Arnhem District Court

Military chamber (Court chambers)
Decision N° 05/07805-95 dated 21 February 1996
Chairman: C.A. Verkuyl; *Judge*: J. Barendsen;
Military member: Lt-Col. J.R.G. Jofriet

DECISION

The Arnhem District Court, military chamber (court chambers), sitting in the matter of the appeal to a higher court by the officer of justice in the district of Arnhem lodged on 13 December, 1995, against the decision of the deputy presiding judge, responsible for dealing with penal cases and military penal cases, at the Arnhem District Court on 1 December 1995, in the case registered under the above number as case against X.

Receivability of the appeal

The deputy presiding judge handed down a decision on 1st December, 1995, on a request submitted by the officer of justice dated 1st November, 1995.
On 13th December, 1995, the officer of justice filed an appeal against that decision.
The court chambers considers that the appeal was submitted in good time.

The officer of justice's original request

In his request dated 1st November, 1995, the officer of justice asked the deputy presiding judge responsible for dealing with penal cases, to set up a legal preliminary enquiry without delay on the determination of legal authority and the competence of the military chamber of the Arnhem District Court concerning the facts set out in greater detail in the request.
The accusation against the person named in the request and the premises of this request is that, on 14th June, 1992, or at least in the month of July, 1992, in a location in Bosnia-Herzegovina in the former Yugoslavia, that person,

a. intentionally caused the death of two people named in the request and
b. together with another or others, or at least alone, took a group of civilians captured from that area under the menace of firearms to a named concentration camp with the purpose of illegally putting them in the power of the guards of that concentration camp and rendering them helpless.
c. in the period from 15 to 30 June, 1992, in Bosnia-Herzegovina in the former Yugoslavia, attempted to rape two women within the meaning of article 242 of the Criminal Code.

   By acting in this way, the accused has been guilty of offences against the laws and usages of war as set out in article 8 of the Act on Wartime Offences Act , as the deeds were committed by the accused while he, as a soldier, or at least an armed person, was a member of an armed group under responsible command, said group's belonging to the (Bosnian) Serb military units which was involved on the territory of the former Yugoslavia in armed conflict with groups including those belonging to the Muslim community. This armed conflict is -- once again according to the request -- to be regarded as an armed conflict within the meaning of article 3 premises of the Geneva Convention dated 12 August, 1949, on the protection of civilians in armed conflict,

taking account of the actual findings of, among others, the "UN Committee of experts" formed following Security Council resolution 780/1992.

The victims of the facts set out under a, b and c belonged to the aforementioned Muslim community.

The facts set out under a. above must be regarded as violations of article 3 premises and 1a) of the aforementioned Convention of 12 August 1949.

The fact set out under b. must be regarded as a violation of article 3 premises and 1b) of the aforementioned Convention of 12th August 1949.
The fact set out under a. must be regarded as violations of article 3 premises and 1c) of the aforementioned Convention of 12th August 1949.
All as in the aforementioned request.

The court chamber proceedings

The officer of justice explained his appeal in greater detail at the court chamber proceedings on 19 January 1996.
The accused in the request did not appear at the court chamber proceedings nor was he heard, as he had not been summoned.
Under the provisions of articles 21 et seq. of the Penal Code, an accused must be summoned to the hearing of his case by the court chamber or at least summoned thereto.
In accordance with article 200 et seq. of the Penal Code and in view of the existing jurisprudence and literature, the accused should be heard by the deputy presiding judge at the latest before the closure of the preliminary legal examination, while at that hearing the accused must first be given a copy of the GVO. Detection reasons may form the basis for holding this hearing at the latest possible stage.
In the present procedure the question is whether a preliminary judicial inquiry should be instituted and in the views of the court chamber whether the accused in the summons would not be involved at this stage and thus not called, as calling the accused to the court chamber proceedings at that point could adversely affect the discovery of the truth in the context of a possible further tracing investigation or legal pre-examination.
For these reasons the court did not have the accused summoned before the court chamber proceedings.

The contested decision of the deputy presiding judge

The legal questions put to the deputy presiding judge after his decision are:

a. Are the Netherlands legally competent?
b. If so, which legal authority is competent to hear the facts set out in the action and on the basis of which legal rules?
c. Are there sufficient grounds for a preliminary legal inquiry and is such an inquiry opportune?

On the grounds set out in this decision, the deputy presiding judge came to the conclusion that the Netherlands have no criminal justice authority. For that reason, he declared the request by the officer of justice to open a preliminary legal inquiry not receivable, thus leaving the other questions, under b and c above, out of consideration.

Decision on the matter of legal authority

1. In order to assess the content of the disputed decision, the court chamber should, in its view, first assume that the Dutch judge does have legal authority and that the court chamber of the court's military chamber is entitled to deal with this appear.

2. Ex officio, the court chamber first considers the following.
In Resolution 827 (dated 25 May 1993) of the United Nations Security Council was set up the International Tribunal for the prosecution of people responsible for serious breaches of international humanitarian law in the territory of the former Yugoslavia and the Statute of that Tribunal was accepted (Trb. 1993, 169).
With regard to legal competence, article 9 of that Statute contains two provisions. Its first article reads:
“The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991”.
This provision leads to the conclusion that, in such a case, the national judicial authorities do initially have legal authority besides that of the International Tribunal.

3. The second paragraph of that article reads:
“The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal.”
There is no mention that the International Tribunal requires the person given in the summons as the accused.

4. The four Geneva Conventions dated 12 August 1949, mentioned in the summons were signed by the Netherlands on 8 December, 1949 (Trb. 1951, N°s 72 to 75 incl., States-General approval Stb. 1954, 249) and came into force on 3 February 1955. The Wartime Offences Act (Stb. 1952, 408) was brought into effect to meet the requirements laid upon the parties by the conventions.

5. The facts described and set out in greater detail in the summons contain actions conflicting with the common article 3 of the Geneva Conventions and, if they are established, must be regarded in the view of the court chamber as an offence against the laws and customs of war as provided for in article 8 of the Wartime Offences Act . Judging such offences is possible in the case of an armed conflict or a war, including a civil war, as determined in article 1 of the Wartime Offences Act .

6. There are generally known facts:
- that in any case groups on the territory of the member republic Bosnia and Herzegovina of the former federal republic of Yugoslavia were in armed conflict over the mastery of parts of that region;
- that two of these conflicting parties were known as the Bosnian Serbs on the one hand and the Bosnian Muslims on the other;
- that the aforementioned parties were capable of appearing with and as such acted as organised military units;
- that these parties were under the command or leadership of a body, called their government by the parties themselves, responsible for their actions;
- that they operated on and from a region under their effective control;

- that the parties in question aimed at obtaining or establishing sovereignty over a part of the territory of the former republic of Yugoslavia, one of the parties to the aforementioned Geneva Convention dated 12 August 1949.

6.2 The United Nations Protection Force (UNPROFOR) was established in Resolution 743, approved by the UN Security Council on 21 February 1992.
This resolution states, insofar as it applies here:
“Concerned that the situation in Yugoslavia continues to constitute a threat to international peace and security as determined in resolution 713 (1191)”.
This, in the view of the court chambers, must be taken to mean that the aforementioned conflict has assumed such a scale and intensity that it can no longer be termed internal troubles or uprisings.

6.3 In the view of the court chambers, all this justifies the conclusion that the hostilities referred to under 6.1 must be regarded as a non-international armed conflict within the meaning of article 3 of the oft-mentioned Geneva Conventions.
Such a conflict must be regarded as a civil war within the meaning of article 1, section 3 of the Wartime Offences Act. Therefore it is not a matter of an armed conflict within the meaning of article 1, section 2 of that act.

7. Article 1 of the Wartime Offences Act states, insofar as is concerned here:
"1. The provisions of this act apply to the punishable offences committed in the event of war or first punishable in the event of war, which are described in (.....) articles 4 - 9 of this act (.....).
"2. In the event of armed conflict which cannot be regarded as war and in which the Netherlands are involved for either individual or collective self-defence, or to restore international order and safety, articles 4-9 are correspondingly applicable and We, determine as a general rule of control, that the other clauses of this act will be fully or partly applicable.
"3. The term war includes civil war."

For the concept of war and, in the present case, civil war, both within the meaning of the aforementioned legal provisions, it is of no consequence whether or not the Netherlands are involved in it.
The court chambers comes to this conclusion on the basis of the considerations below:
- the text of the act.
Contrary to the provisions of the second section of this article, in which, in the event of armed conflict as defined therein, the requirement of the Netherlands' involvement is expressly stated, the text of the first section refers to offences "committed in the event of war", where no such requirement is made.
- history of the act.
Nor does the history of the passing of the Wartime Offences Act in any way support the view that the legislator, in the provision involved here, was concerned only with a case of war in which the Netherlands are involved. The contrary appears from the reply memorandum, as will be shown under item 10.
- origin of the concept of war.
Finally, the above view is unacceptable and does not meet the legislator's intention, for: according to the text of article 1, section 1 of the Wartime Offences Act, this act is, in the event of war, applicable to the offences listed thereunder, including that specified in articles 4 - 9 of this act.
Article 8, section 1 of the Wartime Offences Act states:

"Anyone found guilty of violating *"de wetten en gebruiken van de oorlog"* shall suffer the penalty of a maximum of ten years' imprisonment or a fifth-category fine."
The expression *"de wetten en gebruiken van de oorlog"* above is the translation of "the laws and customs of war", taken from the Hague Conventions of 1899 and 1907, in which the Land War Rules were established and which involved the codification of international war legislation.
The laws and customs of war were also laid down in the aforementioned Geneva Conventions.
It would be difficult to attribute another meaning of "war" than "war, wherever waged in the world", in view of the purpose of these conventions, i.e. to codify international humanitarian war legislation.
This consideration, to which should also be added the declaration of applicability in article 1, section 1 of the Wartime Offences Act to the offences described in article 8, section 1 of that Act, leads the court chambers to the conclusion that article 1, section 1 of that act can only be applicable if the words therein "in the event of war" can have no other meaning than the word "war" in the expression "laws and customs of war" as appears in aforementioned conventions..

8. It follows from the considerations under 5, 6 and 7 that article 1, sections 1 and 3 of the Wartime Offences Act apply to the offences set out in the GVO request.

9. Moreover, the applicability of article 3 of the act follows from that of article 1.

10. The introduction to article 3 and article 1 of the Wartime Offences Act rules that Dutch criminal law is applicable to anyone committing one of the offences described in articles 8 and 9 of that act outside the Netherlands, without prejudice to the relevant provisions of the Criminal Code and the Military Criminal Code.
In the case of war crimes, Dutch law thus recognises the principle of universality which the reply memorandum (Lower Chamber Deliberations 1951/52, draft act N° 2258) sets out in the Wartime Offences Act in the paragraph "Development of international criminal law" with the terms:
"The provision in article 3, section 1 decrees that the Dutch judge is competent in the case of war crimes, regardless of by whom and where they are committed, and hence also in cases where the crime is committed by a non-Dutch citizen outside the Netherlands in a war in which our country is not involved."
In the view of the court chambers, any other conception would lead to a failure to fulfil the contractual obligations, the oft-mentioned Geneva Conventions, to which the Netherlands have subscribed. In view of the text and phraseology of these conventions, the basis is also expressly one of universality.
The question whether this view also applies to, in short, war crimes committed during a civil war must, in the court chambers' view, be given a positive answer. It appears from neither the content of the act nor the parliamentary procedure that any other view could apply, while the Wartime Offences Act expressly states that the term war includes civil war.

11. On the basis of the fact that the offences set out in the request, if they can be confirmed, were committed during a civil war and in view of the provisions of article 1, section 3 together with section 1, the court chambers reach the decision that, as set out in said section 1, the provisions of the Wartime Offences Act are applicable, whereunder article 3 establishes universal jurisdiction concerning the offences described in articles 8 and 9 of that act.
Moreover, it has already been established under 5 that the facts concerned -- set out in the

request -- must be regarded as war crimes under the provisions of article 8 of the Wartime Offences Act. All this leads to the conclusion that the Dutch judge is thus competent and that Dutch criminal law, namely the Wartime Offences Act, is applicable.

Assessment of the matter of competence

12. This leads to the recognition that, under the provisions of article 12, section 1 of the Wartime Offences Act, the military judge within the meaning of the military justice act is competent. This conclusion, like that relating to legal authority, had also already been accepted by the court chambers in order to make a full assessment of the deputy presiding judge's disputed decision possible.

13. From the aforementioned conclusions that the Dutch judge is competent and the military chamber of this court is qualified to take note of the facts set out in the request it follows that the disputed decision by the deputy presiding judge, whose legal authority and competence must be derived from those of the military chamber, cannot be upheld. The court chambers will therefore not annul this decision.

Assessment of the original request

14. The answers to these legal questions by the court chambers leave no further grounds to assign the officer of justice's request as the extent of the request, extending from the implementation of a preliminary legal examination to the judgment by the deputy presiding judge of the legal authority and competence of the military chamber, no longer exists.
The court chambers will therefore refuse the request of the officer of justice.

Decision

Annuls the decision by the deputy presiding judge charged with dealing with penal cases and also military penal cases, in this court on 1 December 1995, and, in a further legal procedure:
rules that the officer of justice is receivable in his original request;

understands that the Dutch judge has legal competence to hear the facts as described in the aforementioned request by the officer of justice for the district of Arnhem dated 1 November 1995;
declares the military judge specified in article 12 of the Wartime Offences Act competent to take note of these facts;

rejects the request by the officer of justice for the district of Arnhem dated 1 November 1995, extending to the establishment of a preliminary legal examination concerning the decision on legal authority and the competence of the military chamber of the district court in Arnhem.