Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues

National report - The Netherlands

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List of Abbreviations

CJEU	Court of Justice of the European Union
DCCP	Dutch Code of Criminal Procedure
DNB	De Nederlandsche Bank
DPC	Dutch Penal Code
DPPO	Dutch Public Prosecutors Office
DSC	Dutch Supreme Court
ECHR	European Convention on Human Rights
ECTPCM	European Convention on the Transfer of Persons in Criminal Matters
EOA	Economic Offences Act
ICA	International Crimes Act
ICC	International Criminal Court
LTTE	The Liberation Tigers of Tamil Eelam
NCP	National Contact Point
OECD	Organisation for Economic Co-operation and Development
RDS	Royal Dutch Shell
SCID	Service Criminal Investigation Department
TIM	Team International Crimes
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNTOC	UN Convention against Transnational Organised Crime
USA	United States of America

List of Translations

Absolute competence	Absolute bevoegdheid
Act boundaries Dutch Territorial Sea	Wet grenzen Nederlandse territoriale zee
Act of change of the Penal Code	Wet tot wijziging van het Wetboek van Strafrecht
Wartime Offences Act	Wet Oorlogsstrafrecht
Economic Offences Act	Wet op de Economische Delicten
Act Financial monitoring	Wet op het Financieel Toezicht
Act General Provisions	Wet Algemene Bepalingen
Act Mandatory Job Retirement Ruling	Wet Verplichte Beroepspensioen Regeling
Act on the Judicial Organisation	Wet op de Rechterlijke Organisatie
Act review of the rules concerning extraterritorial jurisdiction in criminal cases	Wet herziening regels betreffende extraterritoriale rechtsmacht in strafzaken
Change of the Act, Review extraterritorial Jurisdiction	Wijzigingswet, Herziening extraterritoriale rechtsmacht
Consumer and Market Authority	Autoriteit Consument en Markt
Cultural Heritage Inspection of the Ministry of Education, Culture and Science	Erfgoedinspectie van het Ministerie van Onderwijs, cultuur en wetenschappen
Decision of International Obligations of Extraterritorial Jurisdiction	Besluit internationale verplichtingen extraterritoriale rechtsmacht
Department of International Mutual Legal Assistance in Criminal Cases	Afdeling Internationale Rechtshulp in Strafzaken
Duty of caution	Cautieplicht
Easy in nature	Eenvoudig van aard
Functional perpetration	Functioneel daderschap
General Inspection Agency	Algemene Inspectiedienst
General Intelligence and Security Service	Algemene Inlichtingen- en Veligheidsdienst
Human environmental and Transport Inspectorate	Inspectie Leefomgeving en Transport
Institute for Human Rights	College voor de Rechten van de Mens
Joining procedure	Voeging benadeelde partij
Justified division	Goede rechtsbedeling
Law of Environmental Management	Wet Milieubeheer
Military Criminal Code	Wetboek van Militair Strafrecht
Misdemeanours	Overtredingen
National Criminal Investigation Department of the National Police Agencies	Korps Landelijke Politiediensten
National Public Prosecutor’s office	Landelijk Parket
National Public Prosecutor’s office	

for serious fraud and environmental crime and confiscation	Functioneel Parket
National Tax Agency	Rijksbelastingdienst
Opium Act	Opiumwet
Protocol of investigation and prosecution concerning foreign corruption	Aanwijzing opsporing en vervolging buitenlandse corruptie
Relative competence	Relatieve bevoegdheid
Research- and Documentation Centre	Wetenschappelijk Onderzoek- en documentatiecentrum
Retirement Act	Pensioenwet
Royal Netherlands Military Constabulary	Koninklijke Marechaussee
Sanctions Act	Sanctiewet
Special investigation agencies	Bijzondere opsporingsdiensten
Tax Agency of the Ministry of Finance	Belastingdienst van het Ministerie van Financiën

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.

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.

Word of thanks

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B. General Framework for Prosecuting Corporations for Violations of International Criminal Law

I. Legal Framework & Relevant Actors

1. Legal rules governing the prosecution of corporations – in a nutshell

a) Substantive criminal law establishing criminal liability

The doctrinal basis

Dutch criminal law has traditionally been concerned with individual criminal conduct.[1] However, as a result of the increased importance of corporations in our society, awareness regarding possible illegal conduct of *corporations* has been on the rise. 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.[2]

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 count as illegal conduct of the corporation.[3] It is this attribution of illegal conduct to the corporation that is the doctrinal basis for establishing corporate criminal liability under Dutch law.[4] In the *Drijfmest* 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

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1 J. de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht (vierde druk),* Deventer: Kluwer 2009, p. 149.

2 Article 51 Dutch Penal Code:
1. Offences can be committed by natural persons and legal persons.
2. If an offence has been committed by a legal person, prosecution can be instituted and the punishments and measures provided by law can be imposed, if applicable, on:
   a. The legal person, or
   b. Those who have ordered the offence, as well as on those who have actually controlled the forbidden act, or
   c. The persons mentioned under 1. And 2. Together
3. For the application of the former subsections, equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purpose.

- The translation of this article derives from the translation used by De Doelder 2008, p. 566. F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. Eijsbouts & J.M. de Jongh (Eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)*, Deventer: Kluwer 2010, p 132.

3 F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. Eijsbouts & J.M. de Jongh (Eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)*, Deventer: Kluwer 2010, p 133.

4 F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. Eijsbouts & J.M. de Jongh (Eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)*, Deventer: Kluwer 2010, p 133.

concrete circumstances of the case, which includes the nature of the conduct.[5] 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.[6] 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.[7]

These four criteria are non-cumulative and flexible, and give the judge the freedom to formulate additional, more specific criteria.[8]

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.[9] Proof of *mens rea* is only required for more serious offences, the so-called *misdrijven.*[10] As can be derived from case law of the DSC, imputing intent differs from attributing negligence to a corporation.

Intent could 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.[11] 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.[12]

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5 HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

6 W.J. Koops, 'De Hoge Raad over het daderschap van rechtspersonen', *V&O* 2003, afl. 12, p. 200; HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

7 HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

8 F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. Eijsbouts & J.M. de Jongh (Eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)*, Deventer: Kluwer 2010, p 137.

9 M. Hornman & E. Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea',* in: F. de Jong, J.A.E. Vervaele, M.M. Boone, C. Kelk, F.A.M.M. Koenraadt, F.G.H. Kristen, D. Siegel-Rozenblit & E. Sikkema (eds.), *Overarching views of delinquency and deviancy- rethinking the legalcy of the Utrecht School*, The Hague: Eleven International Publishers 2015, p. 290.

10 B.F. Keulen & E. Gritter, 'Corporate Criminal Liability in the Netherlands', in: M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability: Emergence, Convergence and Risk*, Dordrecht: Springer 2011, p. 184.

11 *Kamerstukken II* 1975/76, 13655, 3, p. 19.

12 M. Hornman & E. Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea',* in: F. de Jong, J.A.E. Vervaele, M.M. Boone, C. Kelk, F.A.M.M. Koenraadt, F.G.H. Kristen, D. Rozenblit & E. Sikkema (eds.), *Overarching views of delinquency and deviancy- rethinking the legacy of the Utrecht School*, The Hague: Eleven International Publishers 2015, p. 297.

Negligence is imputed directly to the corporation by proving the existence of negligence of the corporation itself. Intent can also directly be imputed to the corporation, however not based on a duty of care but on for instance a decision of the corporation to perform the criminal conduct. Such proof can be deduced from the violation of a duty of care.[13] Corporate criminal liability is thus established on the basis of deficiencies within the structures, policies, and culture of the corporation itself.[14]

One of the respondents working within the field of international crimes[15] added that, when applying Dutch substantive law to international crime cases, reference should be made to the development of relevant international law, including the case law of international criminal tribunals.

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.[16] 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.[17]

That being said, the exact mode of establishing corporate criminal liability differs according to the type of offence. In respect of more serious offences (*misdrijven*), the DPC requires proof of both *actus reus* and *mens rea.* However, for lighter offences - misdemeanours or contraventions - it is generally sufficient for the public prosecutor to prove only the existence of *actus reus* in order to establish corporate criminal liability.[18]

b) 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.[19] A corporation is regarded as a suspect from the moment that there is a reasonable suspicion that criminal activity

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13 Ibid., p. 290.
14 Ibid., p. 292.
15 A public prosecutor working within the field of international crimes.
16 R. van Elst, *Strafbare rechtspersonen en hun leidinggevers,* Nijmegen: Ars Aequi Libri 1997, p. 9; Article 15 Economic Offences Act.
17 J. de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht (vierde druk),* Deventer: Kluwer 2009, p. 163.
18 B.F. Keulen & E. Gritter, 'Corporate Criminal Liability in the Netherlands', in: M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability: Emergence, Convergence and Risk*, Dordrecht: Springer 2011, p. 184.
19 A. Minkenhof's, *Nederlandse Strafvordering*, elfde druk Prof. mr. J.M. Reijntjes (ed.), Deventer: Kluwer 2009, p. 561.

is taking place within the corporation.[20] The DSC has held that the fair trial rights laid down in article 6 of the European Convention on Human Rights (hereafter: ECHR) also apply to legal persons.[21]

When the corporation is prosecuted, it is represented in court by the director, or in case there are multiple directors, by one of them.[22] The DSC has clarified that the corporation may decide to be represented by more directors at the same time.[23] The judge has the right to demand the personal appearance of a particular director.[24] The representative of the corporation has the right to remain silent.[25] 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.[26]

An important act of relevance to the procedural framework for prosecuting a corporation for violations of core crimes is the International Crimes Act (hereafter: ICA). Although this act does not explicitly deal with corporate criminality, it cites the principle of (individual) liability on the basis of authority or control exercised over one or more subordinates committing offences.[27] This liability can be extended to CEOs and other corporate officers,[28] but in any event the combination of article 51 DPC and the ICA allows for the establishment of corporate liability for international crimes under Dutch law.

As far as the commission of core crimes under the 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.[29] The District Court in The Hague is the sole competent court to hear these cases.[30] The procedural rules applicable to ICA prosecutions are complementary to the procedural rules which are laid down in the DCCP.[31] However, prosecutions for ICA crimes are not time-barred.[32] The ICA prohibits the prosecution of persons enjoying personal immunity – notably foreign 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.[33] The

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20 Article 27 Dutch Code of Criminal Procedure.
21 HR 1 juni 1993, *NJ* 1994/52.
22 Article 528(1) Dutch Code of Criminal Procedure.
23 HR 26 januari 1988, *NJ* 1988/ 815.
24 Article 528(3) Dutch Code of Criminal Procedure.
25 HR 13 oktober 1981, *NJ* 1982/17.
26 Article 529(1) Dutch Code of Criminal Procedure.
27 Article 1(1)(b) of the International Crimes Act.
28 *Kamerstukken II* 2001/02, 28337, 3.
29 C. Cleiren, J. Nijboer, D. Paridaens-van der Stoel, *Internationaal Strafrecht Tekst & Commentaar*, Deventer: Kluwer 2009, p. 1538.
30 Article 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.
31 In paragraph 4 (more specific in article 10 – article 16) of the ICA general rules of criminal procedural law are laid down.
32 Article 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).
33 Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt*. 2011, 22803, p. 1.

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.[34]

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.

Article 132a DCCP defines an investigation as 'the investigation of crimes led by the public prosecutor with the aim of taking decisions resulting in a criminal procedure'. On the basis of article 148 DCCP, the public prosecutor leads the investigation but can delegate orders to officers who have the legal competence to investigate.[35] These investigators (*opsporingsambtenaren)* are mentioned in articles 141 and 142 DCCP, and include police officers, police officials, military service-members, special investigation forces, and extraordinary investigators (*buitengewone opsporingsambtenaren).*[36] All these investigators have the duty to report cases according to article 152 DCCP, which entails that they are required to make a police report of every investigation as soon as possible.[37] The DPPO must then decide whether or not to prosecute the reported cases.[38]

When investigating crimes, several methods of investigation are available to investigators. Not all of these are laid down in the law. One of the most well-known and -used methods is hearing the suspect. During this hearing the suspect is not obliged to answer (article 29(1) DCCP). This right to remain silent has to be brought to the knowledge of the suspect by officer or judge who conducts the hearing, before the hearing begins (*i.e.*, the duty of caution) (*cautieplicht*).[39] Other methods of investigation are the hearing of witnesses and the appointment of experts when this is in the interest of the investigation (article 150 DCCP). Furthermore, the DCCP provides for several powers to seize property (or goods. For instance on the basis of article 134(1) DCCP it is possible to sequester property when this is in the interest of the criminal procedure.

The investigation of ICA crimes is conducted by the National Criminal Investigation Department of the National Police Agencies (*Korps Landelijke Politiediensten).*[40] This team will often have to conduct part of its investigations on foreign territory in order to establish the factual scenario of the alleged international crimes. In practice, this is a complex task.

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34 Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt*. 2011, 22803.

35 G.J.M. Corstens & M.J. Borgers, *Het Nederlands Strafprocesrecht* (7e druk), Deventer: Kluwer 2011, p. 245.

36 Ibid., p. 251-255.

37 Ibid., p. 251-255.

38 Article 167 Dutch Code of Criminal Procedure.

39 Article 29(2) Dutch Code of Criminal Procedure.

40 C. Cleiren, J. Nijboer, D. Paridaens-van der Stoel, *Internationaal Strafrecht Tekst & Commentaar*, Deventer: Kluwer 2009, p. 1538.

Possibilities of investigating may be limited, the cooperation of foreign authorities may not be forthcoming, and witnesses may be hard to find.[41]

The investigation of offences under the EOA is governed by the framework as laid down in the DCCP. The EOA only lays down a limited set of additional competences in Title III of the EOA. Pursuant to the EOA, investigators are entitled to seize property when this is in the interest of the investigation.[42] In the interest of the investigation, they have the competence to access any place and to request data inspection if this is reasonably required for the fulfilment of their task. They are moreover competent to make copies of these data.[43] On the basis of article 24(a) EOA, the corporation is required to cooperate with the investigators.[44] A failure to cooperate constitutes an economic offence.[45]

In gathering evidence in environmental cases, investigation officers often make use of the method of sampling: taking samples from the soil or the water and analysing them in order to find proof of alleged violations of environmental law. This practice of sampling is governed by the Protocol sampling and analysing environmental crimes (*Aanwijzing bemonstering en analyse milieudelicten*).[46]

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, where several mining areas are controlled by militias, which plunder mines and use mining 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.[47]

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.[48] This also applies to international crimes under the ICA.

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41 M. Wijers, K. Lünnemann, R. Haveman, S. ter Woerds, J. Timmer, *Evaluatie Plan van Aanpak opsporing en vervolging oorlogsmisdrijven*, Verwey-Jonker Instituut 2005, p. 32.
42 Article 18(1) Economic Offences Act.
43 Article 19, 20 Economic Offences Act.
44 Article 24a Economic Offences Act.
45 Article 26 Economic Offences Act.
46 Aanwijzing bemonstering en analyse milieudelicten, *Stcrt.* 2009, 14714, retrieved from: https://www.om.nl/onderwerpen/milieucriminaliteit/@86224/aanwijzing-2/ (last reviewed: 7 September 2016).
47 Public prosecutor working within the field of international crimes.
48 Article 528(1) Dutch Code of Criminal Procedure.

According to Dutch procedural criminal law, a suspect is not required to appear in trial. On the basis of article 279(1) DCCP, (s)he can be represented in trial by a lawyer if the latter is expressly authorized to do so. If the lawyer is not authorized on the basis of article 279 DCCP, the trial is 'in absentia'. When the lawyer is expressly authorized according to article 279 DCCP, then the case concerns 'adversarial proceedings' (*procedure op tegenspraak)* and not a trial in absentia.

2. Principles of Jurisdiction/Building the nexus – in a nutshell

a) Defining jurisdiction – in a nutshell

How is jurisdiction specified in your national system? Does your country distinguish between jurisdiction to prescribe and jurisdiction to adjudicate?

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. A 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.[49] The passive personality principle also extends to aliens with permanent residence in the Netherlands.[50]

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.[51]

The scope and content of the principles of jurisdiction in Dutch criminal law are elaborated on below (in part C).

3. International law/Human rights framework

Please indicate the relevant international conventions/ human rights framework that may determine your country's prosecution of "core crimes" or "treaty crimes".

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.

A. Core crime conventions

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[49] Article 5(1) of the Dutch Penal Code. In 2013 the DPC was revised in this respect. *Kamerstukken II* 2012/13, 33572, 1.

[50] Article 5(2) of the Dutch Penal Code.

[51] 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.

-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. The Geneva Conventions provide the obligation of states to prosecute or extradite alleged offenders of grave breaches of the conventions.[52] These conventions provides for universal jurisdiction: respectively articles 49,50, 129 and 146 of the four conventions require states to search for alleged offenders 'regardless of their nationality'.[53]

-Rome Statute

The Netherlands is a party to the Rome Statute establishing the International Criminal Court (hereafter: ICC),[54] which confers jurisdiction on the ICC to prosecute individuals for genocide, crimes against humanity, and war crimes, but also reiterates in its preamble that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[55] The ICC's jurisdiction is complementary to the jurisdiction of states, which means that a case is only admissible when the prosecuting state is unwilling or unable genuinely to carry out the prosecution. Although the Statute does not clearly indicate which type of state jurisdiction it takes into account, universal jurisdiction arguably qualifies as well, aside from territoriality and nationality. Indeed, it is stated in the preamble that 'the most serious crime of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level'.[56] The ICA provides for universal jurisdiction over the core crimes listed in the ICC Statute.[57]

-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. This convention was introduced after the horrors of the Second World War, the UN acknowledged that 'genocide was an international crime which entails national as well as international responsibility for both individual persons and for states'.

Article VI of the Convention provides for territorial jurisdiction and for jurisdiction of an international penal tribunal.[58] However, in the *Eichmann* case the Supreme Court of Israel ruled

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52 Art. 49 of Geneva Convention I; Article 50 of Geneva Convention II; Article 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).

53 Art. 49 of Geneva Convention I; Article 50 of Geneva Convention II; Article 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); 'Universal jurisdiction over war crimes', *International Committee of the Red Cross,* retrieved from: https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf (last reviewed: 1 September 2016).

54 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.

55 'ICC Statute, preamble', retrieved from: http://legal.un.org/icc/statute/99_corr/preamble.htm (last reviewed 30 August 2016).

56 'Wet Internationale Misdrijven', *NJB* 2003, retrieved from: http://njb.nl/wetgeving/staatsbladen/import/wet-internationale-misdrijven.3138.lynkx (last reviewed 1 September 2016).

57 *Kamerstukken II* 2011/12, 32475, 3; *Kamerstukken II* 2002/03, 28337, 17.

58 M. Bossuyt & J. Wouters, *Grondlijnen van het Internationaal Recht,* Antwerpen: Intersentia 2005, p. 766; 'Convention on the prevention and punishment of the crime of genocide', retrieved from: https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf (last reviewed: 2 September 2016).

that the exercise of universal jurisdiction of genocide is authorised by customary international law, a position which is currently widely shared and codified in national penal codes.[59]

B. Conventions dealing with treaty crimes

-UN Convention against Corruption (UNCAC)[60]

The Netherlands is a party to the UNCAC which entered into force on the 30th of November 2006.[61] This convention has the aim of preventing corruption by establishing measures and promoting international cooperation in this field to combat international corruption.[62]

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.

Recently, in 2014, the United Nations (hereafter: UN) made an evaluation of the efforts carried out by the Netherlands which they conducted aiming at combatting corruption. This evaluation can be found in a report named 'Review of implementation of the United Nations Convention against Corruption'.[63] The review considers the Dutch system as an 'advanced system' in combatting corruption. Furthermore, the evaluation team is highly positive about the broad range of institutions which are involved in combatting corruption, especially in the field of money-laundering. It furthermore praised the Netherlands for the possibilities to recover illegally obtained assets. However, The UN evaluation team advises to increase the maximum sentences for corruption and fraud. Furthermore, it recommended making the punishments for legal persons more flexible, proportional, and effective.[64]

-UN Convention against Transnational Organised Crime (UNTOC)[65]

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

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59 W. Schabas, Introductory Note on the Convention on the Prevention and Punishment of the Crime of Genocide', retrieved from: http://legal.un.org/avl/ha/cppcg/cppcg.html (last reviewed 1 September 2016).

60 '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 (last reviewed 31 May 2016).

61 'Verdrag van de Verenigde Naties tegen corruptie', *Verdragenbank Overheid,* retrieved from: https://verdragenbank.overheid.nl/nl/Treaty/Details/010077.html (last reviewed 18 August 2016).

62 *Kamerstukken II* 2005/06, 30808, 1.

63 The executive summary of this report can be consulted via: http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/2-6June2014/V1403524e.pdf (last reviewed 14 August 2016).

64 Kamerbrief 'Aanbieding samenvatting evaluatie VN-verdrag tegen corruptie', *Rijksoverheid*, retrieved from: https://www.rijksoverheid.nl/documenten/kamerstukken/2014/07/08/aanbieding-samenvatting-evaluatie-vn-verdrag-tegen-corruptie (last reviewed 14 August 2016).

65 'United Nations Convention against Transnational Organized Crime and the Protocols thereto', *United Nations Office on Drugs and Crime,* retrieved from: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (last reviewed 31 May 2016).

to Trafficking in Human Beings of the Council of Europe, and the International Labour Organization conventions concerning child labour and working conditions.[66]

Article 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, a facultative protocol - in which the acceptance of control mechanisms is regulated - was added to the convention, which the Netherlands ratified in 2010.[67]

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[68] is implemented in the Dutch legislation since the 1st of February 2001.[69] 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.[70]

- It is of note that none of the relevant treaties specifically refer to *legal* persons (corporations). The recommendations of the Financial Action Task Force (hereafter: FATF) constitute an exception, however. The FATF issued forty recommendations to states regarding the establishment of an adequate legal framework to prevent money-laundering and terrorist financing. With respect to the scope of the criminal offence of money-laundering, the FATF urges states to ensure that 'criminal liability, and, where that is not possible civil or administrative liability, should apply to legal persons'. According to the FATF, parallel criminal, civil, or administrative proceedings with respect to legal persons in states in which such forms of liability are available, are not precluded. What is crucial is that legal persons are subject to effective, proportionate, and dissuasive sanctions.[71]

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66 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).

67 'Naleving van het Verdrag tegen Foltering in Nederland', *Nederlandse Vereniging voor de Verenigde Naties,* retrieved from: http://www.nvvn.nl/artikel/naleving-van-het-verdrag-tegen-foltering-in-nederland/ (last reviewed 1 August 2016).

68 'Convention on combatting bribery of foreign public officials in international business transactions', *Organisation for Economic Co-operation and Development,* retrieved from: https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last reviewed 12 August 2016).

69 'Nederland doet meer tegen buitenlandse omkoping', *Rijksoverheid,* retrieved from:https://www.rijksoverheid.nl/actueel/nieuws/2013/01/08/nederland-doet-meer-tegen-buitenlandse-omkoping (last reviewed 12 August 2016).

70 G. Smid, Internationale corruptiebestrijding in Nederland', *TvCo* 2016/03, p. 115

71 Financial Action Task Force, FATF 40 Recommendations, p. 4

B. 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.[72]

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

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

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

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 Committee against Torture, for instance, stated that States parties are obliged to take positive measures to ensure that torture and ill-treatment are effectively prevented and repressed, insofar as the relevant acts took place in a territory under the state's jurisdiction. The Committee stated that 'territory' includes 'all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law'.[73]

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.[74] The latter convention has been 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.[75]

C. 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 human rights (also known as the Ruggie Principles).[76] 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. After the adoption of the Principles, the Netherlands released a National Action Plan in 2014, in which the Ministry of Foreign Affairs extensively discussed how these principles are to be implemented in the Netherlands. Compliance with the Principles makes a corporation more

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[73] Concluding observations on the combined fifth and sixth periodic reports of the Netherlands, *Committee against Torture,* 20 june 2013.
VN Verdrag tegen foltering en andere wrede, onmenselijke of onterende behandeling of bestraffing, New York 10 december 1984, *Trb.* 1989, 20.

[74] 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.

[75] 'Mission and Ambition', *College voor de rechten van de mens,* retrieved from: https://www.mensenrechten.nl/mission-and-ambition (last reviewed 14 August 2016).

[76] 'Guiding principles on business and human rights', *United Nations Human Rights – office of the high commissioner-,* retrieved from: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last reviewed 14 August 2016).

eligible for funding and is even a requirement for companies doing business with the Dutch government itself.[77]

The Netherlands also supports the OECD Guidelines on Multinational Corporations, and on that basis has established a so-called National Contact Point (*Nationaal Contactpunt),* which functions as an information centre and a mediator in case of differences of opinion between stakeholders and the corporation regarding the implementation of obligations arising under the OECD Guidelines.[78]

Finally, there are several other ways in which the Dutch government stimulates corporate social responsibility, such as establishing knowledge networks and providing financial support for relevant initiatives.[79]

4. Framework for Prosecuting a Cross-Border Case

How is a cross border-case built in your criminal justice system?

To build a cross border-case, the first step will be to find information which will lead 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.

The (multiple) authorities involved in the prosecution of a cross-border case will be discussed subsequently.

From information to prosecution

The first step in building a cross-border case concerns the collection of information about a possible crime. Usually this information 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.[80] 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). Respondents emphasized that while start information may derive from cooperation with NGOs, actual evidence-gathering is conducted solely by the public prosecutor for reasons of efficiency

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77 'Nationaal Actieplan bedrijfsleven en mensenrechten', *Ministerie van Buitelandse Zaken,* retrieved from: https://www.rijksoverheid.nl/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten (last reviewed 17 August 2016).

78 'Nationaal Contactpunt (NCP) Nederland', retrieved from: https://www.oesorichtlijnen.nl/ncp (last reviewed 14 August 2016).

79 Dutch Government on Corporate Social Responsibility on its website. Retrieved from: https://www.rijksoverheid.nl/onderwerpen/maatschappelijk-verantwoord-ondernemen/inhoud/maatschappelijk-verantwoord-ondernemen-in-de-praktijk.

80 Public Prosecutors working in the field of international criminal law.

and legality. The respondents added that information can also come from the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst* (*AIVD)*; this occurs mainly in cases of terrorism.

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 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.[81] 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 try and obtain documents regarding the administration of the corporation, more specifically the minutes of meetings. The respondent furthermore noted that the prosecutor typically tries to get in contact with the person working within the corporation who knows everything but is not himself/herself involved in the crime. This person is often the secretary of the corporation or a former co-worker who has remorse.[82]

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.

Rules governing the investigation

The investigation will primarily be 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). Therefore, the legal framework of the DCCP will be set out first and subsequently the rules of the more specific acts will be elaborated on.

- Dutch Code of Criminal Procedure (DCCP)

The phase before the court-hearing is called the 'preliminary investigation', which consists of three stages; the criminal investigation (*opsporingsonderzoek),* the financial crime investigation, and the preliminary judicial investigation (*gerechtelijk vooronderzoek).*[83]

The criminal investigation (*opsporingsonderzoek*) marks the beginning of the criminal procedure, meaning that from this moment onwards any activity only takes place on the basis

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[81] Article 132 Dutch Code of Criminal Procedure; the public prosecutor is competent to start a preliminary investigation on the basis of article 141 Dutch Code of Criminal Procedure.

[82] Public prosecutor working within the field of international criminal law.

[83] G.J.M. Corstens & M.J. Borgers, *Het Nederlands Strafprocesrecht* (7e druk), Deventer: Kluwer 2011, p. 227.

of the law.[84] In the regular course of events the prosecutor will start an investigation in response to a reasonable suspicion that a crime has been planned or committed.[85] The information of this reasonable suspicion is thus, as already mentioned, often provided by the police or, in international crime cases, by NGOs. Occasionally, the protection of the legal order (*rechtsorde)* requires that an investigation must take place when a crime is not yet committed. This so-called 'early investigation' (*vroegsporing*) can be instituted against a suspect when there is a reasonable suspicion that organised crime, which forms a grave breach on the legal order, is planned or committed.[86] The investigation is led by the public prosecutor.[87] It is conducted by the public prosecutors (art. 141 DCCP), the police officers (as referred to in article 2 a, c and article 2a Police Act 2012), the police officers of The National Police Internal Investigations Department (*Rijksrecherche*) (article 2 d Police Act 2012), members of the military of the Royal Netherlands Military Constabulary (*Koninklijke Marechaussee*) (article 4 Police Act 2012), and investigation officers of the special investigation agencies (article 59 sub 1 Police Act 2012).

The task of these investigation officers concerns the collection of evidence. As already mentioned above (under Question 1.b. *special rules for fact-finding*), the DCCP offers the investigation officers several methods to fulfil this task. To briefly summarize, these methods include hearing the suspect, hearing the witness, technical investigation such as DNA-research,[88] and the sequester of property[89]. Another regular used method of evidence-gathering constitutes the request of information about certain persons or certain transactions. The request of information in response to a suspicion of a crime is governed by articles 126nc – 126ni DCCP. The request within the early investigation is governed by article 126o DCCP.[90] For a request in response to signs of crimes or terror, the rules are laid down in articles 126zk-126zp DCCP. These articles rule which investigation officers are competent to request information and the type of information which can be requested (identifying[91], other[92], future,[93] and sensitive[94] information).

Under globalisation, international and cross-border crime has increased. In building a cross-border case, the DPPO must cooperate with authorities in other countries in order to collect correct and complete information. This cooperation is referred to as mutual legal assistance. The DCCP provides for several possibilities in this respect. The framework of international legal assistance is set out in Title X of the DCCP. Part A governs requests of foreign authorities

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84 This principle of legality is laid down in article 1 Dutch Code of Criminal Procedure.

85 G.J.M. Corstens & M.J. Borgers, *Het Nederlands Strafprocesrecht* (7e druk), Deventer: Kluwer 2011, p. 245.

86 G.J.M. Corstens & M.J. Borgers, *Het Nederlands Strafprocesrecht* (7e druk), Deventer: Kluwer 2011, p. 246.

87 Article 148 Dutch Code of Criminal Procedure.

88 This possibility is laid down in article 151a Dutch Code of Criminal Procedure.

89 Article 134 (1) Dutch Code of Criminal Procedure.

90 In this phase, no reasonable suspicion exists yet as the crime is not yet committed. Article 126o Dutch Code of Criminal Procedure.

91 As laid down in articles 126nc, 126uc and 126zk Dutch Code of Criminal Procedure, this type of information can be requested by every investigation officer

92 'Other' information means information which not constitutes identifying or sensitive information, the law refers to this as 'certain saved or recorded information', see articles 126nd, 126ud and 126zl Dutch Code of Criminal Procedure.

93 Articles 126ne, 126ue and 126zm Dutch Code of Criminal Procedure.

94 Articles 126nf, 126uf and 126zn lay down the rules of requesting sensitive information, which is the information concerning religion, race, political affiliation, health, sexual life or membership of a corporation, as referred to in article 126nd sub 2 Dutch Code of Criminal Procedure.

for legal assistance of Dutch authorities. An extensive explanation of the relevant legislation on the exchange of information in criminal cases is set out in a protocol of the Dutch Public Prosecutor's Office (hereafter: DPPO).[95] The DPPO has a separate department for international legal assistance in criminal cases, namely the 'Department of International Mutual Legal Assistance in Criminal Cases' (*Afdeling Internationale Rechtshulp in Strafzaken*).

Within the framework of cross-border cases, there is the possibility to extradite a person from the Netherlands to another state for the purpose of an investigation or prosecution. The legal framework governing this extradition is laid down in the Extradition Act (*Uitleveringswet*).[96] The act defines extradition as 'the removal of a person from the Netherlands to authorities of another state for the purpose of an investigation focused on that person in that state or for the purpose of enforcing a penalty against that person'.[97] Extradition from the Netherlands can only take place if the Netherlands has a treaty with the state to which the person will be extradited. Recently, the Dutch Minister of Security and Justice, Minister Van der Steur, proposed a change to the law to simplify the procedure for international legal assistance, which had become increasingly complex as a result of subsequent amendments of the law. The cabinet accepted the bill.[98]

- 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). The Protocol for the treatment of complaints under the International Crimes Act sets out these specific rules for the prosecution of crimes laid down in the ICA.[99] 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.[100]

- 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 (*pasieve omkoping*) on the

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95 Aanwijzing inzake de informatie-uitwisseling in het kader van de wederzijdse rechtshulp in strafzaken, *Stcrt.* 2008, no. 232, retrieved from: http://wetten.overheid.nl/BWBR0024759/2009-01-01/0/afdrukken+informatie (last reviewed 31 May 2016).

96 Uitleveringswet, retrieved from: http://wetten.overheid.nl/BWBR0002559/2015-11-17 (last reviewed 31 May 2016).

97 Article 1(1) Uitleveringswet, retrieved from: http://wetten.overheid.nl/BWBR0002559/2015-11-17 (last reviewed 31 May 2016).

98 Kabinet moderniseert internationale rechtshulp in strafzaken, 6 November 2015, retrieved from: https://www.rijksoverheid.nl/actueel/nieuws/2015/11/06/kabinet-moderniseert-internationale-rechtshulp-in-strafzaken (last reviewed 31 May 2016).

99 Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt*. 2011, no. 22803, p. 1.

100 Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt*. 2011, no. 22803, p. 3.

basis of article 362, 363, and 364 DPC.[101] Although corruption is criminalized in the DPC, the specific word 'corruption' cannot be find 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'*).[102] For instance, strictly speaking 'facilitation payments' fall within the scope of corruption. However as follows from the Protocol of the Dutch Public Prosecutor concerning the policy of corruption, the DPPO will not prosecute corporations for facilitation payments, on the condition that the administration of these payments takes place transparently.[103]

The Protocol moreover sets out the criteria which the Public Prosecutor has to take into account when deciding whether an act constitutes corruption. It will usually be the case that a person working for the corporation has engaged in corrupt practices. However, as mentioned earlier (under Question 1), 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.[104] In deciding whether to prosecute a corporation for corruption, the public prosecutor is required to take into account article 5 of the OECD Convention on combating bribery of foreign public officials in international business transactions: (s)he may not make the decision under the influence of national economic interests, nor may he take into account the possible effect on the individuals or corporations concerned.[105]

Since the legislative change in 2001, it is possible to prosecute all Dutch corporations and individuals suspected of foreign corruption. The same goes for a Dutch civil servant, or corporation, who, bribes a foreign civil servant in a foreign country.[106] Persons employed by a public service (*openbare dienst)* or humanitarian organization are treated as civil servants for purposes of the applicable legislation.[107] The legislative change also makes it possible for individuals and corporations to be prosecuted in the Netherlands for bribing a Dutch civil servant in a foreign country.

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.[108] To support corporations in preventing corruption and moreover to inform them about the specific instances in which they contravene the rules on

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[101] Aanwijzing opsporing en vervolging buitenlandse corruptie, *Stcrt* 2012, 26939, https://zoek.officielebekendmakingen.nl/stcrt-2012-26939.html (last reviewed 31 May 2016).

[102] J.H. Maat, 'Buitenlandse corruptie en de aanpak door de Rijksrecherche', in: WODC, *Justitiële Verkenningen, Ambtelijke corruptie*, Den Haag: Boom Juridische Uitgevers 2005, p. 66.

[103] Aanwijzing opsporing en vervolging buitenlandse corruptie, *Stcrt* 2012, 26939*,* https://zoek.officielebekendmakingen.nl/stcrt-2012-26939.html (last reviewed 31 May 2016); M.J.C. Somsen en R. Van Staden ten Brink, *Anti-corruptie compliance: wat te doen als het mis gaat?,* Ondernemingsrecht 2013/4.

[104] HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938.

[105] Aanwijzing opsporing en vervolging buitenlandse corruptie, *Stcrt.* 2012, 26939, retrieved from: https://zoek.officielebekendmakingen.nl/stcrt-2012-26939.html (last reviewed 31 May 2016);

[106] Article 178a Dutch Penal Code; *Kamerstukken II* 1999/2000, 26469, 5, p.3.

[107] Articles 178a and 364a DPC.

[108] F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. Eijsbouts & J.M. de Jongh (Eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)*, Deventer: Kluwer 2010, p. 144.

corruption, the Organisation for Economic Co-operation and Development (hereafter: OECD) established guidelines.[109]

- Economic Crimes

In building a cross-border case concerning economic offences, the Economic Offences Act (hereafter: EOA) contains some complementary rules.

- Environmental Crimes

For environmental crimes the legal framework on the protection of the environment is primarily laid down in 'the Law of Environmental Management' (*Wet Milieubeheer*). However, the enforcement of this law is generally governed by the EOA, as environmental crimes are often committed with economic motives. Back in 1994, the EAO was drastically changed for the purpose of increased sentences for economic crimes.[110] The environmental crimes for which the sentences have been increased are those which lead to a 'direct deterioration of the environment, or those who form a grave and direct threat to the environment' (article 1a of the Law of Environmental Management).[111]

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, in the ten different districts, 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.

- The National Office and the Functional Office

The National Office is appointed with the task of combatting (international) organized crime.[112] The office leads the investigations of the National Investigation Service (*Nationale Recherche)*, whose investigations are concerned with international smuggling of people, cocaine, heroin, weapons and explosives, the production and exports of synthetic drugs, money-laundering, terrorism, and extreme forms of politically inspired activism.[113]

The Functional Office (*Functioneel Parket*) of the DPPO focuses on complex questions, such as combatting complex fraud or environmental crime cases.[114] The Functional Office is responsible for four 'special investigation agencies' (*Bijzondere opsporingsdiensten)*: The Dutch Food and Goods Authority (NVWA), The Fiscal Intelligence- and Investigation Agency (FIOD), The Inspection Social tasks and Employment (Inspection SZW), and The Inspection

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[109] 'OESO-guidelines: Combatting Corruption'*, Nationaal Contactpunt OESO-richtlijnen,* retrieved from: http://www.oesorichtlijnen.nl/oeso-richtlijnen/c/corruptiebestrijding (last reviewed 31 May 2016).

[110] *Kamerstukken II* 1993/94, 23196, 186.

[111] *Kamerstukken II* 1992/93, 23196, 3; these crimes include violations of several Acts concerning the environment such as the Flora and Fauna Act, the Fisheries Act, the Law of Environmental Management.

[112] 'Organisation of the Public Prosecution Service', *Openbaar Ministerie,* retrieved from: https://www.om.nl/algemeen/english/about-the-public/organisation-the/ (last reviewed 14 August 2016).

[113] 'Landelijk Parket', *Openbaar Ministerie,* retrieved from: https://www.om.nl/organisatie/landelijk-parket-1/ (last reviewed 10 August 2016).

[114] 'Organisation of the Public Prosecution Service', *Openbaar Ministerie,* retrieved from: https://www.om.nl/algemeen/english/about-the-public/organisation-the/ (last reviewed 14 August 2016).

Goods and Transport (ILT). The competences and tasks of these agencies are laid down in 'The Act on the Special Investigation Agencies'.[115]

The national public prosecutor in charge of money-laundering *(landelijk corruptie-officier van justitie)* has a coordinating role in the investigation of money-laundering in the Netherlands as well as outside the Netherlands.

- 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.[116]As far as the prosecution of international crimes is concerned, the National Prosecutor cooperates with the Team International Crimes of the Criminal Investigation Department.[117]

- 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 tasks to prevent corruption in accordance with article 6 UNCAC.[118] 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.[119] 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.[120] 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 Financieel Toezicht),* can carry out the business of a bank, the business of an exchange

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[115] Wet op de bijzondere opsporingsdiensten, retrieved from: http://wetten.overheid.nl/BWBR0019919/2013-01-01 (last reviewed 31 May 2016).

[116] Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcrt*. 2011, no. 22803, p. 1.

[117] 'Internationale Misdrijven', *Openbaar Ministerie*, retrieved from: https://www.om.nl/onderwerpen/internationale/ (last reviewed 31 May 2016).

[118] W. Slingerland, F. Eijkelhof, M. van Hulten, O. Popovych, J. Wempe, 'National Integrity System Assessment The Netherlands', Transparency International 2012, p. 198.

[119] 'Wat doet de Rijksrecherce', retrieved from: http://www.rijksrecherche.nl/organisatie/doet-rijksrecherche/ (last reviewed 10 August 2016).

[120] Article 1 Regeling toezichthoudende ambtenaren Sanctions Act 1977.

adjustment, the business of insurance, or the business of a payment service in the Netherlands.[121] 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 Financiele 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.[122] Furthermore, they have competence over financial corporations.

- Authorities concerned with environmental crimes

The Human environmental and Transport Inspectorate (*Inspectie Leefomgeving en Transport)* is a department of the Ministry of Infrastructure and Environment and is given the task of monitoring compliance of corporations with environmental regulations.[123]

5. Prominent cases, media coverage

In your country, have prominent cases triggered a public debate? Do media discuss the usefulness and legitimacy of prosecuting corporations for violations of international law abroad?

This section contains an overview of some leading Dutch cases concerning the prosecution of corporations for violations of international law, or at least for trans boundary 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 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.[124] 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

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[121] Article 10(2) sub a, c, f, j. Sanctions Act; R. Van Elst, 'Commentaar op artikel 10 Sanctiewet 1977', in: D.J.M.W. Paridaens, P.A.M. Verrest (eds.), *Tekst & Commentaar Internationaal Strafrecht*, Deventer: Kluwer 2015.

[122] Article 10(2) sub b,d Sanctions Act.

[123] Over de Inspectie Leefomgeving en Transport , *Ministerie van Infrastructuur en Milieu,* retrieved from: https://www.ilent.nl/over_ilt/ (last reviewed: 7 September 2016).

[124] Rb. Amsterdam 23 juli 2010, ECLI:NL:RBAMS:2010:BN2149, r.o. 10.

Dutch Penal Code (hereafter: DPC), because it had delivered gravely polluted slops to Amsterdam Port Services while concealing the harmfulness of the substances.

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.[125] 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 was admittedly incorporated in the Netherlands, but their main activities were taking place from the United Kingdom and Switzerland.[126] 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.[127]

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.[128] 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.[129]

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.[130]

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.[131]

If anything, the Trafigura case has triggered calls for corporations to act more responsibly in host countries.[132]

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125 Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012

126 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

127 Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012, r.o. 3.1.

128 Hof Amsterdam, 23 december 2011, ECLI:NL:GHAMS:2011:BU9237, r.o. 8.

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

130 H. de Zeeuw, 'Nieuwe massaclaim tegen gifdumping Trafigura', *NRC.nl* 2 maart 2016, retrieved from: https://www.nrc.nl/nieuws/2016/03/02/slachtoffers-gifdumping-dienen-nieuwe-massaclaim-in-tegen-trafigura-a1408915 (last reviewed 2 September 2016).

131 L. Roorda, 'Geld stinkt niet, chemisch afval wel: een terugblik op de Probo Koala-zaken', *Ucall blog* 10 november 2015, retrieved from: 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); 'Trafigura: A toxic journey, *Amnesty International,* retrieved from: https://www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/ (last reviewed 24 October 2016).

132 L. Enneking, F. Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen*, Den Haag: Boom Juridische Uitgevers 2016, p. 451-453.

- *Tamil Tigers*

  The Liberation Tigers of Tamil Eelam (hereafter: LTTE) is a criminal organisation from Sri Lanka. It fought a long war against the government of Sri Lanka, in order to create its own independent state. The war ended in 2009 with a victory for the Sri Lankan government. The United Nations (hereafter: UN) judged that it was credible to define the crimes committed by the LTTE as 'war crimes and crimes against humanity'.[133] LTTE participants were later prosecuted in the Netherlands. Investigations into the LTTE and its supporters are also pending in England, France, Germany, Australia, and Canada.[134]

  Although the LTTE is not a 'corporation' in the technical case, it is relevant to discuss the Dutch case here as it evidences the broad jurisdictional possibilities to prosecute persons associated with a criminal organization. It is also observed that the Dutch Court sentenced Seliah to five years imprisonment on the basis of the 'Conflict of Laws (Corporations) Act' (*Wet Conflictenrecht Corporaties)* for participating in the continuation of the business of an organisation which is prohibited.

  Five participants of the LTTE were active in support of the organisation in the Netherlands; their activities mainly concerned fundraising to support the LTTE in Sri Lanka.[135] The prime suspect was Selliah, who was responsible for fundraising in several countries in Western Europe, including the Netherlands, and was accused of carrying out this fundraising with improper pressure and coercion. The prosecutor was of the view that he knew that the LTTE was on a European list of terrorist organizations and thus that he was aware that his fundraising activities for the LTTE were prohibited. The case was brought before the District Court in The Hague by the International Crimes Unit (*Team Internationale Misdrijven)*. The court declared Selliah guilty of participating in a criminal organisation (on the basis of article 140 DPC), of continuation of the banned organisation (on the basis of article 140 sub 2 and 3 DPC in conjunction with article 5b Conflict of Laws (Corporations) Act) and of violating article 2 of the Sanctions Act in conjunction with article 1 sub 1 of the Sanctions Regulation Terrorism 2002. Selliah was considered not guilty of participating in a terrorist organisation (which was the most serious crime of which he stood accused).[136] The LTTE itself was considered to have engaged in crimes such as money-laundering[137], gambling[138], as well as conducting pressure.[139] On appeal, the Court of Appeal of The Hague sentenced Selliah to four years and eleven months of imprisonment.[140]

- *Prosecutor v. Van Anraat*

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133 H. Post, 'Tamil Tijgers voor de Haagse Strafkamer', *NJB* 2012, afl. 10, p. 669.
134 'Vervolging Tamils heeft politiek karakter', *Prakken d'Oliveira,* retrieved from: http://www.prakkendoliveira.nl/nl/nieuws/vervolging-tamils-heeft-politiek-karakter/ (last reviewed: 7 September 2016).
135 Rb. Den Haag 21 October 2011, ECLI:NL:RBSGR:2011:BU2066
136 H. Post, 'Tamil Tijgers voor de Haagse Strafkamer', *NJB* 2012, afl. 10, p. 669.
137 This crime is punishable on the basis of article 420ter and or 420bis Dutch Penal Code.
138 LTTE organised lotteries in violation with article 1 of the Law on Gambling (*Wet op de kansspelen)*
139 Pressure as referred to in article 284 Dutch Penal Code
140 Hof Den Haag 30 April 2015, ECLI:NL:GHDHA:2015:1082

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 gas 'thiodiglycol' and delivered this gas to the regime of Saddam Hussein. This 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.[141] This conviction was upheld by the Supreme Court.[142]

In this case, 16 victims joined the procedure to claim damages.[143] The Court of Appeal of The Hague[144] 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).[145] In the Court's view, a criminal trial should not be burdened with complex civil cases. The Supreme Court agreed.[146]

- *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.[147] On appeal, both charges were dismissed for lack of evidence.[148] 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

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141 Hof Den Haag 9 mei 2007, ECLI:NL:GHSGR:2007:BA4676, r.o. 18.

142 HR 30 juni 2009, *NJ* 2009/481.

143 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.

144 Hof Den Haag 9 mei 2007, ECLI:NL:GHSGR:2007:BA4676, r.o. 18.

145 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.)

146 HR 30 June 2009, *NJ* 2009/481.

147 District Court The Hague, 6 June 2006, LJN:AX7098.

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

Court of Appeal.[149] The DSC referred the case back to the Court of Appeal. The case is currently again pending before the Court of Appeal in 's Hertogenbosch. It is to be assessed anew on all facts and evidence.[150]

The case of Kouwenhoven shows the difficulty which a judge faces in deciding a case with foreign elements. The particular challenge for the judge is to make a sound evaluation of a criminal case which occurred in a completely different context characterized by different norms and values, and a different geographical, cultural, and social setting.[151] At any rate, the case demonstrates that the judge should take on an proactive attitude in finding the truth.[152]

- *Riwal*

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 *Riwal* 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 was based on 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 particular, the complaint referred to contributions by the company to the construction of the security barrier and settlements by Israel in the West Bank'.[153]

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.[154] 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

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[149] 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.

[150] High Court of The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068; 'Vrijspraak in zaak Kouwenhoven', *Rechtspraak,* retrieved from: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Vrijspraak-in-zaak-Kouwenhoven.aspx (last reviewed: 18 August 2016).

[151] L. Zegveld and J. Handmaker, 'Universal Jurisdiction: State of Affairs and Ways Ahead, A Policy Paper', *International Institute of Social Studies* 2012, p. 6.

[152] E. Van Sliedregt, M. Borgers, K. Rozemond, V. Glerum, 'Kroniek van het internationale en Europese strafrecht', *NJB* 2011, afl. 15, p. 1017.

[153] Al-Haq/ report of war crimes and crimes against humanity by Riwal, *Böhler Advocaten,* retrieved from: http://www.alhaq.org/images/stories/PDF/accoutability-files/Complaint%20-%20English.pdf (last reviewed: 7 September 2016).

[154] A. Smeulers, 'Tien jaar Wet Internationale Misdrijven – Een evaluatie', *DD* 2014/25, afl. 4, p. 287.

to its extraterritorial aspect, would also necessitate the cooperation of the Israeli authorities (which may not be forthcoming).[155]

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.[156] 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.[157] 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.[158]

- *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 foreign officials.[159] The case was eventually settled for 240 million USD, a new record for a Dutch corruption case.[160] Although it was a new record, the settlement amount had 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.[161]

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

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

156 Thijs Berger, public prosecutor.

157 J. Franke, 'Ethische connecties PGGM', *NIW* 16 januari 2014, retrieved from: http://www.niw.nl/ethische-connecties123/ (last reviewed: 7 September 2016).

158 'PGGM stopt met Isrealische banken', *NOS.nl,* 8 januari 2014, retrieved from: http://nos.nl/artikel/594827-pggm-stopt-met-israelische-banken.html (last reviewed: 7 September 2016).

159 SBM Offshore N.V. betaalt US$ 240.000.000 wegens omkoping, 12 november 2014, retrieved from: https://www.om.nl/onderwerpen/ambtelijke-corruptie/@87202/sbm-offshore-betaalt/ (last reviewed: 6 September 2016).

160 Redactie Volkskrant. 'Nederlands bedrijf SBM Offshore betaalt megaschikking van 192 miljoen', *Volkskrant* 12 November 2014.

161 G. Smid, Internationale corruptiebestrijding in Nederland', TvCo 2016/03, p. 117

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.[162]

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 Petrobas to secure contracts.[163] A first settlement was entered into, according to the terms of which SBM is to pay the Brazilian government 163 million USD.[164] The Brazilian Justice department recently rejected this settlement, and SBM is currently waiting for more information.[165]

- *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.[166] According to the DPPO, this practice constitutes bribery of a government official (*ambtelijke omkoping*) and forgery of documents (*valsheid in geschrift*).[167] 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).[168] In 2016, Dutch and US prosecutors settled with VimpelCom for 795 million USD. The Netherlands will receive half of the amount, which is 397 million USD.[169]

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[170] and 16 in 2015.[171] However, from the statistics it does not become clear how many of these investigations specifically concerned corporations.[172]

TMC Asser Institute: International Crimes Database

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[162] 'SBM Offshore N.V. betaalt US $ 240.000.000 wegens omkoping', *Openbaar Ministerie*, 12 november 2014, retrieved from: https://www.om.nl/vaste-onderdelen/zoeken/@87202/sbm-offshore-betaalt/ (last reviewed 24 October 2016).
[163] B. Nagtegaal, 'Miljoenenschikking SBM Offshore toch niet goedgekeurd', *NRC.nl* 2 september 2016.
[164] R. Postma, 'SBM Offshore treft eerste schikking in Brazilië', *NRC.nl* 26 January 2016.
[165] Redactie Volkskrant, 'Justitie Brazilie keurt Petrobras- schikking SBM Offshore af', *Volkskrant.nl* 2 september 2016.
[166] Redactie NRC, 'Grootste ontnemingszaal ooit in Nederland, *NRC.nl* 7 juli 2016.
[167] K. van der Togt, D.S. Schreuders, 'Recente ontwikkelingen op het gebied van corruptiebestrijding', *Bb* 2016/19, afl. 7, p. 79.
[168] G. Smid, Internationale corruptiebestrijding in Nederland', TvCo 2016/03, p. 115
[169] V. Van der Boon, 'VimpelCom schikt corruptiezaak voor $795 mln', *Financieel Dagblad* 18 februari 2016.
[170] Rapportagebrief Internationale Misdrijven 2014, 29 juni 2015, p. 4.
[171] Rapportagebrief Internationale Misdrijven 2015, 23 mei 2016, p. 2.
[172] Rapportagebrief Internationale Misdrijven 2013, 25 september 2014, p. 2.

The International Crimes Database is a relatively new initiative launched by the TMC Asser Institute in The Hague in 2013, partly sponsored by the Dutch Ministry of Security and Justice.[173] The aim of this database is to offer a comprehensive overview of international crimes adjudicated by national and international courts.[174] However, the database does not specifically concern corporations, and it is thus of relatively limited use.

7. Public debate on Corporate Social Responsibility

Has the accountability of corporations and their compliance with the law and certain ethical standards been subject to recent debate?

The debate on human rights and corporations is ongoing in the Netherlands. For example, the Institute for Human Rights (*College voor de Rechten van de Mens*) emphasized in its annual report of 2014 the importance for corporations to take into account human rights.[175] 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'.[176]

The Netherlands published its national action plan on business and human rights in 2014,[177] 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. Still, corporations may be held responsible in tort and in some cases under criminal law.[178] In any event, the legal aspects of CSR were considered to be a very much evolving field, subject to continuous developments and public debate.[179]

NGO activity in the field of CSR

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 CSR) was

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[173] Website of the international crimes database. Retrieved from: http://www.internationalcrimesdatabase.org/AboutIcd/History (last reviewed: 31 May 2016).

[174] Rapportagebrief internationale misdrijven van 25 september 2014. Opgesteld door het Ministerie van Veiligheid en Justitie aan de Tweede Kamer, p. 14.

[175] Jaarverslag 2014, College voor de Rechten van de Mens, p. 21.

[176] Mensenrechtenrapportage 2014, Ministerie van Buitenlandse zaken, p. 31.

[177] Ministerie van Buitenlandse Zaken (April 2014), 'Nationaal Actieplan bedrijfsleven en mensenrechten', retrieved from: https://www.rijksoverheid.nl/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten (last reviewed 31 May 2016).

[178] A very much debated civil case is the ongoing case *Akpan v Shell*, regarding oil pollution in Nigeria. The latest judgment is available at https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view (last reviewed 15 August 2016).

[179] L. Enneking, F. Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen*, Den Haag: Boom Juridische Uitgevers 2016, p. 451-453.

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".[180] The setting up of this platform was in part a response to the debate that was ignited after scandals involving Dutch multinationals such as Heineken and Shell. The MVO platform issues its own statements on issues within the field of CSR. In addition, it participates in roundtables, fulfils an advisory role, provides information to various stakeholders, and fulfils several other roles such as lobbying and consulting.[181]

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, as the name indicates, 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. Other NGOs, such as Amnesty International, focus more on the legislative aspects of CSR and exert pressure on multinationals to comply with human rights standards.

C. Holding Corporations Accountable – the Jurisdictional Issue

I. General Jurisdiction/ General Aspects of Jurisdiction

1. General jurisdiction – Generals

Jurisdiction concerns the reach which the State gives to its (criminal) law.[182] It addresses the question as to *where* and *to whom* Dutch criminal law is applicable.[183] The scope of a State's jurisdiction is ordinarily informed by the desire to protect the specific interests of the State, including its nationals.[184]

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)*.[185] The Dutch Government changed the legal framework concerning jurisdiction quite recently 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

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[180] Retrieved from: http://mvoplatform.nl (last reviewed 31 May 2016).
[181] Jaarverslag MVO Platform 2014 (May 2015).
[182] H.D. Wolswijk, *Locus delicti en rechtsmacht*, Deventer: Gouda Quint 1998, p. 17.
[183] J. de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht (vierde druk),* Deventer: Kluwer 2009, p. 138.
[184] H.D. Wolswijk, *Locus delicti en rechtsmacht*, Deventer: Gouda Quint 1998, p. 17.
[185] Besluit internationale verplichtingen extraterritoriale rechtsmacht, retrieved from: http://wetten.overheid.nl/BWBR0034775/2016-01-01 (last reviewed 31 May 2016).

persons with Dutch nationality and foreigners residing on Dutch territory; and (3) making the rules on jurisdiction more accessible.[186]

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 crime concerning the import of drugs into the Netherlands,[187] 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.[188] Furthermore, Dutch criminal law applies to military service-members suspected of any criminal act committed outside the Netherlands.[189]

Finally, article 2 of the International Crimes Act (hereafter: ICA) provides not only for active and passive personality-based jurisdiction[190] 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).[191] There is no clear definition of the term 'presence'. From the *travaux préparatoires* it can be derived that 'an investigation can start in case there exists a grave reason to assume that the suspect is present on Dutch territory'.[192] 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.[193]

Even where jurisdiction obtains on the basis of the aforementioned principles, it cannot be exercised in cases where the suspect enjoys international immunity. This is laid down in article 8d DPC. However, this article is strictly speaking not necessary for the application of immunity: as the Dutch Supreme Court ruled in its decision of 8 July 2008, rules of immunity directly deriving from international law restrict the application of the DPC.[194]

As in general international law, there exists no hierarchy between the different grounds of jurisdiction in Dutch criminal law.[195] That being said, Dutch legal practice applies the principle of the proper administration of justice (*goede rechtsbedeling)* in cross-border cases in which multiple states might have jurisdiction.[196] This principle entails that in each case, a

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[186] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikel 2 -8', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[187] Article 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.

[188] Article 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*, Deventer: Kluwer 2014.

[189] Articles 4 and 168 of the Military Criminal Code.

[190] Article 2(1)(b) and (c) International Crimes Act.

[191] Article 2(1)(a) International Crimes Act.

[192] *Kamerstukken II* 2001/02, 28337, 3.

[193] J.A.C. Bevers, 'Commentaar op artikel 2 WIM', in: J.A.C. Bevers, N.M. Blokker, J.F.L. Roording, *Tekst& Commentaar: Internationaal Strafrecht*, 2e druk, Deventer: Kluwer 2007.

[194] HR 8 juli 2008, *LJN* BC7418, *NJ* 2011/91, r.o. 6.6.

[195] R. Van Elst, 'Tekst&Commentaar Strafrecht, commentaar op artikelen 2-8', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[196] Ibid.

decision has to be made regarding the most appropriate jurisdiction.[197] However, the exact meaning of this principle is not very clear and it is only used sporadically, mainly in cases concerning transfer of prosecution.[198]

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 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 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 act of natural persons to the corporation. The different proposed models of attribution of jurisdiction are discussed in Section 2a.[199]

2. Territorial Jurisdiction

Territoriality can be regarded as the basic principle of criminal jurisdiction.[200] 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. As to the latter, it is practical indeed to conduct an investigation on the territory where the crime took place, in light of evidence-gathering, fact-finding, and hearing witnesses.[201]

a) Legal Framework

Statutory rules and their historical context

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[197] Ibid.

[198] See the criteria mentioned in article 8(1) European Convention on the Transfer of Proceedings in Criminal Matters (*inter alia*, the ordinary residence of the suspect); R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[199] 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, p. 255.

[200] J. de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht (vierde druk),* Deventer: Kluwer 2009, p. 138; A.H. Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, Den Haag: WODC 2010, p. 5.

[201] J. de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht (vierde druk),* Deventer: Kluwer 2009, p. 139.

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.[202] The principle of territorial jurisdiction, as a Dutch author held, is 'uncontested and incontestable' (*onbetwist en onbetwistbaar*).[203] Article 2 DPC was only amended once, in 1973, when the term 'The Realm in Europe' (*Het Rijk in Europa*) was changed into 'the Netherlands' (*Nederland*).[204]

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.[205] 'The Act regarding the Boundaries of the Dutch Territorial Sea' (*Wet grenzen Nederlandse territoriale zee*) provides that the width of the Dutch territorial sea is 12 nautical miles;[206] this is in accordance with the United Nations Convention on the Law of the Sea.[207] The Convention on International Civil Aviation provides that every state has jurisdiction over the airspace above its territory.[208] Also, on the basis of the flag principle, Dutch criminal law applies to crimes committed on board a Dutch vessel.[209]

Can territoriality be based on where the defendant has acted and/or where his act took effect?
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:[210]

- The doctrine of the human behaviour;
- 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 has its effect.[211] On the basis of the third doctrine, the effects doctrine, the *locus delicti* is the place where the crime is completed (*i.e.*,

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[202] Article 2 Dutch Penal Code, *De Nederlandse Strafwet is toepasselijk op ieder die zich in Nederland aan enig strafbaar feit schuldig maakt.*
[203] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.
[204] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.
[205] J.E.D. 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, p. 108.
[206] Article 1 (1) Act boundaries Dutch Territorial Sea.
[207] Article 3 United Nations Convention on the Law of the Sea.
[208] Article 1 Verdrag inzake de burgerluchtvaart Chicago 7 december 1944, *Stb.* H (1947) 165.
[209] Article 3 Dutch Penal Code.
[210] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.
[211] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

where the effect occurred), insofar as the occurrence of the effect forms a component of the crime.[212] 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.

To apply these 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.[213] 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.[214] Schneider, however, proposes to base the territorial place of organization of a corporation on the corporation's centre of main interest.[215] Under Schneider's theory, a foreign corporate agent's corrupt 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.

b) 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

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[212] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[213] 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, p. 254.

[214] 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, Baden-Baden 2013, pp. 329 – 367.

[215] 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, p. 257.

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.[216] 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.[217]

3. Extraterritorial Jurisdiction

Extraterritorial jurisdiction means that the Netherlands has jurisdiction over crimes committed outside Dutch territory.[218] 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 1st of July 2014,[219] 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.[220] Most of these obligations refer to crimes of terrorism. The change of legal framework was inspired by the legal systems of Belgium and Germany.[221]

In the Netherlands, the exercise of extraterritorial jurisdiction needs a statutory basis. It cannot be based directly on customary international law (*gewoonterecht).*[222] 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.[223]

a) Active Personality (or Nationality) Principle

aa) Generals

The active personality principle allows a state to penalize (certain) acts committed by its nationals outside national territory.[224]

Under article 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 article 7(1) DPC, Dutch criminal law applies to a Dutch national who has committed a

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216 HR 14 september 1981, ECLI:NL:1981:AC3699, r.o. 4.
217 HR 2 februari 2010, ECLI:NL:HR:2010:BK6328, r.o. 2.4.
218 A. De Hoogh en G. Molier, 'Jurisdictie', in: N. Hornbach, R. Lefeber, O. Ribbelink, *Handboek Internationaal Recht,* Den Haag: TMC Asser Press 2007, p. 5.
219 *Staatsblad 2013, 484.*
220 'Besluit internationale verplichtingen extraterritoriale rechtsmacht', retrieved from: http://wetten.overheid.nl/BWBR0034775/2016-01-01 (last reviewed 31 May 2016).
221 A.H. Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, Den Haag: WODC 2010.
222 R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Kluwer: Deventer 2014.
223 HR 18 september 2001, ECLI:NL:PHR:2001:AB1471, r.o. 6.4.
224 A. De Hoogh en G. Molier, 'Jurisdictie', in: N. Hornbach, R. Lefeber, O. Ribbelink, *Handboek Internationaal Recht,* Den Haag: TMC Asser Press 2007, p. 5.

crime outside Dutch territory when the act is punishable under both Dutch and foreign territorial law. The dual criminality requirement of article 7(1) DPC is not interpreted very strictly. The crime category need not be the same in both states; it suffices that the statutory provisions in Dutch respectively foreign criminal law in essence protects the same right.[225]

Article 7(2) DPC provides for exceptions to the dual criminality requirement of article 7(1) DPC, containing a limited list of offences which do not require punishment of the act under foreign territorial law. The *travaux préparatoires* indicate that the list was established on the basis of three conditions being satisfied: (1) the absence of dual criminality stood in the way of prosecution in the Netherlands, where such prosecution was regarded as desirable; (2) the crimes should be serious, such as to shock the country; and (3) the acts should not only be regarded as serious criminal acts in the Netherlands but also in other countries.[226] The crimes listed in article 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).[227] 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. Article 7(2)(b) DPC criminalizes acts harming the International Criminal Court.[228] Article 7(2)(c) DPC concerns crimes of sexual abuse of minors.[229] This provision was added to provide law-enforcement agencies with another instrument to fight sex tourism.[230] Article 7(2)(d) DPC concerns crimes of genital mutilation against a girl below the age of 18.[231] Art. 7(2)(e) DPC concerns crimes which force someone to do something under violence or threat of violence.[232]

The active personality principle is in the Netherlands restricted to "crimes" (*misdrijven*), although specific statutes allow for the exercise of jurisdiction over (lesser) misdemeanours (*overtredingen)*.[233] A specific legal provision which exceptionally allows for the exercise of active personality jurisdiction over misdemeanours rather than crimes is article 13 of the Sanctions Act (*Sanctiewet*) 1977. This act is an instrument used to implement international agreements and recommendations concerning the punishment of certain crimes, which are aimed at safeguarding the international legal order.[234] The Sanctions Act is applicable to Dutch nationals who commit the crimes laid down in the Act outside Dutch territory.[235] Dutch

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[225] R. Van Elst, 'Tekst & Commentaar bij artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[226] *Kamerstukken II* 2003/04, 29451, 1.

[227] Article 7(2) sub a: Crimes as defined in Title I and II of Book 2 Dutch Penal Code and articles 192a – 192c, 197a – 197c, 206, 237, 272 and 273.

[228] Article 7(2) sub b: Crimes as defined in articles 177, 178, 179, 180, 189, 200, 207a, 285a, 361 Dutch Penal Code.

[229] Article 7(2) sub c: Crimes as defined in articles 240b and 242-250 Dutch Penal Code.

[230] R. Van Elst, 'Tekst & Commentaar bij artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[231] Article 7(2) sub d: Crimes as defined in articles 300 – 303 Dutch Penal Code.

[232] Article 7(2) sub e: Crime as defined in article 284 Dutch Penal Code.

[233] A. De Hoogh en G. Molier, 'Jurisdictie', in: N. Hornbach, R. Lefeber, O. Ribbelink, *Handboek Internationaal Recht,* Den Haag: TMC Asser Press 2007, p. 5; for an example see: Article 13 Sanctiewet, retrieved from: http://wetten.overheid.nl/BWBR0003296/2015-01-01 (last reviewed 31 May 2016).

[234] R. Van Elst, *Tekst & Commentaar Internationaal Strafrecht, Actief Nationaliteitsbeginsel bij: Sanctiewet 1977, artikel 13 (6e druk*), Deventer: Kluwer 2015.

[235] Article 13 (3) Sanction Act.

nationals also include Dutch legal persons.[236] The corporations subjected to the supervision of the Nederlandsche Bank and the Stichting Autoriteit Financiele Markten, entrusted with the supervision of compliance with Part V of the Sanctions Act concerning financial trafficking, are set out in article 10(2) (a-j) Sanctions Act.[237]

Underlying rationale

As a justification for the active personality principle, Dutch doctrine mentions the prohibition of extraditing one's own nationals.[238] This principle is laid down in article 4(1) of the Extradition Act (*Uitleveringswet)*.[239] It ensures that a Dutch national returning to the Netherlands after committing a crime abroad, can be prosecuted for that crime in the Netherlands in case he cannot be extradited to the foreign state.

ab) Corporations and the Active Personality Principle

The Dutch Supreme Court (hereafter: DSC) ruled in 1990 that the active personality principle also applies to legal persons (corporations).[240] The case concerned the interpretation of article 13 of the Sanctions Act, which was construed as including corporations within its scope.

Regarding article 7 DPC, it is of note that the DSC ruled in 1991 that the DPC applies to a Dutch person who exercised *de facto* leadership over a criminal act within a German corporation which committed the crime.[241]

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 is whether the act is punishable according to that country's criminal law.[242]

The nationality of a corporation is usually established on the basis of the real seat of the corporation (*werkelijke vestigingsplaats)*.[243] 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.[244] It is not required that the activities of the corporation take place on Dutch territory.[245]

b) Passive Personality Principle

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[236] HR 11 december 1990, ECLI:NL:HR:1990:ZC8649, r.o. 5.2.

[237] R. Lugard, 'Sanctieregelgeving. De sanctiewet 1977 en de Regeling toezicht Sanctiewet 1977 in het algemeen en in het bijzonder voor trustkantoren', *TvCo* 2006/4.

[238] A.H. Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, Den Haag: WODC 2010, p. 91.

[239] Extradition Act, retrieved from: http://wetten.overheid.nl/BWBR0002559/2015-11-17 (last reviewed 31 May 2016).

[240] HR 11 december 1990, ECLI:NL:HR:1990:ZC8649, r.o. 11.

[241] HR 12 Februari 1991, *NJ* 1991, 528.

[242] R. Van Elst, 'Tekst & Commentaar bij artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[243] J. de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht (vierde druk),* Deventer: Kluwer 2009, p. 142.

[244] Aanwijzing opsporing en vervolging buitenlandse corruptie', *Stcrt.*2012, no. 26939.

[245] F.G.H. Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. Eijsbouts & J.M. de Jongh (Eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)*, Deventer: Kluwer 2010, p 131.

ba) General

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.[246] Thus, the link with the Netherlands is the Dutch nationality of the victim.[247] The principle has only recently been included as a general principle of jurisdiction in the DPC.

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.[248] 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.

Current legal framework

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. This general inclusion of the principle strengthens the protection given by the DPC.[249]

Requirements of the principle

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.[250] The rationale regarding the eight years rule is that passive personality jurisdiction should only be justified for crimes of a certain gravity.[251] For some offences, dual criminality is not required, *per* article 6 DPC, in order to comply with duties flowing from international treaties.[252]

bb) Corporations and the passive personality principle

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[246] A. De Hoogh en G. Molier, 'Jurisdictie', in: N. Hornbach, R. Lefeber, O. Ribbelink, *Handboek Internationaal Recht,* Den Haag: TMC Asser Press 2007, p. 5.

[247] A.H. Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, Den Haag: WODC 2010, p. 93.

[248] Advies Raad van State en Nader Rapport, *Kamerstukken II* 2001/02, 28028, p. 2; Convention on the Safety of United Nations and Associated Personnel, accessible at: 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.

[249] R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

[250] Article 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.*

[251] *Kamerstukken II* 2012/13, 33572, 3.

[252] Besluit Internationale Verplichtingen Extraterritoriale Rechtsmacht, retrieved from: (last reviewed 31 May 2016). The provisions of this Decision which form a basis to establish jurisdiction based on the passive personality principle are: Article 2 (1) under a) 1,3,4, under b) 1 , under d) 1,2 , under e), under f), under h), article 3(1) under a and b, article 4 (1) under a), article 4(5).

The passive personality principle also extends to corporations as, under Dutch law, 'person' is also understood 'legal person'.[253]

c) Protective Principle

ca) General

On the basis of article 4 sub a-d and sub f, DPC jurisdiction can obtain 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.[254]

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.[255] These provisions have been crafted in order to protect the Dutch political structure and its economy.[256] There are no specific requirements attached to the exercise of protective jurisdiction.

cb) Corporations and the protective principle

Are corporations targeted under the regime of secondary boycotts, i.e. extraterritorial measures in order to enforce a (international) boycott (as for instance under the U.S. Helms-Burton Act)? Are there substitutes for criminal prosecution under the protective principle, e.g. torts claims?

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.[257] The boycott has an impact on Dutch companies, mainly those active within the vegetable and fruit sector.[258] The EU has also imposed sanctions on Syria, on the ground that Syria oppresses its own citizens.[259] EU sanctions regulations are directly applicable in the Netherlands.

e) Vicarious Jurisdiction – *Stellvertretende Strafrechtspflege*

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253 R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

254 *Kamerstukken II* 2012/13, 33572, 3.

255 R. Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

256 *Kamerstukken II* 2001/02, 28337, 3.

257 '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', *EUR-Lex, access to European Union Law,* retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1425979848378&uri=CELEX:02014R0833-20141206 (last reviewed 25 August 2016).

258 'Sancties tegen Rusland', retrieved from: Rijksoverheid, https://www.rijksoverheid.nl/onderwerpen/internationale-sancties/inhoud/sancties-tegen-rusland (last reviewed: 25 August 2016).

259 'The European Council Regulation No 36/2012 of 18 January 2012, concerning restrictive measures in view of the situation in Syria', *EUR-Lex, access to European Union Law,* retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0036 (last reviewed 25 August 2016).

The possibility for the Netherlands to prosecute an alleged offender on behalf of another State is laid down in article 4a DPC. Prosecution is possible if there is a treaty in place that establishes jurisdiction for the Netherlands.[260] The article also provides that the DPC can be applied to anyone with regard to whom an extradition request in respect of terrorist crimes has been rejected.[261] The Dutch Code of Criminal Procedure (hereafter: DCCP) adds that in case of a rejection of an extradition request by the Netherlands, this may be considered as an acceptance of the transfer of prosecution.[262]

The application of article 4a sparked controversy in 2008 in the case of Joseph M., who was suspected of committing war crimes and genocide in Rwanda. Joseph M., originating from Rwanda, applied for asylum in the Netherlands in 1998, was arrested in 2006 on suspicion of war crimes, and was convicted in 2009.[263] In 2006, the prosecutor of the International Criminal Tribunal for Rwanda had requested the Netherlands to prosecute Joseph M. for the crime of genocide. The Dutch Public Prosecutor accepted the request, with the support of the Dutch Minister of Justice. Prosecution was later discontinued after the Dutch Supreme Court ruled that the transfer of prosecution by the Netherlands had no legal basis. The Court argued that article 4a, which allows for the transfer of prosecution from another State, could not be applied in this case as the Rwanda Tribunal was simply not a State. Consequently, Joseph M. could not be prosecuted for genocide.[264] The Dutch Minister of Justice responded with a proposal to expand the scope of art. 4a to also allow for the transfer of prosecution when requested by an international tribunal.[265] The proposal was accepted and the change entered into force in 1 April 2012.

4. Universal jurisdiction

Does your criminal justice system apply universal jurisdiction? If so, for which offences? Do courts make frequent use of the universality principle? Is the principle applied even when the alleged offender is not present in your country? Are there cases where the universality principle has been applied to corporations?

Universal jurisdiction can be regarded as the broadest ground for establishing jurisdiction, as jurisdiction based on this principle can be established in respect to 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.[266]

Dutch Penal Code

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[260] Article 4a (1) Dutch Penal Code.
[261] Article 4a (2) Dutch Penal Code.
[262] Article 552hh Dutch Code of Criminal Procedure.
[263] Joseph M. was in first instance sentenced to 20 years imprisonment (Court of first instance The Hague 23 March 2009 ECLI:NL:RBSGR:2009:BI2444 and in appeal increased to life imprisonment (Court of Appeal, 7 July 2011, NJFS 2011, 205).
[264] HR 21 oktober 2008, *NJ* 2009, 108.
[265] *Kamerstukken II* 2009/10, 32475, 3.
[266] *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).

Although article 4 Dutch Penal Code (hereafter: DPC) is primarily concerned with jurisdiction based on the protection 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).*[267] These sub-articles may concern the protection of national interests, yet their primary aim is compliance with international norms.[268] For counterfeiting, this is compliance with the International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 April 1929.[269] While the Act has been subject to legislative changes, it has nevertheless been decided to maintain the grounds for jurisdiction based on universal jurisdiction.[270]

In practice, universal jurisdiction has hardly been exercised on the basis of the DPC. This is because prosecutors may consider that the case has no direct link to, or interest for the Netherlands. Thus, in 2009, pirates captured by the Dutch navy were not prosecuted under Dutch law (at that time on the basis of article 4 sub 5 DPC in conjunction with article 381 DPC while those rules are now laid down in article 4 sub e in conjunction with article 381 DPC),[271]

Introduction of International Crimes Act

Universal jurisdiction over *core crimes* is not governed by the Dutch Penal Code but 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.[272] 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. Thus, in case an offender will enter the Netherlands after he committed a core crime on foreign territory, the Netherlands will have jurisdiction on the ground of the principle of universality.[273] It is not immediately clear how presence-based universal jurisdiction applies in respect of *corporations*. Possibly, the professional presence of a senior officer of the corporation on Dutch territory may trigger Dutch jurisdiction over the corporation.

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.

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267 R. van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

268 R. van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014.

269 Ibid.

270 *Kamerstukken II* 2012/13, 33572, 3.

271 'Universele rechtsmacht voor gevallen van piraterij op de volle zee waar ook ter wereld door wie dan ook gepleegd', retrieved from: http://www.juridischkennisportaal.nl/wiki/strafrecht/rechtsmacht/universele-rechtsmacht-voor-gevallen-van-piraterij-op-de-volle-zee-waar-ook-ter-wereld-door-wie-dan-ook-gepleegd.htm (last reviewed: 31 August 2016).

272 Article 2(a),(b),(c) of the International Crimes Act.

273 'NJCM: commentaar Ontwerpwet Internationale Misdrijven (WIM)', NJCM 7 november 2001, p.2 , retrieved from: www.njcm.nl/site/uploads/download/47 (last reviewed: 28 August 2016).

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 corporate presence, it is more likely that prosecutions will be brought under the nationality principle or the territoriality principle (in cases where a corporate decision to commit, or be involved in, international crimes could be traced back to Dutch territory, *e.g.*, when a meeting of a foreign corporation took place in the Netherlands).

5. Other sources of jurisdiction

Has your legal system established other, "creative" grounds of jurisdiction in order to hold corporations liable? Has the effects doctrine been interpreted broadly in order to extend jurisdiction to foreign corporations? Do such bases of jurisdiction exist for typical white collar-crimes, for instance violations of anti-trust law?

As discussed under Question 2 regarding territorial jurisdiction, the *locus delicti* is determined on the basis of a number of doctrines.

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.[274] Compliance with the Act is monitored by the Consumer and Market Authority (*Autoriteit Consument en Markt*).[275]

The Authority has on multiple occasions imposed fines on foreign corporations for violating anti-cartel rules, on the ground that the anti-competitive agreements they had entered into had effect on the Dutch market, even if the corporations were not otherwise linked to the Netherlands. In the "flour" case of 2010, for instance, the Authority imposed a fine on several corporations domiciled in Belgium, Germany, and France for making agreements that reduced natural competition on the Dutch flour market.[276] It is not fully clear whether the effects doctrine used in the Netherlands is based on the implementation doctrine espoused by the Court of Justice of the European Union or whether it goes beyond it.[277]

6. Transitional justice mechanisms

Are the special rules on extraterritorial jurisdiction for special justice mechanisms, e.g., truth and reconciliation commissions, local justice, reparation schemes for victims?

n/a

II. Jurisdiction for Prosecuting Corporations under International Law (UN law, multilateral treaties)

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[274] *Kamerstukken II* 1995/96, 24707, 3.
[275] Chapter 2 (article 2-5a) of the Competition Law.
[276] NMa decision 16 December 2010, Case no. 6306/Meel.
[277] European Court of Justice 27 september 1988, Wood Pulp

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. Before this revision, each time the Netherlands committed itself to a new international obligation, sections had to be added to article 4 DPC. This resulted in a long list with several subsections. 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, has to be amended.[278]

For Dutch extraterritorial jurisdiction to be expanded on the basis of a treaty, via the DPC and the mentioned Decision, it is required that the treaty explicitly *oblige* the Dutch State to establish its jurisdiction. It is not sufficient that the exercise of jurisdiction is mentioned as an *option*. Still, in the latter case, a separate act can be adopted to provide for extraterritorial jurisdiction. For instance, the International Crimes Act provides for universal jurisdiction over such core crimes as crimes against humanity and genocide, even if treaties do not require the Netherlands to establish jurisdiction.

2. Jurisdiction prescribed by International Humanitarian Law – Core Crimes

Has your country implemented the jurisdictional requirements of International Humanitarian Law? What are the constitutive elements? Are there any specifics?[279]

The Netherlands has signed and ratified the four Geneva Conventions and the two Additional Protocols to these Conventions. The Conventions were initially codified in the Wartime Offences Act (1952), which in part aimed to implement the universal jurisdiction requirements set out in the Geneva Conventions regarding grave breaches. Grave breaches were criminalised by articles 8 and 9 of the Wartime Offences Act.[280] With the introduction of the International Crimes Act (hereafter: ICA), the articles of the Wartime Offences Act dealing with breaches of international humanitarian law were removed and substituted by articles in the new Act, while leaving the other articles of the Act intact.

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.[281] 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

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[278] R. Van Elst, 'Tekst en Commentaar Internationaal Strafrecht, commentaar op artikelen 2-8 Sr', in: D.J.M.W. Paridaens, P.A.M. Verrest, *Tekst & Commentaar Internationaal Strafrecht*, Deventer: Kluwer 2015.

[279] See, e.g., Art. 4 and Art. 5 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Art. 4 and 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000, Art. 36 of the UN Single Convention on Narcotic Drugs of 1961, Art. 4 of the UN Convention for the Suppression of Terrorist Bombings of 1997 and Art. 4 and 5 of the UN Convention for the Suppression of the Financing of Terrorism of 1999.

[280] *Kamerstukken II* 2001/02, 28337, 3, p. 3.

[281] *Kamerstukken II* 2001/02, 28337, 3, p. 3.

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 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.*

3. Jurisdiction based on Customary International Law

Does your country acknowledge jurisdiction based on Customary International Law? If so, under what conditions and on which offences?

The Netherlands does not acknowledge courts' exercise of jurisdiction directly based on customary international law, as it interprets the legality (*lex certa*) principle strictly.[282] This was confirmed in the *Bouterse* case before the Dutch Supreme Court (hereafter: DSC) in 2001, a case concerning the alleged torture and murder of fifteen people in 1982 by Desi Bouterse, the president of Suriname. The Court ruled that the Convention Against Torture, and its provision on universal jurisdiction, did not apply to the case, since the offences were committed in 1982 when the Convention had not yet entered into force in the Netherlands (and had not even been adopted). The prosecution argued that the prohibition of torture and the exercise of universal jurisdiction could be derived from customary law as it existed in 1982, but the Court reaffirmed the traditional interpretation of the legality principle: domestic criminal law prevails over conflicting customary law.[283]

This being said, customary international law may obviously inform the legislator's jurisdictional choices. Thus, the grant of universal jurisdiction in the International Crimes Act was based, at least in part, on customary international law, notably regarding genocide, crimes against humanity, and war crimes committed in non-international armed conflicts.

D. Overlapping Domestic Legal Frameworks and the Prosecution of Corporations.

I. Conflicts of jurisdiction – General

Please assess whether your system is rather dominant or reluctant in claiming jurisdiction in cross-border cases. Do you think that there is rather a problem of positive or of negative conflicts of jurisdiction?

The grounds for establishing (extraterritorial) jurisdiction under Dutch law are rather extensive. In drafting these grounds, the Dutch legislator, just like other legislators for that matter, was

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[282] R. van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, Deventer: Kluwer 2014, p. 8.

[283] HR 23 oktober 2001, *NJ* 2002, 77.

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.[284] The Dutch Government may have been aware of the potential for such conflicts, but has not drafted rules on how to solve these conflicts. Pragmatic solutions have thus been developed, such as the possibility of transfer of prosecution or transfer of execution of a decision.[285]

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)*.[286] As this article does not supply any criteria that could assist in applying the principle, inspiration may be sought in article 8 of the European Convention on the Transfer of Proceedings in Criminal Matters (1972), which suggests such criteria as habitual residence and origins of the suspect. Interviews with experts indicate that the allocation of the prosecution to a particular State is a matter of negotiation between the different States concerned. Suitability, capacity, gravity of the crime, and intensity of links to the State will guide the allocation decision.

The risk of positive conflicts of jurisdiction should not be overstated, however. In practice, few relevant extraterritorial cases have been brought in the Netherlands, [287] 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.[288] In cases against individuals, the hardship endured by the targeted person may also may be factored in.

A case in point concerns Delft Instruments, a Dutch technology company which produced certain instruments that could be used for night vision and delivered these instruments through a Belgian subsidiary company. The components of these instruments originated in the United States and were no longer delivered to Delft Instruments after the US found out that Delft had sold products to Iraq when an arms embargo applied against Iraq. Because of the already existing losses of the corporation, and the fact that a criminal investigation was already pending in the United States, the Dutch Public Prosecutor decided to refrain from prosecuting the corporation. This decision was criticized by Dutch politicians, after which the prosecutor

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

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

[286] Article 552t (1) Dutch Code of Criminal Procedure.

[287] A.H. Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, Den Haag: WODC 2010, p. 98.

[288] L. Enneking, F. Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen*, Den Haag: Boom Juridische Uitgevers 2016, p. 136.

investigated the possibility of prosecuting the directors of the corporation on the basis of a breach of the Sanctions Act 1977. Eventually, a settlement was reached with some of the corporation's employees. A prosecution was foregone on the ground that the corporation had already suffered reputational damage and had to go through a long period of uncertainty about the outcome of the investigations. The investigation carried out by the United States resulted in a settlement of 3.3 million dollars.[289]

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.[290] This holds even if the Dutch State takes violations of international core crimes otherwise very seriously, especially if they have a non-economic dimension (*e.g.*, torture).

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 also explained that when mulling prosecution of a corporation, a distinction is (to be) made between (relatively) *bona fide* corporations and corporations which are, for all intents and purposes, nothing more than an empty shell. It was not considered advisable to prosecute the latter corporations, as they do not exist apart from the individual suspect behind the corporation, and the suspect may sooner have established a new corporation than the prosecutor has dealt with the former. In respect of corporations which do have an independent existence, by contrast, prosecution may have added value.

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 are no longer exceptional.

II. Overlapping Domestic Jurisdictions – in a nutshell

Can corporations be held accountable in collateral legal domestic frameworks (torts, administrative sanctions…) for providing financing or other involvement in atrocities abroad?

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[289] Ibid., p. 36.
[290] Ibid., p. 136.

Civil/tort jurisdiction is governed by the EU Brussels I Regulation (recast 2012), which is directly applicable in the Netherlands.[291] Pursuant to this Regulation, Dutch courts have civil jurisdiction over disputes involving corporations domiciled in the Netherlands.[292] Domicile is based on the location of the corporation's statutory seat, its central administration, or its principal place of business.[293] 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.[294] 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 (articles 5 to 7 Regulation). This special jurisdiction applies to cases where the harmful event takes place in the Netherlands[295] or when the dispute is linked to the operations of a branch or agency situated in the Netherlands.[296] 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.[297] Finally, the parties to the dispute could choose a Dutch court as the forum.[298]

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).[299] The most common basis for Dutch jurisdiction is similar to the Brussel I Regulation, namely the party's domicile in the Netherlands.[300] Besides the domicile link, Dutch law also provides grounds for jurisdiction on the basis of events that have taken place in the Netherlands[301] or when there is a series of cases so much interlinked, that it would benefit efficiency to consider them jointly.[302] 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. At least in theory, *forum necessitatis* creates opportunities for victims of international crimes to sue foreign corporations in Dutch courts, where foreign courts are not reasonably available.

The principle of joint treatment for jurisdictional purposes was most prominently relied on in the *Akpan* case. Akpan is a Nigerian farmer who, together with the Dutch NGO

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[291] *Eur-Lex,* retrieved from: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32001R0044 (last reviewed: 18 August 2016).
[292] Article 4(1) Brussel Ibis-Vo.
[293] Article 63(1) Brussel Ibis-Vo
[294] 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, p. 252.
[295] Article 7(2) Brussel Ibis-Vo
[296] Article 7(5) Brussel Ibis-Vo
[297] Article 8(1) Brussel Ibis-Vo
[298] Article 25 & Article 26 Brussel Ibis-Vo
[299] Articles 1 to 14 of the Dutch Code of Civil Procedure (Rv.)
[300] Article 2 Dutch Code of Civil Procedure (Rv.)
[301] Article 6(e) DCCP (Rv.)
[302] Article 7(1) DCCP (Rv.)

Milieudefensie, filed a claim against the Dutch corporation Royal Dutch Shell (hereafter: RDS) and its Nigerian subsidiary: Shell Petroleum Development Company of Nigeria Limited Akpan filed the claim as two oil spills, in 2006 and 2007, leaking from pipelines owned by Shell Nigeria in the village Ikot Ada Udo, caused damage to his fishpond.[303] With the claim, Akpan aimed at obtaining a court declaration that both RDS as well as Shell Nigeria acted unlawfully against him and thus were fully responsible for the damage the oil spills had caused to his fishpond.[304] Shell stated that RDS was not responsible for acts carried out by its Nigerian subsidiary and furthermore stated that Shell Nigeria is a Nigerian company and for that reason cannot be forced to appear before a Dutch judge.[305] In an interim decision, the District Court of The Hague decided in 2010 that Dutch court have jurisdiction over RDS, as its headquarters were based in the Netherlands, as well as over Shell Nigeria, as both cases were so interlinked that is was efficient to treat them jointly.[306] In 2013, this decision was confirmed by the District Court, which ruled on the merits, applying Nigerian law in accordance with the rules of private international law, that Shell Nigeria was responsible for a tort of negligence harming Akpan.[307] According to the Court, Shell Nigeria had failed to sufficiently protect the oil pipelines against sabotage, and thus it was under an obligation to compensate Akpan for the damages which he had suffered. All other claims, including the claim against RDS, were rejected.[308] Subsequently, both parties appealed against the judgement. *Milieudefensie* took issue with the rejection of the other claims, Shell Nigeria argued that Akpan had not brought forward any arguments which proved that he was exclusive owner of the fishponds, and RDS argued that the Court had no jurisdiction. In 2015, The Hague Court of Appeal confirmed the District Court's jurisdictional decision, ruling that Dutch courts have jurisdiction to decide the claims as these are sufficiently interlinked.[309] The Court added that, in respect of the damages claimed, that is suffices for Akpan to prove that he is in such a way connected to the polluted fishponds that he therefore is legitimated to make a claim against the party possibly responsible for the pollution.[310] The Court also decided that Shell has to offer access to documents which might include information on the cause of the oil spills and the company's specific role in it.[311] The Court will decide on the merits at a later stage.

III. Conflicting International Jurisdictions – in a nutshell

In your national system do specific provisions or case law address problems of international jurisdiction conflicts, when prosecuting corporations for "core crimes" or "treaty crimes" abroad (either with regard to prosecution in another country, civil or administrative litigation or settlements in arbitration courts)?

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303 Vonnissen over aansprakelijkheid Shell; Ollielekkages: slecht onderhoud of sabotage?, *NJB* 2013/327.
304 L. Enneking, F. Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen*, Den Haag: Boom Juridische Uitgevers 2016, p. 42; Rb. Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854, r.o. 3.1.
305 'Tijdlijn: verloop van de rechtszaak', *Milieudefensie,* retrieved from: https://milieudefensie.nl/shell-in-nigeria/rechtszaak/belangrijke-momenten-van-de-rechtszaak (last reviewed: 29 August 2016).
306 Rb. Den Haag 24 februari 2010, ECLI:NL:RBSGR:2010:BM1469.
307 Rb. Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854.
308 Rb. Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854, r.o. 5.1
309 Hof Den Haag 18 december 2015, ECLI:NL:GHDHA:2015:3587, r.o. 2.8.
310 Ibid., r.o. 4.2.
311 Ibid., r.o. 5.9.

Even though multiple grounds of jurisdiction exist, the Netherlands has a preference for investigation and prosecution by the State where the crime took place.[312] 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.[313]

When the other State concerned is a Member State of the European Union, the EU Framework Decision on 'prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings' applies.[314] This Decision is part of a set of measures adopted by the EU to more effectively counter cross-border crimes. It is based on the principle of cooperation between States and requires (1) the establishment of contact between the different States making a jurisdictional claim and (2) an ultimate decision on who can continue proceedings, depending on criteria such as the nationality of the offender, the place of commission of the crime, and the interests of the victim. If the different Member States fail to reach consensus, the case will be referred to Eurojust, which will provide a written, non-binding opinion in order to resolve the issue.[315]

This intra-EU approach is based on mutual confidence in the competence of the other States' judicial systems. While this confidence may exist within the EU, it may be doubted whether it could exist in the relationships between the Netherlands and non-EU Member States. At the time of the revision of the jurisdictional provisions in the Penal Code, experts thus suggested to separate the rules concerning jurisdiction of crimes committed in and outside of the EU. This idea was not followed up, however. This may suggest that the Netherlands also intends to pursue the confidence-based approach in its relations with non-EU States.[316]

E. Proposals for Reform of the Legal Framework of Jurisdiction

In your state, is there a discussion about the role of rules on jurisdiction for defending sovereignty or for fixing global problems?

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 international (treaty) obligations.[317] It is unlikely that the legislator will amended the Penal Code for this purposes again any time soon.

In Dutch academia, a discussion is currently raging regarding the impact of the rules of jurisdiction on *suspects* of cross-border crime. As explained above, the Dutch Penal Code

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[312] *Kamerstukken II* 2012/13, 33572, 2, p. 14.
[313] Ibid., p.15
[314] EU Council Framework Decision 2009/948/JHA (30 November 2009)
[315] Eurojust News. Issue no. 14 (January 2016).
[316] *Kamerstukken II* 2012/13, 33572, 2, p. 17.
[317] 'Stb. 2013, 484 Uitbreiding extraterritoriale rechtsmacht', retrieved from: http://njb.nl/wetgeving/staatsbladen/uitbreiding-extraterritoriale-rechtsmacht.6516.lynkx (last reviewed 31 May 2016).

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,[318] 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.[319] 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 *postbus-firma'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.[320] 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.

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.[321]

A respondent also cited the need for more specialized and more educated 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 bargain system. This respondent also considered the maximum

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[318] 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. p. 6.

[319] 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, p. 147.

[320] M. van Geest, J. van Kleef, H.W. Smits, *Het belastingparadijs, waarom niemand hier belasting betaalt behalve u*, Amsterdam: Business Contact 2013, hoofdstuk 6.

[321] Dr. Ward Ferdinandusse, Officier van Justitie.

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.

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Annex A

A. Strafprocesrecht

De regels van het strafrecht omtrent de vervolging van bedrijven.
1a. Hoe wordt de wetgeving omtrent het opsporen en vervolgen van vermeende schenders van internationaal recht uitgevoerd in de praktijk (beleidsvraagstuk)?
1b. Naast het bestaan van wetgeving en beleidsnotities (bijvoorbeeld aanwijzingen), hoeveel vrijheid heeft een opsporingsorganisatie in hun taakuitvoering? (bijv. FIOD, AFM, Nederlandsche Bank)
1c. Welke problemen bestaan er in de praktijk met betrekking tot het opsporen en vervolgen van vermeende schenders van internationale misdrijven?

2a. Op grond van wiens (*NGO?)* en welke informatie gaat het OM over tot het onderzoek naar een vermeende schending van het internationale recht?
2.b. Hoe geschiedt de bewijsvergaring in de praktijk en tegen welke problemen wordt hierin tegenaan gelopen?
2.c. Kunt u een korte schets geven van het gehele vervolgingstraject zoals dit in Nederland plaatsvindt wanneer een bedrijf wordt verdacht van het betrokken zijn bij internationale misdrijven?

3. Hoe is het Nederlandse beleid/praktijk omtrent het treffen van schikkingen tussen het OM en bedrijven?

B. Uw eigen ervaring met het wettelijk kader.
4. Wat is uw ervaring met het huidige wettelijke kader omtrent schendingen van internationaal recht door bedrijven, loopt u in uw eigen praktijk tegen leemtes/moeilijkheden aan in de wet?

5. Is er in uw opvatting behoefte aan een verdere ontwikkeling van deze wetgeving en wat zou u hierin voorstellen of aanbevelen?

6. Welke ervaringen/zaken zijn u bijgebleven in uw carrière als officier van justitie op de afdeling internationale misdrijven?

C. Het publieke debat.

7. In hoeverre worden de beslissingen van het OM beïnvloed door het publieke debat en door NGOs?

8. Wat is uw eigen ervaring met de discussie omtrent de rol van regels betreffende het uitbreiden van de gronden van extraterritoriale rechtsmacht? Is dit debat meer gefocust op het beschermen van de Nederlandse soevereiniteit of op het oplossen van wereldproblematiek?

D. Afronding

9. Wat vond u van het interview, heeft u zelf nog iets toe te voegen? Is er iets belangrijks dat wij zijn vergeten te vragen?