

19 March 1997

Arnhem Court of Appeal, military chamber

AVNR 2300

Decision, following referral by the Supreme Court, on the higher appeal against a decision dated 1 December 1995, by the deputy presiding judge responsible for dealing with criminal cases and also military criminal cases in Arnhem in the case against:

D.K.

according to his own declaration, named D.K.

born in , Croatia, on 13 November, 1964, and according to identity papers shown to the court, named D.K., born in (in the former Yugoslavia) on 10 October, 1964, resident in The Hague.

1. The disputed decision

The deputy presiding judge has declared the officer of justice non-receivable in his request for the opening of a preliminary judicial inquiry because the Netherlands has no criminal legal authority in the matter of the facts set out in greater detail in the request.

2. The higher appeal

The officer of justice in Arnhem has referred the disputed decision to a higher court in good time.

3. Procedure

The officer of justice requested a preliminary judicial inquiry against D.K. on the grounds that the latter is guilty of breaches of the laws and customs of war within the meaning of article 8 of the Wartime Offences Act in that in June, 1992, he did, in Bosnia-Herzegovina (former Yugoslavia), commit the acts described in greater detail in the request in violation of the provisions of the Geneva Convention of 12 August, 1949, concerning the protection of civilians in time of war.

The request was expressly restricted to a decision on the question whether the military chamber of the Arnhem court is competent to take note of the earlier described facts and has judicial authority concerning them. On higher appeal, the bench initially declared the officer of justice receivable, provided that the Dutch judge is legally empowered and the military judge is competent in the matter, and subsequently rejected the request by the officer of justice.

This decision was annulled by the Supreme Court because D.K. was not heard on the request, and the matter was referred to this court.

The court heard the case at its session in the court chambers on 19 February 1997, at which appeared the public prosecutor and the aforementioned D.K., represented by B.D.W. Martens and M.J. van Basten Batenburg, attorneys in The Hague.

4. Consideration

4.1 For D.K. it is claimed that the request of the public ministry must be declared non-receivable because the restriction of the request to the questions of legal authority and competence would result in an abuse of case law and, moreover, D.K. had not been notified of the request in due time.

4.2 In the court's view, the restricted request in this matter by the public ministry provides the opportunity for important legal questions concerning the further course of the case to be answered before a detailed and also laborious investigation for those involved is conducted. The court rejects the argument because the public ministry's operations did not conflict with any start of proper criminal law administration. The failure to inform D.K. earlier of the request lodged against him has meanwhile been corrected and he now has the opportunity of doing what is necessary adequately and in good time.

4.3 On the basis of the provisions of article 1 of the Act on Wartime Offences Act, and also considering the legal precedents therein, it must be considered that war crimes committed during a (civil) war or armed conflict in which the Netherlands are not directly involved cannot be prosecuted here on the basis of the provisions of that article and that the provisions of this act are not applicable thereto.

4.4 This result, however, is unacceptable because the punishability of breaches of the laws and customs of war is included in Articles 8 and 9 of the Act on Wartime Offences Act in order to meet the obligations for the Netherlands arising from the Red Cross Conventions. In this connection, article 3 of the Act on Wartime Offences Act states that Dutch criminal law is also applicable to anyone who commits an offence described in articles 8 and 9 outside the kingdom in Europe.

4.5 A reasonable drafting of the law, also based on the reply memorandum and on the duty, laid down in the Red Cross Conventions to judgment (or handover) implies that article 3 of the Act on Wartime Offences Act does not fall under the provisions of article 1, which are applicable only to offences committed during a (civil) war or armed conflict in which the Netherlands are directly involved, but is valid at all times.

4.6 The court is therefore of the opinion that the Dutch judge is competent to hear the facts set out in the officer of justice's request, but that the special provisions of the Act on Wartime Offences Act, also appointing the judge competent to take note of the facts, are not applicable thereto, because article 1 of that act is inapplicable. Therefore it is not the military judge appointed in the aforementioned act who is competent but the ordinary criminal judge, which is also the case in the countries surrounding the Netherlands.

5. Summary

Because, in the court's view, the ordinary judge is competent to hear the actions attributed to D.K. and no points of contact have been established which render the Arnhem court competent, in the disputed decision the deputy presiding judge in Arnhem has correctly ruled the request of the Arnhem officer of justice not receivable. That decision therefore requires improvement and completion of grounds as set out above.

6. Decision

The court:

Confirms the disputed decision -- with improvement and completion of grounds.

This decision is handed down by Mr. Lion, chairman, Mr. Van Eupen, member, and Commodore Klück, military member, in the presence of De Vries as clerk and pronounced in open session on 19 March 1997.

(signatures)

Certified true and correct copy

The Clerk to the court in Arnhem (signature)

Signature duly certified

Arnhem, 21 March 1997

The Attorney-General (signature)