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Instantie	Rechtbank Den Haag
Datum uitspraak	14-04-2022
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Zaaknummer	09/748011-12 (English version)
Rechtsgebieden	Strafrecht
Bijzondere kenmerken	Eerste aanleg - meervoudig
Inhoudsindicatie	The District Court of The Hague sentences the suspect to 12 years imprisonment for war crimes. The suspect committed serious violations of international humanitarian law; arbitrairy detention, cruel and inhuman treatment and outrage upon personal dignity of at least 18 persons in the period from 1983 to 1987 in the Pul-e-Charkhi prison in Afghanistan.
Vindplaatsen	Rechtspraak.nl

Uitspraak

THE HAGUE DISTRICT COURT

Criminal law

Full chamber in charge of hearing cases concerning international crimes
Case/file no.: 09/748011-12

Date of judgement: 14 April 2022

Judgement in a defended action

On the basis of the indictment and following the examination in court, the District Court of The Hague rendered the following judgement in the case of the Public Prosecutor against defendant, summoned as:

[name defendant],
born on [date of birth] in [place of birth] (Afghanistan),
currently detained at the Penitentiary Institution 'Zuid West, De Dordtse Poorten,
in Dordrecht.

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1 Introduction

The defendant is charged with involvement in war crimes committed in Afghanistan in the period from 1 January 1983 up to and including 31 December 1990.

In this judgement, the court will first deal with a number of formal issues, such as the validity of the

indictment and the admissibility of the Public Prosecutor. This is followed by a discussion of the historical context. Subsequently, the establishment of the facts and the assessment of the indictment will be discussed.

Now that the defendant is accused of involvement in war crimes, the court must also consider whether the requirements for the application of international humanitarian law have been met in this case. To this end, it will pay attention to the questions of whether there was an armed conflict during the indicted period, whether the defendant knew about it, whether the victims named in the indictment were protected persons and whether there was a close connection between the alleged conduct and the armed conflict ('nexus').

Where the court expresses itself in its judgement about evidence, it derives this from the means of evidence that are attached to the judgement as Annex I. In the endnotes of the judgement, the court refers to, among other things, legal history, literature, case law and with regard to the description from the historical context of this criminal case to some documents of the criminal file.

2 Criminal charges

After an amendment of the indictment at the court hearing on 1 October 2020, the defendant was charged with the following: That he,

at one or more time(s), in or about the period from 1 January 1983 up to and including
31 December 1990, in Kabul, at least (elsewhere) in Afghanistan,
together and in association with (an) other(s), at least alone,
(each time) violated the laws and customs of war, while

- those offences have resulted in serious physical injury and/or
- those offences involved violence (with united forces) against persons and/or
- those offences involved forcing (with united forces) others to do something, not to
do or tolerate and/or
- those offences were expressions of a policy of systematic terror and/or
unlawful acts against a certain group of the population and/or
- from those offences death or serious bodily injury of persons other than the defendant
was to fear and/or
- those offences involved inhumane treatment,

consisting in the fact that he, the defendant and/or one or more co-perpetrators, then and there (each time) acted in violation of

- the provisions of the "common" Article 3 of the Geneva Conventions of
12 August 1949 and/or

- international customary humanitarian law and/or

(in particular) the customary international law prohibition of arbitrary deprivation of liberty,

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

with regard to persons who (then) did not (any longer) participate directly in the hostilities, namely civilians and/or personnel of armed forces who had laid down their arms and/or those who had been put hors combat by illness, injury, imprisonment or other cause, being:

1. one or more members of the Amin family (the former President of Afghanistan),

including [persons 1 and 2];

2. [person 3];

3. [person 4];

4. [person 5];

5. [person 6];

6. [person 7];

7. [person 8];

8. [person 9];

9. [person 10];

10. [person 11];

11. [person 12];

12. [person 13];

13. [person 14];

14. [person 15];

15. [person 16];

16. [person 17];

17. [person 18];

18. [person 19];

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

- treated them cruelly and/or inhumanely and/or

- repeatedly assaulted their personal dignity (and/or) (in particular)

treated the aforementioned persons humiliatingly and/or degradingly and/or

- pronounced judgements against them and/or executed these judgements without

preliminary adjudication by a court established in a regular manner

that offers all judicial guarantees, recognised and considered indispensable by the civilized peoples and/or

- arbitrarily deprived them of their liberty;

which 1) cruel and/or inhumane treatment and/or assault of the personal

dignity and/or degrading and/or inhumane treatment and/or 2) which pronouncement and/or carrying out of judgements and/or any arbitrary deprivation of liberty as aforesaid consisted in the fact that he, the defendant and/or one or more co-perpetrators,

1. made the aforementioned person(s) (seriously) physically and/or (seriously) psychologically suffer, by (among other things)

the poor detention conditions,

- incidents of physical violence,

- imposing punishments,

- long-term psychological torment and/or

- creating an atmosphere of terror and/or fear of being exposed to physical or psychological

violence,

because he, the defendant and/or one or more perpetrator(s), held the aforementioned person(s) captive with too many people in too small spaces and/or in spaces in which no or hardly any daylight entered and/or without being able to make sufficient use of sanitary facilities and/or without being able to receive (regular) visitors and/or while the food and/or drinking water they received was poor and/or dirty and/or insufficient and/or they received no or insufficient medical care and/or while they were placed in isolation for a long time and/or their cell was flooded and/or while they were not or hardly allowed to 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 said person(s) violently and/or said person(s) witnessed the violent treatment of others;

and/or

2. implemented against the aforementioned person(s) (prison) sentences and/or other custodial measures and/or had those implemented without prior adjudication by an (independent) court and/or without having received a fair trial and/or (in particular) without having been tried by an independent and impartial body and/or without being informed without delay of the allegations against them and/or without them having the necessary rights and means of defence at their disposal and/or in violation of the prohibition of collective punishment and/or in violation of the principle of legality and/or without the presumption of innocence and/or without being able to make use of the right to be present at their own trial and/or without having the right not to cooperate with their own conviction and/or without being able to make use of the right to receive advice on legal and other remedies and on the terms within which they should be used;

and/or

(a) person(s)subordinate to the defendant who was/were employed within the Pul-e-Charkhi prison (such as (block) commanders and/or guards and/or interrogators) and/or one or more others, together and in association, at one or more time(s), in or about the period of 1 January 1983 up to and including 31

December 1990, in Kabul, at least (elsewhere) in Afghanistan,

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

- those offences resulted in serious physical injury and/or

- those offences involved violence (with united forces) against persons and/or

- those offences involved forcing (with united forces) others to do something, not to

do or tolerate and/or

- those offences were expressions of a policy of systematic terror and/or

illegal acts against a certain group of the population and/or

- from those offences death or serious bodily injury of persons other than the defendant

was to fear and/or

- those offences involved inhumane treatment,

consisting in the fact that he, the defendant and/or one or more co-perpetrators, then and there (each time) in violation of

- the provisions of the "common" Article 3 of the Geneva Conventions of

12 August 1949 and/or

- customary international humanitarian law and/or

- (in particular) the customary international law prohibition of arbitrary

deprivation of liberty,

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

with regard to persons who (then) did not (any longer) participate directly in the hostilities, namely civilians and/or personnel of armed forces who had laid down their arms and/or those who had been put hors combat by illness, injury, imprisonment or other cause, being:

1. one or more members of the Amin family (the former President of Afghanistan),

including [persons 1 and 2];

2. [person 3];

3. [person 4];

4. [person 5];

5. [person 6];

6. [person 7];

7. [person 8];

8. [person 9];

9. [person 10];

10. [person 11];

11. [person 12];

12. [person 13];

13. [person 14];

14. [person 15];

15. [person 16];

16. [person 17];

17. [person 18];

18. [person 19];

and/or one or more others, who were detained (as political prisoners) in (among others) block(s) 1 and/or 2 and/or 3 of the Pul-e-Charkhi prison, treated them cruelly and/or inhumanely and/or repeatedly assaulted their personal dignity (and/or) (in particular)

treated the aforementioned persons humiliatingly and/or degradingly and/or pronounced judgements against them and/or executed these judgements without preliminary adjudication by a court established in a regular manner that offers all judicial guarantees, recognised and considered indispensable by the civilized peoples and/or arbitrarily deprived them of their liberty;

which 1) cruel and/or inhumane treatment and/or assault of the personal

dignity and/or degrading and/or inhumane treatment and/or 2) which pronouncement and/or carrying out of judgements and/or any arbitrary deprivation of liberty as aforesaid consisted in the fact that he, the defendant and/or one or more co-perpetrators,

1. made the aforementioned person(s) (seriously) physically and/or (seriously) psychologically suffer, by (among other things)

- the poor detention conditions,

- incidents of physical violence,

- imposing punishments,

- long-term psychological torment and/or

- creating an atmosphere of terror and/or fear of being exposed to physical or psychological

violence,

because he, the defendant and/or one or more perpetrator(s), held the aforementioned person(s) captive with too many people in too small spaces and/or in spaces in which no or hardly any daylight entered and/or without being able to make sufficient use of sanitary facilities and/or without being able to receive (regular) visitors and/or while the food and/or drinking water they received was poor and/or dirty and/or insufficient and/or they received no or insufficient medical care and/or while they were placed in isolation for

a long time and/or their cell was flooded and/or while they were not or hardly allowed to 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 said person(s) violently and/or said person(s) witnessed the violent treatment of others;

and/or

2. implemented against the aforementioned person(s) (prison) sentences and/or other custodial measures and/or had those implemented without prior adjudication by an (independent) court and/or without having received a fair trial and/or (in particular) without having been tried by an independent and impartial body and/or without being informed without delay of the allegations against them and/or without them having the necessary rights and means of defence at their disposal and/or in violation of the prohibition of collective punishment and/or in violation of the principle of legality and/or without the presumption of innocence and/or without being able to make use of the right to be present at their own trial and/or without having the right not to cooperate with their own conviction and/or without being able to make use of the right to advice on legal and other remedies and on the terms within which they should be used;

which the defendant, being (general) commander and/or head of political affairs (of a certain group of prisoners, i.e. those who were detained (as political prisoners) in (among others) block(s) 1 and/or 2 and/or 3) in the Pul-e-Charkhi prison in Kabul, at (one) (or more) time(s) in or about the period from 1 January 1983 up to and including 31 December 1990, in Kabul, at least (elsewhere) in Afghanistan , (each time) intentionally admitted and/or (in particular) did not take sufficient measures to prevent and/or stop and/or punish the aforementioned crimes.

3 Criminal investigation

The investigation carried out by the police and the examining magistrate

The investigation into this case (under code name 'Chevron') started in 2012 with an open sources investigation into alleged war crimes committed in Afghanistan by perpetrators now living in the Netherlands. The suspicion arose that the former general commander or head of political affairs of the Pul-e-Charkhi prison in Kabul in the 1980s, named [name], allegedly was staying in the Netherlands under a false name.

Apparently this was a man born in [place] in Afghanistan, currently living in [place] under the name [name] and, according to the Public Prosecution Service, being the defendant.

The International Crimes Team (*Team Internationale Misdrijven* hereinafter: TIM) of the National Police / National Criminal Investigation Service, mapped out the situation in the Pul-e-Charkhi prison on the basis of reports from various human rights organisations. The investigation by the TIM focused on the one hand on the identity of the defendant and the answer to the question whether the defendant was the [name] who worked as a supervisor in the Pul-e-Charkhi prison. On the other hand, the investigation focused on the situation of the political prisoners in the Pul-e-Charkhi prison during the period that [name] was working there as a superior. During the investigation, open source research was conducted, files were requested from the Immigration and Naturalisation Service (*Immigratie- en*

Naturalisatiedienst hereinafter: IND) and witnesses were heard. Special investigative powers were also used, such as wiretapping and recording telephone conversations and confidential communication.

The defendant was arrested at his home on 12 November 2019. Subsequently, the house of the defendant and the houses of relatives of the defendant were searched. The defendant was taken into custody on the same day. On 15 November 2019, the examining magistrate placed the defendant in detention. Subsequently, the court ordered the detention of the defendant. His pre-trial detention has been extended since then.

From 2020, the examining magistrate has heard a large number of witnesses at home and abroad at the request of the defence and the Public Prosecutor, in the presence of the defence and the Public Prosecutor. Some witnesses the defence wanted to hear turned out to be deceased. Some witnesses who were in Afghanistan were not heard because of the political-administrative situation that arose in Afghanistan in the summer of 2021.

Examination at the hearing

The court's examination was held during several court hearings. During the pro forma hearings of 19 February 2020, 14 April 2020, 7 July 2020, 1 October 2020, 23 December 2020, 17 February 2021, 12 May 2021 and 2 June 2021, the progress of the investigation and the continuation of the pre-trial detention was discussed. At the hearings on 12 July 2021, 20 September 2021, 28 October 2021 and 13 December 2021, the substantive hearing of the case was started, insofar as it concerned the discussion of a number of formal questions regarding the jurisdiction and admissibility of the Public Prosecutor. The further substantive hearing took place at the sessions on 16 February 2022, 17 February 2022, 18 February 2022, 21 February 2022 and 22 February 2022. The examination in court was closed at the hearing on 4 April 2022.

The court has taken cognizance of the demand of Public Prosecutors N.H. Vogelenzang and M. Blom (hereinafter jointly referred to as: the Public Prosecutor) and of what the defendant and his counsel M.M.H. Zuketto and R.M. Heemskerk (hereinafter: the defence) brought forward.

[person 19] made use of his right to speak as a victim at the hearing on 16 February 2022.

4 Position of the parties

In this chapter, the court will suffice with a brief summary of the parties' positions. Specific positions will be discussed in more detail in subsequent chapters where appropriate.

Position of the Public Prosecutor

Validity of the indictment

The Public Prosecutor has taken the position that the indictment is valid.

Jurisdiction

According to the Public Prosecutor, jurisdiction exists on the basis of the active personality principle. The requirement of double criminality is not at issue here.

Finding of fact

The Public Prosecutor considers it legally and convincingly proven that the defendant, being [name], is guilty of co-perpetrating humiliating, degrading, cruel and inhumane treatment and of carrying out extrajudicial judgements and arbitrary detention of prisoners in blocks 1, 2 and 3 of the Pul-e-Charkhi prison in the period from 1 January 1983 up to and including 31 December 1988. The Public Prosecutor also considers the grounds for aggravation referred to in the indictment to be legally and convincingly proven.

Punishment demanded

The Public Prosecutor demanded that the defendant be sentenced to a prison sentence of 12 years. In addition, the Public Prosecutor demanded the withdrawal from circulation of the *taskara* of the defendant and the return of the other seized objects.

Position of the defence

Validity of the indictment

The defence has taken the position that the indictment is null and void in two respects.

Inadmissibility of the Public Prosecutor

The defence has primarily taken the position that the Public Prosecutor should be declared inadmissible in the prosecution of the defendant since it was not foreseeable for the defendant that he could be prosecuted for the offences charged against him, if proven.

Acquittal

In the alternative, the defence has taken the position that the defendant should be acquitted, because it cannot be legally and convincingly proven that he committed the offences as charged.

Dismissal of all legal proceedings

More in the alternative, the defence has taken the position that the defendant should be released from all legal proceedings as far as the accusation of arbitrary deprivation of liberty is concerned, because this was not contrary to the laws and customs of war at the time.

Conditional request

Finally, the defence requested the court - if it were to reach a conviction - to reopen the investigation and to order that an expert be appointed regarding the defendant's suitability for detention.

5 Applicable law

The indictment is based on Articles 8 and 9 of the Criminal Law in Wartime Act (*Wet Oorlogsstrafrecht* - hereinafter: WOS). These Articles, to the extent applicable in this case, provide:[1]

Article 8

1. Anyone who commits a violation of the laws and customs of war shall be liable to a term of imprisonment not exceeding ten years or a fine of the fifth category.

2. A term of imprisonment not exceeding fifteen years or a fine of the fifth category shall be imposed if:

1°. the violation results in the death or severe bodily harm of the other person;

2°. the violation includes inhuman treatment;

3°. the violation includes forcing the other person to do, to refrain from doing or to endure certain acts;

4°. the violation includes plundering.

3. A term of life imprisonment or a term of imprisonment not exceeding twenty years or a fine of the fifth category will be imposed if:

1°. the violation results in the death or severe bodily harm of the other person and/or includes rape;

2°. the violation includes violence together with others against one or more persons and/or violence against the dead, the sick or the wounded;

3°. the violation includes destroying, damaging, rendering unusable or removing any goods, alone or together with others, that belong in whole or in part, to another person;

4°. the violations as meant in article 2 under 3° or 4° are committed together with others;

5°. the violation is an act of systematic terror or unlawful behaviour against the entire population or a certain group thereof;

6°. the violation includes the breach of certain promises or the breach of agreements that existed between the parties;

7°. the violation includes the abuse of a flag and/or military insignia and/or military uniform of the other party, which are protected by the laws and customs of war.

Article 9

The same punishment as described in the afore mentioned article will be imposed on anyone who intentionally allows a subordinate to commit such violations.

Where the WOS refers to 'the laws and customs of war', this refers to the orders and prohibitions contained in the four Geneva Conventions, the Additional Protocols to these Conventions, other international treaties and customary international law.[2]

The immediate cause for the establishment of the aforementioned penal provisions in the WOS in the early 1950s were the four Geneva Conventions of 1949, which determine the rules of humanitarian law during an armed conflict (hereinafter: the Geneva Conventions or separately: GC I , GC II, GC III, GC IV). Central to these treaties are the different categories of protected persons during an armed conflict. These categories are: wounded and sick in the armed forces in the field (GC I), wounded, sick and shipwrecked in the armed forces at sea (GC II), prisoners of war (GC III) and civilians in time of war (GC IV).

The Geneva Conventions apply in their entirety to international armed conflicts and to a limited extent to non-international armed conflicts. The four Geneva Conventions all contain a similar article 3, also known as the common article 3, with minimum standards of conduct to which the warring parties must adhere in a non-international armed conflict.

In the indictment of this criminal case, the common article 3 of the Geneva Conventions is mentioned as part of the accusation of acting contrary to the laws and customs of war, as referred to in article 8 of the WOS. This article states the following:

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 above-mentioned 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 judgement 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.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

6 Validity of the indictment

The defence has taken the position that the indictment should be declared null and void with regard to the part "and/or one or more others, who were detained (as political prisoners) in (among others) block(s) 1 and/ or 2 and/or 3 of the Pul-e-Charkhi prison" and with regard to the part "and/or one or more other(s)" included several times with regard to the second cumulative/alternative indictment. According to the defence, both parts of the indictment are insufficiently clear and specific and therefore do not meet the legal requirements.

Pursuant to Article 261, first and second paragraph, of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering* - hereinafter: Criminal Procedure), the indictment contains a description of the offence charged, stating the time and the location of committing the offence. It also includes a statement of the circumstances under which the offence was allegedly committed. The purport of this provision is that it must be clear to the defendant what the accusation against him is, so that he can defend himself against it.

The court agrees with the Public Prosecutor that the part "and/or one or more others, who were detained (as political prisoners) in (including) block(s) 1 and/or 2 and/or 3 of the Pul-e-Charkhi prison" meets the requirements. Although it is not mentioned who those "others" supposedly were, it is specified that it must concern prisoners in certain blocks of the Pul-e-Charkhi prison, in the indicted period. Viewed against the background of the file, it is sufficiently clear to the defendant what the allegation relates to.

The court understands the frequently used part "and/or one or more others(s) " under the second cumulative/alternative indictment in such a way that it always refers to co-perpetrators of persons subordinate to the defendant. The defendant is thus accused of deliberately allowing his subordinates to perform certain acts, whether or not together with "others". Again, no mention has been made of who those others would be, but in view of the specific accusation made here, viewed against the background of the file and in the light of the full indictment, the court is of the opinion that it is sufficiently clear to the defendant what the allegation relates to.

Since the court does not see any grounds for nullity of the indictment, the indictment is valid in the opinion of the court.

7 Admissibility of the Public Prosecutor

Jurisdiction

The Public Prosecutor has taken the position that the basis for jurisdiction in this case is the unrestricted active personality principle, which is not subject to the requirement of double criminality. The defence has not taken a position on the question of jurisdiction.

The court considers the following:

The defendant has been charged with (co-)perpetrating and/or intentionally admitting war crimes committed in Afghanistan in the period from 1 January 1983 up to and including 31 December 1990. At the time, the defendant possessed Afghan nationality. Afterwards, the defendant became a Dutch citizen.

Article 3 of the WOS read at the time of the indictment, insofar as relevant:

Without prejudice to the provisions of the Criminal Code and the Military Criminal Code in this regard, the Dutch criminal law applies:

1°. to anyone who commits a crime described in Articles 8 and 9 in Europe outside the Kingdom of the Netherlands;

(…)

4°. to the Dutch citizen who is guilty of a crime referred to in Article 1 in Europe outside the Kingdom of the Netherlands;

Article 1 of the WOS read at the time of the indictment, insofar as relevant:

The provisions of this Act shall apply to the crimes committed in the event of war or punishable in the event of war, which are described in:

(…) 3°. Articles 4–9 of this Act.

Under Article 3, under 1°, of the WOS, universal jurisdiction can thus be established, while on the basis of Article 3, under 4°, of the WOS, jurisdiction can be established for a defendant who is a Dutch citizen, the so-called active personality principle, which is a stronger reference point for jurisdiction.

The court is faced with the question whether in this case, in which it concerns a defendant who subsequently became a Dutch citizen, jurisdiction can also be established on the basis of the active personality principle as referred to in Article 3, under 4°, of the WOS.

Article 5, second paragraph, of the Dutch Criminal Code (*Wetboek van Strafrecht* - hereinafter: Criminal Code), as it read at the time of the indictment, provides that prosecution may also take place if the

defendant only became a Dutch citizen after committing the offence.

The court understands from the history of the creation of the WOS that Article 3 of the WOS must be read in conjunction with the provisions on jurisdiction in the Criminal Code. [3] In view of the provisions of Article 5 of the Criminal Code, the court reads 'the Dutchman' as referred to in Article 3 of the WOS as such that this may also include a defendant who only became a Dutch citizen after the fact.

This means that jurisdiction in this case can be determined on the basis of the active personality principle. Now that the WOS does not require that there must be double criminality, i.e. that the offences charged are also punishable under the law of the country where they were allegedly committed, the unlimited active personality principle is applicable.

Admissibility defences

The defence has taken the position that the Public Prosecutor is inadmissible in the prosecution of the defendant, because it was not foreseeable for [name], in view of his

education and background, that he would eligible for prosecution in the Netherlands as a civilian superior for the offences as charged, if proven.

The court considers that the assessment of these defences requires a judicial finding of fact. This means that these defences do not relate to the admissibility of the Public Prosecutor, but are of a material nature and – if they succeed – lead to the dismissal of all legal proceedings against the defendant. The court will therefore discuss these defences after the finding of fact, in chapter 23.

Since there are no further impediments for prosecution as far as the court is concerned, it declares the Public Prosecutor admissible in prosecuting the defendant.

8 Historical context

Before the court arrives at the actual finding of fact, a brief outline of the political, administrative and social developments in Afghanistan in the run-up to and at the time of the period referred to in the indictment (hereinafter: the indicted period) will be shown below.[4]

On 17 July 1973, Lieutenant General Mohammad Daoud staged a coup that ended the 40-year reign of King Zahir Shah. Daoud initially received support from the communist party, the People's Democratic Party of Afghanistan (hereinafter PDPA) which consisted of two factions: the Khalq faction, led by Nur Muhammad Taraki, and the Parcham faction, led by Babrak Karmal. Both factions propagated the communist ideology.

The arrest of a number of communist activists in April 1978 triggered the so-called "Saur" revolution on

27 April 1978 by the PDPA. Daoud was overthrown and assassinated and Taraki and Karmal formed a government with Taraki appointed President and Prime Minister and Karmal and Hafiz Allah Amin both deputy prime ministers. In September 1979, Taraki was in turn deposed by Amin and killed.

In December 1979 the Soviet Union invaded Afghanistan, Amin was also murdered and Karmal took power. Karmal was appointed President, Prime Minister, Chairman of the Revolutionary Council, among others.

In 1986 Mohammed Najibullah became President of Afghanistan until 1992. Najibullah announced a reconciliation policy in January 1987. In the period after 1986, the Soviet Union withdrew troops from Afghanistan.

Armed uprisings against the succeeding regimes broke out in various places in Afghanistan from 1978. Under Karmal, the violence intensified. People who resisted the regime were detained and large-scale executions took place. Millions of Afghans fled their country in the period 1978-1985.

One of the groups, called 'Mujahedin', put up an armed resistance against the invasion and the regime. The Mujahedin aimed to defend Islam against what they saw as unbelieving Marxists. Within the Mujahedin were several religious and ideological groups. The Mujahedin were supported by the United States and Pakistan, among others.

The security agency called KhAD (Khadimat-e Atal'at-e Dowlati) was established in 1980 and headed by the aforementioned Najibullah. Until 1986, the KhAD was part of President

Karmal's office and was tasked with ensuring internal security in Afghanistan and the continued existence of the regime. In 1986 the KhAD became a separate ministry and its name was changed to WAD (Wazarat-e Amaniat-e Dowlati).[5]

Opponents of the regime who were arrested by the KhAD were often first taken to the KhAD's detention and interrogation centres in Kabul, called Shashdarak and Sedarat. After a few months, these political prisoners were transferred to the Pul-e-Charkhi prison just outside Kabul, which prison also had separate sections, also called blocks, for political prisoners.

The United Nations Special Rapporteur on the Human Rights Situation reported in 1985 on large-scale arbitrary arrests of people who opposed the reforms; possibly around 50,000 political prisoners were detained.

9 Establishment of the facts: general considerations

The defence has argued that the witness statements cannot be used for evidence in view of the passage of time, because of the contacts between witnesses, because they have read books about the situation in the Pul-e-Charkhi prison, and because the questioning of the interrogators has been careless. The defence has also argued that the reports in the file cannot be used for evidence, because they are based on anonymous sources. Finally, the defence argued that the statements of the witnesses always stand on their own, while several pieces of evidence are required for the indictment to be proven.

In general, the court notes that the mere passage of time does not mean that the statements of the witnesses are by definition unreliable. The circumstances that some witnesses have had contact with each other and may have read books about the Pul-e-Charkhi prison, cannot in themselves lead to the conclusion that the statements are simply unreliable.

In this case, the court has carefully assessed and valued the witness statements, and only used them if and insofar as they found confirmation on essential elements in other evidence, such as other witness statements or reports. The court has no reason to doubt the correctness and reliability of the witness statements insofar as it has used them as evidence, now that these statements – viewed together and in (time) relation to each other and the other evidence – are essentially consistent.

With regard to the reports in the file, the court notes the following. These include reports from the Special Rapporteur of the United Nations Commission on Human Rights and reports from non-governmental organisations (NGOs) such as Amnesty International and Helsinki Watch. In addition, a so-called context report titled "Afghanistan Context Report (1978 - 1992) " is included in the file, which was prepared by officials of the National Police and the Public Prosecution Service, based on public sources such as reports from NGOs, reports from the Special Rapporteur and official messages of the Ministry of Foreign Affairs. The court has no reason to doubt the reliability of the reports used for evidence, because these reports are a written representation of research conducted by independent

organisations and reporters in Afghanistan at the time. The fact that the reporters relied in part on anonymous sources does not mean that the reports cannot be used as evidence. Contrary to what the defence argues, the reports cannot be regarded as written documents 'containing the statement of a person whose identity is not proven', as referred to in Article 344a, paragraph 3, of the Criminal Code. After all, the identity of the authors of the reports is known. The defence also noted that the reports may refer to statements by witnesses who also testified in this case. The court considers that although this cannot be ruled out, the reports contain reports from a large number of witnesses, and there are no concrete indications that the witnesses in this case also made a substantial contribution to these reports.

With regard to the required minimum evidence, the court considers in general as follows. Pursuant to Article 342, second paragraph, of the Criminal Code – which, contrary to what the defence has argued, concerns the indictment in its entirety and not just a part of it – the court may accept that the evidence that a defendant has committed an offence charged against him cannot be assumed solely on the testimony of one witness. This provision serves to guarantee the validity of the evidence. The statement must be sufficiently supported by other evidence and the link between the witness statement and the other evidence used must not be too distant.

10 Establishment of the facts: The existence and nature of the conflict

The court is first faced with the question whether it can be established that in Afghanistan, as one of

the contracting parties to the Geneva Conventions, there was a non-international armed conflict within the meaning of international humanitarian law in the period referred to in the indictment.

The International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) has further elaborated the concept of non-international armed conflict and formulated criteria for assessing whether this is the case. According to established case law, there is a non-international armed conflict if there is protracted armed violence and the armed group(s) involved is/are sufficiently organised.[6]

Factors that may be important for determining the intensity of the violence include the number, duration and intensity of the confrontations, the amount and type of ammunition fired and the number of internally displaced persons.[7] The following factors are important in determining whether an armed group is sufficiently organized: the circumstance that the group controls a certain area, the ability to give the group access to weapons and other military equipment and the ability to plan, coordinate and conduct military operations, including troop movement and associated logistics.[8] These factors are not limitative but only indicative and a single factor is not decisive.[9] A state is presumed to have armed forces that meet the requirement of organisation.[10]

The court infers from the evidence, in particular the context report and the report of the Special Rapporteur on the human rights situation in Afghanistan in 1985, that large numbers of victims were killed on a daily basis during the period referred to in the indictment.

The armed violence caused four million Afghans to be displaced. With the arrival of the Soviet Union, hostilities between the Soviet-backed Afghan regime and opposition groups including the Mujahedin increased substantially. Resistance was brutally countered by military intervention. Bombing raids and large-scale infantry operations took place, killing many people. The armed violence thus continued for a long time and confrontations took place where heavy military artillery was used. Thus, in the opinion of the court, one can speak of ongoing armed violence.

The opposition groups were different in nature. Some were armed and used violence, others were not. The Mujahedin, among others, offered armed resistance. This group consisted of 150,000 fighters and had 4,000 bases from which they operated. In the various areas they controlled, the base had a prison, there were Sharia judges to hear cases and military actions were often planned. This group of Mujahedin thus had control over territory, and was able to plan and carry out operations. Thus, in the opinion of the court, the required degree of organisation has been met.

In view of the above, the court is of the opinion that at the time of the period referred to in the indictment in Afghanistan there was a non-international conflict between the Afghan government troops on the one hand and the Mujahedin who had staged an armed revolt on the other.

11 Establishment of the facts: the identity of the defendant

First and foremost the question is whether the defendant, who calls himself [name] and is known as such in the Netherlands, was called [name] during the period referred to in the indictment in Afghanistan and worked in the Pul-e-Charkhi prison.

The court infers the following from the evidence.

The defendant reported to the IND as an asylum seeker in 2001 under the name [name] and stated that he had fled overland from Afghanistan to the Netherlands. The defendant further stated that he was from the [city] region of Afghanistan and lived in the [name] district of Kabul. The defendant was unable to submit a passport to the IND, but was able to submit a so-called '*taskara*', an Afghan identity document in the name of [name]. This taskara was found by the police in 2019 during a search of the home of the daughter of the defendant, named [name]. The taskara has been investigated by the police and that investigation shows that the last name mentioned on pages 3 and 6 has been changed with a blue pen from [name] to [name].

During the search of the defendant's home, an Afghan driving licence of the defendant was found in the name of [name], son of [name], with a passport photo. The defendant has stated to the police that this driving licence belongs to him and that it is his photo.

Telephone conversations recorded and intercepted by the police show that the defendant's wife calls him [name] and that the defendant also calls himself [name] on the phone when Afghan-speaking people call him.

Also, in a confidential conversation recorded and overheard by the police between the defendant and his son [name], the defendant answered his son's question whether his name was [name] in Afghanistan in the affirmative.

The photo on the driving licence was shown to the witness [person 16] who stated that he believed that the photo shows [name], who worked in the Pul-e-Charkhi prison.

Witness [person 21] stated that [name], head of politics of the Pul-e-Charkhi prison, came from [place] and that the orchards of both their families were adjacent. This fact is consistent with the statement of the defendant to the police that he is from [place] and that his family had an orchard.

Witness [person 22] also stated that he knew [name] from the Pul-e-Charkhi prison, that he came from [place] and that he lived in the district [name] just like the defendant. This also corresponds to what the defendant has stated himself.

Finally, the witness stated that he met [name] of the Pul-e-Charkhi prison in the Netherlands at a wedding.

On the basis of the foregoing, the court established that the defendant, although also known in the Netherlands under the name [name], was known in Afghanistan as [name] and worked under that name in the Pul-e-Charkhi prison. Now that the file offers leads for the possibility that [name] was dismissed somewhere in the period 1988-1989, the court assumes for the sake of certainty that [name] was no longer working in the Pul-e-Charkhi prison from 1 January 1988 onwards.

It follows from the foregoing that the court does not agree with the defence's argument that there is a mistaken identity. To substantiate this statement, the defence has submitted a passport of an Afghan person, not being the defendant, who claims to be [name] and to have worked in the Pul-e-Charkhi prison at the time. However, the Afghan authorities informed in October 2020 about this passport that it is not officially registered and that it is labelled as counterfeit by the authorities. The defence also submitted a video in which a man, not being the defendant, can be seen who declares that he is [name], who was working in the Pul-e-Charkhi prison at the time. The court attaches no value to this video, in view of all the foregoing findings.

Where the name [name] appears below in the judgement, this refers to the defendant.

12. Establishment of the facts: circumstances of detention in the in de Pul-e-Charkhi prison

The question that the court will answer under this point is whether the facts have happened as referred to in the charges. In order to answer that question, the court took into account the witness statements relating to the period from 1983 to 1988. The court disregarded the statements relating to circumstances or events in the period before or after.

The witnesses were mainly detained in blocks 1, 2 and 3. The conditions under which the prisoners were detained per block were different. The court will therefore examine the circumstances per block.

Block 1

Block 1 held political prisoners, including political opponents, former ministers, a former ambassador, relatives of former President Amin and relatives of former ministers. Prisoners were held here without having been convicted by a court. Some witnesses had never been to a court during their stay in Block 1. Block 1 also held people who had been sentenced to death. Prisoners have been imprisoned in block 1 for several years, sometimes with temporary transfers to blocks 2 and/or 3.

The cells in block 1 were relatively small and were divided into an east and a west wing. The cells in the west wing had a toilet in their own corridor, the cells in the east wing had a toilet in the cell. It was allowed to use the toilet with the permission of the guards. Showering was not possible and the water to wash with was cold. Everyone was covered in lice. There was overcrowding in the sense that there were often many more people in the cell than the cell was intended for. For example, witness [person 17] stated that in the east wing there were cells for one person, where five people were placed, and in the west wing there were cells for three people, where 12 people were placed. Witness [person 13] stated that there were so many people in the cell that you literally could not breathe properly. Block 1 was overcrowded according to [person 13]. In some cells no daylight came in because the windows were covered. The defendant was responsible for this, according to witnesses

[person 1] and [person 8]. The food was bad. Sometimes there was dirt or sand in the food or even a piece of intestine with faeces in it.

There was hardly any room for airing. Several witnesses have stated that they were not allowed to air at all, such as witness [person 11] and witness [person 18]. Others have stated that they were allowed to air, but that this was not daily, such as witness [person 10] and witness [person 2]. The prisoners were not allowed to receive visitors. Life consisted of being in a cell with nothing at all, sometimes for years on end.

In addition, prisoners were locked up between political opponents, which felt like psychological torture. They had to share their cell with prisoners who had been sentenced to death. The death row inmates were then taken away and the other inmates were then told that the same would happen to them the following week. Now that people did not know what their fate was, this was experienced as heavy and painful. In some cases this happened for years in a row, as was the case with witnesses [person 10] and [person 2].

There were also spies in the cell. These spies passed information to the officials about things that were not allowed. If a prisoner violated household rules, that prisoner was punished, according to witness [person 17]. Examples of punishments were assault, a long period of no airing or transfer to another cell. In addition, inmates were confronted with violent mistreatment when other abused inmates were returned to their cell. Crying could also be heard from people who were interrogated and tortured in block 1, according to witness [person 2].

Block 2

Block 2 contained political prisoners who had not (yet) been to court. There were also prisoners who had already been sentenced by a court to a prison sentence or to the death

penalty. It regularly happened that prisoners after a period in block 1 were transferred to block 2. Some prisoners have been imprisoned in block 2 for several years, sometimes with temporary transfers to blocks 1 and/or 3.

The cells of block 2 had bars, just like in a cage. Block 2 mainly consisted of cells containing many people. Witnesses cite numbers ranging from 70 to 500 people per cell. The cells were overcrowded, with the degree of overcrowding varying. Witness [person 11], for example, stated about cells for 60 people, sometimes containing as many as 250 to 300 people. Sometimes there was such a lack of space that the prisoners did not always have the opportunity to sleep continuously, but had to take turns sleeping. They touched each other as they lay on the floor. Witness [person 14] was unable to stretch his legs because he would hit other people in the head. In addition to the larger cells, there were also smaller cells in block 2 and these cells were also overcrowded. For example, there were cells intended for four prisoners, but on some days there were eight or nine prisoners, according to witness [person 18].

There was a shortage of sanitary facilities. Witness [person 12] testified about one toilet for 500 people. Witness [person 14] about four to five toilets for 600 people. The toilets were open so that everyone could hear and see each other. Toilet visits were only possible with permission and at designated times. Witnesses gave varying statements about the number of times they were allowed to go to the toilet per day; one to four times. Because there were a large number of prisoners, they had very little time to go to the bathroom. Witness [person 16] talks about only two minutes at a time. If one felt the need to go earlier than the appointed time, the prisoners had to relieve themselves in something else, for example in a plastic bag, bottle, cardboard box or bucket. According to Afghan culture, it is very humiliating to relieve oneself in public where other people can see or hear it, and this

was experienced as such by the inmates.

There were also insufficient opportunities to wash, which was due to a lack of water, especially in the summer. Witness [person 16] refers to once every two weeks that prisoners were given the opportunity to wash themselves. But when the water ran out, it ran out. The lack of water was a problem according to witness [person 13]. There was no hygiene. Witness [person 11] stated that even animals in a stable would not be kept in the way that he and his fellow prisoners were kept. There were countless fleas, lice and insects in all the cells. As a result, many people had skin diseases.

The food was bad, often insufficient, dirty and cold. Witnesses testified that they found, for example, vermin, mice, pebbles, soil and excrement in the food. The food was labelled as inhumane by witness [person 4]. The poor food caused many inmates to have diarrhoea, which in turn led to problems due to the limited number of toilets. Witness [person 4] stated that people wet their pants when there was a diarrhoea epidemic. When the cell door opened there was a streak of diarrhoea to the toilet.

Medical facilities were inadequate. Access to medical care or medicines was very limited. Only if a prisoner was very ill, he had access to the medical clinic in the prison, according to witness [person 17]. There the drugs were very limited and often ineffective. There were no medicines for common diseases such as diarrhoea. Prisoners died due to lack of medical care. For example, witness [person 14] stated that a former student of his died because he was not given any medication. Witness [person 16] stated that many prisoners died of easy, simple diseases. There was no help for them. For example, a cellmate of his died of diabetes.

Prisoners were inside all day. Sometimes they were allowed to get fresh air. Witness [person 13] mentioned about fifteen minutes every two days, witness [person 3] testified about one hour a day. Visitors were not allowed, so many prisoners did not see their families for years. For example, witness [person 7] stated that he did not receive any visitors during his seven years of imprisonment.

In addition, inspections of the cells took place. It regularly happened that guards, sometimes in the middle of the night and with or without the presence of the defendant, checked the cells. There were also spies in the cell, so-called *bashis*, who passed on their observations to the officials. Several witnesses have stated that if prisoners had pen or paper against the rules, for example, or complained about the detention conditions, they were mistreated by the prison staff. For example, witness [person 17] stated that you were punished for the least you did. You got beat up. Witness [person 12] stated that prisoners were beaten up during a hunger strike. Other forms of punishment were also applied, such as standing for hours in a cold ventilation shaft without a blanket or extra clothes, limiting the possibility to air out or being placed in an isolation cell for a long time. For example, witness [person 11] was placed in isolation for 15 days after a spy reported about him to the prison management that he had defended the Mujahedin and witness [person 16] was placed in isolation for seven months because he had spoken out about the situation in the prison. Prisoners were confronted with prisoners who had been mistreated or tortured because these prisoners were in a cell among the other prisoners.

Political opponents were also placed together. According to [person 14], this created an atmosphere in which no one trusted each other anymore, because they did not know what information would end up with the officials.

The court cannot establish that the cells were flooded, as was charged. Witness [person 11] stated to the police that his isolation cell where he had to stay for 15 days as a punishment was flooded, but there are no other witnesses who have testified about the flooding of the cells. Nor can the court establish that the prisoners did not have access to sufficient drinking water. Only witness [person 14] stated specifically about this. Although other witnesses have stated about a lack of water, it is insufficiently clear that this concerns drinking water.

Block 3

Once the political prisoners were sentenced to a prison sentence by the court, they were transferred to block 3, among other places. In block 3 there were large cells where sometimes there was overcrowding. If a prisoner spoke out about the detention conditions, he was mistreated. There was a hospital that you could only go to in very exceptional cases. The food was bad and there were regular insects in the rice or in the soup. Conditions were better compared to blocks 1 and 2, according to some witnesses. For example, prisoners had access to a small electric oven, books and a game of chess. There was also a television. It also appears from several witness statements that prisoners in block 3, in contrast to the prisoners in blocks 1 and 2, were allowed to air daily and also receive visitors.

Interim conclusion

Based on the above, the court establishes that all the facts as charged, with the exception of flooding the cell and not having sufficient drinking water available, took place in the period referred to in the indictment.

13. Establishment of the facts: deprivation of liberty and judicial process of prisoners in the Pul-e-Charkhi prison

From the evidence, the court infers that in the Pul-e-Charkhi prison, in the period referred to in the indictment, persons were detained awaiting trial, as well as persons who had been tried and persons who would never be tried. For example, witnesses [person 2] and [person 1] stated that they and members of their family had been detained for years in the Pul-e-Charkhi prison, but had not had a trial. Witness [person 4] also stated that he had not had a trial during his five-year detention. Other witnesses have stated that they did have a trial, but that they had been detained in the Pul-e-Charkhi prison for a long time before that. For example, witnesses [person 3], [person 10] and [person 8] stated that they were only tried after six years of imprisonment and witness [person 14] stated that he was tried after five years. Witness [person 6] stated that he was interrogated and tortured in the years prior to his trial. Witness [person 17] stated that he was interrogated and tortured in the week after his arrest.

Several witnesses have stated that they were not informed of the charges against them until shortly before their trial. According to witnesses [person 18] and [person 6] this was only one day before, according to witnesses [person 7] and [person 3] three days before and according to witness [person 19] a week before. Several witnesses have stated that they were given pen and paper in their cells to write their defence themselves. They received no legal assistance. They also could not see their file. Witness [person 13] stated that he wanted to see legal texts with a view to his defence, but that this request was rejected by the defendant.

Several witnesses have referred to the court that tried them as the Special Revolutionary Court. Witness [person 18] spoke of the "court of the KhAD", as distinct from the civil court. Witness [person 13] also spoke of "judges of the KhAD". According to some witnesses, their trial was very short; witness [person 3] mentioned 20 minutes, witness [person 19] spoke about ten minutes and witness

[person 18] said even less than a minute.

Witnesses also stated that the judges had little or no interest in what they had to say. For example, witness [person 8] stated that he only got two questions and that he was verbally abused by the judges. Witness [person 19] stated that the judges were eating while he was conducting his defence and that they were indifferent. Witness [person 12] stated that he was beaten up by soldiers in court on the orders of a Public Prosecutor while he was conducting his defence. There was also no legal assistance during the hearing. Several witnesses have stated that they had the idea that the course of justice had been rigged. According to witness [person 19], his conviction had already been established. According to witness [person 17], the trial was just for show. According to witness [person 15] it was a premeditated investigation, because there was no evidence against him. Witness [person 13] stated that through his family he already knew what his sentence would be before his trial. This witness also stated that during his trial statements about torture of prisoners were brushed aside by the court.

Witnesses have stated that after their trial they were returned to the Pul-e-Charkhi prison. There they heard their conviction after some time, if they were sentenced to prison. If their verdict involved the death penalty, they did not hear this and sometimes remained in ignorance for years. For example, witness [person 16] stated that he did not know what the verdict was for ten years and that he had constantly waited for his execution. Several witnesses stated that there was no possibility for them to appeal against the judgement.

The statements of the witnesses are in line with what is stated about the Special Revolutionary Court in the context report. It states, citing various public sources, that the Special Revolutionary Court was supervised by Soviet advisers and functioned as a branch of the KhAD. At the beginning of 1984, the Special Revolutionary Court had imposed a prison sentence on hundreds of political prisoners and also the death penalty on a number of prisoners. There was no right of appeal and no right of defence. A person was only acquitted if there was a "total and clear innocence of the accused". Normally, lawsuits lasted no more than a few minutes. Sessions were not public. The judges of the Special Revolutionary Court were believed to have been members of the PDPA and in some cases recruited from the KhAD.

Opposite to all the above is the statement of witness [person 20], who at the time was working as a judge at the Special Revolutionary Court. His statement on the course of events at the Special Revolutionary Court includes the following. Defendants were sent their files 20 to 30 days before the hearing to prepare their defence. Defendants had the right to an attorney. Some sessions lasted a day, others longer. The judges put questions to the defendant and the prosecutor. The judgement was handed out to the convicts on paper. The pre-trial detention could last a maximum of six months, according to the witness [person 20]. The court establishes that this statement is at odds on almost all points with the statements of many other witnesses and with the information that appears from the context report, as stated above. Moreover, the statement finds no confirmation in any other source. The court therefore sets aside the statement of witness [person 20] as implausible.

14. Establishment of the facts: The defendant's role in the Pul-e-Charkhi prison

The court finds that many witnesses who were detained in the period referred to in the indictment in the Pul-e-Charkhi prison have testified about one [name], [name], [name], [name], [name], [name], or [name] who worked in that prison. The court assumes that all witnesses are referring to the defendant, of whom the court has already established that he worked under the name [name of the

defendant] in the Pul-e-Charkhi prison. The court takes into account that differences in spelling can be explained by transcription of the Persian alphabet.

It appears from the statements of the aforementioned witnesses that the defendant had a managerial position in the Pul-e-Charkhi prison in the period referred to in the indictment. Regarding the exact position and responsibilities of the defendant, statements of witnesses

were varied. However, the court considers this understandable in view of the position of the witnesses: as prisoners, they cannot be expected to have had a complete picture of the duties and responsibilities of the prison staff. It is equally understandable that - certainly taking into account the passage of time - they have stated differently about the exact names of the functions of the prison staff.

In addition, statements were made by so-called insider witnesses, that is to say: witnesses who were employed in the Pul-e-Charkhi prison at the time or who were otherwise affiliated with the PDPA. By virtue of the position they held at the time, they can be regarded as having a better idea of the defendant's position. The statements of the insider witnesses are in line with those of the other witnesses to the extent that these statements also show that the defendant held a leading position in the prison.

The insider witnesses [person 23], [person 24] and [person 22] have unequivocally stated that the defendant in the Pul-e-Charkhi prison was responsible for the political prisoners' ward. This is in line with the statements of the witnesses [person 4] and [person 13]. They stated that the defendant was responsible for blocks 1 and 2 in the prison, while the file shows that political prisoners were in any case detained in these blocks. It could be concluded from the statements of other witnesses that the defendant was also responsible for the ward where non-political prisoners were detained. However, the court cannot establish this with sufficient certainty. However, the court believes that the defendant was in any case responsible for the department for political prisoners.

Several witnesses have referred to the defendant as "head of political affairs", although this job title was not used by the insider witnesses. Several witness statements show that at some point the defendant took up another position in addition to his original position, which witnesses referred to as “general commander”. Other witnesses mentioned different job titles. The court is therefore unable to determine what the exact job title of the defendant was. Nor can the court determine what the exact chain of command in the Pul-e-Charkhi prison was like. Whether the commander-in-chief, for example, was a superior to the head of political matters, or vice versa, or whether they stood side by side, has remained unclear.

However, the court can establish that the defendant led block commanders, who in turn led guards and soldiers who served in the prison. Reference can be made to the statements of witnesses [person 16], [person 6], [person 11] and [person 10] and the insider witness [person 24]. They all stated that the defendant gave orders to block commanders and/or that the block commanders were subordinate

to the defendant. [person 24] also named the head of the kitchen as subordinate to the defendant. Witness [person 14] stated that the employees of the hospital and the canteen were also subordinate to the defendant. It appears from the statements of the witnesses that the subordinates actually followed the orders given to them by the defendant.

Multiple witness statements indicate that the defendant was referred to as Lieutenant Colonel, although witnesses have also mentioned other military ranks. It is unclear whether the defendant was wearing a uniform. The defendant was able to give orders to soldiers on duty in the Pul-e-Charkhi prison, but it is unclear whether there was a military structure in the prison.

The responsibilities that the defendant had by virtue of his managerial position can be inferred from the statements of both insider witnesses and other witnesses. Although there are some differences between the statements of the witnesses, they also have similarities. For example, insider witness [person 23] stated that the defendant was responsible for the living conditions and supervision of the prisoners. Insider witness [person 24] stated that the defendant was responsible for "all matters concerning the prisoners", such as food, airing and family visits. Insider witness [person 22] stated that the main task of the defendant was to guard the prisoners. Witness [person 4] stated that the responsibilities of the defendant were the safety and order in the prison and the living conditions of the prisoners. Witness [person 16] stated that the defendant had authority with regard to the regime in the prison, such as food and safety, frequency of toilet visits and airing. It can also be deduced from several witness statements, such as those of [person 3], [person 10], [person 13] and insider witness [person 22], that the defendant had the authority to transfer prisoners to other cells or blocks.

The court therefore finds that, by virtue of his position, the defendant was in any case responsible for the detention conditions and the order in the prison, including the allocation or transfer of prisoners.

How the defendant fulfilled his function can be deduced from the witness statements. Several witnesses have stated that from their cell they saw or spoke to the defendant. According to these witnesses, the defendant regularly walked around the prison and inspected the cells. The defendant also had an actual influence on the detention conditions. Witness [person 2], for example, stated that the situation in the prison changed completely for him when the defendant was put in charge: he was not allowed to go to the toilet as often, or to receive visitors, and to take air as often. Witness [person 4] stated that he was not allowed to air as often under [defendant] and that he was not allowed to go to the toilet as often. This witness also stated that the food got worse under the defendant. According to the witness, the defendant deliberately provided bad food. The witness stated that a fellow prisoner addressed the defendant about the bad food with the words "you can't mix our food with dirty things", whereupon the defendant told this fellow prisoner that he was a traitor and anti-revolutionary. Witnesses [person 8] and [person 14] also stated that the detention conditions were getting worse under the defendant. In particular, [person 14] stated that the quality of the food deteriorated and he had less access to a doctor when the defendant was put in charge. Witnesses [person 2] and [person 8] stated that it was on the defendant's orders that the windows in their cell were covered.

The defendant was also involved in violence in the Pul-e-Charkhi prison, according to the statements of several witnesses. Witness [person 6] stated that he saw a fellow prisoner being beaten by a

guard on orders of the defendant, because the fellow prisoner had complained about the detention conditions. This witness also stated that the defendant had prisoners mistreated as punishment, for example if pen and paper were found in a cell. This witness further stated that the defendant visited him while he was in the prison hospital, withdrew an IV from his hand and had a guard take him back to his cell. Witness [person

11] stated that he had to report to the defendant, who threatened him with execution and had him locked up in an isolation cell by a block commander for 15 days. This was after a spy in his cell had reported about him to the defendant. This witness also stated that the defendant ordered subordinates to beat him. Witness [person 4] stated that he had seen several times that the defendant ordered subordinates to take away a prisoner, after which he heard on this prisoner's return that violence had been used against him. In a more general sense, witness [person 16] testified about abuse of prisoners and putting prisoners in the cold as punishment. According to the witness, this was the work of the defendant, who had the authority to do so.

The defence has argued that there is insufficient evidence for these incidents of violence, because about each incident only one witness testified. The court does not follow the defence. As has already been considered above, the statutory minimum evidence of Article 342, second paragraph, of the Criminal Code pertains to the indictment as a whole and not to a part thereof. This means that it is not necessary to testify about each individual incident by several witnesses. In addition, the statements of the witnesses do not stand alone, but they reinforce each other. Although the individual witnesses testify about different incidents, these incidents are after all similar, i.e. violence committed against prisoners by or on behalf of the defendant, often as punishment.

On the basis of the foregoing, the court establishes that the defendant was not only responsible for the detention conditions and the order in the prison by virtue of his position, but also actively interfered with this. On the one hand, by inspecting the cells and by making decisions regarding, among other things, toilet visits, receiving visitors, airing, food, visiting a doctor and covering windows and on the other, because of his involvement in violence in prison, as described above. It can therefore be established that the defendant knew what happened in the prison. He was also aware of who was being detained in the prison and he knew about the judicial process of the prisoners. He knew that shortly before their trial, prisoners were given a pen and paper to write their defence, but when asked refused to provide law documents. He could also be presumed to have known that no lawyers visited the prison to prepare the prisoners for their trial.

15 Establishment of the facts: victims

19 persons were named in the indictment. The court infers from the evidence that 18 of them were detained as political prisoners in the period referred to in the indictment in blocks 1, 2 and/or 3 of the Pul-e-Charkhi prison. Only regarding [person 5] this cannot be established. However, these individuals were not the only political prisoners in those blocks of the Pul-e-Charkhi prison in the period referred to in the indictment. After all, the witnesses also testified about fellow prisoners other than the 18 persons in the indictment and about overcrowding of the cells, stating numbers of 70 to 500 persons

per cell. In addition, the reports of the Special Rapporteur also show that more political prisoners were detained in the Pul-e-Charkhi. However, the court cannot determine an exact number, not even approximately. The court did establish that all political prisoners in the Pul-e-Charkhi prison were detained without trial, or while waiting (a long time) for their trial, or after a trial as described above. The court also established that all political prisoners were exposed

to the detention conditions described above at some point during their detention, although this was not the case for all to the same extent; for example, not all prisoners are exposed to violence to the same extent.

16 Protected persons

International humanitarian law aims to protect persons who do not or no longer participate in hostilities. The victims in this case are political prisoners, who were detained in the Pul-e-Charkhi prison. As a result, they no longer took part in the hostilities and enjoyed protection under international humanitarian law. In the court's opinion, the defendant must have been aware of this, given his position as manager of the blocks where the political prisoners were detained.

17 Violations of international humanitarian law

The court must assess whether the facts and circumstances it established above constitute violations of international humanitarian law. To that end, in this chapter it will first explain what the prohibitions and injunctions relevant to this case entail. For its interpretation and interpretation, the court has taken into account the comments made to the Geneva Conventions of the International Red Cross (hereinafter referred to as: ICRC) as well as the case law of the ad hoc tribunals and the International Criminal Court (hereinafter referred to as: ICC).

Humanitarian and humane treatment

Inhumane treatment is any treatment of a person that is not in accordance with the fundamental principle of human dignity. The principle of human treatment is a rule of customary international law.[11] Humanitarian or humane treatment, as stated in the ICRC commentary to GC IV of 1958, is also the *leitmotif* of the Geneva Conventions.[12] The injunction for humane treatment is valid at all times and under all circumstances.

Common Article 3 of the Geneva Conventions also begins with the injunction for humanitarian treatment in a non-international armed conflict. Common article 3 of the Geneva Conventions further prohibits various conduct contrary to the injunction of humane treatment, such as killing, maiming, cruel treatment, assault on personal dignity, inhumane and degrading treatment and the imposing and execution of judgements without prior trial. These prohibitions are mandatory and are introduced with the sentence (emphasis added): *"To this end, the following acts are and shall remain prohibited at any*

time and in any place whatsoever with respect to the above-mentioned persons". The ICRC noted in its commentary to GC I in 1952 that this coercive wording leaves no room for loopholes or mitigating circumstances.[13] The prohibitions relevant to this case will be discussed in more detail below.

Cruel treatment

Common Article 3 of the Geneva Conventions includes the prohibition of cruel treatment. This prohibition is a means of ensuring that persons not participating in hostilities are treated humanely under all circumstances. The terms "cruel treatment" and "inhumane treatment" are interchangeable, as the ICTY has considered in several rulings.[14] The ICTY has specified cruel and inhumane treatment as an intentional act or omission that causes serious mental or physical suffering or injury, or constitutes a serious violation of human dignity.[15] In order to assess whether this is the case, all factual circumstances must be taken into account, such as the duration and repetition of the behaviour, the context, the personal circumstances of the victim and the physical, mental and moral effects of the behaviour on the victim. The suffering is not required to be permanent, but the suffering must be real and serious in order to qualify as cruel and inhumane treatment.[16] A special aim is not required.[17]

The ICTY has established in several cases that poor detention conditions can be regarded as cruel treatment. Specific acts that could be seen as cruel include lack of adequate medical facilities and inhumane prison living conditions, beating, and attempted murder.[18]

Assault on personal dignity

Common Article 3 of the Geneva Conventions prohibits the assault on personal dignity, in particular humiliating and degrading treatment of persons not directly participating in the hostilities. The interest protected by this prohibition is the honour and dignity of these persons.

The Geneva Conventions and the Additional Protocols do not define what constitutes "assault of personal dignity". In the case law of the ICTY, it has been considered, among other things, that this is an intentional conduct that will generally be regarded as seriously humiliating or degrading treatment or which otherwise constitutes an assault on personal dignity.[19] Objective criteria play a role in the assessment thereof, such as the form, duration, intensity of the violence, whether or not mental suffering is involved,[20] as well as the cultural and/or religious background of the person involved.[21] As a result, behaviour that is, for example, degrading to someone of a certain nationality, culture or religion, while not necessarily to others, also falls within the scope of the notion of assault on personal dignity.[22] The humiliation must be substantial and serious, but it does not have to be permanent.[23] Physical or mental pain is not a requirement.[24] It must be established that the perpetrator had knowledge of the degrading and humiliating consequences of his or her conduct or omission.[25]

The act or omission charged may in itself constitute an assault on personal dignity, but may also constitute an assault on personal dignity by assessing the act or omission in the context in which it was committed.[26]

Both the prohibition of cruel treatment and the prohibition of assault on personal dignity are part of customary international law.[27]

Arbitrary deprivation of liberty

A prohibition on arbitrary deprivation of liberty in the context of a non-international armed conflict is not explicitly included in the common article 3 of the Geneva Conventions, but in the opinion of the court can be included in the common law injunction of that article to prevent persons to treat those who do not or no longer participate in the hostilities in an inhumane manner.

After all, as has already been considered, inhumane treatment is any treatment of a person that does not correspond to the fundamental principle of human dignity.[28] This fundamental principle has also guided the drafting of human rights treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (hereinafter: ICCPR). Article 9 of those treaties states that no one shall be subject to arbitrary deprivation of liberty.[29] In 1980, the International Court of Justice also considered in the Tehran Hostages case that unlawful deprivation of liberty and subjection to physical restraint under severe conditions is manifestly incompatible with the fundamental principles enshrined in the Universal Declaration of Human Rights.[30]

Reference may also be made to the 2005 ICRC study on customary international humanitarian law, which states (rule 99):

"It should be noted that common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons hors de combat be treated humanely, whereas arbitrary deprivation of liberty is not compatible with this requirement".

All countries have rules regarding the required grounds for detention. Of the legislation of seventy countries cited in the ICRC study, a large part provides for a ban on arbitrary deprivation of liberty in both non-international armed conflicts and international armed conflicts.[31] Furthermore, many countries have criminalized arbitrary deprivation of liberty as a war crime in their legislation.[32]

The United Nations Human Rights Commission already considered in 1994 that the prohibition of arbitrary deprivation of liberty is part of customary international law and that deviation from these norms is not allowed.[33]

In addition, as early as 1952, the ICRC stated in its commentary to Geneva Convention I that the injunction to humane treatment is valid in all circumstances and at all times, and is a minimum guarantee that applies in armed conflict.[34]

The court thus has come to the conclusion that the prohibition on arbitrary deprivation of liberty in the period referred to in the indictment belonged to customary international law and is contrary to the injunction on humane treatment.

With regard to the content of that prohibition, reference can be made to the aforementioned Article 9 of the ICCPR. This article requires that anyone arrested shall be promptly notified of the reasons for his arrest and the suspicion, and that anyone arrested shall be brought before a judge without delay and be entitled to a trial within a reasonable time and the right to periodic review of the grounds for pre-trial detention. Thus, the grounds for

detention and due process should be provided. If one of these minimum requirements is not met, there is arbitrary deprivation of liberty.

By definition, deprivation of liberty based on extrajudicial punishment cannot have a valid reason, as such punishment is expressly prohibited by common Article 3. What is meant by this is further elaborated in Article 6, second paragraph, of the Second Additional Protocol to the Geneva Conventions (hereinafter: AP II). Reference is made to:

- adjudication by a non-independent and non-impartial court;
- failure to comply with the obligation to inform the defendant of the allegation in a timely manner;
- not respecting the rights of the defendant and not making resources available for the purpose of his defence;
- disregarding the right of the defendant to be convicted solely on the basis of individual criminal responsibility;
- failure to observe the principle of *nullum crimen nulla poena sine lege* (no crime, no punishment without law) and failure to uphold the prohibition to impose a heavier penalty than the penalty in force at the time the criminal offence was committed;
- not observing the presumption of innocence;
- not recognising the right of the defendant to be present at his trial;
- not recognising the defendant's right to remain silent and not enforcing the prohibition on forced confession;
- not respecting the right of the defendant to be informed of the legal remedies available to him.

<u>Pronouncing and executing extrajudicial judgements</u>

Common Article 3(1)(d) of the Geneva Conventions prohibits the following:

"the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

What is to be understood by this has already been explained above in the discussion of arbitrary deprivation of liberty. In addition, the court devotes a consideration to the part "executing judgements".

The defence has taken the position that the execution of judgements (*the carrying out of executions*) only concerns the execution of death penalties. At the hearing on 13 December 2021, the court already ruled that it follows the defence. This was followed by further debate between the parties on this part. However, the court sees no reason for a different opinion in this regard and therefore considers as follows:

The French translation *("les exécutions effectuées")*, the German translation *("Hinrichtungen")* and the original English text of the prohibition in common Article 3(1)(d) of the Geneva Conventions refer specifically to executions in the sense of death penalties . The ICRC clearly believes that "the carrying out of executions" refers to the death penalty. For example, in 1960 the ICRC stated in its commentary to GC III when discussing this provision that executions without prior trial are too vulnerable to error and that the provision only concerns "summary justice",[35] and the ICRC noted in its 2020 commentary to GC III on this point that the prohibition of executions does not mean a prohibition on the death penalty, but that a death penalty may only be executed if there has been a prior trial by an independent tribunal, whereby all legal safeguards have been complied with.[36] With regard to this part of the prohibition, the "Elements of Crime" of the ICC includes the element "the perpetrated executed one or more persons".[37]

The Public Prosecutor has referred to article 6 of the AP II. However, the ICRC's 1987 commentary states that this provision refers to the two stages of the procedure, i.e. the preliminary investigation and the hearing - and not the execution. In a footnote to the comment it is explicitly stated that article 6 of the AP II does not concern the execution of penalties, except for paragraph 4 of that article.:

"The execution of penalties is not dealt with in this article - with the exception of the execution of the death penalty on pregnant women and mothers of young children, which is prohibited by para. 4". [38]

The Public Prosecutor also referred to the national penalisations of Germany, France and Sweden of the prohibition standards from common Article 3 of the Geneva Conventions to substantiate that 'executions' should also be understood to mean the execution of sentences other than the death penalty. The court considers that countries are free to criminalize more than what the prohibition standards in the common article 3 refer to. The question now before the court is whether, with regard to the passage "the carrying out of executions" in common Article 3 of the Geneva Conventions, something else should be understood than death sentences, in the period referred to in the indictment. In the opinion of the court, the original text of common article 3, as well as the comments from the ICRC and the Elements of Crime, provide insufficient points of reference. Nor is there a single rule of customary international law in the ICRC's study that states that. Rule 100 (customary law) of the ICRC's study, which deals with the prohibition referred to in Article 3(1)(d) of the Geneva Conventions, does not deal with this part. The three national provisions referred to are insufficient to establish the required *opinio juris* and state practice for customary international law.

Finally, the Public Prosecutor referred to the Al Hassan case, which is currently pending before the ICC

and on which the Trial Chamber has yet to give a ruling. That case, however, at its present stage, does not throw any other light on the foregoing. The suspicion in that case relates to "the passing of sentences without previous judgement pronounced by a regularly constituted court", and not to the "carrying out of judgements" under Article 8, second paragraph, under c, iv. , of the Rome Statute. [39] It can be deduced from multiple decisions of the Pre-trial Chamber that "the passing of sentences" does not also include the execution of a penalty.[40] The enforcement of extrajudicial punishments, including corporal punishment, is - to the extent the court can determine - not involved in the individual

liability of Al Hassan for the war crime of violation of Article 8, paragraph 2, under c, iv, of the Rome Statute.[41]

What has been considered above leads to the court's opinion that the execution of judgements, insofar as those judgements do not relate to the death penalty, does not fall under the prohibition included in the common Article 3 of the Geneva Conventions.

18 Violations of international humanitarian law in this case

In this chapter, the court will assess whether the facts and circumstances it has established constitute violations of the standards of international humanitarian law set out in the previous chapter.

Cruel treatment and assault on personal dignity in this case

With regard to blocks 1 and 2, the court considers that the prisoners were detained in overcrowded cells, some of which had no daylight. Sometimes the cells were so full that there was not enough room to sleep. In both blocks the prisoners could not make sufficient use of sanitary facilities. There was no shower and, especially in summer, there was a shortage of water, which meant that the prisoners were unable to wash themselves sufficiently. Hygiene in the cells was seriously lacking. The prisoners had a lot of problems with fleas, lice and other vermin. In block 2 there were too few toilets for the number of prisoners. In addition, people were only allowed to use the toilets at set times. This resulted in the prisoners having to relieve themselves in something else such as a bottle, cardboard box or plastic bag. This caused a problem with diarrhoea, which was a regular occurrence due to poor food. As mentioned the food was bad, often insufficient, dirty and cold. Prisoners were not allowed to air or only a few times a week and were not allowed to receive visitors. There was hardly any medical care, which meant that prisoners died from diseases that could have been treated with sufficient medical care. If prisoners complained about the detention conditions or if the prison management found out through cell inspections or spies that prisoners had a pen or paper in violation of the rules, they were mistreated or received some other form of punishment such as standing in the ventilation shaft. Prisoners were placed in the same cell with political opponents and spies, which created mistrust among the prisoners. In Block 1, inmates were confronted by fellow inmates who were taken from the cells to be executed, while they themselves were still unsure of their own fate and thus feared that the same would happen to them.

The prisoners were political prisoners: persons who were seen by the incumbent Afghan regime as an opponent of that regime, for example because they had spoken out against the regime, or because

they were associated with the previous regime. After being captured, prisoners were left in complete uncertainty about their fate for years, sometimes throughout their detention period, due to the lack of information about the duration of and reason for their imprisonment.

The prisoners experienced their detention conditions as harsh and inhumane, and although some prisoners were not physically abused, they did experience the combination of the conditions as mental abuse. Not only then but to this day some former inmates experience mental problems as a result of their imprisonment in the Pul-e-Charkhi prison.

The court established that the prisoners suffered serious mental suffering as a result of the circumstances under which they were held in the Pul-e-Charkhi prison. In addition, due to the detention conditions, the abuse and the lack of medical facilities, they also suffered physical injuries such as headaches, back pain and bladder problems. To this day, some experience physical consequences such as back and neck hernia, bladder problems and loss of vision as a result of their detention in the Pul-e-Charkhi prison.

The court comes to the following conclusion:

Blocks 1 and 2

The combination of years of detention in a hopeless and uncertain situation as a political prisoner, and the structural confrontation with degrading detention conditions, which has led to serious suffering and injury, leads the court to the opinion that there has been cruel or inhumane treatment of the political prisoners in blocks 1 and 2. Due to these circumstances, these prisoners were also assaulted in their personal dignity and treated in a humiliating and degrading manner.

Block 3

With regard to block 3, the court sees indications that the circumstances were also not good in that block. At the same time, the court notes that there are also indications that the situation in block 3 was better than in blocks 1 and 2. This means that the court cannot determine with sufficient certainty that the circumstances in block 3 were such that there was cruel treatment. and/or assault on the personal dignity and/or humiliating and degrading treatment of the prisoners in that block.

This does not alter the fact that one can still speak of cruel treatment with regard to individuals. In particular, the court considers that to be the case with regard to witness [person 19]. This witness had been detained in block 3 from 1983. He has stated that in 1984 in block 3 he complained to an officer about the detention conditions. He was then taken by the block commander and two guards and received 120 lashes on his body. He lost consciousness and broke his hand and foot. [person 19]'s statements to the police and to the examining magistrate are detailed and consistent on this point. His statement is broadly confirmed in the statement of witness [person 6]. This witness stated that he had been detained in block 3 from April 1984 and that in block 3 constant beatings took place by the staff and the officers when prisoners spoke about the circumstances. The court is of the opinion that this event can be qualified as cruel or inhumane treatment.

<u>Arbitrary deprivation of liberty in this case</u>

From what the court has established above follows that in the period referred to in the indictment in the Pul-e-Charkhi prison, persons were detained without prior trial by a court, as well as persons who had been tried by a court but whose deprivation of liberty was based on extrajudicial punishment. After all, it follows from what the court has established about their adjudication by the Special Revolutionary Court that this adjudication did not meet the basic requirements. That court cannot be regarded as an impartial court. Those tried by that

court were not promptly notified of the charges against them and they did not have at their disposal the necessary rights and resources to conduct a defence. Nor did they have the right not to cooperate with their own conviction and they could not exercise the right to legal advice.

Thus, the inmates in the Pul-e-Charkhi prison – both those tried by the Special Revolutionary Court and those who had never been to a court – were arbitrarily deprived of their liberty and thus the injunction on humane treatment was violated.

Pronouncing and executing extrajudicial judgements in this case

As considered, extrajudicial prison sentences were executed in the Pul-e-Charkhi prison, which is contrary to the international prohibition of arbitrary deprivation of liberty. However, this is not contrary to the prohibition on the execution of extrajudicial judgements referred to in the common article 3 of the Geneva Conventions. After all, as considered in the previous chapter, that prohibition only applies to the execution of the death penalty.

From the file, in particular from many witness statements, it appears that the Special Revolutionary Court also pronounced death sentences, that the death row inmates were also detained in the Pul-e-Charkhi prison and that they were collected from there and then executed. This could indeed be in conflict with the prohibition on the execution of extrajudicial judgements, but will not be discussed further here, because involvement in the execution of the death penalty is not blamed on the defendant in view of the actual effect of the indictment.

Since the execution of extrajudicial judgements, as charged, does not conflict with the common Article 3 of the Geneva Conventions, the court acquits the defendant thereof.

Neither will the defendant be held accountable for involvement in the *pronouncement* of extrajudicial judgements in view of the actual elaboration of the indictment, so that this will not be discussed any further.

19 Liability of the defendant for violations of international humanitarian law

Introduction

The court has established in the previous chapters that the defendant was employed in the Pul-e-Charkhi prison as a supervisor in the period from 1 January 1983 up to and including 1 January 1988. The court has also established which facts took place in the Pul-e-Charkhi prison during that period and that those facts constitute violations of international humanitarian law. The court will subsequently determine whether and to what extent the defendant can be held criminally liable for involvement in those violations of international humanitarian law.

Assessment framework for liability

The first cumulative/alternative charge was that the defendant committed the alleged offences as a *co-perpetrator*, or that he committed these offences together and in association with one or more others. As a second cumulative/alternative charge, it was charged that as a superior the defendant is liable for the alleged offences.

Concurrence of co-perpetration and liability as a superior

Contrary to what it considered in its judgement of 15 December 2017 in the case against Eshetu A.,[42] the court is now of the opinion that these two forms of liability are not mutually exclusive. Where both forms of liability have been charged cumulatively, as in this case, the court will have to assess whether they can be proven for both. In the opinion of the Dutch legislator, liability as a superior is a *sui generis* liability, which does not alter the fact that the superior can also be regarded as an "ordinary" perpetrator under certain circumstances.[43] This view is supported by the case law of the ad hoc tribunals. For example, the International Criminal Tribunal for Rwanda (hereinafter: ICTR) considered the following in the case against Setako:

"The Appeals Chamber finds that, since the Amended Indictment charged Setako cumulatively under Articles 6(1) and 6(3) of the Statute, the Trial Chamber was required to make a finding as to whether Setako incurred superior responsibility for the purpose of sentencing. The Trial Chamber's failure to make such a finding constituted an error of law". [44]

However, it must be prevented that disproportionate criminal liability arises. That would be the case if a defendant is penalized for both his direct involvement and his involvement as a superior in exactly the same offence. The ICTY expressed this in the case against *Delalic et al*. as follows:

"A different situation may arise of two separate counts against an accused, one alleging Article 7(1) responsibility for direct or accessory participation in a particular criminal incident, and another alleging Article 7(3) responsibility for failure to prevent or punish subordinates for their role in the same incident. If

convictions and sentences are entered on both counts, it would not be open to aggravate the sentence on the Article 7(3) charge on the basis of the additional direct participation, nor the sentence on the Article 7(1) charge on the basis of the accused's position of authority, as to do so would impermissibly duplicate the penalty imposed on the basis of the same conduct". [45]

Under Dutch law, disproportionate liability is prevented because in such a situation – i.e. a situation in which there is evidence of both direct involvement and involvement as a superior in the same facts – there will be "one act concurrence" (i.e. an offence charged under more than one penal provision) as referred to in Article 55. of the Criminal Code. After all, there is then a coherent complex of facts occurring at the same time and place to such an extent that the defendant can essentially be blamed for it, in which the purport of the violated staff provisions is the same. The penalty in that case will be based on the direct involvement of the defendant. In the same context, see, for example, District Court of Dili, Special Panel for Serious Crimes, in the case against *Sufa*:

"Rather, in a first stage, it has to be acknowledged that both types of responsibility exist, and in a second stage it must be decided whether they continue to co-exist or whether one is displaced by the other. In this second stage, the Court took recourse to legal instruments developed in "civil law" jurisdictions to resolve the concurrence: In "civil law" jurisdictions, a person who intentionally participates in the commission of a crime by ordering it, is regarded as a perpetrator of that crime himself, whereas a superior who fails to prevent a crime by his subordinates is not regarded as the perpetrator of that crime but of a separate crime of omission (failure to supervise). In such a case it is an undisputed principle that the separate crime of omission (by negligence) is subsidiary to the (intentionally) ordered crime. This principle also applies to international criminal law". [46]

Co-perpetration

With a few exceptions, the general rules of Dutch general criminal law also apply to the trial of war crimes (see Article 91 of the Criminal Code), in particular the rules relating to participation in criminal offences. According to case law of the Supreme Court of the Netherlands, co-perpetration is involved if several persons have cooperated closely and consciously to commit a criminal offence. This requires that the co-perpetrators have intentionally cooperated, that the co-operation was aimed at committing the criminal offence, and that the co-perpetrator's contribution to the offence was sufficiently substantial.

Liability as a superior

Article 9 of the WOS makes punishable anyone who intentionally allows a subordinate to commit an offence as referred to in Article 8 of the WOS. Command responsibility refers to the general obligation of superiors to take measures in an armed conflict to prevent and punish crimes committed by subordinates. Superiors, if they fail in this obligation, can be held criminally liable for failure to prevent and punish crimes by their subordinates.[47] In the legal interpretation of superior liability, the court aligns with the international law concept of *command responsibility* and considers this as follows.

The obligation of superiors to take measures in an armed conflict to prevent and punish crimes committed by subordinates follows from the fundamental principle of international humanitarian law, i.e. *responsible command*.[48] The principle is contained in the earliest codifications of the laws of war.[49] After the Second World War, the principle of *responsible command* and the *command responsibility* ensuing from it developed into a general principle of law within (international) law. Through *command responsibility*, superiors can be held criminally liable for failure to prevent and punish crimes by their

subordinates.[50] Codification of the doctrine of *command responsibility* took place with the adoption of the AP I in 1977, whereby Articles 86 and 87 of the AP I included both the duties of the commander and the criminal consequences if he does not comply with the duties.[51] The AP II does not contain any codification of the doctrine of *command responsibility*. However, it is generally accepted that the doctrine also applies in non-international armed conflicts, as the AP II allows states to - in accordance with common Article 3 of the Geneva Conventions - prosecute and try individuals and members of the armed forces who have committed conflict-related (serious) violations of international humanitarian law.[52]

Penal provisions regarding the doctrine of *command responsibility* can be found in Article 7 of the Statute of the ICTY, Article 6 of the Statute of the ICTR and Article 28 of the Rome Statute before the establishment of the ICC.[53] The resulting case law dates from after the

period referred to in the indictment. However, the court sees no impediment to aligning the interpretation of Article 9 of the WOS with the development of this doctrine within these tribunals.

It can be deduced from the case law of the aforementioned tribunals that the following requirements must be met in order to determine liability as a superior:

- the superior exercises effective authority and control over the subordinate in a hierarchical structure;[54]
- the superior knew or had reason to know that a crime was imminent or was being committed by his subordinate;
- the superior fails (intentionally or unintentionally) to take necessary measures that are within his power to prevent the crime being committed.[55]

Liability in this case

Co-perpetration

The court has established that the defendant, by virtue of his position as superior, was responsible for the detention conditions and the order in the prison, including the allocation and transfer of prisoners. The defendant could not fulfil his duties alone; for this he worked together with the prison staff subordinate to him, such as the block commanders. Together with them, the defendant detained persons without a prior fair trial and created and maintained a detention regime in which the prisoners lacked adequate and good basic facilities, such as sanitation, food, medical care and airing. Part of that regime was the use of physical violence as punishment, and an atmosphere of fear, for example by placing spies in a cell. To achieve this, the defendant gave orders to his subordinates, but sometimes he intervened himself, as evidenced by the many witness statements.

In view of these findings, one can speak of a close and conscious cooperation between the defendant and his subordinates, aimed at cruel treatment, assault on personal dignity, humiliating and degrading treatment and arbitrary deprivation of liberty of prisoners in the Pul-e-Charkhi prison. In the opinion of the court, the contribution of the defendant to this was of sufficient weight to classify him as a co-perpetrator in those violations of international humanitarian law. This also applies to the brutal treatment in block 3, as the latter can be seen as part of a policy of violent punishment of prisoners in

which the defendant himself sometimes took an active part.

The fact that the defendant may not have had the power to release prisoners by virtue of his position, as the defence has argued, does not prevent him from being held responsible as a co-perpetrator for arbitrary deprivation of liberty. Contrary to what the defence has argued, international humanitarian law does not make that requirement. It is sufficient that it can be established that the defendant has made a significant contribution to the continuation of the deprivation of liberty.[56] That is certainly the case here, in view of the position and responsibilities of the defendant.

Liability as a superior

The court is of the opinion that the defendant can also be held liable as a superior for all of the foregoing. After all, he has deliberately allowed subordinates to – whether or not on his behalf – treat prisoners cruelly, assault them in their personal dignity, humiliate and

degrade them and arbitrarily deprive them of their freedom. Although the precise command structure in the Pul-e-Charkhi prison has remained unclear, it can be established that the defendant exercised effective authority and control over his subordinates, being the block commanders, guards and others. He gave them orders, and those were followed. The defendant also knew what was going on in the prison, so he could also be expected to know what his subordinates were doing. He may not have been aware of every incident, but the behaviour in question was not incidental in nature. It has not been shown that the defendant has taken any measures against his subordinates.

20 Nexus

In the foregoing, the court has established that there was a non-international armed conflict going on in Afghanistan of which the defendant was aware, that violations of international humanitarian law had taken place and that the defendant is liable for this. The next question is whether there was a close connection between these violations and the armed conflict, and whether the defendant was aware of this.

This relationship is also known as the nexus. The nexus requirement serves to distinguish war crimes from common crimes and other international crimes such as genocide and crimes against humanity.[57]

It follows from ICTY case law that the nexus does not require that the conduct took place in the course of the fighting or within the area where the actual combat took place, insofar as the crimes are closely related to the hostilities.[58] A causal relationship is not required, but the conflict must have played an essential role in the possibility or decision to commit the crime, the manner in which the crime was committed or the purpose with which the crime was committed.[59] Criminal liability for war crimes is not limited to the warring parties and those in close relationship with one of the parties.[60]

The nexus can be determined, among other things, on the basis of the status of the victim and the perpetrator under the Geneva Conventions and the role they played in the hostilities, whether the

crime furthers the (end) goal of a military strategy and/or the act(s) were committed as part of or in the context of the offender's official duties.[61] The perpetrator must have been aware of the factual circumstances that led to the armed conflict. It is not required that the perpetrator has made a legal analysis as to whether there was a (non-)international armed conflict. It must be established whether he or she was aware of the actual circumstances of the armed conflict. In concrete terms, the ICC considers that the perpetrator must be aware of the hostilities between (at least two) entities, that these hostilities have a certain intensity and that the entities are organised.[62]

In the opinion of the court, it follows from the factual findings in this case that there is a close connection between the armed conflict and the violations of international humanitarian law for which it holds the defendant liable. This leads to the following considerations.

The violations of international humanitarian law established by the court were committed against political prisoners in the Pul-e-Charkhi prison, i.e. persons who were regarded by the incumbent Afghan regime as opponents of that regime, for example because they opposed the regime, or because they were linked to the previous regime. The detention of political prisoners in the Pul-e-Charkhi prison cannot be separated from the armed conflict. As the court established in Chapter 10, there was an armed conflict going on at the time between the Afghan regime, supported by the Soviet Union, and groups opposing that regime, in particular the Mujahedin. Although it cannot be established that the political prisoners offered armed resistance to the regime, they were among the regime's opponents, at least in the eyes of the regime. As a result, the regime saw an interest in detaining these political prisoners. This is also apparent from the witness statements. For example, several witnesses have testified that they were accused of being against the Soviet Union, or of having ties with the United States, the Soviet Union's opponent at the time. Thus, the conflict has played a vital role in the defendant's ability to commit the violations of international humanitarian law.

In addition, the defendant allowed the detention conditions in the Pul-e-Charkhi prison to deteriorate, precisely because the prisoners were political opponents. Reference can be made to the various witness statements. Witness [person 16] stated that the high officials in the prison saw the prisoners as their enemies, they were anti-revolutionaries. For that reason, the prisoners and their relatives had to be put under pressure, according to the witness. Witness [person 14] stated that the detention regime under the defendant was getting worse, because he saw the prisoners as his enemy. Witness [person 4] stated that the defendant, when asked why he treated the detainees so badly, replied: "during your reign you also did that to us and killed us". This witness also stated that the defendant said to a fellow prisoner who had complained about the detention conditions: "you are a traitor, anti-revolutionary, you are against your comrades". Witness [person 11] stated that he was placed in isolation for 15 days after a spy reported on him to the defendant that the witness had defended the Mujahedin. According to this witness, the defendant told him: "The prisoners are rogues and they are against my revolution. Therefore, they should not be left alive and they should not be treated humanely. " In the opinion of the court, detention under these circumstances could be regarded as a way to (temporarily) eliminate political opponents and add suffering, so that they could no longer play a role in the conflict. Thus, the conflict has also played an essential role in the purpose with which the violations of international humanitarian law were committed.

The court therefore believes that nexus has been proven.

It also follows from the foregoing that the defendant was aware of the circumstances leading to the conflict. Reference can also be made to the witness statements, including those of [person 14] and [person 4], which show that the defendant received Russian advisers in the prison and that the defendant held talks with the prisoners about the party and the regime, and the statement from witness [person 2]. According to this witness, the defendant told him that anyone who doesn't like the Russian occupation or communism is from the CIA and "shouldn't be alive here."

21 Conclusion – provability of the facts

Violation of the laws and customs of war

In view of all the foregoing, the court concludes that the defendant, together and in association with others, has violated the laws and customs of war, as referred to in Article 8 of the WOS, and that he has deliberately allowed subordinates to do so. as referred to in Article 9 of the WOS.

Grounds for an increased sentence

The indictment includes several statutory grounds for an increased sentence, derived from Article 8, paragraphs 2 and 3, of the WOS. It follows from the findings made above that several of these grounds have been proven.

The court has already determined that the established facts constituted inhumane treatment and that these facts resulted in serious physical injury to the witnesses [person 11] (visual impairment) and [person 16] (back and neck hernia and bladder problems).

The court also established that the offences involved acts of violence with combined forces against persons. After all, several witnesses have stated that violence was used during their detention in the Pul-e-Charkhi prison.

Due to the extremely bad sanitary detention conditions, contracting various diseases was far from imaginary. In combination with the lack of medical facilities, death or serious physical injury was to be feared because of the established facts.

Prisoners had no choice but to undergo their deprivation of liberty under the established conditions. Thus one can speak here of forcing to tolerate in conjunction with others.

Finally, in the opinion of the court, the established facts were an expression of systematic terror and illegal action against a certain group of the population, being the political opponents detained in the Pul-e-Charkhi.

22 The judicial finding of fact

The court declares that it has been proved against the defendant that:

in the period from 1 January 1983 up to and including 31 December 1990, in Kabul, together and in association with others, violated the laws and customs of war, while

- those offences have resulted in serious physical injury and

- those offences involved violence with united forces against persons and

- those offences involved forcing with united forces others to tolerate and

- those offences were expressions of a policy of systematic terror and unlawful acts against a certain group of the population and

- from those offences death or serious bodily injury of persons other than the defendant

was to fear and

- those offences involved inhumane treatment,

consisting in the fact that he, the defendant and/or one or more co-perpetrators, then and there (each time) acted in violation of

- the provisions of the "common" Article 3 of the Geneva Conventions of

August 12, 1949 and/or

- international customary humanitarian law and/or the customary international law prohibition of arbitrary deprivation of liberty,

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

with regard to persons who then did not participate directly in the hostilities, namely civilians who had been put hors combat by imprisonment, being:

1. [persons 1 and 2];

2. [person 3];

3. [person 4];

4. [person 5];

5. [person 6];

6. [person 7];

7. [person 8];

8. [person 9];

9. [person 10];

10. [person 11];

11. [person 12];

12. [person 13];

13. [person 14];

14. [person 15];

15. [person 16];

16. [person 17];

17. [person 18];

18. [person 19];

and others, who were detained as political prisoners in blocks 1 and 2 and 3 of the Pul-e-Charkhi prison,

- treated them cruelly and inhumanely and/or

- repeatedly assaulted their personal dignity and treated the aforementioned persons humiliatingly and degradingly and/or

- arbitrarily deprived them of their liberty;

which 1) cruel and inhumane treatment and/or assault of the personal

dignity and/or degrading and/or inhumane treatment and/or 2) which arbitrary deprivation of liberty as aforesaid consisted in the fact that he, the defendant and co-perpetrators,

1. made the aforementioned persons seriously physically and seriously psychologically suffer, by

- the poor detention conditions,

- incidents of physical violence,

- imposing punishments,

- long-term psychological torment and/or

- creating an atmosphere of terror and fear of being exposed to physical or psychological

violence,

because he, the defendant and co-perpetrators, held the aforementioned persons captive with too many people in too small spaces and in spaces in which no or hardly any daylight entered and/or without being able to make sufficient use of sanitary facilities and/or without being able to receive (regular) visitors and/or while the food they received was poor and/or dirty and/or insufficient and/or they received no or insufficient medical care and/or while they were placed in isolation for a long time while they were not or hardly allowed to 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 said persons violently and/or said persons witnessed the violent treatment of others;

and/or

2. implemented against the aforementioned persons prison sentences and/or other custodial measures and/or had those implemented without prior adjudication by a court and/or without having received a fair trial and/or in particular without having been tried by an independent and impartial body and/or without being informed without delay of the allegations against them and/or without them having the necessary rights and means of defence at their disposal and/or in violation of the prohibition of collective punishment and/or in violation of the principle of legality and/or without the presumption of innocence and/or without being able to make use of the right to be present at their own trial and/or without having the right not to cooperate with their own conviction and/or without being able to make use of the right to advice on legal and other remedies and on the terms within which they should be used;

and/or

persons subordinate to the defendant who were employed within the Pul-e-Charkhi prison such as block commanders and/or guards and/or interrogators and others, together and in association, in the period of 1 January 1983 up to and including 31 December 1990, in Kabul, violated the laws and customs of war, together and in association with others while

- those offences resulted in serious physical injury and/or

- those offences involved violence with united forces against persons and/or

- those offences involved forcing with united forces others to do something, not to

do or tolerate and/or

- those offences were expressions of a policy of systematic terror and/or

illegal acts against a certain group of the population and/or

- from those offences death or serious bodily injury of persons other than the defendant

was to fear and/or

- those offences involved inhumane treatment,

consisting in the fact that he, the defendant and co-perpetrators, then and there in violation of the provisions of the "common" Article 3 of the Geneva Conventions of 12 August 1949 and/or

- customary international humanitarian law and/or

- the customary international law prohibition of arbitrary deprivation of liberty,

- in connection with a non-international armed conflict on the territory of Afghanistan,

with regard to persons who then did not participate directly in the hostilities, namely civilians and those who had been put hors combat by imprisonment being:

1. one or more members of the Amin family (the former President of Afghanistan),

including [persons 1 and 2];

2. [person 3];

3. [person 4];

4. [person 5];

5. [person 6];

6. [person 7];

7. [person 8];

8. [person 9];

9. [person 10];

10. [person 11];

11. [person 12];

12. [person 13];

13. [person 14];

14. [person 15];

15. [person 16];

16. [person 17];

17. [person 18];

18. [person 19];

and others, who were detained as political prisoners in blocks 1 and/or 2 and/or 3 of the Pul-e-Charkhi prison,

- treated them cruelly and inhumanely and/or

- assaulted their personal dignity and treated the aforementioned persons humiliatingly and degradingly and/or arbitrarily deprived them of their liberty;

which 1) cruel and inhumane treatment and/or assault of the personal

dignity and/or degrading and/or inhumane treatment and/or 2) arbitrary deprivation of liberty as aforesaid consisted of the fact that he, the defendant and co-perpetrators,

1. made the aforementioned persons seriously suffer physically and/or psychologically, by

- the poor detention conditions,

- incidents of physical violence,

- imposing punishments,

- long-term psychological torment and/or

- creating an atmosphere of terror and/or fear of being exposed to physical or psychological

violence,

because he, the defendant and co-perpetrators, held the aforementioned persons captive with too many people in too small spaces

in which no or hardly any daylight entered and/or without being able to make sufficient use of sanitary facilities and/or without being able to receive (regular) visitors and/or while the food and/or drinking water

they received was poor and/or dirty and/or insufficient and/or they received no or insufficient medical care and/or while they were placed in isolation for a long time and/or they were not or hardly allowed to 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 said person(s) violently and/or said person(s) witnessed the violent treatment of others;

and/or

2. implemented against the aforementioned persons prison sentences and/or other custodial measures and/or had those implemented without prior adjudication by a court and/or without having received a fair trial and/or in particular without having been tried by an independent and impartial body and/or without being informed without delay of the allegations against them and/or without them having the necessary rights and means of defence at their disposal and/or in violation of the principle of legality and/or without the presumption of innocence and/or to without having the right not to cooperate with their own conviction and/or without being able to make use of the right to advice on legal and other remedies and on the terms within which they should be used;

which the defendant, in the period from 1 January 1983 up to and including 31 December 1990, in Kabul, intentionally admitted and did not take sufficient measures to prevent and/or stop and/or punish the aforementioned crimes.

Insofar as typing and language errors occur in the indictment, these have been corrected in the judicial finding of fact, without the defendant being harmed in the defence. It concerns the spelling of the names of two victims.

23 Punishability of the proven facts

The defence took the position that it was not foreseeable for the defendant that he could be prosecuted as a superior in the Netherlands for the alleged conduct. This constitutes a violation of the principle of legality, which, according to the defence, should lead to the dismissal of all legal proceedings.

The principle of legality means that an offence can only be punished on the basis of a prior statutory criminalisation. In addition, the principle implies that everyone must also be able to know which acts are punishable and what penalties are imposed on them. The law must therefore be accessible and foreseeable. The foreseeability of the law must be tested on the basis of concrete facts, taking into account the possibility, but also the obligation of the person concerned to effectively take cognizance of the criminal law standard. In other words: once the underlying norm (and the violation thereof) has been given, it must be assessed whether it was concretely foreseeable for the defendant at the time of the alleged conduct that he could possibly be prosecuted for it. The possibility and obligation of those involved to effectively take cognizance of the criminal law standard should also be taken into consideration.

The court has already established that the standards violated by the defendant were part of customary international law at the time. Afghanistan ratified the Geneva Conventions on 26

September 1956. The protected interests to which these standards refer can also be found in Afghan national law. For example, the Afghan Criminal Code of 1976 contains the following criminal provisions:

Article 414: 'A person who, illegally and without the instruction of concerned authorities, arrests, detains, or prevents someone else from work, shall be sentenced in view of the circumstances to medium imprisonment.'

Article 416: 'If arrest, detention, and prevention from work is accompanied by coercion, threat, or torture or if the person committing the crime is an official of the government.'

Article 276: 'If the official of public services punishes the convict more than 'what he has been sentenced to, or issues an order to this effect, or applies to him a punishment to which he has not been sentenced, in addition to medium imprisonment, he shall be sentenced to debarment from profession or separation from duty, too.'

Article 278: 'If the official of public services, making use of his official authority, treats any person so rudely and coarsely as to cause him physical pain. or contrary to his honour and prestige, he shall be sentenced in view of the circumstances to imprisonment of not more than two years or cash fine of not more than twenty four thousand Afghanis.' [63]

Furthermore, the 1976 Afghan Constitution incorporates principles of the United Nations Charter and the Universal Declaration of Human Rights, recognizing that every individual has the right to life, liberty and security of person. Articles 5 and 12, respectively, of the 1976 Afghan Constitution set out as "*fundamental objectives*" that the principles of the UN Charter and the Universal Declaration should be respected, that freedom and dignity should be protected and respected and that all forms of torture and discrimination should be eliminated. That violation thereof can constitute a crime follows from article 31 of that Constitution, which states that a crime is a personal act and that punishment incompatible with human dignity is not allowed.

The defendant was aware of the norms he had violated, and certainly in view of his position as supervisor in the Pul-e-Charkhi prison, he could be expected to take cognizance of them.

In addition, the file contains specific indications that the defendant knew that the detention conditions in the Pul-e-Charkhi prison did not comply with international law standards. Visits were made to the Pul-e-Charkhi prison in the proven period by both the ICRC and the United Nations Special Rapporteur. Before these delegations were received, prisoners were moved so that a virtually empty part of the prison could be shown to the delegations. Delegations were also prevented from talking freely with prisoners and careful selection was made of who was allowed to talk to the delegations. The prison management apparently wanted to hide the real conditions in the prison from the delegations, which indicates that the prison management knew that the conditions in the prison were not good.

With regard to the prosecution as a superior, the defence argued that it was not foreseeable that the defendant would be prosecuted as a civilian superior, because according to customary international law in force at the time, only a military superior could be held liable for the actions of his subordinates. In this respect the court considers as follows:

It is important to answer that question whether and, if so, from when the doctrine of command responsibility formed part of customary international law, in particular whether that was the case in the period from 1983 to 1987. As has already been considered in Chapter 19, individual criminal

liability for *command responsibility* has been codified, inter alia, in Article 7 of the ICTY Statute, which dates from 1993. The doctrine of command responsibility as included in Article 7 of the ICTY Statute has therefore been included in any event from 1993 from customary international law. It follows from the case law of the ICTY since 1993 that the doctrine of command responsibility applies in both international and non-international armed conflicts.[64]

The court sees no leads for the assumption that command responsibility as a form of liability would not also apply with regard to facts from ten years earlier, which are the subject of the present case. It points out that when the ICTY Statute was drawn up, it was explicitly considered that the intention was that the ICTY would only apply rules of international humanitarian law that were already "beyond any doubt part of customary law" at the time.[65] The court therefore concludes that the doctrine of command responsibility was part of customary international law at the time of the provenance.

Contrary to what the defence has argued, the court is of the opinion that the doctrine of command responsibility already included liability of both military and civilian superiors at that time. For example, the International Military Tribunal (also known as the Nuremberg Tribunal, hereinafter: IMT), the Special Court for Sierra Leone (hereinafter: SCSL), the Extraordinary Chambers in the Courts of Cambodia (hereinafter: ECCC), the ICTR and the ICTY considered that both superiors fall under command responsibility.[66] In the case law of the ICTY, which, although dating from after the judicial finding of fact, in which, with reference to case law of the IMT, i.e. from well before that, it is considered: "The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law".[67]

In view of his position as supervisor in the Pul-e-Charkhi prison, the defendant had to be aware of this standard and he could therefore be expected to take cognizance of it. The foregoing justifies the conclusion that it was concretely foreseeable for the defendant at the time of the proven offences that he could be prosecuted as a superior for this. There is therefore no conflict with the principle of legality.

According to Dutch law, the proven offences are punishable because no facts or circumstances have become plausible that exclude the criminality of the facts. The court qualifies the offences declared proven as stated below in chapter 28. There is an immediate concurrence between the first and second cumulative/alternative, that is, between co-perpetration and deliberate admission as a superior. After all, in essence, it concerns the same offences, while the protected interest of both penal provisions, Articles 8 and 9 of the WO, is the same.

24 Punishability of the defendant

The defendant is also punishable, because no facts or circumstances have become plausible that exclude his criminality.

25 Punishment

The sentence mentioned below is in accordance with the seriousness of the offences committed and the circumstances under which they were committed and is based on the person and the personal circumstances of the defendant, as proved to be the case during the investigation during the court hearing.

The defendant worked as a supervisor in the Pul-e-Charkhi prison in Afghanistan from 1983 to 1988. At that time, Afghanistan was involved in a non-international armed conflict, in other words, a civil war. Alleged opponents of the regime were widely rounded up and detained as political prisoners. The defendant was in charge of the section of the Pul-e-Charkhi prison where these political prisoners were held.

In the prison the prisoners were in an uncertain and hopeless situation. Some were never tried, others had to wait years for their trial. In no way that trial resembled fair legal proceedings. The prisoners were held in degrading conditions. For example, the cells in the prison were overcrowded, the hygienic situation was appalling, the food was substandard and prisoners were denied basic medical facilities, causing some to die from diseases such as tuberculosis and diabetes. Physical violence was used against prisoners who did not follow the prison rules or spoke out against the detention conditions. Prisoners lived in constant fear. The detention conditions and the hopelessness meant that daily life was experienced as systematic terror by the prisoners. Most inmates have been imprisoned under these conditions for several years.

The defendant contributed to this by maintaining and deteriorating the detention regime together with his subordinates. He was also involved in acts of violence against prisoners. The actions of the defendant can be regarded as a violation of international humanitarian law.

By his actions, the defendant inflicted serious psychological and physical harm on the victims and deprived the victims of the basic rights that protected persons in times of conflict, i.e. the right to liberty, the right not to be treated cruelly and the right not to be assaulted in their personal dignity. The actions of the defendant were aimed at eliminating political opponents of the regime for a longer period of time by imprisoning them and causing them suffering during their detention. The actions of the defendant show indifference to the human dignity of the prisoners and the basic standards that apply during an armed conflict.

The actions of the defendant have left deep marks on the victims. Even today, many of them still suffer from what was done to them in detention.

With his actions, the defendant has seriously infringed the Afghan and the international – and therefore also the Dutch – legal order. In view of the nature and seriousness of what has been declared proven, the court is of the opinion that only the imposition of an unconditional prison sentence is appropriate.

The maximum sentence that the court can impose on the defendant is life imprisonment. The maximum temporary prison sentence is twenty years. In determining the duration of the sentence to be imposed on the defendant, the court has taken into account the sentences imposed by it and by other courts in more or less comparable cases.

In the case against *Eshetu A.*, the court has imposed a lifelong prison sentence.[68] The punishment was imposed for arbitrary deprivation of liberty, detention under inhumane conditions, torture, the imposition and execution of extrajudicial prison sentences and the killing of a large group of people.

In the case against *Delalic*, the ICTY has imposed a seven-year prison sentence for direct involvement and involvement as a superior in inhumane treatment of six prisoners. In the case against *Delić*, the ICTY has imposed a 10-year prison sentence for the inhumane treatment of prisoners.[69] These cases involved a smaller number of victims than the present case.

Lifelong prison sentence is the highest penalty known to the Criminal Code and should therefore only be imposed in cases of very exceptional seriousness. That high threshold has not been met in this case. The facts declared proven in this case are of a different nature from the facts in the case against *Eshetu A.*, already because this involved the killing of a large group of persons.

The court has also decided not to impose the highest temporary prison sentence. Taking into account the sentences imposed by the ICTY, the court considers a prison sentence for a period of 12 years to be appropriate to the seriousness of what has been declared proven in this case.

The court is then faced with the question of whether there are reasons to moderate that sentence.

This case concerns facts from almost 40 years ago. However, the passage of time does not constitute a reason for a reduced sentence. Violations of international humanitarian law are permanently topical and still shock the legal order today. In addition, it is partly due to the defendant that he is only now being tried for these offences. After all, he has established himself in the Netherlands under a false name, which has made his investigation and prosecution more difficult.

The court is aware of the defendant's advanced age and state of health. During the proceedings, the court received information about this several times. This information shows that the defendant suffers from several (age) ailments, for which he receives adequate medical treatment in detention. The Dutch prison system offers possibilities to continuously monitor the health of the defendant in relation to the detention conditions. It has not been shown to the court that the defendant would be unsuitable for detention now or in the near future. The defence's request to appoint an expert as to the suitability of the defendant for detention is therefore rejected.

The court concludes that there are no circumstances that would justify a reduction of the sentence.

In view of all the foregoing, the court considers an unconditional prison sentence for a period of 12 years, minus pre-trial detention, appropriate and required.

Enforcement of the prison sentence to be imposed will take place completely within the penitentiary institution until the moment that the defendant is granted conditional release as referred to in article 6:2:10 of the Code of Criminal Procedure.

26 Seized objects

The Public Prosecutor has submitted to the court a list of seizures containing the following objects:

1. driving licence in the name of [name];
2. identity card taskara [name];
3. identity card taskara [name];
4. identity card taskara [name];
5. identity card taskara [name];
6. identity card taskara [name].

The court will withdraw the taskara in the name of [name] from circulation. This object can be withdrawn from circulation, since with the help of this object the detection of the proven facts has been impeded, while the uncontrolled possession thereof is contrary to the public interest.

Now that the interest of criminal proceedings does not preclude this, the court will order the restitution of the other objects mentioned on the list of attachments to the rightful claimants.

27 Applicable law articles

The penalty and measure to be imposed are based on the articles:

- 36 b, 36c, 47, 55 and 57 of the Criminal Code;
- 8 of the WOS.

These regulations have been applied as they were legally applicable at the time of the proven offences or as legally applicable at the time of this ruling.

28 Judgement

The court:

declares legally and convincingly proven that the defendant has committed the alleged offences, as stated above under 22, and that the proven offences consist of:

concursis idealis

complicity in violation of the laws and customs of war, while the act results in grievous bodily harm to another and while the act involves the use of united forces against one or more persons and while the act involves forcing another to tolerate something with united forces and while the offence is an expression of a policy of systematic terror or illegal action against the entire population or a particular group thereof and while the offence is likely to lead to death or grievous bodily harm to another and while the offence involves inhumane treatment, committed several times

and

deliberately allowing a subordinate to violate the laws and customs of war, while the act results in grievous bodily harm to another, and while the act involves the use of united forces against one or more persons, and while the act involves forcing another to tolerate something with united forces and while the offence is an expression of a policy of systematic terror or illegal action against the entire population or a particular group thereof and while the offence is likely to lead to death or grievous bodily harm to another and while the offence involves inhumane treatment, committed several times;

declares the proven offence and the defendant punishable accordingly;

declares not proven what has been charged against the defendant more or differently than has been declared proven above and acquits the defendant thereof;

condemns the defendant to:

a term of imprisonment for the duration of 12 (TWELVE) YEARS;

determines that the time spent in custody and pre-trial detention by the convicted person before the execution of this judgement shall be deducted in full from the prison sentence imposed on him, insofar as that time has not already been deducted from another sentence;

declares withdrawn from circulation the object numbered on the seizure list under 2, i.e.: an identity card *taskara* [name];

orders the return to the person who is reasonably entitled to the objects numbered on the seizure list under 1, 3, 4, 5, 6, i.e.:

1. driving licence in the name of [name];
2. identity card taskara [name];
3. identity card taskara [name];
4. identity card taskara [name];
5. identity card taskara [name];
6. identity card taskara [name].

dismisses the request for a suspended sentence.

This judgement was rendered by
mr. E.C. Kole, President,
mr. D.C. Laagland, Judge,
mr. B.W. Mulder, Judge,
in presence of *mr*. D.G. Lammerts van Bueren and *mr.* F. Kok, Clerks,
and pronounced at the public hearing of this court on 14 April 2022.

End notes

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[1] At the time of the indictment, the WO still stated the death penalty as the maximum penalty. By Act of 14 June 1990 (Official Gazette (OG.) 1990, 369), which entered into force on 1 January 1991 (OG 1990, 582), the death penalty was abolished. By Act of 10 March 1984 (OG 1984, 91, the Classification of Fine Categories Act) in Article 8 of the WO a punishment with a fine was added to the first, second and third paragraphs.

[2] Parliamentary Documents II 1951-1952, 2258, no. 3, p. 9. Also see Supreme Court 8 July 2008, ECLI:NL:HR:2008:BC7418, par. 10.2.

[3] Parliamentary Documents II 1951-1952, 2258, no. 5: '*The undersigned can understand that the question has arisen as to whether the regulation of the criminal law of war, as it is technically contained in the present draft, is not particularly complicated. The War Criminal Law Act contains on the one hand derogations from the Criminal Code and the Military Criminal Code, on the other hand its own separate descriptions of offences and finally provisions on the judicial organisation and the procedure. The Criminal*

Law in Wartime Act cannot therefore be understood without reading the various other statutory regulations that have been declared fully or partially applicable. The undersigned acknowledge this. However, they are of the opinion that this shortcoming cannot be remedied by dividing the provisions of the Criminal Law in Wartime Act between the Criminal Code, the Code of Criminal Procedure and the military criminal law. Our current war legislation is simply very complicated. The Explanatory Memorandum provides a detailed explanation of this under the general considerations. It would not be beneficial for the clarity of the matter if one would have divided the material, which is currently contained in the Criminal Law in Wartime Act, across the various relevant codes and laws, embroidering on this pattern. In the design, the designer had in mind to provide a comprehensive overview of all special provisions of a criminal nature that would apply in the event of war, i.e. when there is actual war. In that case, the military or civil judges charged with the application of this provision could therefore find together in one law what our legislation in the field of war criminal law contains. The aim was therefore not to bundle random laws or codes of law, which would have been impossible with the legislation already widely distributed, but to bundle together the provisions containing deviations from the common and military criminal law in the event of war.'

[4] Report on the situation of human rights in Afghanistan prepared by the Special Rapporteur, *mr*. Felix Ermacora, in accordance with Commission on Human Rights resolution 1984/55, E/CN.4/1985/21, 19 February 1985; Context report Afghanistan (1978-1992), Chevron investigation, drawn up by the International Crimes Team of the National Criminal Investigation Service and the Public Prosecution Service in February 2021 and which is included in the file (loose-leaf).

[5] Where this judgement mentions the KhAD, from 1986 onwards this means the WAD.

[6] ICTY, *Prosecutor v. Tadić a/k/a "Dule",* Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, par. 70.

[7] ICTY, *Prosecutor v. Haradinaj,* Trial Chamber Judgement, IT-04-84-T, 3 April 2008, par. 49.

[8] ICTY, *Prosecutor v. Haradinaj et al*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, par. 60.

[9] ICTY, *Prosecutor v. Haradinaj*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, par. 49; S. Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, volume 91 (873), p. 76.

[10] S. Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, volume 91 (873), p. 77; L. Cameron et al, 'Article 3: Conflicts not of an international character', ICRC, Commentary on the First Geneva Convention, 2016, par. 429; ICTY, *Prosecutor v. Haradinaj et al,* Trial Chamber Judgement, IT-04-84-T, 3 April 2008, par. 60.

[11] See, for example: International Court of Justice, Military and Paramilitary Activities In and Against Nicaragua, 1986, ICJ Report 14, 114, par. 218-220.

[12] International Committee of the Red Cross (ICRC), Commentary of the Fourth Geneva Convention, 1958, article 27.

[13] International Committee of the Red Cross (ICRC), Commentary of the First Geneva Convention, 1952, article 3: *What Article 3 guarantees such persons is 'humane treatment'.*
Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood. It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him "humanely", that is to say as a fellow human being and not as a beast or a thing. The details of such treatment may, moreover, vary according to circumstances -- particularly the climate -- and to what is feasible.
On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite: "To this end, the following acts ' are ' and ' shall remain prohibited at any time and in any place whatsoever... '" No possible loophole is left; there can be no excuse, no attenuating circumstances.

[14] ICTY, *Prosecutor v. Delalić,* 11-96-21-T, Trial Chamber Judgement, 16 November 1998, par. 552; ICTY , *Prosecutor v. Blaskic*, IT 95-14-T, Chamber Judgement, 3 March 2000, par. 186; ICTY, *Prosecutor v. Kordić & Čerkez,* Trial Chamber Judgement, IT-95-14/2-T, 26 February 2001, par. 265.

[15] ICTY, *Prosecutor v. Delalić,* 11-96-21-T, Trial Chamber Judgement, 16 November 1998, par. 552, *Prosecutor v. Kordić & Čerkez,* Trial Chamber Judgement, IT-95-14/2-T, 26 February 2001, par. 265, ICTY, *Prosecutor v. Naletilić & Martinović*, Trial Chamber Judgement, IT-98-34-T, 31 March 2003, par. 246.

[16] ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber Judgement, 15 March 2002, par. 131.

[17] International Committee of the Red Cross (ICRC), Commentary of the First Geneva Convention, 2016, par. 618: *To qualify as cruel (or inhuman) treatment, an act must cause physical or mental suffering of a serious nature. Unlike for torture, no specific purpose is required for cruel treatment. As far as the seriousness of the mental or physical suffering is concerned, the ICTY considers that 'whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis'. This interpretation mirrors that of human rights bodies and texts.*

[18] Respectively: ICTY, *Prosecutor v. Mrksic*, 11-95-13/1-T, Trial Chamber Judgement, 27 September 2007, par. 517; ICTY, *Prosecutor v. Delalić*, 11-96-21-T, Trial Chamber Judgement, 16 November 1998, par. 554-558 and 1112-1119; ICTY, *Prosecutor v. Jelisic*, IT-95-10-T, Trial Chamber Judgement, 14 December 1999, par. 42-45; ICTY *Prosecutor v. Vasijevic*, 11-99-32-1, Trial Chamber Judgement, 29 November 2002, par. 239.

[19] ICTY, *Prosecutor v. Kunarac,* Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, par. 514 and Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, par. 161 and 163.

[20] ICTY, *Prosecutor v. Aleksovski*, Trial Chamber Judgement, IT-95014/1-T, 25 June 1999, par. 56 and *Prosecutor v. Kunarac,* Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, par. 504 and Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, par. 162 and 163.

[21] ICC Elements of crime, ICRC in: *Commentary on the First Geneva Convention*, 2016, par. 669.

[22] ICRC, 'Article 3: Conflicts not of an international character', in: *Commentary on the First Geneva Convention*, 2016, par. 669.

[23] ICTY, *Prosecutor v. Kunarac,* Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, par. 501.

[24] ICC Elements of Crimes (2002), Article 8(2)(c)(ii).

[25] ICTY, *Prosecutor v. Kunarac,* Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, par. 164, 165.

[26] ICC Pre Trial Chamber, *Katanga,* decision on the confirmation of charges, 30 September 2008, par. 375-376.

[27] ICRC Customary International Humanitarian Law Study, rule 90, '*Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited'*.

[28] See, for example: International Court of Justice, Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), 1986, ICJ Report 14, 114, par. 218-220.

[29] Human rights are also valid in times of conflict. The 1977 Additional Protocols to the Geneva Conventions explicitly affirm the continued applicability of human rights in the event of conflict. For example, Article 72 of the First Additional Protocol states that the provisions are supplementary to other applicable rules of international law that relate to fundamental human rights and is stated in the preamble of the AP II: *"international instruments relating to human rights offer a basic protection to the human person".* In customary law studies, the ICRC also refers to the various human rights treaties for the interpretation of arbitrary deprivation of liberty in the event of a non-international armed conflict.

[30] ICJ, *Case concerning United States Diplomatic and Consular Staff in Tehran,* Judgement 24 May 1980, I.C.J. Reports 1980, p. 3, par. 91.

[31] See, for example the legislation from Armenia, Belgium, Georgia, Nicaragua and Portugal cited in J.M. Henckaerts en L. Doswarld-Beck, Customary International Humanitarian Law, Volume II: practice (CUP, Cambridge 2005)

[32] See, for example the legislation from Azerbaijan (article 112 and 116.0.18 Azerbeijdan Criminal Code 1999), Bosnia and Herzegovina (article 154 Bosnia and Herzegovina Criminal Code 1998), Ethiopia (article 282 Ethiopia Criminal Code 1957), Portugal (article 241(1)(g) Portugal Criminal Code 1976),

Slovenia (art. 374 Slovenia Criminal Code 1994) and article 142(1) of the Socialist Federal Republic of Yugoslavia Penal Code 1976, cited in J.M. Henckaerts and L. Doswarld-Beck, Customary International Humanitarian Law, Volume II: practice (CUP, Cambridge 2005).

[33] CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant Adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994 CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), par. 8.

[34] International Committee of the Red Cross (ICRC), Commentary of the First Geneva Convention, 1952, article 3: *What Article 3 guarantees such persons is 'humane treatment'. Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood. It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him "humanely", that is to say as a fellow human being and not as a beast or a thing. The details of such treatment may, moreover, vary according to circumstances -- particularly the climate -- and to what is feasible. On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite: "To this end, the following acts ' are ' and ' shall remain prohibited at any time and in any place whatsoever... '" No possible loophole is left; there can be no excuse, no attenuating circumstances*

[35] The ICRC stated in its commentary to the Third Geneva Convention in 1960: "… *executions without previous trial are too open to error. "Summary justice" may be effective on account of the fear it arouses — though that has yet to be proved— but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. We must be very clear about one point : it is only "summary" justice which it is intended to prohibit. No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm ; and it leaves intact the right of the State to prosecute, sentence and punish according to the law."*

[36] In the ICRC commentary from 2020 to GC III is included: "*630. As is manifest from the acknowledgement of 'executions' in subparagraph (1)(d), common Article 3 does not prohibit the death penalty against persons falling within its protective scope. However, it does require that a death sentence be passed and an execution carried out only following a 'previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. A death sentence or execution not respecting these strict requirements would not only be in violation of subparagraph (1)(d), but would also constitute unlawful violence to life within the meaning of subparagraph (1)(a)" (…) 713 . As regards the 'carrying out of executions', which is not prohibited by common Article 3, other treaties may have an impact for States Parties. First, Additional Protocol II limits the right to impose and carry out the death penalty on persons who were under the age of 18 years at the time they committed the offence and on pregnant women and mothers of young children, respectively. Humanitarian law does not prohibit the imposition of death sentences or the carrying out of a death sentence against other persons. However, it sets out strict rules in respect of international armed conflicts for the procedure under which a death sentence can be pronounced and carried out. In addition, several treaties prohibit the death penalty altogether for States Parties. Many countries have abolished the death penalty, even for military offences*."

[37] Elements of Crime, 2011, article 8 (2) (c) (iv).

[38] ICRC Commentary from 1987 with article 6 of the AP II, par. 4597.

[39] ICC, Pre Trial Chamber, *Affaire Le Procureur c. Al Hassan Ag Abdoul Aziz Ag Mahomed Ag Mahmoud*, « Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, 11 May 2019, available on https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-335-Corr-Red, par. 481.

[40] In a decision of 11 May 2019, the Pre Trial Chamber considered that the underlying criminal conduct in the context of 'the passing of sentences without previous judgement pronounced by a regularly constituted court' is the *pronouncement* of an extrajudicial judgement, not the *execution* of an extrajudicial judgement. (ICC, Pre Trial Chamber, Affaire Le Procureur c. Al Hassan Ag Abdoul Aziz Ag Mahomed Ag Mahmoud, « Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, 11 May 2019, available on https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-335-Corr-Red, par. 481). Subsequently, the Pre Trial Chamber reiterated in the 'Decision on the Confirmation of Charges' that in Article 8, paragraph 2, under c, iv, of the Rome Statute, the 'passing of sentences' refers to pronouncing a judgement, not the execution of judgements. A conviction can be inferred from the execution of a sentence, according to the Pre Trial Chamber (ICC)., Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ICC-01/12-01/18-461-Corr-Red 13 November 2019, available on https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-461-Corr-Red, par. 365, 366).

[41] ICC, Pre Trial Chamber, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ICC-01/12-01/18-461-Corr-Red 13 November 2019, available on https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-461-Corr-Red, par. 928, 969.

[42] ECLI:NL:RBDHA:2017:14782, par. 13.5.3.

[43] Parliamentary Documents II 2001/02, 28 337, no. 3, p. 30. This concerns the history of the establishment of the International Crimes Act, which contains a provision equivalent to Article 9 of the WO.

[44] ICTR *Prosecutor v. Setako*, ICTR-04-81-A, Appeals Chamber Judgement, 28 September 2011, par. 268.

[45] ICTY *Prosecutor v. Delalić et al*., IT-96-21-A, Appeals Chamber Judgement, 20 February 2001, par. 745; also see: ICTY *Prosecutor v. Kordic and Cerkez,* Appeals Chamber Judgement, IT-95-14/2-A, 17 December 204, par. 34.

[46] District Court of Dili, Special Panels for Serious Crimes, *Deputy Prosecutor-General for Serious Crimes v. Anton Lelan Sufa*, Judgement, 25 November 2004, par. 21.

[47] ICTY, *Prosecutor v. Halilovic*, IT-01-48-T, Judgement, 16 November 2005, par. 42.

[48] ICTY, *Prosecutor v. Halilovic*, IT-01-48-T, Judgement, 16 November 2005, par. 50 and ICTY, *Prosecutor v. Hadžihasanovic et al*., IT-01-47-PT, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to 'command responsibility', 16 July 2003, par. 22.

[49] Hague Convention on the Laws and Customs of War on Land of July 29, 1899, the replacement Fourth Hague Convention on the Laws and Customs of War on Land of October 18, 1907.

[50] ICTY, *Prosecutor v. Halilovic*, IT-01-48-T, Judgement, 16 November 2005, par. 42.

[51] Article 86 of AP I in so far as important here: 2. The fact that an infringement of the Treaties or this Protocol has been committed by a subordinate shall not relieve superiors of their criminal or disciplinary responsibility, as the case may be, if those superiors knew or had information which would enable them in the circumstances of that moment to understand that he was committing or about to commit such an infringement, and when they have not taken all practicable measures in their power to prevent or counter the infringement. Article 87 AP I: 1. The High Contracting Parties and the party to the conflict shall oblige military commanders to prevent violations of the Treaties and this Protocol with regard to members of the armed forces under their command and other persons under their control, as well as, if necessary, to stop them and report them to the competent authorities. 2. In order to prevent and stop breaches, the High Contracting Parties and the parties to the conflict should oblige commanders to ensure, in accordance with the level of their responsibility, that members of the armed forces under their command know their obligations under the Treaties and this Protocol. 3. The High Contracting Parties and the parties to the conflict shall require any commander who knows that subordinates or other persons under his control are about to commit or who have committed such a breach of the Conventions or this Protocol. to take necessary steps to prevent such violations of the Treaties or this Protocol and, if appropriate, to initiate disciplinary or criminal proceedings against those who have violated those instruments.

[52] ICRC, Comments on article 6 of the Second Additional Protocol of 1987, par. 4597.

[53] The interpretation of the ICC of the doctrine differs on a number of points from the interpretation of the tribunals. In these cases, the court will follow the jurisprudence of the ICTY and ICTR as much as possible.

[54] The following possible indicators of the presence of effective control can be distinguished: the official *de jure* title of the superior and his actual powers, the authority to issue orders including ordering subordinates to participate in hostilities, his ability to have his orders obeyed, his ability to make changes in the chain of command, and his authority to promote, replace, remove or punish subordinates as well as to initiate investigations into his subordinates (see ICC, *Prosecutor v. Bemba*, ICC-01/05 -01/08, Trial Chamber Judgement, 21 March 2016, par. 188).

[55] ICTY *Prosecutor v. Delalić et al*., IT-96-21T, 16 November 1998, par. 346; ICTY *Prosecutor v. Oric,* Appeals Chamber Judgement, IT-03-68-A, 3 July 2008, par. 18.

[56] ICTY *Prosecutor v. Delalić et al*., IT-96-21-A, Appeals Chamber Judgement, 20 February 2001, par. 346: *they must have participated in some significant way in the continued detention of the civilians*.

[57] H. van der Wilt, 'War Crimes and the Requirement of a Nexus with an Armed Conflict', *Journal of International Criminal Justice*, vol. 10 (5), p. 1116.

[58] ICTY, *Prosecutor v. Tadić a/k/a "Dule",* Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, par. 70.

[59] ICTY, *Prosecutor v. Kunarac,* Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, par. 57 en 58.

[60] ICTR, *Prosecutor v. Akayesu*, Appeals Chamber Judgement, ICTR 96-4-A, 1 June 2001, par. 444.

[61] ICC *Ntaganda* case, Trial Chamber Judgement, ICC-01/04-02/06, 8 July 2019, par. 732.

[62] ICC *Ntaganda* case, Trial Chamber Judgement*, ,* ICC-01/04-02/06, 8 July 2019*,* par. 733; also see the earlier ICTY, *Prosecutor v. Kunarac,* Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, par. 59.

[63] Penal Code Afghanistan, issue no. 12, serial no. 247, 15 Mizan 1355 (7 October 1976), Official Publication of the government of the Republic of Afghanistan (English translation).

[64] ICTY, *Prosecutor v. Délalic*, IT-96-21-T, Judgement, 16 November 1998, par. 275; ICTY, *Prosecutor v Hadžihasanovic et al*., IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to 'command responsibility', 16 July 2003, par. 11 and further and ICTY, *Prosecutor v. Halilovic,* IT-01-48-T, Judgement, 16 November 2005, par. 55.

[65] Report of the Secretary-General pursuant to paragraph 2 of Security Council, Res. 808 (1993), 3 May 1993 (S/25704), par. 33-34.

[66] Trial of Karl Brandt and Others ('Medical case'), Judgement of 19 August 1947, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950), Volumes I-II; Trial of Friedrich Flick and Others Case ('Flick case'), Judgement of 22 December 1947, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950), Volume VI; ICTY, *Prosecutor v. Délalic*, IT-96-21-T, Judgement, 16 November 1998, par. 275; ICTY, *Prosecutor v Hadžihasanovic et al*., IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to 'command responsibility', 16 July 2003, par. 11 e.v..; ICTY, *Prosecutor v. Halilovic,* IT-01-48-T, Judgement, 16 November 2005, par. 55 as well as ICTY, *Prosecutor v. Mucić et al.* ('Čelebići'), Appeal Judgement, par. 195; ICTR, *Prosecutor v. Bagilishema*, Appeal Judgement, ICTR-95-1A-A, 3 July 2002, par. 51; SCSL, *Prosecutor v. Brima et al.*, Appeal Judgement, SCSL-2004-16-A, 22 February 2008, para. 257; 26 July 2010, para. 477; ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan (Case 002/02)*, Trial Judgement, 002/19-09-2007/ECCC/TC, 16 November 2018, par. 4200; ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan (Case 002/02)*, Trial Judgement, 002/19-09-2007/ECCC/TC, 16 November 2018, par. 4200; ECCC, *Prosecutor v. Kaing Guek Eav* alias *Duch (Case 001)*, Trial Judgement, 001/18-07-2007/ECCC/TC.

[67] ICTY *Prosecutor v. Delalić et al*., IT-96-21-A, Appeals Chamber Judgement, 20 February 2001, par. 195. Afterwards followed by the ICTR, *Prosecutor v. Bagilishema*, Appeals Chamber Judgement, ICTR-95-1A-

A, 3 July 2002, par. 51.

[68] The Hague District Court, 15 December 2017, ECLI:NL:RBDHA:2017:14782.

[69] ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber Judgement, 16 November 1998, par. 1285.