

Report of the Kingdom of the Netherlands

submitted under Article 29, paragraph 1

of the International Convention for the Protection

of All Persons from Enforced Disappearance

Introduction

1. The report of the Netherlands on the measures taken to give effect to the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance (hereafter the Convention) is hereby submitted in accordance with Article 29, paragraph 1 of the Convention.
2. The report has been drawn up and structured in keeping with the guidelines relating to the form and content of reports under article 29 of the Convention.
3. The Convention was signed by the Netherlands on 29 April 2008. Subsequently the bill to approve the Convention was adopted by the House of Representatives without a debate or vote on 7 October 2010. The bill also went through the Senate on the nod on 2 November 2010. The Convention was ratified by the Netherlands on 23 March 2011 and entered into force on 22 April 2011. It has been translated into Dutch and published in the Dutch Treaty Series 2008, no. 173.
4. Enforced disappearance perpetrated by the State does not occur in the Netherlands. Where persons are deprived of their liberty by the State, this is based on Dutch law and is subject to procedural safeguards. The lawfulness of deprivation of liberty is assessable by an independent court.
5. Nonetheless, the Netherlands may be confronted with enforced disappearance in cases where a person suspected of perpetrating an enforced disappearance outside the Netherlands is found to be on Dutch territory.
6. By providing that enforced disappearance constitutes an offence under criminal law, the Convention helps to combat this practice.
7. The Convention contains a package of measures intended to prevent and combat enforced disappearance and protect victims. It also establishes a Committee on Enforced Disappearances to supervise its implementation.

General legal framework

Relevant provisions of Dutch criminal law

Offence under the International Crimes Act

8. The approval of the Convention was accompanied by various changes to Dutch law. Besides amending the existing provision, under which enforced disappearance is a crime against humanity, the legislation provides that enforced disappearance is now also an autonomous offence under Dutch criminal law.
9. It was decided that enforced disappearance should be made an autonomous offence under the International Crimes Act for various reasons:
 - Enforced disappearance was already included in the International Crimes Act (section 4) as one of the crimes against humanity. It was therefore only logical for the provision making it an autonomous offence to be based as far as possible on the existing provision.
 - The offence of enforced disappearance is equivalent in terms of its nature and gravity to the other international crimes regulated in the International Crimes Act. It should be noted, incidentally, that these crimes, like the offence of enforced disappearance, do not require an international element.
 - The Convention imposes an obligation to hold superiors criminally responsible. The International Crimes Act already makes provision for such responsibility.
 - The Convention imposes an obligation to create substantial extraterritorial jurisdiction. The jurisdiction provisions of the International Crimes Act already make provision for this.
 - The Convention imposes an obligation to depoliticise the offence of enforced disappearance. This too is already provided for in the International Crimes Act.

Dutch jurisdiction over the prosecution of international crimes

10. The jurisdiction of the Netherlands to prosecute international crimes such as genocide, crimes against humanity, war crimes, torture and enforced disappearance is regulated in section 2 of the International Crimes Act.
11. This section establishes universal jurisdiction, albeit subject to certain conditions. These conditions are that the suspect must be a Dutch national or be in the Netherlands or that the offence must have been committed against a Dutch national.
12. In accordance with the 'aut dedere aut judicare' obligation laid down in Article 11 of the Convention, the Netherlands will, in such circumstances, either itself prosecute and try the person concerned or extradite him to another State which has requested his extradition for the same offences or surrender him to an international criminal tribunal which has

requested his surrender. In such a case all the usual conditions for extradition and surrender should be fulfilled.

13. Besides this conditional universal jurisdiction, the International Crimes Act establishes jurisdiction in respect of these crimes on the basis of the active and passive personality principles, in other words whether the offence has been committed by or against a Dutch national. In the latter case, the condition that the suspect should be in the Netherlands does not apply.

Custodial sentences and fines

14. Section 4, subsection 2 (d) of the International Crimes Act provides that enforced disappearance of persons means the arrest, detention, abduction or any other form of deprivation of liberty 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 liberty or to give information on the fate or whereabouts of those persons or by concealment of their fate or whereabouts, thereby removing them from the protection of the law.
15. Section 4, subsection 1, opening words and (i) of the International Crimes Act provides that committing an act involving the enforced disappearance of a person as part of a widespread or systematic attack directed against a civilian population is a crime against humanity. The sentence carried by this crime is life imprisonment or a term of imprisonment not exceeding 30 years and/or a sixth category fine.
16. Section 8a, subsection 1 of the International Crimes Act provides that a person who is guilty of the enforced disappearance of a person will be liable to a term of imprisonment not exceeding 15 years and/or a fifth category fine.
17. Section 8a, subsection 2 of the International Crimes Act adds that a heavy sentence (life imprisonment or a term of imprisonment not exceeding thirty years and/or a fine of the sixth category) may be imposed if the crime of enforced disappearance is committed in a number of special circumstances or in respect of certain categories of vulnerable people.
18. Examples are cases in which the crime has resulted in the death of or serious physical injury to the victim, the victim has been raped or the crime has been accompanied by violence committed in association. Vulnerable people include people who are sick or injured, pregnant women, minors or persons with a disability.

Disposal of complaints

19. The policy rules of the Public Prosecution Service, in particular the Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions, contain provisions for the disposal of cases in which a complaint is lodged with a district court or the police concerning an international crime as defined in the International Crimes Act. The National Public Prosecutors' Office decides on the disposal of complaints about such crimes.
20. If a complaint has been lodged it is necessary to decide whether the suspect has immunity. Section 16 of the International Crimes Act provides the statutory framework for this decision. The Board of Procurators General makes the final decision on immunity, where necessary after consultation with the Minister of Foreign Affairs.
21. The next step is to decide whether there is a realistic prospect of successful investigation and prosecution within a reasonable period. This decision involves relevant aspects such as statutes of limitations, mutual legal assistance agreements, whether it would be possible to carry out investigation and prosecution activities safely in the relevant country or countries, and/or the likelihood of witnesses being willing and able to testify in Dutch criminal proceedings.
22. After investigation, and in accordance with the discretionary principle applicable in the Netherlands, the public prosecutor decides whether or not a suspect will be prosecuted.
23. Since the Convention entered into force, two complaints have been received by the National Public Prosecutors' Office on the basis of both sections 4 and section 8a of the International Crimes Act. After investigation the Public Prosecution Service decided that, as for the first complaint, there was no realistic basis for a successful prosecution. The second complaint is still being investigated.

Consolidating and reporting activities

Consultation

24. The measures to combat the crime of enforced disappearance are coordinated as part of the arrangements for combating all international crimes. The following points can be made about this coordination.
25. Consultation between the authorities concerned takes place at regular intervals in the International Crimes Task Force, which consists of the Ministry of Security and Justice (represented by various departments within the Ministry, the Public Prosecution Service, the National Police and the Immigration and Naturalisation Service) and the Ministry of Foreign Affairs.
26. The Task Force is chaired by the chief public prosecutor of the National Public Prosecutors' Office in Rotterdam.

27. Where necessary, consultation within the Dutch context may also take place between government ministries, the police and the Public Prosecution Service, non-governmental organisations and research organisations. No coordination framework has been established for this purpose. Coordination therefore takes place on an ad hoc basis.

International crimes reporting letter

28. The annual international crimes reporting letter to the House of Representatives sets out how many cases concerning international crimes have been considered and disposed of by the International Crimes Team (TIM) of the National Police Services Unit (ELPD) in the previous year.

29. It also addresses the system-wide approach aimed at preventing, investigating and prosecuting international crimes in and outside the Netherlands. The statistical data in the report include figures for investigations and prosecutions of international crimes, including the enforced disappearance of persons.

30. This concerns the international crime files dealt with by the National Public Prosecutors' Office of the Public Prosecution Service and the National Police Services Unit, with special focus on files concerning aliens (received from the Immigration and Naturalisation Service) in which a challenge has been made on the grounds of article 1F of the Refugee Convention.

International assistance and cooperation

Extradition/surrender

31. The Netherlands may surrender a person suspected of having committed the crime of enforced disappearance to another member state of the European Union on the basis of a European arrest warrant.

32. Under Dutch law, the extradition of persons to countries outside the European Union requires a treaty. The Netherlands has concluded multilateral or bilateral extradition treaties with a large number of countries.

33. Under the Surrender of War Crime Suspects Act, persons can be extradited by the Netherlands to all countries that are parties to the Convention, even if the Netherlands has not concluded an extradition treaty with the country concerned.

Information relating to the implementation of the Convention in the Netherlands

Article 1

34. The Netherlands has chosen to make enforced disappearance an autonomous offence in the International Crimes Act. It was already punishable as one of the crimes against humanity (in section 4 of the Act). The provision making it an autonomous offence is based as far as possible on the existing provision.
35. The amended provisions under which enforced disappearance was originally a criminal offence can be found in section 4, subsections 1 (i) and 2 (d) of the International Crimes Act. The autonomous offence is now regulated in a new section 8a of the International Crimes Act.

Article 2

36. In implementing the Convention the Netherlands has used and extended the definition in the International Crimes Act. Section 4, subsection 2 (d) of the International Crimes Act defines the enforced disappearance of persons as the arrest, detention, abduction or any other form of deprivation of liberty 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 liberty or to give information on the fate or whereabouts of those persons or by a concealment of their fate or whereabouts, thereby removing them from the protection of the law.
37. In this way Dutch legislation provides a definition of enforced disappearance which is in keeping with the provisions of article 2 of the Convention since it contains each of the following elements:
- a) deprivation of liberty,
 - b) the involvement of a State or representatives of the State or persons or groups of persons acting with the authorisation, support or acquiescence of the State,
 - c) followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, and
 - d) the person concerned is thus placed outside the protection of the law.

Article 3

38. Under this provision the States Parties are obliged to investigate enforced disappearances committed without the authorisation, support or acquiescence of the State and to bring those responsible to justice. This provision also requires State Parties to take action against forms of deprivation of liberty in which the State is not involved. The Disposal of

Criminal Complaints (Offences under the International Crimes Act) Instructions lay down specific rules about investigating cases of enforced disappearance. Deprivation of liberty by parties other than the State already constitutes a separate criminal offence.

Articles 4 and 5

39. Enforced disappearance was already punishable in the Netherlands as a crime against humanity (section 4 of the International Crimes Act). When the Convention was implemented it was decided that it should be made an autonomous offence. The new provision making enforced disappearance an offence has been based as far as possible on the existing provision.
40. Enforced disappearance was originally an offence under section 4, subsections 1 (i) and 2 (d) of the International Crimes Act. As a result of the amendment, the autonomous offence is now regulated in a new section 8a of the International Crimes Act.

Article 6

41. Criminal responsibility is regulated in Dutch law in various statutory provisions. Section 9 of the International Crimes Act regulates the responsibility of a superior, who is liable to the same penalties as the perpetrator if he '(a) intentionally permits the commission of such an offence by a subordinate;' or '(b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence.'
42. Section 11, subsections 1 to 3 of the International Crimes Act regulate the exclusion under Dutch law of a defence based on an order or instruction:
 1. A crime as defined in this Act which was committed pursuant to a regulation issued by the legislature of a State or pursuant to an order of a superior shall remain an offence.
 2. 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 subordinate position.
 3. For the purposes of subsection 2, an order to commit genocide, a crime against humanity or the enforced disappearance of a person is deemed to be manifestly unlawful.
43. Unlike section 11, subsection 2 of the International Crimes Act, however, the Convention does not provide for an exception to the exclusion of defences based on an order or instruction. According to section 11, subsection 2 of the International Crimes Act, a subordinate is not criminally responsible if he believed in good faith that the order was given lawfully.

44. However, section 11, subsection 3 of the International Crimes Act does negate the effect of subsection 2 in the case of genocide or a crime against humanity. An order to commit genocide or a crime against humanity is deemed to be manifestly unlawful, and enforced disappearance is a new addition to this subsection.

Article 7

45. Under section 8a, subsection 1 of the International Crimes Act, the offence of enforced disappearance automatically carries a maximum sentence of fifteen years' imprisonment and a fifth category fine.

46. Under Dutch law a court may take account of aggravating circumstances when passing sentence for the offence of enforced disappearance. This is laid down in section 8a, subsection 2 of the International Crimes Act. This defines four sets of aggravating circumstances which can lead to the imposition of a sentence of life imprisonment or a sentence of imprisonment up to thirty years or a sixth category fine.

47. These circumstances occur where an offence as defined in subsection 1 of section 8a:

- a) causes the death of or serious bodily harm to the person concerned or involves the rape of that person;
- b) involves violence committed in association against a person or violence against a sick or injured person;
- c) concerns a pregnant woman, a minor, a person with a disability or other particularly vulnerable person;
- d) concerns a group of persons.

Article 8

48. Section 13 of the International Crimes Act provides that there is no limitation period for the prosecution of the crimes defined in the International Crimes Act. This provision also applies to enforced disappearance. Article 8, paragraph 2 of the Convention guarantees the right of victims of enforced disappearance to an effective remedy during the term of limitation.

49. The absence of a period of limitation for prosecution of the crimes defined in the International Crimes Act differs from the normal situation under Dutch law and reflects the gravity of this type of offence.

Articles 9 and 10

50. Dutch jurisdiction over the offence of enforced disappearance as defined in the International Crimes Act is established in articles 2, 3 and 5, paragraph 1, (2°) of the Criminal Code and section 2, subsection 1 (c) of the International Crimes Act.
51. Article 9, paragraph 1 (c) of the Convention provides for optional jurisdiction on the basis of the passive personality principle. This jurisdiction is established in section 2, subsection 1 (b) of the International Crimes Act.
52. Article 9, paragraph 2 contains the usual obligation for a State to establish secondary universal jurisdiction in those cases in which the alleged offender is present in any territory under its jurisdiction and it does not extradite him to another State. This jurisdiction is established in section 2, subsection 1 (a) of the International Crimes Act.
53. Special rules known as the Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions apply to international crimes and the treatment of victims of such crimes.

Article 11

54. Article 11 of the Convention lays down the principle of 'aut dedere aut judicare'. This means that if the Netherlands has jurisdiction in accordance with the above and does not extradite an alleged offender, the public prosecutor will investigate the case with a view to prosecution. The fundamental procedural rights of the suspect are observed in this connection.

Article 12

55. The International Crimes Act is governed by Dutch criminal law and criminal procedure. However, it should be noted that where the provisions of the Act differ from the general provisions of the Criminal Code, the former will prevail pursuant to article 91 of the Criminal Code.
56. The National Public Prosecutors' Office in Rotterdam has been designated by the Board of Procurators General as the prosecuting authority responsible for considering complaints concerning offences under the International Crimes Act and bringing prosecutions before the competent court. If a complaint concerning one of the crimes in question is reported to a different prosecutor's office it should be immediately passed to the National Public Prosecutors' Office for consideration.
57. Under article 161 of the Code of Criminal Procedure anyone who has knowledge of the commission of a criminal offence may lodge a criminal complaint. This right is not limited to the victim. As against this, investigating officers have a duty to receive any such complaint pursuant to article 163, paragraph 5 of the Code of Criminal Procedure. This

also applies to offences under the International Crimes Act. The complaint is then considered by the public prosecutor at the National Public Prosecutors' Office, who decides whether further steps should be taken to prosecute a suspect or potential suspect.

58. After the complaint has been considered, the public prosecutor at the National Public Prosecutors' Office decides whether the case should be investigated and prosecuted.

Article 13

59. Section 12 of the International Crimes Act gives effect to the obligation not to regard the offence of enforced disappearance as a political offence for the purposes of extradition.
60. Under this provision the crimes defined in the International Crimes Act are not regarded as offences of a political nature for the purposes of the Extradition Act or the Surrender of War Crime Suspects Act.
61. The Netherlands has made use of the possibility of designating the Convention as the legal basis for extradition in cases where there is no extradition treaty (addition to section 51a of the Extradition Act).
62. As the Netherlands only grants extradition in pursuance of a treaty (section 2 of the Extradition Act), article 13, paragraph 5 of the Convention is not relevant to the Netherlands.
63. As regards article 13, paragraph 6, the Netherlands may, in so far as no special extradition treaty is applicable to a request for extradition, invoke the grounds for refusal contained in the Extradition Act and the European Convention on Extradition done at Paris on 13 December 1957 (Dutch Treaty Series 1965, 9) (see section 51a, subsection 3 of the Extradition Act).

Article 14

64. This article does not require changes to Dutch legislation. Where Dutch legislation makes the granting of requests for mutual legal assistance conditional upon the existence of a treaty basis, the basis can be found in this article (see articles 552m, 552n and 552o of the Code of Criminal Procedure).

Article 15

65. The Netherlands implements the obligation to cooperate and afford mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying

them and returning their remains. The Netherlands Forensic Institute can play a role in this connection.

Article 16

66. Article 16 does not necessitate additional legislation. This obligation already arises from article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment.

67. Article 16 also has similarities to the non-refoulement principle contained in article 33 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (Dutch Treaty Series 1951, 131), but should be distinguished from it since, unlike article 33, it is unrelated to the question of whether the life or freedom of the person concerned would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Articles 17-23

68. Articles 17-23 contain a large number of rules designed to ensure the lawfulness of the detention and prevent unlawful detention and enforced disappearance.

69. Dutch criminal procedure and prison law provide for the application of the criminal law in accordance with these rules. An important safeguard in ensuring that persons do not 'get lost' in the prison system is the obligation in article 17, paragraph 3 to compile and maintain official registers and records of deprivations of liberty and persons in custody. Computerised registers containing these data are kept by the Custodial Institutions Agency.

Article 24

70. Article 24 does not necessitate additional legislation. The position of victims is regulated in the Code of Criminal Procedure and the Victim Support Directive, which sets out the policy established by the Board of Procurators General for the benefit of the Public Prosecution Service and the police.

71. Under article 161 of the Code of Criminal Procedure anyone who has knowledge of the commission of a criminal offence may lodge a criminal complaint. This right is not limited to the victim. As against this, investigating officers have a duty to receive any such complaint pursuant to article 163, paragraph 5 of the Code of Criminal Procedure. This also applies to offences under the International Crimes Act.

72. Dutch policy on the care of victims is based on three fundamental rights, namely the right to courteous and, where necessary, personal treatment and the right to information about

the course of the proceedings against the suspect, the possibilities for obtaining compensation and how to make maximum use of a compensation scheme in the course of criminal proceedings.

Article 25

73. The wrongful removal of children is an offence under article 279 of the Criminal Code (removal of children from the custody of the person who has legal authority over them), article 280 of the Criminal Code (concealment of the whereabouts of a minor) and article 282 of the Criminal Code (intentional deprivation of liberty).

74. Dutch adoption law makes provision for account to be taken of the special interests of children who are victims of enforced disappearance.

The Hague, 5 June 2013