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Vindplaats(en):	Rechtspraak.nl

Uitspraak

JUDGMENT (English translation, see BO7552)

THE HAGUE DISTRICT COURT

Criminal Law Section

Three-judge division

Public Prosecutor's Office number 09/751003-04

Date of the judgment: 16 December 2010

Judgment under Article 36e SR (Dutch Criminal Code)
(PROMIS)

Decision of the The Hague District Court, giving judgment in criminal cases, on the demand of the Public Prosecutor under Article 36e of the Criminal Code in respect of the person sentenced:

[name person sentenced]
born in [place of birth] on [date] 1942,
at present for other reasons detained in the [Penal Institution]

The court hearing.

The demand was heard on the hearing of 28 August 2008 and 11 November 2010.

On behalf of the person sentenced Mr. L.P.A. van Schaik LL.M., lawyer in Veenendaal, appeared at the hearing, who is expressly authorized by the person sentenced to defend him at the hearing and was heard on the demand.

The hearing of the demand was suspended at the court session of 28 August 2008 for the purpose of the - upon the request of the defence - investigation to be conducted by the public prosecutor into still existing administration of the costs incurred by the person sentenced at the Banco del Gottardo in Lugano (Switzerland) and for the purpose of exchanging statements of defence, statements of reply and rejoinders.

The demand.

Standpoint of the public prosecutor

The initiatory written demand of the public prosecutor is to the effect that the court determines the amount the illegally obtained profits as meant in Article 36e, fourth paragraph of the Criminal Code, is estimated at, and imposes on the person sentenced the obligation to pay to the State the estimated profits to an amount of € 2,225,544.59.

The public prosecutor bases himself in this case on the official report made under oath of office "in relation to deprivation of the illegally obtained profits" (1) . The conclusion of this official report is, that the total profits illegally obtained by the person sentenced from supplies of raw materials to Iraq amounts to a maximum of (converted from Dutch guilders into euro's) € 2,225,544.59.
At the court session of 28 August 2008 the public prosecutor changed the demand at the statement of claim in such a sense that the illegally obtained profits are estimated at an amount of
€ 1,086,976.58, being the profits the person sentenced obtained from supplies of TDG, and that on the person sentenced the obligation is imposed to pay afore-mentioned amount to the State. At converting the US dollars into euro's the public prosecutor started from an average of the exchange rates of the US dollar with regard to the Dutch guilder in the years 1984 to 1989, as these are published on the website of the Nederlandse Bank.
At the court session of 11 November 2010 the public prosecutor persisted in the demand, as changed at the statement of claim at the court session of 28 August 2008.

2.2 Standpoint of the defence

At the statement of defence at the court session of 11 November 2010 Mr Van Schaik principally adopted the standpoint that the demand should be rejected, as the defence rights are violated and that therefore there is an unfair trial in this deprivation case. Hereto the argument was put forward that the demand of the public prosecutor was the result of an estimate without taking into account the costs to be deemed plausible, whereas because of the detention of the person sentenced and the absence of any administration the defence had not been able to produce a (counter) estimate of the costs incurred by the person sentenced. Alternatively it was argued that the person sentenced earned 300,000 to 400,000 US dollars in the period of 1984 up to and including 1987 and that this amount concerns his total profits in relation to the transactions of all chemical substances in this period.

2.3 Reaction of the public prosecutor

At the statement of reply the public prosecutor opposed the principal standpoint of the defence, referring to legal history and jurisprudence of the Supreme Court. According to the public prosecutor it can be derived from this that it is up to the person sentenced to make it plausible that he incurred costs which should be deducted at the determination of the amount of the estimated profits.

2.4 Opinion of the court

Previous decisions of the Supreme Court (2) show that neither the law nor jurisprudence gives the court officially the obligation to take into account the costs incurred by the person sentenced for committing the criminal offence. Neither does any legal rule give the court the obligation to conduct an investigation into cost items of the person sentenced. The court is free to whether or not take into account any costs incurred and also to what extent it wants to take these costs into account. It is up to the person sentenced to make it plausible that he incurred costs and it is also his risk if he is not able to submit against the calculation of the public prosecutions department the costs he incurred, motivated and proven by evidence.
Therefore the court rejects the defence of the defence.

Applicable law.

3.1. Deprivation order applicable to war crimes?

On 9 May 2007 the person sentenced was sentenced by final and conclusive (3) judgment of the The Hague court of appeal because of - in summary - being an accessory to complicity in being a co-perpetrator of war crimes, made punishable in the Articles 8 Criminal Law in Wartime Act in conjunction with the Articles 47 and 48 of the Criminal Code.
In 1983 the order for deprivation of illegally obtained profits was introduced in the general criminal law by way of the Financial Penalties Act (4) . The first question to be answered in relation hereto is whether the deprivation order can be imposed in respect of crimes made punishable in the Criminal Law in Wartime Act.
Article 91 of the Criminal Code provides that the provisions of that code are also applicable to offences for which other laws impose a punishment, unless the law determines otherwise. As Article 2 of the Criminal Law in Wartime Act (5) forms the basis for applicability of the provisions of the Criminal Code to crimes made punishable in the Criminal Law in Wartime Act, and furthermore in this article of law or in other articles of the Criminal Law in Wartime Act no provisions are included which contain an exception in respect of the deprivation order, the court establishes that the deprivation order can be imposed in respect of war crimes.

The court subsequently went into the question which formal and material law if applicable in this procedure.

3.2. Material law

Since 1982 the deprivation legislation was amended twice, namely in 1993 (6) and in 2003 (7) . The offences for which the person sentenced was sentenced under afore-mentioned judgment, are committed in the period of 19 April 1984 up to and including 25 August 1988. At the amendment to the Act in 1993 no transitory law was decided by the legislator. In the explanatory memorandum (8) the legislator writes with regard to this:

"In the opinion of the undersigned the proposed amendments to the Act do not require any special transitory provisions. (...) As for the material provisions the provision of Article 1, second paragraph, of the Criminal Code applies. In the opinion of the undersigned this means that in particular the extended scope of application of Article 36e Criminal Code, on the one hand in the second paragraph as regards the profits obtained by means of or from the proceeds of similar offences and on the other hand in the third paragraph as regards the illegal profits obtained also in any other way - cannot be made applicable with retroactive force (...) ."

As from 1983 to 1 March 1993 it was in case of a deprivation order necessary to determine a detention for a term not exceeding six months. As from 1 March 1993 to 1 September 2003 it was in case of a deprivation order necessary to determine a detention for a term not exceeding six years. As from 1 September 2003 the detention in case of a deprivation order was cancelled.

When the Act was amended in 2003 the legislator decided on a transitory provision in Article V. In the explanatory memorandum (9) the legislator writes with regard to this:

"Article I concerns adjustments of the material criminal law. They are governed by Article 1 Criminal Code. This implies that the adjustment of Article 24, in so far as relevant, can also be relevant for criminal offences which were committed prior to the present legislative proposal taking effect; the fact that partial payments can be translated into reducing a detention by the criminal court, is actually a change for the benefit of the person sentenced. It can for that matter also be derived from Article 577b Code of Criminal Procedure taking effect, that obligations to pay - also the ones imposed prior to this law - are on this basis eligible to reduction. Article 577b is a formal criminal provision which can be applied immediately with regard to all nonpunitive orders already imposed.

The adjustment of Article 36e Criminal Code can be characterized as a change to the disadvantage of the suspect. The criminal court is at this moment, according to the judge-made law of the Supreme Court, at the moment of imposing the obligation to pay obliged to take into account the person's sentenced possibilities to pay. This implies that these adjustment does not have any significance for the deprivation order that is based on a criminal offence committed prior to this legislative proposal taking effect".

At its judgment of 24 April 2007 (10) the Supreme Court decided that " (..) An exception for cases in which an obligation to pay was imposed for the purpose of deprivation of illegally obtained profits with regard to offences committed before 1 March 1993, as here is the case, the text of the transitory provisions does not provide for. Legal history does not give any lead hereto either. Cancellation of the detention as from 1 September 2003 must be regarded as a change in legislation as meant in Article 1, second paragraph, Criminal Code. The law applicable after 1 September 2003 must be regarded as more favourable for the person concerned, as the order for detention cannot be given anymore. Therefore it cannot be derived from Article 1 Criminal Code, as the remedy wants, that the regulation of detention applicable before, must be applied. "

On the basis of legal history and afore-mentioned judgment of the Supreme Court the court is of the opinion that in this case the former provision of Article 36e paragraph 1 Criminal Code is applicable, as this was applicable until 1 March 1993 (11) , i.e. the for the person sentenced most favourable provision in the sense of Article 1, second paragraph, of the Criminal Code, but without determining any detention.
This judgment implies that exclusively the estimated profits obtained by means of or from the criminal offences proven, can be deprived and that one must be able to prove the causal relationship between these offences and the illegally obtained profits.

3.3. Formal law

In general prosecution provisions have effect immediately after amendment, as provided in Article 1 of the Code of Criminal Procedure, unless transitory law makes an exception to this. In a deprivation case the Supreme Court judged (12) that reasonable explanation of a passage from the explanatory memorandum implies that the intention of the legislator was to have new procedural provisions initially be applicable to criminal cases which on or after the effective date of the law were taken to court in the first instance.

Until the adjustments of the deprivation law in 1993 the deprivation order could exclusively be imposed as pecuniary sanction in case of a sentence because of a criminal offence in a criminal case. As from 1993 a separate deprivation procedure was mandatory

decreed. In 2003 the deprivation legislation was last amended.. The criminal case against the person sentenced was taken to court in the first instance in 2005. This means that the present prosecution regulation of the deprivation procedure is applicable and that the demand for deprivation must be taken to court in a separate procedure, as was done is this case.

Entitlement of the public prosecutor to bring a demand.

As the present prosecution regulation of the deprivation procedure is applicable in this case and the demand for deprivation has been taken to court in a separate procedure, the public prosecutor is so far entitled to bring the demand. The court subsequently went into the question whether the public prosecutor is also otherwise entitled to bring the demand.
In the criminal case of the person sentenced the public prosecutors expressed at the court session of the court on 7 December 2005 their intention to bring a deprivation demand to court (13) , as is required pursuant to Article 311, first paragraph, of the Code of Criminal Procedure.
Article 511b, first paragraph, of the Code of Criminal Procedure requires that the demand must be taken to court not later than two years after the judgment in the first instance.
On 23 December 2005 the court pronounced its judgment in the criminal case of the person sentenced. On 11 December 2007 the public prosecutor submitted the demand. Therefore the demand was submitted in time and the court deems the public prosecutor also otherwise entitled to bring the demand.

Basis for the demand

The The Hague court of appeal has against the person sentenced declared proven - stated succinctly - that he has been guilty of being an accessory to complicity in being a co-perpetrator in respect of war crimes - offences 1 alternatively and 2 of the charges - the war crimes consisting of bringing chemical combat means into action against persons who were present on or around:
5 June 1987 in Zewa, situated in Iraq;
16 March 1988 in Halabja, situated in Iraq;
3 May 1988 in Goktapa (Gukk Tapah) , situated in Iraq;
11 April 1987 in Khorramshar, situated in Iran;
16 April 1987 in Alut, situated in Iran;
28 June 1987 in Sardasht, situated in Iran;
28 June 1987 in Rash Harmeh, situated in Iran;
22 July 1988 in Zardeh, situated in Iran;
2 August 1988 in Oshnaviyeh, situated in Iran;

and being an accessory to complicity in being a co-perpetrator in these war crimes consisting of deliberately supplying on the points in time in the period of 19 April 1984 up to and including 25 August 1988 thiodiglycol (TDG) to the (Republic of) Iraq, meant for the production of mustard gas.

The court takes afore-mentioned proven offences into account as basis of the demand.

On the basis of the hearing at the court session the court is of the opinion that the person sentenced has by means of the afore-mentioned criminal offences illegally obtained profits.

The calculation of the illegally obtained profits.

Articles of evidence

The court bases its conviction that the person sentenced has obtained afore-meant profits on the legal articles of evidence (14) to be mentioned hereinafter and derives the estimate of afore-meant profits from the contents of the same.

Causal relationship

Applying the old provision of Article 36e of the Criminal Code leads to the fact that exclusively the estimated illegally obtained profits resulting from the supplies of TDG, of which mustard gas ammunition was produced, which was deployed at the nine proven chemical- weapon attacks, can be deprived. In order to be able to estimate these profits the causal relationship between the supplies of the TDG and these attacks must be proven. In this respect is important:

the amount of TDG supplied in total to the Iraq regime (6.3) ;
the amount of TDG the person sentenced supplied in total to the Iraq regime (6.3) ;

the total amount of mustard ammunition produced (6.4) ;
the amount of mustard gas ammunition used at the attacks (6.5.) ; and
the amount of TDG required for mustard gas ammunition (6.6.) .

Total amount of TDG supplied and total amount of TDG supplied by the person sentenced.

The court uses in the first place the judgment of the The Hague court of appeal of 9 May 2007 (hereinafter: the judgment) as article of evidence for the calculation of the estimated illegally obtained profits. The places in the judgment of this court of 23 December 2005 (hereinafter: the judgment) where it can be found will also be referred to.
In the proven case (15) the court of appeal took the view that the person sentenced did in the period between the middle of 1985 and February 1988 actually supply 1116 tons of TDG to Iraq. The amount is mentioned in the "Official Report with regard to the deliveries of various chemicals to Iraq" and concerns a total amount of 20 deliveries.(16) Apart from that the court of appeal deemed proven that the person sentenced has at least supplied 1116 tons of TDG to the Iraqi regime after supplies from others were terminated in the course of 1984. (17)
Expert [GI] establishes in his report (18) that according to the 1995 FFCD an amount of 3225 tons of TDG was imported by Iraq during the eighties of the past century. 1400 tons of this is supposed to have been supplied by the person sentenced. Although the court will, pursuant to the case proven by the court of appeal, not take this amount into account at the calculation, it will proceed on the assumption of 3225 tons at the determination of the total stock of imported TDG by Iraq.
On the basis of the above the court decides that in the proven period, a total of 1116 tons of TDG was supplied by the person sentenced to the Iraqi regime.

Total amount of mustard gas ammunition produced

Expert [GI] (19) has calculated on the basis of UNSCOM data how much H-ammunition (20)
was filled under the chemical weapon program of Iraq from 1981 up to and including 1990:

Number of type 250 bombs: 7,100
Number of type 500 bombs: 10,390
Number of 155mm artillery grenade: 69,850

Amount of mustard gas ammunition deployed at the attacks

The court bases the calculation of the amount of mustard gas ammunition deployed at the attacks on the statements of witnesses. From these statements cannot be derived that also mustard gas grenades were used at the attacks. In this calculation the court does therefore not take grenades filled with mustard gas into account. In view of the types of aeroplanes mentioned in the witness statements, the court proceeds on the assumption that per aeroplane two mustard gas bombs were dropped on average. These aeroplanes always - apart from, as will appear hereinafter, one time a large bomber, the TU-22 - concern fighter-bomber. It is general known that fighter-bombers can only carry a limited number of bombs.

6.5.1 Mustard gas attack on 5 June 1987 in Zewa, situated in Iraq
The witness [G 128] (21) remembers that that day there were five aeroplanes flying in V-formation. One aeroplane was flying low over the Zewa valley and dropped two or three chemical bombs. The other aeroplanes dropped bombs in the higher situated areas around Zewa.
The witness [G 134] (22) was at the time of the bombardment at the base. There were six aeroplanes. Two aeroplanes dropped simultaneously chemical bombs, whereas the other aeroplanes were flying round. They were Migs and Sukhoi, Russian aeroplanes used by the Iraqi.
On the basis of these statements the establishes that two aeroplanes each dropped two bombs, so that in total four bombs were dropped above Zewa.

6.5.2. Mustard gas attack on 16 March 1988 in Halabja, situated in Iraq
The witness [G 16] (23) was during the attack present at 20 kilometers from Halabja and he saw through his binoculars Iraqi Sukhoi and Mig planes in formations of four.
The witness [G 1] (24) lived in Halabja and saw that eight aeroplanes were approaching. After the two first aeroplanes had dropped balloons, he saw that six aeroplanes dropped bombs. He counted eight bombs being dropped by one bomber and after that he saw a second formation of eight aeroplanes approaching. From this second formation chemical bombs were dropped on the town.

The witness [G 121] (25) saw through his binoculars that eight aeroplanes approached the city of Halabja. They flew one time over

the town and then started a series of bombardments. The bombs fell in the town and contained chemical substances.
Although the witness [G 120] (26) , who was in the operations room of the Iraqi forces, stated that on 16 March 1988 at least 33 (fighter) -bombers were deployed - namely 16 Sukhoi-22 fighter-bombers, 16 Mirage fighter-bombers and one TU-22 bomber - , it also appears from this statement that raids were carried out above Halabja. The first one was a raid with conventional bombs and the second one a raid with chemical bombs.
On the basis of the statements of the witnesses [G16] , [G1] and [G121] - viewed in relation to each other - and furthermore those statements viewed in relation to the statement of the witness
[G 120], the court establishes that at least eight aeroplanes each dropped two mustard gas bombs, so that in total 16 mustard gas bombs were dropped on Halabja. The court takes in this respect into account - as considered before - that it is a generally known fact that fighter-bombers can carry a limited number of bombs.

6.5.3 Mustard gas attack on 3 May 1988 in Goktapa (Gukk Tapah, situated in Iraq.
The witness [G 99] (27) lived in Goktapa during the attack. The witness saw for fighter-bombers flying from the direction of Kirkuk. The witness heard chemical bombs explode and saw after that that the four fighter-bombers immediately after that flew back into the direction of Kirkuk.
The witness [G 98] (28) lived in Goktapa during the attack and saw four aeroplanes flying three times over the village. The fourth time they dropped their chemical bombs.
On the basis of these statements the court establishes that four aeroplanes at least each dropped two bombs, so that in total eight bombs were dropped on Goktapa.

6.5.4. Mustard gas attack on 11 April 1987 in Khorramshar, situated in Iran.
Around midnight the witness [G 109] (29) heard in Khorramshar four explosions. He understood that it concerned a chemical attack and went to the roof in order to stand under the shower. However, the water had been disconnected. When he was standing downstairs under the shower, he noticed that he could not see anything anymore. Shortly after that he became unconscious.
The witness [G 110] (30) heard on 11 April 1987 in Khorramshar an explosion. The sound was muffled. After that he saw white smoke and he smelt the smell of garlic. The witness walked through the smoke and fainted. Doctors told the witness that he had been exposed to mustard gas.
On the basis of these statements the court establishes that four bombs were dropped on Khorramshar.

6.5.5 Mustard gas attack on 16 April 1987 in Alut, situated in Iran
On the day of the attack the witness [G 67] (31) was working in the field of his father when he saw three aeroplanes approaching from the direction of Iraq. They dropped chemical bombs, turned into the direction of Sardasht and flew back into the direction of Iraq. In his neighbourhood four bombs fell. Further away another three bombs fell.
The witness [G 68](32) was not at home when the village of Alut was bombed. He heard bomb explosions from the direction of Alut. When he went back to Alut, it appeared that seven chemical bombs had been dropped around his house.
On the basis of these statements the court establishes that seven bombs were dropped on Alut.

6.5.6 Mustard gas attack on 28 June 1987 in Sardasht and in Rash Harmeh, both places situated in Iran

Just before the attack the witness [G 13] (33) was at work in the Hospital of Sardasht. The witness saw four aeroplanes and heard muffled bangs. In the town center of Sardasht three chemical bombs came down.
The witness [G 58] (34) heard aeroplanes flying over, smelled the smell of garlic and saw two aeroplanes flying in the direction of Iraq. Shortly after the attack the witness saw six bomb hits. Four of them in Sardasht and two in Rash Harmeh, two kilometers from Sardasht.
On the basis of these statements the court establishes that at least four bombs were dropped on Sardasht and two bombs on Rash Harmeh.

6.5.7 Mustard gas attack on 22 July 1988 in Zardeh, situated in Iran
When approaching the town of Zardeh the witness [G 65] (35) smelled the smell of herbs. From other people the witness heard that nine bombs were dropped at three different locations.
During the attack the witness [G62] (36) was at home in Zardeh. The witness saw two aeroplanes flying over. The aeroplanes returned, made a kind of dive and dropped chemical bombs. The witness heard several explosions. Later on the witness understood that nine bombs had fallen.
The witness [G 63] (37) was during the bombardement in Zardeh. He saw two aeroplanes and after that heard the sound of nine explosions. On three different places the village had been bombed with chemical bombs.
On the basis of these statements the court establishes that by two aeroplanes in total nine bombs were dropped on Zardeh.

6.5.8 Mustard gas attack on 2 August 1988 in Oshnaviyeh, situated in Iran
The witness [G 71] (38) heard from the outskirts of Oshnaviyeh the sound of aeroplanes and the bombs that were dropped. The witness [G 69] (39) was in Oshnaviyeh at work on the farm and heard two explosions, one next to the river and one behind the garden at about 100 meters away from the witness. He smelled an awful smell.
On the basis of these statements the court establishes that two bombs were dropped on Oshnaviyeh.

6.5.9 Conclusion
The following conclusion in respect of the total amount of mustard gas bombs used is drawn from the above:

Place of attack	Number of bombs dropped
Zewa	4
Halabja	16
Goktapa	8
Khorramshar	4
Alut	7
Sardasht and Rash Harmeh	6
Zardeh	9
Oshnaviyeh	2
Total	56

The court concludes therefore that at nine proven attacks in total at least 56 bombs were deployed. The court remarks in this respect that in favour of the person sentenced a minimal calculation was started from. The court furthermore assumes in favour of the person sentenced that at these attacks every time the lighter bombs were dropped, as it cannot be derived from the articles of evidence which type of bomb was used. Moreover, the amounts to be mentioned hereinafter are in favour of the person sentenced either rounded down or rounded up.

Calculation of the amount of TDG used

At the court hearing in appeal the expert [GI] stated about the proportion between TDG and mustard gas among other things that, when there was a batch of 1000 kilos (the court understands:

1000 kilograms or 1 ton of TDG) and 5 liters was put into one grenade, 200 grenades could be filled(40) .

The proportion TDG - grenades: 1 ton of TDG=200 grenades.

(total amount of filled grenades)
200 (amount of grenades per ton TDG) = 349.25 tons of TDG used for grenades

3225 tons (total of imported TDG stock)
349.25 tons (TDG used for grenades) -
2875.75 tons

2875 tons of TDG available in stock for bombs

In its calculation of the amount of filled bombs, the court calculates with the type 250 bomb as a unit of account. The court estimates the proportion of this lighter type of 250 bomb in relation to the type 500 bomb as 2 to 1. Of the type 500 bombs in total 10,390 were filled; so arithmetically that is
22 x 10,390=20,780 type 250 bombs.

Number of filled bombs:

7,100 (type 250 bomb)
20,780 (converted amount of type 500 bombs) +
Total: 27,880 bombs

2875 (total amount of TDG for bombs)
27,880 (total amount of filled bombs) =0.103120516 tons of TDG per bomb

56 bombs x 0.103120516 tons=5.774748896 tons of TDG used at the attacks, rounded off 5.77 tons.

Calculation of the profit and costs
Part of the profit and costs related to the TDG used at the proven attacks:

5.77 tons (TDG used at the attacks)
1116 tons (TDG in total supplied to Iraq) = 0.00517025

From the official report "in relation to the deprivation of illegally obtained fortune"(41) the court derives that for the supplying of 1116 tons of TDG the person sentenced has made a gross profit of
$ 1,066,211.35. In this official report the costs the person sentenced incurred for supplying 1116 tons of TDG are also taken into account. The bank costs are calculated on $ 31,411.38 and the commission the person sentenced owed Mr. [G 92] is calculated at $ 32,500 (42) .

The court observes for the other costs, namely:
incorporation expenses (the costs made for founding the companies [Company 5] and [Company 6] ;
costs for office administration; and
costs of transport;
a percentage of 6.5% of the gross profit = $ 69,303.74.

$ 1,066,211.35 x 0.00517025=$5,512.58 gross profit TDG used

bank costs	$ 31,411.38	x0.00517025	=$ 162.40
commission [G 92]	$ 32,500	x0.00517025	=$ 168.03
other expenses	$ 69,303.74	x0.00517025	=$ 358.32 +
total costs TDG used			$ 688.75

Gross profit TDG used $ 5,512.58
Costs $ 688.75 -
$ 4,823.83 net profit TDG used

In which currency is the profit estimated and at which exchange rate?

The Supreme Court judged in its judgment of 13 July 2010, LJN BL1454, that the currency and the amount of the obligation to pay with regard to deprivation of illegally obtained profits must be established in euro's.
At the conversion of US dollars into euro's the court concurs with the present Article 36e of the Criminal Code. Pursuant to the fourth paragraph of this article of law objects can be estimated at the market value at the point in time of the decision.

The court establishes as point in time of the decision the date the demand was last heard at the court session, namely 11 November 2010. Therefore the court uses at the conversion of the US Dollar in respect of the euro the exchange rate of 11 November 2010: 1 US dollar = € 0.7242178447.

Estimate of the illegally obtained profits

On the basis of the above the court is of the opinion that the profits illegally obtained by the person sentenced can be estimated at:

$ 4,823.83 x 0.7242178447 = € 3,493.00 (rounded off) .

Conditional defence put up with regard to ability to pay

On behalf of the person sentenced Mr. Van Schaik put up alternatively and under condition a defence with regard to ability to pay. This condition implies that the counsel maintains this defence, however, exclusively in so far as the court bases the calculation of the estimated illegally obtained profits on the total amount of TDG supplied to the Iraqi regime by the person sentenced.

As the court at the calculation of the estimated illegally obtained profits took the TDG used at the proven mustard gas attacks as a starting point, the condition of the counsel is not fulfilled and the discussion of the defence with regard to ability to pay may be dispensed with.

Obligation to pay

As the court does also in all other respects not see any reason to mitigate the amount, it will impose on the person sentenced the obligation to pay € 3,493.00 to the State for the deprivation of illegally obtained profits.

The applicable Articles of Law

The order to be imposed is founded on Article 36e and 36e (old) of the Criminal Code.

The decision

The court,

-establishes the amount at which the illegally obtained profits is estimated at € 3,493.00;

-imposes on the person sentenced the obligation to pay € 3,493.00 to the State for the deprivation of the illegally obtained profits.

This judgment was pronounced by
Mr. R.A.C. van Rossum LL.M. chairman,
Mrs. Y.J. Wijnnobel-van Erp LL.M. and J.R.G. Jofriet LL.M. judges,

in the presence of Mr. M. Gest LL.M. clerk of the court,
and pronounced at the public hearing of this court of 16 December 2010.

Mr. Jofriet is not able to co-sign this judgment.

(1) Official report number 200710160900.4419, drawn up on oath of office and signed by [police inspector] , working as financial criminal investigator at the Korps landelijke politiediensten (National Police Agency) , Dienst Nationale Recherche, Unit Midden Nederland,
result scope Internationale misdrijven (International Crimes) .
(2) Inter alia the judgments of 30 October 2001, NJ 2002; 29 June 2004, JOW 2005,23; 10 May 2005, LJN:AT1805 and 28 September 2010, LJN: BM6834.
(3) On 30 June 2009 the appeal in cassation against this judgment was rejected by the Supreme Court. By judgment of 20 July 2010 the European Court of Human Rights considered the complaints of the person sentenced concerning his trial unfounded.
(4) Act of 31 March 1983, Bulletin of Acts and Decrees 1983 (effective date 1 May 1983) .
(5) As the article of law was applicable from 1 August 1952 to 1 January 1991 and as from 1 January 1991 to 1 October 2003.
(6) Act of 10 December 1992, Bulletin of Acts and Decrees 1993, 11 (effective date 1 March 1993) .
(7) Act of 8 May 2003, Bulletin of Acts and Decrees 2003, 202 (effective date 1 September 2003) .
(8) Lower House 1989-1990, 21504, no. 3.
(9) Lower House 2001-2002, 28079, no. 3.
10) Supreme Court, 24 April 2007, r.o. 4.3. and 4.4., NJ 2007, 265, LJN:AZ4724
11) In case of a court judgment sentencing a person because of a criminal offence, the obligation can be imposed on him to pay to the state an amount for the purpose of depriving him of the estimated profits he obtained by means of or from this criminal offence. Saving costs is included in profits.
12) Supreme Court, 11 October 1994, NJ 1995, 156, LJN:ZD1093.

(13) Official report at court session in the first instance of 21 November 2005 up to and including 23 December 2005
(14) When hereinafter an official report is referred to, an - unless mentioned otherwise - official report oath of office is meant, drawn up in the legal form by one or more investigating officers of the Landelijke korps politiediensten (KLPD) (National Police Agency) , Dienst Nationale Recherche (National Criminal Investigators Department) competent to do so. Between brackets are indicated the places where it can be found in the KLPD file (RL5009) and/or the file of the examining magistrate (RC file) , forming part of the criminal case of the person sentenced. When hereinafter a document is referred to, - unless mentioned otherwise - a testimony not drawn up by oath of office is meant, which forms part of the KLPD file.
(15) Judgment, ground 12.2.3., page 48.
(16) "Official report with regard to the supplies of various chemicals to Iraq", F90, page 111.
(17) Judgment, ground 12.5., page 51
(18) Expert's report, namely the report published on 10 November 2005 by [GI] "TDG [person sentenced] " (hereinafter: Report [GI]) , addition to judgment, article of evidence 67, page 102.
(19) [GI] Report, Addition to judgment article of evidence 67, page 105 to 107 and judgment item 12.33, page 76.
(20) H ammunition is mustard gas ammunition, Report [GI], Addition to judgment article of evidence 67, page 100 and judgment item 12.33., page 73.
(21) A document, namely the statement of [G128] of 19 June 2004, Addition to judgment, article of evidence 16, page 28 (H90a-page 78 to 95) and judgment item 12.42., page 84.
(22) A document, namely the statement of [G 134] of 5 may 2003, Addition to judgment, article of evidence 17, page 29(H90a-page 203 to 209) and judgment item 12.49., page 86.
(23) An official report of hearing witnesses [G 16], [G 8], [[G10] en [G9] in the case against [person sentenced], on 14 June 2005, 15 June 2005 and 16 June 2005, drawn up and signed by mr. P. Oskam LL.M., examining magistrate in charge of hearing criminal cases in the The Hague court and F.A.M. Vreeswijk, clerk of the court, which official report consists inter alia of the statement of [G16], made before the afore-mentioned examining magistrate, Addition to judgment, article of evidence 18, page 30(G16.I-page 791 to 797 and RC file page 108 to 134) and judgment item 12.54., page 88.
(24) An official report of hearing the witness [G 1] of 17 June 2004 drawn up by the KLPD, Addition to judgment, article of evidence 19, page 30 and 31 (G1-page 001 to 007) and judgment item 12.55., page 89.
(25) A document, namely the statement of the witness [G 121] of 2 May 2001 drawn up by Belgian investigating officers. Addition to judgment, article of evidence 24, page 35 and 36(H46a-page 1 to 11) and judgment item 12.69., page 96.
(26) A document, namely the statement of the witness [G 120] of 28 January 2001 drawn up by Belgian investigating officers, Addition to judgment, article of evidence 12, page 24 and 25(H46a-page 1 to 5) and judgment item 12.67., page 95.
(27) An official report drawn up by the KLPD of the hearing of the witness [G 99] of 25 August 2005, Addition to judgment, article of evidence 25, page 37(G99.1-page 1045 to 1047) and judgment item 12.70., page 97.
(28) An official report drawn up by the KLPD of the hearing of the witness [G 98] of 30 August 2005, Addition to judgment, article of evidence 26, page 38(G98.1-page 1031 to 1035) and judgment item 12.71., page 98.
(29) An official report of the hearing of the witness [G 109] of 4 October 2005 drawn up and signed by mr. J.A. Steen LL.M., examining magistrate in charge of hearing criminal cases in the The Hague District Court and H. Elshof, clerk of the court. Addition to judgment, article of evidence 28, page 40(G109.1-page 1474 to 1479) and judgment item 12.73., page 99.
(30) An official report of the hearing of the witness [G 110] of 5 October 2005, drawn up and signed by mr. J.A. Steen LL.M., examining magistrate in charge of hearing criminal cases in the The Hague District Court and H. Elshof, clerk of the court Addition to judgment, article of evidence 27, page 39(G110.1-page 1480 to 1486) and judgment item 12.72., page 98.
(31) An official report of the hearing of the witness [G 67] of 2 October 2005, drawn up and signed by mr. J.A. Steen LL.M., examining magistrate in charge of hearing criminal cases in the The Hague District Court and H. Elshof, clerk of the court Addition to judgment, article of evidence 30, page 41(G67.1-page 926 to 929) and judgment item 12.75., page 99.
(32) An official report drawn up by the KLPD of the hearing of the witness [G 68] of 30 April 2005, Addition to judgment, article of evidence 32, page 43(G68-page 657 to 659) and judgment item 12.78., page 101.
(33) An official report drawn up by the KLPD of the hearing of the witness [G 13] of 19 October 2004, Addition to judgment, article of evidence 35, page 46(G13.1-page 161 to 165) and judgment item 12.81., page 103.
(34) An official report of the hearing of the witnesses [G 20], [G 58], [G 64], [G 65] and [G 71] in the case against [person sentenced], of 24 September 2005, 25 September 2005, 27 September 2005 and 28 September 2005, drawn up and signed by mr. P. Oskam LL.M., examining magistrate in charge of hearing criminal cases in the The Hague District Court and F.A.M. Vreeswijk, clerk of the court, which official report contains among other things the afore-mentioned statement of [G 58], Addition to judgment, article of evidence 34, page 45(G58.I-page 910 to 915) and judgment item 12.80., page 102.
(35) An official report drawn up by the KLPD of the hearing of the witness [G 65] of 4 May 2005, Addition to judgment, article of evidence 41, page 51 and 52(G65-page 644 to 650) and judgment item 12.96., page 113.
(36) An official report drawn up by the KLPD of the hearing of the witness [G 62] of 4 May 2005, Addition to judgment, article of evidence 43, page 53(G62-page 632 to 637) and judgment item 12.98., page 114.
(37) An official report drawn up by the KLPD of the hearing of the witness [G 63] of 4 May 2005, Addition to judgment, article of evidence 44, page 54(G63-page 638 to 640) and judgment item 12.99., page 114.

(38) An official report drawn up by the KLPD of the hearing of the witness [G71] of 1 May 2005, Addition to judgment, article of evidence 47, page 57 (G71-page 665 to 666) and judgment item 12.103., page 116.
(39) An official report drawn up by the KLPD of the hearing of the witness [G 69] of 1 May 2005, judgment item 12.102., page 116 (G69-page 660 to 662) .
(40) The statement of [GI] made at the hearing in appeal at the Court of Appeal in The Hague on 4 April 2006 (the court reads: 4 April 2007) , article of evidence 69 Addition to judgment, page 108.
(41) Official report number: 200710160900.4419, drawn up and signed on oath of office by [police inspector], working as financial criminal investigator with the Korps Landelijke Politiediensten, Dienst Nationale Recherche, Unit Midden Nederland, scope area International crimes, pages 9 and 10.
(42) Pages 10 and 11.