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Task Force International Criminal Court
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TF/ICC-300/02

Concerns:

Promise during General Consultation of 20 November 2002 with regard to factual information concerning the status of the EU- (candidate) member states, NATO member states and candidate member states which participate in the NATO "Membership Action Plan" with respect to the International Criminal Court as well as existing agreements between the Netherlands and the United States

As has been promised during the General Consultation on 20 November 2002 about the International Criminal Court, I send you hereby the information requested by the chamber concerning the status of the EU- (candidate) member states, NATO member states and candidate member states which participate in the NATO "Membership Action Plan" with respect to the International Criminal Court as well as existing agreements between the Netherlands and the United States.

The Minister of Foreign Affairs
Mr. J.G. de Hoop Scheffer

Article 98.2 Statute International Criminal Court
- Overview of 'existing treaties' relevant for US citizens staying in the Netherlands

During the General Consultation on 20 November 2002, I promised the Second Chamber of Parliament to provide them in writing with overview of different treaties, which may be relevant with respect to US citizens staying in the Netherlands. Based on these treaties, it may be considered impossible for the Netherlands to honor a request for the surrender of US citizens to the Court without US permission, in particular when taking into account the criminal immunity of persons falling within the scope of these treaties.

Four primary categories of treaties can be distinguished, as has been indicated below (I-IV). Furthermore, there are some other treaties, which can be considered relevant to the issue. Examples are listed under V.

I. Treaties on diplomatic and consular relations

These treaties encompass regulations with regard to diplomatic and consular communication as well as provisions dealing with privileges and immunities of diplomatic and consular officials. The primary purpose of these treaties is to enable these officials to perform their duties on the territory of the recipient state without being hampered. These treaty provisions are foremost a codification of international customary law. Criminal immunity

has been provided for various categories of persons falling within the scope of these treaties, whether under all circumstances or only with respect to acts carried out in their official capacity. The most important treaties within this category are the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963)

II. Military treaties

Military treaties contain provisions on the basis of which the jurisdiction of the state parties has been defined and/or provisions, which furnish criminal immunity. Examples of treaties, which fall within this category are the 1950 Agreement on reciprocal assistance regarding defense between the Netherlands and the United States of America (1950) and the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (1951).

III. Treaties concerning the suppression of narcotic activities

Also with respect to other issues, the Netherlands and the United States Reached agreements which may be relevant for US citizens staying in the Netherlands. This concerns the Agreement of Cooperation between the Kingdom of the Netherlands and the Government of the United States of America Concerning Access to and Use of Facilities in the Netherlands Antilles and Aruba for Aerial Counter-Narcotics Activities (2000). This agreement includes a provision, which deals with, among others, criminal immunity. Furthermore, the 1994 Agreement between the Kingdom of the Netherlands with respect to Aruba and the United States of America concerning Customs Pre-clearance may be considered relevant. This agreement contains provisions based on which the jurisdiction of state parties is clearly defined and which provide for criminal immunity.

IV. Agreements concerning headquarters, concluded with international organizations based in the Netherlands

Seat-agreements are concluded in order to enable the independent functioning of (organs of) international organizations on the territory of the host state. From 1945, the Netherlands has concluded these kind of treaties with international organizations seated here. These treaties mostly deal with the status of the organizations or their organs in the Netherlands and the privileges and immunities of the staff. Genuinely, closer identified categories of persons receive criminal immunities. Examples of these treaties are: Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (1951), the Agreement between the Kingdom of the Netherlands and Supreme Headquarters Allied Powers Europe (SHAPE) on the special conditions applicable to the establishment and operation of international military headquarters within the European territory of the Kingdom of the Netherlands (1964), the Exchange of Notes between the Dutch Government and SHAPE on the operation of AFCENT in the Netherlands (1969), the Exchange of Notes between the Government of the Kingdom of the Netherlands and NATO on the operation of the NATO Airborne Early Warning and Control Program Management Agency in the Netherlands (NAPMA, 1979), the Exchange of Notes between the Government of the Kingdom of the Netherlands and the President

of the "Iran-United States Claims Tribunal" on granting of Privileges and Immunities to the Tribunal (1990), the Agreement concerning the headquarters of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (1994), the Agreement between the organization for the prohibition of chemical weapons (OPCW) and the Kingdom of the Netherlands concerning the headquarters of the OPCW (1997).

V. Other treaties

The Charter of the United Nations falls within this category. Based on Chapter VII of the Charter, the Security Council adopted Resolution 1422 on 12 July 2002. By virtue of this resolution, the ICC may not initiate or conduct an investigation or prosecution against American participants of UN-operations or operations authorized by the Security Council. With regard to these US citizens, the ICC is not allowed to make a request for surrender to the Netherlands. Resolution 1422 remains in force for a period of one year.

Furthermore, the Statute of the ICC can be considered relevant here. An extradition treaty exist between the Netherlands and the United States on the basis of which both states are obliged to respect requests to extradite by the other party (the common exceptions like ne bis in idem are also included). In case the United States and the Court simultaneously request the Netherlands to extradite or surrender a person, the Netherlands may be at liberty on the basis of art. 90(6) and (7) of the ICC Statute to respect the request made by the United States instead of the one made by the Court. While this does not concern a situation in which the United States has to give permission for the extradition of US citizens to the Court, the Netherlands has the opportunity to extradite an US citizen to the United States rather than to surrender that person to the Court. Moreover, it is customary to include in extradition treaties clauses on further extradition or, in other words, on the prohibition of the requesting state to surrender the extradited person to a third state without the permission of the original extraditing state. Such a provision is included in the extradition treaty between the Netherlands and the United States (art. 15). This principle is furthermore acknowledged in art. 101 ICC Statute. Those clauses may hamper the surrender of an US citizen to the Court by the Netherlands without permission of the United States.