

Strasbourg, 15/09/06

4th Consult/ICC (2006) 14
Anglais seulement



FOURTH
CONSULTATION
ON
THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE
RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL
COURT
PROGRESS REPORT
NETHERLANDS

Council of Europe, Athens (Greece)
14-15 September 2006

Progress Report

1) Ratification

The Netherlands ratification process of the Rome Statute ended with the ratification of the Statute on 17 July 2001. During the parliamentary debates, most of the political focus was on matters such as the planning of the implementing legislation (which was yet to follow) and the typical preparations which were to be made as the (then future) host State.

The most noteworthy legal aspect of this process was on constitutional immunities, especially the relation between the irrelevance of official capacity in the Rome Statute (art. 27RS) on the one hand and the complete constitutional immunity of the King (art. 42 Netherlands Constitution) respectively the constitutional immunity of politicians and public officials for official communications with parliament (art. 71 Netherlands Constitution) on the other hand. The relationship between these provisions led to much discussion on the practical relevance of this incompatibility. On the other hand, it was felt that any real situation of non-compliance with the Statute was virtually impossible for a number of reasons: within the Netherlands constitutional order the King has no powers of his own and would therefore be *de facto* incapable of committing any crimes under the Rome Statute and, even if such a situation would occur, he would be forced to step down as soon as the ICC would request his surrender, which would then be possible. Nevertheless, it was established that it was more elegant to explicitly conclude that there was an incompatibility, theoretical or not. As a result, it was necessary that the Statute be adopted with a special procedure allowing unconstitutional international conventions to be adopted by a qualified majority without having to amend the Constitution. After adoption through this procedure, which had not been used before, the convention concerned will, as all international law, be binding for the Netherlands and take precedence over all national law, including the Constitution with its immunities.

2) Implementation

The implementing legislation was prepared and adopted in two separate tracks: the first one on cooperation, the second one on substantive criminal law, thus giving effect to the complementarity principle (criminalisations).

The **ICC Cooperation Act** was considered more urgent, especially for the Host State; in addition, as cooperation could be dealt with in a Kingdom Act, it could also offer a legal basis for cooperation between the Caribbean parts of the Kingdom and the ICC. The Act, which entered into force on July 1 2002, creates the possibility of surrender of suspects to the ICC and provisional arrest for that purpose on its request. As far as the surrender is concerned, the procedure prescribed is similar to the one for extradition between States, but considerably simplified, without allowing any of the traditional grounds for refusal (absence of double incrimination, double jeopardy, lack of jurisdiction on the side of the ICC, constitutional immunity, and nationality of the suspect). For none of these grounds for refusal, the exclusion was a real topic of discussion in this context, as most of them had been dealt with implicitly or, as far as the constitutional immunity is concerned, explicitly, during the parliamentary procedure of the Ratification Act. The original bill of law also contained the apparent innocence of the requested person as a ground for refusal, but this was removed by Parliament as being contrary to the Statute. The only reasons for not surrendering a suspect to the Court are now: mistaken identity, the existence of international immunity for the requested person (art. 98), the existence of a concurring request for extradition (as referred to in art. 90) and the complementarity principle, i.e. the person is or has been prosecuted in the requested State (or another State) for the same facts. In the latter two cases however, the ICC will have the last word whereas in the second case, i.e. the case of international immunity, the ICC will not be allowed to file a request unless the sending State or organisation has waived the immunity.

In addition to the surrender, the ICC Implementation Act also enables all available forms of mutual legal assistance to be provided to the ICC, without any grounds for refusal being applicable. In short, this means that all the different means of investigation available to countries within the framework of mutual legal assistance in criminal matters have also been made available to the organs of the ICC. In December 2004, The Netherlands also concluded a Memorandum of Understanding with the Prosecutor, setting out key operational details for their mutual cooperation.

The **International Crimes Acts**, which entered into force 1 October 2003, concentrates the criminalisations of genocide, crimes against humanity, war crimes and the crime of torture all in one Act and under one general principles regime. Most of these crimes had been criminalised in The Netherlands before, but in separate Acts with their own scope of application; the only really new criminalisation under the International Crimes Act is that of crimes against humanity.

In that sense, the aim of the Act was to codify existing crimes under international law, rather than modifying substantive international law in this field. As a result, most of the definitions of the crimes have been taken from or inspired by definitions in existing multilateral instruments, especially the Rome Statute. The approach of codification rather than modification also had a strong influence on the general principles which will apply to these criminalisations, such as the secondary universal jurisdiction (only when the suspect is in The Netherlands, he or the victim is Dutch), the explicit applicability of the international immunities recognised in the Yerodia judgement of the International Court of Justice, the exclusion of retro-activity for the new criminalisations, and the distinction maintained between war crimes of an international and those of a non-international nature. Most discussion during consultations and in Parliament was on these general principles, which a considerable minority of parliamentarians considered to be too restrictive and insufficiently ambitious. They feared that, with such a regime of general principles, the practical value of the new Act would be minimal and the entire legislative operation would be hardly more than symbolic. A final general principle, one which was not discussed at all in the context of the International Crimes Act, is the impossibility to prosecute the Netherlands King or another person protected by national constitutional immunity. As during the ratification process the Constitution itself was not amended and the explicit requirements of the Rome Statute do not go beyond taking away impediments for surrender to the ICC, it was always envisaged that, if any crimes under the Rome Statute would be committed by one of those persons, the suspect would be surrendered to the ICC rather than prosecuted at a national.

3) Recent developments

Once the ratification and implementation process of the Rome Statute is completed, enabling far-reaching cooperation with the ICC for the prosecution of these severe crimes and creating a legal basis for national prosecutions, one could say that the next phase, that of complementarity, actually begins. The challenge in this phase lies in the complexity of national prosecution of these types of crime.

Since the coming into force of the International Crimes Act on 1 October 2003, there have not been any prosecutions pursuant to this Act. The Netherlands, however, have successfully completed a number of prosecutions for international crimes committed before the coming into force of the Act. This development is consistent with the Rome Statute principle of complementarity.

Before the implementation of the Rome Statute, the Netherlands had not been able to prosecute any such crime. The international developments at the time of the emergence of the International Criminal Court prompted the Dutch Parliament to urge the Government to increase the public prosecutor's department's means for such complex prosecutions, which led to the prosecution in 2004, of Sebastien Nzapali, a Congo colonel. Sébastien Nzapali, who had applied for asylum in The Netherlands, was prosecuted for torture, rape and severe physical abuse and sentenced to an imprisonment of two and a half years. Soon after, two former Afghan generals, who had also sought asylum in The Netherlands, were prosecuted for war crimes allegedly committed during the Soviet occupation of Afghanistan. Heshamuddin Hesam and Habibullah Jalalzoy were senior

officials of the feared Khad secret military police when Communists ruled Afghanistan in the 1980s. They were sentenced to an imprisonment of 12 and 8 years, respectively. In 2005, the trial of Frans van Anraat began, the first Dutch person to be accused of complicity in genocide and war crimes. He was accused of selling the chemical raw materials for mustard gas to Saddam Hussein and in that sense accused of being an accomplice to the attacks of Saddam Hussein's armed forces against the Kurdish civilian population during the former Iraqi regime in the mid 80s. Van Anraat's sentence amounted to no less than 15 years imprisonment. A few months after Van Anraat's arrest, a second Dutch national, Guus Kouwenhoven, was arrested, this time on charges of complicity to war crimes by supplying weapons to Charles Taylor, the former president of Liberia. Kouwenhoven, however, has not been found guilty of war crimes, but of illegal arms dealing, for which he has received the maximum sentence of eight years. Incidentally, both Afghan nationals, Van Anraat and Van Kouwenhoven have appealed the decision taken by the court in the first instance.

In the course of this spring, a third former Afghan officer was arrested. He is suspected of having been involved in war crimes and torture. This summer, finally, a Rwandan refugee was arrested and charged with war crimes and torture for his alleged role in the 1994 genocide that tore apart his home country.

These types of cases are very challenging: they are complex and time-consuming, involving investigations in difficult situations in countries with which the Netherlands have no agreement providing for mutual legal assistance or at any rate little experience. Moreover, the cases are more often than not '(c)old cases', adding an extra difficulty to the work of the investigators. Adding to the practical challenges of the investigations, other more political and ethical problems have arisen: more often than not, the investigators face post-conflict countries, countries 'in transition' where it is not always obvious with which authority one should seek cooperation. Human rights issues arise with countries in which human rights are being systematically violated (e.g. under a dictatorship) or in which the government in power is unable to guarantee the security of its citizens, or any situation in between. Any combination of the above mentioned factors may moreover cause reliability issues for the evidence: because, for instance, the evidence was obtained through fear, coercion, political motives, or because of lack of technical means or forensic know-how or just through the elapsing of time.

The investigation of international crimes requires a tailor-made approach as far as obtaining evidence and mutual legal assistance are concerned. The competent authorities in The Netherlands have chosen a pragmatic approach to these issues, for instance through risk reduction (risk assessment [human rights, security etc.] and eventual remedy [diplomatic assurances or eventual other types of guarantees]). In addition, Dutch procedural law enables the exercising of extraterritorial jurisdiction insofar as international law so permits. This makes it possible for Dutch investigators, in accordance with international law and with the authorisation of the competent authorities, to carry out investigations in foreign countries, increasing the 'usability' of collected evidence for the Dutch criminal system.

In conclusion, implementing the Rome Statute into national legislation may be a first important step to giving effect to the complementarity principle. However, that in itself does not guarantee any success in this field. In addition, sufficient resources, expertise and determination among all national authorities involved are essential preconditions to bringing those thought to be responsible for the heinous crimes in the Statute to justice.

There is in this context a growing need to exchange views and experience in dealing with these complex cases and with the implementation of the principle of complementarity. In this respect, The Netherlands are in strong favour of further developing the EU-Network of contact points for persons responsible for (investigating and prosecuting) genocide, crimes against humanity and war crimes (*Official Journal L 167, 26/06/2002 P. 0001 - 0002*). The exchange of views on the implementation of the principle of complementarity initiated by the network should however not be limited to the EU, but rather be an open discussion with like-minded nations.