Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings
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3.1 Introduction

In order to understand the manner in which full criminal proceedings are avoided, it is essential to discuss first the main characteristics of the criminal trial in the Dutch criminal justice system. The Criminal Code and the Code of Criminal Procedure are based on the notion that a sentence can be imposed only after trial proceedings have been conducted before the court: this is the nulla poena sine iudicio principle.\(^1\) In the past decades, however, this principle has eroded: out of court settlements, such as the transaction and conditional dismissal, have been used to enhance the efficiency of the criminal justice system. The introduction of the punitive order in 2008 was a milestone in the search for even more efficiency in the criminal justice system.

Efficiency considerations are, as such, legitimate: a criminal justice system in which criminal cases are processed in a swift and just manner is of general interest. However, it is at least equally important to ensure that criminal proceedings (including diversion mechanisms) do not infringe upon the rights of the accused. As the Minister of Security and Justice stated in the context of the upcoming revision of the Code

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\(^1\) J.F. Nijboer, *De doolhof van de Nederlandse strafwetgeving: de systematische grondslag van het algemeen deel van het W.v.Sr.*, Wolters Noordhoff, Groningen 1987, p. 98. One could also refer to the principle of nulla poena sine processu: only after proceedings have been conducted can a sentence be imposed. The nulla poena sine iudicio principle, however, is more appropriate because it refers to the actor that imposes the sentence: the judge.
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of Criminal Procedure, the law of criminal procedure must also protect the accused from undue interference in his personal life. This applies in particular when criminal proceedings are shortened. According to the Minister, however, a differentiation between cases concerning minor offences and serious offences is necessary. The latter category has to be handled by the courts, but minor offences can be handled by the prosecutor without judicial involvement.

Before the diversions and shortcuts are discussed, the main characteristics of the full criminal trial will be analysed: one has to know what is avoided in the first place. This is also done in order to place the diversions and shortcuts in the proper context. Avoiding the full criminal trial has to be accounted for, especially from the point of view of the fair trial rights of the accused.

There are several ways of describing how a full criminal trial is conducted in a particular system. One way is to look at the role of the different actors in the criminal proceedings. Such an analysis focuses on the legal position of the different actors and the relationship between them. In the following pages, another perspective is chosen. In Chapter 2, the participatory model of proof was discussed and presented as the normative framework for the diversions and shortcuts in Dutch and international criminal procedure. The model emphasizes the importance of participatory rights regarding evidence; in other words, it seeks to answer the question: has the accused been able to participate effectively during the proceedings? In the following pages, the full criminal trial will be presented with a focus on the law of evidence. Three aspects will be discussed: the admissibility of evidence, the weighing of evidence and the obligation to provide a reasoned judgement. These aspects allow for a comparative approach: they provide a framework which can be used to analyse any particular system of criminal law. In this framework, three basic questions are of primary importance: what is the evidentiary input (the rules of admissibility), how is the input weighed and how does the court have to account for the conclusions it draws?

The concept of admissibility of evidence refers to the question of which evidence the court may use for the determination of the guilt or innocence of the accused. Rules of admissibility are prominent in systems that consist of a bifurcated court, where the fact-finder can be effectively shielded from unreliable, prejudicial or illegally obtained evidence. Bifurcated courts are courts in which the fact-finder does not rule on the admissibility of evidence but solely on the assessment or weighing of the admitted evidence (such as the typical common law judge-jury setting). In unitary courts, the court decides on both the admissibility of evidence and the

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weight that should be attached to the evidence.\textsuperscript{4} Although one can safely state that bifurcated courts are characteristic of common law criminal proceedings concerning serious crimes, it would be wrong to equate unitary courts with civil law proceedings. French and Belgium criminal proceedings concerning serious crimes, for example, are held before a \textit{court d’assizes}, which resembles a judge-jury setting. Dutch and German criminal proceedings are conducted before unitary courts: the court decides on the admissibility and evaluation of the evidence.\textsuperscript{5}

Weighing the evidence refers to the question of how the court determines the probative value of evidence that has been presented. Particularly relevant in this regard is whether the court is in any way restricted by statutory rules on the weight of the evidence. Since the time of the French Revolution, the idea that the legislator is able to determine \textit{ex ante} the probative value of various types of evidence (e.g. witness statements, confessions or real evidence) and their cumulative weight (e.g. three witness statements result in conclusive evidence; a confession is regarded as \textit{regina probatio nis} and, therefore, conclusive evidence) has been gradually abandoned.\textsuperscript{6} Stein argued that the last two centuries have been characterized by what he called an ‘abolitionist wave’: the tendency to abolish as many rules of evidence as possible.\textsuperscript{7} That is to say: rules that conflict with, what Stein called, the epistemic confidence doctrine. During this process, rules of evidence that prescribe how fact-finders should evaluate the evidence are abolished, while rules on the exclusion of evidence on grounds extraneous to accurate fact-finding (e.g. exclusionary rules regarding illegally obtained evidence)

\textsuperscript{5} It is noted that unitary courts are not necessarily composed of professional judges: the German \textit{Schwurgericht}, which hears homicide cases, consists of both professional and lay judges. Volk observed on the distinction between lay and professional judges: ‘Die Schöffen üben als ehrenamtliche Richter “das Richteramt in vollem Umfang und mit gleichem Stimmrecht” aus wie die Berufsrichter (§§ 30, 70 Abs. 1 GVG). Sie entscheiden über die Schuld- und Straffrage gemeinschaftlich und Tatfragen ebenso wie Rechtsfragen. Bei Entscheidungen ausserhalb der Verhandlung wirken sie aber nicht mit (§§30 Abs. 2, 76 Abs. 1 S. 2 GVG). Das Gericht hat es allerdings nicht in der Hand, ob innerhalb oder ausserhalb der Hauptverhandlung entschieden wird. Nur bei zwingenden Gründe darf ausnahmsweise ausserhalb der Hauptverhandlung entschieden werden. Die Schöffen sollen sich ihre Überzeugung allein auf Grund der Hauptverhandlung bilden und haben deshalb kein Recht, Einsicht in die Gerichtsakten zu nehmen. Das macht es sehr schwierig, der Hauptverhandlung zu folgen (weshalb der BGH allerdings Ausnahmen zulässt).’ K. Volk, Grundkurs StPO, Verlag C.H. Beck, Munich 2010, p. 12, 14.
\textsuperscript{7} Cf. Jeremy Bentham (1748-1832) who favoured the abolition of exclusionary rules and rules on weighing the evidence. Rupert Cross (1912-1980) is believed to have stated that he worked for the day his subject is abolished. W. Twining, Rethinking Evidence: Exploratory Essays, Northwestern University Press, Evanston 1990, p. 1 and 39.
are kept in place. The decline in statutory rules of evidence favours a system of evidence law in which the available evidence is weighed freely by the court.

When the legislator provides no guidance on how to weigh the evidence, one could conclude that the system is best characterized as a system of free proof: the court is free to weigh the evidence as it wishes and is not obstructed by any statutory provision. This is misleading, though, because it could well be that the legislator has clearly regulated which evidence the court may take into account: the evidentiary output is not regulated in such a system, but the evidentiary input is. In other words, there is a notable difference between the free admission of evidence and the free evaluation of evidence.

The final element concerns the manner in which the court has to account for its factual findings: after deciding on the admissibility of the evidence, the court weighs the available evidence and decides whether it is convinced of the guilt of the accused. The result of the deliberations of the court have to be accounted for. The right to be provided with a reasoned judgement ensures that the court is, in fact, explaining how it has weighed the evidence presented.

3.1.1 Rules of Admissibility

Dutch law of evidence, as such, does not provide for rules of admissibility. The Code of Criminal Procedure contains the legal means of proof that the court may consider, namely the observation of the court during the proceedings, the statements of the accused, witnesses and experts and documentary evidence. These legal means of proof stem from 1926, when the Code of Criminal Procedure was adopted. The fact that the legal means of proof have never been amended shows their flexibility. In fact, every piece of information can be categorized as a legal means of proof. This means that no category of evidence is inadmissible ex ante: the legislator gives the court considerable freedom to determine which evidence it takes into consideration. The fact that no category of evidence is inadmissible must not be misunderstood: it refers solely to the kind of evidence. Evidence can be inadmissible due to the manner in which it was obtained; for example, a statement of the accused that was obtained under torture will be inadmissible evidence.

The exclusion of evidence in criminal proceedings shields the court from unreliable, prejudicial or illegally obtained evidence. It stands to reason that the doctrine of exclusionary rules (or, rules of non-admissibility) has been developed primarily in systems with a bifurcated court system. In such systems, rules of exclusion can func-

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9 Article 339 CCP.
10 For other examples, see HR 19 February 2013, ECLI:NL:HR:2013:BY5321.
tion in *optima forma*: the judge determines whether certain evidence is admissible in the absence of the fact-finder (i.e. the jury). This way, the fact-finder is effectively shielded from non-admissible evidence. The definition of exclusionary rules given by Roberts and Zuckerman is worth quoting here, because their definition encompasses both exclusionary rules aiming at the enhancement of accurate fact-finding and rules aiming at other objectives:

Exclusionary rules of evidence might be conceptualized as evidentiary standards purporting to encapsulate – or at least serve as durable proxies for – good epistemic or normative reasons for ignoring relevant information in criminal adjudication.\(^\text{12}\)

Damaška divided these rules into two categories, intrinsic and extrinsic exclusionary rules. Both types will be discussed briefly.

### 3.1.1.1 Intrinsic Exclusionary Rules

Intrinsic exclusionary rules are described as rules that exclude evidence in order to ‘enhance the accuracy of fact-finding’.\(^\text{13}\) Intrinsic exclusionary rules are meant to shield the fact-finder from unreliable or prejudicial evidence.\(^\text{14}\) The common law rule against hearsay is an example of an intrinsic exclusionary rule: the risk that the (lay) fact-finder will overestimate the hearsay evidence justifies its exclusion.\(^\text{15}\) Such rules, then, oblige the judge (who can be characterized as an evidentiary gatekeeper in this regard) to exclude evidence that is easily misinterpreted by lay fact-finders or is notoriously unreliable. Intrinsic exclusionary rules are largely unknown in systems consisting of a unitary court, where the court rules on both the admissibility and the probative value of the evidence presented. Evidence regarded as antithetical to accurate fact-finding will, in unitary systems, not be excluded but be ignored by the court. When, for example, hearsay testimony is admissible in a criminal justice system but the court finds a particular witness statement unreliable it will not be excluded; instead, it will simply not be used in the determination of the guilt or innocence of the accused. If, in a particular unitary court system, hearsay testimony is not admissible as a *general rule of evidence* and is therefore excluded, the court is still aware of the contents of the hearsay testimony. In such a system the legislator has made an *ex ante* assessment of the probative value of hearsay evidence.

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\(^{14}\) The exclusion of illegally obtained evidence is not primarily justified on the ground that exclusion enhances accurate fact-finding. On the contrary, illegally obtained evidence can be highly probative.

The Dutch Code of Criminal Procedure does not contain intrinsic exclusionary rules: the court has to decide itself whether the evidence presented is reliable.\textsuperscript{16} When the court concludes that a particular piece of evidence is not reliable, the evidence will be ignored. Exclusion of evidence occurs when an extrinsic exclusionary rule applies, which will be discussed below. Although the legislator has not formulated intrinsic exclusionary rules, the Supreme Court has: a witness statement obtained under hypnosis has no probative value.\textsuperscript{17} Such a statement cannot be used as evidence.

### 3.1.1.2 Extrinsic Exclusionary Rules

Extrinsic exclusionary rules as such do not exist in Dutch evidence law. Instead of a statutory rule, the court has discretionary power to exclude evidence. Evidence that has probative value may be excluded when such evidence is the result of procedural irregularities in the pre-trial phase. Such procedural irregularities must have had a substantial impact on an important principle of the law of criminal procedure.\textsuperscript{18} The Supreme Court held that evidence obtained in violation of the \textit{Salduz} criteria (regarding the assistance of a lawyer during police interrogations) must, in principle, be excluded.\textsuperscript{19}

To speak of the \textit{exclusion} of evidence in Dutch criminal proceedings is somewhat misleading. Exclusion of evidence, or its non-admissibility, presupposes a bifurcated court system in which the person that decides on the admissibility of the evidence is not the same as the fact-finder that decides upon the probative value of the evidence. In the words of Damaška:

> Even when a party is successful in alleging a violation of an evidence rule, the exclusion of information obtained in judge-driven examination is an infrequent sanction in Continental courts. The demand to exclude probative information to which the fact-finder already has been exposed is criticized as conducive to undesirable, artificial decision-making [sic]. One cannot unbite the apple of knowledge: \textit{factum infectum fieri nequit}\textsuperscript{20}

\textsuperscript{16} Corstens and Borgers argued that composing the \textit{dossier}, or case-file, is a dynamic process. G.J.M. Corstens, M.J. Borgers, \textit{Het Nederlands strafprocesrecht}, Kluwer, Deventer 2014, p. 250. During the pre-trial investigations the prosecutor is responsible for the composition of the case-file. The accused and the victim can request the prosecutor to include particular documents to the case-file. The investigating judge can add documents to the case file. During the trial phase, the court can order the presentation of documents or other evidence, which is included in the case-file. However, it is common practice that the case-file is, to significant extent, composed by the prosecutor.

\textsuperscript{17} HR 17 March 1998, \textit{NJ} 1998, 798, m.n.t Reijntjes, par. 5.4.

\textsuperscript{18} HR 19 February 2013, \textit{ECLI}:NL:HR:2013:BY5321, par. 2.4.2.


Although Dutch legal doctrine and case law speak consistently of the exclusion of evidence (‘bewijsuitsluiting’), the court, in fact, does not exclude the evidence from the proceedings but attaches a fixed probative value (namely, none) to that evidence. This resembles what is called in German legal doctrine a Beweisverwertungsverbot: the court is precluded from taking the illegally obtained evidence into account in the judgement. Illustrative is a judgement of the Supreme Court in which it held that statements made by defence counsel during the proceedings are not a legal means of proof. Therefore, they cannot be taken into account in the judgement. In another case, the Supreme Court held that the reports of probation officers cannot be used as evidence, because the information contained in such reports is gathered in a relationship of trust between the accused and the probation officer. Such information may be used only to determine the appropriate sentence for the accused, but not as evidence against the accused.

Melai argued that it is only human, and therefore inevitable, that judges will be influenced by evidence that they have excluded from the case file themselves. He favoured the possibility for the accused to file a complaint in the pre-trial phase concerning illegally obtained evidence with a judge who is barred from hearing the case on the merits. Such a procedure would enable the effective exclusion of tainted evidence. This would also enhance the adversarial character of the investigatory phase of

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21 Article 359a CCP does not speak of ‘bewijsuitsluiting’ (exclusion of evidence), but the term was used during parliamentary debates. Kamerstukken II, 1993/94, 23705, 3. (MvT).
24 HR 15 September 1980, NJ 1981, 13. This also applies to the written pleadings of defence counsel. HR 31 October 2010, L/JN: AX9178, par. 4.2.
25 HR 18 September 2007, NJ 2008, 192, m.nt. YB, par. 3.3. In another case, the probation officer was questioned by the court of appeal on the probation report. The probation officer did not invoke the right to remain silent (based on the professional privilege of Article 218 CCP). The Supreme Court held that statements of a probation officer during the proceedings may be used as evidence against the accused. HR 25 September 2012, NJ 2013/127, m.nt. T.M. Schalken, par. 2.4-2.5.
However, the Code of Criminal Procedure does not allow for such a division, and it is highly unlikely that this will change in the near future. Courts are required to leave out the excluded evidence from their deliberations.

3.1.1.3 The Principle of Immediacy

Rules of admissibility do not hold a prominent place in Dutch criminal law: the law of evidence favours the free admission of evidence, with some minor exceptions that were described above. The free admission of evidence does not mean that every piece of evidence is discussed extensively during the trial proceedings. The principle of immediacy (i.e., the notion that every piece of evidence has to be presented and discussed during the proceedings with a view to adversarial argument) does not apply unconditionally. According to Article 338 CCP, the court may declare the charges proven only after the close of the trial proceedings in which the evidence was presented. The principle of immediacy resembles the common law ‘best evidence rule’, which entails that the court should be provided with the best evidence available (i.e. preferably primary sources). The principle of immediacy in Dutch criminal proceedings has been restricted significantly by the famous De auditu judgement of the Supreme Court. In this judgement, the Supreme Court approved the use of (written) hearsay evidence. The importance of this judgement for the manner in which trial proceedings are conducted can hardly be overestimated: the courts are allowed to base their factual findings on derivative evidence. Moreover, the hearsay testimony is normally included in the case file in written form. An adversarial debate during trial proceedings, in which the live testimony of a witness is challenged by the defence is, therefore, rather exceptional. One can only agree with the statement by Pompe, who observed that the De auditu judgement was more important for the law of criminal procedure than the adoption of the CCP itself. Over the last decades, however, the interpretation of the ECtHR regarding the right to examine witnesses in criminal proceedings has resulted in a renewed appreciation of the principle of immediacy.

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influence of the ECtHR’s case law on the manner in which Dutch criminal proceedings should be conducted in order to be fair, will be analysed in Chapter 5.

The court is, apart from some minor exceptions, free to admit any evidence it deems relevant. Not every piece of evidence is discussed extensively during the trial proceedings. The question then arises how the court evaluates or weighs the evidence presented. The notion of free proof can be divided into the admission of evidence and the weighing of the evidence. The manner in which Dutch courts weigh the evidence is of utmost importance: when a court is allowed to include any relevant piece of evidence in its decision, the weighing of such evidence becomes more prominent. This is related to the fact that the Dutch rules of evidence are regarded as an example of a negative statutory system of evidence law. In such systems, the court is left considerable discretion in the weighing of the evidence presented. In a positive statutory system, the legislator has determined ex ante the probative value of certain categories of evidence. For example, two witness statements that corroborate each other are regarded as conclusive evidence. In such a system, one can easily predict the outcome of the proceedings: the court is under an obligation to convict the accused when two similar witness statements are available. It is therefore a moot question how the court weighs the evidence: it simply has to apply the rules of evidence. In a negative statutory system of evidence law, the court has discretion in weighing the evidence. The legislator has not attached a fixed probative value to particular means of proof, but leaves it to the court to decide whether the applicable standard of proof has been met. Such systems do not oblige the court to convict the accused when a certain quantity of evidence has been presented; rather, it is the quality of the evidence that counts, and this is for the court to determine. Such systems, however, may require the court to base a conviction on a minimum number of means of proof: the nuda confessio rule and the unus testis, nullus testis rule are prime examples. Both rules are codified in the Dutch Code of Criminal Procedure and are discussed in some more detail below.33

3.1.2 Weighing the Evidence

Dutch courts enjoy considerable freedom regarding the evaluation or weighing of the evidence. It is within the court’s discretion to select and weigh the evidence presented.34 Article 338 CCP states that the court may declare the charges proven when it is convinced that the accused is, in fact, guilty as charged. This conviction or persuasion must be based on the legal means of proof that have been presented during

33 Article 341 (4) CCP and Article 342 (2) CCP.
34 E.g. HR 21 September 1999, LJN:ZD5186. The fact that the court has discretion in this regard, should not be confused with arbitrariness: the court cannot randomly select and weigh the evidence. The court must account for its choices in the judgement: this is why a reasoned judgement is so important.
the proceedings.\(^{35}\) The freedom of the court to weigh the evidence is encapsulated in this notion of *conviction:*\(^{36}\) on the basis of the legal means of proof that are discussed during the trial proceedings, the court must determine whether it is convinced that the accused is guilty. Cleiren described the personal belief of the judge as a *conditio sine qua non* for a conviction.\(^{37}\) Although the judge has considerable freedom to weigh the evidence, two statutory restrictions should be mentioned.

First, it follows from Articles 338 and 339 (1) CCP that the *conviction* may be based only on a limited number of means of proof that have been presented during the proceedings, namely the observation by the judge, statements made by the accused, witnesses and experts and documentary evidence.

Second, the law of criminal procedure contains evidentiary thresholds. In order to convict, a minimum quantity of evidence must have been presented to the court. A distinction can be made between explicit and implicit statutory thresholds. The court must acquit the accused when the evidence consists solely of the statement of the accused or of a single witness statement. The *nuda confessio*-rule and the *unus testis, nullus testis*-rule are explicit statutory rules. The same holds true for evidence that consists solely, or to a decisive extent, of statements made by anonymous witnesses. In such cases, the court is barred from convicting the accused.\(^{38}\) Similarly, when the evidence consists solely of the statements of witnesses that have testified on the promise of a sentence reduction, the court cannot convict.\(^{39}\) Finally, documentary evidence which cannot be brought under one of the categories of Article 344 (1) (1) to (4) CCP may be used only when it is combined with other evidence: it is, as such, insufficient evidence to convict the accused and it must be corroborated by other evidence.\(^{40}\)

Implicit statutory evidentiary thresholds require the court to base its factual findings on several independent sources; in order to convict, the court needs at least two means of proof.\(^{41}\) The Code of Criminal Procedure does not explicitly preclude the court from convicting solely on the basis of the court’s observations during proceedings, the sole statement of an expert or the categories of documentary evidence summed up in Article 344 (1) to (4) CCP. However, the requirement that a conviction must be based on multiple sources is implied. The observation of the court is restricted to the observations *during the proceedings.* The sole statement of an expert cannot suffice either: experts are asked to give their opinion on a particular aspect of the case.

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\(^{35}\) Article 339 (1) CCP contains the means of proof.

\(^{36}\) A differentiation between *conviction intime* and *conviction raisonné* will be made below.


\(^{38}\) Article 341 (4) CCP; Article 342 (2) CCP; Article 344a CCP.

\(^{39}\) Article 344a (4) CCP.

\(^{40}\) Article 344 (1) (5) CCP.

\(^{41}\) Nijboer argued that corroboration is indeed a principle underlying the law of evidence. J.F. Nijboer, *Strafrechtelijk bewijsrecht,* Ars Aequi Libri, Nijmegen 2011, p. 77.
based on a certain expertise (e.g. forensic psychiatry, forensic statistics etc.). The aspects of the case upon which the expert testifies are never equal to the charges the accused is facing. Therefore, it is impossible to base a conviction on an expert statement alone. The same holds true for the categories of documentary evidence under Article 344 CCP because such documentary evidence can never cover the whole charge. The only exception to this rule is Article 344 (2) CCP, which states that the court may convict on the basis of the written statement of an investigating officer. In practice, however, this rule applies only to cases concerning minor (mostly traffic) offences.

Regarding the rules of weighing evidence, the multitude of evidentiary sources and (implicit) statutory restrictions, it is useful to discuss the principle of corroboration. Nijboer argued that this principle permeates the Dutch law of criminal evidence: charges can be proven only on the basis of a multitude of sources. As Nijboer acknowledged, this does not mean that every aspect of the charges has to be corroborated or confirmed by two or more means of proof.

It is important to be clear about the scope of the principle of corroboration. One could define corroborating evidence as means of proof that relate to the same factum probandum. Two witnesses that state they both saw an accused shoplifting, for example, is corroborative evidence relating to the same factum probandum: the accused took away certain goods. The statement of witness A is then confirmed or corroborated by the statement of witness B (provided that both witnesses testified independently from each other). Another definition of corroboration entails the following. Witness A testified that she saw the accused grabbing something from a shop, and witness B testified that he saw the accused running away from the same shop. Although such witness statements are often regarded as corroborating each other, they are not; instead they supplement, rather than corroborate each other.

The latter example is in fact what is meant by the phrase ‘a multitude of sources’. The court cannot convict on the basis of one witness statement, but when the statements of witnesses A and B are combined there is sufficient evidence to convict (provided that the witness statements are reliable). Dutch law of criminal procedure requires that the conviction of the accused is based on several sources: a single statement simply does not suffice. It is, however, not required that every factum probandum is corroborated by two or more means of proof. When one speaks about the principle of corroboration, it is important to keep this distinction in mind. The first definition would introduce a high burden of proof for the prosecutor (he has to present corroborating evidence regarding every fact), whereas the second definition would allow for very formal reasoning. As long as the prosecutor presents several means of proof that relate to particular facts in the charges, the accused can be convicted.
In recent years, the Supreme Court has introduced a new criterion regarding the *unus testis, nullus testis*-rule, contained in Article 342 (2) CCP. This criterion resembles the principle of corroboration: in cases in which the statement of a witness is the decisive evidence, the courts are required to specifically address the question whether there is sufficient other evidence that supports the witness statement.\(^{45}\) In a typical sexual assault case, in which the evidence consists predominantly of the statement of the victim, the court is required to indicate which evidence supports the statement. Although the new criterion does not require that two or more means of proof corroborate each other completely, it does require the courts to consider carefully whether the *unus testis, nullus testis*-rule is observed.

The conclusion must be that the court is required to base its finding of guilt on a multitude of sources. When the evidence consists predominantly of the statement of the accused or the statement of a witness, the court is obliged to provide sufficient reasons when it convicts the accused.\(^{46}\)

### 3.1.2.1 Conviction intime and Conviction raisonnée

When the court weighs the evidence, it has to decide on the probative value of each particular piece of evidence. Moreover, the court must determine whether the applicable standard of proof is met by answering the question: is there sufficient evidence to convict the accused? The applicable standard of proof in Dutch criminal proceedings is the *conviction* of the court: it must be convinced that the accused is guilty as charged. Defining the standard of proof is notoriously difficult. Sometimes references are made to what the standard is not: the preponderance of probabilities, the subjective belief of the court or absolute certainty. For present purposes, the degree of belief that the court must have for a conviction is that of a very high degree of probability that the accused is, in fact, guilty. This resembles the common law standard of proof beyond reasonable doubt.

In Continental criminal justice systems, including the Dutch, reference is often made to the distinction between the *conviction intime* and the *conviction raisonnée*. These two concepts can be discussed from two perspectives: the standard of proof and the obligation to provide reasons in the judgement. In both concepts the subjective


\(^{46}\) Corstens and Borgers argue convincingly that the new criterion regarding the *unus testis, nullus testis*-rule also applies to the *nuda confessio*-rule. Both rules aim to improve accurate fact-finding by precluding the court from convicting on the basis of a single statement. It is immaterial whether the statement stems from the accused or from a witness. G.J.M. Corstens, M.J. Borgers, *Het Nederlands strafprocesrecht*, Kluwer, Deventer 2014, p. 773, 799-800.
belief of the fact-finder is regarded as the standard of proof. The term ‘fact-finder’ was chosen deliberately because it refers to both lay fact-finders and professional judges. The question of how certain the fact-finder must be (his degree of personal belief) in order to convict refers to the notion of conviction. The second perspective is the obligation to provide reasons: when the standard of proof is met, must the fact-finder account for his subjective belief that the accused is guilty? In criminal justice systems that are based on the conviction intime this is not necessary. In fact, it is undesirable. The fact-finder (mostly lay fact-finders in a typical jury setting) is asked to determine whether he is convinced of the guilt of the accused. Reasons for his personal belief are not required. In systems that are based on the conviction raisonné, such as the Dutch criminal justice system, the subjective belief must be accounted for. The court must provide reasons why it is convinced that the accused is guilty as charged.

In their commentary on the 1926 Code of Criminal Procedure, Blok and Besier argued that systems of free proof are often associated with the conviction intime: when the fact-finder is not constrained in any way by statutory rules regarding the admission and the weighing of the evidence, his personal belief is the applicable standard of proof. Corstens and Borgers argued that the difference between conviction raisonné and conviction intime is the existence of evidentiary thresholds in conviction raisonné systems. The court must acquit when there is insufficient evidence, even if it is convinced of the guilt of the accused. Nijboer agreed: evidentiary thresholds and other legal impediments to the free evaluation of evidence are absent from systems based on the conviction intime. This is why admissibility rules are so prominent in such systems: first, sufficient evidence has to be presented to meet the applicable standard of proof and, more importantly, admissibility rules can effectively shield the fact-finder from tainted evidence. This way, evidence with probative value can be kept away from the deliberations of the fact-finder.

### 3.1.2.2 Statutory and Free Systems of Evidence Law

When the two types of conviction are discussed, reference is often made to the different systems of evidence law. Traditionally, systems of evidence law are divided into free and statutory systems of evidence law. The latter category is then subdivided into positive and negative statutory systems.

In the archetypical free system of evidence law, no rules of admissibility or rules regarding the evaluation of evidence exist. It is completely up to the court to select the relevant evidence and to determine whether it is convinced of the guilt of the accused. It is obvious that in such systems the court has been given a large amount of discretion regarding the determination of guilt; in fact, critics might argue that this
is noting more than an arbitrary system. Prominent proponents of the abolishment of technical legal rules of evidence include Jeremy Bentham and Rupert Cross. They favoured a system in which the fact-finder is left considerable freedom to assess any relevant evidence.\textsuperscript{50}

In statutory systems of evidence law, the legislator has defined rules regarding the admission and evaluation of evidence. In such systems, evidence is divided into particular categories (the legal means of proof) with all kinds of technical rules attached to it. The evaluation of the admissible evidence is regulated to a greater or lesser extent. In positive-statutory systems, the legislator has determined that a certain quantity of evidence suffices for a conviction; the court is then obliged to convict the accused, even if it is not convinced of the accused’s guilt.

Positive-statutory systems are at odds with both the \textit{conviction intime} and the \textit{conviction raisonnée}. Guilt or innocence follow almost mechanically from the evidence presented. This entails that there is no need to provide the accused with a reasoned judgement: it is simply superfluous to give reasons for a decision that is inevitable. To oblige judges in a positive-statutory system to account for their decisions is providing an appearance of accountability at best. The judgement will consist of a summing up of the evidence, without any substantive reasoning. It is therefore rather immaterial which type of persuasion is chosen in positive-statutory systems: the end result is an unreasoned judgement.

In negative-statutory systems, the court must be convinced in order to convict. In such systems, the court is never obliged to convict when a certain amount of evidence has been presented. What is of importance is the quality and probative value of the evidence.

Negative-statutory systems are characterized by the emphasis on the \textit{conviction} of the court. When sufficient evidence has been presented to meet any evidentiary threshold and the court is convinced of the accused’s guilt, the importance of a reasoned judgement comes to the fore. The leap from the evidence to the final judgement requires a solid justification. It is this final step in criminal proceedings that favours a combination of the negative-statutory system and \textit{conviction raisonnée}: without a reasoned judgement, the accused would be left in the dark on how the court conducted fact-finding and determined his guilt.

Dutch law of criminal evidence is characterized as a negative-statutory system of evidence law.\textsuperscript{51} The court is bound by legal means of proof (although it resembles a system of free admission of proof, in practice), and it has to observe evidentiary thresholds. Crucially, the \textit{conviction} of the court is of primary importance: the court is never under a statutory obligation to convict. Nijboer argued convincingly that the


Dutch system of evidence law is deeply influenced by the case law of the Supreme Court. Examples include the *De auditu* judgement and the case law on the *unus testimonii, nullus testimonii*-rule, discussed above.

Considering the weighing of evidence, the Dutch law of criminal evidence can be characterized as a system of conditional free evaluation. When the evidentiary thresholds are met, the court is free to weigh the evidence as it wishes (provided, of course, that no epistemological errors are made). The court has to account for the outcome of the deliberations: the right to a reasoned judgement is a vital safeguard to verify how the court has evaluated the evidence and whether any factual errors have been made.

### 3.1.3 Reasoned Judgements

The rationale for providing the accused, and the public in general, with a reasoned judgement is uncontroversial. By providing reasons, the court accounts for its findings and explains its conclusions regarding the facts. A reasoned judgement enables the parties to verify whether all procedural rules, including the rules of evidence, have been observed. From the perspective of the ECtHR, the domestic courts must ‘indicate with sufficient clarity the grounds on which they base their decisions’.

The rationale for this obligation found the Court, *inter alia*, in the fact that the accused must be able to understand the judgement and to demonstrate that the arguments of the parties have been taken into consideration. Moreover, a reasoned judgement obliges the court to base its findings on ‘objective arguments’. This way, arbitrary decisions are avoided.

Article 121 of the Constitution states that judgements must be reasoned. Corstens and Borgers argued that providing reasons ensures that the court takes the rules of procedure and evidence into account. The accused, the prosecutor and the public in general are properly informed of the court’s reasoning. A reasoned judgement also allows for effective supervision by a higher court.

The assessment of evidence is a mental process that, as such, cannot be verified by others. Ideally, after the evidence has been weighed the court juxtaposes the result to the applicable standard of proof. This process is often described as a leap: the judge takes a leap from the evidence presented to the final judgement. The CCP stipulates which evidence may be considered, but the *conviction* is obscured from others. Although this mental process cannot be verified (we do not know, for instance, at which

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54 ECtHR (GC), 16 November 2010, App. No.: 926/05, (*Taxquet v. Belgium*), par. 91.
56 C.P.M. Cleiren, ‘De rechterlijke overtuiging: een sprong met hindernissen’, *RM Themis*, 2010-
moment the court considers itself convinced) the outcome can. Considered this way, the importance of a solid motivation in the judgement becomes clear: the legislator has, as far as possible, described the means of proof that the court may consider, but the ultimate issue remains for the court to answer. To underline the importance of a reasoned judgement, it is useful to refer again to bifurcated and unitary court systems. Damaška observed that bifurcated court systems produce judgements without reasons: a typical judgement consists of the jury’s apodictic verdict on the guilt or innocence of the accused. The reasons for this finding are left in the dark because juries are not obliged to explain how they have reached their verdict and which evidence they have found persuasive. Damaška emphasized that in such proceedings, the admissibility stage of the proceedings gains in importance: the evidentiary basis upon which the fact-finder must decide is in fact the only way parties can influence the ultimate decision and, at least equally important, can determine whether the proceedings were fair:

If the rational support for the output of their decision-making process eludes supervision, the rational support for the input can be subject to attack.\(^5\)

The lack of reasoning in the final judgement is then compensated by meticulous debates on the admissibility of evidence. Judgements of bifurcated courts gain their legitimacy \textit{ex ante}: during the proceedings and before the final verdict is handed down. In unitary courts with their flexible, or even absent, admissibility standards, the legitimacy is gained only \textit{ex post}: it is in the final judgement that the court accounts for its findings regarding the evidence.\(^5\)

The Court has held that the absence of reasons in a judgement handed down by a lay jury is not in itself contrary to the Convention. However, in order to prevent arbitrariness, the accused and the public as a whole must be able to understand the judgement. This understanding can be provided in various ways, which can all be brought under the \textit{ex ante} justifications Damaška discussed. In \textit{Papon v. France}, for example, the Court held that the unreasoned judgement by the French Assize Court did not violate the Convention because the jury had answered 768 questions put to it by the president of the Assize Court. These questions ‘formed a framework on which the jury’s decision was based.’\(^6\) Regarding proceedings before professional judges, the Court held that ‘the accused’s understanding of his conviction stems primarily

\(^6\) ECtHR (GC), 16 November 2010, App. No.: 926/05, (\textit{Taxquet v. Belgium}), par. 90.
\(^6\) ECtHR, 7 June 2001, App. No.: 64666/01, (\textit{Papon v. France (No. 2)}), p. 28.
from the reasons given in judicial decisions.” The observations of Damaška fit well within these rulings of the Court; in bifurcated court systems, the understanding of the judgement occurs during the proceedings, and in unitary court systems, it occurs in interlocutory and final judicial decisions.

Article 359 CCP obliges the court to hand down a reasoned judgement. Although not limited to the question of whether the accused is guilty (the ultimate issue), the obligation to provide reasons in case the court concludes that the accused is guilty is of particular relevance. Article 359 (3) CCP states that this decision must be based on legal means of proof that have probative value. The court must indicate which means of proof it has used. Besides the obligation of the court to provide reasons proprio motu, the court must respond when one of the parties has specifically addressed a particular issue. When the court is not persuaded by the arguments of the accused or the prosecutor, it must account for that decision in the judgement. Article 359 (2) CCP requires the court to respond specifically to such arguments.

Other instances in which the court must specifically address a particular issue in the judgement concern the use of chain evidence; in case of a ‘Murray-situation’; the use of false testimony of the accused, and the use of statements of particular witnesses. When the court uses chain evidence in its judgement, solid reasoning is required; specifically, the court must provide sufficient reasons why and how chain evidence was used in a particular case. The court must indicate the similarities between the charges and why it is convinced that the accused is guilty. A ‘Murray-situation’ is a situation in which an adverse inference is drawn against the accused when he remains silent in the face of a significant amount of incriminating evidence. In such cases, the court must address this issue in the judgement. Similarly, using any false testimony of the accused in order to convict him is allowed when the court provides suffi-

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63 ECtHR (GC), 16 November 2010, App. No.: 926/05, (Taxquet v. Belgium), par. 91.
65 Cf. G.K. Schoep, in: T&C Strafvoering, art. 359 Sv, (online, revised 1 July 2015), Opm. 4.
67 ECtHR (GC), 8 February 1996, App. No.: 18731/91, (John Murray v. United Kingdom). The Court held, inter alia: ‘On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.’ (par. 47).
cient reasons for doing so.\textsuperscript{69} Finally, Article 360 CCP states that the court must provide specific reasons when use is made of statements of particular categories of witnesses.

There are also instances in which the court may refrain from handing down a reasoned judgement.\textsuperscript{70} The court may hand down an abridged judgement, in which no reasons are given for the conviction.\textsuperscript{71} Such a judgement contains the charges, the facts for which the accused is found guilty and the reasons for the sentence that is imposed. The means of proof are not included, nor any reasoning on the weighing of the evidence by the court. However, when appeal or cassation proceedings are initiated, the abridged judgement must be supplemented with the means of proof on which the court relied.\textsuperscript{72} In case the accused confesses unconditionally to the charges, it suffices for the court to sum up the means of proof; in this case, it is not necessary to provide a fully reasoned judgement.\textsuperscript{73} The confession of the accused must be clear, unconditional and not equivocal.\textsuperscript{74}

3.1.3 Conclusion

The full criminal trial in Dutch criminal proceedings can be characterized as follows. The court can take into account virtually all evidence that it deems relevant for the case. The weighing of the evidence is within the court’s discretion (provided the evidentiary thresholds are met), for which the court must account in the final judgement. It can be concluded that the court holds a prominent place in the Dutch criminal justice system. The principle of \textit{nulla poena sine iudicio} is mirrored in the manner in which criminal proceedings are conducted: the court is entrusted to ensure that trials are fair and result in accurate fact-finding. In order to do so, the legislator has left the court considerable freedom regarding the admissibility and weighing of the evidence. However, this freedom is not unlimited: the court must account, sometimes in great detail, for its factual and legal conclusions.

The following pages present a discussion of the diversions from the full criminal trial, addressing the question: what are the mechanisms that deviate from the \textit{nulla poena sine iudicio} principle? After the diversions are discussed, the use of shortcuts will be analysed. Shortcuts to proof do not deviate from the \textit{nulla poena sine iudicio} principle; rather, they operate within the procedural context of criminal proceedings.

\textsuperscript{69} E.g. HR 3 July 2012, \textit{ECLI:NL:HR:2012:BW9968}, par. 4.2.
\textsuperscript{70} In case of a single judge bench, Article 378 (CCP) applies (in case of proceedings before the court of appeal: Article 425 (3) CCP). These articles allow the single judge to deliver the judgement orally, directly after the close of the proceedings.
\textsuperscript{71} Article 365a CCP.
\textsuperscript{72} Article 365a (2) CCP.
\textsuperscript{73} Article 359 (3) CCP.
\textsuperscript{74} See e.g. M.J.A. Duker, ‘De verkorte bewijsmotivering bij bekennende verdachten: is er nog een toekomst?’, \textit{Delikt en Delinkwent}, 2012-53.
They deviate, however, from the notion that every part of the evidence has to be discussed during the proceedings in order to provide for an adversarial trial.

3.2 Diversions in Dutch Law of Criminal Procedure

3.2.1 Introduction

Three ways of diverting a case from the full criminal trial will be discussed here: the punitive order, the transaction and the conditional dismissal. These diversions enable the prosecutor to react to criminal offences without bringing the case to court. He can either impose a sentence (in case of the punitive order) or try to reach an agreement with the accused, in which the accused agrees to comply with certain conditions that are punitive in nature (in case of the transaction and the conditional dismissal). The punitive character of these different ways to divert from the full criminal trial is important: the accused has to comply with the conditions imposed or agreed to. If he fails to do so, the prosecutor will most likely initiate regular criminal proceedings. The fact that the accused reaches an agreement does not alter the punitive character of the conditions that are agreed to. This is why mediation is not regarded as a diversion mechanism for the purposes of this study: mediation concerns primarily the relationship between the accused and the victim. The prosecutor is absent in this relationship, which means that the concept of mediation does not have a punitive character. On the contrary, reconciliation is the most important goal.

The diversions that are discussed here will be evaluated in Chapter 5, where the participatory model of proof will function as the normative framework. In order to provide fruitful results, the analysis of the diversions is done with this framework in mind. Specifically, these sections will address the following questions: What are the main characteristics of each diversion mechanism? What is the legal position of the accused when he is confronted with a diversion from the full criminal trial proceedings?

3.2.2 The Punitive Order

The punitive order was introduced in 2008. The prosecutor can issue a punitive order for certain, relatively minor, offences. This entails that the prosecutor can im-

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75 The fact that, according to Article 51h CCP, the prosecutor promotes mediation between the victim and accused, does not alter the fact that mediation is aimed at reconciling the victim and the accused. For an analysis of several recent mediation pilots in Dutch criminal proceedings, including the theoretical background of mediation in criminal cases, see: K.M.E. Lens, A. Pemberton, I. Clev- en, *Tussenrapportage onderzoek pilots herstelbemiddeling: een eerste evaluatie*, Tilburg University/Intervict, Tilburg 2015.
77 Article 257b and Article 257ba CCP state that other public officials may also issue a punitive order. This is subject to detailed regulation.
pose sentences unilaterally without the involvement of the court. The punitive order can be imposed in case of crimes ('misdrijven') that are punishable by a maximum sentence of 6 years' imprisonment and in case of minor offences ('overtredingen').

This is the same range of offences for which transactions can be offered. Punitive orders can, for example, be imposed for theft, simple assault or vandalism.

The sentences that can be imposed by way of a punitive order are community service, a fine, the seizure of certain goods, the payment of a sum to the State (which is then transferred to the victim) and the prohibition to drive vehicles for a maximum period of six months. Moreover, the following measures can be imposed: the surrender of certain objects, the handing over of certain objects to the State or paying the value of those objects, the confiscation of illegal proceeds, the payment of a sum to victim organizations and any other measure, provided that such a measure does not restrict the constitutional and religious freedoms of the accused.

During the parliamentary debates, the Minister of Justice argued that the introduction of the punitive order was necessary to increase the crime control capacities of the judicial authorities. The introduction of the punitive order changed the position of the prosecutor vis-à-vis the judiciary within the criminal justice system profoundly. The Minister of Justice envisaged that cases should be brought before the courts only if they are of a certain gravity, warrant imprisonment or should result in higher sentences than can be imposed by the punitive order. Contested cases, in which the prosecution and accused differ regarding the guilt of the accused, should also be brought before the courts.

With the introduction of the punitive order the traditional prerogative of the judge, his ius puniendi, is abandoned. Considering the implications for the position of the judiciary and the prosecution regarding sentencing, intense debates were held over the past decades. Since the 1960’s, several proposals have been drafted that argued in favour of allowing the prosecutor to impose sentences unilaterally.

One of the major objections against the punitive order concerned this prosecutorial authority to impose sentences without judicial involvement. According to Article 113 of the Constitution, the judiciary is responsible for conducting criminal proceedings. Article 113 (3) of the Constitution states that only the judiciary may impose sentences that consist of the deprivation of liberty. Although imprisonment is not a

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78 Article 257a CCP
79 Article 74 CC.
80 Article 310 CC, Article 300 CC, Article 350 CC.
81 Article 257a (2) CCP. See also Article 36 Economic Crimes Act.
82 Article 257a (3) CCP. Cf. J.H. Crijns, in: T&C Strafvordering, art. 257a CCP, aant. 5a. (online, revised 1 July 2015)
85 Cf. the enumeration given by the Minister of Justice in the Senate during the parliamentary debates. Kamerstukken I, 2005/06, 29849, C, p. 1-2.
sentence that can be imposed in a punitive order, the constitutional implications that arise by expanding the *ius puniendi* of the judiciary have been discussed extensively.\(^8\)

To allow the prosecutor, or other public officials, to impose sentences is a significant departure from the *nulla poena sine iudicio* principle and profoundly changed the original framework of the CCP. Nijboer argued that this principle is the cornerstone of both the Code of Criminal Procedure and the Criminal Code.\(^8\) Crijns emphasized that the justification for this expansion of the *ius puniendi* has not been discussed profoundly during the parliamentary debates.\(^8\)

Although the prosecutor may impose a sentence unilaterally, the accused has the possibility to file a notice of disagreement against the punitive order.\(^8\) This entails that the prosecutor must reconsider the case and decide either to withdraw the punitive order or to send the case to court. In the latter case, regular first-instance proceedings will be initiated. The possibility of filing a notice of disagreement ensures that the accused’s right of access to a court is guaranteed. Unlike the transaction, which is discussed below, the initiative for involving an independent and impartial judge lies with the accused. Normally, the judge will not review whether the punitive order was issued correctly, i.e. whether all procedural safeguards have been complied with.\(^9\)

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\(^9\) Article 257e CCP.

\(^9\) Cf. Crijns who argued that in exceptional circumstances the judge will review the manner in which the punitive order has been issued. When the imposition of the punitive order violates the principle of due process, the judge will take this into account (for example, by ruling that the prosecutor no longer has standing in court). J.H. Crijns, ‘Op zoek naar consistentie: bestraffing buiten de rechter om in strafrecht en bestuursrecht’, *RM Themis* 2014-6, p. 270.
The judge will determine whether the accused is guilty as charged, applying the rules of criminal procedure regarding regular first-instance proceedings.\footnote{\textsuperscript{91}}

The fact that sentences can be imposed implies that the accused is in fact guilty of the offence for which the punitive order is issued. The prosecutor must determine whether the accused is guilty; in this regard the determination of the ultimate issue shifts from the court to the prosecutor. The prosecutor must determine whether there is sufficient evidence and whether there are any legal impediments to the imposition of the punitive order. The main difference between this and the other diversions is this determination of guilt; specifically, the other diversions are based on an agreement or consensus between the accused and the prosecutor.

### 3.2.2.1 Safeguards

The accused must be heard by the prosecutor when the punitive order consists of community service, a driving disqualification, measures or a fine or damages of more than 2,000 €.\footnote{\textsuperscript{92}} Hearing the accused in such cases has a threefold rationale. First, the manner in which the prosecutor determines the accused’s guilt will be more accurate when the accused is able to present his side of the story. Second, the prosecutor will be able to evaluate the consequences of the sanctions he wishes to impose; before doing so, the accused can inform the prosecutor about his personal circumstances and the effect that any punitive order may have on his personal life. Finally, it enhances effectiveness: if the accused states during the hearing that he will file a notice of disagreement, the prosecutor might as well summon the accused immediately.\footnote{\textsuperscript{93}}

When the views of the prosecutor and the accused differ, the prosecutor is obliged to provide the accused with reasons why he is not persuaded by the arguments of the accused. According to Article 257c (3) CCP, this obligation arises only when the accused has specifically addressed certain issues. This is similar to the obligation for the court to respond to issues that the accused has specifically addressed during the proceedings. When the court disagrees, it must provide reasons for this decision.\footnote{\textsuperscript{94}}

\begin{itemize}
  \item \textsuperscript{91} A comparison with plea bargaining is instructive: in such procedures, the plea bargaining procedure as such and the factual basis of the plea are supervised by a judge. Cf. Rule 62\textsuperscript{bis} ICTY RPE: ‘If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that: (i) the guilty plea has been made voluntarily; (ii) the guilty plea is informed; (iii) the guilty plea is not equivocal; and (iv) there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case, the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.’
  \item \textsuperscript{92} Article 257c CCP. In case of a fine or damages of more than 2,000 €, the presence of the lawyer of the accused is required. Article 257c (2) CCP. Article 36 (2) Economic Crimes Act stipulates that the presence of a lawyer is required when the punitive order consists of a fine or damages of more than 10,000 € and is issued for an economic crime committed by a corporation.
  \item \textsuperscript{93} \textit{Kamerstukken II}, 2004/05, 29849, 3, p. 31.
  \item \textsuperscript{94} Article 359 (2) CCP.
\end{itemize}
The rationale of hearing the accused to increase the accuracy of the punitive order is somewhat problematic. The diversion is designed to entrust the determination of guilt to the prosecutor, and it should, therefore, be rather irrelevant whether the accused is heard or not. Currently, hearing is mandatory when the punitive order concerns certain sentences or measures. It would stand to reason to oblige the prosecutor to hear the accused in cases in which the evidential basis is rather small. In such cases, hearing the accused contributes to the accuracy of the determination of guilt. If the prosecutor is unable to determine the guilt of the accused due to insufficient evidence, the only appropriate reaction is to withhold the punitive order or to bring the case to court and let the court decide whether the accused is guilty.

In order to ensure that filing a notice of disagreement against the punitive order is effective, it is necessary that the accused knows on which evidence the prosecutor relies. This way, the accused is able to formulate his objections against the punitive order in a detailed and effective manner. Article 33 CCP states that the accused has the right to acquaint himself with the case file when the prosecutor has issued a punitive order. The right to file a notice of disagreement entails that the accused is able to bring the case before a judge. According to the Minister of Justice, this is sufficient to comply with the requirement that sentences can be reviewed by a court, which is contained in Article 6 ECHR. The right of access to a court is, therefore, guaranteed.

The implications of the punitive order for the (constitutional) position of the prosecutor and the judiciary raises the question of how the prosecutor determines whether the accused has committed a particular offence. Articles 257a through 257h CCP do not specifically address the question of how the prosecutor should determine the guilt of the accused. Article 257a CCP merely states that the prosecutor may issue a punitive order when he determines that a certain offence has been committed.

During the parliamentary debates, it remained unclear how the prosecutor should determine the guilt of the accused. The Minister of Justice argued that the right of the accused to file a notice of disagreement will ensure compliance with the CCP, including the rules of evidence. In other words, the prosecutor must be convinced that the case, if brought to court, will result in a conviction. This is, in fact, the essence of this diversion from the full criminal trial: the prosecutor must act as if he were an independent and impartial judge.

95 Kamerstukken II, 2004/05, 29849, 3, p. 42.
96 In Deweer v. Belgium, the Court held that the right to a court is ‘a constituent element of the right to a fair trial’. ECtHR, 27 February 1980, App. No.: 6903/75, (Deweer v. Belgium), par. 49.
97 Article 257f (3) CCP.
98 Article 257a CCP.
99 Kamerstukken I, 2005/06, 29849 C, p. 31-32. Kooijmans argued in his inaugural address that the rules of evidence, contained in the CCP, must be taken into account by the prosecutor when he issues a punitive order. T. Kooijmans, Dat is mijn zaak!, inaugural address Tilburg University, Tilburg 2011, p. 44-45.
3.2.2.2 Judicial Supervision

When a notice of disagreement is filed and the prosecutor sends the case to court, the court will not review the punitive order as such, but will determine itself whether the accused is guilty. The manner in which the prosecutor determined the guilt of the accused is not relevant because the court will process the case just as it would any other first-instance case. This means that the question of whether the prosecutor has complied with the safeguards contained in the CCP, such as the obligation to hear the accused, is as such not subject to judicial supervision. Apart from exceptional circumstances, the manner in which this diversion mechanism operates in practice is not supervised by the courts. The fact that the prosecutor can withdraw the punitive order after a notice of disagreement has been filed is not without relevance in this respect: the prosecutor effectively controls the access to the court.

Although the court will process the case in conformity with the rules on first-instance criminal proceedings, this does not necessarily mean that the manner in which the punitive order was issued is completely irrelevant. Crijns argued that the manner in which the punitive order was issued can be regarded as part of the pre-trial phase. This entails that any procedural errors that have been made can be taken into account during the trial proceedings. This way, the court is able to respond to procedural errors that the prosecutor made when he issued the punitive order. In Imbrioscia, the Court emphasized that the rights contained in Article 6 may also be relevant before the case is sent to trial. An initial failure to comply with the procedural guarantees of Article 6 during the pre-trial proceedings may have consequences for the fairness of the trial as such.

The legislator envisaged that the court would not determine whether the punitive order was issued correctly. The Council of State, the Dutch advisory body on legislation, expressed profound critique on this point. The fact that the court is, in principle, not allowed to assess the legitimacy of the punitive order, combined with the ‘quasi judicial function’ of the prosecutor, is incompatible with the constitutional position of both the prosecutor and the judiciary. This is particularly troublesome in cases that cannot be categorized as petty crimes, such as shoplifting. Article 257a CCP gives the prosecutor the authority to issue punitive orders for crimes with a maximum sentence of 6 years’ imprisonment. This entails that punitive orders may also be issued for more serious offences in which an accurate and concise determination of guilt is even more essential.

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100 J.H. Crijns, in: T&c Strafvordering, Artikel 257f, Opm. 4c (online, revised 1 July 2015).
103 Kamerstukken II, 2004/05, 29849, 5, p. 5-6.
104 This does not imply that the accuracy of the determination of guilt should depend on the gravity of the offence: every determination of guilt should be as accurate as possible.
The internal directive of the prosecution service on the punitive order states that cases in which sufficient evidence has been collected and where no legal impediments exist are diverted from the courts. In such cases, a punitive order will be issued. This means that, in principle, the courts will handle only contested cases, cases in which the prosecutor wants to have the accused imprisoned and cases concerning offences for which no punitive order can be issued. The result is that a significant number of criminal cases are handled outside the traditional trial context. To enforce criminal law to a significant extent outside the realm of trial proceedings has consequences for the normative framework in which criminal law is enforced. Trial proceedings must be conducted in a fair manner; in its case law, the Court has developed a sophisticated and detailed framework regarding the fairness of trial proceedings. It is essential that when cases are diverted from the court they are still handled in a fair manner. In Chapter 5, the notion of fairness will be applied to the practice of diversions, including the punitive order.

3.2.3 The Transaction

With the introduction of the punitive order, the future of the transaction as a diversion is somewhat uncertain. The Minister of Justice envisaged that the transaction will be abolished after the punitive order has been implemented completely. The annual reports of the prosecution service show that the number of punitive orders has risen significantly in the period 2009-2013. This to the detriment of the number of transactions. It is, however, possible that, after the full implementation and evaluation of the punitive order, both diversions will co-exist. It can be questioned whether it is desirable to abolish the category of special transactions all together. Such transactions consist, for example, of out of court settlements with large corporations for fraud offences. This way, the prosecutor can avoid complex and time-consuming trial proceedings with an uncertain outcome. Transactions that do not fall into this category will be replaced by the punitive order (this is the category of relatively minor offences, such as shoplifting or simple assault).

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105 Aanwijzing OM-strafbeschikking (2015A0004), Stcrt. 2015, 8971.
106 The Annual Report of the prosecution service shows that the punitive order is on the rise, to the detriment of the transaction. In 2009, 76,400 cases were diverted from the courts: 3,900 punitive orders were imposed, 65,800 transactions were offered and accepted and 6,700 conditional dismissals were reached. In 2013, the prosecution service diverted 61,700 cases from the courts: 34,300 punitive orders; 17,600 transactions and 9,800 conditional dismissals. Openbaar Ministerie, Jaarbericht 2013, The Hague 2014, p. 62.
107 Kamerstukken II, 2004/05, 29849, nr. 4.
108 Kamerstukken I, 2005/06, 29849, C, p. 22.
3.2.3.1 The Legal Nature of the Transaction

Article 74 CC enables the prosecutor to offer a transaction to the accused. A transaction is best characterized as a consensual out of court settlement between the prosecutor and the accused.\(^{109}\) This is the main difference to the punitive order: the transaction requires that the accused consents to the conditions stipulated by the prosecutor, whereas the punitive order can be imposed without the consent of the accused.

When the accused complies with the conditions stipulated by the prosecutor, the prosecutor forfeits the right to prosecute and no longer has standing in court.\(^{110}\) The current practice of transactions stems from 1983 and, according to Osinga, consists of two elements: a sanction and a procedure.\(^{111}\) Considering the procedural element, Osinga argued that the principles of due process (‘beginselen van een goede procesorde’) function as the normative framework. When the prosecutor offers a transaction, he must ensure that no due process principle, such as the prohibition to act in an arbitrary manner, is violated.\(^{112}\)

It is important to keep the punitive character of the transaction in mind: although the transaction requires the consent of the accused, this should not detract from the fact that the conditions the prosecutor offers to the accused have a punitive character.\(^{113}\) From the perspective of the Court, the transaction has to be regarded as a ‘criminal charge’. In Deweer, the Court held that:

> The ‘charge’ could, for the purposes of Article 6 par.1, be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.\(^{114}\)

Hartmann discussed the hybrid character of the transaction and concluded that the transaction is best characterized as a mechanism that encompasses both punitive and

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\(^{110}\) Article 74 (1) CC.


\(^{113}\) Consent is not the mere acceptance of the offer by the prosecutor: it also consists of complying with the conditions in the transaction. Cf. J.H. Crijns, *De strafrechtelijke overeenkomst. De rechtsbetrekking met het Openbaar Ministerie op het grensvlak van publiek- en privaatrecht*, Kluwer, Deventer 2010, p. 175.

\(^{114}\) ECtHR, 27 February 1980, App. No.: 6903/75, (*Deweer v. Belgium*), par. 46. See also: ECtHR, 8 June 1976, App. No.: 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72 (*Engel and Others v. The Netherlands*), par. 81.
consensual elements.\textsuperscript{115} Crijns emphasized that the transaction is often regarded as a typical public law concept, in which private law notions such as freedom of contract and party autonomy are mostly absent.\textsuperscript{116} Considering the consensual character of the transaction, reminiscent of private law contract theory, this is remarkable. Although consensualism is a constitutive element of the transaction, it does not fundamentally alter its punitive character.

3.2.3.2 Conditions

Transactions can be offered for a limited number of offences. A transaction can be offered for all minor offences and for crimes for which the statutory maximum term of imprisonment does not exceed 6 years. The prosecutor may include the following conditions in the transaction: payment of a sum between 3 € and the maximum fine of the offence, surrendering confiscated goods or payment of the value of non-confiscated goods, confiscation of illegal proceeds, payment of damages and, finally, community service with a maximum of 120 hours.

One of the main rationales for the transaction is to increase efficiency in the enforcement of criminal law. Trial proceedings are costly and the criminal justice system becomes overburdened when minor offences are brought before the courts. Closely related is the effect on law enforcement: when a significant number of minor offences are left unpunished, the legitimacy of such laws may be questioned. It is obvious that these rationales are primarily beneficial for the State, in particular for a State that considers the criminal process as an instrument to implement state policy.\textsuperscript{117}

From the perspective of the accused, it may be in his best interest to accept the offered transaction. By accepting the transaction and complying with the conditions, he avoids a public trial with an uncertain outcome. Especially in the case of more serious offences, the transaction can be attractive for the accused to divert the case from the court and the general public. Similarly, the prosecutor can avoid lengthy proceedings and an uncertain outcome by offering the accused a transaction in such cases.

3.2.3.3 Safeguards

The prosecutor who offers the transaction must be sure that the accused actually committed the offence for which the transaction is offered. The transaction may be offered only when there is sufficient evidence and when there are no legal impedi-


This entails that no transaction may be offered when the prosecutor is not convinced that he could bring the case successfully before the court. Similar to the practice of the punitive order, the prosecutor must act like a quasi-judge when he offers a transaction to the accused. Although the prosecutor must ensure that a conviction could follow, complying with the conditions of the transaction does not result in an official determination of guilt. The determination of guilt can only be done within the context of a full criminal trial or by the imposition of a punitive order.

Considering that the prosecutor has no standing in court when the accused complies with the conditions stipulated in the transaction, there is no judicial supervision regarding the manner in which transactions are offered and accepted. Unlike the punitive order, there is no explicit obligation to hear the accused in case the transaction involves the payment of a sum exceeding 2,000 €. When the accused does not comply with the transaction, or does not respond to the transaction offer, the prosecutor cannot enforce the conditions in the transaction. The prosecutor must then bring the case to court.

The accused will be informed for which offence the transaction is offered, with a description of the underlying facts. This way, the accused is notified for which particular fact the transaction is offered. It is important to make a distinction here between normal transactions (which have been replaced by the punitive order) and special transactions. The last category consists of all transactions above 500,000 € and transactions above 50,000 € that are not included in the internal directives of the prosecution service. Transactions that are offered in controversial cases, such as cases that have attracted substantial media coverage or concern ethical issues, are also labelled as special transactions. In case of a special transaction the prosecutor and the accused can enter into negotiations in order to settle the case and reach an agreement that is acceptable to both parties. The evidence that has been collected will most likely be part of the negotiations; as a result, such evidence will be disclosed to the accused. This enables the accused to determine whether it is in his best interest to settle or not. Informing the accused about the evidence that has been gathered enables the accused to make an informed decision: by complying with the transaction, he waives his right to a fair trial. This is acceptable only when he has done so voluntarily and on an informed basis. The generally accepted procedural safeguards regarding plea-bargaining procedures are instructive in this regard: a valid guilty plea has to be informed, voluntary and not equivocal. Waiving the right to have the case determined by an independent and impartial judge requires solid procedural safeguards in order to enable the accused to make a well-informed decision.

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118 This includes, for example, the existence of any justification or excuse.


120 The accused’s lawyer can play an important role in such negotiations. Cf. A.A. Franken, Handboek strafzaken, par. 66.3.6 (online, revised 30 October 2002).
Corstens and Borgers, authors of the leading text book on the Dutch law of criminal procedure, have argued that controversial transactions, such as cases that have attracted substantial media coverage or cases in which a transaction is offered for a crime that would normally lead to trial proceedings, should be brought before a court for judicial approval. This resembles the guilty plea procedure, in which the court determines whether the plea has been reached in conformity with the law.

3.2.4 The Conditional Dismissal

The conditional dismissal resembles the transaction, but it has a broader scope: the conditional dismissal can be offered for a wider range of offences than the transaction. In fact, the conditional dismissal can be offered for any offence.

In order to be effective, the cooperation of the accused is required: the prosecutor cannot impose the conditional dismissal. The accused has to be willing to fulfil the conditions that are stipulated by the prosecutor. If the accused is not willing to do so, the prosecutor cannot enforce them. The only alternative left is to bring the case to court and request the court to impose a conditional sentence in which a similar condition is included. The consensual character of the conditional dismissal resembles the transaction and is the most striking difference when compared to the punitive order.

3.2.4.1 Legal Basis

The legal basis for the conditional dismissal is Article 167 (2) CCP, which gives the prosecutor the discretionary power to not bring the case to court when the accused complies with the conditions stipulated by the prosecutor. If the accused complies, the prosecutor will not pursue the case and the case will accordingly be dismissed. The prosecutor can offer a conditional dismissal only if the case, when brought before the court, would likely result in a conviction. This is similar to the requirements for offering a transaction and imposing a punitive order.

The conditional dismissal will exist alongside the punitive order and can be offered for any offence. This entails that the prosecutor may issue a conditional dismissal for offences above the 6 years’ imprisonment range. In cases in which the maximum term of imprisonment exceeds the term of 6 years, no punitive order can be imposed, nor can a transaction be offered. Normally, the prosecutor will bring the case to court and initiate regular trial proceedings. If, however, the prosecutor concludes that a full criminal trial is inappropriate in a given case (for example, when the accused shows sincere remorse and the victim is not in favour of trial proceedings), he

122 The transaction can be regarded as a specialis of the conditional dismissal.
123 G.J.M. van den Biggelaar, De buitengerechtelijke afdoening van strafbare feiten door het Openbaar Ministerie, Gouda Quint, Arnhem 1994, p. 54.
124 Kamerstukken I, 2005/06, 29849, C, p. 22.
may opt for the conditional dismissal and stipulate the conditions the accused has to comply with. This may, for example, include the prohibition to contact the victim or to be present in a certain area.

Compared to the other diversions, the conditional dismissal is not strictly regulated.\textsuperscript{125} Originally, the authority to dismiss a case had to be derived implicitly from the CCP. With the implementation of the punitive order, an explicit statutory basis has been introduced by amending Article 167 (2) CCP. Prior to this, the authority to offer a conditional dismissal was based on the notion that he who can do more (to summon the accused) is allowed to do less (to offer a dismissal with certain conditions).\textsuperscript{126}

The rudimentary legal framework of the dismissal makes it rather difficult to give a detailed description of the precise workings of this diversion. During the parliamentary debates on the introduction of the punitive order, the Minister of Justice explicitly stated that the conditional dismissal will exist next to the punitive order.\textsuperscript{127} The punitive order can, according to Article 257a (3) CCP, also contain conditions that the accused has to fulfil. Considering that the punitive order is not dependent on the consent of the accused, conditions contained in punitive orders are more effective than conditional dismissals, for which the consent of the accused is necessary. Conditional dismissals may remain indispensable for those cases in which no punitive order can be imposed because the maximum term of imprisonment exceeds 6 years and in which a full criminal trial is undesirable.

3.2.4.2 Conditions

The conditions that have to be fulfilled by the accused are not, as such, codified. It is common understanding, however, that the prosecutor may formulate only conditions that comply with the articles on conditional sentences (Article 14a CC et seq.).\textsuperscript{128} This means that any condition that consists of a deprivation of liberty cannot be included in the conditional dismissal, as Article 113 (3) C states that the deprivation of liberty

\textsuperscript{125} This was already noted by Bleichrodt in 1996. F.W. Bleichrodt, Onder voorwaarde: een onderzoek naar de voorwaardelijke veroordeling en andere voorwaardelijke modaliteiten, Gouda Quint, Deventer 1996, p. 203.

\textsuperscript{126} For a critical analysis, see: F.W. Bleichrodt, Onder voorwaarde: een onderzoek naar de voorwaardelijke veroordeling en andere voorwaardelijke modaliteiten, Gouda Quint, Deventer 1996, p. 199-200.


is the prerogative of the judiciary. Conditions that can be included in the dismissal are, for example, the payment of damages, the prohibition to be present in a certain area and the duty to report regularly to the authorities. The list of conditions is not exhaustive: Article 14 (2) (14) CC states that any condition can be included that relates to the accused’s behaviour. However, such conditions may not result in the restriction of the freedom of religion and other constitutional rights of the accused.

The manner in which the prosecutor determines that the accused has committed an offence is similar to the other diversions. The prosecutor must determine whether the case, when brought to court, would result in a conviction. Similar to the other diversions, the prosecutor must act as if he were a judge and determine whether there is sufficient evidence for a conviction and whether there are any legal impediments to a conviction. Crijns emphasized that, considering the consensual character of the conditional dismissal, it is likely that the prosecutor will consult the accused before issuing a conditional dismissal. There is, however, no (detailed) legal framework for the correct and fair issuing of the conditional dismissal. This is similar to the practice of the transaction in that no legal framework exists to ensure that transactions are offered in a correct and fair manner.

The most important safeguard regarding the accused is that the fulfilment of the conditions stipulated by the prosecutor is voluntary. The accused can refuse to comply with the conditions from the moment the conditional dismissal is offered. Moreover, even after the accused has informed the prosecutor that he wants to comply with the conditions, he can refuse to comply any longer with the conditions.

### 3.3 Shortcuts in Dutch Law of Criminal Procedure

#### 3.3.1 Introduction

In the following pages, several shortcuts in Dutch criminal proceedings will be discussed. Shortcuts to proof infringe on the notion that the evidence is discussed during the proceedings in an adversarial setting, which allows the parties to comment upon the evidence in front of the court. Shortcuts are distinguished from diversions, because shortcuts to proof do not infringe upon the *nulla poena sine iudicio* principle: the criminal proceedings are conducted in front of the court. However, shortcuts do infringe upon the principle of a full criminal trial because a full criminal trial requires that the evidence is presented and discussed extensively with both the prosecutor and the defence in front of the trier of fact. The shortcuts that are chosen, vary in nature and legal character. First, there are shortcuts that allow for a comparative approach with shortcuts in international criminal proceedings, such as the use of facts.

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of common knowledge and the manner in which appeal proceedings are conducted. Second, it is important to emphasize the variety of shortcuts, as this variety makes a comprehensive and coherent normative framework indispensable. Every time the full criminal trial is avoided, either by way of a diversion or a shortcut, it is essential from a fair trial perspective that the accused can participate properly in the (out of court) proceedings.

3.3.2 Facts of Common Knowledge and Contextual Facts

Every criminal law system allows the court to take notice of facts that are so notorious that they are, in fact, indisputable. It enables the court to focus the trial proceedings on contested facts: patently indisputable facts do not require evidence in criminal proceedings. Such facts are regarded as facts of common knowledge. Article 339 (2) CCP states that facts of common knowledge do not require proof. The consequences in terms of probative value of such facts are clear and undisputed. Questions arise, however, when one has to define facts of common knowledge. In this paragraph the character of facts of common knowledge will be discussed, beginning with an overview of the place of facts of common knowledge within the Dutch law of criminal procedure. After this general introduction a detailed analysis will be presented on a particular type of criminal cases: cases in which the accused stands trial for crimes committed in the context of an armed conflict. These cases are chosen because they can be compared with the cases before the international tribunals, which is important because the use of facts of common knowledge in the Dutch and international contexts is comparable and raises similar questions regarding the fairness of the proceedings. The use of facts of common knowledge in respect of contextual facts, which will be discussed below, is of interest here.

3.3.2.1 Legal Framework

Prior to the introduction of the current Code of Criminal Procedure in 1926, no statutory provision existed regarding facts of common knowledge. The Codes of Criminal Procedure of 1838 and 1886 did not contain a provision like the current Article 339 (2) CCP. Notorious facts did not require proof, however: the court could rely on its own knowledge of, for example, the laws of gravitation and geographical facts. The Code of 1926 provided for a statutory basis for court practice. The 1926 codification put an end to the reliance on the subjective knowledge of the court and introduced a more objective standard.

Article 339 (2) CCP states that facts of common knowledge do not require proof. This entails that it suffices for the court to identify facts of common knowledge without requiring formal proof of those facts. Unlike the provisions on facts of common knowledge in the Rules of Procedure and Evidence of the ad hoc Tribunals, Article 339 (2) CCP does not oblige the court to judicially notice a fact of common knowledge. This means that it remains within the discretion of the court to require formal proof of a fact when the court is not sure whether the fact is of common knowledge.

Facts of common knowledge do not fall under the enumeration of means of proof of Article 339 (1) CCP. This entails that, according to Article 338 CCP, the charge cannot be proven on the basis of facts of common knowledge. More precisely: a component ('bestanddeel') of the statutory definition of the crime cannot be proven by labelling it as a fact of common knowledge. It follows from Article 339 (2) CCP that a fact of common knowledge falls outside the probandum, or the object of proof as formulated in the indictment. Criminal proceedings must concentrate on facts that are not of common knowledge (and are, mostly, in dispute between the parties) and require formal proof. Moreover, the court’s conviction cannot be based to a decisive extent on facts of common knowledge, in fact, Article 338 CCP states that the court’s conviction can be based only on legal means of proof.

An analysis of facts of common knowledge runs the risk of being fragmented and case-specific. Generally, courts do not state explicitly how they discerned a fact of common knowledge. In Germany, a distinction is made between facts of general common knowledge (‘Algemeinkundigkeit’) and facts that are common knowledge for the court (‘Gerichtskundigkeit’). The last category is the factual equivalent of the ius curia novit-principle. ‘Gerichtskundigkeit’ is not to be confused with any particular knowledge of the court: facts must still be notorious in general. Stein has argued that specialized courts (such as courts that hear exclusively military or economic cases) should be allowed to rely on empirical facts (‘gerichtskundige Erfahrungssätze’) that are established in so-called ‘Serienprozesse’, or proceedings that concern the same factual basis with several accused that stand trial successively. The use of such facts

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132 Cf. Rule 94 (A) ICTY RPE and ICTR RPE. As the ICTR Appeals Chamber held in Karemera, Chambers do not have any discretion to judicially notice a fact of common knowledge: when a fact is of common knowledge, the Chamber is obliged to take judicial notice of it. ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Prosecutor v. Karemera, Case No.: ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 22-23.

133 Van Woensel argued that, because facts of common knowledge limit the probandum, the provision on facts of common knowledge should have been incorporated in Article 338 CCP. A.M. van Woensel in: Melai/Groenhuijsen e.a., Wetboek van Strafvordering, aant. 5, art. 339 Sv (online, revised 1 March 1997). Similar: J.F. Nijboer, Algemene grondslagen van de bewijsbeslissing in het Nederlandse strafprocesrecht, Gouda Quint, Arnhem 1982, p. 31.

134 In the meaning of conviction raisonnée.


136 F. Stein, Das private Wissen des Richters. Untersuchungen zum Beweisrecht beider Prozesse, C.L.
speeds up the proceedings significantly and may be useful in cases in which accused have committed their crimes within the context of a criminal organization or state apparatus. In fact, it resembles the practice of taking judicial notice of adjudicated facts, which will be discussed in detail in Chapter 4.

3.3.2.2 Different Categories of Facts of Common Knowledge

Attempts have been made to categorize facts of common knowledge. Nijboer divided them into unique historical facts (e.g. ‘1st of January 2015 was a Thursday’), factual situations (e.g. ‘the Thames flows through the city of London’) and empirical facts (e.g. ‘Newton’s laws of motion’). The CCP incorporates empirical facts in the general concept of facts of common knowledge, whereas the Dutch Code of Civil Procedure makes a distinction between facts or circumstances of common knowledge and empirical facts. The distinction is more of academic than practical interest, though. Besides distinguishing between categories of facts or rules, one can also make a distinction between different grades of ‘commonality’. Facts do not need to be universally known in order to be common knowledge; for example, locally known facts (that is, within the territorial jurisdiction of the court) can be regarded as common knowledge. The Amsterdam District Court may regard the fact that one cannot walk from the Central Station to the Leidseplein in less than five minutes as common knowledge, whereas the Rotterdam District Court may not. To distinguish between locally and universally known facts is also common practice before the international criminal tribunals.

Hirschfeld, Leipzig 1893, p. 74-75.


138 Art. 149 (2) Dutch Code of Civil Procedure: ‘Feiten of omstandigheden van algemene bekendheid, alsmede algemene ervaringsregels mogen door de rechter aan zijn beslissing ten grondslag worden gelegd, ongeacht of zij zijn gesteld, en behoeven geen bewijs.’

139 W.H. van Boom, M.L. Tuil, I. van der Zalm, ‘Feiten van algemene bekendheid en ervaringsregels – virtuele werkelijkheid?’, Nederlands Tijdschrift voor Burgerlijk Recht, 2010/2 no. 7, p. 36-43. In the ‘All Cops Are Bastards-case’, the Supreme Court did make a distinction (without commenting on it) between facts of common knowledge and rules of thumb. HR, 11 January 2011, ECLI:NL:HR:2011:BP0291 par. 3.2.1. In another case, both categories were regarded as very similar to each other. HR 12 July 2011, ECLI:NL:HR:2011:BQ6555, par. 2.4.


141 E.g. the power vested in Rwandan Bourgmestres is, within the jurisdiction of the ICTR, a fact of common knowledge. ‘Moreover, the powers of the office of Bourgmestre is a proper subject of judicial notice because it falls squarely into the category of matters that are of common knowledge.
Facts can be common knowledge for a limited number of people, such as professionals; for example, it is common knowledge for farmers that rules and regulations regarding agricultural issues, such as the use of certain types of fertilizer, often change (which obliges farmers to remain up to date regarding such issues). During the Second World War, it was common knowledge for journalists that Dutch conscripts were mobilized in a certain period. This type of facts of common knowledge is often used in relation to a Garantenstellung for accused acting in a certain capacity. In a case before the court of appeal, a farmer faced charges of soil pollution. He had dumped certain types of manure on his estate, without a proper cover or package. According to the farmer, both the type and quantity of the manure could not have polluted the soil. The court of appeal did not agree with the farmer: the court stated first that it is common knowledge that the total quantity of manure produced by Dutch farmers results in environmental problems. Although these environmental problems are mostly associated with other types of manure than the farmer used, ‘everyone’ must know that manure may pollute the soil. Second, the court stated that farmers in particular should be aware of these risks. The court identified expert reports and the internet as sources for the proposition that this fact is widely known. Consequently, it may be required of farmers that they familiarize themselves with such facts, which results in a Garantenstellung for professional farmers.

within the jurisdiction of this Tribunal and which may readily be determined by reference to such reliable sources as the written laws of Rwanda. It also bears noting that within the area of its territorial jurisdiction and within the sphere of its specialized competence, a court is allowed to take judicial notice of an even wider scope of facts of common knowledge and notorious history. Thus, the Chamber may take judicial notice of facts that are notorious within the territories of Rwanda, Burundi and other neighboring states. ICTR, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Fact Pursuant to Rule 94 and 54, Prosecutor v. Semanza, Case No. ICTR-97-20-I, T. Ch. III, 3 November 2000, par. 29-30.

143 Bijzondere Raad van Cassatie, 5 December 1945, NOR 3.
144 In the case mentioned above, the court of appeal stated that manure may cause environmental problems. This is a (general) fact of common knowledge and, addressing the farmer in particular, a well-known fact within the profession of the accused. Consequently, on farmers rests a special duty to avoid soil pollution by manure. Gerechtshof ’s-Hertogenbosch, 28 September 2010, ECLI:NL:GH-SHE:2010:BN8480 par. B.2.
145 Violation of article 13 of the Soil Protection Act and article 1a of the Economic Offences Act.
146 To substantiate his claim, the farmer relied on a ruling by the Supreme Court in which the Supreme Court held that it is not common knowledge that 16 m³ horse manure can result in soil pollution. Gerechtshof ’s-Hertogenbosch, 28 September 2010, ECLI:NL:GH-SHE:2010:BN8480. HR 6 June 2000, ECLI:NL:HR:2000:AA6088.
147 Environmental problems arise in respect to pig, cow and poultry manure. The farmer used horse and mushroom manure.
It is important to note that facts of common knowledge are not the same as ready knowledge. Few people will be able to name the capital of Guinea-Bissau or the density of zinc off the cuff, but both facts can easily be looked up in an encyclopedia or on the internet. Therefore, they are facts of common knowledge.

In general, courts are not obliged to discuss facts of common knowledge with the parties during the proceedings. However, when the court is not sure whether a particular fact is of common knowledge, it must discuss the fact with the parties. This creates a dichotomy: there are facts that are patently of common knowledge and facts that are, in the court’s view, presumably of common knowledge. In such cases, the Supreme Court ruled, the court must discuss such facts with the accused and the prosecutor. One wonders how facts of common knowledge can be subject to debate: if there is doubt about the notoriety of a particular fact, it is, by definition, not notorious. Nevertheless, in such cases, the adversarial character of the proceedings is upheld in that the parties can comment on the fact in question.

The Supreme Court held that when a party disputes that such a fact is of common knowledge, the court must respond and explain why it concluded that the fact is of common knowledge.

3.3.2.3 Contextual Facts

The following pages will present an overview of Dutch case law concerning crimes that have been committed in the context of an armed conflict or war. In such cases, the contextual fact of the existence of an armed conflict or a state of war has to be proven. The acts committed by the accused have to be placed within the context of such an armed conflict or state of war. In order to prove these contextual facts, use has been made of facts of common knowledge. These cases are of particular relevance because they demonstrate how facts of common knowledge can be used as a shortcut to proof.

**Crimes committed in the context of an armed conflict or a state of war**

Dutch courts have not often dealt with cases concerning crimes that were committed in the context of an armed conflict or war. Two periods can be discerned: the first post-World War II years when Dutch collaborators were prosecuted before so-called extraordinary courts and the more recent prosecutions (2005-2013) of asylum seekers that, allegedly, committed war crimes in their countries of origin. In this period,
two Dutch nationals also stood trial for having committed war crimes in Iraq and Liberia, respectively. These two cases will also be discussed under the heading ‘recent prosecutions’.

3.3.2.4 The First Post-WWII Years

The Dutch government-in-exile approved the Extraordinary Criminal Law Decree (ECLD) in December 1943 which, despite the absence of parliamentary approval, functioned next to the provisions of the Dutch Criminal Code as the basis for the post-war prosecutions. Temporary extraordinary courts were set up consisting of both civil and military judges. Five extraordinary courts were set up that heard cases as a first-instance court. No appeal was possible against the judgements of the extraordinary courts; the accused could, however, lodge cassation proceedings at the Extraordinary Court of Cassation in The Hague. Similar to ordinary cassation proceedings, the Extraordinary Court of Cassation could quash the judgment of an extraordinary court due to errors on questions of law. The extraordinary courts had to grant leave to the accused to initiate cassation proceedings against their judgments. The factual conclusions of the extraordinary court could not be challenged during the cassation proceedings because the admissibility of evidence and the weighing of the evidence were the prerogatives of the extraordinary court. However, because facts of common knowledge do not require proof, the Extraordinary Court of Cassation could determine whether a fact was indeed of common knowledge.

The ECLD stipulated that the extraordinary courts could impose the death penalty in cases concerning crimes that, according to the provisions of the Criminal Code, were punishable by 15 years’ imprisonment or more. Most accused faced charges of joining the German armed forces (punishable under Article 101 CC with a maximum sentence of 15 years’ imprisonment) and aiding the German occupying forces (punishable under Article 102 CC with a maximum sentence of 15 years’ imprisonment). The case law concerning these two crimes will be discussed separately.


153 The extraordinary courts are called ‘Bijzonder Gerechtshof’ in Dutch. In the Dutch criminal justice system, ‘gerechtshof’ normally refers to a court of appeal. To avoid confusion, the term extraordinary court will be used to refer to such a ‘Bijzonder gerechtshof’, instead of the misleading term ‘extraordinary court of appeal’. The extraordinary courts were set up in Amsterdam, The Hague, Den Bosch, Arnhem and Leeuwarden. Cf. A.D. Belinfante, In plaats van bijltjesdag. De geschiedenis van de bijzondere rechtspleging na de Tweede Wereldoorlog, Van Gorcum, Assen 1978, p. 95-96.

Joining the German armed forces

Article 101 CC (old) states in translation:

The Dutchman who, out of his own free will, joins the armed forces of a foreign power, knowing that this power is at war with The Netherlands, or in the anticipation of war with The Netherlands, will be punished with imprisonment of fifteen years. Joining the armed forces of a foreign power in the anticipation of war is only punishable if the war breaks out.\(^\text{155}\)

The contextual component of Article 101 CC is the state of war: when the war does not break out, joining the armed forces of a foreign power does not come within the article’s reach. In order to convict an accused, the state of war has to be proven.

The existence of a state of war, including the duration of the war, was regarded as a fact of common knowledge by the extraordinary courts. For example, in a case concerning a Dutchman who worked as a driver for the German *Luftwaffe*, the Amsterdam extraordinary court held that it was a fact of common knowledge that The Netherlands were in a state of war since 10 May, 1940.\(^\text{156}\)

In several cases the existence of the state of war was used as a line of defence: accused argued that the war had ended with the cessation of hostilities and the Dutch capitulation on 15 May, 1940. Consequently, they argued, joining the German armed forces after 15 May, 1940 was not a crime under Article 101 CC because their acts were not committed during a state of war. The extraordinary courts and the Extraordinary Court of Cassation uniformly rejected this view: they held that it was common knowledge that The Netherlands were at war with Germany between 10 May, 1940 and 5 May, 1945.\(^\text{157}\)

Noach was somewhat less precise and stated that the war ended in May 1945, while Van Eck argued that the war started as early as April 1939 and ended with the German general capitulation on 9 May 1945.\(^\text{158}\) The state of war applied to

\(^{155}\) In Dutch: ‘De Nederlander die vrijwillig in krijgsdienst treedt bij eene buitenlandsche mogendheid, wetende dat deze met Nederland in oorlog is, of in het vooruitzicht van een oorlog met Nederland, wordt, in het laatste geval indien de oorlog uitbreekt, gestraft met gevangenisstraf van ten hoogste vijftien jaren’ (oud). The phrase ‘knowing that this power is at war with The Netherlands’ was omitted by the Criminal Law in Wartime Act, 10 July 1952, Stb. 1952, 408 (*Wet Oorlogsstrafrecht*).

\(^{156}\) Bijzonder Gerechtshof Amsterdam, 1 December 1945, *NOR* 37.

\(^{157}\) Bijzonder Gerechtshof ’s-Gravenhage, 25 September 1945, *NOR* 2; Bijzonder Gerechtshof Amsterdam, 1 December 1945, *NOR* 37; Bijzonder Gerechtshof Amsterdam, 1 December 1945, *NOR* 41; Bijzonder Gerechtshof Arnhem, 27 February 1946, *NOR* 49; Bijzonder Gerechtshof Amsterdam, 22 December 1945, *NOR* 50; Bijzonder Gerechtshof ’s-Gravenhage, 4 September 1945, *NOR* 155; Bijzondere Raad van Cassatie, 4 March 1946, *NOR* 302; Bijzonder Gerechtshof ’s-Hertogenbosch, 26 February 1947, *NOR* 781.

the whole territory of The Netherlands. The liberation of the southern part of The Netherlands in 1944 did not result in the cessation of the state of war in that part of the country. Theoretically, one could commit the crime of Article 101 CC in the liberated, southern part of The Netherlands until 5 May 1945 or, if one adhered to the view that the state of war ended with the general capitulation of Germany, until 9 May 1945.

From a fair trial perspective, the use of facts of common knowledge to ‘prove’ a contextual fact is problematic. The fairness of the proceedings may be infringed upon when the accused is confronted with facts of common knowledge for the first time in the court’s final judgment. This can take the accused by surprise: he is confronted with facts he did not, and by definition, cannot dispute. This infringes upon the adversarial nature of proceedings, especially when it concerns components that are included in the probandum and are an important component of the statutory definition of the crime. Moreover, the public character of the proceedings and the principle of immediacy may be infringed upon. Dreissen observed that in German criminal proceedings, the court is obliged to discuss facts of common knowledge during the trial proceedings. According to the Dutch law of criminal procedure, however, the court is not under an obligation to identify facts of common knowledge in the judgment. Facts of common knowledge do not have to be proven and, therefore, do not have to be supported by reference to specific means of proof or to be discussed during the trial proceedings. If one of the parties argues that a particular fact is not of common knowledge, then the court must specifically respond to that argument. This presupposes that the parties are able to ‘predict’ which facts are likely to be regarded as common knowledge by the court.

By considering the state of war as a fact of common knowledge, the extraordinary courts took notice of the contextual component of Article 101 CC. This is similar to the manner in which contextual facts (or chapeau elements) are proven by the international criminal tribunals, regarding war crimes, crimes against humanity and genocide. In Chapter 4, this will be discussed in more detail.

In order to convict the accused it was not sufficient to determine that a state of war existed. In the old definition of the crime of joining the enemy, it had to be proven

159 That is, the European part of the kingdom.
160 Cf. W.H.B. Dreissen, Bewijsmotivering in strafzaken, Boom Juridische Uitgevers, The Hague 2007, p. 57. Reijntjes referred to Röling, who stated that it is the accused’s right to know in detail the factual grounds upon which he is convicted. Remmelink, on the other hand, was of the opposite view: facts of common knowledge do not need to be explicitly mentioned in the judgment. HR 26 August 1958, NJ 1959, 95; HR 7 January 1975, NJ 1975, 197; J.M. Reijntjes, ‘Eigen wetenschap van de rechter; algemene bekendheid en ervaringsregels,’ Strafblad 2006, nr. 1, p. 57.
163 Cf. HR, 11 January 2011, ECLI:NL:HR:2011:BP0291 par. 3.2.2.
164 E.g. the widespread and systematic character of an attack in the articles on crimes against humanity. Cf. Article 7 ICC Statute, Article 3 ICTR Statute.
that the accused knew that he had joined the enemy during a state of war. With the implementation of the Criminal Law in Wartime Act in 1952 this phrase was deleted. The extraordinary courts had to determine whether the accused knew that a state of war existed.

According to the extraordinary courts, the knowledge of the state of war could also be based on common knowledge. In a case before the Amsterdam extraordinary court, it was concluded that the accused knew The Netherlands were at war with Germany: the existence of a state of war had to be regarded as a fact of common knowledge and was therefore also known to the accused.165 In a case before the extraordinary court in The Hague, the connection between contextual and subjective components was made more explicit, when the court concluded that it was common knowledge that units of the Dutch navy and army, under the command of the Dutch government, fought against the German army and that persons of the age and maturity of the accused were aware of this fact. Therefore, the accused had knowledge of the state of war.166

The difference in reasoning between these two rulings is subtle, but significant. The Amsterdam extraordinary court based the conclusion that the accused had knowledge of the state of war solely on a fact of common knowledge, whereas the extraordinary court in The Hague based its finding only in part (although a significant part) on common knowledge. The accused's knowledge of the state of war was derived from his age and maturity.

The Extraordinary Court of Cassation approved this line of reasoning. In a similar case concerning Article 101 CC, counsel for the accused argued that the intent of the accused could not be derived solely from facts of common knowledge. In his advisory opinion, the Advocate-Fiscal agreed to this proposition, but stated that in this case the argument was without merit because the extraordinary court had based its conclusion of the accused's intent only in part on a fact of common knowledge. The Court of Cassation agreed that the extraordinary court was right in finding that the state of war was common knowledge for persons of the accused's age and intellectual capacities, which the extraordinary court had observed during the trial proceedings.167

In a case before the extraordinary court in The Hague, the state of war was regarded as common knowledge but was, nevertheless, unknown to the accused, resulting in an acquittal. The court concluded that the accused was unaware of the state of war

165 Bijzonder Gerechtshof Amsterdam, 1 December 1945, NOR 37. See also: Bijzonder Gerechtshof Amsterdam, 1 December 1945, NOR 41; Bijzonder Gerechtshof Arnhem, 27 February 1946, NOR 49; Bijzonder Gerechtshof Amsterdam, 22 December 1946, NOR 50.
166 Bijzonder Gerechtshof ’s-Gravenhage, 4 September 1945, NOR 155.
167 Bijzondere Raad van Cassatie, 4 March 1946, NOR 302.
when he joined the German navy: he was mentally incapable to grasp the meaning of the state of war.\textsuperscript{168}

**Aiding the enemy during a state of war**

Article 102 CC (old) states in translation:

Imprisonment with a maximum of fifteen years shall be imposed on him who, intentionally, during a state of war, aids the enemy or damages the interests of the state to the benefit of the enemy.\textsuperscript{169}

Article 11 ECLD, as quoted by Van Eck, stipulates that the extraordinary courts can impose the death penalty, life imprisonment or temporary imprisonment with a maximum of 20 years.\textsuperscript{170} Similar to Article 101 CC, which contains a contextual and subjective component (the state of war and the knowledge thereof), Article 102 CC requires that the accused intentionally aided the enemy during a state of war. The contextual component ‘war’ falls within the scope of the accused’s intent: the intent must include aiding the enemy during the war.\textsuperscript{171} In several cases, the existence of a state of war and the proof of the intent of the accused were based on facts of common knowledge.

In the case against Max Blokzijl, notorious for his pro-German radio propaganda, the extraordinary court in The Hague held that the state of war was a fact of common knowledge. The accused’s defence that he believed the war had ended with the capitulation of the Dutch armed forces in May 1940 was rejected on the basis that it was common knowledge that persons with the intellectual capacity of the accused knew that the state of war had not ended before May 1945.\textsuperscript{172} Moreover, the court deemed it of common knowledge that national socialists in The Netherlands (of which the accused was a prominent member) aided the enemy to the detriment of the Allies between 1941 and May 1945.\textsuperscript{173} Compared with the legal definition of the crime of aiding

\begin{itemize}
\item \textsuperscript{168} Bijzonder Gerechtshof ’s-Gravenhage, 29 July 1946, NOR 445.
\item \textsuperscript{170} D. van Eck, *Het misdrijf van hulp aan de vijand in verband met de bepalingen van het Besluit Buitengewoon Strafrecht*, Dekker en Van de Vegt, Utrecht 1945, p. 368.
\item \textsuperscript{172} Bijzonder Gerechtshof Den Haag, 25 September 1945, NOR 2. CABR, BRC 10/45 inv. nr. 74349 (M. Blokzijl) Proces-verbaal Politieke Opsporingsdienst ’s-Gravenhage No. 976 C.B. (22 augustus 1945). For a similar line of reasoning, see: Bijzonder Gerechtshof Amsterdam, 29 November 1945, NOR 40; Bijzonder Gerechtshof ’s-Gravenhage, 19 March 1946, NOR 80; Bijzondere Raad van Cassatie, 17 June 1946, NOR 395.
\item \textsuperscript{173} Bijzonder Gerechtshof ’s-Gravenhage, 25 September 1945, NOR 2. Bijzondere Raad van Cassatie, 5 December 1945, NOR 3, sub IV.
\end{itemize}
the enemy during times of war, the accused was, to a significant extent, convicted on the basis of facts of common knowledge. The state of war, his knowledge thereof and the fact that national socialists aided the enemy during the war, were all considered common knowledge. The evidence that the accused acted intentionally, necessary for a conviction based on Article 102 CC, derived from testimony the accused gave during the trial proceedings, in particular when the accused testified that he made propaganda for the German New Order in his radio speeches. He denied, however, that he did so during a state of war.\(^{174}\) The court combined the statement of the accused that he had intentionally delivered his radio speeches with the facts of common knowledge and imposed the death penalty.\(^{175}\)

Before the Extraordinary Court of Cassation, Blokzijl specifically challenged the reasoning of the extraordinary court regarding the use of facts of common knowledge. The Extraordinary Court of Cassation approved the reasoning of the extraordinary court, however, and endorsed the finding of the extraordinary court that the knowledge of the accused, based on common knowledge, could be inferred from his profession as a journalist.\(^{176}\)

In response to an argument raised in Blokzijl’s defence, the Extraordinary Court of Cassation held that Articles 338 and 339 CCP must be regarded as complementary and of the same standing. It is within the discretion of the courts to make inferences from the means of proof of Article 338 CCP. According to the Court, this discretion to select the evidence presented during trial also extends to Article 339 (2) CCP.\(^{177}\) Consequently, courts may rely on either Article 338 or Article 339 (2) to prove a crime.

A final observation on the post-WWII case law concerns the adversarial character of the trial proceedings. It follows from Articles 338 and 339 CCP that facts of common knowledge cannot be disputed. This means that the adversarial character of proceedings, when it comes to those notorious facts, is absent. If applied properly, this should not be of any concern because those facts cannot be part of the probandum and, therefore, are not detrimental to the accused. In a judgment of the extraordinary court in The Hague, the court tried to uphold the adversarial character of proceedings. In the early case against the national socialist Van Genechten, installed by the occupying German forces as Procurator-General of the so-called ‘Peace Court of Appeal’ in The Hague, the extraordinary court considered the existence of a state of war common knowledge. It further stated that this fact had not been challenged by

\(^{174}\) Bijzonder Gerechtshof ’s-Gravenhage, 25 September 1945, NOR 2.
\(^{175}\) Bijzonder Gerechtshof ’s-Gravenhage, 25 September 1945, NOR 2. For a similar case in which the accused’s intent was based to a large extent on facts of common knowledge, see: Bijzonder Gerechtshof Amsterdam, 11 April 1946, NOR 321.
\(^{176}\) Bijzondere Raad van Cassatie, 5 December 1945, NOR 3, sub IV.
\(^{177}\) Bijzondere Raad van Cassatie, 5 December 1945, NOR 3, sub IV.
the accused during the proceedings.\textsuperscript{178} One could argue that it is immaterial whether the accused acknowledges or denies that a fact is notorious, as Article 339 (2) CCP instructs the court not to require evidence of notorious facts, which renders the opinion of the accused irrelevant. It remains solely within the competence of the court to determine whether a particular fact is of common knowledge.

A similar reasoning can be found in a judgment of the extraordinary court in Den Bosch. As many others, the accused denied that he knew Germany and The Netherlands were at war during 1943 and 1944. In its judgement, the court reiterated that the state of war was of common knowledge and that no special circumstance had been put forward to substantiate the argument of the accused.\textsuperscript{179}

The manner in which the extraordinary courts dealt with the contextual fact of the state of war shows how problematic it can be to conclude that a state of war existed on the basis of facts of common knowledge. The adversarial character of the trial proceedings is infringed, in particular when the accused denies that he had knowledge of the state of war. It is one thing to regard the contextual fact of the state of war as a fact of common knowledge, but it is quite something different to use facts of common knowledge to prove the accused’s intent. In such cases it is better, from the perspective of adversarial and fair proceedings, to base such findings on legal means of proof that have been discussed during the trial proceedings. This way, the adversarial character of the proceedings is guaranteed.

3.3.2.5 More Recent Cases Regarding International Crimes

Besides the post-WWII cases, Dutch courts have dealt with international crimes in the recent past. The previous paragraph revealed how problematic the use of fact of common knowledge regarding contextual facts can be from the perspective of a fair and adversarial procedure. The question then arises how Dutch courts have handled the more recent cases in which contextual facts also played a pivotal role. Similar to the post-WWII cases, the acts of the accused have to be placed within the context of an armed conflict.

The recent prosecutions were conducted on the basis of the Criminal Law in Wartime Act (\textit{Wet Oorlogsstrafrecht}), the International Crimes Act (\textit{Wet Internationale Misdrijven}), the Convention against Torture Implementation Act (\textit{Uitvoeringswet Folteringverdrag}) and the Convention against Genocide Implementation Act (\textit{Uitvoeringswet genocideverdrag}). They have resulted in a small number of judgments, which

\textsuperscript{178} However, Van Genechten had challenged his knowledge of the state of war. His dossier contains a statement he made before a police officer. In this statement, which Van Genechten authorised, he stated that he believed the war was over when the Dutch armed forces surrendered to the German armed forces. \textit{Bijzonder Gerechtshof ’s-Gravenhage, 17 October 1945, NOR 7. CABR, BRC 27/45 inv. nr. 74376 (R. van Genechten) Proces-verbaal Politieke Opsporingsdienst ’s-Gravenhage No. 979 C.B. (27 augustus 1945) p. 3.}

\textsuperscript{179} \textit{Bijzonder Gerechtshof ’s-Hertogenbosch, 26 February 1947, NOR 781.}
are primarily concerned with war crimes. Due to a lack of jurisdiction between 15 May 1945 and the implementation of the International Crimes Act on 1 October 2003, no charges of crimes against humanity could be brought before Dutch courts during this period.\textsuperscript{180} Charges of genocide were brought in the case against a Rwandan asylum seeker, but these charges were dismissed due to a lack of jurisdiction.\textsuperscript{181}

Therefore, the analysis will be focused on the contextual component of war crimes: the existence and nature, either international or non-international, of an armed conflict. First, two cases will be discussed involving Rwandans who were prosecuted for their role in the Rwandan genocide of 1994. This discussion will be followed by the cases against members of the Afghan military who were prosecuted for their role during the armed conflict in Afghanistan between 1978 and 1992. Finally, two cases against Dutch nationals will be discussed. One case concerns the supply of components of chemical weapons to the Iraqi regime of Saddam Hussein, while the other concerns war crimes and the supply of weapons to the regime of Charles Taylor in Liberia.

The case against Joseph M.

The case against the Rwandan asylum seeker Joseph M. was brought before the district court of The Hague in the fall of 2008. The accused faced charges of war crimes based on Article 8 of the Criminal Law in Wartime Act and, in the alternative, torture under Article 2 (b) of the Convention against Torture Implementation Act.\textsuperscript{182} The charges of genocide were dismissed, due to a lack of jurisdiction.\textsuperscript{183} The district court concluded that sufficient evidence had been presented to convict the accused on the torture charges.\textsuperscript{184} The accused was acquitted, however, of the charges of war crimes under the Criminal Law in Wartime Act. The district court concluded that insufficient evidence had been presented for the nexus between the acts of the accused and the armed conflict. On the question of whether an armed conflict existed during the relevant period, the district court observed:

With reference to established case law of the ICTR, the Court concludes that during the period described in the charges (from 6 April up to and including 17 July 1994) a non-international armed conflict took place between the FAR and the RPF. The FAR was the government army. The RPF was a structured and disciplined army under respon-
sible command, which had partial control over Rwandan territory and which was able to execute military operations in a coordinated manner and to meet the obligations of humanitarian laws of war. 185

The district court relied on case law of the ICTR to conclude that an armed conflict existed during the relevant period. During the parliamentary debates on the International Crimes Act, the Minister of Justice stated that Dutch courts, when hearing a case concerning international crimes, must take into account the international standards on the correct interpretation of the elements of crimes. 186 It was emphasized that this was already common practice in the interpretation of the Criminal Law in Wartime Act, in particular in relation to the element ‘laws and customs of war’ contained in Article 8 of the Criminal Law in Wartime Act. 187

However, a distinction must be made between the interpretation of an element and the legal means of proof that are used to prove that element. When the court interprets, for example, the element ‘armed conflict’, it should take into account the manner in which the international criminal tribunals have interpreted this element. Subsequently, the court must determine whether sufficient and reliable evidence has been presented to conclude that an armed conflict occurred during the relevant period.

In its conclusion that an armed conflict existed, the court, next to the reference to ‘established case law’, referred to one decision of the ICTR Appeals Chamber. In this interlocutory decision in Karemera, the Appeals Chamber held that the existence of a non-international armed conflict in Rwanda between 1 January and 17 July 1994 was a notorious fact, not subject to reasonable dispute. 188 The Appeals Chamber held that the existence of an armed conflict has to be regarded as a fact of common knowledge. The ICTR Trial Chamber in the same case had ruled, however, that the existence of an armed conflict must be proven by the prosecutor by other means than by judicially noticing it as a fact of common knowledge. The existence of an armed conflict must be determined on a case by case basis, after evidence has been presented by the parties. 189 The Appeals Chamber, nevertheless, took judicial notice of this fact under Rule 94 (A) of the ICTR Rules of Procedure and Evidence. This entails that the fact is regarded as a fact of common knowledge, which means that Trial Chambers are obliged to

186 Kamerstukken II, 2001/02, 28337, 3, p. 5.
188 ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Prosecutor v. Karemera et al., Case No.: ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 29. With reference to a decision by the Appeals Chamber in Prosecutor v. Semanza.
take judicial notice of this fact. The fact becomes indisputable, allowing no evidence in rebuttal to be presented.190

The manner in which the district court in The Hague relied on the finding of the ICTR Appeals Chamber regarding the existence of an armed conflict raises some questions. First, it is remarkable that the ICTR Trial Chamber refused to regard the existence of an armed conflict as a fact of common knowledge. The Trial Chamber argued that such a legal finding must be based on the presentation of evidence (which can be challenged by the defence) and not on common knowledge. The ICTR has a hierarchical structure in which decisions of the Trial Chamber regarding both factual and legal questions can be reversed by the Appeals Chamber. However, when two chambers differ with regard to the notoriety of a particular fact, the preferred way to proceed should be to require the presentation of legal means of proof.

Second, from the perspective of a fair and adversarial trial it is troublesome that elements of the legal definition of a crime are proven by reference to a fact of common knowledge, as the adversarial character of the proceedings may be harmed. It is imperative that the adversarial character of the proceedings (‘une procédure contradictoire’) is upheld.

The reasoning of the district court in The Hague with respect to the existence and character of the armed conflict is, therefore, unsatisfactory. The court relied on an interlocutory decision of the ICTR Appeals Chamber in which the Appeals Chamber relied on a fact of common knowledge to prove the existence of an armed conflict. Chapter 4 will present a more detailed analysis of the use of facts of common knowledge by the international criminal tribunals, but it is noted here that facts of common knowledge cannot be challenged before the international criminal tribunals. This means that the Chambers are not under an obligation to allow the defence to present evidence in rebuttal in order to challenge the notoriety of such a fact. This has detrimental consequences for the adversarial character of the trial proceedings.

The judgment the district court relied on did not allow for an adversarial dispute on the existence and nature of the armed conflict. This entails that an important contextual component of the crimes alleged is proven, although indirectly, on the basis of an indisputable fact of common knowledge. Although the finding of the district court was not detrimental to the accused in the end (the nexus between his acts and the armed conflict could not be proven, resulting in an acquittal), when the court would have found a nexus, the finding of guilt would have relied in part on common knowledge. The presentation of legal means of proof on the armed conflict in Rwanda, such as an expert statement or documentary evidence, would have been preferable. Besides providing the district court the possibility to determine itself whether an armed

190 Rule 94 (A) reads in full: ‘A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.’ The legal effects of Rule 94 (A), in terms of probative value, are established in the case law.
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conflict existed (rather than relying on the findings by the ICTR Chambers), it would enable the parties to comment and, if necessary, dispute the evidence presented.

The district court convicted Joseph M. for the torture charges and sentenced him to 20 years' imprisonment. He was acquitted for the war crime charges. Both the accused and the prosecutor appealed the decision by the district court.

**Appeal proceedings**

The court of appeal in The Hague considered, *inter alia*, whether a nexus existed between the armed conflict and the acts of the accused regarding the war crimes charges. The court of appeal first summed up the relevant case law of the *ad hoc* Tribunals to determine the appropriate legal interpretation of an armed conflict, just as the Minister of Justice had envisaged during the parliamentary debates on the International Crimes Act.\(^{191}\) The same holds true for the nexus-element and the status as a protected person under Common Article 3 of the Geneva Conventions. The court of appeal concluded that, during the period of 6 April and 17 July 1994, an armed conflict existed in Rwanda which was not of international character. The court of appeal referred to the judgment of the ICTR Trial Chamber in *Kayishema and Ruzindana*.\(^{192}\)

The ICTR Trial Chamber in this case delivered its judgment before the *Semanza* appeal judgment and the Appeals Chamber decision in *Karemema*, in which the existence of an armed conflict was considered a fact of common knowledge.\(^{193}\) This means that the court of appeal, unlike the district court, did not rely on facts of common knowledge to prove the contextual fact of the existence of an armed conflict. The ICTR Trial Chamber in *Kayishema and Ruzindana* based its finding on the existence of an armed conflict on legal means of proof, instead of on a fact of common knowledge.

The court of appeal concluded that the acts of the accused were committed in the furtherance of, or under the guise of, the armed conflict (the nexus-standard which was applied before the *ad hoc* Tribunals) against protected persons and, therefore, constituted war crimes.\(^{194}\) Joseph M. was convicted to life imprisonment. The Supreme Court rejected the arguments raised by the accused during the cassation proceedings and confirmed the judgement of the court of appeal.\(^{195}\)

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The case against Yvonne B.

In another case concerning the Rwandan genocide, the accused faced charges of genocide and war crimes. Yvonne B. was accused of genocide, attempted genocide, murder, conspiracy to commit genocide, incitement to commit genocide and war crimes (unlawful assault and threat). Ultimately, she was convicted only of incitement to commit genocide. She was acquitted of the other genocide charges and the war crimes charges.

Regarding the genocide charges, the district court referred to the famous interlocutory decision of the ICTR Appeals Chamber in Karemera, in which the Appeals Chamber held:

The fact of the Rwandan genocide is part of world history, a fact as certain as any other, a classic instance of a ‘fact of common knowledge’.  

The evidence against the accused regarding the charge of incitement to commit genocide consisted mainly of witness statements. Witnesses testified that the accused participated in public meetings in which she incited the public to sing genocidal songs. The district court had to determine whether the accused acted with the required special intent to destroy, in whole or in part, a protected group. The district court, referring to the Van Anraat case, took the following general factors into consideration:

- the general framework in which the criminal offence took place;
- the circumstance that the protected group systematically became the victim of other unlawful acts;
- the extent in which the crimes were committed;
- hitting systematically on victims because of belonging to a certain group;
- the repetition of destructive and discriminative acts;
- the number of victims;
- the way in which the crimes were committed;
- the area where the perpetrator was active;
- the evidence aim of the perpetrator to take the life of the victims;
- the seriousness of the genocidal acts which were committed;
- the frequency of the genocidal acts in a certain area;
- the general political framework in which the crimes were committed;
- expressions made by the perpetrator regarding the position and/or fate of the protected group.

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The district court derived the accused’s genocidal intent from the following specific factors:

- the general as well as political framework in which the defendant’s remarks were made;
- the circumstance that the Tutsis at that time systematically became the victim of violence merely based on their ethnicity;
- the manner in which and the specific context in which the defendant made her remarks;
- the fact that the defendant made her remarks repeatedly;
- the defendant’s social position as CDR-member and prominent local resident, as well as her authority over the public.\(^{200}\)

In this paragraph the district court placed the specific acts of the accused in the context of the general and political framework (or context) of Rwanda in the early summer of 1994. The acts of the accused were placed in the genocidal context that existed during this period. The court provided a detailed and comprehensive framework in which the acts of the accused were placed, without simply referring to the fact that the Rwandan genocide was a ‘classic instance of a fact of common knowledge’. This way of reasoning allows for a detailed examination of the conclusions of the court and enabled the accused to specifically challenge those aspects of the general framework and personal factors with which she disagreed. By providing such a detailed and transparent approach to the question of whether the accused acted with genocidal intent, the court enabled the accused to challenge the evidence effectively.

Regarding the war crimes charges, the district court held:

> The RPF was a structured and disciplined army under the supervision of a responsible commander, which partially dominated Rwandan territory, that was capable of executing military operations in a coordinated manner and satisfying the requirements of the humanitarian laws of war.\(^{201}\)

The court concluded that a non-international armed conflict existed in Rwanda between 1 October 1990 and 17 July 1994. The court based this finding on the interlocutory decision of the ICTR Appeals Chamber in *Karemera* and the judgement of the Trial Chamber in *Akayesu*. Similar to *Joseph M.*, the court referred to *Karemera* in which the existence of a non-international armed conflict was regarded as a fact of common knowledge.\(^{202}\) In the trial judgement in *Akayesu*, the ICTR Trial Chamber I concluded that an armed conflict not of an international character existed during the


period described in the indictment.\textsuperscript{203} The Trial Chamber based this finding on documentary evidence presented during the trial proceedings.

The district court concluded that no nexus existed between the acts of the accused and the armed conflict and acquitted the accused on the war crimes charges. She was, however, convicted of incitement to commit genocide and punished to imprisonment for 6 years and 8 months.

**The cases against Afghan asylum seekers**

In 2005 and 2007, several cases were brought before the district court in The Hague involving Afghan asylum seekers who had served in the Afghan military. The 2005 cases concerned two former members of the Afghan military intelligence service who were accused of torture and of having committed war crimes during the armed conflict in Afghanistan, which lasted from 1978 until 1992. They were prosecuted under the Criminal Law in Wartime Act and the Convention against Torture Implementation Act.

The district court concluded in both cases that an armed conflict existed in Afghanistan between 1978 and 1992. The conflict was qualified as non-international.\textsuperscript{204} In both cases, the court paid extensive attention to the evidence of both the existence and the nature of the conflict. The evidence consisted of the testimony of an expert, the result of documentary research conducted by the police, several witness statements and the testimony the accused gave during the trial proceedings.\textsuperscript{205} On the basis of these legal means of proof, the district court concluded that the contextual element of the existence of an armed conflict was proven. In both cases, the accused were convicted of having committed war crimes.

In the case from 2007 against a former officer of the Afghan military intelligence service, the district court held with respect to the existence and nature of an armed conflict:

In this respect it needs to be pointed out that the District Court, following the District Court and the Court of Appeal in the cases mentioned above,\textsuperscript{206} agrees with the Public Prosecution Service and the defense, that the armed conflict in Afghanistan in the eighties of the last century, was mainly a non-international conflict between the regime in Kabul and the “Mujaheddeen”, that revolted against this regime – also using arms. It’s


true that this regime was partly supported by Russian advisors and army divisions and participated in the armed conflict, yet this was not a conflict between two sovereign states.\textsuperscript{207}

Apart from the reference to the judgements of the district court and court of appeal, no other legal means of proof were identified by the court.\textsuperscript{208} The court of appeal endorsed this finding of the district court:

There is no dispute regarding the nature of the conflict in this case, which was primarily a non-international conflict.\textsuperscript{209}

The court of appeal did not explicitly refer to particular means of proof that supported this conclusion.

The manner in which both the district court and the court of appeal concluded that an armed conflict existed in the relevant period, is an example of courts that rely on the factual findings of another court (or, another bench within the same court). In this case, both the prosecutor and the defence agreed with the factual conclusions of the district court. This entails that the existence and character of an armed conflict were discussed during the proceedings; as such, the adversarial character of the proceedings was respected. However, courts should be careful when they ‘import’ the factual conclusions of other courts. The parties must be allowed to comment upon such conclusions and have the opportunity to effectively challenge the conclusions when they wish to do so. In the international context a rather detailed framework has been developed in order to safeguard the accused from the import of facts that have been established by other courts (or by another chamber of the same tribunal). This will be discussed extensively in Chapter 4. It is noted here that, when courts act in such a way, it is imperative that the accused is able to effectively challenge these facts.


\textsuperscript{208} Judgements and decisions of courts are a distinct category of documentary evidence, according to Article 344 (1) (i) CCP.

\textsuperscript{209} Gerechtshof Den Haag, 16 July 2009, \textit{ECLI:NL:GHSGR:2009:BK8758}. Court provided translation of \textit{LJN: BJ2796}. The Court of Appeal stated in par. 68: ‘The Court of Appeal would begin by noting that it is not in the dispute that the present case concerns a non-international armed conflict in the period referred to in the indictment, that the defendant had knowledge of this conflict, and that there is a close relationship between this conflict and the criminal offence of which the defendant is accused (the ‘nexus requirement’). In this sense, the general criteria for crimes covered by common Article 3 are fulfilled.’ The Supreme Court dismissed the cassation appeal lodged by the prosecution. It did not comment on the cited passage of the District Court and Court of Appeal. HR 8 November 2011, \textit{ECLI:NL:HR:2011:BR6598}. 
Chapter 3

The cases against Dutch nationals: Van Anraat

The Dutch businessman Van Anraat was accused of having supplied components for chemical weapons that were used against the Kurds by the Iraqi-regime under Saddam Hussein in the 1980’s. Van Anraat faced charges of aiding and abetting genocide and aiding and abetting war crimes. He was acquitted for the genocide charge, but convicted for being an aider and abettor to war crimes committed by the Hussein regime.

Considering the war crimes charges, the district court had to determine whether an armed conflict existed in the relevant period. The court was presented with the following means of proof: a report by an investigating officer on the history of the Kurds in Iraq, a report written by two employees of the prosecution service and the testimony of a witness who had helped write Human Rights Watch reports on Iraq.

The reports were mainly based on historical studies and non-governmental organisations reports.

On the basis of these legal means of proof, the court concluded:

a. that in the period from 22 September 1980 to 20 August 1988, an international armed conflict took place between Iran and Iraq as defined in armed conflict law;

b. that a non-international armed conflict took place as defined in armed conflict law on the territory of Iraq between Iraqi government troops on one side and armed (Kurdish) resistance groups on the other side. This non-international armed conflict had already started long before the period mentioned in the charges and lasted even thereafter.

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The manner in which the district court considered whether an armed conflict existed is an example of how, ideally, such contextual facts should be proven. The legal means of proof are clearly identified and, more importantly, it is clear on which sources the reports are based. Although one might argue that the underlying sources should be presented during the trial proceedings (for instance, by appointing an expert who could summarize and explain the main findings of the historical studies), it is completely clear how the district court came to the conclusion that an armed conflict existed. Under Dutch evidence law, no strict 'best evidence' rule exists: the summary and analysis of the investigators suffice (except, of course, when the court deems it necessary to be presented with the original sources of such reports. There is, however, no statutory obligation to do so).\(^{213}\) Van Anraat was convicted to 15 years’ imprisonment.

Appeal proceedings
Both the prosecutor and Van Anraat initiated appeal proceedings against the judgement of the district court. On the existence and nature of the armed conflict, the court of appeal held:

Regarding the attacks that took place in the proven period on the places in Iraq mentioned in the proven charges under count 1. alternatively, the Court considers it a proven fact that these were carried out within the framework of an international and/or non-international armed conflict (as also proven by the court of first instance). [...] For proof of the nature of the armed conflict, the Court’s opinion is particularly founded on the official report dated 19 May 2005 drawn up by an investigating officer, which includes the report on an investigation that had been conducted regarding certain sources, as well as on a report drawn up by (employee PPS 1 [Public Prosecution Service, KV]) and (employee PPS 2), included in the case file under reference number F61. Furthermore, the Court’s judgment rests partly on the statement made by the (co-author of the Human Rights Watch reports) at the hearing at the first instance court on 30 November 2005.\(^{214}\)

Similar to the judgement of the district court, it is clear on which sources the court of appeal based its finding on the existence and nature of the armed conflict. The contextual component was, therefore, proven by legal means of proof that were presented during the trial proceedings. The Supreme Court rejected the complaints by the accused against the judgement of the court of appeal. Due to a violation of the right to be tried within a reasonable time, the sentence imposed by the court of appeal (17 years’ imprisonment) was reduced to 16 years and 6 months.\(^{215}\)


The cases against Dutch nationals: Kouwenhoven

The other case in which a Dutch national stood trial involved the businessman Kouwenhoven. He faced charges of war crimes and economic crimes under the Criminal Law in Wartime Act and the Economic Offences Act in conjunction with the Liberian Sanctions Regulations 2001. Kouwenhoven was accused of being involved in war crimes that were committed by the armed forces of Liberia between 2000 and 2002. He was also accused of supplying weapons to the Liberian regime of Charles Taylor. The district court in The Hague acquitted the accused of the charges of war crimes under Articles 8 and 9 of the Criminal Law in Wartime Act, because the personal involvement of the accused could not be proven.216

Kouwenhoven was convicted for two violations of the Liberian Sanctions Regulations 2001 in conjunction with the Economic Offences Act.217 Although the district court acquitted the accused of the war crimes charges, it did conclude that a non-international armed conflict existed in Guinea and Liberia at the relevant time and places.218 The district court did not specify on which means of proof this conclusion was based. Kouwenhoven was sentenced to 8 years’ imprisonment; both the prosecutor and the accused appealed the judgement of the district court.

Appeal proceedings

The court of appeal in The Hague acquitted the accused of all charges, stating that insufficient evidence had been presented for the involvement of the accused with the war crimes. Regarding the weapon supplies, the court of appeal held that the witness statements on which the district court relied were inconsistent. Therefore, the court of appeal concluded, insufficient evidence was presented for the charges concerning the supply of weapons.

218 ‘The court is of the opinion that the present evidence has demonstrated sufficiently that in February 2001 in Gueckedou in Guinea, in the year 2002 in Voinjama in Liberia and in the period from 1 December 2001 through 30 June 2002 in Kolahun, at least in the neighborhood of Kolahun, in Liberia during of a [sic] non-international conflict, contrary to international common law (in particular the common law [the court meant customary law, KV] ban on attacks carried out without making any distinctions between soldiers or civilians, torture, inhuman treatment, rape, looting and acts of violence against civilians) and the stipulations set out in the common Article 3 of the Geneva Conventions dated August 12, 1949, members of one of the combating parties acted as described in the charges of the indictment.’ Rechtbank Den Haag, 7 June 2006, LJN: AY5160 par. 6 (court provided translation of LJN: AX7098).
Although the court of appeal acquitted the accused, the court concluded that an armed conflict existed during the relevant period. Unlike the district court, the court of appeal identified the sources on which this conclusion was based:

That there was an armed conflict (whether international or not) – at least when considering the circumstances – in and around the second Liberian civil war, the Court of Appeal gleans from general reports, such as of the International Crisis Group, the Global IDP (Internal Displaced Persons) Database and consecutive official country reports from the Netherlands Ministry of Foreign Affairs.\(^\text{219}\)

Similar to the reasoning in *Van Anraat*, it is clear on which means of proof the court relied.

The case is currently pending before the court of appeal in Den Bosch after a referral from the Supreme Court. The Supreme Court referred the case due to the fact that the court of appeal in The Hague refused to hear two witnesses for the prosecution. The court provided insufficient reasons for this decision. The Supreme Court did not comment on the reasoning of the court of appeal regarding the existence of an armed conflict.\(^\text{220}\)

### 3.3.2.6 Conclusion

The manner in which contextual components of war crimes have been proven in the cases discussed above, varies considerably. In the post-WWII cases, the existence and duration of the war were considered to be facts of common knowledge; in the most recent cases, legal means of proof were required to prove the context in which the accused committed his crimes. The fair trial implications of using facts of common knowledge to prove contextual components will be discussed in detail in Chapter 5. It will be shown that the court must ensure that the accused can challenge any factual conclusion, including facts that others may regard as indisputable. The procedural context in which facts are presented and evidence is weighed requires that the accused is given the opportunity to participate effectively in his own trial.

### 3.3.3 Chain Evidence

#### 3.3.3.1 Legal Framework

When an accused faces several charges that are similar to each other (e.g. an accused is suspected of three rapes), the court can use chain evidence to convict the accused. The court may do so when it concludes that the charges are strikingly similar to each other; in other words, the same *modus operandi* can be discerned regarding each

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\(^{219}\) Gerechtshof Den Haag, 10 March 2008, LJN: BC7373 par. 9.3 (court provided translation of *LJN*: BC6068).

particular charge. When chain evidence is used, the charges are not proven by legal means of proof but by analogy: the evidence that the accused committed an offence is partially based on the conclusion that he has committed another offence. The requirements for the use of chain evidence will be discussed in detail below.

Chain evidence has been developed in the case law of the Dutch courts: the Code of Criminal Procedure does not, as such, provide guidance on the use of such evidence. One of the first cases in which the Supreme Court ruled on the use of chain evidence stems from 1930. In this case, the accused faced four charges of sexual assault on four boys. The assaults were committed over a period of four months; and the assaults, as such, were unrelated to each other. The evidence consisted mainly of the statements of the victims. The accused was acquitted of one charge, but convicted for the other three charges. The Supreme Court upheld the reasoning of the court of appeal: specifically, the court of appeal, confirming the findings of the district court, held that the statements of the victims had probative value regarding their own assault, but also for the other two assaults. The statements were used back and forth, so to say. The Supreme Court held that such an approach was allowed, because the assaults were similar to each other.

The defining characteristic of chain evidence is this similarity between the charges; that is, the modus operandi regarding the different charges is similar. The question then arises how one determines whether there are sufficient similarities between the charges to consider the use of chain evidence. In an instructive advisory opinion to the Supreme Court, the Advocate General argued that one should distinguish clearly between inter-individual variation and intra-individual variation in human behavior. The first notion refers to the criterion that the variation of human behavior between different people should be great: the behavior of a particular person must be really typical. The latter notion refers to the idea that the variation of behavior of a particular person should be small.

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221 HR 24 November 1930, NJ 1931, p. 118-119. Reference is often made to HR 5 November 1928, NJ 1929, 333-334 in which, at first sight, chain evidence was used. The case concerned an accused that faced a charge of performing an abortion. The evidence consisted of the statement of the woman who requested the abortion of her foetus and the statements of two witnesses. These two witnesses stated that the accused had also performed abortions a few years earlier (for which the accused was never charged). Although this resembles chain evidence, a closer look reveals it is not. The court ruled that the two witness statements had probative value regarding the charge. This differs, however, fundamentally from HR 24 November 1930, NJ 1931: in the latter case the accused faced several charges. The statements of the victims were used back and forth to prove the charges. In HR 5 November 1928 the accused faced one charge and the court held that the witness statements had probative value. Consequently, there is no ‘chain’ here: chain evidence is used to prove several charges, not a single charge.

222 This type of chain evidence is defined as quasi chain evidence. The different types of chain evidence will be discussed in the following pages.


224 Advisory Opinion, par. 5.3.1., HR, 15 November 2011, NJ 2012, 279, m. nt. Reijntjes.
When a court considers the use of chain evidence, the court has to determine whether the charges are similar: is the *modus operandi* essentially the same regarding each charge? Then the court must determine whether it is convinced that all charges, with the similar *modus operandi*, are committed by one particular person. The final question then is whether the accused is this particular person. Chain evidence can be used to prove any part of the *probandum*, including the *mens rea* of the accused. The Supreme Court rejected the argument that a conviction for a particular charge cannot be based to a significant degree on chain evidence.\(^{225}\) Chain evidence can also be used to corroborate other evidence, in order to meet the evidentiary threshold of, for example, the * unus testis, nullus testis*-rule.\(^{226}\) Chain evidence is predominantly used when there are insufficient means of proof for each particular charge: by using chain evidence the evidence for charge 1 can be used for the evidentiary basis of charge 2 and *vice versa*. Chain evidence is often used in cases concerning sexual assault and fraud offences; in such cases, the collected evidence is often insufficient to meet the standard of proof for each particular charge.

### 3.3.3.2 Different Concepts of Chain Evidence\(^{227}\)

The fact that chain evidence has been developed in case law might explain why several concepts of chain evidence can be discerned. Three different concepts of chain evidence can be discerned in the judgements of the district courts and courts of appeal. The following sections will present explanations of each concept and show that, in fact, only one concept can properly be considered as chain evidence.

**‘Quasi chain evidence’**

The first category of chain evidence, called ‘quasi chain evidence’, entails the following. The court hears a case in which the accused faces several, similar charges. The court concludes that the *modus operandi* is similar in relation to each charge and uses the means of proof regarding one particular charge to prove the other charges and *vice versa*. Such means of proof, for example a witness statement, are then used to prove each particular charge. The witness statements have, in other words, probative value for each particular charge.

This line of reasoning has been considered as a proper use of chain evidence.\(^{228}\) It

\(^{225}\) HR 14 March 2006, *NJ* 2007/345, m. nt. Mevis, par. 6.4


\(^{227}\) The different concepts have been discussed earlier in K.C.J. Vriend, ‘Inzichtelijk gebruik van schakelbewijs in strafzaken: een Bayesiaans perspectief’, *Expertise en Recht*, 2013 Vol. 4, p. 131-134

has, however, nothing to do with chain evidence. Such reasoning resembles what in English law of criminal evidence is called cross-admissibility:

In technical parlance, this scenario presents issues of ‘cross-admissibility’, that is to say, is the evidence pertaining to one count on the indictment also admissible in relation to the other count(s) on the indictment and vice versa? So, [...] could evidence specifically relating to robbery #1 also be used as partial proof of robberies #2–#4; and evidence specifically relating to robbery #2 also be used to prove robberies #1, #3, and #4; and so on?

To use the same means of proof for several charges is legitimate when such means of proof do have probative value regarding each particular charge. In this case, the court has to explain why a means of proof that seems to have probative value for a particular charge also has probative value for the other charges. Such ‘cross-admissibility’ requires solid reasoning from the court; it is, however, not to be considered chain evidence.

‘Superfluous chain evidence’
The second category of cases in which the courts referred to the concept of chain evidence consists of cases in which the use of chain evidence was superfluous. In this category, the courts reason along the following lines. The court hears a case involving several charges and, similar to the first category, concludes that the *modus operandi* is similar in relation to each charge. The court then concludes that there is sufficient evidence to prove each charge separately, but, referring to the similarity between the charges, also takes chain evidence into account to convict the accused.

It is, in this category of cases, simply superfluous to use chain evidence for a conviction. When there is sufficient evidence regarding each particular charge, it is no longer necessary to consider whether chain evidence can be used.

‘Real chain evidence’
The last category of cases consists of proper chain evidence: this is the category in which the distinct character of chain evidence comes to the fore. When a court considers the use of real chain evidence, the reasoning unfolds as follows. Again, the court is confronted with an accused who faces several, similar charges. The court concludes that a similar *modus operandi* can be discerned regarding the different

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charges. The court concludes that there is sufficient evidence to prove one or more charges. This conclusion can then be used to prove other, similar charges for which insufficient evidence has been presented. The Rotterdam district court held in 2010 that ‘real’ chain evidence entails that the conclusion that the accused has committed a particular offence is used, together with other evidence, to prove that the accused has committed another, similar offence.231

The use of chain evidence in Dutch criminal proceedings is controversial. Chain evidence is normally used when the case file contains insufficient evidence regarding each particular charge (the category of superfluous chain evidence is the obvious exception).232 The standard of proof is then met by using chain evidence: the resemblance between the different charges results in sufficient evidence for a conviction. The risks of using chain evidence have been highlighted by the case of Lucia de B., a nurse who was wrongfully convicted for seven murders and three attempted murders.233 234 The court of appeal in this case relied predominantly on chain evidence.235 De B. was accused of having killed infants and elderly people in three hospitals in The Hague. The court of appeal concluded that De B. had administered a (potentially) lethal doses of medications to two patients. One of them died, while the other survived. The court concluded that sufficient evidence had been presented to convict De B. for murder and attempted murder regarding these two patients. The other six murders and two attempted murders were proven with the help of chain evidence: the court concluded that the other charges showed a striking similarity with the proven murder and attempted murder. The latter two were regarded as the strongest links, so to say, to

231 Rechtbank Rotterdam, 12 April 2010, ECLI:NL:RBROT:2010:BM0727, par. 3.2.4.
234 The district court convicted De B. to life imprisonment for four murders and three attempted murders. The district court did not use chain evidence. Rechtbank Den Haag 24 March 2003, LJN:AF6172.
235 Mevis observed that the court of appeal seemed to have used quasi chain evidence. However, he argued, it is likely that the fact that two counts could be proven without using chain evidence made it easier for the court of appeal to consider the use of chain evidence in the first place. It can be argued that this means that although quasi chain evidence was used, the two strong cases functioned de facto as real chain evidence. HR, 14 March 2006, LJN:AU5496, m.nt. P.A.M. Mevis (par. 19).
which the other cases were connected. The similarities the court of appeal identified were as follows:

- the patients died suddenly and unexpectedly or suffered from a life-threatening incident;
- no medical cause could be found that could explain the death or incident; and
- the accused was present at the medical unit of the patient at the time of the death or incident.

These similarities, combined with evidence regarding each particular patient, were sufficient for the court of appeal to convict De B. for seven murders and three attempted murders. She was sentenced to life imprisonment and compulsory psychiatric treatment, which was later reversed to life imprisonment without compulsory psychiatric treatment.236

The manner in which the court of appeal used chain evidence is a prime example of the potential dangers of chain evidence: the conviction is to a significant degree based on the two charges that could be proven. The other charges are proven by analogy and not by legal means of proof that meet, without more, the standard of proof. It is obvious that such reasoning depends on how strong the two strongest links in the chain actually are: one must be sure that the murder and attempted murder meet the standard of proof on the basis of legal means of proof. Only then can the other charges be chained to them. In the case of De B., those two links were not as strong as the court of appeal thought they were. In revision proceedings, serious doubts were raised regarding the incidents and deaths of the patients. The court of appeal held that there was simply not enough evidence to conclude that the incidents and deaths were caused by a factor other than a medical one.237 The fact that no medical causes could be identified, does not mean that external factors (including any interventions by De B.) were the cause for these incidents and deaths, according to the court of appeal. The court of appeal in the revision proceedings found insufficient evidence for a conviction and acquitted De B. of all charges of murder and attempted murder.238

This case shows that courts should use chain evidence very carefully and provide the accused with sufficient procedural safeguards.

The use of chain evidence, in particular the category of real chain evidence, is an example of a shortcut to proof. When real chain evidence is used, the court does not rely on legal means of proof to convict the accused for a particular charge. Rather, the accused is convicted by analogy: the fact that the accused committed another, similar offence has probative value regarding the other charge. Chapter 5 will present

a discussion of the fair trial implications of the use of chain evidence. The possibility for the accused to effectively challenge the use of chain evidence will be of particular interest.

### 3.3.4 Confessions

The archetypical way of avoiding a full criminal trial is to confess to the charges. Criminal proceedings are either avoided altogether (the guilty plea procedure) or they are significantly shortened when the accused confesses (the confession as the *regina probationis*). The accused does not challenge the charges, which means that there is no longer any need for adversarial proceedings: there is no contested issue left for the court to decide.

Depending on the particular characteristics of the criminal justice system, the confession results in either out of court procedure in which the court has no (or a very limited) role, or it is regarded as a means of proof. The Dutch criminal justice system is an example of the latter category, whereas in international criminal proceedings the confession has to be regarded as a procedural fact which obviates the need for trial proceedings altogether. In the following pages the place and legal character of the confession in Dutch criminal proceedings will be discussed. The part on the confession as such is the introduction to the legal concept of the *ad informandum* cases. In such cases, the confession of the accused is essential.

#### 3.3.4.1 Legal Framework

In the articles in the Code of Criminal Procedure on the means of proof, no reference is made to the confession as such; instead, Article 339 and Article 341 CCP refer to the ‘statement of the accused’.\(^\text{239}\) According to the CCP, the confession (for reasons of consistent terminology, this term will be used) is just one of the legal means of proof. The CCP does not make a procedural distinction between cases in which the accused confesses or denies the charges.\(^\text{240}\) In practice, however, trial proceedings will differ significantly when the accused confesses: the court still has to determine whether sufficient other evidence has been presented (due to the *nuda confessio* rule), but trial proceedings will be more concentrated on sentencing issues.

When we discuss confessions in Dutch criminal proceedings, it is necessary to distinguish between confessions that result in an out of court settlement, pre-trial confessions that are submitted to the case file and confessions uttered during trial proceedings. The two latter categories may overlap: confessions made during pre-trial investigations are often repeated or confirmed during the trial proceedings. The fol-

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\(^{239}\) This has not always been the case: Article 428 of the 1838 CCP referred to the confession of the accused as a means of proof.

\(^{240}\) It is noted that the court is not obliged to provide a fully reasoned judgement when the accused confesses (Article 359 (3) CCP).
lowing pages are concerned with confessions related to the *nulla poena sine iudicio* principle as discussed in Chapter 1. This means that the accused has confessed during the trial proceedings.

### 3.3.4.2 The Confession and the Legal Character of Dutch Criminal Proceedings

The essentially inquisitorial Dutch criminal procedure, the dominant position of the judge and the emphasis on impartial and accurate fact-finding help to explain why confessions do not have a similar procedural effect as in adversarial systems: the moment the case has been called by the court, the prosecutor and the accused have no material say anymore regarding the type of proceedings. This fits well within the inquisitorial type of criminal proceedings in which the court has been entrusted, *inter alia*, with the task of accurate fact-finding. It would be antithetical to such systems to allow the parties to withdraw the case from the court when they deem this in their interest. A confession does not, in other words, set aside the principle of *nulla poena sine processu*. The court must decide autonomously whether sufficient evidence has been presented. The proceedings will come to an end only when the court determines it has been sufficiently informed to render a final verdict. The CCP mirrors this court-dominated procedure. In adversarial systems, the confession obviates the need for presenting more evidence: the contest between the two parties has ended, and the trial moves to the sentencing stage. Because the contest is terminated, the fact-finder has no need to require more evidence, even if this would be in the interest of accurate fact-finding, enhancing the public character of proceedings or any other interest extraneous to respecting the autonomy of the parties. An outcome that has been agreed between the parties, which is not in conformity with the material truth, is acceptable: the contest model of proceedings is regarded as superior to the official inquiry model. The manner in which criminal justice systems consider confessions

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241 This does not imply that the manner in which both parties conduct their cases does not influence the proceedings. However, this is within the court-controlled setting of trial proceedings (*onderzoek ter terechtzitting*). The CCP does not contain a mechanism similar to common law systems where a confession during trial proceedings results in a different procedure altogether. Cf. J.L.M. Boek, J.F. Nijboer, ‘De bekentenis als de koningin van het bewijs, *Delikt en Delinkwent* 1994-1, p. 56 ‘De haast ideologische verbinding tussen het zoeken naar de ‘materiële waarheid’ met een inquisitioire stijl van procederen’ in de typisch Nederlandse situatie laat weinig ruimte voor een eigen processuele inbreng van de verdachte.’ Cf. M.R. Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’, *University of Pennsylvania Law Review* 1972-1973, p.511-512.

242 Article 270 CCP states that the investigation by the court starts with the president of the court calling the case. Article 272 (1) states that the president is in charge of the proceedings. The proceedings will come to an end when the court deems this appropriate, according to Article 345 CCP. Cf. M.R. Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’, *University of Pennsylvania Law Review* 1972-1973, p. 564.
Diversions and Shortcuts in Dutch Law of Criminal Procedure can be regarded as a distinctive feature which has its roots in the old dichotomy between inquisitorial and adversarial procedures.

In present inquisitorial procedures, the confession is regarded as a means of proof which helps the court to reach an accurate factual conclusion. A confession is by no means required to declare the charges proven, and the confession is, as such, insufficient proof to convict.\(^{243}\) In this regard, current inquisitorial procedures differ significantly from the archetypical inquisitorial procedures, in which the confession was regarded as necessary (the \textit{regina probationis}) to declare the charges proven and, consequently, to punish. Formally, in present-day proceedings, the confession is nothing more than just a means of proof. The effect in terms of probative value of a confession is, however, much more significant: although confessions must be regarded with some suspicion to filter out the false ones, confessions will facilitate the court’s ability to conduct fact-finding.

After the close of proceedings, the court can just list the means of proof in case of a confession, instead of presenting a fully reasoned judgment.\(^{244}\) During the 2003 parliamentary debates, the rationale for the introduction of abbreviated reasoning in the judgment was found in the input of the parties during the proceedings. This entails that criminal proceedings should be more responsive to the arguments presented by the parties (cf. the appeal procedures discussed above): when the accused does not bring forward any objections against the charges, there is no need, the Minister of Justice argued, to provide him with a fully-reasoned judgment.\(^{245}\) A contested trial should in fact be concentrated on those issues that remain in dispute between the parties.\(^{246}\)

The responsibility of the court to conduct accurate fact-finding and to explain the reasons for a particular decision, however, are left intact: the possibility of rendering an abbreviated judgment is discretionary. This way, the court is always able to provide a fully reasoned judgement if it deems this necessary.

3.3.4.3 Plea Bargaining in Dutch Criminal Proceedings?

There were debates in the 1990s on the introduction of a separate procedure for accused who confess to the charges. Such a separate procedure has not been incorporated into the CCP, though. Commenting on the findings and recommendations of the Moons-committee, the Minister of Justice underlined the advantages of a separate procedure for accused who confess to the charges. Besides increased efficiency of the proceedings, the Minister favoured a more adversarial approach in criminal proceed-

\(^{243}\) Article 341 (4) CCP.  
\(^{244}\) Article 359 (3) CCP.  
\(^{246}\) ‘(...) de concentratie van de motiveringsverplichtingen op daadwerkelijke geschilpunten die in het voorgaande besloten ligt, een uitvloeisel is van een meer algemene ontwikkeling, de behandeling van de strafzaak door de rechter vooral te richten op geschilpunten.’ Kamerstukken II, 2003/04, 29255, 3, p. 7.
ings. He stated that criminal proceedings should concentrate on those issues that are in dispute.\(^{247}\) Accused who confess to the charges limit the dispute to sentencing, whereas those who deny the charges request the court to fully investigate all factual and legal claims made by the prosecution. The Minister of Justice stated that a confession in this regard should be understood as a statement that has been delivered before the court, in which the accused confesses to the charges. The proceedings then move to the sentencing stage, in which the accused may present any mitigating circumstances.\(^{248}\)

According to the Minister of Justice, a separate procedure should not be regarded as a \textit{corpus alienum} in Dutch criminal procedure: the CCP does already provide for different procedures, for example depending on the age of the accused or on the severity of the crime. The possibility to avoid public proceedings by complying with a transaction and the use of \textit{ad informandum} cases are other examples in which the confession of the accused results in a differentiated procedure.\(^{249}\) The Minister of Justice argued that, when the accused confesses before the district court, the appeal proceedings will be limited to sentencing.\(^{250}\) Similar to the transaction and \textit{ad informandum} procedures, the accused may freely determine whether he wants to rely on his procedural rights or waive them. In this regard, the Minister argued, a differentiated procedure is nothing extraordinary. The rules of evidence contained in the CCP apply without reservations to this procedure: the \textit{nuda confissio} rule still applies.\(^{251}\)

The objections against a separate procedure for accused who confess were numerous. Hildebrandt emphasized that a distinction should be made between two notions of the confession. First, the confession can be regarded as a means of proof: combined with other evidence (or in its own right, when no \textit{nuda confissio}-rule applies), it helps to reach the applicable standard of proof and, ideally, contributes to accurate fact-finding. The second notion of the confession regards the confession as a procedural fact. This resembles the manner in which guilty pleas are regarded in international criminal proceedings and in typical adversarial, common law procedures. An accused may, provided he is sufficiently informed of his rights, waive the right to full criminal proceedings by confessing to the charges. Such a waiver has often been the result of a bargaining process. It is easy to see that the latter notion fits well within


\(^{249}\) The transaction, however, does not require a confession: it requires the consent of the accused to the conditions proposed by the prosecutor.


the adversarial system, where the fact-finder relies heavily on the procedural choices of the parties.252

One of the major objections to the separate procedure concerned the shift from the inquisitorial procedure to a party-driven procedure.253 In the latter procedure, the confession is regarded as a procedural fact. This, it was argued, would result in less emphasis on accurate fact-finding and would introduce ‘formal truth’ in the criminal justice system.254 The public character of the proceedings would diminish: the bargaining process that normally precedes the confession leads to a negotiated truth which is at odds with the public, impartial discussion and determination of the facts. Related to the criticism on the increased role of the parties is the concern that, in inquisitorial procedures in general, parties do not have a determinative say in the manner in which the procedure is conducted. Parties are able to influence the outcome of the procedure (by calling witness, challenging the evidence etc.), but the procedure as such is determined by the CCP and the court itself. Considering that the court in Dutch criminal proceedings has the exclusive competence to call and close a case, a separate procedure for the parties would not be in line with this principle.

It is noted that an agreement between the parties, including a confession, does not inevitably lead to diverting the case from the court altogether. In common law systems, the court has to ensure that the plea, as the result of the bargaining process, was informed, unequivocal and based on the free will of the accused before it can be accepted by the court. Criminal justice systems in which the procedure is predominantly for the parties to choose can thus be combined with judicial control on the outcome of the procedure. It is instructive to refer to Rule 62bis of the ICTY RPE, which states that the Trial Chamber may only enter a finding of guilt when the guilty plea is, inter alia, based on a ‘sufficient factual basis for the crime’.255 This means that values extraneous to respecting party autonomy (accurate fact-finding) may set the plea aside. At the ICC, the Trial Chamber must be satisfied that ‘the admission of guilt is supported by the facts’.256 It may also refuse to accept an admission of guilt when acceptance is not in the interests of justice, in particular the interests of the victims.257

255 Cf. Article 65 ICC Statute, which requires also that the Trial Chamber is satisfied that ‘the admission of guilt is supported by the facts’.
256 Article 65 (1) (c) ICC Statute.
257 Article 65 (4) ICC Statute.
This means that the public character of a contested trial may set aside an agreement reached by the parties.

The revision of the Dutch Code of Criminal Procedure, which will be implemented in the coming years, does not change the effect and probative value of the confession in Dutch criminal proceedings. The confession remains, as such, insufficient evidence to meet the standard of proof (the *nuda confesso* rule still applies). No special procedure will be introduced for accused who confess. The possibility to deliver an abbreviated judgement when the accused confesses will remain.

### 3.3.5 Cases Ad informandum

The confession does not, in the context of Dutch criminal proceedings, result in a diversion of the case from the court: it is not a procedural fact which diverges the case from regular trial proceedings. The confession is regarded as an important means of proof, and the proceedings will be concentrated on other issues that are contested. However, the confession of the accused does play a pivotal role in a particular type of cases: the *ad informandum* cases.258

*Ad informandum* cases resemble the English concept of ‘offences taken into consideration’, often referred to as ‘TIC’. Zander gave the following description of TIC’s:

A different form of ‘confession’ is the admission by someone who either pleads guilty or is found guilty that he committed other offences. If this happens before the court case, they are mentioned in court and ‘taken into consideration’ for the purpose of sentencing. (Hence they are called TICs). The advantage for the accused is that they cannot be brought up against him. The advantage for the police is that they can ‘clear the books’ – the success rate of cleared up crime in that force area improves.259

In case of a habitual offender, the use of *ad informandum* cases increases efficiency: the accused is formally charged with, for example, one charge of shop-lifting. If he confesses to certain other instances of shop-lifting, the court may take those latter confessions into consideration regarding the sentence. The cases are then finally disposed of: the prosecutor may not bring the *ad informandum* cases to court again. The *ad informandum* cases are similar to the formal charge(s). Corstens and Borgers stated that the quality of the crimes (i.e. the crime’s legal definition) is included in the charges. The *ad informandum* cases are useful to indicate the quantity of the crimes.260 Thus, a charge of burglary can be combined with several *ad informandum* cases.

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258 According to CBS Statistics Netherlands, 2,130 cases were processed *ad informandum* in 2013. http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=81534NED (last visit: 1 January 2016).
cases regarding burglaries: to include an *ad informandum* case regarding assault, for example, is not allowed. The Supreme Court held in 2014 that the practice of *ad informandum* cases can be very helpful in cases of large-scale possession of child pornography. The charges in such cases can be limited to a maximum of five pictures, the Supreme Court held. When the court concludes that these pictures consist of child pornography, the element of large-scale possession can be ‘proven’ by the confession of the accused that he possesses, for example, thousands of such pictures. This obviates the need to charge the accused with the possession of each picture separately.

### 3.3.5.1 Legal Framework

Processing cases *ad informandum* has been developed in case law; no statutory basis exists for this practice. This is remarkable, considering the fact that criminal cases are finally disposed of without an explicit legal basis. Considering the legality principle of Article 1 CCP, a statutory basis for this practice is needed. The current practice has been approved by the Supreme Court. In the near future, the practice of handling cases *ad informandum* will be codified, though: the Minister of Security and Justice has stated that the *ad informandum* practice will be included in the revision of the Code of Criminal Procedure. Until the CCP has been revised, the requirements that have been developed in the case law remain relevant.

Processing cases *ad informandum* occurs mostly, and preferably, when the accused is present during the proceedings. In front of the court, the accused confesses to the cases that are presented *ad informandum* by the prosecutor. In the indictment, the prosecutor will inform the accused of the *ad informandum* cases. In order to take these cases into consideration, the accused has to confess during the proceedings and the prosecutor has to indicate that no new charges will be filed for these cases. When the court concludes that the accused has committed these crimes, the court may take them into consideration regarding the sentence.

The Supreme Court held that when the accused is not present during the proceedings, the case may still be taken into consideration. The following requirements apply:

1. the accused must be informed in the indictment, or at least before the start of the proceedings, that the prosecutor intends to present several cases *ad informandum*;
2. it must be probable, on the basis of an out of court confession, that the accused committed the cases that are to be taken into consideration; and

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262 HR 13 February 1979, *NJ* 1979, 269, m.nt. ThWvV.
3) the prosecutor must indicate that no charges will be filed for the cases that are taken into consideration by the court.265

The fact that _ad informandum_ cases are not formal charges has two important consequences. First, the requirements contained in Article 261 CCP on the formulation of the charges are not, as such, applicable: it suffices for the prosecutor to notify the accused that certain cases will be brought to the attention of the court _ad informandum_. The prosecutor provides a summary description of these cases in the indictment, including the place and date of each particular case.266 Considering the fact that the accused is not formally charged, the question arises how this relates to the right to be informed in detail of the nature and cause of the accusation, as formulated in Article 6 (3) (a) ECHR. Similar to the requirements for a formal charge, the description of the _ad informandum_ case must be such as to provide the accused ‘with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence.’267 The Court emphasized the connection with the right to be provided with adequate time and facilities to prepare a defence, protected under Article 6 (3) (b) ECHR.268 The notification of the prosecutor to present cases _ad informandum_ should be sufficiently detailed and done in a timely manner in order to enable the accused to make an informed choice regarding these cases.

Second, the rules of evidence are not applicable to _ad informandum_ cases: Articles 338-344a CCP apply only to formal charges. Consequently, the _nuda confessio_ rule does not apply; that is, the confession of the accused suffices for the court to take the case into consideration (although the court is not obliged to do so). Franken argued that although the rules of evidence are not applicable to _ad informandum_ cases, the same standard of proof should apply as for normal charges. In other words, the court must be convinced beyond reasonable doubt that the accused committed the _ad informandum_ case. Any other conclusion, according to Franken, would result in circumventing the rules of evidence.269

3.3.5.2 _Ad informandum_ Cases as Shortcuts

The principle of _nulla poena sine iudicio_ is fully adhered to: the court may process a case _ad informandum_ when the accused confesses (during the proceedings itself or out of court) and the prosecutor states that no separate charges will be filed.270 The court may then take this case into consideration in sentencing. The prosecutor is barred from prosecuting the accused for the same case. This follows from due process
considerations: if the prosecutor has brought a case *ad informandum* before the court and the court takes it into consideration regarding the sentence, the prosecutor cannot instigate new proceedings.²⁷¹

The fact that the prosecutor is barred from filing formal charges regarding the *ad informandum* case when the court has taken it into consideration, means that the case is finally disposed of. The derogation from the ideal type described in the Introduction (in which every part of the charges has to be proven by legal means of proof that are discussed during the proceedings) entails that the practice of *ad informandum* cases is a shortcut: full criminal proceedings are avoided. Considerations of efficiency, including the benefits for the accused (‘clearing the books’), are legitimate, and this practice certainly helps to process a greater number of cases. Similar to the other shortcuts and diversions that were discussed, the question arises of how the accused can participate effectively regarding the *ad informandum* cases. Avoiding a full criminal trial comes at a price: the accused must be enabled to effectively invoke his fair trial rights. In Chapter 5, the practice of *ad informandum* cases will be evaluated with the participatory model of proof as the normative framework.

### 3.3.6 Appeal Proceedings

Appeal proceedings provide another example of a shortcut in criminal proceedings. As has been described in the Introduction, shortcuts are mechanisms that deviate from the ideal type of conducting criminal proceedings: charges are proven on the basis of legal means of proof that are discussed during the proceedings. Appeal proceedings deviate from this ideal type because the proceedings before the court of appeal are narrowed: the proceedings are concentrated on the objections that the prosecutor or the accused has formulated against the judgement of the district court. Despite the fact that the court of appeal remains responsible for accurate fact-finding and for providing the accused a fair trial, appeal proceedings differ from trial proceedings. In this section the legal framework of the appeal proceedings will be discussed. Moreover, attention will be paid to the manner in which appeal proceedings are actually conducted in practice. The focus will be on the position of the accused: how can he effectively participate during the appeal stage?

#### 3.3.6.1 Legal Framework

When appeal proceedings are discussed, a distinction must be made between cases concerning crimes (‘misdrijven’) and infractions (‘overtredingen’). One must also distinguish between the position of the prosecutor and the accused.

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When the case concerns a crime, the prosecutor can appeal the judgement of the district court. The accused can also appeal the judgement, unless he has been acquitted of all the charges.\textsuperscript{272} This is an example of \textit{point d’intérêt, point d’action}: if the accused has been acquitted, he has nothing to gain from the appeal proceedings. Therefore, his notice of appeal will be declared inadmissible. When the accused has been convicted of a crime, he can appeal the judgement. There is, however, one exception to this rule. The accused must initiate leave to appeal proceedings when:

- he has been convicted for a crime with a maximum sentence of 4 years’ imprisonment; and
- the sentence that the district court imposed did not exceed 500 €.

When both criteria are met, the presiding judge of the court of appeal must determine whether granting leave to appeal is in the interest of justice.\textsuperscript{273} According to the Minister of Justice, granting leave to appeal in such minor cases may be in the interest of justice when the presiding judge has doubts about whether sufficient and reliable evidence was presented during the first-instance proceedings or when the sentence that was imposed seems to be too high.\textsuperscript{274}

The leave to appeal procedure has an uncertain future, though: the Human Rights Committee of the UN held in \textit{Mennen v. The Netherlands} that article 14, paragraph 5 of the ICCPR requires a review by a higher tribunal of both conviction and sentence:

\begin{quote}
Such review, in the frame of a decision regarding a leave to appeal, must be examined on its merits, taking into consideration on the one hand the evidence presented before the first instance judge, and on the other hand the conduct of the trial on the basis of the legal provisions applicable to the case in question.\textsuperscript{275}
\end{quote}

Van Kempen and Pesselse concluded that the current leave to appeal procedure is not in conformity with the standards set by the Human Rights Committee.\textsuperscript{276} In \textit{Lalmahomed v. The Netherlands}, the ECtHR held that the grounds of appeal of the accused require a ‘full and thorough evaluation of the relevant factors.’\textsuperscript{277} Considering the limited review that is conducted in leave to appeal procedures, it can be questioned whether this is in conformity with the requirements of Article 6. The Minister of Justice stated that the leave to appeal procedure will be abolished in the near future:

\begin{footnotesize}
\textsuperscript{272} Article 404 (1) CCP.
\textsuperscript{273} ‘belang van een goede rechtsbedeling’, Article 410a (1) CCP.
\textsuperscript{274} Kamerstukken II, 2005/06, 30320, 3, p. 24.
\textsuperscript{277} ECtHR, 22 February 2011, App. No.: 26036/08, (\textit{Lalmahomed v. The Netherlands}), par. 37.
\end{footnotesize}
besides the criticism of the HRC and the ECtHR, the procedure appeared to be less effective than envisaged.\footnote{278}{Ministry of Security and Justice, ‘Kamerbrief over modernisering Wetboek van Strafvordering’, 30 September 2015, p. 116.}

In case of infractions, appeals can be lodged by both the prosecutor and the accused unless the sentence consists of no more than 50 €, or when the court has not imposed a sentence, according to Article 9a CC.\footnote{279}{Article 404 (2) CCP.} Similar to the possibility of lodging an appeal for crimes, the accused cannot appeal a judgement in which he was acquitted of all charges.

One of the aims of the appeal proceedings is accurate fact-finding: the case is reviewed by a court that has both the case file and the judgement of the district court at its disposal.\footnote{280}{Article 404 (2) CCP states that the court of appeal may use the transcript of the first-instance proceedings in its deliberations.} Although appeal proceedings are normally concentrated on the objections of the parties, the court of appeal has to ensure that its judgement is based on an accurate factual basis. Article 415 (1) CCP states that the provisions on trial proceedings, evidence and the contents of the judgement are applicable to appeal proceedings as well. This allows the court of appeal to conduct accurate fact-finding itself.

The responsibility for the court of appeal to conduct accurate fact-finding \textit{proprio motu} can also be derived from the provisions on the admissibility of new evidence during the appeal proceedings.\footnote{281}{Article 414 CCP. Article 412 (3) CCP states that the accused must be informed of the possibility to present new evidence before the court of appeal.} The fact that new evidence can be presented during the appeal means that the appeal proceedings are not a marginal review of the conclusions of the district court.

Article 410 CCP states that the prosecutor must file his objections against the judgement of the district court within fourteen days after he has lodged the appeal. The accused may also file his objections, although he is not obliged to do so.\footnote{282}{Article 410 (1) CCP. In case of leave to appeal proceedings the accused is obliged to file his objections, according to article 410 (4) CCP. Article 410a (2) CCP provides for an exception to this obligation.} At the beginning of the appeal proceedings, the prosecutor is requested to formulate his objections against the judgement: when the prosecutor has not filed his objections, the court of appeal may declare the appeal inadmissible.\footnote{283}{Article 416 (3) CCP.} When the accused does not file his objections before the beginning of the appeal proceedings, and does not formulate his objections at the beginning of the appeal proceedings, the court of appeal may declare the appeal inadmissible.\footnote{284}{Article 416 (2) CCP.} It is within the discretion of the court of appeal to declare the appeal inadmissible: if the court wants to hear the case, although no objections have been formulated, the court is free to do so. This will normally only occur...
when the court of appeal concludes that the district court has made a significant legal or factual error.

The fact that both the prosecutor and the accused are requested to file their objections against the judgement of the district court when they lodge an appeal, is a defining characteristic of Dutch appeal proceedings. According to the Minister of Justice, appeal proceedings require an ‘active attitude’ from the parties: when the prosecutor or accused lodges an appeal, the objections against the judgement of the district court must be presented to the court of appeal. According to the Supreme Court, however, the objections do not need to be very detailed, especially when the objections are formulated by the accused.

3.3.6.2 The Scope of the Appeal Proceedings

Article 415 (2) CCP states that the court of appeal shall concentrate the appeal proceedings on the objections that are formulated by the parties and on every other matter the court of appeal deems relevant:

The court of appeal shall concentrate the proceedings on the objections put forward by the accused and the public prosecutor against the first instance judgment. The court of appeal shall deliberate on any other matter it deems necessary.

This entails that appeal proceedings are not trials de novo, but a second stage in the proceedings in which the parties present their objections against the judgement of the district court. The court of appeal is responsible for accurate fact-finding and must ensure that the accused receives a fair trial. Traditionally, appeal proceedings provide for a full rehearing of the case, in which every factual and legal aspect of the case can be discussed. Although in practice the appeal proceedings will be concentrated on contested issues, this does not alter the character of the appeal proceedings. It does, however, require an active attitude from the parties, especially from the accused. From a fair trial perspective, it is vital that he is properly informed of the character of the appeal proceedings and the manner in which he can effectively challenge the evidence against him.

The trial proceedings are relevant for the appeal stage as well: Article 417 CCP states that, unless the accused requests to do so, documentary evidence which has been read out during the trial proceedings does not have to be read out again during

285 Kamerstukken II, 2005/06, 30320, 3, p. 11.
286 HR 19 June 2007, NJ 2007, 629, m.nt. P.A.M. Mevis, par. 3.5.
287 The character of the appeal proceedings has not changed profoundly: the court of appeal has always been responsible for a fair and accurate outcome of the appeal proceedings. The focus, however, of the appeal proceedings has shifted towards the parties. On the history of appeal proceedings and the legal character of appeal proceedings, see: J. De Hullu, Over rechtsmiddelen in strafzaken, Gouda Quint, Arnhem 1989, p. 183-214.
the appeal proceedings. Moreover, the court of appeal takes into consideration the transcript of the trial proceedings during its deliberations.\textsuperscript{288}

3.3.6.3 The Character of Appeal Proceedings

Appeal proceedings have a hybrid character: although the proceedings are concentrated on the objections of the parties, the court remains responsible for accurate fact-finding. Moreover, the court has to ensure that the accused receives a fair trial. This means that the court of appeal must act \textit{proprio motu} when it deems a certain aspect of the case important, even if the parties have not raised it in their objections. The hybrid character of Dutch appeal proceedings can be illustrated by referring to the distinction made by Damaška between proceedings conducted in hierarchical and coordinate justice systems.\textsuperscript{289} The hierarchical system consists of several layers of officials conducting fact-finding in a hierarchical, authoritative system. The findings of lower courts are subject to review and may be quashed by the superior court, whose members are in general more experienced judges than the first-instance judges. In the coordinate system there is no hierarchy between fact-finders, which means that the fact-finding process is limited to one stage of proceedings. Typically, appeal proceedings in coordinate systems are limited to questions of law, not of fact. The hierarchical system presupposes a succession of stages, in which each stage contributes to the final outcome. In coordinate systems, there is a tendency to concentrate the proceedings, in particular when lay decision-makers enter the stage. The culmination of such proceedings is the famous ‘day in court’.\textsuperscript{290} In this regard, the concept of ‘trial’ is associated with coordinate justice systems with lay participation, whereas the concept of ‘proceedings’ is more characteristic for hierarchical justice systems with professional fact-finders. Damaška observed that appeal proceedings are not something extraordinary in hierarchical systems, but an important part of the proceedings as a whole. On the accuracy of the findings of the first-instance court, he observed:

\begin{quote}
The great significance attributed to ‘quality control’ by superiors in a hierarchical organization inevitably detracts from the importance of original decision making: the latter acquires an aura of provisionality [sic].\textsuperscript{291}
\end{quote}

This observation underlines the importance of appeal proceedings in a criminal justice system that consists of multiple layers of proceedings. Although the idea that judgments by first-instance courts are ‘provisional’ can be criticized, Damaška revealed

\begin{references}
\item \textsuperscript{288} Article 422 (2) CCP.
\end{references}
from a systemic perspective the importance of appeal proceedings in hierarchical legal systems. Considering the prominent position of appeal proceedings in hierarchical criminal justice systems, it is vital that appeal proceedings can indeed contribute to accurate fact-finding. This depends to a significant extent on the manner in which the accused is able to participate effectively during the appeal proceedings.

3.3.6.4 Law in Action: Interviews with Judges

The observations above illustrate the hybrid character of appeal proceedings: the court of appeal is responsible for providing a fair trial and conducting accurate fact-finding, but the proceedings will be focused on the input of the parties. This interplay during the appeal proceedings between the court, the prosecutor and the accused is of interest here because it helps to provide an answer to the question of how the accused can participate effectively during the proceedings. Therefore, it is essential to know how appeal proceedings are actually conducted. In order to analyse the practice of appeal proceedings, interviews have been held with judges working in the courts of appeal. Considering that Article 415 (2) CCP allows the court of appeal to direct the proceedings to any matter it deems relevant, input from practitioners is essential to understand the workings of appeal proceedings.

Interviews have been held with nine judges from different courts of appeal. The aim of these interviews was to analyse how appeal proceedings are conducted, with regard to the different roles of the court and the parties. The interviews were conducted under the promise of anonymity. Because a limited number of judges were interviewed, no general conclusions can be drawn. The interviews do, however, give an indication of how appeal proceedings are conducted in practice.

Judges who worked in the courts of appeal prior to the 2006 amendment, did not notice a great difference after the introduction of Article 415 (2) CCP. Prior to the introduction, the CCP already required the court of appeal to ask the accused and the prosecutor (that is, if he had filed an appeal himself) to bring forward their objections against the judgment of the district court. This focused the appeal proceedings to particular objections against the judgment, such as the length or kind of sentence that the district court imposed.

The manner in which the presiding judge presided over the appeal proceedings was of great importance: it was within the court’s discretion to discuss the case thoroughly, but the Code of Criminal Procedure did not preclude the court of appeal to

292 Five of the judges were senior judges (‘senior raadsheer’), while the other four were ordinary judges (‘raadsheer’).
293 The transcripts of the interviews are kept in the author’s archive.
294 One senior judge did notice a great difference after the implementation of Article 415 (2) CCP. He observed that appellate proceedings, prior to the implementation, were often trials de novo. This has changed profoundly since the 2006 amendment.
focus on the objections that were raised by the parties. In this regard, some judges noted, Article 415 (2) CCP merely codified the manner in which most judges presided over the appeal proceedings already. Several judges observed that, since the introduction of Article 415 (2) CCP, defence counsel put forward more specific objections against the judgement of the district court. This is also greatly enhanced by Article 416 (2) CCP, which states that the court of appeal can declare the appeal inadmissible if no objections have been filed nor brought forward during the appeal proceedings itself.\footnote{For examples in which the court of appeal declared the appeal admissible, although no objections were presented, see \textit{inter alia}: Gerechtshof Den Bosch, 29 November 2010, \textit{ECLI}:NL:GH-SHE:2010:BO9735; Gerechtshof Arnhem, 27 August 2009, \textit{ECLI}:NL:GHERN:BJ6248; Gerechtshof Amsterdam, 22 July 2010, \textit{ECLI}:NL:GHAM:BN3122. Cf. B.F. Keulen, ‘Naar een appel met appeal. Over bezwaar en (hoger) beroep in strafzaken’, \textit{Rechtsgeleerd Magazijn Themis} 2012-1, p. 3-14.}

The Minister of Justice envisaged that the focus on the objections of the parties would enhance the efficiency of the appeal proceedings.\footnote{\textit{Kamerstukken II}, 2005/06, 30aan320, 3, p. 9.} Most judges stated that the objections filed by the prosecutor are concise and of a decent quality. The quality of objections filed by defence counsel varies tremendously. Some judges stated that it was the strategy of the defence to see what the district court would make of the evidence presented. On appeal, objections were raised that could have been put forward during the trial proceedings. One experienced judge commented that this practice seems to be coming to an end: objections are normally brought before the district court. Considering the quality of the objections raised by defence counsel, two judges favoured a more stringent approach. They argued that objections should be clear, precise and not repetitive. They further asserted that one should not simply repeat the arguments that have been presented before the district court.

One senior judge favoured appeal proceedings in which uncontested matters are not reviewed by the court of appeal. When the accused files objections against a certain charge or the sentence, the appeal proceedings will be strictly limited to those objections. The court will not consider the facts \textit{proprio motu} even if the court of appeal disagrees with the findings of the district court. An important safeguard in this respect is the manner in which the accused files his appeal: if he is informed about the consequences of a ‘partial’ appeal, the court may ignore matters that are not brought forward by him.

Related to the quality of the objections is the question of how leading these objections are during the appeal proceedings. The interplay between the prosecutor, the accused, his defence counsel and the court of appeal is influenced by the quality of the objections. The observations of the judges varied here: some stated that the objections were leading for the proceedings, where others found that they were not. The latter group regarded objections merely as points that need to be discussed. Most judges emphasized the particular responsibility of the court of appeal with regard to...
accurate fact-finding. However, most of them also stated that focusing on a particular matter *proprio motu*, is not done frequently. They reported that the court of appeal discusses the matter only when the judges find something extraordinary during the preparation of the case which has gone unnoticed by the parties (a sentence that diverges from standard sentencing guidelines, for example).

During the parliamentary debates on the introduction of the new Article 415 (2) CCP, the issue was raised whether the appeal proceedings could be limited to the sentence that the district court imposed.\(^{297}\) When, for example, an accused has confessed during the trial proceedings and appeals the judgement, because of the sentence, should it be possible to limit the appeal to the imposed sentence? The Minister of Justice argued that a ‘sentence appeal’ would infringe on the fact-finding task of the court of appeal. Because the court of appeal is responsible for accurate fact-finding, it would be undesirable to limit the role of the court of appeal to sentencing.\(^{298}\) Sentencing appeals restrict the appeal proceedings: the factual conclusions of the district court could bind the court of appeal in this respect.

In practice, however, accused regularly limit their objections to the sentence by arguing that the sentence is too high or the sentence should be conditional, for example. In other cases, the accused merely wishes to postpone the enforcement of the sentence. At first sight, this would favour separate appeal procedures for accused who limit their appeal to the sentence. Several judges stated that objections regarding the sentence are often factual appeals in disguise. Regularly, the accused states during the appeal proceedings that he filed an objection against the sentence because his contribution to the crime was negligible (the accused, for example, argued that he was an aider and abettor instead of a co-perpetrator). In such cases, the court of appeal must still discuss the facts on which the sentence was based. Some judges stated that even when the accused limits the appeal to the sentence, it may still be necessary to distil from the facts which are the aggravating and mitigating circumstances regarding the sentence. Therefore, it would be rather artificial to introduce a distinction in the CCP between factual and sentencing appeals.

Another issue that was discussed with the judges was whether appeal proceedings differ depending on the type of cases. The articles on appeal proceedings in the CCP do not make any distinction between different types of cases (for example between shoplifting and murder cases). Practice appears to be very diverse, which makes any generalization difficult: a murder trial might be very simple when it comes to the evidence, whereas a case concerning public disorder might be very complicated. Cases in which the accused confessed to the charges are normally quite straightforward. The proceedings on appeal will then concentrate on the personal circumstances of the accused regarding the appropriate sentence.

Appeal proceedings can differ from ordinary appeal proceedings, though, when the case is voluminous and complicated, such as cases concerning the International Crimes Act or fraud cases. Several judges who have handled these types of cases emphasized that the proceedings differ from ordinary proceedings. This is not due to a different attitude of the court of appeal; instead, the difference can be explained by the quality and experience of the prosecutor and defence counsel. The prosecution has specialized branches for international crimes and large-scale fraud cases. On the side of the defence, counsel too is often experienced and specialized in such cases. This has consequences for the proceedings on appeal: frivolous objections are seldom made, time-schedules are adhered to and both prosecution and defence counsel tend to focus on the complicated and controversial issues in the first-instance judgment. In this regard, the appeal proceedings are streamlined and focused on the most controversial issues of the case.

3.3.6.5 The Future of Appeal Proceedings in Criminal Cases

Currently, the Code of Criminal Procedure is being revised. The Minister of Security and Justice has informed parliament that over the next years, several amendments of the CCP will be presented in parliament. It is envisaged that the last revisions will take effect in 2018.299 Regarding appeal proceedings, the Minister stated that the appeal should be focused even more on the objections against the judgement of the district court (although the court of appeal can still direct the proceedings to any matter it deems relevant). This is already the case, as was discussed above. However, the Minister emphasized that the main stage of criminal proceedings should be the trial stage. Because appeal proceedings should be focused more on the objections against the judgement of the district court, those objections must be duly reasoned. As a result, the Minister proposed to oblige the parties to file well-reasoned objections.300 The amendment regarding appeal proceedings is expected in May 2016. It is premature to speculate on the consequences for the appeal proceedings. However, it seems that a more active attitude is required from the parties to have the case reviewed before the court of appeal. The ability to participate effectively in the proceedings, including the appeal stage, is of paramount importance regarding the fair trial rights of the accused. Chapter 5 will present an answer to the question of how the accused can participate effectively during the appeal proceedings.