THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 65389/09
by Frans Cornelis Adrianus VAN ANRAAT
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 6 July 2010 as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged with the European Court of Human Rights on 4 December 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Frans Cornelis Adrianus van Anraat, is a Netherlands national who was born in 1942. He is currently serving a sentence of imprisonment (*gevangenisstraf*) in Zoetermeer Prison, Netherlands. He was represented before the Court by Mr G. Spong, a lawyer practising in Amsterdam.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant and apparent from information accessible to the public, may be summarised as follows.

1. Introduction

3. The applicant was a businessman. Between April 1984 and August 1988 he purchased quantities in excess of eleven hundred metric tons of the chemical thiodiglycol in the United States and Japan, which, acting through companies based in a variety of countries, he supplied to the Government of Iraq. After 1984 he was the Government of Iraq's only supplier of this substance.

4. Thiodiglycol is a precursor in a chemical reaction at the final stage of formation of 1,5-dichloro-3-thiopentane. One of a group of compounds known as sulphur mustards and better known as mustard gas, 1,5-dichloro-3-thiopentane has severe vesicant properties. In contact with the skin, it causes severe and potentially lethal chemical burns; in contact with the eyes, it causes inflammation possibly resulting in blindness; if inhaled, it blisters mucous membrane and lung tissue and can cause pulmonary oedema. Its known long-term effects on survivors include an increased risk of cancer in later life. Mustard gas, so called because of its smell, was first used as a battlefield weapon during the First World War (1914-18), at the Third Battle of Ypres (July-November 1917).

5. Mustard gas is known to have been used by the Iraqi military, along with other chemical weapons, against Iranian armed forces and civilians during the Iran-Iraq War (1980-1988) and in attacks against the Kurdish population of northern Iraq (1988). One such attack, carried out on the town of Halabja in March 1988, killed thousands of non-combatant civilians and injured thousands

more. Among those later considered primarily responsible were Saddam Hussein Abd al-Majid al-Tikriti (better known as Saddam Hussein), President of Iraq from 1979 until 2003, and Ali Hassan Abd al-Majid al-Tikriti, Secretary General of the Ba'ath Party in northern Iraq between 1987 and 1989, nicknamed “Chemical Ali”.

6. Saddam Hussein was charged before the Special Iraqi Tribunal (later re-named Supreme Iraqi Criminal Tribunal) with the use of poison gas against Kurdish civilians in Halabja. However, he never stood trial on this charge; he was hanged on 30 December 2006 for another crime.

7. Ali Hassan Abd al-Majid al-Tikriti was tried by the Special Iraqi Tribunal/Supreme Iraqi Criminal Tribunal on a plurality of charges; these included the 1988 Halabja gas attack, in respect of which he was found guilty. He was hanged on 25 January 2010.

2. Criminal proceedings against the applicant

(a) The charges

8. Charges were brought against the applicant in the Netherlands which may be summarised as follows:

1) aiding and abetting genocide committed by named individuals including Saddam Hussein and Ali Hassan al-Majid al-Tikriti against the Kurdish population of northern Iraq in a number of places including Halabja;

in the alternative, aiding and abetting violations of the laws and customs of war committed by named individuals including Saddam Hussein and Ali Hassan al-Majid al-Tikriti, as regards gas attacks on the Kurdish population of northern Iraq in Halabja and elsewhere; and

2) aiding and abetting violations of the laws and customs of war committed by named individuals including Saddam Hussein and Ali Hassan al-Majid al-Tikriti, as regards gas attacks on the territory of Iran.

9. The acts constitutive of these crimes were stated to be the supply of various named chemicals, thiodiglycol among them, to the Republic of Iraq as well as materials and advice for the manufacture of chemical weapons in violation of international law. The charges referred to several provisions of domestic legislation, including, as relevant to the case before the Court, section 8 of the War Crimes Act (*Wet Oorlogsstrafrecht*), taken together with Article 48 of the Criminal Code (*Wetboek van Strafrecht*).

(b) Proceedings in the Regional Court

10. The trial opened before the Regional Court (*rechtbank*) of The Hague on 18 March 2005. On 23 December 2005 the Regional Court delivered its judgment. It acquitted the applicant of the first primary charge, aiding and abetting genocide, finding that genocidal intent on his part could not be proved; but it convicted him of the first alternative charge and the second charge. It sentenced him to fifteen years in prison and ordered him to pay sums of money in compensation to a number of named individuals who had joined the proceedings as civil parties.

(c) Proceedings in the Court of Appeal

11. Both the prosecution and the applicant appealed against the Regional Court's judgment to the Court of Appeal (*gerechtshof*).

12. In its judgment of 9 May 2007, the Court of Appeal of The Hague acquitted the applicant of aiding and abetting genocide as the Regional Court had done. It convicted him, however, of aiding and abetting violations of the laws and customs of war committed by Saddam Hussein, Ali Hassan al-Majid al-Tikriti and another person or other persons in a non-international or international conflict as the case might be, as regards gas attacks on the Kurdish population of northern Iraq in Halabja and elsewhere (the first alternative charge), and of aiding and abetting violations of the laws and customs of war committed by Saddam Hussein, Ali Hassan al-Majid al-Tikriti and another person or other persons in an international conflict, as regards gas attacks on the territory of Iran.

13. The Court of Appeal's judgment concluded as follows (translation published by the Court of Appeal itself):

“12.5 Conclusion

Based on the above, the following conclusions can be made:

a) The defendant played an important part by supplying the precursor Thiodiglycol [or TDG] to the Iraqi regime for the production of mustard gas: at least 38% of this substance had been supplied by him in the years 1980 up to and including 1988. If any TDG would also have been supplied from the United Kingdom to Iraq in those same years, this fact does not impair the qualification of 'important' regarding defendant's part in this matter.

b) When the supplies by others eventually stopped no later than in the course of 1984, the defendant supplied at least another 1,116 tons of this precursor until the spring of 1988.

c) The first shipment of TDG supplied by the defendant arrived in Iraq towards the summer of 1985; in that year he supplied a total of approximately 197 tons. Based on the considerations written under item 12.3 above, the Court deems it very likely that in the course of that year TDG supplied by the defendant was also used for the production and finally ended up in ammunition that was used for the attacks as mentioned in the charges.

Conclusive evidence for his co-responsibility regarding the attacks mentioned in the charges (in so far as mustard gas was deployed in those attacks) is the following:

d) As of 1985, the supplementation of the essential precursor TDG to the Iraqi regime depended completely on the supplies made by the defendant.

e) For that reason, the unwholesome policy that was continuously carried out by the regime that from 1984 onwards seemed to find it necessary to deploy hundreds of tons of this poison gas during combat, depended to a decisive extent if not totally on those supplies.

Taking into consideration the crucial significance that the shipments of TDG supplied by the defendant since 1985 had for the chemical weapon program of the regime, the Court finds the defendant (together with his co-perpetrators) guilty of being an accessory to providing the opportunity and the means for the proven attacks with mustard gas in the years 1987 and 1988.

13. Liability to punishment on account of the proven charges

The proven charges constitute a punishable offence:

Regarding the proven charges under count 1. alternatively:

The defendant is found guilty of the offence of complicity in being an accessory to a violation of the laws and customs of war, while that offence resulted in the death or grievous bodily harm of another person or that offence was an expression of a policy of systematic terror or wrongful actions against the whole population or a specific group thereof, committed several times.

Regarding the proven charges under count 2:

The defendant is found guilty of the offence of complicity in being an accessory to a violation of the laws and customs of war, while that offence resulted in the death or grievous bodily harm of another person, committed several times.

14. Liability to punishment of the defendant

No circumstance has become plausible that would rule out the punishability of the defendant. Therefore the defendant is liable to punishment.

15. Considerations regarding the applicable legislation

The [War Crimes Act] which was applicable at the time of the period referred to in the charges, was amended several times afterwards; following the entry into force of the International Crimes Act (...) on 1 October 2003, the war crimes were devolved from the [War Crimes Act] to the [International Crimes Act]. Only the amendments to the law dated 27 March 1986 (...) and dated 14 June 1990 (...) are important when determining whether the later legal provisions are more favourable for the defendant than the law that was applicable during the period referred to in the charges.

Pursuant to Act of Parliament dated 27 March 1986, a new [section] 10a was inserted into the [War Crimes Act], which makes it possible to impose an additional sentence provided by article 28, first paragraph, under 3º, of the Penal Code (deprive a person of his/her active and passive right to vote) on account of – inter alia – a conviction for being found guilty of war crimes, while by Act of Parliament dated 14 June 1990, the death penalty as possible punishment was removed from the [War Crimes Act].

The [War Crimes Act] as it reads as of 1 January 1991, after the amendment by Act of Parliament of 14 June 1990, is more favourable to the defendant in terms of an eventual penalty. From the devolvement of the penal provisions that refer to war crimes from the [War Crimes Act] to the International Crimes Act, as from 1 October 2003, it cannot be said that they result in more favourable provisions for the defendant. Based on the provisions in article 1, paragraph 2, of the Penal Code, the [War Crimes Act] will have to be the starting point as it read on 1 January 1991. Furthermore with regards to complicity, the Court has taken into consideration article 49, paragraph 2, of the Penal Code, as it read until 1 February 2006 (the date of entry into force of the Act regarding reassessment

of maximum penalties). Pursuant to article 10 (old), 49, paragraph 2 (old), 57 and 78 of the Penal Code and [section] 8 of the [War Crimes Act], as it read on 1 January 1991, viewed together and in relation to each other, the Court cannot draw any other conclusion than that in this case the defendant is liable to a maximum term of twenty years imprisonment.

16. Grounds for the punishment

During the appeal trial, the advocate general moved that the sentence of the court of first instance be set aside and on account of the principal charge under counts 1. and 2. he demanded that the defendant be sentenced to a term of imprisonment of 15 years, less the period spent in pre-trial detention.

In making its assessment as to what penalty should be imposed, the Court has taken into account the following considerations.

During a number of years the defendant supplied raw material to the Iraqi regime for the production of chemical weapons. From 1985 until early 1988, in a total of twenty shipments he supplied at least more than 1,100 tons of Thiodiglycol (TDG) on the basis of three Letters of Credit. That substance was used for the production of mustard gas that was deployed during the war in Iran as well as in Iraq. By doing so during a number of years, the defendant has consciously made a substantial contribution to the continuing violation of the laws and customs of war committed by the Iraqi regime. Based on Dutch criminal law that was applicable at that time, a person who is found guilty of complicity in a criminal offence which carries a life sentence can be sentenced to a term of imprisonment of a maximum of 15 years. Seen the fact that the defendant committed the offence of complicity several times, in his case the penalty to be imposed will be a maximum term of twenty years imprisonment, which is based on the regulation set out in article 57, paragraph 2, of the Penal Code, concerning various offences for which one sentence is pronounced.

In determining the punishment in this case, the Court has taken into account the following circumstances, that on the one hand relate to the seriousness of the offences, the circumstances in which they were committed, as well as the intended purposes of the punishment to be considered when fixing the punishment, and on the other hand the personal circumstances of the defendant.

As results from the case file (in the period referred to in the charges), the Iraqi regime carried out multiple attacks with (among others) mustard gas during the war with Iran on places in that country, as well as on the border region between Iraq and Iran, where Kurdish population groups lived that were suspected of collaboration with the Iranian enemy. Those attacks caused the death of at least thousands of civilians (that did not participate in the conflict) and caused permanent and severe health problems to very many persons. It is beyond doubt that the regime in Bagdad by doing so committed extensive and extremely gross violations of the international humanitarian law by using a weapon that was already prohibited by the Geneva (Gas) Protocol of 17 June 1925.

The defendant has made an essential contribution to these violations – at a time that many, if not all other suppliers 'pulled out' with regard to the increasing international pressure – by supplying many times in the course of several years (among other matters) very large quantities of a precursor for mustard gas; in doing so the defendant made significant profits. Those supplies enabled the Iraqi regime to (almost) continue their deadly (air) attacks in full force during a number of years. Apparently the defendant did not give his deliberate support to the afore mentioned gross violations out of sympathy for the targets of the regime, but – as it should be assumed – the defendant acted exclusively in pursuit of large gains and fully neglected the consequences of his actions. Even today the defendant does not show any sense of guilt or any compassion for the numerous victims of the mustard gas attacks.

The Court recognizes that the proven offences were committed over more than twenty years ago and that the defendant is a man of advanced age, who is to be expected to spend a large part of the remaining years of his life in prison. The Court will only be able to attach limited weight to this slightly mitigating circumstance. In this case the most important aspect concerning the determination of the appropriate sanction – considering the extreme gross violation of the principles of humanitarian law that took place and the important supporting role that was played by the defendant – is to point out to the victims and survivors, as well as to the international legal community, how much value is put on the actions of the defendant and what severe punishment can only be the consequence of these actions.

Finally in fixing the appropriate punishment, the Court has taken into account the general prevention aspect. People or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that – if they do not exercise increased vigilance – they can become involved in most serious criminal offences.

It should be made clear to them that they will have to face prosecution and long-term prison sentences, in accordance with the seriousness of the crimes they committed.

Considering all of the above, the Court concludes that the only suitable and necessary reaction in these circumstances is a non-suspended prison sentence of a very long term as set out below."

14. The Court of Appeal sentenced the applicant to seventeen years' imprisonment; however, it rejected the claims of the civil parties as unsuitable for summary decision.

(d) Proceedings in the Supreme Court

15. The applicant lodged an appeal on points of law (cassation, *cassatie*) with the Supreme Court (*Hoge Raad*), submitting a statement of points of appeal on 14 April 2008. He argued, referring to section 1(1) of the War Crimes Act, that the Netherlands courts lacked jurisdiction since the Court of Appeal had not convicted the applicant of aiding and abetting crimes committed in "time of war" (as distinct from non-international or international "conflict"); section 1(2) of that Act could not apply, since the conflict, whether international or not, did not in any way involve the Netherlands. He also alleged a violation of Article 7 of the Convention in that the concept of "laws and customs of war" as used in section 8 of the War Crimes Act was so vague and uncertain in scope that he could not reasonably have been found to have had the criminal intent to be an accessory to their violation. He further claimed that the 1925 Geneva Gas Protocol and the 1949 Geneva Conventions, as considered relevant by the Court of Appeal, had become a dead letter in the light of the use of weapons of mass destruction, nuclear in particular, and the widespread use of other indiscriminate weapons such as incendiary bombs and napalm (which he described as "chemical weapons") during the Second World War (1939-45), the Korean War (1950-53) and the Vietnam War (1959-75). The 1925 Geneva Gas Protocol, moreover, had lost its force, or at the very least could no longer be seen as proof of the existence of customary law given widespread State practice to contrary effect.

16. The Procurator General (*Procureur-Generaal*) to the Supreme Court submitted an advisory opinion on 18 November 2008. He considered the Court of Appeal's reference to general international law an error which the Supreme Court could itself correct *ex officio*: it was sufficient to refer to the 1925 Geneva Gas Protocol, to the common Article 3 of the 1949 Geneva Conventions, and (in relation to the second charge) to Article 147 of the fourth Geneva Convention, all of which had been relied on by the Court of Appeal, as setting out the applicable substantive standards.

17. The applicant submitted a response to the Procurator General's opinion on 27 November 2008, as permitted by Article 439 § 5 of the Code of Criminal Procedure (*Wetboek van Strafvordering*). He argued, among other things, that Saddam Hussein and Ali Hassan al-Majid al-Tikriti, whose crimes he had supposedly aided and abetted, had at the time been members of the government of a sovereign State (one of them its Head of State) and for that reason protected by that State's sovereign immunity. Since the Netherlands courts had no jurisdiction over them, it followed that they were not entitled to try him as their accessory either.

18. On 30 June 2009 the Supreme Court gave judgment dismissing the appeal on points of law. It found that section 3 of the War Crimes Act conferred universal jurisdiction on the Netherlands courts in respect of the crimes set out in section 8 of that Act. In response to the applicant's complaint going to the supposed vagueness of the concept of "laws and customs of war" as used in section 8 of the War Crimes Act, it held as follows:

> "Contrary to the argument made in the point of appeal (*middel*), section 8 of the War Crimes Act is not contrary to the 'requirement of specificity' (*bepaaldheidsgebod*) contained in the statutory and Convention provisions relied on. In the light, among other things, of the nature of its subject-matter, consisting of the setting of penal sanctions on the severest indictable offences which originate in a common legal consciousness – whether it be set out in laws and treaties or not –, the norm formulated in section 8 of the War Crimes Act makes it clear enough what behaviour shall carry a penal sanction and sufficiently enables the suspect to adjust his behaviour accordingly, even though the nature and content of this provision inevitably entail a certain vagueness in the description of the crime (*een zekere vaagheid in de delictsomschrijving*)."

B. Relevant domestic and international law

1. Relevant domestic law

19. Provisions of domestic law, in the versions applicable and applied in the applicant's case, read as follows:

(a) The Code of Criminal Procedure

Article 439

"...

5. Within two weeks from the transmission of the copy of the advisory opinion (of the Procurator General) the accused's counsel ... may submit his written comments thereon to the Supreme Court."

(b) The Criminal Code

Article 48

"[The following] shall be punished as accessories (*medeplichtigen*) to an indictable offence (*misdrijf*):

1. they who deliberately offer their assistance in the commission of the indictable offence;

2. they who deliberately provide an opportunity, means or information to commit the indictable offence."

Article 49

"1. The maximum of the principal punishments (*hoofdstraffen*) threatened against the indictable offence shall be reduced by one-third in the case of an accessory.

2. If it concerns an indictable offence carrying life imprisonment, a term of imprisonment shall be imposed not exceeding fifteen years.

3. The additional punishments (*bijkomende straffen*) shall be the same in the case of an accessory as for the indictable offence itself.

4. In sentencing, only those actions shall be considered which the accessory has deliberately aided or abetted (*die de medeplichtige opzettelijk heeft gemakkelijk gemaakt of bevorderd*), as well as their consequences."

Article 57

"1. In case of a concurrence of criminal acts which must be considered as independent acts and which result in more than one indictable offence carrying principal punishments of like nature (*gelijksoortige hoofdstraffen*), a single sentence shall be imposed.

2. The maximum sentence shall be the total of the maximum punishments threatened against these acts, but – in so far as it concerns imprisonment and penal detention (*hechtenis*) – shall not exceed the highest maximum by more than one-third."

(c) The War Crimes Act

Section 1

"1. The provisions of this Act shall apply to the crimes, committed in time of war or criminal only in case of war, that are set out in:

...

3º sections 4-9 of this Act; ...

2. In case of an armed conflict that cannot be described as war and in which the Netherlands is involved either for the purpose of individual or collective self-defence or to restore international order and security sections 4-9 shall apply by analogy and We [i.e. the Crown; that is the Monarch together with the responsible Minister] may determine by order in council (*algemene maatregel van bestuur*) that the other provisions of this Act shall apply in whole or in part.

3. the expression 'war' shall be understood to include civil war."

Section 3

"Without prejudice to the relevant provisions of the Criminal Code and the Military Criminal Code (*Wetboek van Militair Strafrecht*), Netherlands criminal law shall apply to:

1º anyone who commits the indictable offence set out in [section] 8 outside the Realm in Europe; ...

4º any Netherlands national who commits an indictable offence as referred to in section 1 outside the Realm in Europe."

Section 8

"1. He who commits a violation of the laws and customs of war shall be punished by a term of imprisonment not exceeding ten years ...

2. A term of imprisonment not exceeding fifteen years ... shall be imposed:

1º if the criminal act is liable to result in someone else's death or cause them severe bodily injury;

2º if the criminal act involves inhuman treatment;

3º if the criminal act involves forcing someone else to do something, not to do something or suffer something to happen;

4º if the criminal act involves looting.

3. Life imprisonment or a temporary term of imprisonment not exceeding twenty years ... shall be imposed:

1º if the criminal act results in someone else's death or causes them severe bodily injury or involves rape;

2º if the criminal act involves violence by a plurality of persons acting in concert (*geweldpleging met verenigde krachten*) against one or more persons or violence against a dead, sick or injured person;

3º if the criminal act involves the destruction, damaging, putting beyond use or hiding, by a plurality of persons acting in concert, of any property belonging to someone else in whole or in part;

4º if the criminal act set out under 3º or 4º of the preceding paragraph is committed by a plurality of persons acting in concert;

5º if the criminal act is an expression of a policy of systematic terror or unlawful action (*wederrechtelijk optreden*) against the entire population or a particular group thereof;

6º if the criminal act involves the breaking of a promise or the breaking of an agreement entered into as such with the opposing party;

7º if the criminal act involves the misuse of a flag or emblem protected by the laws and customs of war or the military distinctive signs or uniform of the opposing party."

(d) The International Crimes Act

20. The International Crimes Act (*Wet internationale misdrijven*) entered into force on 1 October 2003, replacing the War Crimes Act and the Genocide Treaty (Implementation) Act (*Uitvoeringswet Genocideverdrag*). In relevant part, it provides as follows:

Section 4

"1. He shall be punished, as being guilty of a crime against humanity, with life imprisonment or temporary imprisonment not exceeding thirty years ..., who commits one of the following acts, if it is committed as a part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack:

a. wilful killing;

b. extermination;

c. slavery;

d. deportation or forced transfer of population;

e. imprisonment or other serious deprivation of physical liberty contrary to fundamental rules of international law;

f. torture;

g. rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, or any other form of sexual violence of comparable seriousness;

h. persecution of an identifiable group or collectivity on political grounds, because they belong to a particular race or a particular nationality, on ethnic, cultural or religious grounds, on grounds of gender or on other grounds which are universally recognised as impermissible pursuant to international law, in connection with an act as referred to in this paragraph or any other crime set out in this Act;

i. forced disappearance of persons;

j. apartheid;

k. other inhuman treatment of a comparable nature deliberately causing serious suffering or serious bodily injury or harm to mental or physical health. ..."

Section 5

"1. He who, in case of an international armed conflict, commits one of the serious violations of the Geneva Convention, namely the following acts if committed against persons protected by the said Conventions:

a. wilful killing;

b. torture or inhuman treatment, including biological experiments;

c. deliberately causing serious suffering or serious bodily injury or harm to health;

d. large-scale deliberate and unlawful destruction and taking of property in the absence of military necessity;

e. forcing a prisoner of war or other protected person to enlist in the armed forces of an enemy power;

f. deliberately denying a prisoner or war or other protected person the right to a fair trial in accordance with the law;

g. unlawful deportation or removal or unlawful detention; or

h. taking hostages

shall be punished with life imprisonment or temporary imprisonment not exceeding thirty years ...

...

5. He who, in case of an international armed conflict, commits one of the following acts:

a. deliberately directing attacks against civilian objects, that is to say objects which are not a military target;

b. deliberately initiating an attack knowing that such an attack will cause collateral loss of life or injury to civilians or damage to civilian objects or considerable, long-lasting and serious damage to the environment, which would clearly be disproportionate to the concrete and direct general military advantage to be expected;

c. attacks or bombing, by whatever means, of towns, villages, dwellings or buildings which are not being defended and are not military targets;

d. direct or indirect removal by the occupying power of sections of its own civilian population to the occupied territory or deportation or removal of part of all of the population of the occupied territory within that territory or out of it;

e. declaring that the rights and actions of subjects of the enemy party are lapsed, suspended, or inadmissible in law;

f. forcing subjects of the enemy party to take part in hostile acts directed against their own country, even if before the beginning of the war they were in the service of the belligerent;

g. the use of poisonous weapons;

h. the use of asphyxiating, poisonous or other gases and other similar liquids, materials or devices;

i. the use of bullets which easily expand or flatten or widen in the human body, such as bullets with a hard jacket which leaves the core partially exposed or is incised;

j. misdeeds (*wandaden*) committed against personal dignity, in particular humiliating and degrading treatment;

k. making use of the presence of a civilian or other protected person to secure particular points, areas or forces against military operations;

l. deliberately making use of the starving of civilians as a method of waging war by denying them objects which are indispensable to their survival, including deliberately impeding the supply of aid goods as provided for in the Geneva Conventions;

m. deliberately directing attacks against the civilian population as such or individual civilians who are not directly participating in hostilities;

n. deliberately directing attacks against buildings, materiel, medical units and transport as well as personnel making use in accordance with international law of the emblems of the Geneva Conventions;

o. deliberately directing attacks against personnel, installations, materiel, units or vehicles involved in humanitarian aid or peace missions in accordance with the Charter of the United Nations, as long as these are entitled to the protection granted to civilians or civilian objects pursuant to international law of armed conflict;

p. deliberately directing attacks against buildings intended for religion, education, art, science or charitable ends, historic monuments, hospitals and places where sick and wounded are collected, provided that these are not military targets;

q. looting a town or a place, even if taken in an attack;

r. calling to arms or drafting into military service in the national armed forces or groups children under the age of fifteen or using them for active participation in hostilities;

s. declaring that no quarter will be given;

t. destroying or seizing goods of the opposing party unless such destruction or seizure is urgently necessary as a consequence of cogent circumstances of a conflict,

shall be punished with a term of imprisonment not exceeding fifteen years ...

6. If an act as set out in ... the fifth paragraph:

a. results in someone else's death or causes them severe bodily injury or involves rape;

b. involves violence by a plurality of persons acting in concert (*geweldpleging in vereniging*) against one or more persons or violence against a dead, sick or injured person;

c. involves the destruction, damaging, putting beyond use or hiding, by a plurality of persons acting in concert, of any property belonging to someone else in whole or in part;

d. involves a plurality of persons acting in concert forcing someone else to do something, not to do something or suffer something to happen;

e. involves a plurality of persons acting in concert looting a town or a place, even if taken in an attack;

f. involves the breaking of a promise or the breaking of an agreement entered into as such with the opposing party; or

g. involves the misuse of a flag or emblem protected by the laws and customs of war or the military distinctive signs or uniform of the opposing party

the person found guilty shall be punished with life imprisonment or temporary imprisonment not exceeding thirty years ...

Section 6

1. He who, in the event of a non-international armed conflict, commits a violation of the common Article 3 of the Geneva Conventions, that is to say the commission against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, of any one of the following acts:

a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b. taking of hostages;

c. outrages upon personal dignity, in particular humiliating and degrading treatment;

d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples;

shall be punished with life imprisonment or temporary imprisonment not exceeding thirty years ...

2. He who, in the event of a non-international armed conflict, commits one of the following acts:

a. rape, sexual slavery, forced prostitution, forced sterilisation, or any other form of sexual violence that can be deemed equally serious as a serious violation of the Geneva Conventions;

b. forced pregnancy;

c. subjecting persons who are in the power of an opposing party to physical maiming or medical or scientific experiments, whatever their nature, not justified by medical or dental treatment of the person concerned or his treatment in hospital, nor are carried out in his interest, and which result in death or can seriously endanger the health of that person or persons; or

d. treacherously killing or wounding persons who belong to the enemy nation or the enemy army;

shall be punished with life imprisonment or temporary imprisonment not exceeding thirty years ...

3. He who, in the event of a non-international armed conflict, commits one of the following acts:

a. deliberately directing attacks against the civilian population as such or against individual civilians who are not participating directly in hostilities;

b. deliberately directing attacks against buildings, materiel, medical units and transport, as well as personnel making use in accordance with international law of the emblems of the Geneva Convention [i.e. the Red Cross, the Red Crescent and the Red Crystal];

c. deliberately directing attacks against personnel, installations, materiel, units or vehicles involved in humanitarian assistance or peace missions in accordance with the Charter of the United Nations, as long as these are entitled to the protection granted to civilians or civilian objects pursuant to the international law of armed conflict;

d. deliberately directing attacks against buildings intended for religion, education, art, science or charitable

ends, historic monuments, hospitals and places where sick and wounded are collected, provided that these are not military targets;

e. looting a town or a place, even if taken in an attack;

f. calling to arms or drafting into military service in the national armed forces or groups children under the age of fifteen or using them for active participation in hostilities;

g. declaring that no quarter will be given;

h. destroying or seizing goods of the opposing party unless such destruction or seizure is urgently necessary as a consequence of cogent circumstances of a conflict; or

i. giving orders for the removal of the civilian population for reasons connected with the conflict, not including reasons connected with the safety of the civilians or in case of urgent necessity because of cogent circumstances of the conflict,

shall be punished by a term of imprisonment not exceeding fifteen years ...

4. The sixth paragraph of section 5 shall apply by analogy to an act as referred to in the third paragraph."

(e) Relevant domestic case-law

21. In a decision of 11 November 1997, *Nederlandse Jurisprudentie* (Netherlands Law Reports) 1998, no. 463, the Supreme Court held as follows:

"5.2. That it certainly was the Government's intention to comply in full with that treaty obligation [sc. to criminalise all serious breaches of the four 1949 Geneva Conventions] is apparent from, among other things, the parliamentary history of that Act, in particular from the Explanatory Memorandum (*Memorie van Toelichting*) and the Memorandum in Reply (*Memorie van Antwoord*) pertaining to the Bill in question, which include the following:

'When another power that is a party to the violated Convention does not request the transfer (*overlevering*) of a prisoner of war who is in the hands of the Netherlands, it should be possible for him to be tried by a Netherlands court, even though the indictable offence may have been committed abroad, and even if the criminal act has not been committed against a Netherlands national or harms no Netherlands interest.'

and

'The provision enacted in section 3(1) grants the Netherlands courts jurisdiction to try war crimes, regardless of by whom and where these have been committed, that is to say also in those cases in which the indictable offence has been committed by a non-Netherlands national outside the Netherlands in a war to which our country is not a party. It is rightly pointed out in the Provisional Report (*Voorlopig Verslag*) that this provision is to be seen as an application of the so-called principle of universality.'

respectively.

5.3. In view of the finding contained in paragraph 5.2 above, a reasonable interpretation of the law, in accordance with the legislature's intention to comply in full with the treaty obligations entered into by the Netherlands, makes it necessary to understand section 1 of the War Crimes Act – despite its, to that extent, opaque wording – in such a way that the limitations comprised in subsections 1, 2 and 3 respectively of section 1 of the War Crimes Act have no bearing on sections 8 and 9, and to that extent, not on section 3 ... either."

22. Similar rulings have appeared since this decision in other decisions and judgments of Netherlands courts, including a judgment (*Landelijk Jurisprudentie Nummer* [National Jurisprudence Number] BC7418) given by the Supreme Court on 8 July 2008, while the present case was pending before it.

2. Relevant international law and practice

(a) The 1925 Geneva Gas Protocol

23. The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (signed at Geneva on 17 June 1925), better known as the 1925 Geneva Gas Protocol, entered into force on 8 February 1928. It reads as follows:

"THE UNDERSIGNED PLENIPOTENTIARIES, in the name of their respective Governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

DECLARE:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, and by the latter to all signatory and acceding Powers, and will take effect on the date of the notification by the Government of the French Republic.

The present Protocol, of which the French and English texts are both authentic, shall be ratified as soon as possible. It shall bear today's date.

The ratification of the present Protocol shall be addressed to the Government of the French Republic, which will at once notify the deposit of such ratification to each of the signatory and acceding Powers.

The instruments of ratification of and accession to the present Protocol will remain deposited in the archives of the Government of the French Republic.

The present Protocol will come into force for each signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications."

24. Among the earliest States to agree to be bound by this Protocol were Iran, which acceded to it (as the Imperial State of Persia) on 5 November 1929; Iraq, which acceded to it (as the Kingdom of Iraq) on 8 September 1931; and the Kingdom of the Netherlands, which ratified it on 31 October 1930. All three are still parties.

25. Other States have followed suit throughout the second half of the twentieth century and more recently still. Among them are the United States of America (which ratified the Protocol in 1975), Vietnam (which acceded to it in 1980) and the Democratic People's Republic of Korea and the Republic of Korea (which acceded to it on the same day, 4 January 1989). The most recent are Ukraine (2003), Serbia and Croatia (both 2006), Slovenia (2008) and Costa Rica (2009). To date, more than one hundred and thirty States have ratified or acceded or declared succession to this Protocol.

26. The Kingdom of the Netherlands and Iraq were among those States which, in ratifying or acceding to the Protocol, entered a reservation making its binding force in war conditional on reciprocal application by the enemy. The Kingdom of the Netherlands withdrew its reservation on 17 July 1995. Other States which entered similar reservations to the Protocol but have since withdrawn them are Ireland (1972), Australia (1986), New Zealand (1989), Czechoslovakia (1990, binding its successor States), Mongolia (1990), Bulgaria (1991), Chile (1991), Romania (1991), Spain (1992), France (1996), South Africa (1996), Belgium (1997), Canada (1999), and Russia (2001).

(b) The Charter of the International Military Tribunal

27. The Charter of the International Military Tribunal (better known as the "Nuremberg Tribunal") was annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") of 8 December 1945. In the relevant part, it reads as follows:

"Article 6

...

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of

public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

c. Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

(c) The Nuremberg Principles

28. In its Resolution 177 (II), paragraph (a), the General Assembly of the United Nations directed the International Law Commission to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal." The International Law Commission adopted a text at its second session (*Yearbook of the International Law Commission*, 1950, Vol. II, pp. 374-378).

29. The Principles identified by the International Law Commission ("Nuremberg Principles") are the following:

"Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

(d) The 1949 Geneva Conventions

30. The Kingdom of the Netherlands ratified the 1949 Geneva Conventions (Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War) on 3 August 1954. Iraq did so (as the Kingdom of Iraq) on 14 February 1956. Neither State has entered any reservation.

31. Article 3 common to all four 1949 Geneva Conventions 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 and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

32. In the relevant part, Convention (IV) relative to the Protection of Civilian Persons in Time of War additionally provides as follows:

"Article 146

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.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health,

unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

33. Over 140 States had ratified or acceded or declared succession to the 1949 Geneva Conventions by 1980. Iran and the Kingdom of the Netherlands, both among the original signatories, did so in 1957 and 1954 respectively; Iraq did so in 1956. The 1949 Geneva Conventions now bind every State in the world.

(e) The Treaty on the Non-Proliferation of Nuclear Weapons

34. The Treaty on the Non-Proliferation of Nuclear Weapons was laid open for signature on 1 July 1968 and entered into force on 5 March 1970. Among other things, it binds States Parties not already in possession of nuclear weapons not to seek possession of, or control over, nuclear weapons or nuclear explosive devices and to submit to verification measures.

(f) Case-law of the International Court of Justice

35. In *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, page 3 and following, the International Court of Justice held:

"71. In so far as this contention is based on the view that Article 6 of the Convention [sc. the 1958 Geneva Convention on the continental shelf] has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio iuris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. ...

77. The essential point in this connection – and it seems necessary to stress it – is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; – for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e.., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (*P.C.I.J., Series A, No. 10*, 1927, at p. 28):

'Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstance alleged ..., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, there are other circumstances calculated to show that the contrary is true.'"

36. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 and following, it held:

"186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's interna1 affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way

prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

(g) The Biological Weapons Convention

37. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction ("Biological Weapons Convention") was opened for signature simultaneously in Moscow, Washington DC and London on 10 April 1972. By the end of 1972 it had been signed by over 100 States.

38. The Biological Weapons Convention entered into force on 26 March 1975, after the deposit of the twenty-second instrument of ratification. It had been ratified by 91 recognised States and one non-recognised State by the end of 1980. A further 19 ratified or acceded to it, or declared succession to it upon gaining independence, from 1981 until the end of 1988 (among them the Kingdom of the Netherlands, which ratified it on 22 June 1981). It currently has 163 States Parties (including all member States of the Council of Europe) and 13 signatories. Iraq ratified it on 19 June 1991.

39. In the relevant part, it reads as follows:

"The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control,

Recognizing the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of June 17, 1925,

Desiring to contribute to the strengthening of confidence between peoples and the general improvement of the international atmosphere,

Desiring also to contribute to the realization of the purposes and principles of the United Nations,

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognizing that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk,

Have agreed as follows:

...

Article VIII

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925.

Article IX

Each State Party to this Convention affirms the recognized objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction,

and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes. ..."

(h) Instructions to armed forces

40. By the time of the Iran-Iraq War, a number of States had officially instructed their armed forces to refrain from the use of chemical weapons. These included the United Kingdom, whose *Military Manual* (1958) provided that "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices [were] forbidden", and Belgium, whose *Law of War Manual* (1983) proscribed the first use of asphyxiating, toxic or similar gases[1]. The United States, in its *Field Manual FM 27-10, Law of Land Warfare* (1956, revised 1976), forbade its land forces the first use of "lethal and incapacitating chemical agents", referring to the 1925 Geneva Gas Protocol and the American reservation of no first use.

(i) The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects

41. The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects was laid open for signature on 10 October 1980 and entered into force on 2 December 1983. It comprises five Protocols. One of them (Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons) prohibits the use of incendiary weapons against civilian targets and of air-delivered incendiary weapons against military objectives located within a concentration of civilians in all circumstances, and of non-air-delivered incendiary weapons against military objectives located within a concentration of civilians unless the civilians are spared (Article 2).

(j) United Nations documents

(i) General Assembly documents pertaining to the Iran-Iraq War

42. Every year while the war between Iraq and Iran continued, that is between 1980 and 1988, the General Assembly of the United Nations adopted resolutions on chemical and bacteriological weapons (nos. 35/144, 12 December 1980; 36/96, 9 December 1981; 37/98, 13 December 1982; 38/187, 20 December 1983; 39/188, 12 December 1984; 40/92, 12 December 1985; 41/58, 3 December 1986; 42/37, 30 November 1987; and 43/74, 7 December 1988). In each of them the General Assembly reaffirmed "the necessity of strict observance of the principles and objectives" by all States of the 1925 Geneva Gas Protocol and of adherence by all States to the Biological Weapons Convention.

43. In Resolution no. 35/144C of 1980 the General Assembly expressed the belief

> "... that the continued authority of the Protocol and relevant rules of customary international law [required] that full and proper attention be given to all reports regarding the alleged use of chemical weapons and to their harmful effects, both immediate and long-term, to humans and to the environment of the victim countries".

44. In Resolution no. 37/98D on Provisional Procedures to Uphold the Authority of the 1925 Geneva Protocol of 1982 the General Assembly requested the Secretary-General of the United Nations

> "... to devise procedures for the timely and efficient investigation of information concerning activities that [might] constitute a violation of the Geneva Protocol or of the relevant rules of customary international law and to assemble and organize systematically documentation relating to the identification of signs and symptoms associated with the use of such agents as a means of facilitating such investigations and the medical treatment that [might] be required"

with the assistance of qualified experts. Elsewhere (in Resolution no. 37/98E on Chemical and Bacteriological (Biological) Weapons) the General Assembly recalled

> "... that the use of chemical and biological weapons [had] been declared incompatible with the accepted norms of civilization".

45. The Secretary General published his report on 2 October 1984 (UN Doc. A/39/488). To it was annexed a report of a Group of Consultant Experts, transmitted to the Secretary General on 24 August 1984, which set out procedures for investigating allegations of the use of chemical or

biological weapons. Sub-annexed to the report of the Consultant Experts was a list (Annex IX) of potential chemical and biological warfare agents; “sulphur mustard” was one of those mentioned. The General Assembly took note of the Secretary General's report in its Resolution 39/65E of 1984.

46. In Resolution 42/37C of 1987, the General Assembly recalled

> “... the provisions of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and other relevant rules of customary international law”.

The following year, in Resolution 43/74A, it expressed

> “... *deep dismay* at the use of chemical weapons in violation of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and other relevant rules of customary international law”.

(ii) Security Council documents

47. On 30 March 1984 the President of the Security Council delivered the following statement:

> “On behalf of the members of the Security Council, I am authorized to make the following declaration:
>
> *The Security Council*,
>
> *Having considered* again the question entitled 'The situation between Iran and Iraq',
>
> *Greatly concerned* about the conflict between Iran and Iraq, which endangers international peace and security in the region;
>
> *Taking note* of the report of the specialists appointed by the Secretary General to investigate allegations by the Islamic Republic of Iran concerning the use of chemical weapons (S/16433),
>
> *Taking note* with particular concern of the unanimous conclusions of the specialists that chemical weapons have been used,
>
> *Expressing* its grave concern about all reported violations in the conflict of the rules of international law and of the principles and rules of international conduct accepted by the world community to prevent or alleviate the human suffering of warfare,
>
> *Strongly affirming* the conclusion of the Secretary-General that these humanitarian concerns can only be fully satisfied by putting an end to the tragic conflict that continues to deplete the precious human resources of Iran and Iraq,
>
> 1. *Strongly condemns* the use of chemical weapons reported by the finding of the mission of specialists;
>
> 2. *Reaffirms* the need to strictly abide by the Geneva Protocol of 1925 for the Prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare;
>
> 3. *Calls on* the States concerned immediately and unconditionally to reaffirm the obligations flowing from their accession to the Geneva Protocol of 1925;
>
> 4. *Condemns* all violations of international humanitarian law and urges both parties to observe carefully the generally recognized principles and rules of international humanitarian law which are applicable to armed conflicts and their obligations under international conventions designed to prevent or alleviate the human suffering of warfare;
>
> 5. *Recalls* its relevant resolutions, renews urgently its appeal for the strict observance of a cease-fire and for a peaceful solution of the conflict, and calls upon all governments concerned to cooperate fully with the Council in its efforts to bring about conditions leading to a peaceful settlement of the conflict in conformity with the principles of justice and international law;
>
> 6. *Appreciates* the mediation efforts of the Secretary-General and requests him to continue his efforts with the parties concerned with a view to achieving a comprehensive, just and honourable settlement acceptable for both sides;
>
> 7. *Decides* to keep the situation between Iran and Iraq under close review.”

48. On 24 February 1986, the Security Council unanimously adopted Resolution 582 (1986), which, in the relevant part, reads as follows:

> “*The Security Council*,
>
> *Having considered* the question entitled 'The situation between Iran and Iraq',
>
> *Recalling* that the Security Council has been seized with the question between Iran and Iraq for almost six years and that decisions have been taken thereon,

...

Noting that both the Islamic Republic of Iran and Iraq are parties to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare signed at Geneva on 17 June 1925,

...

2. *Also deplores* the escalation of the conflict, especially territorial incursions, the bombing of purely civilian population centres, attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict and, in particular, the use of chemical weapons contrary to obligations under the 1925 Geneva Protocol; ..."

49. On 9 May 1988, the Security Council unanimously adopted its Resolution 612 (1988), which reads as follows:

"*The Security Council*,

Having considered the report of 25 April 1988 of the mission dispatched by the Secretary-General to investigate allegations of the use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq,

Dismayed by the mission's conclusions that chemical weapons continue to be used in the conflict and that their use has been on an even more intensive scale than before,

1. *Affirms* the urgent necessity of strict observance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925,

2. *Condemns vigorously* the continued use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq contrary to the obligations under the Geneva Protocol;

3. *Expects* both sides to refrain from the future use of chemical weapons in accordance with their obligations under the Geneva Protocol;

4. *Calls upon* all States to continue to apply or to establish strict control of the export to the parties to the conflict of chemical products serving for the production of chemical weapons;

5. *Decides* to remain seized of the matter and expresses its determination to review the implementation of the present resolution."

50. On 26 August 1988, the Security Council unanimously adopted its Resolution 620 (1988), which, in relevant part, reads as follows:

"*The Security Council*,

Recalling its resolution 612 (1988) of 9 May 1988,

Having considered the reports of 20 and 25 July and of 2 and 19 August 1988 of the missions dispatched by the Secretary-General to investigate allegations of the use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq,

Deeply dismayed by the missions' conclusions that there had been continued use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq and that such use against Iranians had become more intense and frequent,

Profoundly concerned by the danger of possible use of chemical weapons in the future,

Bearing in mind the current negotiations in the Conference on Disarmament on the complete and effective prohibition of the development, production and stockpiling of chemical weapons and on their destruction,

Determined to intensify its efforts to end all use of chemical weapons in violation of international obligations now and in the future,

1. *Condemns resolutely* the use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq in violation of obligations under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and in defiance of its resolution 612 (1988);

2. *Encourages* the Secretary-General to carry out promptly investigations in response to allegations brought to his attention by any Member State concerning the possible use of chemical and bacteriological (biological) weapons that may constitute a violation of the 1925 Protocol or other relevant rules of customary international law, in order to ascertain the facts of the matter, and to report the results;

3. *Calls upon* all States to continue to apply, to establish or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established

that they have used chemical weapons in violation of international obligations;

4. *Decides* to consider immediately, taking into account the investigations of the Secretary-General, appropriate and effective measures in accordance with the Charter of the United Nations, should there be any future use of chemical weapons in violation of international law, wherever and by whomever committed."

(k) The Chemical Weapons Convention

51. Proposals for a treaty intended to supplement the 1925 Geneva Gas protocol by prohibiting the development, production or possession of chemical weapons in addition to their use were placed on the agenda of the Eighteen-Nation Disarmament Committee in 1968. In 1980, this Committee (re-named the Conference on Disarmament the year before) set up an *ad hoc* working group charged with identifying the issues to be dealt with in a multilateral treaty to be prepared for that purpose. Drafting began in earnest in 1984, after the Secretary-General of the United Nations announced that Chemical Weapons had been used by Iraq in its war against Iran. Beginning in 1986, the global chemical industry actively participated in the negotiations. The new Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (or Chemical Weapons Convention) was opened for signature in Paris on 13 January 1993. One hundred and thirty States signed it within the first two days. It entered into force on 29 April 1997, 180 days after the date of the deposit of the 65th instrument of ratification. It currently binds 188 States.

52. In Article I § 1 of the Chemical Weapons Convention, States Parties undertake

"... never under any circumstances:

(a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

(b) To use chemical weapons;

(c) To engage in any military preparations to use chemical weapons;

(d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."

53. Article VII § 1 obliges States Parties to enact criminal legislation making activities prohibited to a State Party under this treaty punishable by law. This includes extending penal legislation to cover the commission of such acts by natural persons possessing that State's nationality.

54. Appended to the Chemical Weapons Convention is an "Annex on Chemicals" comprising three schedules:

a) Schedule 1 includes toxic chemicals or precursors that are chemical weapons themselves, or may be used as chemical weapons or for the manufacture of such weapons, and have "little or no use for purposes not prohibited under this Convention".

b) Schedule 2 includes chemicals that possess lethal or incapacitating toxicity as well as other properties that could enable them to be used as chemical weapons or that may be used in the manufacture of such weapons, and are "not produced in large commercial quantities for purposes not prohibited under this Convention".

c) Schedule 3 includes chemicals that have been produced, stockpiled or used as chemical weapons, or might be used as chemical weapons, or are important for the production of Schedule 1 or Schedule 2 chemicals, and "may be produced in large commercial quantities for purposes not prohibited under this Convention".

Separate verification regimes apply to chemicals according to the Schedule in which they are listed, details of which are laid down in the Verification Annex appended to the Chemical Weapons Convention.

Thiodiglycol, which has industrial uses (including as a solvent in the manufacture of some types of printing and ballpoint pen inks), is listed in Schedule 2.

55. Article VIII establishes the Organization for the Prohibition of Chemical Weapons (OPCW) to achieve the object and purpose of the Chemical Weapons Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and co-operation among States Parties. The OPCW is based in The Hague, Netherlands.

(l) Case-law of the International Criminal Tribunal for the Former Yugoslavia

56. In its decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction in *Prosecutor v. Duško Tadić* (Case No. IT-94-1), the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held as follows (emphasis in the original):

"119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (...), a general principle has evolved limiting the right of the parties to conflicts 'to adopt means of injuring the enemy.' The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby '[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.' (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) ...

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

'The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war].' (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that 'The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law'); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects*], 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

...

123. It is interesting to note that, reportedly, the Iraqi Government 'flatly denied the poison gas charges.' (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. ... It should also be stressed that a number of countries ... strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of 'conducting a smear media campaign against Iraq.' (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts."

(m) The Statute of the Special Iraqi Tribunal

57. Article 10 of the Statute of the Special Iraqi Tribunal provides as follows:

"The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 - 14, committed since July 17, 1968 and up and until May 1, 2003, in the territory of Iraq or elsewhere,

namely:

a) The crime of genocide;

b) Crimes against humanity;

c) War crimes; or

d) Violations of certain Iraqi laws listed ... below."

COMPLAINTS

58. The applicant complained under Article 6 of the Convention that the Supreme Court had failed to answer his argument that since Saddam Hussein and Ali Hassan al-Majid al-Tikriti were beyond the jurisdiction of the Netherlands courts, he ought not to have been convicted as their accessory.

59. He also complained under Article 6 or Article 7 of the Convention that section 8 of the War Crimes Act did not meet the standard of *lex certa*.

THE LAW

A. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

60. The applicant submitted that in his statement of grounds of appeal to the Supreme Court (lodged on 14 April 2008), he had argued that section 8 of the War Crimes Act was not applicable in his case. On 8 July 2008, the Supreme Court had given a judgment restating its earlier case-law to the effect that the Netherlands courts had universal jurisdiction over the crimes proscribed by section 8 of the War Crimes Act. In his response to the advisory opinion of the Procurator General, which he had submitted on 27 November 2008, the applicant had argued at length that since jurisdiction over the crimes of Saddam Hussein and his henchmen had been vested in the Iraqi Special Tribunal by Article 10 of that Tribunal's Statute (see paragraph 57 above), so *eo ipso* that tribunal had jurisdiction over the applicant as their accessory. The Supreme Court had, however, failed to respond to this argument. This, in the applicant's submission, constituted a violation of Article 6 of the Convention, which, as relevant to the case, provides as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ..."

61. As relevant to the case before the Court, the applicant made three submissions to the Supreme Court. Of these, the first two were contained in his statement of grounds of appeal (see paragraph 15 above).

62. The first was that the Court of Appeal had overstepped its jurisdiction. In his submission, the War Crimes Act could not apply, firstly because the "conflict" between Iran and Iraq had not been found to constitute a "war" (section 1(1) of the War Crimes Act) and secondly because the Netherlands was not in any way involved (section 1(2) of that Act). This the Supreme Court answered by referring to Article 3 of the War Crimes Act, which it held to confer universal jurisdiction on the Netherlands courts in respect of the crimes set out in section 8 of that Act (see paragraph 18 above).

63. The second was that the reference to "laws and customs of war", as contained in section 8 of the War Crimes Act, was so vague and uncertain in scope that it could not reasonably be relied on to convict him; and that in so far as any conventional instrument relevant to his case existed, it had long since lost all meaning. This the Supreme Court also dismissed, finding that the scope of section 8 was in fact clear enough.

64. The third was based on the premise that the crimes which the applicant had supposedly aided and abetted had been committed by persons covered by foreign sovereign immunity and that, as their accessory, that sovereign immunity protected him also; only the Iraqi Special Tribunal had competence in the matter. The Supreme Court did not reply to it in its judgment; the applicant now

alleges a violation of Article 6 on that ground.

65. The Court notes that this submission was not contained in the statement of grounds of appeal. The applicant's suggestion to the contrary notwithstanding (paragraph 60 above), it considers that it was new and original and cannot reasonably be seen as linked to any point raised in the statement of grounds of appeal.

66. The Court observes, furthermore, that the argument was made for the first time in the applicant's written response to the Procurator General's advisory opinion, at the final stage of the proceedings before the Supreme Court gave judgment.

67. The Court has held it to be a requirement inherent in the element of "adversarial proceedings" contained in Article 6 § 1, as applicable to proceedings of a cassation type, that a defendant in a criminal case should have the opportunity to respond to the advisory opinion of the Procurator General (principle stated in *Borgers v. Belgium*, 30 October 1991, § 27, Series A no. 214-B; see also, among many authorities involving a variety of Contracting Parties, the following judgments given against the Kingdom of the Netherlands: *J.J. v. the Netherlands*, 27 March 1998, §§ 42-43, *Reports of Judgments and Decisions* 1998-II; and *K.D.B. v. the Netherlands*, 27 March 1998, §§ 43-44, *Reports of Judgments and Decisions* 1998-II).

68. It is not, however, a requirement that a defendant be allowed to submit fresh arguments that have no bearing on any point contained in the advisory opinion itself. In the circumstances of the present case, characterised as they were by the applicant's making use of the opportunity offered to submit an entirely novel argument at the latest possible stage of proceedings, Article 6 § 1 did not compel the Supreme Court to provide a reasoned response (compare *Van de Hurk v. the Netherlands*, 19 April 1994, § 60, Series A no. 288).

69. Moreover, although the applicant refers to the Supreme Court's judgment of 8 July 2008 in which it was held that Netherlands criminal courts enjoyed universal jurisdiction over the crimes set out in section 8 of the War Crimes Act, the Court observes that the Supreme Court had explained the legal position already in 1997 (see paragraph 21 above). In so far, therefore, as the argument in question is to be understood as an attempt to persuade the Supreme Court to reconsider or refine its case-law, it cannot be seen that there was anything to prevent the applicant from making it sooner.

70. It follows from the above that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

71. The applicant complained under "Article 6 and/or Article 7" of the Convention that section 8 of the War Crimes Act, in referring to international law, did not comply with the requirement that criminal acts be described with sufficient precision (*lex certa*).

Article 6 (in its relevant part) and Article 7 provide as follows:

Article 6

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 7

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

72. The applicant argued, firstly, that the Supreme Court ought not to have found that the vagueness of section 8 of the War Crimes Act was "inevitable". In his submission, proof to the contrary was available in the form of sections 5 and 6 of the International Crimes Act, which had replaced the War Crimes Act in 2003. The latter provisions were very precise; in fact, they specifically set out proscribed acts including, as relevant to the case before the Court, deliberately causing serious suffering (section 5(1)(c)) and the use of poisonous weapons (section 5(5)(g)) and even forced disappearances (section 4(1)(i)).

73. Secondly, he complained of the general and imprecise nature of the reference made by section 8 of the War Crimes Act to the customs of war; doubt might arise as to the existence at any particular time, and as to the knowability and foreseeability, of a rule of customary international law.

74. Thirdly, he submitted that the 1925 Geneva Protocol had lost whatever validity it might still have had since it was no longer reflected by the reality of contemporary warfare. In his submission, the use by Iraq of mustard gas as a weapon of war could not be seen as morally or legally different from the use of napalm (an incendiary weapon) by United States forces during the Vietnam War (1959-1975) and was moreover insignificant in comparison with the possession of nuclear weapons by a small number of States and their actual use in anger in 1945. In these circumstances, he argued, he could not have been expected to realise at the time of the Iran-Iraq war that he was acting illegally by reason of his commercial activities.

75. In discharging its duties in cases originating in an application introduced under Article 34 of the Convention, the Court must confine itself as far as possible to an examination of the particular case before it.

76. Incendiary and nuclear weapons are subject to separate regimes not relevant to the present case (see paragraphs 34 and 41 above). That being the case, the applicant's comparison of mustard gas with napalm and nuclear weapons is irrelevant to the case before the Court.

77. The Court can therefore consider only whether the applicant was held guilty of a “criminal offence” on account of acts which constituted a “criminal offence under national or international law” at the time when they were committed.

78. In *Kononov v. Latvia* [GC], no. 36376/04, §§ 185-187, ECHR 2010-..., the Court stated the applicable principles as follows:

> “185. The guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.
>
> When speaking of 'law', Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Jorgic v. Germany*, no. 74613/01, §§ 101-109, 12 July 2007; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 69-71, 19 September 2008).
>
> 186. Finally, the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (*Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002). Having regard to the subject matter of the case and the reliance on the laws and customs of war as applied before and during the Second World War, the Court considers it relevant to recall that the *travaux préparatoire*s to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws (*X. v. Belgium*, no 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). In any event, the Court further notes that the definition of war crimes included in Article 6(b) of the IMT Nuremberg Charter was found to be declaratory of international laws and customs of war as understood in 1939 (paragraph 118 above, paragraph 207 below).
>
> 187. The Court will first examine the case under Article 7 § 1 of the Convention. It is not therein called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. Rather its function under Article 7 § 1 is twofold: in the first place, to examine whether there was a

sufficiently clear legal basis, having regard to the state of the law on 27 May 1944, for the applicant's conviction of war crimes offences; and, secondly, it must examine whether those offences were defined by law with sufficient accessibility and foreseeability so that the applicant could have known on 27 May 1944 what acts and omissions would make him criminally liable for such crimes and regulated his conduct accordingly (*Streletz, Kessler and Krenz*, § 51; *K.-H. W. v. Germany*, § 46; and *Korbely v. Hungary*, § 73, all cited above)."

79. Inasmuch as the applicant bases this complaint on Article 6, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. This also applies where domestic law refers to rules of general international law or international agreements (see, in particular, *Markovic and Others v. Italy* [GC], no. 1398/03, § 108, ECHR 2006-XIV). The Court therefore finds it more appropriate to consider this complaint under Article 7.

80. The Court notes at the outset that no question of accessibility of the pertinent law arises in the present case. The applicant's complaint, reduced to its essentials, is that the domestic statutory provision under which he was convicted lacked foreseeability inasmuch as it relied for its substantive application on standards of general international law which he disputes.

81. The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Cantoni v. France*, 15 November 1996, § 35, *Reports of Judgments and Decisions* 1996-V).

82. The applicant was convicted by the Court of Appeal of being an accessory to crimes proscribed by section 8 of the War Crimes Act, namely, firstly, violations of the laws and customs of war committed by Saddam Hussein, Ali Hassan al-Majid al-Tikriti and another person or other persons in a non-international or international conflict as the case might be, as regards gas attacks on the Kurdish population of northern Iraq in Halabja and elsewhere (the first alternative charge); and secondly, violations of the laws and customs of war committed by Saddam Hussein, Ali Hassan al-Majid al-Tikriti and another person or other persons in an international conflict, as regards gas attacks on the territory of Iran and in border areas of Iraq adjoining Iran. In setting out the applicable "laws and customs of war", the Court of Appeal referred to customary international law, in particular the prohibition of the use of chemical weapons, poison or poisonous weapons, the use of asphyxiating or poisonous gases, the prohibition of the infliction of unnecessary suffering and the prohibition of attacks targeting civilians and combatants indiscriminately; to the Geneva Gas Protocol of 1925; to Article 3 common to the four 1949 Geneva Conventions; and in relation to the first alternative charge only, to Article 147 of the fourth Geneva Convention (see paragraph 13 above).

83. Turning to the applicant's first argument, namely the replacement of section 8 of the War Crimes Act by the far more detailed enumerations contained in sections 4 to 6 of the International Crimes Act, the Court notes that it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. The choice of legislative technique, however, is the reserved domain of the domestic legislature; in principle, it escapes the scrutiny of the Court, whose task in cases originating in an application lodged under Article 34 of the Convention can go no further than determining whether the legislation as applied in the individual case is in conformity with the Convention (see *Cantoni v. France*, cited above, §§ 32-33).

84. The Court will now address the applicant's complaint based on the supposed lack of precision of the applicable rules of international law relied on by the Court of Appeal.

85. Article 6 of the Charter of the International Military Tribunal (see paragraph 27 above) listed among the crimes over which jurisdiction was conferred on that Tribunal "War crimes: namely, violations of the laws or customs of war [including, but not limited to] murder [and] ill-treatment ... of civilian population of or in occupied territory ..." (Article 6 (b)) and "Crimes against humanity [including, but not limited to] murder, extermination, ... and other inhumane acts committed against

any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (Article 6 (c)). That these were crimes under international law rendering the perpetrator liable to punishment was recognised by the International Law Commission in the Nuremberg Principles (Principles I and VI, see paragraph 29 above).

86. The applicant's complaint is focused on the 1925 Geneva Gas Protocol and on the rules of customary international law identified by the Court of Appeal.

87. The 1925 Geneva Gas Protocol was directly binding on both belligerents at the time of the Iran-Iraq War, as indeed it was on the Kingdom of the Netherlands (see paragraph 24 above). There is nothing to suggest that it had lost its force, as the applicant argues. In fact, the precise opposite is the case.

88. As the International Court of Justice expounds in its *North Sea Continental Shelf* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits* judgments (see paragraphs 35 and 36 above), it is possible for a treaty provision to become customary international law. For this it is necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; that there be corresponding settled State practice; and that there be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio iuris sive necessitatis*).

89. Of the norm-creating character of the 1925 Geneva Gas Protocol there can be no doubt. This Protocol was opened for signature at a time when the use of noxious chemical substances on European battlefields was still a recent memory, with the explicit intention, stated in its Preamble, that the prohibition of any such future use should be "universally accepted as a part of International Law, binding alike the conscience and the practice of nations" (see paragraph 23 above).

90. The Court then notes that beginning in 1972 many of the States which had ratified the 1925 Protocol subject to a reservation of no first use withdrew their reservations, thus expressing their consent henceforth to be bound unconditionally. Also in 1972 a new conventional instrument was laid open for signature, the Biological Weapons Convention (see paragraph 37 above), which explicitly reaffirms the prohibition contained in the 1925 Geneva Gas Protocol (see paragraph 39 above). By the beginning of the Iran-Iraq War this treaty had been ratified or acceded to by a considerable majority of the States then in existence; others continued to do so even as the war continued (see paragraph 38 above). The Court takes these developments as proof not only of State practice consistent with the norm created by the 1925 Protocol but also of *opinio iuris*. The issuing, by a number of Governments, of instructions to their armed forces proscribing the use (or the first use) of chemical weapons (see paragraph 40 above) reinforces this view, as indeed does the drafting history of the Chemical Weapons Convention (see paragraph 51 above).

91. Finally, the Court must have regard to the repeated condemnation throughout the Iran-Iraq war by the General Assembly of the United Nations (see paragraphs 42-46 above) and the Security Council (see paragraphs 47-50 above) of the use in that war of chemical weapons.

92. The Court thus finds that at the time when the applicant supplied thiodiglycol to the Government of Iraq a norm of customary international law existed prohibiting the use of mustard gas as a weapon of war in an international conflict.

93. The Court then observes that inasmuch as the applicant complains of a lack of legal foundation for his conviction as regards complicity in attacks on Iraqi territory, the Court of Appeal's judgment clearly includes attacks in border areas as having occurred in the international armed conflict between Iraq and Iran. In so far as the applicant would call this finding into question, the Court observes that it is not its role to act as a court of appeal, or as sometimes is said, as a court of fourth instance from the decisions taken by domestic courts: it is the role of the domestic courts to interpret and apply relevant rules of domestic procedural or substantive law. Furthermore, it is the domestic courts which are best placed for assessing the credibility and the relevance of evidence to the issues in the case (see, among many other authorities, *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B; *Vernon v. the United Kingdom* (dec.), no. 38753/97, ECHR 1999-VI; *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX; and recently, *Shalimov v. Ukraine*, no. 20808/02, § 67, 4 March 2010, and *Rupar v. Slovenia* (dec.), no. 16480/02 , 18 May 2010).

94. In any event, even assuming the attacks within Iraqi territory to have been part of a conflict not of an international nature, the Court observes that common Article 3 of the 1949 Geneva Conventions (see paragraph 31 above) was, and remains, directly binding on both Iraq and the Kingdom of the Netherlands. Moreover, the Court points to the decision given by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction in *Prosecutor v. Duško Tadić* (Case No. IT-94-1) (see paragraph 56 above) noting the existence, at the relevant time, of a rule of customary international law prohibiting the use of chemical weapons by States against civilian populations within their own territory.

95. Article 146 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, which at all relevant times was directly binding on both Iraq and the Kingdom of the Netherlands, requires High Contracting Parties to prosecute in their own courts, or hand over for trial elsewhere, persons alleged to have committed or ordered the acts proscribed by the following Article. These include "wilful killing... or inhuman treatment..., wilfully causing great suffering or serious injury to body or health ..." (see paragraph 32 above).

96. In conclusion, it cannot be maintained that, at the time when the applicant was committing the acts which ultimately led to his prosecution, there was anything unclear about the criminal nature of the use of mustard gas either against an enemy in an international conflict or against a civilian population present in border areas affected by an international conflict. The applicant could therefore reasonably have been expected to be aware of the state of the law and if need be to take appropriate advice (see *Cantoni v. France*, cited above, § 35).

97. It follows from the above that this complaint is likewise manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada Josep Casadevall
Registrar President

[1] Both cited in International Committee of the Red Cross, *Customary international humanitarian law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.) (Cambridge University Press 2005), vol. II, pp. 1663-68.

VAN ANRAAT v. THE NETHERLANDS DECISION