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**"Plan of Action on the approach of war
crimes in the Netherlands"**

SUMMARY

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Plan of Action on the approach of war crimes in the Netherlands

The arrival of war victims in the Netherlands, for example refugees from the former Yugoslavia and Rwanda, implied that the fight against war crimes was no longer a distant problem. Victims and perpetrators of war crimes both walked on Dutch soil. Also other factors contributed to the increased attention to war crimes, crimes against humanity and genocide (referred to collectively below as war crimes). Among these were the founding of the ad hoc tribunals for former Yugoslavia and Rwanda, the International Criminal Court (ICC), and the introduction of the Dutch International Crime Act (WIM).

The first investigation team (the National Investigation Team for War Crimes: NOVO-team) was set up in 1998 under the responsibility of the Office of the Public Prosecutor in Arnhem (the Criminal Law in Wartime Act (WOS)-team). Following an evaluation of its functioning (Beijer et al., 2001) a “Plan of Action on the approach of war crimes in the Netherlands” was drafted in 2002. In the meantime, the name NOVO-team was changed into ROM-team.

The key question of this second evaluation is whether or not the measures and activities which were formulated in the Plan of Action have contributed to a more efficient and effective investigation and prosecution of war crimes. This question was broken down into four research questions.

1. To what extent have the measures, agreements and activities formulated in the Plan of Action been implemented in practice?
2. To what extent do these measures, agreements and activities contribute to a more efficient and effective investigation and prosecution of war crimes?
3. Does the implementation of the Plan of Action meet the expectations as discussed in Parliament?
4. Are new policy measures desirable for an efficient and effective investigation and prosecution of war crimes? If so, which?

In this summary, we first address the actual implementation of the measures and activities in the Plan of Action. We then discuss the conditions for an efficient and effective approach to war crimes.

1.1 Implementation of the Plan of Action

The various measures and activities in the Plan of Action can be summarised under four aspects:

1. transfer of authority from the Arnhem public prosecutor's office to the national public prosecutor's office;
2. expansion of staff and strengthening of expertise;
3. improvement of cooperation and networking;
4. formulation of clear objectives and attention to continuity.

1. Transfer of authority from the Arnhem public prosecutor's office to the national public prosecutor's office

One of the problems identified in the first evaluation was the discrepancy between the administrative line and the lines of authority. Transferring the authority over the ROM-team from the regional to the national public prosecutor's office solved this problem. All parties involved describe the present relationship between the office of the public prosecutor and the ROM-team as excellent: the lines are clear and short, there is intensive consultation and there is mutual trust and appreciation.

2. Expansion of staff and strengthening of expertise

At the time of writing of the Plan of Action, the NOVO/ROM team had 12 FTEs. The Plan of Action called for an expansion of the team to 32 FTEs, but this did not take place. Currently, 22 FTEs is considered the minimum norm. The most important reason for reducing the proposed staffing from 32 to 22 FTEs was the shift in priority to the fight against terrorism. The 10 FTEs released are being deployed in combating terrorism.

It proved to be extremely difficult to establish whether or not the proposed 22 FTEs have indeed been achieved, because no exact figures are available. This is related to the working method of the National Police Services Agency (KLPD), where flexibility and multi-employability have priority. Staff is seconded in and out, for example to combat terrorism, and no annual overviews are produced. Apart from the ROM-team, the Criminal Intelligence Unit (CIE) is currently playing a more important role than before in preparing cases. However, this development has not been translated in the staffing of the CIE.

Apart from expansion of staffing, strengthening of expertise was envisaged in two ways: by expanding the team with a number of experts, and by improving training opportunities.

The number of experts has indeed increased: a historian with experience at the Immigration and Naturalisation Service (IND), an expert in the area of public administration, a lawyer/criminologist and various financial experts are attached to the team, as are two part-time staff from the Criminal Intelligence Unit (CIE). In addition, the team can call on the expertise of the Operational Expertise Unit (UOE) and is supported by the international criminal law expert attached to the national public prosecutor's office. Unusually, experts from other disciplines (e.g. jurists) are involved in the operational investigations; such a level of integration of disciplines is uncommon within the police and is seen as a positive factor.

The proposed specific training on war crimes did not materialise. A combined terrorism and war crimes course ran for one year, at which point the terrorism course was split off and developed separately, while development of the war crimes course stopped. The investigation shows that the team has a need for

basic training in the legislative and legal framework concerned with combating war crimes (rather than for a separate war crimes course).

The Plan of Action provides for the recruitment of a second international crime officer and an academically trained member of staff for public information and the (further) development of national and international contacts.

During the evaluation investigation, the team of the Public Prosecution Service consisted of three case officers, two specialised clerks and, since 2004, an expert in the application of international law in national law. However, the officers concerned, as well as the public prosecutor's clerk, are not earmarked exclusively for war crimes. The expert is hired on a payroll basis. The above staffing is largely consistent with the Plan of Action.

The staffing and expertise of the ROM-team and the public prosecutor's team have indeed been enlarged. A remarkable feature of the current police and public prosecutor's team is their high degree of commitment to the investigation and prosecution of war crimes: they are enterprising and tenacious. The current number of 22 FTEs for the ROM-team is seen as a sufficient minimum, and allows approximately four investigations to be dealt with at the same time. However, a number of threats can be identified, some arising from the way in which the police service is organised. General policy is that people regularly change their place of work within the police with a view to developing generalists rather than specialists. This policy makes it difficult to retain experience and expertise. Furthermore, dealing with terrorism consumes much time and manpower, at the expense of combating war crimes.

3. Improvement of cooperation and networking

Tackling war crimes demands extensive cooperation with a range of public services and other organisations as well as European consultative structures. The Plan of Action sets out to improve such cooperation.

One of the means to this end is a public information plan, aimed at enhancing the accessibility of the team (i.e. the police and public prosecutor's team). It is also seen as a way of encouraging people to provide information. This public information plan did not materialise. Neither has a special contact been established at the office of the public prosecutor. The ROM-team does not consider folders and general publicity as an effective method to encourage witnesses to come forward and provide information. However, they do consider it useful to increase awareness of the existence and working method of the ROM-team, particularly among potential and existing partners, such as NGOs and the police in other countries. Public information should therefore mainly focus on the strengthening of networks and the exchange of information with partners at home and abroad. To this end, a vision document was drafted in 2005.

Part of the Plan of Action is to improve the exchange of information with various public services, more specifically with the Immigration and Naturalisation Service (IND) and the Ministry of Foreign Affairs with respect to sources of information. The Office of International Legal Assistance in Criminal Matters (BIRS/Ministry of Justice) plays an important role in facilitating international requests for legal assistance. Improvement is also envisaged in the contacts with the Royal Netherlands Military Constabulary (KMAR), the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD).

The IND is the body that decides on the application of art. 1F of the Refugees Convention . All 1F-files are forwarded to the national office of the Public Prosecutor and can give rise to a criminal investigation.

Contacts between the IND, the office of the public prosecutor and the ROM-team have improved since the previous evaluation. The cooperation is described as good. 1F-files are usually forwarded to the Public Prosecution Service immediately after taking the 1F decision. Since January 2004, the IND supplies the 1F-files mainly in digital form to the Public Prosecution Service. Furthermore, there is a fixed contact at the IND and there is an active response to requests for information from the office of the public prosecutor or the ROM-team.

One of the problems identified in the evaluation concerns the supply of information by the IND to the Public Prosecution Service. There is a difference in the information needed by the IND in the asylum decision under administrative law, and the information needed by the Public Prosecution Service for a criminal investigation. The IND's search system is not equipped to deliver the information that is needed from a criminal law perspective. Exchanging information also runs up against the protection of privacy, as set down in the Personal Data Protection Act (Wbp), especially where data on possible witnesses or victims are involved. Furthermore, cooperation is hindered because the IND is a product organisation. Another problem concerns the discrepancy between the time and manpower needed by the Public Prosecution Service to screen the 1F files for criminal law relevance, and the usefulness of 1F files in a criminal prosecution: currently less than one per cent of the 1F files leads to criminal prosecution. However, the 1F files are considered valuable, also for more general background knowledge.

The Ministry of Foreign Affairs plays an important facilitating role in establishing contacts abroad. For the national public prosecutor's office, the embassies and liaison officers abroad are important partners. When working abroad, the Dutch embassies act as a base of operation for the Central Intelligence Unit (CIE) and the ROM-team. The cooperation and exchange of information with the Ministry of Foreign Affairs has improved since the previous evaluation.

A potential conflict exists between the public prosecutor's office/ROM-team and the Office of International Legal Assistance in Criminal Matters (BIRS) of the Ministry of Justice. For carrying out investigations abroad, permission has to be obtained from the competent foreign authorities. BIRS policy is that this should normally happen (via BIRS) through the prior submission of a formal request for mutual legal assistance through diplomatic channels. It is only possible to deviate from this procedure in exceptional cases. The reasons for this are twofold: on the one hand watching compliance with the rules of international law, on the other hand political considerations. The police considers this working method to be unnecessarily restrictive. From the perspective of investigation, the Public Prosecution Service and ROM-team would prefer to establish their own contacts with the authorities as necessary. They would prefer to submit requests for mutual legal assistance through police officers or the public prosecutor rather than through BIRS.

The Plan of Action sets out to improve the contacts with the Royal Netherlands Military Constabulary (KMAR), the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD), with a view, among other things, to enhancing military law expertise. To date there has been no contact with KMAR, which is not seen as an important partner.

On an operational level there are occasional contacts between the Central Intelligence Unit team and the AIVD and the MIVD. Currently, so called 'Article 60'

officials are acting as a kind of liaison officer between the AIVD and the criminal investigators.

On an operational level, there are bilateral contacts with police teams in other countries. In addition, a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes was established in 2002. This is viewed as a positive development. For the Netherlands, the war crimes officer at the national public prosecutor's office functions as the contact point.

Besides cooperation with public services, the cooperation with NGOs has been intensified in the past period. Experience shows that personal and informal contacts are important in this regard. Contacts are mainly made in response to concrete cases. The Public Prosecution Service and the ROM-team maintain contact with the tribunals (in particular the Yugoslavia Tribunal), especially with regard to concrete dossiers. Opportunities for cooperation are currently being investigated with the International Criminal Court.

In general, the cooperation with the partners identified in the Plan of Action has improved in the past period. Cooperation with some partners, such as the IND and the Ministry of Foreign Affairs, is proceeding on a structural basis. Cooperation with other partners, such as the tribunals and NGOs, is mainly sought in response to a concrete case. The cooperation can be developed further, in particular with the NGOs and the International Criminal Court. On a policy level, the European Network could play an important role in the future.

The evaluation identified two obstacles. Different information is needed for the asylum decision and the criminal investigation. The IND's information search system is not geared to the information needed for criminal investigation and prosecution, which makes IND information hard to access for the police and Public Prosecution Service. Furthermore, the possibilities for exchange of information between the IND and the Public Prosecution Service concerning possible witnesses and victims are restricted by the Personal Data Protection Act. Moreover, the protocol concerned is outdated. Secondly, the BIRS policy that all requests for mutual legal assistance pass through BIRS as a matter of course may come into conflict with the interest of rapid and efficient police and Public Prosecution Service action in the country concerned.

4. Formulation of clear objectives and attention to continuity

Besides the envisaged measures in the areas of authority, expertise and cooperation, the Plan of Action contains a number of concrete objectives with respect to the working method and for safeguarding continuity. The concrete objectives include the so-called cluster approach, the turnaround time for assessing 1F files and access to information in IND files.

In order to monitor the implementation of the Plan of Action, it is proposed that a supervisory committee be set up. This committee has been established and consists of representatives of the Ministry of the Interior and Ministry of Justice, the National Police Services Agency (KLPD), the IND and the National Office of the Public Prosecution Service. The committee met on two occasions.

From cluster investigation to operational investigation

The Plan of Action opted for a so-called cluster approach, or, in other words, the clustering of related files with the objective of investigating four clusters at the same time with an assumed turnaround time of approximately one and a half years. In practice, clustering has actually been applied in a number of cases, in particular in the Afghan files. However, in the course of the evaluation period this working method has been abandoned because it led to few results. Investigations are currently set up in a more operational manner, in other words: a shar-

per focus on concrete criminal facts as the starting point of investigation, combined with the use of traditional investigation methods. Apart from 1F files, also other sources are used to start an investigation, such as media reports or statements of victim-witnesses. Dutch suspects are also being given attention. The approach is result oriented, focusing on the actual investigation, prosecution and conviction of suspects. The 1F files are used mainly as background and databank. In addition, the Central Intelligence Unit (CIE) acts as a 'front post', gathering information that can be used in the investigation.

This new working method has produced results: of the 1F files sent to the public prosecutor's office in the 1998-2003 period, four have culminated in a criminal investigation. Two of them have resulted in a conviction (one ultimately turned out to be a human smuggling case rather than a war crime case) and two cases were still being heard in the summer of 2005. In addition, two investigations into Dutch citizens suspected of war crimes are still running.

Assessment of 1F files and access to information

The assessment of the 1F files has improved greatly. The processing of 1F files has been organised more efficiently through the development of standard forms and a new recording system. The newly arrived files are assessed with priority, usually within a month.

Furthermore, efforts are being made to make up the ground lost in the 1998-2003 period. When the new public prosecutor's clerk started in October 2003, there was a backlog of 525 files. By February 2005, this backlog had been reduced to 260 files, 106 of which had newly arrived for assessment and 154 waited for reassessment because of the introduction of more stringent criteria.

The IND hardly provides any information to the Public Prosecution Service on potential witnesses who could be relevant to a criminal investigation. One of the reasons is that the identification of potential witnesses strongly depends on how observant individual IND staff is. Another reason is a more structural problem: general access to asylum files by the Public Prosecution Service with an eye to identifying witnesses or victims runs up against the Personal Data Protection Act. The information can be passed on only with the permission of the person involved.

It can be concluded that the more operational working method of the ROM-team and the office of the public prosecutor has been successful. What is lacking, however, is a more long-term vision in terms of political choices on the type of cases and perpetrators to focus on and the related priorities to be set. Along with a reactive response to a 1F file or incident, the police and public prosecutor team feel the need for a more proactive working method. Also a policy is lacking for dealing with victims and the protection of, possibly threatened, witnesses, in particular when the witnesses are abroad.

1.2 Conditions for combating war crimes

In recent years, various measures have been taken for making the approach to war crimes more dynamic, and results have been booked in investigation and prosecution. Whether or not this approach can be considered efficient and effective is a question that is not simple to answer, because the criteria for an efficient and effective approach are unclear. The Plan of Action establishes no criteria on which to base an assessment of efficiency or effectiveness. The question is

therefore rather whether, with the current resources and working method, conditions exist for working efficiently and whether promising investigations also lead to success.

The most important conditions for an efficient approach are sufficient manpower and expertise, an extensive and differentiated network of partners and contacts, and the safeguarding of continuity. Are these conditions met and what risk factors can currently be identified?

1. Sufficient manpower and expertise

Experience has shown that each investigation requires a team of six detectives on average (including the coordinator), depending on the phase of the investigation. With current staffing, it is possible to conduct approximately four investigations at the same time (one of which in project preparation), in accordance with the objectives of the Plan of Action. The number of 22 FTEs is a minimum staffing level. In addition, it is necessary to realise 2 FTEs of Central Intelligence Unit (CIE) effort in order to proceed with the current working method. For the Public Prosecution Service, the current staffing is also a minimum. However, the issue is not only about establishing a minimum number of FTEs. Above all, it is important to beware of too much capacity flowing away to combating terrorism, both with respect to the police and the Public Prosecution Service.

Here we touch on the organisation of the National Police Services Agency (KLPD) in general, where the emphasis is on flexibility and multi-employability. The predominant model in current KLPD policy is in fact a loose group of people, each with their own defined expertise, who are deployable as the need arises in a variety of places, whereas various kinds of expertise can be hired on an ad hoc basis. One of the arguments for this organisation form is to prevent 'subject fatigue': avoiding teams losing creativity by developing too many habits. This organisation form, however, can lead to problems in dealing with war crimes: the organisation wants to have generalists who are multi-employable, whereas the investigation of war crimes requires experts who are able to conduct professional and specialised investigations. A condition for an efficient working method is at any rate the existence of a team that consists of a sufficient number of people and expertise. One of the options is to work with a fixed, multidisciplinary team, in any case for each separate investigation. Expertise, experience and the possession of networks is not necessarily interchangeable or transferable, nor to be hired on an ad hoc basis. It is advisable for the staffing level to be above the minimum, which would make the team less vulnerable to shifts in political and other priorities and the departure of experienced members.

In addition to the staffing and working method, safeguarding expertise is another point of concern: how to ensure that knowledge is retained and remains usable for subsequent investigations? This aspect is currently a weak link. Another problem is capturing the accumulated expertise. The question is whether a separate centre of expertise in partnership between the Public Prosecution Service and the National Police Services Agency is necessary for safeguarding the accumulated knowledge, or whether the knowledge could also be safeguarded in a different way, for example by working with 'knowledge systems', like the ICTY.

The prosecution of war crimes is still in a development phase with respect to the trial phase. If the number of cases submitted to the court increases, the call on the expertise of the Public Prosecution Service will also increase. It is therefore

necessary to safeguard the expertise in international criminal law at the Public Prosecution Service.

2. Cooperation with different bodies and on various levels

Cooperation with the various partners involved improved in the evaluation period, particularly where the public services are concerned. However, improvement is desirable on a number of points from the perspective of efficiency.

The conditions for an efficient coordination between the IND and Public Prosecution Service concerning the 1F files have improved. However, it is questionable whether or not the considerable investment in time outweighs the usefulness of 1F files from the perspective of criminal investigation. The “gap” between the application of Art. 1 F of the Convention on Refugees and the number of cases that actually lead to prosecution is wide. One of the possibilities for narrowing this gap is to adopt a more restrictive interpretation of the refugee law criterion of ‘serious reasons’, so that it moves closer to the criminal law criterion of suspicion, as is the case in Belgium. Another possibility is greater integration of the criminal proceedings into the asylum procedure, bearing in mind that in that case, criminal guarantees will also be applicable sooner. Another point is that the exchange of information on potential witnesses or victims can be improved.

The efficiency of the coordination between the public prosecutor/ROM team and BIRS with respect to requests for mutual legal assistance can be improved by clearly distinguishing the requirements of international law from what is deemed politically necessary or desirable. Furthermore, a notification procedure as an alternative to the current policy may provide more flexibility.

The contacts with the tribunals and the ICC are not yet optimal. Contacts mainly take place on an operational level and on an ad hoc basis. More structural cooperation with the tribunals and the ICC is advisable. Similarly, relatively little attention has been paid to establishing structural contacts with NGOs and with the ethnic groups involved in the Netherlands itself.

3. Safeguarding continuity

It can be concluded that in general the conditions for successful working are currently present. The present challenge is to strengthen and consolidate several of the lines that have been laid out.

It is important in the coming period to pay attention to the institutional positioning of both the public prosecutors and the ROM-team. The ROM-team must be institutionally well anchored in the KLPD, and the Public Prosecution Service team in the national public prosecutor’s office. The ad hoc nature of the police organisation and the lack of a staffing policy oriented to retaining experienced staff, together with the inadequate safeguarding of expertise, is making the current team vulnerable.

Furthermore, a long-term policy is necessary, both in terms of (priorities in) investigation and prosecution, and of European cooperation. Currently the approach is mainly reactive: which cases are investigated depends on what comes up in the form of 1-F files and - new - signals from other investigations or the media. A long-term policy needs political and other choices on the type of cases and perpetrators to focus on and the associated priorities. One option is to proactively investigate centres of combat in countries that can be expected to be the source of asylum-seekers arriving in the Netherlands. Other options include

to more actively try to get reports from victims or witnesses, to tap into other sources (e.g. NGOs and the tribunals) or to explicitly opt for a proactive investigation and prosecution of Dutch citizens who may be involved in war crimes abroad, for example Dutch mercenaries.

In addition, a policy could be developed within the European Network on a division of tasks between the European countries. Possible criteria could include knowledge of the local language or the presence of a large population group from the country concerned. From the perspective of efficiency and effectiveness, gains are certainly to be made in this area. This has the additional effect of being able to retain the information and expertise gathered, rather than losing expertise and built-up networks after an investigation closes.

In order to guarantee the continuity it is advisable to proceed with the current system of progress reports and to set up a steering group or supervisory committee for monitoring progress.

1.3 Does the implementation meet the expectations of Parliament?

In the parliamentary debates the importance of sufficient staffing of the then NOVO team was pointed out, as well as the need for separate teams on war crimes and terrorism. The latter was out of fear that the tackling of war crimes would suffer from the combat of terrorism. Reference was also made to the importance of improvement of expertise by establishing a training course for the police and the IND. Finally a need was identified for measures to increase the willingness of witnesses and victims to provide information and press charges.

The proposed measures and activities have been largely implemented. Staffing has increased and there are separate teams. However, the danger that combating terrorism will draw manpower away from the Public Prosecution Service and ROM-team has not abated. The fear expressed by Parliament at the time seems justified. The proposed training course specifically oriented to war crimes did not materialise. Training does take place within the IND on war crimes, but it is not compulsory. No specific measures have been taken for making victims more willing to supply information and press charges.

The police and Public Prosecution Service consider political support for dealing with war crimes to be important; it provides cover. Motions and questions in Parliament can play an important role in consolidating the approach to war crimes and developing a long-term policy.

1.4 Conclusion and policy recommendations

In general, it can be said that prosecuting war crimes is complex, not only because of the substance of the field, but also because of the large number of actors involved, each with their own perspective. Formally, control over all these actors is exercised by the Ministry of Justice, the Ministry of the Interior and the Board of Procurators General. In practice, there is no tight top down control; much depends on individual people and relationships. This degree of 'freedom from control' has created a productive space for exploring limits and developing new working methods.

The general picture is that sufficient legal opportunities exist and that competence is not a problem. The degree of difficulty of cases, the problems of finding witnesses and the fact that the crimes concerned were committed long ago and in another country, are seen as factors demanding high quality investigation skills rather than as insurmountable obstacles. These are different signals than those picked up in the previous evaluation report, where a strong emphasis was put on the problems, in particular with gathering evidence, in cases of this kind.

The conditions for working successfully currently exist: there is a properly functioning team at the police and Public Prosecution Service, expertise and competencies are present, a varied network of partners and sufficient resources and facilities are available. However, the presence of these conditions is currently to a large extent dependent on individual people and thus on fortunate coincidence rather than conscious policy. It is therefore important to put in place a number of measures to make the teams less vulnerable, such as expansion of staffing and a better securing of expertise, among other means by working with fixed teams. Furthermore, a long-term policy is needed for enhancing efficiency. The challenge for the coming years will be to continue along the path now embarked upon, and to improve and consolidate the results thereof.

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