Executive summary

In the context of the ratification process of the Netherlands of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005, the issue of the scope of three principles of jurisdiction (passive personality principle, domicile principle and beyond the jurisdiction of any state principle) arose from the discussion between Parliament and the government. This study aims at examining this issue in broader terms, by answering to the following research question: **What are the foundations for jurisdiction with regard to offences committed abroad?**

Following a comprehensive analysis of the legal system of four countries (Belgium, Germany, England and Wales and the Netherlands) and of international law, the study seeks to offer recommendations on how to improve the Dutch approach of jurisdiction over extraterritorial offences. For each country, the research was guided by a set of questions: Which extraterritorial grounds for jurisdiction do states recognize, and which categories of offences are concerned by each ground? Why have states chosen to recognize a ground for jurisdiction and not another, with regard to specific offences? Which rationale do states put forward to justify the extension of jurisdiction to offences committed outside their national borders? Interviews of practitioners in the four countries have completed the study and highlighted the practical implications of the recognition of extraterritorial jurisdiction in terms of investigations and prosecutions.

Chapter 2 examines the extraterritorial jurisdiction of Belgium. The country recognizes the following extraterritorial grounds for jurisdiction: the protective principle, the active personality principle, the passive personality principle and the universality principle. While some of these principles benefit from a general application (active personality principle, passive personality principle and universality principle derived from the principle of *aut dedere aut judicare*), others are limited to specific categories of offences. The jurisdictional provisions lack coherence, and it is frequent that an offence falls within the scope of more than one principle, as it is the case in the Netherlands. Most of the extensions of jurisdiction result from the compliance with Belgium's international and European obligations, but others are the consequence of its willingness not to remain powerless in certain circumstances or to go beyond its international obligations with regard to specific crimes. In only one case did Belgium restrain the scope of its extraterritorial jurisdiction, under international pressure. This restraint concerned war crimes, crimes against humanity and genocide, for which an application of the principle of universality was replaced by the principles of active and passive personality. On the procedural side, the exercise of extraterritorial jurisdiction, unless otherwise provided, is subjected to the respect of a set of requirements, such as the presence of the accused on the Belgian territory and the double criminality principle. In addition, a procedural feature typical to the Belgian system, the institution of civil action proceedings or "constitution de partie civile" by which the victim may institute criminal proceedings, was recently conditioned to a decision to proceed by the federal prosecutor with regard to international crimes and grave breaches of international humanitarian law. Finally, Belgian practitioners are satisfied with the existing infrastructure and financial means to exercise extraterritorial jurisdiction, but it results from the interviews that very few

criminal proceedings are instituted with regard to offences committed outside national borders, with the exception of international crimes, such as genocide.

Chapter 3 looks into the extraterritorial jurisdiction in Germany. The country, which benefits from a very broad scope of extraterritorial jurisdiction, recognizes the following jurisdictional grounds: the universality principle, the active personality principle and the passive personality principle. The universality principle, which is the cornerstone of German extraterritorial jurisdiction, covers an extremely large array of offences in comparison with the other countries examined. It is grounded in the protection of both values advocated by Germany and international values. The coherent structure adopted in the criminal code, contrary to the chaotic situation in the Netherlands and to some extent in Belgium, results in the fact that the overlapping between the different principles is much more sporadic than for the Netherlands and Belgium. Additionally, the systemic approach of jurisdiction, in contrast with a more *ad hoc* response in other countries, presents the advantage that the ratification by Germany of international or European instruments has required only very few amendments of the national provisions on jurisdiction. With regard to the requirement of double criminality, the latter plays a relatively modest role. On the procedural side, however, Germany has chosen to counterbalance the broad scope of extraterritorial jurisdiction with the principle of opportunity, which leaves the national prosecutor with a wide discretion to decide, on the basis of various factors, whether it would be appropriate to institute criminal proceedings concerning offences committed abroad. The limitations on jurisdiction are therefore brought, not in substantial, but rather in procedural terms. Finally, German practitioners are satisfied with the existing infrastructure and financial means to exercise extraterritorial jurisdiction, but the interviews highlight that criminal proceedings are rarely instituted with regard to offences committed outside national borders, as a clear consequence of the principle of opportunity.

Chapter 4 explores the extraterritorial jurisdiction of England and Wales. This country, of a *common law* tradition, has a radically different approach of jurisdiction than the three continental countries examined. Indeed, it considers that domestic courts only have territorial jurisdiction unless a statute has expressly broadened the jurisdictional scope to cover offences that were committed abroad. Such extraterritorial jurisdiction is much more limited than in Germany, the Netherlands or Belgium. England and Wales recognize the following grounds for jurisdiction: the active personality principle, the passive personality principle and the universality principle. While the active personality principle is justified by the function of the offender or by the nature of the offence, both the passive personality principle and the universality principle find their rationale in the UK's compliance with its international and European obligations. The English 'territoriality-biased' approach of jurisdiction has a certain influence on the other grounds for jurisdiction, as a criterion of 'fictive territoriality' is often required for the exercise of extraterritorial jurisdiction. This criterion requires that the extraterritorial act would constitute an offence under English law if it had been committed within national borders. As far as procedural requirements are concerned, the double criminality principle is not generally a condition for the exercise of jurisdiction, except in limited cases. In contrast, the presence of the suspect on the territory is always a prerequisite for the institution of criminal proceedings. Finally, it results from the practice that criminal proceedings for extraterritorial offences will almost never take place in England and Wales, as the

authorities give absolute priority to any stronger claim to jurisdiction emanating from another country and extradite the offender, even when he is a national. The only notable exception to this reluctance from exercising extraterritorial jurisdiction concerns war crimes.

Chapter 5 scrutinizes the extraterritorial jurisdiction in The Netherlands. The last country examined recognizes the following grounds for jurisdiction: the universality principle (without and with limitations), the subsidiary principle, the active personality principle and the passive personality principle. It is noteworthy that the Netherlands, in sharp contrast with Germany and Belgium, did not recognize a general application of the passive personality principle until 2009. The jurisdictional provisions have gone through many amendments over the years. This renders the current structure not transparent and incoherent, with the consequence that many offences fall within the scope of more than one principle. In addition, the *ad hoc* response to international or European obligations requires additional amendments each time a new convention is ratified. With the exception of the unlimited universality principle, the extraterritorial grounds for jurisdiction require a set of conditions, such as the double criminality principle or the presence of the accused on the national territory. Those requirements are justified by the need to avoid conflicts of jurisdiction, or the difficulties in obtaining evidence. Finally, similarly to the other countries, the practice reveals a substantial difference between international crimes and other offences in terms of extraterritorial exercise of jurisdiction, even though the provisions providing for extraterritorial grounds for jurisdiction are still rarely used.

Chapter 6 examines the extraterritorial jurisdiction under international law and asserts that two conceptions of the exercise of extraterritorial jurisdiction conflict. Under the first, the exercise of extraterritorial jurisdiction is allowed in the absence of a prohibition. The second conception regards the exercise of extraterritorial jurisdiction as prohibited unless it has been authorized. The Permanent Court of International Justice favored the first approach, in the *Lotus* case in 1927. The more recent case law of the International Court of Justice has not brought much in the field of criminal jurisdiction, with the exception of the *Yerodia* case, in which the judges took the opportunity to give their view on the exercise of extraterritorial jurisdiction in their separate and dissenting opinions, and the *Republic of the Congo v. France*, not decided yet, in which the Court has been asked to determine which forms of extraterritorial jurisdiction could be exercised by states in the light of international law.

Chapter 7 summarizes the findings of the research, and offers recommendations on how to improve the Dutch approach of jurisdiction over extraterritorial offences. These recommendations, which are organized in four categories, are the following:

Recommendations, not tied to any scenario

1. It is recommended to organize the provisions on jurisdiction in such a way that an adequate balance is found between the link with the act and the seriousness of the act.
2. No jurisdiction over misdemeanors and offences that are punished by less than a maximum sentence of three years. The penalty and prescription also need to determine the choice of crimes.

3. It is recommended to adjust the jurisdictional provisions to the capacity to investigate, prosecute and try that are available. The capacity to investigate, prosecute and try also needs to be adjusted to the scope of Dutch criminal law.
4. The legislator needs to better realize the mutual relation between the principles of jurisdiction. It is possible to comply differently with conventional obligations, than through incorporation in the jurisdictional provisions.
5. It holds for all principles of jurisdiction that it must be assessed, for each principle of jurisdiction individually, which criminal acts from the criminal code are justified on the basis of this link with the act from a legal policy standpoint. With regard to principles of limited scope, such as the active and passive personality, offences that already fall within the scope of the universality should not be taken into consideration again. A fundamental choice may be expected of this, for all jurisdictional principles.

Alternative scenario for jurisdiction over facts committed within the European Union

6. It is recommended, with regard to jurisdiction over acts committed on the territory of other Union members, to set up a limitation of the extraterritorial jurisdiction. As a further appropriate objective, a European regulation needs to be suggested in the light of mutual recognition.
7. In case the wish is expressed to maintain the principle, it is suggested, as far as the acts to which the active personality principle relate are concerned, to reconsider the selection of offences to which the principle applies
8. The separate justification of domicile is so weak that its removal needs to be considered. It goes without saying in order to treat all residents identically and to have jurisdiction over the same acts. It needs to be suggested to merge the active personality principle and the domicile principle into a principle of active Dutch residence.
9. It is recommended, within the European Union, to use more prominently the subsidiary jurisdiction in aid of principles of jurisdiction that do not request any consultation with other member states.
10. The possibility to remove the requirement of double criminality needs to be considered.

Alternative scenario for jurisdiction over facts committed outside the European Union

11. It is recommended to exclusively admit, in the provisions on jurisdiction, requirements that express a link with the act at the time of the act. Requirements that take place later, such as the presence of the suspect in the Netherlands, should be mentioned as relevant requirements for the opportunity of prosecution.
12. It is recommended to also see the equilibrium between the link with the act and the seriousness thereof in the light of the permission under international law for the establishment of jurisdiction.
13. It is recommended, with regard to facts committed outside the national territory, to only investigate (respectively to prosecute) them if, in the light of the circumstances of the concrete situation, including circumstances that occurred after the act, it seems (also internationally) opportune.
14. It is recommended to unambiguously apply the principle of unlimited universal jurisdiction with regard to the most serious criminal acts, which are identified in international law. For instance through a treaty or through the protection of the Dutch state.

15. It is recommended to adopt a jurisdictional provision that establishes jurisdiction over offences covered by a treaty, a framework decision or a directive.
16. It must be considered whether limited universality (or "secondary unlimited universal jurisdiction") as a principle of jurisdiction does not need to disappear. The interests that are protected can be better served with broader possibilities for the public prosecutor to define the opportunity principle.
17. The justification of the principle of passive personality is so weak that it should only be used with regard to serious acts or due to the exceptional forms of the offence. It also raises the question on whether a broader principle of jurisdiction should not be first designated.
18. It is recommended to adopt complementary grounds to allow for a decision to refrain from prosecution in article 167 Sv in the case of acts that have been committed outside the Netherlands.

General recommendations

19. The constitutive elements of the offence, as well as the aggravating circumstances, and other requirements for the criminalization, do not need to be foreseen in the jurisdictional provisions.
20. A possible adjustment of the rules on extraterritorial criminal investigation set forth in article 539a Sv, as required by the practice, needs to be taken into consideration.