

LJN: AV1489, Rechtbank 's-Gravenhage , 09/751005-04 - English version

Datum uitspraak: 14-10-2005
Datum publicatie: 13-02-2006
Rechtsgebied: Straf
Soort procedure: Eerste aanleg - meervoudig
Inhoudsindicatie: [...] The punishment to be imposed is based on the Articles 47 an 57 of the Netherlands criminal code; 8 of the Criminal Law in Wartime Act. [...]

Uitspraak

THE HAGUE DISTRICT COURT
SECTION CRIMINAL LAW

THREE-JUDGE SECTION

Public prosecutor's office number 09/751005-04

The Hague, 14 October 2005

The The Hague District Court, giving judgment in criminal cases, pronounced the following judgment in the case of the public prosecutor against the suspect:

[suspect]
born in [place of birth] (Afghanistan) on [date of birth],
address: [address]
at present detained in the penitentiary institution
"Haaglanden – Zoetermeer" in Zoetermeer.

The court session

The investigation was held in court on 11 March 2005, 3 June 2005, 26 August 2005, 19 September 2005, 20 September 2005, 21 September 2005, 26 September 2005, 28 September 2005, 3 October 2005 and 7 October 2005.

The suspect, assisted by his lawyers Mr A.S. van der Biezen LL.M. and Mr B.G.M. Frencken LL.M., both lawyer in 's-Hertogenbosch, appeared in court and was heard.

The public prosecutors Mrs Polescuk LL.M. and Mr Teeven LL.M. have demanded the suspect to be sentenced relating to what he has principally been charged with in the - amended - writ of summons, to 9 years' imprisonment, less the period spent in pre-trial detention.

The charge.

After amendment of the charge in court, the suspect has been charged with what is mentioned in the inserted photocopy of the writ of summons, marked A and of the demand of amendment of charge, marked A1.

The Public Prosecutions Department being allowed to prosecute and the legitimacy of the evidence.

The defence has set up a defence on behalf of the suspect that the Public Prosecutions Department should be barred prosecution. Hereto the defence put forward the following.

First the defence argues that Article 6 of the European Convention for the protection of Human Rights and Fundamental Freedom (ECHR) has been violated, as the Public Prosecutions Department (Dutch: OM) has acted in violation of the so-called principle of nemo tenetur by using the statements the suspect made in his procedure at the Immigratie- en Naturalisatiedienst (IND) (Immigration and Naturalisation Service).

Apart from that it was argued on behalf of the suspect that Article 8 ECHR has been violated as well, as the IND, in violation of the right to suspect's privacy, has handed over IND files to the police.

The court rejects the defence of being barred the prosecution in both parts and considers in this respect the following.

The use of IND statements pertaining to criminal law.

General

The defence argues that the Public Prosecutions Department has acted in violation of the principle of *nemo tenetur*. The purport of this principle, as laid down in the *Funke* judgment of the European Court of Human Rights, is that nobody should be made obliged to cooperate towards his own conviction or to attribute to the inception of a suspicion of having committed an offence. According to previous judgments of the same Court the suspect's right not to be obliged to cooperate towards his own conviction is part of the right to fair trial. However, according to the European Court of Human Rights and also according to the Netherlands Supreme Court such a right is not absolute. In a concrete case the Court shall have to determine afterwards whether, and if so, to what extent the principle of *nemo tenetur* has been violated.

The facts

When answering the question whether the principle of *nemo tenetur* has in casu been violated, the court assumes the following facts.

On 31 May 1996 the suspect submitted applications to be admitted as a refugee and to be granted a residence permit. On 7 and 10 June 1996 the suspect was given the opportunity to explain these applications and to this purpose he was heard by an official of the IND. On 26 August 1996 the suspect was given a refugee status. In a letter of 8 November 1997 the then State Secretary for Justice reported to the Netherlands Lower House that, in view of the international conventional-law (the four Red Cross Conventions of Geneva, the Genocide Convention and the Convention against Torture) and moral obligations of The Netherlands, the Public Prosecutions Department will be informed of all decisions that were rejected (among other things) on the basis of Article 1F Convention on Refugees.

On 7 January 1999 the suspect was additionally heard "in connection with the strong suspicion that on account of his functions he held in Afghanistan, he would yet have been guilty of violations of human rights". The contents of this additional interview were not essentially different from the interviews of 7 and 10 June 1996.

On the basis of the statements of the suspect and after investigation performed by officials of the Ministry of Foreign Affairs and the IND, on 31 July 2000 the decision was subsequently given:

1. the application submitted by the person concerned to be admitted as a refugee, will be withdrawn,
2. the person concerned will not be granted a residence permit".

As appears from the decision the reason of this decision is the fact that there were strong reasons to assume that the suspect had been guilty of war crimes, or crimes against humanity, as described in Article 1F of the Convention on Refugees.

The IND later on sent the "1F" decision with regard to the suspect to the Public Prosecutions Department including the request to consider whether a criminal action should be taken against the suspect.

On 11 March 2003 a preliminary inquiry was started against a person named [N.A.N.]. Within the scope of this preliminary inquiry several telephone lines were tapped. From this it appears that aforementioned [N.A.N.] has several conversations w[co-suspect]co-suspect]. Some of these conversations relate to the past of this [co-suspect], while also "acts of torture" are referred to. Subsequently on 2 December 2003 an initial official report was drawn up in order to start a preliminary inquiry against aforementioned [co-suspect]. Statements made in the criminal investigation against [co-suspect] have led to the instigation of a judicial investigation against the suspect.

Violation of the principle of *nemo tenetur* in casu?

The defence argues that the Public Prosecutions Department has acted in violation of the principle of *nemo tenetur* because statements made under pressure at the IND were used. The defence's view is that from the so-called *Saunders* judgment of the European Court of Human Rights it could be derived that statements made under pressure may not be used in any way whatsoever in criminal proceedings.

In the first place the Court in this respect is of the opinion that it cannot be argued that the statements the suspect made at the IND were made "under pressure". As a matter of fact nobody is forced to apply for a residence permit in the Netherlands and by requesting such a permit one deliberately subjects oneself to the pertaining procedure of interviews. Furthermore no sanction is set to not answering the questions asked during the admission procedure.

If the above had been different, it can still not be derived from the *Saunders* judgment that it would not be allowed to use any statement made under pressure at another stage or within the scope of a non-criminal procedure against the suspect during the criminal proceedings. The Court is of the opinion that the *Saunders* judgment does not allow this general conclusion.

It is not decisive whether a statement made is incriminating in itself, but whether this statement has been

obtained (among other things) with a view to a criminal prosecution. This has in casu not been the case.

The moment the suspect made his statements at the IND a matter of “criminal charge” in the sense of Article 6 ECHR did not yet exist. It is a matter of a “criminal charge” in the sense of this conventional-law provision when on behalf of the State an act has been performed vis-à-vis the person concerned from which he could in reasonableness have drawn the conclusion that criminal proceedings would be instituted against him. However, the investigation performed by the IND did not have the character of a criminal charge. It was in any case not aimed at the “determination of a criminal charge”, but at the assessment of the applications submitted by the suspect, which concerned aliens law.

Furthermore the Court considers that as the interviews took place at the IND as early as 1996, the first policy intentions as regards transmission of the “1F” files to the Public Prosecutions Department were announced at the end of 1997 and the actual transmission to the Public Prosecutions Department of the “1F” file of the suspect did not take place before 2000, there was not a situation in which it can be said that the interviews in the asylum procedure were possibly primarily, at least also, aimed at gathering criminally relevant information.

Neither has it appeared in any other way that there was any inadmissible confusion of criminal and administrative competences during the relevant IND interviews, or a situation in which the IND already reasonably knew at the time of the interview that the answers to be given by the suspect were also going to be used in criminal proceedings. The interview held on 7 January 1999 does not alter this, as the contents of this additional interview were not essentially different from the contents of the previous interviews and the purpose of this interview was to judge to what extent the admission as a refugee should be withdrawn. In view of the above the Court is therefore of the opinion that in the present case the principle of *nemo tenetur* has not been violated. Therefore the Court deems there is no violation of the principle of legitimate expectations as invoked by the defence

The right to privacy

General

Pursuant to Article 8 ECHR everybody is entitled to respect for his personal life, for his domestic and family life, his dwelling and his correspondence. However, this is not an absolute right. Violations of this right are permitted on the condition that these violations are “in agreement with the right” and moreover also “necessary in a democratic society”. According to previous judgments of the European Court of Human Rights not only an adequate basis in the written and unwritten law is required, but requirements as to quality can be set to this right as well. Apart from that it should be established whether there is an urgent social need for this violation and whether a correct weighing has been made between the interest pursued and the way in which the right of privacy has been violated.

The facts

As explained above, the suspect applied for admission as a refugee and the granting of a residence permit on 31 May 1996. On 7 and 10 June 1996 the suspect was given the opportunity to explain these applications and he was heard to this purpose by an official of the IND. In this context he was told that everything he said will be treated confidentially. On 26 August the suspect was given a refugee status.

In a letter of 8 November 1997 the then State Secretary for Justice reported to the Netherlands Lower House that, in view of the international obligations on the basis of convention-law (the four Red Cross Conventions of Geneva, the Genocide Convention and the Convention against Torture) as well as moral obligations of the Netherlands, the Public Prosecutions Department will be notified of all 1F-reports which had been rejected (among other things) on the basis of Article 1F of the Convention on Refugees.

On 7 January 1999 the suspect was additionally heard “in connection with the strong suspicion that on account of the functions he held in Afghanistan he would possibly have been guilty of violations of human rights” after all.

The contents of this additional interview were not essentially different from the interviews of 7 and 10 June 1996.

On the basis of the statements of the suspect and after investigation performed by officials of the Ministry of Foreign Affairs and the IND, the decision was subsequently given on 31 July 2000:

1. the application submitted by the person concerned to be admitted as a refugee, will be withdrawn,
2. the person concerned will not be granted a residence permit”.

As appears from the decision the reason of this decision is the fact that there were strong reasons to assume that the suspect had been guilty of war crimes, or crimes against humanity, as described in Article 1F of the Convention on Refugees.

The IND later on sent the “1F”-decision with regard to the suspect to the Public Prosecutions Department including the request to consider whether a criminal action should be taken against the suspect.

Violation of the right to a private life?

It appears from the file or it has become plausible otherwise, that upon commencement of the interviews in connection with the asylum procedure (including the procedure that led to the decision of 31 July 2000) the suspect was informed by the IND officials that his statements would be treated confidentially. Subsequently his asylum file was transferred to the Public Prosecutions Department. Together with the defence the Court is of the opinion that this transfer of the asylum file violated suspect’s right to a private life, as meant in Article 8 ECHR.

In order to judge the legitimacy of this violation the Court will therefore have to establish whether: (1) there was a legal basis for this violation; and (2) the violation was proportional.

Item 1. The moment the statements made by the suspect at the IND were transferred to the Public Prosecutions Department there was a legal basis to do so, to wit the Wet bescherming persoonsgegevens (Wbp) (Personal Data Protection Act)¹. Pursuant to Article 43 Wbp, personal data may be processed in a way that is incompatible with the purposes they have been obtained for in so far as this is necessary in the interest of (inter alia) prevention, investigation and prosecution of criminal offences. Also the Registratiekamer (Registration Board) concluded in its letter of 3 November 1999 that laws and regulations shall not be an impediment to have (structural) exchange of data as regards potential suspects of war crimes and crimes against humanity between the Public Prosecutions Department and the IND take place.

Item 2. The Court is furthermore of the opinion that in casu the violation of the privacy of the suspect was urgently necessary (also in view of the aforementioned letter of the State Secretary for Justice to the chairman of the Netherlands Lower House). The Court is of the opinion that a correct weighing was made between the interest pursued – punishment, or surrender or extradition of persons suspected of very serious (war) crimes – and the way in which the right to a private life was violated.

The suspect is not entitled to a plea of violation of his right to privacy regarding the IND files of other persons, as those files do not violate the private life of the suspect, his family or relatives and the suspect had not been promised any confidentiality with regard to these files.

Unlike the defence the Court is therefore not of the opinion that in the present case Article 8 ECHR has been violated. The Court rejects the defence.

¹On 21 September 2001 this Act replaced the Wet persoonsregistratie (Data Protection Act)

Although the defence has not explicitly argued that in the present case the principle of ‘equality of arms’ and the right to ‘cross-examination’ have been violated, the Court considers – ex officio – the following.

Equality of arms

General

The right to fair trial, as laid down in Article 6 ECHR, implies that in criminal cases each party is given reasonable opportunity to state its view without falling substantially behind. Both parties must be given the possibility to bring forward items of evidence to support their own point of view and they must be able to learn about and to take a position concerning everything presented as items of evidence, in order to be able to influence the judgment of the Court.

Criminal proceedings that do not or to an insufficient extent comply with this, can constitute a conflict with the principle of ‘equality of arms’. Whether this is the case will always depend on the circumstances of the case, in which the course of the proceedings in their entirety will have to be taken into account. Differences in (material) possibilities can play a role in it. However, as appears from the previous decisions of the European Court of Human Rights such a right is not absolute. Under certain circumstances the principle of ‘equality of arms’ can imply that the right to fair trial is violated, for instance, by rejecting the request to examine witnesses for the defence without offering adequate compensation for it. However, a right without any special stipulations thereto does not arise from Article 6 ECHR.

The facts

From the moment the suspect was arrested until the beginning of the hearing as regards content of the case against the suspect on 19 September 2005 the defence had several possibilities to express any wishes as regards the investigation. A large number of witnesses (for the defence as well as for the prosecution) was heard by the examining magistrate also as a result of requests by the defence. The lawyers of the suspect were given the opportunity to be present at all these hearings and to examine the witnesses. At two points in time it appeared to be necessary to travel to Afghanistan in order to examine witnesses in Kabul. On both occasions the defence was

invited to attend the hearings and was given the opportunity to list questions

Furthermore the Court establishes that from the beginning the suspect was granted legal aid, that three witnesses have been examined in court in his presence and furthermore that assistance of interpreters was available in court and during examinations and discussions with his lawyers.

The suspect has therefore been provided with time (almost ten months as from the moment the suspect was arrested) and the facilities necessary to give shape to his own defence.

Violation of the principle of the 'equality of arms' in casu?

In view of what has been considered above the Court is of the opinion that neither from the available documents nor from what has been put forward in court on behalf of the suspect, it has become plausible that the principle of 'equality of arms' has been violated.

The right to 'cross-examination'

General

According to previous judgments of the European Court of Human Rights it must be possible at some stage in the proceedings to exercise the defence's right to examination. However, using as evidence a statement for the prosecution of a witness who has not been examined by the defence, laid down in an official report, is not unreservedly disallowed. In any case there is no unauthorized use when at some stage of the proceedings the defence has been given the opportunity to examine this witness (have him examined). If the defence has not had this opportunity referred to and this statement is not supported in other items of evidence either, it is not allowed to use this statement for evidence pursuant to Article 6 ECHR. Principles of due process, as well as the interest of arriving at the truth can also imply that the Public Prosecutions Department should summon certain persons as witnesses in court or that the court will order to do so, on penalty of not allowing as evidence their statements made in the preliminary inquiry. The latter will in any case have to take place if the involvement of the suspect in the offence he is charged with is founded, to a dominant extent, on a testimony made in the preliminary inquiry and this witness has subsequently withdrawn his previous incriminating statement before a (examining) magistrate or has changed this statement on essential points or has refused to make a further statement.

The facts.

On 10 January 2005 the witness [witness A.U.A.] was examined by telephone by an investigating officer. The witness made a statement that was incriminating with regard to the suspect. On 28 July 2005 and 7 September 2005 the witness [witness A.U.A.] was subsequently examined by a judge in [place] and the examining judge in The Hague. Again the witness made a statement that was incriminating for the suspect. The defence was invited for these two examinations, it deliberately did not make use of this invitation.

Subsequently on 23 September 2005 at the request of the defence, which request was honoured by the Court out of benevolence towards the defence, the witness [witness A.U.A.] was again called by the examining judge for another examination. The witness, who had to come from [country], did not appear on that occasion for medical reasons, one of these reasons being that he had to have an operation.

Violation of the right to cross-examination of the witness [witness A.U.A.]?

First of all it has to be established whether the defence has had the opportunity to examine the witnesses (have them examined), of whom the statements will be (can be) used as evidence against the suspect. The judicial authorities are obliged to actually give the defence the opportunity to examine the witness. The Court also has its own obligation, apart from the defence, to exercise reliable control on the trustworthiness of witnesses. When direct examination of witnesses by the defence is not possible, an adequate compensation should in each case be offered to the defence.

The Court is of the opinion that in casu these obligations have been met. As appears from the facts presented above the defence has had sufficient possibilities to examine the witness [witness A.U.A.] (have him examined).

As regards the witness [witness A.U.A.] the Court furthermore establishes that apart from being heard by the police he was also heard by the judges and he has made a statement before these judges. Also during these examinations the witness has made incriminating statements and statements in line with the statement he previously made before the police.

Apart from that the Court is of the opinion that the statement of the witness [witness A.U.A.] that incriminates the suspect is sufficiently founded on other items of evidence. This is of interest as it is now accepted in judge-made law that if the involvement of a suspect in the offence he is charged with is affirmed by items of evidence different from the statement of a witness who could not be examined by the defence, this latter statement may also be used for evidence. Article 6 ECHR is therefore no impediment for using as evidence the statement of the witness [witness A.U.A.] that incriminates the suspect.

Grounds in respect of the evidence with regard to the nature of the conflict.

Items of evidence in respect of applicable humanitarian laws of war:

1. an official report of the examination of the expert witness [expert witness A.G.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases in this Court and the clerk of the court. This official report includes inter alia – stated succinctly – the statement of the expert witness [expert witness A.G.] made on 15 September 2005:

You ask about the role of the Soviet army in the period 1979-1992. The Soviets absolutely had much power. Officially the Soviets were only advisers, but in reality this was different. It should not appear from documents how much power they had. Therefore decisions were always signed by Afghani officials, officers or judges. After the Soviet invasion in December 1979 dozens of groups were in opposition. Later on various groups merged and there were fewer groups. Much of the opposition was badly organized and was at village level. All opposition groups conducted a Jihad against the communist regime and the Soviets. The entire opposition was called ‘Mujahedin’. However, this was not one organized group.

In the period of April 1978 to December 1979 under the leadership of Amin there was already armed resistance. There were two kinds of armed resistance. In the remote areas it especially concerned armed clans. Apart from that the political organizations which were in an ideological way against the communists, also conducted armed resistance already. I know there were conflicts between the Soviet advisers and the Afghani. In that case such a conflict was submitted to superiors. In most cases the Soviet adviser would win the conflict. I know from literature that many Soviet advisers complained that the decisions they had proposed were put on paper but not carried out.

[beginning: after the SAUR coup of 27-4-1978 / end: 1992]

2. the police report of the Korps landelijke politiediensten (National Police Agency), Nationale Recherche (National Criminal Investigation Department), Unit Midden-Nederland, Resultaatsgebied Internationale Misdrijven (Performance Area International Crimes), police report no. RL/5051/20041115/1758, dated 03 December 2004, drawn up in the legal form by an investigating officer authorized thereto. This police report included inter alia – succinctly stated – as statement of this investigating officer in connection with a sources investigation he performed (page 51-63):

I have used the following three sources:

- ‘The Fragmentation of Afghanistan’ by Barnett Rubin;
- ‘Afghanistan, a history (Afghanistan, een geschiedenis) by Willem Vogelsang;
- The Background Note on Afghanistan from the United States Department of State (USDS) to be found on internet.

On 27 April 1978 left-wing army officers revolt and kill Daoud. Soon after Daoud’s removal the fight starts between the Afghani PDPA regime established in Kabul and some big cities and resistance groups in other parts of the country. The national resistance grows more and more as from the middle of 1978. Russian troops and Afghani soldiers loyal to the government and paramilitary units fight against the Afghani resistance movements. Outside the cities the PDPA regime has little to no influence. USDS reports that 80% of the rural areas withdrew from the state power and that it was almost impossible to maintain some form of local administration outside the important cities as a consequence of the resistance by mujahedin.

In 1988 the withdrawal of the soviet troops starts. In March 1989 the mujahedin attack Jalalabad. The Russians supply military equipment to Najibullah and with the aid of planes his army inflicted severe losses to the mujahedin. Najibullah manages to remain in power until 1992.

[actions in 1979]

3. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 200404271700, dated 27 April 2004, drawn up in the legal Form by investigating officers authorized hereto. This police report included inter alia – succinctly stated - the statement of [getuige M.N.A.] he made on 27 April 2004 before these investigating officers (page 286-294):

The safety situation was bad. Every day the Mujaheddin fired missiles and mortars to the town. The events of 24 haut 1358 (15 March 1979) were already over.

Another example is to liberate a district from the hands of the Mujaheddin or when a district was liberated to put officials there.

[actions in 1980/1981]

4. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 2004.08.14.19.00 dated 14 August 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness S.S.Y.] he made on 12 August 2004 before these investigating officers (page 192-206):

After the Russians came to Afghanistan and the assumption of power by the communists I joined the Mujahedeen in 1359 [1980/1981]. We were engaged in activities against the government and against the Russians in the central district of Kabul. The arrival of the Russians was for me reason to join the Mujaheds group to fight the Russians and the communists. The area west of Kabul was an open area and there was the general base of the Russians. Therefore they were very active there.

[actions in the period 1981-1982]

5. the police report of the Korps landelijke politiediensten, Nationale Recherche, Driebergen unit, dated 24 February 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness S.T.] he made on 24 February 2004 before these investigating officers (page 13-23):

As from August/September 1981 to October/November 1982 I was working as commander with the regiment 11 of division 17 in Herat. The Mujaheddin fired at our division day and night.

When a convoy had to be escorted, it meant that the war increased. Many soldiers lost their lives in it.

The government carried on a war with the Mujaheddin, they made attacks on the districts. And we consequently attacked the Mujaheddin.

When there was an attack, it was made with the aid of all available heavy arms at the same time. By heavy arms is meant tanks, mortars, long-range missiles and guns.

[actions in 1984/1985]

6. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 2004.08.11.10.00 dated 14 August 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness S.A.] he made on 11 August 2004 before these investigating officers (page 214-220):

In the year 1363 [1984/1985] I went together with others to the Ashawa district in Pansjir. In the Totam Dara area soldiers of the government lay in wait. It was one o'clock in the night and we fought until four o'clock in the morning.

[actions in 1985]

7. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 2004.08.11.10:00 dated 11 August 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness S.S.Y.] he made on 11 August 2004 before these investigating officers (page 188-191):

On 16 sonbola 1364 [8 September 1985] the Russians attacked us and it was in the Parwan area. We set fire to some of the Russian tanks and captured one Russian.

On the 2nd day of the ninth month in 1364 [23 November 1985] we exchanged the Russian soldier for three of our Mujahedeen fighters who were detained at the government.

[actions in 1990]

8. the police report of the Korps landelijke politiediensten, Nationale Recherche, Driebergen unit, no. 200406231800 dated 11 May 2004 (court: 23 June 2004), drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness M.K.S.] he made on 23 June 2004 before these investigating officers (page 126-134):

On 7 March 1990 the KGB and the NAJIB-supporters jointly attacked members of the Khalq party. The Russians deployed their own airplanes and bombarded the air force base from which the Tanai operated.

[general]

9. the police report of the Korps landelijke politiediensten, Nationale Recherche, Driebergen unit, 19 March 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness G.M.B.] he made on 19 March 2004 before these investigating officers (page 36-42):

The enemy at the time consisted of fundamentalist Muslims and groups as they formed a coalition against the government. The Khad screened these areas where these opponents would be active. In those days there were called bandits, now they are called Mujahedin.

10. the statement of the witness [witness B.A.W.] made in court on 20

September 2005:

The Mujahadin and the Hezb-i-Islami were opponents of the government. They fought against the government and were also fighting each other. It was an armed fight. This armed fight started in 1978 and is at present still going on. The cities were in the hands of the Islamic party. Part of the rural areas was in the hands of the Islamic party and another part was in the hands of the Jamiaat-i-Islami.

It was war.

When I talked about propaganda I meant that these stories were circulating in Afghanistan.

As a matter of fact, there were two wars going on, one was an armed fight and the other one was a propaganda war.

11. the statement of the suspect in court on 07 October 2005, in so far as saying – succinctly stated -:

There was a war in Afghanistan for 25 years.

In view of the statement of the expert as represented under 1, the report of the sources investigation under 2 and the statements represented under 3 to 11 the Court is of the opinion that, during the period of 27 April 1978 (the so-called SAUR revolution) until Najibullah left at the end of 1992, there was an armed conflict on the territory of Afghanistan between on the one hand governmental troops – whether or not supported by Russian troops – and groups that fought with arms against the government.

The role of the Russian troops in this conflict is a role of armed support to the governmental troops on the territory of Afghanistan and in that context it does not necessarily mean that there was an armed conflict between various states. Therefore the armed conflict cannot be regarded as a war.

In view of the statement of the expert under 1. the Afghan authorities had such freedom of acting, also during the presence of the Russian troops, that this presence cannot be regarded as an occupation.

As appears from the statement under 1 to 10 the armed conflict no longer had the character of internal disturbances or tensions such as riots, independently and sporadically occurring acts of violence and acts of a similar nature.

Therefore the Court is of the opinion that during the period mentioned in the charge a non-international armed conflict existed on the territory of Afghanistan in the sense in which this expression is included in the humanitarian laws of war and that the common Article 3 of the four Geneva Conventions of 12 August 1949 is applicable to this.

Grounds in respect of the evidence with regard to the protected persons.

Items of evidence with regard to protected persons:

1.[witness M.A.S.]:

1.1 the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200501311300, dated 01 February 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness M.A.S.] he made on 31 January 2005 before these investigating officers (page 415-426):

I was arrested on 19 Quas 1364. When I was arrested I was a civil servant at the directorate petrochemistry with the Ministry of Trade.

I was suspected of being involved in both the SAMA gang as in the Jamiat Islami party. I had to give information about the activities and the members of the SAMA gang.

I heard [suspect] tell my interrogators, you have to take a confession from him that he belongs to the antirevolutionary groups.

I think I was released in the winter of 1367 I think in the month of Quas. I have therefore been detained for over two years. I was sentenced to 17 years' imprisonment on the accusation of being a member of the SAMA organization.

1.2. an official report of the hearing of [witness M.A.S.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This police report includes inter alia – succinctly stated – the statement of [witness M.A.S.] he made on 30 May 2005:

At the time I was a sympathizer of the Mujaheddin. I was not a member but I expressed their range of ideas. I indeed was a sympathizer of the Jamait-Islami party. I once participated in a rally by students and pupils against the government. It was in 1362 (Afghan era, I hear the interpreter say that that was in 1983/1984).

1.3. an official report of the hearing of [witness H.M.N.], drawn up and signed by the examining magistrate

entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness H.M.N.] he made on 03 June 2005:

From his political background [witness M.A.S.] was a fighter for the Mujaheddin.

2. [witness A.K.A.]

2.1. the police report of the Korps landelijke politiediensten, Dienst Recherche Onderzoeken, Resultaatsgebied war crimes, investigation 2001690, police report no. G, dated 29 July 2003, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness A.K.A.] he made on 27 July 2003 before these investigating officers (page 83-92):

On the day of the revolution in April 1978 I was at school and I was teaching the pupils. I am a teacher for mathematics and physics.

I was a member of the movement of Rabbani Hikmatiyar.

They continuously wanted to know what my function was, where the mujahedin was and what their plans were.

2.2. the police report of the Korps landelijke politiediensten, Dienst Recherche Midden Nederland unit, investigation RL5051, dated 23 February 2005, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia – succinctly stated – the statement of this investigating officer (page 93-95):

On 23 December 2004 I, reporting officer, phoned with [witness M.K.]. [witness M.K.] indicated that he had spoken with [witness A.K.A.] and told me the following:

[witness A.K.A.] told that in the month of Aqrab 1358, he was arrested in Kabul by the Military Kam. The reason of his arrest was that he was against the communism and the regime.

2.3. an official report of the hearing of [witness A.U.A.], drawn up and signed by the magistrate entrusted with the hearing of criminal cases with the Bezirksgericht Innere Stadt Wien (Republic of [country]) and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.U.A.] he made on 28 July 2005 before this magistrate (page 101-123):

In 1348 the Islamic party of which I was a member, started to organize itself. Together with my friend ([A.H.A.M.]) I canvassed members for the Islamic party.

2.4. an official report of the hearing of [witness A.U.A.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.U.A.] he made on 07 September 2005:

We were all against the regime.

I was a member of the Hezb-i-Islami.

I knew my friend had also been arrested by the military branch of the Khad. I knew that because we were carrying out activities together.

We tried to disclose to other people the true identity of the regime. We talked about the Russian invasion and in that way we tried to canvass members for our party.

The name of this friend of mine is [witness A.K.A.].

2.5. an official report of the hearing of [witness A.K.A.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.K.A.] he made on 16 September 2005:

In 1979 I participated in the Islamic party, the Hezb-i-Islami.

I fought for an Islamic regime

2.6. statement made at the public hearing of 20 September 2005 by the witness [witness A.K.A.]:

I was a teacher and not a soldier. I was a member of Hezb-i-Islami when I was arrested.

In 1978 I went to Pakistan and I was subsequently sent back with the task to gather people to revolt against the communists.

At the time I was arrested my task was to point out to people to revolt against the authorities and against the Russians.

During the period the Russians were in our country, I led the opposition against the Russians. There were several groups at the time, Burhannudin Rabani, Hekmatyar and Molawi Mohammad Nabi.

I was cooperating with these three groups. I had to rouse people and make them revolt against the Russians.

3. [witness A.U.A.]:

3.1. the police report of the Korps landelijke politiediensten, Dienst Recherche Onderzoeken, Midden Nederland unit, police report no. 200501101500, dated 10 January 2005, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia – succinctly stated – the statement of A.G.A. he made on 10 January 2005 before this investigating officer (page 402-404):

They tortured me to have me make a statement. I was supposed to have ties with the party of Hezb-i-Islami.

3.2. an official report of the hearing of [witness A.U.A.], drawn up and signed by the magistrate entrusted with the hearing of criminal cases with the Bezirksgericht Innere Stadt Wien (Republic of [country]) and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.U.A.] he made on 28 July 2005 before this magistrate (page 101-123):

I have been working in my village as a teacher for 5 years. After that I studied at the Paschtu university. When the communist came to power I was in my last university semester.

In 1348 the Islamic party of which I was a member, started to organize itself. Together with my friend ([A.H.A.M.]) I canvassed members for the Islamic party.

3.3. an official report of the hearing of [witness A.U.A.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.U.A.] he made on 07 September 2005:

I was arrested on 25-08-1358 (16 November 1979).

We were all against the regime.

I was a member of the Hezb-i-Islami. This party gathered information about the other side. A good friend of mine had been arrested one week earlier.

We tried to disclose to other people the true identity of the government.

The name of this good friend of mine is [witness A.K.A.].

3.4. the statement of the witness [witness A.K.A.] he made at the public hearing of 20 September 2005:

I know Mr. [witness A.U.A.]. We have fought together for an Islamic regime.

The Court is of the opinion that [witness M.A.S.] should be rated among the protected persons as meant in the common Article 3 of the Geneva Conventions of 12 August 1949 on the basis of aforementioned items of evidence mentioned under 1.1 to 1.3, [witness A.K.A.] on the basis of the aforementioned items of evidence mentioned under 2.1 to 2.6 and [witness A.U.A.] on the basis of the aforementioned items of evidence mentioned under 3.1 to 3.4. At the moment of their arrest they were citizens who had associated themselves with, were working for or expressed the range of ideas of a group or groups which fought in the armed conflict against the regime of which the suspect was part. It was also because of this (assumed) involvement that they were arrested and tortured.

The reliability of the witness statements made.

The defence argued that an influencing effect must have been exerted by the fact that the public prosecutions department paid relatively large sums of money to the witnesses.

The Court follows the defence only partly in this respect, notably the fact that it also struck the Court that allowances for expenses of USD 100.00 per day were paid to both the witnesses for the defence and the witnesses for the prosecution, which allowances can be regarded as relatively high in relation to the level of income in Afghanistan. However, the Court does not follow the defence in its conclusion that “it must obviously have exerted an influencing effect”. The single fact that payments of a daily compensation have been made to persons who come to make a statement or have made statements, whereas these allowances for expenses are substantially higher than the money those persons earn or can earn in one day, do not cause these statements to be unreliable. As a matter of fact, the compensations are paid regardless of the contents of the statement made.

The items of evidence.

The Court bases its conclusion that the suspect has committed the facts found on the facts and circumstances embodied in the following items of evidence and which give cause to the judicial finding of facts.

1. the police report of the Korps landelijke politiediensten, Nationale Recherche, Resultaatgebied International Crimes, police report no. 20050126, dated 26 January 2005, drawn up in the legal form by investigating officer

authorized thereto. This police report includes inter alia – succinctly stated – the statement of this investigating officer (page 48-50):

The Afghan era is 621 years and 78 days behind with respect to the Dutch era.
Once every four years the Afghan era is 621 years and 9 (court: 79) days behind with respect to the Dutch era.

The 12 Afghan months are called as follows:

Hamal [=21 March to 20 April]
Saur [=21 April to 21 May]
Djawza [=22 May to 21 June]
Saratan [=22 June to 22 July]
Asad [=23 July to 22 August]
Sonbola [=23 August to 22 September]
Mizan [=23 September to 22 October]
Aqrab [=23 October to 21 November]
Qaus [=22 November to 21 December]
Djadi [=22 December to 20 January]
Dalwa [=21 January to 19 February]
Hoet [=20 February to 20 March]

The Afghan era converted to Gregorian era:

1359 – [=21 March 1980 to 20 March 1981]
1360 – [=21 March 1981 to 20 March 1982]
1361 – [=21 March 1982 to 20 March 1983]
1362 – [=21 March 1983 to 20 March 1984]
1363 – [=21 March 1984 to 20 March 1985]
1364 – [=21 March 1985 to 20 March 1986]
1365 – [=21 March 1986 to 20 March 1987]
1366 – [=21 March 1987 to 20 March 1988]
1367 – [=21 March 1988 to 20 March 1989]
1368 – [=21 March 1989 to 20 March 1990]
1369 – [=21 March 1990 to 20 March 1991]
1370 – [=21 March 1991 to 20 March 1992]
1371 – [=21 March 1992 to 20 March 1993]
1372 – [=21 March 1993 to 20 March 1994]

2. the statement of the suspect in court of 03 June 2005, in so far as saying – succinctly stated - :

It is correct that I was head of the department investigation/interrogation of the military Khad. [co-suspect] was the boss of the General Military Directorate. He was my immediate superior.

3. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 2004.08.15.10:00, dated 15 August 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness S.K.] he made on 15 August 2004 before the investigating officers (page 242-248):

(To the question: Has anyone ever been disciplinary punished by [co-suspect] for torturing prisoners?)
Never. There was 100% torture. The tortures within the Khad-e-Nezami were not as fierce as in the Sedarat.
(To the question: Could [suspect] have ordered to stop the torture and would this consequently have been carried out?)

Yes, of course. There was a hierarchy within the military system and the subordinates were to carry out the orders of their executives.

During all of the four years I was working there, there was no interrogation without torture.

4. an official report of examination, drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness S.K.] he made on 01 June 2005:

In the charged period from 1983 to 1987 I was working with the Military Intelligence Department. I was working with the operational group responsible for the arrests. I was a soldier and my rank was junior captain. At the time I was in favour of the government.
The Director General of Military Intelligence Service is at the top of the structure. This is general [co-suspect]. The chief of the Interrogation/Investigation department was [suspect]. His immediate boss was [co-suspect]. I tell you our departments had much to do with each other and that sometimes at the request of an official interrogator I talked in advance with a prisoner. That was not yet an official interrogation. I have been working

with the Military Intelligence Service from 1984 to 1992. I have been working with Operational Affairs all the time until 1368 (1989/1990). After that I started working for the State Security Service. This was at a different location, but the State Security Service also fell under [co-suspect]. This was a police unit. I have not ill-treated any people myself.

I know that [co-suspect] regularly paid visits to the Sedarat and to the Pol-e-Charkhi prisons.

We had contacts with the body guards of [co-suspect]. They told us where [co-suspect] was going.

It is correct that I stated earlier that also in the Sedarat tortures took place and that the tortures at the Military Intelligence Service were less fierce than at the Sedarat. You ask me how I know about that. I know this because I have transferred prisoners or suspects from the Military Intelligence Service to the Sedarat myself. I then talked with prisoners there and with soldiers and they told me that the tortures were very fierce there. A well-known cry was 'god forbid' when people had to go to the Directorate Investigation in Sedarat. This happened by order of [co-suspect].

I made statements before about the instructions that were given about the ill-treatments and tortures. I then said that it came from [co-suspect], subsequently ordered to [suspect] who in his turn passed the instruction on, et cetera. The instructions were not on paper. It was done orally and within the Military Intelligence Service it was publicly known that it was done this way.

Sometimes [co-suspect] and [suspect] were present themselves at interrogations where tortures took place. I myself was present once.

[co-suspect] himself gave orders for arrests. [co-suspect] could give these orders to any employee of the various units of the Military Intelligence Service.

Should someone refuse an order from [co-suspect], he would then be transferred, fired or get a disciplinary punishment.

5. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 2205020201200 dated 02 February 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness M.K.S.] he made on 2 February 2005 before the investigating officers (page 427-433):

[suspect] was head of the interrogation department.

If I am not mistaken [witness S.K.] was an interrogator or was working at the administration department of the Khad-e-Nezami.

As general head of the department [suspect] was the boss of the interrogators, among whom was [witness S.K.].

6. the statement of witness de [witness B.A.W.] made in court on 20 September 2005:

At the civil departments I have seen some examples of tortures. This concerned interrogators of the Civil Khad. I have seen injuries on detainees. When a suspect did not want to tell the truth during interrogations he was beaten. They were that kind of examples. It sometimes happened that we came to somebody and we said rise, and then he could not rise. In such a case we understood something had happened. Then I had a look at his body. As soon as I saw signs of ill-treatment I wrote it down. I then asked a doctor to have a look and asked for his opinion.

Only when we asked them, the suspects told they had been ill-treated. They only told this when they were convinced that I was the public prosecutor. They did not tell it when they thought I was one of the interrogators. Sometimes they only told me when I had asked to pull up a sleeve or a trouser leg and saw injuries and subsequently asked them how they got these injuries.

I only saw this when I was deputy head public prosecutor of justice with the special public prosecutions department.

In 1980 I exclusively worked at the Military Khad and during that period I did not see any injuries. I did not see any injuries on detainees of the Military Khad either during the period of 1981 to 1985. When I saw ill-treatments it was at the Civil Khad. The ill-treatment with the Civil Khad concerned beating with hands and kicking with feet. They beat with fists, hands and with sticks. I have also seen lashes.

It was clear who was where: at the Military Khad only soldiers were kept as prisoners, the conscript soldiers and the officers.

When a soldier was arrested together with a number of citizens, he went to the Civil Khad.

The Mujahedin and the Hezb-Islami were opponents of the government. They fought against the government and were also fighting among themselves. It was an armed combat. The armed combat started in 1978 and is at present still going on.

I have never spoken with [suspect] or [co-suspect] about the aforementioned ill-treatments at the Civil Khad. It was known that ill-treatments took place at the Civil Khad. It was war. The Khad was therefore somewhat in a hurry to arrest persons.

With regard to [witness A.K.A.]:

7. the police report of the Korps landelijke politiediensten, Dienst Recherche, Resultaatsgebied War Crimes, investigation 2001690, police report no. G, dated 29 July 2003, drawn up in the legal form by investigating

officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness A.K.A.] he made on 27 July 2003 before the investigating officers (page 83-92):

On the day of the revolution in April 1978 I was at school and I was teaching the pupils. I am a teacher for mathematics and physics.

I had hidden myself because I was a member of Rabbani and Hikmatiyar. I was arrested in July/August 1979. Two or three days after I had hidden myself I escaped to Pakistan through the mountains. After three months it was decided that I had to return to Afghanistan to supervise the revolt of Hujahedin against the communists.

I returned to Kabul. The intelligence service had infiltrators and eventually they found out where I stayed.

They took me to the office of the military KAM. The building belonged to the Seyed Ahmad Gailani.

Someone kicked me with his leg on my jaw. After that I was taken to the torture room. I was tortured from twelve o'clock in the afternoon until eleven o'clock in the evening. The torture consisted of applying live current and hitting with all kinds of items, such as sticks and twigs.

I have scars on my arms where they ripped off flesh and skin with tongs. They broke my right shin-bone as well as the metacarpi of my right hand. My toenails were pulled out.

I can not hold my urine because of the tortures on my kidneys and other tortures. Apart from that I have substantial problems with my nerves. I am very stressed and strained. They wanted to know what my function was, where the Mujahedin was and what their plans were. The director of Tahqiq (investigation) was major [suspect] Modir. [suspect] remained in function until the government of Najibullah. He then became general. My interrogators and torturers were all soldiers.

I suffered the worst torture in the military KAM, I had hardly any flesh left in my arms or my back.

After two months I was transported to the Kam Shesdarak. I think by then it was December 1979. The prisoners who did not confess at one KAM were transported to another KAM, hoping the other KAM could force them to make a confession.

8. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, investigation RL5051, dated 23 February 2005, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia – succinctly stated – the statement of this investigating officer (page 93-95):

On 19 December 2004 I, investigating officer, phoned [witness A.K.A.].

[witness A.K.A.] indicated that he was arrested in 1358 by the Kam (Note investigating officer: name for the Military Intelligence Service in 1979). [witness A.K.A.] indicated that he was imprisoned at the Military Intelligence Service. [witness A.K.A.] told that he was tortured by captain [suspect] in all sorts of ways and he indicated that [suspect] was originating from the Nangarhar province. I, investigating officer, phoned [witness M.K.] on 23 December 2004. [witness M.K.] indicated that he had spoken with [witness A.K.A.] and told me the following:

[witness A.K.A.] told that in the month of Aqrab 1358 he was arrested in Kabul by the Military Kam. The reason for his arrest was that he was against communism and the regime. [witness A.K.A.] has been locked up for 13 years, of which for two months, from Aqrab 58 to the 6th of Jadi 58, at the Military Intelligence Service at the Interrogation department. He was interrogated there and tortured in all sorts of ways. He indicated that he was tortured by [suspect] in person in any imaginable sort of way.

[suspect] was a well-known person and a well-known torturer.

[witness A.K.A.] told that there is yet another witness, named [witness A.G.A.], who is staying in [country].

[witness A.K.A.] told that he has scars on his legs and on his left arm, as a result of the tortures, because he was struck with a stick. At the time his leg was fractured because of this ill-treatment.

With regard to [witness M.A.S.]:

9. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 220412281300 dated 28 December 2004, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia – succinctly stated – the statement of this investigating officer (page 313-316):

On 27 December 2004 I, investigating officer, telephoned with a person who introduced himself as [witness A.K.]ness A.K.). [witness A.K.] said: "I was arrested 19 Ghaus 1364. The reason for my arrest was the fact that I was against the regime of the Russians and that I was politically active against the government. I was arrested by [suspect] in person and his group".

10. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200501250930 dated 25 January 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness A.K.] he made on 25 January 2005 before these investigating officers (page 321-328):

In 1364 I was arrested by the Military Intelligence Service. I was eventually released in 1367.

I was arrested together with [witness M.A.S.]. He was a student at the technical school of Kabul. The operation of my arrest was led by [suspect] and other members of the Military Intelligence Service.

On the 19th or 20th of Mizan or Gauss of 1364 I was transferred to the building of the Military Intelligence Service.

When they brought me to the interrogation room I heard on my way there in the corridor the sound of [witness M[witness M.A.S.].] voice shouting. He was being tortured. I heard him shout 'Why do you beat me, what did I do?'

11. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. G.29/02 dated 27 January 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of the investigating officers (page 329-394)

The witness voluntarily hands over to us a number of documents which were acquired by him from the administration of the directorate investigation of the Khad and gives permission to make copies of them.

28 documents have been received from the witness [witness A.K.].

Appendix 3: A transfer form of a prisoner to the central prison of the Ministry of Foreign Affairs. The prisoner is [witness M.A.S.] (son of [M.J.]). The signature on the second page is dated 12-6-1365.

Appendix 9: Concerns an announcement of the sentence of the BRR in the matter of [witness M.A.S.] (the son of [M.J.]).

12. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200501311300 dated 01 February 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness M.A.S.] he made on 31 January 2005 before these investigating officers (page 415-426):

On 19 Qaus I was arrested in Khair Khana. At the time [witness A.K.] was also arrested. When I was arrested I was a civil servant with the directorate petrochemistry at the Ministry of Trade.

They took me to the Khad-e-Nezami. I was kicked and beaten by the interrogators. After the interrogation I had to stand at the outside grounds during the entire evening and I was not allowed to sleep. I was suspected of being involved in both the SAMA gang and the Jamiat Islami party. I had to give information about the activities and the members of the SAMA gang. Not a single document had been found that showed I was a member of the SAMA or Jamiat party. The next morning I was taken to my cell. The second day I was interrogated and tortured by the same interrogators.

In general my interrogations took place in the presence of [suspect].

After my interrogation on the second day I was taken outside and I had to stay awake and stand up until morning. It was very cold, it was in the month of Quas, December. On the third evening I was beaten and kicked again by the interrogators.

On the fourth or fifth day [suspect] put his interrogators under pressure by asking why I had not confessed yet. The interrogators put the fingers of my right hand between the door and the door frame by force. I heard [suspect] say to the interrogators put the fingers of his left hand between the door and not those of his right hand because he must be able to write with his right hand. After [suspect] had said this he left.

The interrogators put my fingers between the door, by force. While all four fingers of my left hand were between the door, one of the interrogators slammed the wooden door several times fiercely.

The second time an interrogator pushed my in the direction of the door and the other interrogator grabbed my arm and held my fingers between the door. My fingers were put between the door at the side of the hinges and the door was slammed.

I became unconscious because of the pain. When I came round I saw that the interrogators as well as [suspect] were present. I saw [suspect] looking at the blood on the door. I heard [suspect] say to the interrogators: 'torture him some more'. As a consequence of this torture I later on lost the finger top of my left middle finger.

During the following interrogations I was kicked against my shin-bone.

Note reporting officer. The witness shows his right shin-bone and points at a number of scars saying that these scars are the result of the kicks he got during the interrogations at Khad-e-Nezami.

After I had been detained at the Military Intelligence Service for about 20 days, a person visited me together with the interrogators. The person who came to visit me had medical scissors, bandages and medicines with him. The fingers of my left hand were in a very bad condition, the nails of two fingers had become black while the flesh of the top of my middle finger had turned completely black. The person snipped off the top of my middle finger with scissors, without any anaesthesia and without asking me anything. It hurt very very much, almost unbearable pain.

During the two months I stayed with the Military Intelligence Service, the interrogations just went on. I was tortured by my interrogators, but because I had lost the top of my finger the interrogators kicked me against my shin-bones.

I was not a member of any group whatsoever. I was indeed against the military presence of the Russians in Afghanistan. My family stayed in the area that was controlled by the Mujaheddeen, therefore they thought at the Military Intelligence Service that I had ties with the Mujaheddeen.

I heard [suspect] say to my interrogators, you must take a confession from him that he belongs to the

antirevolutionary groups, it does not matter, true or not true. [suspect] was often present at my interrogations and tortures.

I heard that [suspect] was encouraging the interrogators. After two months I was transferred to the Sedarat, I was tortured there as well.

I think I was released in the winter of 1367. I think it was in the month of Quas. I have therefore been locked up for more than two years. I was sentenced to 17 years' imprisonment on the accusation of being a member of the SAMA organization.

13. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200502031000 dated 03 February 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of [witness H.M.N.] he made on 03 February 2005 before these investigating officers (page 434-438):

I was picked up by the Khad-e-Nezami in 1364. I was arrested together with [witness M.A.S.] and [witness A.K.]. I was taken to the directorate of the Khad-e-Nezami, established in the house of Pir Sayd Gilani.

They suspected me of having ties with the opposition group of Jamiat Islami and Ahmad Shah Massoud. Jamiat Islami and Ahmad Shah Massoud were opponents of the government in office and conducted an armed fight against the government.

I know that [witness M.A.S.] has been fiercely tortured by the Military Intelligence Service. One day I saw [witness M.A.S.] standing outside in the snow with one hand chained to his leg. After he was also released, [witness M.A.S.] himself also told me that he had been fiercely tortured.

We were living in a war situation, it was normal that by beating there (court: they) tried to get to the truth.

14. an official report of examination of [witness M.A.S.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness M.A.S.] he made on 30 May 2005:

I stick to my statement I made before the police on 31 January 2005.

In 1364 (afghan era, I hear the interpreter say that that was 1985/1986) when I was arrested, I was a civil servant with the Directorate Oil and Gas. I did not have a military rank. I did have an anti-Russian range of ideas but I had not joined any group. During that time I was a sympathizer of the Mujaheddeen. I was not a member but I expressed their range of ideas. I was neutral with regard to the SAMA. I was indeed a sympathizer of the Jamiat-Islami party.

I was not a member of this party either.

I once participated in a rally of students and pupils against the government. That was in 1362 (Afghan era, I hear the interpreter say that that was in 1983/1984).

On 10 December 1985 I was arrested. I was arrested together with 24 people who were supposed to be against the government. I did not fight against the government. I was arrested by members of the Military Intelligence Service, the Khad-e-Nezami. The head of the Military Intelligence Service is [co-suspect]. Everybody in Kabul knew that he was the head of the Military Intelligence Service. [suspect] was subordinate to [co-suspect].

After my arrest I was transferred to the building of the Military Intelligence Service of the Khad. They said I was an opponent of the regime. As from 10 December 1985 I was tortured several times for two to three months at the Military Intelligence Service of the Khad in Kabul. I was for example beaten and kicked several times and after I had been interrogated beaten and kicked they put me outside for three or four days. The first day it was snowing. It was very cold and it was very windy. I was particularly beaten on my legs, my back and my belly. Furthermore my fingers were put between the frame of the door and then the door was slammed. That was at the side where the hinges are. Furthermore at one time the top of my middle finger was snipped off.

I was injured on my left hand, on the three middle fingers. I lost the top of my middle finger. I was beaten with military shoes on both my legs and because of that I have scars on both my legs. About standing outside I can tell that whenever I wanted to go and sit down on the ground, I had to get up and in that way I was kept awake. In that period I sometimes became unconscious because of the ill-treatments. [suspect] was often present at the interrogations and ill-treatments. They wanted me to admit that I belonged to this gang. By that they generally meant the SAMA. [suspect] put the interrogators under pressure, he gave instructions.

I am still nervous because of what happened to me at that time and it scares me for instance when I hear loud noises.

At the time of the invasion of the Russians in Afghanistan Karmal was appointed president. The government troops had Kabul in their possession and the other big cities. The periphery was in the hands of the resistance. There were fights between the troops of the government and the Mujaheddin. They were trying to conquer land from each other.

I was also tortured in the Sedarat. I have been in the Sedarat until June 1986. It was winter when I was arrested, it was spring when I was transferred to the Sedarat and when it became really hot I was transferred to the Pol-i-Charkhi.

I was released on about 20 Quas (I hear the interpreter say that that is 11 December 1988).

Once I was in [suspect]'s room and then I saw a name plate on his desk.

I tell you that block I and II of the Pol-e-Charkhi prison fell under the responsibility of the Khad and block III and IV under Interior.

I saw [witness A.K.] and [witness H.M.N.] being arrested as well.

Only after the Russians had visited the prison the interrogators squeezed my fingers between the door and the door frame.

There was a direct link between the Military Khad and the Directorate of Investigation. Both groups have a good relationship with each other. The first interrogation is done by the Military Khad. The further investigation is done by the Directorate Investigation. The Directorate Investigation is an independent institution.

15. an official report of examination of [witness H.M.N.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness H.M.N.] he made on 03 June 2005:

In 1364 (1985/1986) I was imprisoned together with [witness M.A.S.] in the prison of the Military Intelligence Service. He is the son of [M.J.].

I have once seen in the prison of the Military Intelligence Service in Kabul that he his hand was bandaged. Later on I heard from his family that a nail was pulled out and that they took away part of his finger. Furthermore I saw that [witness M.A.S.] had to stand up outside. When he had to stand up outside it was winter and it was very cold. Moreover, it was at night. He was standing there stripped to the waist. I saw both his hands and his feet were chained. This was in any case more than one night.

Once when I met [witness M.A.S.] in the prison of the Military Intelligence Service he said: “I did not state anything about you. I myself am being tortured, they beat me”.

[witness M.A.S.] was not a professional soldier. On the contrary, from his political background he was a fighter for the Mujaheddin and I know that he actually joined the fighting. Apart from that he was an engineer in civil service.

With regard to [witness A.U.A.] and [witness A.K.A.]:

16. the police report of the Korps landelijke politiediensten, Dienst Recherche Onderzoeken, Midden Nederland unit, police report no. 200501101500 dated 10 January 2005, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia – succinctly stated – the statement of A.G.A. he made on 10 January 2005 before this investigating officer (page 402-404):

On 25 Aqrab 1358 I was arrested in Kabul and taken to the Military Intelligence Service, established in the house of Pir Saheb, where I was regularly interrogated and tortured. I was hit on my head with an object so that I became unconscious. During 15 to 20 days I was tortured several times by means of having live current attached to my toes and fingers and by striking me with sticks. Because of this live current attached to me there came blood from my nose and ears. The eardrum of my left ear was torn.

They tortured me in order to have me make a statement. I was assumed to have ties with the party of Hezb-i-Islami.

During 15 to 20 days I was several times tortured by means of having live current attached to me and by means of strokes with sticks. They struck me with a stick on my bag, my buttock and my legs.

I was interrogated by the head of interrogations. During my interrogations the head of the department struck me several times with a stick. He wanted to make me confess. Later on I learnt that the head was called [suspect].

His origin was [address]. He personally struck me with a stick and told me that I was now going to state everything. He was several times present during my tortures. As a result of the fact that [suspect] struck me several times with the stick I still have pains in my knee. One time they almost broke my back. They pushed me down so fiercely to the floor, that I got an acute pain in my back. My back is also bothering me now as a result of these tortu[O.K.][O.K.] had suffered the same as I had. He was imprisoned in the same period. The way in which [O.K.] and I were tortured was almost identical.

After 15 to 20 days I was taken from the Military Intelligence Service to the Shasdarak, from there I was transferred to the Sedarat. They started to interrogate and torture me there again.

After I had been imprisoned for in total about 40 days they told me I would be executed. However, the next day Karmal came to power and I was taken to the Pol-i-Charki.

17. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, investigation RL 5051, dated 14 February 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia – succinctly stated – the statement of the investigating officers (page 1-79)

The full data of the witness A.G.A. domiciled in [place], [country], are known to the investigation team. [witness O.K.] who is mentioned by the witness A.G.A. was previously heard in a criminal investigation and is called [witness A.K.A.].

18. an official report of the hearing of [witness A.U.A.], drawn up and signed by the magistrate entrusted with the hearing of criminal cases with the Bezirksgericht Innere Stadt Wien (Republic of [country]) and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.U.A.] he made on 28 July 2005 before this magistrate (page 101-123):

I have been working in my village as a teacher for 5 years. After that I studied literature at the Paschtu university. When the communists came to power I was in the last university semester.

In 1348 the Islamic party of which I was a member, started to organize itself. Together with my friend ([A.H.A.M.]) I canvassed members for the Islamic party. My friend was arrested in 1979 one week before I was arrested. My friend was brought to the house of Ahmad Gilani which was used as a prison. One week later I was arrested by members of the military secret service and taken to that house.

This was on 16 November 1979 (25 Aghrab 1358). I was arrested because I had organized the Islamic party that was against the communists. [[suspect] wanted to know everything and what I had done. [suspect] kicked with his shoe against my right shin-bone and my right knee joint and as a result I was injured. This happened after the interrogation. First they had gravely ill-treated me with electric shocks, after that they every time took me to the leader of the interrogation department. My head was spinning. The people had me sign something. They hit me with 'mit einer Gerte'. (The Court translates this with 'rod')

Because I was with my friend in the same cell, I heard that he had been tortured and that he had scars caused by strokes with a stick.

My friend was an important person. After the take-over of power by the Mudschahedin he became Advising Minister.

I was tortured with electric shocks. I was tortured because I was known to be an opponent of the government and my friend had betrayed me as member of the Islamic party. The electrodes were attached to my toes and fingers. The live current came from a device with a drive handle.

During the electric torture I was blindfolded. During the noises at the torture I felt shocks, it felt as if my legs were on fire.

I was put on live wire until I was almost unconscious. This went on for three hours.

I was also tortured in another way. They struck me with sticks and pulled at my hairs. I think [suspect] and [co-suspect] were present during the torture. They gave instructions. Nothing happened without the direct instructions of [suspect] and [co-suspect].

The second day of my interrogation I saw [suspect] for the first time. He struck me with a stick on my legs and interrogated me.

I know that [suspect] and [co-suspect] gave the instructions for the torture. I heard somebody giving directions and orders how I had to be tortured. At first I did not recognize the voices, but later on I became clear to me that it were [suspect]'s and [co-suspect]'s voices.

I am absolutely certain about the time of my arrest. I learnt the name of the director [co-suspect] only after one year or maybe after more than one year.

When I was interrogated I heard the torturers speak Paschtu with each other. They said: 'Call modir saheb [suspect]' (modir means head of the department in Paschtu).

[suspect] ill-treated me several times, 3 to 4 times. The ill-treatment was always the same, with a stick or with live current.

[suspect] told me I had better confess, because otherwise he would take me to the interrogation room again, where I was going to be tortured again.

[suspect] hit me at tender places. He hit me always on my knees or around the knees. As a result of the hitting on my knees and the kicking against my shin-bone I am now medically treated. When the weather is cold and wet everything in my body hurts. I attribute my problems with high blood pressure, temporary drowsiness and arrhythmia to the tortures with live current. The problems with my knees have only been caused by the tortures of [suspect].

My friend told me that he had been tortured by [suspect]; I have seen his scars. I have told my friend that I was tortured by [suspect].

On 27 December 1979 everybody, except my brothers and I, were released from the prison. I served my full time and was released on 15 June 1986.

Apart from [A.H.A.M.] nobody can confirm my statement. All other members of the Hesb-i-Islami who had been taken prisoner are dead.

19. an official report of examination of [witness A.U.A.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.U.A.] he made on 07 September 2005:

On 28 July 2005 I was examined in [place].

I know the exact date I was arrested in Afghanistan. Just like I know the exact date I was released. It was on 25-08-1358 (16 November 1979. The interpreter remarks: it may have been one day earlier or later because of a leap year.).

Taraki had just been murdered and Amin had just come to power.

We were all against the regime. My five brothers were arrested together with me. My father mobilized people against the regime.

I was a member of the Hezb-i-Islami. This party gathered information about the opposition. Mr Zegveld asks me to explain how I found out that I was arrested by the Military Secret Service.

I found out because I knew that their office was established in the house of Pir Sayed Ahmmad Gelani. I recognized that house. A good friend of mine had been arrested a week earlier, he had been taken there.

I knew that my friend had been arrested by the military branch of the Khad. I knew that because we did activities

together. The examining magistrate asks me what I mean by the activities I performed with my friend. We tried to disclose to other people the true identity of the regime. We talked about the Russian invasion and in that way we tried to canvass members for our party. According to me the date of amnesty was 06-10-1358 (27 December 1979). You tell me that from an official country report of Foreign Affairs it appears that Amin was in any way killed on 27 December 1979 during a coup with the aid of the Soviet Union.

In my statements I regularly speak about a good friend of mine. His name is [witness A.K.A.].

During the interrogations with the KhAD we were in separate cells, but from the moment we were in the Pol-i-Charki prison we shared a cell. One time [witness A.K.A.] was present when I was ill-treated. We have seen each other several times at a distance when we were escorted to our cell and we were once put opposite each other at the director's.

I did state that [witness A.K.A.] has told me that he had been ill-treated.

Every time when the name of [co-suspect] appears in my examination of 28 July 2005, I mean the then director of state security.

20. an official report of examination of [witness A.K.A.], drawn up and signed by the examining magistrate entrusted with the hearing of criminal cases with this court and the clerk of the court. This official report includes inter alia – succinctly stated – the statement of [witness A.K.A.] he made on 16 September 2005:

Every time I have told the truth.

In 1979 I was part of the Islamic party, the Hezb-i-Islami. It was a well-organized party with a double order system. After the coup in April 1978 we started an armed fight against the Taraki and Amin. The Hezb-i-Islami had actual control over parts of Afghanistan territory.

In April 1978 I went to Pashwar in Pakistan. The armed fight was organized from Hekmatia I was a member of the Central Council in Peshawar. I was sent to Kabul. In Kabul I mobilized the population to revolt and I informed them. That was my task at the time of my arrest.

At the end of September or beginning of October I was arrested, some days after the death of Taraki. Amin had just come to power.

After my arrest I was transferred to the building of the Military Kam, Kam-e-Nezami. I was imprisoned there for a little bit less than 2 months.

[witness A.U.A.] was also with the Hezb-i-Islami and was responsible for the northern districts. He reported to me in Kabul. When I was imprisoned at the Military Kam I saw and spoke to [witness A.U.A.]. We were not in the same cell. When we were given an airing, the prisoners saw each other. We were not allowed to talk, but we did so secretly. [witness A.U.A.] told that he was being tortured. You could see that from his wounds. [witness A.U.A.] told me that during the interrogations he was asked about my activities.

One day I was taken to the interrogation room. [witness A.U.A.] was there. Furthermore [suspect], [D.M.] and [J.] were present. At that time [suspect] was major and head of the investigation department. Prisoners always had to sit on the floor with their hands tied behind their backs and the knees raised. They were then struck with a stick below their knees.

This time that I was brought inside the interrogation room I saw myself that [suspect] started to kick [witness A.U.A.] all over his body with his shoes. I have told I could hear [witness A.U.A.] being tortured more often. I then heard him cry out.

The scars are the result of the tortures I suffered during the period I was imprisoned by the Military Khad. For me the tortures started at 11.00 hours the day I was arrested and they went on up and including the evening before I was transferred to Shashdarak.

I have fought for an Islamic regime. I was not happy when the Taliban came to power. The Taliban have besmirched the name of the Islam.

You ask me whether I myself ever performed any hostility. Until today I have never had a gun in my hands yet. I have never given orders for any such actions or for bomb attacks. I was not with the military branch of the Hezb-i-Islami.

On 23 July 2003 I spoke the full truth.

The injuries as a result of the tortures still bother me. There is a sharp pain from my shoulder to my hand, especially when it starts getting cold. I have the same feeling in both my shin-bones. The many tortures have also caused great psychological damage.

I can not describe to you how horribly I have been tortured. After the fifth day they had to carry me on their backs to the interrogation room, because I could not walk anymore. This went on in this way until the sixteenth day. After that they could not carry me on their backs anymore, otherwise my body would fall apart, I was in such a bad condition. I was carried to the interrogation room by two men in a basket. Behind the building of the Kam there were trees with rigid branches. The soldiers went and took the branches by order of the interrogators. I was struck with these branches very hard, until even the branches broke. I was struck with these branches so often that the bone of my arm became visible. Then there was one day rest, until there was a little bit of skin on my arm again. After that I was constantly hit on this wound. The scars on my arm and leg are the result of the strokes with those branches.

I also have wounds on my buttocks. The wounds were so serious that pieces of rotten flesh had to be taken from my arm and my buttocks with scissors or tongs.

The building of the Kam was in the centre of Kabul.

If [suspect] had an office there I must have been on the 2nd floor.

20. the statement of the witness [witness A.K.A.] made on the public hearing of 20 September 2005:

In my statements I have told everything according to the truth.

I have been detained for fourteen years. I never participated in hostilities. I was a teacher and not a soldier. I was a member of the Hezb-i-Islami. Since 12 years I am no longer a member of this party. In 1979 I was a member indeed. I was then arrested and taken to Military Kam, this was the house of Said Ahmad Gelani in Kabul. There I was detained for two months. There the interrogations and the ill-treatments took place.

The injuries I have are caused by strokes with sticks. I was struck by two persons, one was hitting me at my backside and the other one at the front. I was held by two other persons so that I could not move.

They struck me against my left upper arm while my hands were tied behind my back. My legs were fractured by these strokes with sticks. I was hit against my head both with fists and with sticks.

My hands were tied and I was struck with the stick at my left side. My left arm was mostly aimed at, but I was also struck with the stick on my right arm. There was on my body not a single spot that was not injured by those strokes, but you can still see the spots that were injured most. They also struck me with sticks against my buttocks and kicked against my knees, also against my right lower leg, the inner edges of my feet and my soles. My nails had even fallen out. One nail had been pulled out but the others had fallen out by themselves because of the fierce strokes with the sticks.

The head of the department interrogation, [suspect], was the one who gave orders. Then there were [D.M.] from [place], [J.] and another interrogator. All four of them interrogated me and struck me.

On the first day of my arrest I was beaten and treated inhumanly from 11.00 hours in the morning until 23.00 hours in the evening. Because of this I became unconscious. When I came to I was sitting among other suspects. The next day I could not walk anymore and I was taken to the interrogation by somebody I could lean on. After five days I was taken to the interrogation on somebody's back.

After 16 days my condition was very bad, I could not walk anymore and could not be carried by somebody else. They then carried me in a basket to the interrogation. It was not in a wheelbarrow. It was two sticks with in between a wooden plank where I was sitting on, two people could hold it and carry it.

When those people came to power, I was a member of Hezb-i-Islami and an ordinary teacher. After the coup many people who were against the communists were arrested.

In 1978 I went to Pakistan and I was subsequently sent to Afghanistan with the task to get people together to revolt against the communists. It was not a military revolt, the purpose was to get people revolt from their ideology, to make people change their political view.

That was my task until the moment I was arrested. My task was to point out to people to revolt to the authorities and the Russians.

My answer to the questions by lawyer of the suspect [suspect], Mr Van der Biezen is, that I am [witn[O.K.]. My family name is [witness A.K.A.]. I am called that way because I was a teacher. [O.K.] means teacher. [witness A.K.A.] is my first name.

I have told that I was tortured by the head of the department interrogation, major [suspect].

There were soldiers imprisoned and they knew [suspect], they have mentioned his name. [suspect] also mentioned his name himself.

I know Mr [witness A.U.A.]. We fought together for an Islamic regime. That is not a regime that intends to kill people but an Islamic regime for peace and safety of the people. I have not been active for Hezb-i-Islami for 12 years now.

During the time the Russians were in our country, I led the revolt against the Russians. At the time there were several groups, Burhannuddin Rabani, Hekmatyar and Molawi Mohammad Nabi.

I was cooperating with those three groups. The intention was to set up an Islamic regime that was elected by the citizen himself. I had to wake up people and make them revolt against the Russians.

The judicial finding of facts.

By the aforementioned contents of above items of evidence – each of them, also in its elements, used for the evidence of what it is related to as appears from its content – the facts and circumstances mentioned in them are established. On the basis thereof the Court has come to the conclusion and deems it legally proven that the suspect has committed the offence principally charged in the - amended - writ of summons on the understanding that the Court deems proven – and deems it to be inserted herein, with corrections of possible typing and language errors, as represented in the judicial finding of facts, by which correction the suspect has not been harmed in his defence – the contents of the charge, as it is mentioned in the photocopies of it, marked B.

Punishability of the proven facts and of the suspect.

On 1 October 2003 the International Crimes Act came into force and in its context the penalizations of the war crimes from the Criminal Law in Wartime were transferred to the International Crimes Act. The penalization of torture has also been given a place in this Act under simultaneous cancellation of the Torture Convention Implementation Act.

Since 1 October 2003 the proven facts are also punishable offences pursuant to Article 6, first paragraph, under a, of the International Crimes Act.

The Court is of the opinion that the amendment to the Act as from 1 October 2003 has not provided more favourable provisions for the suspect on the basis of which Article 1, second paragraph of the Netherlands Criminal Code would have to be applied. The proven facts were committed before 1 October 2003 which implies that the proven facts should be qualified under the Criminal Law in Wartime Act and the Torture Convention Implementation Act.

On behalf of the suspect the lawyers have set up two defences which in the defence's view should lead to discharge from any further prosecution.

The nature of the conflict

The defence has argued that the nature of the armed conflict is lacking in the charge.

However, the Court is of the opinion that the public prosecutor can leave the establishment of the nature of the armed conflict to the court by preparing a principal/alternative charge. The legislator explicitly mentions this way of charging as a possibility in the explanatory memorandum to the International Crimes Act (parliamentary documents II, 2001-2002, 28 337, no. 3, page 46).

In the present case the public prosecutor opted for an implicit principal/alternative charge.

There is no rule that does not allow this.

The element of 'protected persons'.

The defence argues that the characterization of 'protected persons' should have been included in the charge.

In the writ of summons is stated that it here concerns acts "committed with regard to (one or more) person(s) who (then and there) did not directly participate (anymore) in the hostilities (namely citizen(s) and/or staff of the forces that had laid down their weapons and/or those who had been put hors de combat by imprisonment or other cause), namely".

This description of the protected person is for the greater part derived from the common Article 3 of the four Geneva Conventions of 12 August 1949, but also includes the prisoners of war (see "who had been put hors de combat by imprisonment") and the wounded and sick (see "who had been put hors de combat by another cause"). Only persons who did not belong to the suspect's party can be meant by this, as this description may not be read separately from the provisions mentioned before in the writ of summons which were supposedly violated, notably: the international customary law, the Geneva Conventions of 12 August 1949 and the common Article 3 in these Conventions.

It will have to be established from the investigation on the basis of items of evidence that it here concerns 'protected persons' as meant in the humanitarian laws of war.

Punishability of the suspect.

The suspect is therefore punishable, as no grounds for exemption from criminal liability have become plausible.

Grounds for the punishment

The punishment to be mentioned hereinafter is in agreement with the serious nature of the offences committed, the circumstances under which they were committed and based on the person and the personal circumstances of the suspect, as shown during the investigation in court.

Furthermore the following has particularly been taken into account.

During the period of 1 July 1979 to 31 December 1989 the suspect was guilty of war crimes and tortures in Kabul, in Afghanistan at the time of the communist regime. During that period the suspect, a high-ranking soldier, (lately a general), in the Afghan army, was the head of the department of interrogation with the military intelligence department, the KhAD-e Nezami.

When exercising his function the suspect was guilty of violation of the laws and practices of war. His victims were, for instance, kicked and beaten. A number of the victims had electric wires attached to their bodies after which they were subjected to electric current through these electric wires. One victim had his toenail pulled out whereas another victim was pushed to the ground in such a fierce manner that his back almost broke.

It appeared from the file that these offences constituted a fixed pattern of behaviour within the military intelligence service of Afghanistan.

The war crime of torture belongs to the international crimes alongside genocide and the crimes against the humanity and is regarded as belonging to 'the most serious crimes which are cause for concern for the entire international society' (explanatory memorandum to the International Crimes Act, parliamentary documents II,

2001-2002, 28 337, no. 3, page 1).

Torture as a war crime is a serious form of lack of sense of standards in the already special situation of the armed conflict. By torturing persons who in the armed conflict belong to the other party and who have fallen into the hands of the opposite party, any notion of humanity is denied.

The war crime of torture creates large-scale indignation and alarm internationally. These crimes also affect Dutch society in this case. The war crime of torture committed in Afghanistan affects the Dutch legal order not only because this is an international crime but also because the suspect fled to the Netherlands and indicated by his application for asylum that he intended to form part of the Dutch society. At this moment many persons who originate from Afghanistan and who have been confronted with the horrors of the armed conflict, form part of this society.

Therefore the Court is of the opinion that committing these crimes should not remain unpunished and considers that the seriousness of the offences, despite the interval of time since they were committed, justifies an imposition of a very long-term imprisonment.

The applicable Articles of Law.

The punishment to be imposed is based on the Articles:
- 47 and 57 of the Netherlands Criminal Code;
8 of the Criminal Law in Wartime Act.

Judgment

The Court,

declares legally and convincingly proven that the suspect has committed the offence in the principal charge of the - amended – writ of summons and that the facts found include:

complicity in violation of laws and practices of war, while this violation includes violation with joint forces against a person, committed several times,
and

complicity in violation of the laws and practices of war, while this violation results in grave bodily harm of another person,
made punishable pursuant to Article 8 of the Criminal Law in Wartime Act in conjunction with Article 47 of the Netherlands Criminal Code declares the facts found proven and the suspect hence punishable;

sentences the suspect to:

imprisonment for a term not exceeding 9 years;

determines that upon the enforcement of the imprisonment imposed on him the time the suspect spent in custody and pre-trial detention before the enforcement of this judgment, will be deducted in its entirety, in so far as this term has not already been deducted from another punishment;

put into custody on : 2 December 2004,

put in pre-trial detention on : 6 December 2004;

declares not proven what the suspect is charged with in addition to or differently from what has been proven above and acquits the suspect of any such charge.

This judgment was passed by

Mr Van Rossum LL.M. president

Mr Kuijer LL.M. and Mr Jofriet LL.M. judges

in the presence of Mr Dingley LL.M. and Mr Van de Vrede LL.M., clerks of the Court,
and pronounced in open court of this District Court of 14 October 2005.

I, Frederika Veldhuyzen, sworn as translator for the English language before the The Hague District Court, petition number 90.5684, certify the above to be a full and true translation from Dutch into English of the original seen by me and hereunto attached.

The Hague, 4 December 2005.

