RS. As the Dutch government is of the opinion that the Court is not fitted with the power to detain individuals other than suspects awaiting trial or sentenced persons awaiting transfer to a state of execution.69

Witnesses, experts, victims or other persons present on Dutch territory in response to a summons, subpoena or a warrant to bring them before the Court may not be prosecuted, arrested or subjected to any other measure that restricts their liberty in the Netherlands for offences or convictions that preceded their arrival in the Netherlands.70 This immunity however ceases to apply once the person had the opportunity to leave the Netherlands for a total of fifteen days after he is no longer required by the Court.71

(iii) Other forms of assistance

Sections 41 and 42 of the ICC Act 2002 cover the remaining provisions of Article 93 (1) RS. In case a form of cooperation is requested that is not explicitly provided for, a general cooperation provision exists stating that other requests will be fulfilled, unless prohibited by law.

3.a (ii) Consultations with the Court, Article 97

Section 7 ICC Act 2002 stipulates there is a duty to consult with the Court in the case of questions, ambiguity, or insufficient information when there are obstacles or impediments in relation to the granting of a request for cooperation or enforcement. Specific obstacles and impediments are listed in the second paragraph of this provision. All the obstacles mentioned in Section 7 (2) ICC Act 2002 seem to be in keeping with the Statute in the sense that they are mentioned as grounds for refusal or suspension of legal assistance in the Statute or are self-evident.72

3.a (iii) Article 96 (2) (e) and (3)

When the Court issues a request under Article 93 RS, it will have to fulfill the criteria mentioned in Section 46 of Chapter 3 of the ICC Act 2002. This section states that a request for cooperation as referred to in this chapter will, to the fullest extent possible, be executed in the manner indicated in the request. This will include the application of the procedures described in it and consent for the persons referred to in the request to be present at and assist in the execution of the request.

3.a (iv) On site investigation, Article 99 (4)

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69 Introduction to ICC Act 2002, 3.
70 Section 87 (1) ICC Act 2002.
71 Section 87 (2) ICC Act 2002.

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Sections 45 and 46 lists the intention to cooperate fully with the Court but do not provide a competence to launch, without an express request to the Netherlands, an investigation on Dutch territory (e.g. to question witnesses who are present on Dutch territory). Since the Statute provides for such on site investigations in a very limited fashion, the Dutch government is of the opinion that the Court will follow the path of a request in order to launch such an on site investigation on Dutch territory.\textsuperscript{73}

3.b Denial of a request for assistance

The Dutch government considers the Court to operate under the principle of Kompetenz-Kompetenz in the sense that the Court is able to decide over its own competence. In this light, the traditional grounds for refusal under Dutch Law are not incorporated in the ICC Act 2002. However, according to Section 25 (1), a Dutch Court is competent to determine whether a person brought before it is indeed the person as mentioned in the request for surrender, and whether this person has been able to indicate his innocence for the facts as laid down in the request.\textsuperscript{74} This very restrictive freedom afforded to the Dutch judges is an expression of the fact that the State parties to the Statute have surrendered part of their competence to a supranational Court, but still keep certain powers of discretion within their competence due to state sovereignty.\textsuperscript{75}

4. ARREST AND SURRENDER (ARTICLES 59, 89 et seq.)

4.a Implementation of the duty to arrest and surrender persons

4.a (i) Legal obstacles of all kinds

An important part of the ICC Act 2002 deals with the surrender of persons to the Court. According to Section 10, the surrender can concern both the core crimes of Article 5 RS, or the offences against the administration of justice as listed in Article 70 RS. Chapter 2, Sections 11-44, of the ICC Act 2002 regulate the actual surrender of persons to the Court. As a result of the vertical character of the relationship between the Court and state parties, all of the classical grounds for refusal in cases of interstate extradition requests are absent.\textsuperscript{76}

Sections 13 and 18 of the ICC Act 2002 list the possibilities to meet a request by the Court to arrest a person for the purpose of surrender. An arrest is not necessary in the case of a voluntary surrender to the Court or Dutch authorities.

Since the Dutch Extradition Act (\textit{Uitleveringswet}) has been declared inapplicable in Section 11 (2) of the ICC Act 2002, the only possible situations that allow for a refusal of a request for surrender (or conditional release and suspension of detention) occur under very strict conditions and only after consultations with the Court. These are listed in Sections 16, 20 and 26 of the ICC Act 2002. The

\textsuperscript{73} EM 28 098, no. 3, at 32.
\textsuperscript{74} The Section reads: “The District Court shall suspend the investigation for the purpose of consultation with the ICC if, in the provisional opinion of the District Court, the person brought before it is not the person whose surrender has been requested.” In the article innocence is not specifically mentioned but in the explanatory memorandum (28 098) p. 27 it is mentioned.
\textsuperscript{75} EM 28 098, no. 3, at 7.
\textsuperscript{76} Not all judicial decisions in this area are turned over to the Court. Three areas remain at the discretion of the Dutch authorities. 1) The possibility to release suspects from preventative arrest; 2) The possibility for the Public Prosecutor to release an individual when he thinks that the person arrested is not the person sought by the Court; and 3) When faced with concurrent extradition/surrender requests, the Minister of Justice can decide which to accede to, in accordance with the criteria laid down in Article 90 RS.
exception to these conditions is Section 25 of the ICC Act 2002, which states that when the judge believes that the person being investigated is not the one sought by the Court, he can suspend the investigation for the purpose of consultation with the Court. This procedure differs from that of the ICTY and the ICTR in the sense that there is no room for claims of innocence. There is no requirement for double criminality, and no appeal is possible.\textsuperscript{77} In all other situations, the provision explicitly states that the Dutch Court must declare the surrender permissible.\textsuperscript{78} The Dutch Court does have the power, when declaring a surrender permissible, to add a negative advice to the Minister of Justice.\textsuperscript{79}

If the surrender has been declared admissible and the Minister considers that he needs further information from the Court in order to make a sound decision, he may defer the decision and consult with the Court. Depending on the result of the consultation with the Court, he may again forward the file of the case to the public prosecutor who has dealt with the request for surrender, after which Sections 21-29 (hearing and ruling by the District Court) will apply again.\textsuperscript{80}

\textbf{4.a (ii) Execution of a request for arrest and surrender}

At the request of the Court and subject to the provisions of Chapter 2 of the ICC Act 2002, persons can only be surrendered to the Court for the following reasons as spelled out in Section 11: a) prosecution and trial in respect of criminal offences over which the Court has jurisdiction under the Statute, and b) for enforcement of a sentence of imprisonment imposed by the Court.

Section 21 (1) and Section 22 (1) of the ICC Act 2002 deal with the execution of a demand for arrest and surrender (“without delay”). Sections 14\textsuperscript{81}, 15 and 18 of the ICC Act 2002 ensure that an arrested person will be promptly brought before the competent judicial authority to determine whether the person arrested is the person referred to in the warrant, and whether he or she has been arrested in accordance with the applicable law.\textsuperscript{82}

There is no mention in the ICC Act 2002 of the requirement of a warrant for a provisional arrest but it can be inferred from Section 7 (2) (c) of the ICC Act 2002 that one is necessary since this provision states that the judicial authority must determine whether the person arrested is the person referred to in the warrant.

Pursuant to Sections 16 (5) and 20 (2) of the ICC Act 2002, the investigating judge may, on his own initiative or on the application of the public prosecutor or at the request of the person claimed or his council, terminate the order for remand in custody if no request for surrender has been received from the Court within 60 days from the date of provisional arrest. The person claimed might request that on account of urgent and exceptional circumstances the deprivation of liberty pursuant to the provisions of Sections 13-17 (provisional arrest) be ended or discontinued subject


\textsuperscript{78} The draft implementation act contained a provision, Article 24 (3) that obliged the court to examine immediate proof of innocence submitted by the requested person. This was not added to the final implementation act.

\textsuperscript{79} In the view of G. Sluiter, this “[n]egative advice could find a legal basis in Article 91 (2) RS, attaching a number of conditions to the content of surrender requests which may also concern the degree of proof against the requested person”.

\textsuperscript{80} Section 30 of the ICC Act 2002.

\textsuperscript{81} This section states that after a claimed person has been questioned in accordance with Article 55 (2) and Article 59 (2) RS, the public prosecutor may order that he be detained in police custody for three days.

\textsuperscript{82} Section 7 (2) (C) of the ICC Act 2002.
to certain conditions. The investigating judge is therefore not merely limited to the situation as stipulated in Section 59 (4) ICC Act 2002.

There is a provision obliging the investigating judge, through the Minister of Justice, to inform the Pre-Trial Chamber of the Court before an order such as a suspension or discontinuation be given. The Pre-Trial Chamber can make recommendations pursuant to Article 59, paragraph 5 of the Statute within a period to be determined by the Minister of Justice of the Netherlands. On the grounds of Sections 13-17 of the ICC Act 2002 it can be inferred that no problems will arise with regard to the issue of arrest, provisional arrest, and detention for persons awaiting trial. Section 15 of the ICC Act 2002 for instance provides for the investigating judge the necessary competence to order a person to remand in custody.

4.a (iii) Multiple proceedings against the same person

No claim before a national court can be made on the basis of ne bis in idem if the person claimed is being prosecuted in the Netherlands for the same offence. In such a case, when deciding to grant the request of surrender, the Minister of Justice will give instructions for the prosecution to be discontinued. There is no legal remedy available against the ruling. In case the person claimed is the subject of prosecution in the Netherlands or that all or part of a sentence imposed on him by a Dutch court is still eligible for execution, the public prosecutor may decide that the person claimed will not be surrendered to the Court. In this case, Section 21 then applies.

With regard to competing requests by the Court and other states, the competent authority to make a decision is the Minister of Justice. The provision where the duty of the Minister to inform this fact to the Court is listed is in Section 32 of the ICC Act 2002. If the surrender has been declared inadmissible and the Minister considers that further information is necessary from the Court, he may defer the decision and consult with the Court. In case the Minister makes a decision that the surrender is inadmissible, he will refuse the request.

Article 90 RS does not provide for the situation that a third party requests the surrender of a person while in transit towards the Court. In such a case, the Netherlands must decide along the lines of Article 90 RS, but the final decision will be in the hands of the Minister of Justice.

4.a (iv) Transit of persons being surrendered through a State Party

The obligation for the transit of persons being surrendered to the Court through the territory of the Netherlands has been implemented in chapter 5, Sections 85 to 88 of the ICC Act 2002. This chapter deals mostly with the transit of persons going from and to the Court through the Netherlands, where the officials of the Court will not have exclusive jurisdiction (outside of the exclusive terrain reserved for the Court). When competencies are exercised in the Netherlands, on account of the Court but nevertheless outside the jurisdiction of the Court, Dutch officials will take the lead. On the one hand these officials operate at the request of the Court, but on the other hand under the

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83 Section 16 of the ICC Act 2002.
84 Section 16(2) of the ICC Act 2002.
85 Section 27 (4) of the ICC Act 2002.
86 Section 31 of the ICC Act 2002.
87 The Minister of Justice must notify the public prosecutor and the ICC immediately of his decision on the request for surrender.
88 Section 30 (3) of the ICC Act 2002.
89 Section 30 (4) of the ICC Act 2002.

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direction of the Minister of Justice. The task of the Host State is therefore facilitating in nature: to ensure that the effective functioning of the Court is guaranteed.90

4.a (v) Duties to inform the Court

Section 32 of the ICC Act 2002 stipulates that the Minister of Justice notifies the public prosecutor and the Court immediately of his decision on a request for surrender. As mentioned earlier, Section 7 (4) ICC Act 2002 contains the general obligation to consult the Court when there is a problem with the execution of the request for surrender.

4.b “Article 98 (2) agreements”

No agreements falling under Article 98 (2) RS have been concluded by the Netherlands. Some “guiding principles” were adopted that restrict the possibility to sign a bilateral agreement with the United States concerning the surrender of US nationals to the Court.91

4.c Constitutional issues: immunities, surrender of nationals and life imprisonment

4.c (i) Immunities

The provisions for immunity from prosecution are listed in Article 42 (2) of the Constitution and Section 16 of the ICA 2003.92 This section is essentially a codification of the ICJ’s ruling in the DRC Congo vs. Belgium case.93 Besides mentioning a prohibition of prosecution of foreign heads of state, heads of government and ministers of foreign affairs as long as they are in office, it also stipulates that this prohibition is valid in so far this immunity is recognized under customary international law.94

Immunities under international law are also applicable, and a request for prosecution can be rejected with reference to these immunities. Article 16 of the ICA 2003 notes the categories of persons for whom the immunity as described in the law applies to. Immunity is not applicable to actions that former civil servants committed prior to or after their term in office and neither does it apply to actions committed while in public office with respect to private affairs.95

If the Court were ever to ask the Netherlands to surrender a head of state present on Dutch territory, the Netherlands would be obliged to do so if it concerned a head of state of a country party to the Statute; assuming that a waiver of immunity is obtained from the perpetrator’s national state pursuant to Article 98 (I) RS.

4.c (ii) Surrender of nationals

The Dutch government is of the opinion that a refusal to surrender a national to the Court is not in spirit with the founding principles upon which the Court is based. A refusal would undermine the

90 This also implies that no claim for criminal prosecution will be considered against a person in transit to the Court.
91 Parliamentary documents 21 501-02 (no. 445).
92 Section 16 reads: “Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (a) foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law; (b) persons who have immunity under any Convention applicable within the Kingdom of the Netherlands.”
94 According to G. Sluiter, this flexible provision “prevents the Netherlands, at this moment, from taking a position on the scope of immunities of former Heads of State”.
authority of the Court, which was created by a large number of states as a supranational institution and would not allow it to function effectively.\(^{96}\)

4.c (iii) Life imprisonment

The Dutch government did not adopt a system that allows a judge to adapt or transform a sentence given by the Court into Dutch Law.\(^{97}\) This would undermine the authority and trust that the Netherlands should place in the Court due to its special position as co-founder and Host State. Also, the Netherlands could be obliged to accept prisoners if no other states are willing to accept them (Article 103 (4) RS).

Due to the supranational character of the Court, the Netherlands is obliged to accept imposed prison sentences that surpass the maximum possible sentence in Dutch Criminal Law without restrictions.\(^{98}\) In relation to the Court, this is especially important for an imposed temporary sentence (not being life imprisonment). On the basis of Article 77 (1) (a) RS, this temporary sentence is maximum 30 years imprisonment, but in the Netherlands this maximum is 15 years, or in case the judge has the choice between life imprisonment and temporary imprisonment, 20 years (as explained in Article 10 of the Dutch Penal Code). This provision of maximum prison sentences was considered, in the opinion of the , inapplicable for the execution of sentences imposed by the Court.\(^{99}\) This deviation from normal practice is justified because of the vertical character of the relationship between the Court and other states, as well as the exceptional gravity of the crimes that justify such a punishment. These crimes are mostly committed in a specific context (such as a war or an armed conflict, or in the case of crimes against humanity in the context of a wide and systematic attack against a civilian population) and are therefore crimes that affect the whole of the international community.\(^{100}\)

5. RIGHTS OF THE ACCUSED

The Dutch Penal Code gives sufficient protection to the accused. Among those rights are the right to a fair trial, the right to remain silent, the principle of the prohibition of coercion and the right of assistance by an attorney.\(^{101}\) For those that do not speak Dutch, Article 191 of the Penal Code provides for the possibility of obtaining a translator without costs.\(^{102}\)

To ensure that the suspect will be presented in front of a judge in due time, Article 59a of the Dutch Penal Code states that this must happen within 3 days and 15 hours.

According to Section 19 (2) of the ICC Act 2002 the person claimed must be brought before the public prosecutor within 24 hours of his arrest. Sections 14 and 18 of the ICC Act 2002 provide the competence for an interrogation of a suspect in accordance with Article 55 (2) RS, the public prosecutor may order that he be detained and remain in police custody until the date on which the

\(^{96}\) EM 28 098, no. 3, at 5.
\(^{97}\) As opposed to the procedure followed by the ICTY, where the *exequatur* procedure does not prevent the judge from transforming the sentence in accordance with Dutch Criminal Law.
\(^{98}\) EM 28 098, no. 3, at 13.
\(^{99}\) See Section 67 and 68 of the ICC Act 2002.
\(^{100}\) EM 28 098, no. 3, at 14.
\(^{101}\) Mostly codified in Articles 28 and 29 of the Dutch Penal Code.
\(^{102}\) This however is at the discretion of the supervisory judge; therefore Article 191 of the Penal Code does not imply a right to an interpreter.
district court decides on remand in custody.\textsuperscript{103} The rights set out in Article 55 RS are equally applicable during the procedure of arrest and surrender.\textsuperscript{104}

\textbf{6. PRIVILEGES AND IMMUNITIES OF THE COURT AND ITS OFFICIALS, PROTECTION OF VICTIMS AND WITNESSES, AGREEMENT ON PRIVILEGES & IMMUNITIES OF THE COURT}

On 11 September 2003, the Netherlands became the 35\textsuperscript{th} country to sign the Agreement on the Privileges and Immunities of the International Criminal Court.

“Other persons” mentioned in Article 48 RS and not covered by Article 3 of the Headquarters Agreement between the Netherlands and the Court shall, to the extent necessary for their presence at the seat of the Court, enjoy the same privileges and immunities as witnesses and experts pursuant to Article XVIII of the Tribunal headquarters agreement.\textsuperscript{105} The privileges and immunities set out in the Tribunal Headquarters Agreement are similar to Article 48 (1) RS. Sub 4 of Article 3 applies to witnesses enjoying the same immunities and privileges regardless of their nationality.

In Article 14 of the Tribunal Headquarters Agreement functional privileges and immunities as set out in Article 28 (3) RS are provided for. Identical privileges and immunities similar to Article 48 (2) RS are afforded to key officials of the Court. Their privileges and immunities continue to apply after the expiry of their term of office under the conditions set out in Article 48 (2) RS. This provision is similar to Article 15 (1) (a) of the Tribunal Headquarters Agreement.

The Dutch government wants to combine the Headquarters Agreement and the APIC, since the provisions are complementary.

\textbf{7. ENFORCEMENT OF SENTENCES, FINES AND FORFEITURES IMPOSED BY THE ICC}

With respect to the enforcement of prison sentences, the ICC Act 2002 distinguishes in Section 66 between voluntary enforcement and obligatory enforcement. A request can only be refused if enforcement would not be reasonable such as for example in case of an excessive security risk. In both situations, the Dutch government has opted for direct enforcement.\textsuperscript{106} If the Court designates the Netherlands to accept a sentenced person, the Minister of Justice decides whether a designation of the Netherlands by the Court in accordance with Article 103 (1) (b) RS will be accepted. However, if no other state is designated or no other state will accept the person in question, the Netherlands will, as the host state be obliged to enforce the sentence of imprisonment, this according to Article 68 ICA 2003.\textsuperscript{107} In this case, the sentence of imprisonment imposed by the Court will, on the instruction of the Minister of Justice, be enforced in the

\textsuperscript{103} Section 18 (2) of the ICC Act 2002.

\textsuperscript{104} The Netherlands is a party to various human rights Conventions. This raises the question whether and to what extent persons within the jurisdiction of the Court (the accused in particular) can invoke these rights before a Dutch court and possibly also before an international court (other than the ICC itself) or any other monitoring body. Of particular relevance is the European Convention on Human Rights and Fundamental Freedoms (ECHR), and specifically the right to a fair trial as established in this convention. The Netherlands is obliged to respect the Convention rights, and persons within its jurisdiction are entitled to invoke these rights.

\textsuperscript{105} Article 3 (4) of the Headquarters Agreement between the Kingdom of the Netherlands and the ICC. The Tribunal Headquarters Agreement refers to the Headquarters Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters Agreement of the International Tribunal for protection of Persons Responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia since 1991.


\textsuperscript{107} The Dutch government has, already at the Rome Conference, made clear that this should only happen in exceptional cases.
Netherlands in accordance with the conditions set out in the Headquarters Agreement referred to in Article 3(2) of the Statute.108

No separate legislation was necessary to ensure that the detention facilities in the state meet widely accepted international treaty standards governing the treatment of prisoners. This issue has already been met due to the fact that as the Host State for the ICTY and the Lockerbie trial, many international prisoners have already been transferred to the Netherlands. In most of these cases, special detention facilities were set up in or around The Hague.

The implementing legislation also provides for the enforcement of orders by the Court concerning fines and forfeiture measures (Chapter 4 ICC Act 2002, Sections 72-84). The Dutch authorities have the competence to transform the penalty imposed by the Court into Dutch law (but not impose a heavier one). The sentence can also be transformed into a measure (e.g. a withdrawal from circulation in accordance with Article 36(b)-(d) of the Dutch Penal Code or a forfeiture).

In order that no problems arise with the imposition under Dutch law of a maximum regarding fines, Section 81 (2) of the ICC Act 2002 states that Articles 23 (3) (4) (7) and (8) of the Penal Code do not apply to the imposition of a fine in accordance with Section 79 (1) of the ICC Act 2002.109

IV. OTHER PROBLEMATIC ISSUES

There appear to be no other problematic issues with the implementation of the Statute.

V. CONCLUSION

There was widespread support within the Dutch government for the implementation of the Statute. The political and legal debates in both the first and second chamber were extensive and thorough due to the many technical and constitutional issues raised as well as the status of Host State of the Netherlands. As a whole, the ICC Act 2002 and the ICA 2003 fully reflect the desire of the Netherlands, as a State Party and as the Host State, to live up to its international obligations.

During the debates, Article 103 (4) RS proved to be a point of concern to parliament. The fear that this Article did not clearly stipulate the role of the Netherlands as a ‘last option’ was expressed by many political factions. The government reassured parliament by stating that the Netherlands already had plenty of practical experience with regards to the execution of prison sentences by hosting the Yugoslav Tribunal. The extensive amount of prison sentences passed by the ICTY did not prove to be a political, financial or legal burden for the Netherlands. Another point was the reassurance that the costs involved will come from the contribution of State parties and not entirely from the Netherlands itself, and will therefore limit the use of Article 103 (4) RS.

Another minor issue that arose during the implementation process concerned the new International Crimes Act and the issue of on-site investigations. Some of the provisions of the ICA 2003 were actually more restricted than the previous national legislation. The fact that the universality principle is complemented (“secondary universality”) by the active and passive nationality principle is a step backwards. Previously, in the War Crimes Act, the universality principle applied to all situations with no restrictions. In the current situation, the person indicted

109 Which in its turn states that Articles 353 and 357 of the Code of Criminal Procedure shall apply mutatis mutandis.

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by the Court will have to be on Dutch territory in order for the Dutch authorities to arrest him. In practice, this can lead to complicated situations, and opportunities to combat impunity might be missed.