

# Netherlands' report for the International Association of Penal Law on Ne bis in Idem

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## **AIDP – Non bis in idem**

### **Report for the Netherlands**

by André Klip and Harmen van der Wilt\*

#### **I. Ne bis in idem at the *domestic (national)* level**

##### **1. Is the *ne bis in idem* principle recognized by national law?**

Article 68, paragraph 1 of the Penal Code provides since 1886:<sup>1</sup> “Except in cases in which judgments are susceptible to review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands, the Netherlands Antilles or Aruba has rendered final judgment on the substance of the charges against him.”<sup>2</sup> The principle is usually characterised as the *ne bis in idem* principle.<sup>3</sup> Article 68, paragraph 1, exclusively applies to court decisions. It does not prevent that prosecutions take place in situations where the accused was previously subjected to administrative sanctions, unless this is specifically prohibited.<sup>4</sup> Thus, in principle, *ne bis in idem* is applicable only for decisions of criminal courts.<sup>5</sup> However, it does not apply to the confiscation of the proceeds from crime. The protection is also awarded in respect of decisions of courts in the two other countries of the Kingdom of the Netherlands, the Netherlands Antilles and Aruba. This is logical because on the basis of the 1954 Charter for the Kingdom of the Netherlands: decisions can be enforced throughout the kingdom.<sup>6</sup>

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<sup>1</sup> For an historical overview of the principle in the Netherlands before 1886, see J.M. van Bemmelen, *Nemo debet bis vexari*, *Weekblad van het Recht* 12736, 12737 and 12738 (1934). We refrain from discussing a *ne bis in idem* protection given in Article 15 of the 1855 Act on the Responsibility of Ministers (*Wet van 22 april 1855, houdende regeling der verantwoordelijkheden van de hoofden der ministeriële departementen*). After refusing to order a criminal investigation by parliament a regular criminal prosecution may no longer be initiated.

<sup>2</sup> “Behoudens de gevallen waarin rechterlijke uitspraken voor herziening vatbaar zijn, kan niemand andermaal worden vervolgd wegens een feit waarover te zijnen aanzien bij gewijsde van de rechter in Nederland, de Nederlandse Antillen of Aruba onherroepelijk is beslist.”

<sup>3</sup> See also Peter Baauw, *Ne Bis in Idem*, in: Bert Swart and André Klip, *International Criminal Law in the Netherlands*, Freiburg im Breisgau 1997, p.75-84.

<sup>4</sup> Examples are the 1959 General Act on Taxes (*Algemene wet inzake Rijksbelastingen*) and the 1990 Military Disciplinary Sanctions Act (*Wet militair tuchtrecht*), as well as the 1995 General Act on Welfare (*Algemene Bijstandswet*).

<sup>5</sup> See A.H. Klip, *Ne bis in idem en Bouterse*, *Nederlands Juristenblad* 1998, p.2070 and J. de Hullu, *Materieel strafrecht*, Deventer 2000, p.519.

<sup>6</sup> The mutual enforceability was the reason to treat these decisions as equal to Dutch decisions. This raises the question whether the internal logic of the legislation would not have to extend the recognition to those foreign judgments, that could be enforced in the Netherlands on the basis of an applicable treaty on the enforcement of the execution of judgments.

On the basis of case law the recognition of ne bis in idem has been extended to those offences not formally indicted by the prosecutor but briefly mentioned by the prosecutor in the indictment, the so called “ad informandum” indictment. This is on condition that the accused admitted those offences and that the court took these offences into account in sentencing.<sup>7</sup>

In addition to Article 68, Article 74, paragraph 1, Penal Code stipulates “Before the court hearing has started, the public prosecutor may impose one or more conditions in order to prevent the prosecution for crimes, with the exception of those crimes for which, following the statutory description, a penalty of more than six years is provided, as well as for misdemeanours. By compliance with the conditions the right to prosecute no longer exists.”<sup>8</sup> Article 74a Penal Code stipulates that the Prosecutor may not refuse to accept an offer by the suspect to pay the fine for an offence, for which only a fine is provided, if the suspect is willing to pay the maximum fine provided for in the Code.

Ne bis in idem is only applicable in respect of the same person. In this sense Dutch law distinguishes between the individual responsibility and the criminal responsibility of legal entities. The result is that a natural person may be prosecuted for the same facts after a legal entity was prosecuted for these facts and vice versa.<sup>9</sup>

Article 255 Code of Criminal Procedure should be mentioned here as well. If the Prosecutor has notified a suspect that he does not want to bring charges, he may no longer bring the case to court. This prevents the prosecutor from prosecuting even in case that there is no decision in the sense of Article 68 Penal Code. However, the protection is not absolute. If new inculcating evidence comes up, the Prosecutor is not hindered by Article 255 in bringing the case to court. Dogmatically this is not regarded as a breach of the ne bis in idem rule because the facts were not prosecuted before court.<sup>10</sup> It also means that an investigation as such is not regarded as a prosecution that involves the protection of Article 68. In the rare cases that the Prosecution is inadmissible because of severe violations of the principles of a fair administration of justice (beginselen van een goede procesorde), the Prosecution cannot try its luck again.

In addition to the Dutch Penal Code, the principle is recognised in conventions applicable to the Netherlands, like for instance Article 14, paragraph 7 of the International Covenant on Civil and Political Rights. A reservation was made by the Netherlands: “The Kingdom of the Netherlands accepts this provision only insofar as no obligations arise from it further to those set out in Article 68 of the Criminal Code of the Netherlands and Article 70 of the Criminal Code of the Netherlands Antilles as they now apply. They read: 1. Except in cases where court decisions are eligible for review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands or the Netherlands Antilles has delivered an irrevocable judgement. 2. If the judgment has been delivered by some other court, the same person may not be prosecuted for the same offence in case of (I) acquittal or withdrawal of proceedings or (II) conviction followed by complete execution, remission or lapse of the

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<sup>7</sup> Supreme Court 13 February 1979, NJ 1979, 243.

<sup>8</sup> “De officier van justitie kan voor de aanvang van de terechtzitting een of meer voorwaarden stellen ter voorkoming van de strafvervolgung wegens misdrijven, met uitzondering van die waarop naar de wettelijke omschrijving gevangenisstraf is gesteld van meer dan zes jaar, en wegens overtreding. Door voldoening aan die voorwaarden vervalt het recht tot strafvordering.”

<sup>9</sup> See G.J.M. Corstens, *het Nederlands strafprocesrecht*, 4th edition, Arnhem 2002, p.192.

<sup>10</sup> The relevance of Article 68 in this situation is that for both articles the same criterion for the “same facts” is being used.

sentence.”<sup>11</sup> The Netherlands will not ratify the 1984 Seventh Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms.<sup>12</sup>

## 2. What is considered to be the decisive *rationale* of “ne bis in idem”?

The guarantee contained in the requirement of a previously laid down criminal provision would be merely an illusion if a person could be troubled continually with various aspects of the same offence.<sup>13</sup> The doctrine distinguishes the right not to be prosecuted twice from the right not to be punished twice. At a certain point in time the accused is entitled to be left alone. The state cannot jeopardise the accused unlimited times. The rule of law requires that if the state has initiated a prosecution versus one of its citizens that it will respect the outcome of the proceedings.<sup>14</sup> Decisions of the court should therefore be respected.<sup>15</sup> If *res judicata* would not be final, this would undermine the legitimacy of the state.<sup>16</sup>

## 3. Prerequisites and scope of *ne bis in idem*

Criminal trials in the Netherlands may take place on the facts before two instances. The fact that a case is tried in first instance and in second instance both on the facts is not regarded as a violation of the principle. To the contrary, Dutch law regards the whole chain of procedures (first instance, second instance, Supreme Court) as an integral part of one prosecution within the meaning of Article 68.

The principle can only be applied if the court gave a decision on the substances of the facts, following the procedure of Article 350 Code of Criminal Procedure. That means that the court considered whether the alleged fact has been proven, that the fact is a criminal offence, that the accused is criminally liable and what punishment should be imposed. Should the court apply Article 349, paragraph 1 Code of Criminal Procedure and declare the indictment null and void, declare itself incompetent to hear the case, declare the case inadmissible or suspend the prosecution, then this is not regarded as a final decision in the sense of Article 68.<sup>17</sup> The decisions that deserve the protection of Article 68 are *vrijspraak* (acquittal), *ontslag van rechtsvervolging* (dismissal of the charges) and *veroordeling* (conviction).<sup>18</sup>

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<sup>11</sup> Tractatenblad van het Koninkrijk der Nederlanden/ Treaty Series of the Kingdom of the Netherlands 1978, 177.

<sup>12</sup> The government fears that the extensive interpretation of the European Court of Human Rights of the words “criminal charge” may have consequences for administrative fines, which are excluded under Dutch law from appeal. It therefore does not want to submit the protocol to parliament for ratification. See Kamerstukken II, 2002-2003, 28600 V, p.35.

<sup>13</sup> J. de Hullu, *Materieel strafrecht*, Deventer 2000, p.516-517.

<sup>14</sup> See J. Remmelink, *Inleiding tot het Nederlandse strafrecht*, 13<sup>e</sup> druk 1994, p. 585.

<sup>15</sup> Melai, aant. 5 op Art. 313 Sv.

<sup>16</sup> See G.J.M. Corstens, *het Nederlands strafprocesrecht*, 4th edition, Arnhem 2002, p.191. See further P.A.M. Mevis and T. Kooijmans, *Herziening ten nadele*, Rotterdam 2003, p.106-117.

<sup>17</sup> See Constantijn Kelk, *Studieboek materieel strafrecht*, 2<sup>e</sup> druk 2001, p.60-61.

<sup>18</sup> Recently the prohibition for the Supreme Court to revise an acquittal has been abolished. Article 430 of the Code of Criminal Procedure has been repealed by Act of 31 October 2002, Stb. 2002, 539 entering into force on 1 January 2003.

Most problems in practice result from the determination of whether we deal with “the same facts” (hetzelfde feit).<sup>19</sup> The finding that the facts are the same as in an earlier case are essential to its application. The prevailing rule in the case law since 1963 is that we deal with the same facts if “facts were committed under circumstances out of which apparently a link exists between the temporal coincidence of the acts and the essential coherence between acts and guilt of the perpetrator”.<sup>20</sup> In a decision from 1972 the Supreme Court added an additional element to the criterion requiring that it concerns a similar reproach of guilt.<sup>21</sup>

In sum, the Dutch approach combines the historical facts with the legal qualification of the crime for which the accused is prosecuted twice. If a second crime based on the same historical facts protects entirely different values, then the accused may not enjoy the protection of Article 68. That does not lead to a principle that can be easily applied.<sup>22</sup> An exception to the combination of the historical facts and the legal qualification is the out-of-court-settlement (transactie). In these cases a legal qualification is the basis only.

The application of the principle causes more and more problems with regard to certain crimes with very broad descriptions as to their application in time and place. An example of this is Article 140 Penal Code, criminalising participation to an organisation which aim it is to commit crimes. Is it possible to prosecute both for the participation in the criminal organisation as for one of the individual crimes the organisation has committed? In a 1996 decision the Supreme Court ruled that a second prosecution may not take place, whereas a parallel prosecution could have taken place.<sup>23</sup>

In the 1963 decision the Supreme Court distinguished between the concept of same facts within the meaning of Article 68 and the concept of concursus of Article 55 and 57 Penal Code. The latter regulated the consequences for one historical fact that may generate more than one offence. The outcome was that the accused may be prosecuted for more than one crime based on the same historical facts, as long as the prosecution takes place at the same time.<sup>24</sup>

This corresponds to the limitations under which a Prosecutor may amend an indictment already issued. Article 313 Code of Criminal Procedure provides that under no circumstances an amendment may be granted that would amount to other facts in the meaning of Article 68 Penal Code. In the Meindert Tjoelker decision the Supreme Court held that in cases of amendment of the indictment it is not necessary that the purpose of the offences is the same.<sup>25</sup> However, an amendment is inadmissible if the purpose of the different offences would divert

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<sup>19</sup> It is interesting to note that the parliamentary history of Article 68 does not pay attention to what should be understood as “fact” (feit). See H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht 1891*, 1<sup>e</sup> deel, p.502-508.

<sup>20</sup> Supreme Court 17 December 1963, *Nederlandse Jurisprudentie 1964*, 385: “onder omstandigheden waaruit blijkt van een zodanig verband met betrekking tot de gelijktijdigheid van de gedragingen en de wezenlijke samenhang in het handelen en de schuld van de dader, dat de strekking van artikel 68 Sr meebrengt, dat zij in de zin van dat artikel als hetzelfde feit zijn aan te merken.” See for earlier case law views on the same facts *De Hullu*, o.c., p.524-525.

<sup>21</sup> Supreme Court, 18 January 1972, *NJ 1972*, 378.

<sup>22</sup> See also J.A.W. Lensing, “Feit”, *artikel 68 Wetboek van Strafrecht en dubbele vervolging*, in: *Dynamisch strafrecht (Corstens-bundel)*, Arnhem 1995, p.203-220.

<sup>23</sup> Supreme Court 26 November 1996, *NJ 1997*, 209.

<sup>24</sup> *De Hullu* (o.c., p.534-537) criticizes that the concepts differ, but also admits that it is difficult to present an alternative.

<sup>25</sup> The case gives the impression that the Court might be more willing to extend the concept of the same facts in a situation of an amendment of the indictment than in case of a second prosecution. However, this is speculation.

on essential points.<sup>26</sup> In this context the Supreme Court accepted an amendment of the indictment by which the period in which the crimes have been committed was extended.<sup>27</sup> At first sight it seems that the Supreme Court has given up the requirement of a temporal coincidence of the crime(s). However, such amendments have been granted with specific crimes only, such as participation in a criminal organisation. Since the crime as such is committed over a longer period by definition, the exactitude of the temporal coincidence is less decisive. De Hullu concludes that basically the whole question is determined and decided by the factual circumstances of each case.<sup>28</sup>

#### **4. What are the legal consequences of the application of ne bis in idem?**

As soon as a decision is irrevocable the protection of Article 68 is called to life.<sup>29</sup> Unlike the recognition of foreign decisions, for Dutch decisions it is not required that these have been (completely) enforced. Under Dutch law the consequences of a finding of a ne bis in idem situation are very clear. It means that the prosecutor has lost the right to prosecute and that the case will be declared inadmissible. The Netherlands apply the Erledigungsprinzip. No exceptions to the rule exist, even in cases in which new inculpatory evidence appears that would certainly have led to a different outcome than the acquittal in the first trial.

However, compliance with the conditions set by the Prosecution is open for some form of review. Article 12 and following of the Code of Criminal Procedure allows for a complaint by an interested person against a decision by the Prosecutor not to prosecute.<sup>30</sup> If the Court of Appeal, that is competent in such cases, subsequently orders the Prosecution to prosecute, he must comply with that order (Art. 74b Penal Code) and the earlier out-of-court settlement is declared null and void.

#### **5. Are there exceptions from the principle of ne bis in idem?**

Review of convictions may only take place if that is favourable to the convicted person (Article 457 Code of Criminal Procedure). Such a review is limited to two circumstances. The first is when different court decisions are incompatible with each other. The second is when evidence subsequently makes it likely that, had the trial court known the newly discovered facts, it would have taken a more favourable decision for the convicted person. In practice requests for review are hardly ever declared admissible.<sup>31</sup> Theoretically, review (herziening) is not regarded as being related to ne bis in idem. The initiative lies with the convicted person and his situation may not get worse as a result of this procedure. In conclusion: there are no exceptions to the principle.

## **II. Ne bis in idem in cases involving “horizontal (trans)national concurrence”**

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<sup>26</sup> Supreme Court 2 November 1999, NJ 2000, 174.

<sup>27</sup> Supreme Court 2 July 2002, LJN: AE3728 and Supreme Court 24 December 2002, LJN: AE9043.

<sup>28</sup> J. de Hullu, commentary to Supreme Court 2 November 1999, NJ 2000, 174.

<sup>29</sup> In cases of compliance with the conditions as meant in Article 74, the right to complain about non prosecution lapses three months after an interested person learnt of the application of this provision. See Article 12k Code of Criminal Procedure.

<sup>30</sup> Regardless of the reasons for that decision, or whether a normal decision as meant in Article 255 Code of Criminal Procedure or Article 68 Penal Code was taken.

<sup>31</sup> A recent exception is Supreme Court 26 June 2001, NJ 2001, 564.

## 1. Preliminary substantive-legal question

The general rapporteurs correctly observe that the proliferation of jurisdictional claims augments the risk of multiple prosecutions in several countries. In view of the efforts to restrict double prosecution in international perspective as far as possible, these developments call for proper solutions for positive jurisdiction conflicts as a matter of urgency. We will deal with this question in the final part of our report.

As far as the Dutch criminal law system is concerned, in times past it showed a remarkably restrained position as to the establishment and exercise of extraterritorial jurisdiction.<sup>32</sup> Out of respect for foreign *res judicata* and in order to avoid conflicts of jurisdiction, the only bases for extraterritorial jurisdiction recognised by the Dutch Criminal Code until recently were the active personality principle and the protective principle. The gradual expansion of extraterritorial jurisdiction after World War II was triggered by two different motives, the inclination to afford better protection for national interests abroad and international solidarity which mainly manifested itself in the ratification and implementation of multilateral treaties aiming at the repression of international crimes.

As in almost all criminal law systems, the territoriality principle is the prime basis for jurisdiction in the Dutch Penal Code (Article 2). Application of the principle begs the question where the conduct involving the commission of a crime is located, a question left for case law to resolve. According to a rather ancient decision of the Supreme Court, the *locus delicti* may not only be the place where the perpetrator physically acted but also the place where the instrument used by the perpetrator had its effect.<sup>33</sup> Recent case law of the Supreme Court sustains the exercise of jurisdiction over accomplices acting abroad in support of crimes which are committed on Dutch territory.<sup>34</sup> Whereas this expansion of jurisdiction had already been established in specific provisions in the Economic Offences Act (Article 3) and the Opium Act (Article 13), it is now generally acknowledged for all offences. In the reverse situation – participation in the Netherlands in an offence committed abroad – it is usually assumed that the Netherlands have jurisdiction, but whether this power is subject to additional conditions (for instance whether the conduct constitutes a criminal offence under the law of the foreign state) is still not entirely clarified.<sup>35</sup> Article 3 of the Penal Code containing the so called principle of the flag establishes jurisdiction over offences committed on board a Dutch vessel or aircraft and can be considered as an extension of the territoriality principle.

The protective principle is applicable to a limited number of offences which are committed abroad and affect vital Dutch interests. For one thing, Article 73 of the General Act on Taxes extends Dutch jurisdiction over tax crimes, mentioned in the Act, which have been committed abroad, suggesting that Dutch financial interests might be jeopardised from without.<sup>36</sup>

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<sup>32</sup> For a useful survey in English of the Dutch law on criminal jurisdiction, see Marius Teengs Gerritsen, *Jurisdiction*, in: Bert Swart and André Klip (Eds.) *International Criminal Law in the Netherlands*, Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Band S 66, Freiburg im Breisgau 1997, p. 49-73

<sup>33</sup> Supreme Court 6 April 1954, NJ 1954, 368 (Singapore-case).

<sup>34</sup> Supreme Court 18 February 1997, NJ 1997, 628.

<sup>35</sup> For a critical analysis of case law and legal doctrine, see H.D. Wolswijk, *Locus delicti en rechtsmacht*, Gouda Quint: Deventer 1998, p. 227-244

<sup>36</sup> Algemene wet inzake rijksbelastingen (General Act on Taxes), 2 July 1959, Stb. 1959, 301. We are indebted to Mr. C. F. Mulder for providing us with useful information in this regard.

Furthermore, Article 4 of the Penal Code enumerates a number of offences to which the protective principle applies. The list comprises *inter alia* offences against the security of the (Dutch) state (Article 4, paragraph 1), offences against the royal dignity (paragraph 2), falsification of official documents and the offence of impeding Dutch authorities in their investigation of criminal offences outside Dutch territory (paragraph 5). Some paragraphs of Article 4, notably paragraphs 7 and 8, do not only aim at the protection of Dutch aircraft and vessels against unlawful seizure or other offences, but serve to implement a number of multilateral treaties, broadening the scope of criminal law protection to foreign aviation and shipping mainly against terrorist offences as well.<sup>37</sup> However, the exercise of jurisdiction is premised on the condition that the suspect is present on Dutch territory and thus the regulation exemplifies the application of the *aut dedere, aut judicare*-principle. Moreover, the Netherlands has made reservations to most treaties of this kind, indicating that prosecution by the Netherlands is only a secondary option if the Netherlands has received and rejected an extradition request from a state party who is better equipped to start criminal proceedings on the basis of the territoriality principle or the active personality principle.<sup>38</sup> As is well known, the *aut dedere, aut judicare*-principle is generally considered as the modern variant of the universality principle. The circumspect and restrictive application of the *aut dedere, aut judicare*-principle in the Netherlands corroborates our thesis that the Dutch are rather reluctant to establish and exercise extraterritorial jurisdiction. The unrestricted universality principle is only applicable to piracy and counterfeiting currency.<sup>39</sup> Both regulations derive from explicit treaty obligations which reveals another – though closely connected – aspect of the Dutch view on expanding jurisdiction: the application of the principle of universality is only possible if a treaty not only allows but enjoins state parties to establish jurisdiction. A comprehensive system of jurisdiction based on the principle of *aut dedere, aut judicare* in relation to the core crimes, belonging to the jurisdiction of the International Criminal Court is envisaged in the draft Statute for international crimes which implements the Rome Statute and which will shortly (partially) replace the 1952 Act on criminal law in time of war.

Similar proof of the self imposed restraint of the Netherlands as regards extraterritorial jurisdiction is the rejection of the passive personality principle. Only the 1952 Act on criminal law in time of war explicitly recognises this principle as a basis for jurisdiction. To a certain extent, paragraphs 9 –11 of Article 4 which declare Dutch criminal law applicable to offences against internationally protected persons in Dutch service and corruption committed abroad against Dutch civil servants reveal concern for Dutch nationals abroad. Nevertheless, the protection of Dutch (abstract) interests seems to prevail which indicates that these are examples of the protective principle. Moreover, the exercise of jurisdiction is premised on the condition that the conduct constitutes a criminal offence in the foreign state as well.

The Dutch inclination to put the exercise of jurisdiction in the key of international co-operation in criminal affairs comes to the fore in Article 4a Penal Code which contains the so called representation principle. According to this provision the Netherlands may derive criminal jurisdiction from a foreign state, provided that such a transfer of proceedings is based on a treaty.

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<sup>37</sup> These treaties are the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol.

<sup>38</sup> For obvious reasons this reservation has not been made to the 1984 Torture Convention.

<sup>39</sup> Article 4, paragraphs 3 and 5 Dutch Penal Code.

Finally, mention should be made of the active personality principle which features in Article 5 Penal Code in both a restrictive and an unrestrictive version. According to Article 5 paragraph 1 sub 1 Dutch criminal law is applicable to Dutch nationals committing certain criminal offences abroad – including bigamy and making oneself unsuitable for military service – irrespective of the question whether these acts constitute criminal offences in the foreign state. Article 5, paragraph 1 sub 2 on the other hand, introduces the requirement of double criminality as a precondition for the exercise of jurisdiction over nationals who have committed crimes abroad. In the past the provision served as a compensation for the non extradition of Dutch nationals and in this respect there is a certain connection (though a weak one) with the concept of international solidarity as the basis for the exercise of jurisdiction.<sup>40</sup> Following EU decisions, the Netherlands have introduced a domicile principle in Article 5a Penal Code in respect of sexual abuse of minors in 2002.

## **2. In your country, is the principle of ne bis in idem also prescribed on a transnational level?**

The relevant provisions in Dutch law, governing the ne bis in idem-effect of foreign res judicata within the Dutch legal order are Article 68, paragraphs 2 and 3 of the Penal Code. Article 68, paragraph 2 precludes criminal proceedings in the Netherlands after a final judgement has been rendered by a foreign court in case of acquittal or dismissal of the charges and in case of conviction, if punishment has been imposed, followed by complete enforcement, pardon or lapse of time. Furthermore, according to paragraph 3 of Article 68 criminal prosecution in the Netherlands is barred by the fulfilment of a condition set by the competent authorities of a foreign state to prevent prosecution. We will deal more thoroughly with the legal content of these judicial decisions in paragraphs 3 and 4.

Although the Dutch regulation of transnational ne bis in idem lacks constitutional status, it is generally considered as being rather generous towards foreign res judicata, offering a wide measure of protection against double jeopardy.<sup>41</sup> Moreover, the Netherlands is a party to several international treaties which contain provisions on the principle of ne bis in idem within an international context. If these international provisions were to offer wider protection than the national regulation, they would certainly prevail in view of Articles 93 and 94 of the Dutch Constitution. These constitutional provisions proclaim primacy of conventional law over national law, including statutes, provided that the international regulations are binding on all persons. Undoubtedly, provisions on ne bis in idem are self-executing as they confer rights on individual persons.

Within the realm of conventions which deal with the international ne bis in idem-principle a distinction can be made between human rights treaties and conventions on international co-operation in criminal affairs. As to the first category, Article 14, paragraph 7, of the International Covenant on Civil and Political Rights provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. The Netherlands has made a reservation to this provision, indicating that it would not recognise the ne bis in

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<sup>40</sup> Cf. M.Teengs Gerritsen, o.c. (1987), p. 61.

<sup>41</sup> Cf. Peter Baauw, Ne Bis in Idem, in: Bert Swart and André Klip (Eds.) *International Criminal Law in the Netherlands*, Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Band S 66, Freiburg im Breisgau 1997, p. 79; Tom Vander Beken, *Forumkeuze in het internationaal strafrecht*, Maklu: Antwerpen-Apeldoorn 1999, p. 270.

idem principle to extend beyond Article 68 of the Dutch Penal Code as it applied at the moment of ratification.<sup>42</sup> The background to this reservation was that the Dutch government was in doubt whether Article 14, paragraph 7, would only cover the national application or also the international application of the ne bis in idem principle. In the latter case the courts would probably be obliged to deduct the sentence served abroad in case the sentence had not completely been enforced, a requirement which Article 68, paragraph 2 does not mention. Here we stumble on one of the weak spots of the Dutch regulation of the international ne bis in idem, a point which we will explore in more detail below. Anyway, the Dutch fear was unwarranted, as the Human Rights Committee has ruled that Article 14, paragraph 7, does not apply to foreign res judicata.<sup>43</sup>

The European Convention on Human Rights does not contain provisions on ne bis in idem. On several occasions the former European Commission on Human Rights denied the applicability of Article 6 to multiple prosecutions for the same fact, although it did not completely rule out the possibility that in specific circumstances a second prosecution might militate against the fair trial-principle of Article 6.<sup>44</sup> Article 4, paragraph 1 of the 1984 Seventh Protocol to the European Convention however, does contain a provision on ne bis in idem. The phrasing of the provision excludes any misunderstanding that it does not apply to decisions of foreign courts.<sup>45</sup> Anyhow, the Protocol does not affect the Dutch regulation, as the Netherlands will not ratify this instrument.

Two instruments on international co-operation in criminal affairs – the European Convention on the International Validity of Criminal Judgements and the European Convention on the Transfer of Proceedings in Criminal Matters – have rather extensive regulations on the ne bis in idem principle on the international level, which are not related to the international co-operation.<sup>46</sup> Both regulations are practically similar in content. These conventions have been drawn up within the institutional framework of the Council of Europe and the Netherlands is a party to both conventions, a privilege which it shares with a growing number of states.<sup>47</sup> For the Netherlands these regulations are of minor importance, as Article 68, paragraphs 2 and 3 offer wider protection. Both conventions allow for exceptions in those cases in which a state's jurisdiction is founded on the territoriality principle, when it's vital interests are in jeopardy or when it's civil servants are implicated in the commission of an offence. The Dutch provision makes no allowance for such exceptions.

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<sup>42</sup> See *supra* I.1.

<sup>43</sup> UN Human Rights Committee 2 November 1987, Report 204/1986, *A.P. v. Italy*, Rechtspraak Vreemdelingenrecht 1988, 95.

<sup>44</sup> European Commission on Human Rights, 13 July 1970, Applications nr. 4212/69, in: Collections of Decisions and Reports 35, p. 151 and 154. Compare also H.G.M. Krabbe and W.F. van Hattum, *De ne bis in idem-regel in de rechtspraak van het EHRM*, in: 30 Delikt en Delinkwent (2000), p. 8.

<sup>45</sup> Article 4, par. 1 reads: 'No one shall be liable to be tried or punished again in criminal proceedings *under the jurisdiction of the same State* for an offence for which he has already been finally acquitted or convicted *in accordance with the law and penal procedure of that State*' (italics added).

<sup>46</sup> European Convention on the International Validity of Criminal Judgments, Strasbourg 28 May 1970, ETS No. 70, Articles 53-57; European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg 15 May 1972, ETS No. 73, Articles 35-37.

<sup>47</sup> The European Convention on the International Validity of Criminal Judgments is ratified by Austria, Cyprus, Denmark, Estonia, Georgia, Iceland, Lithuania, Norway, Romania, San Marino, Spain, Sweden and Turkey. Georgia, Iceland and San Marino have not ratified the European Convention on the Transfer of Proceedings in Criminal Matters, but all the other states just mentioned did. Besides, the Convention on the Transfer of Proceedings in Criminal Matters has been ratified by Albania, Czech Republic, Latvia, Slovakia, Ukraine and Yugoslavia (reference date: 1-1-2003).

The 1987 Convention between the Member States of the European Communities on Double Jeopardy specifically deals with the issue of *ne bis in idem* in transnational relations.<sup>48</sup> This convention has largely been superseded by Articles 54 to 58 of the 1990 Convention applying the Schengen Agreement.<sup>49</sup> Basically, these regulations follow the same approach as the Conventions of the Council of Europe, although they offer more refined solutions in a number of respects. For one thing, Article 54 of the Schengen Convention maintains the possible exception to the ban of *ne bis in idem*, if the crime has been committed on the territory of the state-party considering a second prosecution, but this exception is precluded if the crime has partially been committed on the territory of the state who irrevocably decided the case in criminal proceedings. Secondly, the Schengen Convention enjoins state parties to make explicit declarations in case they want to invoke the exceptions provided for in Article 54. Finally, both the 1987 Convention and the Schengen Convention do not only preclude multiple prosecution after sentence has been passed involving deprivation of liberty, but also offer protection if the sentence amounted to the imposition of a fine.

The risk of insoluble conflicts between the provisions of the conventions just mentioned is virtually extinct. As the provisions in the human rights treaties do not apply to international *ne bis in idem*, any conflict with the regulations of the other conventions is by definition precluded. The Schengen-provisions will govern the relations between the state-parties, prevailing over the older instruments, as they cover the same issue and figure as *lex posterior vis à vis* their predecessors.

Reference need to be made to recent developments within the European Union. On 11 February 2003, the Court of Justice took a decision concerning Article 54 Convention Applying the Schengen Agreement, and interpreted the concept of an “area of freedom, justice and security”, as introduced by the Treaty of Amsterdam. The Court of Appeal in Köln (Oberlandesgericht Köln) and the Court of First Instance in Veurne (Rechtbank van Eerste Aanleg te Veurne) had lodged the first request for a preliminary ruling with the Court of Justice.<sup>50</sup> Does Article 54 Schengen preclude a second prosecution before a German court when according to Dutch law the matter can no longer be prosecuted because it is already settled? Is Belgian Prosecution and the claim of the civil party barred if the accused concluded a settlement with the Prosecution in Germany? Is it relevant that the form of settlement is unknown in the state that wants to prosecute? Especially the transnational application of *ne bis in idem* suffers from problems of interpretation.<sup>51</sup> In this case not only the exact formulation of the *ne bis in idem* principle in the Convention is important, but also its context: they are the area of freedom, justice and security and the principle of mutual recognition.<sup>52</sup> If one regards the European Union as a single judicial area (whatever that

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<sup>48</sup> Brussels, 25 May 1987, Trb. 1987, 167. The Convention has been ratified by and is provisionally applied between Denmark, France, Italy, the Netherlands and Portugal.

<sup>49</sup> Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen 19 June 1990. Later on, Italy, Greece, Portugal and Spain have ratified the Convention.

<sup>50</sup> Request of the Oberlandesgericht Cologne of 30 March 2001 for a preliminary ruling in the criminal proceedings against Hüseyin Gözütok, Case Number C-187/01, OJ 2001, C 212/10; Reference for a preliminary ruling by the Rechtbank van Eerste Aanleg te Veurne by Judgment of 4 May 2001 in criminal proceedings brought against Klaus Fritz Brügge; civil party: Benedikt Leliaert, Case Number C-385/01, OJ 2001, C 348/15.

<sup>51</sup> See J.A.W. Lensing, *Ne bis in idem* in strafzaken; een rechtsvergelijkende en internationaalstrafrechtelijk oriëntatie, Preadvies voor de Nederlandse Vereniging van Rechtsvergelijking 2000, No.60, see also the interventions, in No.61, 2001.

<sup>52</sup> See also the Framework Decision on a European Arrest Warrant of 13 June 2002.

exactly may mean), concurrent jurisdiction forces to recognition of decisions taken by other authorities in the same area.

The Court of Justice starts off by mentioning that nowhere in the Treaty on European Union nor in the Schengen Convention is the application of Article 54 “made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is banned.”<sup>53</sup> The Court further holds that the objective of Article 54 “is to ensure that no one is prosecuted on the same facts in several Member States *on account of his having exercised his right to freedom of movement.*”<sup>54</sup> The latter phrase should not be interpreted that the origin of Article 54 aimed at limiting the protection to those convicted European Union citizens who are entitled to free movement. A more convincing argument is that Article 54 should also apply to out-of-court-settlements because otherwise only those who commit serious crimes would profit from the protection offered by the principle. Although the decision can be welcomed because it will protect citizens and prevent second prosecutions, it is absolutely clear from the negotiations on the Schengen Convention that the parties did not want to extend its protection over other decisions than court decisions.

The third institutional framework in which the *ne bis in idem*-principle has found recognition is the European Union. The conventions which have been drafted in order to deal with the protection of the financial interests of the EU in particular, contain provisions which aim to prevent double criminal prosecution. Article 7 of the Convention on the Protection of the European Communities’ Financial Interests is modelled after the regulation in the Schengen Convention.<sup>55</sup> Similar provisions are to be found in the First Protocol to the Convention on the Protection of the European Communities’ Financial Interests (Article 7) and in the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (Article 10).<sup>56</sup> Of special interest is Article 12, paragraph 2 of the Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests, as it extends the application of the *ne bis in idem*-principle to the benefit of legal persons as well.<sup>57</sup>

The Framework Decision on the European Arrest warrant and the surrender procedures between Member States distinguishes – as far as the effect of prior prosecutions are concerned – between grounds for mandatory non-execution and grounds for optional non-execution.<sup>58</sup> According to Article 3, paragraph 2, a final judgment in another Member State constitutes a ground for mandatory refusal, provided that, if the requested person was sentenced, the sentence has been served, or is currently being served or may no longer be executed under the law of the sentencing Member State. The executing state may invoke a final judgment in a third state, subject to the same proviso’s, as a ground for optional refusal. Similarly, decisions not to prosecute for the offence on which the arrest warrant is based or to halt proceedings, either in the executing state or in another Member State, may serve as a legitimate reason for the state to deny the execution of the arrest warrant (Article 4, paragraphs 3 and 5).

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<sup>53</sup> Court of Justice, 11 February 2003, joined cases Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01), par. 32.

<sup>54</sup> *Idem*, par. 38.

<sup>55</sup> Brussels, 26 July 1995, OJ 1995 C 316/33.

<sup>56</sup> Respectively Brussels, 27 September 1996, OJ 1996 C 313/3 and Brussels, 26 May 1997, OJ 1997 C 195/1.

<sup>57</sup> Brussels, 19 June 1997, OJ 1997 C 221/11.

<sup>58</sup> Brussels, 13 June 2002, OJ 2002, L 190/1.

Although the *ne bis in idem*-provisions on an international level certainly contribute to the reduction of the risk of multiple prosecutions, a more positive approach involving the quest for finding the best place of prosecution would be preferable.<sup>59</sup> Inter-state consultation in the pre-trial phase is an important first step to accomplish this goal. The consultation-procedure envisaged in Article 30 of the European Convention on the Transfer of Criminal Proceedings may serve as a model.<sup>60</sup> The European Union has followed suit by incorporating such consultation-procedures in several of their instruments.<sup>61</sup> Even more appropriate would be a central European body, supervising and co-ordinating the initiatives of EU-Member States to start criminal proceedings and giving them advice as how to centralise the prosecution in one Member State, in order to avoid jurisdiction conflicts and double jeopardy. In this field EUROJUST may serve a useful function in the near future, as this task is especially mentioned in the Framework decision which created the organisation.<sup>62</sup>

The procedural consequence of an imminent double prosecution in violation of Article 68, paragraph 2 or 3 is that the Public Prosecutor will be held inadmissible in his claim. According to Article 348 of the Dutch Code of Criminal Procedure, the court has to inquire *ex officio* whether the Prosecutor's claim is admissible. The defendant may invoke the inadmissibility of the Prosecutor and the verdict must, in case of rejection of the defence, contain a formal and motivated explanation (Article 358, paragraph 3 Code of Criminal Procedure). Subsequently, the defendant may appeal against the judgement and finally lodge an appeal with the Supreme Court.

### **3. Prerequisites and scope of the horizontal application of *ne bis in idem***

The interpretation of the concept of "same offence" in Dutch case law for the purpose of the application of the *ne bis in idem*-principle has already been addressed exhaustively in the first section of this report. It might be useful to summarise the main features and point at some specific problems which may arise in the context of *ne bis in idem* on an international level, as the General Rapporteurs suggest. The Dutch Supreme Court takes as point of reference whether there is a close connection as to the simultaneity of the behaviour and an essential coherence of the acts and the nature of the reproaches that can be made to a person.<sup>63</sup> This middle of the road approach implies that the courts attach value to both the factual situation and the legal assessment of the offence. In a more recent decision the Supreme Court held that

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<sup>59</sup> On this issue: Tom Vander Beken, Gert Vermeulen, Soetekin Steverlynck and Stefan Thomaes, *Finding the Best Place for Prosecution; European study on jurisdiction criteria*, Maklu: Antwerpen/Apeldoorn 2002.

<sup>60</sup> This provision stipulates that any Contracting State which is aware of proceedings pending in another Contracting State against the same person in respect of the same offence must consider whether it can either waive or suspend its own proceedings, or transfer them to the other State.

<sup>61</sup> Vander Beken et al. (o.c., 2002, p. 31) mention Article 7, paragraph 3 of the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, OJ 14 June 2000, L 140/1 which reads as follows: 'Where more than one Member State has jurisdiction and has the opportunity for viable prosecution of an offence based on the same facts, the Member States involved shall co-operate in deciding which Member State shall prosecute the offender or offenders with a view to centralising the prosecution in a single Member State, where possible'.

<sup>62</sup> Council decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 6 March 2002, L63/1. See especially Articles 6 a sub ii (Eurojust acts through its national members) and 7 a sub ii (Eurojust acts as a college): 'Eurojust can ask the competent authorities of the Member States to accept that another Member State is in a better position to undertake an investigation'.

<sup>63</sup> See for instance Supreme Court 21 November 1961, NJ 1961, 89 and Supreme Court 5 February 1963, NJ 1963, 320.

if the purpose and scope of the various criminal provisions were to diverge substantially, the *ne bis in idem*-principle would not apply.<sup>64</sup>

The interpretation of the *ne bis in idem*-principle on an international level does not differ from the one applied in the domestic context. Case law is scarce, but we may point at an interesting decision in which the Supreme Court overturned the District Court's ruling that export of soft drugs from the Netherlands and import into Belgium constituted different offences. The defendant, after having been convicted for the latter offence in Belgium, stood trial again for the former offence in the Netherlands. The Supreme Court suggested that, in view of the simultaneity of the conduct and the similar scope of the criminal provisions, prosecution in the Netherlands was barred under Article 68, paragraph 2 of the Penal Code.<sup>65</sup>

The General rapporteurs have put some pertinent questions as to how the identity of the crime might be affected by different concepts of substantive criminal law in the various countries and the resulting differences in their legal assessments. Given the absence of relevant case law we find it hard to come up with clear cut answers, but we might tentatively submit some solutions. In view of the applicable standards expounded above, it is suggested that courts will shift the emphasis on the factual circumstances of the case, taking into account that criminal provisions in different countries do not always match.<sup>66</sup> They might investigate whether the foreign criminal provision corresponds to a large extent with the Dutch indictment and only in case of substantial divergence conclude that *ne bis in idem* does not apply.

It is important here to note that the concept of non-bis-in-idem in civil law countries and double jeopardy in common law countries differs considerably.<sup>67</sup> Whereas common law countries in principle provide for one trial on the facts, civil law countries may regard an appeal on the facts as included in the concept "one trial". In addition, many civil law countries will provide for an appeal by the prosecutor against an acquittal. These differences of opinion as to the extent of the protection of the principle or rule are important in the understanding of the principle as it emerges from national law or as it appears in Statutes of international criminal tribunals. In this context it is important to note that the recognition of a foreign decision as relating to the same facts is unilateral and does not bind the state whose decision has been recognised to attach a similar protection. As a consequence, even in situations that both states (or both jurisdictions) apply a transnational recognition of the *ne bis in idem* principle the application in practice may differ tremendously due to the diverging concepts of "same facts".

Some clues may be offered by reasoning by analogy. In the domestic context the Supreme Court has been confronted with the problem whether, in view of the *ne bis in idem*-principle, a conviction for participation in a criminal organisation – constituting a criminal offence

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<sup>64</sup> Supreme Court 2 November 1999, NJ 2000, 174. In this particular case the Supreme Court did not consider the criminal law provisions prohibiting 'public assault and battery' and 'manslaughter' to be substantially divergent in their scope and purpose.

<sup>65</sup> Supreme Court, 13 December 1994, NJ 1995, 252. It is interesting to note that the Supreme Court in this decision deviates from previous case law and even defies Article 36 of the Single Convention on Narcotic Drugs (New York, 30 March 1961, Trb. 1962, 30). After all, paragraph 2, sub a (i) of Article 36 prescribes that each of the offences enumerated in the paragraph 1 – including importation and exportation – shall be considered as a distinct offence, if committed in different countries. However, the provision makes allowance for deviations, based on constitutional limitations, the legal system and domestic law of a State Party.

<sup>66</sup> Noyon/Langemeyer/Rommelink, *Wetboek van Strafrecht* (loose-leaf commentary on the Dutch Penal Code) – Suppl. 97 (June 1998), Vol. I, p. 486b: "It is unlikely to happen frequently that a decision of a foreign court will cover entirely the same "fact" under Dutch criminal law."

<sup>67</sup> See The Law Commission, *Double Jeopardy*, Consultation Paper No.156, 1999 and Lensing, o.c.

under Article 140 of the Dutch Penal Code – would preclude a new prosecution for the very offences, if they were actually to be committed. Although in the opinion of the Supreme Court the preparatory act of participation and the actual commission of the crimes constituted several offences in the sense of Article 68 Penal Code, a new prosecution would militate against the principles of a proper criminal procedure.<sup>68</sup> A similar line of reasoning might be followed in the case of judging a continuous offence in the light of the *ne bis in idem*-principle.<sup>69</sup> However, the Public Prosecutor may circumvent the *ne bis in idem*-effect by taking care to charge the aspects of the continuous offence at different time intervals.<sup>70</sup> As far as the multiple prosecution of legal persons and principals, acting on behalf of the legal person, is concerned the Supreme Court follows the same approach. In this case the *ne bis in idem*-principle is not applicable, for the simple reason that the prosecution does not concern the same person. Nevertheless, the Supreme Court opined that in exceptional circumstances a prosecution of the principals, after the legal person had been convicted and sentenced to a considerable fine, might violate the principle of an equitable appraisal of interests.<sup>71</sup>

As expounded above, the protection against double jeopardy offered by Article 68, paragraphs 2 and 3 is rather broad, as the provisions do not differentiate between the kind of offence, the state where the foreign judgement has been pronounced, the place where the offence was committed or the jurisdictional basis of the foreign judgement.<sup>72</sup> None of the exceptions which are proposed in the treaties to mitigate the effects of the international *ne bis in idem*-principle are incorporated in Dutch legislation. A rather complicated issue involves the question whether only decisions by foreign criminal courts would bar prosecution in the Netherlands or that the *ne bis in idem*-effect would extend to judgements of other courts or public authorities as well. It is uncontested that disciplinary measures and civil judgements do not preclude criminal proceedings in relation to the same facts.<sup>73</sup> However, the outcome may be different in case of cumulation of fiscal fines or custom fines, imposed by tax officials, and criminal proceedings, due to the fact that the Supreme Court, following the autonomous interpretation of ‘criminal charge’ by the European Court on Human Rights, has assumed that the fiscal fine has a punitive and deterrent purpose.<sup>74</sup> In the domestic context the problem has been solved by the introduction of the *una via*-principle, incorporated in several statutes, which enjoins the public authorities to choose between administrative proceedings and criminal law enforcement.<sup>75</sup> In fiscal affairs this solution would be less viable in view of the divergent purpose of tax law and criminal law enforcement.<sup>76</sup>

Article 68, paragraph 2 stipulates that criminal prosecution in the Netherlands for the same criminal offence is foreclosed if *final* judgement has been rendered by a foreign court which

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<sup>68</sup> Supreme Court, 26 November 1996, NJ 1997, 207.

<sup>69</sup> The concept of “continuous offence” for the purpose of reduction of punishment is recognized in Article 56 of the Dutch Penal Code.

<sup>70</sup> Noyon/Langemeyer/Rommelink, o.c., (1998), p. 492a and Supreme Court 14 June 1994, *Delikt en Delinkwent* 94.392.

<sup>71</sup> Supreme Court 20 June 1990, NJ 1990, 811. Compare also A.L.J. van Strien, *De rechtspersoon in het strafproces*, SDU: Den Haag 1996, p. 195-196.

<sup>72</sup> Baauw, o.c., (1997), p. 79. Compare also H.G.M. Krabbe and H.M. Poelman, *Enkele aspecten van het ne bis in idem-beginsel in internationaal verband*, in: Liber Amicorum Th.W. van Veen, Arnhem 1985, p. 138.

<sup>73</sup> Noyon/Langemeyer/Rommelink, o.c., (1998), p. 485.

<sup>74</sup> Supreme Court 19 June 1985, NJ 1986, 116.

<sup>75</sup> Cf. First part of this report and J.A.W. Lensing, *Ne bis in idem in strafzaken*, Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, Arnhem 2000, p. 121-125.

<sup>76</sup> Nevertheless, Article 67o of the General Act on Taxes rules out the imposition of an administrative fine if criminal proceedings have been pursued and reached the trial phase or if the right to institute criminal proceedings has expired.

means that the judgement is irrevocable. In the Explanatory Report on Protocol No. 7 to the ECHR the term ‘irrevocable’ is clarified in the sense that ‘no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them’.<sup>77</sup> In other words: pending criminal proceedings abroad do not preclude prosecution in the Netherlands. Furthermore, Article 68, paragraph 2 only applies if the foreign court has pronounced on the merits of the case. Preliminary decisions like the annulment of the indictment, the court’s declaration that it lacks jurisdiction, the inadmissibility of the Public Prosecutor or the suspension of prosecution do not bar prosecution in the Netherlands.<sup>78</sup>

An acquittal or a dismissal of the charges by a foreign court on the other hand, constitute absolute impediments against prosecution in the Netherlands. Neither the law itself nor legal doctrine make any distinction as to the reason why the person has been acquitted. Even an acquittal because of lack of evidence, while evidence would be abundant in the Netherlands, would impede new criminal proceedings. In the same vein, a dismissal of charges based on the consideration that the conduct does not constitute a criminal offence in the foreign state will preclude prosecution. The standard used by the Supreme Court is whether the foreign judgement, according to Dutch law, amounts to an acquittal or a dismissal of charges; the Court has explicitly rejected the opinion that the Dutch judiciary would have to inquire whether it would have reached a similar decision in the analogous situation.<sup>79</sup>

The absolute protection against double jeopardy that Article 68, paragraph 2 offers – at least as far as acquittal and dismissal of charges is concerned – has triggered a discussion among learned writers whether the Dutch regulation is not too benevolent in this respect. For one thing, it has been argued that an exception to the *ne bis in idem*-principle after an acquittal would be plausible, if the acquittal had been caused by fraud by the defendant.<sup>80</sup> Secondly, the idea that a dismissal of the charges by a foreign court on the basis that the behaviour does not constitute a criminal offence according to the *lex loci delicti* would impede a prosecution in the Netherlands, has been severely criticised by Klip.<sup>81</sup> The author shows how this far reaching consequence has derived from the confusion over the relationship between the application of the active personality principle and the international *ne bis in idem*-effect. According to Klip, lack of double criminality would certainly impede the prosecution of a Dutch national, whether he had previously stood trial abroad or not, but would not automatically rule out renewed criminal proceedings in the Netherlands, if that state were to found its jurisdiction on (for instance) the principle of territoriality. Such criticism gives expression to a more general concern that the categorical exclusion of the initiation of criminal proceedings after sham trials abroad may impede the Netherlands to live up to its international obligations. We will return to this problem at the end of the next paragraph.

#### **4. What are the legal consequences of a transnational application of *ne bis in idem*?**

In case of conviction, if punishment has been imposed, the sentence must have been enforced completely for the *ne bis in idem*-principle to take effect, so Article 68, paragraph 2 reads.

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<sup>77</sup> Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Strasbourg 1985, p. 11 and 12.

<sup>78</sup> G.J.M. Corstens, *Het Nederlands strafprocesrecht*, Arnhem 2002, p. 191.

<sup>79</sup> Supreme Court 4 February 1969, NJ 1970, 325.

<sup>80</sup> R Emmelink, in: Noyon/Langemeijer/ Remmelink, o.c., (1998), p. 490/491.

<sup>81</sup> A.H. Klip, *Ne bis in idem en Bouterse*, NJB 1998, p. 2071-2072.

This requirement follows from the Dutch determination not to serve as a safe haven for detainees who absconded from foreign prisons. Although Dutch legislation provides for the transfer of prisoners, the execution of foreign sentences is premised on the existence of a treaty.<sup>82</sup> Besides, if Dutch nationals were to escape from foreign detention, Article 4, paragraph 2 of the Dutch Extradition Act would preclude their extradition for the purpose of the (continued) enforcement of the sentence. Custodial measures which have been imposed because of diminished responsibility of the offender are to be considered on the same par as criminal sanctions.<sup>83</sup>

If the foreign sentence is consumed entirely, the conviction serves as a complete barrier to the initiation of criminal proceedings in the Netherlands. In this respect, the Dutch system certainly embraces the *Erledigungsprinzip*. If, on the other hand, the foreign sentence is only partially enforced, nothing prevents the Public Prosecutor from initiating fresh proceedings and the courts are not legally bound to take the sentence served abroad into consideration. Officially at least, the *Anrechnungsprinzip* is unknown in the Netherlands. As we discussed above, the Dutch regulation does not meet the standards of the Schengen Convention which prescribes deduction of the foreign sentence in case of renewed prosecution. We suggest change of legislation in stead of leaving the matter to the free discretion and the wisdom of the courts.<sup>84</sup> Finally, it is immaterial whether the reason that the sentence has not completely been enforced can be attributed to the convict or to the authorities.<sup>85</sup>

Not all sentences which have not been completely enforced allow a second prosecution in the Netherlands. Paragraph 2 of Article 68 attaches *ne bis in idem*-effect to pardon and lapse of time. A general amnesty will probably not be equated to a judicial pardon, because in the former case the public authorities have not expressed their opinion on the personal guilt of the defendant.<sup>86</sup> The inclusion of lapse of time as an impediment to double prosecution is slightly spurious and probably superfluous as the statute of limitations for the prosecution will by definition have been expired.<sup>87</sup> Would Article 68, paragraph 2 allow prosecution of persons who are on probation? A second trial will only be precluded if the sentence has become irrevocable under foreign law.

The phrase ‘if punishment has been imposed’ has been inserted by Statute of 6 March 1985 in order to comply with the European Convention on the Transfer of Criminal Proceedings, Article 35, paragraph 1 sub c of which explicitly proscribes double prosecution if a foreign court has made a declaration of guilt, without imposing a penalty. Article 68, paragraph 3 extends the protection against double jeopardy by precluding prosecution in the Netherlands if the person involved has reached a settlement out of court in order to prevent prosecution and has fulfilled the conditions. This provision implies that Dutch courts are to respect a foreign discharge of liability to conviction by payment of a fixed penalty. Unconditional decisions of foreign authorities that a trial will not take place do not rule out prosecution for the same

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<sup>82</sup> Article 2 of the Act on the transfer of enforcement of criminal judgments.

<sup>83</sup> Supreme Court 4 February 1969, NJ 1970, 325.

<sup>84</sup> Compare Rummelink, in: Noyon/ Langemeijer/ Rummelink, o.c., p. 495.

<sup>85</sup> In the important *Drost*-case (Supreme Court, 4 February 1969, NJ 1970, 325) Sweden had requested the Netherlands to take over the execution of custodial measures. After the Netherlands had consented, Sweden had evicted the convicts, without formally putting an end to the enforcement of the measures in Sweden. The Supreme Court held that even by Swedish standards the enforcement could not be considered as having been completed. Corstens ( o.c., p. 196) blames the Supreme Court for ignoring the rationale of Article 68, section 2: countering the escape from foreign prisons.

<sup>86</sup> Klip, o.c., (1998), p. 2070.

<sup>87</sup> Rummelink, o.c., p. 496.

offence in the Netherlands.<sup>88</sup> It is not entirely clear whether Article 68, paragraph 3 covers all kinds of plea bargaining and other forms of deals between the Prosecutor and the defendant. If the foreign courts honour the arrangements and the reduced sentence is completely enforced, Article 68 paragraph 2 will block prosecution in the Netherlands. In other cases the outcome is less certain. This takes us to the broader issue of sham trials.

Dutch law does not squarely confront the question whether exceptions should be allowed to the rule of *ne bis in idem* in those cases where a foreign trial is concocted in order to shield the defendant. Klip contends that the legislator simply did not foresee the possibility that civilised nations would indulge in sham trials and concludes that he did not intend to attach any consequences under Dutch law to ensuing sentences.<sup>89</sup> Lensing, on the other hand, favours a change of legislation.<sup>90</sup> The discussion has gathered momentum since the case of Desi Bouterse, former head of the army of Surinam, which raised doubts as to the diligence and impartiality of the Surinam courts in proceeding with the inquiry into the possible involvement of Bouterse in the so called ‘December-murders’ in 1982.<sup>91</sup> The best suggestion seems to us to tailor Dutch legislation to the solutions proffered by the Statutes of the ICTY, ICTR and ICC.<sup>92</sup>

## 5. What effect does *ne bis in idem* have on international legal assistance?

Before we elaborate on the Dutch legal position in this respect, we find it useful to dwell upon the different meaning of *ne bis in idem* when applied within the framework of international co-operation in criminal affairs. Article 68, paragraphs 2 and 3 of the Dutch Penal Code generously recognise the effect of foreign *res judicata* within the Dutch legal order. (Dutch) legal provisions on international co-operation on the other hand, seek, conversely, to expand the *ne bis in idem*-effect of national court decisions (or of third countries) beyond the national borders. To a large extent, the recognition of the foreign dictum in the first case is really unselfish, because it may not serve the national interests of the state concerned, whereas in the second case the state endeavours to impose its sovereign will on other states. This may at least partially explain why the scope of *ne bis in idem* as a ground for refusal of international co-operation is often larger.<sup>93</sup> Another important difference is that refusal of co-operation on the basis of the *ne bis in idem*-principle does not entirely wipe out prosecution in the requesting state. It only precludes assistance by the requested state.

Article 9 of the Extradition Act contains a rather elaborate regulation of the *ne bis in idem*-principle as a ground for refusing extradition.<sup>94</sup> It is interesting to notice that the provision to

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<sup>88</sup> P. Baauw, o.c., (1997), p. 80.

<sup>89</sup> Klip, o.c., (1998), p. 2073.

<sup>90</sup> Lensing, o.c., (2000), p. 164.

<sup>91</sup> The Dutch Supreme Court (17 September 2001, NJ 2002, 559) held the Dutch Prosecutor inadmissible, mainly because the Netherlands lacked jurisdiction at the moment the murders had allegedly been committed. For an interesting comment: L. Zegveld, *The Bouterse Case*, in: Netherlands Yearbook of International Law XXXII – 2001 – p. 97-118.

<sup>92</sup> For further details see *infra* under III.

<sup>93</sup> In the same vein: H.G.M. Krabbe and H.M. Poelman, *Enkele aspecten van het ne bis in idem-beginsel in internationaal verband*, Arnhem 1985, pp. 133-134.

<sup>94</sup> Act of 9 March 1967, Staatsblad 139, containing new regulations relating to extradition and other forms of international assistance in criminal matters, as last amended by the Act of 13 December 2000, Stb. 616. For a succinct survey in English, compare A.H.J. Swart, Extradition, in: Bert Swart and André Klip (Eds.) *International Criminal Law in the Netherlands*, Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Band S 66, Freiburg im Breisgau 1997, p. 110-112.

a large extent attaches similar blocking effects to foreign *res judicata* which obviously corresponds with the generous recognition of these decisions in Dutch law. Consequently, an acquittal or dismissal of the charges, either by a Dutch court or by the court of a third state, serves as an impediment to extradition (Article 9, paragraph 1 sub c). In case of conviction by final judgement, extradition is precluded if the penalty or measure imposed has already been served, such penalty or measure is not susceptible of immediate enforcement or further enforcement (*id est* in case of conditional sentencing) and if the conviction entails a finding of guilt without a penalty or measure having been imposed. Again, the provision does not discriminate between decisions of national courts and decisions of foreign courts. The Extradition Act does not explicitly put settlements out of court on the same par as final court decisions. However, in view of Article 68, paragraph 3 Penal Code, it is only fair to assume that extradition will be refused in such cases as well.<sup>95</sup>

In a number of respects Article 9 of the Extradition Act extends the blocking effects of Dutch proceedings and judgements beyond those of third countries. For one thing, pending proceedings in the Netherlands constitute an imperative ground for refusing extradition. According to paragraph 2 however, the Minister of Justice may decide to discontinue criminal proceedings after having received an extradition request. Materially, the instruments of extradition and transfer of proceedings merge in such cases. Secondly, extradition is barred by a decision of a Dutch Prosecutor that proceedings are not to be continued. Article 9, paragraph 1 sub b refers to Article 255 of the Dutch Code on Criminal Procedure which allows for reopening of the case if new evidence has surfaced. To this exception two more are added in Article 9, paragraph 3 of the Extradition Statute: extradition would still be viable in those cases in which the decision to discontinue proceedings ensued from lack of jurisdiction or if, prior to the extradition request, the Dutch authorities had already indicated their preference for transfer of proceedings to another state. Finally, the requirement that the sentence should be enforced completely does not hold for Dutch convictions. This provision connotes a preference for the execution of Dutch criminal sentences in the Netherlands.<sup>96</sup>

The regulations of the other forms of international co-operation in respect of *ne bis in idem* are, with the necessary modifications, geared to the model presented in the Extradition Act. As far as mutual assistance in criminal affairs is concerned, Article 552l of the Dutch Code of Criminal Procedure imperatively bars the rendering of such assistance, if compliance with a request would contravene the principle underlying Article 68 of the Penal Code and Article 255, first paragraph of the code of Criminal Procedure.<sup>97</sup> Consequently, a request for assistance will be denied if final judgement has been passed by a Dutch court or criminal proceedings have been discontinued by a Dutch Prosecutor, or if the case has been irrevocably decided by a court of a third state, provided that the conditions of Article 68, paragraphs 2 and 3 have been met. Sjöcrona addresses the interesting question whether the exception incorporated in Article 9, paragraph 2 of the Extradition Act – *id est* if criminal proceedings have been discontinued because of the determination that the Netherlands lacks substantive jurisdiction – would apply by analogy in case of the rendering of mutual assistance. He concludes that, in the absence of an explicit provision by the legislator, such an application by analogy would be unwarranted.<sup>98</sup> Just as in case of extradition, Article 552l, paragraph 1

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<sup>95</sup> In the same vein: Swart, o.c., (1997), p. 111.

<sup>96</sup> Compare A.H.J. Swart, *Nederlands uitleveringsrecht*, Tjeenk Willink: Zwolle 1986, p. 240.

<sup>97</sup> In cases of cooperation of joint investigation teams this ground of refusal is not applicable. See the new Article 552qa Code of Criminal Procedure in the legislative proposal implementing the EU Convention on Mutual Assistance in Criminal Matters, Kamerstukken II, 2001-2002, 28351.

<sup>98</sup> J.M. Sjöcrona, *De kleine rechtshulp*, Arnhem 1990, p. 165-166.

sub c precludes mutual assistance in cases in which criminal proceedings are pending in the Netherlands.

With respect to the transfer of criminal proceedings, the *ne bis in idem*-principle works both ways. On the one hand, Article 552y, paragraph 1 sub e of the Code of Criminal Procedure forbids the taking over of criminal proceedings by the Netherlands if the proceedings would infringe the provisions of Article 68 of the Penal Code. This provision dutifully complies with Article 10 of the 1972 Convention on the Transfer of Criminal Proceedings which forecloses the transfer of proceedings if this were to militate against the principle of international *ne bis in idem*, as incorporated in Article 35 of the Convention. Interestingly enough, Article 8, paragraph 2 of the Convention introduces an exception to the rule by allowing state parties to transfer criminal proceedings even though they have irrevocably passed judgement on the case themselves. The provision addresses the problem of prisoners, absconding from foreign prisons by permitting state parties to take over criminal proceedings if the foreign judgement cannot be enforced otherwise, either by extradition or transfer of the execution of the judgement.<sup>99</sup> On the other hand, Article 77 of the Penal Code explicitly stipulates that the right to prosecute and the right to execute a sentence expire with the transfer of criminal proceedings to another state. In no uncertain terms this provision corroborates Article 21 of the Convention on the Transfer of Criminal Proceedings.

Finally, the *ne bis in idem*-principle serves as an impediment to the transfer of the execution of sentences as well. According to Article 7, paragraph 2 of the Act on the transfer of enforcement of criminal judgements a sanction imposed in a foreign state shall not be enforced in the Netherlands if proceedings in the Netherlands would not be compatible with the principle underlying Article 68 of the Penal Code and Article 255, first paragraph, of the Code of Criminal Procedure.<sup>100</sup> For obvious reasons a similar provision for the reverse situation – transfer of execution of a Dutch sentence to another state – is lacking. It is assumed that the previous trial will have respected the principle of *ne bis in idem* and it is for the requested state who takes over the execution of the judgement to decide whether the transfer of execution infringes the principle of *ne bis in idem*. However, Article 59, paragraph 4 of the Act on the transfer of enforcement of criminal judgements guarantees that the transfer of the sentenced person suspends *ipso jure* the enforcement of the sanction imposed upon him in the Netherlands.

Dutch legislation does not explicitly contain rules for solving competing claims of competence. At several places Acts refer to the principle of “proper administration of justice”, which serves as a guideline in deciding whether transfer of criminal proceedings or transfer of the execution of a (Dutch) sentence would be propitious.<sup>101</sup> Moreover, Article 35 of the Extradition Act sums up a number of aspects which should be taken into account, within the framework of the proper administration of justice, in case a choice has to be made between competing requests for extradition. Nevertheless, the concept of ‘proper administration’ serves more as a source of inspiration and a regulative principle, rather than a set of clear cut standards.

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<sup>99</sup> See Y.G.M. Baaijens-van Geloven, *Overdracht en overname van strafvervolgning*, Gouda Quint: Arnhem 1996, p. 169-170.

<sup>100</sup> Act of 10 September 1986, Staatsblad 464. Likewise, paragraph 1 of Article 7 precludes the execution of foreign sentences, if criminal proceedings for the same offense in the Netherlands are still pending.

<sup>101</sup> Compare Article 552t, paragraph 1 of the Code of Criminal Procedure and Article 51 of the Act on the transfer of enforcement of criminal judgments.

Apart from the consultation procedures, mentioned above, we do not know of a mechanism to solve competing claims on an international level either. However, it will be quite interesting to follow the developments within the framework of the European Union in this respect. Article 35, paragraph 7 of the Treaty on the European Union empowers the European Court of Justice to decide on conflicts between the Member States as regards the interpretation and application of the instruments, mentioned in Article 34. As framework decisions regularly contain provisions on (hierarchy of) jurisdiction and *ne bis in idem*, conflicts are bound to arise and the adjudicative power of the Court will certainly be of avail.

### **III. Ne bis in idem in cases of “vertical national-supranational concurrence”**

#### **1. General issues concerning the relationship between national and supranational jurisdiction**

As host to both the International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY) and the International Criminal Court (hereafter: ICC), the Netherlands occupies a special position vis à vis these criminal tribunals. It seems unavoidable that this special position will influence the relationship between our country and the international courts. Hereafter, we will make a distinction between the ad hoc tribunals, established by resolutions of the Security Council and the Permanent International Criminal Court.

The Netherlands has enacted legislation in order to enable co-operation with both the ICTY and the Rwanda Tribunal (hereafter: ICTR).<sup>102</sup> As is well known, the Statutes of both ad hoc-tribunals have vested the international courts with primary jurisdiction over domestic courts which entails the power of the Tribunals to request national courts to defer to their competence (Article 8, paragraph 2 ICTR-Statute; Article 9, paragraph 2 ICTY-Statute). This principle of primacy logically implies that prosecution and trial by the ad hoc-tribunals will bar a second trial by a national court (Article 9, paragraph 1 ICTR-Statute; Article 10, paragraph 1 ICTY-Statute). Conversely, trials by a national court will impede a second trial by the ad hoc-tribunals, unless the culprit has been convicted for an ordinary crime or the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted (Article 9, paragraph 2 ICTR-Statute, Article 10, paragraph 2 ICTY-Statute). Paragraph 3 of these Articles incorporates the “Anrechnungsprinzip” by prescribing that prior sentences by national courts should be taken into account in the consideration of the penalty to be imposed.

The Dutch implementing legislation does not explicitly refer to the issue of *ne bis in idem*. By dropping all grounds for refusal, the Netherlands acknowledges the primacy of the jurisdiction of the ad hoc-tribunals.<sup>103</sup> Nevertheless, it should be emphasised that both the Yugoslavia Tribunal Assistance Act and the Rwanda Tribunal Assistance Act instruct the district court, considering the request for surrender, to verify whether the person brought before it is really the one whose surrender is requested and, more importantly, whether that surrender has been

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<sup>102</sup> Act containing provisions relating to the establishment of the International Tribunal for the prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, Act of 21 April 1994, Stb.1994, 308 and Act of 18 December 1997, Stb. 1997, 754 (co-operation with ICTR).

<sup>103</sup> In the Explanatory Memorandum to the Act of 21 April 1994 the government indicated that all grounds for refusal, amongst them the principle of *ne bis in idem*, would be disregarded, MvT, 2nd Chamber, 1993-1994, 23 542, no. 3, p. 4.

requested on account of offences for which the Tribunals have jurisdiction. A negative answer will result in the denial of the request. This verification should be marginal and is not intended to challenge the jurisdiction of the Tribunals, so the government wishes to emphasise. It merely has to do with the fact that the request for surrender involves deprivation of liberty and that the state would be obliged, in view of relevant human rights provisions, to check whether this deprivation of liberty is legitimate.<sup>104</sup>

As far as the International Criminal Court is concerned, the division of competence between the Court and domestic jurisdictions is predicated on the principle of complementarity which entails primary jurisdiction for national courts. According to Article 17 the ICC is only expected to step in whenever states have proved to be either unwilling or unable genuinely to conduct criminal proceedings. However, as soon as the ICC has grasped jurisdiction and subsequently has tried the accused, resulting in his conviction or acquittal, both the ICC itself and any other court are barred from starting new proceedings, so Article 20, paragraphs 1 and 2 read.<sup>105</sup> Conversely, previous criminal proceedings will impede a second trial by the ICC, unless those proceedings were for the purpose of shielding the person concerned from criminal responsibility or were otherwise not conducted independently or impartially and were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice. This asymmetric application of the *ne bis in idem*-principle connotes the concept of complementarity and reinforces the presumption behind the ICC jurisdiction being different from the one as between states.<sup>106</sup>

The Netherlands has ratified the Rome Statute in July 2001 and has followed a bifurcated approach in the adaptation of its legislation with a view to the implementation of the Statute. The preponderant concern was to guarantee that the Netherlands would be able to co-operate with and assist the Court as soon as it would come into practice. For this purpose the Act on the implementation of the Statute of the International Criminal Court with respect to co-operation with and assistance to the International Criminal Court and the enforcement of its sentences was enacted.<sup>107</sup> The Act is largely modelled after the legislation implementing the Statutes of the ICTY and the ICTR, although its provisions are certainly elaborated in more detail. It consists of four parts which deal with surrender of suspects and other persons to the Court, other forms of international co-operation, enforcement of the Court's sentences and "assistance". The last mentioned concept is a term of art which refers to co-operation in respect of the crimes against the administration of the Court such as the threatening of witnesses, corruption of officials and tampering with evidence. It is likely that most of these crimes will be committed in the vicinity of the Court and that the Netherlands will hence be more involved than other countries. Article 70, paragraph 4 sub b of the Statute makes clear that the principle of complementarity does not apply to these crimes.<sup>108</sup> It is highly interesting to note that the parallel provision to Article 4 of the Acts implementing the Statutes of the ICTY and ICTR – concerning the competence of the district court to verify whether conduct qualifies as a core crime within the jurisdiction of the Tribunals -, though featuring in a previous draft, has been removed. In its explanatory statement the Dutch government has

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<sup>104</sup> Explanatory Memorandum, p. 4.

<sup>105</sup> The opening sentence of paragraph 1 – "Except as provided in this Statute"- refers to appeal and revision which are not to be considered as infringements of the *ne bis in idem*-principle. See Immi Tallgren, Article 20 *Ne bis in idem*, in: O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden 1999, p. 426.

<sup>106</sup> I. Tallgren, o.c., (1999), p. 420.

<sup>107</sup> Act of 20 June 2002, Staatsblad 314 ("Uitvoeringswet Internationaal Strafhof": Implementing Act ICC).

<sup>108</sup> Compare also G.A.M. Strijards, *Een internationaal strafhof. Jurisdictie en rechtshulpperikelen*, 29 Delikt en Delinkwent (1999), p. 779.

explicitly acknowledged that the ICC should decide over its own competence (the so called “Kompetenz-Kompetenz”).<sup>109</sup>

The second “prong” of the implementing legislation is the (Draft-) Act on International Crimes which is clearly intended to enable the Netherlands to comply with its responsibilities flowing from the principle of complementarity. The Act fills up some existing gaps and lacunae in the field of penalisation of the “core crimes” under Dutch law and provides for jurisdiction on the basis of *aut dedere, aut judicare*. The active and passive nationality principle are recognised as appropriate basis for jurisdiction as well. The restrictive application of the universality principle amplifies the Dutch position that either the International Criminal Court or other states might better qualify to start proceedings. If possible the Dutch government would certainly be prepared to enter into negotiations in order to attune the decisions in this respect.<sup>110</sup> We will return to this later on.

## 2. Prerequisites and scope of prohibition on vertical double punishment

Article 17, paragraph 1, sub b ICC Statute extends the recognition of the non-bis-in-idem principle as expressed in Article 20: “The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.” However, the fact that the Statute uses five different terms for the relevant set of facts, thus for “idem”, does not offer the best opportunity for a reasonable interpretation of Article 20. What is meant by “the case” in Article 17, paragraph, 1 sub a? It must be distinguished from “the crime” in Article 20 and “the situation” in Article 13 and 14, as well as “the conduct” in Article 17, paragraph 1 sub c. Article 20, paragraph 1, further mentions “conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.” By the phrase “except as provided in this Statute”, Article 20 ICC excludes the application of the rule on subsequent proceedings in one case, such as appeal or revision (Articles 81-85 ICC Statute).<sup>111</sup>

It can be deduced from the complementarity principle that it contains two impediments to prosecutions by the international criminal court. Firstly, there is the element, underlining that the first task of the prosecution lies with the states, not with the ICC. This can be regarded as a bottom up approach. The very first thing the Prosecutor of the ICC therefore should do after a crime has been committed is wait and see what happens.<sup>112</sup> One could also call this a temporal non-bis-in-idem. Pending the investigation by the state, the ICC-Prosecutor may not bring the case before the ICC.<sup>113</sup> Secondly, it contains a final impediment in the sense that if a state has taken action and the national case has come to an end, the case has also come to an

<sup>109</sup> Explanatory Memorandum, 2nd Chamber, 2001-2002, 28 098 (R 1704), nr. 3, p. 6

<sup>110</sup> Explanatory Memorandum, Draft Act on International Crimes, p. 18

<sup>111</sup> Tallgren, p.426 margin number 12.

<sup>112</sup> States have many legal ways (based on the Statute) to prevent the Court from operating. They can defend their sovereignty quite well. See G. Hafner, The Status of Third States before the ICC, Politi and Nesi, p.253. Herwig Roggemann and Petar Šarčević (Eds.), National Security and International Criminal Justice, The Hague 2002; Claus Kreß, Vorbemerkungen zu dem Römischen Statut des Internationalen Strafgerichtshofes, in: Grützner/ Pötz, Internationaler Rechtshilfeverkehr in Strafsachen, Heidelberg 2003, p.26, marginnr. 30.

<sup>113</sup> The term was used as to give the ICC the possibility to subject states’ behaviour to a subjective test. See Sharon A. Williams, Commentary to Article 17, margin number 22, O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Baden-Baden 1999, p.392. Hafner emphasized the importance of paragraphs 2 and 3 saying “that Article 18 gives a State the right to request a delay of the investigations for six months if the prosecutor wants to act either upon referral of a situation by a Party State or proprio motu.” Hafner 2002, p.249. I have been unable to read that in Article 18.

end before the ICC, unless one of the criteria for a second prosecution apply. So in the end, the application of the complementarity principle leads to the establishment of a non-bis-in-idem. As such this is a logical consequence. If the jurisdictions of the ICC and a state are concurrent and thus on an equal level, it does not matter who will exercise this jurisdiction. If then either the ICC or a state deals with the matter the result must be recognized by the other jurisdiction as well. Only the finding that the state or states are unable or unwilling triggers the role of the ICC. It brings in an element of primacy in the sense that the ICC determines the existence of such a situation and may overrule the relevant state.

For a better understanding we have structured our analysis of the meaning of the principle of non-bis-in-idem into five different questions:

- a. What is non? Which new acts are prohibited? (see under III.3 and 4)
- b. What is bis? Which act triggers the principle? (see under III.2)
- c. What is idem? What is the same fact? (see under III.2)
- d. What jurisdictions are bound by the norm? (see under IV)
- e. Who is protected by the principle? (see under V)

We will further follow the structure of the questionnaire as drafted by the General Rapporteur.

What is bis? Which act triggers the principle? This identifies what decision or act forms the first decision. Article 20 mentions a conviction or an acquittal by the ICC (top-down). For other courts (bottom-up) not the outcome, but the process as such is relevant: “has been tried.” This is correct because under national law other final decisions may exist that are not named as a conviction or an acquittal. The ICTY decided in the Tadić case that the fact that the investigation into the case had been conducted, the case was brought to Court and this reached according to national legal terminology its “final phase”, did not qualify as a situation for which Article 10 ICTY Statute had been provided.<sup>114</sup> The decision thus raises the question whether some form of investigation is sufficient for a finding that there is a final decision? How final must the decision then be? Must all (theoretical) remedies have been exhausted?<sup>115</sup> It does not seem to be the case. However, in light of the qualification of parts of Article 17 as belonging to the ne bis in idem rule an imbalance emerges. Whereas a decision by the Prosecutor of the ICC not to prosecute does not hinder national prosecutors to initiate prosecutions, vice versa things are different. Article 17, paragraph 1 sub b declares the case inadmissible when “the State has decided not to prosecute the person concerned.” Is a decision by the prosecutor not to prosecute a final decision (for instance the ICTY Prosecutor’s decision not to prosecute NATO)? Or do only final decisions by a court qualify? What about plea bargaining, out of court-settlements, diversion, deals with criminals, pardon, parole, conversion of the sentence and pending prosecutions?<sup>116</sup>

One of the other questions relevant to understand the principle is: What is idem? What is the same fact? It is here that we may expect most controversies, disputes and problems regarding the application of the principle. Here we search for guidance as to which fact is relevant. Is it relevant what happened in reality (the actual or historical or material fact) or is it relevant what was on the indictment or what the legal definition of the crime in the Statute or in the

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<sup>114</sup> ICTY, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem, *Prosecutor v. Tadic*, Case No. IT-94-1-T, T.Ch., 14 November 1995, Klip/ Sluiter ALC-I-143.

<sup>115</sup> Lensing, p.97.

<sup>116</sup> See John T. Holmes, The Principle of Complementarity, in: Roy S. Lee, The International Criminal Court, The Making of the Rome Statute, The Hague 1999. Holmes’ remarks on p.58-60 and 76 seem to imply that a national decision to pardon or parole would not open up for an examination by the Court. He regards this as the “greatest weakness to the complementarity regime.”

Penal Code is?<sup>117</sup> If we were to recognise the legal definition only, it would not give any protection at all. The legal definition or name will always differ from one state to another.<sup>118</sup> States will apply very different standards to define what the same facts are. On a national basis states have mixed forms. The same goes for international criminal tribunals. A problem could arise if culpability under national law is described narrower as under the law of the Statute. If national law would allow for defences that are inexistent under the Statute the Court would not be able to declare the case admissible. It seems that, regardless whether we apply a bottom-up or a top-down approach, the second court decides whether the prosecution concerns the same facts.

For the ICC, the specific rules of the Statute apply. This leads to five important questions. What is “the case” in Article 17, paragraph 1 sub a and b? It must be distinguished from “the crime” in Article 20 and “the situation” in Article 13 and 14, as well as “the conduct” in Article 17, paragraph 1 sub c. Article 20, paragraph 1 further mentions “conduct which formed the basis of crimes for which the person has been considered or acquitted by the Court.” It seems to us that “the case” refers to a historical fact (not necessarily in the indictment) in respect of certain individuals. The “crime” in Article 20, paragraph 2 is limited to the crimes as found in the Statute. This would allow prosecution for other crimes on the same historical facts. “Conduct” in paragraph 3 of Article 20 has a similar meaning. It differs from “crime” in the sense that the conduct may carry a different name tag under national law.<sup>119</sup> “Conduct which formed the basis of the crimes for which the person has been convicted or acquitted” as meant in paragraph 1 of Article 20 (only relevant for the ICC itself) seems to rely on the historical facts again. The “situation” of Articles 13 and 14 ICC Statute must be regarded as an unidentified conglomerate of historical facts committed by an unknown number of individuals.<sup>120</sup> Depending on the protection given by a national system, this could trigger non bis in idem protection, especially if the national system protects against parallel investigations. There are also mixed systems that combine the historical fact and the indicted fact in the sense that if the indicted facts are of a different legal character they will allow for prosecutions of both facts. An example in ordinary criminal law is the participation in a criminal organisation and committing one or more of the individual offences of which the organisation is accused of. It is not difficult to come up with similar situations in the field of international crimes: the prosecution of murder as a crime against humanity and as genocide and as a murder under ordinary law.

The question of who is addressed by the norm is not only relevant in the context of a vertical relationship between a state and an international criminal court. Is a ICC-state bound by a decision of another ICC-State? It can be argued that if the ICC ought to respect a decision (*res judicata*) of a state, a logical consequence would be that a third state also must recognize the state decision, because it would also have to respect a decision of the ICC. Article 20 ICC must be implemented into national law or applied directly by state authorities. It is very interesting to see that due to the complementarity principle non Party states may bind the

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<sup>117</sup> Only facts are relevant. In proposals during the negotiations reference was also made to prohibiting accusations based “on the same evidence.” See Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/51/22 (1996), Vol.II, p.202, published in M. Cherif Bassiouni, *The Statute of the International Criminal Court, A Documentary History*, Transnational Publishers 1998, p.548.

<sup>118</sup> Britta Specht, *Die zwischenstaatliche Geltung des Grundsatzes ne bis in idem*, Heidelberg 1999, p.160.

<sup>119</sup> According to Holmes, the rationale for the difference between crime and conduct was never fully explained. See Holmes, *o.c.*, p.58.

<sup>120</sup> Nsereko, *Commentary*, p.398 margin number 6.

ICC.<sup>121</sup> However, it does not work vice versa. A non Party state is not bound by a decision of the ICC.

The Statutes of the ICC, ICTY and ICTR explicitly preclude a second trial by domestic courts for acts constituting “core crimes” for which the person involved has already been tried by the International Tribunal (Article 9 ICTR-Statute, Article 10 ICTY-Statute, Article 20, paragraph 2 ICC-Statute). These provisions stand to logic, because –as far as the ICC is concerned - a trial by the ICC presupposes a prior decision, based on the principle of complementarity, that no appropriate national jurisdiction is available. However, the issue may involve intricate legal questions which ensue from the fact that the ICC’s jurisdiction is restricted to the gravest crimes which are of concern to the international community as a whole. What would for instance be the outcome if the ICC were to acquit the accused of charges of rape constituting a crime against humanity, because of lack of evidence that the rape was part of a widespread or systematic pattern? Would the acquittal stand in the way of a trial by a national court of the accused for rape as an ordinary crime?<sup>122</sup> Obviously, one may counter that such issues should be addressed at an earlier stage, when the Court decides on challenges to its jurisdiction, but a ruling on *prima facie* admissibility does not exclude the possibility that the objection is raised again in view of additional evidence. One might argue that the qualification of rape as “crime against humanity” and rape as an ordinary crime are not the same in a legal sense (nor in a moral sense). The issue has been identified and discussed by the Preparatory Committee in its meeting in 1998. From the choice of the phrasing “for a crime referred to in Article 5” one should infer the intent to ensure that a person who commits a crime under national law will not escape responsibility simply because it has not been proved beyond reasonable doubt that the acts constituted a crime in the jurisdiction of the ICC. The disadvantage of this approach however, is that a person convicted for an international crime by the ICC may be tried for crimes under national law for the same conduct.<sup>123</sup> Another problem involves the question what should be done if a convict absconds and seeks refuge in another country. For the Netherlands this situation will not give rise to difficulties, as (continued) enforcement of the Tribunals’ sentences is provided for in legislation.

Issues coming up: the same facts and multiple charges

It is unclear how international criminal tribunals will interpret the relationship of *ne bis in idem*, multiple charges and the amendment of the indictment. From the case law of the current two ad hoc tribunals it is clear that the interpretation of “the facts” is similar in the assessment of multiple charges and in dealing with the question of whether an amendment of the indictment is admissible. The issue of whether “the same facts” of the *ne bis in idem* principle must be interpreted identically to “the same facts” of multiple charges in the indictment has not arisen yet. Especially in view of the complementarity principle, it is likely that the ICC or other international(ised) tribunals will use an identical criterion.

The ICC Statute and other statutes emphasize the importance of the process in the sense that it should not be a sham trial. None of the statutes pays any attention to the concept of the same facts. To the contrary: As demonstrated above, the ICC Statute further contributes to the confusion. This situation does leave room for interpretation. This issue relates to the ideas on the rationale of the *ne bis in idem* principle. If one emphasizes that an accused should not be punished twice for the same conduct, one would follow an identical concept of facts for *ne bis*

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<sup>121</sup> See Flavia Lattanzi, *The International Criminal Court and National Jurisdictions*, M. Politi and G. Nesi, *The Rome Statute of the International Criminal Court, A challenge to impunity*, 2002, p.181.

<sup>122</sup> The example is given by Strijards, o.c., (1999), p. 776.

<sup>123</sup> I Tallgren, o.c., (1999), p. 428.

and for multiple charges. The result would be that multiple charges were unacceptable. If one emphasises that an accused should not be bothered twice there is no problem with differing concepts of the same facts.

In the case law of the ICTR some of these issues have surfaced. In the case of Kayishema and Ruzindana the Defence had argued that the Trial Chamber could not convict for both genocide and crimes against humanity, because there was a concurrence of violations in relation to the same set of facts. The Trial Chamber accepted this in situations where offences have differing elements, or where the laws in question protect differing social interests. The Chamber first determined whether concurrence of genocide and crimes against humanity could occur.<sup>124</sup> On the basis of four examples, it found that one may at the same time have the specific intent required to commit genocide and also to act pursuant to a policy that may fulfil the intent requirements for some crimes against humanity. In addition, with regard to protected social interests, the Trial Chamber found that the two crimes may overlap in some scenarios, while not in others. The killings at each one of the crime sites took place as part of the policy of genocide, but might also prove the commission of crimes against humanity (murder/ extermination). “Therefore the Trial Chamber finds that the elements of the crimes are the same for all three types of crimes and that evidence used to prove one crime is used also to prove the other two.”<sup>125</sup> As a result no more than one offence was committed. Otherwise the accused would have been convicted twice for the same crime. “If the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative. As such, *these* cumulative charges are improper and untenable.”<sup>126</sup> The Trial Chamber therefore regarded the relevant charges of crimes against humanity in the present case fully subsumed by the counts on genocide, and found both accused not guilty of the former.

In his Dissenting Opinion, Judge Khan held that problems resulting from cumulative charging should be solved by concurrent sentencing.<sup>127</sup> The Dissenting Opinion of Judge Tafazzal H. Khan in Kayishema and Ruzindana was followed by a judgement of the Trial Chamber in Rutaganda, half a year later. The Prosecutor charged Ruzindana cumulatively in the indictment. His overall activities were regarded as Genocide and Crimes against humanity. Three specific acts were characterised by the Prosecution as Crimes against humanity and Violations of common Article 3. With regard to the concurrence of various crimes under the Statute, the Trial Chamber fully concurred with the Dissenting Opinion of Judge Tafazzal H. Khan in the case against Kayishema and Ruzindana and cited the ICTY: “The Prosecutor may be justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values and when each Article requires proof of a legal element not required by the others.”<sup>128</sup> The Chamber held that the offences covered under the Statute (genocide/ crimes against humanity/ violations of common Article 3) have disparate

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<sup>124</sup> See ICTR, Judgement, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, T.Ch.II, 21 May 1999, Klip/ Sluiter ALC-II-555, par. 628.

<sup>125</sup> See Judgement, par. 644.

<sup>126</sup> See Judgement, par. 649. Please note that the Trial Chamber also puts emphasis on using the same evidence.

<sup>127</sup> See ICTR, Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan regarding the verdicts under the charges of crimes against humanity/ murder and crimes against humanity/ extermination, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, T.Ch.II, 21 May 1999, Klip/ Sluiter ALC-II-555, par. 52. Further ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998, ALC-II-399, and ICTR, Judgement and Sentence, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, T.Ch.I, 6 December 1999, ALC-II-709. See a Commentary by Kai Ambos and Steffen Wirth in ALC-II-701-708.

<sup>128</sup> See ICTY, Decision on Defence Challenges to Form of the Indictment, *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Santic, Alilovic, Josipovic, Katava, Papic*, Case No. IT-95-16-PT, 15 May 1998.

ingredients and the respective punishment for each is aimed at protecting discrete interests. It therefore allowed the claim of multiple offences for the same act “in order to capture the full extent of the crimes committed by an accused.”

The reasoning of the Trial Chamber is but a summary of the Akayesu case.<sup>129</sup> In that case it also referred to a decision of the ICTY in the Tadic case.<sup>130</sup> The Trial Chamber of the ICTY held that the emphasis was not on the cumulative charging as such, but on its relevance for the penalty: “In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty call for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.”

We return to the question of whether it is acceptable to convict the accused of two offences in relation of the same set of facts. In the Akayesu case and cited in Rutaganda the Trial Chamber formulated three separate circumstances in which it would accept that this was possible: “(1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order to fully describe what the accused did. However the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.”<sup>131</sup>

The Trial Chamber in the Kayishema and Ruzindana case also discussed whether the accused may be convicted of two offences in relation to the same set of facts (ie crimes against humanity (murder) and crimes against humanity (extermination)). In paragraph 422 of the Judgement it stated that “Both murder and extermination are constituted by unlawful, intentional killing. Murder is a (sic) the killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals.” The Trial Chamber had already held Rutaganda criminally responsible for crimes against humanity (extermination). On the basis of the same facts it could not also hold him responsible for crimes against humanity (murder). The latter is already included in the finding of the former. In terms of a verdict the result is that the accused was declared “not guilty” of crimes against humanity (murder). This is strange because the Trial Chamber had established that he was guilty of the crime charged, but this crime was also part of an even more serious crime for which the accused was also found guilty. It would have been preferable had the Trial Chamber stated that the accused “cannot also be held criminally responsible” for the other crime.<sup>132</sup> This illustrates that this count had to be charged alternatively rather than cumulatively.<sup>133</sup>

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<sup>129</sup> See ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998, ALC-II-491-493, par.461-470.

<sup>130</sup> See Decision on Defence Motion on Form of the Indictment, *Prosecutor v. Tadic*, Case No. IT-94-1-T, T.Ch.II, 14 November 1995. (Tadic (1995) I ICTY JR 293 at p.303).

<sup>131</sup> Akayesu, Judgement, par.461-470 and Rutaganda Judgement, par. 421.

<sup>132</sup> See par. 424 and 427.

<sup>133</sup> See also Daniel D. Ntanda Nsereko, in: Klip/ Sluiter ALC-IV-66-68.

A related issue is the question as to whether the accused had been indicted on the basis of command responsibility or individual responsibility, an early Blaškić decision tells us that this must be clear at the stage of the initial appearance. This was necessary to permit the accused to prepare his defence. The accused understood his rights such that he must be able to identify from the indictment whether he is charged as having committed the offences himself, or as having ordered the offences (command responsibility). The Trial Chamber in the Krnojelac case referred to the Blaškić decision in response of an argument made by the Prosecution: “The Prosecution has suggested that the decision in *Prosecutor v. Blaškić* (...) has said to the contrary, but that is not correct. That decision makes clear that the accused must be able to prepare his defence on “either or *both* alternatives” (emphasis added).”<sup>134</sup> As appears from the Krnojelac decision, the Trial Chamber considered that it may be required of the Defence to prepare for both situations. This view is consistent with a decision in the Kvočka case by which the Prosecution was directed to “provide more information as to the specific acts of two accused, that would establish their criminal responsibility under Article 7, paragraph 1, and Article 7, paragraph 3.”<sup>135</sup> What first seemed an issue relevant in the context of the vagueness of the indictment is now an issue of criminal responsibility as well. Without mentioning its earlier decision, the Blaskic Trial Chamber convicted in the same set of facts both on paragraph 1 as on paragraph 3.<sup>136</sup> Judges Hunt and Bennouna, dissenting from the majority in Delalic, argued that also here cumulative charging is permissible, but cumulative convictions not.<sup>137</sup> This seems to be followed by the Trial Chamber in Krnojelac, holding that “Where the Prosecutor alleges both heads of responsibility, the Trial Chamber has a discretion to chose which is the most appropriate head of responsibility under which to attach the responsibility of the Accused.”<sup>138</sup>

In Kupreskic, the Appeals Chamber of the ICTY adopted the so called Blockburger test. This requires the following: “The test then lies in determining whether each offence contains an element not required by the other. If so, where the criminal act in question fulfils the extra requirements of each offence, the same act will constitute an offence under each provision.”<sup>139</sup> In February 2001 the ICTY departed from this, what it called Tadic-Akayesu test. It is hard to believe that the three different chambers rendering judgement on the 20th, 22nd and 26th of February 2001 did not orchestrate their views on cumulative charging. The Appeals Chamber formulated the (now) prevailing rule: “Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the

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<sup>134</sup> ICTY, Decision on Defence Motion to Dismiss the Indictment Based upon Defects in the Form thereof (Vagueness/ Lack of Adequate Notice of Charges), *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, T.Ch. I, 4 April 1997, p.7 footnote 21, Klip/ Sluiter ALC-III-57.

<sup>135</sup> ICTY, Decision on Defence Preliminary Motions on the Form of the Indictment, *Prosecutor v. Kvočka/ Kos/ Radić/ Žigić*, Case No. IT-98-30-PT, T.Ch.III, 12 April 1999, par. 32-33, Klip/ Sluiter ALC-III-111.

<sup>136</sup> ICTY, Judgement, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, T.Ch.I, 3 March 2000, Klip/ Sluiter ALC-IV-477 and the commentary by Keijzer and van Sliedregt, ALC-IV-656-667.

<sup>137</sup> ICTY, Judgement, *Prosecutor v. Delalic/ Mucic/ Delic/ Landzo*, Case No. IT-96-21-A, A.Ch., 20 February 2001, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, Klip/ Sluiter ALC-V-567.

<sup>138</sup> ICTY, Judgment, *Prosecutor v. Krnojelac*, Case No. IT-97-25, T.Ch.II, 15 March 2002, par. 173.

<sup>139</sup> ICTY, Judgement, *Prosecutor v. Kupreskic/ Kupreskic/ Kupreskic/ Josipovic/ Papic/ Santic*, Case No. IT-95-16-T, T.Ch.II, 14 January 2000, ALC-IV-703, par. 682.

ICTR.”<sup>140</sup> For the ICTY, the issue then became a matter of cumulative or multiple convictions. In *Musema* the ICTR Appeals Chamber formally accepted this distinctive element test.<sup>141</sup>

The test provided by the Appeals Chamber in *Delalic* is:

“412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal conviction entered under different statutory provision but based on the same conduct are permissible only if each statutory provisions involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

413. Where this test is not met, the Trial Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered under that provision.”<sup>142</sup>

It is also necessary that the element materially distinct from another should require proof of fact not required by the other: “Applying the provision of the test articulated above, the first issue is whether each applicable provision contains a materially distinct legal element not present in the other, bearing in mind that an element is materially distinct from another if it requires proof of a fact not required by the other.”<sup>143</sup> The consequence of this test is that under these circumstances cumulative convictions for both Articles 2 and 3 and Articles 3 and 5 are permissible.<sup>144</sup>

Two judges in the Appeals Chamber dissented from the view of the majority relating to the application of the test to determine whether two crimes are legally distinct. In addition, they disagreed with the way in which a choice must be made if two crimes are distinct. These judges criticize the method of the majority, in their view, neither the different value, nor the comparison with national jurisdictions do offer any help here. In their eyes allowing cumulative convictions may prejudice the rights of the accused.<sup>145</sup> They do not accept a

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<sup>140</sup> ICTY, Judgement, *Prosecutor v. Delalic/ Mucic/ Delic/ Landzo*, Case No. IT-96-21-A, A.Ch., 20 February 2001, Klip/ Sluiter ALC-V-369. This view is now generally accepted. See ICTY, Judgement, *Prosecutor v. Kunarac/ Kovac/ Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, T.Ch.II, Klip/ Sluiter ALC-V-617, par.548; ICTY, Judgement, *Prosecutor v. Jelusic*, Case No., A.Ch., 5 July 2001, par.78; ICTY, Judgement, *Prosecutor v. Krstic*, Case No. , 2 August 2001, par.659; ICTY, Appeal Judgement, *Prosecutor v. Kupreskic/ Kupreskic/ Kupreskic/ Josipovic/ Papic/ Santic*, A.Ch., 23 October 2001, par.385; ICTY, Judgement, *Prosecutor v. Kvočka/ Kos/ Radic/ Zigic/ Prcac*, T.Ch., 2 November 2001, par. 214; ICTY, Judgement, *Prosecutor v. Kunarac/ Kovac/ Vukovic*, A.Ch. 12 June 2002, par.167; ICTR, Judgement, *Prosecutor v. Bagilishema*, ICTR-95-1A-T, T.Ch.I, 7 June 2001, par.108.

<sup>141</sup> ICTR, Judgement, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, A.Ch., 16 November 2001, par.363.

<sup>142</sup> ICTY, Judgement, *Prosecutor v. Delalic/ Mucic/ Delic/ Landzo*, Case No. IT-96-21-A, A.Ch., 20 February 2001, Klip/ Sluiter ALC-V-369, par.412 and 413. See also ICTY, Judgment, *Prosecutor v. Krnojelac*, Case No. IT-97-25, T.Ch.II, 15 March 2002, par. 502.

<sup>143</sup> ICTY, Judgement, *Prosecutor v. Delalic/ Mucic/ Delic/ Landzo*, Case No. IT-96-21-A, A.Ch., 20 February 2001, Klip/ Sluiter ALC-V-369, par.421.

<sup>144</sup> ICTY, Judgement, *Prosecutor v. Kvočka/ Kos/ Radic/ Zigic/ Prcac*, T.Ch., 2 November 2001, par. 212.

<sup>145</sup> ICTY, Judgement, *Prosecutor v. Delalic/ Mucic/ Delic/ Landzo*, Case No. IT-96-21-A, A.Ch., 20 February 2001, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, Klip/ Sluiter ALC-V-567, par.23.

gradation of specificity amongst the offences of the Statute.<sup>146</sup> They demonstrate that it is almost always possible to find unique contextual elements and that the test does not serve a purpose.<sup>147</sup> There is no such thing as an additional element.<sup>148</sup> Judges Hunt and Bennouna would allow for taking into account the actus reus and the mens rea of the offence.<sup>149</sup> Regarding the choice that should be made they propose to consider all of the elements of the offence to arrive at the closest fit between the conduct and the provision violated.<sup>150</sup> In order to express their opinion that a cumulative conviction is not acceptable, the two dissenting judges suggest the following terms: “Not guilty on the basis that a conviction on this charge would be impermissibly cumulative.”<sup>151</sup> Whilst the Appeals Chamber in *Kunarac* still does not depart from its “Celebici/ Blockburger” test, it admits “ that it is deceptively simple. In practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice.”<sup>152</sup>

From the case law of the ICTR and ICTY it becomes clear that the non-bis-idem principle does not prohibit the prosecution at the same time on the basis of one historical fact for two (or more) offences (multiple charges). The ad hoc Tribunals have adopted an argumentation based on an abstract comparison of the offences, not on what the accused actually did. This case law allows for cumulative charging of the same conduct either as, for instance, war crimes, genocide or crimes against humanity. The question subsequently arises what the consequence of this law is for a second prosecution for a different offence on the same historical facts. Especially in view of subsequent prosecutions (national after international or international after national) this approach does not offer any assistance. It is only helpful in cases in which there is only one exclusive forum that can make decisions.

### **3. Legal consequences of ne bis in idem in the vertical plane, including possible differences between the “top-down” and the “bottom-up” context**

Most questions raised under this heading have already been addressed, implicitly or explicitly, in the previous paragraphs. The application of the Erledigungsprinzip and the failure to apply the Anrechnungsprinzip which is open to criticism do not differ substantially within the context of vertical concurrence, although the last mentioned problem is certainly less acute in view of the possibility, incorporated in the Dutch implementing legislation, to take over the execution of the sentences of international tribunals. Only a final judgement by the International Tribunals on the merits of the case will preclude a second prosecution in the Netherlands. It is self-evident that a ruling of inadmissibility, in accordance with Article 17 of the ICC-Statute, will not bar criminal proceedings. Conversely, pending proceedings in the national state do not have a ne bis in idem-effect and therefore do not impede a trial by an international tribunal. This issue, although apparent from the plain phrasing of the relevant provisions, was decisively settled by the ICTY in the *Tadic*-case in which the German authorities, after having suspended their own proceedings, had complied with the Tribunal’s

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<sup>146</sup> idem, par. 41, relying on the Appeals Chamber in ICTY, Judgment in Sentencing Appeals, *Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, A.Ch., 26 January 2000, Klip/ Sluiter ALC-IV-419, par. 69.

<sup>147</sup> Idem, par.28-32.

<sup>148</sup> Idem, par. 43-45.

<sup>149</sup> Idem, par.33.

<sup>150</sup> Idem, par. 37 and 52.

<sup>151</sup> Idem, par.59.

<sup>152</sup> ICTY, Judgement, *Prosecutor v. Kunarac/ Kovac/ Vukovic*, A.Ch. 12 June 2002, par.172.

request to surrender the accused.<sup>153</sup> In his commentary to the case, Lagodny rightly observes that the opposite outcome would fully undermine the very system of an international criminal tribunal, as it would preclude local authorities from initiating criminal investigations.<sup>154</sup> The failure in Dutch law to redress sham trials does not impede the obligation on the part of the Dutch authorities to co-operate with the international tribunals in case of a finding by these tribunals that a second trial is warranted. The last question whether national courts would be bound by factual determinations made by supranational courts in their dealing with domestic issues, though an interesting one, has not been addressed so far by the Dutch courts or legislator.

#### 4. What is the effect of the *ne bis in idem* principle on international legal assistance?

After having established that there is an earlier decision on the same facts, the question arises what constitutes a second act concerning these facts. What is non? Which new acts are prohibited? Does this only relate to acts aiming at prosecution in the authorities' jurisdiction or does this also have its implications on acts of investigation by which a state assists another state by rendering mutual legal assistance? The effect of the application may differ according to the measures sought. As mentioned earlier, if a request for extradition is refused, it is likely that the requesting state will not be able to continue the proceedings. This is not necessarily so with requests for mutual legal assistance. Also here it is relevant whether states apply the *Anrechnungsprinzip* or the *Erledigungsprinzip*.<sup>155</sup>

In the famous *Blaskic*-case, the ICTY depicted the model of co-operation between states and the ad hoc Tribunals as a vertical one which implied an unconditional and absolute duty for states to co-operate. It added that “ a plain reading of Article 29 of the Statute makes it clear that it does not envisage any exception to the obligation of States to comply with requests and orders of a Trial Chamber”.<sup>156</sup> The Dutch Acts implementing the Statutes of the ICTY and the ICTR seems to corroborate this point of view by excluding all the prevailing grounds for refusal in its relationship with both tribunals. As was mentioned before, the acts only prescribe verification of the identity of the requested person and the examination of the jurisdiction *ratione materiae*. Although the model of co-operation envisaged by the ICC-Statute may best be described as a mixture between the “horizontal” or inter-state relationship and the vertical model, the Dutch Implementing Act of the ICC-Statute is no less exacting as to the duty to co-operate on the part of the Dutch authorities.<sup>157</sup> The international *ne bis in idem*-principle may not be invoked either as a ground for refusing surrender or for the rendering of other forms of co-operation.

It is interesting to point at Article 31 of the Act Implementing the ICC Statute which is geared to Article 90 of the ICC Statute and deals with the problem of competing requests. Normally,

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<sup>153</sup> ICTY, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem, *Prosecutor v. Tadic*, 14 November 1995, Case No. IT-94-1-T, par. 33, in: Klip/Sluiter ALC-I-150.

<sup>154</sup> Otto Lagodny, Commentary to Decision on the Defence Motion on the Principle of Non-Bis-In-Idem, *Prosecutor v. Tadic*, 14 November 1995, Case No. IT-94-1-T, par. 33, in: Klip/Sluiter ALC-I-152.

<sup>155</sup> See Christoph J.M. Safferling, *Towards an International Criminal Procedure*, Oxford University Press 2001, p.319-331.

<sup>156</sup> ICTY, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108bis, 29 October 1997, par. 63.

<sup>157</sup> Bert Swart and Göran Sluiter, *The ICC and International Criminal Co-operation*, in: Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (eds.) *Reflections on the International Criminal Court; Essays in Honour of Adriaan Bos*, T.M.C. Asser Press: The Hague 1999, p. 99.

the requested state will have to give precedence to the ICC's request, especially if it is not under an international obligation to comply with the other state's competing request. Article 90 only portrays two situations in which the solution to the predicament is not self-evident. Paragraph 6 mentions the case where the requesting state is not a party to the Statute while the requested state is under a treaty obligation to comply with the request; paragraph 7 refers to the situation in which the request relates to other conduct than that which constitutes the crime for which the Court seeks the person's surrender. Article 90, paragraph 6 mentions several factors which should be taken into account by the requested state in making its decision. One of these factors involves the possibility of subsequent surrender between the Court and the requesting state. This construction may however raise problems in view of the *ne bis in idem*-principle which should be taken into account by both the requesting state and the ICC.<sup>158</sup>

A less hypothetical case would involve the situation in which a perpetrator of "core crimes" after having received a sham trial in another country would escape to the Netherlands. Article 68, paragraph 2 of the Penal Code would – as explained before – usually preclude a second trial in the Netherlands. However, the International Criminal Court may, after having ruled on the admissibility of the case, request the surrender of the person and the Netherlands would be under an obligation to comply with this request. Of course this may give rise to conflicts of interpretation as to whether the Court would have competence and jurisdiction to try the case. For one thing, the person sought for surrender may challenge the jurisdiction of the Court because of presumed violation of the *ne bis in idem*-principle. Article 89, paragraph 2 of the ICC-Statute explicitly mentions this possibility and dictates that the requested state shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested state shall proceed with the execution of the request forthwith, but it may postpone the execution of the request until the issue has been settled. Secondly, the state whose criminal proceedings are disqualified as unsatisfactory may raise an issue under Article 19 of the ICC-Statute and challenge the jurisdiction of the International Criminal Court. In order to solve such conflicts of interpretation, Article 97 of the Statute provides for a general consultation procedure which has been adopted in Article 7 of the Dutch Implementing Act. However, in final instance the Dutch government will comply with the decision of the ICC.

## **5. Change of regime**

Fortunately the Netherlands' experience is rather old and limited to the decisions of the German criminal courts during the second World War. The German legislation providing for criminal trials was already declared inexistent by Royal decree of the Government in exile in 1944.<sup>159</sup> However, it took until 1952 before all German decisions were deleted from the Dutch judicial records.<sup>160</sup>

## **IV. Ne bis in idem in cases of "horizontal inter(supra)national concurrence"**

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<sup>158</sup> In the same vein: I. Tallgren, o.c., (1999), p. 433.

<sup>159</sup> See Besluit van 17 september 1944, houdende vaststelling van het Besluit bezettingsmaatregelen, Stb. 1944, E93. See further G.E. Mulder, *Schijn van recht*, Arnhem 1995, p.121.

<sup>160</sup> See Geraldien von Freitag Drabbe Künzel, *Het recht van de sterkste, Duitse strafrechtspleging in bezet Nederland*, Amsterdam 1999, p.252-253.

## 1. Positive conflicts between supranational jurisdictions

It is obvious that positive conflicts of jurisdiction exist between the ICC and the ICTY, between the ICC and the Special Court for Sierra Leone, between the ICC and the Special Chambers of the Criminal Court in East Timor. Since the ICTR only has jurisdiction over crimes committed in 1994 and the ICC only over crimes committed after June 2002, there is no overlap.

When analysing the various elements of the *ne bis in idem* rule we identified the importance of determining what jurisdictions are bound by the norm. Here it is relevant to see whether the norm has any impact on non-State jurisdictions, such as internationalised tribunals and in the relationship between ad hoc tribunals and the ICC. This question must be answered affirmatively. Internationalised tribunals qualify under Article 20 as “another court”.<sup>161</sup> The ICC Statute does not refer in that Article to any link with a State, as it for instance does in Article 17. Unlike the ad hoc tribunals, the ICC is also bound by its own decisions (Article 20, paragraph 1 ICC).<sup>162</sup>

## 2. Resolution of jurisdictional conflicts

Positive conflicts of jurisdiction could be solved through consultations aiming at the most appropriate place for the prosecution. As far as this decision making process is concerned, we suggest that tribunals with a limited (or specialised) jurisdiction for only one country or one conflict, in principle seem to be more qualified for trying such cases than the ICC.

## V. Concluding Questions and Recommendations

Who is protected by the principle?

One of the elements that is not discussed is who is protected by the principle. Facts as mentioned earlier stand in connection with the person. That does not help us in complicated situations like the criminal liability of entities that may exist on a national level that coincides with the prosecution of individuals of the same crimes on an international level.

Parallel prosecutions and joint prosecutions

The *ne bis in idem* principle does not protect against parallel prosecutions of several states. However, the admissibility requirements for the ICC do so in the relationship state-ICC (Article 19, paragraph 7).<sup>163</sup> New developments, especially within the European Union raise new questions that do not fit into the system we just described. Interesting questions pop up when it comes to concurrent/ parallel prosecutions in two different jurisdictions for the same fact. The astonishing consequence seems to be that there is a race between various prosecutors, whereby the “winner takes it all”.<sup>164</sup> However, the jurisdictions that are prosecuting may not be aware of that fact. The question is whether it should not follow from (the rationale of) the recognition of a final judgment that recognition of the principle should

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<sup>161</sup> Tallgren, p.427 margin number 15.

<sup>162</sup> Theoretically the Prosecutor with the ICTY and ICTR could prosecute again for the same fact. This must be regarded as an unintended lacuna of the drafters.

<sup>163</sup> Under the Statute of the ad hoc tribunals, the primacy did. See Morris and Scharf, *The International Criminal Tribunal for Rwanda*, 1998, p.312-325.

<sup>164</sup> See Lagodny, o.c., p.39.

also take place much earlier, in the phase that both states are investigating. That would not be an easy rule to apply. Who should recognise whom and refrain from further prosecution? And what would be the criteria for that: starting point of the investigation or prosecution? The applicable jurisdictional principle or the presence of the accused?

#### Human rights considerations

Traditionally, human rights treaties protect against a second trial/ investigation only when it takes place within the same state. From a perspective of the ECHR (and the ICCPR) in the light of the “collective responsibility” (Preamble and Art.1 ECHR), the question must be raised whether the importance of being two jurisdictions is not reduced. If the concept “state” loses its meaning, it should not result in less protection for the individual. That raises the question whether concurrent jurisdiction should not lead to the recognition of foreign res judicata. This view is also adopted in Article 50 of the European Union Charter of Fundamental Freedoms, which reads: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.” Article 4 of Protocol Nr. 7 ECHR protects against a second prosecution or punishment within one state. Individualisation in respect of human rights should take place at the level of the accused not at the level of states. This results in a standard by which the cumulative acts of two or more party states have violated the convention rights of one individual, not whether an individual act of an individual state violated the rights of the accused.<sup>165</sup> This seems to be a much better option than to bring transnational non-bis-in-idem under the right to a fair trial as expressed in Article 6 ECHR.<sup>166</sup> In this context we may refer to a Resolution Section IV B.4 adopted by the XVIth International Congress of Penal Law: “The principle of ne bis in idem should be regarded as a human right that is also applicable on the international or transnational level. Consideration should be given to incorporating this principle in the ICCPR and in regional human rights conventions. (...)”<sup>167</sup>

#### Exceptions to ne bis

Now we have established the contents of the principle it is important to identify whether any exceptions exist. Both in the Netherlands and the United Kingdom the question is being discussed whether new evidence (nova) may lead to the reopening of the case.<sup>168</sup> Is this acceptable? Does it make a difference whether it is in favour of the accused or not? Arsanjani referred to situations in which national law allows for more defences excluding criminal responsibility than the Statute. The ICC would then be bound by an acquittal or any other decision not imposing a penalty.<sup>169</sup> Can one argue that as long as some form of review is possible the decision is not irrevocable? Are there any cases of non-recognition? The appearance of such a rule in the Statutes raises this question. The Statutes do not give a ne bis protection to sham-proceedings.<sup>170</sup> This basically comes down to a disqualification of such a procedure as a genuine trial conducted by an impartial court. Unlike the non-bis-in-idem protection, the exceptions in Article 10 ICTY to the rule seem to take a formal criterion:

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<sup>165</sup> See Klip, The Decrease of Protection under Human Rights Treaties, 68 International Review of Penal Law 1997, p.291-310.

<sup>166</sup> Britta Specht, Die zwischenstaatliche Geltung des Grundsatzes ne bis in idem, Heidelberg 1999, p.49-53.

<sup>167</sup> See 70 International Review of Penal Law 1999, p.908, Preparatory Colloquium of Section IV in Utrecht, the Netherlands, Congress in Budapest, Hungary.

<sup>168</sup> P.A.M. Mevis and T. Kooijmans, Herziening ten nadele, Rotterdam 2003.

<sup>169</sup> See Mahmoud H. Arsanjani, Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos, T.M.C. Asser Press 1999, p.63.

<sup>170</sup> Article 20 ICC Statute was copied into the Recommendations of The Law Commission, see Report on Double Jeopardy and Prosecution Appeals, No.267, p.76-78.

“characterisation as an ordinary crime.” This phrase has not been copied into the ICC-Statute, because ordinary crimes could also give rise to severe penalties (e.g. life imprisonment for murder).<sup>171</sup> This is a point that also has been discussed in the Netherlands.<sup>172</sup> The Dutch system is based on the fiction that the integrity of foreign authorities is not in dispute. It is interesting to see that the accused loses the protection also in cases in which he did not contribute to the sham character of the proceedings.

#### A current issue?

Following the implementation of the European Arrest Warrant as of 1 January 2004, we may expect quite some cases in which other states request the surrender of persons to which the Netherlands would apply Article 54 Schengen or Article 68 Penal Code. In that sense the application can be regarded as a protection of Dutch decisions against an extensive use of extraterritorial jurisdiction by other states. There is no evidence that the principle frustrates the application of extraterritorial jurisdiction by the Netherlands.

#### Concluding remark

It is our understanding that the most prominent issue regarding the application of the principle *ne bis in idem* is the interpretation of “the same (set of) facts”. As long as that is not decided on an international level, disputes may arise. It has been our aim to identify some of the problems related to this and to suggest some solutions.

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<sup>171</sup> See Safferling, p.328-329 and Tallgren, p.429 margin number 22.

<sup>172</sup> An unconditional recognition of foreign decisions has been in the Penal Code since 1886. It was undisputed for more than a century. See A.H. Klip, *Ne bis in idem en Bouterse*, NJB 1998, p.2069-2075.