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Soort procedure:	Hoger beroep
Inhoudsindicatie:	Vertaling in de Engelse taal van de Afghaanse zaak, nr. AZ7143. In the period of the end of 1983 to the end of 1990 the accused was in Kabul, in Afghanistan, at the time of the communist regime supported by the Soviets, head of the military intelligence service, the KhAD-e-Nezami, and deputy minister of the Ministry of State Security (WAD). In performing these duty/duties the accused, as can be proven, has in respect of three victims been guilty of very grave offences: being a co-perpetrator to torture and the breach of the laws and practices of war. Article 1 (old) of the “Uitvoeringswet folteringverdrag” UWF [Convention on Torture Implementation Act] and the Articles 8 (old) and 9 (old) of the “Wet oorlogsmisdrijven” [War Crimes Act].
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Uitspraak

LJN: AZ7143, The Hague Court of Appeal, 2200613105

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Kind of procedure : Appeal
Indication of contents : In the period of the end of 1983 to the end of 1990 the accused was in Kabul, in Afghanistan, at the time of the communist regime supported by the Soviets, head of the military intelligence service, the KhAD-e-Nezami, and deputy minister of the Ministry of State Security (WAD). In performing these duty/duties the accused, as can be proven, has in respect of three victims been guilty of very grave offences: being a co-perpetrator to torture and the breach of the laws and practices of war. Article 1 (old) of the “Uitvoeringswet folteringverdrag” UWF [Convention on Torture Implementation Act] and the Articles 8 (old) and 9 (old) of the “Wet oorlogsmisdrijven” [War Crimes Act].

JUDGMENT

Cause-list number : 22-006131-05
Public Prosecutor’s
Office number(s) : 09-751004-04 and 09-750006-05
Date of judgement : 29 January 2007
IN DEFENDED ACTION

Court of Appeal in The Hague
Three-judge criminal section

Judgment

passed in appeal against the judgment of the The Hague District Court of 14 October 2005 in the criminal case against the accused:

[accused],
born in [place of birth] (Afghanistan) on [date of birth] 1948,
at present detained in the Penitentiary Institution Midden Holland – Remand Prison De Geniepoort in Alphen aan de Rijn.

1. Examination of the case

This judgment is passed as a result of the examination in court at the hearing in the first instance and the examination in court at the hearings in appeal of this court of appeal of
3 and 17 May 2006, 18 September and 2 October 2006,
4, 11 and 13, December 2006 and 15 January 2007.

The court of appeal has taken cognizance of the demand from the advocate-general and of what has been put forward by and on behalf of the accused.

2. Indictment

The accused is charged with what is mentioned in the originating summons, as amended on the demand of the public prosecutor at the hearing in the first instance.
Copies of the summons and of the demand amendment to the indictment are inserted in this judgment.
The court of appeal has given a consecutive numbering to the offences included in these summons. It will follow the numbering in this judgment.

3. Course of the proceedings and scope of the appeal.

The accused, who was at the time, as an Afghan high-ranking soldier in Kabul, in charge of the military intelligence service Khad-e-Nezami, is charged in the first instance in two summons with – in short – the following offences:
1. being a co-perpetrator in Kabul to breaching the laws and practices of war in the period of 1 January 1982 up to and including 31 December 1988 by committing violence against seven victims (partly by the serious result, partly qualified otherwise);
2. being a co-perpetrator in Kabul in the period of 1 November 1989 up to and including 31 December 1990 to the torture of two victims;
3. allowing that subordinates violate in Kabul in the period of 1 October 1985 up to and including 31 December 1988 the laws and practices of war by committing violence against two victims (qualified).

The accused was in the first instance acquitted of count 1 of the indictment, as well as of allowing that against one of the two victims mentioned in count 3 of the indictment violence was committed. He was sentenced with regard to count 2 of the indictment, as well as with regard to count 3 of the indictment, committed in respect of the other victim, to imprisonment for a term of twelve years, less the period spent in pre-trial detention. Only the accused appealed against the judgment of the district court. The judgment of the district court with respect to count 3 of the indictment raises the question of the scope of this appeal, in view of what has been determined in Article 407, second paragraph, Wetboek van Strafvordering (Sv) (Netherlands Code of Criminal Procedure). On that subject the court of appeal, together with the advocate-general and the defence, has come to the conclusion that count 3 of the indictment should be regarded as an implicit cumulative indictment and that therefore the reproach with respect to one of the in that offence mentioned victims, for which the accused was acquitted, is at present not under discussion anymore.

4. Assessment of the judgement of which this appeal

To a large extent the court of appeal comes to the same decisions as the district court, albeit on partly different grounds. In relation to this the court of appeal will quash the judgment of which this appeal.

5. Review of the international (criminal) legal defences.

5.1. The defence has put forward a number of defences which have (partly) as a joint
characteristic: the international law aspects of the prosecution of the accused and the ‘scope’ of the Articles 3 and 8 of the “Wet oorlogsstrafrecht” WOS [Criminal Law in Wartime]. The court of appeal summarizes – in short (and reproduced in a different order) - these defences, all argued extensively in the pleading notes.
a. Dutch criminal law lacks in the case at issue (universal) jurisdiction if in the period charged a non-international armed conflict were concerned, to which ‘only’ the common Article 3 of the Geneva conventions applies. These conventions (or other international regulations) do not provide for universal criminal jurisdiction with respect to breaches of these articles; establishing such jurisdiction

needs an international authorization which is not to be found in the unwritten international law either, as the Yugoslavia Tribunal (ICTY) in its decision of 2 October 1995 also states. The defence is of the opinion that at the time there was in Afghanistan, at least in so far as of interest for the charged conducts, no international armed conflict. Therefore the public prosecutions department, exercising its prosecution competence in violation of the international law, should be barred prosecution as to this prosecution;
b. the WOS (at least in the eighties) does not pertain to violation of the standards included in the common Article 3. Lifting the immunity from prosecution through lapse of time which was laid down by law of 8 April 1971 (Bulletin of Acts and Decrees [Stb] 210) in Article 10 of the WOS (assuming a non-international armed conflict) does therefore not extend to what the accused (in count 3) is blamed for with respect to the alleged victim [victim 1]. The international juridical view that gave cause to this amendment to the Act, only relates to the very grave war crimes, the 'grave breaches' in the Geneva conventions. The offence the accused is reproached with sub 3. has therefore become extinguished by limitation. Also in that respect the public prosecutions department should be barred prosecution in this prosecution;
c. moreover, this alleged victim cannot be regarded as a 'protected person' in the sense of the Geneva Conventions. This should therefore lead to the accused being discharged of any further prosecution in respect of this offence;
d. in view of what is stated sub b) the punishablility of the accused as to the charged torture, assuming a non-international armed conflict, can neither be based on the common Article 3, nor on Article 8 of the WOS. The legislator has in this Act only wanted to comply with the obligation of 'grave-breaches' pursuant to the Geneva conventions. The punishability of acting should be judged according to the law of the location of the crime; applying Dutch law to acts performed in Afghanistan is in violation of the principle of legality. This should also lead to discharge of the accused of any further prosecution for this offence;
e. erroneously in count 3 the nature of the conflict and the protected status of the alleged victim have not been included and (factually) substantiated. The way of charging as it is used would in the ICTY practice not be accepted, it should lead to invalidation of the summons.

5.2. Before the court of appeal discusses the specific defences, it will put into words its views in relation to the general aspects of the prosecution of the accused and the applicable law.

5.2.1. The accused is reproached for actions he is supposed to have performed in Kabul in Afghanistan in the eighties as a high-ranking Afghan soldier who was in charge of the command of the military intelligence service. His actions are – mentioned in short – related to participating in, or (allowing) torture, of a number of Afghan citizens who were under the control of this service. Prosecution was started against him after he had sought refuge in the Netherlands as a asylum seeker and had come to the notice of the Dutch judicial authorities.
In view of this it can be established that the basis for the prosecution in the case at issue does not lie in the principles of territoriality, nationality or protection, but in the (secondary) principle of universality. Also the court of appeal recognizes that this jurisdiction, also in its secondary form, is applied by the Dutch legislator with considerable reticence and raises questions of international legitimacy, as it influences the sovereignty of the territorial state.

5.2.2. The reproach made to the accused falls, in the opinion of the public prosecutions department under the scope of the Geneva conventions of 12 August 1949. These conventions and the standards included in these conventions are primarily related to war as international armed conflict; some of these standards are regarded (for instance in Article 147 of the Fourth convention) as 'grave breaches'. However, the conventions also formulate in the common Article 3 the (minimum) standards in respect of the (decent) treatment of "persons who do not directly participate in the hostilities" in case of a non-international armed conflict. The court of appeal establishes that these standards are described by the International Court of Justice (ICJ) in its judgment of 27 June 1986 in the case Nicaragua vs USA (§ 218, 219; with reference to an earlier judgment from 1949) as "minimum yardsticks; they ... reflect elementary considerations of humanity". And: "the minimum rules applicable to international and non-international conflicts are identical. ... The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions". In the case at issue it concerns (participation in, or allowing) torture, which is in so many words mentioned in Article 3, preamble and sub 1 under a, as well as in Article 147 (Fourth convention).
All this leads to the fact that the reproached behaviour should thus be regarded as grave breach of the substantive standards of the international humanitarian law in international ánd non-international armed conflict (albeit that in the latter case it cannot be called 'grave breaches' in respect of the convention). Insofar there is – also in the opinion of the defence – no difference as to the nature of the conflict.

5.2.3. With respect to the obligations of the parties to the convention to maintain the substantive standards of the international humanitarian law, the conventions do make a distinction.

Article 146 of the Fourth convention reads as follows:

[1.] The Grand Parties to the Convention bind themselves to achieve all necessary legal regulations, needed to determine effective

criminal provisions for persons who have committed one of the grave breaches of this Convention, described in the following article, or have given orders to commit these grave breaches.
[2.] Any Grand Party to the Convention is obliged to trace persons who are suspected of having committed one of these grave breaches, or having given orders to commit these grave breaches and must bring them, regardless of their nationality, before its own courts. It can also, if it prefers to do so and in accordance with the provisions of its own legislation, transfer them for trial to another Grand Party to the Convention which has interest in the prosecution, on the condition that this Party to the Convention submits against the accused a charge supported by proof sufficient to justify a prosecution.
[3.] Each Grand Party to the Convention shall take measures, necessary to prevent the actions that violate the provisions of this Convention, which do not fall under the grave breaches described in the following article.
[4.] ...

The court of appeal takes this provision to mean that the first two paragraphs of this article impose the obligation to penalization, as well as to tracing and trying regardless of the nationality in case of 'grave breaches', but that with respect to other violations (such as in case of Article 3) there is 'only' the obligation to prevent these other violations, without describing the way in which this should take place. In itself the text of the convention leaves the possibility open that also in the afore-meant latter case the criminal law will be used for enforcement. The question whether a state is entitled to do so seems in itself to be answered absolutely affirmatively, in case it concerns the own territory, own citizens as perpetrators or victims. But in the case at issue it concerns secondarily exercised universal jurisdiction.
The defence argued and substantiated with many sources that the Dutch criminal law –internationally seen - cannót be extended that far. There are two things contrary to that. On the one hand it can be established that in 1987 the Dutch legislator based in the parliamentary history of the Implementation Act Torture Convention (Dutch: Uitvoeringswet folteringsverdrag UFV) the applicability of the (although somewhat more restrictive interpreted by the Supreme Court) principle of universality also on "the unbearableness of the thought that torturers, ... , can freely move to other countries and can even come, unpunished, face to face there with their victims who fled to foreign countries". This situation is the case in the case at issue could not be simply 'solved' by transferring the accused to his country of origin (and location of the crime), as that could possibly be at odds with absolute rights guaranteed in the EVRM (ECHR). On the other hand, because the legislator – in any way according to the letter – has laid down this jurisdiction for the (war) crimes described in the Articles 8 and 9 of this law, without any stipulations in Article 3, preamble and under 1º of the WOS. This (part of) article reads:

Without prejudice to what has been determined in that respect in the Criminal Code and the Military Penal Code the Dutch criminal law applies to:
1o. anyone who is outside the Kingdom in Europe guilty of an offence described in the Articles 8 and 9; ....

5.3. The court of appeal is, with respect to the nature of the conflict, of the opinion together with the court, the defence and (more implicitly) the public prosecutions department that the combat in Afghanistan in the eighties of the past century primarily concerned a non-international armed conflict and in particular between the regime in Kabul and the 'Mujahedin' which revolted – also armed – against it.
It is true that this regime was also supported by Russian advisers and army units (which also participated in fights), but in the opinion of the court of appeal this does not affect the primarily non-international character of the combat. As a matter of fact an international armed conflict is in the first place characterized by the fact that the conflict takes place between sovereign states; the court of appeal refers to Article 2 of the Fourth Geneva convention. That was not the case, as also appears from the statements used as evidence and the reports of the witness-expert Giustozzi.

5.4. Against this background the court of appeal considers the following with respect to the specific defences.

5.4.1. What has been put forward above with respect to Article 3 WOS concerns the question whether this statutory provision is in accordance with international law.

However, before this question can be answered, the question whether the Dutch court, in view of the division of powers between the legislature and other public bodies, as laid down in Article 94 of the (Dutch: Grondwet GW) Constitution, is competent to give an opinion about this question. Article 94 GW reads:

Statutory regulations applicable within the Kingdom shall not be applied if this applicability is not consistent with provisions of conventions binding to everyone, and of resolutions of international organizations.

This provision raises the question whéther the court is competent indeed to not apply Article 3 WOS in the case at issue. Apart from that the question arises whether in the (parliamentary) history of the realization of Article 3 WOS itself there are any leads for a –

with respect to its clear wordings – restrictive interpretation of this article of law, with the conclusion that this article does in the case at issue not provide for secondary universal jurisdiction, as argued by the defence.

5.4.2. As seems to have been widely accepted,
Article 94 GW does not allow the court to test laws against unwritten international law. This interpretation of the law laid down by the Supreme Court in its Nyugat II judgment of 6 March 1959 NJ (Netherlands Law Journal) 1962.2 has (also) been a basis to the 1983 Constitutional Revision and is also expressed (a contrario) in the text of this article of the constitution. In the opinion of the court of appeal no argument, at least no sufficiently explicit argument can be derived from the Geneva conventions that makes clear that Article 3 WOS is in violation of international law written in these conventions. It is true that the defence has pointed at a general rule of international law that universal jurisdiction may only be exercised in so far as international law gives authorisation thereto and argued that such authorisation with respect to violations of the common Article 3 (in case of non-international armed conflicts) is not to be found in the Geneva conventions; however, the counsel has when asked admitted that such rule of international law is nót to be found in any written convention provision.
At this state of affairs the court of appeal deems itself not competent to test Article 3 WOS against – apparently unwritten – international law. Also the public prosecutors department is in its prosecution decision bound to Article 94 GW; for that very reason the complaint that the public prosecutors department exercises its prosecution competence in violation of international law, will not wash.

The defence has also argued by rejoinder that pursuant to Article 8 Criminal Code (Sr) the applicability of the regulation of jurisprudence in the Articles 2 up to and including 7 "is limited by the exceptions recognized in international law" and that Article 8 pursuant to Article 91 Sr álso applies to the WOS. Apart from the question to which international exceptions in this article applies (in the opinion of the court of appeal: immunity) and apart from what meaning should be attached in this respect to the preamble of Article 3 WOS, the court of appeal is of the opinion that Article 8 Sr at the interpretation of Article 3 WOS can not set aside the Constitution.

5.4.3. The court of appeal unnecessarily points out against the background of the prohibition of testing established above, that as appears from the Explanatory memorandum to the Act (see note 3, page 4) of the UFV, the legislator was already in 1987 apparently of the opinion that "torture committed in case of internal or international armed conflict constitutes a violation of the laws of war, ... made punishable in Article 8 of the Criminal Law in Wartime Act". The regulation of the punishability (and of the jurisdiction) of torture in the WOS did in its opinion álso concern violation of the common Article 3. This regulation seems rather far-reaching; the (former) Advocate General Van Dorst, for instance, argues in his conclusion (§ 10) preceding the judgment of the Supreme Court of 11 November 1997 NJ 1998.463 (Knesevic II) that our country takes an exceptional position by making not only the 'grave breaches' punishable but also the less grave breaches, with universal jurisdiction. However, support for establishing secondary universal jurisdiction (thus no trial by default) is to be found in the development of convention law after the Second World War, as represented in separate views of courts as regards the judgment of the ICJ of 14 February 2002 in the case Yerodia (Congo vs Belgium). In relation to the ultra petita-rule, the ICJ itself did not get around to answering the question about the international legitimacy of the (unlimited) universal jurisdiction exercised by Belgium 'in absentia'.

5.4.4 Moreover, the court of appeal establishes with respect to the substantiation of the Criminal Law in Wartime Act, as the Supreme Court analyzed in its Knesevic II judgment,
that the legislator wanted at the time to fully comply with the convention obligation of the Geneva conventions. In doing so – this should be granted to the defence – the obligation to make 'grave breaches' punishable was especially thought of, which cannot be a surprise against the background of the at the time very recent global conflict. However, from the oral hearing of the legislative proposal (pages 2247 and 2251) it appears (also at the time) that the possibility was kept open that crimes committed in a non-international armed conflict (it concerned the coupe in Bolivia) would be tried in our country. Whatever may be: the court of appeal derives from the following legal grounds in the afore-mentioned mentioned judgment of the Supreme Court, that it should be assumed that also in case of violations of the common Article 3, jurisdiction exists:

6.1. The Court of Appeal apparently assumed in the disputed judgment that the offences described in the [...] demand meant and further specified facts, if proven, act in violation of the common Article 3 of the 1949 Geneva Red Cross Conventions and for this reason constitute the crime described in Article 8 WOS. That judgment is not disputed in cassation, so that in judging the ground this should also be assumed.
6.2. The ground serves apparently as an argument that the Court of Appeal unlawfully judged that the Dutch court has jurisdiction with respect to the offences stated in the demand to initiate a preliminary inquiry.
6.3. In view of what has been considered above under 5.3. Article 1 WOS must thus be interpreted that the relevant provisions of this act, including Article 3 preamble and under 1º and the Articles 10, 10a and 11, are always applicable to crimes as described in the Articles 8 and 9, without the restrictions set in the first, second, third paragraph of that Article 1 respectively.

6.4 The Court of Appeal has therefore rightly judged that the Dutch court has jurisdiction with respect to the offences stated in the demand for initiating a preliminary inquiry.

The court of appeal recognizes that the demand meant in the decision was related to offences which were supposed to have been committed in 1992 in the former Yugoslavia, but does not see any lead in the arguments of the Supreme Court for the (supposition) assertion that this jurisdiction grounds would not álso apply in respect of offences of 10 to 15 years earlier, which is the case in the case at issue.
The above leads to the fact that the defence represented under a) as regards lack of jurisdiction should be rejected. The court of appeal again stresses that – also in view of the adagium of 'aut dedere aut punire' – in the case at issue it concerns exercising secondary universal jurisdiction. And the fact that it is important that the accused is present in the territory of the prosecuting state is also stressed in the Explanatory memorandum to the Act international offences.

5.4.5 Also the assertion under b) that the WOS did (at the time) not pertain to violations of the common Article 3 of the Geneva conventions and that lifting the immunity from prosecution through lapse of time does not apply to such offences, should be rejected on the same grounds.

5.4.6 The defence meant under b) should meet the same fate. If there are no grounds to limit the scope of effect of the Criminal Law in Wartime Act, it does not only apply to jurisdiction but also to individual penilazation in Article 8 WOS of war crimes, also in case of non-international armed conflict. In view of the fact that the reproached actions should be regarded as grave violation of substantive standards of international human law (see above § 5.2.2) and criminal jurisdiction would be pointless if it could not take effect because of individual penalization, the court of appeal fails to see any ground not to deem the description of the offence and sanction standard applicable to the accused – for crimes he committed in a non-international armed conflict in Afghanistan -. The court of appeal agrees with the procurator general with the Supreme Court and the advocate general Keijzer in the demand for cassation in the interest of law which led to the judgment of the Supreme Court of 18 September 2001 (AB1471, in the Bouterse case). He concluded (§ 26) inter alia:

"By the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) [Adopted by the General Assembly of the United Nations by Resolution 3452 (XXX), 9 December 1975] the General Assembly of the United States has not only pronounced that torture is in violation of human dignity and of human rights, but also that according to the law of every state torture should be punishable and that cases of torture should be prosecuted".

The fact that at the end of the eighties the accused did not need to take into account what the Dutch Criminal Law in Wartime Act states about actions which is not made punishable in international law and that applying the WOS in his case constitutes violation of the principle of legality, is a defence the accused is not entitled to in the light of the above.

5.4.7. As regards the assertion of the defence under e) that the summons of count 3 should be nullified because the nature of the conflict and the protected status of the alleged victim are not included and (factually) substantiated in the charge, the court of appeal considers the following.
The requirement set cannót be derived from the description of the offence of Article 8 in conjunction with 9 WOS, as this article 'only' makes "violation of the laws and practices of war" punishable. What those laws and practices of war include appears (inter alia) from the Geneva conventions. As indicated above under 5.2.2 the case at issue is related to a reproach concerning a substantive standard which is applicable independently of the nature of the conflict. The denounced charge – in its reference to relevant provisions of the convention – relates to both types of conflict. Although it cannot be excluded beforehand that an explicit alternative indictment would provide an even larger clarity, the court of appeal cannot see that the indictment fails at this point. It has in no way become plausible that because of the way of charging the accused is impeded in (the preparation of) his defence.
The description with regard to the protected persons is included in the common Article 3 in the indictment in the passage about persons who did not directly participate in the hostilities (namely citizens or personnel of army forces that had laid down its weapons or those who had been put hors de combat); moreover, the prohibited actions explicitly mentioned in those articles are factually described, also reporting the circumstances relevant for the criminal qualification pursuant to Article 8 WOS.
In case of an international armed conflict Article 147 of the Fourth Geneva convention only mentions offences "committed against persons protected by the convention". In this convention the persons are described in Article 4: 'persons who, ..., in case of a conflict or occupation, are in the control of a Party to the conflict or of a occupying Power, of which they are no subjects".

The court of appeal establishes – as does the defence – that this description is not included in the indictment. As the court of appeal has regarded the conflict as non-international, investigation into the possible consequences this lack of indication should have, can be dispensed with. The same thing here applies as well, namely that it has not become plausible in any way that the accused has been impeded in (the preparation of) his defence because of this way of charging.

5.4.8 The court of appeal is furthermore of the opinion that, unlike what has been argued by the defence above sub c), the victim [victim 1] should be regarded as "protected person" in the sense of the Geneva conventions, which sufficiently appears from the articles of evidence. In particular the items of evidence 11 up to and including 16, which are to be attached, are referred to.

6. Review of the other defences

6.1 The defence argued that the public prosecutor should be barred prosecution, or that items of evidence should be excluded on the basis of being unlawfully acquired. The defence put forward the following arguments which are stated succinctly below:
a. by using in the case at issue the statements the accused made in his procedure with the IND (Immigration and Naturalization Service) the public prosecutions department has acted in violation of the principle of nemo-tenetur included in Article 6 ECHR, described in short as saying that nobody should be obliged to cooperate towards his own conviction;
b. the IND has in violation of the privacy of the accused, namely in violation of the confidentiality of his statement promised to the accused, furnished his IND file to the police. In this way Article 8 of the ECHR has been violated;
c. the principle of equality of arms as included in Article 6 ECHR has been violated because the defence did not have sufficient time and facilities to prepare the defence.

The court of appeal rejects these defences and considers hereto as follows.

6.2.1. The defence has argued with respect to the defence meant under a) that the statements made by the accused at the IND within the scope of the assessment of his application for asylum should be considered as to have been made "under pressure" and were therefore not allowed to be used in the prosecution against the accused. To support this assertion the defence has relied on decisions of the European Court for the protection of the human rights (ECHR) and in particular the decision of 17 December 1996, NJ 1997, 699, in the case of Saunders vs UK.
With regard to the argument thus put forward the following has been established.

6.2.2 On 24 September 1992 the accused submitted applications to be admitted as a refugee and for being granted a residence permit. On 5 October 1992 and 8 March 1993 the accused was given the opportunity to explain those applications and was interviewed for this purpose by an official of the IND – not being an investigative service in criminal sense -. Before the interview was started the importance of the interview, as appears from the report that was made of the interview, was explained to the accused and he was requested to state truthfully..
On the basis of the statements of the accused and after investigation performed by employees of the Ministry of Foreign Affairs and the IND, the applications of the accused were then rejected by means of a decision of 1 February 1994. As appears from the decision the reason for the rejection was the fact that there were serious reasons to suppose that the accused had been guilty of war crimes or crimes against humanity, as described in Article 1 F of the Convention on Refugees.
In a letter of 8 November 1997 the former State Secretary of justice reported to the Second Chamber that, in view of the international conventional-law set out in more detail in this letter and moral obligation of the Netherlands, the public prosecutions department was to be notified of all decisions that had (also) been negative on the basis of Article 1 F. On 4 September 2000 the IND sent the 1 F decision in respect of the accused to the public prosecutions department, including a request to see whether the accused should be prosecuted. On 2 December 2003, after further incriminating circumstances with regard to the accused had come up from another criminal investigation, a starting report was drawn up with a view to prosecution of the accused. Less than a year later, on 27 November 2004, the accused was arrested and subsequently several times heard by the police as a suspect.

6.2.3 At the interrogations of the accused the investigative officers used, in the sense of reminded of, confronted with and elaborated on, the contents of the statements the accused had made with the IND. Neither at the court session in the first instance nor at the court session in appeal the accused was in particular confronted with his statements made before the IND. In the first instance only the short contents of these statements were put to him at the court session. At the hearing in first instance as well as in appeal the accused has mainly claimed his right to remain silent.

6.2.4. Against the background of the above an answer should be given, in view of the afore-mentioned assertion of the defence, to the question whether at the IND procedure as undergone by the accused, the accused cooperated 'under pressure' as meant in the Saunders judgment of the ECHR. And subsequently whether – if that were the case – it is allowed to use the information obtained in the criminal procedure. In the case this judgment was related to, the person concerned was obliged under penalty of prosecution in respect of an offence comparable to 'contempt of court', which in case of an conviction could lead to imprisonment for a term not exceeding two years, to answer the questions put to him within the scope of a – non criminal – financial economical inspection inquiry.
It should be put first that, just like in the Saunders case, with regard to the IND procedure the accused went trough, this is neither a

procedure to which the Article 6 ECHR is applicable, nor a procedure that can be regarded as a prosecution procedure. Therefore the IND was, in the opinion of the court of appeal, not obliged to point out to the accused the risk of a criminal prosecution if the accused incriminate himself in any way.

6.2.5 The court of appeal is of the opinion that in the IND procedure the accused went through there has been no question of making statements 'under pressure' of a threatening prosecution as was the case in the Saunders judgment. Anyone who voluntarily subjects to an IND procedure and cooperates in this procedure in particular by making statements, does in fact not make these statements 'under pressure' of a prosecution. In the opinion of the court of appeal this does not alter the fact that if the person concerned 'enters into' this procedure for obtaining admission and a residence permit, he is actually obliged to (further) cooperation to (parts of) this procedure, and neither does it alter the fact that complying with this obligation can also be sanctioned and that the ultimate consequence of non-complying with this obligation can result in the not-granting of what the person concerned has requested. Neither does it alter the fact that the person who requests this admission and residence permit can feel himself pressed to cooperate in order to reach his aim.

6.2.6 Insofar as it should be judged differently, the court of appeal is of the opinion, in respect of the question whether it was allowed to use the information submitted in the criminal case at issue through the IND interviews, that the way this information was used was absolutely different from the way it was used in the Saunders case. In the latter case the person concerned was during the (jury) trial for three days confronted with the statements he had made in the inspection inquiry. In the case of this accused the IND statements were used in the preliminary inquiry, namely by the reporting officers who interrogated him. Maybe unnecessarily the court of appeal points furthermore at the fact that the self-incriminating elements from the IND statements concerned limit themselves essentially to reports about the very high-ranking position the accused had at the time in the military intelligence service of the regimes concerned. What happened in this service and caused a reason for the present prosecution was or became – gradually – clear(er) from other sources.
Apart from that, the court of appeal observes that it has not become plausible that the public prosecution department or the criminal-law officials working under its responsibility, have exercised any (steering) influence with regard to the IND interviews, or that these IND interviews took place (also) with a view to the prosecution of the accused.
Not in the last place the court of appeal points in this respect at the above-mentioned considerable period of time between the IND interviews and the commencement of the criminal inquiry, and the statements the accused made in that respect before the investigating officials.

6.3.1. It has become plausible with regard to the defence meant under b) that the IND officials informed the accused that his statements made before the IND would be treated confidentially. The court of appeal recognizes that the notion of 'confidentiality' is not particularly well-defined. However, the court of appeal does not deem it has become quite plausible that further promises, relating to a criminal investigation, were made to the accused. This is contrary to the procedure in the 'Koningskoppel' case invoked by the counsel of the co-accused, which led to the judgment of this court of appeal of 5 March 2002, LJN AD9816. The accused could in itself have derived from the general promise that was made, the confidence that the personal data he furnished would not simply be made known to other authorities. However, his IND file was afterwards transferred to the public prosecutions department. The court of appeal is therefore, together with the defence, of the opinion that this transfer of the criminal file infringed the accused's right to private life, as meant in Article 8 ECHR. The court of appeal should therefore establish whether (1) there was a legal basis for this infringement and (2) the infringement was proportional.

6.3.2 (item 1) The defence did not contradict the opinion of the court – which the court of appeal agrees with – that there was a legal basis for the transfer of the IND file of the accused to the public prosecutions department at the time of this transfer.
(item 2) The court of appeal also agrees with the opinion of the court that in this case there was an urgent necessity for the infringement on the privacy of the accused and refers in this respect also to afore-mentioned letter of the State Secretary of Justice of 8 November 1997. In that respect, also in the opinion of the court of appeal, a correct weighing was made between the interest of punishment and the transfer or extradition of persons in respect of whom there were serious reasons to suppose that they had been guilty of very grave (war crimes) and the way in which the right to privacy was infringed. That does not, in the opinion of the court of appeal, alter the fact, especially with a view to the afore-mentioned letter of the State Secretary of Justice, that it has not been established that this weighing was also expressly made in the specific case of the accused. The court of appeal refers also in this respect to afore-mentioned high-ranking position of the accused in the intelligence service concerned.

6.3.3 The defence pointed out that within the scope of the criminal investigation at issue also investigations were made into and in IND files of persons other than the accused, without the persons concerned having given permission to do so. Insofar as in doing so the privacy of those other persons was infringed in a not justified way, the court of appeal is of the opinion that the accused is not entitled to invoke this, as it does not concern the privacy of the accused. Unlike the defence argues, a legal rule which prohibits in this case the application of the so-called Schutznorm cannot be derived from any judgment of the ECHR, nor did any such legal rule

actually appear to the court of appeal.

6.4 Unlike the defence argues under c) the court of appeal is of the opinion that the defence in the criminal case at issue has had enough time and possibilities to prepare the defence.
In this respect the court of appeal puts first that the proceedings against this accused should be conducted according to the rules of the Dutch Code of Criminal Procedure and other relevant Dutch legislation. That cannot alter the fact that except for the presence of the accused, a co-accused and some witnesses in our country, there are in the Netherlands hardly any factual leads available for arriving at the truth. Also further on in this judgment the complications connected with this observation will actually be dilated upon. The circumstance that further investigation had to be conducted abroad and especially in Afghanistan, does not imply that extra facilities - as maybe possible in other countries and in case of adjudications by international courts – beyond and/or in derogation of the Dutch legislation should be granted to the defence. The court of appeal is of the opinion that the defence has had enough possibilities in the case that has lasted for the more than two years now, to put forward and – depending on review by the court and court of appeal on the basis of legal criteria - be able to realize any wishes for investigation. Some witnesses were heard at the session of the court, many witnesses were heard by the examining magistrate in the first instance as well as in appeal, in a single case even in both instances, in particular also – by four letters rogatory – in Afghanistan. At these occasions the defence has had, but for a single exception, the necessary contribution. Nevertheless the defence has also argued in appeal that there was not enough time and opportunity to prepare hearings in Afghanistan and to hear and present persons as witnesses who might make disculpatory statements. The court of appeal does recognize that the circumstances under which persons were heard in Afghanistan were not optimal, but does in so far not follow the defence, as it is of the opinion that it can not be said that the defence has not been able to sufficiently prepare the hearings by the examining magistrate. Furthermore the court of appeal is of the opinion that the defence has been sufficiently able, on the basis of the behaviour the accused is (now) in particular reproached for and the persons to be pointed out by the accused himself in that respect, also with the aid of extra means granted to the defence in the first instance, to present relevant and possibly disculpatory witnesses.

6.5. In view of what has been considered above, the court of appeal is of the opinion that investigating officers and/or the public prosecutions department did not infringe any principle of due process by which the right of the accused to fair trial has purposively or with grave infringement of the interests of the accused been wronged; neither has there been any unlawful gathering of evidence. The court of appeal is actually of the opinion that in the case at issue against the accused there has been a ‘fair trial’.

7. Ground in relation to the request of the defence with regard to the witness [victim 1].

The defence requested in rejoinder to hear the witness [victim 1] again, preferably at the session. It argued hereto - succinctly stated – that during his last hearing at letters rogatory in Kabul on 9 January 2007 there had not been enough opportunity to ask further questions on items of which the defence requires further explanation from the witness, including his statement submitted by the defence in rejoinder in another criminal case (against “F”).

The court of appeal considers the following about this.

The witness was heard by the examining magistrate on successively 30 May 2006, 2 July 2006, 5 July 2006 and 9 January 2007. The counsel (man/woman) of the accused was present at all these hearings. During all these hearings the defence was given the opportunity to put questions to the witness.
After the hearing on 5 July 2006 was finished the counsel (woman) of the accused has reserved the right to ask the witness additional questions about a single item (with which the counsel (woman) apparently meant: applying electric currents during the interrogation) at a later point in time. Therefore the court of appeal has deemed opportune that the witness was again heard by letters rogatory, so that the still remaining questions of the defence could be put to the witness.
This hearing took place on 9 January 2007 and was, due to circumstances (among other things because of the strongly delayed arrival of the witness), shorter than planned. After the counsel (man) of the defence had put a (considerable) number of questions to the witness, as a matter of fact none of them being related to the item meant by the counsel (woman), the examining magistrate stopped the hearing, because of the emotional state the witness had got into at that moment, according to him because he felt threatened. The court of appeal is, in view of the above facts and circumstances, of the opinion that it is not necessary to hear (have heard) the witness [victim 1] another time. As regards this opinion the court of appeal took into account the circumstance that the statement of the witness in “the criminal case F.” submitted by the counsel, is at essential points not contrary to his statements in the case at issue and therefore in the opinion of the court of appeal no further explanation is needed.

The court of appeal rejects the request.

8. Judicial finding of the facts

The court deems legally and convincingly proven that the accused has committed count 2 primarily and count 3 of the indictment, on the understanding that:

Count 2 primarily:

He at points in time in the period of 1 November 1989 up to and including 31 December 1990 in or near the Sedarat prison in Kabul, in Afghanistan,

jointly and in conjunction with others,
as official, namely as official with the (military) intelligence service, (the Khad-e-Nezami) (more in particular as head/director of afore-mentioned Khad-e-Nezami), during the exercise of his duties,

several times, (every time)(deliberately)(gravely) maltreating somebody who was deprived of his freedom, namely [victim 2] and [victim 3], with the intention of
obtaining a confession and/or
frightening him,

while this behaviour was of such nature that they could be conducive to the intended purpose, consisting of the fact that

the accused within the scope of his activities as official with the Khad-e-Nezami (more in particular as head/director of afore-mentioned service)

jointly and in conjunction with co-perpetrators,

at that time and at that place, every time with afore-mentioned intentions,

has (every time) deliberately maltreated [victim 2] who was deprived of his freedom and was staying as a soldier detained in the Sedarat prison,

-by at points in time in the period of
1 March 1990 up to and including 30 June 1990 in Afghanistan, during fourteen days, at least some days in succession putting [victim 2] partly undressed for some hours, at least during some period of time outside in a barrel with (cold) water, while it was cold outside and

keeping afore-mentioned [victim 2] awake for days in succession and/or
prohibiting [victim 2] during these days to sit down and/or to lie down and/or to lean against a wall in order to prevent [victim 2] from sleeping

while afore-mentioned [victim 2] suffered (severe) pain because of that and/or

-by deliberately causing in the period of 1 March 1990 up to and including 30 June 1990 in Afghanistan, a state of severe fright with afore-mentioned [victim 2] by expressing (having expressed) threats by using words like: “Forget humanity, you [name], you wanted to destroy our revolution” and “Tell you have contacts with [name] and that [name] is an supporter of [name], otherwise I will put you in the water again” and “Keep him awake so that he confesses. If he is not punished he will not confess” and

has (every time) deliberately maltreated the [victim 3] who was deprived of his freedom and was staying as a soldier detained in the Sedarat prison, in Kabul,

-by punching in the period of 1 November 1989 up to and including 31 December 1990 in Afghanistan afore-mentioned [victim 2] in his face and

by once having afore-mentioned [victim 2] stand for some hours bare feet in the snow and

by keeping several times, (every time) afore-mentioned [victim 2] awake for days in succession and

by attaching several times electric wires to the body of afore-mentioned [victim 2] and (subsequently) applying current through afore-mentioned electric wires to the body of afore-mentioned [victim 2],

while afore-mentioned [victim 2] suffered (severe) pain because of that.

Count 3:

Members of the military intelligence service, the Khad-e-Nezami in Afghanistan, (all of them) working for and subordinates to the accused [accused] to be mentioned hereinafter,

at point(s) in time in the period of 1 October 1985 up to and including 31 December 1988 in Kabul, in Afghanistan, jointly and in conjunction with others
(every time) have violated the laws and practices of war,

whereas
that offence resulted in grievous bodily harm of another person or

whereas these offences (every time) included acts of violence with joint forces against a person

consisting of the fact that afore-mentioned members of the military intelligence service at that time and at that place in violation of

what has been determined in the "common" Article 3 of the Geneva Conventions of 12 August 1949,

as members of the (military) intelligence service (Khad-e-Nezami) of Afghanistan, belonging to one of the combating parties in a (non-international) armed conflict at the territory of Afghanistan,

have committed (several times) acts of physical violence and cruel (inhuman) treatment and torture with regard to a person who (at that time and at that place) did not directly participate in the hostilities (namely a citizen),

namely [victim 1], which acts of physical violence and cruel (inhuman) treatment and torture included among other things that afore-mentioned members, jointly and in conjunction with others

-at points in time in or around the period of 1 December 1985 up to and including 1 February 1986 in (or near) the building of the Khad-e-Nezami in Kabul,
-several times, at least once, have kicked [victim 1] against his shin-bone and have kicked and beaten against his body and
-have once kept afore-mentioned [victim 1] awake for days in succession and have forced afore-mentioned [victim 1] during this day/these days to stand outside while it was cold outside and
-have put and kept the finger(s) of afore-mentioned [victim 1] with force between a door and the frame belonging to this door, and (subsequently) have shut afore-mentioned door with force while the finger(s) of afore-mentioned [victim 1] was/were still between afore-mentioned door and afore-mentioned frame and have cut off without anaesthetics part of a finger of afore-mentioned [victim 1],

as a result of which afore-mentioned [victim 1] suffered pain and (grievous) bodily harm

in respect of which (afore-described) act(s) of physical violence, of which one resulting in grievous bodily harm, he, the accused [accused] at points in time in or around the period of 1 October 1985 up to and including 31 December 1988 in Afghanistan,

has deliberately allowed that person(s) subordinate to him, accused, have committed the following

namely that he, the accused, did not take any and/or not enough measures to prevent these acts of physical violence and grievous bodily harm and to punish the subordinate(s)/responsible persons.

Everything charged more or differently, has not been proven. The accused must be acquitted of that.

Any mistakes as to language or writing having possibly occurred in the indictment, have been corrected in the judicial finding of facts. As appeared from the proceedings at the session the accused was not harmed in the defence because of that.

9. Furnishing of proof

The court of appeal bases its conviction that the accused has committed the facts found on the facts and circumstances which are included in the items of evidence and which give reason for the judicial finding of facts.

In those cases in which the law requires an addition to the judgment with items of evidence or, in so far as Article 359, third paragraph, second sentence of the Code of Criminal Procedure is applied, with stating the items of evidence, this will be done in an addition which will be attached as an appendix to this judgment.

10. Further evidence grounds

10.1. General

a)The court of appeal puts first that the case at issue is characterized by a number of special facts and circumstances which deserve further consideration. Firstly the indictment contains facts that have occurred a long time ago, which draws heavily on the investigation (especially tracing the witnesses of which a small number is still available) and subsequently on their memories. Moreover, the facts took place in a non-western country which in cultural, technological, economical and sociological respect constitutes few resemblances to the Dutch situation and which was, apart from that, internally divided, as it still is, by drastic political and (consequential) armed conflicts. These circumstances in particular have hampered the investigation in this case in many ways to a substantial extent. The unsafe situation Afghanistan is still in at the moment constituted in a number of cases impediments for hearing witnesses, in the presence of the counsels, and conducting further investigation. Moreover, because of the poor Afghan infra structure written sources appeared to be available to a very limited extent. All these facts and circumstances taken into account, the court of appeal will at the judgment of the reliability of the in this case (actually) available items of evidence observe cautiousness to a considerable extent.

b)From the available items of evidence the following can be derived.
The accused was at the time of the offences he is charged with head of the military KhAD (KhAD-e-Nezami). This organization was at the time to a considerable extent guilty of violation of the human rights, such as torturing prisoners. The military KhAD was directed by the accused in a strict way; he was also in the political and military order of those days a powerful and influential man (also see below item 10.2).
These facts and circumstances are of great importance for the judgment of the charges against the accused. However, at the court session in appeal the accused, by invoking his right to remain silent, refused to provide any explanation on his side about the role he fulfilled in his organization and outside, the daily routine there, as well as the specific charges against him, which means that the accused did not make use of the possibility offered to him to shed, from his side, a different light on the above-described facts and circumstances.
The court of appeal considers this circumstance of importance at the judgment of the items of evidence available to him.

10.2 Voice recognition by the witness [victim 2]

With regard to the witness [victim 2] the defence argued to have considerable doubts as to his statement where it concerns the recognition by him, the victim, of the voice of the accused at the time of his interrogations by the civil KhAD. These doubts are caused by, succinctly represented, the following circumstances. In psychology it is a well-known phenomenon that one thinks to have heard the voice of somebody, because one expects to hear this person's voice, which means that hearing, in combination with memory, can "pretty much fool" somebody. Furthermore it is extremely improbable that the accused had authority at the territory of the civil KhAD to give instructions for torture. In relation to this the defence refers to a number of testimonies, from which can be derived that the accused did not have authority to do so and did not even have the right to come there without permission, and refers to the Italian witness expert Giustozzi where he states that the accused "did not [have] authority to give instructions to the Directorate Investigation of the civil KhAD". Furthermore the witness has shown to be uncertain about the number of times he heard the voice of the accused.

The court of appeal considers the following about it.

The arguments put forward by the defence cannot be denied a certain internal contradiction; in fact, if the accused had not been permitted to be actually present at the territory of the civil KhAD and to give instructions there about the way of interrogating, it is maybe less obvious that the witness [victim 2], who as a high-ranking soldier will have had good knowledge of the underlying relations, yet "expects" to hear the voice of the accused at that place in this role. The court of appeal has in relation to this furthermore taken notice of in particular the statements of the witnesses [witness 2] (item of evidence [ioe] 5 and 7), [witness 3] (ioe

9), [victim 1] (ioe15), [victim 2] (ioe 17, 23 and 57), [witness 4] (ioe 21), victim 2] (ioe 35), the co-accused [co-accused] (ioe 20 and 42) and the accused himself (ioe 37).
From this can be derived, seen in cohesion, that there was a form of cooperation between the military KhAD directed by the accused and the Directorate Investigation of the so-called civil KhAD, directed by [name X], which is characterized by the accused himself as a "working relation". It also appears from that, that the members of the first mentioned organization were (occasionally) free to have interrogations in the building of the civil KhAD. The witness [victim 2] was imprisoned at the time of the so-called coup of Tanai; during this period many soldiers were picked up and detained. This drew extra heavily on the interrogation capacity available at both organizations and made mutual cooperation all the more necessary. The above is confirmed in the report of the expert Antonio Giustozzi of 29 October 2006 (ioe 56, item 18), in which he reports that the military KhAD called in the civil KhAD for "further, more detailed investigation and interrogation" and that the civil KhAD had more facilities and a bigger prison (for this purpose).
Moreover, the accused, as appears from a number of statements, came regularly in the building of the civil KhAD, often indicated as Sedarat. Because of his position as head of the military KhAD and also of deputy minister of State Security the accused was a powerful man and had much influence.
These facts and circumstances in particular support, to a substantial extent, the statements of the witness [victim 2] in so far as they contain that he has heard the accused giving instructions in the Sedarat which have led to the challenged torture. The statement of witness expert Giustozzi the defence invokes does not harm this, as this statement holds that the accused did not have authority ("had no power") to give instructions to the directorate Investigation of the civil KhAD and it can be derived from afore-mentioned testimonies that the active role of the accused at the violent interrogations of [victim 2] is not based on the instructions he gave to the civil KhAD, but took place within the scope of the existing mutual cooperation between both organizations. Therefore the court of appeal considers the statement of [victim 2] credible enough to be used as evidence, while the court of appeal also took into account the circumstance that [victim 2] also stated that he could recognize the voice of the accused very well and that he had worked with him together for nine years in the same division of the Afghan army.
The circumstance that the witness, as the counsels argued, in respect of the number of times he heard the voice of the accused, has made dissimilar statements does in the opinion of the court of appeal not harm the credibility of these statements as, also in view of the dramatic events he refers to in his statements and about which he actually did make in essence similar statements, the discrepancies the counsels meant are very well to be derived to unsteadiness of his memory, caused by the considerable period of time, while these statements cannot be considered absolutely incredible or unreliable as to their essential elements.

The court of appeal rejects the defence.

10.3 Torture [victim 2]

The defence has argued that on the basis of the documents it cannot be established whether prisoners at the civil KhAD were running the considerable risk of torture and, if the considerable risk were there, it could not be proven that the accused knew about it at the time. To this purpose it put forward, succinctly presented, inter alia the following. No value should be attached to voice recognition by the witness [victim 2], as argued before. It can not be derived from the tapped telephone conversation in which is spoken of the fact that the directorate supposedly treated arrested persons who were to be interrogated "with fanaticism", that the accused had knowledge, because these words did not originate from the mouth of the accused but from the mouth of minister [name minister] and because [name minister] has only used these words on a later occasion.

Therefore the court of appeal considers the following in this respect.

What the court of appeal has considered above [under10.2] is referred to where it concerns the credibility of the voice recognition by the witness [victim 2]. Furthermore, the items of evidence to be mentioned hereinafter the following can be derived. The witness [witness 5], a high-ranking soldier with the Afghan antiaircraft defence, is through the active interference of the accused, who was ordered to do so by the minister of State Security [name minister], arrested at the Kabul airport in November 1989 and there, with the cooperation of the accused, transferred to the authorities of the civil KhAD and placed in the Sedarat prison. From a number of testimonies ([witness 2], ioe 7, [witness 3], ioe 9, [witness 6], ioe 27 and [witness 7], ioe 39 it can be derived that (frequent) torturing took place in the Sedarat prison and that this was generally known within leading circles, to which the accused undoubtedly belonged. The high-ranking soldier, also state secretary of political and legal affairs with the ministry of home affairs, [witness 6], states for example: "Everybody with the KhAD knew that torture took place. All KhAD chiefs knew about it and they also gave orders themselves to carry out torture". The accused himself (ioe 37) makes a statement with almost the same tenor: "[name staff member] was a strict person. He used methods to keep people awake. What I heard was that he interrogated the arrested persons during the night and they hand to stand up or sit down. What has happened to Walisha can have happened". From what has been considered above under 10.2 it appears that the accused was himself in the period meant a frequent visitor of the Sedarat and that occasionally he contributed actively to the violent character of the interrogations that took place there. In view of

these facts and circumstances the court of appeal is of the opinion that the accused by transferring [victim 2] to the civil KhAD, knowing that he would be detained in Sedarat in order to be interrogated there, has knowingly and wilfully accepted the risk that [victim 2] would in the Sedarat be subjected to the torture he is charged with.

The court of appeal rejects the defence.

10.4 Reliability of the witness [victim 1]

The counsels have argued that the statements of the witness [victim 1] should not be allowed to be used as evidence, as the witness has made varying statements in respect of whether or not he was subjected to electric currents, there is a strong impression that this witness was influenced by witness [witness 1] and that therefore [victim 1] has become incredible as a witness.

Within that context the court of appeal establishes that the statements of the afore-mentioned witness sometimes constitutes less concrete information than would be desirable or at a single point even constitutes internal discrepancies, but the court of appeal is of the opinion that in this case, also in view of the dramatic events the witness is referring to in his statement and about which he does state in essence unambiguously indeed, the discrepancies meant by the counsels can very well resolve themselves into unsteadiness of memory by the considerable period of time and (fierce) emotions induced by the recollection of for the witness extremely dramatic events, while the statements should, as to their essential elements, not be regarded as absolutely incredible or unreliable. The mere circumstance that the statements of the witness [victim 1], as the counsels state, "particularly resemble" the statements of the witness [witness 1] do furthermore not make it absolutely plausible that the witness [victim 1] has been influenced by the witness [witness 1].

The court of appeal rejects the defence.

10.5 Applicability of Article 9 WOS

The counsels have, succinctly represented, argued that, as it has not been established which duties and powers the accused had within the military KhAD and it is plausible that the Russian advisors were, if not exclusively than in any case next to the accused, in charge within the military KhAD, the accused cannot be regarded as a commander who was obliged to interfere in the alleged torture of [victim 1] and that it has not been established that the accused did beforehand know about this torture, so that intention is not concerned. Eventually the defence does not consider it proven that the accused has actually allowed the alleged torture. The counsels have inter alia put forward to that purpose that it has not been established that the challenged torture was executed by a subordinate of the accused who was actually under his control, the more as all the indications are that the Russian advisors in Afghanistan used at the time a divided instructions' structure.

The court considers therefore the following.

It emerges from the file that the Soviet advisors in the eighties and therefore also in the period the [victim 1] was held imprisoned by the military KhAD, exercised great influence on the Afghan government bodies, among which the military KhAD (KhAD-e-Nezami). Moreover, the file contains data (including the statement of [victim 1] before the examining magistrate dated 4 July 2007 (item 11)) from which it can be derived that the "Russian" advisors were occasionally present at the interrogations of the prisoners of the military KhAD, also at the tortures accompanying these interrogations.
The reports of the expert Giustozzi, as well as the statement he made before the examining magistrate on 15 September 2005, extensively dwell upon the role of the Soviet advisors. In so far as of interest here these can be summarized as follows.
The (primary) reason for the advisors to keep (strict) control on the military KhAD was to prevent that the Parchami fraction of the pro-Soviet HCK party would abuse the military KhAD in its persisted fight with the Khalqi fraction. The KhAD was dominated by Parchami, the army in general by the Khalqi. The expert considers probable (report 29/10/2006) that the advisors checked the work of the KhAD officers, even in the event of interrogations. He gives with regard to this the following in this respect relevant comment: "In view of the widespread use of acts of torture and executions before the Soviet occupation and also among resistance groups it looks as if the Soviet advisors did not need to encourage the Afghan to adopt such techniques". Furthermore there is, according to the expert, not much doubt that the advisors knew about the acts of torture within the military KhAD which took nevertheless place: "they were present there in person and had access to all facilities. There was at least tacit permission". As regards the KhAD the role of the Soviet differed in respect of location and in respect of department. In case of a weakly directed department their influence was bigger and in case of a forcefully directed department their role was mainly limited to an advisory role.
In the period of 1985/1986 ([victim 1] was arrested on 10 December 1985) the aim of the Soviet was to reduce its involvement and to force the Afghan in that way to play a bigger role themselves in maintaining authority.

As furthermore appears from the items of evidence and has already been considered above under 10.2, the accused was at the time head of the military KhAD and deputy minister of State Security and in that capacity a powerful man with much influence.
Taking the facts and circumstances described above into account, the court of appeal is of the opinion that although it has been established that the Soviet advisors in their capacity of advisors were (intensively) involved in the activities of the military KhAD, it has not appeared that their involvement and the way in which this was organizationally fitted in, affected in any way the existing, official hierarchic relations within this organization and the power the accused exercised as appears from the items of evidence: in an unmistakable way. Therefore the assertion of the defence has in no way become plausible, that within the organization which was led by the accused (the military KhAD) the Soviet advisors have next to the accused been highest in command in this organization (or, as the defence calls it: "were the boss"), or that there was a divided instructions' system within this organization because of the Soviet advisors' doing, in such a way that the accused could not be regarded as commander of this organisation who was obliged to interfere in the torture of [victim 1].
In that respect the court of appeal has also included in its considerations the circumstance that the statements of the accused, in so far as he has wished to provide any clarity about his role as leader of the military KhAD and the circumstances in which he fulfilled this role, do not offer any leads for the divided instructions' system as argued by the defence and that actually no concrete leads in this respect are to be found in the file either.

The court of appeal rejects the defence.

11. Punishability of the proven facts

The proven facts furnish:

In respect of the proven facts under 2 primarily: Being a co-perpetrator to torture, committed several times.

In respect of the proven facts under 3: Wilfully allowing that a subordinate of him is guilty of violating the laws and practices of war, whereas the fact includes acts of violence with joint forces against one of more persons and the fact results in grievous bodily harm of another person.

In respect of what the defence argued as regards the WOS (which should be applied as lex specialis instead of the UFV) the court of appeal considers the following.
In the view of the legislator (Explanatory memorandum to the UFV, see note 3) torture in time of war will after this Act has come into effect not be punishable anymore on the basis of Article 8 WOS (as acting in violation of the Acts of war), but in view of Article 2.2.of the Convention on Torture of 10 December 1984 (which in time of war maintains the prohibition fully) be punishable as specialis on the basis of the UFV (but will be tried through the WOS). Apart from the fact that there is no speciality in any logical sense, it appears from legal history that it concerns a systematic, teleological speciality. Therefore the defence is rejected.

12. Punishability of the accused

No circumstance has become plausible that would rule out the punishability of the accused. Therefore the accused is punishable.

13. Grounds for the punishment

The advocate general has moved that the judgment of which this appeal be set aside and that the accused will be sentenced in respect of count 2 primarily and count 3 of the indictment to imprisonment for a term of 12 years, less the period spent in pre-trial detention.

The court of appeal has determined the punishment to be imposed on the basis of the gravity of the facts and circumstances under which these have been committed and on the basis of the person and the personal circumstances of the accused, as these have appeared from the examination in court.

In this respect the court of appeal has considered the following in particular.

The accused was in the period of the end of 1983 up to and including May 1990 in Kabul, in Afghanistan, at the time of the communist regime supported by the Soviets, head of the military intelligence service, the KhAD-e-Nezami and deputy minister of the ministry of state security (WAD) and he was therefore a powerful and influential person. During the exercise of this duty/these duties the accused has been guilty, as can be proven, of very serious crimes with regard to three victims: being a co-perpetrator to torture and the violation of the laws and practices of was.

It has appeared from the file that one of his victims was, for days in succession, for some time, partly undressed, put outside – while it was cold (outside) – in a barrel with (cold) water. This victim was also threatened. Another victim was punched in his face and had to stand for some hours with his bare feet in the snow. Also electric wires were several times attached to his body and he was subsequently subjected to electric current through these wires.
The third victim was kicked and beaten and had to stand outside for days while it was cold. Apart from that the fingers of this witness were put between a door and the frame of this door, after which the door was shut closed. Subsequently one of these fingers was cut off without any anaesthetic.
Furthermore all of these victims have been kept awake for days on end. All this happened with the apparent purpose to make the victims, political opponents of the ruling regime, "confess".

It has also become plausible from the file that these facts formed part of a consistent pattern of acting within the (military) intelligence service, in which the accused was in command.

As appeared from the file the above-described acts have had dramatic and traumatic (psychological) consequences for the victims who, as it seems, are of a permanent nature.

The facts proven are regarded, apart from genocide and crimes against humanity, as 'the gravest breaches that fill the entire international community with concern' (explanatory memorandum to the international crimes Act, parliamentary documents II, 2001-2—2, 28 337, no. 3, page 1).
The war crime consisting of acts of torture and torment arouses all over the world indignation and anxiety on a broad scale; these crimes also disturb the international legal order. Moreover, they concern the Dutch legal order as the accused has, because of his flight to the Netherlands, become part of the Dutch community. Many persons who have been confronted there with the atrocities of the armed conflict and the acts of violence committed by the organisation of which the accused was in command, are now also part of this community.

The way the accused acted, which implies a flagrant denial of universal respect which should exist for the human rights and the fundamental liberties, shows a lack of respect reprehensible to the highest extent, for the dignity of fellow men. In view of the prominent position the accused held, he is to be extremely blamed for it.

The court of appeal also blames the accused for not having shown in his case in appeal any way of regarding his way of acting as reprehensible.

In the opinion of the court of appeal the seriousness of the facts proven justifies in itself imposing a non-suspended prison sentence for a longer period of time than the court in the first instance has imposed. In doing so the court of appeal has in particular an eye to satisfaction for the victims and their surroundings, the marking of the interest of the human standards at issue and the general prevention.

However, the court of appeal also has taken into account the age of the accused, the circumstance that the risk of re-offending has become negligible and the facts have been committed a considerably long time ago, so that an imprisonment of the – substantial - duration to be mentioned hereinafter will suffice.

14. Seizure

The advocate general has moved that the seized objects be given back to the accused.

In respect of the seized goods that have not yet been returned as they are mentioned in the list added in copy to this judgment, the court of appeal will order to give them back to the accused.

15. Applicable legal regulations

The court of appeal has taken into account the Articles 47 and 57 of the Criminal Code, Article 1 (old) of the Implementation Act Convention on Torture and the Articles 8 (old) and 9 (old) of the Crimes of War Act.

16. JUDGMENT

The court of appeal:

Quashes the judgment of the court below – in so far as subjected to the judgment of the court of appeal – and decides again upon the case.

Declares proven that the accused has committed the count 2 primarily and count 3 of the indictment, as described above.

Declares not proven what has been charged in this case more or otherwise and acquits the accused the same.

Decides that the proven facts constitute the afore-mentioned offences.

Declares the accused punishable in respect of the proven facts.

Sentences the accused to imprisonment for a term of TWELVE YEARS.

Determines the time the accused spent in pre-trial detention before the execution of this judgment, to be deducted at the execution of the imprisonment imposed, in so far as this time was not already counted towards another punishment.

Orders the return to the accused of the seized and not yet returned goods as they are mentioned in the list of seized goods attached in copy to this judgment.

This judgment was passed by mr Oosterhof LL.M., mr Aler LL.M. and mr Heemskerk LL.M.,
In the presence of the clerk of the court of appeal mr Jans LL.M..
It was pronounced at the public court session of the court of appeal of 29 January 2007.

I, Frederika Veldhuyzen, sworn as translator for the English language before the The Hague District Court, petition number 90.5684, certify the above to be a full and true translation from Dutch into English of the original seen by me and hereunto attached.
The Hague, 25 February 2007.