

# THE NETHERLANDS

[Original: English]

Decree of 23 January 2020, no. 2020000099, appointing a national group in the Permanent Court of Arbitration (Appointment of a National Group (Permanent Court of Arbitration) Decree)

We, Willem-Alexander, by the grace of God King of the Netherlands, Prince of Orange-Nassau, etc., etc., etc.

On the recommendation of Our Minister of Foreign Affairs, no. Min-Buza.2019.4726-10, of 13 January 2020;

Having regard to article 23 of the Convention for the Pacific Settlement of International Disputes done at The Hague on 29 July 1899 (Bulletin of Acts and Decrees 1900, no. 163 and Dutch Treaty Series 1963, no. 157);

Having regard to article 44 of the Convention for the Pacific Settlement of International Disputes done at The Hague on 18 October 1907 (Bulletin of Acts and Decrees 1910, no. 73 and Dutch Treaty Series 1963, no. 158);

Having regard to article 4, paragraph 1 of the Statute of the International Court of Justice done at San Francisco on 26 June 1945 (Dutch Treaty Series 1971, no. 55) ('ICJ Statute');

Having regard to article 36, paragraph 4 of the Rome Statute of the International Criminal Court done at Rome on 17 July 1998 (Dutch Treaty Series 1999, no. 13) ('Rome Statute');

Having regard to paragraph 3 of the Special Regulations for the award of the Nobel Peace Prize and the Norwegian Nobel Institute;

Decree:

Article 1

For the purposes of this Decree:

Our Minister means Our Minister of Foreign Affairs;

National Group means the National Group in the Permanent Court of Arbitration referred to in article 2.

Article 2

There is a National Group in the Permanent Court of Arbitration.

Article 3

1. The National Group comprises no more than four members. The following are eligible for membership in the order in which they are listed:

a. the chair of the Advisory Committee on Issues of Public International Law;

b. the judge on the European Court of Human Rights who is a Dutch national and who was elected on the basis of a nomination by the Netherlands;

c. any judge on the International Court of Justice who is a Dutch national and was elected on the basis of a nomination by the Netherlands;

d. any judge on the International Criminal Court who is a Dutch national and was elected on the basis of a nomination by the Netherlands or, failing such a candidate, a member of the judiciary;

e. any judge of the International Tribunal for the Law of the Sea who is a Dutch national and was elected on the basis of a nomination by the Netherlands;

f. any member of the United Nations International Law Commission who is a Dutch national and was elected on the basis of a nomination by the Netherlands.

2. Members of the National Group are appointed by Our Minister for six years. Termination of a position referred to in paragraph 1 pending membership of the National Group does not entail termination of membership of the National Group.

3. The head of the International Law Division of the Ministry of Foreign Affairs acts as civil service adviser to the National Group.

4. Members of the National Group may tender their resignation to Our Minister. They may also be suspended or dismissed by Our Minister on grounds of unsuitability or incompetence or for other compelling reasons.

#### Article 4

1. Members of the National Group are members of the Permanent Court of Arbitration and may be called upon to act as arbitrators for the purposes of settling disputes between states pursuant to the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.

2. The National Group may, through Our Minister, submit to:

a. the UN Secretary-General nominations of candidates for election to the International Court of Justice;

b. the President of the Assembly of States Parties to the Rome Statute nominations of candidates for election to the International Criminal Court.

3. The National Group may submit nominations of candidates for the Nobel Peace Prize to the Norwegian Nobel Committee.

#### Article 5

At the request of Our Minister, the National Group must submit to Our Minister a nomination of a candidate for election to:

a. the International Tribunal for the Law of the Sea;

b. the United Nations International Law Commission.

#### Article 6

1. The National Group must consult with our Minister on supporting the nomination of a candidate possessing Dutch nationality for election to the International Court of Justice. The National Group must nominate no more than four candidates for every election to the International Court of Justice, of whom no more than two possess Dutch nationality. The number of candidates nominated by the National Group must not exceed twice the number of seats to be filled.

2. The National Group must consult with our Minister on supporting the nomination of a candidate possessing Dutch nationality for election to the International Criminal Court. For every election to the International Criminal Court, the National Group must nominate no more than one candidate who is a national of a State Party to the Rome Statute.

#### Article 7

1. The National Group must follow a fair, transparent and consistent procedure in selecting a candidate for nomination as referred to in article 4, paragraph 2 or article 5.

2. The National Group must refrain from selecting its own members for the positions referred to in article 4, paragraph 2 or article 5, except where members holding one of these positions are eligible for re-election once.

#### Article 8

The National Group must take into account in its activities international regulations currently in force.

#### Article 9

Our Minister must make provision for the secretariat of the National Group.

#### Article 10

Royal Decrees issued prior to the entry into force of this Decree that appoint persons to perform the activities referred to in article 4 are regarded as appointment Decrees pursuant to this Decree in cases where the person's term of office has not yet expired.

#### Article 11

This Decree may be cited as the Appointment of a National Group (Permanent Court of Arbitration) Decree.

#### Article 12

This Decree enters into force on the day after the date of publication of the Government Gazette in which it appears.

Our Minister of Foreign Affairs is responsible for implementing this Decree, which will be published in the Government Gazette with the explanatory memorandum.

The Hague, 23 January 2020,

Willem-Alexander

S.A. Blok

Minister of Foreign Affairs

### **Explanatory memorandum**

#### Introduction

The Convention for the Pacific Settlement of International Disputes done at The Hague on 29 July 1899 (Bulletin of Acts and Decrees 1900, no. 163 and Dutch Treaty Series 1963, no. 157) ('the 1899 Convention') and the Convention for the Pacific Settlement of International Disputes done at The Hague on 18 October 1907 (Bulletin of Acts and Decrees 1910, no. 73 and Dutch Treaty Series 1963, no. 158) ('the 1907 Convention') provide for the establishment of the Permanent Court of Arbitration (PCA): the first permanent international mechanism for the peaceful settlement of disputes between states. In accordance with article 23 of the 1899 Convention and article 44 of the 1907 Convention, every party to the Conventions designates no more than four persons as members of the PCA. They form that state party's National Group.

Membership of the PCA (and hence of the National Groups) is open to those who possess both a broad, in-depth knowledge of international law and very wide international judicial and/or academic experience. Members are appointed for a term of six years. Members of the PCA should be available to act as arbitrators in the settlement of disputes between states. In addition, the National Groups are charged with tasks under various instruments, in particular with nominating candidates, on behalf of states, for election as members of the International Court of Justice (ICJ) and the International Criminal Court (ICC).

This Decree is based on three considerations, aimed at regulating the membership and tasks of the Dutch National Group ('the National Group') in more detail. First, the government wishes to

involve the National Group in the recruitment and selection of candidates who can be nominated by the Netherlands for positions other than the international judicial positions referred to above. This is in accordance with the government's policy of arranging for the recruitment, selection and nomination of candidates to be carried out by independent persons by means of a fair, transparent and consistent process. Second, the Decree regulates the membership of the National Group. Lastly, it provides for further rules governing the National Group's performance of its tasks.

#### Tasks of the National Group

Originally, members of the PCA had to be available only to act as arbitrators in the settlement of disputes between states. A number of additional tasks were later added to the responsibilities of PCA members in the context of the National Groups.

On 27 November 1895, Dr Alfred Bernhard Nobel drew up his will, under which the Norwegian Nobel Committee awards the Nobel Peace Prize to persons who have 'done the most or best to advance fellowship among nations, the abolition or reduction of standing armies, and the establishment and promotion of peace congresses'. This accords with the aim of the 1899 Convention: to ensure that disputes between peoples are settled not by force or superior power but by law. The power of National Groups to nominate candidates for the Nobel Peace Prize is based on paragraph 3 of the Special Regulations for the award of the Nobel Peace Prize of 10 April 1905.

In addition to the power of National Groups to nominate candidates for the Nobel Peace Prize, article 4 of the Statute of the Permanent Court of International Justice done at Geneva on 16 December 1920 (Bulletin of Acts and Decrees 1921, no. 1049) assigned National Groups the power to nominate candidates for election to the Permanent Court of International Justice, the judicial organ of the League of Nations. When the Permanent Court of International Justice was succeeded by the ICJ, the judicial organ of the United Nations, the power to nominate candidates for election to the ICJ was similarly vested in National Groups: see article 4 of the Statute of the International Court of Justice done at San Francisco on 26 June 1945 (Dutch Treaty Series 1971, no. 55). Echoing this provision, article 36, paragraph 4 of the Rome Statute of the International Criminal Court done at Rome on 17 July 1998 (Dutch Treaty Series 1999, no. 13) enables states parties to make National Groups responsible for nominating candidates for election to the ICC. This is what the Kingdom of the Netherlands has decided to do.

Nominations by the Netherlands for the international judicial positions governed by this Decree include nominations by the National Group (for the ICJ and the ICC) and nominations by the Minister of Foreign Affairs (see below). Article 4 of the Decree sets out the powers vested in the National Group pursuant to the instruments referred to above. The National Group has autonomous powers to nominate candidates on behalf of the Netherlands for election to the ICJ or the ICC. However, such nominations do not oblige the government to campaign or to vote for the candidate thus nominated. The situation is different if the government has notified the National Group, prior to the nomination, of its willingness to campaign for the election of a candidate nominated by the National Group.

The government wishes to involve the National Group not just in the tasks listed above, but also in the recruitment and selection of candidates who can be nominated by the Netherlands for posts other than the international judicial positions referred to in article 4. The positions in question are listed in article 5 of this Decree. Unlike the recruitment, selection and nomination of candidates for the ICJ and the ICC, which are carried out by the National Group at the request of the UN Secretary-General or the President of the Assembly of States Parties to the Rome Statute respectively, recruitment and selection for the positions referred to in article 5 are carried out at the request of the Minister of Foreign Affairs, who is subsequently responsible for nominating candidates for the positions referred to in article 5.

#### Strategy for candidacies

There is a difference between candidacies where a state is the candidate and those where a state nominates an individual as a candidate. In the first case, the Kingdom of the Netherlands is the candidate and after election takes its seat in the body in question. Here the Kingdom's representative acts on instructions from the government; this applies, for example, to membership of the UN

Security Council. In the second case, an individual is nominated by a state but nevertheless, once elected, discharges the duties of the position in a personal capacity and in an independent and impartial manner, without instructions from the state. The candidacies governed by this Decree belong to the second category.

Dutch candidacies, including those for the ICJ and the ICC, should be in accordance with the government's policy priorities and should be viewed as a whole. To this end the government will adopt a strategy for candidacies, indicating the organs or positions in which the government believes that it is important for the Netherlands or a candidate nominated by the Netherlands to sit. To ensure that the candidate nominated has a realistic chance of being elected, the government will need to campaign on behalf of and reach agreement with other states on support for the Dutch candidate. Once the strategy has been adopted, the government will make more detailed implementing arrangements in consultation with the National Group.

The strategy will indicate which candidacies the government is prepared to campaign for. The National Group will be informed of the strategy after it is adopted, to allow sufficient time for it to recruit, select and, where applicable, nominate candidates. This will not apply if the government has decided that the Kingdom should stand for one of the non-permanent seats on the UN Security Council. A candidacy of this kind will take priority over campaigning for other candidacies; in principle all other campaigns will be suspended for three or four years before the election to the Security Council.

Given The Hague's status as the legal capital of the world, there should always be a nominee of the Netherlands on (1) the ICJ, (2) the ICC, (3) the International Tribunal for the Law of the Sea (ITLOS) or (4) the UN International Law Commission (ILC). It is therefore not necessary for the National Group to recruit, select and, where appropriate, nominate a candidate for every election to the positions referred to in articles 4 and 5.

#### Membership of the National Group

Until the entry into force of this Decree, members of the National Group were selected informally and were then appointed by royal decree. The Ministry of Foreign Affairs then informed the Secretary-General of the PCA of the appointments. This Decree provides for membership of the National Group to be determined in an objective, transparent and consistent way. Individuals are eligible for membership on the basis of posts they hold or have held. In view of the nature of these posts, such individuals are deemed to possess both a broad, in-depth knowledge of international law and very wide international judicial and/or academic experience. Under this Decree it will only be necessary to follow a procedure to select a member of the National Group from the ranks of the judiciary as the occasion arises, thereby ensuring that the National Group possesses knowledge and experience in the field of international criminal law. The Council for the Judiciary will be involved in the selection of a member of the judiciary to serve in the National Group. The importance of diversity will be taken into account in the recruitment and selection of persons for the posts which render their holders eligible for membership of the National Group. This will ensure diversity in the membership of the National Group.

Article 3 of the Decree lists the eight individuals who are successively eligible for membership of the National Group. However, it will not always be the case that a Dutch national, elected on the basis of nomination by the Netherlands, is a member of the ICJ, the ICC, ITLOS or the ILC. As noted above, the government aims to ensure that one of these positions is always held by a person nominated by the Netherlands. It is unlikely that more than one of these positions will be held at the same time by Dutch nominees. The members of the National Group may complete the full six-year term of their appointment even if, by the end of that term, they no longer hold the post from which they derived such membership.

The Head of the International Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs is the civil service adviser to the National Group. The civil service adviser will not be involved in the selection of candidates for the nominations governed by this Decree. The National

Group's secretariat will be provided by the International Law Division of the Ministry of Foreign Affairs.

#### Performance of tasks by the National Group

The National Group should take account of the applicable international regulations and those laid down by this Decree in the performance of its tasks.

The main points of the international regulations governing the recruitment, selection and nomination of candidates for the positions in question concern the qualifications of candidates, the number of candidates to be nominated, their nationality, the need for timely consultation with relevant judicial bodies and knowledge institutions, and requirements concerning the nomination. These international regulations may be found in articles 2 to 6 of the ICJ Statute, articles 36 and 37 of the Rome Statute, articles 2 to 4 of the Statute of the International Tribunal for the Law of the Sea, and articles 2 to 8 of the Statute of the UN International Law Commission. Depending on the position in question, relevant judicial bodies and knowledge institutions in the Netherlands include in any event the Council for the Judiciary, the Advisory Committee on Issues of Public International Law, and the Netherlands Institute for Human Rights.

This Decree provides for more detailed rules for the National Group's performance of its tasks. The Group is expected to employ a fair, transparent and consistent procedure when recruiting and selecting candidates for the positions in question and to ensure that candidates are selected on the basis of an objective assessment of their knowledge and experience. The procedure should in any event involve the publication of a recruitment profile with specific requirements that candidates should meet in terms of knowledge and experience.

To date, the National Group has employed an informal procedure in making nominations, allowing its members to put themselves forward for nomination. The Decree will make this impossible, except where members holding a position governed by this Decree are eligible for re-election once. The new procedure accords with the government's goal of restricting appointments of individuals to international positions to two terms of office at most.

To implement the strategy referred to above, the Ministry of Foreign Affairs and the National Group will hold regular consultations on the recruitment, selection and nomination of candidates for the international judicial positions covered by this Decree. As stated above, the National Group has autonomous powers to nominate candidates for election to the ICJ or the ICC, but the government is not obliged to campaign or vote for such candidates. Article 6 of the Decree therefore states that the National Group must consult the Minister of Foreign Affairs before nominating a Dutch national as a candidate for the ICJ or the ICC. This requirement does not apply to the nomination of candidates for the Nobel Peace Prize or to the National Group's powers in relation to co-nomination.

In conclusion, it should be noted that communication between the UN Secretary-General and the National Group or its members, and between the President of the Assembly of States Parties to the Rome Statute and the National Group should take place through diplomatic channels to ensure that a nomination genuinely comes from the National Group.

S.A. Blok

Minister of Foreign Affairs