ANNEX 4

Lower House of Parliament

Session Year 2011-2012

28 098 (R 1704) **Implementation of the Statute of the International Criminal Court with regard to cooperation with and provision of assistance to the International Criminal Court and the enforcement of its decisions (International Criminal Court Implementing Act)**

28 099 **Amendment of the Criminal Code, the Code of Criminal Procedure and other laws in accordance with the International Criminal Court Implementing Act**

No. 13 **LETTER FROM THE MINISTER OF JUSTICE**

To the Speaker of the Lower House of Parliament

The Hague, 3 July 2002

On 11 March 2002 I held a meeting with the standing committee for Justice in the Lower House regarding two bills for the implementation of the Statute of the International Criminal Court: the International Criminal Court Implementing Act (bill, Parliamentary Documents I 2001/2002, 28 098 (R 1704)) and the relevant Amending Act (Parliamentary Documents II 2001/2002, 28 099). During this meeting I made a commitment to send the House a letter with further information on the issue of the International Criminal Court and asylum. I am honouring that commitment with the attached memorandum.

Minister of Justice
A.H. Korthals

Memorandum

The International Criminal Court and asylum

1. Introduction

On 11 March 2002 I held a meeting with the Lower House's standing committee for justice on two bills for the implementation of the Statute of the International Criminal Court, concerning the International Criminal Court Implementing Act (bill, Parliamentary Documents I 2001/2002, 28 098 (R 1704)) and the relevant Amending Act (Parliamentary Documents II 2001/2002, 28 099), respectively. The minutes of that meeting were published in Parliamentary Documents II 2001/2002, 28 098 (R 1704) and 28 099, no. 12 During the meeting there was a lengthy discussion as to whether a person (a suspect, a witness or another person) who is required to appear before the International Criminal Court (ICC) in The Hague may submit a request for asylum in the Netherlands, and as to how the Netherlands should treat such a request. Various issues were discussed in this context: whether the individual concerned falls within the *jurisdiction* of the Netherlands for the purposes of the Refugee Convention; whether a suspect should be given the opportunity request asylum at all, and if so, whether such a request would not, by definition, fail on the grounds of article 1F of the Refugee Convention; and whether an asylum procedure in the Netherlands would not impede the criminal proceedings before the ICC. In light of this discussion, I promised to write to the House to provide further information. At the same time, it was decided that this did not preclude further consideration of the relevant legislative proposals, which accordingly entered into force on 1 July, concurrently with the Statute of the ICC itself.
The debate with the standing committee prompted further discussion of the subject within my ministry and with the Ministry of Foreign Affairs. Those deliberations have led to further elaboration of the views expressed earlier during the debate. These memorandum is intended to inform you of those views. I trust that it provides a satisfactory response to the questions that have arisen.

2. Legal framework

The problems surrounding the ICC and asylum are complicated by the different legal positions of the Netherlands and the ICC and by the variety of concurrent international obligations binding upon the Netherlands in this area. Furthermore, a distinction has to be drawn between different situations: between the status of suspects, convicted persons, and persons released without conviction on the one hand, and the status of persons appearing before the ICC for other reasons, such as witnesses and experts on the other; between persons who are on their way to the ICC in The Hague (arrival) and persons whose presence is no longer required by the ICC (return). This section will first consider the case of (former) suspects. The discussion in the Lower House was also primarily about this category of persons.
It is first necessary to explain the legal framework. This will be done point by point.

a) A relevant aspect under asylum law is that the Netherlands is bound, *inter alia*, by the UN Refugee Convention and the

obligations laid down therein. The convention does not provide for a right to asylum or a right to make a request for asylum. The Netherlands is, however, required to respect the prohibition of expulsion or return (refoulement) with respect to refugees as laid down in article 33: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on the grounds of his race[…].” The Netherlands is also bound by the prohibition of torture laid down in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; inherent to both provisions is a prohibition of refoulement, albeit specifically in relation to the risk of torture.

b) Article 1F of the Refugee Convention provides that the provisions of that convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious crime. ‘Serious crime’ covers, in any case, war crimes and crimes against humanity, both of which fall under the ICC’s jurisdiction. Article 1F can be invoked not only in asylum procedures, but also in procedures for applications for residence permits on other grounds (see articles 3.77 and 3 107 of the Aliens Decree, 2000). The application of Article 1F is reviewed during the substantive treatment of an application. Therefore, a negative finding does not lead to a refusal or any similar response, to treat the application (there was some uncertainty about this during the meeting with the standing committee). No evidence within the meaning of the criminal law is required for the purposes of article 1F. Consequently, an acquittal by the ICC, for example, does not in itself prevent article 1F from applying to the individual concerned.

c) The Seat of the International Criminal Court, which also includes the Court’s detention facility, is situated in the Netherlands. In accordance with the customary practice with respect to international organisations, the basic principle is that in the host country, the ICC enjoys the immunity necessary to perform its tasks. This means, *inter alia*, that Dutch law is applicable to the activities, officials and location of the ICC only insofar as that is reconcilable with the ICC’s performance of its tasks; this relationship will have to be fleshed out in more detail in the Headquarters Agreement that is yet to be reached between the Netherlands and the ICC. This basic principle of the limited application of Dutch law is laid down in article 88 of the International Criminal Court Implementation Act, specifically for provisional detention in the ICC’s detention areas: “Dutch law does not apply to deprivation of liberty by order of the ICC and effected in premises made available to the ICC by the Netherlands” (see also article 17 of the Yugoslavia Tribunal Implementation Act).

d) As host country, the Netherlands is responsible for the smooth transportation – including the security – of suspects to the ICC and of convicted persons from the ICC to the country where the sentence will be enforced, it being understood that such transportation is provided only from and to the Dutch border. Similar transit obligations exist with regard to other persons whose presence is, or has been, requested by the ICC. These movements of persons to and from the ICC, outside the ICC’s detention areas, fall outside the jurisdiction of the ICC. As set out

in the Implementation Act, the Dutch officials responsible for the transit are acting under the authority of the ICC, but they are instructed by and fall under the responsibility of the Dutch Minister of Justice (articles 85 and 86 of the Implementation Act); furthermore, the transport occurs on Dutch territory, outside the facilities of the ICC.

e) The International Criminal Court itself is not formally bound by the Refugee Convention or by the ECHR, the UN Convention against Torture or the International Covenant on Civil and Political Rights. Nevertheless, it is apparent from the drafting history of the ICC Statute and its terms that the founders of the ICC were very conscious of the provisions of the relevant human rights treaties and their importance for the ICC's legitimacy. This "informal" commitment by a supranational judicial body such as the ICC was recognised, for instance, by the European Court of Human Rights in the *Natetilic* case, in which the Court assumed that the Yugoslavia Tribunal provided all the guarantees of a fair trial required by the ECHR (European Court of Human Rights, 4 May 2000, published in NJCM Bulletin, volume 26 (2001) no. 1). According to its own case law, the Yugoslavia Tribunal also regards itself as being bound by the requirements of the ECHR. It has to be assumed that the Yugoslavia Tribunal and the ICC will also regard themselves as being bound by the prohibition of refoulement laid down in the various treaties.

f) If a suspect is sentenced to a term of imprisonment by the ICC, the Court has to decide to which State he or she will be transported to serve the sentence. In designating the State where the sentence will be enforced, the ICC must consider, *inter alia*, the views and nationality of the sentenced person, as well as such other factors regarding the circumstances of the crime or the person sentenced that may be appropriate (article 103(3) of the ICC Statute). In my view, in appropriate situations, such factors would also include the fact that the sentenced person has indicated that he or she cannot or does not wish to return to his or her country of origin. Once the individual concerned has been transferred to the State of enforcement, the ICC monitors the method of enforcement. The sentenced person may apply to the ICC for a transfer to a prison in another State at any time (article 104 ICC Statute). After serving the sentence, the sentenced person may, in accordance with national law of the State of enforcement, be deported unless the State of enforcement authorises the sentenced person to remain in its territory. Here too, the wishes of that person must be taken into account (article 107 ICC Statute).

g) If, for any reason, the accused is released without being sentenced, the ICC must make appropriate arrangements for the transfer of the person concerned to a third country which is obliged or agrees to receive him or her or to which he or she is being extradited, taking into account the views of the individual concerned (Rule 185 of the Rules of Procedure and Evidence). As Rule 185 states, in this case the task of the host country does not extend beyond facilitating the transfer to the third country.

3. The jurisdiction of the Netherlands with regard to asylum applications by suspects

During the meeting with the standing committee there was some confusion about the term "jurisdiction" and the question of whether a

suspect who is being detained by the ICC (or the Yugoslavia Tribunal) or is in transit to the ICC (or, as a sentenced person or acquitted person, in transit from the ICC), is *within the jurisdiction of the Netherlands,* in the sense that he or she could submit an application for asylum to the Dutch authorities. It might be concluded from the memorandum drawn up on the basis of the minutes (Parliamentary Documents II 2001/2002, 28 098 (R1704), no. 6, p.3) that the answer to this question is in the negative, but that based on my comments during the meeting, the answer is in the affirmative. This point therefore needs to be clarified.

A distinction has to be drawn between the situation of detention and the situation of transit. If, and so long as, the suspect is being detained by the ICC, he or she falls under the jurisdiction of the ICC and not of the Netherlands. As stated in paragraph 2(c) above, in principle Dutch law is not applicable to the Seat of the ICC, explicitly including the Court's detention facility. In this situation, therefore, the Aliens Act of 2000, and the rules for making an asylum application contained therein, do not apply. If they were assumed to be applicable, by submitting an application for asylum, with the attendant procedure and legal remedies, the suspect could cause unacceptable complications for the criminal proceedings, while the Dutch authorities would be requested to make a decision on a matter – the destination of the individual concerned after his trial by the Criminal Court – which is reserved to the ICC by the ICC Statute and the Rules of Procedure and Evidence (see paragraphs 2(f) and 2(g)).

In other words, the only relevant phase is that of the transit of the suspect to the ICC Court or the transit of the sentenced or acquitted person from the ICC. On this point, the government noted in the memorandum based on the minutes that in its view, the individual concerned does *not* fall under Dutch jurisdiction durning that phase. I have to qualify that conclusion somewhat. Although the obligation of the Netherlands to arrange immediate transit pursuant to the ICC Statute means that Dutch law is not fully applicable during transit, as mentioned in paragraph 2(d), in the ICC Implementing Act it was expressly decided to delegate responsibility for the method of transit and for providing security for the individual to the Minister of Justice and not to the ICC. It could be argued that the individual concerned does fall under Dutch jurisdiction but that the Netherlands only exercises its jurisdiction to a limited extent, on the grounds of the specific role it is performing on behalf of the ICC. The question, therefore, is whether, given the specific position of the Netherlands and its limited role as host country of the ICC, the Aliens Act of 2000 and relevant international conventions entail an obligation to allow the person concerned (who is in transit) to submit an application for asylum if he or she has indicated a wish to do so, for example immediately on arrival at Schiphol or another airport. In my view, the answer is no. The decisive consideration is that, in my view, the Refugee Convention and the ECHR do not imply an obligation to admit the person concerned to the asylum procedure in the Netherlands and, for that purpose, to interrupt the transportation in order to allow a formal asylum application to be submitted. Such an obligation should only be assumed if there is a risk that the transit would directly or indirectly lead to the refoulement of the individual concerned, as prohibited by the Refugee Convention and the other treaties referred to in section 2. It is, however, inconceivable that such a risk of refoulement exists pending the proceedings before the ICC or after those proceedings. As already mentioned above, the proceedings before the ICC provide all the guarantees required by

the human rights conventions. In particular, the possibility that suspects will be subjected there to actions prohibited by Article 3 of the ECHR can be ruled out. As previously mentioned, when the ICC has made a final decision – either a conviction or an acquittal – the decision on which country the individual will be transferred to is reserved to the ICC; the factors that have to be taken into account were also mentioned. I regard it as inconceivable that the ICC will decide that a sentenced person who indicates that he or she wishes to request asylum will have to serve the sentence in a country that will not respect the prohibitions of refoulement. As host country of the ICC, the Netherlands is entitled to trust the ICC would not simply allow, directly or indirectly, a suspect or sentenced person who expresses a fear of persecution or inhuman treatment in his or her own country to depart for that country, or any other country that has not undertaken to observe the provisions prohibiting refoulement. That third country does not in fact itself need to be a party to the Refugee Convention, the ECHR or the UN Convention against Torture, but can also have undertaken to comply with the prohibition of refoulement by virtue of another treaty. The role of the Netherlands in the transport of suspects, sentenced persons or persons who have been released is based on that trust.

The relevant conventions therefore do not give rise to an obligation to admit suspects or other persons, in transit to and from the ICC, to the asylum procedure. Nor is there any requirement under the Aliens Act of 2000 to escort a person in transit, upon arrival in the Netherlands, to a designated centre for submitting asylum applications. It should also be clear that in the interests of security it would be wrong to interrupt the transit of these persons.

During the meeting with the standing committee, I stated that suspects in the process of being transferred into the custody of the ICC or already in the ICC's custody, or persons who have been sentenced or acquitted may submit an application for asylum and that the Netherlands is obliged to consider and handle such applications in accordance with the Aliens Act of 2000. I further noted that I assumed that such an application would in fact be rejected on substantive grounds. However, the above remarks show that, on further reflection, I am of the opinion that the persons concerned do not have to be admitted to the asylum procedure in the Netherlands, and I have explained the reasons why.

That fact that those persons do not have to be afforded the opportunity to submit an asylum application in accordance with the Aliens Act of 2000 does not alter the fact that on arrival at the seat of the ICC (during his or her stay in detention) the person in custody may, like other aliens, apply in writing to the Dutch government with a request to stay in the Netherlands in the event of his or her release. This option cannot be excluded and the Dutch government must, if only for reasons of propriety, reply to such a request. It is therefore my intention, in principle, to treat such a request in the same way as requests that are submitted outside the Netherlands are treated. Such a request is not a request for asylum within the meaning of article 28 of the Aliens Act of 2000 but has to be regarded as a request for entry to and residence in the Netherlands. The Minister of Justice will make a decision on the request, against which the usual legal remedies (by virtue of the General Administrative Law Act) will be available. The decision will naturally take into account the fact that the alien is suspected of particularly serious crimes and the possibility that the ICC will order the person's transfer to a third country. In practice this will mean that, pending the proceedings before the ICC, the request

might already be rejected on the grounds of article 1F of the Refugee Convention.

4. The status of witnesses and other persons and the possibility of a request for asylum

Witnesses and other persons

So far, the discussion has mainly concerned the case of a suspect who is being brought to the ICC or who is in its provisional custody and of a person who, after his or her trial (either after a conviction or an acquittal) is being transferred to a third country. The conclusion was that there is no requirement that they should be granted access to the asylum procedure, either because they (as persons in provisional custody) fall under the jurisdiction of the ICC or because they are in transit on the authority of the ICC. The situation is different for other categories of persons, who come to the ICC in The Hague in a capacity other than as a suspect. In the first place, this category could include witnesses, but also experts, lawyers of suspects, family members of prisoners, etc. A common characteristic of these categories of person is that their presence before the ICC is purely voluntary. As such, they do not fall under the jurisdiction of the ICC and can in principle (subject to any restrictions that the host country may have imposed on their entry to the Netherlands) move freely in the Netherlands. Nor do the ICC Statute and the Rules of Procedure and Evidence delegate responsibility for the safe return (either to their country of origin or to another country) of these persons, after their business with the ICC has been completed to the ICC (by contrast with suspects; see paragraph 2). In this light, there is no reason to treat these persons differently than any other alien who is on Dutch territory and wishes to invoke the Refugee Convention. As I said during the meeting with the standing committee, witnesses and other persons will therefore also be able to submit an application for asylum and those applications will be treated in accordance with the normal procedure.
In this context, reference is made to rule 16 of the Rules of Procedure and Evidence, under which it is possible for so-called relocation agreements to be reached between the ICC and third countries. Under this rule, traumatised or threatened victims, witnesses and others who say they are at risk on account of their testimony qualify for resettlement in a particular country through the mediation of the ICC. The Yugoslavia Tribunal makes use of such agreements and it seems logical that the ICC will also do so for its witnesses. This will naturally reduce the need for applications for asylum in the Netherlands and for granting asylum. In this context, it should also be mentioned that in practice, witnesses at the Yugoslavia Tribunal, for example, very rarely make a request for asylum in the Netherlands.

Former suspects who may submit an asylum application

There are two specific categories of former suspects who, by contrast with the normal rules for suspects, etc. (see paragraph 3), may submit an application for asylum and to that extent must be equated with the aforementioned witnesses and other persons. In the first place, the situation may arise in which no State can be designated for enforcement of the sentence of a convicted person. In that case, the sentence will be enforced in the Netherlands (article 103(4) of the ICC Statute) and there is therefore no question of transit, with the

individual being transferred to another country. Although the sentenced person is still formally denied entry to the Netherlands (article 7 of the Aliens Act of 2000), he or she may submit a formal application for asylum. The application will have to be assessed on its merits for a decision on whether deportation of that person to his or her country of origin is compatible with the prohibitions of refoulement by the ECHR and the Convention against Torture. Although the request could be rejected under article 1F of the Refugee Convention because the individual has been convicted of particularly serious crimes, the Netherlands is naturally still bound to comply with the "non-derogable" articles, Article 3 of the ECHR and article 3 of the Convention against Torture. The consequence of the asylum application being rejected on the grounds of article 1F of the Refugee Convention is that the Netherlands will not allow the individual to remain in the Netherlands once the sentence has been served. This means that, in accordance with Dutch immigration law, after serving the sentence, the alien will in principle be transferred to his or her country of origin. If the prohibition of refoulement applies, the alien may be transferred to a third country that is willing to accept him or her.

Also conceivable is the case where a former suspect, who has been released without being sentenced for one reason or another, claims that he or she cannot return to his or her country of origin for fear of persecution or inhuman treatment and cannot be transferred to another country by the ICC on the grounds of rule 185 of the Rules of Procedure and Evidence. In that case, the individual will also be able to submit a formal asylum application in the Netherlands, since the question of whether returning the individual to the country of origin is contrary to the prohibitions of refoulement will have to be assessed. Naturally, in such cases, the mere fact that the alien has been released without being sentenced does not rule out the application of article 1F of the Refugee Convention.

5. Conclusion

The questions from the Lower House have hereby been answered and uncertainties clarified to the extent possible. To sum up, there are two distinct groups of potential "asylum seekers" at the ICC:

- The suspects in transit to or in the custody of the ICC, as well as sentenced and acquitted persons who are in transit from the ICC to a third country. These persons are not admitted to the asylum procedure in the Netherlands. If a suspect, during his detention by the ICC, applies in writing to the Dutch authorities with a request to stay in the Netherlands following his release, it is not an asylum application within the meaning of article 28 of the Aliens Act of 2000. However, a decision will have to be made on the request: in practice, the request by a suspect might already be rejected on the grounds of article 1F of the Refugee Convention.
- Other persons who come to the ICC in The Hague, such as witnesses, experts, lawyers, etc may submit a request for asylum during their stay in the Netherlands in accordance with the normal procedure under the Aliens Act of 2000.

I believe that this creates a clear distinction between the responsibilities of the ICC and the Netherlands as host country. The procedures and the commencement of proceedings before the ICC and the Dutch authorities are also clearly separate. In particular, this system prevents suspects from being able to hamper the criminal

proceedings before the ICC by instituting an asylum procedure in the Netherlands, which would conflict with the obligations of the Netherlands' as host country.

The Minister of Justice
A.H. Korthals