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CIL RESEARCH PROJECT ON INTERNATIONAL MARITIME CRIMES

THE NETHERLANDS COUNTRY REPORT

By Prof. A.H.A. Soons & J.N.M. Schechinger LL.M

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This Country Report was prepared in response to a Questionnaire drafted for the CIL Research Project on International Maritime Crimes

The Netherlands Country Report for the CIL Research Project on International Maritime Crimes

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This report was prepared in response to a questionnaire drafted for the CIL research project on international maritime crimes.

Part III is of no relevance and will be left out since the Netherlands is a party to all treaties relevant for this report.

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PART I: GENERAL QUESTIONS ON TREATY RATIFICATION AND IMPLEMENTATION OF GLOBAL CONVENTIONS²

LEGISLATIVE PROVISIONS ON TREATIES

Before elaborating on legislative provisions of the Netherlands regarding treaties, a few general remarks are necessary. The Kingdom of the Netherlands consists of four countries: the Netherlands (mainly located in Europe) and the islands of Aruba, Curaçao and Sint Maarten (located in the Caribbean). The three islands enjoy internal self-government within the Kingdom of the Netherlands and are autonomous with regard to criminal law. Three other islands in the Caribbean, Bonaire, Sint Eustatius and Saba (the so-called ‘BES islands’) are part of the Netherlands as special local authorities and form the ‘Caribbean part of the Netherlands’. Although internal constitutional relations have changed, the Kingdom remains the subject of international law which concludes agreements on the international plane.³

1. Before turning to the relevant provisions on treaties, it can be noted that the Kingdom of the Netherlands is a civil law country. The Constitution of the Netherlands (Constitution)⁴ contains several provisions on treaties. Provisions concerning the government⁵ and the Netherlands Parliament, the States General,⁶ consisting of two chambers (First and Second

² See for an overview of, and information on, Netherlands Constitutional Law e.g. Kortmann, C.A.J.M., *Constitutional Law of the Netherlands: an introduction*, Kluwer Law International Law, Alphen aan de Rijn, 2007; Kortmann, C.A.J.M., *Constitutioneel Recht*, Kluwer, Deventer, 2005, 5th ed. (in Dutch); Besselink, Leonard F.M., *Constitutionele toetsing in internationaal perspectief*, *Ars Aequi*, 52 (2003) 2, 89-95; Besselink, Leonard F.M., *Report on the Netherlands, Becoming a Party to Treaties Which Diverge from the Constitution*, *European Public Law*, Vol. 9, Issue 4, Kluwer Law International 2003, pp. 471-480; Besselink, *The Netherlands, Fundamental Structures of the Constitution of the Netherlands*, 2007, pp. 1-51.

³ See Article 1 of the Charter for the Kingdom and Article I of the *Kingdom Act of 7 September 2010 on the changes of the Charter in connection with the dissolution of the Netherlands Antilles*, see *Stb. 2010*, 775. The composition of the Kingdom of the Netherlands has changed on 10 October 2010. Due to the complexity of the matter, it is not possible to elaborate upon all aspects surrounding this change. It is important to note that the Kingdom concludes treaties, in accordance with Article 3(1)(b) of the Charter for the Kingdom, see also question no. 2. The changes in the composition of the Kingdom do not alter treaties that have been concluded by the Kingdom of the Netherlands and which applied to the former Netherlands Antilles; these treaties remain applicable to all parts of the Kingdom, also Curaçao and St Maarten. The Dutch government is responsible for the implementation of all treaties predating the change in the constitutional composition. See also <http://www.minbuza.nl/>, the website of the Ministry of Foreign Affairs on the new composition of the Kingdom.

⁴ See attachment no. 1 for an (unofficial) translation of the Constitution of the Netherlands.

⁵ Article 42 of the Constitution provides that the government comprises the Ministers and the King, although the King is not responsible for acts of government; the Ministers are responsible.

⁶ Articles 50-72 deal with the States General. Article 50 of the Constitution reads as follows: ‘The States General shall represent the entire people of the Netherlands.’

Chamber⁷) will not be cited here, although it can be noted that Articles 81-111 of the Constitution deal with legislation and administration. These Articles contain rules governing the general ‘normal’ legislation procedure in the Netherlands.⁸

The first relevant provision with regard to treaties is Article 91 of the Constitution, reading as follows:

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. Circumstances in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. If a treaty contains provisions that deviate from the Constitution or which require deviating from the Constitution may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.

Article 92 Constitution is also relevant, the provision reads as follows:

Legislative, executive and judicial powers may be conferred on international organizations by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

Before continuing with other relevant provisions on treaties in the Constitution, it can be noted that European and international law have great influence on the Dutch legal order.

Regarding European law, the European Court of Justice (ECJ) has held that European law is an ‘integral part’ of the domestic legal systems of the member states; European law takes precedence over domestic law of the member states in certain areas. The ECJ has established through its case law that the European Community has a separate legal order, meaning transformation of norms of European (community) law is not needed, the rules are incorporated and part of the Dutch legal order.⁹

Regarding public international law, it is important to note that the Netherlands is a *monist* country. This means that treaties have legal effect within the Netherlands domestic legal order once a treaty has been ratified. No transformation of treaty provisions is needed; these provisions are automatically incorporated and become part of the Dutch legal order.

⁷ Article 51(1) of the Constitution reads as follows: ‘The States General shall consist of a Lower House (Tweede Kamer) and an Upper House (Eerste Kamer).’ The Netherlands Parliament consists of two ‘Chambers’ (First and Second Chamber). The Second Chamber is the House of Representatives; the Senate is the First Chamber.

⁸ Kortmann, *Constitutioneel Recht*, pp. 339-351.

⁹ *Costa-ENEL*, European Court of Justice, judgment of 15 July 1964, case T-6/64; see also Kortmann, *Constitutioneel Recht*, pp. 125-129 and *Van Gend en Loos*, European Court of Justice, judgment of 5 February 1963, case 26/62.

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In the Dutch system, most treaties do not require a new Act to be drawn up in order to implement a treaty into Dutch law. In general, most treaties do not require such an adjustment, existing legislation is often sufficient. Existing provisions (for the present purposes mostly those contained in the Criminal Code) only need (minor) adjustments in order to implement, and comply with, the obligations stemming from a treaty.

If a treaty contains provisions which are directly applicable, meaning provisions which have ‘direct effect’¹⁰ and are binding upon everyone, Article 94 of the Constitution provides that these provisions can be invoked by an individual before a Dutch domestic court.¹¹ Moreover, these directly applicable provisions prevail over Dutch domestic law (including the Constitution) in case there is a clash of two provisions and Dutch legislation is considered to be incompatible with an international norm having direct effect. However, it is important to stress that also provisions which do *not* have ‘direct effect’ according to Articles 93 and 94 have nevertheless automatically legal effect in the Dutch legal order.¹²

Articles 93 and 94 of the Constitution have been mentioned, both are relevant with regard to treaties in the Netherlands. Article 93 of the Constitution provides that:

Provisions of treaties and of decisions by international organizations which may be binding upon all persons by virtue of their contents shall become binding after they have been published.

Article 94 Constitution reads as follows:

Legislation in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding upon all persons or of decisions by international organizations.¹³

Article 95 Constitution reads as follows:

Rules regarding the publication of treaties and decisions by international organizations shall be laid down by Act of Parliament.¹⁴

¹⁰ On ‘direct effect’ see Brölmann and Vierdag in: *The Integration of International and European Community Law into the National Legal Order. A Study of the Practice in Europe*, edited by Eisemann, The Hague: Kluwer Law International, 1996, pp. 433-459.

¹¹ Provided these provisions have been published, see Article 93 Constitution. Note however that individuals cannot invoke all norms of international law (including customary international law) before a Dutch court of law.

¹² Kortmann, *Constitutioneel Recht*, pp. 182-190; the judgment *Grenstractaat Aken*, Hoge Raad (Dutch Supreme Court), judgment of 3 March 1919, NJ 1919, 371; Brants. C. & Franken, S., The protection of fundamental human rights in criminal process – General report, *Utrecht Law Review*, Volume 5, Issue 2, October 2009, pp. 14-15, available at: <http://www.utrechtlawreview.org>; Nollkaemper, A., *Kern van het internationale publiekrecht*, Chapter 7 on the relation of international en domestic law, pp. 219-252. *The Effect of International and European Law*, in *GlobalLex, Researching Dutch Law*, by Oswald Jansen and George Middeldorp, 2007 update by Dorien Snoek and Henk Zonneveld available at: <http://www.nyulawglobal.org/globalex/Netherlands1.htm#TheDutchLegalSystem> (last visited November 2010).

¹³ Besselink, Leonard F.M., *Constitutionele toetsing in internationaal perspectief*, *Ars Aequi*, 52 (2003) 2, 89-95, pp. 92-93; Besselink, Leonard F.M., *Report on the Netherlands, Becoming a Party to Treaties Which Diverge from the Constitution*, *European Public Law*, Vol. 9, Issue 4, Kluwer Law International, 2003, pp. 471-480, pp. 471-472.

2. According to Dutch Constitutional law, the government has the power to conclude treaties for the Kingdom of the Netherlands.¹⁵ Usually a treaty is concluded for the entire Kingdom of the Netherlands. However, a treaty may be only binding for parts of the Kingdom. It should be noted that often ‘the Netherlands’ is used although the entire Kingdom is meant.¹⁶

The ratification and/or implementation procedure of treaties is governed by the Constitution and a subsequent Kingdom Act on approval and publication of treaties, (see question no. 11).¹⁷ This Kingdom Act implements Articles 91 and 95 of the Constitution. The Regulation on the electronic publication of the Treaty Series (*Tractatenblad*) is of little significance, since it merely provides for a procedural change in the way treaties are published.¹⁸

3. The Netherlands does not have other regulations, manuals or unofficial documents which set out the practices and procedures which have to be followed in the ratification and/or accession and/or implementation of treaties.

TREATY RATIFICATION PROCEDURE

Government Agencies Responsible for Treaty Ratification

4. The Ministry of Foreign Affairs has legal experts who provide advice to the government on international law and treaties.

The Legal Affairs Department (DJZ) of the Ministry of Foreign Affairs is, amongst others, concerned with the publication of treaties and drafting legislation that concern Foreign Affairs and the coordination of interministerial activities with regard to international law in general and more specific, and relevant for this report, regarding the signing and approval of treaties.¹⁹

¹⁴ See also Article 88 of the Constitution, reading as follows: ‘The publication and entry into force of Acts of Parliament shall be regulated by Act of Parliament. They shall not enter into force before they have been published.’

¹⁵ The Kingdom concludes treaties in accordance with Article 3(1)(b) of the Charter for the Kingdom; see e.g. Kortmann, *Constitutioneel Recht*, pp. 169-171 and 182.

¹⁶ Kortmann, *Constitutioneel Recht*, p. 189-190, see also Articles 24 and following of the Charter for the Kingdom and Article 29 VCLT; also http://www.minbuza.nl/en/Key_Topics/Treaties/Treaties_Division (last visited in November 2010).

¹⁷ Kingdom Act of 7 July 1994, concerning approval and publication of treaties, *Stb. 1994, 542*.

¹⁸ Kingdom Act of 27 November 2008, concerning the electronic publication of treaties that are published in the *Tractatenblad*, *Stb. 2008, 552*.

¹⁹ See http://www.minbuza.nl/en/The_Ministry/Organisational_Structure/Support_Departments (last visited in December 2010).

The Legal Affairs Department consists of (amongst others) the International Law Division (DJZ/IR), which includes the Centre of Expertise on International Law (DJZ/IR/ECER) and the Treaties Division (DJZ/VE). The Treaties Division is responsible for carrying out the procedures for the approval and publication of treaties. This includes dealing with the ‘formulation, signature, coordination of approval procedures, ratification, entry into force and publication of treaty texts and data in the Treaty Series. The Treaties Division is also responsible for (...) the publication of consolidated versions of the treaties on the internet.’²⁰

Furthermore, the Advisory Commission on International Law Issues (CAVV) should be mentioned in this respect. This Commission is an advisory body to the Ministry of Foreign Affairs, consisting of legal experts from various areas of international law who can provide advice to the government on international law. This independent permanent advisory commission addresses questions of international law and *may* give advice to the Dutch government and/or the First and Second Chamber of the Netherlands Parliament concerning questions/issues of international law (including recommendations in respect of treaties). The CAVV may not only act upon a request of the Parliament and/or government; it may also draft an advisory report on its own initiative.²¹

The Advisory Council on International Issues (AIV) can also be mentioned in this regard. The AIV is an advisory body which, as the CAVV, may give advice to the Dutch government and the Parliament. However, the AIV is not that important for the present report since its focus is more on foreign policy than on international law.

5. Experts on international law and treaty law are present in other ministries or government departments. Employees at ministries, especially at the Ministry of Foreign Affairs and the Ministry of Security and Justice,²² are familiar with (the basics of) treaty law and international law in general.

6. Experts on international law and treaty law are present in national legislative bodies. Some members of the Netherlands Parliament are familiar with (the basics of) treaty law and international law in general. Some staff members are also experts on treaty law.

²⁰ See: http://www.minbuza.nl/en/The_Ministry/Organisational_Structure/Support_Departments and http://www.minbuza.nl/en/Key_Topics/Treaties/Treaties_Division (last visited in December 2010).

²¹ The CAVV is a permanent advisory body, established pursuant to Article 79 of the Constitution; see Articles 79 and 80 Constitution. It is not mandatory to ask the committee for advice. See also <http://www.minbuza.nl/nl/Organisatie/Organisatiestructuur/Adviescolleges> (last visited in November 2010).

7. The Ministry of Foreign Affairs is responsible for studying treaties and making recommendations on whether or not the Kingdom of the Netherlands should ratify and/or accede to a treaty. If other ministries are involved, these will study a treaty as well; the Ministry of Foreign Affairs has a coordinating role regarding (the procedures with regard to) treaties.

8. There are no inter-agency-committees in the Netherlands. However, since the Ministry of Foreign Affairs has a coordinating role regarding (the procedures with regard to) treaties, it would be the leading agency which is responsible for coordination if cooperation between departments or agencies is necessary.

9. The Ministry of Foreign Affairs has a coordinating role regarding (the procedures with regard to) treaties. The Legal Affairs Department of the Ministry of Foreign Affairs studies treaties and the CAVV may give advice (see question no. 4). It is important to note that legal experts for the Ministry of Foreign Affairs have often participated in the drafting of the treaties.

10. Two committees, which are comprised of members of the Second Chamber of the Netherlands Parliament, are involved in the review of treaties. These committees examine a treaty which is in the process of being approved. Members of the committee may ask questions to the responsible Minister(s) and the committee reports on their findings.²³ The permanent committee for foreign affairs deals with the international legal order and, more specific, treaties. The permanent committee for justice deals with law enforcement and discusses proposals for Bills that concern security and justice.

The Council of State is a permanent advisory body which gives advice to the Netherlands Parliament on proposals for legislation and/or proposals to approve treaties.²⁴ This advice is not mandatory, but in practice the Council of State is being consulted when there is a proposal concerning the approval of a treaty. Its advice has considerable influence and is taken seriously by the government.

Articles 73-75 of the Constitution address the Council of State; Article 73(1) reads as follows:

The Council of State or a division of the Council shall be consulted on Bills and draft Orders in Council as well as proposals for the approval of treaties by the States General. Such Consultation may be dispensed with in cases to be laid down by Act of Parliament.

²³ See <http://www.tweedekamer.nl/kamerleden/commissies/index.jsp> (last visited in December 2010).

²⁴ See Article 13 Charter for the Kingdom, chapter 4 Constitution and the Act concerning the Council of State, Act of 9 March 1962, *Stb.* 1962, 88; also Kortmann, *Constitutioneel Recht*, pp. 286-288.

Treaty Ratification Procedure

11. Article 91 of the Constitution (see question no. 1) sets out the procedure for the ratification of a treaty;²⁵ the Kingdom Act on approval and publication of treaties (see also question no. 2.) is also relevant.

In principle, *parliamentary approval* is needed if the Netherlands wishes to become a party to a treaty. The States General need to give their approval according to Article 91 Constitution before the Kingdom can be bound by a treaty.

The form this approval is required to have is prescribed by the Kingdom Act on approval and publication of treaties. Article 7 provides for the circumstances in which no approval is necessary (e.g. treaties that will only be in force for a short term). Parliamentary approval, which is in principle needed (see also Article 2 Kingdom Act on approval and publication of treaties), can be either *explicit* or *tacit* approval according to Article 3 of the Kingdom Act on approval and publication of treaties.

For *tacit* approval, see Article 5 Kingdom Act on approval and publication of treaties; a treaty is deemed to be approved if, after 30 days after a convention has been delivered to the Parliament, the First and/or Second Chamber did not express its wish to have the treaty explicitly approved. *Explicit* approval needs to be realised through an Act of Parliament, see Article 4 Kingdom Act on approval and publication of treaties (also Article 6). An Act of approval follows the legislative procedure as provided for in Articles 81-88 of the Constitution. Article 81²⁶ Constitution provides that Acts of Parliament are enacted by the government and the States General. The States General discusses the treaty in this process and can include amendments in the Act of approval if it wishes that the government makes an (amended) reservation to the treaty.

The procedure of parliamentary approval of a treaty may take some time since domestic law might have to be adjusted in order to fully comply with provisions stemming from a treaty. For example, with regard to the Hostage Taking Convention the treaty has been approved by an Act of approval and the Netherlands Criminal Code (Criminal Code or Penal Code hereafter) has been amended in order to fully comply with the obligations from the Hostage Taking Convention by an Act of implementation. In the procedure of parliamentary approval, these Acts of approval and implementation can be amended many times.

²⁵ See e.g. Kortmann, *Constitutioneel Recht*, p. 170-181.

²⁶ Article 81 of the Constitution reads as follows: 'Acts of Parliament shall be enacted jointly by the government and the States General.'

A treaty that has been approved by Parliament must be published in the Treaty Series according to Articles 93 and 95 Constitution in conjunction with Article 16 Kingdom Act on approval and publication of treaties (see also question no. 1, 2 and 4).²⁷

After parliamentary approval, a convention needs to be ratified before a convention can enter into force for the Kingdom of the Netherlands. The entry into force of a convention is a matter of, and dealt with by, the relevant convention.

TREATY IMPEMENTATION PROCEDURE

Government Agencies Responsible for Treaty Implementation

12. The Legal Affairs Department of the Ministry of Foreign Affairs seems to be the Agency that is responsible for studying and reporting on whether implementation legislation is needed since it is, amongst others, concerned with drafting legislation that concern Foreign Affairs and the coordination of interministerial/interdepartmental activities with regard to the signing and approval of treaties. Furthermore, the Treaties Division (falling under the Legal Affairs Department) is responsible for carrying out the procedures for the approval of treaties (see question no. 4).

In practice, there will be cooperation with the Ministry of Security and Justice. The Ministry of Foreign Affairs has a coordinating role regarding (the procedures with regard to) treaties (see question no. 7, 8, 9 and 13.)

13. The Legal Affairs Department of the Ministry of Foreign Affairs is, amongst others, concerned with drafting legislation that concern Foreign Affairs and the coordination of interministerial activities with regard to treaties (see question no. 4).

The Ministry of Security and Justice is in general responsible for drafting implementation legislation in the Netherlands. Which agencies are involved with regard to a specific treaty will vary according to the subject matter and content of a treaty. For example, the Ministry of Foreign Affairs and the Ministry of Security and Justice are responsible for the UNTOC and Terrorism Financing Convention; the Ministry of Security and Justice, the Ministry of Foreign Affairs,

²⁷ Article 16 of the Kingdom Act on approval and publication of treaties provides that treaties are published in the Treaty Series. At present treaties are published at: www.officielebekendmakingen.nl. The Bulletin of Acts and Orders (of the Kingdom of the Netherlands) (Staatsblad) is abbreviated to *Stb.*, in this report, the Treaty Series (Tractatenblad) is abbreviated to *Trb.* All Treaties, Acts and Orders are available at: www.officielebekendmakingen.nl (last visited in December 2010).

Ministry of Transport, Water Management and Public Works and the Ministry of Defence are all relevant for the implementation of the 2005 SUA Protocol.

14. Draft implementing legislation has to be approved by both the First and Second Chamber of the Netherlands Parliament. Advice may be given by the Council of State and the permanent committee for justice (see question no. 10.)

Treaty Implementation Procedure

15. & 16. A treaty is binding on the Netherlands once it has been ratified and treaties have legal effect within the Netherlands domestic legal order once a treaty has been ratified. Treaty provisions do not require transformation; these provisions are automatically incorporated and become part of the Dutch legal order. If a treaty contains provisions which are directly applicable, meaning provisions having ‘direct effect’ and that are binding upon everyone, Article 94 Constitution provides that these provisions can be invoked by an individual before a Dutch domestic court. These directly applicable provisions prevail over Dutch domestic law. However, it is important to stress that also provisions which do *not* have ‘direct effect’ according to Articles 93 and 94 have nevertheless automatically legal effect in the Dutch legal order (see question no. 1).

After a treaty has been approved by an Act of approval, Dutch legislation (for example the Criminal Code) might have to be adjusted in order to fully comply with the obligations stemming from a convention. This is realised through an Act of implementation. In the procedure of parliamentary approval, these Acts of approval and implementation can be amended many times (see also question no. 11).

CRIMINAL JURISDICTION GIVEN TO NATIONAL COURTS

Since the Netherlands is a *monist* country, conventions are automatically incorporated into domestic law (see question no. 1). This means that, with regard to criminal jurisdiction, jurisdiction may be exercised based on a treaty if the (alleged) offender is found on Dutch territory. The Netherlands has also established *extraterritorial* jurisdiction.²⁸

²⁸ On extraterritorial jurisdiction in the Netherlands see Prof. mr. A.H. Klip & Mr. A.S Massa, *Communicerende grondslagen van extraterritoriale rechtsmacht. Onderzoek naar de grondslagen voor extraterritoriale rechtsmacht in België, Duitsland, Engeland en Wales en Nederland met conclusies en aanbevelingen voor de Nederlandse (wetgevings-) praktijk*, Maastricht University, 2010, in opdracht van het Wetenschappelijk Onderzoek en

In short, the following principles can be found in the Dutch legal order: the *territoriality* principle, the *protective* principle, the *universality* principle (either hedged with an added clause or true universality, without added clause), the principle of *derived jurisdiction*, the *domicilie* principle and the active and passive *personality* (or *nationality*) principle.

Provisions regarding jurisdiction are often adjusted if the Netherlands becomes party to a treaty. Except for the true universality principle (without added clause), extraterritorial jurisdiction requires often certain criteria to be met, such as the ‘double crime’ criteria, meaning an act must be considered as constituting a criminal offence in both states. The principle of *ne bis in idem* is important also, therefore extradition is in principle not possible if the offender has been prosecuted before for the same act. In general, extraterritorial jurisdiction is not often applied.²⁹

17. Provisions with regard to the criminal jurisdiction of Netherlands domestic courts can be found in the Netherlands Criminal Code.³⁰ Articles 2-8 of the Criminal Code address territorial (the ‘normal’ jurisdiction) and extraterritorial criminal jurisdiction.

Article 2³¹ of the Criminal Code provides for the *territoriality* principle of jurisdiction. Article 3³² of the Criminal Code provides for the *flag state* principle. The Criminal Code is applicable to anyone who commits a crime or a criminal offence on board of a Dutch vessel or aircraft *outside* the Netherlands. There is no case law and practice on the application of this principle.³³

The *protective* principle and the *universality* principle of jurisdiction are provided for in Article 4 Criminal Code.³⁴ It can be noted that the universality in this provision is on the one hand hedged with an added clause (e.g. Article 4 (section 14) with regard to the Terrorism Financing

Documentatie Centrum van het Ministerie van Justitie, pp. 1-139 (in Dutch). See especially Chapter 5 on extraterritorial jurisdiction of the Netherlands, pp. 72-105.

²⁹ *Communicerende grondslagen van extraterritoriale rechtsmacht*, pp. 72-105 and p. 173.

³⁰ For a translation of the provisions of the Criminal Code see: *The Dutch Penal Code*, translated by Rayar, L. and Wadsworth, S.; in collaboration with Cheung, M. et al; revision by Lensing, H., Rothman & Co., Littleton, Colorado 1997.

³¹ ‘The criminal law of the Netherlands is applicable to any person who commits a criminal offense within the Netherlands.’

³² Article 3 of the Netherlands Criminal Code reads as follows: ‘The criminal law of the Netherlands is applicable to any person who commits a criminal offense on board a Netherlands vessel or aircraft outside the Netherlands.’ See Article 86 Criminal Code for the definition of a Netherlands vessel.

³³ See also *Communicerende grondslagen van extraterritoriale rechtsmacht*, p. 75.

³⁴ Article 4: ‘The criminal law of the Netherlands is applicable to any person who commits any of the following criminal offences outside the Netherlands: (...)’ This Article contains several sections and subsections, which will not all be cited here. The relevant sections will be cited in the attachment, section 5 of Article 4 is relevant in the context of jurisdiction relating to the crime of piracy under the UNCLOS; section 8 is relevant for the SUA; section 14 is relevant in the context of jurisdiction under the Terrorism Financing Convention; section 11 is relevant with regard to the Hostage Taking Convention. See also Article 2 of the Act on International Crimes, Act of 19 June 2003, *Stb.* 2003, 270.

Convention, see the section on this Convention below) and on the other hand without added clause (with regard to piracy for example, see also the *Somali pirates* case). There are not many examples in practice where the Netherlands enforced its jurisdiction based on true universality, meaning without an added clause.³⁵

Article 4a³⁶ of the Criminal Code provides for derived jurisdiction based on, first, an extradition agreement the Netherlands has with another state and, second, based on the obligation of *aut dedere aut judicare*, stemming from treaties. See also Article 522hh of the Netherlands Code of Criminal Procedure.

However, with regard to the treaties relevant for this report, a reconsideration of the Netherlands' stand on *universal* jurisdiction meant that the secondary *universal* jurisdiction, as provided for in Article 4a Criminal Code in conjunction with Article 522hh Code of Criminal Procedure, had to be converted into unlimited jurisdiction which is established in Article 4 Criminal Code (see question 28e).

The *active nationality* (or *personality*) principle is provided for by Article 5 of the Criminal Code and Article 5a³⁷ provides for the *domicilie* principle, meaning criminal jurisdiction can be established with regard to aliens that reside in the Netherlands.

It has been established through case law that a Dutch juridical person can fall under a Netherlands national in the meaning of Article 5 Criminal Code. This would also mean that a foreign/international juridical person having a seat in the Netherlands may be considered as a resident and may fall under Article 5a of the Criminal Code; providing the Netherlands with jurisdiction in case such a foreign juridical person commits a criminal offense.³⁸

Furthermore, Article 5b of the Netherlands Criminal Code provides for the *passive nationality* (or *personality*) principle of jurisdiction. However, this Article only refers to certain criminal offences, such as human trafficking, and offences relating to minors.

³⁵ See the section on piracy and the UNCLOS below.

³⁶ Article 4a reads as follows: '(1) the criminal law of the Netherlands is applicable to any person whose prosecution was transferred to the Netherlands by a foreign state pursuant to a treaty conferring jurisdiction to prosecute on the Netherlands.' Article 4a(2) provides that 'Furthermore, anyone with regard to whom an extradition request in respect of a terrorist crime and/or one of the crimes as described in Articles 225, paragraph three, 311, paragraph one, at 6°, 312, paragraph two, at 5°, as well as 317, paragraph three in conjunction with 312, paragraph two, at 5°, has been rejected, denied or held inadmissible shall be subject to Dutch criminal law.'

³⁷ Article 5a(1) Criminal Code provides that the criminal law of the Netherlands is applicable to any alien, having his permanent residence in the Netherlands, who commits a terrorist offence outside the Netherlands. Article 5a(2) provides that prosecution regarding (amongst others) terrorist offences is also possible if the Netherlands became the residence of the offender after he committed the offence.

³⁸ Tweede Kamer der Staten Generaal, 2001-2002, 28 463 (on alterations of the Criminal Code and other legislation), no. 3, *memorie van toelichting*, p. 14-15.

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Articles 6 and 7 concern specific cases; Article 6 provides for jurisdiction over Dutch officials and persons who are employed by international organisations which have a seat in the Netherlands and Article 7 provides for jurisdiction over Dutch masters of ships.

PART II: IMPLEMENTATION OF GLOBAL CONVENTIONS TO WHICH THE NETHERLANDS IS A PARTY

1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

No problems and/or issues have arisen relating to the ratification and/or implementation of the UNCLOS.

The UNCLOS was signed on 10 December 1982, published in *Trb. 1983, 83* and *Trb. 1984, 55* and approved (by the States General) for the Kingdom of the Netherlands by Kingdom Act of 26 June 1996 (*Stb. 1996, 357*). The convention was ratified on 28 June 1996 and entered into force on 28 July 1996 for the Kingdom in Europe. The UNCLOS entered into force on 10 October 2010 for the BES islands, Curaçao and Sint Maarten. The convention is not applicable to Aruba.³⁹

Implementing Legislation

Lead Agency

18. (a) The Ministry of Security and Justice is the primary responsible agency for implementing the UNCLOS into domestic law. The Ministry of Foreign Affairs, the Ministry of Economic Affairs, the Ministry of Transport, Water Management and Public Works and the Ministry of Housing, Spatial Planning and the Environment are also relevant agencies for the implementation of the UNCLOS.

(b) The Ministry of Security and Justice is responsible for drafting of implementing legislation, if necessary.

(c) The Ministry of Security and Justice and Dutch domestic courts are responsible for ensuring that the Netherlands complies with the obligations stemming from the UNCLOS.

The Ministry of Foreign Affairs has a coordinating role in all matters concerning (the procedures with regard to) treaties.

³⁹ See e.g. *Trb. 1996, 272*, p. 37.

19. The Netherlands does not have any specific implementing legislation with regard to the UNCLOS. The existing provisions on piracy, as contained in the Criminal Code were deemed to be sufficient to comply with the obligations stemming from the UNCLOS.

20. a. Piracy is criminalized under the Netherlands Criminal Code, Article 381 Criminal Code reads as follows:

1. A person:

(1) who enters into service or is serving as a master on a vessel, knowing that it is intended for or using it for the commission of acts of violence against other vessels on the high seas or against persons or property on board these, without being so authorized by a Power engaged in warfare or without being part of the war navy of a recognized Power, is guilty of piracy and is liable to a term of imprisonment of not more than twelve years or a fine of the fifth category;⁴⁰

(2) who, aware of such purpose or use, enters into service as a crew member on such a vessel, or voluntarily continues his employment after having become aware of such purpose or use, is guilty of piracy and liable to a term of imprisonment of not more than nine years or a fine of the fifth category.

2. Exceeding the limits of authorization, as well as possessing authorizations granted by each of the belligerent Powers, is equivalent to the absence of an authorization.

3. Article 81⁴¹ shall not be applied.

4. The provisions of the preceding sections regarding the master and the crew of a vessel are also applicable with regard to the commander of an aircraft or the crew of an aircraft respectively. The term 'vessel' in the preceding sections includes aircraft and the term 'high seas' includes the airspace above.

Articles 382-385 UNCLOS are also relevant with regard to piracy; Article 382⁴² addresses a circumstance which may result in an increased sentence. Articles 383-385 UNCLOS address the offences of equipping a vessel for, surrendering, or letting a vessel out for an act of piracy.

b. Articles 100-107 and 110(1) of the UNCLOS deal with piracy; Article 101 UNCLOS defines piracy. The provisions on piracy, as contained in the UNCLOS, reflect customary international law and form a legal basis for acting against piracy on the high seas.⁴³ Under general international law, the definition of piracy requires the following criteria to be met: two vessels have to be involved, the attack (being an illegal act of violence, depredation or of

⁴⁰ A fine of the fifth category means a maximum amount of 76.000 euro, see Article 23 Criminal Code

⁴¹ Article 81 Criminal Code provides that bringing in a state of faint or powerlessness is equal to the commission of an act.

⁴² Article 382 UNCLOS is applicable when death ensues from an act of piracy. The provision provides that the master of a ship and individuals who participated in the act of violence will be punished with a prison sentence of a maximum of fifteen years (or a fine of the fifth category) if an individual who is under attack dies.

⁴³ See also e.g. UNSC resolution no. 1838 (2008) and 1918 (2010).

detention) must come from the passengers or crew of a private vessel against the property on or persons of another vessel, the piratical attack must be carried out on the high seas and ‘committed for private ends’.⁴⁴

The motive of the piratical attack, being ‘for private ends’, is not a requirement according to the Criminal Code.

c. The maximum penalty according to Article 381(1)(1) is twelve years imprisonment (with the possibility of a fine) for a master of a ship. The maximum penalty according to Article 381(1)(2) is nine years imprisonment for shipmates.

21. See question no. 20.

Jurisdiction over acts of piracy

22. In principle, piracy can be seen as the (only) clear example of a crime for which universal jurisdiction should be established by states under international law.⁴⁵ UNSC resolution no. 1838 (2008) on the condemnation of acts of piracy and the UNSC resolution no. 1918 (2010) concerning the call for criminalizing piracy under domestic law are relevant for the Netherlands.

With regard to Somalia, where the Netherlands has captured (alleged) pirates in the context of a naval mission to combat piracy, UNSC resolutions no. 1814 (2008), 1816 (2008) and 1846 (2008) are relevant for entering the territorial sea of that state. These resolutions, especially UNSC resolution no. 1846, form the legal basis for entering the territorial sea of Somalia and capturing pirates in the territorial sea of Somalia.

Article 105 UNCLOS provides for *universal* jurisdiction in case of an act of piracy. The Netherlands has established *universal* jurisdiction for the crime of piracy, based on Article 381 in conjunction with Article 4 (section 5) of the Netherlands Criminal Code. Article 4 Criminal Code provides for the *universality* principle of jurisdiction (see also question no. 17), Article 4 (section 5) Criminal Code specifically applies to acts of piracy.⁴⁶

44 See e.g. Shearer, I., Piracy, par. 1-31, available at the Max Planck Encyclopedia of Public International Law (MPEPIL) at www.mpepil.com; Soons, A.H.A., Law enforcement in the ocean: an overview, WMU Journal of Maritime Affairs, vol. 3 (2004), pp. 3-16.

45 Ibid.

46 Article 4 (section 5) Criminal Code reads as follows: ‘The Netherlands Criminal Code is applicable to any person outside the Netherlands who commits: (...) 5° one of the offences described in Articles (...) 381-385, (...)’

The District Court of Rotterdam held in the recent *Somali pirates*⁴⁷ case that the Netherlands has established *universal* jurisdiction over an act of piracy on the high seas. Domestic legislation was considered to be in conformity with the UNCLOS and SUA as relevant treaties. Dutch domestic courts were able to prosecute these (alleged) pirates in the Netherlands under the Criminal Code because the Netherlands had established universal jurisdiction over acts of piracy. Article 105 UNCLOS may be said to have formed, in conjunction with Article 100 UNCLOS, the legal basis of arrest in the *Somali pirates* case.

Prosecution of acts of piracy

The Netherlands has discretionary power when it comes to the actual arrest/prosecution of individuals having (allegedly) committed an act of piracy. In the context of the EU ‘Atlanta’ mission, it has been agreed that if one state cannot, or does not wish to, establish jurisdiction over individuals having (allegedly) committed an act of piracy, it will be considered whether another member state has the possibility, and is willing, to establish jurisdiction over this act. Furthermore, the EU has considered the possibility of extraditing individuals who are arrested, based on extradition treaties, to states in the region.⁴⁸

23. A Dutch domestic court has recently dealt with the prosecution of an act of piracy. In the *Somali pirates* case, five Somali men were each convicted and sentenced to five years imprisonment. It can be noted that the District Court of Rotterdam held that prosecution of acts of piracy before a Netherlands domestic court could be undesired or illogical if there was lack of some kind of connection with the Netherlands. This does, however, not mean that Dutch domestic courts lack jurisdiction, this is only for the sake of expediency.

The view of the District Court seems to be in line with the view of the government in this respect. A document regarding Dutch involvement in the EU naval mission ‘Atlanta’ shows that the

⁴⁷ District Court of Rotterdam, judgment of 17 June 2010, LJN: BM8116, 10/600012-09, see <http://zoeken.rechtspraak.nl/ResultPage.aspx> (last visited in November 2010). This case dealt with the attack on a vessel flying the flag of the Netherlands Antilles and was also referred to as the ‘Cygnus’ piracy case. All five Somali men were sentenced to five years imprisonment which is lower than what was demanded. The reason for this can be found in the fact that, in similar cases, captured pirates have not been prosecuted in the past and that being detained in the Netherlands places a heavy burden on these men. Appeal has been withdrawn; there will be no appeal in this case; see also <http://www.rechtspraak.nl/Gerechten/Rechtbanken/Rotterdam/Actualiteiten/Judgement+case+Somali+pirates.htm>).

⁴⁸ Tweede Kamer, 2008-2009, 29 521, nr. 90, *Nederlandse deelname aan vredesmissies*, brief van de ministers van Buitenlandse Zaken, van Defensie, en voor Ontwikkelingssamenwerking (19 December 2008), p. 7. The European Union has entered into agreements with Kenya and the Seychelles concerning the prosecution of pirates; see *Communicerende grondslagen van extraterritoriale rechtsmacht*, p. 77.

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Netherlands considers prosecution and detaining individuals in the Netherlands as not being the most logical solution/desired if there is not a clear interest for the Netherlands.⁴⁹

Furthermore, (alleged) Somali pirates were released in 2009 because the Netherlands did not wish to prosecute these men. Although it was possible to try these individuals, based on the Netherlands having *universal* jurisdiction with regard to acts of piracy, it was not desired since there was no direct interest or connection (except the fact that the Dutch navy has captured these men) according to the government.⁵⁰

⁴⁹ Tweede Kamer, 2008-2009, 29 521, . nr. 90, *Nederlandse deelname aan vredesmissies*, pp. 6-7.

⁵⁰ Letter from the government to the Second Chamber, Tweede Kamer der Staten Generaal, 2009-2010, 29251, *no. 131*, p. 2; see also *Communicerende grondslagen van extraterritoriale rechtsmacht*, p. 77.

1979 INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES (Hostage Taking Convention)

No problems and/or issues have arisen relating to the ratification and/or implementation of the Hostage Taking Convention.

The Hostage Taking Convention was signed on 18 December 1980, published in *Trb. 1981, 53* and approved for the Kingdom of the Netherlands by Kingdom Act of 19 May 1988 (*Stb. 1988, 275*).⁵¹ The convention was ratified on 6 December 1988 and entered into force on 5 January 1989 for the Kingdom in Europe and Aruba. The Hostage Taking Convention entered into force on 10 October 2010 for the BES islands and Curaçao and Sint Maarten.⁵²

Lead Agency

24. (a) The Ministry of Security and Justice is the primary responsible agency for implementing the Hostage Taking Convention into domestic law. The Ministry of Foreign Affairs and the Ministry of the Interior and Kingdom Relations are also relevant agencies for the implementation of this convention.

(b) The Ministry of Security and Justice is responsible for drafting of implementing legislation, if necessary.

(c) The Ministry of Security and Justice and Dutch domestic courts are responsible for ensuring that the Netherlands complies with the obligations stemming from the Hostage Taking Convention.

The Ministry of Foreign Affairs has a coordinating role in all matters concerning (the procedures with regard to) treaties.

Offences and Penalties under the Hostage Taking Convention (Article 1 and 2)

25. The Netherlands does not have any specific Act which implements the Hostage Taking Convention. The existing provisions on hostage taking, as contained in the Criminal Code were adjusted in order to comply with the obligations stemming from the Hostage Taking Convention.

⁵¹ Articles 1-3 of this Kingdom Act are also cited in *Trb. 1989, 6*, p. 1.

⁵² See e.g. *Trb. 1989, 6*, p. 3 and 7.

Article 51a(2) Extradition Act⁵³ and Article 522hh(2) Code of Criminal Procedure have been adjusted in order to comply with the Hostage Taking Convention. Furthermore, Article 4 (section 8) Criminal Code and Article 282a Criminal Code have been created (for the latter provision see below at question no. 26).⁵⁴

26. The Netherlands Criminal Code is the legislation which deals with the same criminal offences as the Hostage Taking Convention

Substantive criminal law with regard to hostage taking can be found in the following provisions of the Criminal Code:

Article 282 Criminal Code, the general provision on hostage taking, provides that:

1. A person who, intentionally, unlawfully deprives or continues to deprive another person of his liberty is liable to a term of imprisonment of not more than eight years or a fine of the fifth category.
2. Where the act results in serious bodily harm,⁵⁵ the offender is liable to a term of imprisonment of not more than nine years or a fine of the fifth category.
3. Where death ensues as a result of the act, the offender is liable to a term of not more than twelve years or a fine of the fifth category.
4. The punishments prescribed in this article are also applicable to the person who intentionally provides a place for such unlawful deprivation of liberty.⁵⁶

Article 282a of the Netherlands Criminal Code was created in order to fully comply with the Hostage Taking Convention. Although not considered as being strictly necessary by the government, this provision was added for the sake of clarity and to have a specific provision on hostage taking. Article 282a Criminal Code reads as follows:

1. A person who, intentionally, unlawfully deprives or continues to deprive another person of this liberty, with the object of compelling another to act or to refrain from acting, is guilty of the taking of hostages and liable to a term of imprisonment of not more than fifteen years or a fine of the fifth category.⁵⁷

⁵³ *Act of 9 March 1967 on extradition and other forms of international legal assistance in criminal matters* (Uitleveringswet), *Stb.* 1967, 139; see below at question no. 61 (and following).

⁵⁴ See e.g. Tweede Kamer der Staten Generaal, 1983-1984, 18 438 (R 1261), no. 3, *memorie van toelichting*, p. 9; Tweede Kamer der Staten Generaal, 1983-1984, 18 438 (R 1261), no. B, *advies van de Raad van State*, 28 July 1982, p. 9; Tweede Kamer der Staten Generaal, 1983-1984, 18 439, no. B, *advies van de Raad van State*, 16 June 1982, pp. 13,14 and 16; Tweede Kamer der Staten Generaal, 1983-1984, 18 439, no. 1/2, *Koninklijke boodschap/voorstel van wet*, 21 June 1984, p. 1-3; Eerste Kamer der Staten Generaal, 1986-1987, 18 439, no. 88, *gewijzigd voorstel van wet*, 9 December 1986, p. 1-3; Eerste Kamer der Staten Generaal, 1987-1988, 20 373, no. 173, *gewijzigd voorstel van wet*, 17 March 1988, p. 1.

⁵⁵ See Article 82 Criminal Code for what constitutes 'serious bodily harm'.

⁵⁶ Articles 46 and 48 Criminal Code are relevant, see the attachment on the general rules of Dutch criminal law.

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2. When death ensues as a result of the act, the offender is liable to life imprisonment or a term of imprisonment of not more than thirty years or a fine of the fifth category.
3. Article 282, section 4 is applicable.

Article 282b Criminal Code provides a possibility to increase the maximum penalty when the offence has been committed with a terrorist objective; the provision reads as follows:

1. He who deliberately and unlawfully (continues to) deprive(s) a person of his freedom with a terrorist objective, shall be liable to life imprisonment or a prison sentence not exceeding thirty years or a fine of the fifth category.
2. Article 282, paragraph four, applies by analogy.

Article 282c Criminal Code provides that the sentence for conspiracy with regard to crimes of 282b is a prison sentence of a maximum of ten years or a fine of the fifth category.

Articles 83 and 83a of the Criminal Code are relevant with regard to what constitutes a terrorist crime and a terrorist objective⁵⁸ according to the Criminal Code (see the attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code).

a. The offence of hostage taking in Dutch domestic legislation differs from the offence of hostage taking as described in Article 1 of the Hostage Taking Convention in the sense that the offence as described in the convention is broader in scope and more explicit in some ways. Domestic legislation for example does not require the hostage being threatened to be killed, injured or kept detained, as the convention does. Nor does domestic legislation explicitly mentions an act (which has to be done or abstained from) being ‘an explicit or implicit condition for the release of the hostage’ or that a third party that needs to be compelled can be a state, an international organization, juridical or natural person(s); the Criminal Code merely mentions ‘compelling another’. Another difference is that Article 282a requires an act to be an intentionally and unlawfully deprivation of a person’s liberty before constituting hostage taking under the Criminal Code, which is not required under the convention.

b. The penalties for hostage taking as provided for by the Criminal Code depend on the circumstances of the case, e.g. on whether hostage taking was committed with a terrorist objective or not. However, the specific provision on hostage taking, Article 282a Criminal Code,

⁵⁷ It can be noted that there is a possibility of increasing this sentence of a maximum of fifteen years. The judge(s) may apply Article 57 Criminal Code in case serious bodily harm was intentionally inflicted; see Tweede Kamer der Staten Generaal, 1987-1988, 20 373, no. 3, *memorie van toelichting*, p. 2.

⁵⁸ For clarification of the meaning of a ‘terrorist objective’ in Article 83a Criminal Code, see the judgment concerning the ‘Hofstad groep’, Hoge Raad, *Hofstad*, judgment of 2 February 2010, published under LJN number: BK5193, 08/00695, par. 56-73, especially par. 57, 61 and 69; available at: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=bk5193&u_ljn=bk5193.

provides in paragraph 1 that the maximum penalty is a term of imprisonment of fifteen years (or a fine of the fifth category). Article 282a(2) Criminal Code provides that, in case death ensues as a result of an act of hostage taking, the maximum penalty is a term of imprisonment of thirty years (or a fine of the fifth category). For other penalties see Articles 282, 282a, 282b and 282c Criminal Code as cited above.

c. Articles 282(4), 282a(3) and 282b(2) Criminal Code, the latter two in conjunction with Article 282(4), cover abetment. However, the provisions on this matter have to be read in conjunction with the general rules on attempt and abetment as contained in the Criminal Code. For the general rules that are applicable to all criminal offences according to Dutch law, see the attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code, especially Articles 45, 46a, 47, 48 and 49.

d. See said attachment for the penalties these provisions prescribe for different forms of attempt and abetment.

27. See question no. 26.

Jurisdiction over offences under the Hostage Taking Convention (Article 5)

It can be noted that the Netherlands has made a reservation with regard to Article 5(1) of the Hostage Taking Convention; however, this reservation has been withdrawn.⁵⁹

28. Compulsory Jurisdiction:

a. Domestic law gives the Netherlands jurisdiction over an offence committed by a foreign national in Netherlands territory. The *territoriality* principle is covered by Article 2 Criminal Code.

b. Domestic law gives the Netherlands jurisdiction over an offence committed by a foreign national or a Dutch national outside Netherlands territory on board a ship or aircraft registered in the Netherlands. The *flag state* principle is covered by Article 3 Criminal Code.

c. Domestic law gives the Netherlands jurisdiction over an offence committed by a Dutch national outside Dutch territory. The *nationality* principle is covered by Article 5(1) (section 2) Criminal Code.

⁵⁹ *Stb. 2009, 128*; Article 2 addresses the withdrawal of the reservation to the Hostage Taking Convention.

d. Domestic law gives the Netherlands jurisdiction over an offence committed by a Netherlands or foreign national with the objective to compel the Netherlands government to do or abstain from doing any act, whether the act which constitutes the offence is committed in or outside the Netherlands. The *protective* principle is covered by Article 4 (section 11) Criminal Code. Jurisdiction can be established based on Article 282a Criminal Code in conjunction with Article 4 (section 11) Criminal Code if the offender is on Dutch territory.⁶⁰

e. Domestic law gives the Netherlands jurisdiction over an offence committed by a foreign national outside Dutch territory if that person is present on Dutch territory after the commission of the offence. The presence of the offender is covered by the Netherlands having so-called unlimited (meaning with no added clause) secondary *universal* jurisdiction.

The terrorist attacks on 11 September 2001 and the establishment of unlimited secondary *universal* jurisdiction in the Terrorist Financing Convention lead to discussion in Parliament and reconsidering the reservations the Kingdom has made, regarding *universal* jurisdiction, in earlier treaties such as the Hostage Taking Convention, leading to the withdrawal of the reservation to this convention and the 1988 SUA (Protocol).⁶¹

The reconsideration of the Netherlands' stand on *universal* jurisdiction meant that the secondary *universal* jurisdiction, as provided for in Article 4a Criminal Code in conjunction with Article 552hh Code of Criminal Procedure, had to be converted into unlimited jurisdiction which is established in Article 4 Criminal Code.⁶²

29. Permissive Jurisdiction

a. Domestic law gives the Netherlands jurisdiction over certain offences committed outside the Netherlands by a stateless person who has her or his habitual residence in the Netherlands. The *domicilie* principle is covered by Article 5a(1) Criminal Code, assuming hostage taking falls

⁶⁰ *Stb.* 2009, 525, *Wet van 26 november 2009, houdende partiële wijziging van het Wetboek van Strafrecht, Wetboek van Strafvordering en enkele aanverwante wetten in verband met rechtsontwikkelingen, internationale verplichtingen en geconstateerde wetstechnische gebreken en leemten*, p. 2; Eerste Kamer der Staten Generaal, 2008-2009, 31 391 (concerning alterations of the Criminal Code and other legislation), no. A, *gewijzigd voorstel van wet*, 16 June 2009, p. 1-2.

⁶¹ *Stb.* 2009, 128, Kingdom Act of 21 February 2009 on the withdrawal of reservations to certain treaties on counteracting terrorism, pp. 1-2; for discussion see e.g. Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 4-5; Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 5, *nota naar aanleiding van het verslag*, 12 November 2001, p. 8; Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701) and 28 031, no. 15, *brief van de minister van justitie*, 21 December 2001, pp. 1-3; Tweede Kamer der Staten Generaal, 2008-2009, 31 539 (R 1865), no. 3, *memorie van toelichting*, pp. 1-5; Tweede Kamer der Staten Generaal, 2008-2009, 31 539 (R 1865), no. 6, *nota naar aanleiding van het verslag*, 1 December 2008, pp. 1-3.

⁶² Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701) and 28 031, no. 15, *brief van de minister van justitie*, 21 December 2001, pp. 1-3.

under ‘terrorist crimes’. Even though not explicitly mentioned in Article 5a(1), hostage taking (also in the context of maritime crimes) might fall under ‘terrorist crimes’, meaning the Netherlands is able to establish jurisdiction over a stateless person in the sketched scenario. Hostage taking constitutes a terrorist crime according to Article 83(section 2 and 3) Criminal Code which refers to Articles 282c and 282b respectively.

b. Domestic law gives the Netherlands jurisdiction over an offence committed by a foreign national outside Dutch territory with respect to a hostage who is a Netherlands national. It has to be noted that the *passive personality* (or *nationality*) principle remains controversial and was until recently not provided for in the Criminal Code. There was considerable discussion in Parliament over this principle with regard to the Hostage Taking Convention⁶³ and the government of the Netherlands expressed its wish to not apply Article 5(1)(d), meaning the *passive nationality* principle was not desired as a basis for establishing jurisdiction.⁶⁴ However, the Hostage Taking Convention was seen as obliging the Netherlands to introduce the *passive personality* principle of jurisdiction into domestic law. The Criminal Code was adjusted in order to properly meet the requirements of this convention.⁶⁵ Therefore, in general, the *passive personality* principle is covered by Article 5b Criminal Code. However, Article 5b Criminal Code is not applicable to the present scenario, since this Article only refers to certain criminal offences, such as human trafficking, and offences relating to minors.

Applicability to Maritime Crimes (the taking of crewmembers hostage on board a ship)

30. There is nothing in Dutch domestic law which prohibits Dutch legislation from applying to the taking of crewmembers hostage on board a ship.

Prosecution under Hostage Taking National Legislation

31. There have been no prosecutions before Dutch domestic courts of persons who committed the act of hostage taking against crew members on board of a ship.

⁶³ See e.g. Tweede Kamer der Staten Generaal, 1985-1986, 18 438 (R 1261) and 18 439, no. 5, *memorie van antwoord*, 31 December 1985, p. 2. See for the discussion also Eerste Kamer der Staten Generaal, 1986-1987, 18 438 (R 1261) and 18 439, no. 148, *voorlopig verslag van de vaste commissie voor justitie*, 3 March 1987, p. 2-3; Eerste Kamer der Staten Generaal, 1986-1987, 18 438 (R 1261) and 18 439, no. 148a, 14 September 1987, *memorie van antwoord*, p. 3-4.

⁶⁴ Tweede Kamer der Staten Generaal, 1983-1984, 18 438 (R 1261), no. 3, *memorie van toelichting*, p. 10.

⁶⁵ See Tweede Kamer der Staten Generaal, Handelingen Tweede Kamer, 32ste vergadering, 1986-1987, 4 December 1986, pp. 1792-1796; advisory reports from the Council of State: Advies van de Raad van State, no. B, 16 June 1982 (18 439) and no. B, 28 July 1982, 18 438 (R 1261).

**1988 CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS
AGAINST THE SAFETY OF MARITIME NAVIGATION (1988 SUA)**

No problems and/or issues have arisen relating to the ratification or implementation of the 1988 SUA.

The 1988 SUA was signed on 23 January 1989, under the condition of acceptance published in *Trb. 1989, 17* and approved for the Kingdom of the Netherlands by Kingdom Act of 20 November 1991 (*Stb. 1991, 625*). The convention was ratified on 5 March 1992 and entered into force on 3 June 1992 for the Kingdom in Europe. The 1988 SUA entered into force on 15 December 2004 for Aruba and on 10 October 2010 for the BES islands. The SUA is not applicable to Curaçao and Sint Maarten.⁶⁶

It can be noted that the Netherlands has made a reservation⁶⁷ with regard to Article 1 of the 1988 Protocol to the SUA Convention, in conjunction to Article 10 SUA regarding Netherlands *universal* jurisdiction; however, this reservation has been withdrawn (see also question no. 28e).⁶⁸

Lead Agency

32. (a) The Ministry of Security and Justice is the primary responsible agency for implementing the SUA into domestic law. The Ministry of Foreign Affairs, the Ministry of Transport, Water Management and Public Works and the Ministry of Economic Affairs are also relevant agencies for the implementation of this convention.

(b) The Ministry of Security and Justice is responsible for drafting of implementing legislation, if necessary.

(c) The Ministry of Security and Justice and Dutch domestic courts are responsible for ensuring that the Netherlands complies with the obligations stemming from the SUA.

The Ministry of Foreign Affairs has a coordinating role in all matters concerning (the procedures with regard to) treaties.

⁶⁶ See e.g. *Trb. 1989, 17*, p. 26-27; Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no.3, *memorie van toelichting*, p. 1.

⁶⁷ Following discussion in parliament, see e.g. Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no.3, *memorie van toelichting*, p. 2-3; Eerste Kamer der Staten-Generaal, 1991-1992, 21 625 (R 1394), no. 47, *gewijzigd voorstel van rijkswet*, 21 October 1991, p. 1-2.

⁶⁸ *Stb. 2009, 128*; Article 5 addresses the withdrawal of the reservation to the SUA.

Offences and Penalties under 1988 SUA (Article 3 and 5)

33. The Netherlands does not have any specific Act which implements the 1988 SUA. The existing provisions on maritime crimes, as contained in the Criminal Code were adjusted in order to comply with the obligations stemming from the SUA.

Article 51a(2) Extradition Act, Article 522hh(2) Code of Criminal Procedure and Article 4 (section 8) Criminal Code have been adjusted in order to comply with the 1988 SUA. Furthermore, Articles 352, 385a, 385b and 385c Criminal Code have been adjusted.⁶⁹

The Netherlands has established unlimited (secondary) *universal* jurisdiction based on Article 4 Criminal Code for acts which have been criminalized in Articles 381-385 Criminal Code.⁷⁰

34. The Netherlands Criminal Code is the legislation which deals with the same criminal offences as the SUA.

Substantive criminal law with regard to these SUA offences can be found in Articles 385a-385c Criminal Code. Article 385a is the general provision which implements Article 3(1)(a) SUA.⁷¹ Article 385a reads as follows:

1. A person who by an act of violence, by threat of violence or by intimidation seizes or exercises control over an aircraft, or changes its course, is liable to a term of not more than twelve years or a fine of the fifth category.
2. Where two or more persons commit the offense jointly or as a result of a conspiracy, or where the act results in serious in serious bodily harm,⁷² or where the offense has been committed with the object of unlawfully depriving another person of his liberty or of unlawfully keeping him deprived of his liberty, a term of imprisonment of not more than fifteen years or a fine of the fifth category shall be imposed.
3. Where death ensues as a result of the act, life imprisonment or a term of imprisonment of not more than thirty years or a fine of the fifth category shall be imposed.

⁶⁹ Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. B, *advies Raad van State*, 21 May 1990, p. 2; Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. 1-2, *Koninklijke boodschap en voorstel van wet*, 3 July 1990, p. 2-3.

⁷⁰ Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no.3, *memorie van toelichting*, p. 3.

⁷¹ See e.g. Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 6, *nota naar aanleiding van het verslag*, 23 August 2010, p. 1.

⁷² See Article 82 Criminal Code for what constitutes 'serious bodily harm'.

4. The punishment in *section 1* is also applicable to a person who commits the serious offense defined in said *section* with respect to a vessel or an installation at sea (...) ⁷³ (emphasis added)

Article 385b provides that:

1. A person who intentionally commits an act of violence against a person on board an aircraft in flight is liable:
 - (1) to a term of imprisonment of not more than nine years or a fine of the fifth category, where this is likely to jeopardize the safety of the aircraft;
 - (2) to a term of not more than twelve years or a fine of the fifth category, where this is likely to jeopardize the safety of the aircraft and serious bodily harm ⁷⁴ to another person ensues from the act;
 - (3) to a term of imprisonment of not more than fifteen years or a fine of the fifth category, where this is likely to jeopardize the safety of the aircraft and the death of a person ensues as a result of the act. ⁷⁵
2. The punishment in *section 1* is also applicable to those who commit the serious offenses defined in *section 1* with respect to a vessel or an installation at sea. “To jeopardize the safety of the aircraft” in *section 1* also includes to jeopardize the safe passage of a vessel. (emphasis added)

Article 385c reads as follows:

A person who intentionally communicates data he knows of has serious reason to suspect to be incorrect is liable to a term of imprisonment of not more than four years or a fine of the fourth category, where this is likely to jeopardize the safety of an aircraft in flight or the safe passage of a vessel. ⁷⁶

Articles 415a and 415b Criminal Code address the foregoing provisions in conjunction with ‘terrorist objective’ and ‘conspiracy’, providing for an increased sentence. Article 415a reads as follows:

If a crime liable to punishment by virtue of one of the Articles 385a to 385d has been committed with a terrorist objective, the prison term stipulated in that Article shall be increased by half that term, and if the crime carries a prison sentence not exceeding fifteen years, life imprisonment or a prison sentence not exceeding thirty years shall be imposed.

Article 415b Criminal Code provides that:

1. Conspiracy in respect of crimes described in Articles 385a, 385b and 385d, to be committed with a terrorist objective, shall be punished with a prison sentence not exceeding ten years or a fine of the fifth category.

⁷³ See also Article 4 (section 7b) and (section 8) Criminal Code.

⁷⁴ See Article 82 Criminal Code for what constitutes ‘serious bodily harm’.

⁷⁵ See also Article 4 (section 7c and section 8a) Criminal Code.

⁷⁶ See also Article 4 (section 7d and section 8a) Criminal Code. A fine of the fourth category means a maximum amount of 19.000 euro, see Article 23 Criminal Code

2. Article 96, paragraph two, applies by analogy.

Other relevant provisions are Articles 352 and 168 Criminal Code; Article 168 Criminal Code reads as follows:

A person by whom any vessel or aircraft is intentionally and unlawfully caused to sink, run aground or be wrecked, or by whom it is intentionally and unlawfully destroyed, rendered unusable or damaged, is liable:

- (1) to a term of imprisonment of not more than fifteen years or a fine of the fifth category, where danger to another person's life might have been expected to ensue from the act;
- (2) to life imprisonment or a term of imprisonment of not more than thirty years or a fine of the fifth category, where danger to another person's life might have been expected to ensue and where the act results in the death of a person.⁷⁷

Article 176a Criminal Code addresses terrorist objective in conjunction with (amongst others) Article 168 Criminal Code. Article 176a provides that:

If a crime liable to punishment by virtue of Articles 157, 159, 160, 161, 161*bis*, 161*quater*, 161*sexies*, 162, 162a, 164, 166, 168, 170, 172, 173a or 174 has been committed with a terrorist objective, the prison term stipulated in that Article shall be increased by half that term, and if the crime carries a prison sentence not exceeding fifteen years, life imprisonment or a prison sentence not exceeding thirty years shall be imposed.

Article 176b Criminal Code addresses conspiracy in conjunction with (amongst others) Article 168 Criminal Code, reading as follows:

1. Conspiracy in respect of crimes described in Articles 157, 161, section 2° and 3°, 161*bis*, sections 3° and 4°, 161*quater*, 161*sexies*, sections 3° and 4°, 162, 164, 166, 168, 170, 172, 173a and 174, to be committed with a terrorist objective, shall be punished with a prison sentence not exceeding ten years or a fine of the fifth category.
2. Article 96, paragraph two, applies by analogy.

Article 350(1) Criminal Code is a general provision on damaging goods. The maximum penalty on this offence is a term of imprisonment of two years or a fine of the fourth category. Article 352 Criminal Code is also relevant; the provision reads as follows:

⁷⁷ See also Article 4 (section 7a and 8a) Criminal Code.

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A person who intentionally and unlawfully destroys, damages, renders unusable or defective any building, vessel or its cargo, installation at sea, or aircraft belonging in whole or in part to another is liable to a term of imprisonment of not more than four years or a fine of the fourth category.⁷⁸

Article 285 Criminal Code is the general provision on the threat of the use of force against persons or goods which is relevant for Article 3(2)(c) SUA. Article 285(3) reads as follows:

Threatening to commit a terrorist crime shall be punished with a prison sentence not exceeding six years or a fine of the fifth category.

a. The offences in Dutch domestic legislation differ from the offences as described in Article 3 of the 1988 SUA in the sense that the offence as described in the convention are broader in scope. Articles 385a, 385b and 385c Criminal Code have been adjusted in order to implement Articles 3(1)(a), (b), (f) and (g), Article 166⁷⁹ Criminal Code criminalizes the offence of Article 3(1)(e) SUA.

A difference compared to the SUA is, that in the four Articles just referred to (385a, 385b, 385c and 166 Criminal Code) the phrase ‘unlawfully and intentionally’ is not inserted since this is already deemed to be included in the description/definition of the offence in the Criminal Code.⁸⁰ Article 385c goes, compared to Article 3(1)(f) SUA, further since it is already punishable under Dutch criminal law if the offender’s act may cause danger to the safe navigation of a vessel instead of actually bringing the safe navigation of a vessel in danger.⁸¹ Article 352 Criminal Code goes, compared to Article 3(1)(c) further than the SUA in the sense that Dutch criminal law also prohibits damaging and rendering vessels (including its cargo) unusable or defective, which is not obliged by the SUA in this respect.⁸²

⁷⁸ Article 354 Criminal Code provides that the sentence can be increased by one third (1/3) in case the act is committed with the fear of endangering a person’s life; see also Article 4 (section 8) Criminal Code.

⁷⁹ Article 166(1) Criminal Code provides that any person who intentionally destroys, damages, removes or moves a sign or aid that is intended for the safe navigation of a vessel, frustrates the functioning or gives a wrong sign shall be punished with a prison sentence not exceeding twelve years or a fine of the fifth category, if this act may cause danger to the safe navigation of a vessel. According to paragraph 2, an offender shall be punished with a prison sentence not exceeding fifteen years or a fine of the fifth category if, this act may cause danger to the safe navigation of a vessel and the act results in the sinking, being lost or running aground of a vessel.

Paragraph 3 provides that an offender shall be punished with life imprisonment or a temporary prison sentence not exceeding thirty years or a fine of the fifth category if this act may cause danger to the safe navigation of a vessel and results in someone’s death. See also Article 4 (section 7 and 8) in conjunction with Article 166.

⁸⁰ See also Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. 3, *memorie van toelichting*, p. 7.

⁸¹ See also Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. 3, *memorie van toelichting*, p. 7.

⁸² See also Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. 3, *memorie van toelichting*, p. 8.

b. The penalties for the several offences as provided for by the Criminal Code differ and depend on the circumstances. See the provisions cited above for the penalties these provisions prescribe.

c. Articles 285(3), 385a(2), 354, 415b, 176b Criminal Code cover the threat to commit an offence and abetment. However, the provisions on this matter have to be read in conjunction with the general rules on attempt, abetment and threatening to commit criminal offences as contained in the Criminal Code. For the general rules that are applicable to all criminal offences, see the attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code, especially Articles 45, 46a, 47,⁸³ 48 and 49.⁸⁴ See also said attachment for the penalties these provisions prescribe for different forms of attempt, abetment and threatening.

35. See question no. 34.

Jurisdiction over offences under SUA 1988 (Article 6)

36. Compulsory Jurisdiction:⁸⁵

a. The *flag state* principle is covered by Article 3 Criminal Code.

b. The *territoriality* principle (including the territorial sea) is covered by Article 2 Criminal Code.

c. The *nationality* principle is covered by Article 5(1) (section 2) Criminal Code.

d. The *presence of the offender* is covered by Article 4 (section 8) Criminal Code.

Jurisdiction is also covered by Article 4 (section 5) regarding Article 385a, 385b and 385c Criminal Code. The Netherlands has not only established *universal* jurisdiction for the crime of piracy, based on Article 385a, 385b and 385c in conjunction with Article 4 (section 5)⁸⁶ of the Criminal Code, *universal* jurisdiction applies to SUA crimes as well (see also question no. 22).

37. Permissive Jurisdiction:

⁸³ Article 47 of the Criminal Code was relevant in the *Somali pirates* case.

⁸⁴ Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. B, *advies Raad van State*, 21 May 1990, p. 2; Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no.3, *memorie van toelichting*, p. 9.

⁸⁵ See also Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. 3, *memorie van toelichting*, p. 2-3.

⁸⁶ Article 4 (section 5) Criminal Code reads as follows: 'The Netherlands Criminal Code is applicable to any person outside the Netherlands who commits: (...) 5° one of the offences described in Articles (...) 381-385, (...).'

- a.** The answer to this question is not entirely clear. Since the Netherlands did not wish to establish permissive jurisdiction in other cases than those covered by Article 6(2)(c) SUA (see section c. of this question) the answer would be negative.⁸⁷ However, it seems that the *domicilie* principle (not the *nationality* principle), which is covered by Article 5a Criminal Code would currently cover this situation, assuming the offence falls under ‘terrorist crimes’. SUA offences might fall under ‘terrorist crimes’, meaning the Netherlands is able to establish jurisdiction over a stateless person in the sketched scenario. SUA offences might constitute a terrorist crime according to Article 83 Criminal Code; section 3 of this Article refers to Articles 285(3) Criminal Code.
- b.** Once again, the answer is not entirely clear. Since the Netherlands did not wish to establish permissive jurisdiction in other cases than those covered by Article 6(2)(c) (see section c. of this question) the answer would be negative.⁸⁸ Although in general, the *passive personality* principle is covered by Article 5b Criminal Code, Article 5b is not applicable to the present scenario, since this Article only refers to certain criminal offences, such as human trafficking, and offences relating to minors.
- c.** The *protective* principle is covered by Dutch criminal law, *extraterritorial* jurisdiction can be established based on Article 95a Criminal Code (concerning the criminal offence of using violence or threats of violence against the state) in conjunction with Article 4 (section 1) Criminal Code in situations covered by Article 6(2)(c) SUA.⁸⁹

Arrest and Delivery of Offenders by Master of Vessel (Article 8)

38. Domestic legislation provides for the master of a vessel to arrest a person who has committed a criminal offence (and under circumstances to bring such a person to the appropriate authorities in another state party as provided by Article 8 SUA). In general, arrest is covered by Article 53 of the Code of Criminal Procedure. The specific provision regarding arrest by a master of a vessel is Article 539h Code of Criminal Procedure.⁹⁰

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⁸⁷ See Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no. 3, *memorie van toelichting*, p. 5-6.

⁸⁸ See Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no. 3, *memorie van toelichting*, p. 5-6.

⁸⁹ See Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no. 3, *memorie van toelichting*, p. 5.

⁹⁰ See e.g. Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no. 3, *memorie van toelichting*, p. 6 for a general discussion of Article 8 SUA; the implementation was not discussed in detail.

39. The SUA was invoked in the *Somali pirates* case. Articles 3, 7(5) and 7(1) SUA were deemed to have also formed the legal basis of arrest in the *Somali pirates* case. After capturing the Somali men, Denmark has notified the Netherlands of this fact in accordance with Article 7(5) SUA. Subsequently, Denmark held the suspects for the Netherlands with the aim of extradition, as provided for in Article 7(5) SUA.

1999 INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM (1999 Terrorism Financing Convention)

No problems and/or issues have arisen relating to the ratification and/or implementation of the 1999 Terrorism Financing Convention.

The Terrorism Financing Convention was signed on 10 January 2000, published in *Trb. 2000, 12* and *Trb. 2001, 62* and approved for the Kingdom of the Netherlands by Kingdom Act of 20 December 2001 (*Stb. 2001, 674*). The convention was accepted on 7 February 2002 and entered into force on 10 April 2002 for the Kingdom in Europe. The Terrorism Financing Convention entered into force on 23 March 2005 for Aruba and on 10 October 2010 for Curaçao, Sint Maarten and the BES islands.⁹¹

A complicating factor is that the Netherlands has to deal with European legislation as well; e.g. the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (2005).

To combat terrorism financing, certain lists exist (so-called ‘Bush lists’), which are in the European context based on a European *directive* and provide for the possibility to ‘freeze’ funds and property of individuals and terrorist organizations which are on that list.

The Netherlands has made a *declaration* to this Convention, reading as follows:

The Kingdom of the Netherlands understands Article 10, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible.⁹²

Lead Agency

40. (a) The Ministry of Security and Justice is the primary responsible agency for implementing the Terrorism Financing Convention into domestic law. The Ministry of Foreign Affairs is also a relevant agency for the implementation of this convention.

(b) The Ministry of Security and Justice is responsible for drafting of implementing legislation, if necessary.

⁹¹ See e.g. *Stb. 2001, 674*, Articles 1 and 2; see also *Trb. 2002, 110*, p. 4, 9; *Trb. 2010, 151*, p. 94.

⁹² See e.g. Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 13; *Trb. 2002, 110*, p. 7.

(c) The Ministry of Security and Justice and Dutch domestic courts are responsible for ensuring that the Netherlands complies with the obligations stemming from the Terrorism Financing Convention.

The Ministry of Foreign Affairs has a coordinating role in all matters concerning (the procedures with regard to) treaties.

Offences and Penalties under the 1999 Terrorism Financing Convention (Article 2 together with the Annex and Article 4)

41. The Netherlands does not have any specific Act which implements the Terrorism Financing Convention. The existing provisions on financing crimes and terrorism, as contained in the Criminal Code were adjusted in order to comply with the obligations stemming from the Terrorism Financing Convention. Articles 11(3) and 51a(2) of the Extradition Act and Articles 4, 46, 117b and 172(1) of the Criminal Code have been adjusted and Article 4 (section 14) was added (see attachment for the provision).⁹³

42. a. The Criminal Code deals with the offences which are criminalized in the conventions that are listed on the Annex (the *Hostage Taking Convention* and *SUA* are relevant conventions for this report which are listed as no. 4 and no. 7 on the Annex) including attempts, participation as an accomplice, organization or contribution to the commission of an offence, as set out in Article 2 Terrorism Financing Convention.

The Terrorism Financing Convention makes a distinction between two possible basis of criminalization of terrorism financing, first, on the basis of the criminal offence of preparation of a crime covered by the Terrorism Financing Convention and second, the criminalization of terrorism financing on the basis of participation in an organized criminal group.

Participating in an organized criminal group is criminalized by Article 140⁹⁴ Criminal Code, the (rather broad) interpretation given to the terms ‘participating’ and ‘objective’ in case law is also

⁹³ See Tweede Kamer, 2001-2002, 28 031, no. 1-2, *Koninklijke boodschap/voorstel van wet*, 4 October 2001, pp. 1-2; Eerste Kamer, 2001-2002, 28 031, no. 135, *gewijzigd voorstel van wet*, 22 November 2001, pp. 1-2; *Stb.* 2001, 675, pp.1-2.

⁹⁴ Article 140(1) Criminal Code reads as follows: ‘Participating in an organisation with the objective of committing crimes shall be punished with a prison sentence not exceeding six years or a fine of the fifth category’. Article 140(2) deals with participation in an organisation which is prohibited by law. This paragraph provides that a prison sentence can be imposed with a maximum of one year or a fine of the third category (maximum of 7. 600 euro). Article 140(3) provides that the prison sentence can be increased with one third (1/3) for leaders, founders or managers. See also Article 2 Act on International Crimes and Articles 83(3) and 4 (section 14) Criminal Code.

important in this respect. Article 140a Criminal Code specifically addresses participating in an organized terrorist criminal group; the provision reads as follows:

1. Participating in an organisation with the objective of committing terrorist crimes shall be punished with a prison sentence not exceeding fifteen years or a fine of the fifth category.
2. Founders, leaders or managers shall be punished with life imprisonment or a prison term not exceeding thirty years or a fine of the fifth category.
3. Article 140, paragraph four, applies by analogy.⁹⁵

b. Individuals who finance the commission of SUA offences or hostage taking offences would be guilty of an offence under domestic law, but not necessarily on terrorist financing.

c. The penalties for the several offences as provided for by the Criminal Code differ and depend on the circumstances. See the provisions cited above for the penalties these provisions prescribe.

d. Offences cover attempts, participation as an accomplice, organization or contribution to the commission of an offence. This matter has to be read in conjunction with the general rules on attempt and participation. For the general rules that are applicable to all criminal offences, see the attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code, especially Articles 45, 46a, 47, 48 and 49.

e. See said attachment for the penalties these provisions prescribe for different forms of attempt and participation.

43. See question no. 34.

Jurisdiction over offences under the 1999 Terrorism Financing Convention (Article 7)

The Netherlands has established unlimited secondary *universal* jurisdiction with regard to the criminal offences covered by the Terrorism Financing Convention based on Article 4 (section 14) Criminal Code, meaning the Netherlands has jurisdiction if the offender is present on Dutch

⁹⁵ Article 140(4) Criminal Code reads as follows: 'Participation as described in paragraph one includes rendering financial or other material support to, as well as raising funds and recruiting funds for the organisation described therein.'

territory and the Netherlands does not extradite him or her to a state party that has primary jurisdiction.⁹⁶

44. Compulsory Jurisdiction:

- a. The *territoriality* principle (including the territorial sea) is covered by Article 2 Criminal Code.
- b. The *flag state* principle is covered by Article 3 Criminal Code.
- c. The *nationality* principle is covered by Article 5(1) (section 2) Criminal Code.
- d. The *presence of the offender* is covered by Article 4 (section 14) Criminal Code.

45. Permissive Jurisdiction:

- a. The Netherlands may establish jurisdiction, if an offence is directed towards a Netherlands national. The *passive nationality* principle is covered by Article 4 (section 14). This Article provides for the *passive nationality* principle with regard to the Terrorism Financing Convention.⁹⁷
- b. The Netherlands does *not* wish to establish jurisdiction for situations as provided for in Article 7(2)(b) Terrorism Financing Convention.⁹⁸
- c. The Netherlands may establish jurisdiction for situations as provided for in Article 7(2)(c) based on Article 95a Criminal Code (concerning the criminal offence of using violence or threats of violence against the state) in conjunction with Article 4 (section 1) Criminal Code.⁹⁹
- d. The Netherlands does *not* wish to establish jurisdiction for situations as provided for in Article 7(2)(d) Terrorism Financing Convention.¹⁰⁰
- e. The Netherlands does *not* wish to establish jurisdiction for situations as provided for in Article 7(2)(e) Terrorism Financing Convention.¹⁰¹

⁹⁶ Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 6.

⁹⁷ See also Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 6, 9.

⁹⁸ Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 9.

⁹⁹ Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 9; Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. B, *oorspronkelijke tekst van de memorie van toelichting zoals voorgelegd aan de raad van state en voor zover nadien gewijzigd*, p. 2.

¹⁰⁰ Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 9.

Article 4 of the Netherlands Criminal Code provides for the *universality* principle of jurisdiction. The universality that can be found in this provision is hedged with an added clause with regard to the Terrorism Financing Convention (section 14, also mentioned above). The Netherlands has jurisdiction regarding these crimes based on the *passive nationality* (or *personality*) principle and the principle of *universality*. This includes the so-called ‘secondary universal jurisdiction’, meaning the Netherlands has jurisdiction over an (alleged) offender in cases where another state would have (primary) jurisdiction over this person, if this offender is on Dutch territory. There is also jurisdiction in circumstances where an offence is directed towards a Netherlands national.

Prosecutions under national legislation on terrorist financing

46. There have been no prosecutions before Dutch domestic courts of persons who financed the commission of SUA offences and/or hostage taking offences such as hijacking ships or taking crewmembers hostage for ransom.

¹⁰¹ Tweede Kamer der Staten Generaal, 2001-2002, 28 030 (R 1701), no. 3, *memorie van toelichting*, p. 9.

2000 UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (2000 UNTOC)

No problems and/or issues have arisen relating to the ratification of the 2000 UNTOC.

The 2000 UNTOC was signed on 12 December 2000, published in *Trb. 2001*, 68 and *Trb. 2004*, 34 and approved for the Kingdom of the Netherlands on 10 May 2004. The convention was ratified on 26 May 2004 and entered into force on 25 June 2004 for the Kingdom in Europe. The UNTOC entered into force on 18 January 2007 for Aruba and on 10 October 2010 for Curaçao, Sint Maarten and the BES islands.¹⁰²

It can be noted that the Netherlands has made a declaration to this convention providing that the UNTOC is considered to be the legal basis for cooperation on extradition, see question 64 section b.

A complication has arisen relating to the implementation of the 2000 UNTOC. The European Union is a party to this Convention, which means that in certain areas the Netherlands has limited competence or no competence.¹⁰³ As can be read in the declarations made by the European Community, e.g.: ‘(...) the Community has adopted measures to combat money laundering (...) The Community has adopted measures to ensure transparency and the equal access of all candidates for the public contracts and services markets which contributes to preventing corruption. Where the Community has adopted measures, it is for the Community alone to enter into external undertakings with third States or competent international organisations which affect those measures or alter their scope (...) Moreover, Community policy in the sphere of development cooperation complements policies pursued by Member States and includes provisions to combat corruption.’¹⁰⁴

Lead Agency

47. (a) The Ministry of Security and Justice is the primary responsible agency for implementing the UNTOC into domestic law. The Ministry of Foreign Affairs is also a relevant agency for the implementation of this convention.

¹⁰² See e.g. *Trb. 2004*, 184, pp. 1-3 and 6.

¹⁰³ The European Community has competence with regard to combating money-laundering, which is covered by Article 7 UNTOC, for example, see Staten Generaal, 2003-2004, 29 512 (R 1757), no. 1A, *brief van de minister van buitenlandse zaken en toelichtende nota*, 5 April 2004, p. 2-3; Staten Generaal, 2003-2004, 29 512 (R 1757), no. 2B, *advies raad van state van het koninkrijk en nader rapport*, pp. 1-2.

¹⁰⁴ See as published in e.g. *Trb. 2004*, 184, pp. 2-3.

(b) The Ministry of Security and Justice is responsible for drafting of implementing legislation, if necessary.

(c) The Ministry of Security and Justice and Dutch domestic courts are responsible for ensuring that the Netherlands complies with the obligations stemming from the UNTOC.

The Ministry of Foreign Affairs has a coordinating role in all matters concerning (the procedures with regard to) treaties.

Offences and Penalties under UNTOC (Articles 5 and 6)

48. a. See section b.

b. The Netherlands does not have any specific Act which implements the UNTOC. The existing provisions on organized crimes, as contained in the Criminal Code were sufficient, only Article 51a Extradition Act needed a minor addition in order to fully comply with the UNTOC.¹⁰⁵ The Criminal Code deals with the offence of participating in an organized criminal group, including attempt and abetment, as set out in Article 5 UNTOC.

Participating in an organized criminal group is criminalized by Article 140¹⁰⁶ Criminal Code; the (rather broad) interpretation given to the terms ‘participating’ and ‘objective’ in case law is also important in this respect. Article 140a Criminal Code specifically addresses participating in an organized terrorist criminal group; the provision reads as follows:

1. Participating in an organisation with the objective of committing terrorist crimes shall be punished with a prison sentence not exceeding fifteen years or a fine of the fifth category.
2. Founders, leaders or managers shall be punished with life imprisonment or a prison term not exceeding thirty years or a fine of the fifth category.
3. Article 140, paragraph four, applies by analogy.¹⁰⁷

¹⁰⁵ See Staten Generaal, 2003-2004, 29 512 (R 1757), no. 1A, *brief van de minister van buitenlandse zaken en toelichtende nota*, 5 April 2004, p. 4, 12; Staten Generaal, 2003-2004, 29 512 (R 1757), no. 2B, *advies raad van state van het koninkrijk en nader rapport*, p. 2.

¹⁰⁶ Article 140(1) Criminal Code reads as follows: ‘Participating in an organisation with the objective of committing crimes shall be punished with a prison sentence not exceeding six years or a fine of the fifth category’. Article 140(2) addresses participation in an organisation which is prohibited by law. This paragraph provides that a prison sentence can be imposed with a maximum of one year or a fine of the third category (maximum of 7. 600 euro). Article 140(3) provides that the prison sentence can be increased with one third (1/3) for leaders, founders or managers. See also Article 2 of the Act on International Crimes.

¹⁰⁷ Article 140(4) Criminal Code reads as follows: ‘Participation as described in paragraph one includes rendering financial or other material support to, as well as raising funds and recruiting funds for the organisation described therein.’

Offences covering attempts and abetment exist. However, attempt and abetment have to be addressed with reference to general Netherlands criminal law. For the general rules on attempt and abetment that are applicable to all criminal offences, see the attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code, especially Articles 45, 46a, 47, 48 and 49.¹⁰⁸ See said attachment for the penalties these provisions prescribe for different forms of attempt and abetment.

c. See section b.

49. a. See section c.

b. See section c.

c. The Criminal Code deals with the offence of laundering of proceeds of crime (or ‘money laundering’) as set out in Article 6 UNTOC.

The offence of laundering of proceeds of crime is criminalized by Articles 420 *bis* – 420 *quinquies* Criminal Code.¹⁰⁹ Article 416 Criminal Code (on intentionally handling stolen goods) can also be applied in order to combat money laundering and the Act on money laundering is relevant.

The penalties for the offences as provided for by the Criminal Code differ and depend on the circumstances. See the provisions cited above for the penalties these provisions prescribe.

d. See section c.

Jurisdiction over offences under UNTOC

50. Compulsory Jurisdiction:¹¹⁰

a. The *territoriality* principle (including the territorial sea) is covered by Article 2 Criminal Code.

¹⁰⁸ Staten-Generaal, 2003-2004, 29 512 (R 1757), no. 1A, *brief van de minister van buitenlandse zaken en toelichtende nota*, 5 April 2004, p. 7.

¹⁰⁹ Article 420*bis* Criminal Code is the central provision on money laundering. Paragraph 1 provides that individuals guilty of money laundering will be punished by a prison sentence of a maximum of four years or a fine of the fifth category. Subsection (a) and (b) provide what constitutes money laundering.

Regarding Articles 420*bis* – *quater* see also Article 2 Act on International Crimes.

¹¹⁰ See also Staten Generaal, 2003-2004, 29 512 (R 1757), no. 1A, *brief van de minister van buitenlandse zaken en toelichtende nota*, 5 April 2004, p. 11.

- b. The *flag state* principle is covered by Article 3 Criminal Code.
- c. The *nationality* principle is covered by Article 5(1) (section 2) Criminal Code.

51. Permissive Jurisdiction:

- a. The Netherlands does *not* wish to establish jurisdiction for situations as provided for in Article 15(2)(a) UNTOC.¹¹¹
- b. Jurisdiction with regard to nationals can be based on Article 5(1) (section 2) Criminal Code. For residents, jurisdiction can be based on Article 5a with regard to terrorist crimes, assuming UNTOC criminal offences would fall under ‘terrorist crimes’ according to article 83 Criminal Code. The Netherlands is able to establish jurisdiction over a stateless person in the sketched scenario. Participating in an organized terrorist criminal group constitutes a terrorist crime according to Article 83(section 3) Criminal Code which refers to Articles 140a Criminal Code.
- c. & d. The Netherlands does *not* wish to establish jurisdiction for situations as provided for in Article 15(2)(c) UNTOC.¹¹²
- e. The Netherlands does *not* wish to establish jurisdiction for situations as provided for in Article 15(4) UNTOC.¹¹³

Applicability to Maritime Crimes

52. There is nothing in Dutch domestic law on Articles 5 and 6 which prohibits Dutch legislation from applying to persons who organize or launder proceeds from maritime related crimes such as piracy, ship-hijacking or hostage taking of crew members for ransom.

Prosecutions under national legislation on transnational organized crime

53. There have been no prosecutions before Dutch domestic courts of persons who organized or laundered proceeds from maritime related crimes such as piracy, hijacking ships or taking crewmembers hostage for ransom.

¹¹¹ Staten Generaal, 2003-2004, 29 512 (R 1757), no. 1A, *brief van de minister van buitenlandse zaken en toelichtende nota*, 5 April 2004, p. 11.

¹¹² *Ibid.*

¹¹³ *Ibid.*

However, there was a case before the Dutch Supreme Court in 2009 with regard to the UNTOC. Article 16(5) UNTOC was the legal basis for extradition of an (alleged) offender who was present on Dutch territory before he was extradited.¹¹⁴

¹¹⁴ Supreme Court of the Netherlands (Hoge Raad), judgment of 13 January 2009, The Hague, published on www.rechtspraak.nl under LJN number: BF0837, 08/02739 U (in Dutch).

PROTOCOL OF 2005 TO 1988 CONVENTION FOR THE SUPPRESSION ON UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (2005 SUA Protocol)

No problems and/or issues have arisen relating to the ratification or implementation of the 2005 SUA Protocol.

The Protocol has recently entered into force, but not (yet) for the Netherlands.¹¹⁵ The 2005 SUA Protocol was signed, subject to acceptance, on 31 January 2007 and published in *Trb. 2006*, 223. The Netherlands has not (yet) approved the 2005 SUA Protocol; the Netherlands is listed as a signatory state, not as a contracting state on the recent IMO list concerning the status of the 2005 SUA Protocol.¹¹⁶

Lead Agency

54. (a) The Ministry of Security and Justice is the primary responsible agency for implementing the 2005 SUA Protocol into domestic law. The Ministry of Foreign Affairs, the Ministry of Defence and the Ministry of Transport, Water Management and Public Works are also relevant agencies for the implementation of the SUA Protocol.

(b) The Ministry of Security and Justice is responsible for drafting of implementing legislation, if necessary.

(c) The Ministry of Security and Justice and Dutch domestic courts are responsible for ensuring that the Netherlands complies with the obligations stemming from the 2005 SUA Protocol.

The Ministry of Foreign Affairs has a coordinating role in all matters concerning (the procedures with regard to) treaties.

Offences and Penalties under the SUA Protocol (Articles 4 and 5)

55. The Netherlands has not (yet) ratified the SUA Protocol. The approval and implementation of the 2005 SUA Protocol is currently being discussed in Parliament.

¹¹⁵ The 2005 SUA Protocol entered into force on 28 July 2010, see IMO, *Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, 2 December 2010, pp. 401-404.

¹¹⁶ IMO, *Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, 2 December 2010, p. 403; Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 3, *memorie van toelichting*, p. 6.

The Netherlands does not have any specific Act which (will) implement(s) the 2005 SUA Protocol. The existing provisions on maritime crimes, as contained in the Criminal Code were sufficient and already contain the necessary provisions. Only Article 4 (section 8) Criminal Code and Articles 11(3) and 51a(2) of the Extradition Act (would) have to undergo minor additions in order to fully comply with the 2005 SUA Protocol.¹¹⁷

56. a. The Criminal Code is the legislation which deals with the same criminal offences as the SUA Protocol. The Netherlands has not drafted new provisions in order to implement the 2005 SUA Protocol; therefore the provisions concerning the 1988 SUA and the 2005 SUA Protocol do not differ.

It can be noted that the Netherlands does wish to make a *declaration* based on Article 21(3) with regard to Article 3ter of the 2005 SUA Protocol, meaning it will apply this provision in accordance with domestic law.¹¹⁸

b. The penalties for the several offences as provided for by the Criminal Code differ and depend on the circumstances. See the provisions cited above in the section on the 1988 SUA for the penalties these provisions prescribe.

c. Offences covering attempts, accomplices, organization exist, but have to be addressed with reference to general Netherlands criminal law. For the general rules on attempt and abetment that are applicable to all criminal offences, see the attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code, especially Articles 45, 46a, 47, 48 and 49. See the section on the 1988 SUA above.

Jurisdiction under the 2005 SUA Protocol (Article 6)

57. Questions no. 36 and 37 (concerning the 1988 SUA) will be quoted and answered hereafter, as required.

Jurisdiction over offences under SUA 1988 (Article 6)

36. Compulsory Jurisdiction:¹¹⁹

¹¹⁷ See Tweede Kamer der Staten Generaal, 2009-2010, 32 259, no. 2, *voorstel van wet*, pp. 1-2; Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 3, *memorie van toelichting*, p. 4; Tweede Kamer der Staten Generaal, 2009-2010, 32 259, no. 3, *memorie van toelichting*, pp. 2-4; Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 6, *nota naar aanleiding van het verslag*, 23 August 2010, p. 2.

¹¹⁸ Certain family members who assist perpetrators of offences cannot be prosecuted under Dutch criminal law in certain circumstances according to Article 189(3) Criminal Code, see Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 3, *memorie van toelichting*, p. 6-7.

- a. The *flag state* principle is covered by Article 3 Criminal Code.
- b. The *territoriality* principle (including the territorial sea) is covered by Article 2 Criminal Code.
- c. The *nationality* principle is covered by Article 5(1) (section 2) Criminal Code.
- d. The *presence of the offender* is covered by Article 4 (section 8) Criminal Code.

Jurisdiction is also covered by Article 4 (section 5) regarding Article 385a, 385b and 385c Criminal Code. The Netherlands has not only established *universal* jurisdiction for the crime of piracy, based on Article 385a, 385b and 385c in conjunction with Article 4 (section 5)¹²⁰ of the Criminal Code, *universal* jurisdiction applies to SUA crimes as well (see also question no. 22).

37. Permissive Jurisdiction:

- a. The answer to this question is not entirely clear. Since the Netherlands did not wish to establish permissive jurisdiction in other cases than those covered by Article 6(2)(c) SUA (see section c. of this question) the answer would be negative.¹²¹ However, it seems that the *domicilie* principle (not the *nationality* principle), which is covered by Article 5a Criminal Code would currently cover this situation, assuming the offence falls under ‘terrorist crimes’. SUA offences might fall under ‘terrorist crimes’, meaning the Netherlands is able to establish jurisdiction over a stateless person in the sketched scenario. SUA offences might constitute a terrorist crime according to Article 83 Criminal Code; section 3 of this Article refers to Articles 285(3) Criminal Code.
- b. Once again, the answer is not entirely clear. Since the Netherlands did not wish to establish permissive jurisdiction in other cases than those covered by Article 6(2)(c) (see section c. of this question) the answer would be negative.¹²² Although in general, the *passive personality* principle is covered by Article 5b Criminal Code, Article 5b is not applicable to the present scenario, since this Article only refers to certain criminal offences, such as human trafficking, and offences relating to minors.
- c. The *protective* principle is covered by Dutch criminal law, *extraterritorial* jurisdiction can be established based on Article 95a Criminal Code (concerning the criminal offence of using

¹¹⁹ See also Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no. 3, *memorie van toelichting*, p. 2-3.

¹²⁰ Article 4 (section 5) Criminal Code reads as follows: ‘The Netherlands Criminal Code is applicable to any person outside the Netherlands who commits: (...) 5° one of the offences described in Articles (...) 381-385, (...)’

¹²¹ See Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no. 3, *memorie van toelichting*, p. 5-6.

¹²² *Ibid.*

violence or threats of violence against the state) in conjunction with Article 4 (section 1) Criminal Code in situations covered by Article 6(2)(c) SUA.¹²³

Ship-Boarding Provisions (Article 8bis)

The government of the Netherlands is of the opinion that a good balance has been found in this provision between the sovereignty of flag states on the one hand and the necessity of being able to effectively combat terrorism on the other hand; the guarantees which are provided are welcomed.¹²⁴ It can be noted that the Netherlands does not wish to, solely based on this SUA Protocol, give a prior general approval to third states for the *boarding* of ships flying the Netherlands flag.¹²⁵

58. Specific provisions on ship-boarding arrangements are currently not to be found in Dutch domestic legislation. The procedure that has to be followed in case the Netherlands receives a request from another state party based on the 2005 SUA Protocol has to be agreed upon by the ministries involved.¹²⁶

59. The Netherlands does not have other domestic legislation which deals with ship-boarding arrangements in the context of maritime crime. However, a few remarks can be made. The implementation in general falls under the responsibility of the Ministry of Security and Justice; the actual *boarding* based on the SUA will in practice be a task of the military, acting on the basis of Article 59 of the Police Act¹²⁷ in the context of military assistance. The Netherlands Code of Criminal Procedure provides (in title VIA) authority to commanders of Dutch navy vessels, which can be seen as implementing Article 8bis(14).¹²⁸

Prosecutions under national legislation relating to 2005 SUA Protocol offences

¹²³ See Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no. 3, *memorie van toelichting*, p. 5.

¹²⁴ Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 3, *memorie van toelichting*, p. 5.

¹²⁵ Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 6, *nota naar aanleiding van het verslag*, 23 August 2010, p. 2.

¹²⁶ Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 3, *memorie van toelichting*, p. 6.

¹²⁷ Police Act, Act of 9 December 1993, *Stb. 1963*, 724.

¹²⁸ Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 3, *memorie van toelichting*, p. 6; Tweede Kamer der Staten Generaal, 2009-2010, 32 256 (R 1906), no. 6, *nota naar aanleiding van het verslag*, 23 August 2010, p. 3.

60. There have been no prosecutions before Dutch domestic courts of persons for 2005 SUA Protocol offences.

EXTRADITION AND MUTUAL LEGAL ASSISTANCE UNDER THE CONVENTIONS

Extradition

61. a. See section b.

b. Extradition is granted by treaty, either bilateral or multilateral agreements. Bilateral agreements (between the Kingdom of the Netherlands and other states and between the EU and a single other state such as the US) exist, as well as agreements with regard to the extradition between EU member states.

The Constitution, in conjunction with Article 2 of the Extradition Act¹²⁹ provides that extradition can only be granted based on a treaty (see question 62).¹³⁰

c. See section b.

62. The Netherlands has a constitutional provision and domestic legislation on extradition. Article 2(3) of the Constitution provides that:

Extradition may take place only pursuant to a treaty. Further regulations concerning extradition shall be laid down by Act of Parliament.

These further regulations regarding extradition are laid down in the Extradition Act, Article 2 of this Act provides that extradition can in the Netherlands only be granted based on a treaty.

The treaties relevant for this report (except the UNCLOS) provide the option, in Articles 10(2) Hostage Taking Convention, 11(2) 1988 SUA, 11(2) Terrorism Financing Convention, 16(4) UNTOC and 10(2) 2005 SUA Protocol, that a state may apply the relevant treaty as basis for extradition in case a state requires, such as the Netherlands according to Article 2 Extradition Act, a treaty whereupon extradition is based and no such extradition treaty exists. The cited Articles, Article 11(2) of the Terrorism Financing Convention for example, are then the legal

¹²⁹ *Act of 9 March 1967 on extradition and other forms of international legal assistance in criminal matters* (Uitleveringswet), *Stb.* 1967,139.

¹³⁰ See also e.g. Tweede Kamer der Staten-Generaal, 1983-1984, 18 438 (R 1261), no. 3, *memorie van toelichting*, p. 11.; Tweede Kamer der Staten-Generaal, 1989-1990, 21 625 (R 1394), no.3, *memorie van toelichting*, p. 7; Tweede Kamer der Staten-Generaal, 1989-1990, 21 626, no.3, *memorie van toelichting*, p.5; Staten-Generaal, 2003-2004, 29 512 (R 1757), no. 1A, *brief van de minister van buitenlandse zaken en toelichtende nota*, 5 April 2004, p. 12.

basis for extradition between the Netherlands and another state which is a party to the Terrorism Financing Convention.

Such a legal basis is required according to Article 2 Extradition Act. In order to fully comply with the treaties relevant for this report, the Extradition Act refers to the Hostage Taking Convention (treaty no. 1), 1988 SUA (treaty no. 3), Terrorism Financing (treaty no. 4) and UNTOC (treaty no. 5) in Article 51a.¹³¹ This means that extradition, based on one of the treaties mentioned, from the Netherlands to another state party is (in principle) possible for the crimes that are listed in Article 51a Extradition Act. This Act sets out the conditions for extradition and Article 51a has been adjusted every time the Netherlands became a party to the four treaties relevant for this report.

63. With regard to the Hostage Taking Convention, Article 282a of the Netherlands Criminal Code is mentioned on the list of Article 51a Extradition Act, containing possible grounds for extradition, provided the crime falls under the description of the Hostage Taking Convention.

Regarding the SUA, the following Articles are mentioned on the list of Article 51a Extradition Act: Articles 166, 168, 350, 352, 354, 385(a)(4), 385(b)(2), 385(c) and furthermore, Articles 172, 174, 366, 370, 372, 399(a)(4), 399(b)(2) and 399c) of the Netherlands Criminal Code, provided they fall under the SUA descriptions.

With regard to the Terrorism Convention, the following Articles are mentioned on the list of Article 51a(2) Extradition Act: Articles 92-96, 108, 115, 117, 117b, 121-123, 140, 157, 161, 161*bis*, 161*quater*, 161*sexies*, 162, 162a, 164, 166, 168, 170, 172, 173a, 285, 287, 288, 289, 350, 350a, 351, 352, 354, 385a, 385b and 385d of the Netherlands Criminal Code, provided they fall under the descriptions of Article 2 of the Terrorism Financing Convention.

Regarding the UNTOC, the following Articles are mentioned on the list of Article 51a Extradition Act: Articles 140, 177-178, 284, 285a, 362-364, 416, 420*bis*-420*quater* of the Netherlands Criminal Code, provided they fall under the descriptions of Articles 5, 6, 8 and 23 UNTOC or crimes that have a minimum of four years sentence, provided they fall under the description of Article 3(1)(b) UNTOC.

The Netherlands has made a declaration to the UNTOC providing that the Netherlands considers this convention as legal basis for cooperation on extradition (see below at question no. 64).

¹³¹ The 2005 SUA Protocol (treaty no. 6) and UNCLOS (treaty no. 2) are not on the list under Article 51a of the Extradition Act. The 2005 SUA Protocol has not entered into force for the Netherlands; Article 105 UNCLOS was used in the *Somali case* with regard to the extradition from Denmark to the Netherlands.

The SUA Protocol (treaty no. 6) and UNCLOS (treaty no. 2) are not on the list under Article 51a of the Extradition Act. The 2005 SUA Protocol has not entered into force for the Netherlands; Article 105 of the UNCLOS was applied in the *Somali case* with regard to the extradition from Denmark to the Netherlands.

64. a. See section b.

b. Article 2 of the Extradition Act provides that extradition is only granted by treaty; the criminal offences covered by (most) of the treaties relevant for this report are included as extraditable offences in the Extradition Act (see question no. 63).

The Netherlands has made a declaration to the UNTOC which provides that the UNTOC is considered to be the legal basis for cooperation on extradition. The declaration reads as follows:

With reference to Article 16, paragraph 5, under a), of the Convention against Transnational Organized Crime, the Kingdom of the Netherlands declares that it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention¹³²

65. This question is not relevant because extradition is not granted by Statute in the Netherlands.

66. The conditions for granting extradition can be found in chapter II, Articles 2-12 of the Extradition Act. Article 51a(3) Extradition Act provides that the *European Convention on Extradition (1957)* can also be applied, if there is no other extradition treaty applicable.¹³³

Mutual Legal Assistance

With regard to mutual legal assistance it can be noted that this is more of a concept, meaning rules stress that cooperation in criminal matters is desired. The treaties relevant for this report (and the *European Convention on Mutual Assistance in Criminal Matters (1959)*) do however impose obligations on states. Furthermore, the concept of mutual recognition has emerged, whereupon new instruments such as the European Arrest Warrant and the European Evidence Warrant have been based in the European context.

The Public Prosecution Service of the Netherlands (OM) has policy guidelines with regard to legal assistance in criminal matters and how to deal with international requests.¹³⁴ The

¹³² See e.g. *Trb. 2004, 184*, p. 3; *Trb. 2007, 70*, p. 29.

¹³³ See *Trb. 1965, 9*.

department on international legal assistance in criminal matters (AIRS, falling under the Ministry of Security and Justice) is the contact point for international requests for legal assistance in criminal matters.¹³⁵

67. a. See section b.

b. Mutual legal assistance is, as extradition, regulated by treaty in the Netherlands.

68. The Netherlands does have domestic legislation on mutual legal assistance. The Code of Criminal Procedure, especially title X, is relevant, in connection with chapter IV, Articles 46-51a Extradition Act.¹³⁶

69. The provisions on mutual legal assistance, as provided for by the conventions relevant for this report, can be applied in connection with criminal proceedings brought under one of the relevant conventions.

70. The conditions regarding granting mutual legal assistance can be found in chapter IV of the Extradition Act. For example, approval for transportation over Dutch territory will only be granted by treaty according to Article 48(2) Extradition Act.

¹³⁴ Instruction concerning the exchange of information in the context of mutual Legal assistance in criminal matters (2008A024), see <http://www.om.nl/organisatie/beleidsregels/overzicht/internationaal> (last visited in December 2010).

¹³⁵ See <http://www.rijksoverheid.nl> (last visited in January 2011).

¹³⁶ The Extradition Act addresses besides extradition legal assistance in criminal matters.

List of attached relevant domestic legislation and documents

Attachment no. 1: The Constitution of the Netherlands (unofficial translation).

Attachment no. 2: Attachment on the general rules of Dutch criminal law as contained in the Netherlands Criminal Code (rules on attempt, participation, terrorist objective etc.).

Attachment no. 3: *Somali Pirates* case, District Court of Rotterdam, judgment of 17 June 2010, LJN: BM8116, 10/600012-09, (in Dutch).