

**LJN: AV1163, Rechtbank 's-Gravenhage , 09/751004-04**

Datum uitspraak: 14-10-2005  
Datum publicatie: 09-02-2006  
Rechtsgebied: Straf  
Soort procedure: Eerste aanleg - meervoudig  
Inhoudsindicatie: [...] The punishment to be imposed is based on the articles: - 47 and 57 of the Netherlands Criminal Code - 1 of the Torture Convention Implementation Act - 8 and 9 of the Criminal Law in Wartime Act [...]

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**Uitspraak**

THE HAGUE DISTRICT COURT  
SECTION CRIMINAL LAW

THREE-JUDGE SECTION

Public prosecutor's office numbers 09/751004-04 (writ of summons I);  
09/750006-05 (writ of summons II)

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 lawyer Mr M. Pestman LL.M. and Mr L. Zegveld LL.M., both lawyer in Amsterdam, appeared in court and was heard.

The public prosecutors Mrs Polescuk LL.M. and Mr Teeven LL.M. have demanded the suspect to be acquitted relating to what he has been charged with in the writ of summons I under 2 (principally) and the suspect to be sentenced to 12 years' imprisonment less the period spent in pre-trial detention, relating to what he has been charged with in the writ of summons I under offence 1 (principally) and offence 2 (alternatively) and relating to the charge in the writ of summons II.

The public prosecutor furthermore demanded that out of the objects as appearing in the list that were seized but not returned - hereinafter to be referred to as list of seizure, of which there is a photocopy, marked C, attached to this judgment - objects numbered 3 to 8 that were seized from the suspect shall be returned to the suspect and furthermore that the objects 1, 2 and 9 to 15 that were seized from the suspect shall be deposited.

The charge.

After amendment of the charge in court the suspect is charged with what has been mentioned in the inserted photocopy of the writ of summons, marked A and of the demand of amendment of charge, marked A1 and A2.

The Public Prosecutions Department being allowed to prosecute and the legitimacy of the evidence (Article 6 and 8 ECHR).

The lawyers have set up a defence on behalf of the suspect that the Public Prosecutions Department should be barred the 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;
- the principle of equality of arms has been violated because the defence did not have enough time and facilities to prepare the defence and
- the right to cross examination has been violated; especially the right to be able to examine the witness [A. G. T.].

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 its entirety 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 24 September 1992 the suspect submitted applications to be admitted as a refugee and to be granted a residence permit. On 5 October 1992 and on 1 and 8 March 1993 the suspect was given the opportunity to explain these applications and to this purpose he was heard by an official of the IND. 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 applications of the suspect were subsequently rejected by decision of 1 February 1994. As appears from the decision the reason for rejection was that there were serious reasons to suppose that the suspect had been guilty of war crimes or crimes against humanity, as described in Article 1F of the Convention on Refugees.

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 4 September 2000 the IND sent the "1F"-decision with respect 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 with the suspect. Some of these conversations relate to the suspect's past, while also referring to "acts of torture". Subsequently on 2 December 2003 an initial official report was drawn up in order to start a preliminary inquiry against the suspect. Eventually the suspect was arrested on 27 November 2004.

#### 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 is in this respect the Court 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 to 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 1992 and 1993, 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 took place not before 2000, there was not a situation in which it can be said that the (further) 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 has been 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. 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.

#### 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. The first time the defence also travelled to this place and has been able to put questions to witnesses (who were incriminating for the suspect). The second time the defence had been invited to be present at the examinations, but it decided not to participate in it for reasons connected with insurance. The text of the examinations has been translated and every time it was put at the disposal of the defence free of charge.

Apart from that the defence has asked for an advance on the basis of the *Wet Tarieven inzake Strafbzaken* (WTS) (Criminal Cases Fee Act) for the purpose of costs of an investigator for the defence. This request was partly complied with. In May and June 2005 the investigator assigned by the defence was in Afghanistan to carry out an investigation. As a matter of fact this investigation did not result in the identification and the calling of further witnesses for the defence.

Furthermore the Court establishes that from the beginning the suspect was granted legal aid through the *Wet op de rechtsbijstand* (Legal Aid Act), that one important witness has 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, laid down in an official report, of a witness who has not been examined by the defence, 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 27 and 28 May 2004 the witness [A. G. T.] was examined by telephone by an investigating officer. The witness made a statement that was incriminating for the suspect. On 6 and 8 August 2004 the witness [A.G.T.] was subsequently examined in Pakistan by investigating officers. Again the witness made a statement that was incriminating for the suspect. During the so-called pro forma hearing of the case on 11 March 2005 the lawyers of the suspect submitted a request on his behalf to examine the witness [A. G. T.]. As a result of this request this witness was examined in Kabul on 9 August 2005 by the examining magistrate. The lawyers of the suspect have not been present at this examination of the witness as they were of the opinion that they were not able to travel to Kabul in connection with insurance problems. The defence did not make use of the examining magistrate's offer to put questions to the witness in writing. Neither did the defence request a video conference, the possibility indicated to them at the end of April 2005 within the scope of the letters rogatory executed in Afghanistan in May and June 2005.

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

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 [A.G.T.] (have him examined).

As regards the witness [A.G.T.] the Court furthermore establishes that apart from being heard by the police he was also heard in Kabul by the examining magistrate and he has made a statement before this examining magistrate. Also during this examination with the examining magistrate the witness has made incriminating statements and statements in line with the statements he previously made before the police.

Apart from that the Court is of the opinion that the statement of [A.G.T.] 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 [A.G.T.] that incriminates the suspect.

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 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 24 September 1992. On 5 October 1992 and on 1 and 8 March 1993 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 the basis of the statements of the suspect and after investigation performed by officials of the Ministry of Foreign Affairs and the IND, the applications of the suspect were rejected by a decision of 1 February 1994, because there were serious 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.

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) and moral obligations of the Netherlands, the Public Prosecutions Department will be notified of all 1F-reports. On 4 September 2000 the IND sent the 1F decision in respect of the suspect to the Public Prosecutions Department with 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 the suspect was informed by the IND officials that his statements would be treated confidentially. Subsequently - although seven years later - 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)<sup>1</sup>. 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.

<sup>1</sup>On 21 September 2001 this Act replaced the Wet persoonsregistratie (Data Protection Act).

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.

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.

The Public Prosecutions Department being allowed to prosecute (jurisdiction with respect to writ of summons 1; offence 1 (principally and alternatively)).

The argument of the defence that it is not possible for the Netherlands to establish universal jurisdiction as regards violations of the common Article 3 of the four Conventions of Geneva of 12 August 1949 because an authorization governed by international law is lacking, is not correct. Apart from the obligation to penalization of the serious violations ("grave breaches") as laid down in Article 49, second paragraph, of the Geneva Convention on the Improvement of the Fate of the Injured and Sick, among the Field Forces, in Article 129, second paragraph of the Geneva Convention on Treatment of the Prisoners of War

and in Article 146, second paragraph of the Convention on Protection of Citizens in Wartime, these conventions also include the obligation to take measures in order to fight other violations of the provisions of these conventions. This obligation has every time been included in the third paragraphs of the aforementioned articles. No legislator will raise objections against the fact that the obligation to add further provisions to the criminal acts is limited to threat of punishment against those "grave breaches", because one did not want to accept this obligation for all, also less grave, violations. It is laid down in the 3rd paragraph of the aforementioned Articles 49, 129 and 146 that the Parties to a Convention should indeed take action against this, however, the way in which is left to the states themselves to decide and can therefore, for instance, comprise disciplinary punishment, although it remains possible also to include provisions against less grave breaches in the national criminal legislation.

Consequently the fact that the Netherlands has opted for applying criminal law when it concerns settlement of the less serious violations of the provisions included in four Geneva Conventions of 12 August 1949 is not in conflict with the law of nations, in view of the order given to the states on the one hand to act against it and on the other hand the freedom given to the states in that respect.

The Court is therefore of the opinion that also on the basis of Article 3 heading and sub 1°, of the Criminal Law in Wartime Act the Netherlands has universal jurisdiction, also when it concerns violations of the provisions of the common Article 3 of the four Geneva Conventions of 12 August 1949 applicable in a non-international armed conflict.

#### Acquittal

On the basis of the investigation in court the Court deems what the suspect is charged with in the writ of summons under 1 (principally) and (alternatively) not legally and convincingly proven, so that he should be acquitted of this.

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 [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 [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 [N.] and with the aid of planes his army inflicted severe losses to the mujahedin. [N.] 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 [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 [S.S.Y.Z.] 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 [M.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 [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 [S.S.Y.Z.] 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 had been locked up by 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 [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 [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 [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 witness in court on 07 October 2005, in so far saying - succinctly stated -:

It was a 27-years' war in Afghanistan.

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 [N.] left at the end of 1992, there has been 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, to such an extent 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:

[M.A.]:

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 [M.A.] 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 [H.J.] 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.

2. an official report of the hearing of [M.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 police report includes inter alia - succinctly stated - the statement of [M.A.] 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).

3. an official report of the hearing of [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 police report includes inter alia - succinctly stated - the statement of [H.M.N.] he made on 03 June 2005:

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

The Court is of the opinion that on the basis of aforementioned items of evidence [M.A.] should be rated among the protected persons as meant in the common Article 3 of the Geneva Conventions of 12 August 1949. When he was arrested he was a citizen who joined, was working for or propagated the range of ideas of a group or of groups that in the armed conflict fought the regime the suspect was part of. It was also because of this (assumed) involvement that he was arrested and tortured.

Grounds in respect of the evidence with regard to the writ of summons 1, offence 2 (principally).

It is the view of the public prosecutors that the suspect should be acquitted of the charge under 2 (principally). However, on the basis of the acts of the suspect under circumstances to be mentioned hereinafter, the Court judges that the cooperation between the suspect and his co-perpetrators has been conscious, close and complete in such a way that with regard to the torture of the victims [W.A.] and [A.G.T.] this concerns complicity.

From the third police questioning it appears that, after conversations (by telephone) with the head of the Ministry of State Security [Y.] and President [N.],

The suspect personally arrested [W.A.] in the beginning of November 1989 and consciously transferred him to the directorate of the Civil Khad. In a worked-out telephone conversation of 15 October 2004 at 15:17 hours (J 0 16, page 668 and the following) the suspect tells the person he is speaking to that the chief of the Civil Khad, [A.G.A.] even called him by telephone to tell that the transfer had been successful and thanked the suspect for the arrest and transfer. Subsequently the interrogators of the directorate interrogations have tortured [W.A.] in the Sedarat prison in Kabul as has been proven.

On 3 June 2005 the suspect affirmed this statement in outline.

By transferring [W.A.] to the Civil Khad the suspect has consciously accepted the substantial risk that [W.A.] would be tortured. The fact that such a transfer created a substantial risk of torture appears from the statement of the witness [S.K.] who was working with the Military Khad in the period of 1983 to 1987. This witness stated before the police that at the Military Khad it was a matter of 100% torture. Apart from that the witness has stated both before the police and the examining magistrate that the tortures in the Sedarat were more severe than at the Military Khad. This witness has also stated before the examining magistrate that during the transfer of arrested persons to the Sedarat he heard from the prisoners and soldiers there that the tortures were very severe there and that the arrested persons who were taken to the Sedarat often cried: "God forbid".

Furthermore the Court establishes that the suspect must have been aware of this substantial risk. In aforementioned telephone conversation the suspect notably states to the person he is speaking to that [Y.] had told the suspect that Tanai had proposed to transfer [W.A.], among other persons, to the Military Khad and not to the directorate interrogations of [A.G.A.], as this directorate supposedly treated arrested people with fanaticism. In aforementioned police interrogation the suspect also stated that he knew that [A.G.A.] used methods to keep arrested persons awake made arrested people stand up or sit during the night. The fact that the suspect knew about the methods used in the Sedarat is also affirmed by the witness [B.A.W.] who was heard in court, a former public prosecutor who in 1980 was responsible for the Military Khad and from 1981 to 1985 for both the Military and the Civil Khad: "I never talked with [H.J.] or [suspect] about [the ill-treatments by the Civil Khad]. It was known that ill-treatments took place at the Civil Khad".

The circumstance that neither the suspect nor the Military Khad staff took part in this torture is not an

impediment to the judgment that the suspect has been an accessory in this torture. The statements of the witness [A. G. T.] imply that the suspect - who as a matter of fact was not only chief of the Military Khad but also vice minister of state security - in any case had the actual control over the interrogators working in the Sedarat. For [A.G.T.] has stated that he heard the suspect giving (detailed) orders for torture to these interrogators. This statement is partly supported by statements of aforementioned witness [S.K.]. This witness stated before the examining magistrate that he learnt from the suspect's body guards that the suspect regularly visited the Sedarat. This implies that the suspect in the first place could and should have distanced himself from the torture of [W.A.] by not arresting him, at least by not transferring him to the Civil Khad and moreover that the suspect, having done so anyway, could and should have prevented this torture, at least end it by exerting his (actual) power as vice minister of state security over the interrogators working in the Sedarat.

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]  
Saratani [=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 - :

I was the boss of the General Military Directorate.

The investigation/interrogation department came directly under my authority. The head of this department was [H.J.], I was therefore his immediate superior.

It is correct that in November 1989 I flew with Wallishah [W.A.] by plane to Kabul. We got off together and subsequently [W.A.] was arrested by me in a humane way and delivered. [W.A.] was a commander of the air defence division.

We landed at the Kabul airport. I kissed him on his face. [W.A.] had to sit in the car with two persons next to him. I told him it was an order from the prime minister. I sent him to the Directorate Investigation.

He was taken to the Sedarat. The minister of state security had ordered me to arrest him.

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 [S.K.] he made on 15 August 2004 before the investigating officers (page 242-248):

(To the question: Has anyone ever been disciplinarily punished by [suspect] for the torturing of 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 [H.J.] have ordered to stop the torture and would this subsequently 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 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 [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.

At the top of the structure is the Director General of Military Intelligence Service. This is general [suspect]. The chief of the Interrogation/Investigation department was [H.J.]. His direct boss was [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 [suspect]. This was a police unit. I have not ill-treated any people myself.

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

We had contacts with the body guards of [suspect]. They told us where [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 it was very fierce there as to tortures. A well-known cry was 'god forbid' when people had to go to the Directorate Investigation in Sedarat. This happened by order of [suspect].

I made statements before about the instructions that were given about the ill-treatments and tortures. I then said that it came from [suspect], subsequently ordered to [H.J.] who in his turn passed on the instruction, 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 [suspect] and [H.J.] were present themselves at interrogations where tortures took place. I myself was present once..

[suspect] himself gave order to arrests.. [suspect] could give these orders to all employees of the various units of the Military Intelligence Service.

Should someone refuse an order from [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 Mohammad Karim he made on 2 February 2005 before the investigating officers (page 427-433):

[H.J.] was head of the interrogation department.

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

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

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

At the civil departments I have seen 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 with 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 with 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: with 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 nowadays still going on.

I have never spoken with [H.J.] or [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 [M.A.]:

7. 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, reporting officer, telephoned with a person who introduced himself as [A.R.J.K.]. [A.R.J.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 [H.J.] in person and his group".

8. 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 [A.R.J.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 [M.A.]. He was a student at the technical school of Kabul. The operation of my arrest was led by [H.J.] 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 on my way there in the corridor I heard the sound of [M.A.]'s voice shouting. He was being tortured. I heard him shout 'Why do you beat me, what did I do?'

9. 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 witness [A.R.J.K.].

Appendix 3: A transfer form of a prisoner to the central prison of the Ministry of Foreign Affairs. The prisoner is [M.A.] (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 [M.A.] (the son of [M.J.]).

10. 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 [M.A.] 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 [A.R.J.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 [H.J.].

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 [H.J.] 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 [H.J.] 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 [H.J.] 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 [H.J.] were present. I saw [H.J.] looking at the blood on the door. I heard [H.J.] 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 [H.J.] 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. [H.J.] was often present at my interrogations and tortures.

I heard that [H.J.] 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.

11. 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 [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 [M.A.] and [A.R.J.K.]. I was taken to the directorate of the Khad-e-Nezami, established in the house of [P.S.G.].

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

12. an official report of examination of [M.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 [M.A.] 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 at 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 a sympathizer of the Jamiat-Islami party though. I was not a member of this party.

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 [[suspect]]. Everybody in Kabul knew that he was the head of the Military Intelligence Service. [H.J.] was subordinate to [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 and 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. [H.J.] 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. [H.J.] 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.

In the Sedarat I was also tortured. 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 [H.J.]'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 [A.R.J.K.] and [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 is 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 body.

13. an official report of examination of [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 [H.M.N.] he made on 03 June 2005:

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

I once saw in the prison of the Military Intelligence Service in Kabul that his fingers were 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 [M.A.] 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 [M.A.] 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".

[M.A.] 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 [A. G. T.]:

14. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200407021600 dated 02 June 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement of [H.M.N.] he made on 27 May 2004 before these investigating officers (page 136-138):

I belonged to the Khalq fraction and [suspect] to the Parchami fraction. That was the reason of my arrest.

I had to stay awake and stand in a bucket with water for 14 days. The obliged me to stay awake for 27 days. This plan came from [suspect]. [suspect] came to look at the tortures of the Sedarat. I heard that [suspect] gave instructions. I heard [suspect] tell someone which questions they had to ask me and how I was to be tortured.

the statement of [A.G.T.] he made before this investigating officer on 28 May 2004 (page 138):

I heard [suspect] tell the interrogators that they had to put [G.K.T.] in a bucket with water. It was March and it was cold.

After about 20 days after my arrest I heard [suspect] say: 'you should not have him sit down', 'he has to stay awake', he has to stand up so that he can not sleep and will start telling the truth'. After that I was kept awake for 27 days.

15. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 2004.08.06.10.00 dated 08 August 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement [A.G.T.] he made on 06 and 08 August 2004 before these investigating officers (page 139-164):

On 7 March 1990 I was arrested. On the 8th of March I was taken to the Sedarat prison. In the night of 12 to 13 March I was put in the water for the first time. For 14 days I was put in a barrel with water for 2 to 3 hours a day, sometimes even 4 hours on end, in only my underpants. They had put the barrel with water outside. It was in the month of March and it was very cold outside. The back and legs troubles I have now are the result of those tortures.

I heard [[suspect]] say 'did colonel [A.G.T.] confess or not', Give him punishment so that he confesses', Put him in a barrel with water, then he will see whether he will confess or not this Shanawaz-Gulbuddin'.

I heard the interrogator say to me 'Forget the humanity. You are Shanawaz-Gulbuddin. You wanted to destroy our revolution. You opposed the regime of Dr. [N.]'. I then stepped into the barrel with water.

I felt and saw the water came up to my navel. I felt that the water was very cold but not frozen. After some time I felt I had no feeling in my legs anymore. I was desperate. I still feel pain in my legs and back as a consequence of this torture. I felt the pain in my entire body at the places with which I was standing in the water.

During the interrogation I was threatened with having to stand in the water, if I did not confess they would put me in the water again. During the interrogation I heard the interrogator every time telling me 'Say that you have connections with Gulbuddin and that Shanawaz Tanay is a follower of Gulbuddin. If not, I will put you in the water again'.

Until about the 11th time I had every time the same pain but after that the complaints became worse. I also had pains in my genitals and had to urinate urgently. During the urination it hurt even more and I even had blood in my urine. It was so bad that my underpants and my toman (trousers belonging to the traditional Afghan clothing) were full of blood. Furthermore the pain in my legs and in my genitals hurt so much that I could not sleep. Since the interrogator put me in the cold water I have back troubles. I can not sit for a long time on end. Furthermore I have become forgetful. Almost every day I think back to the ill-treatments of that time.

After that I once more heard the voice of [suspect].

This time I heard a loud voice of [suspect]: 'Let him stay awake so that he will confess. If he is not punished he will not confess'.

I heard the interrogator tell the soldier: 'He is not allowed to sit. He is not allowed to sleep. He is even not allowed to lean against the wall'. I subsequently spent four days and nights in this interrogation room standing and walking.

After that I was kept awake three times, each time for a period of three days. The time in between that period I was allowed to sleep in my cell for two days.

16. the police report of the Korps landelijke politiediensten, Nationale Recherche, Resultaatsgebied Internationale Misdrijven, no. 0511040700 dated 05 November 2004, drawn up in the legal form by investigating officer authorized thereto. This police report includes inter alia - succinctly stated - the statement of the investigating officer (page 167-176):

During the examination of the witness on 06 August 2004 the witness [A. G. T.] stated that he knew everything in such detail because he had made notes in note books. The witness gave permission to take along the original note books to the Netherlands. The interpreter has translated the note books as follows:

On 10 March 1992 we were transferred from block 1 to block 6. On 17-18 April 1992 all political prisoners were released.

On 8 March 1990 I was arrested.

Violent actions had been taken against the khalqis. Khalqis were killed.

For 12 years Parchamis have behaved like brutes under the bureaucratic power of the Russians in Afghanistan. The khalqis were oppressed. They were executed or taken prisoner.

17. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200507181000 dated 18 July 2005, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the [H.J.]of [H.J.] he made on 18

July 2005 before these investigating officers (page 13-21):

[A. G. T.] was a member of the party. He was commander of a regiment. [A.G.T.] was suspected of having participated in the coup of Tanai and he was arrested.

18. an official report of examination of [D.J.K.], 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 [D.J.K.] he made on 8 August 2005:

At the time I was imprisoned together with [A.G.T.] at the military intelligence service (Khad-e-Nezami). I worked for defence for 26 years. My highest rank was colonel.

I only saw [suspect] at the compound of the military intelligence service but not at the Sedarat prison, I was isolated there. I tell you that I have seen that he was always surrounded by subordinates. Staff of the Military Intelligence Service was free though, to come to Sedarat. I know from own experience that staff of the Military Intelligence Service did sometimes interrogations in other prisons or for the civil Khad. During the time I was in prison there were as many as 4000 people imprisoned. The normal interrogation department could not cope with that and therefore the Military Intelligence Service was deployed. When later on I was transferred to the Pol-i-Charki prison I spoke with fellow prisoners and they told me this as well. I had heard from soldiers who had been imprisoned in the Sedarat that they had been tortured and ill treated. From the Afghan culture I can tell you that soldiers will not readily admit that they have been tortured or ill treated.

[suspect] was a powerful man, apart from the fact that he was head of the military intelligence service, he was also vice minister of intelligence. Because of this he could instruct practically anyone.

The military and the civil Khad were cooperating closely. Their prisoners were regularly transferred or located back or exchanged, just as it suited them.

I knew already before my arrest that [suspect] was authorized to arrest people without an order from superiors or without an order from for instance the public prosecutor.

I just like to tell you that I myself haven forgiven [suspect]. This happened at the time and he was part of the system.

19. an official report of examination of [S.G.T.], 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 [S.G.T.] she made on 08 August 2005:

I have been married to [A. G. T.] since 1982. My husband was arrested after the coup of Tanai. After my husband was released he told me he had been tortured. He told me that he was made to stand in cold water for hours and for days and was kept awake and that he had to undergo numerous other humiliations consisting of being called names of all sorts.

When my husband came out of prison he was in a very bad condition physically. His legs and back are still bothering him a lot. He constantly uses medicines for it and has to take massages for a better blood circulation. My husband told me that he holds the director of the military intelligence service responsible for his injuries, because he was the one who instructed the people to carry out his punishments and tortures. My husband sometimes told me that he was tortured because the interrogators wanted to make him make a statement about offences he supposedly committed, which he did not commit though. Those tortures then took place in order to put him under pressure.

My husband gets medical treatment since he was released. My husband sometimes has fierce attacks of pain in his back. Then he has to lie flat for a month and he can not move.

20. an official report of examination of [A. G. T.], 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 [A. G. T.] he made on 09 August 2005:

I stick to the three statements I made before the police.

On the 12th or the 13th of the twelfth month of 1368, it was winter, I was arrested. The interpreter says that in the Dutch era this was the beginning of March 1990. I was taken to the building of the military intelligence service. Quite soon after that I was taken to the Sedarat prison in Kabul and the second or third day after my arrest the ill-treatments and the tortures started.

The ill-treatments and tortures consisted inter alia of the fact that during 14 days they put me, only dressed in my underpants, outside in a barrel with cold water. It was winter at that time and it was very cold outside.

They kept me awake for 27 days. They told me I had to confess that I was involved in the coup against the government. The physical tortures took place in the Sedarat prison. I was there for about 85 days to 3 months.

As a result of these tortures I have chronic back and legs troubles. I am still medically treated for this.

Sometimes it gets so bad that I cannot move anymore and I have to lie down flat.

It is correct that the interrogators said inter alia 'Forget the humanity, you are Shanawaz-Gulbuddin, you wanted to destroy our revolution, say that you maintain connections with Gulbuddin and that Shanawaz Tanay is a follower of Gulbuddin, if not I will put you in the water again, let him stay awake so that he will confess. If he is not punished he is not going to confess'. It is obvious that I was scared because of these threats together with



these tortures. The interrogators said they only carried out an order. There are four persons I deem responsible for the harm inflicted on me.

In the first place this is [suspect], he was head of the military intelligence service and vice minister of intelligence.

I know [suspect] very well and I can very well recognize his voice. Prior to a number of tortures I heard that he ordered it.

I cooperated with [suspect] for nine years with the 25th division in the province of Khost.

During the coup of Tanay about 6000 Khalqs were arrested among whom 3000 soldiers. There were some Parchami among them.

I heard [suspect] speak in the Sedarat at four different moments. He interfered in the interrogations and in the tortures and gave instructions for it in advance. This always happened in my case.

With regard to [W.A.]:

21. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 2004.05.07.0900 dated 7 May 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement of [W.A.] he made on 7 May 2004 before these investigating officers (page 77-93):

I was commander air defence division.

On 6 November 1989 we were to return to Kabul. I flew back with the chief of the military Khad.

The chief of the military Khad was called [suspect]. When we arrived at the airport [suspect] disappeared out of sight. I was taken by my arms by other persons. They pulled fiercely at my arms and made it clear to me that I had to come along. I subsequently had to sit down in a car. I was disarmed. We arrived at the building of the Sedarat.

During the interrogation on the first evening I was slapped in my face a few times. They told me I was a traitor. 'You are against the unity within the party', 'you are an enemy of Dr. [N.]'. The man hit me with force, with clenched fist, in my face. With the intention that I would confess the charges. They were very painful punches I received. For a moment I became dizzy because of it.

As from the third evening of my stay in the Sedarat building the tortures started. I was tortured and interrogated for 40 days. During those 40 days I was not allowed to sleep and had to stand up. On the 40th day I had to go and stand outside in the snow. I have been standing with bare feet in the snow from 21.00 hours to 04.00 hours. By that time I was broken and told I was prepared to sign any confession.

When the investigation was resumed after the coup of Tanai, around 17 March 1990, I was charged with having been involved in this coup. I protested against it and told that I had been forced at the time to make a quite different confession. This was for them a reason to subsequently torture me with electric shocks. Eventually I had to sign such a confession under pressure of the electric shocks.

One of the consequences of the detention and the tortures was that my memory was deteriorating strongly, after my detention I also got angry at the lightest excuse and I avoided any form of social contact, even with my own family.

After I arrived in the Netherlands I suffered from insomnia. Furthermore my leg joints bother me especially when the weather is cold and wet.

22. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 2004.05.19.1400 dated 19 May 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement of [W.A.] he made on 19 May 2004 before these investigating officers (page 94-104):

Shortly after [suspect] put his foot on the asphalt, he disappeared behind his bodyguards. I cannot imagine that [suspect] has been able to bridge the distance between the airplane and the cars in such a short time, I presume that he was somewhere out of sight in the vicinity of the airplane. Close to the airplane was another car I had to sit down in after my arrest. My men were not allowed to come along in the airplane, with hindsight this was an extra indication that it had all been planned by [suspect] in advance.

The third evening in Sedarat I was hit in my face several times.

I was not allowed to sleep for 40 days, this happened within the investigation department. I had to stand on one leg with my arms above my head. During those 40 days I was only allowed to sit down 3 times for half an hour. I stayed at the Sedarat for 1 year and only the second evening I was left alone. The interrogations stopped after 42 days, but the tortures continued. It regularly happened that I had to sit half squatted for some hours.

Only after the coup of Tanai they wanted me to sign another confession, to wit conspiracy against the state and participation in a plot. As I refused, they started torturing me with electric shocks. Eventually I stated that I wanted to sign such a statement because I could not stand the shocks anymore.

The tortures with electricity have caused that I have very many complaints, psychological in particular.

The entire Sedarat complex was part of the directorate investigation of the Khad. [G.] was in charge of it. [[suspect]] was superior to [G.] both as to rank and power and influence.

23. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland

unit, police report no. 2004.06.21.1000 dated 21 June 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement of [W.A.] he made on 21 June 2004 before these investigating officers (page 105-109):

[M.K.] told me in no uncertain terms that [suspect] had thought up the entire plan for my arrest. [M.K.] has been working at the head quarters of the military Khad.

24. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200405111200 dated 11 May 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement of [M.K.S.] he made on 11 May 2004 before these investigating officers (page 111-125):

In 1986 I was made general major and I got the function of State Secretary Political and Judicial Matters at the Ministry of the Interior.

[N.] ordered the Khad to arrest a number of important generals of ours. Among others was arrested: General [W.A.], commander of the air defence division.

About two weeks after this arrest the ambassador invited Tanai and [N.]. October 1989.

6 March 1990 I was arrested myself.

I do not know any prisoner who has not been tortured I know for certain that the people who were in the blocks of the Khad were all tortured. All tortures were committed by the Khad.

Everybody with the Khad knew that tortures were committed. All Khad chiefs knew about it and have also personally ordered to carry out tortures. There is not a single Khad chief who did not give such instructions.

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

In Kabul I became vice minister of defence.

26. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200412291000 dated 29 December 2004, drawn up in the legal form by investigating officers authorized thereto. This police report includes inter alia - succinctly stated - the statement of [G.S.Z.] he made on 29 December 2004 before these investigating officers (page 396-401):

It was a war situation. I was arrested in March 1990, we were eventually transferred to the Pol-i-Charki prison. During the first period of my detention I was in the Pol-i-Charki in the cell with a [W.A.] and two others. [W.A.] was a general of the Kabul air defence.

[W.A.] was looking very badly. I concluded from that that he was treated badly. He had lost quite some weight. During the airing he told me that he was being tortured.

The soldier in the middle on the photograph with ibn-code 3.8.2 is probably a man of the military intelligence service. He was pointed out to me as being the head of the military intelligence service. His name was [[suspect]].

27. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, police report no. 200502101700 dated 10 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 108-112):

When on 27 November 2003 the house of the suspect [suspect] was searched for seizure, among other things, two video tapes were found and seized. The video tapes were seen by a sworn interpreter. Parts of the video tapes have been summarized and translated as follows:

[suspect] says: As soon [W.A.] came up Tanai was against it. I said we had items of evidence about [W.A.] and Mr Dr. ([N.]) had also ordered to arrest him ([W.A.]) but he (Tanai) was against it. I had gone to Balkh myself and I had taken [W.A.] along and handed him over.

28. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Resultaatsgebied International Crimes unit, no. 200412160900 dated 10 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 303-304):

On 15 December 2004 [M.N.A.] was heard as a witness. [M.N.A.] stated inter alia that the day prior to the coup of Tanai 7 March 1990 he attended a meeting. During this meeting a video tape of [W.A.] was shown who stated by means of this video tape that he intended to perform a coup.

29. appendix 49 to the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden

Nederland unit, J016 dated 9 February 2005, drawn up in the legal form by an investigating officer authorized thereto (page 533-550).. This appendix includes inter alia - succinctly stated - the contents of a tap conversation (page 668-675):

(Incoming) Sequence no: 1669  
Date: 15.10.2004  
Time: 15:17

Tota Khel calls [suspect].

[suspect]: I will tell you about [W.A.].

[Y.] asked me to arrest [W.A.], the commander of the 99. I answered: 'Okay'.

I asked the head of the department where [W.A.] was, he answered that WaliShah had left that morning for Mazar-e-Shariff.

I phoned [A.] (NT: the commander of the air force). I told him I urgently needed a plane to go to Mazar. I took along two to three heads.

I had not allowed [W.A.]'s bodyguards (NT: to travel together in the same plane).

[G.], from the directorate interrogation, phoned me, he thanked me and said that [W.A.] was with him.

[Y.] told me that Tanai had proposed to transfer the arrested persons, like [W.A.], to me ([suspect]), because I also had an interrogation department and it was better to have the interrogations take place with me and not with the directorate interrogations because the directorate interrogations treated them with fanaticism.

[A.G.T.]: Yes, it should be so that he ([W.A.]) is with you and not with the directorate interrogations.

[suspect]: Yes, yes.

[A.G.T.]: He was a soldier and should be with you.

[suspect]: Yes.

30. an official report of examination of [G.S.Z.], 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 [G.S.Z.] he made on 25 May 2005:

I had already seen [W.A.] before my detention. He was also a professional soldier. I met [W.A.] in the Pol-i-Charki prison. I think it must have been somewhere in 1990. I thought he looked bad. He had lost weight considerably and looked yellowish. He told me he was harassed during the interrogations. [[suspect]] was head of the military Khad.

31. an official report of examination of [W.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 [W.A.] he made on 25 May 2005:

I stick to my statements I made before the police on 7 May 2004, 19 May 2004 and 21 June 2004.

I belong to the Khalq fraction.

I was imprisoned at the same time with [K.M.Z.] and with [G.S.Z.]. When [G.S.Z.] states that he saw me in the Pol-i-Charki prison in November 1990 and that I told him I was being tortured, that could be true. At the time I had considerably been put off. Before that time I had been in the Sedarat prison. They used electric current on me and they had me stand outside in the frost.

I heard I was being detained because they thought I maintained connections with the Hezb-e-Islami. After the coup of Tanai I was also suspected of ties with Tanai.

In November 1989 I was locked up in the Sedarat prison in Kabul. I was there for one year and after that I was transferred to the Pol-i-Charki. During the time I was in the Sedarat prison the tortures took place there. It lasted for 42 days. In violation of the truth I confessed. After the coup of Tanai the tortures started again. I was beaten several times. It hurt every time. I often had to stoop during a longer period of time or stand on one leg with my hands against the wall. One time the latter even lasted for 40 days. My whole body started to hurt. The worst hardships I had to suffer were when they put electric currents on my body. A few times they put live wire in my mouth and they switched the power on. It hurt very much. Furthermore it occurred several times that they put electric current on my toes. That also hurt very much. The worst thing I suffered was that they put live current on my genitals. That hurt terribly much. In November/December, the coldest months in Afghanistan, I had to stand naked in the snow from the evening until the morning. As a result I had to cough terribly and I did not get any medicines or treatment. The purpose of all these tortures was to force me to a confession. During the period I did not have to confess I was only beaten.

Once I also had to stand up for 40 days. I was not allowed to sleep during the day and during the night and when I fell they made me stand up again.

The Khad was pro-Russian, they were also paid by the Russians. There were riots and clashes in Afghanistan between the government and the Mujaheddin. The Mujaheddin had their own areas but fought and performed attacks against police stations and military targets in Afghanistan. Then they withdrew. The government fought back. The Mujaheddin had to be arrested and transferred to the Khad. The Khad was responsible for the execution.

The interrogations took place at [G.], also known as [Z.]. He hit me and asked where I was. He also told me 'you are with Sedarat'. [Z.] can also mean that he can easily kill, literally it means wasp. He was working for the Directorate Investigation of the Khad. High-ranking soldiers were immediately taken to the Sedarat prison. This is right next to the building of the State Security.

The chief of the military Khad who is also vice minister of State Security is a powerful man. He is in fact the most powerful man in the country. He can determine someone's fate and he is actually the one who instructs the President. [suspect] was the director of the military Khad. He belongs to the Parcham fraction.

Before we boarded the plane [suspect] sent the people from my unit away. Right after we had left the plane I was arrested and [suspect] sneaked off. [suspect] has everything to do with this arrest otherwise he would have prevented it.

[suspect] was vice minister and was superior to [G.]. I do not know whether he was the direct chief of [G.].

The statement of [suspect] that [G.] kept everything a secret is nonsense. [suspect] was involved in my arrest through the complot theory I explained. He was [G.]'s boss and [G.] had to force me to a confession no matter how. There is no doubt that [suspect] knew about it. The vice minister knows what is going on in his organization. He is responsible for it, isn't he?

Since I have been tortured my ear troubles me, my hearing troubles me. I suffer from forgetfulness and I become very emotional the moment I see other people who are a wreck. When I was at the AZC (Asylum Seekers' Centre), I suffered from insomnia. This also had to do with coping with it.

32. an official report of examination of [W.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 [W.A.] he made on 31 August 2005:

In the middle of the 80's Afghanistan became divided. The Khalq had disputes with the Parchami, but also with the Russians.

I know it was called the Sedarat, because I was told so when I was imprisoned there.

I myself have never been in the building of the Military KhAD. When [Z.G.] hit me in the Sedarat prison he was wearing a uniform, but without any epaulets. I had seen him before at the Ministry of Defence. He was wearing the same uniform then, but there were epaulets on it at the time. This [G.] was general major.

I was commander in the army and under my command were also people who did work or had worked for the KhAD. Still, I saw some things. The transfer of prisoners from the Military KhAD to the Civil KhAD. I know that from my own experience. When I was arrested, I was also a soldier and I was arrested by the Military KhAD, but after that transferred to the Civil KhAD. I understand from that, that there was some form of cooperation between those two divisions.

About injuries I am left with because of the incidents in Afghanistan. It is correct that my knee joints also bother me.

The last time I was here before you it is included in the official report under point 21 that [G.] was lieutenant general. It was not written down correctly, because I could see from his epaulets that he was general major.

[suspect] was lieutenant general and had a higher rank than [G.]. I know [suspect] had that rank because I was with him in a meeting at the ministry. Then he had his epaulets on and I could see that he was lieutenant general.

With regard to [A. G. T.] and [W.A.]:

33. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 200411291045 dated 29 November 2004, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia - succinctly stated - the statement of the suspect he made on 29 November 2004 before the investigating officers (page 26-38):

[Y.] called me and told me to arrest [W.A.].

I called the head of the department concerned and asked him where [W.A.] was. He answered that [W.A.] had left for the province of Mazar. I was phoned by [N.]. [N.] asked me why I had not arrested [W.A.] before.

I subsequently phoned the commander of the air force. I asked him I needed a plane to go to Mazar. At the Mazar airport I called the head of the Khad of the airport. I asked the head of the Khad to ask [W.A.] to come to the base.

[W.A.] came. I told something important had come up in Kabul and that he had to come along to Kabul. I told [W.A.] a story that in our plane there were other important Mujaheddin commanders. Therefore his bodyguards could not travel on the same plane.

In Kabul there were two cars of the directorate waiting for us. He was taken to the directorate interrogations and I myself took the other car.

I returned to my office and I informed both [Y.] and the President of the fact that [W.A.] had been transferred to interrogations. [G.] was the director of the directorate interrogations. [G.] was a severe person.

[G.] used methods to keep people awake. What I heard is that he heard the arrested people at night and they had to stand or sit.

Right after the revolution of 1978 Colonel [A. G. T.] was the deputy head of Aksa in Khost. When I was arrested and eventually transferred to Khost I was imprisoned under him. He did not torture me.

34. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 200412151100 dated 15 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 [M.N.A.] he made on 15 December 2004 before the investigating officers (page 295-302):

The reason for his arrest was that [W.A.] was suspected of having contacts with the islamic party of Gulbuddin Hekmatyar. They showed a film in which [W.A.] made a confession about what was his intention. When the film was shown there was also somebody from the police station, he shouted that the confession by [W.A.] had been taken under pressure and torture. I have seen the film. This film was shown one day before the coup. You could see [W.A.] very well.

I know that [A. G. T.] was commander at the training centre of the army. He offered resistance against the troops of [N.] until in Hut Khel. Then he gave up fighting. [A. G. T.] was then arrested by the State Security Service or by the MID or by the WAD.

35. the police report of the Korps landelijke politiediensten, Dienst Nationale Recherche, Midden Nederland unit, no. 200507071500 dated 07 July 2005, drawn up in the legal form by an investigating officer authorized thereto. This police report includes inter alia - succinctly stated - the statement of [K.M.Z.] he made on 07 July 2005 before the investigating officers (page 698-702):

[W.A.] was general with the air defence.

In the Pol-i-Charki prison I was transferred to a cell where [W.A.] was also kept. I first did not recognize [W.A.], he had lost quite some weight and I had to look very well before I could recognize his face. This was at the end of 1369.

I am afraid that my name will be known to [suspect], afraid of reprisals from the [suspect] circles.

[W.A.] told me he had been electrified. [W.A.] told me that the electric shocks were so severe that he became unconscious and that the ill-treatments had left psychological traces with him as well. [W.A.] told me that the tortures happened during the investigation stage, right after his arrest.

I know that [W.A.] told me he was kept awake in the investigation stage at Khad.

[A. G. T.] was also imprisoned, I met him in the Pol-i-Charki. I can not remember what he told. [A. G. T.] was commander of the 57th training regiment of the Afghan army. The reason of this arrest was that there was a conflict between Tanai and [N.]. There was no coup attempt at all, this was just an excuse from [N.] so that he could arrest his opponents.

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 offences charged in the writ of summons I under 2 (principally) and on the writ of summons II, 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.

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, and Article 8 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 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 various defences which, in the defence's view, should have to lead to discharge from any further prosecution.

The nature of the conflict

The defence has argued that the nature of the armed conflict must be indicated 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 has opted for an implicit principal/alternative charge both in the case of offence 1 on the writ of summons with public prosecutor's office number 09/751004-04 and of the offence on the writ of summons with public prosecutor's office number 09/750006-05.

There is no rule that does not allow this.

The element of 'protected persons'.

The defence argues that the 'protected persons' are not mentioned in the charge. In offence 1 of the writ of summons with public prosecutor's office number 09/750006-05 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 the 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 out of action 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.

'Laws and practices of war'.

The defence argues that the term 'laws and practices of war' is too vague and that torture can only be dealt with by means of the customary law and that is in conflict with the principle of legality.

The Court establishes that in the explanatory memorandum to the International Crimes Act (parliamentary documents II, 2001-2002, 28 337, no. 3, page 46) is stated that in the 'laws and practices of war' the acts and practices applicable in an armed conflict should be included. Consequently, both in an international and in a non-international armed conflict. The common Article 3 of the four Geneva Conventions of 12 August 1949 is to be regarded as an act applicable in case of a non-international armed conflict, whereby in this Article the standards are set, whereas Article 8 of the Criminal Law in Wartime Act includes the penalization in question.

The standards laid down in the four Geneva Conventions of 12 August 1949 and the common Article included therein, are regarded as generally applicable law.

As a matter of fact Afghanistan became party to those four conventions by ratification on 26 September 1956 and the Netherlands by ratification on 3 August 1954, so that it can not be maintained that the suspect is subjected to standards that have only been set in the Netherlands and which he could not have known when he came to the Netherlands. The standards set in the four Geneva Conventions of 12 August 1949 are applicable as from 26 September 1956 and therefore also the common Article 3 included therein also for Afghanistan, including the obligation of the parties to the convention to take action against violations of those standards by means of punishment.

Application of customary law?

Furthermore the defence presented to the Court a number of arguments in respect of torture which allegedly occurred before 1990 and the absence of the possibility to deal with this torture as pertaining to criminal law in a manner other than by applying customary law.

The Court cannot follow the defence in its argument that the present case is said to concern torture that should be dealt with by means of customary law. In the writ of summons with public prosecutor's office number 09/751004-04 torture is charged in offence 2 and that concerns the period of 1 November 1989 up to and including 31 December 1990.

As the Torture Convention Implementation Act had already been taken effect on 20 January 1989, it does not concern customary law here. Torture committed before that date is according to Dutch Law indeed not an offence. On the other hand the war crime of torment has according to Dutch law been an offence since the Criminal Law in Wartime took effect as far back as on 5 August 1952, as a matter of fact pursuant to Article 8 or 9 of the Criminal Law in Wartime in connection with the provisions of the four Geneva Conventions of 12 August 1949.

The offences on the two writs of summons that are related to a period before 20 January 1989 concern the war crime of torment and not torture. For the settlement of these offences it is not a matter of applying customary law either.

Lex specialis.

Furthermore the defence argued that pursuant to Article 55, second paragraph, of the Netherlands Criminal Code it would only be allowed to apply the Criminal Law in Wartime Act and not the Torture Convention Implementation Act.

The Court establishes that the Torture Convention Implementation Act had not yet come into effect before 20 January 1989, so that during that period it cannot be a matter of a relation general (lex generalis) and special (lex specialis) criminal provision as meant in the second paragraph of Article 55 of the Netherlands Criminal Code.

As from 20 January 1989 the Criminal Law in Wartime Act with respect to the Torture Convention Implementation Act cannot be regarded as a special criminal provision with respect to the Torture Convention Implementation Act because the criminal provisions of the Criminal Law in Wartime Act do not include all the elements of the criminal provisions in the Torture Convention Implementation Act with one or more additional elements (logical speciality) nor can it be regarded as such because on the basis of the legal system or the intention of the legislator the Criminal Law in Wartime Act should have priority.

The only result of the inclusion of the Torture Convention Implementation Act in Article 1 of the Criminal Law in Wartime Act as per 20 January 1989 is that in case of war torture should be dealt with by application of the provisions of the Criminal Law in Wartime Act, such as for instance the regulation of the court of competent jurisdiction in Article 12 of the Criminal Law in Wartime Act. Otherwise Article 1 of the Criminal Law in Wartime Act cannot be applicable in the present case because this provision is only applicable 'in case of war' and that is a war to which the Netherlands is a party. Unlike war crimes which the limitation 'in case of war' does not concern (Supreme Court, judgment 11 November 1997, NJ (Netherlands Law Journal) 1998, 463), this limitation is applicable to the Torture Convention Implementation Act.

Therefore the Court is of the opinion that there is no relationship of general-special criminal provision as meant in Article 55, second paragraph, of the Netherlands Criminal Code between the Criminal Law in Wartime Act and the Torture Convention Implementation Act.

Unnecessarily: "complicity to torture"

The defence also argues that charging complicity to torture does not have a basis in the Torture Convention Implementation Act, nor in the Torture Convention itself. Although in respect of the writ of summons with public prosecutor's office number 09/751004-04 the Court will declare the principal offence of the second offence charged proven and will therefore not get around to the complicity more alternatively charged there, the Court will nevertheless discuss this defence from the point of view that it will constitute law.

The Court does not follow the defence in its argument.

The penalization of complicity to torture pursuant to Dutch law arises from the provision in Article 91 of the Netherlands Criminal Code that inter alia declares Article 48 of the Netherlands Criminal Code applicable to other criminal statutes as well, unless otherwise provided for by such other statutes. The Torture Convention Implementation Act does not provide for an exclusion of penalization of complicity whereas the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Trb. 1985, 69) (the so-called UN Torture Convention that became effective on 10 December 1984 in New York) on which the Torture Convention Implementation Act according to the preamble is based, even explicitly in Article 4, first paragraph, stipulates that, apart from the torture itself, every state should also make the attempt at and complicity and participation in torture punishable. This Convention was signed by both Afghanistan and the Netherlands on 25 February 1985. Since the Torture Convention Implementation Act came into effect on 20 January 1989, apart from torture itself, the attempt at and complicity and the participation in torture are also punishable pursuant to Dutch law by means of Article 91 of the Netherlands Criminal Code.

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 from end 1985 to the end of 1990 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 general, lately a so-called four-star general, in the Afghan army, was the head of the military intelligence, the KhAD-e Nezami, and vice minister of the Ministry of State Security (WAD).

The suspect was guilty of very serious offences: complicity in torture and violation of the laws and practices of war. His victims were for instance kicked, beaten, forced to stand outside when it was cold outside and put in a barrel filled with cold water without any clothes on.. The victims were kept awake for days on end and they were not allowed to sit down, lie and sleep. One of the victims had electric wires attached to his body after which he was subjected to electric current through these electric wires.

Moreover, 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 torment and the torture belong to the international crimes alongside genocide and crimes against humanity and are regarded as '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).

Torment as a war crime is a serious form of lack of sense of standards in the already special situation of the armed conflict. By tormenting 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 seriousness of torture also lies in the fact that it is committed by or on behalf of the authorities. These same authorities to whom the person who is tortured should file his complaint in this respect. It is therefore understandable that most of the time the victim - whether or not correctly - gets the idea that nothing can be done about it and that he is in a situation in which he is entirely at the mercy of the persons who torture him. Besides pain - physical or mental - this causes strong feelings of powerlessness.

Both the war crime of torment and the torture create indignation and alarm at a large scale internationally. These crimes also affect Dutch society in this case. The war crime of torment and the torture committed in Afghanistan affects the Dutch legal order not only because these are international crimes 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 public prosecutors have demanded that a twelve years' imprisonment will be imposed on the suspect. The Court considers that, in its opinion, a lower punishment will not suffice. Although the Court deems the charge with regard to the alleged victim Parlawan not legally and convincingly proven, with regard to the torture of the victims [W.A.] and [A.G.T.] it deems the principal charge legally and convincingly proven but not the alternative charge.

Furthermore the Court is of the opinion that in view of the special responsibility arising from the functions of the suspect, the punishment to be mentioned hereafter is appropriate and necessary.

Objects seized.

The Court shall order the objects numbered 1 to 15 seized as appears from list of seizures to be returned to the suspect.

The applicable Articles of Law.

The punishment to be imposed is based on the articles:

- 47 and 57 of the Netherlands Criminal Code
- 1 of the Torture Convention Implementation Act
- 8 and 9 of the Criminal Law in Wartime Act

Judgment

The Court,

Declares not legally and convincingly proven that the suspect has committed the offence charged in the - amended - writ of summons under 1 (principally and alternatively) and acquits the suspect of this charge;

Declares legally and convincingly proven that the suspect has committed the offences charged in the - amended - writ of summons under 2 (principally) and in the writ of summons II and that the facts found include:

With regard to writ of summons I (offence 2, principally):

complicity in torture, committed several times, made punishable pursuant to Article 1, paragraph 1 of the Torture Convention Implementation Act, in conjunction with Article 47 of the Netherlands Criminal Code;

With regard to writ of summons II:

deliberately allowing that a subordinate to him is guilty of violation of the laws and practices of war, while this violation consists of violence with joined forces against a person, committed several times and



deliberately allowing that an subordinate to him is guilty of 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 in conjunction with Article 9 of the Criminal Law in Wartime Act;

declares the facts found proven and the suspect hence punishable;

sentences the suspect to:

imprisonment for a term not exceeding 12 years;

determines that upon the enforcement of the imprisonment 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 : 27 November 2004,  
put in pre-trial detention on : 30 November 2004,  
which pre-trial detention was suspended as from : 20 January 2005,  
which suspension was lifted as from : 11 March 2005;

orders the objects seized as appears from the list of seizures attached to this judgment numbered 1 to 15 to be returned to the suspect;

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.

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