

Introduction

The Act of 19 June 2003 to adopt the Rules Concerning Serious Violations of International Humanitarian Law (“International Crimes Act”) originated from the complementarity principle enshrined in the Rome Statute for the International Criminal Court. Although Dutch criminal law covered many of the crimes contained in the ICC Statute, the provisions were spread amongst several different laws. Moreover, there existed a lacuna with regard to crimes against humanity, which were not criminalized. Faced with this situation, the Government decided to propose the International Crimes Act, which would consolidate all of the international crimes falling under the Statute of the ICC (including crimes against humanity), in one law. The definitions of crimes contained in the International Crimes Act (“Act”) are to a large extent based on those contained in the ICC Statute, while taking into account the experience of the Netherlands in implementing other relevant international treaties, such as the Geneva Conventions of 1949, the Genocide Convention, the Convention Against Torture and the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

The most important provisions of the International Crimes Act

Section 3 of the Act criminalizes the offense of genocide. The definition of genocide is identical to that contained in the Genocide Convention, and reproduced in the ICC Statute.

Section 4 of the Act criminalizes crimes against humanity, the definition of which was taken verbatim from the ICC Statute.

Sections 5 through 7 criminalize war crimes. After much consideration the Government decided to maintain the traditional distinction between internal and international armed conflicts. The reason for maintaining this distinction is that the provisions of international humanitarian law at present still differ for these two categories of conflicts. Although there has been, and continues to be, development in this area, the Government found it necessary to remain within the confines set by the law in its current status.

The Act contains three lists of war crimes: one applicable to international armed conflicts, one applicable to internal armed conflicts and one applicable to both types of conflicts. Section 5 concerns conduct committed during an international armed conflict, including grave breaches of the Geneva Conventions of 1949 and Additional Protocol I, provisions from the ICC Statute, the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the regulations annexed thereto, and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. Section 6 concerns conduct committed during a non-international armed conflict, including, *inter alia*, violations of common Article 3 to the Geneva Conventions of 1949 and Additional Protocol II, as well as provisions from the ICC Statute. Section 7 contains a catchall provision, applicable to international and non-

international armed conflicts, for other violations of the laws and customs of war.

Section 8 criminalizes the act of torture as an independent crime (as distinct from torture as a crime against humanity and a war crime). The definition of torture as an independent crime is derived from the Convention Against Torture, which differs from the definition of torture as a crime against humanity and as a war crime, both under the Act and under the ICC Statute.

The Act also makes an important step in broadening the bases of jurisdiction for prosecution by the Dutch authorities. Under Section 2, paragraph (1) (b) and (c) the Act adds active and passive nationality as bases for jurisdiction. Further, Section 2, paragraph (1)(a) allows for universal jurisdiction over the crimes contained in the Act, with one restriction: it allows for the prosecution of an individual with no ties to the Netherlands (meaning that neither the suspect nor the victim has the Dutch nationality), but only if that individual is located on the territory of the Netherlands. The reasons for making this exception were the difficulties associated with conducting a trial in *absentia* of an individual with no ties to the Netherlands, as well as the desire to limit jurisdictional conflicts. Nevertheless, if the Netherlands is unable to prosecute an individual due to his or her absence from the territory of the Netherlands, the Government will extend its judicial cooperation to the greatest extent possible.

The Act also provides for prosecution based on the principle of command responsibility. Under Section 9 an individual can be prosecuted for his or her role as a commander (either civilian or military) in regard to one or more of the specified crimes. This principle extends (albeit with a reduced penalty) to the situation where the commander has been negligent in taking necessary measures.

Section 11 incorporates the principle that superior orders do not negate the criminality of an offense. Nevertheless, an exception is made for a subordinate who believes in good faith that an order was lawfully given, while providing that an order to commit genocide or a crime against humanity can never fall within this exception.

Under Section 13 of the Act there is no longer a statute of limitations for the prosecution of the crimes covered by the Act. The only exception to this provision is for the least serious category of war crimes and commander responsibility related to these crimes. The reason for this exception is that this category of war crimes is similar in nature to ordinary crimes, except that they happen to be committed in a period of armed conflict. It was therefore not considered appropriate to remove the statute of limitations for these crimes.

Section 15 provides for the centralization of all cases arising under the Act in one civilian court, except for members of the Dutch military who are alleged to have committed an offense under the Act. Members of the Dutch military remain under the jurisdiction of the military judge.

Finally, Section 16 contains the provisions for immunity from prosecution for one of the offenses contained in the Act. Relying, *inter alia*, on the *D.R. Congo v. Belgium* decision of 14 February 2002 by the International Court of Justice, the Act provides that criminal prosecution is excluded for foreign heads of state, heads of government and ministers of foreign affairs as long as they are in office, as well as other persons whose immunity is recognized under customary international law. Further, immunity is recognized for those individuals who have been granted immunity under a treaty to which the Netherlands is a party.

In accordance with provisions in the Constitution and the criminal code, the provisions of the Act can not be applied *ex post facto*.