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body	Court of The Hague
Date of judgment	14-04-2022
Date of publication	14-04-2022
Case number	09/748011-12
Jurisdictions	Criminal law
Special characteristics	First instance - multiple
Content indication	The District Court of The Hague has sentenced the suspect to a term of imprisonment of 12 years for war crimes. The suspect was guilty of serious violations of international humanitarian law, consisting of arbitrary deprivation of liberty, cruel and inhumane treatment and assault on the personal dignity of at least 18 persons in the period 1983-1987 in the Pul-e-Charkhi prison in Afghanistan.
Locations	Rechtspraak.nl

Statement

COURT OF THE HAGUE

Criminal law

Multiple chamber in charge of dealing with cases concerning international crimes

Parquet number: 09/748011-12

Judgment date: April 14, 2022

Contradiction

On the basis of the indictment and following the investigation at the court hearing, the District Court of The Hague has issued a summons against the suspect in the case of the public prosecutor as:

[name of suspect] ,

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

currently detained in the South West penitentiary, De Dordtse Poorten, in Dordrecht.

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1 Introduction

The suspect is charged with involvement in war crimes committed in Afghanistan in the period from January 1, 1983 to December 31, 1990.

In this judgment, the court will first deal with a number of formal issues, such as the validity of the summons and the admissibility of the public prosecutor. This is followed by a discussion of the historical context. Then, among other things, the determination of the facts and the assessment of the indictment are discussed.

Now that the suspect 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 suspect knew about it, whether the victims named in the indictment were protected persons and whether there was a difference between the alleged conduct and the armed conflict there was a close connection ('nexus').

Where the court expresses itself in its judgment about evidence, it derives this from the means of evidence that are attached to the judgment as Annex I. In the endnotes of the judgment 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 pieces of the criminal file.

2 The criminal charge

After the indictment was amended at the hearing on October 1, 2020, the suspect was charged with:

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

- those offenses have resulted in serious physical injury and/or
- those facts involved violence (with united forces) against persons and/or
- those facts involved forcing (with united forces) others to do something, not to

do or tolerate and/or
- those facts were expressions of a policy of systematic terror and/or

illegal acts against a certain group of the population and/or
- from those acts the death or serious bodily injury of persons other than the suspect

fear was and/or
- those facts involved inhumane treatment,

consisting in the fact that he, the suspect 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

August 12, 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,

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 out of action by illness, wounding, imprisonment or other cause, namely:

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

including [person 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 cruelly and/or inhumanely and/or

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

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

- has pronounced and/or executed judgments against them without

preliminary adjudication by a court established in a regular manner

which offers all judicial guarantees, considered indispensable by the civilized peoples

recognized 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 degrading treatment and/or 2) which pronounce and/or enforcement of judgments and/or any arbitrary deprivation of liberty as aforesaid consisted in the fact that he, the suspect and/or one or more co-perpetrators,

1. has/have allowed the aforementioned person(s) (seriously) physically and/or (seriously) psychological suffer, by (among other things) the poor detention conditions,

- physical violent incidents,
- handing out punishments,
- the prolonged psychological torment and/or
- an atmosphere of terror and/or fear of being exposed to physical or psychological violence,

because he, the suspect and/or one or more co-perpetrators, the aforementioned person(s) has/have held 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 was 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) (and) witnessed the violent treatment of others;

and/or

2. against the aforementioned person(s) (prison) sentences and/or other custodial has/have implemented and/or has had measures 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 defense 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

(a) to suspected subordinate person(s) residing within Pul-e-Charkhi Prison

was/were employed (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 January 1, 1983 to December 31, 1990, in Kabul, at least (elsewhere) in Afghanistan,

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

- those offenses have resulted in serious physical injury and/or

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

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

do or tolerate and/or

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

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

- from those acts the death or serious bodily injury of persons other than the suspect

fear was and/or

- those facts involved inhumane treatment,

consisting in that (a) person(s) subordinate to the accused and/or one or more other(s) then and there (each time) in conflict with

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

August 12, 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,

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 out of action by illness, wounding, imprisonment or other cause, namely:

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

including [person 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 treated one or more others (as political prisoners) in (including) block(s) 1 and/or 2 and/or 3 of the Pul-e-Charkhi prison, cruelly and/or inhumanely and/or (on several occasions) has assaulted their personal dignity (and/or) (in particular) has treated the aforementioned persons humiliatingly and/or degradingly and/or

has pronounced and/or executed judgments against them without

preliminary adjudication by a court established in a regular manner

which offers all judicial guarantees, considered indispensable by the civilized peoples

recognized 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 degrading treatment and/or 2) which pronounce and/or

enforcement of judgments and/or any arbitrary deprivation of liberty as aforesaid

it consisted(s) that (a) person(s) subordinate to the suspected person(s) and/or one or more

other(s),

1. has/have allowed the aforementioned person(s) (seriously) physically and/or (seriously) psychological

suffer, by (among other things)

- the poor detention conditions,

- physical violent incidents,

- handing out punishments,

- the prolonged psychological torment and/or

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

violence,

because (a) person(s) subordinate to the suspect and/or one or more other(s)

has/have held the aforementioned person(s) captive with too many people in too small

spaces and/or in spaces in which little or no daylight entered and/or without being able to make sufficient use of sanitary facilities and/or without having to

were able to receive (regular) visitors and/or while the food and/or drinking water they received was bad 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 has/have treated said person(s) violently and/or said person(s) witnessed the violent treatment of others;

and/or

2. against the aforementioned person(s) (prison) sentences and/or other custodial

has/have implemented and/or has had measures 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 defense at their disposal and/or contrary to the

prohibition of collective punishment and/or contrary to the principle of legality and/or

without the presumption of innocence and/or without their use

could exercise the right to be present at one's own trial and/or

without having the right not to cooperate in their own conviction and/or

without being able to exercise the right to advice regarding the

legal and other remedies and regarding the time limits within which

should be used,

what the suspect, being a (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, on (one) (or more) time(s) in or about the period from January 1, 1983 to December 31, 1990, in Kabul, at least (elsewhere) in Afghanistan , (each time) has intentionally admitted and/or (in particular) has taken no and/or insufficient measures to prevent and/or stop and/or punish the aforementioned crimes.

3 The criminal investigation

The investigation of the police and the examining magistrate

The investigation into this case (under the investigative name 'Chevron') started in 2012 with an investigation into open sources into alleged war crimes committed in Afghanistan by perpetrators residing 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], might have been staying in the Netherlands under a false name. It would be a man born in [place] in Afghanistan, currently living in [place] under the name [name] and according to the Public Prosecution Service he is the suspect.

The International Crimes Team (hereinafter: TIM) of the National Unit, National Criminal Investigation Service, of the national police has mapped out the situation in the Pul-e-Charkhi prison on the basis of reports from various human rights organizations. The investigation by the TIM focused on the one hand on the identity of the suspect and the answer to the question whether the suspect is 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 during the period that [name] was working there as a manager. During the investigation, open source research was conducted, files were requested from the Immigration and Naturalization Service (hereinafter: IND) and witnesses were heard. Special investigative powers have also been deployed,

The suspect was arrested at his home on November 12, 2019. Subsequently, searches were carried out in the home of the suspect and in the homes of relatives of the suspect. The suspect was taken into custody on the same day. On November 15, 2019, the examining magistrate placed the suspect in custody. Subsequently, the court ordered the detention of the accused. 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 defense and the public prosecutor, in the presence of the defense and the public prosecutor. Some witnesses the defense wanted to hear turned out to be dead. Some witnesses who were in Afghanistan were not heard because of the political-administrative situation that arose in Afghanistan in the summer of 2021.

The investigation in court

The court's investigation has been held at several court hearings. During the pro forma hearings on February 19, 2020, April 14, 2020, July 7, 2020, October 1, 2020, December 23, 2020, February 17, 2021, May 12, 2021 and June 2, 2021, the progress of the investigation and the continuation of the pre-trial detention been 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 officer of justice. Further substantive treatment took place at the hearings on February 16, 2022, February 17, 2022, February 18, 2022, February 21, 2022 and February 22, 2022.

The court has taken cognizance of the claim of the public prosecutors mr. NH Vogelenzang and mr. M. Blom (hereinafter jointly referred to as: the public prosecutor) and of what the suspect and his counsel mr. MMH Zuketto and mr. RM Heemskerk (hereinafter: the defence) has been brought forward.

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

4 Positions 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 the following chapters where necessary.

Views of the public prosecutor

Validity of the summons

The public prosecutor has taken the position that the summons 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.

Evidence statement

The Public Prosecutor considers it legally and convincingly proven that the accused, being [name], is guilty of co-perpetrating degrading, degrading, cruel and inhumane treatment and the execution of extrajudicial sentences and arbitrary detention of prisoners in blocks 1, 2 and 3 of the Pul-e-Charkhi prison in the period from January 1, 1983 to December 31, 1988. The public prosecutor also considers the grounds for aggravation of the sentence mentioned in the indictment to be legal and convincing.

penalty

The public prosecutor has demanded that the suspect be sentenced to 12 years in prison. In addition, the public prosecutor has demanded that the suspect's taskara be withdrawn from circulation and the other seized objects returned.

Defense positions

Validity of the summons

The defense has taken the position that the writ of summons is invalid on two counts.

Inadmissibility of the public prosecutor

The defense has primarily taken the position that the public prosecutor should be declared inadmissible in the prosecution of the suspect since it was not foreseeable for the suspect that he could be prosecuted for the offenses charged against him, if proven.

acquittal

In the alternative, the defense took the position that the charge should be acquitted, because it cannot be legally and convincingly proven that the accused committed the charge.

Dismissal of all prosecutions

More in the alternative, the defense took the position that the suspect 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 the war at the time.

Conditional request

Finally, the defense requested the court - if it were to reach a conviction - to reopen the investigation and to order that an expert be appointed regarding the detention capacity of the suspect.

5 The applicable law

The indictment is based on Articles 8 and 9 of the Criminal Law in Wartime Act (hereinafter: Wos). In these articles, to the extent applicable in this case, the following is provided: [1]

Article 8

1. He who is guilty of violation of the laws and customs of war, shall be punished with imprisonment not exceeding ten years.

2. Imprisonment not exceeding fifteen years is imposed:

1°. if the fact is likely to lead to death or serious physical injury to another;

2°. if the offense involves inhumane treatment;

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

4°. if the offense involves looting.

3. The life sentence or temporary prison sentence not exceeding twenty years is imposed:

1°. if the act results in the death or serious physical injury of another or if it involves rape;

2°. if the fact involves violence with combined forces against one or more persons or violence against a dead, sick or injured person;

3°. if the fact involves jointly destroying, damaging, rendering useless or taking away any property belonging in whole or in part to another person;

4°. if the offense referred to in the preceding paragraph under 3° or 4° is committed with combined forces;

5°. if the fact is the result of a policy of systematic terror or unlawful acts against the entire population or a particular group thereof;

6°. if the fact constitutes a violation of a given promise, or a violation of an agreement concluded with the counterparty as such;

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

Article 9

He who willfully allows a person subordinate to him to commit such an act shall be punished with the same penalty as for the offenses referred to in the preceding article.

Where the WOs refers to 'the laws and customs of war', this refers to the prescriptive 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 was 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 conflict and to a limited extent to non-international armed conflict. 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 event of an armed conflict in the territory of one of the High Contracting Parties, which is not of an international character, each of the Parties to the conflict shall apply at least the following provisions:

1. Persons not taking part directly in hostilities, including personnel of armed forces who have laid down their arms and those who have been put out of combat by disease, wound, captivity or any other cause, shall in all circumstances be treated humanely without any harm. discrimination against them based on race, color, religion or belief, sex, birth or social wealth or any other similar criterion.

To this end are and remain prohibited at all times and everywhere with regard to the above persons:

a) assault on life and physical assault, in particular killing by any means, mutilation, cruel treatment and torture;

b. taking hostages,

c. assault on personal dignity in particular humiliating and degrading treatment,

d. the delivery and enforcement of judgments without prior trial by a court duly constituted and offering all the judicial guarantees, recognized by the civilized peoples as indispensable.

2. The wounded and sick must be collected and cared for. An impartial humanitarian organization, such as the International Committee of the Red Cross, can offer its services to the Parties to the conflict.

The Parties to the conflict shall further endeavor to give effect to other or part of the other provisions of this Convention by means of special agreements.

6 The validity of the summons

The defense has taken the position that the summons 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 included several times in the second cumulative/alternative indictment "and/or one or more other(s)" . According to the defense, 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 Code of Criminal Procedure (hereinafter: WvSv), the summons contains a statement of the offense charged, stating the time and where on the spot it would have been committed. It also includes a statement of the circumstances under which the offense was allegedly committed. The purport of this provision is that it must be clear to the suspect what the accusation is against him, 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" would be, it is specified that they must be prisoners in certain blocks of the Pul-e-Charkhi prison, during the indicted period. Viewed against the background of the file, it is sufficiently clear to the accused what the allegation thus made is related 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 suspect. The accused 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 suspect on what sees the accusation thus made.

Since the court has also not shown any grounds for nullity of the writ of summons, the writ of summons is valid in the opinion of the court.

7 The 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 defense has not taken a position on the question of jurisdiction.

The court considers the following.

The suspect was charged with (co-)perpetrating and/or intentionally admitting war crimes committed in Afghanistan in the period from January 1, 1983 to December 31, 1990. At the time, the suspect had Afghan nationality. The suspect subsequently 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 outside the Empire in Europe;

†

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

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 first 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 suspect 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, which concerns a suspect 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 Criminal Code (hereinafter: Criminal Code), as it read at the time of the indictment, provides that prosecution may also take place if the suspect only became a Dutch citizen after committing the offence. .

The court understands from the history of the establishment of the Wos that Article 3 of the Wos must be read in conjunction with the provisions on jurisdiction in the Penal 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 suspect 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 offenses charged are also punishable under the law of the country where they were allegedly committed, the unlimited active personality principle.

Admissibility Defenses

The defense has taken the position that the public prosecutor is inadmissible in the prosecution of the suspect, because it was not foreseeable for [name], in view of his education and background, that he would behave for the accused - if proven - could be prosecuted as a civilian superior in the Netherlands.

The court considers that the assessment of these defenses requires a fact-finding. This means that these defenses 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 suspect. The court will therefore discuss these defenses after the facts have been established, in chapter 23.

Since the court has also not shown any impediments to prosecution, it declares the public prosecutor admissible in prosecuting the suspect.

8 Historical context

Before the court makes factual findings, below is a brief outline of the political, administrative and social developments in Afghanistan in the run-up to and at the time of the indictment. [4]

On July 17, 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 DPPA) 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 April 27, 1978 by the DPPA. Daoud was deposed and assassinated and Taraki and Karmal formed a government with Taraki being 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 policy of reconciliation 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', came in 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 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 arrested the KhAD were often first taken to the KhAD's detention and interrogation centers in Kabul, called Shashdarak and Sedarat. After a few months, these political prisoners were transferred to the Pul-e-Charkhi prison just outside Kabul. There were also 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 about 50,000 political prisoners had been detained.

9 Establishment of the facts: general considerations

The defense 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 defense has also argued that the reports in the file cannot be used for evidence, because they are based on anonymous sources. Finally, the defense 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. Nor can the circumstances that some witnesses have had contact with each other and may have read books about the Pul-e-Charkhi prison, in and of themselves, 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 – viewed in relation to each other (time) and coherence with each other and the other evidence – are essentially consistent. to be.

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 organizations (NGOs) such as Amnesty International and Helsinki Watch. Also included in the file is a so-called context report entitled “Afghanistan Context Report (1978 - 1992)”, 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 as evidence, because these reports are a written representation of research done by independent organizations and reporters at the time in Afghanistan. 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 defense 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. The identity of the 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 WvSv. The identity of the 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 WvSv. The identity of the*after all, the authors* of the reports are known. The defense 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 defense has argued, concerns the indictment in its entirety and not just a part of it – the court may decide to prove that a suspect has committed an offense charged against him. cannot be assumed solely on the testimony of one witness. This provision serves to guarantee the validity of the evidence decision. 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 Establishing 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 indicted. .

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 persistent armed violence (*protracted armed violence*) and the armed group(s) involved 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 organised: the circumstance that the group controls a certain area; the ability to give the group access to weapons and other military equipment; the ability to plan, coordinate and conduct military operations, including troop movement and associated logistics. [8] These factors are not exhaustive but only indicative and a single factor is not decisive. [9]A state is supposed to have armed forces that meet the requirement of organization. [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 indicted period. The armed violence displaced four million Afghans. 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.

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, Sharia judges handled 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 organization has been met.

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

11 Establishment of the facts: the identity of the suspect

The first question is whether the suspect, who calls himself [name] and is known as such in the Netherlands, was called [name] during the indicted period in Afghanistan and worked in the Pul-e-Charkhi prison.

The court infers the following from the evidence.

The suspect 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 suspect further stated that he came from the [city] region of Afghanistan and lived in the [name] district in Kabul. The suspect was unable to submit a passport to the IND, but he 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 suspect, named [name]. The taskara has been investigated by the police and that investigation shows that the last name in blue pen mentioned on pages 3 and 6 has been changed from [name] to [name].

During the search of the suspect's home, an Afghan driver's license of the suspect was found in the name of [name], son of [name], with a passport photo. The suspect has stated to the police that this driver's license is his and that he is in the photo.

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

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

The photo on the driver's license was shown to the witness [person 16], who stated that he would think that the photo shows [name], who worked in the Pul-e-Charkhi prison.

The witness [person 21] stated that [name], chief 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 suspect to the police that he is from [place] and that his family had an orchard.

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

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

In view of the foregoing, the court finds that the suspect, 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 fired 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.

It follows from the foregoing that the court does not agree with the defense's argument that there is a mistaken identity. In support of that statement, the defense has submitted a passport of an Afghan person, not being the suspect, who claims to be [name] and to have worked in the Pul-e-Charkhi prison at the time. However, in October 2020, the Afghan authorities informed about this passport that it is not officially registered and that it is labeled as counterfeit by the authorities. The defense also submitted a video in which a man, not being the suspect, can be seen stating 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 judgment, this also refers to the suspect.

12. Establishing the Facts: Detention Conditions in Pul-e-Charkhi Prison

The question that the court will answer under this point is whether the facts as charged have been involved. 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 being convicted by a court. Some witnesses have 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. The toilet was allowed to be used, with or without 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, the 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. The 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]. Some cells no longer had daylight

entering because the windows were covered. The suspect had taken care of this, according to the 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 feces in it.

There was hardly any room for airing. Several witnesses have stated that they were not allowed to air at all, such as the witness [person 11] and witness [person 18]. Others have stated that they were allowed to air but that this was not daily, such as the witness [person 10] and the 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 held between political opponents, which felt like psychological torture. People who had been sentenced to death were also put in jail. The death row inmates were then removed 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, such as with the witness [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, the witness [person 17] stated. Examples of punishments were assault, a long period of no airing or transfer to another cell. In addition, inmates faced violent treatment from other inmates as abused inmates were returned to jail. Crying could also be heard from people who were interrogated and tortured in block 1, according to the 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 prison or to the death penalty. It regularly happened that prisoners after a period in block 1 were transferred to block 2. 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. For example, the witness [person 11] 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. The witness [person 14] could not stretch his legs because he 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. There were those destined for four captives,

There was a shortage of sanitary facilities. The witness [person 12] testified about one toilet for 500 people. The 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 have varied 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. The 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.

There were also insufficient opportunities to wash, which was due to a lack of water, especially in the summer. The 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. The 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 conditions.

The food was bad, often subpar, dirty and cold. Witnesses testified that they found, for example, vermin, mice, pebbles, soil and excrement in the food. The witness [person 4] labeled the food as inhumane. The poor food caused many inmates to have diarrhea, which in turn led to problems due to the limited number of toilets. The

witness [person 4] stated that people wet their pants when there was once a diarrhea epidemic. When the cell door opened there was a streak of diarrhea to the toilet.

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

Prisoners were inside all day. Sometimes they were allowed to breathe. The witness [person 13] testified about fifteen minutes every two days, the 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, the witness [person 7] stated that he received no 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 suspect, checked the cells. There were also spies in the cell, so-called bashis, who passed on their observations to the officials. Several witnesses have testified that when prisoners held pen or paper against the rules, for example, or complained about the detention conditions, they were mistreated by prison staff. For example, the witness [person 17] stated that you were punished for the least you did. You got beat up. The 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 of airing or placing in an isolation cell for a long time. For example, the 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 the witness [person 16] was placed in isolation for seven months because he had spoken out about the situation in jail. Prisoners were confronted with prisoners who had been mistreated or tortured because these prisoners were in a cell among the other prisoners. For example, the 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 the witness [person 16] was placed in isolation for seven months because he had spoken out about the situation in jail. Prisoners were confronted with prisoners who had been mistreated or tortured because these prisoners were in a cell among the other prisoners. For example, the 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 the witness [person 16] was placed in isolation for seven months because he had spoken out about the situation in jail. 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. The 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 the witness [person 14] specifically stated about this. Other witnesses have indeed stated about a lack of water, but there is insufficient evidence that this concerns drinking water.

Block 3

The moment the political prisoners were sentenced to imprisonment 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 circumstances. 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 an 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,

Interim conclusion

On the basis of the above, the court establishes that all the facts as charged, with the exception of flooding the cell and having sufficient drinking water available, took place in the period charged.

13. Establishing the Facts: Deprivation of Liberty and Trial of Prisoners in Pul-e-Charkhi Prison

From the evidence, the court infers that during the indicted period, persons awaiting trial, as well as persons who had been tried and persons who were never to be tried, were detained in the Pul-e-Charkhi prison. For example, the 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 no trial. Witness [person 4] also stated that he had not had a trial during his five-year detention. Other witnesses testified that they had been tried, but had been detained in Pul-e-Charkhi prison for a long time before that. Thus the witnesses [person 3], [person 10] and [person 8] stated that they were only tried after six years of imprisonment and the witness [person 14] stated that he was tried after five years. The witness [person 6] stated that he was interrogated and tortured in the years prior to his trial. The witness [person 17] stated that he was interrogated and tortured in the week after his arrest.

Several witnesses have stated that they were not told the charges against them until shortly before their trial. According to the witnesses [person 18] and [person 6] this was only one day before, according to the witnesses [person 7] and [person 3] three days before and according to the witness [person 19] a week before. Several witnesses have stated that they were given pen and paper in their cells to write their defense themselves. They received no legal assistance. They also could not see their file. The 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 suspect.

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

Witnesses also stated that the judges were not or hardly interested in what they had to say. For example, the witness [person 8] stated that he only got two questions and that he was verbally abused by the judges. The witness [person 19] stated that the judges were eating while he was conducting his defense and that they were indifferent. The 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 crossed. According to the witness [person 19], his conviction had already been established. According to the witness [person 17], the trial was just for show. According to the witness [person 15] it was a premeditated investigation, because there was no evidence against him. The 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.

The witnesses stated that after their trial they were taken back to Pul-e-Charkhi prison. There they heard their verdict after some time, in case they were sentenced to prison. If their sentence included the death penalty, they did not hear this and sometimes remained in ignorance for years. For example, the 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 verdict.

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 prison terms 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 DPPA and in some cases recruited from the KhAD.

Opposite to all the above is the statement of the 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. Suspects were sent their file 20 to 30 days before the hearing to prepare their defence. Defendants had the right to a lawyer. Some sessions lasted a day, others longer. The judges put questions to the suspects and the public prosecutor. The verdict was handed out on paper to the convicts. 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 emerges from the context report, as stated above. Moreover, the statement is not confirmed in any other source. The court therefore dismisses the statement of the witness [person 16] as implausible.

14. Establishing the Facts: The Defendant's Role in Pul-e-Charkhi Prison

The court finds that many witnesses who were detained in the Pul-e-Charkhi prison during the indicted period 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 suspect, of whom the court has already established that he worked under the name [name of suspect] 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 emerges from the statements of the aforementioned witnesses that the suspect held a managerial position in the Pul-e-Charkhi prison during the indicted period. The exact position and responsibilities of the suspect were varied by the witnesses. However, the court considers this understandable given the position of the witnesses: as prisoners, they cannot be expected to have a complete picture of the duties and responsibilities of prison staff. It is equally understandable that – especially considering the passage of time – they have made different statements about the exact names of the functions of the prison staff.

In addition, statements were made by so-called insider witnesses, i.e. witnesses who at the time were working in the Pul-e-Charkhi prison or who were otherwise affiliated with the DPPA. By virtue of the position they held at the time, they can be considered to have a better idea of the suspect'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 suspect held a managerial position in the prison.

The insider witnesses [person 23], [person 24] and [person 22] have stated unanimously that the suspect in the Pul-e-Charkhi prison was responsible for the department for political prisoners. This is in line with the statements of the witnesses [person 4] and [person 13]. They stated that the suspect 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 suspect was also responsible for the ward where non-political prisoners were detained. However, the court cannot establish this with sufficient certainty. However, the court established that the suspect was in any case responsible for the department for political prisoners.

Several witnesses have called the suspect "head of political affairs", although this job title was not used by the insider witnesses. Several witness statements show that at some point the suspect, in addition to his original position, took up another position, which witnesses referred to as “general commander”. Other witnesses mentioned different job titles. As a result, the court was unable to determine the exact job title of the suspect. 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, stood above his head on political matters, or vice versa, or whether they stood side by side, has remained unclear.

However, the court can establish that the suspect was in charge of block commanders, who in turn were in charge of guards and soldiers who served in the prison. Reference can be made to the statements of the witnesses [person 16], [person 6], [person 11] and [person 10] and the insider witness [person 24]. They all stated that the suspect gave orders to block commanders and/or that the block commanders were subordinate to the suspect. [person 24] also named the head of the kitchen as a subordinate to the suspect. The witness [person 14] stated that the employees of the hospital and the canteen were also subordinate to the suspect. It appears from the statements of the witnesses that the subordinates actually followed the orders given to them by the suspect.

Multiple witness statements indicate that the accused was named lieutenant colonel, although witnesses have also named other military ranks. It is unclear whether the suspect was wearing a uniform. The suspect 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 suspect had by virtue of his managerial position can be deduced 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, the insider witness [person 23] stated that the suspect was responsible for the maintenance and supervision of the prisoners. The insider witness [person 24] stated that the suspect was responsible for "all matters concerning the prisoners", such as food, airing and family visits. The insider witness [person 22] stated that the main task of the suspect was to keep the prisoners. The witness [person 4] stated that the responsibilities of the accused were the security and order in the prison and the living conditions of the prisoners. The witness [person 16] stated that the suspect had authority regarding 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 suspect had the authority to transfer prisoners from cell or from block.

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

How the suspect fulfilled his position can be deduced from the witness statements. Several witnesses have stated that they saw the suspect from their cell or spoke to him. According to these witnesses, the suspect regularly walked around the prison and inspected the cells. The suspect also had an actual influence on the detention conditions. For example, the witness [person 2] stated that the situation in prison completely changed for him when the suspect was put in charge: he was allowed to go to the toilet less often, no longer receive visitors, and air less often. The witness [person 4] stated that he was allowed to ventilate less often under [suspect] and to go to the toilet less. This witness also stated that the food got worse under the suspect. According to the witness, the suspect deliberately provided bad food. The witness stated that a fellow prisoner addressed the suspect about the bad food with the words "you can't mix our food with dirty things", whereupon the suspect told this fellow prisoner that he was a traitor and anti-revolutionary. The witnesses [person 8] and [person 14] also stated that the detention conditions were getting worse under the suspect. In particular, [person 14] stated that the quality of the food deteriorated and he had less access to a doctor when the suspect was put in charge. The witnesses [person 2] and [person 8] stated that the suspect ensured that the windows in their cell were covered. The witness stated that a fellow prisoner addressed the suspect about the bad food with the words "you can't mix our food with dirty things", whereupon the suspect told this fellow prisoner that he was a traitor and anti-revolutionary. The witnesses [person 8] and [person 14] also stated that the detention conditions were getting worse under the suspect. In particular, [person 14] stated that the quality of the food deteriorated and he had less access to a doctor when the suspect was put in charge. The witnesses [person 2] and [person 8] stated that the suspect ensured that the windows in their cell were covered. The witness stated that a fellow prisoner addressed the suspect about the bad food with the words "you can't mix our food with dirty things", whereupon the suspect told this fellow prisoner that he was a traitor and anti-revolutionary. The witnesses [person 8] and [person 14] also stated that the detention conditions were getting worse under the suspect. In particular, [person 14] stated that the quality of the food deteriorated and he had less access to a doctor when the suspect was put in charge. The witnesses [person 2] and [person 8] stated that the suspect ensured that the windows in their cell were covered. The witnesses [person 8] and [person 14] also stated that the detention conditions were getting worse under the suspect. In particular, [person 14] stated that the quality of the food deteriorated and he had less access to a doctor when the suspect was put in charge. The witnesses [person 2] and [person 8] stated that the suspect ensured that the windows in their cell were covered. The witnesses [person 8] and [person 14] also stated that the detention conditions were getting worse under the suspect. In particular, [person 14] stated that the quality of the food deteriorated and he had less access to a doctor when the suspect was put in charge. The witnesses [person 2] and [person 8] stated that the suspect ensured that the windows in their cell were covered.

The suspect was also involved in violence in the Pul-e-Charkhi prison, according to the statements of several witnesses. The witness [person 6] stated that he saw a fellow prisoner being beaten by a guard on behalf of the suspect, because the fellow prisoner had complained about the detention conditions. This witness also stated that the suspect had prisoners mistreated as punishment, for example if a pen and paper were found in a cell. This witness further stated that the suspect 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. The witness [person 11] stated that he had to come to the suspect, who threatened him with execution and had him locked up in an isolation cell for 15 days by a block commander. This was after a spy placed in his cell reported about him to the suspect. This witness also stated that the suspect ordered subordinates to beat him. The witness [person 4] stated that he had seen several times that the suspect ordered subordinates to take a fellow prisoner away, after which he heard on the return of that person that violence had been used against him. In a more general sense, the witness [person 16] testified about mistreatment of prisoners, and putting prisoners in the cold as punishment. According to the witness, this was the work of the suspect, who had the authority to do so. This was after a spy placed in his cell reported about him to the suspect. This witness also stated that the suspect ordered subordinates to beat him. The witness [person 4] stated that he had seen several times that the suspect ordered subordinates to take a fellow prisoner away, after which he heard on the return of that person that violence had been used against him. In a more general sense, the witness [person 16] testified about mistreatment of prisoners, and putting prisoners in the cold as punishment. According to the witness, this was the work of the suspect, who had the authority to do so. This was after a spy placed in his cell

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The defense has argued that there is insufficient evidence for these incidents of violence, because only one witness was testified about each incident. The court does not follow the defence. As has already been considered above, the statutory minimum proof 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 that they reinforce each other. Although the individual witnesses testify about different incidents, these incidents are indeed similar, namely violence committed against prisoners by or on behalf of the suspect, often as punishment.

On the basis of the foregoing, the court established that the suspect 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, going to the toilet, receiving visitors, airing, food, visiting a doctor and covering windows. On the other hand, because of his involvement in violence in prison, as described above. It can therefore be established that the suspect knew what happened in prison. He was also aware of who was being detained in the prison and he knew about the legal process of the prisoners. He knew that shortly before their trial they were given pen and paper to write their defense, but refused to provide legal texts when asked. He could also be presumed to have known that no lawyers visited the prison to prepare the prisoners for their trial.

15 Establishing 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 blocks 1, 2 and/or 3 of the Pul-e-Charkhi prison during the indicted period. Only from [person 5] that cannot be established. However, these individuals were not the only political prisoners in those blocks of Pul-e-Charkhi prison during the indicted period. 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 approximate. However, the court has established that all political prisoners in the Pul-e-Charkhi prison were detained without trial, or while awaiting a (long-term) 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. The court also established that all political prisoners were exposed to the detention conditions described above at some point

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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 opinion of the court, the suspect must have been aware of this, given his position as manager of the blocs 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. In 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).

Humane or 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] Charitable or humane treatment, as stated in the ICRC's commentary to GC IV of 1958, is also the *leitmotif* of the Geneva Conventions. [12] The commandment to treat humanity 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 commandment of humane treatment, such as killing, maiming, cruel treatment, assault on personal dignity, degrading and degrading treatment and the delivery and execution of sentences without prior notice. trial. These prohibitions are imperatively worded 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 on GC I in 1952 that this imperative formulation 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. The ban 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, the ICTY has considered in several rulings. [14] The ICTY has specified cruel and inhumane treatment as intentionally committed conduct or omission which 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 behavior on the victim. It is not required that the suffering or suffering be permanent, but the suffering must be real and serious in order to qualify as cruel and inhumane treatment. [16] No special purpose is 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 the lack of adequate medical facilities and inhumane prison living conditions, beating, and attempted murder. [18]

Violation of personal dignity

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

The Geneva Conventions and Additional Protocols do not define what constitutes 'assault to personal dignity'. In the case law of the ICTY, it has been considered, among other things, that this concerns intentional conduct that will *generally* be regarded as seriously humiliating or degrading treatment or which in some other way constitutes an assault on personal dignity. [19] Objective criteria play a role in the assessment of this, such as the form, duration, intensity of the violence, whether or not mental suffering, [20] as well as the cultural and/or religious background of the person concerned. [21]As a result, behavior that is, for example, degrading to someone of a certain nationality, culture or religion, while not necessarily so to others, also falls within the scope of the concept of assault on personal dignity. [22] The humiliation must be substantial and serious, but it does not have to be permanent. [23] No physical or mental pain is required. [24] It must be established that the perpetrator was aware 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 commandment of that article to prevent persons to treat those who do not or no longer participate in the hostilities in a humane 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] That fundamental principle has also been leading in 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 subjected 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 can also be made to the ICRC study on customary international humanitarian law from 2005, 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] In addition, 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]

Moreover, 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 comes to the conclusion that the prohibition on arbitrary deprivation of liberty in the period indicted 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, on the one hand, 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 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). This concerns:

† adjudication by a non-independent and impartial tribunal;
† failure to comply with the obligation to inform the suspect in a timely manner about the accusation;
† do not respect the rights of the accused and do not provide resources for the purpose of his defence;
† not respect the right of the accused to be convicted only on the basis of individual criminal responsibility;
† fail to observe the *nullum crimen nulla poena sine lege* principle and fail to uphold the prohibition to impose a heavier penalty than the penalty in force at the time the offense was committed;
† do not observe the presumption of innocence;
† not recognize the right of the accused to be present at his trial;
† do not recognize the suspect's right to remain silent and do not enforce the prohibition on forced confession;
† do not respect the right of the accused to be informed of the legal remedies available to him.

Pronouncement and enforcement of extrajudicial judgments

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

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

In the Dutch translation this is formulated as the prohibition of the pronouncing and enforcement of judgments without prior trial by a duly constituted court offering all judicial guarantees, recognized as indispensable by the 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 dedicates a consideration to the 'execution of judgments' part.

The defense has taken the position that *the carrying out of executions* only concerns the execution of death sentences. At the hearing on 13 December 2021, the court already ruled that it follows the defence. This was followed by further party debate on this part. The court, however, sees no reason for a different opinion in this regard and considers this 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 executions . The ICRC clearly places " *the carrying out of executions* " in the key 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] The *Elements of Crime* of the ICC includes the element ' *the perpetrated executed one or more persons*' with regard to this part of the prohibition . [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, ie 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 sentences, 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 criminalizations of Germany, France and Sweden of the prohibition standards from the common Article 3 of the Geneva Conventions in order 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 must be understood something other than death penalties, in the period charged. In the opinion of the court , the original text of the joint article 3, as well as the comments from the ICRC and the *Elements of Crime , provide insufficient points of reference.* Nor is there any rule of customary international law in the ICRC's study that states this. Rule 100 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 in customary law rule 100. The three national provisions referred to are insufficient to meet 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 judgment pronounced by a regularly constituted court*' , and not to the execution of judgments (' *carrying out of executions*') under Article 8, second paragraph, under c, iv. , of the Rome Statute. [39] It can be deduced from several decisions of the Pre Trial Chamber that *'the passing of sentences'* does not include the execution of a sentence. [40]The enforcement of extrajudicial punishments, including corporal punishment, is - to the best of the court's discretion - not involved in *Al Hassan* 's individual liability 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 sentences, insofar as those sentences 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. in diarrhoea, which was a regular occurrence because of the bad food, which caused a problem. As mentioned the food was bad, often subpar, 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 inmates complained about the detention conditions or if prison officials found out through cell inspections or spies that inmates had a pen or paper in violation of the rules, for example, they were mistreated or given 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 and reason for their imprisonment.

The detention conditions were experienced by the prisoners 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 Pul-e-Charkhi prison.

The court established that the prisoners suffered serious mental suffering as a result of the conditions 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 are experiencing physical consequences such as back and neck hernias, bladder problems and loss of vision as a result of their detention in 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, means that the court is of the opinion that there has been cruel or inhuman treatment of the political prisoners in blocks 1 and 2. Because of these circumstances, these prisoners were also assaulted in their personal dignity and treated humiliated and degrading.

Block 3

With regard to block 3, the court sees indications that the circumstances in that block were not good either. At the same time, the court finds 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 degrading and degrading treatment of the prisoners in that block.

This does not alter the fact that cruel treatment may still occur with regard to individuals. In particular, the court considers that to be the case with regard to the witness [person 19]. This witness had been detained in block 3 from 1983. He has stated that in Block 3 in 1984 he complained to an officer about the detention conditions. He was then taken away by the block commander and two guards and received 120 lashes on his body. He lost consciousness and broke his hand and foot. The statements of [person 19] to the police and to the examining magistrate are detailed and consistent on this point. His statement is broadly confirmed in the statement of the 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.

Arbitrary deprivation of liberty in this case

It follows from what the court has established above that during the period charged 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 requirements to be set. This 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.

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

Pronounce and execute extrajudicial judgments in this case

As considered, extrajudicial prison sentences were executed in Pul-e-Charkhi prison, which is contrary to the international law prohibition of arbitrary deprivation of liberty. However, this is not contrary to the prohibition on the execution of extrajudicial judgments 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 handed down 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 sentences, but will not be discussed further here, because involvement in the execution of the death penalty is not blamed on the suspect in view of the actual effect of the indictment.

Since the execution of extrajudicial sentences, as charged, is not contrary to the common article 3 of the Geneva Conventions, the court acquits the accused.

Involvement in the *delivery* of extrajudicial sentences is also not blamed on the suspect in view of the actual effect of the indictment, so this will not be discussed further.

19. **The Defendant's Liability for Violations of International Humanitarian Law**

Introduction

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

The assessment framework for liability

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

Concurrence of co-perpetration and multiple liability

Contrary to what it considered in its judgment 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 is the case in this case, the court will have to assess whether they can be proven for both. In the view of the Dutch legislator, multiple liability 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 constituting an error of law". [44]

However, it must be prevented that disproportionate criminal liability arises. That would be the case if a suspect is punished for both his direct involvement and his involvement as several in the exact same offences. 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 several suspects in the same facts – there will be "one act concurrence" as referred to in Article 55. of the WvSr. After all, there is then a question of a cohesive complex of facts occurring at the same time and place to such an extent that the suspect can essentially be blamed for this, whereby the purport of the violated staff provisions is the same. In that case, the punishment will be based on the direct involvement of the suspect. In the same sentence, 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. [46]

co-perpetrator

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 settled 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 deliberately cooperated, that the cooperation was aimed at committing the criminal offense and that the co-perpetrator's contribution to the criminal offense was of sufficient weight.

Liability as multiple

Article 9 of the Wos makes punishable anyone who intentionally allows a subordinate to him to commit an offense as referred to in Article 8 of the Wos. Multiple liability 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 to fulfill this obligation, may be held criminally liable for failure to prevent and punish crimes committed by their subordinates. [47] In the legal interpretation of multiple liability, the court aligns with the international law figure 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, namely *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 ensuing *command responsibility* developed into a general principle of law within (international) law. Through *command responsibility*executives may be held criminally liable

for failure to prevent and punish crimes committed 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, as common Article 3 of the Geneva Conventions, to punish individuals and members of the armed forces who have committed to prosecute and try 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 for the establishment of the ICC. [53] The resulting case-law dates from after the period charged. 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 multiple:

- 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 committed by his subordinate;
† the superior (whether intentionally or not) fails to take necessary measures against this within his power. [55]

Liability in this case

co-perpetrator

The court has established that the suspect, by virtue of his position as supervisor, was responsible for the detention conditions and the order in the prison, including the transfer or transfer of prisoners. The suspect could not fulfill his duties alone; to this end he collaborated with prison staff subordinate to him, such as the block commanders. Together with them, the accused detained persons without a prior fair trial and created and maintained a detention regime in which the prisoners lacked sufficient 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.

In view of these findings, one can speak of a close and conscious cooperation between the suspect 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 accused 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 suspect himself sometimes took an active part.

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

Liability as multiple

The court is of the opinion that the suspect can also be held liable as multiple for all of the foregoing. After all, he deliberately allowed subordinates to him – whether or not on behalf of the suspect – to cruelly treat prisoners, assault them in their personal dignity, humiliate and degrade them and arbitrarily deprive them of their freedom. While the exact chain of command in the Pul-e-Charkhi prison has remained unclear, it can be established that the suspect exercised effective authority and control over his subordinates, namely the block commanders, guards and others. He gave them orders, and they were followed. The suspect also knew what was going on in prison, so he could also be expected to know what his subordinates were doing. Perhaps he was not aware of every incident, but the behavior in question was not incidental in nature. It has not been shown that the suspect has taken any measures against his subordinates.

20 Nexus

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

This coherence is also referred to 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 the case law of the ICTY 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 who are closely related to 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 of 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 suspect liable. It considers this as follows.

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 seen 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 an essential role in the possibility for the accused to commit the violations of international humanitarian law. 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 an essential role in the possibility for the accused to commit the violations of international humanitarian law. 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 an essential role in the possibility for the accused to commit the violations of international humanitarian law.

In addition, the suspect 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. The 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. The witness [person 14] stated that the detention regime under the suspect was getting worse, because he saw the prisoners as his enemy. The witness [person 4] stated that the suspect, when asked why he treated the prisoners so badly, replied: “during your reign you also did that to us and killed us”. This witness also stated that the suspect said to a fellow prisoner who had complained about the detention conditions: “you are a traitor, anti-revolutionary, you are against your comrades”. The witness [person 11] stated that he was placed in isolation for 15 days after a spy reported on him to the suspect that the witness had defended the Mujahedin. According to this witness, the accused said to him: “The prisoners are ruffians 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 finds that there is a nexus.

It also follows from the foregoing that the suspect was aware of the circumstances that led to the conflict. Reference can also be made to the witness statements, including those of [person 14] and [person 4], which show that the suspect received Russian advisers in prison and that the suspect had conversations with the prisoners about the party and the regime and the statement of the witness [person 2]. According to this witness, the suspect 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 Evidence Question

Violation of the Laws and Customs of War

In view of all the foregoing, the court concludes that the accused, 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.

aggravation grounds

Several statutory grounds for aggravation of the criminal law have been charged, 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 established 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 offenses involved acts of violence against persons with combined forces. Several witnesses have stated that violence was used during their detention in the Pul-e-Charkhi prison.

Due to the extremely unsanitary detention conditions, contracting various diseases was far from imaginary. In combination with the lack of medical facilities, the facts established made it possible to fear death or serious physical injury.

Prisoners could do nothing but undergo their deprivation of liberty under the established conditions. Thus there was talk of forcing to tolerate with united forces.

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, namely the political opponents detained in the Pul-e-Charkhi.

22 The statement of proof

The court finds evidence against the accused that:

he, during the period from January 1, 1983 to December 31, 1987, in Kabul, jointly and in association with others, violated the laws and customs of war, while

- those offenses have resulted in serious physical injury and

- those acts involved acts of violence against persons with united forces and

- those facts involved forcing others to tolerate something with united forces and

- those facts were expressions of a policy of systematic terror and illegal action against a certain group of the population and

- of those facts the death or serious physical injury of others than the suspect was to be feared and

- those facts involved inhumane treatment,

consisting in the fact that he, the suspect, 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 in the territory of Afghanistan, persons not then directly participating in the hostilities, namely civilians, and those who had been horsed by captivity, namely:

1. [person 1 and 2];

2. [person 3];

3. [person 4];

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 cruelly and inhumanely and/or

- assaulted their personal dignity and treated the aforementioned persons in a humiliating and/or degrading manner and/or

- arbitrarily deprived them of their liberty;

which 1) cruel and inhumane treatment and/or assault on personal dignity and/or degrading and/or degrading treatment and/or 2) which arbitrary deprivation of liberty as aforesaid consisted in the fact that he, the suspect, and co-perpetrators,

1. have caused the aforementioned persons to suffer serious physical and/or psychological suffering, by

- the poor detention conditions,

- physical violent incidents,

- handing out punishments,

- the long-term psychological torment and/or

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

because he, the suspect, and co-perpetrators, have held the aforementioned persons 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 they received was bad and/or dirty and/or was insufficient and/or they received no or insufficient medical care and/or while they were placed in isolation for a long time 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) adversaries and/or informants (also called spies) and/or violently treated said persons and/or witnessed said persons being violently treated;

and/or

2. have executed and/or ordered the execution of prison terms and/or other measures restricting freedom of liberty against the aforementioned persons without prior trial by a court and/or without having received a fair trial, in particular without having been tried by an impartial authority and/or without being immediately informed of the allegations against them and/or without having the necessary rights and means of defense at their disposal and/or without the presumption of innocence and/or without that they had the right not to cooperate with their own conviction and/or without being able to exercise the right to advice on legal and other remedies and on the time limits within which they should be exercised;

and

to suspected subordinates who worked within the Pul-e-Charkhi prison such as block commanders and guards and others, together and in association, during the period from January 1, 1983 to December 31, 1987, in Kabul, together and in association with others , has violated the laws and customs of war, while

- those offenses have resulted in serious physical injury and

- those acts involved acts of violence against persons with united forces and

- those facts involved forcing others to tolerate something with united forces and

- those facts were expressions of a policy of systematic terror and illegal action against a certain group of the population and

- of those facts the death or serious physical injury of others than the suspect was to be feared and

- those facts involved inhumane treatment,

consisting in the fact that he, the suspect, 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,

persons who then did not directly participate in the hostilities, namely civilians, and those who had been put out of action by captivity, namely:

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

including [person 1 and 2];

2. [person 3];

3. [person 4];

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 cruelly and inhumanely and/or

- assaulted their personal dignity and treated the aforementioned persons in a humiliating and/or degrading manner and/or

- arbitrarily deprived them of their liberty;

which 1) cruel and inhumane treatment and/or assault on personal dignity and/or degrading and/or degrading treatment and/or 2) which arbitrary deprivation of liberty as aforesaid consisted in the fact that he, the suspect, and co-perpetrators,

1. have caused the aforementioned persons to suffer serious physical and/or psychological suffering, by

- the poor detention conditions,

- physical violent incidents,

- handing out punishments,

- the long-term psychological torment and/or

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

because he, the suspect, and co-perpetrators, have held the aforementioned persons 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 they received was bad and/or dirty and/or was insufficient and/or they received no or insufficient medical care and/or while they were placed in isolation for a long time 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) adversaries and/or informants (also called spies) and/or violently treated said persons and/or witnessed said persons being violently treated;

and/or

2. have executed and/or ordered the execution of prison terms and/or other measures restricting freedom of liberty against the aforementioned persons without prior trial by a court and/or without having received a fair trial, in particular without having been tried by an impartial authority and/or without being immediately informed of the allegations against them and/or without having the necessary rights and means of defense at their disposal and/or without the presumption of innocence and/or without that they had the right not to cooperate with their own conviction and/or without being able to exercise the right to receive advice on legal and other remedies and on the time limits within which they should be exercised,

which the defendant deliberately admitted in the period from 1 January 1983 to 31 December 1987, in Kabul, and took no measures to prevent and to stop and punish the aforementioned crimes.

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

23 The criminality of the proven

The defense took the position that it was not foreseeable for the suspect that he could be prosecuted 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 offense can only be punished on the basis of a prior statutory criminalization. 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 standard (and the violation thereof) has been established, it must be assessed whether it was concretely foreseeable for this suspect at the time of the alleged conduct that he could possibly be prosecuted for it.

The court has already established that the standards violated by the suspect were part of customary international law at the time. Afghanistan ratified the Geneva Conventions on September 26, 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 honor 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 of the 1976 Afghan Constitution, respectively, refer to as " *fundamental objectives "*included 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 of this can constitute a crime follows from Article 31 of that Constitution, which states that a crime is a personal act and that punishment that is incompatible with human dignity is not allowed.

The suspects were aware of the standards he had violated, and especially given his position as a supervisor in the Pul-e-Charkhi prison, he could be expected to take cognizance of them.

In addition, the file contains concrete indications that the suspect knew that the detention conditions in the Pul-e-Charkhi prison did not comply with international law standards. Visits to Pul-e-Charkhi prison in the proven period have been made by both the ICRC and the United Nations Special Rapporteur. Before receiving these delegations,

prisoners were moved so that the delegations could be shown a virtually empty part of the prison. 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 prison conditions from the delegations,

With regard to the prosecution as a superior, the defense argued that it was not foreseeable that the accused 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. The court considers this 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 already stated in Chapter 19 has been considered, 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 District Court sees no leads for the (assumption) 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. She 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 defense 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 it was declared proven, in which it is considered with reference to case law of the IMT, i.e. from well before that: "*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 suspect had to be aware of this standard and could therefore be expected to take cognizance of it. The foregoing justifies the conclusion that it was concretely foreseeable for the suspect at the time of the provenance that he could be prosecuted as a superior for this. There is therefore no conflict with the principle of legality.

According to Dutch law, what has been declared proven is punishable because no facts or circumstances have become plausible that exclude the criminality of the facts. The court qualifies the facts 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, essentially the same facts are involved, while the protected interest of the two criminal provisions infringed, Articles 8 and 9 of the Wos, is the same.

24 The criminality of the suspect

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

25 The sentencing

The punishment to be reported is in accordance with the seriousness of the offenses committed and the circumstances under which they were committed and is based on the person and the personal circumstances of the suspect, as proved to be the case during the investigation during the court hearing.

The suspect worked as a supervisor at the Pul-e-Charkhi prison in Afghanistan from 1983 to 1988. At that time, Afghanistan was 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 suspect was in charge of the section of the Pul-e-Charkhi prison where these political prisoners were held.

In prison the prisoners were in an uncertain and hopeless situation. Some were never tried, others had to wait years for their trial. That trial was nothing like a fair trial. 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 inmates who violated prison rules or spoke out against detention conditions. Prisoners lived in constant fear. The detention conditions and the hopelessness meant that daily life was experienced by the prisoners as systematic terror.

The suspect 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 suspect's actions can be regarded as a violation of international humanitarian law.

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

The actions of the suspect 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 suspect 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 finds that only an unconditional prison sentence is appropriate.

The maximum sentence that the court can impose on the accused is life imprisonment. The maximum temporary prison sentence is twenty years. In determining the duration of the sentence to be imposed on the suspect, 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 imposed a life sentence. [68] The sentences related to 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 persons.

The ICTY has *sentenced Delalic* to seven years in prison for direct and superior involvement in the inhumane treatment of six inmates. In the case against *Delic* , the ICTY imposed a 10-year prison term for the inhumane treatment of prisoners. [69] These cases involved a smaller number of victims than in the present case.

Life imprisonment is the highest penalty known to the Penal Code and should therefore only be imposed in cases of very exceptional seriousness. That high threshold has not been met in this case. What has been declared proven in this case is of a different nature from the facts in the case against *Eshetu A.,* already because it involved the killing of a large group of people.

The court is also not allowed to impose the highest temporary prison sentence. Taking into account the sentences imposed by the ICTY, the court considers a prison sentence 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 suspect that he is only now being tried for these facts. 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 suspect's advanced age and state of health. During the proceedings, the court received information about this several times. This information shows that the suspect is struggling with 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 suspect in relation to the detention conditions. The court has not shown that the suspect would be unfit for detention now or in the near future. The defense's request to appoint an expert on the suspect's suitability for detention is therefore rejected.

The court concludes that there are no criminal circumstances.

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 appropriate.

Enforcement of the prison sentence to be imposed will take place in full within the penal institution, until the suspect is granted conditional release as referred to in Article 6:2:10 of the Criminal Code.

26 The seized objects

The public prosecutor has submitted to the court a list of seizures containing the following objects:

1. driver's license without [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 is 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 The applicable articles of law

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

- 36b, 36c, 47, 55 and 57 of the WvSr;
- 8 of the Wos.

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

28 The decision

The court:

declares legally and convincingly proven that the accused has committed the charged offenses, as stated above under 22, and that the proven facts constitute:

one act concurrence of

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 united forces forcing another to tolerate something and while the fact is an expression of a policy of systematic terror or illegal action against the entire population or a particular group thereof and while the fact is likely to lead to death or grievous bodily harm to another and while the fact involves inhumane treatment, committed several times

and

deliberately allowing a subordinate to him 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 to force another to tolerate something with united forces and while the fact is an expression of a policy of systematic terror or illegal action against the entire population or a particular group thereof and while the fact is that the death or serious bodily injury of another is feared and while the offense involves inhumane treatment, has been committed several times;

declares what has been proven proven and the suspect punishable for it;

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

sentence the accused to:

imprisonment for a term of 12 (TWELVE) YEARS;

provides that the time spent in insurance and pre-trial detention by the convicted person before the execution of this judgment shall be deducted in full from the execution of 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, namely: identity card taskara [name];

ordered the restitution to the person who is reasonably entitled to designate the objects numbered on the attachment list under 1, 3, 4, 5, 6, namely:

- driver's license without [name];
- identity card taskara [name];

- identity card taskara [name];

- identity card taskara [name];

- identity card taskara [name];

rejects the conditional request.

This judgment was rendered by

mr. EC Kole, chairman,

mr. DC Laagland, judge,

mr. BW Mulder, judge,

in the presence of mrs. DG Lammerts van Bueren and F. Kok, clerks,

and pronounced in open court of this court on April 14, 2022.

Endnotes

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1 At the time of the indictment, the Wos still stated the death penalty as the maximum penalty threat. The threat of the death penalty has been deleted by the Act of 14 June 1990 (Stb. 1990, 369), which entered into force on 1 January 1991 (Stb. 1990, 582). By Act of 10 March 1984 (Stb. 1984, 91, the Classification of Fine Categories Act) a threat with a fine was added to the first, second and third paragraphs of Article 8 of the Wos.

2 Parliamentary Papers II 1951-1952, 2258, no. 3, p. 9. See also Supreme Court of 8 July 2008, ECLI:NL:HR:2008:BC7418, par. 10.2.

3 Parliamentary Papers 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 offenses and finally provisions on the judicial organization and the procedure. The Criminal Law in War 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 War 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 for War on War, across the various relevant codes and laws, embroidering on this pattern. In the design, the designer has in mind to provide a complete overview of all special provisions of a criminal nature that would apply in the event of war, ie. 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 has therefore not been 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 which contain 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, prepared 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 the KhAD is referred to in this judgment below, this includes the WAD from 1986 onwards.

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

[7] ICTY, *Prosecutor v. Haradinaj,* Trial Chamber Judgment, IT-04-84-T, Apr 3, 2008, paragraph 49.

[8] ICTY, *Prosecutor v. Haradinaj et al* , Trial Chamber Judgment, IT-04-84-T, Apr 3, 2008, paragraph 60.

[9] ICTY, *Prosecutor v. Haradinaj* , Trial Chamber Judgment, IT-04-84-T, Apr 3, 2008, paragraph 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 and Others, 'Article 3: Conflicts not of an international character', ICRC, Commentary on the First Geneva Convention, 2016, paragraph 429; ICTY, *Prosecutor v. Haradinaj et al,* Trial Chamber Judgment, IT-04-84-T, Apr 3, 2008, paragraph 60.

[11] See, for example: International Court of Justice, *Military and Paramilitary Activities In and Against Nicaragua* , 1986, ICJ Report 14, 114, paragraphs 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. Delalic,* 11-96-21-T, Trial Chamber Judgment, Nov. 16, 1998, paragraph 552; ICTY , *Prosecutor v. Blaskic* , IT 95-14-T, Chamber Judgment, March 3, 2000, paragraph 186; ICTY, *Prosecutor v. Kordić & Čerkez,* Trial Chamber Judgment, IT-95-14/2-T, Feb. 26, 2001, paragraph 265.

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

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

[17] International Committee of the Red Cross (ICRC), Commentary of the First Geneva Convention, 2016, paragraph 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 Judgment, September 27, 2007, paragraph 517; ICTY, *Prosecutor v. Delalic* , 11-96-21-T, Trial Chamber Judgment, Nov. 16, 1998, paragraphs 554-558 and 1112-1119; ICTY, *Prosecutor v. Jelisic* , IT-95-10-T, Trail Chamber Judgment, Dec. 14, 1999, para. 42-45; ICTY *Prosecutor v. Vasijevic* , 11-99-32-1, Trial Chamber Judgment, November 29, 2002, paragraph 239.

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

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

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

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

[23] ICTY, *Prosecutor v. Kunarac,* Trial Chamber Judgment, IT-96-23-T and IT-96-23/1-T, Feb. 22, 2001, paragraph 501.

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

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

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

[27] ICRC Customary International Humanitairan 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, 1986, ICJ Report 14, 114, paragraphs 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 the preamble of the AP II states: *"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,* Judgment 24 May 1980, ICJ Reports 1980, p. 3, paragraph 91.

[31] See for example the legislation from Armenia, Belgium, Georgia, Nicaragua and Portugal cited in JM Henckaerts and 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 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 (Article 374 Slovenia Criminal Code 1994) and Article 142(1) of the Socialist Federal Republic of Yugoslavia Penal Code 1976.

[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 November 4, 1994 CCPR/ C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), paragraph 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,*†

[36] The ICRC comment from 2020 to GC III states: " *630. As is manifest from the acknowledgment 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 judgment 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 offense 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 offenses*†

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

[38] ICRC 1987 Commentary on Article 6 of the AP II, paragraph 4597.

[39] ICC, Pre Trial Chamber, *Affair 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 at https ://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-335-Corr-Red , paragraph 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 convictions without previous judgment pronounced by a regularly constituted court' is the *delivery* of an extrajudicial judgment, not the *execution* of an extrajudicial verdict (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 at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-335-Corr-Red , paragraph 481). Subsequently, the Pre Trial Chamber reiterated in the 'Decision on the Confirmation of Charges' that in Article 8(2)(c)(iv) of the Rome Statute, the 'passing of sentences' refers to the delivery of a judgment, not the execution of judgments. A conviction can be *inferred* from the execution of a sentence, according to the Pre Trial Chamber (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 at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-461-Corr- Red , para. 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 at https: //www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-461-Corr-Red , para. 928, 969.

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

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

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

[45] ICTY *Prosecutor v. Delalic et al* ., IT-96-21-A, Appeals Chamber Judgment, Feb. 20, 2001, paragraph 745; see also ICTY *Prosecutor v. Kordic and Cerkez,* Appeals Chamber Judgment, IT-95-14/2-A, Dec. 17, 204, paragraph 34.

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

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

[48] ICTY, *Prosecutor v. Halilovic* , IT-01-48-T, Judgment, November 16, 2005, paragraph 50 and ICTY, *Prosecutor v. Hadžihasanovic et al* ., IT-01-47-PT, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to 'command responsibility', July 16, 2003, paragraph 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, Judgment, November 16, 2005, paragraph 42.

[51] Article 86 of AP I in so far as relevant: 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, when those superiors knew , or had information enabling them to understand in the circumstances at that time that he was committing or about to commit such an infringement, and where they have not taken all practicable measures in their power to remedy the infringement. prevent or counteract. Article 87 AP I: 1. The High Contracting Parties and the party to the conflict shall require the military commanders not to commit any breach of the Treaties and this Protocol in respect of members of the armed forces under their command and other persons under their control. and, 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 shall require commanders, in accordance with the level of their responsibility, to ensure that members of the armed forces under their command , are aware of 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 have committed such a breach of the Conventions or this Protocol to take the necessary steps to prevent such violations of the Treaties or this Protocol and, if appropriate, initiate disciplinary or criminal proceedings against those who have violated those instruments.

[52] ICRC, Commentary on Article 6 of the Second Additional Protocol of 1987, paragraph 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 align as much as possible with the case law of the ICTY and ICTR.

[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 take orders 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 of his subordinates (see ICC, *Prosecutor v. Bemba, ICC-01/05 -01/08,* Trial Chamber Judgment, March 21, 2016, paragraph 188.).

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

[56] ICTY *Prosecutor v. Delalic et al* ., IT-96-21-A, Appeals Chamber Judgment, February 20, 2001, paragraph 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, Oct. 2, 1995, paragraph 70.

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

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

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

[62] ICC *Ntaganda* case, Trial Chamber Judgment *, ,* ICC-01/04-02/06, 8 July 2019 *,* paragraph 733; see also earlier ICTY, *Prosecutor v. Kunarac,* Appeals Chamber Judgment, IT-96-23 and IT-96-23/1, June 12, 2002, paragraph 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, Judgment, November 16, 1998, paragraph 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, paragraph 11 ff. and ICTY, *Prosecutor v. Halilovic,* IT-01 -48-T, Judgment, November 16, 2005, paragraph 55.

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

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

[67] ICTY *Prosecutor v. Delalic et al* ., IT-96-21-A, Appeals Chamber Judgment, Feb. 20, 2001, para. 195. Followed afterwards by the ICTR, *Prosecutor v. Bagilishema* , Appeals Chamber Judgment, ICTR-95-1A- A, July 3, 2002, paragraph 51.

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

[69] ICTY, *Prosecutor v. Delilić et al.* , IT-96-21-T, Trial Chamber Judgment, November 16, 1998, paragraph 1285.