

# **The Legal Framework for Universal Jurisdiction in the Netherlands**

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# The Legal Framework for Universal Jurisdiction in the Netherlands

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# The Legal Framework for Universal Jurisdiction in the Netherlands

The International Crimes Act (ICA) of June 19, 2003 allows Dutch courts to exercise universal jurisdiction over genocide, crimes against humanity, war crimes, torture, and enforced disappearances provided that the suspect is present on Dutch territory<sup>1</sup> and that the crime was committed after the act's entry into force on October 1, 2003.<sup>2</sup> Dutch courts also have jurisdiction to try cases where the crime was committed by or against a Dutch national regardless of whether the alleged perpetrator is on Dutch territory, including where the suspect obtains Dutch nationality after the alleged crime was committed.<sup>3</sup>

The ICA defines genocide, crimes against humanity, and war crimes in accordance with the Rome Statute establishing the International Criminal Court (ICC). Unlike the Rome Statute, however, the ICA defines torture and enforced disappearance both as distinct crimes and as constituent acts of war crimes and crimes against humanity.<sup>4</sup>

Prior to the introduction of the ICA, Dutch courts had limited jurisdiction over war crimes committed after July 10, 1952<sup>5</sup> and over torture committed after December 21, 1988.<sup>6</sup> Following the dismissal of a high-profile case involving Rwandan genocide suspect Joseph Mpambara, the ICA was amended to extend temporal jurisdiction for the crime of

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<sup>1</sup> The Kingdom of the Netherlands includes Aruba, Curaçao and Sint Maarten and the municipalities Bonaire, Sint Eustatius and Saba.

<sup>2</sup> Wet Internationale Misdriften (WIM) ("International Crimes Act" or ICA), entered into force on June 19, 2003, [http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum\\_10-09-2014](http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum_10-09-2014) (accessed September 10, 2014) and official English translation, undated, [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_loi190603\\_entof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_loi190603_entof.pdf) (accessed September 10, 2014).

<sup>3</sup> This is known as passive and active personality jurisdiction. There appears to be no jurisdiction where the victim acquires Dutch nationality after the alleged crime has been committed. See ICA, section 2(3).

<sup>4</sup> ICA, sections 8 and 8a. The ICA was amended on October 27, 2010 to criminalize enforced disappearance.

<sup>5</sup> The Wartime Offenses Act limited jurisdiction to acts committed during wartime and to acts described in titles I and II of Book 2 of the Penal Code, whereas the ICA applies to the entire penal code. Wet Oorlogsstrafrecht ("Wartime Offenses Act"), entered into force on July 10, 1952, [http://wetten.overheid.nl/BWBR0002099/geldigheidsdatum\\_10-09-2014](http://wetten.overheid.nl/BWBR0002099/geldigheidsdatum_10-09-2014) (accessed September 10, 2014).

<sup>6</sup> On September 29, 1988, the Netherlands passed the Torture Convention Implementation Act. Article 10 of the Act provides that Dutch courts have jurisdiction over torture as of the date upon which the Torture Convention entered into force in the Netherlands, which was December 21, 1988. Torture could also be prosecuted as a constituent element of war crimes as far back as 1952 under the Wartime Offenses Act. Uitvoeringwet folteringverdrag ("Torture Convention Implementation Act"), entered into force on September 29, 1988, [http://wetten.overheid.nl/BWBR0004409/geldigheidsdatum\\_wijkt\\_af\\_van\\_zoekvraag/geldigheidsdatum\\_01-05-2002](http://wetten.overheid.nl/BWBR0004409/geldigheidsdatum_wijkt_af_van_zoekvraag/geldigheidsdatum_01-05-2002) (accessed September 2, 2014).

genocide to October 24, 1970, the date upon which the Netherlands ratified the Genocide Convention.<sup>7</sup>

## Jurisdictional Requirements

There are limitations on Dutch courts' jurisdiction over grave international crimes. Most importantly, the suspect must be present on Dutch territory before criminal justice authorities can carry out an investigation.<sup>8</sup> It is unclear whether prosecutors can initiate an investigation if they anticipate the likely presence of a suspect or whether they can continue an investigation even after a suspect leaves the country, and the issues have never been tested before a court. Practitioners stated that in practice an investigation will only be opened where the suspect is already on Dutch soil.<sup>9</sup>

Dutch courts adhere to the principle of subsidiarity, meaning they will only exercise jurisdiction where neither the courts of the country where the crimes occurred (known as the “territorial state”) nor the ICC is exercising jurisdiction. Dutch authorities have emphasized that they prefer to extradite suspects to the territorial state if possible,<sup>10</sup> as evidenced by the recent move to extradite two Rwandan nationals back to Rwanda to be tried for their alleged involvement in the genocide.<sup>11</sup>

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<sup>7</sup> The legislative amendment took place in April 2012. Human Rights Watch email correspondence with Dutch official, June 19, 2014. See also ICA, section 21(4).

<sup>8</sup> ICA, section 2(1). The suspect's presence must be voluntary and courts will not issue an extradition request to secure his or her presence. *Prosecutor v. Desi B.*, Supreme Court of the Netherlands, Case No. 00749/01, Judgment (Appeal), September 18, 2001, [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/Bouterse\\_HogeRaad\\_18-9-2001.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/Bouterse_HogeRaad_18-9-2001.pdf) (accessed September 2, 2014).

<sup>9</sup> Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>10</sup> Human Rights Watch interview with Dutch official, January 28, 2014; Human Rights Watch interview with Dutch official, January 28, 2014.

<sup>11</sup> In June 2014, the Supreme Court ruled that Jean-Claude Iyamuremye could be extradited to Rwanda. The State Secretary of Security and Justice has final authority on whether he will be sent back to Rwanda for trial. Fellow Rwandan Jean-Baptiste Mugimba is also in extradition proceedings, with the district court ruling that he may be extradited in July 2014. Several other Rwandan genocide suspects are currently under investigation in the Netherlands and may face a similar fate. *Prosecutor v. Jean-Claude I.*, The Hague Supreme Court, Case No. 14/00090, Judgment (Appeal), June 17, 2014, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:1441> (accessed September 9, 2014); *Prosecutor v. Jean-Baptiste M.*, The Hague District Court, Case No. 2012058615, Judgment, July 11, 2014, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:10759&keyword=Rwanda> (accessed September 16, 2014). See also “Dutch Supreme Court allows extradition of Genocide suspect to Rwanda,” Public Prosecution Service press release, June 20, 2014, <http://www.om.nl/onderwerpen/internationale/uitspraken-judgments/map/dutch-supreme-court/> (accessed September 9, 2014).

Dutch courts do not require double criminality, so the crimes need not be criminalized in the territorial state in order to be prosecuted before Dutch courts.

## Barriers to Prosecution

Prosecution of genocide, crimes against humanity, torture, enforced disappearance, and most war crimes is not subject to any statute of limitations.<sup>12</sup>

### *Immunity*

Immunity may, however, be a bar to prosecution before Dutch courts. For example, the ICA provides immunity to foreign heads of state and government and ministers of foreign affairs, but this immunity is limited to the time they are in office.<sup>13</sup> This is consistent with the International Court of Justice's holding in the *Arrest Warrant (Democratic Republic of Congo v. Belgium)* case.<sup>14</sup> The ICA also bars prosecution of other persons whose immunity is recognized under customary international law or who have been granted immunity under a treaty to which the Netherlands is a party, such as foreign diplomats who are posted to the Netherlands or who are visiting the country on official mission for a short period of time.<sup>15</sup>

In April 2012, the Ministry of Foreign Affairs endorsed a report from the Advisory Committee on Issues of Public International Law, confirming that full immunity should only be extended to the three most senior state officials (heads of state and government and ministers of foreign affairs) for the time they are in office but that it should not be extended to other high-ranking government officials.<sup>16</sup> The report also supports the

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<sup>12</sup> ICA, section 13. The Netherlands is one of only three countries that has ratified the European Convention on the Non-Applicability of Statutory Limitation to the Crimes Against Humanity and War Crimes. It has not, however, ratified the United Nations (UN) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

<sup>13</sup> ICA, section 16. The Ministry of Foreign Affairs issued guidelines on the issue of immunity on December 9, 2003. See *Staatscourant*, issue 247, 22 December 2003, section 3.1.1, p.11, <https://zoek.officielebekendmakingen.nl/Stcrt-2003-247-p11-SC63012.html> (accessed September 15, 2014).

<sup>14</sup> The International Court of Justice ruled that certain foreign government officials, such as heads of state and government, foreign ministers, and accredited diplomats are entitled to temporary immunity from prosecution by foreign states, even with regards to grave international crimes. The Court was not explicit in whether the immunity ceases to exist once the person leaves office, and the judgment has been open to differing interpretations on this point. Many advocates, including Human Rights Watch, interpret the judgment not to bar later prosecutions for grave international crimes. *The Democratic Republic of Congo v. Belgium*, International Court of Justice, Judgment, April 14, 2002, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=121&p3=4> (accessed September 8, 2014).

<sup>15</sup> ICA, section 16. The Netherlands is a party to the Vienna Convention on Diplomatic Relations but not the UN Convention on Special Missions.

<sup>16</sup> Letter from Uri Rosenthal, Minister of Foreign Affairs, Dutch Ministry of Foreign Affairs, to Dutch Senate, April 26, 2012, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/04/26/kamerbrief-over->

granting of “special mission immunity,” meaning where foreign state representatives come to the Netherlands on an official visit, provided four conditions are met: the mission must be temporary in nature, involve a delegation from one state to another, have a specific task or purpose, and be with the prior consent of the receiving state.<sup>17</sup> Such immunity is in accordance with the UN Convention on Special Missions, although the Netherlands is not a party to the convention. In cases where immunity may be an issue, prosecutors may consult with the Ministry of Foreign Affairs before deciding whether to proceed with a case.<sup>18</sup>

### *Prosecutorial Discretion*

While victims and other parties can file complaints with the prosecutor’s office or the police, prosecutors make the final decision about whether to initiate criminal proceedings.<sup>19</sup> Prosecutors first assess whether jurisdiction exists and then look at a number of factors, including the seriousness of the alleged crimes, the level of involvement of the accused, the likelihood of cooperation from the territorial state, the chance of securing a conviction, and prosecutors’ general workload.<sup>20</sup> Prosecutors also consider whether the case will help achieve the overarching goal of keeping the Netherlands from becoming a safe haven for war criminals.<sup>21</sup> Prosecutors try to ensure their case selection represents a broad range of countries rather than focusing only on certain countries like Rwanda or the former Yugoslavia.<sup>22</sup>

If prosecutors decide not to proceed with a case, the party that filed the initial complaint is notified of the decision. That party, or anyone with an interest in the case, may

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immuniteit-van-leden-van-buitenlandse-officiële-missies/kamerbrief-over-immuniteit-van-leden-van-buitenlandse-officiële-missies.pdf (accessed September 15, 2014). See also, Advisory Committee on Issues of Public International Law (CAVV), Dutch Ministry of Foreign Affairs, “Advisory Report on the Immunity of Foreign State Officials,” sections 4.1, 4.2, and 4.3.1, <http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/rapporten/2011/05/01/cavv-advies-nr.-20-immuniteit-buitenlandse-ambtsdragers-en.html> (accessed September 15, 2014), unofficial English translation, undated, [http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity\\_foreign\\_officials.pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity_foreign_officials.pdf) (accessed September 15, 2014).

<sup>17</sup> Family members of state officials or other persons representing the state, such as business persons, can also benefit from special mission immunity. CAVV, “Advisory Report on the Immunity of Foreign State Officials,” section 4.3.2.

<sup>18</sup> *Ibid.*, section 5.4.

<sup>19</sup> Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>20</sup> *Ibid.*; Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>21</sup> Human Rights Watch interview with Dutch official, March 28, 2014.

<sup>22</sup> *Ibid.*; Human Rights Watch interview with Dutch official, January 28, 2014.

challenge the prosecutor's decision before the Court of Appeals.<sup>23</sup> The court usually looks to whether there is a reasonable suspicion of guilt, whether a conviction is feasible, and whether it is in the public interest to prosecute the case.<sup>24</sup> The court's decision is final and cannot be appealed.<sup>25</sup>

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<sup>23</sup> Wetboek van Strafvordering ("Dutch Code of Criminal Procedure"), entered into force on January 15, 1921, [http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum\\_09-09-2014](http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum_09-09-2014) (accessed September 9, 2014). One legal practitioner noted that courts interpret this standard broadly. Human Rights Watch interview with Dutch official, January 27, 2014.

<sup>24</sup> M.J.A. Duker, "De toetsingsruimte van het hof in beklagzaken ex artikel 12 Sv," *Delikt en Delinkwent (DD)*, vol. 32 (2009), p. 429. See also Dutch Code of Criminal Procedure, arts. 12-13a.

<sup>25</sup> De Rechtspraak, "Complaint not prosecuting a criminal offence," undated, <http://www.rechtspraak.nl/Naar-de-rechter/Hoger-beroep/Pages/Klacht-over-het-niet-%28verder%29-vervolgen-van-een-strafbaarfeit-artikel-12-Sv.aspx> (accessed September 8, 2014).