

# Universal Jurisdiction Law and Practice in the Netherlands

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## Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. It provides an overview of the Dutch national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdictions. In addition, interviews with national practitioners were conducted on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the jurisdiction in question. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

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# Crimes invoking universal jurisdiction<sup>1</sup>

In the Netherlands, the international provisions relating to international crimes and international humanitarian law have been domesticated in the Dutch 2003 International Crimes Act (*Wet Internationale Misdrijven* – ICA) of 19 June 2003.<sup>2</sup> One of the main reasons for adopting this law was the creation of the International Criminal Court (ICC) and the related Rome Statute, which entered into force on 1 July 2002.<sup>3</sup> The ICA provides for universal jurisdiction over specific offences allowing national authorities to investigate and prosecute such offences under certain conditions when they were committed abroad by foreign nationals (see below on [Universal Jurisdiction Requirements](#)). Yet the ICA does not establish an obligation to prosecute these crimes, the investigation being at the discretion of the prosecutors.

The ICA replaced the Dutch Genocide Convention Implementation Act (*Uitvoeringswet Genocideverdrag*) and the Dutch Torture Convention Implementation Act (*Uitvoeringswet folteringverdrag*). It also replaced several clauses of the Dutch Criminal Law in Wartime Act (*Wet Oorlogsstrafrecht*).

The ICA criminalizes, amongst others, the following crimes:

## 1. Genocide<sup>4</sup>

Genocide is defined according to the Rome Statute.<sup>5</sup> The ICA also incorporates the prohibition of conspiracy and incitement of genocide.<sup>6</sup> In the ICA, these latter acts carry the same penalties as prescribed for attempted genocide.

## 2. Crimes against humanity<sup>7</sup>

The ICA lists the same underlying crimes and contextual elements as well as *mens rea* requirements as Article 7 Rome Statute. It also lists the definitions for certain crimes, including extermination,<sup>8</sup> enslavement,<sup>9</sup> deportation or forced transfer,<sup>10</sup> forced pregnancy,<sup>11</sup> persecution,<sup>12</sup> apartheid,<sup>13</sup> and enforced disappearance,<sup>14</sup> as in

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<sup>1</sup> Article 4 and 6 of the Dutch Criminal Code (*Wetboek van Strafrecht*, hereinafter DCC) contain additional crimes which are subject to universal jurisdiction, such as crimes committed against certain members of the Dutch monarchy (e.g. an attack against the King, the Queen or the successor to the throne, see Articles 108 to 110 DCC) and crimes against the public order (see Articles 131 to 134 DCC) as well as certain crimes prohibited under an international treaty.

<sup>2</sup> The ICA also extends to the special municipalities of Bonaire, Sint Eustatius and Saba (the Caribbean Netherlands or BES islands), see Article 16a ICA.

<sup>3</sup> Dutch Parliament, Explanatory Memorandum - Amendment International Crimes Act, 32 47528 337, no. 3, page 1.

<sup>4</sup> Article 3 ICA.

<sup>5</sup> Article 6 Rome Statute.

<sup>6</sup> Article 25(3)(e) Rome Statute.

<sup>7</sup> Article 4 ICA.

<sup>8</sup> Article 4(3) ICA.

<sup>9</sup> Article 4(2)(b) ICA.

<sup>10</sup> Article 1(1)(c) ICA.

<sup>11</sup> Article 1(1)(f) ICA.

Article 7(2) Rome Statute. Torture is defined differently depending on its character as stand-alone crime or as crime against humanity (see below on [Torture](#)).

### 3. War crimes<sup>15</sup>

With regard to war crimes, the ICA mainly lists similar acts, and follows similar definitions, as the Rome Statute and the 1949 Geneva Conventions. The ICA follows the distinction between international armed conflicts<sup>16</sup> and non-international armed conflicts.<sup>17</sup> The ICA has also incorporated specific treaties, such as the Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of an Armed Conflict.

Article 7 of the ICA stipulates a catch-all clause which criminalizes any other “violation of the laws and customs of war” in international or non-international armed conflicts not listed in Article 5 or 6 ICA.

The ICA is broader than the Rome Statute regarding the intentional starvation of civilians by wilfully impeding relief supplies as it criminalizes this offence in international as well as in a non-international conflict,<sup>18</sup> while the Rome Statute only criminalizes this act in respect of international armed conflicts.<sup>19</sup>

### 4. Enforced disappearance<sup>20</sup>

The ICA criminalizes enforced disappearance as a stand-alone crime in Article 8a ICA, using the same definition for the equivalent crime against humanity. Article 8a ICA, which was introduced per amendment on 27 October 2010, implements the obligation under Article 4 of the International Convention for the Protection of all Persons from Enforced Disappearance (CED) to establish domestic legislation.<sup>21</sup>

The ICA definition of enforced disappearance follows the Rome Statute rather than Article 2 CED. Like the Rome Statute Elements of Crimes,<sup>22</sup> it requires that enforced disappearance involve the arrest, detention, or abduction of the victim. It does not include other forms of deprivation of liberty as provided by the CED. In this vein, the ICA requires that the perpetrators be a State agent or a political organization, whereas the CED includes all persons or groups of persons. The ICA requires a special intent

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<sup>12</sup> Article 4(2)(c) ICA.

<sup>13</sup> Article 1(1)(g) ICA.

<sup>14</sup> Article 4(2)(d) ICA.

<sup>15</sup> Article 5 to 7 ICA.

<sup>16</sup> Article 5 ICA.

<sup>17</sup> Article 6 ICA.

<sup>18</sup> Article 6(3)(m) ICA.

<sup>19</sup> Article 8(2)(b)(xxv) Rome Statute.

<sup>20</sup> Article 8a ICA.

<sup>21</sup> See Human Rights Watch, *The Legal Framework for Universal Jurisdiction in the Netherlands*, 2014, p. 1, [https://www.hrw.org/sites/default/files/related\\_material/J0914Netherlands\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/J0914Netherlands_0.pdf).

<sup>22</sup> Article 7(1)(i) Rome Statute and corresponding Elements of Crimes.

to remove the person from the protection of the law for a prolonged period of time, as required by the Rome Statute but not by the CED.

Article 8a(2) of the ICA contains several aggravating circumstances which can result in higher penalties. These aggravating circumstances include acts resulting in serious injury or the death of the victim or acts involving rape, the victim being sick, wounded, pregnant or a minor, and acts involving a group of victims.

## 5. Torture<sup>23</sup>

Article 1 of the ICA provides two definitions of the crime of torture.

Torture as a war crime or a crime against humanity<sup>24</sup> follows the Rome Statute definition<sup>25</sup> and is broader than Article 1 of the Convention against Torture.<sup>26</sup> Like the Rome Statute, the ICA does not require the act to be committed for a defined purpose (information or confession, intimidation, punishment, coercion or any other reasons based on discrimination of any kind). Also, the ICA does not require the underlying crime of torture to be committed at the instigation of a public official or other person acting in an official capacity, but the ICA requires that the victim was under the custody or under the control of the perpetrator.

Torture as an independent offence is criminalized in Article 8 ICA. This stand-alone crime is defined according to Article 1 of the Convention against Torture.<sup>27</sup> Thus, it requires a specific purpose and the involvement of a government authority.

## Modes of liability

The modes of liability stipulated under the general rules of Dutch criminal law also apply to the crimes listed in the ICA. However, following the Rome Statute, the ICA formulates one additional mode of criminal liability, namely command responsibility.

### 1. Direct perpetrator<sup>28</sup>

The direct perpetrator (*pleger*) is the person committing the crime or attempting to commit the crime.

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<sup>23</sup> Article 8 ICA.

<sup>24</sup> Article 1(d) ICA.

<sup>25</sup> See Article 7(2)(3) Rome Statute.

<sup>26</sup> Article 1 of the Convention Against Torture.

<sup>27</sup> Articles 1(e) ICA.

<sup>28</sup> Article 47(1)(1) DCC.

## 2. Indirect perpetrator<sup>29</sup>

The indirect perpetrator (*doen pleger*) is the person inducing or attempting to induce another person to commit a crime. A requirement for this mode of liability is that the person actually performing the act cannot be held criminally liable for that act. That person is merely used as a tool by the indirect perpetrator to commit the crime and acts without intent, negligence or culpability.

## 3. Co-perpetrator<sup>30</sup>

The co-perpetrator (*mede-pleger*) is the person committing the crime or attempting to commit the crime in a conscious and close collaboration (*bewuste en nauwe samenwerking*) with one or more co-perpetrators.

## 4. Instigator<sup>31</sup>

The instigator (*uitlokker*) is the person intentionally inducing or attempting to induce another person to commit a crime by providing gifts or promises, abusing authority, using violence, threats or deception or providing the opportunity, means or information necessary to commit the crime. Unlike in the situation of the indirect perpetrator, the person actually performing the act can also be held criminally liable for that crime.

## 5. Accessory<sup>32</sup>

The accessory (*medeplichtige*) is the person intentionally assisting in the commission of a crime or intentionally providing the opportunity, means or information necessary to commit the crime.<sup>33</sup> The acts of the accessory can take place before the crime has been committed, while the crime is being committed and, under certain circumstances, shortly after the crime is completed.<sup>34</sup> There is a thin line between qualifying someone as a co-perpetrator versus an accessory.<sup>35</sup>

There are multiple cases in which defendants were accused of being accessories to war crimes. For example, the Court of Appeal of Hertogenbosch sentenced Guus Van Kouwenhoven to 19 years in prison for being an accessory to war crimes and for supplying arms and ammunition to the regime of Charles Taylor in Liberia in violation of weapons embargoes.<sup>36</sup>

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<sup>29</sup> Article 47(1)(1) DCC.

<sup>30</sup> Article 47(1)(1) DCC.

<sup>31</sup> Article 47(1)(2) DCC.

<sup>32</sup> Article 48 DCC.

<sup>33</sup> Dutch Supreme Court, 22 March 2011, ECLI:NL:PHR:2011:BO2629.

<sup>34</sup> Observations by Advocate-General at the Dutch Supreme Court, 20 March 2018, ECLI:NL:PHR:2018:211, with reference to Dutch Supreme Court, 15 December 1987, ECLI:NL:PHR:1987:AD0099.

<sup>35</sup> See for example Dutch Supreme Court, 3 November 2015, ECLI:NL:HR:2015:3218.

<sup>36</sup> Court of Appeal of Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE: 2017:1760.



## 6. Command responsibility<sup>37</sup>

The various modes of criminal liability applicable under general Dutch law do not correspond to the relevant provisions in Part 3 (General Principles of Criminal Law) of the ICC Statute.<sup>38</sup> Therefore, in addition to the general modes of criminal liability under the Dutch Criminal Code (DCC), Article 9 ICA has incorporated one additional form of liability of command responsibility.

According to Article 9(1) ICA, a “superior” who (i) intentionally permits the commission of any of the ICA crimes or (ii) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence, is punished equally as the direct perpetrator of any of the crimes. No distinction is made in the law between civilian and military superiors. On 8 November 2011, the Dutch Supreme Court has delivered a judgement ruling that command responsibility requires effective control by the superior over the subordinate.<sup>39</sup>

More recently, in 2017, the District Court of The Hague sentenced the accused Eshetu Alemu for crimes committed in Ethiopia.<sup>40</sup> The Court found that he held command responsibility for crimes of torture committed in detention. The Court considered the fact that the accused was in charge of paying the direct perpetrators, had the power to summon them to his office and could visit the victims of torture, was a proof of his effective control over the direct perpetrators. The Court concluded that the accused could not have been unaware of the crimes that were committed in the prison camp, emphasizing the severity of the abuses and the screamings that could be heard there. Finally, the Court held that the accused could have, but did not, intervene to stop the violations.

## 7. Legal entities<sup>41</sup>

Under Dutch law, legal entities can be held criminally liable for the actions of individuals. This is possible when the conduct can reasonably be attributed to the legal entity. Whether such an attribution is reasonable does not follow a general rule but depends on the concrete circumstances of the case, including the type of the prohibited behavior, and whether the criminal act is conducted within the scope of that legal entity (*sfeer van de rechtspersoon*).<sup>42</sup>

According to the Dutch Supreme Court, an act falls within the scope of the legal entity if one or more of the following circumstances occur: (1) the individual works for the legal entity, through employment or otherwise; (2) the conduct occurred

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<sup>37</sup> Article 9 ICA.

<sup>38</sup> Dutch Parliament, Explanatory Memorandum, 28 337, no. 3, page 29.

<sup>39</sup> Dutch Supreme Court, 8 November 2011, ECLI:NL:HR:2011:BR6598. Article 11 ICA provides grounds for excluding criminal responsibility for a person who acted following an order. In order to successfully invoke this ground, the defendant must prove that he or she believed, in good faith, that the command was authorized (*bevoegd gegeven bevel*).

<sup>40</sup> District Court of The Hague, 15 December 2017, ECLI:NL:RBDHA:2017:14782.

<sup>41</sup> Article 51 DCC.

<sup>42</sup> Dutch Supreme Court, 26 April 2016, ECLI:NL:PHR:2015:2638.

within the normal course of business; (3) the conduct was useful or beneficial to the business of the legal entity; or (4) the legal entity had control over the occurrence of the conduct and such conduct was, in fact, accepted by the legal person.<sup>43</sup>

Legal entities can furthermore be held criminally liable for the actions of individuals when that legal entity qualifies as a person actually directing the crime (*feitelijk leidinggever*).<sup>44</sup> When a legal entity or person has committed a crime, a natural person or another legal entity – for instance the mother company – can under certain conditions be held criminally liable for directing that crime. The actual director does not necessarily need to hold a certain position at the legal entity that committed the crime. Actually directing the crime can consist of not stepping in when the crime took place. This can be the case when the actual director did not take measures while (i) he or she had the power to take measures to prevent the criminal act from taking place, and (ii) he or she was reasonably obliged to take measures to prevent the criminal act from taking place.<sup>45</sup>

## Temporal jurisdiction over crimes

### 1. Beginning of temporal jurisdiction

Dutch law prohibits laws to apply retroactively.<sup>46</sup> This prohibition can be set aside when provisions of treaties or resolutions by international institutions stipulate that this prohibition should be set aside.<sup>47</sup> However, this exception only applies to binding treaty provisions of international law, not to unwritten customary law.<sup>48</sup> As of this writing, this provision has never been applied.<sup>49</sup>

#### 1.1. Crimes against humanity

The ICA, adopted on 19 June 2003, established the first criminalization of crimes against humanity in the Netherlands. Therefore, only crimes against humanity committed after 19 June 2003 can be prosecuted before Dutch courts.

The Dutch Parliament has considered that it would be difficult to establish exactly when crimes against humanity became a part of international customary law and, as a consequence, it would be contrary to the principle of legal certainty to extend its temporal jurisdiction to before the ICA entered into force.<sup>50</sup>

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<sup>43</sup> Dutch Supreme Court, 21 October 2003, ECLI:NL:HR:2003:AF7938.

<sup>44</sup> Article 51 DCC.

<sup>45</sup> Dutch Supreme Court, 26 April 2016, ECLI:NL:PHR:2015:2638, para. 3.5.2.

<sup>46</sup> Article 16 Dutch Constitution and Article 1(1) DCC.

<sup>47</sup> Article 94 Dutch Constitution.

<sup>48</sup> Dutch Parliament, Explanatory Memorandum, 28 337, no. 3, page 24; see also Dutch Supreme Court, 18 September 2001, ECLI:NL:HR:2001:AB1471.

<sup>49</sup> Interview with Dutch academic.

<sup>50</sup> Dutch Parliament, Explanatory Memorandum, 28 337, no. 3, page 25.

## 1.2. Genocide

Genocide was already criminalized under the Dutch Genocide Convention Implementation Act of 1964. Article 21(4) of the ICA deals with the relationship between these two legal frameworks, and states that Article 2 of the ICA on universal jurisdiction applies to crimes of genocide committed after 24 October 1970.<sup>51</sup>

## 1.3. War crimes

The Dutch Courts have jurisdiction over war crimes committed after 10 July 1952, pursuant the Wartime Offences Act.<sup>52</sup> Since 2003, the jurisdiction of Dutch Courts over war crime is based on the ICA.

The Dutch Supreme Court acknowledged in 1997 that the Wartime Offences Act established universal criminal jurisdiction in respect of war crimes covered by the Wartime Offences Act, regardless of whether the Netherlands was involved in the conflict. Consequently, the Court ruled that the (military) judge in the case was competent to hear the facts of the original request.<sup>53</sup>

## 1.4. Enforced disappearance

Since both the stand-alone crime and crime against humanity of enforced disappearance were criminalized for the first time in the ICA, the prohibition against enforced disappearance can only be enforced before the Dutch courts from 19 June 2003 onwards.

## 1.5. Torture

The Dutch authorities have jurisdiction over acts of torture as an independent offence committed after 21 December 1988, pursuant to the Dutch Torture Convention Implementation Act.<sup>54</sup>

Furthermore, the prohibition of torture as a war crime was already stipulated in the Wartime Offences Act, which makes it possible to prosecute torture as a war crime from 1952 onwards. Torture as a crime against humanity was criminalized with the ICA and therefore can only be prosecuted if committed after 19 June 2003.

# 2. Statute of limitations

Pursuant to Article 13 ICA, the prosecution of genocide, crimes against humanity, torture, enforced disappearance and war crimes are not subject to any statute of limitations. As an exception, war crimes that fall under the catch-all provision of

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<sup>51</sup> Article 21(4) ICA was adopted in 2010 together with several other changes, see Dutch Parliament, Explanatory Memorandum - Amendment International Crimes Act, 32 475, no. 3, p. 7.

<sup>52</sup> Wartime Offences Act (*Wet oorlogsstrafrecht*), 1 October 2013, <https://wetten.overheid.nl/BWBR0002099/2013-10-01>.

<sup>53</sup> Dutch Supreme Court, 11 November 1997, ECLI:NL:HR:1997:ZD0857.

<sup>54</sup> Torture Convention Implementation Act (*Uitvoeringswet folteringverdrag*), 29 September 1988, <https://wetten.overheid.nl/BWBR0004409/1989-01-20>.

Article 7(1) ICA, even when committed through command responsibility, are subject to a statute of limitations of 12 years.<sup>55</sup>

## Universal jurisdiction requirements

Article 2(1) ICA gives Dutch authorities jurisdiction over the following three situations:

- (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands;
- (b) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national; and
- (c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.

This report only discusses universal jurisdiction as defined in Article 2(1)(a) ICA.

### 1. Presence of the accused

Article 2(1)(a) ICA states that any person present on Dutch territory can be prosecuted under universal jurisdiction. The Dutch authorities cannot open an investigation for alleged international crimes committed abroad by foreigners against non-nationals without the suspect being identified and present in the country.<sup>56</sup> Investigations on a general situation are not possible, unless the victim is a Dutch national (see Article 2(1)(b) ICA).<sup>57</sup>

Dutch authorities are competent to investigate universal jurisdiction cases only if the suspect remains on the territory during the investigation. If the suspect leaves the country while the investigation is still ongoing, Dutch jurisdiction ends.<sup>58</sup> Often, complaints are dismissed as the accused had already left the country before an investigation could be opened.<sup>59</sup>

However, if prosecution has started, Dutch courts would still be competent to judge him or her, even if the suspect leaves the country. Most of the suspects are in custody when prosecution starts, so they would not be able to leave.<sup>60</sup> Dutch courts can try the accused even if he or she is no longer present on the territory and has not explicitly authorised a lawyer to act on his or her behalf.<sup>61</sup> Such trials *in absentia* are allowed if the court does not see a reason to (i) declare the summons to appear in Court null and void, or (ii) issue an order to forcibly bring the defendant to the

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<sup>55</sup> See Article 70(1) No. 3 DCC.

<sup>56</sup> For international crimes committed abroad by Dutch nationals or against Dutch victims, presence of the suspects is not required for prosecution by Dutch authorities according to Article 2(1)(b) and (c) ICA.

<sup>57</sup> Interview with Dutch prosecutor.

<sup>58</sup> Court of The Hague (*Gerechtshof 's-Gravenhage*), 26 October 2009, ECLI:NL:GHSGR:2009:BK1478; and interview with Dutch prosecutor and Dutch lawyers.

<sup>59</sup> Interview with Dutch lawyer.

<sup>60</sup> Interview with Dutch prosecutor.

<sup>61</sup> Article 279 of the Dutch Criminal Code of Proceedings (*Wetboek van Strafvordering*, hereinafter DCCP).

Court.<sup>62</sup> However, the Dutch Parliament stated that, although it is possible under Dutch criminal law to try a person *in absentia* in universal jurisdiction cases, it is deemed undesirable.<sup>63</sup>

## 2. Double criminality

Dutch law does not require that the conduct under investigation or prosecution is also criminalized in the home state of the suspect or where the crime was committed. Therefore, double criminality is not a pre-requisite for ICA crimes.

## 3. Prosecutorial discretion

The National Office (*Landelijk Parket*) of the Dutch Public Prosecution Service (DPPS National Office) based in Rotterdam has the monopoly to prosecute “international forms of organised crime” and “crimes that undermine society”, which include ICA crimes.<sup>64</sup>

Once a public prosecutor is informed by the police or by a complaint of an offence committed, he or she has the sole authority to initiate criminal proceedings, and enjoys wide discretion (see below on [Initiation of Investigations](#)). The Dutch public prosecutors are not obliged to investigate ICA crimes and can determine whether or not to start an investigation (and subsequently a prosecution) based on public interest.<sup>65</sup>

### 3.1. Criteria to exercise discretion

Public prosecutors use the following criteria to exercise their discretion:

- the estimated rate of success of investigations;
- the possibility to travel to the country where the alleged crime was committed to find evidence;
- the availability of documentary evidence and the possibility to obtain it;
- the availability of witnesses and their location, including the possibility to travel to where the witnesses live.<sup>66</sup>

If the evidence is located in a country where public prosecutors cannot travel to and no evidence can be found outside that country, it is unlikely that an investigation will be opened.<sup>67</sup>

The National Board of General Prosecutors (*College van procureurs-generaal*), which heads the Dutch Public Prosecution Service, publishes instructions on the

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<sup>62</sup> Article 280 DCCP.

<sup>63</sup> Dutch Parliament, Explanatory Memorandum, 28 337, no. 3, page 18.

<sup>64</sup> See Netherlands Public Prosecution Service’s website on Organisation of the Public Prosecution Service: <https://www.om.nl/algemeen/english/about-the-public/organisation-the/> (last accessed on 13 March 2019).

<sup>65</sup> Article 167 DCCP for the investigation phase and Article 242 DCCP for the prosecution phase.

<sup>66</sup> Interview with Dutch prosecutor.

<sup>67</sup> Interview with Dutch prosecutor.

criteria to be used by prosecutors when deciding whether to investigate or not.<sup>68</sup> These instructions are soft-law that help prosecutors decide whether to open an investigation, but they also inform victims about what the prosecutor will take into consideration.<sup>69</sup>

For example, from 1 January 2012 onwards, Instructions Regarding the Handling of Reported Offenses Contained in the International Crimes Act were applicable.<sup>70</sup> These instructions set up criteria to consider before opening an investigation, including:

- immunity of the suspect;
- chances of success of the prosecution;
- the type and amount of available evidence;
- the potential necessity and feasibility of mutual legal assistance.

These instructions expired on 1 August 2018 and new ones were adopted according to the interview with a Dutch Prosecutor.<sup>71</sup> However, at the time of this publication, the latest version is not available online.<sup>72</sup>

### 3.2. Direction by the Minister of Justice and Security

The Dutch Minister of Justice and Security has the authority, at his or her own discretion, to direct the DPPS to prosecute a crime.<sup>73</sup> Before giving such an order, the Minister of Justice and Security first offers the National Board of General Prosecutors the opportunity to give its view on the order.<sup>74</sup> In general, such an order must be given in writing and reasons must be provided.<sup>75</sup>

When the DPPS receives an order from the Minister of Justice and Security, it is obliged to follow that order. The authority of the Minister of Justice and Security is unfettered. He or she may give a general order relating to the prosecution of a category of crimes or demand the prosecution of a specific criminal case.

### 3.3. Challenges to prosecutorial decision

Pursuant to Article 12 DCCP, a person with a direct interest can challenge the decision of the public prosecutor not to investigate a criminal offence, to dismiss the case or to issue a penalty order (*strafbeschikking*) before the respective Court of

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<sup>68</sup> Article 130(6) of the Dutch Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*, hereinafter DJOA).

<sup>69</sup> Interview with Dutch prosecutor.

<sup>70</sup> Dutch Ministry of Justice and Security, Instructions Regarding the Handling of Reported Offenses Contained in the International Crimes Act (2011A022) (*Aanwijzing afdoening van aangiften met betrekking tot de strafbaarstellingen in de Wet internationale misdrijven (2011A022)*). Other instructions were in place between 1 January 2004 and 31 December 2011, see Instructions Regarding the Handling of Reported Offenses Contained in the International Crimes Act (2003A018) (*Aanwijzing afdoening van aangiften op basis van de wet internationale misdrijven (2003A018)*).

<sup>71</sup> Interview with Dutch prosecutor.

<sup>72</sup> See database of Dutch policies and regulations at <https://www.overheid.nl/beleid-en-regelgeving>.

<sup>73</sup> Article 127 DJOA.

<sup>74</sup> Article 128(1) DJOA.

<sup>75</sup> Article 128(2) ff. DJOA.

Appeal.<sup>76</sup> A “directly interested party” is understood as a legal or natural person who, according to the objectives and as evidenced by the actual activities, promotes interests that are directly affected by the decision of non-prosecution or discontinuance of prosecution (see below [Completion of Investigations](#)).<sup>77</sup>

## 4. Political approval

There is no requirement for formal or informal political approval. However, as set out above, the Minister of Justice and Security may order investigations and prosecutions (see above [Direction by the Minister of Justice and Security](#)).

In addition, the Minister of Justice and Security may decide to give an order not to prosecute. In this event, the Minister of Justice and Security must immediately inform the Dutch Parliament of this decision.<sup>78</sup>

## 5. Subsidiarity

The DCC was amended in 2010 and 2017 to strengthen the relationship between international courts and the Netherlands.<sup>79</sup> As a result, the Dutch Minister of Justice and Security, after requesting advice from the DPPS, will decide whether a case would be taken over by a competent international court.

Dutch authorities also apply the principle of subsidiarity to other national jurisdictions. In June 2014, the District Court of The Hague and the Dutch Supreme Court agreed to send back two Rwandan nationals to be tried in Rwanda for their alleged involvement in genocide, as the Rwandan authorities guaranteed they will ensure the respect of their human rights, including their right to a fair trial.<sup>80</sup>

## 6. Pending extradition

The Dutch authorities can investigate and prosecute a suspect in the Netherlands under universal jurisdiction even if there is an extradition request from another state.

## Steps of the proceedings

The key players in Dutch criminal proceedings are the defendant (and his or her attorney), the DPPS and the Court. Victims have a limited role (see below on [Victim Rights and Participation at Trial Stage](#)).

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<sup>76</sup> Article 12(1) DCCP.

<sup>77</sup> Article 12(2) DCCP.

<sup>78</sup> Article 128(6) DJOA.

<sup>79</sup> Dutch Parliament, Explanatory Memorandum - Amendment International Crimes Act, 32 475, no. 3, pages 10-14.

<sup>80</sup> Human Rights Watch, The Legal framework for Universal Jurisdiction in the Netherlands, 2014, p. 2; Dutch Supreme Court, 13 June 2014, ECLI:NL:HR:2014:1441; District Court of The Hague, 11 July 2014, ECLI:NL:RBDHA:2014:10759.

# 1. Investigation phase

## 1.1. Initiation of investigations

A criminal investigation can be initiated by the DPPS on their own initiative (*proprio motu*) or after a complaint is filed. Various sources of information can lead to *proprio motu* investigations, including information from other investigations, from the media or reports from non-governmental organisations (NGOs).

At the time of this publication, there are five universal jurisdiction investigations ongoing in the Netherlands. They have been mainly opened *proprio motu* by prosecutors, based on information from other investigations, the media, or public NGO reports.<sup>81</sup> It is very rare that investigations are actually opened after a complaint is filed. In 2018, the prosecutors did not receive any formal complaints (see below on [Complaint by Victims and/or NGOs](#)), and in 2017 they received only one.<sup>82</sup>

### 1.1.1. *Proprio motu* investigations

The DPPS National Office has the monopoly to prosecute ICA crimes. Investigations are effectively performed by the Dutch International Crime Unit (*Team Internationale Misdrifven*) within the National Crime Squad of the police.

The DPPS National Office prosecutors receive files and decisions from the Dutch immigration services when asylum applications are rejected based on Article 1F of the 1951 Convention Relating to the Status of Refugees because the applicant committed a serious crimes, including a war crime or crime against humanity.<sup>83</sup> Many of the investigations were triggered this way.<sup>84</sup>

### 1.1.2. *Complaint by victims and/or NGOs*

Anyone with knowledge of a criminal offence can file a complaint, without necessarily being a victim of that offence.<sup>85</sup> The person or entity filing the complaint does not have to become an Injured Party to the criminal proceedings (see below on [Injured Party](#)). A complaint can be filed against an unknown suspect, who can be a natural or a legal person. The Dutch public prosecutors are not obliged to investigate ICA crimes and can determine whether or not to start an investigation (and subsequently a prosecution) based on public interest.<sup>86</sup>

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<sup>81</sup> Interview with Dutch prosecutor.

<sup>82</sup> Interview with Dutch prosecutor.

<sup>83</sup> Article 1F of the 1951 Convention Relating to the Status of Refugees reads: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

<sup>84</sup> Interview with Dutch prosecutor.

<sup>85</sup> Article 161 DCCP.

<sup>86</sup> Article 167 DCCP for the investigation phase and Article 242 DCCP for the prosecution phase.



A complaint in respect of an ICA crime can be filed at any local police authority, in writing or orally.<sup>87</sup> However, as the DPPS National Office is the competent authority in respect of investigating and prosecuting ICA crimes, a written complaint can be sent directly to the DPPS National Office.<sup>88</sup> When filing a complaint orally, it is advisable to contact the Dutch International Crime Unit within the Dutch National Crime Squad of the police directly.<sup>89</sup>

NGOs and other third parties can have a role within Dutch criminal proceedings, but they are not an official party to the proceedings. Dutch law provides that everybody who has knowledge of a criminal offence can file a complaint (*aangifte doen*) to the competent authorities. This includes third parties that are not victims.

Yet a case will be stronger if natural persons who are victims join the complaint. Therefore, lawyers always aim to also include them in the complaint or to file the complaint directly on their behalf.<sup>90</sup>

## 1.2. Role of investigating judge

Investigating judges have several investigative tasks. He or she can be requested by the public prosecutor or the defence to take investigative measures, such as hearing witnesses – also protected or threatened witnesses – or appointing an expert.<sup>91</sup> He or she cannot take investigative measure by themselves; they need the prosecutor to require them to do so.<sup>92</sup>

In addition, the investigating judge ensures that the public prosecutor remains within the limits of his or her investigative authority. The public prosecutor requires approval from the investigating judge for certain investigation methods, such as wiretapping,<sup>93</sup> house searches<sup>94</sup> and the ordering of pre-trial detention (see below on [Arrest Warrant](#)).<sup>95</sup>

Victims and representatives of victims do not have any interaction with the investigating judge under the Dutch system.<sup>96</sup>

## 1.3. Completion of investigations

After the investigation phase, the public prosecutor can dismiss the case or summon the accused to appear before the court. The public prosecutor can decide to dismiss a case until the court hearing.<sup>97</sup>

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<sup>87</sup> Article 163 DCCP.

<sup>88</sup> For contact details of the National Office the Dutch Public Prosecution Service in Rotterdam, see <https://www.om.nl/organisatie/landelijk-parket-1/contact-landelijk/>.

<sup>89</sup> For contact details of the Dutch International Crime Unit, see <https://www.politie.nl/themas/internationale-misdrijven--oorlogsmisdrijven.html>.

<sup>90</sup> Interview with Dutch lawyers.

<sup>91</sup> See Articles 181 ff. DCCP.

<sup>92</sup> Interview with Dutch prosecutor.

<sup>93</sup> Article 126m DCCP.

<sup>94</sup> Article 97 DCCP.

<sup>95</sup> Articles 63, 67 and 67a DCCP.

<sup>96</sup> Interview with Dutch lawyers.

Dutch law does not set any time limits for criminal investigations. However, according to the Dutch Supreme Court, following judgments of the European Court of Human Rights, investigations must be completed within a reasonable time. What constitutes a reasonable time depends on the complexity of the case, the conduct of the accused in the course of the proceedings, and the way the authorities operated during the course of the proceedings.<sup>98</sup>

As a general starting point, a period of two years between the moment of the criminal charge (the moment a defendant can reasonably expect to be prosecuted for a certain criminal offence) and the moment of the final judgement is considered to be a reasonable time by the Dutch Supreme Court.<sup>99</sup>

### **1.3.1. Indictment**

If an indictment is issued, only the accused is entitled to challenge it, by filing a notice of objection to the indictment with the court within eight days after being served the summons.<sup>100</sup>

### **1.3.2. Dismissal**

If the prosecutor decides not to prosecute the crime(s), to dismiss the case or to issue a penalty order, any person with a direct interest has the right to challenge that decision.<sup>101</sup> For example, victims and next of kin enjoy this right.

Article 12(2) DCCP adds that a directly interested party can also involve a “legal entity” – such as an NGO – if their goals and actual activities are sufficiently distinct so that the refusal to prosecute specifically affects them. An NGO can qualify as a person with a direct interest, for instance, if the goal of that NGO is to seek the prosecution of certain persons for certain criminal acts and the public prosecutor decides not to prosecute such person for such acts.

A recent ruling from the Court of Appeal of The Hague on 6 December 2018 considered two NGOs to have a direct interest.<sup>102</sup> The NGOs lodged a challenge (among 58 other complainants) against the decision by the DPPS not to prosecute four tobacco manufacturers. The Court considered the NGOs to have had a direct interest in the prosecution of the case, because the goals of these NGOs were sufficiently distinct and were aimed against the tobacco industry and/or against consuming tobacco products.

The person or entity with a direct interest can challenge the dismissal before the Court of Appeal within three months after he or she becomes aware of the decision.<sup>103</sup> In such case, the Court of Appeal will examine whether there is a

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<sup>97</sup> Articles 242 to 256 DCCP.

<sup>98</sup> Dutch Supreme Court, 17 June 2008, ECLI:NL:HR:2008:BD2578.

<sup>99</sup> Dutch Supreme Court, 17 June 2008, ECLI:NL:HR:2008:BD2578.

<sup>100</sup> Article 262 DCCP.

<sup>101</sup> Article 12 DCCP.

<sup>102</sup> Court of Appeal of The Hague, 6 December 2018, ECLI:NL:GHDHA:2018:3334.

<sup>103</sup> Articles 12k and 12l of the DCCP.

reasonable suspicion of guilt, whether a conviction is feasible, and whether it is in the public interest to prosecute the case.<sup>104</sup> In the end, the Court of Appeal may instruct the public prosecutor to continue or initiate a prosecution.<sup>105</sup> The decision of the Court of Appeal is final and cannot be appealed.

## 2. Arrest warrant

In a situation where the suspect is caught in the criminal act, anyone can arrest the suspect. Otherwise, an arrest must be ordered by the prosecutor (in urgent cases this can also be the assistant prosecutor). A suspect can be detained and held in custody for six days under suspicion of having committed a crime.<sup>106</sup> Then the investigating judge or the court in chambers can order pre-trial detention (*voorlopige hechtenis*) for three months renewable.<sup>107</sup>

Pre-trial detention is possible in relation to certain crimes, including crimes carrying a prison sentence exceeding four years, which applies to ICA crimes, when (i) there are serious suspicions (*ernstige bezwaren*) against the accused and (ii) there is at least one ground for pre-trial detention.<sup>108</sup>

Possible grounds for pre-trial detention include risk of flight and compelling reasons of public safety. The latter can be met if:

- the suspicion relates to an offence carrying a prison sentence exceeding twelve years and the public order has been seriously shaken by the offence;<sup>109</sup>
- there is a serious risk that the accused will commit a crime, which carries a prison sentence exceeding six years and which endangers the general safety of the state, persons or property or poses a danger to health; or
- the pre-trial detention is reasonably required to bring the truth to light.

Pre-trial detention can also be ordered against an accused with no known domicile or residence in the Netherlands.

Victims cannot request the arrest or pre-trial detention of the suspect.<sup>110</sup>

## 3. Victim rights and participation at investigation stage

During the investigation phase, a direct victim has the following rights:

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<sup>104</sup> Article 12i DCCP.

<sup>105</sup> Article 12 DCCP.

<sup>106</sup> Interview with Dutch prosecutor.

<sup>107</sup> *Ibid.*

<sup>108</sup> Articles 67 and 67a DCCP.

<sup>109</sup> Whether or not public order was seriously shaken by the offence depends on factors such as the severity of the offence and the civil unrest that was caused by the offence.

<sup>110</sup> Interview with Dutch prosecutor.

- the right to be informed about the investigation and prosecution, including about commencing or discontinuing.<sup>111</sup> This does not include the right to be informed about the investigation itself, as they are confidential.<sup>112</sup>
- the right to obtain information about reparations;<sup>113</sup>
- the right to be advised and supported by Victim Support Netherlands (*Slachtofferhulp Nederland*) and the right to benefit from a protection program if that is deemed necessary (see below on [Witness and Victim Protection](#));<sup>114</sup>
- the right to be informed when the accused is released or when the accused escapes;<sup>115</sup>
- the right to be informed of his/her rights;<sup>116</sup>
- the right to have access to the parts of the case file relevant to the victim once the file has been transmitted to the defence;<sup>117</sup>
- the right to request the prosecutor to add documents to the proceedings, if they are relevant for the assessment of the case against the suspect or the victim's claim against the suspect (see below on [Introduction of Evidence by Victims/Third Parties](#));<sup>118</sup>
- the right to have legal representation;<sup>119</sup>
- the right to be assisted by a translator and/or to have necessary documents translated;<sup>120</sup>
- the right to claim compensation (see below on [Reparation](#)).<sup>121</sup>

Victims are only entitled to receive notice with respect to the parts of the criminal case file that concern the interest of the victim. For example, in general, a psychiatric report on the accused or other social inquiry reports will not concern the interest of the victim and will therefore not be shared with the victim.

Before the trial phase, the public prosecutor decides which parts of the criminal case file concern the interests of the victim. The refusal to share parts of the criminal case file with the victim requires the approval of the investigating judge (Article 30 DCCP). During trial, the court decides which parts of the criminal case file concern the interests of the victim. A victim can object to the decision not to share a document.

According to the Ministry of Security and Justice, these rights also apply to victims who live or reside abroad.<sup>122</sup>

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<sup>111</sup> Article 51(a)(3) DCCP.

<sup>112</sup> Interview with Dutch prosecutor.

<sup>113</sup> Article 51(a)(4) DCCP.

<sup>114</sup> Article 51a DCCP.

<sup>115</sup> Articles 51a, 51ab and 51ac DCCP.

<sup>116</sup> Article 51ab DCCP.

<sup>117</sup> Article 51(b)(1) DCCP.

<sup>118</sup> Article 51(b)(2) DCCP.

<sup>119</sup> Article 51(c)(2) DCCP.

<sup>120</sup> Articles 51(c)(3) DCCP.

<sup>121</sup> Article 51(f) DCCP.

NGO are not considered direct victims and cannot benefit from these rights. Yet in practice they will be informed if an investigation has been opened on their complaint.<sup>123</sup>

At trial stage, victims can apply to become Injured Party (see below on [Victim Rights and Participation at Trial Stage](#)).

## 4. Trial phase

### 4.1. Competent authorities

The District Court of The Hague has first instance jurisdiction to try cases in relation to the ICA crimes. If the defendant is, however, a member or volunteer of the Dutch military,<sup>124</sup> the District Court of Gelderland (located in Arnhem) is the competent court pursuant to the Dutch Administration of Military Criminal Justice Act (*Wet militaire strafrechtspraak*).<sup>125</sup>

### 4.2. Possible challenges

Only the accused and the public prosecutor have the right to appeal within fourteen days after the first instance judgement.<sup>126</sup> The appeal procedure is defined in Articles 404 to 426 DCCP.

General victims, Injured Parties, or any other third party, including NGOs, do not have the right to appeal, as they are not an official party to the criminal proceedings. They can, however, informally request the public prosecutor to appeal against a judgment. The ultimate decision whether or not to appeal a verdict remains with the public prosecutor.<sup>127</sup>

It is rare that a victim asks the prosecutor to appeal. Most of the time in ICA cases, victims do not make an informal request to the prosecutor, but an appeal is launched by the defence or the prosecutor.<sup>128</sup>

### 4.3. Victim rights and participation at trial stage

A victim can have a role within Dutch criminal proceedings, although this role is limited. Victims are participants, but not an official party to the proceeding.

At trial, a victim may apply to be admitted to the criminal proceedings as a so-called Injured Party (*benadeelde partij*) to claim damages for financial loss, physical

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<sup>122</sup> Ministry of Security and Justice, Rights of victims of criminal offences, April 2017, [https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten/WEB\\_100159\\_Infobladd+Verklaring+Rechten+ENG.pdf](https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten/WEB_100159_Infobladd+Verklaring+Rechten+ENG.pdf).

<sup>123</sup> Interview with Dutch prosecutor.

<sup>124</sup> Articles 60 to 63 of the Dutch Military Criminal Code (*Wetboek van Militair Strafrecht*).

<sup>125</sup> Article 15 ICA in conjunction with Article 2 Dutch Administration of Military Criminal Justice Act and Article 55 DJOA.

<sup>126</sup> Articles 404 and 408 DCCP.

<sup>127</sup> Articles 404 and 408 DCCP.

<sup>128</sup> Interview with Dutch prosecutor.

damages and/or psychological damages due to the crime committed (see below on [Reparation](#)). Since 11 April 2018, families and relatives can also apply to become Injured Party to the procedure and obtain compensation.

With the application, civil proceedings are started within the criminal proceedings. The Injured Party is only a party to the civil proceedings, but not a party to the criminal proceedings itself.

In addition to the [rights during investigation stage](#) listed above, at trial stage a victim has the right to be informed about the continuation of the prosecution, time of hearings and final judgment,<sup>129</sup> and the right to speak in court when the crime carries a prison sentence exceeding eight years, which applies to all ICA crimes.<sup>130</sup> Until 1 July 2016, the right to speak in court was limited to the consequences of the offences on the victim. Since 1 July 2016, there are no longer limitations in respect of the subject matter.

## Rules of evidence

### 1. Investigation phase

#### 1.1. Necessary information for a complaint

A complaint can be filed orally or in writing by anyone who has knowledge of a criminal offence.<sup>131</sup> There are no formal requirements in respect of the information that should be included in a complaint. However, the more details that are given in a complaint, the more likely it is that the DPPS together with the Dutch police will start an investigation into the facts reported.<sup>132</sup> In particular, the factual part should be largely explained.<sup>133</sup> Concrete information that the event took place, and on the involvement of the suspect in the events are helpful to include in a complaint.<sup>134</sup>

In practice, the presence of the accused on Dutch territory must also be demonstrated.<sup>135</sup> Lawyers use media reports when available or information provided by their clients.<sup>136</sup> In practice, lawyers try to discuss the complaint before filing it, but this can be difficult due to the time constraints.<sup>137</sup>

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<sup>129</sup> Article 51(a)(3) DCCP.

<sup>130</sup> Article 51(e) DCCP.

<sup>131</sup> Article 161 DCCP.

<sup>132</sup> Interview with Dutch prosecutor.

<sup>133</sup> Interview with Dutch lawyers.

<sup>134</sup> Interview with Dutch prosecutor.

<sup>135</sup> Interview with Dutch lawyers.

<sup>136</sup> Interview with Dutch lawyers.

<sup>137</sup> Interview with Dutch lawyers.

## 1.2. Necessary evidence to open an investigation

For an investigation to be opened, there needs to be suspicion that a crime has taken place.<sup>138</sup> According to Article 149 DCCP, a prosecutor, who learns about a criminal offence that falls in his or her jurisdiction to prosecute, may open an investigation. There are no further requirements to open an investigation. When the public prosecutor considers that the facts brought to his or her attention potentially constitute an offence and believes an investigation into these facts is in the public interest, he or she has the discretionary power to start an investigation. The goal of investigations is to gather information to make a well-founded decision whether or not to prosecute.

A decision not to open investigations can be challenged by any person with a direct interest (see above on [Dismissal](#)).

## 1.3. Necessary evidence for an indictment

For the investigating authorities to assign the status of an “accused” to a person, there must be a reasonable suspicion that this person is guilty of a criminal offence based facts and circumstances (*degene te wiens aanzien uit feiten of omstandigheden een redelijk vermoeden van schuld aan een strafbaar feit voortvloeit*).<sup>139</sup> Such a reasonable suspicion of guilt should be based on objective and concrete facts. The threshold for a reasonable suspicion of guilt is quite low. However, the mere possibility that someone could have committed a crime is insufficient, if that possibility cannot be supported by objective facts.<sup>140</sup>

## 1.4. Admissibility of evidence

In principle, all evidence – as long as it is not unlawfully obtained – is admissible during the investigation stage. However, for it to be used in court, it must have the form of one of the legal means set out in Article 339 of the DCCP (see below on [Admissibility of Evidence at Trial Stage](#)).

Evidence in Dutch criminal proceedings is, as much as possible, gathered by the police and public prosecutor before the trial, and subsequently collected in the criminal case file. The trial relies heavily on the criminal case file. For example, witnesses are usually heard at the police station or by the investigating judge. In general, witnesses and experts do not need to be heard at trial. Their testimonies under oath given during the investigation are included in a report (*ambtsedig opgemaakt proces-verbaal*) which becomes part of the criminal case file. The court usually sees only those written testimonies.

For example, in a case in which a Rwandan national was convicted for war crimes committed during the genocide in Rwanda in April 1994, to a great extent the conviction was based on witness testimonies included in the criminal case file.<sup>141</sup> These witnesses were heard by the police or by the investigating judge.

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<sup>138</sup> Article 149 DCCP and interview with Dutch prosecutor.<sup>139</sup> Article 27 DCCP.

<sup>139</sup> Article 27 DCCP.

<sup>140</sup> For example, see Dutch Supreme Court, 5 December 2017, ECLI:NL:HR:2017:3057.

<sup>141</sup> Court of Appeal of The Hague, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.

### 1.5. Introduction of evidence by victims/third parties

Unless the victim is heard as a witness, the victim cannot by him- or herself introduce evidence in the criminal proceedings. Victims, however, do have a legal right to request the public prosecutor to add documents to the criminal case file that he or she thinks are relevant for the assessment of the merits of the case.<sup>142</sup> The public prosecutor can only refuse to add these documents to the criminal case file if the documents

- cannot be considered to be procedural documents (*processtukken*);
- will cause serious nuisance to a witness;
- will hamper a compelling interest of the investigation; or
- will harm state security.<sup>143</sup>

In practice, lawyers try to provide the prosecutor with as much information and evidence as possible, including open source material for data, country reports and human rights reports as well as narratives of victims.<sup>144</sup>

Apart from the possibility for a third party to be called as a witness or an expert, the DCCP does not explicitly provide for any further ways for a third party to contribute to the investigation. Third parties can provide information and evidence to the public prosecutor at any stage of the investigation or during the criminal proceedings. It will be up to the public prosecutor whether he or she finds the information sufficiently relevant to be added to the criminal case file.

## 2. Trial phase

### 2.1. Admissibility of evidence

#### 2.1.1. General rules

Article 339 of the DCCP exhaustively lists what can constitute legal evidence in Dutch criminal proceedings. It includes:

- the personal observation of a judge or the court during trial;<sup>145</sup>
- statements of the accused;
- statements of a witness;
- statements of an expert; and
- written materials.

Although the above list may seem restrictive, in practice the categories of legal evidence are so broad that the Dutch system follows the principle of freedom of evidence.<sup>146</sup>

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<sup>142</sup> Article 51b(2) DCCP.

<sup>143</sup> Article 51b(3) DCCP.

<sup>144</sup> Interview with Dutch lawyers.

<sup>145</sup> For example, see Dutch Supreme Court, 29 August 2006, ECLI:NL:HR:2006:AX6414; and Dutch Supreme Court, 15 December 2009, ECLI:NL:HR:2009:BJ2831. In the latter case, the court based the conviction, *inter alia*, on its personal observation that the accused met the physical characteristics as described in witness testimonies.



According to Article 51e DCCP victims and certain relatives can make verbal statements during the court hearings. Such statements made by victims in court who are not testifying as witnesses cannot be used as evidence for the conviction of the accused.<sup>147</sup> The same goes for any evidence an Injured Party gathered to substantiate his or her civil claim for compensation.<sup>148</sup>

Should the court, the public prosecutor or the defence want to use any such statements made by a victim or an Injured Party, that victim or Injured Party must be heard as a witness.<sup>149</sup> Before testifying as a witness during trial, the victim or Injured Party has to take an oath, after which the victim or Injured Party (being a witness) can be asked questions by the court, the public prosecutor and the defence.<sup>150</sup>

In principle, the court can assign weight to different types and pieces of evidence in the way it thinks is appropriate. There are, however, some rules regarding the minimum amount of evidence that is required for a conviction, including:

- The finding that an accused committed the alleged offence(s) cannot be solely based on the statements of one witness.<sup>151</sup>
- Official reports by an investigating officer of a witness interview (*ambtsedig opgemaakt process-verbaal*) can be sufficient evidence for the conviction of an accused in respect of the alleged offence(s).<sup>152</sup>
- An accused cannot be convicted solely or to a decisive extent based on written statements made by an anonymous witness.<sup>153</sup>
- Generally “known facts” (*feit van algemene bekendheid*) do not need to be proven.<sup>154</sup>

### **2.1.2. Unlawfully obtained materials**

#### Unlawfully obtained by Prosecution Service

When evidence is obtained through unlawful means, according to Article 395a DCCP, the court can (i) lower the sentence, (ii) exclude the evidence that was obtained unlawfully or even (iii) bar the prosecution.<sup>155</sup> However, the court is not obliged to impose consequences for the unlawfulness.

Article 359a DCCP can only be invoked when the evidence was obtained unlawfully by investigating officers operating under the responsibility of the DPPS. The breach

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<sup>146</sup> Criminal Procedure, Text & Commentary, 12th Edition, 2017, p. 1475.

<sup>147</sup> For example, see Dutch Supreme Court, 11 October 2011, ECLI:NL:HR:2011:BR2359. This also follows from the fact that the statements made by a victim in court, while not being heard as a witness, are not included in the exhaustive list of legal evidence in Dutch criminal proceedings in Article 339 DCCP.

<sup>148</sup> Article 339 DCCP

<sup>149</sup> Article 339 DCCP.

<sup>150</sup> Article 290(4) DCCP.

<sup>151</sup> Article 342 DCCP.

<sup>152</sup> Article 344(2) DCCP.

<sup>153</sup> Article 344a(1) DCCP.

<sup>154</sup> Article 339(2) DCCP.

<sup>155</sup> Article 359a DCCP.

of procedural rules must be very grave for the court to decide the evidence will be excluded or even to bar the prosecution.<sup>156</sup>

#### Unlawfully obtained by third parties

When evidence is obtained unlawfully by a third party, the unlawfulness will in general not lead to any consequences for the criminal case. However, according to the Dutch Supreme Court, it cannot be ruled out that the evidence is excluded if special circumstances in a case constitute a violation of an important statutory provision pertaining to criminal procedure or a violation of a legal principle.<sup>157</sup> An example thereof is evidence obtained through torture. Such evidence will not be admitted in court.

#### **2.1.3. Open source materials**

Evidence from the internet qualifies as a generally known fact under Article 339(2) if (i) that piece of information does not presuppose any specialist knowledge, and (ii) the correctness of the information cannot reasonably be doubted.<sup>158</sup>

Where open source materials cannot be considered a generally known fact, it can be used in criminal proceeding when it falls within one of the other categories of Article 339(1) DCCP, such as written material or personal observation of the court. It falls within the personal discretion of the court to consider the weight and validity of open source materials as evidence.

Photographs and videos are often part of Dutch criminal case files. Usually they are described in an official report of the police (written statement) or in a report of an expert (written statement) or they are shown during trial (personal observation of the court).<sup>159</sup> The prosecutor has to disclose to the judge and the defence where the material is coming from and prove its authenticity.<sup>160</sup> The prosecutor will have to produce a statement signed by a police officer explaining how the evidence was kept and where it was taken from.<sup>161</sup>

Posts or pages on social media are regularly used as evidence in Dutch criminal cases.<sup>162</sup> If posts on social media are part of the criminal case file, they can be

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<sup>156</sup> See for example Dutch Supreme Court, 13 September 2016, ECLI:NL:HR:2016:2059: The Dutch Supreme Court ruled that prosecution can only be barred in case of irreparable breaches of procedural rules when investigating officers violate the principle of due process resulting in the fact that deliberately or with gross negligence the defendant's interest are not protected. For example, undue delay of the criminal proceedings by the DPPS is, in general, not enough grounds to bar prosecution in this respect.

<sup>157</sup> Dutch Supreme Court, 30 March 2004, ECLI:NL:HR:2004:AM2533; Dutch Supreme Court, 10 April 2012, ECLI:NL:HR:2012:BU7636; and Dutch Supreme Court, 14 January 2003, ECLI:NL:HR:2003:AE9038.

<sup>158</sup> Dutch Supreme Court, 10 July 2018, ECLI:NL:HR:2018:1125.

<sup>159</sup> Article 339 DCCP.

<sup>160</sup> Interview with Dutch prosecutor.

<sup>161</sup> Interview with Dutch prosecutor.

<sup>162</sup> For example, see District Court of Gelderland, 17 December 2013, ECLI:NL:RBGEL:2013:5797, in which the suspect was accused of threatening to kill somebody through Facebook and to cause grievous bodily harm. The relevant Facebook messages were included in the criminal case file. See also District Court of Rotterdam, 27 February 2018, ECLI:NL:RBROT:2018:3003, in which the suspect was accused of threatening somebody through Facebook, and the relevant Facebook messages were part of the criminal case file.

considered written materials.<sup>163</sup> If posts on social media are shown to the court at trial, they can be considered personal observations of the court.<sup>164</sup>

There is no standard procedure for how a court should assess the reliability of this specific type of evidence. The court can assess the reliability in the way it thinks is appropriate, as long it bases a conviction on evidence that is both lawful and persuasive.<sup>165</sup>

#### **2.1.4. Introduction of new evidence**

The public prosecutor, the accused and the court can introduce evidence as long as the evidence is presented and can be contested during the court hearing.

The defence can ask the court for further investigative steps during the trial stage, to the extent that such investigative steps are deemed necessary.<sup>166</sup> If the court grants such a request, the trial will be adjourned and the case will be referred to the investigating judge to perform the additional investigative steps. Once these investigative steps have been performed, the trial will resume. It is also possible that the court itself deems further investigative steps necessary.<sup>167</sup>

The public prosecutor and the defence can introduce new evidence at trial by submitting new documents.<sup>168</sup> Witnesses and experts who have not yet been questioned can be heard during the trial stage.<sup>169</sup> The defence must have a reasonable opportunity to respond to and contest such newly presented evidence, as the court can only consider evidence against an accused that was presented during the court hearing.<sup>170</sup>

## **Witness and victim protection**

There is a national witness protection programme in place in the Netherlands which includes victims in their capacity as witnesses.<sup>171</sup> In case witnesses or other people involved in the investigation face security issues, the national witness protection team will conduct a threat and risk assessment to determine the appropriate measures.<sup>172</sup> Relocation is one of the possible strategies.

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<sup>163</sup> Article 339 DCCP.

<sup>164</sup> Article 339 DCCP.

<sup>165</sup> Article 338 DCCP in conjunction with Article 339 ff DCCP.

<sup>166</sup> Articles 328 and 316 DCCP.

<sup>167</sup> Article 316 DCCP.

<sup>168</sup> Articles 328 and 315 DCCP.

<sup>169</sup> Article 315 DCCP

<sup>170</sup> Article 301(4) DCCP; Conclusion of the General Prosecutor's Office at the Dutch Supreme Court, 14 March 2017, ECLI:NL:PHR:2017:256, para. 3.5.

<sup>171</sup> See Dutch Decree on the Protection of Witnesses (*Besluit getuigenbescherming*).

<sup>172</sup> See Answers from the Dutch Minister of Justice and Security to Parliamentary Questions about Witness Security (*Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden*), Appendix to the Proceedings II, 2017/18, 696.

There are several protection measures possible inside and outside the courtroom. For instance, it is possible to give testimony inside the courtroom while the accused cannot see the witness. It is also possible to give anonymous testimony outside the courtroom in front of an investigating judge.<sup>173</sup>

The statements of anonymous witnesses can be used as evidence as long as the defence did not ask to question the witness.<sup>174</sup> If the defence asks to question the witness, the investigating judge can assign the witness the status of a threatened witness (this also applies to victims who testify as witnesses).<sup>175</sup> The identity of the threatened witness will generally be concealed from the defence. The investigating judge decides whether the public prosecutor and the defence are allowed to attend the examination of the threatened witness.<sup>176</sup> The statements of the threatened witness can be used as evidence, but the conviction of an accused cannot be based solely or decisively on the statements of the threatened witness.<sup>177</sup>

Besides the protection programme for witnesses, there is also a national victim protection programme in place in the Netherlands.<sup>178</sup> Based on this programme, there can be an individual assessment of the risks faced by the victim. It is possible to hear the victim in an adjusted room or to avoid eye contact between the victim and the accused. There are specific measures in place in case the victim is a minor.

## Reparation for victims in criminal proceedings

### 1. General rules

Within criminal proceedings, victims can apply for Injured Party status to claim damages for financial loss, physical damages and/or psychological damages due to the crime committed.<sup>179</sup> The criminal court handles such a claim as long as the claim does not put a disproportionate burden on the criminal proceedings and the damages can easily be determined.<sup>180</sup> Whether or not the claim is too big of a burden on the criminal proceedings depends on factors such as the complexity of the claim.<sup>181</sup>

Should the criminal court rule that the claim for compensation of the Injured Party is too big of a burden for the criminal case, the Injured Party can initiate civil

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<sup>173</sup> See Articles 226(a) to 226(f) DCCP in conjunction with Article 219(a) DCCP.

<sup>174</sup> Article 344(a)(3)(b) DCCP.

<sup>175</sup> Article 226(a) DCCP.

<sup>176</sup> Article 226 (d) DCCP.

<sup>177</sup> Article 344(a)(1) DCCP.

<sup>178</sup> See the Dutch Decree on Victims of Criminal Offences (*Besluit slachtoffers van strafbare feiten*).

<sup>179</sup> Articles 51(f) to 51(h) DCCP.

<sup>180</sup> Article 361(3) DCCP.

<sup>181</sup> For example, see District Court of Oost-Brabant, 10 March 2016, ECLI:NL:RBOBR:2016:1109: The court ruled that the claim made was too big of a burden to the criminal proceedings, as a closer examination of the extent of the damages was required.

proceedings for compensation. Civil claims for compensation can also be brought through separate civil proceedings under tort law, either after being rejected as an Injured Party in criminal proceedings or directly.<sup>182</sup> Civil proceedings under tort law tend to rely heavily on prior criminal convictions, which may serve as compelling proof (*dwingend bewijs*) under the DCCP.

In addition, the criminal court can issue a compensation order (*schadevergoedingsmaatregel*) when convicting an accused.<sup>183</sup> It contains the obligation for the convicted person to pay a certain amount to the Dutch state in favour of the victim(s). Subsequently, the Dutch state will pay the received amount to the victim or his or her next of kin.

## 2. Procedure

If the Dutch Public Prosecution Service becomes aware of a victim in relation to a crime it is investigating, the DPPS registers the victim in its system and sends that victim a compensation form. To file a claim for compensation in criminal proceedings, the victim has to make him- or herself known as an Injured Party and indicate the claim he or she is asking compensation for by filling out the form and sending it to the DPPS. The claim for compensation should be filed at the latest at the time of the court hearing.<sup>184</sup>

In the Netherlands, Injured Parties regularly file their claims for financial loss, physical damages and/or psychological damages within criminal proceedings, as this is a low-key and easy way for Injured Parties to claim their compensation. According to the Ministry of Security and Justice, the right to claim compensation in criminal proceedings applies to any victim independent of his or her presence or residence in the Netherlands.<sup>185</sup>

It is up to the Injured Party to prove the damages suffered, so it is advisable for the Injured Party to substantiate the claim with evidence. However, the Injured Party is not allowed to bring witnesses or experts to support the claim.<sup>186</sup> The Injured Party is allowed to ask questions of witnesses or experts already present in court, to the extent those questions relate to his or her claim for damages.<sup>187</sup>

Based on the claim filed by the Injured Party, the court considers the admissibility of an application as an Injured Party. This consideration depends on the following elements:<sup>188</sup>

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<sup>182</sup> Dutch civil courts have jurisdiction over tort actions brought by individuals or groups of individuals, in relation to a crime committed abroad if (i) the defendants have their residence in the Netherlands or (ii) the damages resulted from the crime committed abroad arose in the Netherlands, see Articles 2 and 6(e) DCCP.

<sup>183</sup> Article 36(f) DCC.

<sup>184</sup> Article 51(g) DCCP.

<sup>185</sup> Ministry of Security and Justice, Rights of victims of criminal offences, April 2017, [https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten/WEB\\_100159\\_Infoblad+Verklaring+Rechten+ENG.pdf](https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten/WEB_100159_Infoblad+Verklaring+Rechten+ENG.pdf).

<sup>186</sup> Article 334(1) DCCP.

<sup>187</sup> Article 334(2) DCCP.

<sup>188</sup> Article 361 DCCP.

- The applicant's claim is admissible only if the applicant is able to show that he or she suffered damages as a direct result of the defendant's alleged crimes.
- The applicant's claim must be sufficiently simple for a criminal judge to adjudicate it in the framework of criminal proceedings.
- A claim within the criminal proceedings will only be successful if the defendant is actually sentenced for the alleged crimes from which the applicant suffered damages.

If any of these prerequisite elements are not met, the court may rule that the application is inadmissible and refer the applicant to the civil courts.

The Injured Party can appeal the criminal judgement only on the part that rejects his or her claim.<sup>189</sup> However, the Injured Party does not have the possibility to appeal when the court rules the application is inadmissible. In that case, the Injured Party needs to start civil proceedings.

Most of the available case law includes compensation for financial loss and/or physical damages. Although it is less often allowed, it is also possible for Injured Parties to file a claim for psychological damages, like shock damages.

In a Rwandan genocide case,<sup>190</sup> the Court of Appeal of The Hague granted damages to two Injured Parties who claimed EUR 680.67 each for damages caused by the insults of the accused and the costs of EUR 7,120.62 made in respect of the claim.

## Immunities

### 1. General rules

Foreign heads of state and government, ministers of foreign affairs and persons who have immunity pursuant to an applicable treaty in the Netherlands or principles of customary international law enjoy immunity by virtue of Article 16 ICA. The immunity thereunder is limited to the time they are in office and to the actions committed while they are in function (immunity *ratio materiae*).

Immunity under the ICA should be assessed on a case-by-case basis. The Dutch government argues that Article 16 ICA does not imply that the Netherlands will not adhere to a request to assist with the arrest and surrender of a suspect to the ICC.<sup>191</sup>

In the *Kouwenhoven* case, the Dutch Supreme Court recently held that it did not recognize Liberia's immunity laws regarding Charles Taylor as these laws had clearly been drafted with the sole purpose of protecting Charles Taylor (and he had been involved in the drafting process).<sup>192</sup>

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<sup>189</sup> Article 421(4) DCCP.

<sup>190</sup> Court of Appeal of The Hague, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.

<sup>191</sup> Dutch Parliament, Explanatory Memorandum, 28 337, no. 3, page 22.

<sup>192</sup> Court of Appeal of Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:2650 (following referral of the case by the Supreme Court after an appeal lodged against the judgement of the District Court of The Hague of June 7 2006, 09-750001-05).

Immunity should be considered by the public prosecutor when assessing whether a person should be prosecuted.

## 2. Special mission immunity

Article 16 ICA does not explicitly touch upon the question of whether special mission immunities also fall within the scope of the ICA. However, in a letter from the Dutch Minister of Foreign Affairs to the Dutch Parliament in 2012, the Minister of Foreign Affairs argues that, in line with the findings of the Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*), members of official missions should be granted immunity.<sup>193</sup> “Members of official missions” include foreign members visiting the Netherlands and Dutch members visiting a country abroad. They are perceived as “temporary diplomats”.

In order to be qualified as an “official mission” the following four conditions need to be fulfilled:<sup>194</sup>

- the mission should be of a temporary nature;
- the mission should be from one state to another state (this, however, does not mean that every member of the mission also has to be a government official);
- the primary objective of the mission should be to visit the government of the state concerned;
- the receiving party should have given its prior consent.

The Netherlands has not ratified the United Nation Convention on Special Missions (1969).<sup>195</sup>

## Amnesties

The ICA does not explicitly discuss the status of amnesties. The Court of Appeal of The Hague has, however, argued that amnesties cannot be upheld in cases involving war crimes and crimes against humanity.<sup>196</sup> The case involved an amnesty granted by virtue of the Libyan Amnesty Law of August 2003. Although not specifically ruling on the status of foreign amnesties in general, the court held that, even though the amnesty had legal force, amnesties for war crimes and crimes against humanity conflict with international law.

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<sup>193</sup> See Letter of Minister of Foreign Affairs (*BRIEF VAN DE MINISTER VAN BUITENLANDSE ZAKEN*), 26 April 2012, <https://zoek.officielebekendmakingen.nl/kst-32635-5.html>. This letter cannot be qualified as either law or soft-law. However, as it states the opinion of the Minister of Foreign Affairs it can be used as a source when, e.g. establishing or amending (new) law or pleading a case in court.

<sup>194</sup> *Ibid.*

<sup>195</sup> Convention on Special Missions, 8 December 1969, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-9&chapter=3&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-9&chapter=3&clang=en).

<sup>196</sup> Court of Appeal of The Hague, 21 April 2017, ECLI:NL:GHSHE:2017:1760.

The **Open Society Justice Initiative**, part of the Open Society Foundations, uses strategic litigation and other kinds of legal advocacy to defend and promote the rule of law, and to advance human rights. We pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption and promote economic justice. In this work, we collaborate with a community of dedicated and skillful human rights advocates across the globe, and form part of a dynamic and progressive justice movement that reflects the diversity of the world.

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