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Rechtsgebied:	Straf
Soort procedure:	Cassatie
Inhoudsindicatie:	Translation into English of BC7418 and BC7421. On 8 July 2008 the Supreme Court of the Netherlands has rejected two appeals against convictions for torture and violations of the laws and customs of war (war crimes) committed during the civil war in Afghanistan. Article 8 of the Wet Oorlogsstrafrecht (Wartime Offences Act) – as applicable at the time of the offences for which the applicants have been convicted – proscribes violations of the laws and customs of war. These include violations of article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. Article 3 of the Wartime Offences Act confers jurisdiction on Dutch Courts to try violations of the laws and customs of war wherever and by whoever committed (so-called universal jurisdiction). The rulings have been published in Dutch on www.rechtspraak.nl and can be retrieved via the numbers BC7418 and BC7421. The decisions from The Hague Court of Appeal can be retrieved on www.rechtspraak.nl via the numbers AZ7143 (in Dutch) and AZ9365 (in English) and AZ 7147 (in Dutch) and AZ9366(in English) respectively.
Vindplaats(en):	Rechtspraak.nl

Uitspraak

8 July 2008
Criminal Division
No. 07/10064

Supreme Court of the Netherlands

Judgment

on the appeal in cassation against a judgment of The Hague Court of Appeal of 29 January 2007, number 22/006132-05, in the criminal proceedings against:
[defendant 2], born in [place of birth] on [date of birth] 1946, detained at the time of service of the notice in the Utrecht Custodial Institution, 'Wolvenplein' Remand Prison.

1. The contested judgment

On appeal the Court of Appeal quashed a judgment of The Hague District Court of 14 October 2005 (in so far as subjected to the decision of the Court of Appeal) and sentenced the defendant to nine years' imprisonment for 'joint perpetration of violations of the laws and customs of war where the offence involves the joint commission of acts of violence against a person on more than one occasion' and 'joint commission of violations of the laws and customs of war where the offence involves the joint commission of acts of violence and causes serious bodily injury to another person'.

2. Proceedings in cassation

2.1. The appeal was lodged by the defendant. On his behalf G.G.J. Knoops, attorney-at-law in Amsterdam, submitted written grounds for cassation. This document is attached to this judgment and forms part of it.

Acting Advocate General Bleichrodt submitted an opinion that the appeal should be dismissed.

2.2. The Supreme Court has taken note of the written comments of counsel on the opinion of the acting Advocate General.

3. Assessment of the seventh ground of appeal

3.1. The ground of appeal is directed against the rejection by the Court of Appeal of the defence that the Public Prosecution Service

acted in breach of the privilege against self-incrimination (nemo tenetur) enshrined in article 6 ECHR and of the right to respect for private life enshrined in article 8 ECHR by making use in the present case of the statements made by the defendant to the Immigration and Naturalisation Service.

3.2. The ground of appeal cannot result in cassation for the reasons given at point 14 of the opinion of the acting Advocate General attached to this judgment.

4. Assessment of the other grounds of appeal

The grounds of appeal cannot result in cassation. Pursuant to section 81 of the Judiciary (Organisation) Act, no further reasons need be given for this judgment since the grounds of appeal do not raise questions of law that need to be answered in the interests of the uniform application or development of the law.

5. Conclusion

As none of the grounds of appeal can result in cassation and the Supreme Court also sees no grounds on which it could set aside the disputed judgment ex proprio motu, the appeal must be dismissed.

6. Decision

The Supreme Court dismisses the appeal.

This judgment was given by vice-president F.H. Koster as presiding judge and by justices A.J.A. van Dorst, W.A.M. van Schendel, W.M.E. Thomassen and H.A.G. Splinter-van Kan, in the presence of S.P. Bakker, clerk of the court, and pronounced on 8 July 2008.

Conclusie

No. 07/10064
Advocate General Bleichrodt
Hearing on 18 March 2008

Opinion concerning:

[Defendant 2]

1. By judgment of 29 January 2007 the Hague Court of Appeal sentenced the defendant to a term of imprisonment of nine years for 'joint perpetration of violations of the laws and customs of war where the offence involves the commission of acts of violence against a person on more than one occasion' and 'joint commission of violations of the laws and customs of war where the offence involves the joint commission of acts of violence1) and causing serious bodily injury to another person'.

2. Appeal in cassation has been lodged by the defendant. G.G.J. Knoops, attorney-at-law in Amsterdam, has filed a statement listing twelve grounds for cassation.

3. The following charges against the defendant have been held proven:

'At times in the period from 1 September 1979 to 31 December 1989, in Kabul, Afghanistan, he, together and in association with others, repeatedly violated the laws and customs of war, one of these offences having caused serious bodily injury to another person and these offences, which in each case involved the joint use of violence against a person, consisted in the fact that the defendant and his co-perpetrators did, at that time and in that place, and contrary to the provisions of "common" article 3 of the Geneva Conventions of 12 August 1949, as a member of the military intelligence service (the KhAD-e-Nezami) of Afghanistan, which belonged to one of the warring factions in a non-international armed conflict in the territory of Afghanistan, on several occasions commit acts of physical violence and inflict cruel and inhuman treatment, including torture, on persons who were not then taking a direct part in the hostilities (namely civilians), namely [victim 1], [victim 2] and [victim 3], which physical violence and cruel and inhuman treatment and torture consisted in, among other things, the fact that the defendant together and in association with his co-perpetrators:
* in the period from 1 September 1979 to the end of December 1979 in the building of the KhAD-e-Nezami,

- attached electrical wires to the body of [victim 1] and subsequently administered electric current to the body of the above-mentioned [victim 1] through the above-mentioned electrical wires, and
- beat the above-mentioned [victim 1] on several occasions with one or more stick(s) and/or other hard object(s) on and/or against the body and
- once tore out a toenail of the above-mentioned [victim 1], causing the above-mentioned [victim 1] pain and bodily injury, and
* on one or more date(s) in or around the period from 1 December 1985 to 1 February 1986 in or near the building of the KhAD-e-Nezami in Kabul:
- kicked [victim 2] on the shinbone and kicked and punched him on the body on several occasions or in any event on one occasion, and
- kept the above-mentioned [victim 2] awake for days on end and forced the above-mentioned [victim 2] to remain outside during this period when the weather was cold, and
- forcibly held the finger(s) of the above-mentioned [victim 2] between a door and the door frame and then slammed the door shut while the finger(s) of the above-mentioned [victim 2] were still between the door and the frame and cut off part of a finger of the above-mentioned [victim 2] without anaesthetic, causing the above-mentioned [victim 2] pain and serious bodily injury, and
* in the period from 1 November 1979 to 31 December 1979 in the building of the KhAD-e-Nezami in Kabul,
- struck [victim 3] on the head with a hard object on several occasions or in any event once and
- beat the aforementioned [victim 3] (with sticks) on the back, legs and buttocks, and
- attached electrical wires to the toes and fingers of the above-mentioned [victim 3] and subsequently administered electric current to the body of the above-mentioned [victim 3] through the above-mentioned electrical wires, and
- forcefully pushed the above-mentioned [victim 3] onto the ground, causing the above-mentioned [victim 3] pain and bodily injury.'

4. The charges, in so far as held proven, relate to a violation of section 8 (old) of the Wartime Offences Act (WOS).2) Section 9 of the Wartime Offences Act, described by the drafter of the grounds of appeal in the second ground of appeal as the 'commander's liability provision', is therefore not relevant.

5. As stated in the introduction to the grounds of appeal, the first four grounds of appeal relate to the question of whether the Dutch courts have jurisdiction in respect of the charges.

6. The Court of Appeal held and decided as follows in this matter:

'Discussion of the international criminal law defences

5.1. The defence has put forward a number of defences that (in part) have a common characteristic, namely the international law aspects of the prosecution of the defendant and the 'scope' of sections 3 and 8 of the Wartime Offences Act. These defences, which are all argued at length - in any event in the memorandum of oral pleading of the co-defendant's counsel - are summarised very briefly by the Court of Appeal (and set out in a different order) as follows:

a) Dutch criminal law lacks (universal) jurisdiction in the present case if it concerns a non-international armed conflict in the period to which the charges relate, since 'only' common article 3 of the Geneva Conventions is applicable. These Conventions (or other international law rules) do not provide for universal criminal jurisdiction in respect of breaches of these articles; the creation of such jurisdiction requires authorisation under international law which cannot be found in unwritten international law, as also stated by the ICTY in its decision in the Tadic case of 2 October 1995. In the view of the defence, the situation in Afghanistan at the time in question did not constitute a non-international armed conflict, in any event as regards the acts forming the basis of the charges. The prosecution brought by the Public Prosecution Service, which is pursuing a prosecution policy that is in breach of international law, should accordingly be declared inadmissible.

b) The Wartime Offences Act did not relate (in any event in the 1980s) to breaches of the rules laid down in common article 3. This is why the provision abolishing the limitation period, as introduced by the Act of 8 April 1971 (Bulletin of Acts and Decrees (Stb.) 210) in section 10 of the Wartime Offences Act, does not extend to the charges against the defendant (always assuming that this was a non-international armed conflict). The international legal arguments that led to this change in the law relate only to the grave breaches (i.e. very serious war crimes) referred to in the Geneva Convention. Count 3 of the indictment against the defendant is therefore barred by the expiry of the limitation period. This is another reason why the prosecution brought by the Public Prosecution Service should be declared inadmissible.
c) The nature of the conflict and the protected status of the alleged victim have wrongly not been specified and are not substantiated by facts. As the manner in which these charges were brought would not be accepted by the ICTY in practice, the indictment should be declared void.

d) The great lack of specificity about the time and place of commission of the alleged offences makes it impossible to mount a defence. This is yet another reason why the indictment should be declared void.

e) The charges do not give a sufficient factual indication of which persons are alleged to have committed criminal acts under the direction of the defendant and for whom he had command responsibility but against whom he did not take action; this too should result in a declaration that the indictment is void.

5.2. Before discussing the specific defences, the Court of Appeal will set out its views on the general aspects of the prosecution of the defendant and the applicable law.

5.2.1 The defendant is accused of acts that he is alleged to have committed in Kabul in Afghanistan in 1979 and the 1980s as a high-ranking officer in the Afghan military intelligence service. These acts involved, in brief, the torture (or participation in the torture) of a number of Afghan citizens who were in the power of this intelligence service. Criminal proceedings were instituted against him after he had sought refuge in the Netherlands as an asylum-seeker and had come to the attention of the Dutch criminal justice authorities. In view of this, it can be held that the basis for the prosecution in the present case is not the territoriality, nationality or protective principle, but the universality principle (secondary jurisdiction). The Court of Appeal recognises that this jurisdiction, in its secondary form too, is applied by the Dutch legislator only with great caution and gives rise to questions of legitimacy in international law as it affects the sovereignty of the territorial state.

5.2.2 In the view of the Public Prosecution Service, the charges against the defendant come within the scope of the Geneva Conventions of 12 August 1949. These Conventions and the rules they contain relate primarily to war in the sense of an international armed conflict; infringements of some of these rules are designated as "grave breaches" (e.g. in article 147 of the Fourth Convention1)). However, the conventions also make provision in their common article 3 for minimum rules governing the humane treatment of "persons taking no active part in the hostilities" in the case of non-international armed conflicts. The Court of Appeal notes that these rules were described by the International Court of Justice (ICJ) in its decision of 27 June 1986 in the case of Nicaragua v. the USA (§ 218, 219; with reference to a previous decision of 1949) as a "minimum yardstick; 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." The present case concerns torture or participation in torture, which is expressly mentioned both in article 3, opening words and 1 (a), and in article 147 of the Fourth Convention.

It follows that the acts of which the defendant is accused must be regarded as grave breaches of the substantive rules of international humanitarian law in international and non-international armed conflict (although in the latter case they do not technically qualify as "grave breaches" under the Convention). To this extent the nature of the conflict is immaterial, even in the view of the defence.

5.2.3 However, the Conventions do make a distinction as regards the obligations of the contracting parties to uphold the substantive rules of international humanitarian law. Article 146 of the Fourth Convention reads as follows:

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
..."

The Court of Appeal interprets this provision as follows: the first two paragraphs of this article impose an obligation to make "grave breaches" criminal offences and to investigate and try offenders regardless of their nationality, but that as regards other infringements, as in the case of article 3, there is "only" an obligation to "suppress" them, without any stipulation as to the manner in which this is to be done. In itself, the text of the Convention leaves open the possibility of the criminal law being used for enforcement purposes in the latter case too. The question of whether a state is entitled to do so would certainly seem capable of being answered in the affirmative where a case involves its own territory and its own citizens are perpetrators or victims. But the present case concerns the exercise of secondary jurisdiction based on the universality principle.

The defence has argued - and produced many sources to prove - that Dutch criminal law, when viewed from the perspective of

international law, may not go so far. There are two arguments against this. First, it should be noted that in the parliamentary history of the Torture Convention (Implementation) Act the Dutch legislator, in 1987, based the applicability of the universality principle (which was to some extent interpreted more restrictively by the Supreme Court) in part on the 'intolerableness of the idea that torturers could move freely to other countries and there come face-to-face, unpunished, with their victims who have fled abroad.' 2) This situation occurs in the present case and could not necessarily be "resolved" by transferring the defendant to his country of origin (and the scene of the crime) since this might possibly be contrary to the absolute rights safeguarded in the European Convention on Human Rights. Second, section 3, opening words and 1° of the Wartime Offences Act provides without qualification - in any event literally - for jurisdiction over the war crimes specified in sections 8 and 9 of that Act. The relevant part of this section reads as follows:

"Without prejudice to the relevant provisions of the Criminal Code and the Military Criminal Code, the provisions of Dutch criminal law are applicable to:
1°. any person who commits a crime as referred to in sections 8 and 9 outside the Kingdom of the Netherlands in Europe; ...".

5.3. As regards the nature of the conflict, the Court of Appeal is of the opinion, like the District Court, the defence and (more implicitly) the Public Prosecution Service, that the conflict in Afghanistan in the 1980s was basically a non-international armed conflict, namely a conflict between the regime in Kabul and the Mujaheddin, who rose up in arms against it. Although the regime was to some extent backed by Russian advisers and army units, which also engaged in hostilities, this does not detract from the Court of Appeal's opinion that the conflict was not basically of an international nature. After all, the most essential characteristic of an international armed conflict is that it is a conflict between sovereign states; the Court of Appeal refers to Article 2 of the Fourth Geneva Convention. This was not the case here, as is also evident from the statements and reports of expert witness Giustozzi used as evidence.

5.4. Against this background, the Court of Appeal holds as follows in respect of the specific defences.

5.4.1 What has been put forward above with respect to section 3 of the Wartime Offences Act gives rise to the question of whether this statutory provision is in accordance with international law. Before this question can be answered, however, it is necessary to determine whether the Dutch courts are competent to rule on this issue in view of the separation of powers between the legislature and other organs of the state, as laid down in article 94 of the Constitution. Article 94 of the Constitution reads:

"Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of decisions of international organisations."

This provision raises the question, however, of whether the court is competent not to apply section 3 of the Wartime Offences Act in this case. There is also the question of whether there is anything in the parliamentary history of section 3 of the Wartime Offences Act to suggest that this section, notwithstanding its clear wording, should be interpreted restrictively and warranting the conclusion, as argued by the defence, that this article does not provide for secondary jurisdiction based on the universality principle in this case.

5.4.2 As seems to have been widely accepted, article 94 of the Constitution does not allow the courts to review acts of parliament for compatibility with unwritten international law. This interpretation of the law by the Supreme Court in its Nyugat II judgment of 6 March 1959, NJ 1962.2, served as a basis for the 1983 revision of the Constitution and is also expressed (albeit in reverse terms) in the text of this article of the Constitution. In the opinion of the Court of Appeal, no argument - or at least no sufficiently cogent argument - can be derived from the Geneva Conventions to support the view that section 3 of the Wartime Offences Act is incompatible with international law as laid down in these Conventions. Although counsel for the co-defendant [defendant 1] has indeed pointed to a general rule of international law that universal jurisdiction may be exercised only in so far as this is authorised by international law and has argued that no such authorisation with respect to violations of common article 3 (in the case of non-international armed conflicts) can be found in the Geneva Conventions, counsel acknowledged, when asked, that no such rule of international law can be found in any written treaty provision.

This being the case, the Court of Appeal does not deem itself competent to review section 3 of the Wartime Offences Act to determine whether it is compatible with what are manifestly unwritten rules of international law. As the Public Prosecution Service too is bound by article 94 of the Constitution in deciding whether to prosecute, this in itself disproves the complaint that the Public Prosecution Service is exercising its prosecutorial powers in breach of international law.

Counsel for the co-defendant [defendant 1] has also argued by rejoinder that under article 8 of the Criminal Code the applicability of the provisions governing jurisdiction in articles 2 to 7 "is limited by the exceptions recognised in international law" and that, under article 91 of the Criminal Code, article 8 also applies to the Wartime Offences Act. Quite apart from the question of what exceptions

in international law are covered by this article (the Court of Appeal considers that it covers immunity) and quite apart from what meaning should be attributed in this respect to the opening words of section 3 of the Wartime Offences Act, the Court of Appeal is of the opinion that article 8 of the Criminal Code may not set aside the Constitution in the interpretation of section 3 of the Wartime Offences Act.

5.4.3 Against the background of the prohibition of review as noted above, the Court of Appeal would point out for the record that it appears from the Explanatory Memorandum (see note 2, p. 4) to the Torture Convention (Implementation) Act that the legislator was clearly already of the opinion in 1987 that 'torture committed in the case of internal or international armed conflict constitutes a violation of the laws of war, ... which is an offence under section 8 of the Wartime Offences Act'. It therefore considered that the provisions governing criminal liability for torture (and jurisdiction in respect of torture) in the Wartime Offences Act also applied to violations of common article 3. These provisions seem fairly far-reaching; for example, the then Advocate General, Van Dorst, argued in his opinion (§ 10) prior to the decision of the Supreme Court of 11 November 1997, NJ 1998.463 (Knesevic II) that the Netherlands takes an exceptional position by providing that not only the 'grave breaches' but also the less serious breaches are covered by universal jurisdiction. However, support for the establishment of secondary jurisdiction based on the universality principle (i.e. no trial in absentia) can be found in the development of treaty law since the Second World War, as represented in the separate views of the judges in the decision of the ICJ of 14 February 2002 in the Yerodia case (Congo v. Belgium). Owing to the non ultra petita rule, the ICJ itself was precluded from answering the question about the legitimacy under international law of the unlimited universal jurisdiction exercised by Belgium "in absentia".

5.4.4 The Court of Appeal also notes with regard to the history of the Wartime Offences Act that, in keeping with the analysis given by the Supreme Court in its decision in the Knesevic II case, the legislator wished at that time to comply fully with the Netherlands' obligations under the Geneva Conventions. It was primarily thinking in this connection - this much can be granted to the defence - of the obligation to make "grave breaches" criminal offences, which can hardly be regarded as surprising against the background of the global conflict that had ended only a short time before. However, it is evident from the debate on the bill (pages 2247 and 2251) that, even at that stage, the possibility was kept open that crimes committed in a non-international armed conflict (it concerned the coup in Bolivia) might be tried in the Netherlands. Whatever the case, the Court of Appeal infers from the following findings of law in the above-mentioned judgment of the Supreme Court that it should be assumed that jurisdiction also exists in the case of violations of common Article 3:

"6.1 In the contested decision the Court of Appeal evidently assumed that the acts described and defined in more detail in the [...] said application would, if proven, constitute acts in violation of common article 3 of the 1949 Geneva Conventions and consequently constitute the crime described in section 8 of the Wartime Offences Act. As this view has not been contested in the cassation proceedings, it must also be assumed to be correct in assessing the ground of appeal.

6.2 The ground of appeal evidently argues that the Court of Appeal was wrong to hold that the Dutch courts have jurisdiction with respect to the offences alleged in the application for the institution of a preliminary judicial investigation.

6.3 In view of what has been held above at 5.3, section 1 of the Wartime Offences Act must be interpreted as meaning that the relevant provisions of this Act, including section 3, opening words and 1º and sections 10, 10a and 11, are always applicable to the crimes defined in sections 8 and 9, without the restrictions specified in subsections 1, 2 and 3 of section 1.

6.4. The Court of Appeal was therefore right to hold that the Dutch courts have jurisdiction with respect to the offences alleged in the application for the institution of a preliminary judicial investigation."

The Court of Appeal recognises that the application referred to in the decision related to offences that were alleged to have been committed in the former Yugoslavia in 1992, but does not see any basis whatever in the findings of the Supreme Court for the view (or assumption) that these findings concerning jurisdiction would not also apply to offences committed 10 to 15 years earlier, as is the situation in the present case.

In view of the above, the defence relating to the lack of jurisdiction as set out at a) should be rejected. The Court of Appeal emphasises once again that - in view of the aut dedere aut punire principle (either extradite or punish) - the present case involves the exercise of secondary jurisdiction based on the universality principle. Moreover, the importance of the presence of the defendant in the territory of the prosecuting state is also emphasised in the Explanatory Memorandum to the International Crimes Act.3)

5.4.5 The submission at b) that the Wartime Offences Act did not at the time relate to violations of common article 3 of the Geneva Conventions and that the abolition of the period of limitation does not apply for such offences should be rejected on the same grounds.'

7.1 I would first make a few general observations concerning the connection between the first four grounds of appeal.

7.2 The following provisions are relevant to the question of the jurisdiction of the Dutch courts:
Article 3 (old) of the Wartime Offences Act, which provides as follows:

'Without prejudice to the relevant provisions of the Criminal Code and the Military Criminal Code, the provisions of Dutch criminal law are applicable to:
1°. any person who commits a crime as referred to in sections 8 and 9 outside the Kingdom of the Netherlands in Europe;
(...)'

Article 8 (old) of the Wartime Offences Act, which provides inter alia:

'1. Any person who violates the laws and customs of war shall be liable to a term of imprisonment not exceeding ten years or a fifth-category fine.
(...)
3. Life imprisonment, a determinate sentence not exceeding twenty years or a fifth-category fine shall be imposed:
1°. if the offence results in the death or serious bodily injury of another person or involves rape;
2°. if the offence involves the joint use of violence against one or more persons or the use of violence against a dead, sick or injured person;
(...)'.3)

Article 9 (old) of the Wartime Offences Act, which provides as follows:

'Any person who intentionally permits an offence as described in the previous section to be committed by a subordinate shall be liable to the same sentence as that carried by such offences.'4)

7.3 The four Geneva Conventions of 12 August 19495) deal with the situation of an international armed conflict and concern various categories of protected persons. Article 3 of these Conventions (which is common to them all and is referred to below as common article 3) is sometimes also known as a mini-convention within the four conventions and relates in each case to a non-international armed conflict. It came into being only after difficult diplomatic negotiations, because it lays down rules regarding an internal conflict and is thus of direct concern to the sovereignty of the state in whose territory such a conflict takes place.6) Part of common article 3 reads as follows:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms (...) shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, (...).
To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (...)'7)

7.4 The Court of Appeal held (and this has not been contested in the cassation proceedings) that when the acts with which the defendant has been charged were committed in Afghanistan the conflict was not an international armed conflict.

Article 146 of the Fourth Convention relative to the Protection of Civilian Persons, as cited by the Court of Appeal, entails an obligation for the Contracting States to introduce universal jurisdiction8) for the 'grave breaches' referred to in Article 147 against the persons protected by the Convention as referred to in Article 4.These breaches include torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health. But this therefore exclusively concerns breaches of the Convention in an armed conflict of an international character.

However, as the Court of Appeal rightly held, the text of the Convention does not in itself preclude the possibility that a Contracting Party may also establish universal jurisdiction in relation to breaches covered not by article 147 but by common article 3.9)

7.5 Section 3 of the Wartime Offences Act is an application of the universality principle, while section 8 of the Act to which it also refers is applicable (as the legislative history of the provision also shows) to breaches of the provisions of the Geneva Conventions (even if they do not qualify as 'grave breaches'). These statutory provisions were among those dealt with in the decision of the

Supreme Court of 11 November 1997, NJ 1998, 463, with note (Knesevic II), which concerned offences committed in the former Yugoslavia.

The basic criterion in the cassation proceedings in that case was that the relevant acts, if proven, constituted violations of common article 3. As the Supreme Court held, acting in breach of common article 3 is covered by section 8 of the Wartime Offences Act.10) The Supreme Court went on to hold that the relevant provisions of the Wartime Offences Act, including section 3, opening words and 1° and sections 10, 10a and 11, always apply to crimes as defined in section 8.11)

8.1 The first ground of appeal is that the Court of Appeal assumed on the wrong grounds, in view especially of what it held at 5.2.2, that common article 3 could be treated as a criminal provision on the basis of which the defendant could be prosecuted in the Netherlands.

8.2 The ground of appeal is, in my view, based on an incorrect reading of the relevant findings of the Court of Appeal and therefore has no basis in fact. The Court of Appeal did not fail to recognise that common article 3 was not an independent criminal provision. The criminal provision on which the charges are based is section 8 of the Wartime Offences Act, which refers in subsection 1, in the phrase 'breach of the laws and customs of war', to (among other things) the prohibitions contained in common article 3. Section 8, subsection 1 of the Wartime Offences Act is therefore the criminal provision which imposes a punishment for a breach of the rules of common article 3 or, to put it another way, the provision implementing common article 3. Moreover, the structure of section 8 of the Wartime Offences Act is such that its subsections 2 and 3 include qualified breaches (which have also been held proven here). The limitation period was abolished in the Act of 8 April 1971, Stb. 210, only in respect of these qualified breaches.

8.3 This is not altered by the fact that the word marteling (torture) does not appear in subsection 2 of section 8 of the Wartime Offences Act (which deals with aggravating circumstances). Marteling which, when translated into Dutch criminal law terms, in fact simply means serious mistreatment, generally premeditated, comes under subsection 1 of section 8 of the Wartime Offences Act, since this provision referred to common article 3 in which this term appears.
It is not correct, as submitted in the ground of appeal, that the term marteling has a specific legal meaning of its own in this connection. The term used in the authentic English text of the Convention is 'torture', which also appears in the Convention against Torture where it does indeed have a specific meaning. In this specific sense it is translated into Dutch as foltering, which should be regarded as marteling with an extra dimension. This extra dimension is the capacity in which the perpetrator acts (in brief, as a government official or other person acting in an official capacity) and the special purpose of the actions constituting the offence, for example to obtain information or a confession.
In other words, the torture or mistreatment is the basic act. If this extra dimension exists, this act constitutes foltering as defined formerly in the Torture Convention (Implementation) Act, which has now been repealed, and now in section 1, subsection 1 (e) of the International Crimes Act. It is made a criminal offence in section 8 of the latter Act.

The act known as marteling (see section 1, subsection 1, opening words and (d) of the International Crimes Act), as referred to in common article 3 of the Fourth Convention and now included in section 6 of the International Crimes Act, also has an additional element, but this is of different nature: the torture must have been committed at the time of a non-international armed conflict.12) To avoid confusion, it is therefore better to use the term marteling in the context of this case.

8.4 Section 8 of the Wartime Offences Act therefore refers, among other things, to common article 3.There is in itself no objection to such a reference: references are regularly made in the implementation of European directives and generally occur in the case of tiered legislation.
The ground of appeal also argues - and this raises, as far as I can see, a different theme - that the rules in common article 3 are insufficiently specific, particularly since the terms used in it are not defined. This last submission imposes an unduly strict requirement. Dutch criminal law has, for example, long made use of criminal provisions such as Article 300 of the Criminal Code without defining the term mishandeling (mistreatment) as used in it.

However, section 8, subsection 1 of the Wartime Offences Act has been criticised for merely containing an unlimited reference to, in particular, the customs of war, but the government saw no objection to this.13) I would note for the record here that the acts with which the defendant is charged consisted of torture (or mistreatment) and the use of physical violence, with serious bodily injury being caused in one case. Both the Act and the relevant Convention were published in the prescribed manner at the time in question. In my view, there is no inconsistency with article 1 of the Criminal Code or article 7 of the European Convention on Human Rights, as regards which no defence was in fact entered before the court trying the facts of the case. The offence was introduced in the Wartime Offences Act dating from the 1950s.

8.5 In so far as the ground of appeal maintains that in the absence of implementation common article 3 is not enforceable as such in

criminal law, for which it cites a number of academic sources, it overlooks the central issue of the case. The Contracting Parties undertook to take the measures necessary for the suppression of all acts contrary to the provisions of common article 3 (article 146 (3) of the Fourth Convention). The Netherlands has fulfilled this obligation (in part) by implementing the provisions of common article 3 in the criminal law (i.e. the Wartime Offences Act), as also held and decided by the Supreme Court in the Knesevic judgment of 1997.

8.6 The ground of appeal was advanced to no avail.

9.1 The second ground of appeal claims that the Court of Appeal wrongly (implicitly) assumed that the Dutch criminal courts were entitled to secondary jurisdiction based on the universality principle in relation to acts contrary to section 9 of the Wartime Offences Act (commanders' liability) in so far as based on common article 3.

9.2 The ground of appeal cannot result in cassation as it lacks relevance. The Court of Appeal declared the principal charge - partly - proven. This charge was based on section 8 of the Wartime Offences Act and involved personal joint perpetration of an offence under section 8, consisting of violations of common article 3, with regard to a number of persons specified in the charge. The offence under section 9 of the Wartime Offences Act of wilfully allowing a subordinate to commit such an offence is mentioned in the alternative charge, which the Court of Appeal did not need to consider.

9.3 The ground of appeal is untenable.

10.1 The third ground of appeal challenges the following findings of the Court of Appeal:
a) finding 5.4.3 on the ground that the Court of Appeal wrongly assumed that torture constituted an offence within the meaning of section 8 of the Wartime Offences Act in so far as committed in 1987 in the case of an internal or international armed conflict;
b) finding 5.4.4. on the ground that the Court of Appeal wrongly assumed that the findings of the Supreme Court in the Knesevic II case in 1997 concerning jurisdiction would also apply to offences committed 10 to 15 years earlier, i.e. before 1997.

10.2 Quite apart from the fact that finding 5.4.3 is obiter dictum, the Court of Appeal merely held there that it is evident from the legislative history of the Torture Convention (Implementation) Act that, as can also be inferred from the parliamentary history of the Wartime Offences Act, the legislator considered that violations of common article 3, including marteling, were punishable under section 8 of the Wartime Offences Act (see also note 9 above).

I have already pointed to the danger of misunderstandings about the terms marteling and foltering (both meaning torture). I would refer to what has already been said on this subject at 8.3.

The argument based on the decision of the Supreme Court of 18 September 2001, NJ 2002, 559 (Bouterse), is not relevant here. This concerned the question - answered in the negative - of whether the Torture Convention (Implementation) Act should have retroactive effect on the basis of a rule of international law, for example as regards the universal jurisdiction introduced by the Convention. Nor is the argument based on the Pinochet judgment of the House of Lords relevant since this case too related to the Convention against Torture (and implementation of the Convention).

However, the acts referred to in common article 3, including torture, committed at the time of an internal conflict, have been punishable under the Wartime Offences Act since 1955, when the Geneva Conventions entered into force for the Netherlands, while as the charges state, the offences were committed later. There is no question of retroactive effect. It is irrelevant that the period in which certain offences were committed was before the date of the entry into force of the Torture Convention (Implementation) Act. My conclusion is that Court of Appeal was correct in its view, contested in the first ground, that torture as prohibited in common article 3 and committed in 1987 in the case of an internal armed conflict constitutes the offence defined in section 8 of the Wartime Offences Act.

10.3 The following points should be made about the second ground. Unlike the drafter of the ground of appeal, I read the Knesevic II judgment as meaning that the Supreme Court held that it had not been disputed before the court trying the facts of the case that the specific acts constituted violations of common article 3 and that this therefore had to be assumed in the cassation proceedings, but not that this also applied to the answer of the Court of Appeal to the legal question of whether violations of common article 3 were included under article 8 of the Wartime Offences Act. I believe that this legal question was answered in the affirmative by the Supreme Court in section 6, when viewed in its context.15)

Finally, it is explicitly stated that the Dutch courts have jurisdiction in relation to the offences specified in the application for the institution of a preliminary judicial investigation.

10.4 The Court of Appeal has also held, rightly in my view, that no basis whatever can be found in the reasoning of the Supreme Court in the said decision concerning the determination of jurisdiction under section 3 of the Wartime Offences Act for the supposition that this universal jurisdiction did not apply to offences committed before 1997. The Wartime Offences Act dates from 1952, and the 1997 decision of the Supreme Court explaining provisions of this Act (the subsequent amendments to which were of only minor importance) contains no basis for the supposition that in the view of the Supreme Court section 3 of the Wartime Offences Act could be applied in 1997 but not in any preceding period, including one or more periods mentioned in the charges. In essence, the defence takes the position that section 3 of the Wartimes Offences Act should not be applied in relation to offences committed in a period of over 30 years after the entry into force of that Act. If the Supreme Court had considered that a special situation applied, there would have been every reason for it to mention this in its decision, particularly since it is precisely in cases of this kind that a long period can elapse between the commission of the offences and the actual possibility of bringing a prosecution. It would then have been of the utmost importance to indicate from what date before 1997 the provision could be applied.

10.5 Both parts of the ground of appeal are untenable.

11.1 The fourth ground of appeal challenges the view of the Court of Appeal that (in the light of what the Supreme Court held in the Knesevic II judgment about, inter alia, section 3 of the Wartime Offences Act) jurisdiction exists even in cases of violations of common article 3.

11.2 It follows from this decision that the view of the Court of Appeal is correct. As already explained above, the Supreme Court has held that section 8 of the Wartime Offences Act also makes violations of common article 3 punishable and that section 3 of the Wartime Offences Act creates universal jurisdiction in respect of breaches of section 8 of the Act.

11.3 The ground of appeal cannot therefore result in cassation.

12.1 The fifth ground of appeal challenges the rejection by the Court of Appeal of a defence that the indictment should be declared void because it does not explain or provide factual substantiation for the protected status of the victim.

12.2 According to the memorandum of oral pleading, defence counsel submitted as follows in this connection:

'If my client is to be able defend himself properly against the charges, he must know what legal rules the Public Prosecution Service considers applicable and what parties were involved in the Afghan conflict in the view of the Public Prosecution Service. It is important, after all, to determine whether the group of persons portrayed as victims by the Public Prosecution Service qualify as "persons protected by the Geneva Conventions".

12.3 The Court of Appeal held and decided as follows in this respect:

'As regards the protected persons, their description in common article 3 has been included in the charges in the passage about persons who were not taking an active part in the hostilities (namely civilians or members of the armed forces who had laid down their arms or been placed hors de combat); in addition, the acts explicitly prohibited in these articles are actually described, and the circumstances relevant to the criminal law classification in accordance with section 8 of the Wartime Offences Act are specified.

In the case of an international armed conflict, article 147 of the Fourth Geneva Convention refers only to offences "committed against persons protected by the present Convention". The protected persons are defined in article 4 of that Convention:

" . persons ... who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

The Court of Appeal notes - as does the defence - that this description is missing in the charges. As the Court of Appeal has classified the conflict as non-international, there is no need to examine the possible consequences of the absence of this designation. Here too no plausible case has been made for saying that the defendant has been hampered, in his defence (or in preparing his defence) by the manner in which the charges are brought.

12.4 I would observe at the outset that the purport of both the defence and the ground of appeal raises questions. Assuming that a given element of the offence is missing in the charges, it would be more logical to enter a defence that if the facts are held to be proven they do not constitute a criminal offence, rather than to invoke the nullity of the indictment on the grounds that the charges

are not sufficiently described. Nor has it been alleged that this description was insufficiently factual.

It seems to me that the ground of appeal too shows that the defence is in two minds. It submits, in essence, that what is at issue here is an essential element of the scope and meaning of common article 3, with the result that if it is omitted, the charges, if proven, fall outside the substantive rules of international humanitarian law. However, it concludes at the end of the explanatory notes that in dismissing the defence the Court of Appeal wrongly applied the 'due perspective requirement' to the present charges by, in brief, holding that the defendant was not hampered in conducting his defence.

12.5 In submitting that 'the Court of Appeal accepts the definition provision in article 4 of the Fourth Geneva Convention', the ground of appeal is based, in my view, on an incorrect interpretation of the judgment of the Court of Appeal, since the Court of Appeal - rightly - considered that article 4 was important only in the case of an international armed conflict, which - as the Court of Appeal held - did not exist here.

In so far as the ground of appeal (see the notes at 4) is based on the view that article 4 is also applicable to a non-international armed conflict and is thus, as it were, an element of common article 3, this view cannot be accepted as correct.

12.6 As explained above at 7.3, each of the four Geneva Conventions relates to a particular group of protected persons in the case of an international armed conflict. For example, the First Convention concerns the wounded and sick in the armed forces in the field and the Fourth Convention relates, as stated in to its title, to the protection of civilians in time of war. As already noted, these Conventions (including the fourth Convention) concern the situation that arises where there is an international armed conflict (except in common article 3). This also applies to article 4 of the Fourth Convention. In short, protected persons are taken there to mean persons who, in the case of a conflict or occupation of this kind, fall into the hands of a party to the conflict or Occupying Power of which they are not nationals, while paragraph 4 of this article excludes persons already protected by one of the other conventions. Not only civilians but also, for example, military personnel who are refused the status of prisoner of war for any reason may come within the category of persons protected by the Fourth Convention.16)

12.7 However, common article 3, which, as already noted, is sometimes described as a mini-convention within each of the four conventions, applies to internal armed conflicts and lays down minimum rules of conduct. It is the sole article that applies to such a conflict; article 4 does not therefore apply.17)

As the text shows, article 3 provides protection in the case of an internal conflict to 'persons taking no active part in the hostilities'. These may be civilians or government military personnel or rebels who have laid down their arms or been placed hors de combat in some other way.
The prohibited acts must have some connection with the internal armed conflict,18) but the existence of such a connection is not disputed in these proceedings and can also be inferred from the evidence submitted.

12.8 It is stated in the charges, in so far as relevant here, that the acts with which the defendant is charged were directed against the persons mentioned in them who were not engaged in the hostilities. This is therefore precisely what common article 3 requires in this connection.
This is also what the Court of Appeal held in relation to the charges. Its view that the defence should therefore be dismissed and that the defendant was not hampered in conducting his defence is not evidence of an incorrect interpretation of the law concerning article 261 of the Code of Criminal Procedure and is not manifestly unreasonable. Nor is this, of course, altered by the fact that if the possibility envisaged in the alternative (but unproven) charge were to exist, namely that there was an international armed conflict, the charge would lack an essential element.

12.9 The ground of appeal is untenable.

13.1 The sixth ground of appeal is directed against the rejection of the defence that the defendant should not be treated as a commander or that he had no effective control over his subordinates, as the case may be. According to the notes, the ground of appeal refers to the requirement included in section 9 of the Wartime Offences Act.

13.2 The ground of appeal lacks any factual basis because the contested judgment does not contain any rejection of such a defence, as the ground of appeal in fact notes. Nor is this surprising because section 9 of the Wartime Offences Act is not relevant to this case, as already noted above at 9. What has been found proven is, after all, the principal charge of joint perpetration as defined in section 8 of the Wartime Offences Act.

A remark is made in the memorandum of oral pleading (page 12), evidently in relation to the alternative charge, about the

submission (namely submission 1 of the Public Prosecution Service) that the defendant 'wilfully allowed a subordinate to commit this offence',19) but the Court of Appeal was not required to deal with this because it did not need to consider the alternative charge, to which section 9 of the Wartime Offences Act would thus have been relevant. The Court of Appeal also stated as much at 5.4.8.

Moreover, it is naturally not possible to challenge in cassation proceedings the rejection of the defence of a co-defendant.

13.3 The ground of appeal cannot result in cassation.

14.1 The seventh ground of appeal is that the Court of Appeal rejected, on the basis of an incorrect criterion and inadequate grounds, the defence that, by using in the present criminal case statements made by the defendant to the Immigration and Naturalisation Service (IND), the Public Prosecution Service had acted in breach of the privilege against self-incrimination (nemo tenetur) enshrined in article 6 of the European Convention on Human Rights (ECHR) and in breach of Article 8 of the ECHR because the right of the defendant to respect for his private life had been violated.

14.2 The Court of Appeal held and decided as follows in this matter:

'6.1 It has been argued by the defence that the prosecution brought by the Public Prosecution Service should be held to be inadmissible or that evidence should be excluded on the grounds that it was obtained unlawfully. The defence has based this on the following arguments, which are summarised below:
a) by using in the present criminal case statements made by the defendant in his dealings with the Immigration and Naturalisation Service (IND) the Public Prosecution Service has acted in breach of the privilege against self-incrimination implicit in article 6 ECHR, in other words the right not to be compelled to incriminate oneself;
b) the IND violated the right of the defendant to respect for his private life by supplying his IND file to the police and thereby breaching the promised confidentiality of the statements made by him. Article 8 ECHR was thereby violated;
(...)

The Court of Appeal rejects these defences and holds as follows.

6.2.1 The defence has stated in relation to the defence referred to at a) that the statements made by the defendant to the IND during the assessment of his application for asylum should be treated as having been made "under coercion" and may not therefore be used against him in the criminal proceedings. In support of this argument, the defence cited case law of the European Court of Human Rights (ECtHR) and in particular the decision of 17 December 1996, NJ 1997, 699, in the case of Saunders v. the UK. The following has been established in relation to the arguments thus put forward.

6.2.2 The defendant submitted applications on 31 May 1996 for admission as a refugee and for the issue of a residence permit. The defendant was given the opportunity to comment on these applications on 7 and 10 June 1996 and was interviewed for this purpose by a staff member of the IND, which is not a law enforcement authority within the meaning of the criminal law. The defendant was granted refugee status on 26 August 1996.

6.2.3 The defendant was interviewed again by the IND on 7 January 1999 in connection with grave suspicions that he might have been guilty of human rights violations in the position which he had held in Afghanistan. Before the start of the interviews, the IND explained the importance of the interviews to the defendant and asked him to make truthful statements.

On the basis of the defendant's statements and after inquiries made by staff of the Ministry of Foreign Affairs and the IND, a decision was made on 31 July 2000, in brief, that the defendant would not be granted a residence permit and that he would be deprived of his refugee status. According to the decision, this action was taken because there were good grounds for believing that the defendant had committed war crimes or crimes against humanity as described in Article 1F of the Refugee Convention. This "1F decision" was then sent by the IND to the Public Prosecution Service with a request to examine whether the defendant should be prosecuted.
The then State Secretary for Justice had already informed the House of Representatives by letter of 8 November 1997 that, in view of the international treaty and moral obligations of the Netherlands as specified in the letter, the Public Prosecution Service would be notified of all applications for decisions that had been refused (in part) on the basis of article 1F of the Refugee Convention.

On 2 December an initial official report was drawn up in order to institute a criminal investigation against the co-defendant [defendant 1]. Statements made in that investigation resulted in the institution of a criminal investigation against the defendant. The defendant was arrested in early December 2004 and then interviewed as a suspect by the police on a number of occasions.

6.2.4 When the defendant was interviewed, the investigating officers used the statements made by the defendant to the IND to jog his memory and to confront him with and build on their contents. Neither at the trial at first instance nor at the hearing on appeal was the defendant confronted with the statements made to the IND. At the trial at first instance only the basic contents of these statements were read out to him. The defendant exercised his right to silence both at the trial and on appeal.

6.2.5 Against this background, it is necessary to determine in relation to the defence's submission whether in the case of the IND procedure the cooperation of the defendant could be said to have been obtained "under coercion", as referred to in the Saunders judgment of the ECtHR. And, if so, whether the information obtained could be used in criminal proceedings. In the case to which this judgment related, the person concerned was obliged to answer questions put to him in the context of a non-criminal investigation of commercial and financial fraud since refusal to answer would result in prosecution for a criminal offence equivalent to contempt of court and conviction could lead to a term of imprisonment not exceeding two years.
It should be noted at the outset that, as in the Saunders case, the IND procedure which the defendant underwent was not a procedure to which article 6 ECHR is applicable, nor can it be described as a criminal proceeding. This is why the IND was not under an obligation, in the opinion of the Court of Appeal, to draw the attention of the defendant to the danger of a criminal prosecution if he were to incriminate himself in any way.

6.2.6 Nor is the situation any different, in the opinion of the Court of Appeal, in relation to the IND interview of the defendant on 7 January 1999. It was only after July 2000 that the defendant's 1F file was sent to the Public Prosecution Service, and there is no plausible evidence that any investigating officer was in any way involved in that interview. This is not altered by the fact that the IND itself may have suspected that the defendant had been involved in serious war crimes.

6.2.7 In the opinion of the Court of Appeal, the IND procedure which the defendant underwent did not involve the making of statements "under coercion" by threat of prosecution as in the Saunders case. A person who voluntarily submits to the IND procedure and cooperates in that procedure, in particular by making statements, does not do so "under coercion" by threat of prosecution. In the opinion of the Court of Appeal, this is not altered either by the fact that if the person concerned embarks on this procedure in order to obtain admission and a residence permit he then in fact becomes obliged to cooperate (or continue cooperating) in that procedure (or parts of that procedure), or by the fact that failure to fulfil these obligations may also carry sanctions and that the ultimate consequence of failure on the part of the person concerned to cooperate is that the requested permits will not be granted. Nor is this altered by the fact that a person who applies for admission and a residence permit may himself feel compelled to cooperate in order to achieve his goal.

6.2.8 In so far as it is necessary to decide differently, the Court of Appeal is of the opinion in relation to the question of whether the information obtained from the defendant in the IND interviews may be used in the criminal proceedings that this information was used in a decidedly different manner from that in which the information in the Saunders case was used. In the latter case the applicant was confronted during the trial (and before a jury) by counsel for the prosecution over a three-day period with the answers he had given during the investigation. In the case of this suspect, the IND statements were used in the preliminary investigation, namely by the officers interviewing him. The Court of Appeal also notes, perhaps superfluously, that the self-incriminating elements of the IND statements concerned are basically limited to statements about the very high position held by the defendant in the military intelligence services of the regimes concerned at the time in question. What happened in that intelligence service and formed the basis for the present prosecution was or gradually became clear from other sources.
The Court of Appeal would also note that there is no plausible evidence for the allegation that the Public Prosecution Service or any criminal justice officials acting under its responsibility exercised any controlling influence over the IND interviews or that the IND interviews were conducted (in part) with a view to the prosecution of the defendant.

Last but not least, the Court of Appeal would refer in this connection to the considerable length of time that elapsed, as explained above, between the IND interviews and the start of the criminal investigation and to the statements made by the defendant in this connection to investigating officers.

6.3.1. As regards the defence referred to at b), there is plausible evidence that IND staff informed the defendant that his statements to the IND would be treated confidentially. The Court of Appeal recognises that the concept of confidentiality is rather ill-defined. However, in the view of the Court of Appeal there is certainly no plausible evidence that undertakings relating to a criminal investigation were given to the defendant. This is in contrast to the events in the "Koningskoppel" case cited by defence counsel, which led to the judgment of this Court of Appeal of 5 March 2002, LJN AD9816. In view of the general undertaking given to him, the defendant was entitled to believe that the personal particulars provided by him would not automatically be divulged to other authorities. However, his IND file was subsequently passed to the Public Prosecution Service. The Court of Appeal therefore agrees with the defence that this transfer of the criminal file constituted an infringement of the defendant's right to respect for his private life, as referred to in article 8 ECHR. The Court of Appeal must therefore determine (1) whether there was a statutory basis for this

infringement and (2) whether the infringement was proportional.

6.3.2 (re 1) The defence has not challenged the District Court's view - which was adopted by the Court of Appeal - that a statutory basis for the transfer of the defendant's IND file to the Public Prosecution Service existed at the time of the transfer.

(re 2) The Court of Appeal also shares the District Court's view that there was a pressing need in this case to infringe the defendant's right to respect for his private life and refers in this connection to the above-mentioned letter of the State Secretary for Justice of 8 November 1997. The Court of Appeal considered in this respect that the importance of punishing (or transferring or extraditing) persons suspected of having committed very serious war crimes had been correctly weighed against the manner in which their right to respect for their private life was infringed. Nor, in the light of the above-mentioned letter of the State Secretary for Justice, does the Court of Appeal consider that this is altered by the fact that it has not been established that such an assessment was expressly made in the specific case of the defendant. The Court of Appeal also refers in this connection to the prominent position held by the defendant in the intelligence service concerned, as mentioned previously.

6.3.3 The defence has pointed out that in the context of the criminal investigation concerned, IND files of persons other than the defendant were sought and examined without the consent of the persons concerned. In so far as this constitutes an infringement of the privacy of these other persons, whether justified or otherwise, this cannot, in the opinion of the Court of Appeal, be invoked by the defendant since it does not concern his privacy. Contrary to what the defence has submitted, a legal rule which prohibits application in this case of the so-called Schutznorm (protective scope of a norm) doctrine cannot be inferred from any decision of the ECtHR, nor has the Court of Appeal indeed found any evidence of such a legal rule.

6.3.4 As regards the use of IND files, the defence has also argued that, notwithstanding the provisions of article 152 of the Code of Criminal Procedure, there was insufficient reporting of the investigation in and screening of IND files by investigating officers. The Court of Appeal considers that the official report does indeed contain few specific data about the exchange of information between the IND and the investigating officers. However, this has been adequately compensated for by the fact that the defence was able to question various officials. The Court of Appeal therefore it sees no reason whatever to exclude the IND files from the present case. (...)'

14.3 After the Court of Appeal had considered and rejected two other objections lodged by the defence, which are no longer at issue in the cassation proceedings, it concluded its findings as follows:

'6.6. In view of the above findings, the Court of Appeal believes that neither the investigating officers nor the Public Prosecution Service infringed any principle of due process in such a way as deliberately to prejudice the defendant's right to fair treatment of his case or grossly violate his interests; nor was evidence collected unlawfully. The Court of Appeal also considers that in the present case the defendant has had a fair trial.'

14.4 The question that now arises concerns the precise nature of the defence, more specifically pages 14 to 35 of the memorandum of oral pleading. Chapter 3 is entitled 'Inadmissibility of the Public Prosecution Service's case'.20)This is immediately followed by the subheading 'Unlawful collection of evidence', after which come the further subheadings 'Violation of article 8 ECHR' (p. 22), 'Duty to draw up an official report' (p. 28) and 'Investigation in relation to the IND stage/Privilege against self-incrimination' (p. 29). Finally, the defence submits that all IND files should be removed from the criminal file and cannot serve as evidence. It concludes with the following sentences: 'Without the IND data there is no sufficiently legal and conclusive proof in this case. Conclusion: declare the Public Prosecution Service's case inadmissible or exclude the evidence.'

Although it is clearly claimed that the case of the Public Prosecution Service is inadmissible, it is not clear what evidence should be excluded: only the IND documents or other documents as well, and, if so, what other evidence should be excluded and for what reasons?

14.5 As the Court of Appeal did not use any IND documents as evidence, this cannot be the problem. In so far as relevant in this connection, the only evidence used in this case - other than a brief statement by the defendant at the trial at first instance, which simply concerned the position he held (item of evidence 3) - consists of two statements made by the defendant to the police in early December 2004 (items of evidence nos. 26 and 27). Nothing is said in these statements about personal involvement in the offences. These statements concern the defendant's position and place in the organisation and that of [defendant 1]. In response to only one question, namely 'Did torture take place at the KAM at the time of Amin, whether or not you were present?' did the defendant reply, 'Yes, it did occur.'

14.6 The Court of Appeal noted that the police instituted a criminal investigation against the co-defendant [defendant 1] at the end

of 2003 on the basis of information obtained from IND files and that statements made in that investigation resulted in the institution of a criminal investigation against the defendant. It was in that context that he was confronted with the contents of his statements to the IND.

14.7 As the ground of appeal does not itself indicate which evidence used by the Court of Appeal should have been excluded on the grounds that it had been unlawfully obtained, I shall assume that the ground of appeal is referring to the defence that the case of the Public Prosecution Service is inadmissible. If I understand it correctly, this defence is in essence that the right of prosecution has been barred as a result of unlawful acts involving violations of articles 6 and 8 ECHR.

14.8 In HR, 30 March 2004, NJ 2004, 376, the Supreme Court held as follows:

'3.6.5. A ruling that the Public Prosecution Service's case is inadmissible, which is a legal consequence provided for in article 359a of the Code of Criminal Procedure, is made only in exceptional cases. There is scope for this only if the procedural defect consists in the fact that investigating or prosecuting officials have seriously infringed the principles of due process in such a way as deliberately to prejudice the defendant's right to fair treatment of his case or grossly violate his interests.'

This is the same criterion as was formulated for the first time by the Supreme Court in judgment HR 19 December 1995, NJ 1996, 249.

14.9 It was to this criterion that the Court of Appeal referred in its finding at 6.6. It therefore seems to me that the complaint that the Court of Appeal applied an incorrect criterion lacks any basis in fact, although it is not clear whether in referring to a 'criterion' the ground of appeal is in any event including the criterion by reference to which a defence of inadmissibility must be assessed. I infer from the further explanation given that the drafter of the ground of appeal was referring in particular to the criterion applied by the Court of Appeal in assessing the lawfulness of the actions of the police and the Public Prosecution Service.

14.10 The ground of appeal states that, even without coercion as understood by the Court of Appeal, there can still be a violation of article 6 (1) ECHR in view of the circumstances of the case if the privilege against self-incrimination is circumvented improperly and in disregard of the statutory safeguards. However, the Court of Appeal's finding of fact is precisely that this situation did not occur. The asylum procedure was not used as a way of 'concealing' the transfer of self-incriminating material from the asylum procedure to the criminal file. The finding of the Court of Appeal is not manifestly unreasonable since the Public Prosecution Service and the police had nothing to do with the IND procedure which was completed long before the criminal investigation was instituted and the last phase of which related to the question of whether the person concerned had rightfully obtained refugee status in 1996 in the light of article 1F of the Refugee Convention. Contrary to what is submitted in the ground of appeal, I also consider that the Court of Appeal's view that no undertakings relating to a criminal investigation were given in the course of that procedure is not manifestly unreasonable.

14.11 However, as the Court of Appeal recognised, the question of whether the - limited - use made of the later IND statements in the criminal investigation, as described above, constituted such coercion that this principle was infringed is therefore certainly decisive.21) In my view, evidence to rebut the suggestion of undue coercion is provided by the fact that the defendant was informed in the criminal investigation that he was not obliged to reply and, with the exception of a few statements made in the course of the preliminary investigation that were themselves not relevant to the acts with which he was charged, invoked his right to silence both at first instance and on appeal.

14.12 The judgment in the Funke case22) has been cited - in my view wrongly - to rebut the reasoning of the Court of Appeal. In this case the person concerned was sentenced for failing to produce on demand papers and documents relating to transactions that were important to the customs authorities and which this government agency believed must exist. The conclusion in that case was that the extent of the coercion had 'destroyed the very essence of the privilege against self-incrimination'. This case, in which there was specific coercion in the form of criminal sanctions, cannot be compared to the present case.

14.13 In its judgment in the case of O'Halloran and Francis v. UK23) the ECtHR gave an overview of its case law on the right to silence and the privilege against self-incrimination. It can be inferred from this that a case such as Funke is regarded by the ECtHR as belonging to a different category from that of Saunders.

The present situation resembles that of the Saunders case24) to the extent that it can also be submitted here that material collected under coercion in a different, previous, procedure was wrongly used in the criminal investigation. But it is essentially a matter of the nature and extent of the coercion.

14.14 As the case of Weh v. Austria25) shows, there must also be a certain link between the other procedure and the criminal proceedings. In that case no such link was held to exist for reasons that are not, in my view, entirely convincing, given the special features of the case. Weh was fined for having given false information when asked to state who had been driving his car. It was held that there was no link between this procedure and the criminal proceedings instituted in respect of the motoring offence itself against persons unknown. Although what Weh was asked was indeed not incriminating in itself, it has to be recognised that if he had fulfilled his obligation under administrative law (which carried the sanction of a fine) and had admitted that he had been driving the car (which is usually the case), the evidence would admittedly not have been conclusive in theory, but would have been so in practice as motoring offences of this kind are proved by technical means. And I suspect that the proceedings against the hitherto unknown persons would have been continued against Weh himself. But, whatever the case may be, the Weh judgment was also cited in the O'Halloran case. The relevant requirement can therefore not be disregarded here.

14.15 It follows, in my view, from the facts found by the Court of Appeal to have been proved, as summarised above at 14.6, that this link does not exist. The IND investigation had been instituted years earlier and for a completely different purpose and without any involvement on the part of the police or criminal justice authorities. The person concerned was asked at that time to provide factual information. At that juncture proceedings were not anticipated, let alone pending. For this reason alone the defence lacks a sufficient basis.

14.16 The Court of Appeal itself dealt with the question of the alleged coercion. I do not consider that its views are either evidence of an incorrect interpretation of the law or manifestly unreasonable. Saunders was legally compelled to provide information in the prior procedure, intensive use of which was subsequently made in the criminal proceedings in the manner indicated in the judgment. None of this applies in the present case.

An asylum-seeker is required to provide complete and correct information. This is in the interests of a proper assessment of his application in the country in which he has sought refuge. If the person concerned feels pressure to provide this information this is mainly due to his alleged position as a refugee, which the requested State wishes and is entitled to investigate. The circumstances in which he finds himself can induce him to provide this information (although in this case he was clearly not entirely frank). In my view, there can hardly be said to have been state coercion of the kind that occurred, for example, in the cases of Funke and Saunders.

14.17 Contrary to what is alleged in the ground of appeal, the view of the Court of Appeal that in the light of the general undertaking given to him the person concerned was entitled to believe 'that the personal particulars provided by him would not be automatically (my underlining, CB [sic]) divulged to another authority' and its view that there is certainly no plausible evidence that undertakings relating to a criminal investigation were given to the defendant are neither manifestly unreasonable nor mutually contradictory.

14.18 This brings us to the second complaint, the violation of article 8 ECHR by the transfer of the defendant's IND file. As the District Court held (which finding was not challenged by the defence on appeal and was endorsed by the Court of Appeal), the statutory basis for this transfer is to be found in section 43 (b) of the Personal Data Protection Act.

The Court's view on this part of the defence is neither evidence of an incorrect interpretation of the law nor manifestly unreasonable, taking into account, inter alia, article 8 (2) ECHR. It seems to me correct that the urgent need to which the Court of Appeal refers consists in the suspicion that serious war crimes have been committed (and that this is sufficient). It cannot be required - as the ground of appeal would evidently wish - that these offences should already have been proven. After all, who other than a court could decide this? Nor is it relevant that the State Secretary for Justice, who formulated the policy, is not an independent authority. It is the Dutch State which has the heavy responsibility of combating, investigating and, if possible, prosecuting offences of this kind. This may mean in a specific case that a person such as the defendant is not expelled to his country of origin because of the fate that probably awaits him there, given the position he held and the activities he performed as an official for the previous, repressive regime. In this way, possible or probable future human rights violations can be prevented. However, the protection that the defendant enjoys from, in brief, the danger of violation of his human rights should not indemnify him from responsibility for war crimes committed in his previous position.

14.19 The ground of appeal is untenable.

15.1 The eighth ground of appeal is that the Court of Appeal wrongly used the statements of the witness [victim 2] as evidence, although it has been established that the defence was not given an adequate opportunity to examine the witness during the last hearing by the examining magistrate, and that the Court of Appeal applied an incorrect criterion in rejecting the request to have the witness [victim 2] examined again at the trial.

15.2 In response to this request, the Court of Appeal held and decided as follows:

'Finding with regard to the request of the defence concerning the witness [victim 2].

The defence has requested by rejoinder that the witness [victim 2] be examined again at the hearing. It has submitted in this connection, in essence, that there was no opportunity for the questions raised by defence counsel to be put to the witness during his last hearing on 9 January 2007.

The Court of Appeal holds as follows on this point.

The witness was examined by the examining magistrate on 30 May 2006, 2 July 2006, 5 July 2006 and 9 January 2007 successively. Defence counsel attended some of these examinations. Counsel had ample opportunity to examine the witness, particularly during the hearings of 30 May 2006 and 2 July 2006. After the close of the hearing on 5 July 2006, counsel for the co-defendant [defendant 1] reserved the right to ask additional questions at a later time about a single issue (counsel was evidently referring to the administration of electric shocks during interrogation). Counsel for the defendant then concurred. The Court of Appeal therefore deemed it appropriate to arrange for the witness to be examined again by means of letters rogatory so that the defence's remaining questions could be put to him. This examination took place on 9 January 2007 and was of shorter duration than planned (owing to the very late arrival of the witness). After counsel for the co-defendant [defendant 1] had put a considerable number of questions to the witness, the examining magistrate broke off the examination because of the emotional state of the witness at that moment, which was, according to him, because he felt threatened. At that point, the questions raised by counsel for the defendant had not been asked.
The Court of Appeal is willing to admit to counsel that a number of the questions raised by the defence may possibly not have been put to the witness, but the Court of Appeal is also of the opinion that that does not alter the fact that the defence was able to exercise to a substantial extent its right to examine the witness.

In view of the above facts and circumstances, the Court of Appeal finds that it is not necessary to have the witness [victim 2] examined again.

The Court of Appeal therefore refuses the request.'27)

15.3 The Court of Appeal applied the criterion of necessity, which was the criterion by reference to which the request made at the trial should be assessed. The second complaint in the ground of appeal therefore lacks any basis in fact. Contrary to what is stated in the explanatory notes to the ground of appeal, this finding (in so far as it is based on the view that there was no substantial violation of the right to examine witnesses) is not manifestly unreasonable, given that counsel had ample opportunity to examine the witness during two previous hearings before the examining magistrate and given the findings of the Court of Appeal about the events in respect of the third letter rogatory on 9 January 2007.

15.4 Nor is this altered by what is stated in the ground of appeal about the interests of being able to examine [victim 2] about the administration of electric shocks. This form of mistreatment of [victim 2] was not part of the charges and was therefore not declared proven. Accordingly, no mention of electric shocks is made in document 112, which is referred to in note 26 and lists the questions to be put to [victim 2] by counsel by letter rogatory of January 2007 before the court trying the facts of the case.

15.5 As the witness [victim 2] was examined on two occasions - namely 30 May 2005 and 2 July 200628) - in the presence of the defence, when the defence had been given and made use of the opportunity to put questions to the witness, the Court of Appeal is entitled to use his statements as evidence. The Court of Appeal used as evidence his statement to the police and the statement of [victim 2] to the examining magistrate on 30 May 2005 (items of evidence nos. 17 and 19).

15.6 The ground of appeal is untenable.

16.1 The ninth ground of appeal argues that the Court of Appeal rejected on manifestly unreasonable grounds the defence that 'the statements of a large number of witnesses could not be used as evidence because they were incorrect and unreliable - a defence which should be described as a properly reasoned position'.

16.2 As noted in the explanatory notes, counsel gave a lengthy exposition on this point in addressing the court in order to show that, in brief, the statements of the three witnesses referred to in the charges (the ground of appeal is evidently referring to the judicial finding of fact as the charges actually mention more victims/witnesses) were not reliable or credible.

Is the complaint as formulated in the ground of appeal sufficiently specific in the sense that it indicates with sufficient precision the 'reasoned position' to which it relates?29) This seems to me to be at least doubtful since the explanatory notes too merely describe the character or scope of the defence in broad terms and in other respects in fact merely characterise a single part of the detailed findings of the Court of Appeal as manifestly unreasonable, without making it immediately clear how, according to the defence, this part relates to the reasoned positions contained in counsel's speech.

16.3 If the ground of appeal is not untenable simply on the basis of the above, I would make the following observations. According to the explanatory notes, the person drafting the ground of appeal was concerned more with the defence relating to the evidence from which the joint perpetration of torture by the defendant could actually (but, according to the defence, may not) be inferred and not so much about the alibi defence also rejected by the Court of Appeal (at 10.4): i.e. that as the result of an attack the defendant was hospitalised at the time of certain offences. I will therefore disregard this part of the Court of Appeal's findings below. Although there is no express complaint about finding 10.3, I have included it below for the record.

16.4 The Court of Appeal held and decided as follows in this matter:

'10. Further evidential findings

10.1. The Court of Appeal would first of all note that the present criminal case is characterised by a number of special facts and circumstances that deserve further consideration. First, the charges include offences that took place long ago, which has placed a heavy burden on the investigation (especially the job of tracing the witnesses, few of whom are still available) and on the memory of these witnesses. Moreover, the offences took place in a non-western country which bears few similarities in cultural, technological, economic and sociological terms to the Netherlands, and which was also internally riven, as it still is today, by deep-rooted political disputes and associated armed conflict. These circumstances in particular have seriously hampered the investigation in this case in many ways. In a number of cases, the lack of security that still exists in Afghanistan today meant that it was difficult to hear witnesses there in the presence of counsel and to carry out further investigations. Moreover, written sources were available only to a very limited extent because of the inadequacies of the Afghan infrastructure. In view of all these facts and circumstances, the Court of Appeal will exercise great caution in judging the reliability of the evidence available in this case.

10.2. Counsel argued in his speech that the statements of a number of witnesses could not serve as evidence because they were incorrect and unreliable. He accordingly submitted, in essence, that the statements of witnesses [victim 1], [victim 3] and [victim 2] were inconsistent, demonstrably incorrect and mutually influenced, that the origin of the information given by them was not verifiable by other means (for example, by any original document dating back to this period), that the origin of the injuries they suffered could not be verified and that when they made their statements they were influenced by the officers interviewing them and by the large sums of money they received for making their statements.

Counsel also argued that defendant had been injured during an attack on 24 June 1979 and was therefore in hospital at the time of the offences with which he is charged.

10.2.1 The Court of Appeal notes first of all in this connection that the statements of these witnesses sometimes yield less concrete information than desirable and occasionally contradict each other, but is of the opinion that, in view of the tragic events to which the witnesses refer in their statements and of which they basically give an unambiguous account, the discrepancies to which counsel refers may very well be due to memory lapses caused by the considerable passage of time and, in the case of witness [victim 2], strong emotions brought about by thinking about what were for him highly tragic events, but that these statements should not be treated as incorrect or unreliable in relation to their essential parts. For instance, contrary to what counsel submitted, the role which the defendant played in these events can certainly be inferred from these statements, without a plausible case having been made for what counsel in fact alleged, namely that one or more of the witnesses concerned wrongly (and deliberately) singled out the defendant as the person involved in the torture to which they were subjected.

10.2.2. The Court of Appeal refers in this connection to the statement of [victim 1] made to the reporting officers [reporting officers 1 and 2] on 27 July 2003 (item of evidence no. 9), where in answer to the question "Do you know the names of your torturers?" he stated, among other things, as follows: "The head of Tahqiq (investigation) was [defendant 1]."
On 19 December 2004 he stated to reporting officer [reporting officer 3] by telephone (item of evidence no. 10) that he had been personally tortured by [defendant 1], and it can be inferred from his statement of 15 September 2005 to reporting officers [reporting officer 4] and [reporting officer 3] (item of evidence no. 11) that while in the custody of KAM he had been beaten with sticks by the defendant and two other persons in turns. The defendant's own statement made on 2 December 2004 to reporting officers [reporting officer 5] and [reporting officer 3] (item of evidence no. 26) is important in conjunction with these statements. The defendant stated there that he was the head of the interrogation department of the military intelligence service KhAD (the Court of Appeal

understands that this was previously known as KAM) from 1979 until the coup by Tanai in 1990, and that in that position he had to check the work of the interrogators, for example by being present for some time during the interrogations and, if necessary, instructing the interrogators how to do their work. In his interview on 3 December 2004 (item of evidence no. 27) he also stated: "I was [the first person referred to]. We do not use a name. In Afghanistan the term used for the head of a civil service department is Modir. If people spoke about the first person referred to that was me at that time.'

Finally, the following question was put to defendant in that same interrogation: "We are asking you if torture took place at the KAM at the time of Amin (the Court of Appeals understands this to mean the period from 1978 to December 1979) when you worked there, whether or not you were present?" He then answered: "Yes, it did occur."

10.3 Nor has it been plausibly shown that the witnesses were influenced by the interrogating officers when making their statements. This conclusion is not affected by the fact that these officers may, the Court of Appeal assumes, have steered the interview to some extent when the need arose in the interests of efficiency and in the light of the specific characteristics of this case. Nor has it been plausibly demonstrated that the witnesses were motivated by improper considerations; the mere fact that witnesses know each other personally and still keep in touch with one another, whether or not in an organised context, does not mean that it can automatically be assumed that they influenced each other. As regards the payments received by the witnesses, reference is made to what was held on this subject by the Court of Appeal at 6.5 above. Incidentally, the Court of Appeal has not seen any evidence of the deceitfulness of the witness [witness 1], as alleged in the rejoinder.'

16.5 In my view, the Court of Appeal's finding that it has not been plausibly shown that one or more of the witnesses mentioned by it wrongly singled out the defendant as involved in the torture is not manifestly unreasonable in the light of its other findings. To this extent I therefore disagree with the drafter of the ground of appeal.

Nor is this finding, in my view, at odds with the part of the statement of expert witness Dr A. Giustozzi (see item of evidence no. 37) in which he observes: 'Generally speaking, there is no reason to assume that most of the human rights violations were committed by persons other than specialised interrogators of the kind that exist in all security services.' First of all, this is a general observation which does not preclude the possibility that persons other than the interrogators directly involved carried out torture, albeit less often than the specialists. In addition, as the Court of Appeal will understandably have taken into consideration, Dr Giustozzi will not have wished to exclude the head of an interrogation department, in the sense that the head was treated as belonging not to the group of specialists but to the 'others' category. After all, 'sound' instructions can generally be given to specialists only by other specialists. In the relevant period, the defendant was the head of the interrogation department and his work consisted, according to his own statement (item of evidence no. 26) of checking the work of the interrogators; for this purpose he regularly attended interrogations and, if necessary, gave instructions. This corroborates the statements of the various witnesses about the defendant's presence and contribution, in which they also mention that the defendant did not always confine himself to giving instructions but also himself took part in the abuses.

16.6 In other respects too the ground of appeal takes issue - in vain - with findings of fact of the Court of Appeal which are not manifestly unreasonable and are not open to review in cassation proceedings. The information about the strong emotions of [victim 2] will have been derived by the Court of Appeal from the examinations and other observations of the examining magistrate. The Court of Appeal explained in detail why it considered the evidence on which it based its decision to be usable, and it was not obliged, taking into account the freedom to which a court trying the facts is entitled in selecting and evaluating the evidence, to provide further explanation of its decision on this matter.

16.7 The ground of appeal was therefore advanced to no avail.

17.1 The tenth, eleventh and twelfth grounds of appeal take issue with the reasons for the sentence. They are suitable to be discussed together.

17.2 The Court of Appeal gave the following reasons for the sentence imposed.
'The Advocate General has submitted an opinion that the appealed judgment should be set aside and the defendant sentenced on the principal charge to a term of imprisonment of nine years, less the period spent in pre-trial detention.

The Court of Appeal has established the sentence to be imposed on the basis of the gravity of the offences and the circumstances under which they were committed and on the basis of the character and personal circumstances of the defendant, as revealed during the examination at the trial.

In doing so, the Court of Appeal has taken special account of the following matters.

The defendant was head of the interrogation department of the KhAD-e-Nezami, the military intelligence service, in Kabul, Afghanistan, in the period from 1 July 1979 to 31 December 1989 at the time of the Soviet-backed communist regime. In this capacity, the defendant committed very grave offences, which may be regarded as proven, with regard to three victims, namely joint perpetration of violations of the laws and customs of war.

The file has shown that one of his victims was beaten and that another had a toenail pulled out. Electric shocks were also administered to this victim through wires attached to his body. Another victim was kicked and beaten and had to stand outside for days in cold weather. He was also kept awake for days on end. A door was also slammed shut on this victim's fingers after they had been forcibly held in position between door and frame. One of his fingers was then cut off without anaesthetic.

The third victim too was beaten. Afterwards he was pushed down hard on the ground and electric shocks were administered to this victim too through wires attached to his body. All of this was done for the obvious purpose of extracting a "confession" from the victims, who were political opponents of the ruling regime.

It has also become apparent from the file that these acts formed part of a fixed pattern of operation within this department of the military intelligence service, which was headed by the defendant.

As the file shows, the activities described above had extremely tragic and traumatic mental and physical consequences for the victims, which, it now appears, are of a lasting nature.

Like genocide and the crimes against humanity, the proven offences are regarded as "the gravest crimes which fill the entire international community with concern" (Explanatory Memorandum to the International Crimes Act, Parliamentary Papers II, 2001-2002, 28 337, no. 3, page 1.

Torture is a war crime that causes widespread outrage and disquiet throughout the world and is also an affront to the international legal order. It also affects the Dutch legal order because the defendant has become part of Dutch society by fleeing to the Netherlands. This society now includes many people who were confronted in Afghanistan with the atrocities of the armed conflict there and the acts of violence committed by the organisation in which the defendant was highly placed. The defendant's conduct represented a flagrant denial of the universal respect due to human rights and fundamental freedoms and evinced a reprehensible contempt for the dignity of his fellow man.

What also counts against the defendant in the view of the Court of Appeal is that in the appeal proceedings he has shown no insight whatever into the reprehensible nature of his actions.

In the opinion of the Court of Appeal the gravity of the proven offences itself warrants the imposition of a term of imprisonment of longer duration than that imposed by the District Court in the proceedings at first instance. The Court of Appeal is thinking above all of the need to provide satisfaction for the victims and those around them, to draw attention to the importance of the humanitarian rules that are at stake and to promote general prevention.

However, the Court of Appeal has also taken into consideration the advanced age of the defendant, the negligible likelihood of re-offending and the fact that the offences were committed quite some time ago. A term of imprisonment of the - considerable - duration mentioned below will therefore suffice.'

17.3 In assessing the grounds of appeal I would note at the outset that the court trying the facts of the case is free to choose and evaluate the factors it considers of relevance to sentencing. In cassation proceedings it is not possible to examine whether the correct sentence was imposed or whether the sentence fulfils all relevant factors, such as the gravity of the offence and the character of the defendant.30) Findings of fact of the Court of Appeal can be reviewed in cassation proceedings only in terms of whether they are reasonable.

17.4 This selection of factors needs no explanation. The only constraint on the court trying the facts of the case in selecting the data it wishes to use in the reasons for the sentence is that the data must have been disclosed at the trial. It is not necessary that they should have been included in the evidence.

17.5 This last rule appears to refute the tenth ground of appeal in so far as it takes issue with the finding of the Court of Appeal that 'it has become apparent that these acts formed part of a fixed pattern of operation within the department of the military intelligence service, which was headed by the defendant'.

The ground of appeal argues at point 2 of the explanatory notes that the Court of Appeal 'thus took into account to the detriment of the appellant an element that did not form part of the charges' and at point 3 that acts have been declared proven against three persons 'without the element of the alleged systematic nature of the actions having been held proven.'

17.6 Although it was not held proven 'that the offences are in each case an expression of a policy of systematic terror or unlawful action against the entire population or a particular group of the population', this is not relevant in this connection. This charge was an aggravating circumstance31) which the Court of Appeal did not declare proven. However, this does not preclude the possibility that the acts which were held proven fit into the pattern described by the Court of Appeal.

17.7 As the ground of appeal does not further challenge the reasonableness of the contested finding, it cannot as such result in cassation. I would note for the record that the pattern concerned can be discerned even from the items of evidence in the case (e.g. nos. 5, 6, 8, 29 and 38).

17.8 The eleventh ground of appeal challenges the finding of the Court of Appeal that the offences have had extremely tragic and traumatic mental and physical consequences for the victims, which, it now appears, are of a lasting nature. It submits that no sound basis for this conclusion exists in the case file since no medical certificate or other document has been lodged, and the Court of Appeal uses the term 'the victims' in a general way without limiting it to the three persons mentioned in the charges.32) According to the ground of appeal, the defendant has in this way been accused, through the reasons for sentence, of more than has been held proven.

17.9 In my view, this last complaint lacks any factual basis as the Court of Appeal was clearly thinking only of the three victims, who are also mentioned in the judicial finding of fact. Indeed, in a part of the grounds for sentence preceding the disputed passage the Court of Appeal once again specifies what each of the three people concerned had to endure. The Court of Appeal is clearly referring to these people when it refers a little later to 'the victims'.

17.10 The submission that the Court of Appeal could not arrive at this finding in the absence of a medical certificate has no basis in law. Indeed, the nature of the proven offences is such that it is only logical, to my way of thinking, that they should have had highly tragic and traumatic consequences for those concerned. This finding of the Court of Appeal is not manifestly unreasonable. As regards the three victims I would also refer for the record to items of evidence nos. 12 and 13 (including a description of an arm in which the bone had become visible as a result of beatings), nos. 17, 18 and 19 (loss of part of a finger and psychological problems long after the event) and no. 23 (permanent medical problems).

The Court of Appeal merely refers to consequences which, it appears, are of a lasting nature. This wording is often used in the case of crimes of violence and sex crimes and, in my view, there is nothing wrong with it. When a case comes to trial there can often be no certainty about the length of medical and, in particular, psychological problems, but the Court of Appeal does not suggest differently here.

17.11 The twelfth ground of appeal is directed against the finding of the Court of Appeal that in the appeal proceedings the defendant showed no insight whatever into the reprehensible nature of his actions and that the Court of Appeal thereby wrongly failed to differentiate between a defendant who has denied the charges and a defendant who has invoked his right to silence, as in the present case. Unlike the position with regard to a defendant who has denied the charges, it is, according to the ground of appeal, not automatically reasonable and acceptable for a court to make such a reproach to a defendant who has consistently invoked his right to silence and said nothing.

17.12 In its judgment of 18 November 1980, NJ 1981, 134, the Supreme Court held as follows:

'The submission in the ground of appeal - as contained in the explanatory notes on it - to the effect that the Court of Appeal's finding (in so far it is evident from it that, when passing sentence, the Court of Appeal took account of the fact that the defendant had also continued to fail to provide information as referred to above33) in the criminal investigation) is contrary to article 29 (1) of the Code of Criminal Procedure cannot be accepted as correct. Although the rule laid down in this provision does indeed safeguard the defendant's right to determine freely and as he sees fit whether or not he will answer questions put to him by the judge or official conducting the examination, this need by no means prevent the judge, once he has found that the charges against the defendant are proven, from taking into account a failure as described above when determining the sentence to be imposed. The ground of appeal is therefore unfounded.'

17.13 Reference may also be made in this connection to Supreme Court judgment HR 23 October 2007, no. 02075/06P, in case the

appellant argued that exercising the right to remain silent in the principal proceedings had adversely affected the position of the defendant in the related confiscation proceedings. The Supreme Court disposed of the case by applying section 81 of the Judiciary (Organisation) Act. Advocate General Knigge observed in his opinion that it is not uncommon for a particular course of action taken in proceedings to have adverse effects in another context, and concluded his remarks by saying that:

'It means in effect that one can't have one's cake and eat it. Anyone who wishes to invoke the right to silence cannot subsequently complain if no account is taken of all the points he could have made.'

17.14 In short, just as, according to settled case law, the court may, in the case of a defendant who denies charges which are subsequently held proven, take into account in the reasons for sentence the fact that the defendant's attitude indicates that he fails to appreciate the wrongness of his acts,34) so the court may, in the case of a defendant who remains silent, certainly draw what is essentially the less far-reaching and, in fact, also unavoidable conclusion that by remaining silent on appeal the defendant 'has shown no insight whatever into the reprehensible nature of his actions'. As I see no ground for a differentiation as advocated in the ground of appeal, this ground of appeal too is untenable.

17.15 It follows from the above that the tenth, eleventh and twelfth grounds of appeal were advanced to no avail.

18. The grounds of appeal are untenable and can be disposed of, in my view, by means of the short procedure provided for in section 81 of the Judiciary (Organisation) Act.

19. I have not discovered any grounds that should properly result in the appealed judgment being set aside ex proprio motu.

20. My opinion is therefore that the appeal should be dismissed.

Procurator General
at the Supreme Court of the Netherlands

1 Here the words 'against a person' have apparently been omitted.
2. Act of 10 July 1952, Stb. 408.
1 The references to the Geneva Conventions are confined by the Court of Appeal to the Fourth Convention relative to the Protection of Civilian Persons in Time of War. The Court of Appeal does not discuss whether it is more appropriate to apply this Convention than the First Convention (for the wounded and sick in the armed forces in the field) or the Third Convention (relative to the treatment of prisoners of war).
2 TK (House of Representatives) 1986-1987, 20 042, no. 3, p. 6.
3 TK 2001-2002, 28 337, no. 3, p. 17-18.
3 Some of the offences were committed before fines were added in section 8 of the Wartime Offences Act in 1984 (Stb. 91), but this question is irrelevant here.
4. Below I will omit the addition 'old'.
5 Trb. (Dutch Treaty Series) 1951, nos 72-75.
6. See for example Commentary IV Geneva Convention relative to the protection of civilian persons in time of war (International Committee of the Red Cross, p. 26: et seq.)
7. See also Additional Protocol II, relating to non-international armed conflicts (Trb. 1978, 42). It supplements common article 3 without altering the conditions for application. Article 4 of the Protocol also sets out the prohibited acts that are at issue in this case.
8. What is known as secondary jurisdiction based on the universality principle follows from the structure of this provision. Such jurisdiction exists where the person concerned is present in the territory of the state exercising universal jurisdiction. It is an application of the aut dedere aut punire principle.
9. See also G. Mettraux, 'Dutch Courts' universal jurisdiction over violations of common article 3 qua war crimes', Journal of International Criminal Justice, 2006, p. 362 ff., in particular p. 368, where the author evidently assumes that national law contains no provision such as section 3 of the Wartime Offences Act on which jurisdiction can be based.
10. It is evident that this view was consistently taken by the legislator not only from the parliamentary history of the Wartime Offences Act but also from the Torture Convention (Implementation) Act (Act of 29 September 1988, Stb. 478). See Parliamentary Papers II, 1986-1987, 20042, no. 3, pp. 3, 4, 6 and 8.
11. Without the limitations laid down in subsections 1, 2 and 3 of section 1 of the Wartime Offences Act. These provided that the provisions of the Wartime Offences Act were applicable only in the event of war, an armed conflict, other than a war, in which the Netherlands was involved and so forth, but this design flaw in the Act can be disregarded here following this decision of the Supreme Court explaining how section 1 of the Act should be interpreted.
12. See also the passage on this subject in the Explanatory Memorandum to the International Crimes Act: Parliamentary Papers II,

2001-2002, 28 337, no. 3, p. 47.
13. See N. Keijzer in Militair straf- en tuchtrecht (Military criminal and disciplinary law), note 3 to section 8, suppl. 14 (November 1994).
14. Nor as regards the lack of foreseeability and accessibility as now alleged.
15. This is also the view taken in the opinion of then Advocate General Van Dorst before the Supreme Court, HR 22 October 1996, NJ 1998, 462 (Knesevic I). And it is the view consistently taken by the legislator (see note 9).
16. Cf. Commentary IV Geneva Convention, Geneva, 1958, on article 4, p. 45 ff.
17. Commentary p. 34. See also, for example, Bassiouni and Nanda, A Treatise on International Criminal Law, I Crimes and Punishment, Springfield, 1973, p. 371 ff. on the 'Underlying principles of the Conventions'.
18. A. Cassese, International Criminal Law, Oxford, 2003, p. 49 ff.
19. Contrary to what is submitted in the explanatory notes to the ground of appeal, I cannot discover in this an explicit submission that the provisions of section 9 of the Wartime Offences Act had not been fulfilled. The remark was in fact made in connection with the claim that the indictment was void.
20. This remark and what I say below are also in keeping with the list of contents on page 2 of the memorandum of oral pleading.
21. On this point see also E. van Sliedregt in her commentary on the judgments of the District Court and the Court of Appeal in NJCM 2007, p. 324 ff and G. Mettraux, 'Dutch Courts' universal jurisdiction over violations of common article 3 qua war crimes', Journal of International Criminal Justice, 2006, p. 362 ff.
22 ECtHR 25 February 1993, NJ 1993, 485.
23 ECtHR 29 June 2007, NJ 2008, 25.
24 ECtHR 17 December 1996, NJ 1997, 699.
25 ECtHR 8 April 2004, no. 38544/97, VR 2005, 155.
26. In my view, G. Mettraux's comment (op.cit. p. 365) that the position should actually be that 'any person subject to questioning by the authorities [should] be regarded as de facto under criminal charges' is much too far-reaching. If this were so, what would be position concerning the duty of a taxpayer to provide information?
27. When the case was heard by the court trying the facts defence counsel evidently decided at the last moment not to accompany the investigating officers bearing the letter rogatory in early January 2007 and instead merely sent a list of written questions (see the folder 'Examining Magistrate's Office, The Hague. Examination on appeal') no. 111, letter of 2 January 2007 and no. 112.
28. Where the Court of Appeal refers to 30 May 2006 in its finding as set out above it evidently means 30 May 2005. In connection with the second letter rogatory, [victim 2] was therefore examined not only on 2 July 2006 but also on 5 July 2006.
29 HR 11 April 2006, NJ 2006, 396, finding of law 3.7.2.
30. A.J.A. van Dorst, Cassatie in strafzaken (Cassation in criminal proceedings), 5th ed., p. 220.
31. See also Parliamentary Papers II, 1951-1952, 2258, no. 3, p. 9, 10.
32. This presumably meant the three people referred to in the judicial finding of fact. The indictment, as subsequently amended, included other people against whom similar offences had allegedly been committed.
33. The defendant did not enter an appearance at first instance or on appeal. That case concerned the absence of statements concerning what had happened to the proceeds of property offences. In my view, however, these differences are not relevant.
34. Cf. for example HR 18 December 1984, NJ 1985, 358.