

**INTERNATIONAL FIGHT AGAIST CRIME**

DOI: 10.24833/0869-0049-2018-2-6-22

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# INTERNATIONAL CRIMES AND THE NETHERLAND'S LAW: STRATEGY OF IMPLEMENTATION

**INTRODUCTION.** *The adoption of the Rome Statute of the International Criminal Court proved to be an important factor that stimulated a radical reform of national laws relating to the prosecution of international crimes. It allowed, on one hand, to considerably improve the mechanism for suppressing most serious violations of human rights the prosecution of which constituted a legitimate interest of both individual States and the international community as a whole, and on the other hand, to adequately implement the obligations of States under the Rome Statute. The Member States of the European Union have an effective experience in ensuring compliance of the national laws with the international treaty provisions concerning genocide, crimes against humanity and war crimes. Among them, the implementation model chosen by the Netherlands de-*

*serves particular scrutiny. The authors analyze the all-encompassing nature of this model with the focus on the criminalization of the international crimes, the regulation of matters relating to the criminal jurisdiction, the definition of the general principles of criminal responsibility for genocide, crimes against humanity and war crimes, and the interrelationship between the Law on International Crimes and other similar legal acts.*

**MATERIALS AND METHODS.** *Materials used for the analysis include international documents, decisions of international judicial bodies, national legislation and judicial practice of Netherlands and other states, as well as the doctrinal positions of various authors. The methodological basis of the research consists of general scientific and special methods.*

**RESEARCH RESULTS.** *The analysis of the substantive implementation of the Rome Statute by individual EU member states, in particular with the example of the national legislation of the Netherlands, has shown that the criminalization of international crimes at the national level makes a significant contribution to the fight against personal impunity for international crimes pertaining to jurisdiction of the International Criminal Court.*

**DISCUSSION AND CONCLUSIONS.** *The national legislation of the Netherlands, mainly the International Crimes Act is an attempt to create a legal regime that prevents impunity for perpetrators of international crimes, and also reaffirms that the norms of the Rome Statute are voluminous and fully*

*implemented that allows the Netherlands to carry on an independent prosecution of defendants, excluding the possibility to transfer the case to the ICC.*

**KEYWORDS:** *international crimes, genocide, war crimes, crimes against humanity, torture, enforced disappearance international criminal court, principle of complementarity, universal jurisdiction*

**FOR CITATION:** Safarov N.A., Mehtiyeva K.N., Safarov F.N. International Crimes and the Netherlands Law: Strategy of Implementation. – *Moscow Journal of International Law*. 2018. No. 2. P. 6–22  
DOI: 10.24833 / 0869-0049-2018-2-6-22

## МЕЖДУНАРОДНАЯ БОРЬБА С ПРЕСТУПНОСТЬЮ

DOI: 10.24833/0869-0049-2018-2-6-22

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# МЕЖДУНАРОДНЫЕ ПРЕСТУПЛЕНИЯ И ЗАКОНОДАТЕЛЬСТВО НИДЕРЛАНДОВ: СТРАТЕГИЯ ИМПЛЕМЕНТАЦИИ

**ВВЕДЕНИЕ.** *Принятие Римского статута Международного уголовного суда явилось важнейшим элементом, стимулировавшим карди-*

*нальную реформу национального законодательства в сфере преследования международных преступлений. Это позволило, с одной сто-*

роны, в значительной степени усовершенствовать механизм борьбы с наиболее серьезными нарушениями прав человека, в преследовании которых имелся юридический интерес как отдельных государств, так и международного сообщества в целом, а с другой – имплементировать обязательства государств по Римскому статуту. В обеспечении соответствия внутригосударственного законодательства положениям международных договоров по борьбе с геноцидом, преступлениями против человечности и военными преступлениями существует весьма эффективный опыт государств – членов Европейского союза, сыгравшего значительную роль в формировании постоянно действующего механизма международного уголовного правосудия. В этом ряду специального рассмотрения заслуживает модель имплементации Королевства Нидерландов, которую отличает комплексный характер, детально проанализированный авторами в представленном исследовании. В статье рассматриваются вопросы криминализации составов международных преступлений, регламентации отдельных аспектов уголовной юрисдикции, определения общих принципов уголовной ответственности за геноцид, военные преступления и т.д., а также соотношения Закона о международных преступлениях Королевства Нидерландов с иными, смежными правовыми актами.

**МАТЕРИАЛЫ И МЕТОДЫ.** Проведенное исследование основано на значительном объеме материалов, включая международно-правовые акты, решения международных судебных органов, национальное законодательство и судебную практику Нидерландов и других государств, а также доктринальные исследования. Методологическую основу исследования составили общенаучные и частнонаучные методы познания.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** Проведенный анализ материально-правовой имплементации Римского статута со стороны отдельных государств – членов ЕС на примере национального законодательства Нидерландов показал, что криминализация на национальном уровне международных преступлений вносит значительный вклад в борьбу с безнаказанностью лиц, обвиняемых в совершении уголовно-наказуемых деяний, подпадающих под юрисдикцию Международного уголовного суда.

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** Анализ национального законодательства Нидерландов, в частности Закона о международных преступлениях, свидетельствует о стремлении к созданию юридического режима, препятствующего безнаказанности лиц, виновных в совершении преступлений, вызывающих озабоченность международного сообщества в целом, а также дает весомые основания для вывода о полной имплементации норм Римского статута Международного уголовного суда, позволяющей Нидерландам самостоятельно преследовать обвиняемых, исключая возможную передачу производства по делу Суду.

**КЛЮЧЕВЫЕ СЛОВА:** международные преступления, геноцид, военные преступления, преступления против человечности, пытки, насильственные исчезновения людей, Международный уголовный суд, принцип комплементарности, универсальная юрисдикция

**ДЛЯ ЦИТИРОВАНИЯ:** Сафаров Н.А., Мехтиева К.М., Сафаров Ф.Н. 2018. Международные преступления и законодательство Нидерландов: стратегия имплементации. – *Московский журнал международного права*. № 2. С. 6–22  
DOI: 10.24833 / 0869-0049-2018-2-6-22

Combating impunity of persons accused of genocide, crimes against humanity and war crimes implies, as core element, establishment of fundamental corpus of material legal rules on national level which according to the Preamble of the Rome Statute of the International Criminal Court (hereinafter “ICC” or the “Court”) raise concerns of

the international community as a whole [Verhoeven 2002:19; Schabas 2010: 269–276, 40–41; Cassese’s... 2013:135; McDougall 2016:135; O’Keefe 2015:65; Jurdi 2016:5]. In that respect, adoption by the Netherlands of the International Crimes Act (*Wet Internationale misdrijven*) (hereinafter “ICA”) has become one of the crucial stages of national implementation of the Rome Statute of the ICC, even though such

adoption surpassed the implementation process *per se* [Jofriet 2009].

The said Act was based not solely on the Rome Statute, but also on other major international sources, including the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954. Thus, the Act represents a consolidated legal document, incriminating grave violations of international humanitarian law. Hence the ICA took into consideration article 10 of the Rome Statute which provides that the second Part of the Statute shall not be interpreted in any way restricting existing or developing norms of international law or undermining them for purposes other than those fulfilled by the Statute [Cryer et al. 2010:151; Grover 2014:267].

Furthermore, the ICA substituted the provisions of the Law on implementation of the Convention on genocide and the Law on implementation of the UN Convention against torture. In addition, provisions of the Law on war crimes were to take important part of the new Act. As a consequence, the completeness of the new legislation on international crimes allowed the Kingdom of the Netherlands to develop legal framework to incriminate genocide, crimes against humanity and war crimes [Van der Borgh 2007:92].

One must note that the Netherlands actively participated in the establishment of the Court. As one its founder States, the Netherlands signed the Rome Statute on July 18, 1998 and ratified it relatively shortly after (on July 5, 2001). Furthermore, the seat of the Court is in The Hague in the Netherlands, which imposed on the State obligation to adopt in an accelerated manner a whole corpus of legal norms deriving from the participation in the activity of the Court.

The Government of the Netherlands based its conception of implementation on three elements. Firstly, the Law on implementation allowed to put in place cooperation with the Court. It is important to note that adoption of the said Act was a less com-

plex task in comparison with introduction of material rules establishing liability for crimes falling under the Court's jurisdiction and consolidated in a special legislative act [Verweij, Groenleer 2005:86]. Entry into force of the Law on implementation starting from July 1, 2002 coincided with the entry into force of the Rome Statute of the ICC. Secondly, the Law on international crimes, allowing to conduct prosecution on national level of genocide, war crimes and crimes against humanity was adopted [Boot-Matthijssen, van Elst 2004:251–296]. Thirdly, amendments were introduced into different legislative acts for the purposes of conducting criminal proceedings against persons accused of obstruction of justice of the ICC, as it is provided for by article 58, § 1 of the Rome Statute. Such provision was crucial given the fact that the Court was to sit and function on the territory of the Netherlands, which brought forward the issue of the scope of national jurisdiction with respect to individuals who could have potentially committed the said crimes. In that respect, an act providing for amendments in the national legislation was adopted and entered into force on August 8, 2002.

As opposed to other states, particularly Germany<sup>1</sup>, the position of the Netherlands relied on the fact that the provisions of the Rome Statute did not contradict the national legislation and therefore no amendments of constitutional character were required. This allowed the Netherlands to focus on implementing the Statute regardless of the national Constitution.

Criminalization of offenses falling under the jurisdiction of the ICC by the Netherlands led to substantial consequences as it allowed, on one hand, to implement the State's obligations under treaty as well as to establish norms of customary international law in the field of prosecution of international crimes, combatting which is of interest for the whole international community, and, on the other hand, created legal grounds to prosecute genocide, war crimes and crimes against humanity on national level, thus reducing to a minimum scenarios where a case may be

<sup>1</sup> The strategy of the federal government of Germany on implementation of the Statute on the ICC was based on a three-pillar procedure introducing amendments in national legislation. The first major step consisted in ensuring conformity between the core relevant legislation in Germany and the Statute. The said stage was terminated on December 11, 2000 with the instrument of ratification. However, prior to ratification, a bill introducing amendments into the Constitution of the country was introduced, thus allowing to resolve a very complex issue of conformity of the Statute of the ICC with the national legislation with respect to the exercise of jurisdiction by international tribunals over its nationals. The law of November 29, 2000 amending article 16 of the Constitution of Germany (in force since December 2, 2000), by way of derogation from the principle of non-extradition of nationals, allowed to extradite German nationals to other states members of the European Union or to surrender them to the ICC under provision of respect of the supremacy of the rule of law. For further information, see: [Jarasch, Kress 2000:91–111; Wilkitzki 2002:195–212; Werle 2002:725–734; Zimmermann 2002:97–102; Turns 2004:337–388].

submitted, according to the principle of complementarity, to the jurisdiction of the ICC<sup>2</sup>.

Thus, the main purpose of the ICA was to implement the Rome Statute on the ICC [Sluiter 2004:158–178]. As Boot-Matthijssen and van Elst have observed, in addition to the legislation regulation of the judicial cooperation which the Netherlands are required to perform with the Court in their capacity of member State of the Rome Statute, as well as the place of the seat of the Court, the Netherlands have sought necessary to amend the criminal legislation in place in order to prosecute individuals for crimes provided for in the Rome Statute [Boot-Matthijssen, van Elst 2004:254]. Firstly, the issue resided in the fact that the use of the national legislation on war crimes dated July 10, 1952 (*Wet Oorlogsstrafrecht – Dutch; Wartime Offences Act*) raised substantial legal matters. The said law was adopted after the Second World War and its use in the framework of the Dutch legal system in contemporaneous conditions did not adequately correspond to the scale and nature of war crimes. The peculiarity of the Law on war crimes consisted in the fact that it did not contain any special provisions related to serious crimes committed during the war in which the Netherlands participated. Along with this, provisions of the said law were destined to fulfill obligations under the Geneva conventions of 1949, thus incriminating grave violations of international humanitarian law and establishing jurisdiction of the Dutch courts in relation to the mentioned violations even when committed outside the Netherlands without participation of the state in armed conflicts. Secondly, rules on extraterritorial criminal jurisdiction in relation to genocide and war crimes contained substantial discrepancies, whereas crimes against humanity were excluded of the scope of incrimination.

In the very beginning of legislative works, substantial discussion concerned the question whether new material norms should be introduced into the Law on war crimes for implementation of international obligations of the Netherlands under the Rome Statute or whether it is necessary to adopt new legislation providing for liability for crimes falling under the jurisdiction of the Court. The second legislative option implied that war crimes be incorporated into a new act on international crimes. This, however, did not mean global revision of the Law on war crimes, which kept its feature of normative regulation of the war times, specially destined at prosecuting and pun-

ishing persons having committed crimes related to armed conflicts in which the Netherlands may have been involved.

Regarding implementation of the Rome Statute, the Government of the Netherlands held the position according to which the necessity of literal reproduction (including textual) of the norms of the Statute establishing liability for crimes falling under the jurisdiction of the Court was to be excluded. As it was noted in the Explanatory memorandum to the ICA, the “principle of complementarity does not oblige that the states establish the same requirements (formal and material) defined by the Statute for the case to be conducted by the Court”<sup>3</sup>.

Furthermore, even prior to ratification of the Rome Statute, the Netherlands, as state party to major international treaties (the Geneva conventions and their additional protocols of 1977) were under obligation to implement norms of international humanitarian law with respect to incriminating relevant doings [Segall 2003:257–271] and established criminal liability because of the above-mentioned treaties. At the same time, as it was decided not to introduce into the legislation the literal “translation” of provisions of the Rome Statute, this could not absolutely exclude the possibility of some declination from internationally recognized concepts of actions falling under the scope of the Court’s jurisdiction. However, the Netherlands considered these concerns groundless as there existed clear legal vectors for national implementation such as definition of relevant doings and elements of crime in the Rome Statute. As a matter of example, article 9 of the Statute allow the Court to interpret and apply articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes) [The International Criminal Court... 2001; Dörmann 2003; Grabert 2014]. Furthermore, the case-law of two international criminal tribunals – for the former Yugoslavia and Rwanda – was considered as sources for formulating elements of doings which were included into the ICA. Thus, implementing legislation of the Netherlands was fully compatible with the requirements of norms of international criminal law providing for liability of individuals for the most serious international crimes foreseen in the Rome Statute.

It is important to note that the legislator of the ICA relied on three major principles – concentration, codification and practicability. Firstly, the said law was to offer concentration and consolidation of

<sup>2</sup> For further information, see: [Kleffner 2003:86–113; Safarov 2003:48–59].

<sup>3</sup> Tange P.C. Netherlands State Practice for the Parliamentary Year 2001–2002. – *Netherlands Yearbook of International Law*. 2003. Vol. 34. P. 235.

legislation on core international crimes in one act and restrain jurisdiction of special courts. In that respect, one must consider that the ICA is not part of the Criminal Code of the Netherlands. At the same time, this does not mean that the said act incorporated all international crimes. Since the Criminal Code of the Netherlands provided for liability for such crimes as piracy, drug trafficking and terrorism, the said doings were not included in the ICA as they were not considered to be violations of international humanitarian law. Instead, the lawmakers focused only on acts contained in the Rome Statute on the Court and additionally incorporated crime of torture into the treaty as violation of international humanitarian law. Secondly, the ICA became the tool of codification of modern development of international criminal law, as it is witnessed by definitions of relevant crimes similar to those contained in international treaties. Thirdly, the ICA is a concrete example of practical approach containing only definitions of crimes as such regardless general principles of law contained in Part 3 of the Rome Statute [Verweij, Groenleer:92–91].

One of the distinctive features of the ICA which deserves attention is the possibility of criminal prosecution of the accused of genocide, crimes against humanity, war crimes and other based on universal jurisdiction [Reydams 2004:144–147; O`Sullivan 2017:8–9]. It is to be noted that as opposed to other types of jurisdiction, implying existence of connecting factor (through territory on which crime has been committed (*locus delicti commissi*), nationality of the accused or of the victim, etc.), universal jurisdiction is based on the universality of condemnation of the crime [Randall 1988:785–778; Van Den Vyer 1999: 107–132; Bassiouni 2001:81–162; Butler 2000:353–373; Hall 2010:201–233; Thompson 2015:65–73]. As it is indicated in principle 1 of the Princeton Principles on Universal Jurisdiction<sup>4</sup>, such jurisdiction is based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction [Universal Jurisdiction... 2004:18–38; Inazumi 2005:26]. In the resolution of the Institute of International Law (rapporteur M. Christian Tomuschat) held in Krakow in 2005, universal jurisdiction is defined as an ad-

ditional ground of jurisdiction, meaning the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law [Kress 2006:561–585].

Pursuant to article 2, § 1, item “a” of the ICA, the said Act may be applied to any person having allegedly committed outside of the Netherlands any of the crimes defined in this Act, if the suspect is present in the Netherlands. The Netherlands Supreme Court in *Wijngaardeet. alv. Bouterse* emphasized the importance of the presence of the accused on the territory of the State as condition to exercise universal jurisdiction [Schimmelpenninck van der Oije 2000]. Before this legislation, the Netherlands already considered the universal jurisdiction as subsidiary jurisdictional basis to prosecute the accused of particularly grave crimes. For instance, article 5 of the Law on implementation of the UN Convention against torture, and other cruel, inhuman or degrading treatment or punishment dated December 10, 1984 provided possibility of criminal prosecution based on universal jurisdiction, although it did not set conditions of mandatory presence of the accused on the territory of the Netherlands [Reydams 2004:439–449]. It is the said legislation which served as a basis for criminal prosecution founded on universal criminal jurisdiction of former military, a Congo national, Sebastien Nzapali.

The latter arrived at the Netherlands in 1998 and requested political asylum. However, the Dutch prosecution service had received complaints about his involvement in serious crimes, including torture and rape, which had allegedly taken place in Congo in 1996 during the dictator Mobutu Sese Seko's presidency. During the investigation, some convincing evidence has been gathered, confirming commission of the crimes. The Rotterdam District Court found S. Nzapali guilty in committing torture and sentenced him to prison on March 24, 2004. The present case became the first precedent in the Netherlands of exercise of universal jurisdiction in accordance with provisions of the UN Convention against torture of 1984 and of national Law on implementation of the said Convention of 1989<sup>5</sup>.

Another example of universal jurisdiction in national legislation is article 3, § 1 of the Law on war

<sup>4</sup> The Princeton project on universal jurisdiction was elaborated under the auspices of the Princeton University (USA) under the guidance of Pr. Stephen Macedo, chairman of the project.

<sup>5</sup> Kaminga M. First Conviction Under the Universal Jurisdiction Provisions of the UN Convention Against Torture. 2004. URL: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S0165070X04004395> (accessed date: 25.04.2018)

crimes, providing for possibility of its exercise in relation to any person having committed outside of the Netherlands violation of laws and principles of military actions [Mettraux 2006:362–371; Van Sliedregt 2007:895–908; La Haye 2008:289; Van den Herik 2009:1117–1132; Ferdinandusse 2009:723–741].

In the explanatory memorandum, which was part of the draft bill of the ICA, it was noted that most of the states rely on the fact that the principle of complementarity obliges national authorities to incriminate crimes falling under jurisdiction of the Court and to exercise universal jurisdiction with respect to those crimes. Although this is not explicitly provided for in the Statute, the majority of States, including the Netherlands, undoubtedly implied that it derived from the principle of complementarity that the States signatories of the Statute carry the burden to introduce criminal liability for crimes falling under the jurisdiction of the Court and to establish extraterritorial criminal jurisdiction allowing national courts to prosecute the said crimes, even when committed outside of their territory by nationals of other countries<sup>6</sup>. In addition to the national laws mentioned above, the Criminal Code of the Netherlands also contained rules of extraterritorial criminal jurisdiction.

Particularly, according to section 4 and 4a, provisions of the Criminal Code were applicable to any person having committed outside of the Netherlands certain crimes, namely those stipulated in articles 92–96, 97–98, 108–110, 131–134 and others.

Reflecting modern trends of international criminal law and national legislation, the ICA extended universal jurisdiction in conformity with international treaty law and customary law, to particularly serious crimes threatening interests of international community. However, in the present case, unlike the so-called absolute universal jurisdiction which does not require the presence of the accused on the territory of the State exercising the jurisdiction, it is the matter of relative universal jurisdiction implying certain restrictions, which will be mentioned later<sup>7</sup>.

The issue with the unlimited exercise of jurisdiction has grown for the past few years since some states have not only considered abstract possibility to exercise universal jurisdiction, but have also taken steps towards its practical implementation with respect to crimes unrelated to national territory and allegedly committed according to states seeking to establish their jurisdiction by high officials of foreign states.

More particularly, the exercise of such jurisdiction with respect to minister of foreign affairs of Congo triggered an important dispute between Belgium and the Democratic Republic of the Congo (hereinafter the “DRC”) in a case examined by International Court of Justice (Arrest Warrant Case (Congo v. Belgium)) [Jennings 2002:99–103; Boister 2002:293–314; Yang 2002:239–294; Wiskremasinghe 2003:775–781; Schult 2002:704–710; Van Alebeek 2008:158–196]<sup>8</sup>. After the decision was rendered in the present case, Belgium introduced amendments into the Act concerning the punishment of grave breaches of international humanitarian law and into other legislative acts (namely into the Criminal procedure code) which strengthened immunity of heads of states, ministers of foreign affairs and other individuals enjoying immunity based on international law.

Given probability of issues which may arise out of the exercise of absolute universal jurisdiction in relation to offences committed outside of the Netherlands, striving, on one hand, to avoid excessive workload lying on national courts, and on the other hand, considering that international crimes such as genocide, crimes against humanity and war crimes must be prosecuted either in conformity with the principle of territorial criminal jurisdiction or by an international tribunal, the Dutch legislator introduced restrictions to the universality principle. Namely, article 16 of the ICA provides that criminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (a) foreign heads of state, heads of government and ministers of foreign

<sup>6</sup> Tange P.C. Op. cit. P. 233.

<sup>7</sup> There is a distinction to be drawn in international criminal law between two types of universal jurisdiction: 1) universal jurisdiction *in absentia* or absolute jurisdiction; 2) conditional or limited universal jurisdiction which implies presence of the offender on the territory of the prosecuting State. International treaty law offers examples of exercise of both types of universal jurisdiction. In particular, article 3 (common) of the Geneva conventions is an example of absolute universal jurisdiction. At the same time, such international agreements as Convention for the Suppression of Unlawful Seizure of Aircraft dated December 16, 1970 (art. 4), International Convention for the Suppression of the Financing of Terrorism (art. 10) and others provide for possibility to exercise limited universal jurisdiction, relying on the presence of the alleged offender on the territory of the State establishing its jurisdiction over the offence. For further information, see: [Cassese's... 2013:284–291; El Zeidy 2003:835–840; Rabinovitch 2004:500–520; Poels 2005:65–75; Safarov 2011:81–92; Simbeye 2017:20–27].

<sup>8</sup> See International Court of Justice: Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium). – *International Law Forum*. 2001. Vol. 3. No. 1. P. 7–8.

affairs, as long as they are in office, and other persons in so far as their immunity is recognized under customary international law; (b) persons who have immunity under any Convention applicable within the Kingdom of the Netherlands [Simbeye 2017:92–108]. The accrued importance of the issue of immunity was reiterated by the Institute of International Law in its Resolution on immunity and international crimes adopted at its Naples session in 2009 regarding immunity of states and their agents for the alleged commission of international crimes<sup>9</sup>.

In support of the approach adopted by the Netherlands in relation to universal jurisdiction, it may be observed that such jurisdiction was not only proclaimed in normative acts, but also found a practical application in concrete cases. The case of Frans van Anraat, Dutch businessman convicted by The Hague District Court on September 23, 2005, for complicity in war crimes and genocide based on Wartime Offences Act 1952, illustrates this statement. The basis for conviction was the fact that he sold raw materials to produce chemical weapons to Iraq which were subsequently used during the Iran-Iraq War [Tabassi, Dhavle 2014:225–226; Van Sliedregt 2012:10; Baughen 2016:38–39]. He was sentenced to a long-term imprisonment and the conviction was upheld by the Supreme Court in 2009.

It should also be noted that pursuant to article 15 of the ICA, The Hague District Court has exclusive jurisdiction over cases on extraterritorial crimes. That being said, the said judicial instance may have exercised universal jurisdiction only in relation to international crimes committed after entry into force of the ICA, i.e. after October 1, 2003 [Kok 2007:214].

This provision raised an issue with prosecution of persons on the territory of the Netherlands and accused of committing crimes of genocide which allegedly took place prior to the above-mentioned date. The case of Joseph Mpambara is an example demonstrating this difficulty. The latter was the sibling of Obed Ruzindana, convicted by the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) to 25 years of imprisonment, and was arrested in the Netherlands on August 7, 2006 in relation to accusations of offences in Rwanda in 1994. J. Mpambara had previously arrived at the Netherlands with a fake Ugandan passport in 1998 where he resided during eight years. His attempts to seek asylum, which he based on his fears to be prosecuted in Rwanda, turned out to be fruitless. The Dutch authorities no-

tified the Prosecutor of the ICTR of his arrest and the tribunal in its turn declared that it was not intending to exercise its jurisdiction in the present case.

Therefore, given absence of extradition agreement, J. Mpambara was not surrendered to the Rwandan authorities and it was decided to prosecute him according to the law of the Netherlands. Despite sufficiency of information about his complicity in committing genocide, war crimes and tortures, the accused was only convicted for torture by judgment rendered on March 23, 2009. In its decision dated July 24, 2007, The Hague District Court resolved that the law in place in the Netherlands does not allow to exercise universal jurisdiction in relation to the accused [Cahima 2013:199]. Although such jurisdiction was stipulated in the ICA, the latter did not have retroactive effect and, as already mentioned, only applied to conduct which took place after its entry into force. Such approach adopted by the district court of The Hague was later upheld by the Appellate and the Supreme Court of the Netherlands.

Prior to this case, issues related to exercise of universal jurisdiction were related to attempts to refer cases by ICTR to judicial authorities of the Netherlands. In particular, similar situation occurred in the case of *Prosecutor v. Michel Bagaragaza*, which illustrated the problem of policy of international tribunal in the matters of referral of criminal cases to third states.

Michel Bagaragaza was, up until July 1994, managing director of company OCIR-Tea, controlling tea industry of Rwanda. Along with his partners, he was accused of serious crimes, including genocide in relation to persons belonging to ethnic group of the tutsi. On November 30, 2006, he was also accused of committing war crimes. The initial attempt to refer the case by Norway turned out to be unsuccessful, as the latter did not have *ratione materiae* jurisdiction over the genocide of which the person was accused [Schabas 2009:433; Ryngaert 2013]. Norway submitted a request for referral under Article 11 *bis* of the ICTR Rules of Procedure and Evidence. However, given that national legislation of Norway did not contain provisions relating to liability for international crimes, in case of referral, the accused person could have been prosecuted for ordinary crimes, such as homicide. As noted by the Trial Chamber, “the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – are significantly different in terms of their elements and

<sup>9</sup> Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes. URL: [http://www.idi-iiil.org/app/uploads/2017/06/2009\\_naples\\_01\\_en.pdf](http://www.idi-iiil.org/app/uploads/2017/06/2009_naples_01_en.pdf) (accessed date: 23.04.2018).



their gravity from the crime of homicide, the basis upon which the Kingdom of Norway states that charges may be laid against the accused under its domestic law. (...) Consequently, Michel Bagaragaza's alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed" [Ryngaert 2013; Drumbl 2016:435–436]<sup>10</sup>. The Appellate chamber of the ICTR highlighted the "the crime of genocide is distinct in that it requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. This specific intent is not required for the crime of homicide" [Combs 2012:341–342]<sup>11</sup>. During the subsequent study of the case, on April 13, 2007, the Trial Chamber III of the ICTR, pursuant to article 11 *bis* of the Rules of Procedure and Evidence decided to refer the case to the Netherlands. However, on July 24, 2007, the District Court of The Hague decided that there are no jurisdictional grounds for criminal prosecution of M. Bagaragaza in the Netherlands. Even though the ICA provided for universal jurisdiction for genocide, according to the Court, the law did not have a retroactive effect and could not apply to actions that took place on the territory of Rwanda in 1994, prior to entry into force of the said law. Furthermore, incrimination on the territory of the country required conformity with provisions of article 4a of the Criminal Code of the Netherlands. Pursuant to this provision, criminal law of the Netherlands is applicable to any person whose criminal case has been referred to the Netherlands by a foreign state based on a treaty allowing to exercise jurisdiction over prosecution in the Netherlands. Since the referral of the case of M. Bagaragaza did not fulfill provisions of article 4a, the request of the Dutch prosecutor was considered by the Court as inadmissible. The Court of appeal upheld the decision of the District Court of The Hague, although relied on slightly different grounds.

By relying on expert opinion, the Court of appeal interpreted correspondence between the ICTR Prosecutor and minister of justice of the Netherlands as informal agreement, although such approach was not considered by the authors of the Criminal Code. Moreover, the Court of appeal rejected theological interpretation of the District Court of The Hague, according to which the ICTR was to be regarded as foreign state for the purposes of the article 4a. Consequently, the Supreme Court of the Netherlands

confirmed such approach, emphasizing that terminological differences between "state" and «international tribunal» are widely admitted. The legal saga ended with the ICTR tribunal withdrawing the referral to the judicial authorities of the Netherlands. Consequently, on May 20, 2008, M. Bagaragaza was surrendered back to the international tribunal.

The cases studied above stimulated reforms of legislation on international crimes. In October 2009, the minister of justice of the Netherlands presented a bill amending the ICA, which was adopted by the Parliament and entered into force on April 1, 2012. In conformity with the introduced amendments, the ICA may be applied retroactively in relation to acts of genocide committed after September 18, 1966, *i.e.* after the date of entry into force of the Law of 1964 on implementation of the Convention on genocide. Amendments were also introduced to article 4 of the Criminal Code of the Netherlands and to the Law of extradition for international crimes. According to the new edition of article 4a, criminal law of the Netherlands is also applied in relation to any person whose prosecution is referred to the Netherlands by international court established based on a treaty or a decision of international organization.

Amongst questions regulated by the ICA, crucial importance is to be granted to liability of officials for actions committed upon orders or decrees. Pursuant to paragraph 3 ("Broad criminal liability") of article 9, an official or a superior may be convicted for crimes punished by § 2 (genocide, crimes against humanity, war crimes, torture) in cases where they: a) knowingly allow to their subordinates to commit such crimes; b) knowingly do not take necessary measures in the framework of their powers when their subordinates committed or were intending to commit such crimes.

Such rule derives namely from article 86 § 2 of the Additional protocol I to the Geneva conventions pursuant to which the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. Provisions of article 9 § 33 of the ICA considered requirements of article 28 of the Rome Statute pro-

<sup>10</sup> *Prosecutor v. Michel Bagaragaza*, ICTR-2005-86-R11bis. Decision on the Prosecution Motion for Referral to the Kingdom of Norway. Trial Chamber III. May 19, 2006. § 16.

<sup>11</sup> *Ibidem*.

viding for, in addition to other grounds of criminal responsibility under the Statute for crimes within the jurisdiction of the Court, responsibility of military commander and of superiors for failure to exercise control properly over subordinates having committed crimes against humanity, war crimes, etc.

The ICA also stipulated a special rule (article 11, § 4) regulating responsibility for fulfilling orders. Pursuant to this rule 1, the fact that a crime as defined in this Act was committed pursuant to a regulation issued by the legal power of a State or pursuant to an order of a superior does not make that act lawful. At the same time, by implementing article 33 of the Rome Statute, the ICA stipulated that a subordinate who commits a crime referred to in this Act in pursuance of an order by a superior shall not be criminally responsible if the order was believed by the subordinate in good faith to have been given lawfully and the execution of the order came within the scope of his competence as a subordinate. However, under article 11, § 4, part 3, for the purposes of part 2 of the present article, orders to commit genocide and crimes against humanity are deemed to be manifestly unlawful.

Article 13 of the ICA is another not less important provision stipulating that articles 70 (statute of limitations to prosecute) and 76 (statute of limitation to enforce judgment) of the Criminal Code of the Netherlands shall not apply to the crimes defined in this Act [Kok 2007:122–123]. This provision reflects requirements of article 29 of the Rome Statute pursuant to which the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

One needs to be reminded that several legal instruments of international law regulate the statute of limitations with respect to international crimes, such as the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the UN General Assembly resolution of 26 November 1968<sup>12</sup> and the European Convention on the non-applicability of statutory limitation to crimes against humanity and war crimes of 25 January 1974<sup>13</sup>.

The Netherlands are not party to the UN Convention, but have ratified the European Convention of 25 November 1981. Introduction of the relevant rule into

the ICA derives from article 29 of the Rome Statute stipulating such principle. At the same time, non-applicability of statutory limitations to genocide, crimes against humanity and war crimes is rule of customary international law, which may be applied in domestic legislation regardless participation in the Convention of 1968 or in the European Convention of 1974.

Another provision of the ICA which deserves attention is its article 12. Pursuant to this provision, the crimes defined in this Act shall be deemed not to be offences of a political nature for the purposes of the Extradition Act or the Surrender of War Crime Suspects Act. With respect to that, it is important to remind that according to article 11 part 1 of the Extradition Act, extradition of a person for crime of political nature is prohibited. At the same time, the said provision contains exceptions to the rule of non-extradition for crimes of political nature. Particularly, pursuant to article 11 part 2 of the Extradition Act, crime against life and freedom of the Head of state of member of royal family may not be considered as crime of political nature. Moreover, in accordance with article 11 part 3, part 1 of this article may not be applied to crimes contained in article 1 of the European convention on the suppression of terrorism of 1977.

The ICA broadened the list of actions which may not be considered as crimes of political nature. The main purpose of such extension is to avoid that persons accused in committing genocide, war crimes and crimes against humanity rely on the rule of non-extradition for political to escape from criminal responsibility motives [Safarov 2005:79–114]. The said rule is perfectly consistent with article VII of the Genocide Convention of 1948, pursuant to which for the purposes of surrender of the accused, genocide is not be regarded as political crime. Admitting the opposite would have led to impunity of offenders who would have pleaded political motive in order to seek non-extradition to the requesting State [Roth 2009:285–295; Schabas 2010:79–480].

The ICA contains elements of crimes encompassed by articles 5, 6 and 7 of the Rome Statute, one of which, pursuant to article 3 of the Law is genocide.

The Netherlands ratified the Convention on the prevention and punishment of the crime of genocide of 1948 on September 18, 1966 and implemented its provisions by way of adoption of a special legislative

<sup>12</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity entered into force on November 11, 1970. URL: <https://web.archive.org/web/20120508073422/http://www2.ohchr.org/english/law/warcrimes.htm> (accessed date: 23.04.2018).

<sup>13</sup> European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes entered into force on June 27, 2003. Belgium, the Netherlands and Romania are signatories of the Convention. URL: <https://rm.coe.int/168007617f> (accessed date: 23.04.2018).

act on July 2, 1964, which was repealed after adoption of the ICA.

Article 3 § 2 of the ICA is identical to article 6 of the Rome Statute which in its turn reproduced article II of the Convention of 1948 pursuant to which five categories of acts mean genocide: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group [Thalman 2009:244]. As opposed to legislative practice of other states members of the European Union (such as France, Poland, Spain), the Netherlands did not enlarge conventional definition of the genocide, opting for literal wording of the commonly used definition of such crime.

A considerable significance is granted in the ICA to crimes against humanity contained in article 4 § 2, which substantially relies on article 7 of the Rome Statute. The Rome Statute was the first multilateral international treaty which contained definition of crimes against humanity [Robinson 1999:237–316; Van Schaac 1999:787–850; McAuliffe de Guzman 2000:335–403; Mettraux 2002:237–316; Clark 2011:8; Bassiouni 2011:359–470]. At the very beginning of negotiations within the Preparatory Commission for the ICC it became clear that most of the states were not going to adopt a narrow interpretation of crimes against humanity contained in article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia. As a result, a wording encompassing eleven types of crimes falling under the category of crime against humanity was adopted, including such actions as murder, extermination, enslavement, deportation, etc.

The ICA, like the Rome Statute, in its definition of crimes against humanity, does not require a connection to an armed conflict, but at the same time foresees a contextual element for crimes against humanity. In order for an offence to fall under category of crimes against humanity pursuant to article 4 § 2

of the ICA, four preliminary conditions must be met according to which the act must a) represent a large-scale or systematic attack; b) be directed against the civilian population; c) be committed intentionally, which means that *mens rea* of the action includes consciousness of certain direction of the actions against civilian population; d) present a repeated committance of acts of attack for the purposes of conducting the policy of the State or organization, directed at committing such attacks, or facilitating such policy.

Regarding implementation of crimes against humanity, it is important to note that the legislation of the Netherlands was unaware of the said category of criminal offences and in that respect the ICA filled the loophole in the system of legal regulation of international crimes by providing in its article 4 § 2 criminal responsibility for this category of offence. Pursuant to the ICA, the following offences fall under the category of crimes against humanity: (a) intentional killing; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture (as defined in section 1(1) (d)); (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this subsection or any other crime as referred to in this Act; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character which intentionally cause great suffering or serious injury to body or to mental or physical health.

Paragraph 2 of this provision (article 4 of the ICA) defines acts such as “attack on civilian population”<sup>14</sup> (item a), “enslavement” (item b)<sup>15</sup>, “prosecution” (item c)<sup>16</sup>, “forced disappearance of persons” (item d)<sup>17</sup>. The latter crime is an innovation of the

<sup>14</sup> According to this item, “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in subsection 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.

<sup>15</sup> Enslavement, according to item b, “means the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children”.

<sup>16</sup> By persecution in item “c” is meant the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

<sup>17</sup> Forced disappearance of persons under item “d” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Rome Statute, which in its terms was consolidated in the ICA. “Forced disappearance of persons” was neither included in the definition of crime against humanity in the Nuremberg Charter, nor in the Control Council Law No. 10. Furthermore, it was not considered in the statutes of ad hoc tribunals for the former Yugoslavia and Rwanda. Reference to “forced disappearance of persons” was first made in article 18 item “i” of the Draft Code of Crimes against the Peace and Security of Mankind. As it was noted in the commentary to the Code, “although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity”<sup>18</sup>.

Consequently, forced disappearance as one of categories of crimes against humanity was codified into the Rome Statute on the ICC. At the same time, it shall be reminded that considering the necessity to enhance suppression and large cooperation of the international community in fighting this criminal conduct gravely harming fundamental rights and freedom, the UN General Assembly adopted, by its Resolution dated December 20, 2006, International Convention for the Protection of all persons from Enforced Disappearance. The said Convention was ratified by the Netherlands on March 23, 2011 and entered into force on April 22, 2011. In that respect, as part of implementation of international obligations, amendments were introduced to the ICA pursuant to which forced disappearance of persons was criminalized as a separate crime. As a result, the Netherlands enlarged the scope of criminal prosecution of the conduct, since accusation of forced disappearance may be brought against any person who committed the said crime in the framework of largescale or systematic attack on any civilian population (crime against humanity) or regardless the latter as a separate criminal act.

As to definition of acts which according to the ICA fall under the category of crimes against humanity, they are contained in article 1 § 1, part 1. In particular, pursuant to item “c”, deportation or forcible transfer of the population’ means the forced removal of persons by expulsion or other coercive acts from the area where they are lawfully present without the existence of any grounds that would justify this under international law<sup>19</sup>. Forced pregnancy

pursuant to item “f” of the same provision means the unlawful imprisonment of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other serious violations of international law [Oosterveld 2011:87]. Item “g” of the article defines crime of apartheid as inhumane acts of a character similar to the acts referred to in section 4, subsection 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

General evaluation of articles of the ICA, defining to crimes against humanity, undoubtedly confirms the fact of full implementation in the Dutch domestic legislation of rules of international law on responsibility for the given category of the most serious acts which raise concerns amongst the international community.

Significant importance within the ICA is given to provisions incriminating war crimes. As the analysis of the said articles show, their systemization differs according to elements of crimes falling in the indicated category and defined in the Rome Statute. The systems of war crimes in the ICA reflect development of international humanitarian law, and it is specificities of the object of criminal acts that form the basis of such systemization. Another significant feature of the ICA regarding responsibility for war crimes is lack of threshold of competence, as it is foreseen by the Statute of the ICC. It shall be reminded that article 8 § 1 of the Rome Statute provides that the Court shall have jurisdiction in respect of war crimes when committed as part of a plan or policy or as part of a large-scale commission of such crimes. However, no such condition is required for application of the ICA.

Elements of war crimes in the law mostly correspond to definitions contained in article 8 of the Rome Statute. Just like in the latter, “war crimes” offence expands to conflicts of non-international nature. Apropos, the mentioned circumstance is one of the most crucial achievements of the Rome diplomatic conference for an ICC, although it shall be noted that the trend towards a unique approach in relation to international and domestic conflicts has clearly appeared in the practice of International *ad*

<sup>18</sup> Draft Code of Crimes against the Peace and Security of Mankind with Commentaries. – *Yearbook of the International Law Commission*. Vol. II. Part 2. 1996. P. 49.

<sup>19</sup> See interpretation of the elements of crime in the Rome Statute on ICC: [Hall 2008:134–136].

*hoc* criminal tribunals<sup>20</sup>. According to the ICA, person accused of war crime carries criminal responsibility regardless of category to which the armed conflict belongs.

Within the structure of the ICA, a significant importance is granted to war crimes committed in the context of an international armed conflict. Pursuant to article 5, § 2, part 1, a person accused of serious violation of the Geneva conventions constituting the below mentioned acts against persons protected by those Conventions are prosecuted for: murder (item "a"), torture or inhuman treatment, including biologic experience (item "b"); intentional harm causing serious strong or serious bodily harm or injury to health (item "c"); unlawful, unfounded and large-scale extermination and appropriation of property, not required for military purposes ("d"); forcing military hostage or any person in captivity to serve in military forces for the rival ("e"); intentional deprivation of military hostage or any person in captivity of right to fair and normal trial ("f"); unlawful deportation or displacement or unlawful deprivation of freedom ("g"); hostage taking ("h").

Article 5 § 2 of the ICA provides for responsibility for any person who, in the case of an international armed conflict, commits serious violation of Additional protocol I of December 12, 1977 to Geneva Conventions dated August 12, 1949, and in particular actions provided for in article 2 § 1 of the ICA, if committed against persons protected under the Additional protocol (item "a"); any intentional act or omission which jeopardizes the health of anyone who is in the power of a party other than the party to which he or she belongs ("b"), and which: (i) entails any medical treatment which is not necessary as a consequence of the state of health of the person concerned and is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the

party responsible for the acts and who are in no way deprived of their liberty (ii) entails the carrying out on the person concerned, even with his consent, of physical mutilations; (iii) entails the carrying out on the person concerned, even with his consent, of medical or scientific experiments; or (iv) entails removing from the person concerned, even with his consent, tissue or organs for transplantation; the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health ("c"): (i) making the civilian population or individual citizens the object of attack; (ii) launching an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; (iii) launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects; (iv) making non-defended localities or demilitarized zones the object of attack; (v) making a person the object of attack in the knowledge that he is hors de combat; or (vi) the perfidious use, in violation of article 37 of Additional Protocol<sup>21</sup> (I), of the distinctive emblem of the red cross or red crescent or of other protective emblems recognized by the Geneva Conventions or Additional Protocol (I); (d) the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): (i) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies or the transfer of all or part of the population of the occupied territory within or outside this territory in violation of article 49 of the Fourth Geneva Convention; (ii) unjustifiable delay in the repatriation of prisoners of war or civilians; (iii) practices of apartheid and other inhuman and degrading practices involving outrages upon person-

<sup>20</sup> See namely, decision of the ICTY in the case *Prosecutor v. Tadic*. In particular, it was noted by the Tribunal that starting from the thirties, differences between rules of customary international law which regulate international armed conflicts and general rules regulating internal armed conflicts started to disappear. As a result of rapprochement of such norms, internal armed conflicts are currently substantially regulated by rules which have previously been applied only during the period of armed conflicts. At the same time, the Appeals Chamber in its decision rendered on October 2, 1995 in the present case indicated that violation of laws and customs of war committed during internal armed conflict constitute war crimes. See for further information, *Prosecutor v. Dusko Tadic*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction. Case No. IT-94-1-AR72. Oct. 2. 1995. See also [Alvarez 1996:245–265; Bohlander 2000:217–248; Kritsiotis 2010:262–300; Knoops 2013:64–66].

<sup>21</sup> Article 37 provides the following: "1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: a) the feigning of an intent to negotiate under a flag of truce or of a surrender; b) the feigning of an incapacitation by wounds or sickness; c) the feigning of civilian, non-combatant status; and d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict".

al dignity, based on racial discrimination; (iv) making clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), of Additional Protocol (I) and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives; or (v) depriving a person protected by the Geneva Conventions or Article 85, paragraph 2, of Additional Protocol (I) of the right to a fair and regular trial; the following intentional acts committed in the case of international armed conflict (§ 3): (a) rape, sexual slavery, enforced prostitution, enforced sterilization or any other form of sexual violence which can be deemed to be of a gravity comparable to a grave breach of the Geneva Conventions; (b) forced pregnancy; (c) subjecting persons who are in the power of an adverse party to the conflict to physical mutilation or medical or scientific experiments of any kind, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such persons or persons; (d) treacherously killing or wounding individuals belonging to the hostile nation or army; (e) killing or wounding a combatant who is in the power of the adverse party, who has clearly indicated he wishes to surrender, or who is unconscious or otherwise hors de combat as a result of wounds or sickness and is therefore unable to defend himself, provided that he refrains in all these cases from any hostile act and does not attempt to escape; or (f) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury.

The ICA also provides for responsibility for war crimes against cultural values and heritage committed in the case of international armed conflict. In particular, pursuant to article 5, § 2, section 4, this category of crimes includes making the object of attack cultural property that is under enhanced protection as referred to in articles 10 and 11 of the Second Protocol, concluded in The Hague on 26 March 1999, to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Netherlands Treaty Series 1999, 107) (“a”); using cultural property

that is under enhanced protection as referred to in (a) or the immediate vicinity of such property in support of military action (“b”); destroying or appropriating on a large scale cultural property that is under the protection of the Convention, concluded in The Hague on 14 May 1954, for the Protection of Cultural Property in the Event of Armed Conflict (Netherlands Treaty Series 1955, 47) or the Second Protocol thereto (“c”); making cultural property that is under protection as referred to in (c) the object of attack (“d”); or theft, pillaging or appropriation of – or acts of vandalism directed against – cultural property under the protection of the Convention (“e”).

The list of war crimes contained in the ICA is quite broad: article 5 § 2 of the Act establishes responsibility for the relevant acts committed in the situation of international armed conflict, while article 6 § 2 of the Act enumerates list of acts committed in an armed conflict not of an international character and article 7 § 2 incriminates violations of laws and customs of war committed during armed conflict of both international and not international character. As Boot-Mathijssen and van Elst have noted, the Government of the Netherlands, when establishing criminal responsibility for war crimes, was relying on the following categorization: 1) conventional rules obliging the States to incriminate the relevant acts; 2) provisions of the Rome Statute on ICC; 3) the so-called “residual clause” reflecting development of laws and customs of war, including war crimes which may appear further [Boot-Mathijssen, van Elst 2004:251–296].

The inclusion of crime of torture into the ICA deserves to be mentioned separately. The said act is provided for in article 8, § 2, section 1 pursuant to which torture committed by a public servant or other person working in the service of the authorities in the course of his duties may be sentenced to a long term or life imprisonment. Similar punishment may be carried out pursuant to section 2 of the same article by a public servant or other person working in the service of the authorities who, in the course of his duties and by one of the means referred to in Article 47, paragraph 1 (ii), of the Criminal Code, solicits the commission of torture or intentionally permits another person to commit torture (“a”); or a person who commits torture, if this has been solicited or intentionally permitted by a public servant or another person working in the service of the authorities, in the course of his duties (“b”).

It shall also be noted that ratification by the Netherlands of International convention for the protection of all persons from enforced disappearance of

March 23, 2011 stimulated introduction of amendments into the ICA for the purposes of implementation of obligations deriving from participation in the said convention [Lintel, Vermeulen 2014:317]. Although the ICA contained responsibility for enforced disappearance of persons in article 4, section 1 "I", such action was punished only if committed as part of a large-scale or systemic attack on civilian population, i.e. as crime against humanity. As already noted, incrimination of the said act resulted from implementation of article 7 of the Rome Statute. Furthermore, the International convention of December 20, 2006 states that the large scale or systemic practice of forced disappearance constitutes crime against humanity, as defined in the applicable international law, and entails consequences provided for in the international law.

This however does not exonerate States signatories of the Convention of their obligation to ful-

fill requirements under article 4 pursuant to which it is important to take measures in order to ensure that enforced disappearance is qualified of crime according to their domestic criminal legislation. In that respect, amended article 8a § 1 of the ICA did provide for responsibility in case of enforced disappearance as a separate crime and not as a sub-category of crime against humanity.

To conclude, general evaluation of the ICA, on one hand, witnesses of movement towards establishment of legal regime striving for avoidance of impunity for perpetrators of international crimes which raise concerns of the international community, and on the other hand, gives sufficient grounds to reaffirm that the norms of the Rome Statute are voluminous and fully implemented, which allows the Netherlands to prosecute the accused persons autonomously, thus excluding possible referral of cases to the ICC.

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