

# DUTCH REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Emma van Gelder and Prof. Cedric Ryngaert \*

## 1 Methodology

Descriptive and empirical methods have been used in order to successfully answer the questions posed by the questionnaire. The descriptive part departs from the relevant primary sources of law, namely the existing legislation, case law, and other legal materials such as explanatory memoranda. In addition, legal doctrine and policy documents have been consulted. To shed further empirical light on the questions posed, a number of semi-structured interviews have been conducted with experts working in the field, on the basis of a proposed questionnaire (Annex A). The qualitative data gained from the interviews have been processed in this report. The combination of a doctrinal approach with interviews allows for a deeper understanding of Dutch legislation and legal practice. In particular, the combination of different methods increases the validity and reliability of the answers.

## 2 Demarcation of research

Led by the questions asked by the questionnaire, the authors have focused on international core crimes (war crimes, genocide, crimes against humanity, and torture), crimes of corruption, and, to a limited extent, other economic offences and environmental crimes. Drug offences are not addressed in this report.

## 3 General Framework for Prosecuting Corporations for Violations of International Criminal Law

### 3.1 Legal rules governing the prosecution of corporations – in a nutshell

#### 3.1.1 *Substantive criminal law establishing criminal liability*

##### *The doctrinal basis*

On the basis of article 51(1) Dutch Penal Code (hereafter: DPC) criminal liability can be established for a corporation: a corporation can be prosecuted for committing and participating in committing an offence.

To hold a corporation criminally liable, one has to inquire whether the corporation actually counts as a perpetrator, thus whether the illegal conduct by one or more natural persons can

---

\* Emma van Gelder is a PhD Candidate at the Erasmus School of Law- Erasmus University Rotterdam, focusing on online dispute resolution and access to justice in the EU. Cedric Ryngaert is Professor of Public International Law at Utrecht University, and a recognized specialist in the law of jurisdiction. The research which resulted in this publication has been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230—UNIJURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No 016.135.322). We would like to thank Francisca Ribeiro Bártolo, Benjamin Thompson, François Kristen and the Gezelschap voor Internationaal Strafrecht (GIS – Dutch branch of AIDP) for their research support and comments.

count as illegal conduct of the corporation.<sup>1</sup> It is this attribution of illegal conduct to the corporation that is the doctrinal basis for establishing corporate criminal liability under Dutch law.<sup>2</sup> In the *Drijfmet* case, the Dutch Supreme Court (hereafter: DSC) ruled in this respect that the possibility of ‘reasonably’ imputing (illegal) conduct to a corporation depends on the concrete circumstances of the case, which includes the nature of the conduct.<sup>3</sup> According to the DSC, it is in principle reasonable to impute conduct to the corporation when the act has occurred within the ‘sphere’ of the corporation.<sup>4</sup> This ‘sphere’ condition is met when:

- The (illegal) conduct is committed by someone who works for the corporation under a formal contract of employment or who is working for the company under any other circumstances of employment.
- The (illegal) conduct fits within the ‘normal operations’ of the corporation.
- The corporation profited from the (illegal) conduct.
- The corporation was at the ‘disposal’ of the (illegal) conduct and the corporation ‘accepted’ or ‘used to accept’ the (illegal) conduct. The scope of ‘acceptance’ includes the failure of the corporation to take reasonable care to prevent occurrence of (illegal) conduct.<sup>5</sup>

These four criteria are non-cumulative and flexible, and give the judge the freedom to formulate additional, more specific criteria.<sup>6</sup>

The DSC emphasized that its ruling exclusively applies to the *actus reus* of the (illegal) conduct and not to the *mens rea*. In order to establish the *mens rea* for the purposes of corporate criminal liability, proof has to be adduced that a corporation acted intentionally, recklessly, or with gross negligence.<sup>7</sup> Proof of *mens rea* is only required for more serious offences, the so-called *misdrijven*.<sup>8</sup>

---

<sup>1</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ. Eijsbouts & JM de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 133.

<sup>2</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ. Eijsbouts & JM de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 133.

<sup>3</sup> HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

<sup>4</sup> WJ Koops, ‘De Hoge Raad over het daderschap van rechtspersonen’, *V&O* 2003, afl. 12, 200; HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

<sup>5</sup> HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

<sup>6</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ Eijsbouts & JM de Jongh (eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 137.

<sup>7</sup> M Hornman & E Sikkema, ‘Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea*’, in F de Jong, JAE Vervaele, MM Boone, C Kelk, FAMM Koenraadt, FGH Kristen, D Siegel-Rozenblit & E Sikkema (eds), *Overarching views of delinquency and deviancy- rethinking the legacy of the Utrecht School* (Eleven International Publishers 2015) 290.

<sup>8</sup> BF Keulen & E Gritter, ‘Corporate Criminal Liability in the Netherlands’, in M Pieth, R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 184.

Intent can be attributed indirectly to the corporation by imputing to that corporation the mental state of a natural person who was (partly) involved in the criminal conduct. According to the explanatory memorandum of article 51 DPC, this imputation is dependent on the internal organization of the corporation as well as the position and responsibilities of the natural person within this corporation.<sup>9</sup> Apart from the option of imputing the intention of a natural person to the corporation, it is also possible to combine the intention of multiple natural persons and impute such 'united intent' to the corporation. Negligence can also be imputed to the corporation according to this manner.<sup>10</sup>

Intent or negligence can also be imputed to the corporation *directly*, by proving the existence of intent or negligence of the corporation itself. This intent or negligence can then be deduced from for instance the internal organisation of the corporation, such as how the corporation is managed, the decision-making culture, the factual course of events, and the mental climate within the corporation.<sup>11</sup>

Corporate criminal liability is thus established on the basis of deficiencies within the structures, policies, and culture of the corporation itself.<sup>12</sup>

*Is corporate criminal liability limited to specific offences?*

Before 1976, corporate criminal liability was limited to certain economic offences on the basis of article 15 of the Economic Offences Act (hereafter: EOA). Since 1976, when article 51 DPC in its current form came into force, this limitation no longer applies.<sup>13</sup> The Explanatory Memorandum explains that it is complex to maintain a distinction between various offences, including the international crimes as stated in the ICA, because there are no standards on the basis of which a proper distinction could be made.<sup>14</sup>

That being said, the exact mode of establishing corporate criminal liability differs according to the type of offence. In respect of more serious offences (*misdrifven*), the DPC requires proof of both *actus reus* and *mens rea*. However, for lighter offences - misdemeanours or

---

<sup>9</sup> *Kamerstukken II 1975/76*, 13655, 3, 19.

<sup>10</sup> M Hornman & E Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea*', in F de Jong, JAE Vervaele, MM Boone, C Kelk, FAMM Koenraad, FGH Kristen, D Rozenblit & E Sikkema (eds), *Overarching views of delinquency and deviancy- rethinking the legacy of the Utrecht School* (Eleven International Publishers 2015) 297.

<sup>11</sup> M Hornman, *De strafrechtelijke aansprakelijkheid van leidinggevenden van ondernemingen. Een beschouwing vanuit multidimensionaal perspectief* (diss. UU) (Boom Juridisch 2016); L Enneking e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen, Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles* (Boom Juridische Uitgevers 2016) 140.

<sup>12</sup> *ibid* 292.

<sup>13</sup> R van Elst, *Strafbare rechtspersonen en hun leidinggevers* (Nijmegen Ars Aequi Libri 1997) 9; art 15 Economic Offences Act.

<sup>14</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Deventer Kluwer 2009) 163.

contraventions - it is generally sufficient for the public prosecutor to prove only the existence of *actus reus* in order to establish corporate criminal liability.<sup>15</sup>

### 3.1.2 Procedural Law governing criminal prosecution and relevant actors (prosecution and authorities, victims, NGOs, courts)

#### *Procedural framework for prosecuting a corporation*

The Dutch procedural framework for prosecuting a corporation is laid down in Title VI of Book 4 of the Dutch Code of Criminal Procedure (hereafter: DCCP) (articles 528-532 DCCP). Although this is not directly clear from the wording of the DCCP, the normal criminal procedure applicable to the prosecution of individuals also extends to corporations.<sup>16</sup> A corporation is regarded as a suspect from the moment that there is a reasonable suspicion that criminal activity is taking place within the corporation.<sup>17</sup>

When the corporation is prosecuted, it is represented in court by the director, or in case there are multiple directors, by one of them.<sup>18</sup> The DSC has clarified that the corporation may decide to be represented by more directors at the same time.<sup>19</sup> The judge has the right to demand the personal appearance of a particular director.<sup>20</sup> The representative of the corporation has the right to remain silent.<sup>21</sup> Trial information is communicated to the defendant, which is done by delivering it to the residence or to the place of office of the corporation or to the residence of one of the directors of the corporation.<sup>22</sup>

As far as the commission of core crimes under the International Crimes Act (ICA) is concerned, to which the aforementioned article 51 DPC on corporate liability also applies, the National Prosecutor (*Landelijk Parket*) has exclusive jurisdiction to prosecute.<sup>23</sup> The District Court in The Hague is the sole competent court to hear these cases.<sup>24</sup> The procedural rules applicable to ICA prosecutions are complementary to the procedural rules which are laid down in the DCCP.<sup>25</sup> However, prosecutions for ICA crimes are not time-barred.<sup>26</sup> The ICA prohibits the prosecution of persons enjoying personal immunity – notably foreign

---

<sup>15</sup> BF Keulen & E Gritter, 'Corporate Criminal Liability in the Netherlands', in M Pieth, R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 184.

<sup>16</sup> A Minkenhof's, *Nederlandse Strafoordering*, elfde druk Prof. mr. JM Reijntjes (ed) (Kluwer 2009) 561.

<sup>17</sup> art 27 Dutch Code of Criminal Procedure.

<sup>18</sup> art 528(1) Dutch Code of Criminal Procedure.

<sup>19</sup> HR 26 januari 1988, NJ 1988/ 815.

<sup>20</sup> art 528(3) Dutch Code of Criminal Procedure.

<sup>21</sup> HR 13 oktober 1981, NJ 1982/17.

<sup>22</sup> art 529(1) Dutch Code of Criminal Procedure.

<sup>23</sup> C Cleiren, J Nijboer, D Paridaens-van der Stoel, *Internationaal Strafrecht Tekst & Commentaar* (Kluwer 2009) 1538.

<sup>24</sup> art 15 International Crimes Act designates the court in The Hague as the competent court, except for the competence of the judge designated by the Act Military Criminal Law.

<sup>25</sup> In para 4 (more specific in art 10 – art 16) of the ICA general rules of criminal procedural law are laid down.

<sup>26</sup> art 13 International Crimes Act, except for crimes as mentioned in article 7(1) and as far those crimes relate to the crimes mentioned in article 9 International Crimes Act, retrieved from: <<http://wetten.overheid.nl/BWBR0015252/2006-01-01>> last reviewed 31 May 2016.

heads of state, governmental leaders and ministers of foreign affairs - but this limitation will obviously not apply to prosecutions of corporations.

A 'Protocol for the treatment of complaints under the International Crimes Act' (hereafter: Protocol) sets out more specific rules for the prosecution of crimes under the ICA.<sup>27</sup> The Protocol states that several factors should play a role in taking a decision regarding whether there is a sufficient and realistic prospect that a successful investigation and prosecution can be brought within a reasonable time. These factors include relevant treaties, the possibility of safely carrying out missions in relevant foreign countries, and the chance of collecting a sufficient amount of evidence, taking into account the willingness of witnesses and foreign countries to cooperate with the Netherlands.<sup>28</sup>

*Are there special rules, especially for fact-finding?*

The general framework of rules concerning fact-finding is laid down in the DCCP. Additional rules are laid down in statutes concerned with specific crimes, such as the ICA and EOA.

The investigation of ICA crimes is conducted by the National Criminal Investigation Department of the National Police Agencies (*Korps Landelijke Politiediensten*).<sup>29</sup> Possibilities of investigating on foreign territory may be limited, the cooperation of foreign authorities may not be forthcoming, and witnesses may be hard to find.<sup>30</sup>

The investigation of offences under the EOA is governed by the framework as laid down in the DCCP. Pursuant to the EOA, investigators are entitled to seize property when this is in the interest of the investigation.<sup>31</sup> Investigators have the competence to access any place and to request data inspection if this is reasonably required for the fulfilment of their task and to make copies of these data.<sup>32</sup>

One respondent elaborated on the process of fact-finding regarding core crimes involving corporations. In order to find evidence, the DPPO investigates the total volume of import and export products of a certain corporation. As to export products, the respondent referred to the *Van Anraat* case, explaining that Van Anraat exported products which were used to create chemical weapons, which were in turn used to commit war crimes. Van Anraat was fully aware of the eventual use of the products sold. As to import products, the respondent referred to investigations with respect to the Democratic Republic of Congo (DRC). In the DRC, several mining areas are controlled by militias, which plunder mines and use mining

---

<sup>27</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt.* 2011, 22803, 1.

<sup>28</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt.* 2011, 22803.

<sup>29</sup> C Cleiren, J Nijboer, D Paridaens-van der Stoel, *Internationaal Strafrecht Tekst & Commentaar* (Kluwer 2009) 1538.

<sup>30</sup> M Wijers, K Lünemann, R Haveman, S ter Woerds, J Timmer, *Evaluatie Plan van Aanpak opsporing en vervolging oorlogsmisdrijven* (Verwey-Jonker Instituut 2005) 32.

<sup>31</sup> art 18(1) Economic Offences Act.

<sup>32</sup> arts 19, 20 Economic Offences Act.

proceeds to engage in conflict in the course of which war crimes are committed. When mineral ores are imported by a Dutch corporation which is aware of the origin of the ores, and the use of the proceeds, the corporation may possibly be complicit in war crimes. In order to establish knowledge on the part of the corporation, the DPPO has to closely investigate complex 'intermediate markets' (*tussenmarkten*) for mineral ores.<sup>33</sup>

*Is it possible to try a corporation (or individual) in absentia?*

As indicated above, on the basis of article 528 DCCP a corporation is represented in the proceedings by the director, or in case there are more directors by one of them.<sup>34</sup> This also applies to international crimes under the ICA.

### 3.2 Principles of Jurisdiction/Building the nexus – in a nutshell

#### 3.2.1 Defining jurisdiction – in a nutshell

The rules of jurisdiction in Dutch criminal law are laid down in articles 2 to 7 of the Dutch Penal Code (hereafter: DPC). These articles provide for territorial and extraterritorial criminal jurisdiction. As far as extraterritorial jurisdiction is concerned, they provide in particular for active and passive personality jurisdiction. However, passive personality jurisdiction only pertains to crimes that are punishable by at least eight years in prison and that are punishable in the State of commission.<sup>35</sup> The passive personality principle also extends to aliens with permanent residence in the Netherlands.<sup>36</sup>

After the ratification of the Statute of the International Criminal Court, the Dutch government introduced a new law on international core crimes, the aforementioned International Crimes Act (hereafter: ICA). The ICA allows for the exercise of extraterritorial and even universal jurisdiction.<sup>37</sup>

### 3.3 International law/Human rights framework

In prosecuting core crimes or treaty crimes, the Netherlands is bound by the rules of the broad range of international conventions and treaties it is party to. The framework of these sources of law - relevant international treaties - will be set out below, with a specific table for the UN human rights treaties.

#### 3.3.1 Core crime conventions

##### *Geneva Conventions on the Laws of War*

The Netherlands is a party to the Geneva Conventions on the Laws of War and its two Additional Protocols. These conventions provide for universal jurisdiction: respectively

---

<sup>33</sup> Public prosecutor working within the field of international crimes.

<sup>34</sup> art 528(1) Dutch Code of Criminal Procedure.

<sup>35</sup> art 5(1) of the Dutch Penal Code. In 2013 the DPC was revised in this respect. *Kamerstukken II 2012/13*, 33572, 1.

<sup>36</sup> art 5(2) of the Dutch Penal Code.

<sup>37</sup> The adoption of the law also allowed for the prosecution of crimes against humanity under the universality principle. This was not possible before. *Kamerstukken II 2001/02*, 28337, 3.

articles 49,50, 129 and 146 of the four conventions require states to search for alleged offenders 'regardless of their nationality'.<sup>38</sup>

### *Rome Statute*

The Netherlands is a party to the Rome Statute establishing the International Criminal Court (hereafter: ICC).<sup>39</sup> The ICA provides for universal jurisdiction over the core crimes listed in the ICC Statute.<sup>40</sup>

### *Convention on the Prevention and Punishment of the Crime of Genocide*

The Netherlands is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, since 1966.

### 3.3.2 *Conventions dealing with treaty crimes*

#### *UN Convention against Corruption (UNCAC)*<sup>41</sup>

The Netherlands is a party to the UNCAC which entered into force on the 30<sup>th</sup> of November 2006.<sup>42</sup> Article 42 (1) sub a of the UNCAC provides for territorial jurisdiction, including, in article 42(1) sub b, jurisdiction on the basis of the flag principle. Furthermore, article 42 (2) offers states the possibility to establish jurisdiction on the basis of the passive (sub a) and active (sub b) nationality principle.

#### *UN Convention against Transnational Organised Crime (UNTOC)*<sup>43</sup>

The Netherlands is a party to the UNTOC and its protocol (which is aimed at preventing, suppressing, and punishing trafficking in persons), the separate Convention on Action against Trafficking in Human Beings of the Council of Europe, and the International Labour Organization conventions concerning child labour and working conditions.<sup>44</sup> Article

---

<sup>38</sup> art 49 of Geneva Convention I; Article 50 of Geneva Convention II; art 129 of Geneva Convention III; Article 146 of Geneva Convention IV. It is also cited by the International Committee of the Red Cross as being part of Customary International Humanitarian Law (rule 158); International Committee of the Red Cross, *Universal jurisdiction over war crimes*, <<https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>> last reviewed 1 September 2016.

<sup>39</sup> The Netherlands signed the Rome Statute during the conference that formed the basis for this Statute in 1998 and subsequently ratified it on 17 July 2001.

<sup>40</sup> *Kamerstukken II* 2011/12, 32475, 3; *Kamerstukken II* 2002/03, 28337, 17.

<sup>41</sup> 'United Nations Convention against Corruption', *United Nations Office on Drugs and Crime*, retrieved from: <[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)> last reviewed 31 May 2016.

<sup>42</sup> 'Verdrag van de Verenigde Naties tegen corruptie', *Verdragenbank Overheid* <<https://verdragenbank.overheid.nl/nl/Treaty/Details/010077.html>> last reviewed 18 August 2016.

<sup>43</sup> United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols thereto*, <[https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THEREO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREO.pdf)> last reviewed 31 May 2016.

<sup>44</sup> Slavery Convention (1926) (League of Nations); Forced Labour Convention (1930); Protection of Wages Convention (1949); Abolition of Forced Labour Convention (1957); Minimum Age Convention (1973); Worst Forms of Child Labour Convention (1999).

15 (1) sub a of the UNTOC provides for territorial jurisdiction, including in sub b jurisdiction based on the flag principle. Article 15 (2) sub a UNTOC provides for jurisdiction on the basis of the passive nationality principle and sub b the active nationality principle.

### *UN Torture Convention*

The Netherlands ratified the Convention against Torture at the end of 1988. In 2002, an optional protocol - in which the acceptance of control mechanisms is regulated - was added to the convention, which the Netherlands ratified in 2010.<sup>45</sup> Article 5 (1) sub a of the UN Torture Convention provides for territorial jurisdiction, sub b for jurisdiction based on the active nationality principle, and sub c based on the passive nationality principle. Section 5 (2) provides for presence-based universal jurisdiction.

### *OECD Convention on Combatting Bribery of foreign public officials in international business transactions (OECD Anti-Bribery Convention).*

The OECD Anti-Bribery Convention<sup>46</sup> is implemented in Dutch legislation since the 1<sup>st</sup> of February 2001.<sup>47</sup> Article 4 sub 1 of the Convention provides for territorial jurisdiction, and sub 2 provides for jurisdiction on the basis of the active nationality principle when a Dutch national or a Dutch corporation is guilty of bribing a foreign official, even when all illegal activities took place outside the territory of the Netherlands.<sup>48</sup>

### 3.3.3 *Human Rights Treaties*

There are nine major UN human rights treaties. The Netherlands can be regarded as a strong advocate for human rights. In 2012, it established an 'Institute for Human Rights' (*College voor de rechten van de mens*), with the aim of promoting human rights, increasing awareness of these rights among Dutch citizens and promoting their observance. The Institute operates in conformity with the Paris Principles and has maintained an "A" accreditation status.<sup>49</sup>

The Netherlands is a party to seven of the nine UN human rights treaties which are set out in the following table:

---

<sup>45</sup> 'Naleving van het Verdrag tegen Foltering in Nederland', *Nederlandse Vereniging voor de Verenigde Naties*, <<http://www.nvvn.nl/artikel/naleving-van-het-verdrag-tegen-foltering-in-nederland/>> last reviewed 1 August 2016.

<sup>46</sup> Organisation for Economic Co-operation and Development, *Convention on combatting bribery of foreign public officials in international business transactions* <[https://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)> last reviewed 12 August 2016.

<sup>47</sup> 'Nederland doet meer tegen buitenlandse omkoping', *Rijksoverheid*, <<https://www.rijksoverheid.nl/actueel/nieuws/2013/01/08/nederland-doet-meer-tegen-buitenlandse-omkoping>> last reviewed 12 August 2016.

<sup>48</sup> G Smid, *Internationale corruptiebestrijding in Nederland*, TvCo 2016/03, p 115

<sup>49</sup> International Coordinating Committee of National Institutions for the promotion and protection of human rights (ICC), *Chart of the status of national institutions. Accreditation status as of 23 May 2014* <<http://nhri.ohchr.org/EN/Documents/Accreditation%20Status%20Chart.pdf>> last reviewed 31 May 2016.

Treaty	Signed	Ratified
<b>International Covenant on Civil and Political Rights</b>	25 Jun 1969	11 Dec 1978
<b>International Covenant on Economic, Social and Cultural Rights</b>	25 Jun 1969	11 Dec 1978
<b>Convention on the Elimination of All Forms of Discrimination against Women</b>	17 Jul 1980	23 Jul 1991
<b>International Convention on the Elimination of All Forms of Racial Discrimination</b>	24 Oct 1966	10 Dec 1974
<b>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>	4 Feb 1985	21 Dec 1988
<b>International Convention on the Protection of All Persons from Enforced Disappearance</b>	29 Apr 2008	23 Mar 2011
<b>Convention on the Rights of the Child</b>	26 Jan 1990	6 Feb 1995

The human rights conventions, with the exception of the UN Torture Convention, do not confer jurisdiction over international crimes. However, procedural human rights guarantees, such as the right to a fair trial, are obviously relevant to international crimes prosecutions. In addition, the treaties impose, or may be considered to impose, positive obligations on the Member States, which may include the establishment of jurisdiction to guarantee victims' right to a remedy. It is unclear, however, to what extent international human rights law requires states to establish *extraterritorial* jurisdiction.

The two main treaties that have not been ratified by the Netherlands are the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities. The first convention has not been signed, due to the granting of the same rights to illegal residents as those residing lawfully.<sup>50</sup> The latter convention was signed in 2007, but has not yet been ratified. This is mainly due to practical reasons relating to legislation which has to be changed and costs which have to be made regarding the performance of treaty obligations.<sup>51</sup>

### 3.3.4 *Soft law mechanisms relevant to corporate social responsibility*

Besides conventions, there are a significant number of soft law mechanisms that are in place and used by the Netherlands in order to prevent core and treaty crimes. One of the most prominent instruments for our purposes are the UN Guiding Principles on business and

<sup>50</sup> National Report submitted by The Netherlands in 2012 to the Human Rights Council for the Working Group on the Universal Periodic Review at 8. Document no. A/HRC/WG.6/13/NLD/1.

<sup>51</sup> 'Mission and Ambition', *College voor de rechten van de mens*, <<https://www.mensenrechten.nl/mission-and-ambition>> last reviewed 14 August 2016.

human rights (also known as the Ruggie Principles).<sup>52</sup> These Principles, even though they are not binding, have led to the adoption of new policies on both the European and the national level. According to the Principles, Dutch corporations ought to respect human rights in the course of their worldwide activities, and the Dutch government has to offer redress in case of violations.

The Netherlands also supports the OECD Guidelines on Multinational Corporations, and on that basis has established a so-called National Contact Point (*Nationaal Contactpunt*).<sup>53</sup> Also, the Dutch government stimulates corporate social responsibility, by establishing knowledge networks and providing financial support for relevant initiatives.<sup>54</sup>

### 3.4 Framework for Prosecuting a Cross-Border Case

To build a cross border-case, the first step is to find information which leads to a suspicion of a crime. In cases where sufficient information is available, the second step is to conduct an investigation, aimed at gathering evidence. When this investigation yields sufficient evidence, the third step is a decision by the public prosecutor on whether or not to prosecute and to bring the case before a (trial) court.

#### 3.4.1 From information to prosecution

The information usually is collected by the police through their own investigation or through citizens informing the police of a (suspected) crime. One of the respondents explains that there are no specific policy regulations governing this so-called 'start information' (*startinformatie*). Accordingly, this belongs to the public prosecutor's freedom of investigation. Both respondents indicated, however, that in cases concerning international crimes, information regularly comes from NGOs.<sup>55</sup> In offering information, NGOs often demand that the source of information be protected, meaning that no personal data about the source may be included in the criminal file. The DCCP offers a possibility to accommodate such demands (namely on the basis of article 187d in conjunction with article 149b DCCP).

During the interview, one of the respondents cited the need for enhanced dual-use goods consultations, which are currently held between the Ministry of Foreign Affairs and the Dutch customs authorities on the basis of the Sanctions Act. In these consultations, parties discuss ways to deal with dual-use goods, *i.e.*, goods that can be used for both civilian and military applications. As these goods could also be used to commit international (war) crimes, it is advisable to also inform the public prosecutor responsible for international

---

<sup>52</sup> United Nations Human Rights – Office of the High Commissioner, *Guiding principles on business and human rights* <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> last reviewed 14 August 2016.

<sup>53</sup> Nationaal Contactpunt (NCP) Nederland <<https://www.oesorichtlijnen.nl/ncp>> last reviewed 14 August 2016.

<sup>54</sup> Dutch Government on Corporate Social Responsibility on its website. <<https://www.rijksoverheid.nl/onderwerpen/maatschappelijk-verantwoord-ondernemen/inhoud/maatschappelijk-verantwoord-ondernemen-in-de-praktijk>>.

<sup>55</sup> Public Prosecutors working in the field of international criminal law.

crimes prosecutions of the content of these consultations. The respondent explained that sometimes the prosecutor just happens to find information about possible international crimes by reading the Parliamentary Questions. Accordingly, due to the current lack of information exchange, cases of corporate involvement in international crimes may not be detected.

When there is a sufficient amount of “start information” the public prosecutor can conduct an investigation.<sup>56</sup> One of the respondents explained how an investigation concerning cross-border corporate crime is, or should be, carried out in practice. The most crucial issue is to obtain documents regarding the administration of the corporation, more specifically the minutes of meetings.

The respondents explain that, in making the decision whether or not to prosecute, they take several factors into account such as the feasibility of a case, the possibilities to conduct an investigation, the availability of, and access to, evidence in foreign countries, the safety of witnesses, and the possibility of doing independent research in foreign countries.

#### 3.4.2 Rules governing the investigation

The investigation is primarily governed by rules laid down in the Dutch Code of Criminal Procedure (hereafter: DCCP). However, when an investigation is focused on certain specific crimes, such as international crimes, additional rules have to be taken into account which are laid down in separate acts such as the International Crimes Act (hereafter: ICA) or the Economic Offences Act (hereafter: EOA).

#### 3.4.3 International Crimes

When building a case concerning an international crime there are complementary rules to the DCCP, laid down in the International Crimes Act (hereafter: ICA). A Protocol sets out specific rules for the prosecution of crimes laid down in the ICA.<sup>57</sup> The National Prosecutor decides on the basis of a report whether or not to undertake a prosecution. In making this decision, he notably inquires whether there is sufficient information to treat the case as a reasonable *prima facie* case and whether there is a reasonable prospect of a successful prosecution.<sup>58</sup>

#### 3.4.4 Crimes of corruption

In building a cross-border case concerning corruption, the DPC provides competence to the Dutch Public Prosecutor’s Office (DPPO) to prosecute corporations. Corporations can be prosecuted for actively bribing a civil servant or judge on the basis of article 177, 177a and, 178 DPC, by offering them a gift (*actieve omkoping*). When a civil servant or judge is being bribed by accepting a gift, they also can be prosecuted for passive bribery (*passieve omkoping*)

---

<sup>56</sup> art 132 Dutch Code of Criminal Procedure; the public prosecutor is competent to start a preliminary investigation on the basis of art 141 Dutch Code of Criminal Procedure.

<sup>57</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt.* 2011, no 22803, 1.

<sup>58</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt.* 2011, no 22803, 3.

on the basis of article 362, 363, and 364 DPC.<sup>59</sup> Although corruption is criminalized in the DPC, the specific word ‘corruption’ cannot be found in this code. In the search for one definition of corruption, a unique answer is hard to find. Corruption is dependent on several factors such as the culture of a particular country. Whether corruption exists often depends on the particular facts of a case (*‘dat ligt eraan’*).<sup>60</sup> Per the decision in *Drijfmest*, a corporation can be prosecuted for corruption when the actions of the person working for the corporation fall ‘within the sphere’ of the corporation.<sup>61</sup>

The justification for extraterritorial jurisdiction over corruption is economic: increased globalization only works adequately when there is an international ‘level playing field’ for cross-border business practices.<sup>62</sup> To support corporations in preventing corruption and moreover to inform them about the specific instances in which they contravene the rules on corruption, the OECD established guidelines.<sup>63</sup>

#### 3.4.5 *Authorities which are concerned with the task of investigation*

The DPPO is a national organization which is active in ten districts within the Netherlands. In addition to these institutions, there is a specific authority named ‘The National Office’ (*Landelijk Parket*) and an authority named ‘The Functional Office’ (*Functioneel Parket*), both of which are charged with specific tasks of investigation.

#### *Authorities concerned with international crimes*

The Protocol for the treatment of complaints under the International Crimes Act designates the National Prosecutor (*Landelijk Parket*) in Rotterdam as the sole authority responsible for ICA crimes.<sup>64</sup> As far as the prosecution of international crimes is concerned, the National Prosecutor cooperates with the Team International Crimes of the Criminal Investigation Department.<sup>65</sup>

#### *Authorities concerned with crimes of corruption*

As far as the prosecution of corruption is concerned, a distinction is made between law-enforcement agencies and anti-corruption agencies. The latter agencies - ‘the National Office for Promoting Ethics & Integrity in the Public Sector’ and ‘The Integrity Bureau’ - carry out

---

<sup>59</sup> Aanwijzing opsporing en vervolging buitenlandse corruptie, *Stcrt* 2012, 26939, <<https://zoek.officielebekendmakingen.nl/stcrt-2012-26939.html>> last reviewed 31 May 2016.

<sup>60</sup> JH Maat, ‘Buitenlandse corruptie en de aanpak door de Rijksrecherche’, in: WODC, *Justitiële Verkenningen, Ambtelijke corruptie* ( Boom Juridische Uitgevers 2005) 66.

<sup>61</sup> HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938.

<sup>62</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ Eijsbouts & JM. de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* ( Kluwer 2010) 144.

<sup>63</sup> Nationaal Contactpunt OESO-richtlijnen, *OESO-guidelines: Combatting Corruption*, <<http://www.oesorichtlijnen.nl/oeso-richtlijnen/c/corruptiebestrijding>> last reviewed 31 May 2016.

<sup>64</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt*. 2011, no 22803, 1.

<sup>65</sup> ‘Internationale Misdrijven’, *Openbaar Ministerie*, <<https://www.om.nl/onderwerpen/internationale/>> last reviewed 31 May 2016.

tasks to prevent corruption in accordance with article 6 UNCAC.<sup>66</sup> The competence to investigate and prosecute crimes of corruption lies with the DPPO. The National Police Internal Investigations Department (*Rijksrecherche*) is the department within the DPPO which is the competent agency to investigate suspicions of corruption.<sup>67</sup> The competent office to prosecute crimes of corruption is the National Office (*Landelijk Parket*), based in Rotterdam. Within this national office, a specific public prosecutor is appointed, specialised in crimes of corruption.

#### *Authorities concerned with economic crimes*

On the basis of article 10(1) Sanctions Act, civil servants of the National Tax Agency (*Rijksbelastingdienst*), of the Tax Agency of the Ministry of Finance (*Belastingdienst van het Ministerie van Financiën*), of the General Inspection Agency (*Algemene Inspectiedienst*), and of the Cultural Heritage Inspection of the Ministry of Education, Culture and Science (*Erfgoedinspectie van het Ministerie van Onderwijs, Cultuur en Wetenschappen*), as well as commanders of Dutch war ships, have competence to monitor compliance with the Sanctions Act.<sup>68</sup> On the basis of article 10(2) Sanctions Act, the Minister of Finance is competent to appoint persons with the task of monitoring corporations' compliance with the rules laid down in the financial part of the Sanctions Act. *De Nederlandsche Bank* (DNB) received competence to monitor financial corporations who, on the basis of the 'Act Financial Monitoring' (*Wet op het Financiële Toezicht*), can carry out the business of a bank, the business of an exchange adjustment, the business of insurance, or the business of a payment service in the Netherlands.<sup>69</sup> Furthermore, they can monitor the retirement funds as mentioned in article 1 of the 'Retirement Act' (*Pensioenwet*) and the funds for job retirement as laid down in article 1 of the 'Act Mandatory Job Retirement Ruling' (*Wet Verplichte Beroepspensioenregeling*). The AFM (*Stichting Autoriteit Financiële Markten*) is the competent authority to monitor compliance of the rules by financial corporations who, on the basis of the 'Act Financial monitoring', can offer rights of participation in an investment fund or can be the administrator of such a fund or can grant investment services.<sup>70</sup>

### 3.5 Prominent cases, media coverage

This section contains an overview of some leading Dutch cases concerning the prosecution of corporations for violations of international law, or at least for transboundary crimes.

#### *The Trafigura Case*

A prominent example of the prosecution of a corporation for violations abroad is the Trafigura Group case. The corporation Trafigura, with offices in London, Amsterdam, and

---

<sup>66</sup> W Slingerland, F Eijkelhof, van Hulst, O Popovych, J Wempe, 'National Integrity System Assessment The Netherlands', Transparency International [2012] 198.

<sup>67</sup> 'Wat doet de Rijksrecherche' <<http://www.rijksrecherche.nl/organisatie/doet-rijksrecherche/>> last reviewed 10 August 2016.

<sup>68</sup> art 1 Regeling toezichthoudende ambtenaren Sanctions Act 1977.

<sup>69</sup> art 10(2) sub a, c, f, j. Sanctions Act; R Van Elst, 'Commentaar op artikel 10 Sanctiewet 1977', in DJMW Paridaens, PAM Verrest (eds.), *Tekst & Commentaar Internationaal Strafrecht* (Kluwer 2015).

<sup>70</sup> art 10(2) sub b,d Sanctions Act.

Geneva, was accused of dumping waste, originating from the ship Probo Koala, in the harbour in Ivory Coast in 2006. This did not only lead to environmental damage, but it had a great health impact on the inhabitants and even caused deaths. These actions of Trafigura led to a number of judicial claims in different countries. In the Netherlands, the DPPO started an investigation, solely focusing on the activities of Trafigura within the Netherlands. This investigation eventually resulted in a prosecution and trial. In 2010, the District Court of Amsterdam convicted Trafigura for exporting waste with the ship Probo Koala to Ivory Coast being aware of the fact that these substances were harmful to life and health.<sup>71</sup> Trafigura was sentenced to a payment of 1 million euro for violating two provisions of Dutch law. Firstly, Trafigura had violated the regulation laid down in article 10.60 sub 5 of the 'Law of Environmental Management' (*Wet Milieubeheer*), by exporting slops from Amsterdam to Ivory Coast. Violation of this regulation is punishable on the ground of article 1a sub 2 jo. article 2 sub 1 of the Economic Offences Act (hereafter: EOA). Secondly, Trafigura had violated article 174 Dutch Penal Code (hereafter: DPC), because it had delivered gravely polluted slops to Amsterdam Port Services while concealing the harmfulness of the substances.

Both the DPPO and Trafigura appealed the decision of the District Court of Amsterdam. In 2012, the Amsterdam Court of Appeal confirmed the District Court's decision.<sup>72</sup> Again, both the DPPO and Trafigura appealed, but the case was never brought before the Dutch Supreme Court as Trafigura and the DPPO reached a settlement for an amount of 1.3 million euro.<sup>73</sup>

Trafigura was not prosecuted, however, for the crimes committed on the territory of Ivory Coast. Greenpeace filed a complaint against this decision, but it was dismissed by the Hague Court of Appeal on the grounds that the DPPO did not have a complete criminal file and the authorities of Ivory Coast did not respond to requests to conduct criminal investigation on their territory.<sup>74</sup> The defendants, for that matter, pleaded that the Netherlands did not have jurisdiction to prosecute Trafigura for the crimes committed in Ivory Coast, as the Dutch Trafigura corporation, a holding company, could not be qualified as a Dutch legal person at that time. According to the defendants, the corporation may have been incorporated in the Netherlands, but its main activities were taking place from the United Kingdom and Switzerland.<sup>75</sup> The Court of Appeal did not address the jurisdictional question in detail, although it stated that it could not readily be assumed that the Dutch judge would accept jurisdiction over offences committed in Ivory Coast.<sup>76</sup>

---

<sup>71</sup> Rb. Amsterdam 23 juli 2010, ECLI:NL:RBAMS:2010:BN2149, r.o. 10.

<sup>72</sup> Hof Amsterdam, 23 december 2011, ECLI:NL:GHAMS:2011:BU9237, r.o. 8.

<sup>73</sup> M Willems, Justitie schikt met Trafigura in Probo Koala-zaak, *NRC.nl* 16 november 2012<<https://www.nrc.nl/nieuws/2012/11/16/justitie-schikt-met-trafigura-in-probo-koala-zaak-a1439934>> last reviewed 2 September 2016.

<sup>74</sup> Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012.

<sup>75</sup> Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012 under 16; J van Kleef, H Smits, M van Geest, *Het Belastingparadijs*, (Amsterdam Atlas Contact 2013).

<sup>76</sup> Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012, r.o. 3.1.

In early 2016, victims of the Probo Koala filed a (tort) claim against Trafigura before a Dutch court. The proceedings were instituted by the foundation 'Victimes des Déchets Toxiques Côte d'Ivoire', which includes 25 victim organizations.<sup>77</sup>

A tort claim against Trafigura was also brought in England, on behalf of 15,000 victims. The claim cited that Trafigura exported waste being aware of the harmfulness of the substances. The claim resulted in Trafigura making payments to the victims. The case was never brought before the court, as the case ended in a settlement, for the high amount of £30 million.<sup>78</sup>

If anything, the Trafigura case has triggered calls for corporations to act more responsibly in host countries.<sup>79</sup>

### *Prosecutor v. Van Anraat*

The Van Anraat case concerned a Dutch businessman, Frans van Anraat, who was prosecuted for conspiracy to commit genocide and to commit war crimes. Van Anraat was the sole supplier of the chemical 'thiodiglycol' and delivered it to the regime of Saddam Hussein. The chemical is the predominant component in the production of mustard gas, which was used by Hussein's military for gas attacks during the war between Iraq and Iran in 1988. The District Court of The Hague dismissed the charge of complicity to genocide, but convicted the accused of complicity in war crimes on the basis of article 8 Wartime Offences Act and article 48 DPC.<sup>80</sup> This conviction was upheld by the Supreme Court.<sup>81</sup>

In this case, 16 victims joined the procedure to claim damages.<sup>82</sup> The Court of Appeal of The Hague<sup>83</sup> declared these claims inadmissible, however, on the ground that they were not 'easy in nature', *i.e.*, the admissibility criterion for joining a procedure to claim damages (at least until the end of 2010).<sup>84</sup> In the Court's view, a criminal trial should not be burdened with complex civil cases. The Supreme Court agreed.<sup>85</sup>

---

<sup>77</sup> H de Zeeuw, 'Nieuwe massaclaim tegen gifdumping Trafigura', *NRC.nl* 2 maart 2016 <<https://www.nrc.nl/nieuws/2016/03/02/slachtoffers-gifdumping-dienen-nieuwe-massaclaim-in-tegen-trafigura-a1408915>> last reviewed 2 September 2016.

<sup>78</sup> L Roorda, 'Geld stinkt niet, chemisch afval wel: een terugblik op de Probo Koala-zaken', *Ucall blog* 10 november 2015 <<http://blog.ucall.nl/index.php/2015/11/geld-stinkt-niet-chemisch-afval-wel-een-terugblik-op-de-probo-koala-zaken/>> last reviewed: 2 September 2016; Amnesty International, *Trafigura: A toxic journey* <<https://www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/>> last reviewed 24 October 2016.

<sup>79</sup> L Enneking, F Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen* (Boom Juridische Uitgevers 2016) 451-453.

<sup>80</sup> Hof Den Haag 9 mei 2007, ECLI:NL:GHSGR:2007:BA4676, r.o. 18.

<sup>81</sup> HR 30 juni 2009, NJ 2009/481.

<sup>82</sup> It is of note that pursuant to article 3 of the Act Conflict of Laws Tort Law (*Wet Conflictenrecht Onrechtmatige Daad*) (WCOD), the claims of the victims had to be examined taking into account Iraqi and Iranian law. L Zegveld, 'Slachtoffers van internationale misdrijven in het strafproces', *NJB* 2012, afl. 28, p 1936.

<sup>83</sup> Hof Den Haag 9 mei 2007, ECLI:NL:GHSGR:2007:BA4676, r.o. 18.

<sup>84</sup> The criterion was changed on the 1st of January 2011, when the Act strengthening position of victims of crimes within the criminal law (*Wet versterking positie van slachtoffers van delicten in het strafrecht*) came into force. Wet van 17 december 2009 (Stb. 2010,1) i.w.t. op 1 januari 2011 (*Stb.* 2010, 792).

<sup>85</sup> HR 30 June 2009, NJ 2009/481.

### *Public Prosecutor v. Guus Kouwenhoven*

Guus Kouwenhoven was a Dutch businessman who owned and participated in several companies active in Liberia. These companies were closely linked to the regime of Charles Taylor who was the dictator of Liberia at that time. During the armed conflict in Liberia, the UN Security Council and the Council of the EU passed a resolution, respectively regulation, prohibiting the supply of weapons to Liberia. These legal instruments were subsequently codified in national legislation. In 2005, Kouwenhoven was taken into custody in the Netherlands, as he was suspected of complicity in war crimes in Liberia during the period 2002-2003. Allegedly, he had illegally supplied weapons which were used by soldiers of Charles Taylor to commit atrocities. He was charged with complicity in war crimes and arms smuggling. The District Court in The Hague found him guilty on the latter charge and sentenced him to 8 years' imprisonment. It rejected the war crimes charge.<sup>86</sup> On appeal, both charges were dismissed for lack of evidence.<sup>87</sup> The Supreme Court (DSC) subsequently held that insufficient attention had been paid to the need to put two anonymous witnesses, key to the prosecution case, in a protection programme. Thus, it overturned the verdict of the Court of Appeal.<sup>88</sup> The DSC referred the case back to the Court of Appeal in 's Hertogenbosch. That court, applying the standard of *dolus eventualis*, went on to convict him for complicity in war crimes.<sup>89</sup>

### *Rival*

Corporations can be held criminally liable for (contributing to) international crimes under article 5 of the International Crimes Act (ICA). The most prominent case against a corporation – rather than a businessman (*e.g.*, van Anraat, Kouwenhoven) – under the ICA has been the *Rival* case. This case pertained to the involvement of the Dutch company Lima Holding B.V. in the construction of a security barrier between the West Bank and Israel. After several warnings from the Ministry of Foreign Affairs requesting full termination of any involvement in the construction, the Palestinian NGO Al Haq brought a criminal complaint against the company in the Netherlands. This complaint alleged complicity in war crimes and crimes against humanity committed in the Netherlands and/or the Occupied Palestinian Territories during the period of 2004 to the present by the company Lima Holding B.V. In

---

<sup>86</sup> District Court The Hague, 6 June 2006, LJN:AX7098.

<sup>87</sup> Court of Appeal The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068; Rechtspraak *Vrijspraak in zaak Kouwenhoven*<<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Vrijspraak-in-zaak-Kouwenhoven.aspx>> last reviewed 18 August 2016.

<sup>88</sup> Dutch Supreme Court, 20 April 2010, ECLI:NL:HR:2010:BK8132; A Smeulers, 'Tien jaar Wet Internationale Misdrijven – Een evaluatie', *DD* 2014/25, afl. 4, p 277.

<sup>89</sup> Court of Appeal 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760. See for a comment C Ryngaert, 'Dutch Court of Appeal holds businessman liable for complicity in war crimes', UCall Blog, 10 May 2017 <<http://blog.ucall.nl/index.php/2017/05/dutch-court-of-appeal-holds-businessman-liable-for-complicity-in-war-crimes/>> last accessed 4 June 2017.

particular, the complaint referred to contributions by the company to the construction of the security barrier and settlements by Israel in the West Bank'.<sup>90</sup>

In 2013, the prosecutor decided not to bring a case, citing the minimal involvement of the company in the construction of the barrier and the termination of these acts after the filing of the criminal complaint.<sup>91</sup> Moreover, the prosecutor referred to the complexity of these legal questions and the likelihood of an extensive investigation. In his view, such an investigation would not only require a significant amount of resources, but, due to its extraterritorial aspect, would also necessitate the cooperation of the Israeli authorities (which may not be forthcoming).<sup>92</sup>

One of the respondents confirmed the difficulties to find a sufficient amount of evidence in such cases. As he explained, access to the relevant administration was not possible as the information was located at a subsidiary of the corporation in Israel and the Israeli authorities refused to act on requests for legal assistance sent by the Dutch Public Prosecutor.<sup>93</sup> The respondent furthermore noted that this case triggered a public debate in the Netherlands and put other Dutch corporations doing business in foreign states on notice. It even resulted in the withdrawal of several Dutch corporations doing business in the Occupied Palestinian Territories. For instance, the Pension Fund 'PGGM' withdrew its involvement in five Israeli banks because of the latter's involvement with Israeli settlements in the West Bank.<sup>94</sup> Furthermore, the Dutch water company 'Vitens' abandoned its cooperation with the Israeli company Mekorot, whereas 'Royal Haskoning DHV', a consulting engineering firm, ended its involvement in the establishment of a waste water purification instalment in East Jerusalem.<sup>95</sup>

### *SBM Offshore*

International corruption cases have recently garnered significant media attention in the Netherlands. In 2014, an international corruption case was settled between the Dutch Public Prosecutor's Office (hereafter: DPPO) and the Dutch corporation SBM Offshore, in relation to bribery in Angola and Equatorial Guinea and allegedly also in Brazil. SBM Offshore agents had entered and explored new, foreign markets since 2000, in the process bribing

---

<sup>90</sup> Böhler Advocaten *Al-Haq/ report of war crimes and crimes against humanity by Riwal* <<http://www.alhaq.org/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf>> last reviewed: 7 September 2016.

<sup>91</sup> A Smeulers, 'Tien jaar Wet Internationale Misdrifven – Een evaluatie', *DD* 2014/25, afl. 4, p 287.

<sup>92</sup> Geen verder onderzoek naar kraanverhuurder', *Landelijk Parket*, 14 mei 2013 <<https://www.om.nl/algemeen/english/@31795/verder-onderzoek/>> last reviewed: 31 May 2016 ; A Smeulers, 'Tien jaar Wet Internationale Misdrifven – Een evaluatie', *DD* 2014/25, afl. 4, p 284.

<sup>93</sup> Thijs Berger, public prosecutor.

<sup>94</sup> J Franke, 'Ethische connecties PGGM', *NIW* 16 januari 2014 <<http://www.niw.nl/ethische-connecties123/>> last reviewed: 7 September 2016.

<sup>95</sup> 'PGGM stopt met Isrealische banken', *NOS.nl*, 8 januari 2014 <<http://nos.nl/artikel/594827-pggm-stopt-met-israelische-banken.html>> last reviewed 7 September 2016.

foreign officials.<sup>96</sup> The case was eventually settled for 240 million USD, a new record for a Dutch corruption case.<sup>97</sup> Although it was a new record, the settlement amount would actually have even been higher, had the DPPO not taken into moderating circumstances. Reasons for this moderation were the fact that SBM Offshore itself draw the public prosecutor's attention to the practices, carried the research out itself, and fully cooperated with the DPPO and the FIOD.<sup>98</sup>

The DPPO considered that it had no jurisdiction to prosecute the natural persons who were involved in the corrupt practices of the corporation SBM Offshore. According to the DPPO, it only has jurisdiction when the criminal conduct took place on Dutch territory or when the suspect is Dutch. This implies that the Netherlands may have jurisdiction over a Dutch(-incorporated) corporation involved in foreign corrupt practices but not over the corporations' employees of foreign nationality who actually committed the crimes abroad.<sup>99</sup>

The case is also pending in Brazil, relating to corrupt practices of SBM Offshore in Brazil, consisting of paying bribes to employees of the company Petrobras to secure contracts.<sup>100</sup> A first settlement was entered into, according to the terms of which SBM is to pay the Brazilian government 163 million USD.<sup>101</sup> The Brazilian Justice department recently rejected this settlement, and SBM is currently waiting for more information.<sup>102</sup>

### *VimpelCom-Case*

Another recent case concerning corruption is the VimpelCom Case. VimpelCom is a Russian-Norwegian corporation headquartered in Amsterdam. The corporation was accused of bribing a local official in order to get access to the telecommunications market of Uzbekistan.<sup>103</sup> According to the DPPO, this practice constitutes bribery of a government official (*ambtelijke omkoping*) and forgery of documents (*valsheid in geschrift*).<sup>104</sup> Although all the illegal activities took place outside the Netherlands, and a subsidiary of VimpelCom (Unitel) had bribed foreign officials, the Netherlands nevertheless had jurisdiction as the headquarters of Vimpelcom are in Amsterdam (on the basis of the active personality principle as laid down in article 7 DPC).<sup>105</sup> In 2016, Dutch and US prosecutors settled with

---

<sup>96</sup> SBM Offshore N.V. betaalt US\$ 240.000.000 wegens omkoping, 12 november 2014 <<https://www.om.nl/onderwerpen/ambtelijke-corruptie/@87202/sbm-offshore-betaalt/>> last reviewed 6 September 2016.

<sup>97</sup> Redactie Volkskrant. 'Nederlands bedrijf SBM Offshore betaalt megaschikking van 192 miljoen', *Volkskrant* 12 November 2014.

<sup>98</sup> G Smid, 'Internationale corruptiebestrijding in Nederland', TvCo 2016/03, p 117

<sup>99</sup> 'SBM Offshore N.V. betaalt US \$ 240.000.000 wegens omkoping', *Openbaar Ministerie*, 12 november 2014, <<https://www.om.nl/vaste-onderdelen/zoeken/@87202/sbm-offshore-betaalt/>> last reviewed 24 October 2016.

<sup>100</sup> B Nagtegaal, 'Miljoenenschikking SBM Offshore toch niet goedgekeurd', *NRC.nl* 2 september 2016.

<sup>101</sup> R Postma, 'SBM Offshore treft eerste schikking in Brazilië', *NRC.nl* 26 January 2016.

<sup>102</sup> Redactie Volkskrant, 'Justitie Brazilië keurt Petrobras- schikking SBM Offshore af', *Volkskrant.nl* 2 september 2016.

<sup>103</sup> Redactie NRC, 'Grootste ontnemingszaal ooit in Nederland', *NRC.nl* 7 juli 2016.

<sup>104</sup> K van der Togt, D.S. Schreuders, 'Recente ontwikkelingen op het gebied van corruptiebestrijding', *Bb* 2016/19, afl. 7, 79.

<sup>105</sup> G Smid, 'Internationale corruptiebestrijding in Nederland', TvCo 2016/03, p 115

VimpelCom for 795 million USD. The Netherlands will receive half of the amount, which is 397 million USD.<sup>106</sup>

All these cases evidence the particular challenges for courts to make a sound evaluation of criminal cases which have occurred in a completely different contexts characterized by different norms and values, and a different geographical, cultural, and social setting.<sup>107</sup>

### 3.6 Statistics

The Team International Crimes (hereafter: TIC) of the Dutch national police office carried out 13 investigations against 23 suspects in the year 2013. In 2014 the TIC carried out 18 investigations<sup>108</sup> and 16 in 2015.<sup>109</sup> However, from the statistics it does not become clear how many of these investigations specifically concerned corporations.<sup>110</sup>

### 3.7 Public debate on Corporate Social Responsibility

The debate on human rights and corporations is ongoing in the Netherlands. For example, the Institute for Human Rights emphasized in its annual report of 2014 the importance for corporations to take into account human rights.<sup>111</sup> Furthermore, in the Human Rights Report 2014 of the Ministry of Foreign Affairs, it is stated that the Netherlands improves the respect of human rights by corporations in accordance with the aforementioned 'Guiding Principles on Business and Human Rights'.<sup>112</sup>

The Netherlands published its national action plan on business and human rights in 2014,<sup>113</sup> which discusses both the expectations of corporations as well as improvements still to be made. One improvement concerns the clarity of Dutch law regarding CSR. This led to a request for more elaborate research on this topic by the Ministry of Foreign Affairs and the Ministry of Security and Justice. The research was carried out on behalf of the latter Ministry's Research and Documentation Centre (*Wetenschappelijk Onderzoeks- en Documentatiecentrum*, WODC) in 2015 by the Utrecht Centre for Accountability and Liability Law (UCALL). The research focused specifically on the duty of care of Dutch companies concerning CSR and also compared it to its neighbouring countries. It concluded that there is currently no specific law in place yet, which obliges corporations to act with due diligence with respect to their own or their subsidiaries' conduct.

In 2002, a platform was created consisting of multiple NGOs that cooperate in order to pursue the corporate social responsibility agenda. This 'MVO Platform' (MVO is Dutch for

---

<sup>106</sup> V Van der Boon, 'VimpelCom schikt corruptiezaak voor \$795 mln', *Financieel Dagblad* 18 februari 2016.

<sup>107</sup> L Zegveld and J Handmaker, 'Universal Jurisdiction: State of Affairs and Ways Ahead, A Policy Paper', *International Institute of Social Studies* 2012, 6.

<sup>108</sup> Rapportagebrief Internationale Misdrijven 2014, 29 juni 2015, 4.

<sup>109</sup> Rapportagebrief Internationale Misdrijven 2015, 23 mei 2016, 2.

<sup>110</sup> Rapportagebrief Internationale Misdrijven 2013, 25 september 2014, 2.

<sup>111</sup> Jaarverslag 2014, College voor de Rechten van de Mens, 21.

<sup>112</sup> Mensenrechtenrapportage 2014, Ministerie van Buitenlandse zaken, 31.

<sup>113</sup> Ministerie van Buitenlandse Zaken (April 2014), 'Nationaal Actieplan bedrijfsleven en mensenrechten' <<https://www.rijksoverheid.nl/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten>> last reviewed 31 May 2016.

CSR) was initiated by twelve NGOs and has grown into a platform of 33 participating organisations. On the Platform's website, its aim is described as "to stimulate, facilitate and coordinate activities of the different organisations in order to reinforce each other's efforts".<sup>114</sup> The MVO platform issues its own statements on issues within the field of CSR.

One of the main NGOs in the Netherlands dealing with the role of corporations is SOMO, the Centre for Research on Multinational Corporations, which in particular, conducts research in this field. It aims at strengthening the position of civil society, workers, and local communities with regard to multinational corporations, by providing information and engaging players such as the boards of these corporations and relevant stakeholders.

## 4 Holding Corporations Accountable – the Jurisdictional Issue

### 4.1 General Jurisdiction/General Aspects of Jurisdiction

#### 4.1.1 General jurisdiction – Generals

Jurisdiction concerns the reach which the State gives to its (criminal) law.<sup>115</sup> It addresses the question as to *where* and *to whom* Dutch criminal law is applicable.<sup>116</sup> The scope of a State's jurisdiction is ordinarily informed by the desire to protect the specific interests of the State, including its nationals.<sup>117</sup>

The general rules concerning jurisdiction in Dutch criminal law are laid down in the Dutch Penal Code (hereafter: DPC), articles 2-8, in conjunction with the 'Decision on International Obligations with regard to Extraterritorial Jurisdiction' (*Besluit internationale verplichtingen extraterritoriale rechtsmacht*).<sup>118</sup> The Dutch Government changed the legal framework concerning jurisdiction on July 1, 2014 when the 'Act on Review of the Rules concerning Extraterritorial Jurisdiction in Criminal Cases' (*Wet herziening regels betreffende extraterritoriale rechtsmacht in strafzaken*) and the aforementioned Decision entered into force. Three rationales informed this change of legal framework: (1) strengthening the protective function of the DPC; (2) removing the distinction between jurisdiction over persons with Dutch nationality and foreigners residing on Dutch territory; and (3) making the rules on jurisdiction more accessible.<sup>119</sup>

Aside from these general rules on jurisdiction, specific rules apply to a number of crimes, in particular crimes related to drugs, economic crimes, military crimes, and international crimes. When a person, whatever his nationality or territorial presence, is suspected of a

---

<sup>114</sup> <<http://mvoplatfom.nl>> last reviewed 31 May 2016.

<sup>115</sup> HD Wolswijk, *Locus delicti en rechtsmacht* (Gouda Quint 1998) 17.

<sup>116</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (r Kluwer 2009) 138.

<sup>117</sup> HD Wolswijk, *Locus delicti en rechtsmacht* (Gouda Quint 1998) 17.

<sup>118</sup> *Besluit internationale verplichtingen extraterritoriale rechtsmacht*<<http://wetten.overheid.nl/BWBR0034775/2016-01-01>> last reviewed 31 May 2016.

<sup>119</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikel 2 -8', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer 2014).

crime concerning the import of drugs into the Netherlands,<sup>120</sup> Dutch criminal law applies on the ground of harm caused to Dutch society, even if the relevant acts of preparation, participation, or attempt took place on foreign territory.<sup>121</sup> Furthermore, Dutch criminal law applies to military service-members suspected of any criminal act committed outside the Netherlands.<sup>122</sup>

Finally, article 2 of the International Crimes Act (hereafter: ICA) provides not only for active and passive personality-based jurisdiction<sup>123</sup> but also for presence-based universal jurisdiction over international crimes. When neither the alleged perpetrator nor the victim has Dutch nationality, Dutch criminal law applies to anyone who is suspected of a crime laid down in the ICA committed outside the territory of the Netherlands, provided that he is present on Dutch territory (i.e., in the Netherlands or in Bonaire, Saint Eustatius, and Saba) at the time of the initiation of the proceedings.<sup>124</sup> There is no clear definition of the term 'presence'. From the *travaux préparatoires* it can be derived that 'an investigation can start when there exists a grave reason to assume that the suspect is present on Dutch territory'.<sup>125</sup> If the suspect leaves Dutch territory during the period of investigation, jurisdiction continues to apply; the prosecution can proceed and the arrest and extradition of the suspect can be requested.<sup>126</sup>

Even where jurisdiction obtains on the basis of the aforementioned principles, it cannot be exercised in cases where the suspect enjoys international immunity (Art. 8 DPC). However, the Dutch Supreme Court ruled in its decision of 8 July 2008, that rules of immunity directly deriving from international law restrict the application of the DPC.<sup>127</sup>

The jurisdictional principles (art. 2-8 DPC) discussed below also apply to corporations. However, some problems may arise in applying these principles, in particular the nationality and territoriality principles, to corporations. These problems have not yet come up in Dutch case-law, but they have been addressed in (international) doctrine.

When applying the nationality principle, the complexity lies in the determination of the nationality of a corporation, which may be active in multiple states. The Netherlands determines corporate nationality by means of the place of registration rather than the place where the corporation's main activities are carried out. This method is in fact used

---

<sup>120</sup> art 13(3) Opium Act. A an act of preparation within the context of smuggling drugs of List I within and without Dutch Territory. B: attempt to or participation in smuggling drugs of List I within and without Dutch Territory.

<sup>121</sup> art 3 Economic Offences Act; R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>122</sup> arts 4 and 168 of the Military Criminal Code.

<sup>123</sup> art 2(1)(b) and (c) International Crimes Act.

<sup>124</sup> art 2(1)(a) International Crimes Act.

<sup>125</sup> *Kamerstukken II* 2001/02, 28337, 3.

<sup>126</sup> JAC Bevers, 'Commentaar op artikel 2 WIM', in: JAC Bevers, N.M. Blokker, JFL Roording, *Tekst&Commentaar: Internationaal Strafrecht* (Kluwer 2007).

<sup>127</sup> HR 8 juli 2008, *LJN* BC7418, *NJ* 2011/91, r.o. 6.6.

throughout the European Union with a view to guaranteeing the freedom of establishment (article 49 TFEU).

Attribution of jurisdiction under the territoriality principle can be based on several models. Problems do not so much arise when the *locus delicti* is grounded on territorial results (effects) of (foreign) conduct but rather when it is grounded on the corporation's *territorial conduct*. When exactly a corporation's conduct occurs in the Netherlands for jurisdictional purposes is open to debate, even if it is established that corporate liability is based on the attribution of acts of natural persons to the corporation. The different proposed models of attribution of jurisdiction are discussed in Section 2a.<sup>128</sup>

#### 4.1.2 Territorial Jurisdiction

Territoriality can be regarded as the basic principle of criminal jurisdiction.<sup>129</sup> This holds even if the dominance of territoriality as a standard parameter for establishing jurisdiction has been somewhat weakened by the increased importance of the aforementioned principle of proper administration of justice. Dutch doctrine sees the justification for the territoriality principle in the sovereignty of the State, international public order, and practical considerations.<sup>130</sup>

##### *General Legal Framework*

The principle of territorial jurisdiction is laid down in article 2 Dutch Penal Code (hereafter: DPC) and in article 8 of the 'Act on General Provisions' (*Wet Algemene Bepalingen*). These statutory provisions state that the DPC applies to everyone who is suspected of a crime committed on the territory of the Netherlands.<sup>131</sup> The precise boundaries of Dutch territory are based on treaties. Dutch territory includes besides Dutch territory also Dutch internal waters, the territorial sea, and the airspace above its territory.<sup>132</sup>

Dutch law uses the term *locus delicti* to define the place where the crime occurred. In the statute, no rules can be found regarding the determination of the *locus delicti*. In practice, four doctrines have been developed:<sup>133</sup>

- The doctrine of the human behaviour;

---

<sup>128</sup> See also A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 255.

<sup>129</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009) 138; AH Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht* (WODC 2010). 5.

<sup>130</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009) 139.

<sup>131</sup> Art 2 Dutch Penal Code, *De Nederlandse Strafwet is toepasselijk op ieder die zich in Nederland aan enig strafbaar feit schuldig maakt*.

<sup>132</sup> JED Voetelink, 'De soevereine staat en de uitoefening van rechtsmacht' - Status of Forces: Strafrechtsmacht over militairen vanuit internationaalrechtelijk & militair-operationeel rechtelijk perspectief', *Academisch Proefschrift Universiteit van Amsterdam* 2012, 108.

<sup>133</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* Kluwer 2014).

- The doctrine of the instrument;
- The doctrine of the constitutive effect;
- The ubiquity doctrine.

On the basis of the first doctrine, the doctrine of the human behaviour, the *locus delicti* is the place where the criminal conduct takes place. The second doctrine, the doctrine of the instrument, applies in cases where a crime is committed with an instrument; the *locus delicti* is determined by the place where the used instrument did its work.<sup>134</sup> On the basis of the third doctrine, the constitutive effects doctrine, the *locus delicti* is the place where the crime is completed (*i.e.*, where the effect occurred), insofar as the occurrence of the effect forms a component of the crime.<sup>135</sup> The last doctrine, the ubiquity doctrine, is not an independent doctrine, but it makes clear that the three abovementioned doctrines can overlap. What can be gathered from this is that the *locus delicti* can be located in more than one place.

#### *Application to Corporations*

To apply the aforementioned doctrines to *corporate* conduct requires some more unpacking. This applies specifically to cases concerning the application of the doctrine of the human behaviour, for which territorial conduct is the jurisdictional linchpin. The application of the doctrine of the constitutive effect to corporations, in contrast, is more straightforward, even if some offences can only be committed by legal persons or natural persons as the case may be.<sup>136</sup> After all, this doctrine is only concerned with identifying the adverse territorial effect of foreign conduct, regardless of the nature or type of offense.

Regarding the doctrine of human behaviour, the first step in attributing actions of natural persons to corporations for jurisdictional purposes is determining both which natural persons can have their actions attributed to a legal person and what types of actions can be attributed to legal persons. Two methods have been put forward to that effect: the imputation method and the holistic method. The imputation method establishes corporate criminal liability by attributing (imputing) the actions of one or more natural persons to the corporation. Pursuant to this model, territorial jurisdiction over the corporation may obtain as soon as the natural person (agent of the corporation) carries out a territorial act. The holistic model, for its part, determines liability by means of organizational failure. The question then is how to determine the place of action of the *group of persons* concerned with organizational failure. Wolswijk suggested to focus on the places of actions of the relevant persons (a suggestion which comes close to the imputation method), or on the corporation's place of registration.<sup>137</sup> Schneider, however, (although not writing from a Dutch perspective) proposes to base the territorial place of organization of a corporation on the corporation's

---

<sup>134</sup> *ibid*

<sup>135</sup> *ibid.*

<sup>136</sup> A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in: D Brodowski, M Espinoza de los Monteros de la Parra, K. Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 254.

<sup>137</sup> H Wolswijk, 'Country Report "The Netherlands"', in M Böse, F Meyer, A Schneider (eds), *Conflicts of jurisdiction in criminal matters in the European Union*, vol 1, National reports and comparative analysis (Nomos 2013) 329 – 367.

centre of main interest.<sup>138</sup> Under Schneider's theory, a foreign corporate agent's practices in the Netherlands may not immediately trigger Dutch territorial jurisdiction if the corporation's centre of main interest is outside the Netherlands (even if possibly it has been formally incorporated in the Netherlands). It is clear that a pure imputation method casts the jurisdictional net most widely.

*Practice: (High Court) Jurisprudence*

From the Dutch Supreme Court's case-law it can be gleaned that territoriality is construed broadly. A link with Dutch territory is required for any exercise of jurisdiction, but not all components of the crime need to have taken place on Dutch territory. As the Supreme Court ruled as early as 1981, in a case concerning criminal acts which only had a minor link with Dutch territory, Dutch criminal law still applied to the case.<sup>139</sup> This view still prevails: in 2010, the Supreme Court ruled that the Netherlands has jurisdiction over crimes of which certain components took place outside the Netherlands, as long as a territorial link could be established.<sup>140</sup>

#### 4.1.3 Extraterritorial Jurisdiction

Extraterritorial jurisdiction means that the Netherlands has jurisdiction over crimes committed outside Dutch territory.<sup>141</sup> The legal framework concerning extraterritorial jurisdiction in Dutch criminal law has radically changed after the entry into force of the 'Act of Amendment, Review Extraterritorial Jurisdiction' (*Wijzigingswet, Herziening extraterritoriale rechtsmacht*) on the 1<sup>st</sup> of July 2014,<sup>142</sup> alongside the 'Decision regarding International Obligations of Extraterritorial Jurisdiction'. The Decision refers to the different international obligations which the Netherlands meets as result of the amended legislation, listing obligations in the context of respectively the United Nations, the Council of Europe, and the European Union.<sup>143</sup>

In the Netherlands, the exercise of extraterritorial jurisdiction needs a statutory basis. It cannot be based directly on customary international law (*gewoonterecht*).<sup>144</sup> This was confirmed by the Supreme Court in 2001, when it decided that the Dutch judge is not allowed to ignore Dutch national rules of jurisdiction when they conflict with rules of customary international law.<sup>145</sup>

---

<sup>138</sup> A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 257.

<sup>139</sup> HR 14 september 1981, ECLI:NL:1981:AC3699, r.o. 4.

<sup>140</sup> HR 2 februari 2010, ECLI:NL:HR:2010:BK6328, r.o. 2.4.

<sup>141</sup> A De Hoogh en G Molier, 'Jurisdictie', in N. Hornbach, R. Lefeber, O. Ribbelink, *Handboek Internationaal Recht*, (TMC Asser Press 2007) 5.

<sup>142</sup> Staatsblad 2013, 484.

<sup>143</sup> Besluit internationale verplichtingen extraterritoriale rechtsmacht' <<http://wetten.overheid.nl/BWBR0034775/2016-01-01>> last reviewed 31 May 2016.

<sup>144</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer2014).

<sup>145</sup> HR 18 september 2001, ECLI:NL:PHR:2001:AB1471, r.o. 6.4.

The active personality principle allows a state to penalize (certain) acts committed by its nationals outside national territory.<sup>146</sup> Under art 7 of the Dutch Penal Code (hereafter: DPC), the active personality principle exists in two forms: one with and one without the condition of dual criminality, *i.e.*, criminality of the act both in the Netherlands and in the state where the act was committed. Under art 7(1) DPC, Dutch criminal law applies to a Dutch national who has committed a crime outside Dutch territory when the act is punishable under both Dutch and foreign territorial law. The dual criminality requirement of art 7(1) DPC is not interpreted very strictly. Art 7(2) DPC provides for exceptions to the dual criminality requirement of art 7(1) DPC, containing a limited list of offences which do not require punishment of the act under foreign territorial law. The crimes listed in art 7(2) DPC include in particular the so-called 'loyalty crimes', these are crimes committed against the security of the State and against royal dignity (art 7(2)(a)).<sup>147</sup> Besides these crimes, art 7(2) (a) DPC includes a number of crimes harming the specific interests of the Dutch State, namely crimes concerning activities of a parliamentary committee, human trafficking, bigamy, and breach of secrets. Art 7(2)(b) DPC criminalizes acts harming the International Criminal Court.<sup>148</sup> Art 7(2)(c) DPC concerns crimes of sexual abuse of minors.<sup>149</sup> Art 7(2)(d) DPC concerns crimes of genital mutilation against a girl below the age of 18.<sup>150</sup> Art 7(2)(e) DPC concerns crimes which force someone to do something under violence or threat of violence.<sup>151</sup> The active personality principle is in the Netherlands restricted to "crimes" (*misdriften*), although specific statutes allow for the exercise of jurisdiction over (lesser) misdemeanours (*overtredingen*).<sup>152</sup>

As a justification for the active personality principle, Dutch doctrine mentions the prohibition of extraditing one's own nationals.<sup>153</sup> It ensures that a Dutch national returning to the Netherlands after committing a crime abroad, can be prosecuted for that crime in the Netherlands when he cannot be extradited to the foreign state.

The Dutch Supreme Court (hereafter: DSC) ruled in 1990 that the active personality principle also applies to legal persons (corporations).<sup>154</sup> The case concerned the interpretation of article 13 of the Sanctions Act, which was construed as including corporations within its scope. Regarding the requirement of double criminality in article 7 DPC, it is not relevant whether the corporation is a legal subject according to the law of the *locus delicti*. What only matters

---

<sup>146</sup> A De Hoogh en G Molier, 'Jurisdictie', in N Hornbach, R Lefeber, O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press 2007) 5.

<sup>147</sup> art 7(2) sub a Crimes as defined in Title I and II of Book 2 Dutch Penal Code and arts 192a – 192c, 197a – 197c, 206, 237, 272 and 273.

<sup>148</sup> art 7(2) sub b: Crimes as defined in arts 177, 178, 179, 180, 189, 200, 207a, 285a, 361 Dutch Penal Code.

<sup>149</sup> art 7(2) sub c: Crimes as defined in arts 240b and 242-250 Dutch Penal Code.

<sup>150</sup> art 7(2) sub d: Crimes as defined in arts 300 – 303 Dutch Penal Code.

<sup>151</sup> art 7(2) sub e: Crime as defined in art 284 Dutch Penal Code.

<sup>152</sup> A De Hoogh en G Molier, 'Jurisdictie', in N Hornbach, R Lefeber, O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press 2007) 5.

<sup>153</sup> AH Klip, A-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht* (WODC 2010) 91.

<sup>154</sup> HR 11 december 1990, ECLI:NL:HR:1990:ZC8649, r.o. 11.

is whether the act is punishable according to that country's criminal law.<sup>155</sup> The nationality of a corporation is usually established on the basis of the real seat of the corporation (*werkelijke vestigingsplaats*).<sup>156</sup> From the 'Notice Investigation and Prosecution of Foreign Corruption' it follows that legal persons are considered as having Dutch nationality when they are established according to Dutch law and when they have their statutory seat (*statutaire zetel*) in the Netherlands.<sup>157</sup>

The passive personality principle allows the State to penalize certain acts which took place outside the territory of the Netherlands and which are committed against its nationals.<sup>158</sup> Dutch Parliament's reluctance to include the passive personality principle changed after an advisory opinion of the Council of State in 2001, which concerned the implementation of the UN Convention on the Safety of United Nations and Associated Personnel.<sup>159</sup> Until 2014, the principle only applied to a limited list of specific offences, which was gradually extended. For instance, in 2009, article 5b DPC was inserted so as to establish passive personality jurisdiction in the context of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings.

Currently the passive personality principle is laid down in article 5 of the DPC. Pursuant to the 2014 amendment of the DPC, it applies to everyone suspected of committing a crime against a Dutch national, a Dutch resident, a Dutch civil servant, or a Dutch vehicle, vessel, or aircraft, when the crime is sentence of at least 8 years imprisonment. This general inclusion of the principle strengthens the protection given by the DPC.<sup>160</sup>

Article 5(1) DPC lays down the requirements of the passive personality principle. The principle only applies if the crime is punishable with at least eight years of imprisonment under the DPC and if the crime is punishable in the State of commission of the crime.<sup>161</sup> The rationale regarding the eight years rule is that passive personality jurisdiction should only be justified for crimes of a certain gravity.<sup>162</sup>

---

<sup>155</sup> R Van Elst, 'Tekst & Commentaar bij artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>156</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009) 142.

<sup>157</sup> Aanwijzing opsporing en vervolging buitenlandse corruptie', *Stcrt.*2012, no 26939.

<sup>158</sup> A De Hoogh en G Molier, 'Jurisdictie', in N Hornbach, R Lefeber, O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press 2007) 5.

<sup>159</sup> Advies Raad van State en Nader Rapport, *Kamerstukken II* 2001/02, 28028, p 2; Convention on the Safety of United Nations and Associated Personnel <<http://www.un.org/law/cod/safety.htm>> last reviewed 30 March 2016; Verdrag inzake de Veiligheid van VN-personeel en geassocieerd personeel, *Tractatenblad* 1998, 84.

<sup>160</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>161</sup> art 5(1) Dutch Penal Code, De Nederlandse strafwet is toepasselijk op een ieder die zich buiten Nederland schuldig maakt aan een misdrijf tegen een Nederlander, een Nederlandse ambtenaar, een Nederlands voertuig, vaartuig of luchtvaartuig, voor zover op dit feit naar de wettelijke omschrijving een gevangenisstraf van ten minste acht jaren is gesteld en daarop door de wet van het land waar het begaan is, straf is gesteld.

<sup>162</sup> *Kamerstukken II* 2012/13, 33572, 3.

The passive personality principle also extends to corporations as, under Dutch law, ‘person’ is also understood ‘legal person’.<sup>163</sup>

On the basis of article 4 sub a-d and sub f, DPC jurisdiction can be obtained under the ‘protective principle’. Such jurisdiction concerns conduct which took place outside Dutch territory and threatens State security. The protection of ‘important national interests’ is the main aim of this relevant provision.<sup>164</sup>

The listed crimes concern not only national security in the strict sense but also crimes against the physical integrity of the King and counterfeiting of national bonds.<sup>165</sup> These provisions have been crafted in order to protect the Dutch political structure and its economy.<sup>166</sup> There are no specific requirements attached to the exercise of protective jurisdiction.

In the Netherlands no practice exists which targets companies under secondary boycotts. However, there is practice targeting companies under primary boycotts, e.g., the EU sanctions against the Russian Federation in the wake of the latter’s actions in Ukraine.<sup>167</sup> The boycott has an impact on Dutch companies, mainly those active within the vegetable and fruit sector.<sup>168</sup> The EU has also imposed sanctions on Syria, on the ground that Syria oppresses its own citizens.<sup>169</sup> EU sanctions regulations are directly applicable in the Netherlands.

Vicarious or derivative jurisdiction<sup>170</sup> is recognized in articles 8b and 8c DPC. Under article 8b(1), Dutch criminal law applies when criminal proceedings have been transferred to the Netherlands by a foreign state on the basis of a treaty which provides for criminal jurisdiction for the Netherlands. Under article 8b(3), Dutch criminal law applies to any person whose extradition for a terrorist offense, or an offense in preparation of, or facilitating a terrorist offense, has been declared inadmissible, has been declined, or has been refused. Under article 8b(4), Dutch criminal law also applies to anyone against whom the criminal proceedings have been taken over by the Netherlands at the request of an international tribunal established by treaty or decision of an international organization. Finally, under article 8c, Dutch criminal law applies to any alien who commits, outside the Netherlands, an offence punishable by at least eight years of imprisonment, if this alien is present in the

---

<sup>163</sup> R Van Elst, ‘Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr’, in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>164</sup> *Kamerstukken II* 2012/13, 33572, 3.

<sup>165</sup> R Van Elst, ‘Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr’, in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>166</sup> *Kamerstukken II* 2001/02, 28337, 3.

<sup>167</sup> The European Council Regulation No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine [2014] OJ L 229/1.

<sup>168</sup> Rijksoverheid *Sancties tegen Rusland*, <<https://www.rijksoverheid.nl/onderwerpen/internationale-sancties/inhoud/sancties-tegen-rusland>> last reviewed 25 August 2016.

<sup>169</sup> The European Council Regulation No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria [2012] OJ L 16/1.

<sup>170</sup> Also referred to as *Stellvertretende Strafrechtspflege*

Netherlands, and (a) extradition for this offense is refused, or (b) extradition is impossible because of the absence of a treaty relationship, subject to the requirement of dual criminality.

#### 4.1.4 *Universal jurisdiction*

Universal jurisdiction can be regarded as the broadest ground for establishing jurisdiction, as jurisdiction based on this principle can be established in respect of every person on foreign territory who commits a very serious crime. A link with the state of prosecution is, unlike the other grounds for establishing jurisdiction, not required for establishing universal jurisdiction.<sup>171</sup>

##### *Dutch Penal Code*

Although article 4 Dutch Penal Code (hereafter: DPC) is primarily concerned with jurisdiction based on the protective principle, it also features the principle of universality. On the basis of article 4 sub e DPC, the Netherlands enjoys jurisdiction based on the universality principle for crimes related to terrorism and, on the basis of article 4 sub c DPC, for crimes concerning counterfeiting (*valsmunterij*).<sup>172</sup> These sub-articles may concern the protection of national interests, yet their primary aim is compliance with international norms.<sup>173</sup> For counterfeiting, this is compliance with the International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 April 1929.<sup>174</sup> While the Act has been subject to legislative changes, it has nevertheless been held to maintain the grounds for jurisdiction based on universal jurisdiction.<sup>175</sup>

##### *Introduction of International Crimes Act*

Universal jurisdiction over *core crimes* is governed by the International Crimes Act (hereafter: ICA), adopted in 2003. Articles 2a and 3-8 ICA establish universal jurisdiction for genocide, crimes against humanity, war crimes, torture, and enforced disappearance.

The ICA provides that jurisdiction can be obtained over any person suspected of committing one of these crimes outside of the Netherlands insofar as he is present on Dutch territory.<sup>176</sup> This is referred to as 'secondary universal jurisdiction', *i.e.*, universal jurisdiction that is applied on the basis of territorial presence of the presumed offender after the fact is committed. The ICA only applies to core crimes committed after 2003. Core crimes committed before 2003 fall under discrete criminal codes, *i.e.*, the Wartime Offences Act dealing with core crimes that were applicable before 2003.

In practice, no corporation has yet been prosecuted in the Netherlands on the basis of the universality principle as laid down in the ICA. Given the problems of establishing transitory

---

<sup>171</sup> *Kamerstukken II* 2012/13, 33572, 3, p. 7, *Rijksoverheid* 11 maart 2013, retrieved from: <<https://www.google.com/#q=artikel+4+wetboek+van+strafrecht+universele+rechtsmacht>> last reviewed 28 August 2016.

<sup>172</sup> R van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, (Kluwer 2014).

<sup>173</sup> *ibid.*

<sup>174</sup> *ibid.*

<sup>175</sup> *Kamerstukken II* 2012/13, 33572, 3.

<sup>176</sup> art 2(a),(b),(c) of the International Crimes Act.

corporate presence, it is more likely that prosecutions will be brought under the nationality principle or the territoriality principle.

#### 4.1.5 *Other sources of jurisdiction*

As regards antitrust law, it is observed that the Dutch Competition Law Act of 1998 can be applied on the basis of the effects doctrine. Article 6 of this Act prohibits anti-competitive agreements between corporations that adversely affect natural competition on the Dutch market. Thus, the Act specifically refers to the effect which the crime has on the Dutch market. This was emphasised in the *travaux préparatoires*, where it was stated that neither the place where the agreements were made, nor the domicile of the corporations mattered, and that the deciding factor was where the agreement comes into effect.<sup>177</sup>

## 4.2 Jurisdiction for Prosecuting Corporations under International Law (UN law, multilateral treaties)

### 4.2.1 *General*

In 2014 the provisions on jurisdiction in the Dutch Penal Code (hereafter: DPC) were revised to enable the Netherlands to better fulfil its international obligations regarding the establishment of extraterritorial jurisdiction. After the revision, the fulfilment of international obligations is set out in article 6 DPC, in conjunction with the Decision regarding International Obligations of Extraterritorial Jurisdiction, which includes a list of treaty obligations (UN, Council of Europe, EU). Since 2014, when the Netherlands enters into new international commitments, only the Decision, and not the DPC itself, needs to be amended.<sup>178</sup>

### 4.2.2 *Jurisdiction prescribed by International Humanitarian Law – Core Crimes*

In the ICA, instead of translating the definitions of the crimes, the Dutch legislator decided to rather refer to the definitions already existing in the Geneva Conventions and the Statute of the International Criminal Court.<sup>179</sup> Article 5 ICA refers to grave breaches of the four Geneva Conventions and Additional Protocol I, as well as breaches of Additional Protocol II and the Hague Convention regarding the protection of cultural heritage. Article 6 concerns acts criminalised in case of a non-international armed conflict under Common Article 3 of the Geneva Conventions, as well as a list of other crimes, such as sexual violence and acts against a civilian population. Finally, similar to article 8 of the Wartime Offences Act, article 7 was included to prevent leaving unpunished war crimes not specifically defined in the previous articles; it criminalises any acts violating the treaty and customary laws of war in both an international and non-international conflict. It is emphasized again that the exercise of universal jurisdiction depends on the alleged offender being present on Dutch territory. Arguably, this limitation finds its roots in the universal jurisdiction provisions of the Geneva Conventions, which operate on the basis of the principle of *aut dedere aut judicare*. Under this

---

<sup>177</sup> *Kamerstukken II 1995/96*, 24707, 3.

<sup>178</sup> R Van Elst, 'Tekst en Commentaar Internationaal Strafrecht, commentaar op artikelen 2-8 Sr', in DJMW Paridaens, PAM Verrest, *Tekst & Commentaar Internationaal Strafrecht* (Kluwer 2015).

<sup>179</sup> *Kamerstukken II 2001/02*, 28337, 3, p 3.

principle, a state only has the option to extradite when it has custody of the offender, which in turn requires the person's arrest *in the territory*.

#### 4.2.3 Jurisdiction based on Customary International Law

The Netherlands does not acknowledge courts' exercise of jurisdiction directly based on customary international law, as it interprets the legality (*lex certa*) principle strictly.<sup>180</sup>

## 5 Overlapping Domestic Legal Framework and the Prosecution of Corporations

### 5.1 Conflicts of jurisdiction – General

The grounds for establishing (extraterritorial) jurisdiction under Dutch law are rather extensive. In drafting these grounds, the Dutch legislator was mainly driven by the motivation to protect the interests of the Netherlands. A Dutch commentator has observed that this focus on the national interest may well lead to an increase in positive conflicts of jurisdiction.<sup>181</sup> The Dutch Government may have been aware of the potential for such conflicts, but has not drafted rules on how to solve them. Pragmatic solutions have thus been developed, such as the possibility of transfer of prosecution or transfer of execution of a decision.<sup>182</sup>

For instance, article 552t Dutch Code of Criminal Procedure (hereafter: DCCP), provides that the Dutch public prosecutor may relinquish the prosecution to another state, in view of the proper administration of justice (*goede rechtsbedeling*).<sup>183</sup> The risk of positive conflicts of jurisdiction should not be overstated, however. In practice, few relevant extraterritorial cases have been brought in the Netherlands,<sup>184</sup> and even fewer cases have been brought against corporations for the commission of international crimes. Thus, it can be asserted that *negative* conflicts of jurisdiction (under-enforcement) are more likely to arise than positive ones (over-enforcement). This is also borne out by interviews conducted with practitioners.

Indeed, it appears that the Government's commitment to principles of corporate social responsibility (hereafter: CSR) is not necessarily matched by an increased willingness to prosecute corporations for CSR violations, *e.g.*, gross human rights violations, international crimes, or corruption. Prosecuting a major corporation carries the risk of financial and reputational damage to the corporation, which may eventually adversely affect the Dutch economy.<sup>185</sup> In cases against individuals, the hardship endured by the targeted person may also be factored in.

---

<sup>180</sup> R van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer 2014) 8.

<sup>181</sup> MJJP Luchtman, 'De opkomst van het beginsel van een goede rechtsbedeling', WvSvA.L. Melai/ A.H. Klip e.a. IV.1.1.6.1.

<sup>182</sup> MJJP Luchtman, 'De opkomst van het beginsel van een goede rechtsbedeling', WvSvA.L. Melai/ A H Klip e.a. IV.1.1.6.1.

<sup>183</sup> art 552t (1) Dutch Code of Criminal Procedure.

<sup>184</sup> AH Klip, AS. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, (WODC 2010) 98.

<sup>185</sup> L Enneking, F Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen* (Boom Juridische Uitgevers 2016) 136.

Also, practical factors are cited as reasons for under-enforcement, such as a lack of capacity within the Dutch Public Prosecutor's Office (hereafter: DPPO) and the difficulty of fact-finding on foreign territory.<sup>186</sup>

A respondent indicated that a substantial number of suspected corporations may have gone bankrupt by the time a decision to prosecute is taken, at which point enforcement no longer serves its purpose.

The respondent indicated that there are three key factors which play a role in taking a decision to prosecute or not: capacity, priority, and complexity. International crimes cases are often complex, and thus require high quality investigators. However, the average educational level of police officers in the Netherlands is relatively low (MBO, *i.e.*, vocational high school training). This may not always be sufficient to deal with highly complex cases. The respondent also stated that priority will be given to cases with a high chance of success, *i.e.*, cases in which sufficient information and evidence can be gathered, and in which investigations can be conducted in a foreign State. The respondent also stated that under-enforcement may be an impression rather than a reality: NGOs may bring a case to the attention of the prosecutor without hard evidence being available.

It is finally emphasized that, while prosecution may be rare, this does not mean that the DPPO does not act against corporations committing international crimes. While actual trials may not often be held, settlements between the DPPO and corporations or corporate officers may become routine occurrences.

## 5.2 Overlapping Domestic Jurisdictions – in a nutshell

Civil/tort jurisdiction is governed by the EU Brussels I Regulation (recast 2012), which is directly applicable in the Netherlands.<sup>187</sup> Pursuant to this Regulation, Dutch courts have civil jurisdiction over disputes involving corporations domiciled in the Netherlands.<sup>188</sup> Domicile is based on the location of the corporation's statutory seat, its central administration, or its principal place of business.<sup>189</sup> To comply with article 49 TFEU in which the freedom of establishment is laid down, EU Member States must determine the nationality of corporations by the place of registration in cases concerning active nationality. If it will determine the nationality by means of the place where the most actions take place, the other manner in determining nationality, it will violate article 49 TFEU as this freedom of establishment forbids discrimination of corporations registered under foreign law.<sup>190</sup> When the corporation is domiciled in another EU member state, there are exceptional situations in which a Dutch court can still claim jurisdiction over claims brought against the corporation (arts 5 to 7 Regulation). This special jurisdiction applies to cases where the harmful event

---

<sup>186</sup> *ibid* 136.

<sup>187</sup> Eur-Lex <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32001R0044>> last reviewed 18 August 2016.

<sup>188</sup> art 4(1) Brussel Ibis-Vo.

<sup>189</sup> art 63(1) Brussel Ibis-Vo

<sup>190</sup> A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 252.

takes place in the Netherlands<sup>191</sup> or when the dispute is linked to the operations of a branch or agency situated in the Netherlands.<sup>192</sup> Moreover, when a dispute is closely linked to a different claim already pending before a Dutch court, there might be sufficient overlap between the claims to join them.<sup>193</sup> Finally, the parties to the dispute could choose a Dutch court as the forum.<sup>194</sup>

When claims are brought before Dutch courts which concern corporations domiciled outside of the Netherlands (and the rest of the EU), different jurisdictional rules apply. Jurisdiction in these cases must be determined on the basis of the Dutch Code of Civil Procedure (hereafter: DCCP).<sup>195</sup> The most common basis for Dutch jurisdiction is similar to the Brussel I Regulation, namely the party's domicile in the Netherlands.<sup>196</sup> Besides the domicile link, Dutch law also provides grounds for jurisdiction on the basis of events that have taken place in the Netherlands<sup>197</sup> or when there is a series of cases so much interlinked, that it would benefit efficiency to consider them jointly.<sup>198</sup> The final noteworthy ground for jurisdiction is *forum necessitatis*, as established under article 9 DCCP. This principle applies when claims cannot be brought before a foreign court or when a case is somehow linked to the Netherlands and it is deemed unacceptable to require the plaintiff to submit the case to a foreign court.

### 5.3 Conflicting International Jurisdictions – in a nutshell

Even though multiple grounds of jurisdiction exist, the Netherlands has a preference for investigation and prosecution by the state where the crime took place.<sup>199</sup> In practice, however, there are few cases of multiple states being able and willing to prosecute the same cases on different - and conflicting - jurisdictional grounds. When a conflict of jurisdiction nevertheless arises, the states concerned will have to jointly consider which state is most suitable to pursue the prosecution, in the view of the proper administration of justice.<sup>200</sup>

## 6 Proposals for Reform of the Legal Framework of Jurisdiction

As explained above, Dutch jurisdictional rules have recently been overhauled through an amendment of the Dutch Penal Code in 2014. The aim of the amendment was to strengthen the possibilities of establishing jurisdiction over crimes with extraterritorial aspects, mainly in order to protect the national interests of the Netherlands but also to meet the State's

---

<sup>191</sup> art 7(2) Brussel Ibis-Vo

<sup>192</sup> art 7(5) Brussel Ibis-Vo

<sup>193</sup> art 8(1) Brussel Ibis-Vo

<sup>194</sup> art 25 & Art 26 Brussel Ibis-Vo

<sup>195</sup> arts 1 to 14 of the Dutch Code of Civil Procedure (Rv)

<sup>196</sup> art 2 Dutch Code of Civil Procedure (Rv)

<sup>197</sup> art 6(e) DCCP (Rv)

<sup>198</sup> art 7(1) DCCP (Rv). See, eg, the *Akpan* case Rb Den Haag 24 februari 2010; ECLI:NL:RBSGR:2010:BM1469; Rb Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854.

<sup>199</sup> *Kamerstukken II* 2012/13, 33572, 2, p. 14.

<sup>200</sup> *ibid* 15.

international (treaty) obligations.<sup>201</sup> It is unlikely that the legislator will amend the Penal Code for this purpose again any time soon.

In Dutch academia, a discussion is currently going on regarding the impact of the rules of jurisdiction on persons suspected of cross-border crime. As explained above, the Dutch Penal Code contains an extensive list of grounds on which prosecutors and courts can base their jurisdiction with a view to combating cross-border crime, without providing any rules on hierarchy between these grounds. The situation is largely similar in other states. As a result, prosecutorial 'forum shopping' may take place: a jurisdiction perceived to be most suitable for an investigation or successful prosecution may, almost randomly, be chosen. This choice of forum has significant consequences for the suspect, *e.g.*, in terms of language and location of the trial. Individual *rights* of the suspect may even be jeopardized, *e.g.*, the right to a family life and the right to a lawful judge. Although this latter right is interpreted differently in different States,<sup>202</sup> the interpretations have in common that the suspect ought to be protected against arbitrariness and that a prosecution should be foreseeable. This discussion brings to the fore the tension between the suspects' rights and the need for an effective approach to fight cross-border crime.<sup>203</sup> In some cases, it may well happen that the latter unfairly prevails over the former. Therefore, in each case, prosecutors and courts may want to be guided by the 'lawful judge' concept. Alternatively, and relatedly, a hierarchy between jurisdictional grounds may be considered in the interest of individual rights protection.

Another proposal for reform relates to the definition of a Dutch legal person (corporation), as the interpretation thereof may cause difficulties in practice. More specifically, one may wonder whether Dutch prosecutors should go after corporations which are only *registered* in the Netherlands, without engaging in any significant business activity on Dutch territory (*i.e.*, the so-called *postbusfirma's*). After all, these corporations have only been established in (or relocated to) the Netherlands for fiscal reasons and because of the presence of the airport of Schiphol and the port of Rotterdam.<sup>204</sup> Dutch prosecutors and courts may then spend scarce government resources to investigate and prosecute such basically foreign corporations in respect of cross-border crime. In a technical-jurisdictional case, such cases are based on the active personality principle, but in fact the Netherlands may act as a global law-enforcer. The aforementioned *VimpelCom* corruption case, concerning the Dutch prosecution of a Russian corporation headquartered in the Netherlands, is a case in point.

---

<sup>201</sup> 'Stb. 2013, 484 Uitbreiding extraterritoriale rechtsmacht' <<http://njb.nl/wetgeving/staatsbladen/uitbreiding-extraterritoriale-rechtsmacht.6516.lynkx>> last reviewed 31 May 2016.

<sup>202</sup> M Fabri and P Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries', *European Journal of Legal Studies*, Volume 1 issue 2 2007, 6.

<sup>203</sup> M Panzavolta, 'Choice of Forum and the Lawful Judge Concept', in M Luchtman, *Choice of forum in cooperation against EU financial crime: freedom, security and justice and the protection of specific EU- interests* (The Hague 2013) 147.

<sup>204</sup> M van Geest, J van Kleef, HW Smits, *Het belastingparadijs, waarom niemand hier belasting betaalt behalve u* (Business Contact 2013) hoofdstuk 6.

One respondent recommended to improve cooperation between NGOs and law-enforcement authorities, especially with respect to the evidence which an NGO can give to the prosecutor in case of suspicions of corporate criminality.

A respondent also cited the need for more specialized and better trained police officers within the investigation teams responsible for complex international crime cases, especially regarding cases of terrorism, which are on the rise. Compulsory training or a higher level of required education may be a solution.

Another respondent recommended the creation of more legal possibilities to cooperate with witnesses and advocated a plea bargaining system. This respondent also considered the maximum sentence of five years for 'sedition to genocide' (*opruiing tot genocide*) in respect of crimes committed before the entry into force of the ICA in 2003, e.g., in respect of crimes committed in Rwanda, as too low.

### Selected Literature

Brodowski D, Espinoza de los Monteros de la Parra M, Tiedemann K, Vogel J(eds), *Regulating Corporate Criminal Liability* (Springer 2014)

Cleiren C, Nijboer J, Paridaens-van der Stoel D, *Internationaal Strafrecht Tekst & Commentaar* (Kluwer 2009)

van Elst R, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in: T Cleiren *et al*, *Tekst and Commentaar Strafrecht* (Wolters Kluwer 2014)

Enneking L *et al.*, *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen* (Boom Juridische Uitgevers 2016)

Fabri M and Langbroek P, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries', *European Journal of Legal Studies*, Volume 1 issue 2 2007.

de Hullu J, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009)

Hornman M & Sikkema E, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate Mens Rea', in: F de Jong, JAE Vervaele, MM Boone, C Kelk, FAMM Koenraadt, Kristen FGH, Rozenblit D & Sikkema E (eds), *Overarching views of delinquency and deviancy-rethinking the legacy of the Utrecht School* (Eleven International Publishers 2015)

Keulen BF & Gritter E, 'Corporate Criminal Liability in the Netherlands', in: M Pieth, R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011)

Klip AH, Massa AS, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, (WODC 2010)

Koops WJ, 'De Hoge Raad over het daderschap van rechtspersonen', *V&O* 2003, afl. 12,

Kristen FGH, 'Maatschappelijk verantwoord ondernemen en strafrecht', in AJAJ. Eijsbouts & JM de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging)* (Kluwer 2010)

Luchtman M, 'De opkomst van het beginsel van een goede rechtsbedeling', WvSvA.L. Melai/A.H. Klip e.a. IV.1.1.6.1.

Panzavolta M, 'Choice of Forum and the Lawful Judge Concept', in: M Luchtman, *Choice of forum in cooperation against EU financial crime: freedom, security and justice and the protection of specific EU- interests* (The Hague 2013)

Smeulers A, 'Tien jaar Wet Internationale Misdrijven – Een evaluatie', DD 2014/25, afl. 4

Wolswijk HD, *Locus delicti en rechtsmacht* (Gouda Quint 1998)