

Universal Jurisdiction

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The Netherlands

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Abstract and Keywords

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A. AMBIT OF THE CRIMINAL LAW

In the Netherlands, the ambit of the criminal law (*strafmachtsrecht*) as a fundamental theoretical question is an academic discipline on its own.¹ Four concerns guide Dutch theory and practice in this regard: legal security (*rechts-zekerheid*), proper administration of justice (*goede rechtsbedeling*), avoidance of conflicts of jurisdiction,

and non-interference.² An important aspect of the proper administration of justice is the reasonable and responsible treatment of offenders, if possible within their own social environment. Thus, restoration rather than retribution is among the primary goals of criminal justice.

These considerations explain why the Netherlands is traditionally reticent in claiming extraterritorial jurisdiction³ and why the penal code in article 68(2) bars prosecution in the Netherlands after foreign *res judicata*, including decisions not to prosecute.⁴ However, it is important to note that this restraint is not prompted by international legal concerns alone but is to some degree self-imposed⁵ by a country that holds particular, somewhat self-willed views on criminal law and criminal justice. This unilateral reserve also explains the criticism in Dutch academic circles of the German decision in the *Dost* case.⁶

(p. 165) The rules of jurisdiction are spelled out in articles 2–8 of the penal code (*Wetboek van Strafrecht*).⁷ These provisions apply not only to all offences under the code itself, but also to those defined in other statutes, unless the statute provides otherwise.⁸ Territoriality of criminal law is the basic principle. Article 2 states: ‘The criminal law of the Netherlands applies to anyone who commits any offence within the Netherlands’. Extraterritorial jurisdiction was traditionally limited to the protective (article 4) and active personality principles (article 5).⁹ Dutch doctrine and practice have consistently been adverse to passive personality jurisdiction.¹⁰ Only when an international convention binding on the Netherlands contains an unequivocal obligation to create passive personality jurisdiction have the Netherlands been willing, albeit reluctantly, to establish jurisdiction on that basis.¹¹ This opposition explains why the Netherlands waited until 1988 to become a party to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.¹²

Dutch doctrine and practice have similar strong reservations about exercising universal jurisdiction.¹³ It is only accepted if the obligation arises from customary or conventional international law.¹⁴ The main objections are the risks of double jeopardy, conflicts of jurisdiction, the shifting of responsibilities,¹⁵ (p. 166) and the obstruction of justice.¹⁶ Moreover, the Dutch have fundamental conceptual and legal-theoretical criticisms of the *aut dedere aut judicare* formulas in modern international criminal law conventions.¹⁷ The most important critiques are the absence of a hierarchy of jurisdictional principles¹⁸ and the lack of clarity of the relationship between extradition and jurisdiction.¹⁹

It is standing practice to make a reservation to all international conventions containing an *aut dedere aut judicare clause*, to the effect that the Netherlands will only assert jurisdiction if a request for extradition from another State party has been received and refused.²⁰ These reservations are inspired by articles 6 and 7 of the 1977 European

Convention on the Suppression of Terrorism²¹ and are intended to ensure that international offences are in principle prosecuted by contracting parties with a strong jurisdictional claim.²²

The reluctance to assert extraterritorial jurisdiction in general and the critique of *aut dedere aut judicare* clauses in international conventions have important effects on the way in which the latter are implemented. Usually ratification of such conventions does not lead to any extension of Dutch jurisdiction. Only when the convention itself contains an unequivocal *obligation* to assert universal jurisdiction will the legislature amend the penal code or enact a statute to establish the required jurisdiction.²³

The penal code provides for universal jurisdiction over the crimes of piracy (article 4(5)) and counterfeiting currency (article 4(3) and 4(4)), where a basis lies in customary international law, the Convention on the High Seas, and the International Convention for the Suppression of Counterfeiting Currency. The presence of the foreign offender is not expressly required. Article 4(7) and 4(8) also create universal jurisdiction over the crimes listed in the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,²⁴ and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation²⁵ and its Protocol,²⁶ if the alleged offender is present in (p. 167) the Netherlands²⁷ and a request for extradition has been received and refused. The latter condition follows from Dutch reservations to these conventions. Universal jurisdiction has also been established by a number of statutes not part of the penal code, two of which are discussed below.

Wet Oorlogsstrafrecht

The Crimes in Wartime Act (*Wet Oorlogsstrafrecht*)²⁸ was adopted primarily to implement the Geneva Conventions. By virtue of article 3(1) in combination with article 8(1) Dutch criminal law applies to anyone who commits outside the Netherlands a 'violation of the laws and customs of war'. By criminalizing all violations of the laws and customs of war, the legislature went further than the requirements of the 1949 Geneva Conventions.²⁹ This is surprising in the light of what has been said above. On the other hand it should be noted that in 1949 the Special Criminal Court of the Netherlands opined that universal jurisdiction over war crimes exists as a matter of customary international law.³⁰ Until recently, however, there was controversy³¹ over whether the Act also applied to war crimes committed in wars in which the Netherlands was not engaged. The issue was settled by the Dutch Supreme Court in the *Knesevic* case, which is discussed below.

Uitvoeringswet Folteringsverdrag

As the title indicates, the Act Implementing the Torture Convention (*Uitvoeringswet Folteringsverdrag*)³² implements the UN Torture Convention. The adoption of a special statute deviates from the normal Dutch practice of implementing *aut dedere aut judicare* conventions through the addition of (p. 168) a new subsection in article 4 of the penal code. The obligation imposed by the Convention to establish universal jurisdiction over torture met with severe criticism in the Netherlands.³³ Nonetheless, the Netherlands did not make the usual reservation and article 5 of the Act provides for universal jurisdiction regardless of whether a decision regarding extradition has been taken.³⁴ (p. 169) The Act does not say that the foreign suspect must be present in the Netherlands, but it is clear that *seeking* extradition of an alien to stand trial in the Netherlands for a totally foreign offence would be irreconcilable with the Dutch understanding of *aut dedere aut judicare*.

Before reviewing cases a few remarks are needed about Dutch criminal procedure.³⁵ The Public Prosecution Service is the only body empowered to bring a prosecution for a criminal offence and is never obliged to do so (opportunity or expediency principle). Interested parties can, however, complain against decisions by the prosecution service not to prosecute before a court. If the court thinks that the accused should be prosecuted, it will order the public prosecutor to bring a prosecution. Dutch law does not forbid trials *in absentia*³⁶ and such proceedings occur relatively frequently.³⁷

B. CASE-LAW

Chili Komitee Nederland v Pinochet

*Chili Komitee Nederland v Pinochet*³⁸ appears to have been one of the first attempts by a non-governmental organization to set in motion the criminal justice system of a third country to hold former Chilean president Augusto Pinochet accountable for the torture and disappearance of thousands in Chile during his rule. When the former head of state was on a private visit in Amsterdam in 1994 the Chile Committee (Chili Komitee) Netherlands filed a criminal complaint on the basis of the UN Torture Convention, which Chile and the Netherlands ratified respectively in September 1988 and January 1989. The complaint related to complicity in two cases of torture committed in Chile in November 1989, when Pinochet was still President. The allegations were (p. 170) taken from a publication of a Chilean human rights organization.³⁹ The Public Prosecutor declined to investigate, for the following reasons.

Universality principle The Convention against torture and cruel, inhuman or degrading treatment or punishment (UN Convention of 10 December 1984) grants jurisdiction in

four cases to try offences which must be capable of being tried in a State Party under the Convention (Article 5 of the Convention). In the present case the Netherlands would obtain jurisdiction under Article 5, paragraph 2, from the presence of the alleged offender in Dutch territory. Article 5, paragraph 2, requires in this situation that the State Party does not extradite the alleged offender (to the State where the offence was committed or to the State of which the alleged offender or the victim is a national). There is nothing to show that the Netherlands has not taken the decision to extradite Pinochet. It is for this reason that in my view the Netherlands does not have jurisdiction.

In addition, it has not been established that Pinochet was in the Netherlands (or is still in the Netherlands) at the time that the request was made to the Public Prosecutor in Amsterdam. The complainant is twisting things around by demanding that the Public Prosecutor should have an investigation into precisely this matter. This is all the more relevant since it would follow from the complainant's submission that anyone who travels in an aircraft through Dutch airspace and who has possibly committed offences would have to be prosecuted by the Dutch criminal justice authorities (leaving aside for the moment the practical matter of how such people could be arrested).

In short, I believe that the Netherlands does not have jurisdiction in this case, or in any event that this has not been adequately established.

Other aspects In the first place, Pinochet was President of Chile in the period from 20 January 1989 to 11 March 1990. A head of State is entitled to invoke immunity. Furthermore, according to the complainant, Pinochet is still head of the Chilean armed forces, which would make it impossible to prosecute him in Chile. A prosecution would in my view be illusory, since it follows from the nature of the alleged torture that all or virtually all proof would have to be gathered in Chile. The Netherlands does not have a treaty with Chile that allows for the gathering of evidence in criminal proceedings. Moreover, a prosecution would entail many (different) practical problems. In my view, the Dutch criminal justice authorities cannot be expected to tackle these problems seriously and arrive at a solution.

There is also another reason why the Dutch criminal justice authorities cannot be required to institute criminal proceedings. German, Japanese and Yugoslavian war criminals have always been and are still being prosecuted and tried before international tribunals. The Netherlands has only prosecuted and tried Dutch war criminals and is still doing so. Viewed in this light, the prosecution of Pinochet by the Dutch criminal justice authorities would be disproportionate and presumptuous.

Finally, a prosecution, trial and execution of sentence would very probably founder because of the problems of implementation. All formal acts in the course of a prosecution must be served in the correct manner. Furthermore, even assuming that

this goes well and that the evidence collected is complete, the sentence imposed could not (p. 171) be executed. Chile could not after all be compelled to extradite one of its own nationals. If the convicted person is not in the Netherlands, the Dutch criminal justice authorities have no means whatever of effectuating the sentence...⁴⁰

On appeal, the Court of Amsterdam held:

The complaint is manifestly ill founded, even if it is assumed that the complainant CKN [Chile Committee Netherlands], according to its objects and as evidenced by its actual work, represents an interest that is directly affected by the decision not to prosecute Pinochet. It is, after all, evident that prosecution of Pinochet by the Dutch Public Prosecutions Department would encounter so many legal and practical problems that the Public Prosecutor was perfectly within his right to decide not to prosecute...⁴¹

Chili Komitee Nederland v Pinochet illustrates the practical problems created by the transitory presence in a third country of a person suspected of a crime to which an *aut dedere aut judicare* convention applies. Because the UN Torture Convention merely requires that the foreign suspect is 'present' (the drafters could have chosen the less ambiguous term 'reside') Pinochet's stay in an Amsterdam hotel arguably triggered the application of articles 5(2) and 7(1) of the Convention. However, the complaint was apparently based solely on a publication of a non-governmental source, without supporting affidavits. Article 7(2) of the Convention provides that '[i]n the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph G. Arguably, this applies also to pre-trial arrest. Unless we are prepared to hold Pinochet responsible as a commander⁴² for any act of torture that occurred in Chile during his rule it is difficult to see how the Dutch authorities could have detained him without lowering the ordinary standards of evidence for pre-trial arrest.

Public Prosecutor v Knesevic

The case of *Public Prosecutor v Knesevic*⁴³ arose out of the war and ethnic violence in the former Yugoslavia in the first half of the 1990s. The Netherlands (p. 172) has at least three links with the conflict: it participated in the UN peacekeeping operation, it is the host country of the International Criminal Tribunal for the former Yugoslavia, and it admitted a considerable number of war refugees.⁴⁴ Among them was Knesevic, whom other refugees denounced as a war criminal. The office of the prosecutor requested an examining magistrate (*Rechter-Commissaris*) to open a preliminary judicial inquiry into possible 'violations of laws and customs of war' by the accused on the basis of the Crimes

in Wartime Act.⁴⁵ The request characterized the events in the former Yugoslavia as 'an armed conflict not of an international character'.⁴⁶ In line with the traditional Dutch attitude towards extraterritorial jurisdiction, the investigative magistrate declared the application inadmissible on the ground that the Crimes in Wartime Act only applies to armed conflicts in which the Netherlands is involved.⁴⁷

After several appeals and a remand the case ended up before the Supreme Court (Hoge Raad). The Court held that the Crimes in Wartime Act applied and that the Netherlands had jurisdiction. The Court found that it was clear from the parliamentary records that the legislature intended to comply in full with the 1949 Geneva Conventions, which require that all States parties search for suspects and bring them to justice before its own courts, regardless of their nationality.⁴⁸

Although the Dutch Supreme Court in *Public Prosecutor v Knesevic* merely clarified an ambiguity in a municipal statute without interpreting international law, the decision has international legal significance. A country traditionally averse to extraterritorial jurisdiction claims universal jurisdiction over war crimes beyond the grave breaches provisions of the Geneva Conventions and Additional Protocol I. After the *Knesevic* decision the Dutch government transformed the special investigation unit for war criminals from the former Yugoslavia into a war crimes investigation unit without territorial restriction. A year later the unit had identified eighty-five foreign residents against whom there were indications that they were involved in war crimes or crimes against humanity in their country of origin,⁴⁹ but no prosecutions have been brought so far.⁵⁰

(p. 173) *Wijngaarde et al. v Bouterse*

The defendant in *Wijngaarde et al. v Bouterse*⁵¹ is the long-time leader of Surinam, Desire Delano Bouterse. Since the country became independent from the Netherlands in 1975, Bouterse seized power twice by military coups. These days he is an elected member of parliament and the leader of Surinam's main political party.

In 1999, after long-drawn-out proceedings, a Dutch court tried and convicted Bouterse in his absence for conspiring to import cocaine into the Netherlands. While these proceedings were going on, a complaint in the Netherlands laid the basis for *Wijngaarde et al. v Bouterse*, which is of importance for this study.

The case arose out of the 'December killings', the arrest and summary execution in Surinam during the night of 8/9 December 1982 of fifteen prominent opponents of the Bouterse regime. At least one of the victims was a Dutch national. The December killings have been investigated and documented by numerous non-governmental and intergovernmental organizations⁵² yet have not led to criminal proceedings in Surinam.

In January 1996 a relative of the Dutch victim filed a criminal complaint against Bouterse for having ordered the December killings⁵³ The complaint was not based on the nationality of the victim—that basis is firmly rejected in the Netherlands—but on the nationality of the alleged perpetrator. The plaintiff asserted that at the time of the offence Bouterse was still a Dutch national and that accordingly article 5 of the penal code should apply.

The Public Prosecutor in Amsterdam, however, believed that Bouterse had lost his Dutch citizenship by joining the Surinam armed forces in 1975, and therefore declined to open an investigation. A prolonged debate ensued on Bouterse's nationality⁵⁴ The plaintiff then tried a different approach. On appeal, he advanced the position that the Netherlands could exercise *universal* jurisdiction over the crimes against all fifteen victims.

In an interlocutory order the Court of Amsterdam took judicial notice of the reports about the December killings of several non-judicial (international) bodies⁵⁵ and concluded that the 'suspicions and allegations are so serious that (p. 174) Bouterse should be held accountable before a criminal tribunal'.⁵⁶ The Court then considered the question whether the Netherlands was an appropriate forum.

To begin with, the Court states that the investigation of criminal offences committed in Surinam and that constitute violations of human rights is in principle incumbent on the Republic of Surinam by virtue of the International Covenant of Civil and Political Rights, to which it became a party in 1977. We accept, however, the position of plaintiffs that it cannot be expected that Bouterse will be brought to justice any time soon, in Surinam or elsewhere, for the conduct complained of. The Netherlands has close historical links with Surinam. A large Surinam community lives within the Netherlands.⁵⁷ The events of December 1982 shocked this community, but also the larger public in the Netherlands. There are indications that at least one victim was a Dutch national. Moreover, plaintiffs, who are relatives of two of the victims, live in the Netherlands. Because it cannot be expected that Bouterse will be prosecuted elsewhere any time soon, the plaintiffs have turned to the most appropriate authority. For these reasons, prosecution in the Netherlands would be opportune.⁵⁸

Having concluded that prosecution by the Netherlands would be opportune the Court decided to ask expert advice on the international legal aspects of the case. The following questions were put to Professor John Dugard. (1) Under customary international law as it was in 1982, can the alleged acts be considered torture, crimes against humanity, or war crimes for which the perpetrator can be held criminally liable? (2) Can it be

said that under customary international law as it was in 1982, or at any time later, the alleged crimes were imprescriptible? (3) Does customary international law as it was in 1982, or at any time since then, provide a State with extraterritorial jurisdiction over torture and crimes against humanity, if the suspect is not a national? (4) Does it make any difference, for the previous question, whether the suspect is present on the territory of that State? (5) Does it make any difference, for question (3), whether the victims are nationals of that State? (6) Does customary international law as it was in 1982, or at any time since then, oblige a State to exercise jurisdiction under the circumstances set out in questions (3), (4), and (5)? The court's final order, which follows the expert opinion,⁵⁹ deserves quotation at length.⁶⁰

Opportunity of prosecution in the Netherlands

3.1 [...]

3.2 According to recent press reports judicial authorities in Surinam have launched their own investigation against Bouterse. This raises the question whether prosecution in the Netherlands is still opportune, as this Court held in its interlocutory order.

• (p. 175)

3.3 This Court did not receive any official communication about such an investigation in Surinam and it is impossible to predict the possible outcome of such an investigation [...] Therefore, there are insufficient grounds for the Court to change its decision of 3 March 2000 regarding the opportunity of prosecution in this country.

3.4 This prosecution can, with the approval of this Court, always be suspended if legal developments in Surinam give cause to that. [...]

No immunity for Bouterse as head of State

4.1 Counsel for Bouterse argues that his client cannot be prosecuted for the alleged facts because he was head of State at the time.

4.2 The Court can leave aside the insufficiently supported submission that Bouterse was indeed the head of State. The commission of very serious crimes, like the ones in this case, cannot be attributed to the official functions of a head of State.

Criminality of the acts under international law and applicability of the universality principle

5.1 The Court accepts the remarks and conclusions of the expert to the effect that the acts can be considered crimes against humanity/torture under customary international law, in that they were committed in a systematic manner as part of an organized plan by the military authorities, of which Bouterse was commander, against a group of civilians, with the intent to obtain confessions or to intimidate or coerce members of the civilian population.

2. 5.2 The Court also sides with the expert on the following points:

- —that torture was already a crime under international customary law back in 1982 for which the perpetrator can be held individually and criminally accountable;
- —that back in 1982, crimes against humanity (probably) could be committed not only during war or armed conflict, but also in time of peace;⁶¹
- —that crimes against humanity are imprescriptible;
- —that customary international law, as it was in 1982, provides a State with extraterritorial (universal) jurisdiction over a foreigner suspected of a crime against humanity.

5.3 The Court further understands from the report of the expert that it is not a requirement for the exercise of jurisdiction that the victim(s) is (are) a national of the prosecuting State, but that—as in the present case where plaintiffs are related to the victims—this would strengthen the legal basis for the exercise of jurisdiction.

5.4 The Court has found insufficient grounds in the report of the expert for the view that prosecution of Bouterse in this country would be impermissible under international (customary) law as long as he is not present in the Netherlands.⁶²

(p. 176) Torture

6.1 [...]

6.2 In the interlocutory order the Court raised the question whether the Act Implementing the UN Torture Convention can be applied to acts committed in December 1982, thus before the coming into force of the Act on 20 January 1989. The Court was concerned that this could violate the legality principle.

[...]

6.3 The expert has voiced the opinion [...] that the UN Torture Convention has a declaratory character. In other words: the Convention only confirmed

existing customary international law in respect of the prohibition on torture, its criminalization, and its recognition as a crime against humanity. It follows, in the opinion of the expert, that the Act Implementing the UN Torture Convention can be applied retrospectively to conduct which was already criminal under Dutch law, though not under the name torture, like assault and murder. In this respect, the expert has made a distinction between *retroactive* and *retrospective* legislation. A retroactive law renders an act criminal which was not punishable when committed. A retrospective law, on the other hand, does not create new offences.

6.4 The Court concurs with the expert's considerations and conclusions. This means that, the possible exercise of universal jurisdiction over Bouterse by a Dutch judge on the basis of the retrospective application of the Act Implementing the UN Torture Convention—which in the opinion of the Court is not only feasible but also appropriate—does not violate Article 15 of the International Covenant on Civil and Political Rights.

6.5 For these reasons, it cannot be concluded that the prosecution and possible punishment of Bouterse would violate the legality principle and/or that Bouterse could not have known that one day he could be prosecuted outside Surinam, in particular in the Netherlands. [...]

The notion of torture in the Act Implementing the UN Torture Convention

7.1 In the interlocutory order the Court raised questions regarding the applicability of the Act Implementing the UN Torture Convention to the killing of the victims. [...]

7.2 Upon closer consideration the Court finds insufficient indications to exclude the 'independent' killing, ie apart from the preceding torture, from the application of the Act.

7.3 In this respect, it is important that Article 1, paragraph 2, of the Act equates ill-treatment with the intentional infliction of a condition of severe angst or other form of mental desperation, which would be the case when one confronts the victims with an imminent execution. As already said, it would be inconceivable that this infliction would be considered torture but not the execution the ultimate ill-treatment. [...]

• (p. 177)

7.4 This leads to the conclusion that all alleged acts—torture, whether it results in death or not, as well as murder as an independent delict—can be prosecuted in the Netherlands on the basis of the Act Implementing the UN Torture Convention.

7.5 [...]

7.6 The Court recognizes, however, that there may be differences of opinion on this point and that it cannot be excluded that the criminal judge construes the Act more narrowly.

7.7 [...]

Other basis for prosecution

8.1 The events of 8/9 December cannot be qualified as war crimes. [...]

8.2 [...] The Court concurs with the view of the expert that crimes against humanity, outside the scope of the Act implementing the UN Torture Convention, are only punishable in the Netherlands under the Wartime Criminal Law Act. The latter, however, does not consider them separate offences but aggravating circumstances in connection with war crimes. The alleged facts, however, cannot be qualified as war crimes.

8.3 These considerations lead the Court to conclude that there is no reason to open an investigation against Bouterse on a different or broader basis than the Act Implementing the UN Torture Convention.

8.4 The Court is, however, of the opinion that the judge who will decide this case on the merits should remain free to qualify the facts in accordance with his own views. The prosecution order will therefore not specify the precise legal grounds on which the prosecution should be brought.

9. [...] 10. [...]

Decision

The Court of Appeal:

- —orders the public prosecutor in the district of Amsterdam to prosecute Desire Delano Bouterse [...] for the offences to which the complaint relates and which were committed in Paramaribo, Surinam, on or about 8/9 December 1982;
- —directs the public prosecutor to file an application with the examining magistrate responsible for dealing with criminal cases in the district of Amsterdam for the institution of a preliminary examination into the offence concerned;
- —[...]

The order was sharply criticized by a prominent Dutch commentator because it broke with the traditional dualistic approach of the Netherlands regarding international criminal law⁶³ The exercise of universal jurisdiction *in absentia* constitutes a further deviation from well-established Dutch practice.⁶⁴ On (p. 178) appeal by the Procurator-General⁶⁵ the Supreme Court quashed the order on no less than five grounds;⁶⁶ first, the application of the Act Implementing the Torture Convention to facts that had occurred before its adoption in 1988 violated article 16 of the Constitution (legality principle);⁶⁷ second, the killing of a person without first torturing him does not constitute torture in the sense of article 1 of the Act Implementing the Torture Convention;⁶⁸ third, the jurisdiction clause of the Act Implementing the Torture Convention (article 5) cannot be applied retroactively;⁶⁹ fourth, prosecution is barred by the domestic statute of limitation;⁷⁰ and finally, based upon a careful examination of the drafting history of the Act Implementing the Torture Convention, the Court opined that 'prosecution and punishment in the Netherlands of a person suspected of an offence under articles 1 and 2 of the Act Implementing the Torture Convention is only possible if one of the links mentioned in the Convention exists, for example when the offender or victim is a Dutch citizen, *or when the suspect is present in the Netherlands at the time of his arrest*'⁷¹ (emphasis added).

The Supreme Court in *Wijngaarde et al. v Bouterse* did not decide any points of international law (dualism versus monism is a matter of domestic law). The court held though that the exercise of universal jurisdiction under the Act Implementing the Torture Convention is only possible if the suspect can be arrested on Dutch territory. With this requirement the Dutch Supreme Court is on the same wavelength as the chief prosecutor of Denmark in *Pinochet*, the French Court of Cassation in *Javor* and the Brussels court of appeals in *Sharon and Ndombasi*⁷² No attention was apparently paid to the fact that the territorial State is not a party to the UN Torture Convention.

C. SUMMARY

The review of Dutch law and practice shows a relatively narrow ambit of municipal criminal law. The reluctance to exercise extraterritorial jurisdiction is motivated by human rights concerns and international comity. Ratification of international criminal law conventions does not usually lead to any extension of jurisdiction, unless the convention contains an unequivocal obligation to do so. Even then a reservation is usually made to the effect that the Netherlands will only prosecute a foreign suspect if a request for extradition has been received and refused.

(p. 179) *Chili Komitee Nederland v Pinochet* illustrates the dilemmas created by the transitory presence in a third country of a person suspected of a crime to which an *aut dedere aut judicare* convention applies. In *Public Prosecutor v Knesevic* it was held that

a foreign asylum seeker can be prosecuted in the Netherlands on the basis of universal jurisdiction for violations of the laws and customs of war committed during an armed conflict in which the Netherlands were not engaged. In *Wijngaarde et al. v Bouterse* the Supreme Court held that a foreigner suspected of torture abroad cannot be prosecuted in the Netherlands unless he is voluntarily present on Dutch territory. *In absentia* proceedings on the basis of universal jurisdiction are thus out of the question, as is the retroactive application of a domestic statute penalizing international crimes.

Notes:

I warmly thank Mr Bas van Riel for his suggestions and critical comments.

(1) For an illustration, see eg GAM Strijards, *Internationaal Strafrecht: Strafmachtsrecht* (1984).

(2) Council of Europe, European Committee on Crime Problems, Select Committee of Experts on extraterritorial jurisdiction, Working documents on the basis of which the report *Extraterritorial Criminal Jurisdiction* (1990) has been prepared. Dutch reply to question 26; MT Gerritsen, 'Jurisdiction' in B Swart and A Klip (eds) *International Criminal Law in the Netherlands* (1997) 49, 50; AMM Orie, CF Ruter, JJE Schutte, and AHJ Swart, 'Netherlands' (1989) 60 *Revue internationale de droit pénal* 395, 411. On the proper administration of justice and its role in the distribution of competence see, extensively, T Vander Beken, *forumkeuze in het Internationaal Strafrecht: Verdeling van misdrijven met aanknopingspunten in meerdere staten* (1999) 276–80 who refers to AHJ Swart, 'Internationalisering van de strafrechtspleging', in C Kelk *et al.* (eds) *Grenzen en mogelijkheden: Opstellen over en rondom de strafrechtspleging* (1984) 112–29.

(3) AHJ Swart, 'De Nederlandse strafrechtspleging en het internationale recht' in *Internationalisering van het strafrecht. Ars Aequi Libri. Serie Strafrecht en criminologie*, VI (1986) 37, 47.

(4) For comments on article 68(2) see P Baauw, 'Ne bis in idem' in B Swart and A Klip (eds) *International Criminal Law in the Netherlands* (1997) 75–84 and Vander Beken (n 2 above) 268–71.

(5) Gerritsen (n 2 above) 50.

(6) See Germany country study above.

(7) For an English translation, see B Swart and A Klip (eds) *International Criminal Law in the Netherlands* (1997) 251–3; for comment, see MR Mok and RAA Duk, 'Toepassing

van Nederlands strafrecht op buiten Nederland begane delicten' in *Handelingen der Nederlandse Juristen-Vereniging deel I, tweede stuk* (1980) 2–149.

(8) Article 91 of penal code.

(9) Dutch nationals can be prosecuted in the Netherlands for all extraterritorial felonies (*misdrifven*), provided there is double criminality. Active personality jurisdiction can be explained by the fact that the 1967 Extradition Act forbids the extradition of Dutch citizens, unless the requesting State promises that the suspect, if convicted, can serve his sentence in the Netherlands (article 4). For a fuller account on active personality jurisdiction in the Netherlands, see Vander Beken (n 2 above) 103–5.

(10) Passive personality jurisdiction can be found though in special statutes on the punishment of offences committed in wartime; see Gerritsen (n 2 above) 58 and Vander Beken (n 2 above) 121–2.

(11) For example, the International Convention against the Taking of Hostages and the International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation leave discretion to the States parties in this matter. Hence, the Netherlands did not establish passive personality jurisdiction over the offences defined therein.

(12) New York, 14 December 1973; GA Res 3166 (XXVIII). Article 3 of the Convention requires each State party to establish its jurisdiction over crimes set forth in article 2, when the crime is committed against an internationally protected person who enjoys his status as such by virtue of functions which he exercises on behalf of that State. During the ratification process the Dutch government stated before parliament: 'We would like to set at rest the fear of parliament, that, through implementing the treaty provision into Dutch criminal law, we have abandoned our objections against the principle of passive personality, and that we might in future propose to give it a wider application. We therefore repeat loud and clear that we are not prepared to do so' (quoted in Council of Europe, European Committee on Crime Problems (n 2 above) Dutch reply to question 26).

(13) Orié *et al.* (n 2 above) 411–17. The Netherlands opposed universal jurisdiction for the Genocide Convention; WA Señabas, *Genocide in International Law* (2000) 355.

(14) Orié *et al.* (n 2 above).

(15) Gerritsen (n 2 above) 63. Indeed, if *all* States are virtually competent there is a serious risk that they shift responsibility and that, in the end, *no* State asserts jurisdiction.

(16) During the parliamentary discussion of the bill relating to the introduction into the penal code of a separate offence of aircraft hijacking the Minister of Justice said that 'under the principle of universality, it is also possible that a State, wishing to protect a hijacker, could bring the man to trial as soon as he entered the country, then impose a not too severe punishment on him or, possibly, even acquit him and then say: no one can be prosecuted twice for the same offence. And this must then be recognized ...' (quoted in (1972) 3 *Netherlands Ybk Int'l* 210).

(17) See, extensively, JJE Schutte, 'Enforcement Measures in International Criminal Law' (1981) 52 *Revue internationale de droit penal* 441; see also AHJ Swart, *De berechting van inter-nationale misdrijven* (1996) 23–6 and MR Mok, 'Het Europese verdrag tot bestrijding van ter-rorisme' (1977) 27 *Nederlands Juristenblad* 665.

(18) Orié *et al.* (n 2 above) 416.

(19) [Ibid](#) 412.

(20) See eg the 'Netherlands' reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

(21) Orié *et al.* (n 2 above) 412.

(22) Gerritsen (n 2 above) 65.

(23) Mok and Duk (n 7 above) 146–7.

(24) Montreal, 23 September 1971; 974 UNTS 177.

(25) Rome, 10 March 1988; 1678 UNTS 29004.

(26) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988; 1678 UNTS 29004).

(27) A reported case of universal jurisdiction over aircraft hijacking on the basis of article 4(7) is *Public prosecutor v SHT* summarized in (1987) 74 *Int'l L Reports* 162.

(28) Staatsblad 1952, No 408. For comments, see BVBA Röling, 'Enkele volkenrechtelijke aantekeningen bij de Wet Oorlogstrafrecht' [1959] *Nederlands Tijdschrift voor Internationaal Recht* 263; MW Mouton, 'La protection pénale des conventions internationales humanitaires' [1953] *Revue internationale de droit pénal* 851. 851–8; MW Mouton, 'De Wet Oorlogstrafrecht en het internationale

recht" [1960] *Nederlands Tijdschrift voor Internationaal Recht* 59; GL Coolen. 'De Wet Oorlogsstrafrecht: Een wet met gebreken' (1996) 26 *Delikt en Detinkwont* 43.

(29) Cf the discussion of the 1949 Geneva Conventions in ch 3 s A above.

(30) *In re Rohrig, Brunner and Heinze*. Special Criminal Court. Amsterdam, 24 December 1949, English translation reprinted in (1950) 17 *Int'l L Reports* 393, 397: 'There was a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so-called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind' The decision refers to the practice of American tribunals as evidence.

(31) Röling (n 28 above) 271–2; Mouton 1960 (n 28 above) 65–71; Coolen (n 28 above) 47–53; AH Klip, 'Strafrechtelijke reactie op ernstige sehendingen van mensenrechten in het buitenland' in CH Brants, C Kelk, and M Moerings (eds) *Er is meer: Opstellen over mensenrechten in inter-nationaal perspectief* (1996) 93. 95–7.

(32) Staatsblad 1988, no 478.

(33) The following observations can be found in the parliamentary records:

'Special attention should be paid to the obligation arising from the Convention to establish universal criminal jurisdiction and to the way in which it is suggested this obligation should be fulfilled. It should first of all be stated that the reasons for imposing an obligation to establish such a far-reaching form of extraterritorial jurisdiction for torture are not obvious ones.

The criminal offence of torture is not intrinsically one which tends to involve more than one country. On the contrary, cases having an international aspect, either because the offender and victim possess different nationalities or because the offender has fled abroad or even because the criminal offence has had tangible effects on the territory of another State, are highly exceptional, experience shows that it is much more typical for offender and victim to be of the same nationality, for the criminal offence to take place on the territory of the State whose nationality they possess, and for the offender to have little reason to flee the country as long as he feels he is supported by his social or political environment.

Furthermore, many instances of torture occur in secrecy, that is to say, in the absence of incidental witnesses, and it may therefore be extremely difficult for a third State which has detained a suspected torturer and has acquired the competence to try him, to obtain the necessary evidence to ensure a successful prosecution, particularly in cases where no

co-operation may be expected from the State where the criminal offence took place in providing such evidence under the terms of a mutual legal assistance agreement.

Viewed in this light, the basic conditions which would justify the establishment of universal jurisdiction (ie over offences committed by foreign nationals outside the Netherlands) are lacking. Only rarely, in fact, will multinational features be inherent in the offence and will the required international solidarity and common interest exist between the States most involved. The mere fact that torture is an extremely serious offence which arouses great indignation and concern is not in itself sufficient justification for subjecting it to universal jurisdiction. This, at any event, is the traditional Dutch standpoint on this issue.

In this context, the basic principle to which we should continue to adhere is that the suppression of such practices is the responsibility of the States whose demonstrable connection with the offence in question constitutes grounds for the exercise of jurisdiction. Where such States are deemed by other States to be failing to exercise their jurisdiction sufficiently, this can easily create the temptation to intervene in the affairs of that State and can even lead to a political conflict, and the criminal law is hardly the most appropriate instrument for tackling political differences' (quoted in the initial report of the Netherlands to the Committee against Torture, UN Doc CAT/C/9/Add.I. 20 March 1990, para 40).

(34) The parliamentary records elucidate why the Netherlands deviated from a standing policy: 'The reasons for deciding to honour the obligation [to establish universal criminal jurisdiction] despite the above considerations are twofold. In the first place, the social and political situation in a country where torture has been practised can always change dramatically, which would immediately lead to two of the necessary conditions (readiness to co-operate and shared code of values) being fulfilled. [...] [T]he second ground on the basis of which the establishment of universal jurisdiction could be accepted [...] rests on the intolerable nature of the idea that as long as torturers are protected by the regime in their own country, they may travel freely and may, with impunity, come face to face with their victims who have fled to other countries.

In this hypothesis, the exercise of extraterritorial jurisdiction is not to be construed as a means of acting on behalf of another, more closely concerned State. On the contrary, the prosecution of a public official representing the State for acts which he performed there with the approval or acquiescence of his superiors will be seen in essence as amounting to the prosecution and condemnation of the regime as a whole. In this way the administration of criminal justice goes far beyond the boundaries of a specific case to become an instrument in an international political conflict. There are thus very powerful objections to such a use of the Dutch criminal justice system. However, understandable scepticism concerning the effectiveness and credibility of criminal

judgments in connection with a conflict in the international political arena stands in opposition to the sense of justice of Dutch society ruled by law. which should find its purest expression in the judgments of the courts. A veritable shock wave would go through the Dutch legal order if. faced with the presence in this country of a foreign national recognized as a torturer by witnesses and victims, the courts were to declare themselves incompetent to hear the case' (quoted in initial report of the Netherlands to the Committee against Torture ([ibid](#)) para 40).

(35) For an account in English of criminal procedure in the Netherlands, see AHJ Swart, 'The Netherlands' in C Van den Wyngaert (ed) *Criminal Procedure Systems in the European Community* (1993) 279–316.

(36) Article 280 of the code of penal procedure (*Wetboek van Strafvordering*),

(37) Swart (n 35 above) 313–14. The remedy is opposition (*verzet*), which leads to a complete retrial by the court that rendered the original decision.

(38) Public Prosecutor of Amsterdam, 6 June 1994; Court of Appeal of Amsterdam, 4 January 1995. Excerpts of both decisions are published in English in (1997) 28 *Netherlands Ybk int'l L* 363–5.

(39) This factual summary is based on the introduction to the case in *Netherlands Ybk Int'l L* ([ibid](#)).

(40) Decision of the Public Prosecutor of Amsterdam (n 38 above); translation from *Netherlands Ybk int'l L* ([ibid](#)).

(41) Court of Appeal of Amsterdam (n 38 above); translation from *Netherlands Ybk int'l L* ([ibid](#)). Critical of the decision to dismiss are MT Kamminga and M Tijssen, 'Pinochet, Nederland en net VN-Vcrdrag tegen foitering' [1995] *Nederlands Juristen Comité voor de Mensenrechten-Bulletin* 986 and C Ingelse and H van der Wilt, 'De Zaak Pinochet: Over Universele Rechtsmacht en Hollandse Bencpenheid' [1996] *Nederlands Juristenblad* 280. For aconcurring opinion, see Klip (n 31 above) 102–5. For the noticeable lack of reaction by the UN Committee against Torture following the Dutch decision not to prosecute, see C Ingelse. *The UN Committee Against Torture: An Assessment* (2001) 347–8.

(42) Neither the UN Torture Convention nor the Dutch implementing statute provide for com-mand responsibility.

(43) Examining magistrate, 1 December 1995; Høge Raad der Ncderlanden, 11 November 1997, published in (1998) XCI *Militair Rechterlijk Tijdschrift* 198–221 with note by H van der Wilt: English translation in (1998) 1 *Ybk Int'l Humanitarian*

L 601 with note by N Kcijzcr at 483; see also R van Eist, 'De zaak Darco Knczevic: Rechtsmaeht over Joegoslavisehe en andere buitcn-landse oorlogsmisdadigers' [1998] *Nederlands Juristenblad* 1587.

(44) R van Eist, 'Afseheid van Joegoslavië: Over oorlogsmisdrijven en misdrijven tegen de menselijkheid begaan in voormalig Joegoslavië en de Ncderlandse rechter' [1994] *Nederlands Juristenblad* 1401–10 examines the possibilities under Dutch law to prosecute refugees sus-pected of war crimes in the former Yugoslavia.

(45) Taken from the decision of the Høge Raad der Nederlanden (n 43 above).

(46) *Ibid.*

(47) Order of the examining magistrate (n 43 above).

(48) Høge Raad der Nederlanden (n 43 above) at 5.2.

(49) Tweede Kamer, vergaderjaar 1998–1999, 26–262, no 1 and no 2.

(50) The whereabouts of Knesevic are said to be unknown (R van Eist, 'Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions' (2000) 13 *Leiden J Int'l L* 815, 847).

(51) District Court of Amsterdam (sitting on appeal against a decision of the office of the Public Prosecutor), interlocutory order of 3 March 2000 and order of 20 November 2000 (District Court order) (copies on file with author), case note by F van Sliedregt and N Keijzer in (2000) 3 *Ybk Int'l Humanitarian L* 548, English translation of the order of 20 November published in *ibid* 677; Høge Raad der Nedelanden, 18 September 2001 (Supreme Court decision) (copy on file with author).

(52) See n 55 below.

(53) Copy of complaint on file with author. A second Dutch plaintiff by the name of Hoost later joined in the proceedings.

(54) The question *when* Bouterse lost his Dutch nationality could not be resolved without the collaboration of the Surinam authorities, which they refused. It was ultimately ruled that Bouterse had 'almost certainly' lost his Dutch citizenship on 25 November 1975.

(55) *Inter alia* the report of Mr S Amos Wako, UN Special Rapporteur on summary or arbitrary executions (UN Doc E/CN.4/1985/17).

(56) Interlocutory order (n 51 above) para 3.8.

(57) Nearly half of the Surinamese population lives in the Netherlands.

(58) Interlocutory order (n 51 above) para 4.2.

(59) Copy of Professor Dugard's opinion on file with author.

(60) District Court order (n 51 above). The numbers refer to the paragraph numbers in the original.

(61) Professor Dugard had reservations in this respect. His opinion at 4.2.3 states that 'whether this was the position in 1982 is not entirely free from doubt, particularly in respect of armed conflict'.

(62) Professor Dugard had stated at 5.6.5 in his opinion: 'It is not clear whether this requirement prevents a State in whose territory the offender is not present from requesting extradition of the offender from a State in whose territory the offender is present, but which elects not to try him itself, when the sole basis for the exercise of jurisdiction is the principle of universality. Some have argued that it is objectionable to allow extradition requests of this kind as this would permit a particular state to act as "policeman" of the world by requesting extradition of torturers from any country. This objection was not raised in the Pinochet proceedings and a number of English courts were prepared to entertain a request from Spain to exercise jurisdiction on grounds of universality. A State that requests extradition of a torturer would probably be wise to stress the presence of some connecting factor between it and the crime to ensure that this objection would not be raised against it.'

(63) For a comprehensive critical analysis, see GAM Strijards. 'Neerlands dualisme en zijn strafmacht'. [2000] *Nederlands Juristenblad* 2113–22.

(64) See above section A of this country study.

(65) The Procurator-General is the Supreme Courts advisor on legal matters; he appealed against the order of the District Court by way of 'cassation in the interest of law'.

(66) Hoge Raad der Nederlanden (n 51 above).

(67) [Ibid](#) para 4.

(68) [Ibid](#) para 5.

(69) [Ibid](#) para 6.

(70) [Ibid](#) para 7.

(71) [Ibid](#) para 8.5.

(72) See the respective country studies above.

