Universal Jurisdiction in the Netherlands — the right approach but the wrong case? Bouterse and the 'December Murders'

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Introduction

In December 1982, 15 political opponents of the then military regime in the South American Republic of Surinam were arrested, allegedly tortured and arbitrarily executed on the orders of the Army Commanding Officer, Desiré Bouterse. Fourteen of the victims had Surinamese nationality and the other was Dutch. Since that time, Bouterse has continued to move freely within Surinam and the Netherlands and is still influential in Surinam domestic affairs. Despite previous attempts by relatives of the victims to initiate proceedings against him in the Netherlands, the Dutch courts have consistently resisted on the basis that the matter was an internal affair of Surinam.

However, the situation has recently changed dramatically, with both the Surinam Court of Justice and the Amsterdam Court of Appeal separately determining that Bouterse can now be prosecuted. In Surinam 37 people, including Bouterse, have been charged under national criminal law with involvement in the December Murders.

In the Netherlands the Amsterdam Court of Appeal ordered the public prosecutor in November 2000 to commence proceedings against Bouterse on the basis of universal jurisdiction in response to a new complaint.[1] The findings of the Court were based in large part on the opinion of a court appointed expert, Professor John Dugard.[2] Though it represents a 'breakthrough' in the pursuit of justice in the Netherlands, the Amsterdam Court of Appeal's findings have triggered considerable legal and political debate. Ironically, the concurrent proceedings in

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1 Decision of the fifth-bench division, 20 November 2000, Petitions R 97/163/12 and R 97/176/12, Petitioners R Wijngaarde and R Hoost.

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both the Netherlands and Surinam may prove self-defeating and it is hoped that the Dutch Supreme Court, which will shortly determine the next stage of the Dutch proceedings, will clarify these issues.

This brief note will discuss a number of interesting and as yet unresolved legal and political questions raised by the Amsterdam Court of Appeal's decision and Professor Dugard's advice.

Amsterdam court decision — legal issues

Universal jurisdiction

The period since the end of the Cold War has seen a gradual move towards the 'internationalisation' of justice. Recent examples include the jurisprudence of the ad hoc tribunals for the former Yugoslavia and Rwanda, the proposed establishment of a permanent International Criminal Court, the *Pinochet* proceedings in the United Kingdom and the Belgian trial of four Rwandans under a 1993 law which allows for the prosecution of international crimes without any territorial or nationality link.[3] Dutch courts have traditionally been slow to embrace universal jurisdiction, and in this regard, the decision of the Amsterdam Court of Appeal is a welcome reflection of this recently emerging trend.

As a preliminary step, the Court determined that universal jurisdiction could apply only if the December Murders could be classified as constituting a war crime, crime against humanity or torture. It concluded that the December Murders was not a war crime, since it did not occur during a period of armed conflict. However, it found that the December Murders did fall within the ambit of crimes against humanity and torture, thus allowing for the possibility of a prosecution based on universal jurisdiction.

Crimes against humanity

The Court concluded that in 1982 the December Murders could already be regarded as a crime against humanity leading to individual criminal responsibility. Under a 1943 Dutch law, however, crimes against humanity are limited to acts committed during World War II. Articles 8 and 9 of the *War Crimes Act 1952* (WCA) categorises a crime against humanity as an aggravation of a war

3 In June 2001, the four accused, including two Roman Catholic nuns, were found guilty of various crimes relating to mass killings in Rwanda during 1994.

crime committed during war or armed conflict (Van Elst 1994: 1401-1404), though it is no longer necessary that the Netherlands itself is involved in the conflict (see the *Knezevic* decision). This issue will require further consideration as proceedings move forward in the Netherlands.

Torture

The Court also found that the December Murders constituted torture within the definition of the *UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (CAT). This instrument recognises universal jurisdiction and obligates parties to prosecute or extradite an alleged perpetrator present in its territory. Issues of timing arise since the December Murders predated both the conclusion of the CAT and its subsequent transformation into domestic Dutch law (20 January 1989). However, based on the *jus cogens* nature of the prohibition on torture (Askin 1997: 240-241), Dugard concluded that this did not represent an obstacle to prosecution. The CAT purports to be declaratory of existing customary international law in respect of the definition, prohibition, and criminalisation of torture. Dugard cited a number of human rights treaties[4] and the *Pinochet* decision to support the existence of torture as a substantive crime under customary law before 1982. Indeed, it can be argued that to allow pre-1984 torturers to travel freely would run counter to the purpose and object of the convention.

In addition, both the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) state that acts that were crimes when committed must be tried and punished, and that the non-retroactivity principle must not prejudice this (Van Dongen 2000: 1141). This supports the application of the CAT to cover earlier crimes such as the December Murders.

However, the general principle of legality provides that treaty obligations commence upon ratification and that retroactive penal measures are prohibited.[5] Dugard, with whom the Court agrees, argued that, although the institutional machinery of the CAT cannot be said to have retrospective effect, the obligation to prosecute or extradite torturers (*aut dedere aut punire*):[6]

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4 He referred to the *European Convention on Human Rights and Fundamental Freedoms* (ECHR), *International Covenant on Civil and Political Rights* (ICCPR), *American Convention on Human Rights* and *African Charter on Human and Peoples' Rights*.

5 See also art 28 *Vienna Convention on the Law of Treaties*.

6 Dugard Opinion para 5.7.7.

> ... is procedural and its extension to cover an act of torture committed before 1989 in terms of a multilateral extradition agreement ... does not offend the rule of legality any more than does the application of a bilateral extradition treaty that entered into force in 1989 to a crime committed in 1982.

On this basis the Court held that the Dutch *Torture Act 1988* (TA) (which became law in 1989) could be applied retrospectively to cover conduct that was already illegal under Dutch law before 1989 — such as assault and murder — but was not yet criminalised as torture.[7]

Transformation of international law into Dutch law

Under Dutch law, the application of the universality principle is only accepted if an explicit basis can be found for it in international law, either as a rule of customary international law or a treaty provision. A domestic statute is also necessary to 'transform' international law obligations into Dutch criminal law (Haentjens & Swart 1997: 27-38). A Dutch criminal court cannot directly apply international law in the absence of this transformation (Strijards 2000: 2114-2115).

Moreover, the relevant international crimes must already have been transformed in this way at the time they were committed. This rule also applies to treaty obligations, even where they represent *jus cogens* norms. It therefore becomes necessary to determine whether the crime of torture was punishable under domestic law in 1982. The explanatory memorandum accompanying the TA expressly provides that acts falling within the description in art 1 of the CAT were already made punishable under Dutch penal law, and under the WCA if committed in times of war. According to Dugard, this confirms that the December Murders were punishable in 1982.

However, Strijards (2000: 2118-2119) argues that even though torture was illegal under Dutch law in 1982, it was not criminalised as such, a necessary prerequisite for jurisdiction. Despite strong moral reasons to proceed against Bouterse, this argument creates a domestic legal hurdle that neither customary international law nor the Amsterdam Court of Appeal can overcome.

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7 On this point, Dugard (at para 8.4.4) points to the Australian *War Crimes Amendment Act 1988* (Cth) and similar Canadian legislation providing for the prosecution of persons guilty of war crimes and crimes against humanity. Both statutes, in providing for the retrospective force of such crimes, refer to conduct that would have constituted a criminal offence by some other name in Australia or Canada respectively.

One could also question whether the crime of torture, if prohibited in the Netherlands before 1989 under a 'national' legal definition, can still be prosecuted on the grounds of universal jurisdiction. Historical evidence offers mixed signals on this point. On the one hand the universality principle is acknowledged under art 5 of the TA. Moreover, the Netherlands did not enter a reservation to restrict the exercise of universal jurisdiction when it ratified the CAT.

On the other hand, during the Parliamentary debates relating to the then proposed TA, it was made clear that the Act would only be applicable to future crimes of torture. In addition, Dutch case law extends the prohibition of retroactive application of the law to jurisdictional matters (see the *Knezevic* decision).

Effect of the ne bis in idem principle

Under Surinam criminal law, any judgment by a Dutch court will bar further prosecution of Bouterse in Surinam.[8] Moreover, Dutch law prevents the Netherlands from providing legal assistance to any country, including Surinam, in prosecuting Bouterse for offences for which he is being prosecuted in the Netherlands (Klip 2000a: 18-19).[9] This applies both during the prosecution as well as after the Court's decision, regardless of the outcome of the trial. It would also restrict assistance in situations where a Dutch judge acquits Bouterse for lack of evidence, even where the Surinam authorities would have access to more comprehensive evidence.

At the same time, Surinam criminal law no longer allows assistance to other countries in prosecuting Bouterse for the same offences once a decision is handed down in a Surinam case. In these circumstances, a move to prosecute Bouterse in the Netherlands may, regrettably, limit the chances of a conviction anywhere. As a result, the Dutch proceedings should be suspended at this point, and before any prosecution is instigated, so as not to invoke the *ne bis in idem* principle.

Suspension of the Dutch proceedings

The Court noted that the prosecution of Bouterse in the Netherlands could be suspended if the progress of proceedings in Surinam warranted such a decision. While this is true, under Dutch legal procedure these comments in no way bind the future actions of the prosecutor. The competence of the Amsterdam Court of Appeal was limited to ordering the prosecution of Bouterse (as it did) or dismissing the

8 Art 94 *Surinam Code of Criminal Law 1910*.

9 See also arts 4 and 68 *Dutch Code of Criminal Law 1881* and art 552t *Dutch Code of Criminal Procedure 1921* (CCP).

complaint. It could, however, have postponed its final decision to allow the Netherlands to render legal assistance to the Surinam proceedings (Klip 2000b: 2120-2121). In that way, the Court would have more positively contributed towards an effective prosecution of Bouterse, rather than creating a new problem as a result of the two concurrent prosecutions.[10]

It is still possible, however, that the Dutch Supreme Court could limit its involvement at this stage to simply deciding on those legal issues it regards as of 'fundamental importance', without proceeding further.[11] Alternatively, the Netherlands could decide to hand the prosecution over to Surinam pursuant to art 552t of the *Code of Criminal Procedure* 1921, which is aimed at preventing double prosecution and eliminating obstacles for legal support.

Political considerations — the most appropriate forum for prosecution?

In many criminal cases, one would normally expect the territorial State to be the most appropriate option for prosecution. The relevant evidence and witnesses would be more likely to be available. From an evidentiary viewpoint, the Bouterse prosecution should take place in Surinam. In addition, the prosecution of Bouterse in Surinam could also herald a symbolic return to justice and order in a country where the rule of law was severely compromised during the years of military rule.

Yet the Amsterdam Court of Appeal should view the current proceedings in Surinam with some caution. Bouterse still exercises considerable influence over elements of the army, the business community and civil authorities. The country's judicial system, which is recovering from years of economic hardship and political obstruction, may still be vulnerable to manipulation by interests loyal to Bouterse. The Court of Appeal should therefore leave open the possibility of (re)instigating a prosecution in the Netherlands if it becomes obvious that the Surinam prosecution is designed to avoid justice, since this would not infringe the *ne bis in idem* principle.

However, as things stand at this moment and notwithstanding its justifiable caution, the Amsterdam Court of Appeal's decision has left a rather arrogant, post-colonial impression — that the prosecution of Bouterse should proceed, but in the Netherlands.

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10 Indeed in August 2001, Surinam requested legal and technical assistance from the Netherlands in relation to its prosecution proceedings.

11 This is known as cassation in the interest of law and is permitted under art 456 CCP.

Having said this, there are some important historical ties between Surinam and the Netherlands that may justify a Dutch prosecution. Customary international law permits a State to exercise criminal jurisdiction where the effect of the crime is felt in its territory, or when the crime threatens its own safety and security (see for example, the *Eichmann* case). It is clear that the killings have had a profound effect in the Netherlands. Surinam was a former Dutch colony, and there is a large Surinam community in the Netherlands, which grew considerably after December 1982.[12] The December Murders significantly influenced the subsequent course of history in Surinam and the lives of Surinamese people living in the Netherlands. The petitioners both live in the Netherlands. Dugard therefore concludes that customary international law would permit the Netherlands to exercise jurisdiction over Bouterse on these grounds.

A Dutch trial in absentia?

Under international law, there is no obligation on the Netherlands to exercise criminal jurisdiction over an alleged offender outside Dutch territory. Nor is the Netherlands under a legal obligation to request Bouterse's extradition from Surinam or any country that he may visit. Instead, the obligation to prosecute or extradite him under the CAT only arises at the moment Bouterse enters Dutch territory. However, this is most unlikely given that he has already been tried and convicted in absentia in the Netherlands for unrelated crimes.[13]

From a human rights point of view, there are strong arguments against holding a trial in absentia in relation to international crimes (see for example the *Furundija* case). These confirm the desirability of allowing the proceedings in Surinam to take their course as the most appropriate legal and political solution.

Concluding remarks

Legal and political developments over the past decade have encouraged an increasing number of states to strengthen their resolve for international justice. After years of neglect, some states are now beginning to prosecute international crimes on the basis of universal jurisdiction. In the authors' opinion, this is a long overdue development.

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12 At present, approximately 300,000 Surinamese people live in the Netherlands, of which 100,000 were born in Surinam.

13 On 30 June 2000, the District Court in The Hague sentenced Bouterse to 11 years in prison on drug related crimes. This trial in absentia was specifically permitted under the Dutch *Opium Act 1928*.

The Amsterdam Court of Appeal has continued this trend and has sought to apply the principle of universal jurisdiction to the December Murders. It has concluded that, according to customary international law as it stood in 1982, they constitute crimes against humanity and torture.

As laudable as this step is from a 'pursuit of justice' viewpoint, there are a number of unresolved legal questions arising from these conclusions. One cannot help but feel that the Court has confused what is morally desirable with what is possible, and what might be permitted with what is not yet obligatory. As crimes against humanity, the December Murders are not punishable under Dutch law. The CAT forms the strongest basis for the prosecution of Bouterse, but the Netherlands implemented it after 1982. It may be difficult to retrospectively apply jurisdiction over torture committed in 1982 without violating the principle of legality, which is rigidly enshrined in Dutch (criminal) law. In addition the presence of Bouterse in the Netherlands is highly preferable in order to exercise universal jurisdiction.

Of even greater practical significance, the concurrent prosecution of Bouterse in both Surinam and the Netherlands may actually hinder the pursuit of justice, at the exact moment that it might finally have been possible. It is regrettable that the Amsterdam Court did not postpone its final decision in order to allow the proceedings in Surinam to take their normal course. The case has now proceeded further in the Netherlands[14] and the Dutch Supreme Court will decide on the matter shortly. Hopefully that decision will clarify the situation and further enrich one of the first Dutch experiences in the exercise of universal jurisdiction.[15]

Whatever the outcome however, it is to be hoped that those responsible for the December Murders will finally face trial, ideally before the Surinam courts. ●

Domestic cases

Darco Knezevic (unreported) Dutch Supreme Court NJ 1998, 463, 11 November 1997
Decision of the fifth-bench division, 20 November 2000, Petitions R 97/163/12 and R 97/176/12, Petitioners R Wijngaarde and R Hoost

14 On 8 May 2001, the Procurator-General (PG) concluded that the Netherlands did not have jurisdiction in this case.

15 A brief summary of the Dutch Supreme Court's decision will appear in the next edition of the AJHR.

United Kingdom

R v Bow Street Metropolitan Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3) (1999) 2 All ER 897 (HL)

Domestic legislation

Australia

War Crimes Amendment Act 1988 (Cth)

Surinam

Code of Criminal Law 1910

The Netherlands

Code of Criminal Law 1881
Code of Criminal Procedure 1921
Opium Act 1928
Torture Act 1988
War Crimes Act 1952

International legal materials

African Charter on Human and Peoples' Rights, (1982) 21 ILM 58, entered into force 21 October 1986

American Convention on Human Rights, 1144 UNTS 123, entered into force 18 July 1978

Attorney-General of the Government of Israel v Eichmann (1961) ILR 5 District Court of Jerusalem, Israel

Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, (1984) 23 ILM 1027 and (1985) 24 ILM 535, entered into force 26 June 1987

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, entered into force 3 September 1953

Prosecutor v Anto Furundija, Judgement, Case No. IT-95-17/1-T, International Criminal Tribunal of the Former Yugoslavia Trial Chamber, 10 December 1998

International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976

Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force 27 January 1980

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Klip A (2000a) 'De roep om strafrecht' (2000) *De Helling* 18

Klip A (2000b) 'Dubbele vervolging voor de decembermoorden?' (2000) 44 *Nederlands Juristenblad* 2120

Strijards G 'Nederlands dualisme en zijn strafmacht' (2000) 44 *Nederlands Juristenblad* 2114

Van Dongen R 'De decembermoorden berecht?' (2000) 23 *Nederlands Juristenblad* 1141

Van Elst R 'Afscheid van Joegoslavië' (1994) 41 *Nederlands Juristenblad* 1401.