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Uitspraak

Cause list number: 22-001197-22

Public Prosecutors Office number: 09-748011-12

Date of judgment: 12 June 2024

JUDGMENT AFTER TRIAL

The Hague Court of Appeal

joint bench for criminal proceedings

Judgment

rendered on appeal against the judgment of the District Court of The Hague of 14 April 2022 in the criminal case against the accused, summoned as:

[Name 1 accused],

born in [place](Afghanistan) on [date] 1946,

address: [address],

currently detained at Sittard prison in Sittard.

Investigation name: Chevron

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1 List of abbreviations used

AP I-II Additional Protocol I or II to the 1949 Geneva Convention

PDPA People's Democratic Party of Afghanistan

GC I-IV 1949 Geneva Convention I-IV

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the former Yugoslavia

KhAD Khadimat-e Atal'at-e Dowlati

Sr Wetboek van Strafrecht [Dutch Criminal Code]

Sv Wetboek van Strafvordering [Dutch Code of Criminal Procedure]

TIM International Crimes Team

WIM Dutch International Crimes Act

WOS Dutch Wartime Offences Act

2 Introduction

The investigation in this case under the name Chevron began in 2012 and has run intermittently since then.

The investigation has raised suspicions that the accused [name 1] is actually [name 2], former general commander and/or head of political affairs at Pul-e-Charkhi prison in Kabul.

The International Crimes Team of the National Police Unit has mapped out the situation in Pul-e-Charkhi prison based on reports from various human rights organisations. This involved conducting open-source research, requesting files from the Immigration and Nationalisation Service and interviewing many witnesses. These included both persons who had been detained in Pul-e-Charkhi prison (so-called victim witnesses) and persons who were interviewed by virtue of their position at the time (so-called insider witnesses).

The investigation revealed that detention conditions in Pul-e-Charkhi prison were described by former detainees as deplorable and inhuman, inter alia due to overcrowded cells, mental and physical torture, and poor medical and sanitation facilities.

In this case, the accused is accused of being involved in war crimes committed in prison during the period from 1 January 1983 up to and including 31 December 1990, namely - in brief - cruel and inhuman treatment, outrages upon personal dignity and arbitrary deprivation of liberty.

The accused came to the Netherlands as an asylum seeker in 2001 and was granted Dutch nationality. He was arrested on 12 November 2019 and has been detained since then.

3 Examination of the case

This judgment was rendered as a result of the examination at the hearing in the first instance and the examination at the hearing in the appeal proceedings of this Court of Appeal.

The Court of Appeal has taken cognisance of the request of the Advocate General and of that which has been put forward by and on behalf of the accused.

4 Procedure

In the first instance, in respect of the charges, the accused was sentenced to a term of imprisonment of 12 years.

The District Court acquitted the accused on a number of counts. The accused was acquitted of the component regarding *the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples*. The accused was also acquitted of the charges insofar as directed against victim [name of victim 5] specified under 4.

In addition, decisions were made regarding the seized objects not yet returned, as described in the judgment appealed against.

The appeal was lodged against the judgment on behalf of the accused and by the Public Prosecutor.

Preliminary hearings were held on 20 April 2023 and 8 December 2023, at which, inter alia, the admissibility of the appeal and the validity of the summons were discussed. The Court of Appeal made decisions during the hearing, which will be listed hereinafter for the sake of completeness.

5 Indictment

The accused - after adjustment of the indictment at the hearing in the first instance has been charged with the following:

at one (or more) point(s) in time in or around the period from 1 January 1983 up to and including 31 December 1990, in Kabul, or at least somewhere (else) in Afghanistan, either alone or jointly and in conjunction with (an) other person(s),

(on each occasion) violated the laws and customs of war, while

- those acts resulted in grievous bodily harm and/or
- those acts involved violence (in concert) against persons and/or
- those acts involved forcing (in concert) others to do, not do or tolerate something and/or
- those acts were expressions of a policy of systematic terror and/or unlawful action against a specific group of the population and/or
- death or grievous bodily harm to persons other than the accused was likely as a result of those acts and/or
- those acts involved inhuman treatment,

consisting of the fact that he, the accused and/or one or more co-perpetrator(s), there and then (on each occasion) violated

- the provisions of Common Article 3 of the Geneva Conventions of 12 August 1949 and/or
- customary international humanitarian law and/or
- (in particular) the prohibition under customary international law on arbitrary deprivation of liberty,

in connection with a (non-international) armed conflict within the territory of Afghanistan,

treated persons who did not take (or no longer took) part in the hostilities directly, namely civilians and/or personnel of armed forces who had laid down their weapons and/or those who had been placed hors de combat by sickness, wounds, detention, or any other cause, namely:

1. one or more members of the Amin (the former president of Afghanistan's) family, including [victim 1] and [victim 2];
2. [victim 3];
3. [victim 4];
4. [victim 5];
5. [victim 6];
6. [victim 7];
7. [victim 8];
8. [victim 9];
9. [victim 10];
10. [victim 11];
11. [victim 12];
12. [victim 13];
13. [victim 14];
14. [victim 15];
15. [victim 16];
16. [victim 17];

17. [victim 18];

18. [victim 19];

and/or one or more others, who were detained (as political prisoners) in (inter alia) block(s) 1 and/or 2 and/or 3 of Pul-e-Charkhi prison,

- cruelly and/or inhumanely, and/or
- (repeatedly) committed outrages upon their personal dignity (and/or) (in particular) treated the aforementioned persons in a humiliating and/or degrading manner and/or
- pronounced judgments against them and/or enforced these without prior trial by a regularly constituted tribunal offering all the legal guarantees recognised as indispensable by civilised peoples and/or
- arbitrarily deprived them of their liberty,

which 1) cruel and/or inhuman treatment and/or which outrages upon personal dignity and/or humiliating and/or degrading treatment and/or 2) which pronouncement and/or enforcement of sentences and/or which arbitrary deprivation of liberty as aforementioned consisted of the fact that the accused and/or one or more co-perpetrator(s)

1. caused (serious) physical and/or (serious) psychological suffering to the aforementioned person(s), by (inter alia)

- the poor detention conditions,
- incidents of physical violence,
- assigning punishments,
- prolonged psychological torment and/or
- an atmosphere of terror and/or fear of being exposed to physical or psychological violence,

because he, the accused and/or one or more co-perpetrator(s), kept the aforementioned person(s) imprisoned with too many people in rooms that were too small and/or in rooms in which no or hardly any daylight entered and/or without them being able to make sufficient use of sanitary facilities and/or without them being able to receive (regular) visits and/or while the food and/or drinking water that they received was bad and/or dirty and/or insufficient and/or while they received no or inadequate medical care and/or while they were placed in isolation for long periods of time and/or while their cell was flooded with water and/or while they were not or hardly allowed time in the open air and/or while they were placed in a cell with (alleged and/or ideological) opponents and/or informants (also called spies) and/or treated the aforementioned person(s) violently and/or the aforementioned person(s) witnessed the violent treatment of others;

and/or

2. has/have had (a) (prison) sentence(s) and/or other restrictions on liberty enforced against the above-mentioned person(s) without prior trial by an (independent) court and/or without them having received a fair trial and/or (in particular) without them having been tried by an independent and impartial body and/or without them having been promptly notified of the charges against them and/or without them having had the necessary rights and means of defence available to them and/or in breach of the prohibition of collective punishment and/or in breach of the principle of legality and/or in breach of the presumption of innocence and/or without the ability to exercise the right to be present at one's trial and/or

without the right to refuse to cooperate in one's own conviction and/or without the right to be advised of the legal and other remedies and time limits for the exercise thereof;

and/or

(a) person(s) subordinate to the accused who worked within Pul-e-Charkhi prison (such as (block) commanders and/or guards and/or interrogators and/or one or more other(s), together and in association,

at one (or more) point(s) in time in or around the period from 1 January 1983 up to and including 31 December 1990, in Kabul, or at least somewhere (else) in Afghanistan,

(on each occasion) violated the laws and customs of war, while

- those acts resulted in grievous bodily harm and/or
- those acts involved violence (in concert) against persons and/or
- those acts involved forcing (in concert) others to do, not do or tolerate something and/or
- those acts were expressions of a policy of systematic terror and/or unlawful action against a specific group of the population and/or
- death or grievous bodily harm to persons other than the accused was likely as a result of those acts and/or
- those acts involved inhuman treatment,

consisting of the fact that (a) person(s) subordinate to the accused and/or one or more others, there and then (on each occasion) violated

- the provisions of Common Article 3 of the Geneva Conventions of 12 August 1949 and/or
- customary international humanitarian law and/or
- (in particular) the prohibition under customary international law on arbitrary deprivation of liberty,

in connection with a (non-international) armed conflict within the territory of Afghanistan,

treated persons who did not take (or no longer took) part in the hostilities directly, namely civilians and/or personnel of armed forces who had laid down their weapons and/or those who had been placed hors de combat by sickness, wounds, detention, or any other cause, namely:

1. one or more members of the Amin (the former president of Afghanistan's) family, including [victim 1] and [victim 2];
2. [victim 3];
3. [victim 4];
4. [victim 5];
5. [victim 6];
6. [victim 7];
7. [victim 8];
8. [victim 9];
9. [victim 10];
10. [victim 11];

11. [victim 12];
12. [victim 13];
13. [victim 14];
14. [victim 15];
15. [victim 16];
16. [victim 17];
17. [victim 18];
18. [victim 19];

and/or one or more others, who were detained (as political prisoners) in (inter alia) block(s) 1 and/or 2 and/or 3 of Pul-e-Charkhi prison,

- cruelly and/or inhumanely, and/or
- (repeatedly) committed outrages upon their personal dignity (and/or) (in particular) treated the aforementioned persons in a humiliating and/or degrading manner and/or
- pronounced judgments against them and/or enforced these without prior trial by a regularly constituted tribunal offering all the legal guarantees recognised as indispensable by civilised peoples and/or
- arbitrarily deprived them of their liberty,

which 1) cruel and/or inhuman treatment and/or which outrages upon personal dignity and/or humiliating and/or degrading treatment and/or 2) which pronouncement and/or enforcement of sentences and/or which arbitrary deprivation of liberty as aforementioned consisted of the fact that (a) person(s) subordinate to the accused and/or one or more others,

1. caused (serious) physical and/or (serious) psychological suffering to the aforementioned person(s), by (inter alia)

- the poor detention conditions,
- incidents of physical violence,
- assigning punishments,
- prolonged psychological torment and/or
- an atmosphere of terror and/or fear of being exposed to physical or psychological violence,

because (a) person(s) subordinate to the accused and/or one or more others, kept the aforementioned person(s) imprisoned with too many people in rooms that were too small and/or in rooms in which no or hardly any daylight entered and/or without them being able to make sufficient use of sanitary facilities and/or without them being able to receive (regular) visits and/or while the food and/or drinking water that they received was bad and/or dirty and/or insufficient and/or while they received no or inadequate medical care and/or while they were placed in isolation for long periods of time and/or while their cell was flooded with water and/or while they were not or hardly allowed time in the open air and/or while they were placed in a cell with (alleged and/or ideological) opponents and/or informants (also called spies) and/or treated the aforementioned person(s) violently and/or the aforementioned person(s) witnessed the violent treatment of others;

and/or

2. has/have had (a) (prison) sentence(s) and/or other restrictions on liberty enforced against the above-mentioned person(s) without prior trial by an (independent) court and/or without them having received a fair trial and/or (in particular) without them having been tried by an independent and impartial body and/or without them having been promptly notified of the charges against them and/or without them having had the necessary rights and means of defence available to them and/or in breach of the prohibition of collective punishment and/or in breach of the principle of legality and/or in breach of the presumption of innocence and/or without the ability to exercise the right to be present at one's trial and/or without the right to refuse to cooperate in one's own conviction and/or without the right to be advised of the legal and other remedies and time limits for the exercise thereof;

what the accused, being (general) commander and/or head of political affairs (of a certain group of prisoners, namely those who were detained (as political prisoners) in (inter alia) block(s) 1 and/or 2 and/or 3 in Pul-e-Charkhi prison in Kabul, at one or more point(s) in time in the period from 1 January 1983 up to and including 31 December 1990, in Kabul, or at least (elsewhere) in Afghanistan,

(on each occasion) deliberately allowed and/or (in particular) failed to take (sufficient) measures to prevent and/or stop and/or punish the aforementioned offences.

6 Admissibility of the Public Prosecutor and the accused on appeal

The Court of Appeal ruled on the admissibility of the Public Prosecutor and the accused as follows at the case management conference on appeal on 20 April 2023:

'Admissibility of Public Prosecutor on appeal'

The Public Prosecutor should have appealed within fourteen days of the decision delivered on 14 April 2022. However, the Public Prosecutor did not lodge an appeal until 29 April 2022. This was too late, and the Court of Appeal declares the Public Prosecutor inadmissible in the appeal.

Admissibility of the accused on appeal

An unlimited appeal has been filed on behalf of the accused. The question is to what extent the accused is admissible in the appeal in respect of the components of the indictment of which the accused was acquitted at first instance.

The Court of Appeal reads the indictment with regard to the component of pronouncing and enforcing extrajudicial judgments at both places in the indictment as a cumulative and therefore independently assessable act. The Court of Appeal - unlike the Public Prosecution Service - is not of the opinion that the components 'pronouncing and enforcing extrajudicial judgments' and 'arbitrary deprivation of liberty' are so intertwined that they should be considered as a whole. The allegation is included in the indictment after the third bullet point in a series of four. The other three allegations are - in brief - cruel and inhuman treatment, outrages upon personal dignity, and arbitrary deprivation of liberty. This systematisation of the indictment already indicates that this is an offence to be assessed independently. Moreover, pronouncing and enforcing extrajudicial judgments is different from arbitrary deprivation of liberty. It does indeed

concern two separate offences that should be assessed separately.

For the same reason, on appeal, the allegation in respect of one of the victims mentioned in that offence, of which the accused was acquitted, is now no longer relevant, namely the victim mentioned under 4 [name victim 5].

In view of the provisions of Article 404, paragraph 5 of the Code of Criminal Procedure, the accused is not entitled to appeal the acquittal of the components listed in the indictment "pronounced judgments against them and/or enforced these without prior trial by a regularly constituted tribunal offering all the legal guarantees recognised as indispensable by civilised peoples" and the acquittal of victim [victim 5] listed under 4.

*The Court of Appeal will therefore declare the accused inadmissible in the appeal lodged, insofar as it is directed against this.'*¹

Wherever reference is made hereinafter to the case or the decision, it shall mean the case or the decision insofar as, by virtue of the foregoing, it is subject to the discretion of this Court of Appeal.

7 Validity of the summons

At the (further) case management conference on appeal on 8 December 2023, the defence took the position that the summons should be annulled in respect of the words *one or more others*' in the context of the description of both victims and co-perpetrators in the indictment.

The Court of Appeal decided as follows:²

Just as the District Court, the Court of Appeal is of the opinion that the component 'and/or one or more others, who were detained (as political prisoners) in (inter alia) block(s) 1 and/or 2 and/or 3 of Pul-e-Charkhi prison' meets the requirements to be set by virtue of Article 261 Sv. While it was not specified who those others might be, it was specified that they must be prisoners in certain blocks of Pul-e-Charkhi prison during the period to which the indictment pertains.

Viewed against the background of the file, it is sufficiently clear to the accused what the charge thus made refers to.

Moreover, the Court of Appeal considers that this case - given the description of the indictment - involves a charge that by its nature is (at least in part) directed against a group, namely the entire group of prisoners described.

Just as the District Court, the Court of Appeal understands, on each occasion, the repeated use of the component and/or one or more others under the second cumulative/alternative charge as referring to co-perpetrators of persons subordinate to the accused. The accused is thus accused of having deliberately allowed his subordinates to commit certain acts performed, whether or not together with others. Again, no mention has been made of who those others might be, but in view of the specific allegation made here, viewed against the background of the case file and in the light of the entire indictment, the Court of Appeal is of the opinion that it is sufficiently clear to the accused what the allegation thus made refers to.

Since the Court of Appeal has, in other respects, also found no grounds for nullity of the summons, the summons is valid in the opinion of the Court of Appeal.

8 Jurisdiction

The indictment in this case is tailored to Articles 8 and 9 (old) WOS and concerns offences committed in the period from 1 January 1983 up to and including 31 December 1990 in Kabul, or at least in Afghanistan, in respect of non-Dutch victims by an accused who did not have Dutch nationality at the time. The accused was arrested in the Netherlands on 12 November 2019.

The Court of Appeal should check whether the Dutch court has jurisdiction over these offences.

Article 3 (old) WOS read at the time of the charges insofar as relevant:

Without prejudice to the provisions laid down in this respect in the Dutch Criminal Code and the Military Criminal Code, Dutch Criminal law is applicable:

1°

to anyone who commits an offence outside the kingdom in Europe as described in Articles 8 and 9;

(...)

This section of the article provides the Dutch court with universal jurisdiction (outside Europe) in respect of Articles 8 and 9 WOS (old). Since the accused has been charged with violation of these articles of the law, the Dutch court has jurisdiction under Article 3 WOS (old).³

As the Public Prosecution Service has endorsed universal jurisdiction as the basis for jurisdiction in this case (the defence has recused itself in respect of this basis), the Court of Appeal will not comment on the assertion also made by the Public Prosecution Service that the active personality principle can also provide a basis for this.

9 Admissibility of the Public Prosecution Service in the prosecution

The defence pleaded that the Public Prosecution Service should be declared inadmissible in the prosecution for violation of the principle of legality since, according to the defence, the accused could not foresee that the conduct he has been charged with could lead to criminal prosecution in the Netherlands for committing war crimes during a non-international armed conflict. In further substantiation of this argument, the defence asserted, with supporting arguments, that during the period in which the offence was committed there was no criminalisation under customary law of violations of humanitarian law committed in a non-international armed conflict and furthermore, that during the period in which the offence was committed there was no state practice of establishing extraterritorial jurisdiction for (international) offences. In the alternative, the defence pleaded that, for this reason, the Public Prosecution Service should be declared inadmissible for the component of the indictment dealing with arbitrary deprivation of liberty.

The Advocates General refuted this position of the defence with supporting grounds and argued for rejection of the plea.

The Court of Appeal first and foremost advances the following.

The principle of legality aims, on the one hand, to protect citizens against an arbitrary government, with the law serving as a safeguard for the citizen, while simultaneously providing a legal basis for the government to impose penalties. The principle is reflected in Dutch law in Article 1 Sv, which stipulates that criminal proceedings only take place in the manner provided for by law (also referred to as the principle of criminal procedure and formal legality), and in Article 1 Sr, which stipulates in its first paragraph that no offence is punishable other than by virtue of a prior statutory criminal provision (also referred to as the principle of criminal or substantive legality).⁴ Of importance in the context of the principle of substantive legality is the question raised by the defence as to whether it was foreseeable to the accused that his conduct was punishable.

In the sequence of questions to be answered as prescribed by the legislator in Articles 348 and 350 Sv, the criminal liability of the accused's conduct will in principle only be addressed after an affirmative answer to the question of evidence. Specifically, it is addressed when determining whether the proven facts qualify as a criminal offence, unless and insofar as the method of indictment has already partially incorporated the question of qualification within the question of evidence. Depending on this, a successful invocation of the principle of substantive legality may lead either to dismissal of the prosecution or to an acquittal.

The Court of Appeal understands the present defence, given its substantiation, as an invocation of the principle of substantive legality and, more specifically, of the foreseeability mentioned above. In the method described above, that question does not touch upon the admissibility of the prosecution, but rather upon the question of qualification or evidence.

The alleged absence of this foreseeability, also in the wording used by the defence, does not automatically lead to the legal consequence of the inadmissibility of the Public Prosecution Service as pleaded by the defence. In the opinion of the Court of Appeal, the defence has also otherwise provided insufficient arguments to reach that conclusion. The defence, both in the primary and the alternative version, can therefore not succeed and is dismissed.

As no other facts and circumstances have emerged to preclude this, the Public Prosecution Service is admissible in the prosecution.

10 Request by the Advocate General

The Advocate General has requested that the judgment appealed against be set aside and that the accused be sentenced in respect of the charges to a term of imprisonment of 12 years, with credit for time served in pre-trial detention.

11 The judgment appealed against

The judgment appealed against cannot be upheld, because the Court of Appeal does not agree with it.

In the following, the Court of Appeal will first address relevant events in Afghanistan's history and discuss applicable law.

12 Relevant developments in Afghanistan (1973-1992)

The Court of Appeal deduces the following from the evidence, in particular the context report⁵ and UN reports of the Special Rapporteur on the human rights situation in Afghanistan.

On 17 July 1973, Lieutenant General Daoud staged a coup, ending the forty-year rule of King Zahir Shah. As president of the Republic of Afghanistan that he proclaimed, Daoud initially received support from members of the communist party, the PDPA, which consisted of two factions: the Khalq faction led by Taraki and the Parcham faction, led by Karmal. However, this support waned as it appeared that Daoud was assuming more and more power. Following demonstrations in Kabul in April 1978, Daoud ordered the arrest of several prominent PDPA figures.

Daoud's purges of communists in the military and civil service were the direct trigger for the military coup that took place on 27 April 1978, known as the Saur Revolution. Daoud and his family members were killed. Taraki, the leader of the Khalq faction, became the first president and prime minister of what was then officially named the Democratic Republic of Afghanistan. Karmal and Amin were appointed as vice-premiers. Taraki initiated large-scale land reforms, which sparked armed uprisings across the country. Many Afghans left the country and fled to Pakistan and Iran.

In September 1979, Amin staged a coup, in which Taraki was deposed and killed. In December 1979, the Soviet Union invaded Afghanistan with tens of thousands of troops. Amin was killed in a coup that followed, and his family was arrested and imprisoned. With Soviet support, Karmal was installed as president, prime minister and chairman of the Revolutionary Council.

In 1986, Najibullah succeeded Karmal as president of Afghanistan. He attempted a policy of national reconciliation. Despite coup attempts, Najibullah managed to remain in power until 1992 with the support of the Soviet Union. In May 1988, the Soviet Union announced the withdrawal of its troops from Afghanistan. Their withdrawal was complete in February 1989.

During his short time in power, Amin had launched a campaign of terror, resulting in mass arrests and executions of political opponents. After December 1979, when Karmal was in power, surveillance, disappearances and mass arrests continued.

The KhAD security service was established in 1980 with Najibullah at its head. Until 1986, the KhAD was part of President Karmal's office and was tasked with ensuring internal security in Afghanistan and the survival of the regime. In 1986, the KhAD became a separate ministry and was renamed WAD (Wazarat-e Amani-at-e Dowlati). Opponents of the regime were often first taken to the KhAD interrogation centres in Kabul, named Shasgdarak and Sedarat. After several months, these political prisoners were transferred to Pul-e-Charkhi prison just outside Kabul. There, there were separate sections, also called blocks, for political prisoners. Below, the Court of Appeal will elaborate further on the organisation of the KhAD.

The United Nations Special Rapporteur on the situation of human rights in Afghanistan reported on the large numbers of political prisoners detained on arbitrary grounds during the period from 1985 to 1991 in Afghanistan, including specifically in Pul-e-Charkhi prison.

In Afghanistan, armed uprisings against successive regimes had broken out in various locations from 1978 onwards. Under Karmal, the violence intensified. In the period from 1980 to 1985, millions of Afghans fled their homeland.

From 1978, armed confrontations between the Afghan government army and the Mujahideen took place in various locations in Afghanistan. The Mujahideen aimed to defend Islamic principles and local traditions against what they conceived as the moral decay caused by the communists.

The Mujahideen consisted of several sub-groups, both Sunni and Shia in nature, each under the responsible command of a military leader, with an internal hierarchy and strict disciplinary rules. Several of these sub-groups were reportedly supported by, inter alia, the United States and Pakistan. In total, the Mujahideen consisted of some 150,000 fighters operating from 4,000 bases.

With the arrival of Russian troops in late 1979, hostilities between the army and the Mujahideen increased significantly. After the withdrawal of Soviet troops in 1989, the fight against the communist regime intensified. Hostilities persisted until the fall of Najibullah's communist regime in April 1992, after which the Mujahideen took power.

13 Applicable law

13.1 Articles 8 (old) and 9 (old) of the WOS

At the time of the acts charged, war crimes were made punishable by Article 8 (old) of the WOS, and the liability of the superior by Article 9 (old) of the WOS. The later recodification of the WOS into the WIM is not the result of a changed insight on the part of the legislator into the punishability of the conduct made punishable, so that the legislation at the time of the offences charged applies, except for the initial threat of the death penalty.⁶

Articles 8 (old) and 9 (old) of the WOS read⁷:

Article 8

1. A person who is guilty of violating the laws and customs of war is liable to a term of imprisonment of no more than ten years.

2. Imprisonment of no more than fifteen years shall be imposed:

1°. if the offence is likely to cause the death of or grievous bodily harm to another person;

2°. if the offence involves inhuman treatment;

3°. if the offence involves forcing another to do, not to do or to tolerate something;

4°. if the offence involves looting.

3. Life imprisonment or temporary imprisonment of no more than twenty years shall be imposed:

1°. if the offence results in the death of or grievous bodily harm to another person or involves rape;

2°. if the offence involves violence in concert against one or more persons or violence against a dead, sick or wounded person;

3°. if the offence involves in concert the destruction of, damage to, rendering unusable or causing to disappear any property that belongs in whole or in part to another person;

4°. if the offence referred to in the preceding paragraph under 3° or 4° is committed in concert;

5°. if the offence is the expression of a policy of systematic terror or unlawful action against the entire population or a specific population group;

6°. if the offence involves a breach of a promise made or a breach of an agreement entered into with the other party as such;

7°. if the offence involves the misuse of a flag or sign protected by the laws and customs of war or of the military insignia or uniform of the other party.

Article 9

A punishment equal to that prescribed for the offences referred to in the preceding article shall be imposed on anyone who intentionally permits a subordinate to commit such an offence.

To interpret the elements of Article 8 (old) of the WOS, the judge must base himself on international law and international case law.⁸

13.2 The term 'the laws and customs of war'

The term laws and customs of war in the WOS is an open term, synonymous with the humanitarian law of armed conflict. It refers to the norms of command and prohibition contained in the four Geneva Conventions, Additional Protocols I and II to these Conventions, other international treaties, and

customary international law.⁹

The four Geneva Conventions

The four Geneva Conventions of 1949 provide the rules of humanitarian law in times of an armed conflict (hereinafter the Geneva Conventions or separately: GC I, GC II, GC III, GC IV). They oblige the signatory states to criminalise and prosecute severe violations of the conventions. Each convention focuses on a category of protected persons during an armed conflict.

The Geneva Conventions apply in their entirety to international armed conflicts and in part to non-international conflicts. The four conventions contain an Article 3, which is identical for all of them, the so-called Common Article 3. Common Article 3 sets out minimum standards of conduct to be observed by the belligerents in a non-international armed conflict. It reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- b. taking of hostages;*
- c. outrages upon personal dignity, in particular humiliating and degrading treatment;*
- d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

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

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

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

In the indictment in this criminal case, Common Article 3 of the Geneva Conventions is mentioned as part of the allegation of acting contrary to the laws and customs of war, within the meaning of Article 8 of the WOS (old).

The four Geneva Conventions were ratified by Afghanistan on 26 September 1956.

Additional Protocols I and II

The term the laws and customs of war, as mentioned, also refers to Additional Protocols I and II to the Geneva Conventions (hereinafter AP I and AP II), dating from 8 June 1977.

AP I and AP II fill a number of gaps in the Geneva Conventions. AP I does this for international armed conflicts, and AP II for non-international armed conflicts. The objective of AP II is the (further) improvement of the protection of civilians and others who do not (or no longer) take part in the armed struggle.

Afghanistan joined AP I and AP II on 10 November 2009 - after the period to which the indictment pertains.

13.3 The requirements for war crimes

Based on Common Article 3 and the interpretation given to it by (international) case law, one can only speak of a war crime in a non-international armed conflict (as the accused has been charged with) if the following requirements have been met:

- (1) there is a non-international armed conflict within the territory of one of the contracting parties;
- (2) the perpetrator must have knowledge of the existence of this armed conflict;
- (3) the victims must belong to one of the categories of protected persons referred to in Common Article 3 - that is, they must be persons taking no (or no longer taking an) active part in the hostilities -;
- (4) there should be a close connection between the criminal offence and the armed conflict - called 'nexus' in (international) legal doctrine and case law. The criminalisation of war crimes aims after all to offer protection against crimes closely related to war.¹⁰

In this case, violation of the laws and customs of war was charged. Since this standard is defined by humanitarian law of armed conflict, the questions formulated above touch upon the issue of proof. In the following chapters, the Court of Appeal will address the existence and nature of the conflict in that context and subsequently discuss the nexus.

First, however, the Court of Appeal will address the question of whether the accused is the person whom the Public Prosecution Service claims him to be, namely [name 2 accused] (hereinafter also: [name 2]).

14 The identity of the accused: is the accused [name 2]?

The defence has argued that the accused denies being [name 2] and should be acquitted because the possibility of mistaken identity cannot be excluded.

The Court of Appeal considers the following in this regard.

During a search of the accused's daughter's home, the Afghan identity document (taskara) of the accused was found, on which the name [name 2 accused] had been changed to [name 1 accused]. Upon examination, this document was found to have been forged.

In telephone conversations intercepted by the investigation team in 2012 and 2016, the accused was called [name 2], and he himself used that name in conversations with interlocutors who were presumably of Afghan origin. In a conversation recorded in 2019 with his son, the accused answered in the affirmative when asked whether his name in Afghanistan was [name 2 accused].

Other indications as to the identity of the accused can be found in his own statements about his past in Afghanistan on the one hand and witness statements on the other. These reveal clear similarities between the accused and the person [name 2], such as his origin from [place], [province], his teaching of mathematics and physics (with the location of the secondary school also matching), his later residence in [neighbourhood] in Kabul and his current residence in the Netherlands.

The claim of a mistaken identity has become insufficiently plausible.

Therefore, the Court of Appeal is, just as the Public Prosecution Service and the District Court, of the opinion that it can be established that the accused is [name 2] and rejects the defence's argument to the contrary.

15 The existence and nature of the armed conflict

International humanitarian law, as mentioned above, applies when there is an armed conflict in the territory of one or more of the contracting parties. The perpetrator - if he is to be convicted of a war crime - must also have knowledge of the existence of this armed conflict.

A distinction is made between international armed conflicts between states and non-international armed conflicts within a state. The rules for these two types of conflict differ in certain respects.

Just as the District Court, the Public Prosecution Service and the defence, the Court of Appeal is of the opinion that the fighting in Afghanistan in the 1980s constituted an armed conflict between the (government) regime in Kabul on the one hand and the Mujahideen on the other, who had staged an armed revolt against it.

This opinion is in line with previous judgments of this Court of Appeal and of the Supreme Court.¹¹ As already considered by the Court of Appeal in previous judgments, although this regime was supported in part by Russian advisers and military units (which also participated in combat), this fact does not detract from the non-international character of the conflict. Indeed, an international armed conflict is characterised primarily by the fact that it occurs between sovereign states; the Court of Appeal refers to Article 2, first sentence, of the Fourth Geneva Convention, which declares the convention applicable in the event of an armed conflict between two or more contracting parties. Such was not the case in Afghanistan during the period to which the indictment pertains.

The Court of Appeal therefore finds that during the period to which the charges pertain, there was a non-international armed conflict between Afghan government forces on the one hand and the Mujahideen on the other in Afghanistan.

The Court of Appeal further finds, based on the accused's own statement, that he had knowledge of the facts and circumstances underlying the armed conflict.

16 Nexus

16.1 Assessment framework

The criminalisation of war crimes aims to provide protection against offences closely related to war. This so-called nexus requirement serves to distinguish war crimes from common offences and other international offences, such as genocide and offences against humanity.¹²

The importance of this distinction is primarily driven by the need to offer optimal protection to non-combatants who are at risk of becoming victims of offences committed in close relation to that war during a war.¹³

However, the importance of the distinction from ordinary criminal offences also lies in the possibility of limiting the exceptional nature of law governing war crimes to the category of criminal offences that warrant its application. War crimes belong to the most severe category of offences in the criminal justice system. In Dutch legislation, this is reflected, *inter alia*, in the broad jurisdictional framework, the absence of a limitation period¹⁴, and the high maximum penalties.

This means that while the law governing war crimes provides the necessary legal tools, it also requires caution to avoid an overly broad application. Careful application of the nexus requirement is to safeguard this.

In the jurisprudence of the ICTY, the interpretation of the term nexus has been discussed in more detail in several judgments.¹⁵ In so doing, guiding starting points have been mentioned to answer the question of whether a nexus exists in the case at hand. This does not alter the fact that the assessment of the existence of a nexus must be assessed on a case-by-case basis. The starting point is that the law governing war crimes applies to the entire territory of the warring parties, regardless of where current fighting is taking place at that time, until a peaceful solution has been reached.

The starting points formulated by the ICTY can be described as follows. The existence of an armed conflict must at least (i) have played a substantial role in the decision of the perpetrator to commit the offence, (ii) in his ability to do so, (iii) in the manner in which the offence was committed or (iv) in the purpose for which it was committed. The Court of Appeal understands these assumptions to be neither hard nor exhaustive criteria. For the assessment of the question of whether certain conduct is sufficiently related to the armed conflict, the Court of Appeal may take, *inter alia*, the following factors into account: the circumstance that the perpetrator is a combatant; the circumstance that the victim is a non-combatant; the circumstance that the victim belongs to the opposing party; the circumstance that the conduct can be said to serve the ultimate goal of the military campaign; and the circumstance that the offence was committed as part of or in the context of the exercise of the official position. When assessing whether there is a close connection between the offences charged and the armed conflict, several factors will have to be weighed; generally, it is insufficient to rely solely on the determination that merely one of these factors has been satisfied. Moreover, special caution is required if the accused is a non-combatant.¹⁶

After all, the perpetrator must have been aware of the factual circumstances constituting the existence of the armed conflict.

Whereas the connection between the facts and the armed conflict is sometimes not at issue in other (national) war crime cases, because it is obvious there, in the present case it is an important subject of legal debate between the parties.

16.2 Positions of the parties

The Public Prosecution Service has argued the following regarding nexus. The victims were arrested and detained, including in Pul-e-Charkhi, by the KhAD, an essentially military organisation that was part of the communist regime/state system in the fight against the Mujahideen and others. The military KhAD, the KhAD-e-Nezami, existed alongside the civilian KhAD. The KhAD had a primarily military role. The accused played an active part in it and held a military rank for good reason. Moreover, the victims were without exception associated with either the Mujahideen or with countries or organisations suspected by the regime of supporting the Mujahideen.

The accused was not a combatant, but neither was he an ordinary civilian (anymore): not only was he a member of the regime, he had become so intertwined with the strong arm of the communist regime that one may speak of a close relationship between the accused and one of the warring parties in the non-international armed conflict (1 of the requirements from ICTR Rutaganda). The KhAD was not just another intelligence service and had an important role in the military struggle against resistance. The KhAD had to safeguard the survival of the communist regime and ensure internal security by identifying and combating all possible enemies (i.e. external and internal opposition). For this purpose, inter alia Pul-e-Charkhi was used: to detain and deal with opponents arrested by the KhAD. The decisive factor is that both the accused and the KhAD accused all political prisoners of being counter-revolutionaries. The accused was part of the military apparatus, and for that reason alone one may speak of a nexus.

The defence has argued that the armed conflict between the Afghan government and the Mujahideen played no substantial role in the charged conduct. The victims named in the indictment cannot be associated with the adversary in the armed conflict - the Mujahideen - and their detention did not serve the same purpose as the armed conflict. Indeed, the purpose of the armed conflict was to squash the (Islamist) Mujahideen, while the victims specified in the indictment were detained as part of a political power struggle unrelated to the armed conflict with the Mujahideen. The defence has checked the reason for detention for all (groups of) victims and has concluded that they did not belong to the Mujahideen or had ties with it. The defence further argued that the KhAD was not a military organisation but an intelligence service with a wide range of activities. While there was a division referred to as the military KhAD, there is no evidence to suggest that the accused was part of it.

16.3 Opinion of the Court of Appeal

Assuming that the actual conduct charged can be proven, the Court of Appeal will assess below whether the required nexus with the armed conflict exists.

In the context of the nature of the armed conflict (see chapter 15), it has already been established that there was an armed struggle between the troops of the Afghan government and the Mujahideen. As mentioned above, the Court of Appeal thus follows previous case law, in particular the cases concerning the prosecution of officials of the (military) KhAD in (largely) the same period. The armed struggle with the Mujahideen forms therefore the starting point in establishing the existence of a nexus.

The allegations brought against the accused - in brief - pertain to the treatment of political prisoners in (inter alia) blocks 1, 2 and 3 of Pul-e-Charkhi prison. The question to be answered is whether the armed conflict played a substantial role in the conduct charged to the accused, if proven. In this respect, the Court of Appeal will consider both the role and position of the accused in Pul-e-Charkhi prison and the persons of the victims, all this insofar as relevant findings can be made on these points on the basis of the case file and the proceedings at the hearing.

Role and position of the accused

The accused, a member of the PDPA, worked for the KhAD, the security/intelligence service in Afghanistan, during the period to which the charges pertain. The task of the KhAD, as considered above, was to ensure the survival of communist rule and internal security in Afghanistan. To this end,

eliminating opposition networks was deemed necessary.

In addition to the civilian KhAD, there was a military intelligence service called the KhAD-e Nezami. This military KhAD formally operated under the ministry of defence. Initially the (civilian) KhAD fell under the ministry of the interior but became an entirely independent directorate-general under the President's Office in 1980. The KhAD also carried out military tasks, such as guarding key military positions and monitoring potential desertion and establishing special battalions to combat resistance. When the KhAD became a separate ministry (WAD) in 1986, both the civilian and military KhAD were incorporated into it.

The KhAD had virtually unlimited powers in detecting enemies of the communist regime, making the service greatly feared by the Afghan population. This fear was partly fuelled by the KhAD's very broad interpretation of the term 'enemy of the communist regime'. Often, a vague suspicion that someone held anti-government views or engaged in anti-government activities was enough to carry out an arrest.

Opponents of the regime were arrested by the KhAD, mostly first taken to the KhAD's detention and interrogation centres in Kabul (called Shashdarak and Sedarat) and then these political prisoners were transferred to Pul-e-Charkhi prison just outside Kabul. Pul-e-Charkhi consisted of several departments, for which responsibility was shared between the ministry of the interior and the KhAD. According to witnesses, the KhAD was responsible for political prisoners while the ministry of the interior was responsible for those detained for common offences.

Regarding the accused's position within Pul-e-Charkhi prison, the following applies. Since there is no information in the case file in the form of (for instance) documents from which the position and task description of the accused can be derived, the Court of Appeal can only rely on the statements of witnesses. Several witnesses referred to the accused as head of political affairs, and witness statements also reveal that the accused held another position at some point, referred to by witnesses as general commander. The witnesses describe these positions in various ways. The statements neither provide any clear indication of whether a military structure was in place in the prison. They do reveal that the accused was addressed as 'lieutenant colonel' but other military ranks are also mentioned. As to whether the accused wore a uniform, statements differ.

As the above shows, the KhAD was a security/intelligence service with initially a civilian and a military branch with very far-reaching powers. Based on the foregoing, it cannot be established that the accused, falling under the KhAD, was part of the military apparatus, as argued by the Public Prosecution Service. It cannot be established that it was a strictly military organisation, neither when it comes to involvement in Pul-e-Charkhi prison. The information available does not show that the military branch was specifically responsible for this.

Since the exact position of the accused cannot be established, and therefore it also cannot be established whether the actions - if proven - were carried out in the performance thereof, the Court of Appeal, unlike the Public Prosecution Service, is of the opinion that the accused's position alone is insufficient to establish a nexus between the offences charged and the armed conflict.

The victims

Some of the political prisoners ended up in Pul-e-Charkhi prison immediately after the coup against Amin (27 December 1979), others in the period that followed. The reasons stated for detention varied. Some of the political prisoners in the indictment belonged to the Amin family or more generally to the Khalq faction of the ruling party PDPA and appear to have been imprisoned as part of the purge within the ruling party.

Other political prisoners named in the indictment were seen as political opponents for a variety of reasons. The common denominator was that they were - for whatever reason - opponents of the regime. It was often sufficient for an arrest that someone held anti-government views or engaged in anti-government activities. However, the case file does not show that the persons mentioned in the

indictment were Mujahideen in the sense that they belonged to the militant group designated as such, nor does it show that they were all associated with it, as argued by the Public Prosecution Service. The few statements cited in this context remain isolated, coming from an insider witness who either does not know the situation in Pul-e-Charkhi and - also according to the Public Prosecution Service - makes politically charged statements, and from an insider witness whom the Public Prosecution Service rightly deemed unreliable in the closing argument.

Insofar as a number of victim witnesses have stated that they were told as prisoners that they allegedly had ties with the United States, Pakistan and/or the CIA - as the case may be - that mere fact is insufficient to establish the close connection between the armed conflict and the conduct required for the nexus. In so doing, the Court of Appeal considers that it can be seen from the context report that in the relevant period geopolitical considerations played a role in the establishment and political course of the Karmal regime. Here, the political spheres of influence of the Soviet Union on the one hand and the United States (including the CIA) and Pakistan on the other hand opposed each other, and these countries and their (alleged) supporters were considered political opponents. Alleged attempts by Amin at rapprochement with the US and Pakistan were a direct reason for Soviet intervention and the establishment of the Karmal regime. It can be deduced from this that the allegation of having ties with any of these countries (and/or their intelligence services) does not in itself indicate a connection with the armed conflict between the Afghan government and the Mujahideen. Based on the evidence, it cannot be established whether the fact that these countries might also support the Mujahideen against the geopolitical background outlined was a factor that played a role in the actions charged.

Moreover, the Court of Appeal has also been unable to establish sufficiently what significance the ongoing struggle with the Mujahideen had for the detention of the political prisoners. It should be borne in mind that the armed conflict with the Mujahideen was already ongoing before Karmal came to power in December 1979. While the conflict intensified with the entry of the Soviet Union onto the battlefield, the aspirations of the Mujahideen remained the same: this group of resistance fighters violently defended Islam and fought for Afghan values against communism, as they had been doing since the Saur revolution in April 1978. Moreover, the armed struggle continued after the departure of the Soviet troops in 1989.

It cannot be said either that the existence of an armed conflict played a substantial role in the treatment of the political prisoners. Insofar as can be established with regard to the purpose of the treatment, it was to propagate the ideas and views of the communist ruling party, i.e. re-education.

Unlike the District Court, the Court of Appeal does not see the fact that the political prisoners were opponents of the regime as grounds to establish a connection with the armed conflict. The starting point being the scope of the conflict as determined by the nature of the conflict. Including the broader political struggle that was ongoing in Afghanistan for the purpose of determining the nexus disregards the exceptional and restrictive nature of the law governing war crimes - as outlined above.

Finally, the Court of Appeal considers that the indictment mentions: and/or one or more others, who were detained (as political prisoners) in (*inter alia*) block(s) 1, 2 and 3 of Pul-e-Charkhi prison (italics Court of Appeal). Insofar as the allegation here pertains to prisoners other than political prisoners in blocks 1, 2 and 3 as well, the Court of Appeal cannot establish a nexus in respect of them either on the basis of the case file.

Conclusion

On the basis of the evidence, the Court of Appeal cannot establish that the existence of the armed conflict in this case played a substantial role in the accused's decision - if proven - to commit the actual conduct charged, his ability to do so, the manner or purpose of doing so. Although the victims were non-combatants,

it is unclear to what extent the charges may have been committed in the exercise of the accused's position; he was not a combatant; there is no evidence that he held a military position; the victims did

not belong to the adversary in the armed conflict; and it cannot be said that the conduct served the ultimate purpose of the military campaign.

Given this context, the Court of Appeal will not further discuss the other requirements for war crimes as outlined under 13.3.

In conclusion, it cannot be established that there is a nexus between the accused's charged conduct and the armed conflict.

This means that these actions - if proven - do not constitute a violation of the laws and customs of war, as charged. For this reason, the accused should be acquitted.

For the sake of completeness, the Court of Appeal emphasises that the Court of Appeal's jurisdiction in this case is limited to assessing the charged conduct insofar as it pertains to a war crime. As this is not the case in the opinion of the Court of Appeal - due to the absence of a nexus - the Court of Appeal is not in a position to assess the question as to whether the accused was guilty of the actual conduct mentioned in the indictment.

This also implies that the detention conditions in Pul-e-Charkhi prison, described in the introduction as appalling and inhuman will not be discussed further in this judgment, without diminishing how witnesses experienced them according to their statements.

17 Conditional request

At the appeal hearing, the Advocate General requested that, if the Court of Appeal uses the report submitted as an annex by the defence in the rejoinder as evidence, the hearing be reopened in order to give the Public Prosecution Service the opportunity to further investigate this report.

Since the condition attached to the request has not been met, the Court of Appeal will no longer consider the request.

18 Seizure

In accordance with the seizure list submitted by the Public Prosecution Service, the following items were seized from the accused and have not yet been returned:

1. driving licence to the name of [name accused];
2. personal identification document taskara [name accused];
3. personal identification document taskara [name];
4. personal identification document taskara [name];
5. personal identification document taskara [name];

6. personal identification document taskara [name];

At the appeal hearing, the Public Prosecution Service demanded that the personal identification document taskara [name accused] be withdrawn from circulation and that the remaining objects seized be ordered to be returned to their rightful owners, in accordance with the judgment at first instance.

The defence has not taken a position on the seizure.

Regarding the personal identification document taskara [name accused], the Court of Appeal considers the following. Based on the case file and the examination at the hearing, it can be established that this is a forged document, intended to serve as proof of a fact, namely the identity of the person specified on it. It follows that it can be established that an offence has been committed in respect of this document, on the basis of which the Court of Appeal sees reason to order the removal of this object from circulation, in accordance with the provisions of Article 36c opening words, under 2 Sr and Article 36b, first paragraph, under 3 Sr.

With regard to the remaining seized objects not yet returned, the Court of Appeal will order their return to their respective rightful owners, as no prosecutorial interest opposes this.

19 Pre-trial detention order

In view of the accused's acquittal, the Court of Appeal will lift the accused's pre-trial detention order and order the accused's immediate release.

20 Applicable legal provisions

The Court of Appeal has considered Articles 36b and 36c Sr as they are or were legally in force.

21 Judgment

The Court of Appeal:

Sets aside the judgment appealed against and pronounces judgment anew:

Declares the Public Prosecutor inadmissible on appeal;

Declares the accused inadmissible on appeal insofar as directed against the acquittal of the components *'pronounced judgments against them and/or enforced these without prior trial by a regularly constituted tribunal offering all the legal guarantees recognised as indispensable by civilised peoples'*, and insofar as directed against the acquittal in respect of the victim mentioned under 4 [name victim 5];

Declares the Public Prosecution Service admissible in the prosecution;

Declares not proven that the accused has committed the charges and acquits the accused thereof.

Orders the **withdrawal from circulation** of the seized item not yet returned, i.e.:

2. personal identification document taskara [name accused];

Orders the **return** to the rightful owner of the seized items not yet returned, i.e.:

1. driving licence to the name of [name accused];
3. personal identification document taskara [name];
4. personal identification document taskara [name];
5. personal identification document taskara [name];
6. personal identification document taskara [name];

Lifts the pre-trial detention order issued against the accused and orders the immediate release of the accused.

This judgment was delivered by L.C. van Walree LLM,
M.A.J. van de Kar LLM and B. Stapert LLM, in the presence of F.A. Janse LLM and R. de Geus LLM, Court Clerks.

It was pronounced at the public hearing of the Court of Appeal on 12 June 2024.

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- ¹ See page 10 et seq. of the minutes of the case management conference of 20 April 2023.
 - ² See page 10 et seq. of the minutes of the (further) case management conference dated 8 December 2023.
 - ³ See also Supreme Court in the so-called Knezevic decision of 11 November 1997, ECLI:NL:HR:1997:ZD0857, *LJN* ZD0857, *NJ* 1998, 463, annotated by A.C. 't Hart en Hoge Raad 8 July 2008, ECLI:NL:HR:2008:BC7418.
 - ⁴ In international law, the principle of substantive legality principle is laid down in Article 7 ECHR and Article 15 ICCPR.
 - ⁵ Context report Afghanistan (1978 - 1992), drawn up by staff of the International Crimes Team and the National Public Prosecutor's Office.
 - ⁶ See, inter alia, Court of Appeal of The Hague 9 May 2008, ECLI:NL:GHSGR:2007:BA4676.
 - ⁷ By Act of 14 June 1990 (Bulletin of Acts and Decrees 1990, 369), which entered into force on 1 January 1991 (Bulletin of Acts and Decrees 1990, 582), the risk of the death penalty being imposed was removed. By Act of 10 March 1984 (Bulletin of Acts and Decrees 1984, 91, the Financial Penalties Classification Act), the risk of receiving a fine was added to the first, second and third paragraphs in Article 8 of the WOS.
 - ⁸ See also Parliamentary Papers II 2001-2002, 28 337, no. 3, p. 6 (Explanatory Memorandum of Legislative History of the WIM).
 - ⁹ Parliamentary Papers II 1951-1952, 2258, no. 3, p. 9. See also Supreme Court 8 July 2008, ECLI:NL:HR:2008:BC7418, para. 10.2.
 - ¹⁰ See also Court of Appeal of The Hague 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.
 - ¹¹ See also Court of Appeal of The Hague 29 January 2007, ECLI:NL:GHSGR:2007:AZ7143, Supreme Court 8 July 2008, ECLI:NL:HR:2008:BC7418, Court of Appeal of The Hague 29 January 2007, ECLI:NL:GHSGR:2007:AZ7147 and Public Prosecutor's Office of the Supreme Court 8 July 2008, ECLI:NL:PHR:2008:BC7421.
 - ¹² See ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, 58.
 - ¹³ See, inter alia, Michael Cottier and Matthias Lippold, Article 8: Jurisdiction, Admissibility and Jurisdiction, in Kai Ambos (eds), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, Fourth Edition: 2022, p. 352, para. 43.
 - ¹⁴ Cf. Article 13 SMO.
 - ¹⁵ See ICTY *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, 22.
 - ¹⁶ ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, (Appeal Judgment), ICTR-96-3-A, 570.
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