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Inhoudsindicatie: Vertaling in de Engelse taal van Afghaanse zaak, nr. AZ7147. During the period between July 1,1979 through December 31, 1989 suspect was in Kabul, in Afghanistan at the time of the Soviet supported communist regime, head of the interrogations department of the military information service, the Khad-e-Nezami. When exercising this function, suspect, as may be considered to have been proven, has committed very serious criminal offences, to wit being a co-perpetrator in the violation of the laws and customs of the war. Article 8 (old) of the Criminal War Act.
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Uitspraak

LJN AZ7147, Court of Appeal The Hague 2200613205

Date of verdict: January 29, 2007

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Indication contents: During the period between July 1,1979 through December 31, 1989 suspect was in Kabul, in Afghanistan at the time of the Soviet supported communist regime, head of the interrogations department of the military information service, the Khad-e-Nezami. When exercising this function, suspect, as may be considered to have been proven, has committed very serious criminal offences, to wit being a co-perpetrator in the violation of the laws and customs of the war. Article 8 (old) of the Criminal War Act.

Ruling

Docket number: 22-006132-05

Number(s) Public Prosecutor's Office: 09-751005-04

Date of verdict: January 29, 2007

DEFENCE

Court of Appeal in The Hague

Three-judge criminal section

Ruling

referring to the appeal against the sentence of the Court in The Hague dated October 14, 2005 in the criminal case against suspect:

[suspect]

Born in [place of birth] (Afghanistan on [date of birth] 1946,

presently detained in the Penitentiary Institution Grave (Unit A + B) in Grave.

1. Investigation of the case

This ruling has been pronounced on the basis of the investigations during the court sessions in first instance as well as the investigation during the court sessions in appeal of this court on:

May 3 and 17, 2006, December 4, 11, and 13 and on

January 15, 2007.

The court of appeal has taken knowledge of the demand of the advocate general and of what has been brought forward on behalf of

suspect.

2. Indictment

Suspect has been charged with the facts mentioned in the introductory writ of summons, as modified during the court session in first instance at the demand of the public prosecutor.

3. Trial and extent of the appeal

Suspect, who was a high Afghani military man in Kabul and the head of the interrogations department of the military information service Khad-e-Nezami at the time, was charged in first instance – summarizing – with the following offences:

Being a co-perpetrator in violating the laws and customs of the war in Kabul during the period between July 1, 1979 through December 31, 1989 by committing (qualified) violence against a number of seven victims.

In first instance suspect was acquitted of the charges against him with regard to four victims mentioned, and sentenced for the offences he was charged with which had been committed with regard to the other victims, to a term of 9 years, less the period spent in pre-trial detention.

Only suspect appealed against the court sentence. The decision of the court raises the question into the extent of this appeal, given the stipulations of article 407, paragraph 2, Code of Criminal Procedure.

Therefore the court of appeal, together with the advocate general and the defence, has come to the conclusion that the charges should be considered to be an implicit-cumulative indictment and that therefore the accusation with regard to four of the victims mentioned in the indictment, of which suspect was acquitted, will not be further discussed in appeal.

4. Judgment of the sentence against which appeal was lodged.

To an important degree, the court of appeal comes to the same decisions as the court did, although partially for different reasons. Given the latter, the court of appeal will annul the sentence against which appeal was lodged.

5. Discussion of the international (criminal) legal defence pleas.

5.1 The defence has brought up a number of pleas which (in part) have as a common characteristic: the aspects pertaining to international law with regard the prosecution of suspect and the “scope” of articles 3 and 8 of the Criminal War Act (WOS). These defence pleas, which all – in any case in the defence plea of counsel of co-suspect – have explicitly been argued – have been summarized by the court of appeal (as well as a different sequence used) – as follows:

- a. in the present case, the Dutch criminal legislations lacks (universal) jurisdiction if, during the period charged, this would concern a non-international armed conflict to which ‘only’ the common article 3 of the Geneva Conventions applies. These conventions (or other provisions pertaining to international law) do not offer universal criminal jurisdiction with regard to violations of those articles; establishment of such a jurisdiction needs an authorization pertaining to international law which can neither be found in the unwritten legislation pertaining to international law, as was also stated by the Yugoslavia Tribunal (ICTY) in its Tadic decision of October 2, 1995. In the opinion of the defence the issue in Afghanistan was at the time, in any case in as far as important to the practices suspect is charged with, not a non-international armed conflict. Therefore the public prosecutions department, who are exercising their authority to prosecute contrary to international law, should be declared non-admissible in that prosecution;
- b. the WOS does not relate (in any case did not during the eighties) to violation of the norms as laid down in the common article 3. Therefore the discontinuance of the prescription laid down in the law dated April 8, 1971 (National Gazette 210) in article 10 of the WOS (based on a non-international armed conflict does not extend to the accusation made against suspect. The international legal conviction that this caused the law to be changed only relates to very grave war crimes, the ‘grave breaches’ in the Geneva convention. The offence with which suspect is charged under 3 is therefore became extinguished by limitation. Also for that reason the public prosecutions department should be declared to be inadmissible in this prosecution;
- c. the nature of the conflict and the protected status of the alleged victim have wrongly not been included and (actually) substantiated. The way used to charge would not be accepted in the ICTY, this should result in annulment of the indictment.
- d. the far-reaching uncertainty about the time and place of the accusations made against suspect makes defence impossible. Also for this reason the indictment should be declared nil and void;
- e. the indictment does not sufficiently (actually) indicate which persons are said to have committed criminal activities under the direction of suspect, against which suspect is said not to have taken action and thus how far his ‘command responsibility’ reached, which should also result in annulment of the indictment.

5.2 Before discussing the specific defence pleas, the court of appeal will put their views in relation with the general aspects of the prosecution of suspect and the applicable legislation into words.

5.2.1 Suspect has been accused of conduct that he is said to have shown in Kabul in Afghanistan in 1979 and during the eighties in his position of a high Afghan military man employed by the military information service. His activities relate – in summary – to (participation in) torturing a number of Afghan citizens who were under the control of this service. He was prosecuted after he had tried to find refuge in The Netherlands as an asylum seeker and had attracted the attention of the Dutch judicial system. Given this fact it may be established that the basis for the prosecution in the present case is not the principle of territory, nationality or protection, but the (secondary) principle of universality. Also the court of appeal does recognize that this jurisdiction, also in its secondary form, is applied by the Dutch legislator with considerable reserve and raises questions of a legitimacy pertaining to international law because it affects the sovereignty of the territorial state.

5.2.2 The accusation against suspect is, in the opinion of the public prosecutions department, within the scope of the Geneva conventions of August 12, 1949. These conventions and the norms included therein primarily relate to the war as an international armed conflict; some of those norms (for instance in article 147 of the Fourth convention) are considered to be ‘grave breaches’. However, the conventions formulate in the common article 3 also (minimal) norms with regard to the dignity of “persons who do not directly participate in the hostilities” in the case of a non-international armed conflict. The court of appeal establishes that these norms are also described by the International Court of Justice (ICJ) in its decision of June 27, 1986 with regard to Nicaragua vs USA (§218, 219; with reference to an earlier decision from 1949) as “minimum yardstick; they ... reflect elementary considerations of humanity”. And also “the minimum rules applicable to international and non-international conflicts are identical.... The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions.” In the present case it concerns (participation in) torturing, which is explicitly mentioned both in article 3, opening words, and sub 1 under a, and in article 147 (Fourth convention) in so many words.

This results into the fact that the imputed conduct therefore should be considered as a gross violation of the material norms of the international humanitarian law in international as well as in non-international armed conflicts (be it that in the latter case conventionwise this may not be described as ‘grave breaches’). In so far there is – also in the opinion of the defence - no difference as to the nature of the conflict.

5.2.3 In relation with the obligations of the parties of the convention to maintain the material norms of the international humanitarian law, the following conventions do make a distinction. Article 145 of the Fourth Conventions reads as follows:

- [1] The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
- [2] Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
- [3] Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
- [4]

The court of appeal understands this provision in such a way that the first two paragraphs of this article impose the obligation of penalization as well as of detection and trial regardless the nationality in case of ‘grave breaches, but that with regard to other violations (as in the case of article 3) there is ‘only’ the obligation to combat these without describing the way in which this should be done. By itself the text of the convention leaves open the possibility that also in the case last referred to, criminal law to maintain is applied. It appears to be possible to answer the question whether a state is justified to do so, affirmatively, when it concerns the own territory, the own subjects as perpetrators or victims. But in the present case, it concerns a secondarily exercised universal jurisdiction.

The defence has brought up and substantiated with many sources that the Dutch criminal legislation – seen as pertaining to international legislation – does not have such a scope. There are two things opposing that. On the one hand it may be established that the Dutch legislator in 1987 in the parliamentary history of the Implementing legislation anti-torture convention (UFV), also based the applicability of the principle of universality (which in any case was more restrictively explained by the Supreme court) on the extreme difficulty to bear the thought that torturers,, may freely travel to other countries, without being punished, and may be confronted there with their victims who fled abroad”. That is the situation in the present case and could not simply be ‘solved’ by transferring subject to his country of origin (and the scene of the crime) because that might possibly be contrary to the absolute rights guaranteed in the European Convention of Human Rights. On the other hand because the legislator – in any case according to the letter of the law – in article 3, opening words and under 1° of the Criminal War Act laid down that jurisdiction of the (war) crimes as described in articles 8 and 9 of that law, without any clauses. This article (part) reads as follows:

Regardless the stipulations in the Penal Code and the Military Penal Code, the Dutch penal legislation applies:

1o. to anyone who committed a crime outside the Kingdom in Europe as described in articles 8 and 9;

5.3 With relation to the nature of the conflict, the court of appeal, as was the court, is together with the defence and (more implicitly) the public prosecutions department, of the opinion that the combat in Afghanistan during the eighties of the last century primarily concerned a non-international armed conflict taking place between the regime in Kabul and the 'Mujahedin' who – also armed - rebelled against that. It is true that this regime was also supported by Russian advisors and parts of the army (who also participated in the battles), but in the judgment of the court of appeal does not negatively affect the primarily non-international character of the combat. An international armed conflict is in the first place characterized by the fact that the conflict is taking place between sovereign states; the court of appeal refers to article 2 of the Fourth Geneva convention. As also becomes clear from the statements used for evidence and the reports of the expert-witness [expert-witness], this was absolutely not the case.

5.4 Against this background, the court considers the following with regard to the specific defence pleas.

5.4.1 The above argument with regard to article 3 WOS concerns the question whether this statutory provision is in conformance with international law. In order to answer this question, the question whether the Dutch judge, given the division of authorities between legislature and other state bodies, as laid down in article 94 of the Constitution (GW), has the authority to make a decision about that question, should first be asked. Article 94 of the Constitution reads as follows:

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

This provision raises the question whether in the present case the judge has the authority to not apply article 3 WOS. It moreover raises the question whether in (parliamentary) history about the coming into effect of article 3 WOS, there are reference points for a restrictive explanation of that article of the law – with respect to its clear wording –, and the conclusion that this article does not provide secondary universal jurisdiction as argued by the defence in the present case.

5.4.2 As seems to have widely been accepted, article 94 Constitution does not allow the judge to compare to international law. This interpretation of the law was laid down in the Nyugat II ruling by the Supreme court on March 6, 1959 and has (also) formed the basis of the Revision of the constitution of 1983 and is also expressed (a contrario) in the text of this article of the constitution. In the opinion of the court of appeal no, in any case no sufficiently legal aspect can be derived from the stipulations of the Geneva conventions, which makes it explicitly clear that article 3 WOS is contrary to the international law pertaining to these conventions. The defence of co-suspect [co-suspect] did refer to the general rule pertaining to international law that universal jurisdiction may only be exercised in as far as the international law authorizes this and argued that such an authorization with regard to violations of the common article 3 (in the case of non-international armed conflicts) cannot be found in the Geneva conventions; when asked, counsel confirmed that such a rule pertaining to international law cannot be found in any written provision of a treaty. Being such the state of affairs, the court of appeal does not consider itself competent to compare article 3 WOS to the – obviously unwritten – international law. Also the national prosecution is bound in its follow-up decision to comply with article 94 GW; also for that reason the complaints that the national prosecutions service exercises its right of prosecution in violation of international law, cannot be upheld.

The defence of co-suspect also argued in rejoinder that pursuant to article 8 Penal Code the applicability of the regulation of the jurisdiction in articles 2 through 7 "is restricted by the exceptions recognized in international law" and that article 8 pursuant to article 91 (Penal Law) also applies to the WOS. Not even considering the question to which exceptions pertaining to international law this refers (in the opinion of the court of appeal: the immunity) and not considering which meaning should be given in this connection to the opening words of article 3 WOS, the court of appeal is of the opinion that article 8 Penal Code should not put aside the Constitution when explaining article 3 WOS.

5.4.3 The court of appeal points out that, against the background of the afore concluded prohibition of comparing, according to the explanatory memorandum to the UFV (see note 2, p. 4) that the legislator in 1987 obviously already was of the opinion that "torture committed in the case of internal or international armed conflict, constitutes a violation of the laws of the war, penalized in article 8 of the Criminal War Act." The regulation of punishability (and of the jurisdiction) of torture in the WOS concerned in his opinion also the violation of the common article 3. This regulation seems rather far-reaching; thus stated the (then) advocate general Van Dorst in his conclusion (§ 10) preceding a decision of the Supreme court dated November 11, 1997 NJ 1998.463 (Knesevic II) that our country has an exceptional position not only because it penalizes 'grave breaches', but also less serious violations, with universal jurisdiction. Support for the establishment of secondary universal jurisdiction (not trial by default) may however be found in the development of the conventional law after the Second World War, as this is represented in separate points of view of judges in the decision of the ICJ on February 14, 2002 in the case Yerodia (Congo vs Belgium). The ICJ itself did not get to answer to question about the legitimacy pertaining to international law of the (unrestricted) universal jurisdiction exercised by Belgium 'in absentia' in view of the ultra-petita provision.

5.4.4 The court moreover establishes, with regard to the history of the formation of the Criminal War Act, that – as analyzed by the Supreme court in its Knesevic II ruling – the legislator at the time had the absolute intention to fully comply with the conventional obligation of the Geneva conventions. The main thought then was – as has to be admitted to the defence – especially the obligation to penalize "grave breaches, which against the background of the then very recent worldwide conflict should not be surprising. From the verbal treatment of the legislative proposal (pp. 2247 and 2251) it however also becomes clear that (also at that time) the

possibility was kept open that crimes committed in a non-international armed conflict (this was about the coup d'état in Bolivia) would be dealt with in this country. Whatever it may be: the court of appeal concludes from the following legal grounds in the latter ruling of the Supreme court that it should be accepted that also in case of violations of the common article 3 there is jurisdiction:

6.1 In the disputed ruling, the Court of Appeal has obviously based itself on the fact that the offences described and further detailed in the [...] demand referred to, if proven, are acting contrary to the common art. 3 of the Red Cross Geneva Conventions of 1949 and on the basis thereof result in the crime described in art. 8 WOS. That judgement is not disputed in cassation so that when judging the assumed legal grounds. 6.2 The legal grounds obviously aims at showing that the Court of Appeal has incorrectly judged that with regard to the demand to institute a judicial preliminary investigation, the Dutch judge has jurisdiction to rule about the offences mentioned.

6.3 Given the facts that have been considered above under 5.3, art. 1 WOS should be interpreted in such a way that the stipulations of that act, among which the opening words of art. 3 and under 1° as well as articles 10, 10a and 11 are always applicable to the crimes as described in articles 8 and 9, without the restrictions mentioned in the first, the second resp. the third paragraph of that article 1.

6.4 Therefore the Court of Appeal has correctly considered that with relation to the facts stated in the demand to institute a judicial preliminary investigation, the Dutch judge has jurisdiction.

The court of appeal recognizes that the decision described in the demand related to offences that had been committed in the former Yugoslavia in 1992, but does not see any reference point for the assumption/statement that these considerations about the jurisdiction would not also apply to the offences committed 10 or 15 years before that, which is true in the present case.

The above leads to the fact that the defence plea as described under a) in relation with the lack of jurisdiction should be rejected. The court of appeal again underlines that – also in view of the adagium ‘aut dedere aut punire’ – in the present case it concerns the exercise of secondary universal jurisdiction. And the interest of the presence of suspects in the territory of the prosecuting state is also underlined in the explanatory memorandum to the International Crime Act.

5.4.5 Also the statement under b) that the WOS (at the time) did not relate to violations of the common article 3 of the Geneva convention and that the abolition of the lapse of time for such offences does not apply, should be rejected on the basis of the same grounds.

5.4.6 In relation with the statement of the defence under c) that the writ of summons should be annulled because the nature of the conflict and the protected status of the alleged victim have not been included and (actually) substantiated in the charges, the court of appeal considers the following.

The demand made cannot be derived from the description of the offence in article 8 in conjunction with 9 WOS, because these ‘only’ penalize the “violations and customs of the war. The meaning of those laws and customs of the war becomes clear from (among other things) the Geneva conventions. As indicated above under 5.2.2 does the present case concern an accusation regarding a material norm, which is applicable independent from the nature of the conflict. The criticized indictment points at both types of conflict – in its reference to the provisions of the convention concerned. Although it may not be excluded in advance that an explicit alternative indictment would provide more clarity, the court of appeal does not see that the indictment fails in this aspect. In no way has it become plausible that suspect has been restricted in (the preparation of) his defence by the way the indictment was drawn up. With regard to the protected persons their description has been included in the common article 3 of the indictment in the passage about persons who not directly participated in the hostilities (to wit citizens or staff of the armed forces who had put down the weapons or those who had been put out of action; moreover, the explicitly prohibited practices were actually described in those articles, whereby also the circumstances relevant to the criminal qualification in accordance with article 6 WOS have been mentioned.

In the case of an international armed conflict article 147 of the Fourth Geneva convention only mentions offences “committed against persons protected by the convention”. In that convention the protected persons are described in article 4: “persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

The court of appeal concludes – together with the defence – that this description is missing in the indictment. Because the court of appeal has judged the conflict to be non-international, the inquiry into the possible consequences because the indication is missing, may be omitted. Also in this case it has in no way become plausible that suspect has been restricted in (the preparation of) his defence by this way of charging.

5.4.7 The court of appeal established with regard to what has been stated under d) that the opening words of the indictment do indeed cover a rather large period (June 1, 1979 through December 31, 1989), but that this period – in as far as this is still under discussion – in the case of Mohammad Alem is limited to two months around the turn of the year 1985/86. In the case of [victim 1] this was not the case. On the basis of his statement it may be assumed that he has been detained during a considerable period, from September 1979 till some time in 1986. The file has moreover shown that he, together with Ustand Aurang, was detained in the military KhAD. In view of this the court of appeal is of the opinion that (also in the case of [victim 1]) the argument of not sufficiently specifying the identity of the alleged victim based on a reasonable demand, and that the defence – also in view of the contents of the file – has not unreasonably been restricted in her interests. Given the statements made by suspect about a possible

alibi, he has very well understood around what point in time [victim 1] would have been tortured according to the person making the statement of the indictment. The same is true for the complaints in relation with the indication of the location of the charges. The defence plea is therefore rejected.

5.4.8 Because the court of appeal concludes that the primary charge has been proven, it will not take into consideration the argument under e), which refers to the alternative charge.

6. Discussion of the other defence pleas

6.1 The defence has brought up that the prosecution of the public prosecutions department should be declared inadmissible and/or that the evidentiary material should be excluded because it was illegally obtained. The defence brought up the following arguments which have been stated succinctly below:

- a. by making use in the present case of the statements suspect made during his procedure with the IND, the public prosecutions department has acted contrary to the *meno tenetur* principle of article 6 ECHR, shortly described meaning that nobody should be obliged to cooperate in his own sentence;
- b. the IND has, contrary to the privacy of suspect, to wit contrary to the confidentiality of his statements as promised to suspect, submitted his IND file to the police as evidence. Therefore article 8 ECHR has been violated.
- c. the principle of equality of arms, as included in article 6 ECHR has been violated because the defence did not have sufficient time and facilities to properly prepare the defence.
- d. high amounts paid to witness must have had an influencing effect.

The court of appeal rejects these defence pleas on the basis of the following considerations.

6.2.1 In relation to the defence plea referred to under a), the defence has said that the statement made by suspect to the IND in the framework of judging his request for asylum, should be considered as to have been made 'under pressure' and therefore could not be used in the prosecution of suspect. In order to substantiate that statement the defence appealed to legal precedents of the European Court for the protection of human rights (ECHR) and especially to the decision of December 17, 1996, NJ 1997, 699 re Saunders vs UK.

The following has been established with regard to what was stated there.

6.2.2 Suspect submitted requests for admission as a refugee as well as for a residence permit on May 31, 1996. Suspect was given the opportunity on June 7 and 10, 1996 to give a further explanation to these requests and he was questioned for this purpose by a staff member of the IND – which is not an investigative service in a criminal sense. On August 26, 1996 the refugee status was granted to him.

6.2.3 Suspect was again questioned by the IND on January 7, 1999 in view of the serious suspicion that in the function he held in Afghanistan he might possibly be guilty of violations of human rights. Before the IND started these interrogations, the importance of the interrogations was explained to suspect and he was also requested to tell the truth.

On the basis of the statements of suspect and after an inquiry carried out by staff members of the Ministry of Foreign Affairs and the IND subsequently a decision was taken on July 31, 2000 – summarizing – not to grant a residence permit and to deny the refugee status to him. According to the decision the reason was that there were serious reasons to assume that suspect had committed war crimes and/or crimes against humanity as described in article 1F of the Convention on Refugees. The so-called 1F decision was subsequently sent by the IND to the public prosecutions department with the request to check whether suspect should be subjected to criminal prosecution. By letter of November 8, 1997 the then deputy minister of justice informed the second chamber that, given the obligation pertaining to the convention and the moral obligation of The Netherlands as further elaborated in that letter, the public prosecutions department would be informed about all decisions that had been rejected (also) on the basis of article 1F Convention on Refugees.

On December 2, 2003, an initial report was drawn up in order to institute a criminal investigation into suspect's co-suspect [co-suspect]. Statements made during that inquiry led to the institution of a criminal investigation into suspect. In the beginning of December 2004 suspect was arrested and was subsequently questioned by the police various times.

6.2.4 During the interrogations of suspect investigative officials have made use of - in the meaning of reminded of, confronted with and continued on - the contents of the statements which suspect made to the IND. Neither during the court session in first instance nor during the court session in appeal has suspect specifically been confronted with the statements he made to the IND. In first instance he was only confronted with a summary of the contents of those statements during the court session. Both during the court hearing in first instance and in appeal suspect has mainly appealed to his right to remain silent.

6.2.5 Against the background of the above the question should be answered with reference to said argument of the defence whether

during the IND procedure that suspect has gone through, suspect has been forced to cooperate as described in the Saunders verdict of the ECHR. And subsequently whether – if that would be the case – the information obtained may be used in the criminal procedure. In the case to which this ruling referred, the person involved had been obliged, on penalty of prosecution with regard to a criminal offence comparable to ‘contempt of court’, to answer the questions in the framework about a – non-criminal – financial-economic audit.

It should first be said that with regard to the IND procedure, as it was in the Sanders case – which suspect went through, that this was not a procedure to which article 6 ECHR applies, nor was it a procedure that may be taken into consideration for prosecution purposes. Therefore the IND did not have the obligation, in the opinion of the court of appeal, to point out to suspect the danger of criminal prosecution if suspect in one way or another would incriminate himself.

6.2.6 In the opinion of the court of appeal that is not different with regard to suspect’s IND interview on January 7, 1999. Only after July 2000, suspect’s 1F file was sent to the public prosecutions department and it has not become plausible that any investigative official was in any way involved in that interview. Anyway, this does not change the fact that the IND themselves may have suspected that suspect had been involved in serious (war) crimes.

6.2.7 In the opinion of the court of appeal there, during his IND procedure that suspect went through, no pressure was exerted on suspect by threatening him with criminal prosecution, to make statements, as was the case in the Saunders case. Anyone who voluntarily subjects himself to the IND procedure and grants cooperation therein by making statements, is not doing so ‘under pressure’ of criminal prosecution. In the opinion of the court of appeal it does not make any difference that, if the person involved has to ‘go through’ a procedure in order to be admitted and to obtain a residence permit, he in that case is actually forced to (further) cooperate in (parts of) that procedure, nor does it make a difference that complying with those obligations may also be sanctioned and that the final consequence of non-cooperation may be not granting the requests made by the person concerned. Neither does it make a difference that the person who requests admission and a residence permit may feel obliged to cooperate in order to reach his objective.

6.2.8 In as far as a different judgement should be made, the court of appeal is of the opinion with regard to the question if in the present criminal case, the information submitted through the IND interviews, may be used in the criminal case, that the use of that information definitely was entirely from the way in which that was done in the Saunders case. In the latter case, the person involved was confronted – in the (jury) trial during three days - with statements he made during the audit inquiry. In the case of this suspect, the IND investigation has been used in the preliminary investigation, to wit by the persons who had questioned him. The court of appeal moreover points out that the self-incriminating elements from the IND statements concerned in essence are limited to information with regard to the very high position of suspect at the time in the military information service of the regimes concerned. What happened in that service and what was the reason for the present criminal prosecution was or became – gradually – (more and more) clear from other sources.

The court of appeal moreover remarks that it has not become plausible that the public prosecutions department and/or the criminal law officials operating under its responsibility have had any steering influence with regard to the IND interviews and/or that those IND interviews took place (also) in view of criminal prosecution of suspect.

Not in the last place would the court of appeal like to point in this connection at the considerable lapse of time as related above between the IND interviews and the start of the criminal investigation, and the statements suspects made in that connection to the investigative officials.

6.3.1 With regard to the defence plea under b), it has become plausible that suspect was informed by IND staff members that his statements made to the IND would be treated confidentially. The court of appeal recognizes that the concept ‘confidentiality’ has not clearly been defined. However, the court of appeal does not consider that it has become plausible that promises were made to suspect relating to a criminal investigation. Such contrary to the state of affairs referred to by his counsel in the ‘Koningskoppel’ case which led to the ruling of this court of appeal of March 5, 2002, LJN AD9816. Based on the general promise made to him, suspect by himself might have derived the confidence that the personal information he issued would not merely be made known to other authorities. Afterwards, however, his IND file has been handed over to the public prosecutions department. The court is therefore, together with the defence, of the opinion that this handing over of the criminal file violated suspect’s right to a private life as described in article 8 ECHR. Therefore the court of appeal should establish whether (1) there was a legal basis for this breach and (2) whether the breach was proportional.

6.3.2 (ad 1) The defence has not denied the judgement of the court – which the court of appeal adopts – that at the time of the handing over of suspect’s IND file to the public prosecutions department, there was a legal basis for that handing over.

(ad 2) The court also shares the judgement of the court that in this case there was an urgent necessity for the breach of privacy of suspect and also points in this connection at the earlier mentioned letter from the deputy minister of Justice of November 8, 1997.

Also in the opinion of the court of appeal, a correct weighing was made of the interest of punishment and/or about the handing over or extradition of persons with regard to whom there were serious reasons to assume that they had committed very grave (war) crimes and the way in which the right to privacy had been violated. In the opinion of the court of appeal it does not make any difference, especially in view of the aforementioned letter of the deputy minister of Justice, that it has not been established that this weighing also explicitly in the specific case of suspect, did take place. In this connection the court of appeal would also like to point at the earlier-mentioned leading position of suspect in said information service.

6.3.3 The defence has pointed out that in the framework of the present criminal investigation also an inquiry has been made into and in IND files of others than suspect, without parties involved having given permission to do so. In the opinion of the court of appeal, no appeal can be made to the fact that the privacy of others was violated – whether or not in a justified way – because this does concern suspect's privacy. Other than the argument of the defence, a legal rule prohibiting application in this case of the so-called *Schutznorm*, cannot be found in any decision made by the EHRM, neither has such a legal rule become clear to the court.

6.3.4 The defence has furthermore argued with regard to the use of IND files that – contrary to the stipulations of article 152 of the Code of Criminal Procedure – the reporting of the investigation into and screening of IND files by investigative officials has not been sufficient. In the opinion of the court of appeal the report referred to indeed contains little specific information about the exchange of information between the IND and investigative officials. This has, however, sufficiently been compensated by the circumstance that the defence has been able to interrogate several officials about this. Therefore the court of appeal, in relation with the IND files, does not see any reasons to remove these from the files in the present case.

6.4 Different from what the defence has argued under c), the court of appeal is of the opinion that the defence in the present case has had sufficient time and possibilities to prepare the defence. In this connection the court puts first that the trial against this suspect should be conducted based on the rules and regulations of the Dutch Code of Criminal Procedure and other relevant Dutch regulations. This does not change the fact that except for the presence of suspect, a co-suspect and several witnesses in the country, there were hardly any reference points available in The Netherlands in order to arrive at the truth. Also later in this ruling we will further go into the complications in connection with that conclusion. The circumstance that further investigation should have been made abroad and especially in Afghanistan, does not mean that the defence in a case like the present one should be granted extra facilities – as might be possible in other countries and when judging is made by international courts – outside and/or in deviation of the Dutch regulations. In the opinion of the court of appeal, the defence has, in this case, which has been taking more than two years already – had more than sufficient possibilities to put forward their investigative wishes and - dependent on assessment by the court and court of appeal of the legal criteria – to realize this. Some witnesses have been questioned during the court session, the examining magistrate has questioned many witnesses both in first and in second instance, in some cases even in both instances, especially also – during four rogatory visits – in Afghanistan. The defence, besides a few exceptions, has had the necessary participation in this. Nevertheless the defence stated, also in appeal, that there has been insufficient time and opportunity to prepare the interrogations and to possibly hear and present persons able to give disculpatory statements as witnesses, in Afghanistan. Although the court of appeal recognizes that the circumstances under which persons were questioned in Afghanistan were not optimal, it does not follow the defence to such an extent that in its opinion it may not be said that the defence has not been able to sufficiently prepare the interrogations made by the examining magistrate. Furthermore, in the opinion of the court of appeal, has the defence, based on the accusations about the conduct of suspect (now) as well as the persons to be indicated in that connection by suspect himself, been sufficiently able, also with the assistance of the extra resources assigned to the defence in first instance, to present relevant and possibly disculpatory statements.

6.5 Counsel argued under d) that the public prosecutions department should be declared to be inadmissible because witnesses, especially those in Afghanistan, have been paid such high amounts that this must definitely have had an influential effect. It has become plausible to the court of appeal that in relation with the level of income in Afghanistan and in relation with the compensations paid by an international tribunal in the course of this case relatively high reimbursements for expenses have been paid and also been promised to witnesses there, to wit 100 dollars. The court of appeal would like to remark that these amounts have been reduced during the last rogatory visit to Afghanistan. However, it has not become plausible to the court of appeal that witnesses to a great degree were willing to make statements on the basis of that compensation. It has not become plausible in any way that the reliability of the statements of the witnesses who received that amount as reimbursement was influenced by granting them this reimbursement of expenses. Therefore this defence plea is rejected.

6.6 Because of the above considerations, the court of appeal is of the opinion that investigative officials and/or the national prosecution have not violated any principle of due process by which intentionally or with grave violation of the interests of suspect his right to honest treatment of his case has been affected, neither has there been any wrongful collection of evidence. Also otherwise the present case against suspect has been a 'fair trial' in the opinion of the court of appeal.

7. Consideration with regard to the request of the defence with regard to the witness [victim 2].

In rejoinder the defence has requested to again question the witness [victim 2] during the court session. On that occasion was brought up, stated succinctly, that during his last interrogation on January 9, 2007, there has not been opportunity to ask questions that had been submitted by counsel.

The court of appeals has the following considerations about this.

The examining magistrate has questioned this witness on, successively, May 30, 2006, July 2, 2006, July 5, 2006 and January 9, 2007. These interrogations were partly attended by counsel. Especially during the interrogations on May 30, 2006 and July 5, 2006, counsel has had (ample) opportunity to question the witness. After terminating the interrogation on July 5, 2006, counsel of co-suspect [co-suspect] has reserved the right about some issues (with which counsel obviously intended: administering surges during questioning) to ask additional questions at a later time. Counsel of suspect has joined her at the time. The court of appeal has therefore considered it opportune that the witness was again questioned during a rogatory visit, so that the remaining questions of the defence could be asked to witness.

That interrogation has taken place on January 9, 2007 and because of the circumstances (among other things the much delayed arrival of witness) was shorter than had been planned. After counsel of co-suspect had asked a (considerable) number of questions, the examining magistrate stopped the interrogation in view of the emotional situation of the witness at that moment, because, according to him, he felt threatened. The questions submitted by counsel had not yet been asked at that moment.

The court of appeal is willing to admit to counsel that possibly a number of the questions raised by the defence have not been asked to the witness but the court of appeal is also of the opinion that that does not change the circumstance that the right of the defence to questioning has been exercised to a considerable degree.

Considering the above facts and circumstances, the court of appeal is of the opinion that it is not necessary to question (have) the witness (questioned) [victim 2] another time.

Therefore the court of appeal rejects the request.

8. Declaration of the charges proven

The court of appeal deems legally and convincingly proven that suspect committed the offences he is charged with on the understanding that:

He, at points of time during the period of September 01, 1979 through December 1989 in Kabul, in Afghanistan, jointly and in conjunction with others, (again and again) has violated the laws and customs of the war, one of those offences has resulted into grievous bodily harm of another person and that those offences (again and again) involved acts of violence with joint forces against a person, which consisted of the fact that suspect and his co-perpetrator(s) then and there have committed (various times) physical acts of violence and cruel and inhuman treatment and torture with regard to persons who (at the time) were not directly participating in the hostilities (to wit citizen(s), to wit [victim1] and [victim 2] and [victim 3] as a member of the (military) information service (Khad-e-Nezami) of Afghanistan, belonging to one of the combating parties in a non-international armed conflict on the territory of Afghanistan, contrary to the stipulations of the 'common' article 3 of the Geneva Conventions of August 12, 1949, which physical acts of violence and the cruel and inhuman treatment and torture among other things consisted that suspect jointly and in conjunction with his co-perpetrator(s),

* during the period between September 1, 1979 through December 1979 in the building of the Khad-e-Nezami
- attached electricity wires to the body of [victim 1] and (subsequently) administered electric current to the body of the aforementioned [victim 1] through the aforementioned electricity wires and
- various times (again and again) hit the aforementioned [victim 1] with one (or more) stick(s) and/or (one) other hard object(s) on or against the body and
- once tore out a nail of the toe of the aforementioned [victim 1],
as a result of which the aforementioned [victim 1] has suffered pain and bodily injuries and

* at one (or more) point(s) in time in or around the period between December 1, 1985 through February 1, 1986 in (or near) the building of the Khad-e-Nezami in Kabul,
- various times, in any case once kicked [victim 2] against the shin-bone and kicked and hit him on the body and

* during the period between November 1, 1979 through December 31, 1979 in the building of the Khad-e-Nezami in Kabul,

- various times, in any case once (again and again) hit [victim 3] on the head with a hard object and
- hit the aforementioned [victim 3] (with sticks) on the back and the buttocks and
- attached electricity wires to the toes and fingers of the aforementioned [victim 3] and (subsequently) administered electric current to the body of the aforementioned [victim 1] through the aforementioned electricity wires and
- pushed the body of the aforementioned [victim 3] forcibly to the floor,

as a result of which the aforementioned [victim 3] suffered pain and bodily injuries.

The offences which furthermore or differently were charged, have not been proven. Suspect should be acquitted of those charges.

In as far as there are language or spelling errors in the indictment, these have been corrected in this judicial finding of the facts. According to what has been discussed during the court session, suspect has not been damaged in his defence because of that.

9. Argumentation

The court of appeal bases its conviction that suspect has committed the offences which have been considered to be proven on the facts and circumstances which are included in the evidentiary material and which give reason to declare the charges proven.

In those cases in which the law requires the ruling to be supplemented by evidentiary material and/or, in as far article 359, third paragraph, second sentence of the Code of Criminal Procedure is applied, with a listing thereof, such will be done in a supplement which will be attached to this ruling as an enclosure.

10. Further evidential considerations

10.1 The court of appeal puts first that the present criminal case is characterized by a number of special facts and circumstances which deserve further consideration. In the first place does the indictment contain facts that have taken place a long time ago, which has had a considerable influence on the investigation (especially to trace the witnesses of which not many are available anymore) and subsequently the memory of these witnesses. Moreover, the offences have taken place in a non-western country which has few similarities in the cultural, technological economic and sociological aspects with the Dutch situation and which moreover was internally torn up, as it still is today, by drastic political and (therefrom resulting) armed conflicts. Especially these circumstances have seriously hampered the investigation in this case in many ways. The unsafe situation in which Afghanistan still finds itself today resulted in a number of cases into an obstacle for hearing witnesses over there in the presence of counsel and to perform further investigation. Moreover the written sources were only available in a limited way because of the poor Afghani infrastructure. Taking all these facts and circumstances into consideration, the court of appeal will exercise a high degree of caution when judging the evidence present in this case.

10.2 Counsel has argued in his plea that the statements of a number of witnesses cannot serve as evidence because they are incorrect and not reliable. For that reasons he has argued with regard to successively the witnesses [victim 1], [victim 3] and [victim 2], stated succinctly, that their statements are inconsistent and that it can be shown that they are incorrect and mutually influenced, that the origin of the information given by them is not verifiable (otherwise, for instance by any original document dating back to this period), that the origin of the injuries they suffered can neither be verified and that when they made their statements, they were influenced by the interrogating reporting officials and by the high amounts which witnesses received for making their statements. Moreover counsel argued that suspect was injured during an attack on June 24, 1979 and that as a result thereof he was in hospital at the time of the charges.

10.2.1 The court of appeal establishes in this framework in the first place that the statements of said witnesses result sometimes in less concrete information than desirable and/or sometimes contradict each other, but the court of appeal is of the opinion that it here, also in view of the dramatic events to which witnesses refer in their statement and about which they certainly made unambiguous statements in essence, the discrepancies to which counsel refers may very well be deduced from loss of memory caused by the considerable lapse of time and, in the case of the witness [victim 2], (strong) emotions because of trying to memorize events which were dramatic for the witness, without that essential parts of statements should be considered to be incorrect or unreliable. For instance, different from the argument counsel put forward, it may definitely be concluded from the statements which role suspect has played in these incidents without that it has become plausible – as counsel actually argued – that one or more of said witnesses (intentionally) wrongly accused suspect of being the one who was involved in the tortures that he suffered.

10.2.2 In this connection the court of appeal refers to the statement of [victim 1], made to reporting officers Houwen and De Jong on July 27, 2003 (item of evidence 9, where in answer to the question: “Do you know the names of your torturers?”), he states among other things: The director of Tahqiq (investigation) was Major Habibullah Modir. On December 19, 2004 he states to reporting officer Tjeerde by phone (item of evidence 10) to have personally been tortured by Habibullah and from his statement of September 15, 2005 to reporting officers Van Dee and Tjeerde (item of evidence 11) it may be concluded that in the KAM he had been hit with

sticks in turns by suspect and by two other persons.

In coherence with the above, the statement of suspect himself, made on December 2, 2004 to reporting officers Limpers and Tjeerde (item of evidence 26) is important. Suspect states there that he was the head of the interrogations department of the military KhAD (the court of appeal understands: previously KAM) from 1979 till the coup d'état of Tanai in 1990 and that in that position he had to control the work of the interrogators, among other things by being present for some time during those interrogations and, if necessary, to instruct the interrogator how to do the work. In his interrogation on December 3, 2004 (item of evidence 27) he furthermore states: "I was Modir Habibullah. We do not write a name. In Afghanistan there is a public servant and his superior is the head, the Modir. If they talked about Modir Habibullah, then that was me at the time".

In the end of that same interrogation suspect is asked the question: "We are asking you if torturing took place at the KAM at the time of Amin (the court understands: the period between 1978 through December 1979) when you worked there, whether you were present or not?" He then answered: "Yes, that did happen".

10.3 Furthermore, it has not become plausible that the witnesses, when making their statements, were influenced by the interrogating officers. The circumstance that the latter, as the court of appeal assumes, in view of the desired efficiency and the specific characteristics of this case, where appropriate gave some steering to the interrogation, does not affect this conclusion. Neither has it become plausible that the witnesses were led by impure motives; the single circumstance that witnesses whether or not in an organized connection, know each other personally and still maintain personal contact, does not simply make it plausible that they influenced each other. As concerns the compensations received by witnesses reference is made to the above considerations of the court of appeal under 6.5. In any case, the court of appeal has not seen any evidence that the witness has lied [witness 1], as argued in rejoinder.

10.4 Counsel has eventually argued that suspect, as a result of an attack on June 24, 1979 at the time of the offences he is charged with, was staying in the hospital, and therefore cannot criminally be held responsible for what happened during his absence in the KhAD-e-Nezami. The offences relating to [victim 1] and [victim 3] did – according to the items of evidence (item of evidence 12) take place during the period of September/October 1979 through December 1979. The offences with regard to [victim 2] date back to the period between December 1985 through February 1986, according to the evidence, and are, in the opinion of the court of appeal reasonably not covered by the defence plea concerned. The injuries suffered by suspect during the attack referred to, according to suspect, a gunshot wound in the upper leg.

It does not seem plausible to the court of appeal that suspect had to spend months in a row in the hospital for such an injury, whereby the court of appeal also takes into consideration the circumstance that the defence has not stated anything about medical complications which might have justified a long stay in the hospital to which suspect is said to have been admitted.

The court of appeal rejects the defence pleas.

11. Penalization of the proven facts

The proven facts are as follows:

Being a co-perpetrator in violating the laws and customs of the war while the offence involves acts of violence with joint forces against a person, committed several times

and

being a co-perpetrator in violating the laws and customs of the war while the offence involves acts of violence with joint forces resulting in grievous bodily harm.

12. Penalization of suspect

No circumstances have become plausible that would exclude the penalization of suspect. Therefore suspect is punishable.

13. Motivation of the punishment

The advocate general has moved to annul the judgement against which appeal was made and to sentence suspect with regard to the primary charges to a term of imprisonment for the duration of nine years, less the period spent in pre-trial detention.

The court of appeal has established the punishment to be imposed on the basis of the gravity of the offences and the circumstances

under which these were committed and on the basis of the person and the personal circumstances of suspect, as shown during the examination in court.

Thereby the court of appeal has especially taken the following into consideration.

Suspect was in Kabul, in Afghanistan during the period between July 1, 1979 through December 31, 1989 at the time of the Soviet supported communist regime and at that time he was the head of the interrogations department of the military information service, the Khad-e-Nezami.

When exercising this position suspect committed, as may be considered proven, very grave offences with regard to three victims, to wit being a co-perpetrator in violating the laws and the customs of war.

The file has shown that one of his victims was hit and that one of his toenails was pulled out. Also electricity wires were attached to this victim's body after which electric current was administered through these electricity wires.

Another victim was kicked and hit and had to stand outside for days while it was cold outside. He was also kept awake for days on end. Fingers of this witness were also put between a door and the frame belonging to that door after which the door was forcibly closed. Thereupon one of these fingers was cut off without anaesthesia.

Also the third victim was hit. Moreover, he was forcibly put to the ground also in the case of this victim were electricity wires attached to his body, after which electric current was administered through these electricity wires.

All this took place with the obvious intention to see to it that the victims, political opponents of the ruling regime, made a "confession".

The file has also made it plausible that these offences formed part of a fixed pattern of acting within the department of the (military) information service which was headed by suspect.

As has already been shown from the file, the above-described activities resulted in extremely dramatic and traumatic (mental) consequences to the victims which, as it now appears, are permanent.

The proven offences are, besides genocide and the crimes against humanity, considered as 'the gravest crimes which give reason for concern to the whole international community' (explanatory memorandum to the International Crimes Act, parliamentary documents II, 2001-2002, 28, 337, no. 3, page 1).

The war crime torture raises indignation and worry at a large scale, worldwide; this also shocks the international legal order. It moreover affects the Dutch legal order because suspect by fleeing to The Netherlands became part of the Dutch society. Many persons now also form part of that society who have been confronted with the atrocities of the armed conflict and the acts of violence committed by the organization in which suspect held a high position.

The way of acting of suspect, which signifies a flagrant denial of the universal respect which should be observed for the human rights and the fundamental freedoms, shows a high degree of a reprehensible lack of respect for the dignity of humanity.

The court of appeal furthermore holds suspect responsible for the fact that during the hearing in appeal he did not in any way show that he recognized the reprehensibility of his conduct.

In the opinion of the court of appeal the gravity of the proven offences justifies by itself to impose an unsuspended term of imprisonment of a longer duration than the one imposed by the court in first instance. The court is thereby especially thinking of remedy and satisfaction for the victims and their surroundings, the marking of the interests of the humanitarian norms which are at stake and general prevention.

However, the court of appeal has also taken into consideration the advanced age of suspect, the circumstance that the possibility of re-offending has become negligible and that the offences were committed quite some time ago, so that a term of imprisonment of the – considerable - duration mentioned below will suffice

14. Applicable legal provisions

The court of appeal has taken into consideration articles 47 and 57 of the Penal Code and article 8 (old) of the Criminal War Act.

15. DECISION

The court of appeal:

Annuls the sentence against which appeal was lodged – in as far as subjected to the judgement of the court of appeal – and again decides upon the case.

Declares proven that suspect committed the primary charges as described above.

Declares not proven the offences which had otherwise or differently been charged and acquits suspects of these offences.

Establishes that the proven facts results in the above-mentioned criminal offences.

Declares that suspect is punishable with regard to the proven offences.

Sentences suspect to a term of imprisonment for the duration of NINE YEARS.

Establishes that the period which suspect served in pre-trial detention before the execution of this ruling, will be reduced when executing the term of imprisonment imposed, in as far as that period has not yet been reduced from another sentence.

This judgement has been rendered by justices Oosterhof LL.M., Aler LL.M. and Heemskerk LL.M. in the presence of the clerk of the court Mr. Jans LL.M.

It was pronounced during the public court session of the court of appeal on January 29, 2007.

The undersigned, Johanna H. Reule, translator of the English language, sworn in by the District Court of The Hague, hereby declares that the above seventeen pages are a true and accurate translation of the original document in the Dutch language.
Zoetermeer, February 27, 2007