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Uitspraak

Cause-list Number : 22-004337-06

Public Prosecutor's Office Number(s) : 09-750001-05

Date Judgment : March 10, 2008

DEFENDED ACTION

Court of Appeal in The Hague

Three-judge criminal section

Judgment

passed in the appeal against the sentence pronounced by the District Court in The Hague on June 7, 2006 in the criminal case against the defendant:

[suspect],

born in [place of birth] on [date of birth] 1942,

address: [address]

1. Examination in Court

This judgment is passed on the basis of the examinations in the court of first instance and the examinations in this court, the Court of Appeal on March 5, 2007 and (following an interlocutory judgment on March 19, 2007) December 10, 2007, January 28, 2008, February 11, 2008, February 18, 2008 and February 25, 2008.

The Court of Appeal has taken cognizance of the demand of the advocates general and of all that was put forward by and on behalf of the defendant.

The advocates general demanded that the judgment of the court below be reversed and that the defendant be acquitted of counts 1B, 2B and 3B of the charges. Further, the advocates general demanded that the defendant with regard to counts 1A, 2A, 3A, 4 and 5 of the charges be sentenced to a custodial sentence of 20 years deducting time spent in pre-trial custody, as well as to a fine in the amount of € 450,000 or, alternatively, 1 year's imprisonment. With respect to the items seized the advocates general concluded in accordance with the judgment the District Court passed in that regard.

2. Indictment

The charges against the defendant are worded in the originating summons, as laid down in article 314a of the Netherlands Code of Criminal Procedure. A copy of the indictment and the demand for more detailed description in the indictment are attached to this judgment.

3. Summary of the charges against the defendant

In the more detailed indictment the defendant is - summarily - charged with two types of serious crime. At issue on the one hand (in counts 4 and 5) are complicity in the illegal supply of arms to the regime of Charles Taylor in Liberia in those periods in 2001 through 2003 in which this was prohibited on the basis of the Netherlands regulations intended for the implementation of United Nations Safety Council Resolutions and Common Positions and Regulations of the Council of the European Union .

At issue on the other hand (in counts 1 through 3 of the indictment) are participation (to different degrees of involvement) in (aggravated) war crimes committed by Liberian troops and/or militia in the years 2000 through 2002 during armed conflicts in Guinea and Liberia. The defendant is also charged with these facts in the legal form of the 'superior' who under the circumstances must be held responsible for the misconduct of his subordinates.

4. Course of the proceedings

In the court in first instance the defendant was acquitted of the war crimes . With respect to the illegal supplies of arms he was sentenced to an eight year custodial sentence deducting time spent in pre-trial custody. With regard to the items seized judgment was passed as described in more detail in the judgment.

This sentence was appealed against both on behalf of the defendant and by the Public Prosecutor

5. Judgment of the court below

The Court of Appeal finds that the judgment of the court below cannot be upheld because the Court of Appeal does not concur with it.

6. Defence with respect to the legal validity of the indictment

The counsel for the defence pleaded that in the statement of the particulars in the indictment some (alternative) specifications of the periods during which the war crimes were said to have been committed were so generic that it was insufficiently clear to the defendant what to defend himself against. She also believed the alternative specifications of place to be insufficiently concrete; for which reasons she demanded the indictment should be declared null and void.

The Court of Appeal notes in this regard that the (alternative) specifications of periods objected to indeed leave much to be desired as to clear definition. This is undoubtedly related to the relative vagueness of the witness statements in the case file which show similar shortcomings. With respect to the specifications of place this is different, because there is no doubt that these statements refer to fights that took place in or around Gueckedou in Guinea and Voinjama and Kolahun in the province of Lofa, Liberia, respectively. That the prosecution 'plays safe' in the indictment by introducing alternative specifications of place as well is not unusual and is, in principle, acceptable.

The Court of Appeal has established that the relatively vague wording of the indictment, which must be considered in relation to the testimony in the case file, has in no way impeded the defendant to effectively put up a defence. It is important in this respect that the defendant is manifestly not charged with having committed the war crimes in the indictment himself, but that he is charged with participation in the form of complicity, incitement or accession; acts which (may) have a time and place of their own.

The Court of Appeal therefore rejects the plea of partial invalidity of the indictment.

7. Plea of bar to the prosecution

7.1 The counsel for the defence also pleaded there was a bar to the prosecution on grounds connected particularly to the way in which the rights of the defence were prejudiced as a result of how the (criminal) investigation was set up right through to the appeal; alternatively, she pleaded that evidence should be excluded.

The counsel argued in this respect that the prosecution failed to investigate the grounds for the accusations made against the defendant by, inter alia, Global Witness, while the National Police Agency failed to test the dependability and accuracy of the statements obtained in the course of the investigation, and structurally refused to accede to requests to that end by the defence. There were even more cogent reasons for such critical testing, according to the defence, because information was obtained in the first instance by the Criminal Intelligence Unit of the National Police Agency, which engaged 'confidants', which seriously prejudiced testing of the dependability of the witness statements obtained. Because at a later stage all questions about the 'backgrounds' of the 'confidants' were disallowed, the right of the defence to examine witnesses was seriously harmed. The same effect had the Examining Magistrate's decision, in spite of requests by the defence to the contrary, to hear witnesses in Liberia under international requests for legal assistance in accordance with Netherlands law instead of Liberian law, for as a result no coercive measures could by used for instance.

Moreover, contrary to an earlier decision by the Court of Appeal (in the opinion of the defence) the prosecution presented in court and added to the case file summaries of the statements by two witnesses, A03 and A04, who according to the prosecution should be heard by the Examining Magistrate as threatened witnesses, which seriously disregarded the rights of the defence. Finally, the lawyer/client secrecy was violated because correspondence addressed to counsel was seized and

confidential telephone conversations between lawyer/client were not destroyed as soon as they were intercepted and recorded.

7.2 With regard to these manifold criticisms, the Court of Appeal considers as follows.

The investigation of the defendant had its origin in information from public sources

that came to the attention of the Netherlands investigative authorities. For instance, the defendant (inter alia in connection with the logging company Oriental Timber Corporation OTC) emerged as an 'important player' in the illegal arms trade from the Global Witness report "The Usual Suspects – Liberia's Weapons and Mercenaries in Cote d'Ivoire and Sierra Leone" published in March, 2003. Moreover, he was referred to disadvantageously in the report dated December, 2000 of the 'Panel of Experts' formed by the Security Council of the United Nations, which investigated, amongst other things "the link between trade in diamonds and trade in arms and related materials" with regard to Sierra Leone. This investigation was later extended to include the situation in Liberia.

The Court of Appeal cannot assess whether this information can partially or wholly be traced back to the same sources, like the defence believes. In any case it was sufficiently concrete to justify the decision to investigate the accusations, the more so considering the seriousness of the offences and the defendant's citizenship. That this investigation focused strictly on the defendant, the Court of Appeal believes, is fully understandable due to the absence of other defendants that have a demonstrable relationship with the Netherlands legal system. From the very beginning this was an investigation with an identified suspect and a suspicion of offences which were still largely undetermined.

The Court of Appeal further finds that in the first stages of the investigation there was no question yet of the use of coercive measures (such as the deprivation of liberty), for which stricter procedural requirements are set. Neither was there an obligation to focus the investigation first of all on the verification of the accusations in public sources which presented the 'starter' intelligence. It is important to note that without proper testing this intelligence could, in reason, not be used in evidence of any indictment.

So far the reproaches relating to the first stage of the investigation fail and these pleas cannot be upheld. However, the Court of Appeal concurs with the defence that other aspects of the investigation conducted do give occasion for critical comment on the way in which this investigation was structured.

7.3 The criticism relates in the first place to the fact that testing of the statements obtained

from witnesses in the course of the investigation was largely omitted, in spite of repeated motivated requests made by the defence to that effect. In this respect the counsel for the defence pointed out, and justly so, that a Netherlands court has a very scant idea of the actual situation in relevant places in Liberia and therefore lacks the proper information in order to test the correctness of the statements made in respect of those places. Counsel used the comparison of a Liberian court hearing a witness who declares emphatically that from the steps in front of the court building in The Hague one has a great view of the Eiffel tower. Without adopting this comparison, the Court of Appeal confirms the problematic nature of the said testing, which may also have a bearing on the assessment of the dependability of the statements made by the witnesses.

There were moreover ample grounds for critical investigation, the Court of Appeal

concludes after thorough examination of the case file, because statements made by a number of witnesses at consecutive moments in time can by no means be said to be 'intrinsically consistent'. The witnesses in question at subsequent occasions made statements that were clearly conflicting even in significant aspects. Also, the statements by many witnesses are incompatible with those by other witnesses, or for other reasons seem to be hardly plausible or incorrect, for instance in the light of generally available data with regard to the topography of the country, the (main) infrastructure or combat action in the periods specified in the indictment. The Court of Appeal will address these problems in more detail in its discussion of the evidence.

7.4 The manner in which the investigation was conducted in its initial stages limited the options of assessing the reliability of the witnesses in a different respect. The Criminal Intelligence Unit made its first preliminary inquiries in April 2004, and in the course of them started to employ so-called 'confidants'. Although eventually the 'interview records' were added to the case file in the autumn of 2005, so that the contents of these first statements became available after all, it has not become transparent at all due to the Criminal Intelligence Unit approach in which manner the said confidants did their jobs and to what extent their method was critical. Neither was this transparency attained by the examinations conducted by the Examining Magistrate, who barred any questions pertaining to this method. As a result, only a very limited degree of transparency was obtained as to the preliminary inquiry, which does not rule out entirely the possibility of manipulation of the investigation by third parties, as suggested by the defence. The conflicts between parties in the civil war at the time, the complex political relations in Liberia and local interests that are or may be involved in the outcome of this criminal case do not exactly reduce the risk of such manipulation or influencing.

The Court of Appeal gives the following illustration. One of the 'confidants' presented handwritten statements by two witnesses; the persons they were attributed to later denied emphatically that the texts were (literally) in their hand; which must be considered plausible on the basis of their sworn statements made before a civil-law notary and submitted by the defence. This course of events may be ominous; the fact that further investigation into this 'confidant' has not been forthcoming is considered singular by the Court of Appeal.

7.5 The set-up of the investigation referred to above, which must be deemed hardly critical and therefore unilaterally incriminating to the defendant, does not do justice, in the opinion of the Court of Appeal, to our system of criminal procedure in which a key role is given to the investigative authorities in (what should be) an unbiased material arriving at the truth.. On the basis of inter alia their findings and reports important decisions are taken, including for instance remand in custody. The outlined procedure also worries the Court of Appeal because it may disadvantageously affect the court's possibilities to arrive at the material truth, and therefore also the quality of the court's judgment. This may - in the broadest sense - have both unjustly negative and unjustly positive consequences for a suspect.

7.6 In the preliminary inquiry the point of departure, according to the Court of Appeal, should be that the investigation should occur keeping the interests of the defence in mind, and therefore should focus on, inter alia, testing the dependability of the incriminating statements made. In this respect the Court of Appeal points out the only complementary arrangement of financial means that may be made available to the defence under the Criminal Cases (Fees) Act. The Court of Appeal also notes that the defence in the case in hand - in its way – made considerable efforts to make the investigation 'more balanced'.

Seen in this light the Court of Appeal finds it alarming that the prosecution, judging from its closing speech on appeal (page 10), seems to be heedless of the problems illustrated, for in the closing speech the position is adopted that "the defence constantly had the opportunity to attend the examinations of the witnesses (in so far as they were conducted by the Examining Magistrate). . . . Therefore, the defence has been able to test the reliability of the witnesses in person." Put like this, testing seems to be the defence's problem or even responsibility. This is leaving aside the question that the defence during the Examining Magistrate's examination of witnesses has not always been able to fully exercise its right to question. Suffice it the Court of Appeal to conclude that the investigation strategy adopted led to the fact that even to the last moment, on appeal, the National Police Agency heard witnesses in a parallel investigation without giving the defence the opportunity to come in or at least be informed of the outcome of these interviews without delay. The Court of Appeal

finds, in the context of conventional-law provisions guaranteeing the right to a proper defence and considering the judgment of the Supreme Court of December 5, 1989, NJ 1990, 719, that the actual circumstances in the parallel investigation in this case call for criticism.

7.7 The objections pertaining to international criminal law submitted by the defence with

respect to the investigation carried out in Liberia lack a factual basis. After previous contacts between the National Police Agency and the Liberian authorities in the matter, the Liberian Minister for Justice granted express written permission for examination by the Examining Magistrate and agreed that the examinations would be conducted in accordance with Netherlands law. That the defence could not function to optimum effect due to the way in which the examinations went, the Appeal is prepared to believe; but that this caused an inadmissible violation of the right to a proper defence, the Court of Appeal fails to see.

The objections concerning the violation of the lawyer /client secrecy the Appeal

Court finds insufficiently founded. The violation did not become plausible, for that matter.

In so far as it can be said that procedures followed were not quite correct, particularly as regards the overdue destruction of intercepted telephone conversations, this has not lead to any legal consequence in this case. Lastly, regarding the circumstances concerning the examination of (threatened) witnesses yet to be heard, the Court of Appeal finds that no decision by the court was ignored.

7.8 Although the Court of Appeal is critical about the limited extent to which the

defence's interests were taken into consideration, it cannot be said in the light of the entire proceedings that due to these failures those interests were prejudiced to the extent that this should lead to a bar to the prosecution, for such a far-reaching sanction can only follow if serious violations of the principle of due process occurred, if the defendant's right to a fair trial was violated purposefully or with flagrant disregard to his rights. This conclusion cannot be drawn in the case in hand.

7.9 Therefore, the plea of a bar to the prosecution is dismissed. The Court of Appeal will

return to questions concerning the evidence later on.

8. Requests and demands concerning further investigative activities

On December 10, 2007, the Court of Appeal held a (second) pro forma hearing, several months after the advocate general had informed the Court of Appeal that the investigation (on appeal) by the National Police Agency had been completed. The reason for this hearing was the demand by the advocate general to hear two witnesses from the ambience of the Sierra Leone Tribunal. According to the prosecution these witnesses, A03 and A04, were to be heard as "threatened witnesses" in the sense of article 226a of the Netherlands Code of Criminal Procedure. At the December 10, 2007 hearing the defence in its turn also submitted (many) requests as to the investigation.

At the hearing the Court of Appeal made it known that it would defer the assessment of and decision on these requests and demands until it had formed an opinion about the case in its entirety, i.e. after the closing of the examination in court on February 25, 2008. The reason for this was first and foremost that a very extensive investigation into the basis for the accusations had already been conducted - even on appeal – and that the Court of Appeal wished to judge the necessity of (even) further investigation against that background. This decision was repeated during the hearing of January 25, 2008, after the advocate general had again requested that these witnesses be heard.

The prosecution returned to this issue again in its reply.

In view of these decisions the Court of Appeal shall first address its assessment of the soundness of the accusations in this case.

9. Assessment of the accusations made

9.1 Earlier on the Court of Appeal summarized the charges against the defendant made by the prosecution: Illegal supply of arms to the Liberian regime in 2001 through 2003, as well as involvement in war crimes in 2000 through 2002. All charges are forcibly denied by the defendant.

9.2 The importation of arms (described in counts 4 and 5 of the indictment) allegedly took place via the port of Buchanan with the Antarctic Mariner, a ship belonging to the Oriental Timber Company (OTC). The defendant, who was the owner of timber logging company Royal Timber Corporation (RTC) was also involved in OTC. OTC acquired the said vessel in March 2000; the ship has born the name Antarctic Mariner since May 8 of that same year, sailing under the Panamanian flag.

To prove these offences it must be established first and foremost that during the periods that the sanctions were in force arms did fall into the hands of the Charles Taylor regime via the port of Buchanan. For the liability to punishment of the defendant, moreover, it must be established that he contributed to these arms supplies in a way that can be specified as well as proven to the extent that he can be charged with complicity to supply.

9.3 Regarding the accusations pertaining to the war crimes committed (counts 1 through 3) this is somewhat different. The prosecution does not accuse the defendant of having committed looting, rape or randomly taking the lives of citizens himself. At issue is that he is held co-responsible for a number of war crimes more or less specifically described in the indictment as to time and place, committed in either Guinea or Liberia. That there was an armed conflict (whether international or not) – at least when considering the circumstances - in and around the second Liberian civil war, the Court of Appeal gleans from general reports, such as of the International Crisis Group, the Global IDP (Internal Displaced Persons) Database and consecutive official country reports from the Netherlands Ministry of Foreign Affairs. The Court of Appeal therefore disallows the defence of the accused in this regard. Evidence that during this conflict the war crimes the defendant is charged with concretely were in fact committed could be found in the statements from witnesses heard in this investigation. According to the indictment the defendant was co-responsible for these crimes because he furnished the means, gave orders to that end, or in some other way, at least by concrete acts incited, was complicit in or promoted those crimes. Besides, he allegedly allowed purposefully that subordinates committed such offences, all within the meaning of article 9 of the Criminal Law in Wartime Act.

Those acts and the required purpose will have to be inferred from the lawful evidence.

Considerations with regard to the evidence – general

9.4 The Court of Appeal feels it is important to stress that offences can only be proven if the Court is convinced that the defendant did commit the offences he is charged with specified in detail in the indictment; i.e. if the court establishes this for a fact without a reasonable doubt. The conviction should moreover be based on lawful evidence from the case file, assessed by the court as sufficiently reliable, which was discussed during the trial.

9.5 In the case file are general sources from governmental and non-governmental organizations about what occurred prior to and during the second Liberian civil war. Having examined these reports the Court of Appeal will assume hereafter that all parties to the conflict committed serious violations against the humanitarian laws governing war crimes and that - almost as a sine qua non for the waging of an armed conflict in the form it took place in the region from 1999 - arms have been either smuggled or imported into the country, including during those periods that the sanctions against Liberia were in force.

It can also be established that for the defendant personally considerable business interests were involved in being able to exploit the logging concessions granted to him during the period specified in the indictment, or at least in receiving the royalties thereof. The defendant maintained close, or at least business relations with the then president of Liberia, Taylor, in connection with those concessions and their exploitation. And Taylor's regime had considerable direct and indirect interests in the revenues of the exploitation of the said interests. A motive for full and close co-operation between the defendant and Taylor's regime and the defendant's participation in the serious offences he is charged with is therefore obvious, at least at first glance.

9.6 To establish that the war crimes in the indictment, or respectively, illegal arms deliveries did in effect occur, obviously more evidence (in the technical sense) is needed than just these general reports and ideas. Particularly in order to prove the defendant's involvement in the crimes detailed in the indictment, much more is required than the single circumstance that he is referred to as the 'usual' suspect in reports and perhaps had a motive to engage in those crimes. To that end reliable and conclusive evidence is needed. In the present case file these consist essentially of: documentary evidence, statements made by the defendant and above all witness statements. This evidence will be dealt with in that order.

'Documentary evidence'

9.7 Firstly, there are data (that in principle can be designated as objective and solid) from different sources with regard to the navigation movements of the Antarctic Mariner (which is believed to have carried the arms into Liberia) as well as the exact time slots the vessel was berthed in the port of Buchanan, Liberia.

Included in the category objective data is also the information, culled from different sources such as travel data and credit card transactions, concerning the defendant's whereabouts in the periods the Antarctic Mariner allegedly delivered arms in Liberia. On the basis of this information, however, often less firm conclusions can be drawn. This is of lesser significance, to the extent that the defendant could very well have been complicit in an illegal arms transport without having been present.

The data referred to concerning the Antarctic Mariner and the defendant's whereabouts in the said time slots on the other hand are also important to the assessment of the dependability of the witness statements, for instance where they say they have seen the Antarctic Mariner berthed in the port of Buchanan at a certain moment and say they have seen the defendant at or around the time the vessel was offloading a load of arms.

There are also other 'solid' data, such as OTC staff files confirming that a certain witness was indeed employed by that company. The Court of Appeal disregards these and similar data because they do not pertain, or very indirectly, to proving the charges or at least the defendant's involvement in it.

In its reply the prosecution also pointed to a Report of the Panel of Experts, which the Court assumes to be the one referred to as 2001/1015 under no. 157, in which the Panel, under the heading "Arming

and disarming in the region: an overview" quotes documents allegedly showing a payment by OTC "for a delivery of arms in August 1999". In spite of close inspection the Court of Appeal fails to find that this concerns a payment for a delivery of arms, whereas upon inspection there are clues that this concerned the supply of (a) helicopter(s) which is not included in the indictment. Furthermore, it will be clear that a delivery in August 1999 does not fall within the period specified in the indictment. The Panel's observation therefore does not furnish direct evidence of the charges filed, leaving aside the matter that it is not clear what the Panel based its assessment on.

9.8 Separate mention deserve the (in principle 'solid') data in the case file derived from the computer seized from the defendant and other digital data carriers. On the one hand these consist of extensive correspondence between the defendant and third parties in the period as filed in the indictment, including Charles Taylor and the OTC management about matters pertaining to the management of OTC and/or RTC. On the other hand they concern an analysis by a Fiscal Intelligence and Investigation Service/Economic Investigation Service staff member that was found. The defendant stated at the hearing of January 28, 2008 that it may be assumed (in principle) that the documents found on the data carriers were his and that the financial transactions were made by him. The defendant was confronted with numerous excerpts from the said documents; he was also asked to clarify some financial data.

The Court of Appeal is of the opinion that a number of the said excerpts and payments in themselves seem questionable. Neither can it be said that the explanations the defendant gave for these were always entirely plausible. The data summarily specified in this section cannot be said to furnish even a beginning of a substantiation of the accusations filed against the defendant. The same is true for the defendant's involvement in the management of OTC, which has not become clear at all. The Court of Appeal will disregard this evidence, therefore. The prosecution effectively did the same when, in its closing speech on appeal, it referred only to a few excerpts from documents and financial data without attaching clear-cut conclusions to them.

An interim review

9.9 The Court of Appeal establishes that in listing the above types of data essentially all the evidence in the case file has been covered which could be (directly) significant in the assessment of the defendant's involvement in the charges as filed and which deserves the epithet "solid and objective". Solid evidence is very scarce, for that matter.

The above could also be worded negatively: in the case file there is no objective and solid evidence whatsoever, found in documents such as cargo manifests, finance documents, customs reports etcetera, that arms were carried to Liberia on board the Antarctic Mariner. On the basis of the Panel of Experts reports published after 2000 one could even argue that it is not very likely at all that (from a certain point in time onwards) the arms were smuggled into Liberia by sea and via the port of Buchanan, but that it is rather more likely that they were supplied by air. However, the one itinerary does not exclude the other.

Neither is there documentary and tested evidence of acquisitions or payments in Liberia made by OTC, or alternatively, RTC, nor of arms and/or ammunition sent by arms suppliers, let alone that the defendant's responsibility for the arms supplies or the war crimes committed can be inferred directly from 'solid' evidence. Proof for this will therefore have to be found in the statements either made by the defendant, or by witnesses.

9.10 As for the statements made by the defendant in consecutive stages of the proceedings, and the overall behaviour adopted by him, the Court of Appeal limits itself to concluding as follows. The defendant was arrested when he was en route to his lawyer (and present counsel) in order to discuss which action could be taken against the allegations made against him in the media. From the very

beginning he made extensive statements in which he strongly opposed the accusations. The Court of Appeal has not been able to establish that those statements were (significantly) inconsistent, in part misstated, or should in any other way be considered false.

With regard to the location of the RTC concessions areas, however – which could be significant up to a point in view of the charges of war crimes (was the defendant's logging really immediately threatened there?) – the Court of Appeal still has some questions. On different occasions the defendant stated that these areas were located in the province of (Lower) Lofa, which also includes Kolahun and Voinjama. This is where the war crimes are believed to have been committed. Later on, the defendant reconsidered his position and said that his concessions were situated in the provinces of Grand Cape Mount and Gbarpolu. Moreover, the defendant indicated partly different areas on maps on various occasions. The Court of Appeal is of the opinion that this cannot be considered incriminating to the defendant, amongst other reasons because on a map of the United Nations from this period it says: "County boundaries depicted do not represent official endorsement by the Government of Liberia or by the United Nations." It can be inferred from the case file that an administrative reorganization took place in the period as filed in the indictment, which led to the creation of the new province of Gbarpolu.

From the defendant's statements or his adopted behaviour during the proceedings, therefore, no conclusive force can be derived. With this consideration, the Court of Appeal also wishes to demonstrate how difficult it is to establish the actual situation in such a distant foreign country and how carefully one should assess the truth or falseness of statements obtained against the background of that actual situation, with which the Netherlands legal authorities are not immediately familiar.

Testimony

9.11 All proof of the illegal arms supplies as filed and the material directly incriminating to the defendant pertaining to those deliveries and his involvement in war crimes consist therefore of statements made by witnesses, the majority of whom are from Liberia.

As a general rule, evidence like testimony (as is the case with a statement made by the defendant) is by definition less 'solid' by nature due to the subjectivity of the powers of observation, let alone the possibly failing memory or malicious intent of the witness in question. The assessment of the dependability (in an objective sense) of statements made by witnesses will have to be based on a) testing against objective data from a different source, such as pertaining to the situation locally, b) the consistency of consecutive statements made by the witness in question, c) the compatibility of those statements with those of other witnesses, and finally d) the plausibility (which cannot in itself be established as 'solidly') of the contents of the statement(s) obtained.

9.12 In the case in hand over thirty witnesses have been heard as an 'informer' in Liberia

within the framework of the investigation, in the first instance by the Criminal Intelligence Unit of the National Police Agency. These informers had been brought to the attention of the Criminal Intelligence Unit by 'confidants'. The information supplied by these informers was then passed on to the National Police Agency: in so far as they had indicated to be prepared to do so, the individuals involved were also heard 'tactically' as a witness. Many other witnesses were heard directly by the police officers. At a later stage many of those heard by the National Police Agency also made a statement to the Examining Magistrate. For this reason there are often two or three consecutive statements by one witness in the case file, after the intelligence obtained by the Criminal Intelligence Unit had eventually been added to the case file as 'interview records'. These are the witness statements that, in as far as they are incriminating should lead to the judicial finding of fact. The prosecution based itself on appeal on a number of witness statements in its closing speech, which was intended to lead to the judicial finding of fact of all the charges filed in the indictment. In its closing speech, however, the prosecution did not address the value that should be attached to these statements as to their dependability, in spite of the fact that the question certainly deserves attention in this case, and this was expressly and repeatedly called for by the defence.

9.13 The defence contested the incriminating statements from the very beginning by pointing out – in many instances amply documented - the falseness (in its opinion) or impossibility of the allegations in those statements, as well as inconsistencies in consecutive statements made by one and the same witness. The defence's objections against the contents of the witness statements were eventually recorded in various extensive collections of comment, and together with 'power point' presentations mostly presented to the Court two weeks before they were to be dealt with in the Court of Appeal, upon which they were discussed extensively in the defence's plea.

It was not until its reply that the prosecution adopted the (unsubstantiated) position that the statements "were indeed not uniform in some respects", but that this could be readily explained by "instability of the memory" due to the passage of time, and that the statements were essentially consistent.

Apart from this, the defence introduced – besides other extensive documentation – dozens of statements (sworn before a civil-law notary) of predominantly Liberian citizens, which in the defence's opinion are exculpatory for the defendant. These statements, often by former employees of OTC or RTC or services such as the National Port Authority, entailed, summarily, that no one ever saw or heard that arms or ammunition were offloaded from the Antarctic Mariner (or other OTC vessels) in the port of Buchanan, and/or were transported from there to Monrovia, whereas the position the witnesses held should surely have furnished insight into such activities. Again, the prosecution failed to adopt a position vis-à-vis those statements.

Testimony with regard to the arms deliveries

9.14 Close inspection on a more detailed level on the basis of the context for assessment described above (section 9.11) leads to a motley and therefore alarming picture as regards the incriminating testimony about the arms deliveries.

In the first place the Court of Appeal could not but conclude that quite a few witnesses stated forcibly about matters about which it can objectively be established that they simply cannot be true. The most striking example of this is constituted by those statements in which the witnesses stated emphatically that they saw that the Antarctic Mariner deliver its first shipment of arms in early October or December 1999 (and that the defendant was seen on board the vessel around this time in the port of Buchanan), whereas it was established (in section 9.2) that the vessel did not start to sail under this name until May 2000, after it had been acquired by OTC, and therefore can never have been in the port of Buchanan in 1999 bearing this name; and the Court of Appeal has no indications, that the vessel at the time was present in that port under its previous name of 'Sinela'. The Court of Appeal believes the statement by many witnesses about a visit of the Antarctic Mariner to the port of Buchanan (and the defendant's presence around the arrival of the vessel) in a month in which it has been established for a fact on the basis of solid data that the vessel was not there, to be of the same category. Another example can be found in a statement to the effect that the vessel was offloading its cargo in the port of Buchanan for longer than was possible in view of the length of its stay, or carried arms already on its first trip from the United Kingdom, whereas it must reasonably be ruled out that it had an opportunity to dock into a port in order to take arms on board.

Secondly, the Court of Appeal concludes that the statements of various witnesses – again in many significant respects – in themselves are particularly unreliable and hard to believe.

What, for instance to make of the statement that part of the arms, packed in cases, were taken onto shore from the (15 metres deep) hold via a steep ladder, while other cases were offloaded from the vessel by means of a derrick? Or of the image of Charles Taylor hurrying with fifty vehicles from Monrovia to Buchanan upon the message that the ship had arrived in order to take

delivery of the arms in person and inspect them on the spot? As belonging to the same category of 'unreliable' the Court of Appeal considers the testimony to the extent that the witness saw an anti-aircraft gun on the forward deck of the Antarctic Mariner, about which claim a shipping expert said that this would have made 'world headlines'. Neither are the statements that the arms were distributed in Charles Taylor's residence in Monrovia, 'White Flower', very plausible if one considers that the access to these premises (according to a video registration of the on the spot inspection by the Examining Magistrate, and assuming that the situation has not changed essentially since) has such limited head room, that (larger) lorries, let alone vehicles carrying containers could not within reason drive into the compound, so that the arms must have been distributed 'in the street', or at least must have been transferred from there into the residence.

9.15 Amongst the inconsistencies between many statements for instance are assertions about the way in which the arms were packed, the seize of the load, the moment and manner in which they were offloaded and the way in which the arms were subsequently transported on, when the statement made by one witness is hardly compatible, to say the least, with those of others.

A good example of this is the fact that a number of witnesses stated that the Antarctic Mariner shipped the arms in by container, which were then conveyed on by flatbed-trailers, whereas other witnesses stated never to have seen a container around at the arms transports, but that the weapons were in cases that continued on their journey in lorries. The fact that it does not always become clear about which one of the four transports filed in the charges a certain witness stated, does not exactly reduce the problem, for the witnesses present variations all of which in themselves seem plausible (although the one version may be more plausible than the other), but where the one version does exclude the other (pertaining to the same transport), for the Court of Appeal was not given assessment criteria which give prima facie evidence that one statement deserves to be given more credence than another. If aspects important to the assessment of the course of events are involved – and therefore the dependability of the statement made – the Court of Appeal can hardly discount these essential inconsistencies. The Court of Appeal then disregards the fact that some witnesses (or other sources) stated or suggested with regard to the origins of the arms that they came from the Far East, whereas other witnesses (others) believed they were from Eastern Europe. As stated before (in connection with this last assertion) an alternative transport route is also named, namely by air.

Finally, various witnesses turn out to have stated different things about not insignificant matters in consecutive stages (to the Criminal Intelligence Unit, the operational police team and the Examining Magistrate). The defence submitted an impressive list of examples of this in its plea. The Court will just give one example. A witness stated about an arms transport from Buchanan that fell into ambush; a high-ranking officer died as a result and another high-ranking official of OTC/RTC was seriously injured. The witness himself was allegedly caught by the rebels and subsequently fought on their side. In his three consecutive statements significant irreconcilable differences can be pointed out with regard to the date and location of the ambush; besides, in his statement to the Examining Magistrate it emerged as new information that 'Gus' - assumed to refer to the defendant - was amongst those on the convoy.

When questioned by the Examining Magistrate some witnesses also turned out to equivocate when confronted with those inconsistencies, or to inflame with anger. It even emerged that the witness who first read the name of the ship on the poop, when heard by the Examining Magistrate, was illiterate and admitted to have learnt the name of the vessel from someone else.

With this last example the Court of Appeal points out a more general problem, namely that many witnesses seem not only to have a less accurate notion of time and place (and cannot read a map, for instance), but also prove or seem to have problems distinguishing their own visual observations and what they heard from others. This leads to an overall picture in which reality and imagination seem (or threaten) to merge into one. The Court of Appeal concludes this without in any way wishing to suggest that this is a matter of deliberate and intentional distortion of the facts.

9.15 Particularly the aforementioned – sometimes considerable – misstatements of fact and improbabilities, apart from the differences in and between the witness statements, form a significant complication in the assessment of the degree of dependability of the statements made, for it is risky, to put it mildly, to attach credence to parts of a witness's statement when other parts are demonstrably wide of the truth. Particularly if confronted with (parts of) statements that are unreliable in an objective sense which pertain directly to the charges filed and the defendant's involvement in the arms deliveries, and therefore should 'be leading' in the furnishing of proof, this complication is such that it prevents this statement to be used for purposes of finding fact. It is true that in the everyday criminal-law practice in the Netherlands it occurs regularly that statements seem to be not entirely consistent, or alternatively are (in part) incompatible with other statements. But the extent to which this occured in the present case – particularly with regard to frequency and seriousness - is incompatible with a sufficiently objective assessment of the events and the forming of a conclusion.

Also, the – putting it mildly: considerably inaccurate - way in which the events were described by the witnesses as to place and time leads to a similar complication. The Court of Appeal is prepared to accept that in the rural community of Liberia there are fewer fixed points of reference in order to determine time and place, but in the Court's opinion this cannot account for the very substantial 'ranges of diversity' encountered and rules out that they be relied on as leading evidence. The Court of Appeal concludes that even the Examining Magistrate often failed to solve all the inconsistencies and to reduce, let alone remove the uncertainties when he tried to clarify matters, in spite of all his efforts.

9.16 The situation described above pertaining to (by far most) witness statements constitutes an irreconcilable impediment to forming a conclusion on the basis of this evidence, for it would not be appropriate to disregard anything that these witnesses stated which was inconsistent, impossible or in any other way hardly likely, and to carefully select odds and ends that might support the finding of fact.

However, there are some witnesses about whom it cannot be 'established' that the same shortcomings attach to their statements, and whose statements after some editing could be brought in line with each other without too much effort. In view of the care that should be exercised in testing the dependability of their statements, those statements – viewed together and in relation to each other – do not furnish conclusive evidence to the extent that the Court would consider it justified to base its conviction thereupon in relation to such serious crimes. Taking stock, due to the very poor 'quality' of the statements obtained even a conviction based on reliable evidence is lacking, that it was the Antarctic Mariner with which the arms and ammunitions transports as charged occurred, and statements to the effect that the defendant came to the port, sometimes even together with president Taylor, in order to inspect the arms should be considered very dubious.

Conclusion with regard to the war crimes

9.18 The conclusion with regard to the arms deliveries as filed in counts 4 and 5 of the indictment must therefore be as follows.

The defendant must be acquitted of these counts due to the ultimate lack of conviction that needs to be founded on reliable evidence.

The war crimes as filed in the indictment

9.19 As the Court of Appeal considered before (section 9.5), it bases itself on the assumption that it is an established fact that all the contending parties in the Liberian armed conflict in 1999 and subsequent years committed serious violations of humanitarian laws governing war crimes. The prosecution charged the defendant (on the basis of testimony about this) with criminal involvement in incidents around a number of places in the border area between Liberia and Guinea.

With regard to the incidents that should 'carry' these accusations it stands out that hardly any of the witnesses seem to testify about the same incident as the others, while it is almost impossible to establish with any accuracy when the incident referred to took place. The prosecution tried to overcome this problem by referring to a very broad indication of time (and place for that matter) in the charges, like for instance in the wording of count 1: times "in or around the period between December 1, 2000 up to and including March 1, 2001, or at least in the year 2000 and/or 2001, and/or (also) in or around the period from January 1, 2002 up to and including December 31, 2002, at Gueckedou, or at least in Guinea." If finding of fact of complicity would be attempted in this apparently cumulative indictment, this would lead to considerable problems in view of the provisions of article 342, subsection 2 of the Netherlands Code of Criminal Procedure, which prohibits that the finding of fact is based on one testimony only. In other forms of participation this can play a less significant role, for instance because the emphasis is more on the defendant's supporting acts than on the war crimes committed.

9.20 Generally, the same problems arise with regard to the defendant's alleged involvement in these crimes as with regard to the dependability of the testimony, which was discussed extensively heretofore in connection with the arms deliveries as filed. Often the same witnesses are concerned as those who testified about the arms deliveries, although about the war crimes only a limited number of witnesses testified. The problem with the dependability of the statements is also an obstacle to the finding of fact with respect to these offences.

With regard to these statements also the defence not only disputed the dependability of the statements obtained in an informed way, but also submitted sworn statements made before a civil-law notary. In those statements it is emphatically denied that OTC ever had any militia. It is also argued that the OTC security by no means had as many staff as was asserted by other witnesses. This would imply that never large OTC militia could have been introduced to combat. And the same applies for RTC.

As the Court of Appeal considered before (section 9.7 ff), solid and unequivocal indications are lacking from the case file in the form of for instance (digital) documents or payments pertaining to the defendant's involvement in the war crimes. The prosecution actually bases evidence for this involvement strictly on witness statements, too. And with respect to the war crimes those statements do not meet the required standards of dependability, either.

9.21 There are further obstacles to the forming of at least some conviction as to the defendant's involvement. The Court of Appeal shall restrict itself to a concise indication of these obstacles.

OTC, at least in the periods as filed in the indictment, did not engage in any logging activities in the North-Western province of Lofa (or the neighbouring part of Guinea) where the alleged war crimes were said to have taken place. This conclusion gives rise to the pressing question which motive the OTC management would have to reserve security staff (in the OTC logging areas in the South-Eastern part of Liberia) to deploy them in combat. Besides it is very much the question whether the defendant had control over such deployment of OTC staff. The company's Indonesian owner at least denies forcibly that the defendant had any management powers, which assertion should at least have given rise to motivated refutation. There is no clue whatsoever that the OTC management consented to such control over its staff.

Neither is the evidence for the defendant's intention (required for all types of participation) to have

war crimes committed (by 'his') staff in any way substantiated.

Finally, the picture emerges from several different statements that (many) OTC security staff were recruited in 1999 amongst former soldiers who after the end of the first civil war in Liberia had lost there positions. The OTC security was managed by someone who held (and still holds) a high ranking position within the Liberian army. This fact quite leaves open the option that, if OTC security staff did fight at the front in Lofa in the years specified,

this happened because they had been conscripted again.

Conclusion with regard to the war crimes

9.22 In view of what was considered before the defendant must also be acquitted of involvement in the war crimes committed as filed in the indictment due to the ultimate lack of conviction that needs to be founded on dependable evidence. Again, with regard to these charges, a conviction would be very unsafe.

10. Decisions on requests and claims for further investigation

From the circumstance that the Court of Appeal on the basis of the above will arrive at full acquittal on the facts it already follows that the defence no longer has an interest in further investigation, leaving aside if such investigation is still required. The Court of Appeal therefore rejects the defence's requests.

As regards the advocate general's request to have the witnesses A03 and A04 heard by the Examining Magistrate the Court considers as follows. In itself statements designated as reliable about the defendant's involvement in the war crimes as filed in the indictment could be important to the prosecution's furnishing of proof. The delay that would be caused to the appeal by re-opening the investigation could be justified by a concrete expectation of relevant and reliable testimony. In view of the overall picture described above in respect of the testimony in the present case and also in view of the fact that statements obtained from anonymous witnesses (as was the case here) can only be tested to a very limited extent and that the dependability of the testimony could only be established to a very limited degree, the Court of Appeal arrived at the conclusion that it cannot reasonably be expected that the testimony would change the picture decisively.

The Court of Appeal has particularly taken into account the official report of findings by the National Police Agency dated December 18, 2007, attached to a letter sent by the advocate general dated January 9, 2008. In this official report the statements made by the witnesses A03 and A04 are related. On the basis of it, the Court of Appeal could not draw a different conclusion than that the testimony of these two witnesses – if they pertain to the period as filed in the indictment - also must be designated as incredible, incompatible with testimony by other witnesses or in some other way as implausible. The latter because they include elements which are not found in any other statement in the case file, like the assertion by witness A04 that the defendant bought 140 motor-cycles in order to "move weapons (and) ammunition and to carry casualties to (the Court understands: from) the front". Finally the statements refer in part tot events that do not fall within the scope of the period specified in the indictment and/or are hearsay. In view of the aforementioned considerations with regard to the contents of the statements related hereinbefore the Court of Appeal is of the opinion that it does not anticipate the contents of those statements yet to be made.

Considering the above no evidence is produced that these witnesses must be heard, and therefore the Court of Appeal dismisses the advocate general's demand.

11. Items seized

With regard to the items seized that have not yet been returned as specified in a copy of the list attached to this judgment under item numbers 1 through 54, the Court of Appeal will order that they be returned to the defendant.

12. JUDGMENT

The Court of Appeal:

Reverses the sentence of the court below and gives judgment.

Declares not proved that the defendant committed the charges in the indictment and acquits the defendant on all counts.

Terminates the defendant’s suspended order for pre-trial detention

Orders the return to the defendant of the items numbered 1 through 54 specified in the copy of the list of items seized attached to this judgment.

This judgment was given by G.P.A. Aler, LL.M., G. Oosterhof, LL.M., J. Kramer, LL.M., in the presence of W.S. Korteling, Clerk of the court of appeal.

It was pronounced at the public hearing of the Court of Appeal on March 10, 2008.