

NETHERLANDS JUDICIAL DEVELOPMENTS

AMENDMENT OF THE PROVISIONS OF THE DUTCH PENAL CODE PERTAINING TO THE EXERCISE OF EXTRATERRITORIAL JURISDICTION

By the Act of 27 November 2013, the Dutch Government has radically changed the provisions of its Penal Code pertaining to the exercise of extraterritorial jurisdiction (Arts. 4-8 Penal Code).¹ The new rules take effect from July 1st 2014 onwards.² Most importantly, the Act widens the scope of the *passive personality principle*, generalizes the application of the *domicile principle*, which equates permanent residents with nationals for purposes of the application of the active personality principle, and establishes jurisdiction over foreigners present in the Netherlands who have committed a serious crime abroad if extradition proves impossible (*aut dedere aut judicare*), even if international law does not oblige the Netherlands to do so.³ In addition, the Act brings order to the Penal Code's hitherto rather chaotic jurisdictional provisions by, *inter alia*, grouping the jurisdictional mandates based on international legal instruments together in one provision,⁴ and limiting the number of jurisdictional grounds on which offences can be prosecuted.⁵

1. *Wet van 27 november 2013 tot wijziging van het Wetboek van Strafrecht in verband met de herziening van de regels over werking van de strafwet buiten Nederland (herziening regels betreffende extraterritoriale rechtsmacht in strafzaken)* (Act of 27 November 2013 to amend the Penal Code in connection with the review of the regulations on the effect of criminal law outside the Netherlands (review of the regulations concerning extraterritorial jurisdiction in criminal cases)), *Staatsblad* (Bulletin of Acts and Decrees) (*Stb.*) 2013, 484.

2. *Stb.* 2014, 103.

3. Note that while historically the Government has been reticent in broadening the jurisdictional scope of Dutch criminal law, since the early 2000s, in the wake of the 9/11 attacks, it has supported more expansive jurisdictional assertions. See A.-H. Klip and A.S. Massa, *Communicerende grondslagen van extraterritoriale rechtsmacht. Onderzoek naar de grondslagen voor extraterritoriale rechtsmacht in België, Duitsland, Engeland en Wales en Nederland met conclusies en aanbevelingen voor de Nederlandse (wetgevings-) praktijk* (Communicational bases of extraterritorial jurisdiction. Research into the bases for extraterritorial jurisdiction in Belgium, Germany, England and Wales and the Netherlands with conclusions and recommendations for Dutch (legislative) practice) (The Hague, WODC, Ministry of Justice of the Netherlands 2010) p. 74. The new law fits this mould.

4. The amendment was preceded, and partly based on the study conducted by Prof. A. Klip and A.-S. Massa, mentioned in footnote 3. See *Kamerstukken II* (Parliamentary Papers II) 2010-2011, 32 500 VI, no. 3. Note, however, that the Government did not act on all recommendations made by the authors of this study.

5. Klip and Massa, *supra* n. 3, noted at p. 97 that, for instance, the offence of destruction (*vernieling*, Art. 350 Penal Code) could be prosecuted on the basis of *nine* jurisdictional grounds.

1. **Passive personality principle**

The Dutch Penal Code, unlike the codes of other continental European states, did not feature a general grant of passive personality-based jurisdiction, i.e., jurisdiction based on the nationality of the victim. The Penal Code only provided for the exercise of such jurisdiction over specific offences, e.g., certain sexual offences, genital mutilation, and offences committed against Dutch government officials abroad.⁶ Given the increasing internationalization of society and the attendant heightened travelling opportunities, coupled with the unwillingness or inability of some territorial states to address crimes committed on their territory involving non-nationals, the Dutch legislator has now come round to the view that the Dutch state has the duty actively to defend the interests of the victim or his relatives by widening the passive personality principle in Dutch law, thereby bringing it into line with the legislation of neighbouring states.⁷

Henceforth, a new generic provision in the Penal Code⁸ provides for the exercise of jurisdiction over *any* crime committed against Dutch nationals, Dutch government officials, Dutch vehicles, and Dutch vessels. The law requires, however, that the crime be statutorily punishable under Dutch law by at least 8 years of imprisonment, and be also punishable in the state where the crime has been committed. The former requirement is informed by international law concerns over the use of the passive personality principle.⁹ The latter requirement of double criminality is informed by concerns over the foreseeability of the law, but also by the very practical consideration that the territorial state will not, or cannot normally undertake investigations for, or on behalf of the Netherlands with respect to an act that is not a crime under its own law.¹⁰ The requirement of double criminality does not apply in respect of some more serious crimes that are covered by international conventions which oblige the Netherlands to establish its jurisdiction.¹¹

2. **Domicile principle**

The Dutch Penal Code has traditionally conferred jurisdiction on Dutch courts based on the Dutch nationality of the offender (active personality-based jurisdiction). Such jurisdiction is premised on a double criminality requirement,¹² although in respect of specific offences – most of them featuring in an international conven-

6. See Art. 4, 9° and Art. 5b Penal Code (old).

7. *Kamerstukken II* 2012-2013, 33 572, no. 3, p. 15. It appears that this duty is a moral rather than a legal one.

8. Art. 5 Penal Code (new).

9. *Kamerstukken II* 2012-2013, 33 572, no. 3, p. 19.

10. *Kamerstukken II* 2012-2013, 33 572, no. 3, pp. 18-19.

11. Art. 6 Penal Code (new) (see below).

12. Art. 5(2) Penal Code (old); Art. 7(1) Penal Code (new).

tion – this requirement has been abandoned.¹³ For most of these offences, jurisdiction obtains also if the presumed perpetrator acquires Dutch nationality after the fact.¹⁴

Under the previous legislation, Dutch permanent residents who committed specific offences, such as certain terrorist offences, child abuse, genital mutilation, and human trafficking, were equated with Dutch nationals, under an ‘active domicile’ principle.¹⁵ Such equation also applied in respect of Dutch permanent residents who were the victim of specific offences, under a ‘passive domicile’ principle.¹⁶ Permanent residents are defined as foreign nationals who have resided lawfully in the Netherlands for at least five years at the time of the initiation of the prosecution.¹⁷

This domicile principle has now been extended to all offences to which active or passive personality-based jurisdiction applies.¹⁸ The Government has explained this extension on the ground that permanent residence is an equally strong jurisdictional connection to the Netherlands as nationality.¹⁹ Equating permanent residence with nationality for purposes of the exercise of active personality-based jurisdiction is not novel in international legal practice, however; it has for instance been enshrined in Belgium’s Penal Code since 2003.²⁰ In spite of this extension, the Government has made it nonetheless clear that *territorial* prosecution, e.g., via the extradition of the suspect, is preferable, even in respect of Dutch nationals or permanent residents.²¹

Persons who reside in the Netherlands for less than five years are *not* equated with Dutch nationals, in spite of a recommendation to this effect by the Public Prosecutor and the Dutch Association for the Judiciary.²² This may create a situation of impunity, where such persons, if suspected of a crime committed abroad,

13. Art. 5 Penal Code (old); Art. 7(2) Penal Code (new).

14. Art. 5 *in fine* Penal Code (old); Art. 7(3) Penal Code (new).

15. Art. 5a Penal Code (old).

16. Art. 5b Penal Code (old).

17. Art. 86b Penal Code (new). The five-year period is derived from one of the criteria that may have to be satisfied to obtain a permanent residence permit in the Netherlands (Art. 21 *Vreemdelingenwet* (Aliens Act) 2000), and from the residence period that entitles citizens from other EU Member States and their family members to obtain permanent residence in the Netherlands (Art. 16 of EU Directive 2004/38).

18. Art. 7(3) Penal Code (new) with respect to ‘active domicile’ and Art. 5(2) Penal Code (new) with respect to ‘passive domicile’.

19. *Kamerstukken II* 2012-2013, 33 572, no. 3, p. 6.

20. Art. 6 Preliminary Title of the Belgian Code of Criminal Procedure (as amended by the law of 2003-08-05/32).

21. *Kamerstukken II* 2012-2013, 33 572, no. 3, p. 6.

22. The legislator was not so much concerned that such an extension of the jurisdictional scope would overload the public prosecutor and the judiciary. Rather, it feared that such residents – who, in case of equation to nationals, are entitled to claim execution of the sentence in the Netherlands in case of extradition – would force the Government to condition extradition on such execution, which, in the legislator’s view, would not serve the goal of reintegrating the offender if his residence in the Netherlands is uncertain, and, obviously, might overload the Dutch prison system. See *Kamerstukken II* 2012-2013, 33 572, no. 3, p. 21.

cannot be extradited, and cannot be prosecuted in the Netherlands for lack of jurisdiction. The legislator has been aware of these concerns, however, and in order to prevent impunity from arising, has created presence-based *aut dedere aut judicare* jurisdiction, even if international law does not oblige the Netherlands to exercise such jurisdiction. This means that the Dutch courts have jurisdiction if the extradition of the suspect has been refused or proves to be impossible. Such presence-based jurisdiction is not limited to Dutch residents, but to any foreigner who is found on Dutch territory. Importantly, it only applies to serious offences, defined as offences punishable by at least 8 years of imprisonment,²³ the same category of offences that can give rise to the exercise of passive personality-based jurisdiction.

The *aut dedere aut judicare*-based jurisdiction introduced by the new legislation could be characterized as ‘secondary’ universal jurisdiction, as it is based on the *gravity* of the crime in combination with the *territorial presence* of the presumed offender. This change in the law has partly been inspired by the impossibility of prosecuting asylum seekers whose request was rejected on the basis of Article 1F of the 1951 Refugee Convention, which excludes suspected criminals from the protective scope of the Convention. To the extent that this rejection was not based on suspicions of involvement in international crimes, but of involvement in common but nevertheless serious crimes such as murder, drug trafficking, and rape, the Netherlands could in the past not establish its jurisdiction. The new Article 8c of the Penal Code addresses this concern, and substantially broadens the jurisdictional scope of Dutch law. That being said, the legislator has made it clear that prosecution in the territorial state enjoys priority,²⁴ so that the number of instances where Article 8c will actually be invoked will ordinarily remain rather limited, and will only extend to those cases where the Netherlands cannot extradite a person because of concerns over respect for human rights in the territorial state or where the Netherlands does not have an extradition treaty with the territorial state.²⁵

3. Jurisdiction based on international legal instruments

A substantial number of international legal instruments, treaties in particular, oblige states to establish their jurisdiction over particular offences, and more in particular require that states prosecute a presumed perpetrator present on their territory if they do not extradite him (*aut dedere aut judicare*). Hitherto, the Dutch

23. Art. 8c of the Penal Code (new).

24. *Kamerstukken II 2012-2013*, 33 572, no. 6, p. 12.

25. Note that Art. 8c Penal Code (new) does not apply in an intra-EU context, where presumed offenders are not ‘extradited’ but ‘surrendered’ on the basis of an EU Framework Decision on a European arrest warrant. See *Kamerstukken II 2012-2013*, 33 572, no. 3, p. 23. This Decision replaces the extradition treaty. It is not unimaginable, however, that the Netherlands will refuse to surrender a person to another EU Member State on the basis of abiding human rights concerns. In this case, the Netherlands may prosecute this person on the basis of Art. 8c Penal Code, at least if he is suspected of having committed a serious crime.

Penal Code was amended every time the Dutch Government became a party to such an instrument. Moreover, these instruments were cited on multiple occasions in the Penal Code, depending on whether the offender was a Dutch national or a foreigner. This rendered the jurisdictional provisions of the Penal Code somewhat chaotic.²⁶ To remedy this, the legislator decided to insert a *generic* provision in the Penal Code which declares Dutch law applicable to anyone (a Dutch or a foreign national) who has committed an offence over which the Netherlands is obliged to establish its jurisdiction pursuant to a treaty or decision of an international organization,²⁷ while removing all references to specific international legal instruments in the Code.²⁸ These instruments are henceforth mentioned in special administrative legislation (*'algemene maatregel van bestuur'*).²⁹ When the Netherlands ratifies a new international instrument concerning the exercise of extraterritorial jurisdiction, this legislation rather than the Penal Code will be amended. While this solution does not widen the scope of Dutch jurisdiction, from a technical perspective it is undeniably a step forward.

4. Concluding observations

On paper, the jurisdictional scope of the Dutch Penal Code has been broadened as a result of the amendment of its jurisdictional provisions, in particular the inclusion of a generic provision on passive personality-based jurisdiction, the generalization of domicile-based jurisdiction, and the introduction of *aut dedere aut judicare*-based jurisdiction over all serious crimes. In practice, however, it is unlikely that the amount of 'extraterritorial' cases prosecuted in the Netherlands will increase substantially. Extraterritorial crime is not prosecuted proactively in the Netherlands; in fact, prosecution often depends on law-enforcement agencies accidentally stumbling on evidence of an offence.³⁰ The only exception is the prosecution of international crimes (war crimes, crimes against humanity, genocide, torture), which are governed by a special statute (International Crimes Act),³¹ and prosecuted by a special unit.

26. The concern had earlier been raised in Parliament, notably after the approval of the 2005 Warsaw Convention on Combating Human Trafficking. See *Kamerstukken II* 2007/08, 31 391, no. 3, p. 9.

27. Art. 6 Penal Code (new).

28. This decision is inspired, *inter alia*, by Belgian legislation. See Art. 12*bis* Preliminary Title of the Belgian Code of Criminal Procedure.

29. *Besluit van 28 januari 2014 tot aanwijzing van de gevallen waarin verdragen en besluiten van volkenrechtelijke organisaties tot het vestigen van rechtsmacht verplichten (Besluit internationale verplichtingen extraterritoriale rechtsmacht)* (Decision of 28 January 2014 to designate cases where the treaties and decisions of public international law organizations oblige the establishment of jurisdiction (Decision on international obligations concerning extraterritorial jurisdiction)), *Stb.* 2014, 47.

30. Klip and Massa, *supra* n. 3, p. 102.

31. *Wet van 19 juni 2003, houdende regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (Wet internationale misdrijven)*, *Stb.* 2013, 270, adopted 19 June 2003.

It does not come as a surprise then that the Government has estimated that the new legislation will lead to only a few extra cases per year, and will not create an additional workload for prosecutors and the courts.³² In light of this statement, one may wonder whether the legislator is not creating false expectations which are not acted on in practice.³³ At the same time, it is pointed out that this limited enforcement practice does not fundamentally differ from the practice in other states.³⁴ In respect of transnational crime, negative conflicts of jurisdiction, resulting from under-enforcement, rather than positive conflicts of jurisdiction, resulting from overlapping jurisdictional claims and enforcement in multiple jurisdictional orders, are likely to remain the order of the day.³⁵

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32. *Kamerstukken II* 2012-2013, 33 572, no. 6, p. 4.

33. Klip and Massa, *supra* n. 3, p. 105.

34. *Id.*, p. 102, fn. 450.

35. Also in the Netherlands, there is little to no evidence that conflicts of jurisdiction between different states have arisen, although the danger of such conflicts arising is sometimes cited in Parliament. *Id.*, p. 99.