Written position

Legal framework

National Public Prosecutors' Office

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Case MH17

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1 Introduction

This written position explores a number of legal issues that, in the opinion of the Public Prosecution Service, are relevant to the *Primo* case. The aim of this written position is to provide a legal framework against which the criminal charges should be assessed. In some areas, a position is taken in this document. Further conclusions will be drawn in the public prosecutor's closing speech.

2 Jurisdiction

Article 5, paragraph 1 of the Criminal Code reads as follows:

> Dutch criminal law applies to any person committing a serious offence outside the Netherlands against a Dutch national, a Dutch public servant, or a Dutch vehicle, vessel or aircraft, in so far as the offence carries a statutory penalty of at least eight years' imprisonment and is punishable under the law of the country where it is committed.

If, as is the case in *Primo*, the offence concerns a single act resulting in multiple simultaneous fatalities, the material offence as a whole is designated as the serious offence over which article 5 of the Criminal Code grants jurisdiction. That jurisdiction extends to the taking of the lives of *all* the victims, including those who did not hold Dutch nationality but were killed by means of the same act.

A different reading of article 5 of the Criminal Code could lead to the court considering itself not competent to give judgment on the killing of the non-Dutch victims but giving a material decision on a complex of offences in which non-Dutch persons were in fact also victims. If a prosecution regarding the deaths of those non-Dutch victims should subsequently take place in another country, the result would be either that the defendant is prosecuted twice for the same complex of offences, or, if the court considers that prosecution is not possible on account of the principle of *ne bis in idem*, that any prosecution concerning the non-Dutch victims is permanently ruled out. After all, the *ne bis in idem* principle ensures that a defendant cannot be tried again after a previous final and unappealable judgment has been given on 'the same offence'. It follows from the case law of the Court of Justice of the European Union and the European Court of Human Rights that the European courts advocate a strict material interpretation of the *ne bis in idem* principle – i.e. one that is purely factual and thus free of legal elements.[1] Under the current law, both a defendant's double prosecution and a situation in which any prosecution concerning the non-Dutch victims is permanently ruled out would be unacceptable.

In some situations, including this case, this problem can be dealt with by taking over jurisdiction from the territorial state. However, this will not always be possible because in many cases the required treaty basis with the country concerned is not in place, or the territorial state in question is not prepared to transfer the proceedings. The scope for transferring proceedings thus cannot be an argument for a more restrictive reading of article 5 of the Criminal Code, because in by no means all cases can this prevent the violation of the rights of foreign next of kin that could result from such a restrictive reading.

Therefore the Netherlands has jurisdiction, on the basis of article 5 of the Criminal Code, over the entire offence and in respect of all the victims, regardless of their nationality and regardless of whether in this case the charges are based on article 168 of the Criminal Code or on articles 287

[1] zie J.W. Ouwerkerk, 'Het feitsbegrip bij *ne bis in idem* en eendaadse samenloop: tussen nationale uitlegging en internationale verplichtingen', DD 2012, p.490-507 en Borgers, M.J. (2013). 'De Hoge Raad en het ne bis in idem-beginsel: een onbezonnen koers?', In: J.W. Fokkens, P.H.P.H.M.C. van Kempen, H.J.B. Sackers, & P.C. Vegter (eds.), *Ad hunc modum* (blz. 23-32). Deventer: Kluwer. Zie ook EHRM 10 februari 2009, ECLI:NL:XX:2009:BI6882, m.nt. Buruma (Zolotukhin t. Rusland) en HvJ EG 9 maart 2006, ECLI:EU:C:2006:165 (Van Esbroeck).

and 289 of the Criminal Code. This reading of article 5 of the Criminal Code is in keeping with the manner in which jurisdiction is interpreted internationally on the basis of the passive personality principle.[2]

In so far as this reading of article 5 of the Criminal Code does not already follow from Dutch law, international law requires such a reading. Article 2 of the European Convention on Human Rights imposes positive obligations in respect of victims' next of kin on states conducting homicide investigations. These positive obligations also apply (to a certain extent) to foreign-based next of kin of foreign victims who have died abroad.[3] These obligations entail, *inter alia*, carrying out an effective and independent investigation and providing for the possibility of criminal prosecution and punishment.[4] In this connection, next of kin have the right to information and participation in so far as necessary to protect their legitimate interests.[5] These international obligations are not compatible with a reading of article 5 of the Criminal Code according to which jurisdiction is limited to the killing of Dutch victims and does not extend to the simultaneous killing of foreign victims. After all, the consequence of this would be that the next of kin of the foreign victims have no position in the Dutch investigation and prosecution, contrary to what the European Convention on Human Rights requires. It would also mean that the foreign next of kin's right to information and participation could be definitively denied by excluding them from the Dutch criminal proceedings. After all, given the principle of *ne bis in idem*, among other factors, a separate subsequent criminal prosecution abroad in respect of the foreign victims is not likely where the offence concerns a single act of violence resulting in multiple fatalities.

Although the Public Prosecution Service therefore believes that the Netherlands has original jurisdiction over all the offences in the indictment, for certainty's sake the proceedings have been transferred from Ukraine.[6] In so far as the court – in contrast to the Public Prosecution Service – should conclude that the Netherlands has no original jurisdiction over certain offences in the indictment, the Netherlands does have derivative (or subsidiary) jurisdiction over those offences.

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[2] Zie bijvoorbeeld European Committee on Crime Problems (Raad van Europa), Extraterritorial criminal jurisdiction, 1990, p. 12 ("In cases where there are several victims of different nationalities, the fact that one of them possesses the nationality of the State claiming jurisdiction is usually considered sufficient for the exercise of jurisdiction by that state.") en United States District Court, S.D. New York, United States of America v. Usama Bin Laden, et al, 109 F.Supp.2d 211, 2000 (veroordeling in de Verenigde Staten van verschillende personen met andere dan Amerikaanse nationaliteit voor meervoudige moord op vele slachtoffers met andere nationaliteiten dan de Amerikaanse in verband met bomaanslagen op Amerikaanse ambassades in Kenia en Tanzania).

[3] Zie EHRM 29 januari 2019 (*grand chamber*), Güzelyurtlu e.a. t. Cyprus en Turkije (Nr. 36925/07), r.o. 188; EHRM 9 juli 2019, Romeo Castaño tegen België (Nr. 8351/17) en HR 18 december 2018, ECLI:NL:HR:2018:2336, r.o. 5.2.

[4] Zie o.a. EHRM 29 januari 2019 (*grand chamber*), Güzelyurtlu e.a. t. Cyprus en Turkije (Nr. 36925/07), r.o. 219 en F. Vellinga-Schootstra en W.H. Vellinga, 'Positive obligations' en het Nederlandse straf(proces)recht (oratie), Deventer: Kluwer, 2008.

[5] Zie ook EHRM 7 juli 2011 (*grand chamber*), Al-Skeini e.a. tegen Groot-Brittannië (Nr. 55721/07), r.o. 167.

[6] Zie ook *Kamerstukken II* 2017/18, 34 915, nr. 3 p. 4. *Kamerstukken II* 2017/18, 34 916, nr. 3, p. 2 en 4.

3 Evidence

3.1 Evidence from abroad

The case file contains a great deal of evidence from abroad, which was obtained by the Joint Investigation Team (JIT) in this investigation, or on the basis of requests for legal assistance. As a general point of departure, the principle of mutual trust applies to such evidence from abroad. That principle forms, in the words of Hofstee, the 'backbone of the system of international mutual assistance' and as the fundamental point of departure it implies that states employing mutual legal assistance may rely on the integrity of the proceedings and the decisions (including on the evidence) taken by the authorities of the other state.[7]

A JIT is an practical form of legal assistance if simultaneous investigations into the same criminal offences are going on in different countries. The JIT format enables the countries concerned to coordinate their activities, perform them jointly where efficient, and share evidence and information without unnecessary bureaucracy. The assessment of evidence that originated in other countries is not, in the case of a JIT, essentially different to that in other forms of legal assistance. Unless there are specific facts or circumstances that indicate the contrary, it should therefore be assumed that countries providing legal assistance acted correctly and with due respect for human rights and foreign law when obtaining and transferring the evidence they provided. In addition, if information and evidence are obtained in a foreign state through the application of investigative powers that are not covered by the same guarantees as those laid down in Dutch law or that are not as such regulated by statute in the Netherlands, they are in principle not excluded from use in Dutch criminal proceedings.

In principle, further investigation into the manner in which evidence was obtained abroad is appropriate only if there are strong indications that when exercising its powers the foreign state's actions were in breach of the essential norms of the Dutch legal order, including human rights guaranteed under international treaties.[8] In a judgment Amsterdam District Court has indicated on this point that the principle of mutual trust should be put aside only if it is shown that the manner in which information was obtained abroad '*shocks the judicial conscience*'.[9]

The Public Prosecution Service has already indicated previously that more caution was exercised with evidence that originated in Ukraine than would normally be the case in the system of mutual legal assistance.[10]

[7] PHR 29 mei 2012 (CAG Hofstee), ECLI:NL:PHR:2012:BW6798, pt. 11-16.

[8] Zie o.a. Rechtbank Rotterdam 22 mei 2006 (10/601072-05), HR 21 januari 2006, ECLI:NL:HR:2006:AU3426.

[9] Rechtbank Amsterdam 7 juni 2006, ECLI:NL:RBAMS:2006:AX7135. Zie ook Hof Amsterdam 12 juni 2012, ECLI:NL:GHAMS:2012:BW8380.

[10] Spreektekst zitting 10 maart 2020, voortgang proces, par 2.1.2 (validatie).

3.2 Evidence from public sources

A great deal information was looked up on the internet and in other public sources as part of this investigation. Where relevant to this case, in whatever form, these documents (usually printed from the internet) were added to the prosecution file. These are written documents within the meaning of article 344, paragraph 1 (5) of the Code of Criminal Procedure.[11] The law does not require that the content of such documents must concern facts and circumstances that the person drafting the document has personally observed or experienced.[12] However, the law does provide that such documents may be used in evidence only in conjunction with the content or substance of other items of evidence. This means that articles, reports, etc. obtained from public sources and added to the case file may in principle be used as evidence. In the past such documents have indeed been used on multiple occasions in Dutch criminal cases.[13]

3.3 Evidence from intelligence services

In its judgment of 5 September 2006, the Supreme Court considered as follows:

> '4.6. (...) There is no rule of law, therefore, that would prevent the use of intelligence provided by an intelligence and security service as information that initiates the institution of a criminal investigation. Nor is there any rule of law preventing the use of material collected by such a service as evidence in a criminal case. Where such use in evidence is concerned, it should be noted that the criminal court will need to consider on a case-by-case basis and with due caution whether the material in question can serve as evidence, given the sometimes-limited extent to which it can be assessed.'[14]

The caution referred to above will find expression primarily in a critical substantive assessment of the material in question using the other information in the file.

The Public Prosecution Service sees no need for or added value in the use in evidence of the official reports by the AIVD and MIVD contained in the file or the information provided by the United States about the missile launch location. After all, there are numerous other, more solid sources of evidence regarding the launch location.

3.4 Threatened witnesses

In this case, numerous witnesses have been granted the status of anonymous threatened witness. The legislature tasked the examining magistrate with assessing whether a witness can and must be designated an anonymous threatened witness (article 226a, paragraph 1 of the Code of Criminal Procedure). The relevant explanatory memorandum notes *inter alia* that:

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[11] HR 10 december 1985, ECLI:NL:HR:1985:AC1737, *NJ* 1986, 495 mbt tot het gebruik van krantenberichten als bewijsmiddel ("de opvatting dat journalistieke producten niet onder geschriften in de zin van art. 344 eerste lid onder 5 Sv begrepen kunnen worden vindt geen steun in het recht.").

[12] HR 21 januari 2003, ECLI:NL:HR:2003:AE8815.

[13] Zie bijvoorbeeld Gerechtshof Den Haag 30 april 2015, ECLI:NL:GHDHA:2015:1082, o.a. r.o. 11.3.2.2.1.3.

[14] HR 5 september 2006, ECLI:NL:HR:2006:AV4149 (Eik).

> ‘Once it has been decided by the court of competent jurisdiction that the identity of the witness must be concealed, this question should not be raised again during the remainder of the proceedings.’[15]

In its judgment of 30 June 1998, the Supreme Court therefore noted first and foremost:

> ‘(...) that the legislature had wished to ensure that decisions on whether a witness was rightly treated as a threatened witness within the meaning of article 226a of the Code of Criminal Procedure should not be made by the trial judge.’[16]

In its judgment the Supreme Court did however consider it conceivable that:

> ‘(...) the manner in which the decision was made or the content of an order made by the judge pursuant to article 226a and/or 226b of the Code that the identity of the witness should be concealed during examination was so fundamentally defective that the use by the trial judge of the results of the subsequent examination of that witness pursuant to article 226d of the Code would violate the right of the accused to a fair trial as guaranteed in the treaty provisions referred to in the ground for appeal [Public Prosecution Service’s note: i.e. article 6 of the European Convention on Human Rights].’[17]

The Supreme Court repeated these considerations verbatim in further judgments, including those of 10 September 2002,[18] 28 March 2006[19] and 24 April 2018.[20] Together they constitute established case law. According to Keulen, the term ‘fundamentally defective’ referred to above primarily concerns a situation in which information comes to light demonstrating that the witness in fact had nothing to fear.[21]

There is thus a clear division of competences between, on the one hand, the examining magistrate who grants the status and the court in chambers that may have acted as appeal court in the proceedings under article 226a of the Code of Criminal Procedure and, on the other hand, the trial judge: the granting of status to threatened witnesses and the prior proceedings are assessed by the examining magistrate and possibly the court in chambers and are no longer subject to assessment by the trial judge. However, the question of to what extent the statements taken from ‘article 226a witnesses’ after the decision on witness status can be used in evidence is assessed by the trial judge. In this regard it is relevant to consider whether the [restrictions on the] right to question a witness have been sufficiently compensated and whether the use in evidence of the witness statements is compatible with article 6 of the European Convention on Human Rights.

The final statutory safeguard in respect of a threatened witness is the ‘reasoning requirement’ to which the trial judge is subject under article 360, paragraph 1 of the Code of Criminal Procedure: when giving judgment the court must explain why it considers the statement of the threatened

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[15] *Kamerstukken II* 1991/92, 22 483, nr. 3, blz.18 (aangehaald in HR 30 juni 1998, ECLI:NL:HR:1998:ZD1214, *NJ* 1999, 88).

[16] HR 30 juni 1998, ECLI:NL:HR:1998:ZD1214, *NJ* 1999,88, r.o. 6.3.4.

[17] Idem, r.o. 6.3.5.

[18] HR 10 september 2002, ECLI:NL:HR:2002:AF0556, r.o. 4.2.

[19] HR 28 maart 2006, ECLI:NL:HR:2006:AU5471, r.o. 4.8.1.

[20] HR 24 april 2018, ECLI:NL:HR:2018:666, r.o. 2.4.

[21] PHR 28 november 2017 (CAG Keulen), ECLI:NL:PHR:2017:1613, randnummer 22.

witness reliable. This explanation must in any event meet the conditions of use laid down in article 344a, paragraph 2 of the Code of Criminal Procedure.

3.5 Witnesses whose identities are not established

Article 344a, paragraph 3 of the Code of Criminal Procedure sets out conditions for the use of a written document containing the statement of a 'person whose identity is not established'.[22] Such a statement may serve as evidence only if the finding that the charges are proven is largely supported by other types of evidence and the defence has not asked to examine the witness (or have him or her examined) at any point in the proceedings.

Examples of a witness 'whose identity is not established' include a random passer-by who gives a statement but refuses to reveal their identity,[23] or a person who provides information over the telephone but wishes to remain anonymous.[24] A person who writes an anonymous letter also falls within the scope of this provision. The common denominator is that these witnesses' lack of individual identifying details makes them impossible to trace, and therefore impossible for the examining magistrate or trial judge to examine.

If a witness's personal details are not (or not fully) recorded in the official report containing their statement, but it has been established that there are sufficient details for them to be individually traced so that the defence can request their examination as a witness by the examining magistrate or the court, that witness does not meet the definition of a 'person whose identity is not established'.[25] The key point is that it must be possible for the person who has given a statement to be traced.

For this reason the statement given by witness S21, for example, cannot be deemed a written document within the meaning of article 344a, paragraph 3 of the Code of Criminal Procedure. Although S21's name is not known, he is individually traceable, meaning the defence can request his examination as a witness.

4 Article 168 of the Criminal Code

On 17 July 2014, article 168 of the Criminal Code read as follows:

> Anyone who intentionally and unlawfully causes to sink, ground or crash, destroys, renders unusable or damages any vessel, vehicle or aircraft is liable to:
> 1°. a term of imprisonment not exceeding fifteen years or a fifth-category fine if there is reason to fear that the act will endanger another person's life;

[22] Zie voor een helder overzicht: E.T. Luining, 'De beperkt anonieme getuige: een puzzel', Strafblad 2018/8.

[23] HR 2 november 2010, ECLI:NL:HR:2010:BM9774, *NJ* 2011, 451.

[24] Bv. HR 17 april 2001, ECLI:NL:HR:2001:AB1271, *NJ* 2002, 107.

[25] HR 12 mei 2009, ECLI:NL:HR:2009:BG6608, *NJ* 2009, 239 en HR 18 juni 2013, ECLI:NL:HR:2013:CA3300, *NJ* 2013, 370.

2°. life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fifth-category fine if there is reason to fear that the act will endanger the lives of others and it results in a person's death.

This provision has not been amended since that time.[26]

Article 168 of the Criminal Code was originally applicable only to vessels. Later, aircraft and vehicles were added to the provision.

4.1 Relationship to various treaties

From the Extraterritorial Jurisdiction (International Obligations) Decree,[27] it is apparent that article 168 of the Criminal Code is now considered the implementing legislation in respect of obligations to establish certain acts as criminal offences, as laid down in various treaties and a European directive:

- the Convention for the suppression of unlawful seizure of aircraft (The Hague,16 December 1970; Treaty Series 1971, 50);[28]
- the Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971; Treaty Series 1971, 218);[29]
- the Convention on offences and certain other acts committed on board aircraft (Treaty Series 1964, 115), as amended by the Protocol amending the Convention on offences and certain other acts committed on board aircraft (Montreal, 4 April 2014; Treaty Series 2019, 140 and Treaty Series 2020, 3);[30]
- the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing, 10 September 2010; Treaty Series 2013, 134);[31]
- Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing, 10 September 2010; Treaty Series 2013, 133);[32]
- the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988; Treaty Series 1989, 17);[33]
- Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (London, 14 October 2005; Treaty Series 2006, 223);[34]
- the International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997; Treaty Series 1999, 161);[35]

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[26] De laatste wijziging dateert van 1 februari 2006; *Stb.* 2006, 11.

[27] Besluit van 28 januari 2014, inwerkingtreding 1 juli 2014.

[28] Zie artikel 2, eerste lid, onder a sub 1 Besluit internationale verplichtingen extraterritoriale rechtsmacht en de bijlage bij dat besluit waarin per artikel de corresponderende verdragen worden vermeld.

[29] Ibid.

[30] Ibid.

[31] Zie artikel 2, eerste lid, onder a sub 6 Besluit internationale verplichtingen extraterritoriale rechtsmacht.

[32] Ibid.

[33] Zie artikel 2, eerste lid, onder b sub 1 Besluit internationale verplichtingen extraterritoriale rechtsmacht en de bijlage bij dat besluit.

[34] Ibid.

[35] Zie artikel 2, eerste lid, onder e Besluit internationale verplichtingen extraterritoriale rechtsmacht en de bijlage bij dat besluit.

- Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88/6).[36]

It should be noted that on 17 July 2014 Directive (EU) 2017/541 had not yet entered into force and article 168 of the Criminal Code was still considered the implementing legislation in respect of obligations to establish certain acts as criminal offences under Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.[37]

It is important to note that although article 168 of the Criminal Code is considered the implementing legislation with regard to international obligations to establish certain acts as criminal offences, the elements of the provision that are relevant in this case were not introduced in response to a previous treaty. By Act of 31 March 1971 (Bulletin of Acts and Decrees, 166) 'aircraft' (*luchtvaartuig*) was added as a protected legal interest and 'causes to crash' (*doen verongelukken*) as a means by which that legal interest is infringed. The Bill that preceded the Act was submitted to parliament on 18 March 1970.[38]

In essence, the government was anticipating the anti-hijacking conference that was due to take place in The Hague from 1 to 16 December 1970. The legislative process for the Netherlands' criminalisation of causing an aircraft to crash, as laid down in article 168 of the Criminal Code, was thus initiated *before* the establishment of the aviation conventions of 1970 and 1971.
It is also important to note that all the treaties and the EU directive referred to above formulate *minimum requirements* that national criminal provisions must meet, but they are not intended to *harmonise* national criminal legislation. That is why the treaties and directive contain provisions to the effect that they are not intended to restrict more far-reaching national law.[39]

This relationship between these treaties and Dutch law was addressed during the Dutch legislative process in respect of various aviation treaties, and the government explicitly advocated having broader criminal provisions in the Dutch legislation than those prescribed in the various treaties.[40]

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[36] Zie artikel 4, eerste lid, onder c en tweede lid Besluit internationale verplichtingen extraterritoriale rechtsmacht en de bijlage bij dat besluit jo. artikel 83 Sr.

[37] Zie *Kamerstukken II* 2001/02, 28 463, nr. 3, p. 6, 13 en 16.

[38] *Kamerstukken II* en *I*, 1969/70 en 1970/71, 10 594.

[39] Zie o.a. het op 23 september 1971 in Montreal tot stand gekomen Verdrag tot bestrijding van wederrechtelijke gedragingen gericht tegen de veiligheid van de burgerluchtvaart (*Trb*. 1971, 218) artikel 5 lid 3; het op 16 december 1970 te 's-Gravenhage tot stand gekomen Verdrag tot bestrijding van het wederrechtelijk in zijn macht brengen van luchtvaartuigen (*Trb*. 1971, 50) artikel 4 lid 3; het Verdrag inzake strafbare feiten en bepaalde andere handelingen begaan aan boord van luchtvaartuigen (*Trb*. 1964, 115), zoals gewijzigd door het op 4 april 2014 te Montreal tot stand gekomen Protocol tot wijziging van het Verdrag inzake strafbare feiten en bepaalde andere handelingen begaan aan boord van luchtvaartuigen (*Trb*. 2019, 140 en *Trb*. 2020, 3) artikel 3 lid 3; het op 10 maart 1988 te Rome tot stand gekomen Verdrag tot bestrijding van wederrechtelijke gedragingen gericht tegen de veiligheid van de zeevaart (*Trb*. 1989, 17) artikel 6 lid 5; het op 15 december 1997 te New York tot stand gekomen Verdrag inzake de bestrijding van terroristische bomaanslagen (*Trb*. 1999, 161) artikel 6 lid 5; artikelen 1 en 19 lid 6 richtlijn 2017/541.

[40] Zie *Kamerstukken II* 1971/72, 11 866, nr. 3, p. 3 ("Het vernielen of beschadigen van een luchtvaartuig valt thans onder artikel 168 van het Wetboek van Strafrecht, dat, ook waar het luchtvaartuigen betreft, ruimer is dan het verdrag, dat zich slechts richt tegen vernieling en beschadiging van luchtvaartuigen in bedrijf en niet tegen elke vernieling en beschadiging. De nationale wetgever mag echter verder gaan dan het verdrag.") en p. 5, en *Kamerstukken II*, 1992/93, 23 229, nr. 3, p. 2. De laatste twee passages komen hieronder nog nader aan de orde bij de bespreking van het begrip 'enig luchtvaartuig'.

The conclusion is that although article 168 of the Criminal Code contains various criminal provisions required by international law, the article's scope is deliberately broader than the minimum requirements formulated in the various treaties.

4.2 'Any aircraft'

Article 168 of the Criminal Code applies to 'any aircraft'[41] and makes no distinction between military aircraft and civil aviation. This is also the case in respect of other aviation-related offences, such as those referred to in articles 162a, 385a and 385b of the Criminal Code. The legislative history contains the following passages in this connection:

> 'Both conventions (The Hague: article 3, paragraph 2 and Montreal: article 4, paragraph 1) explain, further to older aviation conventions (Chicago and Tokyo) that they do not apply to aircraft used in military, customs or police services. This does not mean that a contracting state may not criminalise the hijacking of a military, customs or police aircraft, or the sabotage of such an aircraft; it means only that the conventions provide no basis in international law for expanding the normal operation of national criminal law to cover such offences.'[42]

and

> 'Further to the Act of 10 May 1973 (Bulletin of Acts and Decrees 228), in which the implementing provisions for the Hague and Montreal Conventions are laid down, the proposed new criminal provisions are not limited to international civil aviation. This is in line with the system used for similar criminal provisions, where no such limitation is laid down either. An attack on a military airfield in the Netherlands would thus also fall under the new criminal provisions. There is after all no reason to make a distinction in the national legislation between military and civil aviation.'[43]

Where the Criminal Code speaks of 'any' or 'a(n)' aircraft or of 'aviation', <u>any type of aircraft</u> is thus included, regardless of whether it is a military or civilian aircraft.[44]

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[41] Een luchtvaartuig is volgens artikel 1 onderdeel b luchtvaartwet jo artikel 1.1 lid 1 Wet luchtvaart een toestel, dat in de dampkring kan worden gehouden ten gevolge van krachten die de lucht daarop uitoefent, met inbegrip of met uitzondering van bij algemene maatregel van bestuur aan te wijzen toestellen. Er zijn derhalve meer luchtvaartuigen dan alleen vliegtuigen.

[42] *Kamerstukken II* 1971/72, 11 866, nr. 3, p. 5. Zie ook p. 6 ("In het Wetboek van Strafrecht wordt tot dusver wel het begrip Nederlandse schepen gedefinieerd (artikel 86), maar niet het begrip Nederlandse luchtvaartuigen. Aangenomen wordt dat hieronder luchtvaartuigen worden verstaan die in Nederlandse luchtvaartuigregisters zijn ingeschreven. Voorgesteld wordt thans dit in een nieuw artikel 86a in het wetboek vast te leggen. Nederlandse luchtvaartuigregisters zijn de registers bedoeld in artikel 5 van de Luchtvaartwet nl. het register genoemd in de artikelen 3 en volgende van de Regeling Toezicht Luchtvaart, <u>alsmede de militaire luchtvaartuigregisters</u>."

[43] *Kamerstukken II*, 1992/93, 23 229, nr. 3, p. 2.

[44] Zie ook Rechtbank Gelderland 25 januari 2021, ECLI:NL:RBGEL:2021:715 (luchtvaartuig uit artikel 385b Sr, zijnde een vorm van luchtverkeer uit art. 164 Sr, is een Apache gevechtshelicopter); Gerechtshof Arnhem 1 juni 2012, ECLI:NL:GHARN:2012:BW7255 (luchtvaartuig uit artikel 169 Sr is een Apache gevechtshelicopter) – bevestigd in Hoge Raad 28 januari 2014, ECLI:NL:HR:2014:223; Rechtbank Leeuwarden 15 november 2011, ECLI:NL:RBLEE:2011:BU4453 (luchtvaartuig uit artikelen 162a en 385b Sr is een militaire helicopter).

4.3 'Causes to crash'

The term 'causes to crash' (*doen verongelukken*), in normal usage, means to bring about a crash. There is no relationship between it and the term 'procuring [the commission]' (*doen plegen*) as referred to in article 47, paragraph 1 (1) of the Criminal Code. As in other parts of the Code, the word *doen* in article 168 of the Criminal Code means to 'effectuate, get done or bring about'.[45]

4.4 Criminal intent and unlawfulness

The explanatory memorandum (1879) that accompanied the entry into force of the Criminal Code stated the following with regard to Title VII (offences that endanger the safety of persons or goods):

> '[A]s soon as the acts which the law deems to endanger general safety have been performed, the offence has occurred. The intent needs only to be aimed at the acts described in the law, regardless of the general danger and the consequences for certain persons.'[46]

Article 168 of the Criminal Code thus only requires criminal intent on the part of the perpetrator with regard to the act described in the opening words, in this case 'causes to crash' (*doen verongelukken*). Therefore, no criminal intent on the part of the perpetrator is required with regard to the unlawfulness of the act.[47] This follows from the general rule that intent relates to all elements included after the intent requirement in the definition of the offence,[48] unless those elements are grammatically coordinate [with the intent requirement].[49] Given the use of the conjunction 'and' between the words 'intentionally' and 'unlawfully' in article 168 of the Criminal Code, this latter element (unlawfully) is not connected with the question of intent. The unlawfulness of the act will, in accordance with the established case law of the Supreme Court, need to be interpreted broadly as 'in breach of the law' or 'incompatible with objective law'.[50]

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[45] Vergelijk bijvoorbeeld C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht. Tekst & Commentaar*, Deventer: Wolters Kluwer 2020, aantekening 9c op artikel 231 Sr (J.M. Verheul).

[46] H.J. Smidt (1891), *Geschiedenis van het wetboek van strafrecht*, Haarlem, H.D. Tjeenk Willink, tweede deel, p.116. Vergelijk HR 5 juni 2012, ECLI:NL:HR:2012:BW4230, m.nt. F.W. Bleichrodt, *NJ* 2012, 670, r.o. 5.2.

[47] C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht. Tekst & Commentaar*, Deventer: Wolters Kluwer 2020, aantekening 10a bij artikel 168 Sr (A. de Lange): "*De (aan het schuldverband onttrokken) wederrechtelijkheid is ingevoegd omdat er situaties konden zijn waarbij het doen stranden van schepen geschiedde om erger te voorkomen en derhalve niet strafbaar was (Smidt II, p. 154-155).*" T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 5 op artikel 168 Sr (bijgewerkt tot en met 1 maart 2006 door J.W. Fokkens) en M.L.C.C. de Bruijn-Lückers e.a. (red.), *Sdu Commentaar Strafrecht*, aantekening C.4.4 op artikel 168 Sr (bijgewerkt tot 22 maart 2015 door M. van Delft).

[48] Zie J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par IV.2.3.1.

[49] Zie J. de Hullu, *Materieel strafrecht.* | Wolters Kluwer 2021, par IV.2.3.2: "*Samenvattend is dus de hoofdregel dat er geen opzet op het overtreden van de wet behoeft te worden bewezen. Op deze hoofdregel van het kleurloze opzet bestaan twee uitzonderingen. De belangrijkste daarvan is een delictsomschrijving waarin de formulering 'opzettelijk … wederrechtelijk' wordt gebezigd zonder dat beide bestanddelen zijn verbonden door het voegwoord 'en'*".

[50] C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht. Tekst & Commentaar*, Deventer: Wolters Kluwer 2020, aantekening 10a bij artikel 168 Sr (A. de Lange) en M.L.C.C. de Bruijn-Lückers e.a. (red.), *Sdu Commentaar Strafrecht*, aantekening C.4,4 op artikel 168 Sr (bijgewerkt tot 22 maart 2015 door M. van Delft).

Nor does the perpetrator's intent need to be aimed at the constitutive consequence described in 1° and 2° ('endanger another person's life') or the aggravating consequence described in 2° ('results in a person's death').[51] In order to prove endangerment of life, as referred to in 1° and 2°, it is therefore irrelevant whether the perpetrator themselves actually foresaw the danger. The only relevant factor is whether, judging from general experience, it was foreseeable.[52]

According to Fokkens, the syntax makes clear that the intent encompasses only 'causes to sink' (*doen zinken*), etc., but the perpetrator does not have to have known that the object of their action was a vessel, vehicle or aircraft.[53] De Lange too points out that the perpetrator does not need have to have knowledge regarding the purpose of the object they cause to sink, etc.[54]

4.5 Conclusion

Among other things, article 168 of the Criminal Code establishes as a criminal offence deliberately causing any aircraft to crash, which in plain language means deliberately bringing about an air crash. Article 168 of the Criminal Code applies to both military aircraft and civilian aircraft. The manner in which the air crash is brought about is not relevant. Causing the aircraft to crash must be unlawful, which means: in breach of the law. The criminalisation of such an act requires criminal intent in regard to the act of causing the aircraft to crash, but not in regard to the unlawfulness of the act, the risk of endangering lives or the aggravating consequence, i.e. the death of the aircraft's occupant(s). Nor does the nature or identity of the object of the act fall within the scope of the intent requirement. This will be discussed in more detail in the section concerning *error in objecto*.

[51] Zie C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht, Tekst en Commentaar,* Deventer: Kluwer 2020, aantekening 9 (De Lange) "Het opzet behoeft evenmin gericht te zijn op de bijkomende voorwaarde voor strafbaarheid of het kwalificerende gevolg". M.L.C.C. de Bruijn-Lückers e.a. (red.), *Sdu Commentaar Strafrecht*, aantekening C.2 op artikel 168 Sr (bijgewerkt op 22 maart 2015 door M. van Delft).

[52] HR 17 februari 2009, ECLI:NL:HR:2009:BG1653.

[53] T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 4 op artikel 168 Sr (bijgewerkt tot en met 1 maart 2006 door J.W. Fokkens).

[54] C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht. Tekst & Commentaar*, Deventer: Wolters Kluwer 2020, aantekening 10a bij artikel 168 Sr (A. de Lange)

5 Article 289 of the Criminal Code.

Manslaughter (*doodslag)* is the deliberate taking of a life. Murder (*moord*) is manslaughter with premeditation. A charge of murder implicitly includes an alternative charge of manslaughter.[55]

5.1 Criminal intent

Both murder and manslaughter can be accompanied by any form of criminal intent, including, therefore, recklessness.[56] Some acts can, on their face, be determined to be so clearly aimed at the death of a victim that it is impossible in the absence of indications to the contrary for the defendant not to have intended the death or at least to have accepted the considerable chance of that outcome, which constitutes recklessness.[57]

5.2 Premeditation

A finding that the element of 'premeditation' is proven requires that it be established that the defendant had time to consider the taking of the decision he took and did not act in the sudden heat of passion. This means he had the opportunity to consider the significance and consequences of the intended act and take those factors into account.

The question concerning the existence of premeditation inherently involves the assessment and evaluation of the circumstances of the specific case by the court, and these must determine the weight of the indications for and against a finding that premeditation has been proven. The finding that the defendant had sufficient time to consider the decision may be an important objective indication that he acted with premeditation, but it does not prevent the court from affording greater weight to indications to the contrary.

For example, the decision-making and action may have taken place in a sudden fit of anger; the decision and action may have taken place in rapid succession; or the opportunity for reflection may not have arisen until the decision was already being acted on. In this way, certain circumstances (or a constellation of circumstances) may ultimately lead the court to conclude that the defendant in a given case did not act with premeditation.

Partly with a view to the aggravating consequence that this element entails, certain requirements must be met for a finding that the opportunity necessary for premeditation existed, and the court must pay detailed attention to it in the reasons given for such a finding, especially if premeditation does not follow directly from the evidence.

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[55] HR 19 oktober 1999, ECLI:NL:HR:1999:ZD1600, *NJ* 2000, 109 m.nt. De Hullu.

[56] H.A. Demeersseman, *Met voorbedachte rade*, Arnhem: Gouda Quint 1989; T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 4 bij artikel 289 Sr (bijgewerkt tot en met 26 mei 2015 door A.J.

[57] HR 25 maart 2003, ECLI:NL:HR:2003:AE9049, *NJ* 2003, 552.

If it is established that the defendant had the opportunity to consider the significance and consequences of his intended act and to take those factors into account, it is reasonable to assume that the defendant made use of that opportunity and thus actually considered the significance and consequences of his intended act and took those factors into account. After all, it is difficult under the criminal law of evidence to prove that a defendant actually reflected on the act and its significance and consequences, especially if the statements of the defendant and/or any witnesses provide no insight into the defendant's state of mind prior to and during the commission of the offence. Therefore, whether premeditation can be proven in such a case very much depends on the aforementioned opportunity to consider the significance and consequences of the intended act and on the other factual circumstances of the case, such as the nature of the offence, the circumstances in which it was committed and the behaviour of the defendant before and during the commission of the offence. It should also be noted that premeditation cannot be deduced solely on the basis that it has not been established that the defendant acted in the sudden heat of passion.[58]

The premeditation need not be related to the time and location of the offence.[59] Nor does the premeditation need to be related to the intended victim. Former Advocate General Fokkens has observed the following in this regard:

> 'The fact that this person was not [the victim] whom the appellant, according to the evidence, was targeting, does not negate the premeditation.'[60]

Circumstances *after* the killing can also contribute to the assessment that the offence was premeditated, for example if the defendant enquires shortly after the commission of the offence as to whether it succeeded. In a liquidation case, Arnhem-Leeuwaarden Court of Appeal held as follows:

> 'The premeditation of [co-defendant 1] and the defendant is also explained (and illustrated) by the telephone conversation that the co-defendant [individual 4] had with the co-defendant [co-defendant 2] shortly after the liquidation, in which [co-defendant 2] asked [individual 4]: 'Is it done?'.[61]

Establishing motive is not relevant for a finding that murder (or manslaughter) is proven.[62]

5.3 Conclusion

Criminal intent within the meaning of articles 289 and 287 of the Criminal Code covers all forms of criminal intent. Evidence of premeditation is in principle a question of whether there was an opportunity to consider the significance and consequences of the intended act and it can (thus) also be reasonably assumed that use was made of that opportunity. Such an assessment can take

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[58] HR 28 februari 2012, ECLI:NL:HR:2012:BR2342, HR 15 oktober 2013, ECLI:NL:HR:2013:963, HR 23 september 2014, ECLI:NL:HR:2014:2761, HR 27 oktober 2015, ECLI:NL:HR:2015:3167 en HR 20 december 2016, ECLI:NL:HR:2016:2907.

[59] HR 15 april 1986, ECLI:NL:HR:1986:AC4108, *NJ* 1986, 741.

[60] CAG Fokkens bij HR 8 april 1997, *NJ* 1997, 443.

[61] Hof Arnhem-Leeuwarden 26 april 2013, ECLI:NL:GHARL:2013:BZ8949.

[62] Zie PHR 8 januari 2008, ECLI:NL:PHR:2008:BC3744, randnummer 4.2 en Rb Midden-Nederland 28 oktober 2009, ECLI:NL:RBUT:2009:BK1485.

account of circumstances before, during and after the murder took place. The premeditation need not be related to the time or place of the murder, nor to the identity of the victim. This last matter, the identity of the victim, will be discussed in more detail in the section dealing with *error in persona*. The motive for manslaughter or murder is not relevant for a finding that such an offence has been proven.

6 Functional perpetration

6.1 Introduction

Functional perpetration is not often specified in an indictment or found to be proven. In recent years both the literature[63] and the Supreme Court have noted that it is both possible and advisable to make broader use of functional perpetration, particularly when it comes to offences covered by criminal law as laid down in Books 2 and 3 of the Criminal Code (i.e. criminal law not relating to tax or political, public office or military offences). In this connection the Supreme Court took the following into consideration.

> '3.1 Articles 47 to 51 inclusive of the Criminal Code offer a range of possibilities, under specific conditions, to hold someone criminally liable for their involvement in a criminal offence, even if they do not themselves entirely fulfil the definition of the offence, whether in a so-called functional form or otherwise.
> 3.3.1 It is striking that, compared with economic offences, when prosecuting offences covered by Books 2 and 3 of the Criminal Code and other non-economic offences, the Public Prosecution Service appears to make more frequent use of (sometimes-complex) participation constructions than of the apparently better-suited approach of functional perpetration. (Cf. Supreme Court, 24 May 2011, ECLI:NL:HR:2011:BP6581, NJ 2011/481 concerning the sale of cannabis plants by the owner of a grow shop).'[64]

In this section of the Public Prosecution Service's written position, the following topics will be discussed in turn:

- what is functional perpetration?;
- the charges;
- is functional perpetration of the offences contained in the indictment possible?;
- the assessment framework;
- the relationship between the functional perpetrator and the person who actually performed the act;
- The relationship with 'regular' forms of participation.

This will then be followed by a conclusion.

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[63] Zie o.a. J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.4; J.M. ten Voorde, 'Van containers en growshops. Over functioneel daderschap als alternatief voor medeplegen', *Tijdschrift voor Bijzonder Strafrecht en handhaving* 3(1) p. 3-11; B.F. Keulen e.a,, *Daderschap en deelneming doorgelicht*, Zutphen: Uitgeverij Paris 2010, p. 109-110; H. van der Wilt, *Het kwaad in functie*, Amsterdam: Vossiuspers UvA 2005, p. 20-25.

[64] Zie HR 2 december 2014, ECLI:NL:HR:2014:3474, r.o. 3.1.

6.2 What is functional perpetration?

The essence of the concept of functional perpetration is that someone who did not themselves physically commit the criminal act is nonetheless criminally liable because they are *responsible* for the act.[65] The person is deemed to have committed the offence themselves. Thus, according to De Hullu, it is no longer an appropriate line of reasoning to identify only the carpenter as the builder of a house constructed in violation of the regulations and to view the contractor as merely procuring or soliciting the commission of the offence. It is more appropriate to designate both parties as builder, and the contractor perhaps even as having the primary role.[66] Keizer speaks of indirect perpetration, or acting by means of others.[67]

The origins of the concept of functional perpetration in Dutch case law can be found in the 1887 judgment in the 'Butter case', in which the Supreme Court succinctly held that 'a person must be considered to have done himself anything that he has another person do.'[68]
According to Postma,

> 'The emphasis nowadays is on the person responsible for the accomplishment of the actual criminal act. The question of who actually carried out the act is not (or is no longer) the decisive factor in this regard. This idea forms the basis of functional perpetration.'[69]

Functional perpetration is not a form of participation but a way of interpreting the criminal act. The question is whether the act contained in the indictment can be attributed to the defendant[70] to the extent that it can be said that they committed the act themselves.
Hornman states:

> 'The question at the heart of functional perpetration is whether carrying out the criminal act through the intervention of another party can be viewed as fulfilling the definition of the offence – in other words, committing the offence – oneself. (...) This is primarily a matter of interpretation of the offence: can ensuring that another person physically carries out the criminal act be deemed as (functionally) carrying out the act oneself? If the latter is the case, the functional perpetrator is equally liable as the person who physically carried out the acts, and he or she is thus 'simply' a perpetrator. Viewed this way, functional perpetration is not a separate liability concept or form of perpetration, but a specific manifestation of regular perpetration that is encapsulated in the definition of the offence.'[71]

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[65] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.1.

[66] Ibid. Ook een architect kan 'bouwen', zie rechtbank Middelburg 6 maart 1964, *NJ* 1965, 317.

[67] Zie noot Keijzer onder HR 24 mei 2011, ECLI:NL:HR:2011:BP6581, *NJ* 2011, 481, in het bijzonder pt. 4 en 5.

[68] HR 31 oktober 1887, W 5492. Zie ook A.M. van Woensel, *In de daderstand verheven*, Arnhem: Gouda Quint 1994, p. 34.

[69] A. Postma, *Opzet en toerekening bij medeplegen. Een rechtsvergelijkend onderzoek*, diss. Groningen, Oisterwijk: Wolf Legal Publishers 2014, p. 20.

[70] Ook de Hoge Raad spreekt in dit verband over 'toerekenen'. Zie HR 8 december 2015, ECLI:NL:HR:2015:3487, *NJ* 2016, 23.

[71] M.J. Hornman, 'Feitelijk leidinggeven: Hoe een weinig vernieuwend arrest toch veel nieuws kan brengen; een kritische beschouwing', *TBS&H* 2016/3, p. 134.

Van Woensel states:

> 'Functional perpetration in fact amounts to an attribution construction: the actual act of another person is attributed to the defendant, and by means of the "functional" interpretation, this attribution results in perpetration.'[72]

Various judgments of the Supreme Court show that not only perpetration, but also joint perpetration, solicitation and being an accessory can be interpreted in a functional sense.[73] A functional perpetrator is someone who has another person carry out a serious offence. If they do so in close and deliberate cooperation with others and have the serious offence performed by one or more third parties, they can also be designated a functional co-perpetrator.

6.3 The indictment

In these criminal proceedings, the principal charge under offence no. 1 is that the four defendants, either as functional perpetrators or functional co-perpetrators, caused an aircraft to crash by means of launching a Buk missile. The principal charge under offence no. 2 is that, acting in this capacity, they premeditatedly took the lives of the occupants of an aircraft (i.e. flight MH17) by firing a Buk missile at that aircraft from a Buk TELAR.

The question, in a 'functional' interpretation of these offences, is whether these defendants – either in close and deliberate cooperation or otherwise – contributed to the offences in the indictment to such an extent that responsibility for those offences can be attributed to them.

The question of whether there was (also) close and deliberate cooperation between the defendant on the one hand and the individuals who actually fired the missile on the other is thus – in contrast to the alternative charges of 'regular' joint perpetration under offences no. 1 and no. 2 – of no importance per se. From a criminal-procedure perspective there is no need to distinguish between functional perpetration or joint perpetration and 'regular' perpetration or joint perpetration in the indictment: after all, functional joint perpetration is not a separate form of participation. However, making a distinction in the indictment does make it possible to request the court to give judgment on the functional variant of perpetration or joint perpetration before giving judgment on the 'regular' variant of perpetration or joint perpetration.[74] For this reason the choice was made to explicitly make the principal charges functional perpetration or joint perpetration in respect of both offences.

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[72] A.M. van Woensel, *In de daderstand verheven. Beschouwingen over functioneel daderschap in het Nederlandse strafrecht,* Arnhem: Gouda Quint 1994, p. 428.

[73] Zie o.a. HR 1 juli 2014, ECLI:NL:HR:2014:1593, r.o. 2.3 ("De art. 47 tot en met 51 Sr bieden - al dan niet in zogenoemd functionele vorm - diverse mogelijkheden om iemand onder specifieke voorwaarden strafrechtelijk aansprakelijk te stellen voor zijn betrokkenheid bij een strafbaar feit.") en HR 24 mei 2011, ECLI:NL:HR:2011:BP6581, r.o. 2.3. Zie ook J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.1 ("functioneel daderschap ziet overigens niet alleen op plegen maar ook op (de gedraging uit) de deelnemingsvormen") en J.M. ten Voorde, 'Van containers en growshops. Over functioneel daderschap als alternatief voor medeplegen', *Tijdschrift voor Bijzonder Strafrecht en handhaving*, p. 3-11.

6.4 Is functional perpetration of the offences contained in articles 168 and 289 of the Criminal Code possible?

Functional perpetration is often associated with economic offences committed within a given corporate context. However the concept is not limited to such offences. Other criminal offences can also involve functional perpetration. Above we noted that in 2014 the Supreme Court held that use of the functional perpetration concept was possible in respect of 'offences covered by Books 2 and 3 of the Criminal Code and other non-economic offences'. Examples of such use in the case law include fraud,[75] forgery,[76] offences under the Arms, Ammunition and Offensive Weapons Act,[77] drugs offences,[78] culpable handling,[79] theft,[80] and crimes of expression.[81] Violent offences[82] and [83] homicide can also be committed in a functional capacity.[84] Examples in the case law where a 'functional' interpretation is rejected are exceptional.[85]

In De Hullu's view, the decisive factor in the scope for functional perpetration lies not so much in the nature of the offence, but in the description of the act in the definition of the offence. In particular, acts that are primarily tied to a result, such as producing something or causing something to happen, can be committed in a functional capacity, according to De Hullu.[86] In his view, the so-called 'Abortion judgment',[87] in which a doctor was convicted of murder because he had instructed his assistant to perform a termination when the pregnancy was too far advanced, shows that there is probably no limit *per se* to the types of offences to which the functional perpetration construction can be applied.

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[75] Zie o.a. HR 1 oktober 2019, ECLI:NL:HR:2019:1454, m.nt. N. Jörg, r.o. 2.3 en de daar genoemde jurisprudentie; HR 18 juni 1968, ECLI:NL:HR:1968:AB5202, *NJ* 1969, 70.

[76] Bakker, F.C., *Valsheid in geschrift*, s.n. 1985, p. 134: "het delict van art. 225 Sr kan ook in de vorm van functioneel daderschap worden gepleegd". Zie HR 14 november 1938, ECLI:NL:HR:1938:19, *NJ* 1939, 367, HR 12 juni 1934, W 12760, HR 26 februari 1934, *NJ* 1934, 788 en HR 10 juni 2014, ECLI:NL:HR:2014:1358, *NJ* 2014, 512, m.nt. P.A.M. Mevis.

[77] PHR 7 april 2020, ECLI:NL:PHR:2020:333, randnummers 40-44.

[78] Zie HR 24 mei 2011, ECLI:NL:HR:2011:BP6581, r.o. 2.4.

[79] HR 3 juli 1989, ECLI:NL:HR:1989:ZC8171, *NJ* 1990, 165.

[80] HR 19 mei 2015, ECLI:NL:HR:2015:1251, *NJ* 2015, 259, zie ook D.H. de Jong, De klassieke vermogensdelicten: nieuwe wijn in oude zakken, *Tijdschrift voor Bijzonder Strafrecht & Handhaving*, 2021 (1).

[81] Zie bijvoorbeeld HR 13 maart 1933, *NJ* 1933, p. 1385 (De tribune (Atalanta)).

[82] Zie PHR 4 november 2014, ECLI:NL:PHR:2014:2255, randnummer 29.

[83] HR 29 mei 1990, ECLI:NL:HR:1990:ZC8539, *NJ* 1991, 217, m.nt Schalken. Zie ook E. Gritter, 'Functioneel plegen door een natuurlijke persoon' in: J.B.J. van der Leij (red.) (2007) *Plegen en deelnemen*, Deventer: Wolters Kluwer, p. 2-3 en A.M. van Woensel, *In de daderstand verheven. Beschouwingen over functioneel daderschap in het Nederlandse strafrecht*. Arnhem: Gouda Quint 1994, p. 88.

[84] Zie ook B.J.V. Keupink, *Daderschap bij wettelijke strafrechtelijke zorgplichtbepalingen*, Nijmegen: Wolf legal publishers 2011, p. 63-64 (opmerkingen over functioneel daderschap bij zedendelicten en rijden onder invloed).

[85] Als dat al gebeurt, zoals in het Sproeivliegtuig-arrest, lijkt dat eerder te gaan om een gebrek in de kwaliteit van de door de delictsomschrijving geadresseerden dan om een afwijzing van functionele interpretatie als zodanig. Zie HR 2 juni 1992, ECLI:NL:HR:1992:ZC9042 (Sproeivliegtuig), *NJ* 1992, 754 m.nt. Knigge.

[86] Zie J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.3.

[87] HR 29 mei 1990, ECLI:NL:HR:1990:ZC8539, *NJ* 1991, 217 m.nt. T.M. Schalken.

The nature of the definitions of the offences provided for by articles 168 and 289, with which the defendants have been charged, is thus no impediment to a 'functional' interpretation of these articles. On the contrary, these criminal provisions are especially well suited to such an interpretation, since they criminalise in general terms the causing of a particular result: 'causes to crash (...) any (...) aircraft' and 'takes another person's life'.

In fact, in some situations a 'functional' interpretation of an offence better reflects the actual course of events. For example, Vellinga-Schootstra wonders rhetorically why someone who arranges a murder and exerts authority over the person who does the 'dirty work' could not be convicted as the *perpetrator* of the murder (Public Prosecution Service's italics).[88]

6.5 Assessment framework

According to the Supreme Court, functional perpetration can *in any event* be established if the defendant 'had control of whether the act did or did not take place and if the actual course of events shows that the defendant accepted or tended to accept such or similar behaviour.' This acceptance includes 'not exercising the care that could reasonably have been expected of the defendant with a view to preventing the act'.[89]

These so-called 'Iron Wire Criteria', later expanded in the 'Slurry judgment', are not exhaustive.[90] They were developed with a view to businesses and in particular to situations in which the party accused of the specific act in the indictment was not aware of the act but tended to accept the commission of similar offences.[91] However, functional perpetration can also be established in other ways.[92]

Knigge states:

> '(...) that the question of whether someone can be 'designated' a perpetrator is a matter of interpretation that centres on the definition of the offence and in which the reasonableness of the attribution serves as a guideline. In this approach, the criteria for perpetration are

[88] Zie F. Vellinga-Schootstra, 'Het daderschap van de natuurlijke persoon', in: J.L. van der Neut (red.), Daderschap en deelneming, 4e druk, Deventer 1999, p. 21.

[89] HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938 (Drijfmest) en HR 8 december 2015, ECLI:NL:HR:2015:3487.

[90] Vergelijk HR 10 juni 2014, ECLI:NL:HR:2014:1358, *NJ* 2014, 512 m.nt. Mevis, met punt 10 van de bijbehorende CAG. Zie ook o.a J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.4; de noot van Mevis bij HR 10 juni 2014, ECLI:NL:HR:2014:1358, *NJ* 2014, 512; H.D. Wolswijk, 'Functioneel daderschap en IJzerdraadcriteria', *DD* 2001/10, p. 1088-1114, p. 1106-1113 en H.D. Wolswijk, *Plegen en/of deelnemen*, Deventer: Wolters Kluwer, 2015 p. 3, 4 en 10-12; G. Knigge, Doen en laten; enkele opmerkingen over daderschap, *DD* 1992/2, p. 128-154, p. 140-146 en G. Knigge, 'De dader heeft het niet gedaan', in: A. Dijkstra, B.F. Keulen en G. Knigge. (red.), *Het roer recht: liber amicorum Feikje en Wim Vellinga* (pp. 221-230), Zutphen: Uitgeverij Paris 2013, p. 223; J.M. ten Voorde, 'Van containers en growshops. Over functioneel daderschap als alternatief voor medeplegen', *TBS&H* 2016, p. 3-11, p. 6.

[91] Zie G. Knigge, 'Doen en Laten; enkele opmerkingen over daderschap', *DD* 1992/2, p. 145 en 151.

[92] H. Wolswijk, *Plegen en/of deelnemen*. Deventer: Wolters Kluwer 2015, p. 9.

> derived from the concrete definition of the offence, meaning there appears to be no place for abstract criteria that apply to every offence.'[93]

Functional perpetration can be established in cases involving omissions, but is easier to establish in cases involving positive acts. In this way, a prohibited act can be attributed more quickly to a defendant if they played an active, initiating or organising role in that act.

On this subject, Keijzer states that:

> 'By accepting acts performed by his lackey, the master makes them his own. *A fortiori* one can act indirectly by instructing a subordinate to actually perform the act in question.'[94]

Thus, a person can 'smuggle' goods by hiring others and then following them across the border,[95] 'take another person's life' by instructing someone else to do it,[96] and even 'create' a forgery by dictating the contents to another individual.[97] The contractor who 'builds' the house in De Hulla's example also plays an active, organising role.[98]

In such situations – where defendants themselves make an active, indirect, intellectual and/or material contribution to the offence – the 'Iron Wire' criteria do not constitute the assessment framework for establishing functional perpetration.[99] In this connection Knigge notes that it is debatable whether the Supreme Court in the 'Iron Wire judgment' would have set the same benchmark if the owner of the business had been much more directly involved in the acts performed by other parties, for example if he himself, rather than the export manager, had arranged the transport. Knigge suspects that the owner would then have been deemed a (functional) perpetrator, even though it was not a matter of acceptance: in that case, 'his involvement in the criminal events is (...) such that he can be held to account as the person primarily responsible for the lack of proper paperwork.'[100]

Mevis writes,

> 'It is not the case that the somewhat elaborate normative decision-making criteria from the Iron Wire judgment have in all cases bound the courts to the condition that in cases of functional interpretation they must explicitly establish that the requirements for functional perpetration as set out in that judgment have been met. Those requirements did not apply even prior to that judgment. As Van Woensel (op cit, p. 43) wrote, surveying the case law from prior to 1930, 'The courts certainly did not have a monogamous relationship with the concept of physical action.' She gives plentiful examples of judicial decisions in which a 'functional' interpretation of a definition of an offence can be found. See also Van

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[93] G. Knigge, 'Doen en Laten; enkele opmerkingen over daderschap', *DD* 1992/2, p. 141.

[94] Noot Keijzer onder HR 24 mei 2011, ECLI:NL:HR:2011:BP6581, *NJ* 2011, 481, pt. 4.

[95] HR 22 juni 1947,ECLI:NL:HR:1947:144, *NJ* 1947, 469.

[96] HR 29 mei 1990, ECLI:NL:HR:1990:ZC8539, *NJ* 1991, 217, m.nt Schalken.

[97] HR 10 juni 2014, ECLI:NL:HR:2014:1358, *NJ* 2014, 512 m.nt. P.A.M. Mevis.

[98] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.1.

[99] Zie bijvoorbeeld PHR 7 april 2020, ECLI:NL:PHR:2020:333, randnummers 40-44.

[100] G. Knigge, 'Doen en Laten; enkele opmerkingen over daderschap', *DD* 1992/2, p. 142.

> Toorenburg, *Medeplegen,* p. 11-16. But also after the 'Iron Wire judgment' the Supreme Court has allowed scope for a 'functional' interpretation that results in 'perpetration', without requiring that the court establish explicitly in the judgment that normative perpetration criteria have been met, as in the case of perpetration by a legal person.'[101]

Nor is it a requirement for functional perpetration that a hierarchical relationship must exist between the functional perpetrator and a person in a subordinate position who physically performed the act.[102] It is a circumstance that can help establish functional perpetration and that often arises in the passive variant of the concept ('had control of') but it is not a *sine qua non*.[103] There are many examples in the case law where functional perpetration is established, even if the person who physically carried out the act did not have a hierarchical or subordinate position.[104]

Functional perpetration is thus solely a matter of interpretation which is guided by the serious offence and form of participation with which the defendant is charged. It must then be established whether a 'functional' interpretation of the criminal act in question is reasonable in the specific case concerned.

As Knigge states:

> 'The key question is whether the specific involvement in the criminal incident is such that it can reasonably form the basis of criminal liability.' [105]

6.6 Relationship between functional perpetrator and person who actually carried out the act

The legal concept of functional perpetration makes it possible to convict as a perpetrator or co-perpetrator individuals who (actively) bring about the occurrence of an offence and individuals who (passively) have control of and accept the occurrence of the offence, without requiring evidence of close and deliberate cooperation between those who actually carried out the offence and the

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[101] Noot Mevis pt. 8 bij HR 10 juni 2014, ECLI:NL:HR:2014:1358, *NJ* 2014, 512.

[102] Zie bijvoorbeeld de noot van Rozemond bij HR 27 maart 2018, ECLI:NL:HR:2018:432, A. Postma, *Opzet en toerekening bij medeplegen. Een rechtsvergelijkend onderzoek*, diss. Groningen, Oisterwijk: Wolf Legal Publishers 2014, p. 262 en K. Lindenberg en H.D. Wolswijk, *Het materiële strafrecht*. Deventer: Wolters Kluwer 2021, p. 340.

[103] Zie H. Wolswijk, *Plegen en/of deelnemen.* Deventer: Wolters Kluwer 2015, p. 8-9.

[104] Zie bijvoorbeeld HR 22 juli 1947, ECLI:NL:HR:1947:144, *NJ* 1947, 469, HR 13 december 1988, ECLI:NL:PHR:1988:AC3339, *NJ* 1989, 499, HR 28 augustus 2007, ECLI:NL:HR:2007:BA5659, HR 15 december 2009, ECLI:NL:HR:2009:BI9326, HR 10 juni 2014, ECLI:NL:HR:2014:1358, vergelijk HR 9 december 2014, ECLI:NL:HR:2014:3538 (jongensbesnijdenis) – geen functioneel maar wel middellijk daderschap zonder hiërarchische relatie verdachte en uitvoerder.

[105] G. Knigge, 'Doen en Laten; enkele opmerkingen over daderschap', *DD* 1992/2, p. 142. Zie ook: M.J. Hornman, M.J., 'Feitelijk leidinggeven: Hoe een weinig vernieuwend arrest toch veel nieuws kan brengen; een kritische beschouwing', *TBS&H* 2016/3, p. 134-135; H.D. Wolswijk, 'Functioneel daderschap en IJzerdraadcriteria', *DD* 2001/10, p. 1090, J.M. ten Voorde, 'Van containers en growshops. Over functioneel daderschap als alternatief voor medeplegen', *Tijdschrift voor Bijzonder Strafrecht en handhaving* 2016, p. 3-11, par 2.2.

functional (co-)perpetrators.[106] A series of judgments concerning cannabis cafés makes clear that this is relevant in practice, since the Supreme Court sets strict requirements regarding evidence of deliberate and close cooperation in joint perpetration, even if a defendant's responsibility can be established on the basis of other evidence.[107] Where there is evidence of the defendant's responsibility for an offence but not of their close and deliberate cooperation with the person who physically carried it out, such responsibility can be expressed by means of functional perpetration. In a judgment concerning male circumcision, for example, the defendant was acquitted of joint perpetration of assault because of a lack of evidence of cooperation between the defendant and the doctor who carried out the procedure, but he was nonetheless convicted of the assault of his sons because he had allowed the doctor to remove their foreskins.[108] In the case of multiple, closely cooperating functional perpetrators, it is necessary only to establish that the functional co-perpetrators, acting in close and deliberate cooperation, played an essential, organising role. The precise nature of their relationship to those physically performing the act is not relevant to the finding as to whether the charges are proven. Although the relationship between the defendant and the person who physically performed the act plays an important part in regular forms of participation, the 'functional' interpretation centres on the relationship between the defendant and the offence committed.

If any relationship *can* be demonstrated between the defendant and one of the individuals who physically carried out the act, this need not stand in the way of establishing functional co-perpetration. De Hullu offers the example of a company director who could also be a co-perpetrator in the event that a subordinate jointly commits an offence with his agreement or on his instructions.[109]

Whether or not the person physically performing the act is criminally liable is not relevant to the criminal liability of the functional perpetrator.[110] The case law contains examples of functional perpetration both where those who physically performed the act were not criminally liable (such as the doctor's assistant who was unaware that the statutory deadline for terminating a pregnancy had passed) and where the those who physically performed the act could also be prosecuted and punished (such as the co-perpetrator in the 'Telecom' case[111]). In the latter variant, the criminal liabilities of functional perpetrators and those who physically carry out the acts concerned exist side by side, without any mutual dependency.[112] Remmelink notes in this regard that:

> 'The Court has even acknowledged the possibility – which to me seems an excellent solution – that the import standard can be violated by different individuals each acting in

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[106] Zie HR 24 mei 2011, ECLI:NL:HR:2011:BP6581, r.o. 2.4.

[107] Zie o.a. HR 1 juli 2014, ECLI:NL:HR:2014:1593, *NJ* 2014, 513, m.nt. P.A.M. Mevis; HR 24 mei 2011, ECLI:NL:HR:2011:BP6581, *NJ* 2011, 481; HR 23 maart 2010, ECLI:NL:HR:2010:BL1689, *NJ* 2010, 196; HR 30 mei 2006, ECLI:NL:HR:2006:AV2344, *NJ* 2006, 315.

[108] Gerechtshof Amsterdam 14 december 2012, ECLI:NL:GHAMS:2012:BY6521.

[109] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.1.

[110] Zie ook M.A.M. Hoeks en J.T.C. Leliveld, Geen overzichtsarrest voor functioneel daderschap, *Strafblad* 2018/6, nr. 5.

[111] HR 10 juni 2014, ECLI:NL:HR:2014:1358, *NJ* 2014, 512 m.nt. P.A.M. Mevis.

[112] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par III.1.4.1.

their own capacity. C.f. Supreme Court, 21 December: 1954, as above: Forwarders and contractors can both 'import' goods. This case does not involve joint perpetration: in essence the import standard is interpreted in such a way that it comprises various standards that exist side by side, each addressing a different party.'[113]

6.7 Relationship to 'regular' forms of participation

The case law shows that the Public Prosecution Service and the courts have a great deal of scope to hold perpetrators who act through others criminally liable. Within that scope there is no clear delineation between 'regular' perpetration, 'regular' joint perpetration and functional perpetration. Sometimes a finding that charges are proven does not specify whether the court considers the perpetration to be 'regular' or 'functional' in nature.[114] Functional perpetration is often interchangeable with 'regular' perpetration, solicitation or procurement. Frequently a finding that both perpetration and participation are proven appears to be possible, and both with and without functional perpetration being (explicitly) observed. For example, writing about the 'Abortion judgment', Knigge points out that '[i]f the public prosecutor had prosecuted the doctor [in the Abortion judgement] not on account of (functional) perpetration but rather procurement (or [...] solicitation), that would surely also have been viewed favourably by the Supreme Court',[115] and Wolswijk notes that the perpetrator of forgery in the 'Telecom judgment' could also have been convicted of joint perpetration.[116] Conversely, the co-perpetrator in the 'Container theft judgment' could also have been viewed as someone who in a 'functional' capacity had removed goods, and thus could have been convicted of functional perpetration.[117] The boundaries of functional perpetration thus cannot be sought by delineating the concept from regular forms of participation. Whatever construction is chosen for the indictment, the primary consideration in cases of indirect perpetration remains the Supreme Court's observation from 1887 that 'a person must be considered to have done himself anything that he has another person do.'[118]

6.8 Conclusion

Functional perpetration is a manner of interpreting an offence that facilitates a judicial finding of fact in respect of an act that the defendant did not physically perform but is responsible for. That responsibility may arise both from the defendant's active conduct and from inaction where intervention was required. Perpetration, joint perpetration, solicitation and being an accessory can all be interpreted in 'functional' terms. Definitions of criminal offences in which the causing of a certain result are criminalised in general terms – such as articles 168 and 289 of the Criminal Code – are particularly suited to a 'functional' interpretation.

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[113] Conclusie AG Remmelink bij HR 15 juni 1975, ECLI:NL:HR:1976:AD6927, *NJ* 1976, 565.

[114] Zie H.D. Wolswijk, *plegen en/of deelnemen*, Deventer: Wolters Kluwer 2015, p.10-11 en J.M. ten Voorde, Van containers en growshops. Over functioneel daderschap als alternatief voor medeplegen, *Tijdschrift voor Bijzonder Strafrecht en handhaving* 2016 p.3-11, p. 6.

[115] G. Knigge, 'Doen en laten; enkele opmerkingen over daderschap', *DD* 1992/2, p. 152.

[116] H.D. Wolswijk, *plegen en/of deelnemen*, Deventer: Wolters Kluwer 2015, p. 1 en K. Lindenberg en H.D. Wolswijk, Het materiële strafrecht. Deventer: Wolters Kluwer 2021, p. 341.

[117] A. Postma, *Opzet en toerekening bij medeplegen. Een rechtsvergelijkend onderzoek*, diss. Groningen, Oisterwijk: Wolf Legal Publishers 2014, p.20 en H.D. Wolswijk, *plegen en/of deelnemen*, Deventer: Wolters Kluwer 2015, p. 10.

[118] Zie in dezelfde zin PHR 28 augustus 2007, ECLI:NL:PHR:2007:BA5659, randnummer 9.

There is no exclusive assessment framework for functional perpetration. The assessment is always guided by the serious offence and form of participation specified in the indictment. A hierarchical relationship between the functional perpetrator and a person in a subordinate position who physically carried out the act can help establish functional perpetration, but is not a requirement. Whether or not the person who physically performed the act is criminally liable is not relevant to the criminal liability of the functional perpetrator.

7 Participation

7.1 Introduction

Pursuant to article 47 of the Criminal Code, those who commit, jointly commit or solicit the commission of an offence are punished as the perpetrators of the offence. Article 48 of the Criminal Code sets out who can be punished as accessories to an offence.

7.2 Joint perpetration

7.2.1 General ruling on joint perpetration

In its general ruling on joint perpetration, the Supreme Court stressed that in order to prove that a person is guilty of joint perpetration, there must have been sufficient close and deliberate cooperation with one or more other persons, with the emphasis on the cooperation rather than the question as to who carried out which specific acts (consideration 3.1).[119] The court must establish that the defendant's intellectual and/or material contribution was of sufficient weight (consideration 3.2.1). If the defendant's contribution in its essence does not comprise joint execution, but rather actions that are generally associated with being an accessory, a finding of joint perpetration will require further substantiation. The Supreme Court pointed to the following non-exhaustive list of factors to consider: the intensity of the cooperation, the division of tasks, the role in the preparation, execution or implementation of the offence and the importance of the defendant's role, their presence at key moments and their failure to extricate themselves at an appropriate moment (consideration 3.2.2). If the defendant's contribution was not made during the commission of the offence in the form of joint execution, but in the form of various acts before and/or during and/or after the offence, it must be clear from the evidence why the contribution was of sufficient weight (consideration 3.2.3).

7.2.2 Deliberate and close cooperation

The assessment of whether the defendant's contribution was of sufficient weight depends strongly on the details of the case. In any case a contribution that is of *sufficient* weight does not mean that it has to have been necessary or indispensable.[120] Nor does the defendant's contribution have to have been of equal weight to those of the co-perpetrators.[121] After all, it follows from the above-mentioned general ruling that contributions that are generally associated with being an accessory can also lead to the conclusion that joint perpetration has taken place, as long as reasons are given to substantiate that conclusion.[122] These contributions can have been made before and/or during and/or after the offence. Acts that were carried out largely *after* the offence can in exceptional cases independently support the conclusion that joint perpetration took place,[123]

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[119] HR 2 december 2014, ECLI:NL:HR:2014:3474, gevolgd door HR 24 maart 2015, ECLI:NL:HR:2015:718 en HR 5 juli 2016, ECLI:NL:HR:2016:1316.

[120] J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par. VII.2.2.2.

[121] Ibid., zie ook HR 12 juni 2018, ECLI:NL:HR:2018:893.

[122] HR 2 december 2014, ECLI:NL:HR:2014:3474, r.o. 3.2.2.

[123] HR 2 december 2014, ECLI:NL:HR:2014:3474, r.o. 3.2.3, HR 20 januari 2015, ECLI:NL:HR:2015:713, r.o. 3.2.3.

but in any case they can strengthen the plausibility of a 'substantial' contribution.[124] For instance, they could shed light on the role played by the defendant in the whole chain of events.[125] The existence and content of communication that took place *after* the offence can also contribute to the conclusion that joint perpetration took place.

For instance, in a certain liquidation case, in establishing joint perpetration importance was given to the fact that the defendant was informed of a liquidation immediately after it had taken place.[126] And in a case concerning an arms transport, messages sent after the arms transport containing the phrases 'the things we didn't receive' and 'can you fix the last pieces for me' were considered to support the conclusion that joint perpetration had taken place.[127]

A defendant can therefore be held criminally liable for acts that were carried out (exclusively) by co-defendants. The fact that the defendant did not actually carry out any such acts need not preclude proof of joint perpetration. The absence of a physical act at the scene of the crime can be compensated by other factors, such as the role of the defendant in the planning and preparation of the offence.[128]

In addition to the Supreme Court's non-exhaustive list of factors, it appears that in assessing whether joint perpetration has taken place, great importance is also given to the *intention* with which the defendant acted with regard to the accomplishment of the offence.[129] A co-perpetrator sees the offence as 'their own' offence, whereas an accessory provides assistance in the commission of the offence, but sees it mainly as the other person's offence, thus as it were submitting themselves to the will of the other person or persons.[130] Therefore, in assessing joint perpetration both the defendant's objective contribution and their subjective intentions play a role: these can be viewed as communicating vessels.[131] According to Advocate General Aben, this means that if a defendant has made a 'direct and indispensable contribution' to an offence, less weight can be given to shared intent. Conversely, a 'limited, more indirect role in an offence' can

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[124] PHR 20 januari 2015, ECLI:NL:PHR:2015:309, randnummer 25, zie ook J. de Hullu, *Materieel strafrecht.* Wolters Kluwer 2021, par VII.1.3.1.

[125] PHR 9 maart 2010, ECLI:NL:PHR:2010:BJ7275.

[126] Hof Arnhem-Leeuwarden 26 april 2013, ECLI:NL:GHARL:2013:BZ8949.

[127] Zie bijv. PHR 10 december 2019, ECLI:NL:PHR:2019:1287 pt. 24 (the things we didn't received' en 'can you fix the last pieces for me').

[128] PHR 20 april 2021, ECLI:NL:PHR:2021:390, randnummer 26.

[129] W. Albers, T. Beekhuis en R. ter Haar, 'Medeplegen: van wezenlijke bijdrage naar planverwezenlijking?', *DD* 2020/23, Noot J.S. Nan onder HR 13 oktober 2020, ECLI:NL:HR:2020:1606, pt. 6, T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 21 bij artikel 47 (bijgewerkt t/m 17 juli 2017 door A.M. Machielse), J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par. VII.2.2.2.

[130] W. Albers, T. Beekhuis en R. ter Haar, 'Medeplegen: van wezenlijke bijdrage naar planverwezenlijking?', *DD* 2020/23, pt. 2.

[131] M. Cupido, T. Kooijmans & L.D. Yanev, 'De grondslag en reikwijdte van medeplegen, hoe het Nederlandse strafrecht inspiratie kan putten uit het internationale strafrecht'. *DD* 2018/29. Ook De Hullu ziet in de geldende rechtspraak hier aanknopingspunten voor en vindt die benadering aansprekend: J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par. VII.2.2.2.

still be characterised as joint perpetration if 'the defendant committed to a joint plan aimed at committing the offence in question' whereby the essence lies in the subjective aspect.[132] In such cases, the actual acts of the defendants must be specifically assessed in conjunction with one another and in connection with the intention shared by the group.[133] Rozemond concludes the following on defendants who are part of a group of perpetrators focused on a particular aim: 'The shared intention that is apparent from the joint actions is more important in these cases than the weight of the contribution that the defendant makes to the offence.'[134]

The Hague Court of Appeal noted the following recently, in line with the case law of the Supreme Court,[135] with regard to the conviction, for joint perpetration of attempted murder, of a defendant who had travelled with a co-defendant to the vicinity of the victim's building but had not entered with the co-defendant nor been present during the commission of the violence:

> 'In order to be considered a co-perpetrator of this attempted murder, there must have been sufficient close and deliberate cooperation with another person or persons *for the purpose of accomplishing the shared criminal aim* [italics added]. The emphasis is on the cooperation rather than the question as to who carried out which specific acts.'[136]

The importance of the defendant's intention when considering whether joint perpetration has taken place is widely accepted in case law. A *joint plan*, for instance, can help answer the question as to whether an offence committed by the co-perpetrator can be deemed part of the collaboration.

This proved true in a case in 2003 in which the mother of an Afghan girl was convicted of joint perpetration of the murder of her daughter, who had brought shame upon the family. The mother drove with other family members and her daughter to a house to which she had the key, knowing that her daughter would be killed there.

The Supreme Court held that the appeal court was entitled to find that there had been deliberate and close cooperation.[137]

It can be deduced from recent case law of the Supreme Court on joint perpetration that in the past few years the existence of *a plan that is clear to all participants* has increasingly become a relevant point in assessing whether joint perpetration has occurred. In the event of several people acting together with a view to accomplishing a joint plan, joint perpetration may have taken place, even if a defendant's actions cannot be considered, when viewed in isolation, to be a contribution of sufficient weight to the charges in the indictment.[138]

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[132] PHR 10 december 2019, ECLI:NL:PHR:2019:1286, randnummer 13.

[133] Ibid., randnummer 16.

[134] Noot Rozemond bij HR 5 juli 2016, ECLI:NL:HR:2016:1316, *NJ* 2016, 411, pt. 11. Zie ook: PHR 24 juni 2014, ECLI:NL:PHR:2014:1680, randnummer 21, met verwijzing naar HR 9 juni 1992, ECLI:NL:HR:AC0934, *NJ* 1992, 772 m.nt Knigge.

[135] HR 2 december 2014, ECLI:NL:HR:2014:3474, r.o. 3.1.

[136] Hof Den Haag 17 maart 2021, ECLI:NL:GHDHA:2021:430.

[137] HR 14 oktober 2003, ECLI:NL:HR:2003:AJ1457, *NJ* 2005, 183 m.nt. Knigge.

[138] Zie ook PHR 22 juni 2021, ECLI:NL:PHR:2021:609, randnummer 16, PHR 10 december 2019, ECLI:NL:PHR:2019:1286, PHR 11 februari 2020, ECLI:NL:PHR:2020:124, randnummer 15 en PHR 19 mei 2020, ECLI:NL:PHR:2020:472, randnummer 10, HR 4 februari 2020, ECLI:NL:HR:2020:187, *NJ* 2020, 140 m.nt. W.H.

The defendant's *own interest* in the accomplishment of the offence can be included in the assessment of joint perpetration.[139] For instance, a more or less equal division of the proceeds of a robbery can be a significant indication of joint perpetration.[140]

The actual authority or *functional position* of a defendant can also play a significant role in concluding that joint perpetration has taken place.[141] This was already clear from the 'Container theft judgment',[142] but was explicitly confirmed in a Supreme Court judgment of 2012, in which it was held in an extortion case that, in assessing deliberate and close cooperation, it could be taken into account that:

> 'the defendant, given his position in his father's contracting firm and his involvement in its business operations, was not only "aware from the outset of the decision by [co-defendant 1] to have the disputed debts (...) collected by [individual 6]", but that he had also supported that decision from the outset'.[143]

The above also means that in the case of criminal joint perpetration, it does not have to have been established who the other person or persons are who are or were involved in the offence. The fact that there is an unknown person who has carried out an attempted murder does not preclude the conviction of the other persons involved for joint perpetration.[144] Closely connected with this is the fact that a defendant need not know the identity of all their co-perpetrators, nor do they have to have been in (direct) contact with all the other co-perpetrators. For instance, blocking a motorway with a group of unknown persons in response to a call on Facebook to do so also leads to joint perpetration.[145]

It also does not have to be apparent to what degree a co-perpetrator is liable to prosecution and punishable as a co-perpetrator.[146] Nor does an indictment focusing on joint perpetration have to

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Vellinga ("een vooraf voor alle deelnemers duidelijk plan om inbraken te plegen"), HR 5 juli 2016, ECLI:NL:HR:2016:1321, *NJ* 2016/416 m.nt. Rozemond onder *NJ* 2016, 420 ("we wilden geld maken"), W. Albers, T. Beekhuis en R. ter Haar, 'Medeplegen: van wezenlijke bijdrage naar planverwezenlijking?', *DD* 2020/23, HR 22 november 2011, ECLI:NL:HR:2011:BR2355, HR 31 oktober 2017, ECLI:NL:HR:2017:2799, HR 24 april 2018, ECLI:NL:HR:2018:662 en 967, HR 18 juni 2019, ECLI:NL:HR:2019:967, *NJ* 2019, 264, HR 13 oktober 2020, ECLI:NL:HR:2020:1606 en PHR 1 april 2014, ECLI:NL:PHR:2014:480, randnummer 12.

[139] R. ter Haar, 'Opzet op het grondfeit bij medeplegen en medeplichtigheid: wanneer is sprake van een exces?', *TPWS* 2019/52.

[140] PHR 19 mei 2020, ECLI:NL:PHR:2020:472, randnummer 14, met verwijzing naar CAG Knigge voorafgaand aan HR 9 maart 2010, ECLI:NL:HR:2010:BJ7275, *NJ* 2010, 194 m.nt Mevis, HR 3 april 2018, ECLI:NL:HR:2018:494, *NJ* 2018, 255 m.nt. Rozemond, PHR 24 juni 2014, ECLI:NL:PHR:2014:1680, randnummer 21.

[141] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2018, par VII.2.2.2 (voetnoot 9). Hij schaart dit onder 'belang van de rol van de verdachte'.

[142] HR 17 november 1981, ECLI:NL:HR:1981:AC7387, *NJ* 1983, 84.

[143] HR 3 juli 2012, ECLI:NL:HR:2012:BW8766, r.o. 2.3.

[144] Rb 's-Gravenhage 28 juni 2019, ECLI:NL:RBDHA:2019:6416.

[145] Hof Arnhem-Leeuwarden 31 oktober 2019, ECLI:NL:GHARL:2019:9292 (project P).

[146] J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par. VII.2.2.3.

specify whether, and if so which specific acts the defendant or the co-perpetrators have performed.[147] It is also not a requirement that all the co-perpetrators have performed the same acts, nor that it is established who did what.[148] If an indictment contains a charge of joint perpetration of murder it is not necessary to establish who inflicted the fatal violence and the fact that, in addition to the persons named in the indictment, another person was involved in the offence, is no impediment to proof of guilt.[149] It is sufficient for the intended offence to have been accomplished by means of close and deliberate cooperation with the defendant, regardless of how, where and by whom exactly it was carried out.[150]

In the assessment of joint perpetration, the course of action adopted by the defendant in the proceedings can play a role. In assessing the evidence, the fact can be taken into account that, with regard to a circumstance that in itself or in conjunction with other evidence can be considered to substantiate the evidence for the charge brought against the defendant, the defendant has given no plausible explanation that negates that substantiation.[151] In practice, this often plays a role in situations in which the defendant is found with the stolen goods shortly after a theft, but the rule that a failure to provide a plausible explanation can be taken into account when assessing the evidence also applies in equal measure to homicide cases.[152] Even in cases where, as regards the circumstances, it has not been established that co-perpetrators performed the acts in question, a failure to provide such an explanation can be taken into account when establishing whether the defendant can be considered a co-perpetrator.[153]

7.2.3 Double intent

Advocate General Paridaens describes the conditions for intent with regard to joint perpetration as follows:[154]

> 'Joint perpetration requires double intent: intent with regard to the cooperation and intent with regard to the accomplishment of the main offence.[155] This is an inherent part of the joint perpetration requirement of close and deliberate cooperation with regard to the commission of the main offence. If the various persons involved did not have identical intent – if they were cooperating with a view to different offences – the concept of conditional intent can often qualify this problem considerably, particularly with regard to the details of the events.[156] For conditional intent, it is not a requirement that the defendant was aware of the exact actions of the co-perpetrator(s).[157] However, if the intent of the various persons involved diverges excessively or fundamentally, and the

[147] HR 2 december 2014, ECLI:NL:HR:2014:3474 en vgl. HR 6 juli 2004, ECLI:NL:HR:2004:AO9905.

[148] PHR 20 januari 2015, ECLI:NL:PHR:2015:309, randnummer 10.

[149] HR 13 oktober 2020, ECLI:NL:HR:2020:1606.

[150] Noot J.S. Nan onder HR 13 oktober 2020, ECLI:NL:HR:2020:1606 (Enschedese voogdijmoord), randnummer 5.

[151] HR 5 juli 2016, ECLI:NL:HR:2016:1315 en ECLI:NL:HR:2016:1323, zie ook HR 30 juni 2020, ECLI:NL:HR:2020:1162.

[152] HR 5 juni 2018, ECLI:NL:HR:2018:796.

[153] HR 28 november 2017, ECLI:NL:HR:2017:3022, *NJ* 2018, 310, m.nt. Wolswijk.

[154] PHR 19 januari 2021, ECLI:NL:PHR:2021:47, randnummer 13.

[155] HR 6 december 2005, ECLI:NL:HR:2005:AU2246, *NJ* 2007, 455.

[156] J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.2.2.4.

[157] HR 10 april 2007, ECLI:NL:HR:2007:AZ5713, *NJ* 2007, 224.

> actual perpetrator goes substantially further than the aim of the co-perpetrator's intent, the co-perpetrator cannot be held criminally liable for that, in which case the co-perpetrator will have to be assessed and qualified according to their own intent. In that case no 'deliberate and close cooperation' can be established, and the co-perpetrator's own intent, and not that of the other person, determines their own liability.'[158]

The then Advocate General Wortel summarises it as follows:

> 'Put plainly: in order to prove "joint perpetration" there must be evidence available from which it is apparent that the defendant intended for the prohibited situation to be brought about, also wanted this to happen, and moreover intended to become a "partner in crime" with one or more other persons.'[159]

If there is intent with regard to the main offence, the participant follows the perpetrator in the sense that the participant, too, must have intent with regard to the elements of the main offence to which intent applies. Conditional intent suffices in this respect. That intent must be aimed at the *elements* of the indictment.

In the 'Firework bomb judgment'[160] the defendant helped make a firework bomb that was to be detonated at night in a shopping centre. The bomb destroyed a telephone box. The (conditional) intent regarding the *elements* of the indictment could be deduced from, *inter alia*, the nature of the bomb. Although the defendant's intent with the bomb related to *a* form of damage, that intent did not pertain to *that particular* form of damage, i.e. the telephone box as mentioned in the indictment. However, the Supreme Court made it clear in this judgment that the object of the intent need not be specified so precisely. The defendant's knowing that this specific telephone box would be destroyed is not a requirement for the existence of intent regarding the damage charge in the indictment.[161] Nan phrases it as follows in an annotation:

> 'It has become even clearer that to establish joint perpetration, it is really not necessary that the precise form of the actual execution of the main offence was predetermined and was known or became known to all co-perpetrators. It is sufficient for the intended offence to have been accomplished by means of – and in – close and deliberate cooperation, regardless of how, where and by whom exactly it was carried out. With (conditional) intent as a limit, this leads to reasonable criminal liability. I think it would lead to too many evidential problems if joint perpetration also required the specific way in which the offence was carried out to have been known to everyone. It is sufficient (also in terms of the law of evidence) that every co-perpetrator consciously accepted the significant chance *that* the offence would take place (and therefore wanted that to happen) and to that end carried out sufficient intellectual and/or physical acts themselves.'[162]

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[158] PHR 20 november 2012, ECLI:NL:PHR:2012:BY0267, randnummer 8.

[159] PHR 18 maart 2008, ECLI:NL:PHR:2008:BC6157 (Rijswijkse stoeptegel) randnummer 14.

[160] HR 13 november 2001, ECLI:NL:HR:2001:AD4372, *NJ* 2002, 245.

[161] Ibid. r.o. 3.4, zie ook Postma, A. (2014), opzet en toerekening bij medeplegen: een rechtsvergelijkend onderzoek. Nijmegen: Wolf Legal Publisher, p. 98-99.

[162] J.Nan, annotatie bij HR 13 oktober 2020, ECLI:NL:HR:2020:1606, *SR* 2020-0324.

Conditional intent has a qualifying effect in cases where the execution of the plan deviates from what the co-perpetrator had in mind. This was apparent, for instance, in the case of a shooting at a school in Veghel.[163] In this case the defendant's plan was to have his son kill his daughter's ex-boyfriend. However, the son hit four other students who were near the ex-boyfriend. As initiator and organiser of the shooting, the father was convicted as a co-perpetrator of the shooting of these persons. In his advisory opinion on the 'Nijmegen scooter case',[164] the then Advocate General Knigge considered regarding the Veghel case that the bullets that hit the students had been fired for the purpose of the execution of a joint plan and that because the risk that other persons would be hit was inherent to that plan, the defendant had conditional intent with regard to that eventuality. It sufficed that the defendant had intent with regard to the fact that 'other persons' were hit. He did not need to have intent with regard to the exact number of persons,[165] let alone their identities. Knigge points out that not all criminal plans are equally well thought out, and that even, or particularly, well-considered plans should take account of unforeseen circumstances. This does not detract from the co-perpetrator's intent.[166] A co-perpetrator therefore does not need to have been aware of the precise actions of their co-perpetrator(s).[167] Nor does there have to be evidence of the intent of the other co-perpetrators in a particular defendant's case.[168]

If an element of the indictment has been excluded from the requirement of intent for the perpetrator, for instance if there are objective aggravating circumstances, this obviously also applies to the co-perpetrator.[169]

Besides intent regarding the accomplishment of the main offence, the defendant must also have intent with regard to the cooperation. That deliberate cooperation will often be based on agreements and (possibly brief) consultations, but can also be tacit.[170] Not distancing oneself from other persons' actions can also point to intent with regard to the cooperation.[171] Often, the evidence of intent regarding the cooperation in question follows from the evidence for the objective aspect of the cooperation.[172] After all, people do not break into a building together by mistake.

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[163] HR 17 september 2002, ECLI:NL:HR:2002:AE6118.

[164] PHR 29 oktober 2013, ECLI:NL:PHR:2013:1080, randnummer 3.16.

[165] Vgl HR 14 oktober 2003, ECLI:NL:HR:2003:AJ1396, *NJ* 2004, 103 (één extra dode).

[166] PHR 29 oktober 2013, ECLI:NL:PHR:2013:1080, randnummer 3.17.

[167] HR 10 april 2007, ECLI:NL:HR:2007:AZ5713, *NJ* 2007, 224.

[168] HR 6 maart 2012, ECLI:NL:HR:2012:BQ8596, *NJ* 2012, 176.

[169] J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.2.2.4. Zie expliciet Modderman (Smidt, I, p.439) en impliciet HR 20 januari 1998, ECLI:NL:HR:1998:BX5506, *NJ* 1998, 426 en voorts HR 20 februari 2007, ECLI:NL:HR:2007:AZ2105, *NJ* 2007, 263 m.nt. Reijntjes.

[170] HR 18 maart 2008, ECLI:NL:HR:2008:BC6157, *NJ* 2008, 209 en PHR 20 april 2021, ECLI:NL:PHR:2021:390, randnummer 39.

[171] HR 11 januari 2000, ECLI:NL:HR:2000:ZD1700, *NJ* 2000, 228.

[172] J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.2.2.2.

7.3 Perpetrator by solicitation

Solicitation in essence means to deliberately induce a person by way of a means of solicitation to commit an offence. At first the 'solicitee' did not want to do something, at least not definitely; after the instigator's actions with certain means, they did want to do it *and* acted accordingly.[173]

It is not the case that the solicitee must not have thought about the act in question at all before the instigator comes into the picture. Machielse describes it as follows:

> 'An inclination, an as yet immature intention, a conditional will, can exist beforehand. If a person offers to commit an offence for payment, the person to whom the offer was made is the instigator if the offer is taken up and the offence follows. After all, the will, the decided intention to commit the offence, was evoked by the gift of money. The material perpetrator did not intend beforehand to commit the offence without reward; his will was not aimed at doing so. Had the offer not been made, and the money not been given, the offence would not have been committed. The instigator's actions can have given concrete shape to a certain willingness that the other person already had.'[174]

Direct contact between the instigator and the solicitee is not necessary in order for solicitation to be proven. De Hullu gives the example of newspaper advertisements that can serve as a means of solicitation.[175] It is (therefore) not a requirement that the defendant knew who was eventually persuaded to commit the intended offence.[176] Nor does the solicitee have to be liable to punishment.[177] The instigator has an offence in mind and it does not matter to them how or by whom that offence is committed. The important factor is the fact that the offence was solicited. If the offence is committed by two co-perpetrators, the instigator need not have solicited both co-perpetrators, as long as it is established that that person solicited the offence in question.[178]

Solicitation must take place by use of one of the means mentioned in the exhaustive list in article 47 of the Criminal Code. These are: gifts, promises, misuse of authority, violence, threats or deception, or by affording opportunity, means or information. Misuse of authority means 'any use

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[173] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.4.4

[174] T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 32 bij artikel 47 (bijgewerkt t/m 17 juli 2017 door A.M. Machielse), met verwijzing naar HR 29 september 1992, *NJB* 1992, 193; HR 8 juli 1992, *NJB* 1992, 148 p. 385. Aldus ook HR 1 januari 1934, *NJ* 1934, 549, w 12 725.

[175] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.4.1. en HR 12 oktober 1982, ECLI:NL:HR:1982:AC2660, *NJ* 1983, 799 en H.G.M. Krabbe, Uitlokking, in: J.B.J. van der Leij, *Plegen en deelnemen* (facetten van strafrechtspleging: vol 17), Deventer: Kluwer 2007, p.136 en 137.

[176] T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 33 bij artikel 47 (bijgewerkt t/m 17 juli 2017 door A.M. Machielse) en A.M. van Woensel, A.M., *In de daderstand verheven: Beschouwingen over functioneel daderschap in het Nederlandse strafrecht*, Arnhem: Gouda Quint 1993, p.150-151.

[177] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.4.1 en HR 29 januari 1917, *NJ* 1917, p.209.

[178] HR 2 maart 1982, ECLI:NL:HR:1982:AB7914, *NJ* 1983, 492.

of authority to provoke an offence'.[179] The existence of a (legal or actual) relationship of authority suffices in this respect.[180] Generally this will entail ordering criminal conduct,[181] but encouraging and in some circumstances even requesting it can also be considered to be 'misuse' of authority.[182]

Machielse points out that if the solicitee commits an offence that deviates somewhat from the aim of the instigator, this does not detract from the latter's criminal liability because the acts of the solicitee do fall within the scope of the instigator's wishes, albeit that the desired result did not ensue.[183] The (conditional) intent of the instigator must in essence be aimed at the elements of the offence. Because the instigator opts for a hands-off position and leaves the commission of the offence to others, possible deviations can easily be inherent to the instigator's intent.[184] For instance, intent can be established with regard to the theft of an undesired item because the instigator consciously accepts the significant chance of the thief stealing an item other than the desired one.[185] Or, as Knigge remarks: 'it is the case more so than in general that anyone who gets other people to do their criminal dirty work for them takes a certain risk (...) Anyone who does not want to take the blame for other people's mistakes must therefore do the job themselves.'[186]

If the intent of the instigator and that of the solicitee diverge, it follows from article 47, paragraph 2 of the Criminal Code that the instigator can be held liable only as far as their own intent reaches.[187] The objective elements of an (intentional) offence are also excluded from the requirement of intent for an instigator.[188] Under article 47, paragraph 2 of the Criminal Code, aggravating consequences are attributed to the instigator, even if their intent was not aimed at those consequences; after all such consequences are objective.

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[179] HR 6 juni 1910, w.9045, HR 28 februari 1921, ECLI:NL:HR:1921:54, *NJ* 1921, p.524, HR 12 januari 1942, ECLI:NL:HR:1921:54, *NJ* 1921, p.524 en T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 40.2 bij artikel 47 (bijgewerkt t/m 17 juli 2017 door A.M. Machielse).

[180] Van Woensel, A.M., *In de daderstand verheven: Beschouwingen over functioneel daderschap in het Nederlandse strafrecht*. Arnhem: Gouda Quint 1993, p.155, vgl HR 14 mei 1991, ECLI:NL:HR:1991, *NJ* 1991, 769.

[181] Vgl. conclusie Remmelink onder HR 29 juni 1971, *NJ* 1972, 116 (Postwissel).

[182] HR 29 mei 1984, ECLI:NL:HR:1984:AC8436, *NJ* 1985, 6 m.nt. Van Veen, Hof 's-Hertogenbosch 20 november 2017, ECLI:NL:GHSHE:2017:5111 en vgl. H.G.M. Krabbe, Uitlokking, in: J.B.J. van der Leij (2007) *plegen en deelnemen* (facetten van strafrechtspleging: vol 17), Deventer: Wolters Kluwer, p.148.

[183] T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 30 bij artikel 47 (bijgewerkt t/m 17 juli 2017 door A.M. Machielse) en zie bijvoorbeeld HR 17 december 1917, *NJ* 1918, 79.

[184] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.4.2.

[185] HR 29 april 1997, NJ 1997, 654 (kleurenkopieerapparaat) en vgl rb Limburg 13 november 2019, ECLI:NL:RBLIM:2019:10220 (vergismoord).

[186] G. Knigge, 'Het opzet van de deelnemer', in: Groenhuijsen M.S. en Simmelink J.B.H.M. (red.) *Glijdende schalen* (De Hullu-bundel), Nijmegen: Wolf legal publishers, p. 291-321.

[187] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.4.2.

[188] HR 5 juli 2011, ECLI:NL:HR:2011:BL:8997, vgl. HR 29 maart 1966, ECLI:NL:HR:1966:AB6309 *NJ* 1966, 395 over 'gemeen gevaar voor goederen' in artikel 157 Sr.

7.4 Being an accessory

Article 48 of the Criminal Code deals with being an accessory to an offence. A person can be an accessory prior to the offence, if they intentionally provide opportunity, means or information. Or during the commission of the offence, if they intentionally aid and abet the commission of of the offence Actions *after* the commission of the offence cannot as such result in a person being an accessory, but they can point to prior or simultaneous involvement.[189]

The main accusation with regard to being an accessory is 'aiding and abetting or facilitating an offence committed by another person'.[190] Whereas a co-perpetrator sees the offence as 'their own' offence, an accessory sees it mainly as the other person's offence, thus as it were submitting themselves to the will of the other person.[191] The accessory's (conditional)[192] intent must be aimed at the offence they are supporting and also at that support.[193] The requirement of intent for an accessory does not comprise 'the exact manner in which the offence is committed',[194] or the question as to whether the offence was committed in association with one or more persons.[195] An accessory is willing to be of assistance in the commission of an offence; how that offence is accomplished is of less importance. The assistance provided by the accessory need not be indispensable, not does there have to have been an 'adequate causal contribution' to the accomplishment of the main offence.[196] Mere support (in the sense of aiding and abetting or facilitating) suffices.

The accessory also does not have to know the identity of the person who actually carries out the offence, whom they have supported.[197] Machielse gives the following example:

> 'anyone who, knowing that another person intends to break into building, lays down a ladder can in doing so make themselves an accessory to burglary, with conditional intent, even though there was no consultation with the burglar.'[198]

Given that the accessory does not determine the course of events, on account of their subordinate role, it is logical for the qualification of the accessory's actions to follow that of the perpetrator. That matching of the qualification of the perpetrator's actions is conditional upon the accessory's intent (conditional or otherwise) at least partly tying in with the main offence committed.

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[189] C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht. Tekst & Commentaar*, Deventer: Wolters Kluwer 2020, aantekening 1 op artikel 48 Sr (Dolman).

[190] Vgl HR 22 maart 2011, ECLI:NL:HR:2011:BO2629, *NJ* 2011, 341.

[191] W. Albers, T. Beekhuis en R. ter Haar (2020), 'Medeplegen: van wezenlijke bijdrage naar planverwezenlijking?', *DD* 2020/23, punt 2.

[192] HR 18 februari 2014, ECLI:NL:HR:2014:385.

[193] HR 18 juni 2019, ECLI:NL:HR:2019:964.

[194] HR 4 maart 2008, ECLI:NL:HR:2008:BC0780, *NJ* 2008, 156.

[195] HR 23 januari 2018, ECLI:NL:HR:2018:67.

[196] HR 8 januari 1985, ECLI:NL:PHR:1985:AC0142, *NJ* 1988, 6, m.nt. Th.W. van Veen.

[197] HR 4 maart 2008, ECLI:NL:HR:2008:BC0780, *NJ* 2008, 156, r.o. 3.6.

[198] T.J. Noyon, G.E. Langemeijer en J. Remmelink (voortgezet door J.W. Fokkens, E.J. Hofstee en A.J.M. Machielse), *Het Wetboek van Strafrecht*, Deventer: Kluwer, aantekening 7 bij artikel 48 (bijgewerkt t/m 17 juli 2017 door A.M. Machielse).

According to Advocate General Hofstee, 'a certain incongruity (...) in that respect is acceptable'.[199] The only condition is that the offence with regard to which the accessory *does* have intent is sufficiently connected to the eventual main offence.

For instance, in a case where the defendant provided a knife with intent regarding threatening behaviour, but in the end the knife was used to stab other persons, a finding of being an accessory to attempted manslaughter and attempted serious assault was nonetheless made.[200] If the intent of the perpetrator and that of the accessory do not match exactly, the maximum penalty for the accessory is not determined by the qualification but by the accessory's intent.[201] In other words, an accessory to murder therefore does not have to have acted with premeditation, and any absence of premeditation will be accounted for in sentencing.[202] Consequences and circumstances that have been excluded from the requirement of intent *can* play a role in sentencing (article 49, paragraph 4 of the Criminal Code).[203]

If the perpetrator goes less far than the aim of the accessory's intent, the accessory can only be punished for that lesser charge. For instance if the perpetrator commits common theft instead of burglary.[204]

In addition, in relation to being an accessory (as is the case for joint perpetration and solicitation) the accessory's liability to prosecution does not depend on the liability to prosecution of the perpetrator of the main offence.[205]

7.5 Combined forms of participation

Besides singular participation, which involves only two persons, there are also combined forms of participation. The judiciary has accepted the criminality of 'participation in participation' in an offence without any substantial limitations. For instance joint perpetration of being an accessory to joint perpetration of attempted murder.[206]

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[199] PHR 12 maart 2013, ECLI:NL:PHR:2013:BZ3622.

[200] HR 22 maart 2011, ECLI:NL:HR:2011:BO4471, r.o. 2.5.3.

[201] HR 27 oktober 1987, ECLI:NL:PHR:1987:AD0021, *NJ* 1988, 492, HR 2 oktober 2007, ECLI:NL:HR:2007:BA7932, *NJ* 2007, 553, HR 22 maart 2011, ECLI:NL:HR:2011:BO4471 en HR 6 maart 2018, ECLI:NL:HR:2018:304.

[202] HR 2 oktober 2007, ECLI:NL:HR:2007:BA7932.

[203] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.5.3.

[204] C.P.M. Cleiren, J.H. Crijns & M.J.M. Verpalen (red.), *Strafrecht. Tekst & Commentaar*, Deventer: Wolters Kluwer 2020, aantekening 4b. op artikel 48 Sr (Dolman).

[205] HR 29 januari 1894, W 6467; vgl HR 22 mei 2001, ECLI:NL:HR:2001:AB1761, *NJ* 2001, 698 Alleen bij algemene vervolgingsuitsluitingsgronden (zoals ontbreken klacht bij een klachtdelict) kan de medeplichtige ook niet worden vervolgd.

[206] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.7.1. HR 24 januari 1950, ECLI:NL:HR:1950:220, *NJ* 1950, 287, HR 24 maart 1959, ECLI:NL:HR:1959:29, *NJ* 1959, 559 (uitlokking van uitlokking van een strafbaar feit), HR 13 maart 1990, ECLI:NL:HR:1990:ZC8505, *NJ* 1991, 56 (medeplichtigheid aan medeplichtigheid aan valsheid in geschrift), HR 22 mei 2001, ECLI:NL:HR:2001:AB1761, *NJ* 2001, 698 (feitelijk leidinggeven aan medeplichtigheid van een rechtspersoon),

7.6 Overlap between forms of participation

There is no precise boundary between joint perpetration and other forms of participation.[207] This is certainly the case for joint perpetration and solicitation, given that joint perpetration need not have comprised joint execution and does not even require a physical presence.[208] For example a request or an order to carry out certain acts and, for instance, the promising of a reward to the other person for doing so can result in both solicitation and joint perpetration.[209]

Another possibility is multiple participation, i.e. when a person involved in the commission of an offence carries out several participatory acts themselves. For instances, one of the main persons involved in the theft of paintings from the Van Gogh museum was convicted of joint perpetration, but also of soliciting the theft.[210]

HR 13 maart 2007, ECLI:NL:HR:2007:AZ5461 (medeplegen van medeplichtigheid aan medeplegen van poging tot moord).

[207] HR 2 december 2014, ECLI:NL:HR:2014:3474, *NJ* 2015, 390 m.nt. Mevis, r.o. 3.3.1. Zie ook HR 1 juli 1993, ECLI:NL:HR:1993:AB7635, *NJ* 1994,55, waarin de Hoge Raad oordeelde dat de stelling dat medeplegen en uitlokking vormen van daderschap zijn die elkaar uitsluiten, geen steun vindt in het recht.

[208] HR 17 november 1981, ECLI:NL:HR:1981:AC7388, *NJ* 1983, 84 m.nt. ThWvV; HR 17 december 1985, ECLI:NL:PHR:1985:AC9145, *NJ* 1986, 427; HR 15 april 1986, ECLI:NL:HR:1986:AC4107, *NJ* 1986, 740.

[209] HR 27 januari 1998, *DD* 98.155, r.o. 7.1. Zie ook HR 24 januari 2017, ECLI:NL:HR:2017:375, *NJ* 2017, 375 m.nt. Keulen, waarin het medeplegen van een poging tot doodslag, waarin verdachte's bijdrage hoofdzakelijk bestond in het aansporen van en het aanwijzingen en opdrachten geven aan de medeverdachte.

[210] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par VII.7.4, HR 1 juni 1993, ECLI:NL:HR:1993:AB7635, *NJ* 1994, 55.

8 *Error in objecto/persona*

8.1 Introduction

Given the indications in the case file that the defendants may have intended to hit an aircraft other than flight MH17, it is logical for a discussion of the legal framework to look at the question of whether a possible target error will affect the decisions the court must make in this case. We will limit our discussion to an error in the target: the Public Prosecution Service sees no indications in the case file to suggest that the defendants intended to commit any other offence, or intended to use any other method to commit it, than that which took place.

8.2 *Error in objecto/persona* and the perpetrator's liability to prosecution

Error in objecto means the wrong object is hit; *error in persona* means the wrong person (as an 'object') is hit.[211]

When the current Criminal Code was introduced, the then justice minister Anthony Modderman commented briefly on the consequences of *error in persona* for the perpetrator's criminal liability. During a debate in the House of Representatives on 1 November 1880 he said:

> 'When *will* and *deed*, although both present in accordance with the indictment, do not correspond in full, in my opinion this only removes intent if the error, the mistake, the intervening coincidence – in other words the difference between deed and will – pertains to the *essential* factors, not the *accidental* factors. Imagine a person is hiding in the twilight in order to ambush and kill another person, but he doesn't hit the person he intended, but someone else instead, with fatal consequences. In my opinion this is not attempted murder *plus* negligent manslaughter, but one single crime: *murder*. No matter that the human being he wanted to kill was named A and the person he actually killed was named B; that does not detract from the fact at all in my opinion. For murder is not the killing of A or of B, but of a human being. He wanted to kill a human being, and a human being he did kill.'[212]

Mr Modderman's approach to the perpetrator's criminal liability has been generally adhered to in the case law.

In 1997 the Supreme Court had to give judgment in a murder case where the victim's identity had been mistaken. The Joint Court of Justice of the Netherlands Antilles and Aruba had deduced from the evidence that the defendant had intentionally, after calm consideration and consultation, aimed a loaded pistol at the person he took to be R.G.F., then shot that person and fatally wounded that person, who later turned out to be C.I.S. According to the Supreme Court, the Joint Court had clearly and understandably interpreted the indictment as accusing the defendant of intentionally and premeditatedly taking the life of a person, who later turned out to be C.I.S., by

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[211] 'Hit' should be understood in the broadest sense. It includes, for instance, stealing the wrong object.

[212] H.J. Smidt (herziening en aanvulling door J.W. Smidt), *Geschiedenis van het Wetboek van Strafrecht*, deel II, Haarlem: H.D. Tjeenk Willink 1891, p. 130.

firing a bullet from a loaded pistol at that person, after calm consideration and consultation. In that interpretation, the Supreme Court held, the offence with which the defendant was charged and which was found proven could be deduced from the evidence submitted. The murder conviction was upheld.[213]

In a later case heard by 's-Hertogenbosch District Court in 2007, the defendant said she had intended to murder her psychiatrist. She had deliberately stabbed a knife in the direction of the neck of the person – an investigating officer – who entered the consultation room in question. The court convicted the defendant of attempted murder, among other charges. The court considered it irrelevant that the defendant had stated that she thought it was her psychiatrist entering the consultation room, because in the court's opinion under the applicable law a possible case of mistaken identity does not preclude proof of premeditation.[214]

In 2012 Dordrecht District Court heard a case in which the defendant was tried for, *inter alia*, a 'mistaken identity murder'. He had – in his view, due to humiliations suffered – wanted to kill his ex-girlfriend, but shot her elder sister dead by mistake. He was subsequently convicted of murder; the court considered that the occurrence of a mistake in the victim's identity was no impediment to establishing premeditation.[215] The Hague Court of Appeal agreed on appeal.[216]

In 2018 Amsterdam District Court held in a mistaken identity murder case that 'the circumstance that someone else was mistaken for the intended victim does not change the assessment of the defendant's intent with regard to the killing' and that 'the circumstance that someone else was mistaken for the intended victim is no impediment to establishing premeditation.'[217]

Also relevant is the case in which the defendant intended to use an explosive to damage another person's houseboat because that person had allegedly sexually assaulted his younger sister 10 years previously. He had hoped that person would move house if he no longer had a boat. However, the defendant made a mistake in the execution of his plan. He confused the houseboat in question with a nearby houseboat belonging to a man and his girlfriend, attached the explosive to the latter houseboat and detonated it. The explosion killed the occupant and seriously injured his girlfriend. The mistake did not preclude the defendant's conviction in 2017 by Amsterdam Court of Appeal for intentionally causing an explosion, while there was reason to fear that the act would present a general danger to property and there was reason to fear that the act would endanger the lives of others or cause them serious bodily injury and the act resulted in a person's death.[218]

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[213] HR 8 april 1997, ECLI:NL:HR:1997:ZD0681, *NJ* 1997, 443. Ook dit arrest komt (onder nr. 62) kort ter sprake in PHR 17 november 2009, ECLI:NL:PHR:2009:BI2315, zijnde de conclusie van A-G Jörg vóór HR 17 november 2009, ECLI:NL:HR:2009:BI2315, *NJ* 2010, 143 m.nt. T.M. Schalken.

[214] Rb Den Bosch 24 december 2007, ECLI:NL:RBSHE:2007:BC1039.

[215] Rb Dordrecht 11 oktober 2012, ECLI:NL:RBDOR:2012:BX9919.

[216] Hof Den Haag 19 januari 2015, ECLI:NL:GHDHA:2015:37. Het cassatieberoep in deze zaak werd verworpen in HR 19 december 2017, ECLI:NL:HR:2017:3185 na het tussenarrest HR 5 juli 2016, ECLI:NL:HR:2016:1325, *NJ* 2016, 348 m.nt. T. Kooijmans. In de procedure bij de Hoge Raad kwam de error in persona-problematiek niet aan de orde.

[217] Rb Amsterdam 9 mei 2018, ECLI:NL:RBAMS:2018:3223.

[218] Hof Amsterdam 20 september 2017, ECLI:NL:GHAMS:2017:3783.

In the legal literature regarding *error in objecto* and/or *in persona* we see the same approach as in the case law. Particularly with regard to abstractly worded definitions of offences (in which the object or the person that is the focus of the act is described in general terms), *error in objecto* or *error in persona* does not affect intent, nor does it preclude the perpetrator's criminal liability. In other words: the way in which an offence is executed is excluded from the requirement of intent for the perpetrator if the relevant elements are abstract in nature.

In this respect De Hullu refers to the concept of *dolus generalis* – in other words, general intent: the more general the concept of intent is, the less correspondence is required between what was intended and what was actually done.[219]

Postma writes:

> 'In the literature no high requirement is set in terms of substantive law for the degree of specificity of the perpetrator's intent. The dominant opinion seems to be that it suffices for their intent to pertain to the *elements* of the offence to which the requirement of intent applies (the essentials of the offence). Those elements are often general in nature: the removal of "a good" (article 310 of the Criminal Code), or the taking of "another person's" life (article 287 of the Criminal Code). In those cases the intent only needs to be aimed at those general aspects.
>
> As a consequence, the intent for instance does not have to be aimed at the killing of a *specific* victim. A practical mistake – a "wrong idea" of an actual situation that "was (in part) decisive for the act" – also does not as a rule preclude that intent, since the intent does not by any means have to be aimed at the specific way in which the elements of the offence were executed. For instance, intent with regard to killing is not affected by a practical mistake with regard to the causal manner of accomplishment of manslaughter or an *error in persona/objecto* in that context.' [220]

So if a person wanted to kill A on impulse, but it later turns out he killed B, he has still 'simply' committed manslaughter. Even though he did not kill the person he intended to kill, but someone else instead, what he has done still 'simply' falls within the scope of the definition of the offence laid done in article 287 of the Criminal Code. The person he saw before him at the time of the offence and killed is, after all, 'another person' within the meaning of that article and, in view of the general phrase 'another person', intent aimed at the killing of (a person who can be considered to be) 'another person' suffices. For the purposes of manslaughter, there is no difference in legal terms between A and B. Legally they are equivalent.

Both articles 168 and 289 of the Criminal Code are drafted in abstract terms. Article 168 of the Criminal Code criminalises causing 'any aircraft' to crash. The definition of the offence of murder criminalises premeditatedly taking the life of 'another person'. These articles express the fact that causing an aircraft to crash and killing another person is in principle unlawful. The nature of the

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[219] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par IV.2.5.

[220] Zie A. Postma, *Opzet en toerekening bij medeplegen. Een rechtsvergelijkend onderzoek*, diss. Groningen, Oisterwijk: Wolf Legal Publishers 2014, p. 91.

aircraft and the identity of the victims are irrelevant. The same applies to the time, the location and the way in the crash was caused and life was taken.[221]

8.3 *Error in objecto/persona* and the participant's criminal liability

It is clear from case law that for participants, too, differences between a planned offence and its execution will not easily result in impunity, regardless of whether they concern the manner of execution or the identities of the victims.

This is apparent, *inter alia*, from a Supreme Court judgment from 2018. The defendant in that case had persuaded other persons by, *inter alia*, promising them a sum of money, to 'beat up' the father of his ex-girlfriend. The persons who executed the plan then caused serious injury with a knife to someone they mistook for the intended victim. This took place in January, in the evening, in the dark, and the defendant had not been present at the scene to identify the intended victim. Moreover the persons executing the plan did not know the intended victim and the defendant had supplied them with only very limited information about the intended victim's appearance. So in this case the way in which the assault was carried out deviated from what had been agreed and the victims was a different person. The defendant had been convicted by the appeal court of joint perpetration of premeditated serious assault.[222] In the Supreme Court's view, the appeal court was entitled to hold that the defendant had had conditional intent with regard to inflicting serious physical injury on a person who later turned out to be the (wrong) victim. The fact that the defendant had agreed with his co-perpetrators that they would 'beat up' the intended victim did not detract from this, in the Supreme Court's view.[223]

Another example is the 2002 Supreme Court judgment, mentioned earlier, concerning a father who had his son enter a school in Veghel with a firearm to kill his daughter's ex-boyfriend.[224] During the shooting that ensued several victims were hit. The father was convicted of joint perpetration of the attempted murder of one victim and joint perpetration of the attempted manslaughter of all the (other) victims. Van Dijk writes about this case:

> 'In this case it is clear that the father could not know who might become a victim of the acts to be carried out by his son in the father's absence. The indeterminateness of this object – the killing of "other persons" by his son – is no impediment to establishing intent under criminal law. Viewed in isolation, the existence of intent that is relevant in a criminal law context is insufficient for criminal liability for a completed offence. Such intent only leads to criminal liability if there is sufficient correspondence between the object of the intent and the *actus reus*. In this kind of case the question is whether the vague object of

[221] Zie A. van Dijk, *Opzet, Kans en Keuzes : Een Analyse van Doodslag in het Verkeer*, Zutphen: uitgeverij Paris 2017, p. 240.

[222] De rechtbank was gekomen tot de kwalificatie uitlokken van het medeplegen van zware mishandeling, met voorbedachte raad begaan.

[223] HR 12 juni 2018, ECLI:NL:HR:2018:895, *NJ* 2018, 273. A-G Machielse wijst in zijn conclusie voor dit arrest op twee uitspraken van het Duitse Bundesgerichtshof (BGH 25 oktober 1990, 4 StR 371/90 en BGH 7 oktober 1997, 1 StR 635/96) volgens welke, in de omstandigheden van die zaken, error in persona bij de uitvoerders niet aan uitlokking in de weg staat. Vergelijk ook RB Limburg 13 november 2019, ECLI:NL:RBLIM:2019:10220.

[224] HR 17 september 2002, ECLI:NL:HR:2002:AE6118.

> the intent (another person's death) corresponds sufficiently with the very specific *actus reus* (the death of this victim). This does not lead to dogmatic problems either, however. First it can be noted that Dutch law sets relatively low requirements for correspondence. Neither a causal course of events that deviates from the initial idea nor *error in persona* will easily be an impediment to establishing correspondence. In these cases a comparison is made between a specific object of the intent and a specific *actus reus*. If the object of the intent is indeterminate, the comparison leads to even fewer issues. After all, the specific *actus reus* can easily be included in the vague object of the intent. In the above-mentioned case, any person killed by the son in the school can be considered to be 'another person'. If the intent is indeterminate the question of correspondence will seldom be problematic.'[225]

The above-mentioned 'general nature' of the intent on the part of the perpetrator is also important in criminal participation. When other persons are involved, more or less unforeseen circumstances often occur, i.e. the course of events is slightly different to what one envisaged. De Hullu writes in this context:

> 'Intent is a legal concept, as is confirmed by the above, and in particular it is broader than "intention". A finding of intent includes a degree of attribution: intent can stretch to include circumstances resulting from the initiation of a chain of events, even though what exactly happened in the end was not the person's precise intention. There are many actions that cannot be completely controlled, but in that regard a slightly different course of events is, from a legal point of view, nonetheless "accepted" by the perpetrator.'[226]

Therefore, for participants too, a deviation in the way the offence is executed in practice will not easily be an impediment to criminal liability on their part.

In the case law we only see, including for participants, the (abstract) approach of Van Dijk and De Hullu. In the 'Colour photocopier judgment' it was said that a person who incites another person to commit theft is responsible for that, even if the persons who actually carry out the theft make a mistake and steal the wrong item.[227] In several criminal cases persons operating in the background have been held liable for the murders, or attempted murders, of several people, even if they intended only one person to be killed (and sometimes a completely different person).[228]

As mentioned above, articles 168 and 289 of the Criminal Code are drafted in abstract terms. As these articles set no specific requirements for the identity of the crashed aircraft or the 'other person' whose life is taken, intent with regard to that identity is not required, and a mistake regarding the identity of the target is not relevant to the finding that the charges are proven, including in the case of participants.

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[225] A. van Dijk, *Opzet, Kans en Keuzes : Een Analyse van Doodslag in het Verkeer*, Zutphen: Uitgeverij Paris 2017, p. 240-241.

[226] J. de Hullu, *Materieel strafrecht*. *Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht*, Deventer: Wolters Kluwer 2021, par IV.2.5.

[227] HR 29 april 1997, ECLI:NL:HR:1997:ZD0148, *NJ* 1997, 654.

[228] Zie o.a. Rb Limburg 13 november 2019, ECLI:NL:RBLIM:2019:10220, r.o. 4.3-4.4. Hoge Raad 17 september 2002, ECLI:NL:HR:2002:AE6118 (Schietpartij school Veghel) en HR 14 oktober 2003, ECLI:NL:HR:2003:AJ1396 (Snookercentrum), Rb Amsterdam 9 mei 2018, ECLI:NL:RBAMS:2018:3196 (Djordy Latumahina).

8.4 Conclusion

The Public Prosecution Service concludes that for perpetrators and participants a mistake in the target is no impediment to a finding that the offences provided for by articles 168 and 287 of the Criminal Code have been proven. For perpetrators and participants evidence is required 'only' of their intent with regard to causing *an aircraft* to crash, or taking the life of *another person*. The nature of the aircraft (military or civilian) and the identities of the victims are not relevant to the applicable definitions of the offences.