JUDGMENT OF THE COURT OF APPEAL IN THE HAGUE

LJN: BA6734, Gerechtshof 's-Gravenhage, 2200050906-2 Print uitspraak

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Uitspraak

LJN: BA4676, Court of Appeal The Hague, 2200050906 - 2

Date of judgment: 9 May 2007
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Legal area: Criminal law
Proceedings: Appeal
Indications of contents: The criminal proceedings against Van Anraat: The defendant is an accessory to the violation of the laws (and customs) of war by the rulers in Iraq on account of supplying them considerable quantities of raw materials for the production of mustard gas during a period of several years. Sentenced to a term of imprisonment of seventeen years.

Pronouncement of the Court's decision
Cause-list number: 22-000509-06
Public Prosecutors' Office number: 09-751003-04
Date of judgment: 9 May 2007
JUDGMENT IN A DEFENDED ACTION

The Court of Appeal in The Hague
Three-judge section for criminal matters

Judgment

rendered in the appeal case against the sentence of the District Court in The Hague of 23 December 2005, in the criminal case against the defendant:

[defendant],
born in [place of birth] on [date of birth] 1942,
at present detained at Haaglanden Penitentiary [Penitentiaire Inrichting Haaglanden], Remand Prison [Huis van Bewaring] “Zoetermeer” in Zoetermeer.

1. Investigation of the case

This judgment has been rendered as a result of the investigation at the court sessions in the first instance and the investigation at the court sessions of the Court of Appeal on 9 October 2006 and – after interlocutory judgment on 23 October 2006 – on 2, 4, 11, 16 and 25 April 2007.
The Court has taken notice of the punishment demanded by the Advocate General and of the comments made by the defendant himself and by the defence counsels on behalf of the defendant.

2. Charges

The defendant has been charged with the facts as mentioned in the initiatory writ of summons, and as described or altered by respectively the Public Prosecutor and the Advocate General during the court sessions and during the appeal, being:

Count 1, principally:

that

Saddam Hussein Al-Tikriti and/or

Ali Hasan Al-Majid Al-Tikriti and/or

Hussein Kamal Hassan Al-Majid and/or

(an)other person(s) (who so far has/have remained unknown)

on or around 5 and/or 6 June 1987 and/or August 1988 in Zewa situated in Iraq and/or

on or around 16 March 1988 in Halabja,

situated in Iraq and/or

on or around 3 May 1988 in Goktapa (Gukk Tapah)

situated in Iraq and/or

on or around 25 August 1988 in Birjinni (Bergin)

situated in Iraq

in any case at (one) (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iraq,

together and in conjunction with (an) other(s),

in any case in conspiracy,

(again and again) with the intention to completely or partially wipe out a national or ethnic group as such, intentionally has/have killed members of the group and/or inflicted grievous bodily and/or mental harm by then and there,

together and in conjunction, in any case in conspiracy,

in Iraq (in Zewa and/or Halabja and/or Goktapa (Gukk Tapah) and/or Birjinni (Bergin) and/or

(an) other place(s)

(intentionally) used chemical weapons (mustard gas and/or nerve gas(es)) against persons, belonging to (part of) the Kurdish population group (in the country side and/or in Halabja) in Northern Iraq who were present then and there,

as a result of which those persons from (part of) that Kurdish population group (in the country side and/or in Halabja) have died and/or suffered grievous bodily and/or mental harm ((among other things) existing in that those persons from (part of) that Kurdish population group (in the country side and/or in Halabja) have found themselves in a (permanent) situation of (serious) fear) to commit said crime(s), defendant and/or his co-perpetrator(s) together and in conjunction, in any case alone,

at (one) (more) point(s) in time in the period between 19 April 1984, through 25 August 1988 in Den Helder and/or

Zoetermeer and/or

Rotterdam, in any case in The Netherlands

and/or in Baghdad

and/or in Samara, in any case in Iraq,

and/or Lugano, in any case in Switzerland

and/or in Antwerp, or in any case in Belgium

and/or in Milan and/or in Trieste, in any case in Italy

and/or in Luxemburg-City, in any case in Luxemburg

and/or in Baltimore, in any case in the United States of America

and/or in Tokyo and/or Osaka, in any case in Japan

and/or Singapore

and/or in Aqaba, in any case in Jordan

intentionally provided the opportunity and/or means and/or information to commit these crimes by then and there intentionally supplying Thiodiglycol (TDG) and/or Phosphoroxychlorid (POCL3) and/or other precursors intended for the production of chemical weapons (mustard gas and/or nerve gas(es)) to (the Republic of) Iraq

and/or by supplying materials to (the Republic of) Iraq in order to construct (a) factory(ies) for the production of chemical weapons (Al-Muthanna State Establishment)

and/or by giving advise to (the Republic of) Iraq for the production of chemical weapons.

(Article 1 Genocide Convention Implementation Act in conjunction with Article 48 Penal Code)

and/or

count 1. alternatively: if and in so far as the above should or could not lead to a conviction:

that

Saddam Hussein Al-Tikriti and/or

Ali Hassan Al-Majid Al-Tikriti and/or

Hussein Kamal Hassan Al-Majid and/or

(an)other person(s) (who so far has/have remained unknown),

on or around 5 and/or 6 June 1987 and/or August 1988 in Zewa situated in Iraq and/or

on or around 16 March 1988 in Halabja,

situated in Iraq and/or

on or around 3 May 1988 in Goktapa (Gukk Tapah)

situated in Iraq and/or

on or around 25 August 1988 in Birjinni (Bergin)

situated in Iraq

in any case at (one) (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iraq,

together and in conjunction with (an) other(s), (again and again) has/have violated the laws and customs of war,

while that offence/those offences (again and again) resulted in the death of (an)other(s) and/or

that offence/those offences (again and again) inflicted grievous bodily harm on (an)other(s)

and/or that offence/those offences (again and again) was/were (an) expression(s) of a policy of systematic terror or wrongful actions against the whole population or a specific group thereof,

by then and there contrary to international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of poison or poison weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians)

and/or the stipulations of the Geneva Gas Protocol (1925)

and/or the stipulations of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention", 1949)

and/or the stipulations of the "common" Article 3 of the Geneva Conventions of 12 August 1949,

(as members of the Government (of the Republic) of Iraq) belonging to one of the fighting parties in a state of war

and/or in a (non-international and/or international) armed conflict

several times at places in the territory of Iraq (intentionally) using chemical weapons (mustard gas and/or nerve gas(es)) against persons who were present then and there

and as a result of which those persons have died and/or suffered grievous bodily harm

and/or by (systematically) terrorizing (part of) that Kurdish population group (while those chemical weapons were (also) used against persons who did not directly participate in the hostilities,

being civilians from Zewa and/or Halabja and/or Goktapa (Gukk Tapah) and/or Birjinni (Bergin), in any case civilians in Northern Iraq

and/or the use of those chemical weapons involved the cruel and/or inhuman treatment and/or mutilation of these persons and/or purposely caused serious suffering to these persons) and

to commit said crime(s), defendant and/or his co-perpetrator(s)

together and in conjunction, in any case alone,

at (one) (more) points(s) in time in the period between 19 April 1984 through 25 August 1988

in Den Helder and/or Zoetermeer and/or Rotterdam, in any case in The Netherlands

and/or in Baghdad and/or in Samara, in any case in Iraq,

and/or Lugano, in any case in Switzerland

and/or in Antwerp, or in any case in Belgium

and/or in Milan and/or in Trieste, in any case in Italy

and/or in Luxemburg-City, in any case in Luxemburg

and/or in Baltimore, in any case in the United States of America

and/or in Tokyo and/or Osaka, in any case in Japan

and/or Singapore

and/or in Aqaba, in any case in Jordan

intentionally provided the opportunity and/or means and/or information to commit these crimes by then and there intentionally supplying Thiodiglycol (TDG) and/or Phosphoroxychlorid (POCL3) and/or other precursors intended for the production of chemical weapons (mustard gas and/or nerve gas(es)) to (the Republic of) Iraq

and/or by supplying materials to (the Republic of) Iraq in order to construct (a) factory(ies) for the production of chemical weapons (Al-Muthanna State Establishment)

and/or by giving advice to (the Republic of) Iraq for the production of chemical weapons.

(Article 8 Criminal Law in Wartime Act in conjunction with Article 48 Penal Code)

Count 2.

that

Saddam Hussein Al-Tikriti and/or

Ali Hassan Al-Majid Al-Tikriti

and/or Hussein Kamal Hassan Al-Majid and/or

(an)other person(s) (who so far has/have remained unknown)

on or around 13 and/or 14 February 1986 and/or

27 February 1986 at (approximately) 40 kilometres south of Abadan, in any case in the surroundings of Abadan situated in Iran, and/or

on or around 10 and/or 11 April 1987 in Khorramshar

situated in Iran and/or

on or around 16 and/or 21 April 1987, in any case in April 1987, in Alut situated in Iran and/or

on or around 28 June 1987 in Sardasht and/or in Rash Harmeh (in the immediate surroundings of Sardasht) situated in Iran and/or

on or around 22 July 1988 in Zardeh situated in Iran and/or

on or around 2 August 1988 in Oshnaviyeh situated in Iran,

in any case at one (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iran,

together and in conjunction with (an) other(s), (again and again) has/have violated the laws and customs of war,

while that offence/those offences (again and again) resulted in the death of (an)other(s)

and/or that offence/those offences (again and again) inflicted grievous bodily harm on (an)other(s),

by then and there, contrary to

international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of poison or poison weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians) and/or

the stipulations of the Geneva Gas Protocol (1925) and/or

the stipulations of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention", 1949)

(as members of the Government (of the Republic) of Iraq) belonging to one of the fighting parties in a state of war and/or in an (international)

armed conflict

several times at places in the territory of Iran, (intentionally) using chemical weapons (mustard gas and/or nerve gas(es)) against persons (military and/or civilians) who were present then and there,

and as a result of which those persons (military and/or civilians) have died and/or suffered grievous bodily harm

(while those chemical weapons were (also) used against persons who did not directly participate in the hostilities, being civilians from Khorramshar and/or Alut and/or Sardasht and/or Rash Harmeh and/or Zardeh and/or Oshnaviyeh, in any case civilians in Iran,

and/or the use of those chemical weapons involved the cruel and/or inhuman treatment and/or mutilation of these persons (military and/or civilians) and/or purposely caused serious suffering to these persons (military and/or civilians)).

to commit said crime(s), defendant and/or his co-perpetrator(s)

together and in conjunction, in any case alone,

at (one) (more) points(s) in time in the period between 19 April 1984 through 25 August 1988

in Den Helder and/or Zoetermeer and/or Rotterdam, in any case in The Netherlands

and/or in Baghdad and/or in Samara, in any case in Iraq, and/or

Lugano, in any case in Switzerland and/or

in Antwerp, or in any case in Belgium and/or

in Milan and/or in Trieste, in any case in Italy and/or

in Luxemburg-City, in any case in Luxemburg, and/or

in Baltimore, in any case in the United States of America and/or

in Tokyo and/or Osaka, in any case in Japan

and/or Singapore and/or

in Aqaba, in any case in Jordan,

intentionally provided opportunity and/or means and/or information to commit these crimes,

by then and there intentionally supplying Thiodiglycol (TDG) and/or Phosphoroxychlorid (POCL3) and/or other precursors intended for the production of chemical weapons (mustard gas and/or nerve gas(es)) to (the

Republic of) Iraq

and/or by supplying materials to (the Republic of) Iraq in order to construct (a) factory(ies) for the production of chemical weapons (Al-Muthanna State Establishment)

and/or by giving advise to (the Republic of) Iraq for the production of chemical weapons.

(Article 8 Criminal Law in Wartime Act in conjunction with Article 48 Penal Code)

Copies of the initiatory writ of summons and the demands for a further description of the charges and the amendment to the charges have been inserted into this judgment.

3. Course of the proceedings

In the judgment of the court of first instance the summons was invalidated on certain parts of the charges under count 1 principally, count 1 alternatively and count 2, regarding the phrase "in any case at (one) (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iraq". The defendant was acquitted of the charges under count 1 principally, while he was convicted on account of the charges under count 1 alternatively and count 2 and sentenced to a term of imprisonment of 15 years less the period spent in pre-trial detention. Furthermore a decision was taken concerning the claims of the injured parties and the articles seized before judgment as described in the sentence of the present case on appeal.

Both the defendant and the public prosecutor lodged an appeal against the sentence of the court of first instance.

4. Nullity of the summons

The defence put forward the plea of nullity against the summons concerning the period represented in counts 1 and 2 "in any case at (one) (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iraq", as well as against the place indications represented (alternatively) in counts 1 and 2 "in any case in Iraq" (count 1) and "in any case in Iran" (count 2). The defence argued that they could not defend themselves against this accusation, because this period and these places had been represented in such general terms that the defence could not understand what the writer of

the charges actually meant.

Furthermore the defence argued that after the insertion of the words "in any case in conspiracy", the indictment is hard to understand and self-contradictory. On the one hand it seems to refer to the main offences that have been committed together and in conjunction. On the other hand, in count 1-principally the defendant is charged with conspiracy, a preparatory offence, which is hard to combine with offences that have already been committed.

The Court considers the following.

The Court is of the opinion that the attacks as such do not directly refer to the acts that the defendant has been charged with, but to the acts of the Iraqi regime.

However, against the background of the case file, the above mentioned period and place indications have been represented in such an indefinite manner that it does not become sufficiently clear to the defendant against what he should defend himself.

With respect to the phrase “in any case in conspiracy” the Court considers that since no further description has been given in the charges, it does not become clear what the defendant is actually charged with on account of that phrase.

For that reason the indictment with regard to the above mentioned period and place indications, as well as the phrase “in any case in conspiracy”, do not satisfy the requirements of Article 261 of the Code of Criminal Procedure and therefore the writ of summons of first instance will have to be invalidated regarding the periods and places indicated in counts 1 and 2, “in any case at (one) (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iraq”, “in any case at (one) (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iran”, as well as regarding the phrase “in any case in conspiracy”.

5. Judgment of the sentence of the court of first instance

The Court of Appeal has partly reached the same conclusions, although partly based on different grounds. Therefore the Court will reverse the sentence of the court of first instance.

6. The public prosecution's entitlement to proceedings

The defence pleaded to bar the prosecution because of lack of a fair trial. Concisely summarized, the counsel for the defence has brought forward the following arguments.

6. 1 Equality of arms

The defence claims that their (financial) means in this case have been largely insufficient, as a result of which they plead the infringement of the right to a fair trial and a violation of the equality of arms principle.

The defendant is assisted by his two counsels on the basis of assignment of legal assistance; recently the Legal Aid Board tightened its standards for legal assistance, stating that the counsels could only act on behalf of their client in replacement of the other and therefore they actually receive half of the fee.

This lack of financial means is even more serious because the present case concerns offences that were allegedly committed approximately 20 years ago in an other part of the world with a totally different culture and because the investigation was carried out in many countries all over the world. For that reason the defence has not had a reasonable chance to conduct an independent investigation, to exercise the necessary influence on the evidence gathered by the Public Prosecution Service and the National Criminal Investigation Department (who seemed to have unlimited means available) and so they claim that they could not put forward a defence with equal means as those that were available to the Public Prosecution Service. Therefore they argue that they had a substantial backlog as opposed to the Public Prosecution Service.

The Court considers the following.

It should be handed to the defence that the present criminal case has exceptional proportions, partly because of its international dimensions and the fact that the offences (serious international crimes) would have taken place decades ago and mainly in a non-European country. In hearing such a case, especially when the police and the Public Prosecution Service apparently have ample (extra) financial means available for the execution of their tasks, one should make sure that the defence does not end up in a

relatively disadvantageous position. This could be true if the present rules for financed legal aid should not acknowledge the special nature of this case. According to the Court, from this special nature arises the need for a defence carried out by two counsels working closely together, which indeed they did, also during the hearings. Moreover the defence brought forward, in general terms, a number of other aspects that hindered them in the performance of their duties, for lack of financial room.

First of all the Court concludes that the resulting practical problems, also due to the conscientious way in which the defence counsels performed their duties, did not represent any obstacle for them in the sense that they were almost always able to personally attend the numerous witness examinations conducted by the examining magistrate, which took place at many different locations in the world. Furthermore, in this case that has lasted for more than two years, the defence has had sufficient possibilities to bring forward their own requests for investigative activities and – depending on the assessment based on legal criteria by the first instance court and the Appeals Court – the defence has been able to carry out these further activities concerning subjects that they wished to investigate in the interest of their client. In view of the above, the Court is of the opinion that neither the arguments brought forward by the defence, nor otherwise the infringement of the right to a fair trial has become evident, nor that a violation of the equality of arms principle has taken place.

6. 2 Witnesses

During the counsel's speech the defence pleaded for an infringement of the right to a fair trial, because the following witnesses have not been heard; furthermore the defence submitted a request (once again) to hear those witnesses:

1. [Director of SEORGI]
2. [General Director of MSE]
3. [Iraqi witness 1]
4. [Iraqi witness 2]
5. [Iraqi witness 3]
6. [Iraqi witness 4]

7. [Iraqi witness 5]
8. Ali Hasan Al-Majid Al-Tikriti
9. Saddam Hussein Al-Tikriti
10. [former employee UNSCOM]
11. X and Y
12. [defendant's business partner]
13. [leader of the investigative police team]
14. [contact person AIVD 1]
15. [contact person AIVD 2]
16. Prof. Elffers
17. [defendant's ex-wife]
18. [expert witness]
19. [Ambassador of Iraq in the Netherlands]

Regarding the above mentioned witnesses, the Court pronounced a decision taken on the grounds as put forward in the interlocutory judgment of 23 October 2006, also taking into account the following considerations.

Regarding witnesses 1 and 2, in his official report of findings dated 19 December respectively 21 December 2006, based on the investigation conducted by the examining magistrate himself, as well as by the National Criminal Investigation Service, the examining magistrate concluded that it is not likely that these witnesses can still be heard. For that reason, the Court holds the opinion that it is not likely that these witnesses can be examined within an acceptable time-limit.

The requests for the examination of witnesses 3 up to and including 7 and 11 up to and including 18 have already been dismissed by the Appeals Court in the aforesaid interlocutory judgment. Regarding the witnesses 3 – 7 the Court ruled that it would be unlikely that these witnesses could be heard within an acceptable time-limit. Concerning witness 12 the Court considered that this witness had already been heard by the examining magistrate, as well as during the hearing in the first instance court (in the presence of the defence). Regarding witness 17 the Court considers that this witness had already been heard by the examining magistrate in the first instance in the presence of the counsel for the defence of the defendant.

With respect to the last two witnesses mentioned above the Court also

considers that it has not become evident what questions should (still) be put to these witnesses in relation to the facts that the Court needs to investigate, nor that there are circumstances that would require a (further) examination. In the counsel's speech the defence did not mention any facts or circumstances that could lead to another judgment regarding all the witnesses referred to in the above.

With regard to witness 8 the Appeals Court has taken a decision during the hearing of the case on appeal on 16 April 2007, which decision includes the fact that it is not likely that the witness will be heard within an acceptable term. Furthermore, in their reply by rejoinder the defence argued that it can be blamed on the inactivity of the Public Prosecution Service that the defence has not been able to question this witness, which is of importance in view of the fact that this witness could possibly have given a disculpatory statement about the defendant.

It should be handed to the defence that a large period passed since 23 October 2006, the date of the interlocutory judgment, when the Court requested the examining magistrate to verify the possibilities to hear or put questions to this witness at short notice, and 30 March 2007, the date that the Public Prosecution Service sent a request for legal assistance to the Iraqi authorities, while in the perception of the Court in that period no other activities have been carried out that were meant to meet with the request of the Court. However, the Court considers that this should not lead to further consequences, even more because in the rejoinder the defence did not draw any conclusions from its observations.

Witness 9 has died in the meantime.

In respect of witness 10 the following facts have been established. In his capacity as Unscom employee, the witness himself and/or together with others interviewed the defendant in October 1994, apparently about his role as supplier of chemical substances to Iraq.

As appears from one of the two letters submitted by the Public Prosecution Service on 20 April 2007, at the time of the interview the defendant gave evasive answers, whereby he apparently tried "to avoid self-implication", as the witness himself wrote in his letter.

The witness has made notes of that conversation. During the rejoinder

the defence requested to insert these notes into the case file and to examine the witness about these notes in relation to the possibility that these might contain disculpatory paragraphs for the defendant.

The Court concludes that the defence has not brought forward any facts or circumstances that might show the necessity of hearing this witness (as yet). In reaching this conclusion the Court has also taken into account the fact that the notes of the conversation in the above mentioned letter written by the witness himself are more of an incriminating nature, rather than disculpatory. For that matter the Court will not use the letters of this witness as evidence. For the same reason the Court does not find it necessary to include the notes of the witness into the case file.

Regarding witness 16, the Court will explain its considerations in paragraph 12.1.5 below.

On 4 April 2007, the Court already decided it was not necessary to hear witness 19. The defence did not bring forward any facts or circumstances that might lead to another conclusion.

Considering the facts and circumstances in the above, at this moment the Court does not see the necessity to hear these witnesses and therefore rejects these requests.

The defence also pleaded that the consequence of not hearing these witnesses is that their eventual incriminating statements cannot be used as evidence and that the testimony given by witness 12 seems very incredible and unreliable and for that reason these statements cannot be used as evidence either.

Subsequently, seen the above facts and circumstances, the Court is of the opinion that, whatever may come of it, in any case concerning witnesses 3 – 7, 12 and 17 the arguments of the defence need to be dismissed, because there are no legal rules that oppose the use of the statements of these witnesses as evidence in this case, with due observance of the necessary cautiousness. Moreover, under item 11.8 the Court will motivate its opinion on the credibility and reliability of witness 12.

6. 3 Violation of the equality principle

During the hearing the defence argued that the Public Prosecution

Service had acted contrary to the ban on arbitrariness and/or the equality principle, at any rate that it had not made a reasonable and fair weighing up of interests in deciding to prosecute the defendant. The defence, concisely summarized, put forward the following arguments.

The Public Prosecution Service did decide to start criminal proceedings against the defendant, but did decide not to prosecute (the witnesses) [defendant's business partner] and [director of the technical department of SEORGI] and furthermore the PPS decided to release [defendant's contact person at the Banca del Gottardo] from custody after his apprehension and examination, knowing that he would no longer be available for prosecution in person.

Other countries and companies were guilty of supplying to Iraq, which supplies can be compared to the accessory actions that the defendant has been charged with. This appears from the documents (letters of credit from the years 1982 through 1984), that show similar supplies by [company 1] and [company 2] of 900 tons of TDG and 400 tons of SOCL2 and 1850 tons of SOCL2 respectively.

The Court draws the following conclusions.

Actually the plea to the equality principle can only be valid when it has become apparent that both according to feasibility (the real chance estimated by the Public Prosecution Service that the proceedings that they have started will indeed lead to a conviction) as well as according to opportunity (the advisability to be determined by the Public Prosecution Service to commence a legal action against a certain defendant), these cases totally correspond with the case against the defendant. Two of the three persons mentioned by the defence do not have the Dutch nationality; and (as far as the Court is aware) all three do not reside in the Netherlands. Although they did have contact with the defendant and/or worked together with him in relation to the practices that he has been charged with, none of them is regarded to (eventually) have had a part in the offences that the defendant has been charged with and that can in any way be compared to the role of the defendant. For that reason it has not become plausible that regarding the aforesaid persons, potential criminal cases could be started similar to the case against the defendant, even more because the defence has not brought

forward any facts or circumstances that could support the commencement of such proceedings.

Furthermore, the Court considers that the supplies from [company 1] and [company 2], in so far as it can be established with any certainty that these were related to precursors for the production of combat gasses including mustard gas, according to the documents took place in or around the period from 1982 to 1983, while the supplies from the defendant allegedly took place years later, and therefore much less time before the attacks occurred as described in the charges.

The court deems that it cannot be excluded that this discrepancy would be of (considerable) influence on the feasibility of a potential legal action against the companies in question, and the question whether they can demonstrate any causal relationship between the supplies from the companies referred to by the defence and the attacks that occurred (years later).

Given those circumstances, the court believes that it has not become evident at all that these cases can be compared with the present case against the defendant, even more because the defence has not brought forward any facts or circumstances that could lead to another opinion.

The Court dismisses this plea.

6. 4 Plea contesting the conduct of the AIVD [Dutch National Intelligence and Security Service] and the violation of the nemo tenetur principle by the government

The defence pleaded for the disallowance of the Public Prosecution Service and/or a remission of the sentence pursuant to article 359a of the Code of Criminal Procedure because – concisely summarized – the public prosecutor together with the AIVD (claiming that the AIVD exceeded its powers) intentionally created a ground for suspicion against the defendant on account of the offences that he has been charged with in the meantime. Therefore they argue that the defendant has been manoeuvred into a position whereby he could or would make himself liable to prosecution, by letting him cooperate in a televised interview that was broadcasted on 6 November 2003, during the television program called Network.

Regarding this matter the Court has the following considerations.

Based on the statements made by the defendant himself and also based on other facts, the Court does not think it can be excluded that the defendant already had regular contact with officers of the AIVD before 6 November 2003.

However, the Court wants to observe that during the trial on appeal the defence did not bring forward any further circumstances that presented grounds for the allegation that there had been contact between the Public Prosecution Service (or police officers operating under the authority of the PPS) and the AIVD before the date mentioned above. Furthermore, the factual correctness of the observation made by the court of first instance at the hearing of 16 March 2005, about the fact that the public prosecutor stated that there had been no contact between the Public Prosecution Service (and the police) and the AIVD, has not been sufficiently verified by the defence. Therefore the Court does not consider that this kind of contact has become evident. This judgment is not altered by the fact that none of the AIVD officials were interviewed on this matter. The Court wishes to add in this respect that the chance that such an interview could indeed take place cannot be considered very large, seen that Mr. [Deputy Chief]of the AIVD did not receive permission from his superiors to give evidence.

In as far as it should even be assumed that the AIVD incited the defendant or gave him a misleading advice to cooperate in the televised interview concerned, the Court wishes to observe that it has not been clearly stated – neither by the defendant himself – nor has it become evident that the defendant, seen the fact that there was no obligation involved, did not render his cooperation to this program of his own free will. What's more, if there had been a case of any confidence inspired by the AIVD concerning the defendant's safety, meaning that he would not risk being prosecuted, or if there had been a case of unlawful action on behalf of the AIVD, this could not directly be contributed to the responsibility of the Public Prosecution Service, considering the strict separation of duties between the PPS and the AIVD, for the latter is not an investigative service under the responsibility of the Public Prosecution Service.

Moreover, the Court concludes that the contents of the televised

interview, except for being the cause for the start of criminal proceedings against the defendant, did not play any role of importance in the course of the case, which means that the contents were not used as evidence whatsoever.

For that reason the Court believes that the Public Prosecution Service did not intentionally commit a gross violation of the principle of due process, nor did it violate the nemo tenetur principle (the principle that nobody is obliged to cooperate to his own conviction) and consequently the plea by the defence for disallowance of the Public Prosecution Service and/or a remission of the sentence is rejected.

Furthermore, the Court is of the opinion that no other circumstances have come forward that could lead to the assumption that gross violation of the principles of due process have taken place that, by intentional disregard of the interests of the defendant, allegedly caused a violation of his right to a fair trial. Therefore the Court dismisses this plea.

7. Acquittal of the principle charge under count 1

Concisely summarized, the principle charge under count 1 accuses the defendant of having assisted Saddam Hussein and his people as an accessory to carry out attacks with chemical weapons in 1987 and 1988 on a number of places in Northern Iraq. The defendant's assistance allegedly consisted of supplying the chemical substances for those chemical weapons. The said attacks caused many people to die and/or suffer grievous bodily harm.

Saddam Hussein and his people are said to have carried out these attacks with the intention to partially or totally destroy the Kurdish population group.

For that reason the Public Prosecution Service believes that the defendant is guilty of being an accessory to genocide.

Article 1 of the Genocide Convention Implementation Act stipulates that, as far as relevant in this case, a person who intentionally kills members of an ethnic group, causes severe bodily harm or places such a group under certain living conditions that are aimed at their total or partial physical destruction, with the intention to partially or totally destroy that population group, is guilty of genocide.

In the judgment of the question whether it can be proven that the defendant is liable to punishment on account of the actions he is charged with in the present criminal proceedings, the following issues should be considered.

A. Is it possible to deduct from the evidence whether the actions described in the indictment – concisely summarized – the air attacks with mustard gas carried out by the Iraqi regime (the perpetrators), were indeed the consequence of the intention (hereafter: the genocidal intention) to partially or totally destroy the Kurdish population group in (Northern) Iraq as such?

B. Article 48 of the Penal Code stipulates inter alia that persons who intentionally provide the opportunity, means or information necessary to commit criminal offences are considered to be accessories to those crimes. From the text of this article follows that the intention of the accessory should be focussed on all component parts of the crime under consideration. Consequently the question that needs to be answered is the following: to what extent is the Dutch criminal court entitled to apply Dutch law in judging the requirement of intention in the present case and to what extent should it (also) consider the application of international criminal law?

C. (If the answer to question A would be affirmative,) was the purpose of the defendant (also) focussed on the – possible – genocidal intention of the perpetrators?

Re A. The Court considers that, in answering the question whether the perpetrators had a genocidal intention, other completed actions committed by the perpetrators against the population group involved should also be taken into account. Although the aforesaid population group does not appear as such in the indictment, they do come forward from documents in the case file, especially from the reports inserted under H 74 and H 75, which were drawn up by the Special Rapporteur of the Commission on Human Rights of the United Nations, Mr. Van der Stoel, even if these actions as such do not (all) fulfil the description of the crime referred to as genocide. From a number of documents, including the afore mentioned reports and statements in the case file, it appears that the offences put forward in the charges refer to the air attacks that were carried out partly during the so-called Anfal

Campaign by or under the command of the perpetrators. Moreover, they show that those attacks, however horrifying and shocking they were, formed part of a considerably larger complex of many years of actions against the Kurds in the Northern Iraqi territory, which is mainly inhabited by the Kurdish population. Apparently these actions involved the systematic destruction of hundreds of Kurdish villages. Hundreds of thousands of Kurdish civilians were chased from their home towns and deported to other places and tens of thousands of Kurds were killed. In one of his reports, Van der Stoel described the policy that constituted the basis for the so-called Anfal Campaign, as a policy that without a doubt had the characteristics of a genocidal design.

In view of the said facts and circumstances, the Court believes that the actions taken by the perpetrators, in any case even the ones that have not been included in the charges, as outlined in the above, as to their nature at least produce strong indications that the leaders of the Iraqi regime, also regarding the actions that have been put down in the charges, let themselves be guided by a genocidal intention with regards to at least a substantial part of the Kurdish population group in (Northern) Iraq.

Nevertheless, the Court deems that a final judicial judgment regarding the important as well as internationally significant question whether certain actions by certain persons as mentioned in the charges should be designated as genocide, deserves a better motivated judgment (which should be based on conclusive evidence) than the one on which the Court was able to establish its observation.

The Court would like to point out in this respect that Mr. Van der Stoel, in his capacity as witness, stated that he based his reports on human rights violations in Iraq (H 74 and H 75), reports which in this case should be regarded as highly relevant, on “a large stream of documents, fourteen tons” while, except for some annexes to those reports, there are no documents in the case file from which the findings and conclusions of the Special Rapporteur can be directly deduced and that could serve as evidence in these criminal proceedings to prove the offence of genocide with a sufficient degree of certainty.

In view of the consideration following hereafter under C, the Court

thinks that only these observations need to be stated, and that any other observations could only be qualified as ‘unnecessarily’.

Re B. The international aspects of the case under consideration have given the Court cause for a focus on international criminal law, especially when answering the question whether the defendant had the legally required degree of intention in committing the offences that he has been charged with. In this respect the Court concludes that, especially regarding the question which degree of intention is required for a conviction on account of complicity in genocide, international criminal law is still in a stage of development and does not seem to have crystallized out completely. The main question, which has not yet been answered unanimously in all respects, is whether the accessory must have “known” that the perpetrator acted with a genocidal intention or that a lesser degree of intention is sufficient, compared to or similar to the conditional intention as accepted in the Dutch legal system, or in other words: willingly and knowingly accepting the reasonable chance that a certain consequence or a certain circumstance will occur. The Court wishes to add that it holds the opinion that the legal history of the International Crimes Act does not provide an unambiguous answer for this matter either. Seen the fact that a ruling by the Court on this matter – notwithstanding the circumstance that such a ruling could possibly make a contribution to the development of law -, in view of the following consideration could not produce more than an ‘obiter dictum’ which in the eyes of the Court does not fit in with the decision on the case concerned, the Court has decided to leave this question for what it is.

Re C. When answering the above mentioned question, it is important to focus on the circumstance whether especially those actions carried out by the perpetrators that have not been included in the charges contribute to the credibility of the fact that these perpetrators did have genocidal intentions.

The Court takes the grounds that the case file does not include enough facts and circumstances which, with a sufficient degree of certainty, could lead to the assumption that the defendant, before or during the time of his actions in any way had knowledge about those actions of the perpetrators that have not been included in the charges, neither that he could reasonably suspect that these would occur or had occurred, nor did it become apparent

that the defendant, in those days, had any other relevant information from which he could have concluded the genocidal intention of the perpetrators. In this respect the Court has taken into account that, as appears from the documents, the Iraqi authorities kept their actions against the Kurds away from publicity as much as possible. (Consequently) even a number of Dutch ambassadors, who were assigned to Bagdad at that time, as evidenced by their statements, appeared to have had no knowledge about the things that were actually happening to the Kurds.

Based on the above, the Court has come to the conclusion that it has not been established with a sufficient degree of certainty that the defendant, before or during this actions, disposed of the information that could give him the knowledge that by acting the way he did, which actions he has been charged with in the present proceedings, he would be assisting the perpetrators in the fulfilment of this alleged genocidal intention, or that could have made him aware that he willingly and knowingly accepted that reasonable chance. Seen that this criteria of intention, which is regarded as minimal, (also from an international criminal law point of view) has not been met, the Court believes that it has not been legally and convincingly proven that his intentional act, not even in a conditional way, was also targeted at the genocidal intention of the perpetrators.

Therefore the defendant should be acquitted of the principle charge under count 1.

8. Conclusive evidence

The Court has found conclusive evidence which proves that the defendant has committed the offences he has been charged with under count 1, alternatively and count 2, on the understanding that:

Count 1. alternatively:
that
Saddam Hussein Al-Tikriti and
Ali Hassan Al-Majid Al-Tikriti and/or
(an)other person(s)
on 5 June 1987 in Zewa, situated in Iraq and
on 16 March 1988 in Halabja,

situated in Iraq and

on 3 May 1988 in Goktapa (Gukk Tapah)

situated in Iraq

together and in conjunction

(again and again) have violated the laws and customs of war,

while those offences (again and again) resulted in the death of others and those offences (again and again) inflicted grievous bodily harm on others

and those offences (again and again) were expressions of a policy of systematic terror or wrongful actions against a specific population group,

by then and there contrary to

international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians)

and/or the stipulations of the Geneva Gas Protocol (1925)

and/or the stipulations of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention", 1949)

and/or the stipulations of the "common" Article 3 of the Geneva Conventions of 12 August 1949,

(as members of the government (of the Republic) of Iraq) belonging to one of the fighting parties

in a (non-international and/or international) armed conflict

several times at places in the territory of Iraq (intentionally) using chemical weapons (mustard gas) against persons who were present then and there,

and as a result of which those persons have died or suffered grievous bodily harm and (systematically) terrorizing (part of) that Kurdish population group

while those chemical weapons were (also) used against persons who did not directly participate in the hostilities,

being civilians from Zewa and/or Halabja and/or Goktapa (Gukk

Tapah) (Bergin), in any case civilians in Northern Iraq,

and the use of those chemical weapons involved the cruel and/or inhuman treatment and/or mutilation of these persons and purposely caused serious suffering to these persons

to commit said criminal offences, defendant and his co-perpetrators

together and in conjunction,

at points in time in the period between

19 April 1984 through 25 August 1988

in Iraq and/or

in Switzerland and/or

in Italy and/or

in the United States of America and/or

in Japan and/or

in Singapore and

in Aqaba, in Jordan

intentionally provided the opportunity and means

by then and there intentionally supplying Thiodiglycol (TDG) intended for the production of mustard gas to (the Republic of) Iraq.

Count 2.

that

Saddam Hussein Al-Tikriti and

Ali Hassan Al-Majid Al-Tikriti and/or

(an)other person(s)

on 11 April 1987 in Khorramshar

situated in Iran and

around 16 April 1987, in Alut situated in Iran and

on 28 June 1987 in Sardasht situated in Iran and in Rash Harmeh (in the immediate surroundings of Sardasht) situated in Iran and

on 22 July 1988 in Zardeh situated in Iran and

around 2 August 1988 in Oshnaviyeh situated in Iran,

together and in conjunction

(again and again) have violated the laws and customs of war,

while those offences (again and again) resulted in the death of others and those offences (again and again) inflicted grievous bodily harm on others,

by then and there contrary to international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians)

and/or the stipulations of the Geneva Gas Protocol (1925)

and/or the stipulations of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention", 1949)

(as members of the government (of the Republic) of Iraq) belonging to one of the fighting parties in an (international) armed conflict several times at places in the territory of Iran (intentionally) using chemical weapons (mustard gas) against persons who were present then and there,

as a result of which those persons have died or suffered grievous bodily harm while those chemical weapons were (also) used against persons who did not directly participate in the hostilities,

being civilians from Khorramshar and/or Alut and/or Sardasht and/or Rash Harmeh and/or Zardeh and/or Oshnaviyeh, in any case civilians in Iran,

and the use of those chemical weapons involved the cruel and/or inhuman treatment and/or mutilation of these persons and purposely caused serious suffering to these persons to commit said crimes defendant and his co-perpetrators together and in conjunction,

at (one) (more) points(s) in time in the period between 19 April 1984 through 25 August 1988

in Iraq and/or

in Switzerland and/or

in Italy and/or

in the United States of America and/or

in Japan and/or

in Singapore and/or

in Aqaba, in Jordan

intentionally provided opportunity and means,

by then and there intentionally supplying Thiodiglycol (TDG) intended for the production of mustard gas to (the Republic of) Iraq.

All other or additional charges have not been proven. The defendant should be acquitted of those charges.

In as far language or writing mistakes appear in the indictment, these have been corrected in the conclusive evidence. As appears from the pleadings during the hearing, no harm was done against the defendant's interests

9. Argumentation

The Court founds its conviction that the defendant committed the proven offences on the facts and circumstances that serve as evidence and that specify the grounds for the conclusion that the charges have been proven.

In those cases where the law requires the judgment to be supplemented with proper evidence, this will be presented in an additional document that shall be included in the judgment as an appendix.

10. Documents

The defence pleaded to leave out the following documents from the evidence:

1. minutes of meetings
2. the statements made by witness X and Y;
3. document H 20 (the so-called FFCD 1995);
4. official reports of evidence outlines;

and concisely summarized, the defence based this plea on the following arguments.

Re 1: The defence finds it impossible to verify the origin of these documents and does not know how to verify their authenticity either. Consequently the defence challenges their authenticity and reliability.

Re 2: This regards two anonymous witnesses whose testimonies have not been signed, and the defence has not been able to interview these witnesses;

Re 3: The contents of this document are totally unreliable;

Re 4: This concerns official police reports in which an investigative officer made a selection of the evidence or gave an overview of the evidence.

The Court should not base its judgment on such 'summaries'. Only the underlying complete documents should be used as evidence.

The Court considers as follows.

Re 1: The Court will not use the referred documents as evidence.

Re 2: Also with reference to the decisions taken by the Court in the interlocutory ruling of 23 October 2006, the Court will not use the aforesaid official reports as evidence.

Re 3: Hereafter under item 12.1.7. the Court will discuss the reliability of the document in question.

Re 4: The argument put forward by the defence cannot generally be acknowledged as true and does not find any support in law. This is even more valid because in this case the defence has not specified in concrete terms, in respect of each official report concerned, which point(s) allegedly contain(s) inaccuracies in relation to the underlying complete documents.

11. Evidentiary considerations to prove the complicity of the defendant regarding the proven charges under count 1. alternatively and count 2

11.1. In so far as relevant at this point, the defence brought forward the following meritorious defence pleas. The defence argued that the defendant did not act deliberately, in the meaning of conditional intention. They also argued that there was no question of a reasonable chance that, as a result of his actions in relation to TDG, the attacks on the proven places would take place.

The defence also pleaded that the possibility existed that the actions of the defendant only served the purpose of storage or transport of TDG.

Moreover they asserted that the defendant did not know that the TDG supplied by him would be used for the production of chemical weapons, also because of the fact that he was not aware that Iraq had the capability to produce such weapons and that it was not a matter of concealing the nature and destination of the substances that he supplied. Furthermore, the defence put forward that the defendant, after the attack on Halabja in March 1988, did no longer make any efforts to supply TDG to Iraq. Finally, the defence pleaded that the statements made by [defendant's business partner] should be dismissed for reason of being unreliable.

With regard to the above mentioned pleas brought forward by the defence, in so far as these pleas have not already been refuted by the used evidence, the Court considers as follows.

11.2. The Court is of the opinion that based on the used evidence it has been established without any doubt that the persons referred to in the charges, in other words the Iraqi regime that was in power at that time, carried out (air) attacks or bombings – whether or not by using mustard gas, among other matters – or ordered these attacks to be carried out on the proven places in Iraq and Iran respectively, places that were mentioned in the charges under count 1. alternatively and count 2., and which had the results that have been brought forward in the judicial finding of facts. The Court believes that these attacks, in so far as they concerned count 2. (Iran), took place within the framework of an international armed conflict that was going on between Iran and Iraq between September 1980 and August 1988.

Regarding the attacks that took place in the proven period on the places in Iraq mentioned in the proven charges under count.1 alternatively, the Court considers it a proven fact that these were carried out within the framework of an international and/or non-international armed conflict (as also proven by the court of first instance). 'International' in so far as Kurdish groups and/or other opposition groups that worked together with the Iranian troops, formed part of the target of the bombings. In this respect the Court has also taken into account the circumstance that the war between Iraq and Iran also took place at the border region between those neighbouring countries and in some case Iranian soldiers operated within the borders of Iraq; 'non-international' in so far as the (air) attacks referred to were - mainly - targeted at Kurdish resistance groups in the armed conflict, that also lasted for years, against those - partly cooperating - resistance groups.

For proof of the nature of the armed conflicts, the Court's opinion is particularly founded on the official report dated 19 May 2005 drawn up by an investigative officer (F58), which includes the report on an investigation that had been conducted regarding certain sources, as well as on a report drawn up by [employee PPS 1] and [employee PPS 2], included in the case file under reference number F61. Furthermore, the Court's judgment rests partly on the statement made by the [co-author of the Human Rights Watch

reports] at the hearing of the first instance court on 30 November 2005.

11.3. The Court of Appeal holds the opinion that the air attacks with mustard gas referred to in the charges under count 1. alternatively, were also acts of a policy of systematic terror and an unlawful targeted action against a certain – Kurdish – population group.

Together with the court of first instance, the Court derives conclusive evidence especially (inter alia) from parts of the report about the situation of human rights in Iraq, dated 19 February 1993, drawn up by Mr. M. van der Stoel, Special Rapporteur to the Commission on Human Rights (file H75 – paragraphs 25 through 27), and partly from his report dated 25 February 1994 (file H74, pages 36 through 43) and from the evidence given to the Examining Magistrate on 1 November 2005 by [a Kurdish victim of the Iraqi attacks] (EM file pages 2022 through 2112).

11.4. With regard to the defendant's role, or his involvement, in the aforesaid attacks with mustard gas, the following facts were adequately established.

11.5. From 1985 up to and including 1988, the defendant supplied the chemical raw material TDG (Thiodiglycol) to Iraq, or to an Iraqi firm. In this context, the defendant stated during the court hearing in the first instance on 18 March 2005, that he himself or through the intermediary of one or more of his firms, or at least firms in which he was a leading figure, in the above mentioned period, supplied a total of 1,400 metric tons of the raw material TDG to the then government of the Republic of Iraq, which raw material came from the United States of America among other countries.

During the hearing of the case on appeal on 2 April 2007, the defendant also admitted that during this period he also supplied TDG that came from Japan and he specified that he had delivered it to the firm called SEORGI (State Establishment for Oil Refinery and Gas Industries), which was affiliated with the Iraqi Ministry of Oil. During the above mentioned court hearing he also admitted that, in 34 shipments of chemical substances, he mainly supplied TDG. The Court derives further details concerning these shipments and the firms that were involved, from the official report that is attached to the evidence from [official reporters] and dated 5 December 2005 (F90).

11.6. Different from what the defendant stated during the court session in the first instance, the Court derives in particular from the below mentioned evidence that the defendant knew that the final destination of the TDG was Iraq, and that it was going to be used there as well.

11.7. According to the statement that was made on 22 June 2005 in Osaka by defendant's trading partner for the chemicals between 1984 and 1988 (G 92d – pages 839 through 856) in relation to the trade in chemicals between him and the defendant, [defendant's trading partner] knew that the final destination of the chemicals was Iraq. He stated: "In 1984, when I started trading with [the defendant], he told me that the final destination of the chemicals was Iraq. Also, [the defendant] requested me to keep secret the fact that the chemicals would be shipped to Iraq." [The defendant] told me: first the chemicals will be shipped to Triest, Italy". After that, they will be transported to Iraq by truck." [Defendant's trading partner] also stated this during the court session of 2 December 2005.

11.8. The Court of Appeal is of the opinion that it considers the statements of [defendant's trading partner], that are included in the evidence, sufficiently trustworthy. The defence has argued that these statements should not be used as evidence because they are not reliable now that some parts are not consistent and in conflict with each other. However, after ample considerations, the Court of Appeal is of the opinion that these statements are essentially consistent notwithstanding the fact that at some points they are not identical. Moreover, the Court of Appeal notes that [defendant's trading partner] had been defendant's trading partner for years and that he incriminates himself as well in his statements.

11.9. For that matter, the defendant himself admitted during the preliminary investigation that he knew that the goods went to Iraq, as mentioned in his statement of 7 December 2004

(C 1.b.2): "first the goods went to Triest, after that to Iraq" and "I know that the goods had been shipped from Triest to Aqaba in Jordan. I understood that the goods had arrived. By asking SEORGI whether the products had arrived, I got the confirmation that it had occurred." In the light of all other evidence, the defendant states very cynically, in the opinion of the Court of Appeal: "I did not get any complaints about the quality of the

products either." The defendant also stated during the hearing on appeal of 2 April 2007 that he assumed that the substances which he supplied were going to be used in Iraq.

11.10. During the hearing on appeal, the defendant denied being aware of the fact that the TDG which was supplied by him – with the purity as appeared in the evidence – was suitable for the production of mustard gas and would be used for that purpose. From the evidence it becomes quite clear that the mentioned substance was suitable for such use. The fact that TDG, in the quantities as supplied by the defendant - more than eleven hundred (1,100) tons altogether – could only serve for the production of mustard gas and not – as continuously argued by the defendant and his defence – for use in the textile industry, has been stated by expert witness [A], among others, during the court session of 4 April 2007. [A] confirmed his earlier statement of 30 May 2007 before the examining magistrate in which he said that it is totally unthinkable that during the 1980's TDG was used in Iraq as textile 'additive' and that in Iraq not one factory had been found that was equipped for the production of textile paint or printing ink.

Also witness [head of the Iraqi team that set up the FFCD], who was in charge of quality control of mustard gas and who was head of the team that set up the already mentioned Full Final and Complete Disclosure (FFCD) stated mid 2005 before the examining magistrate: "If one speaks about tons of TDG, then there is only one possible application: mustard gas".

On 22 June 2005, [defendant's trading partner] stated: "From the negotiations that were held in 1984 it became obvious that the chemicals were going to be used as raw material for chemical weapons." He also stated – concisely summarized -: "Around May or June 1984 [the defendant] approached me and told me that he wanted to import the chemical substance TMP. During the negotiations both [Japanese supplier of chemicals 1] and [Japanese supplier of chemicals 2] explained that TMP is a precursor for poison gas and that it needed special attention during export. When I heard this I was certain that the manufacturing of poison gas in Iraq was the defendant's purpose."

During the initial negotiations with [Japanese supplier of chemicals 2], [the defendant] also mentioned TDG. TDG was bought from [Japanese

firm]. During the negotiations, the firm explained that these chemicals can be modified into chemical weapons such as poison gas. I had heard from [Japanese supplier of chemicals 1] and [Japanese supplier of chemicals 3] that restrictions had been set out for the export of TDG to the Middle East. I informed [the defendant] about this. From the beginning of the negotiations, the Japanese companies and I told him that the chemical substances could be modified into chemical weapons such as poison gas. And from his words I understood that he already knew this. [The defendant] was knowledgeable in the field of chemicals.

The chemicals were exported from Japan between 1984 and 1986 by [the defendant] and me. [The defendant] asked me whether I could find American chemical companies for the export of chemicals. In 1987 I went to America. [The defendant] and I went to [company that supplied TDG 1] in North Carolina. The subject was TDG. With [the defendant], among others, I visited [company that supplied TDG 2]. Just like at [company that supplied TDG 1], [the defendant] said that he wanted to export Thiodiglycol to Belgium. During the first negotiations I heard from [the defendant] that the goods were going to Iraq." [Defendant's trading partner] confirmed this statement on the main points during the court hearing on 2 December 2005.

11.11. The statements of [defendant's trading partner] concerning the final destination of the TMP and TDG are supported by the telex messages that were used as evidence and that originated from [the defendant] or his companies, [defendant's trading partner], SEORGI and supplying companies. It also becomes apparent that in these messages efforts are made to conceal the nature and the final destination of the chemicals. Following two telex messages (H10/8586 and H10/8549) of early September 2004 concerning the poison gas and the final destination of the chemicals to be announced, [the defendant] stated on 8 December 2004, during the preliminary investigation (C.1.b.4): "I see that one telex message mentions that it can be used as poison gas." I have contacted SEORGI. I have always believed that [defendant's trading partner] knew what it was going to be used for, that the goods had a questionable destination. In a telex message dated 1 September 1984 (H10/8586) [defendant's trading partner] mentions to [defendant] that as far as he is concerned, a necessary lie may be told.

Subsequently, [defendant] sends a telex message to [the director of SEORGI] on 3 September 1984 (H10/8549) saying with respect to the necessary lie: “my personal advice is ‘fuel additive’ and final destination ‘Triest’”. When [defendant’s trading partner] apparently keeps on mentioning a certain TDG application, [the defendant] admonishes him on 19 February 1985 as follows – rendered concisely -: “Particulars of TDG are certainly known to you, so you do not have to mention them.”

Furthermore, [the defendant] states: “At the start of the deliveries I personally asked [the director of SEORGI] whether poison gas was manufactured from the products. The telex message of 3 September 1984 shown to me and which I wrote, mentions Triest as final destination and that is actually wrong. Apparently the Japanese government wants to know the final destination because the telex message mentions that it can also be used as poison gas.”

Moreover, to the question whether the conclusion could be drawn that [the defendant] knew in 1986 that TDG could be used to manufacture chemical weapons, [the defendant] answered: “If this was the case in 1986, then so be it”. Moreover, on 7 January 2005 (C.1.b.7) the defendant also stated: “The customer in Iraq was SEORGI. I have never noted that it was used in textiles or any other civil industry.”

11.12. From the above mentioned under 11.10 and 11.11 the Court can draw no other conclusion than that already during the course of 1984, but in any case in 1986, the defendant knew that the TDG which was supplied by him would serve for the production of poison/mustard gas in Iraq and that efforts were made to conceal that purpose.

11.13. From the afore mentioned statement of [the head of the Iraqi team that set up the FFCD] it appeared that the customer SEORGI (or Sorgi), of which [name] was the director, was just a cover name, just like its predecessor SEPP. He states: “TDG was processed at Al Muthanna after its delivery. [The director of SEORGI] was the then head of Sorgi. He told me about his contacts with Al Muthanna. He told that goods arrived as if they were for Sorgi. I met [the defendant] for the first time in 1991. From conversations with [the defendant] it became clear to me that he knew Sorgi was a cover name. From 1987 on, we at MSE (Court: Muthanna State

Establishment) also used the cover name Sorgi. [The director general of MSE] succeeded [the director of MSE] in 1987 as director general of MSE. [The defendant] was in direct contact with [the director of MSE] first and after that with [the director general of MSE]. [The defendant] often visited him. [The defendant] had a good business relation with [the director general of MSE]. In his statement of 19 July 2005 before the examining magistrate, [a former executive of MSE] mentions that he was in charge of Al Muthanna with [the director of MSE] among others, and that he got in touch, through the intermediary of [the director of SEORGI], with the defendant and that this contact lasted at the offices of [the director of SEORGI] until the end of 1985 and that the defendant also had contacts with [the director general of MSE], who had succeeded [the director of MSE] as head of Al Muthanna. On 8 December 2004, the defendant states that he met [the director general of MSE] for the first time in 1985 or in 1986. "I have been in the office of [the director general of MSE] in Samarra several times." The defendant also states on 7 December 2004 (C.1.b.3): "[the director general of MSE] told me that I should try to get products from America." Furthermore, when at a later point in time the defendant applies for an Iraqi passport, he mentions that has worked together with this [director general of MSE] for several years. These statements lead the Court to the conclusion that the defendant was also in direct personal contact with persons who were in charge or who held important positions at MSE or Al Muthanna, the location where TDG was processed into mustard gas, and that he was aware of the supplies of TDG through cover companies in Iraq.

11.14. It appears from statements made by the defendant that he had lived in Iraq since 1978 and that he left Iraq again shortly after the start of the Iran – Iraq war in 1980. Soon thereafter, the defendant went back for a short period to make a damage assessment report of the bombarded technical installations at the request of the Iraqi authorities. The defendant was aware of the fact that Iran and Iraq had been fighting a war since the end of 1980. On 4 May 1980, the ex-wife of the defendant states before the examining magistrate: "Frans followed all world events. Frans and I regularly discussed the situation in Iraq because Iraq had become a part of our lives. When we lived in Italy and Switzerland we often watched the news on television. Also

in Singapore Frans watched the news on television." Furthermore, the defendant stated on 7 January 2005 (C.1.b.7) – rendered concisely -: the story about the Kurds was always an issue of the war in Iraq. In the beginning it was a war between Iraq and Iran.

11.15. Elsewhere in this judgment, the question whether the TDG which was supplied by the defendant could have been used during the attacks that are mentioned in the evidence, is dealt with in more detail. The answer to this question is affirmative.

11.16. From the defendant's awareness of the fact that his supplies of TDG served for the production of mustard gas in a country that was involved in a long lasting war with a neighbouring country and of the efforts to conceal the supplies of a precursor of that gas and the production of the poison gas itself, follows defendant's awareness that the mustard gas was going to be used by Iraq in the war that Iraq fought against and in Iran and against the allies, and/or those states which were considered as such in the sense that they were involved in an armed conflict with the Iraqi regime, and that this use of mustard gas has actually taken place. In view of this, the Court points out that the defendant had direct, and in some cases long lasting, contacts with prominent persons who were involved in the production of mustard gas in Al Muthanna.

Through his conscious contribution to the production of mustard gas in a country at war, the defendant knew under those circumstances that he was the one who supplied the material and created the occasion for the actual use of that gas, in the sense that he was very aware of the fact that in the given circumstances the use of this gas could not and would not fail to materialise. In different words: the defendant was very aware of the fact that -'in the ordinary cause of events'- the gas was going to be used. In this respect the Court assumes that the defendant, notwithstanding his statements concerning his relevant knowledge, was aware of the – also then known – unscrupulous character of the then Iraqi regime.

Furthermore, the Court notes that there is no evidence whatsoever that the production of the mustard gas, to which the defendant made an important contribution, was destined for stockpiling or served for anything else than its use during the war. In this respect the Court considers – perhaps

unnecessarily – that normally products are produced with the aim of using them in some way. The Court finds it very unlikely that the defendant could think that the mustard gas would only be used for stockpiling. The only thinkable purpose for that could have been to openly keep the gas available as a deterrence of the (potential) enemy, but the Court does not consider this very plausible, also in view of the fact that great efforts were made to keep the chemical weapon program a secret, a fact that was known to the defendant, especially in view of his knowledge of the use of cover names.

Also in view of what has been mentioned under the chapter 'causality', the Court is of the opinion that the defendant – together with others – intentionally provided the occasion and the means for the acts as described in the evidence, committed by the persons who are mentioned in the evidence. In view of all the aforementioned considerations, the defendant has intentionally been an accessory to those actions.

A message from [defendant's trading partner] dated 6 May 1988 (H10/4750) to a certain [American trading partner] in America concerning business with 'Frans' (Court: the defendant) mentioning, among other matters: "he is anxiously wishing to make shipment of 10 Ctrs T.H.D (Court: TDG) cargoes due to his clients are causing Materials Short Supply" and that the defendant stated in this respect on 8 December 2004 (C.1.b.4): "that he called it that", leads the Court to conclude that the defendant still wanted to supply TDG at that moment, 6 May 1988.

That moment was long after the attack on 16 March 1988 on Halabja, about which the defendant stated on 25 May 2005 (C.1.b.8) that he "was deeply shocked after March 1988".

This also leads the Court to believe that the atrocities of the poison gas and mustard gas attacks did not stop the defendant from willingly and knowingly supplying TDG to Iraq.

The Court adds to this that the defendant stated during the appeal hearing that the effects of the use of mustard gas during World War I were already known to him for a long time.

According to the Court it has not been made plausible that the defendant – as has been argued by his defence counsels – by way of delaying and through smart manoeuvres before [defendant's trading partner] made

any efforts to withdraw from participating in the supply of further deliveries.

According the Court, if the defendant had wanted to, it would have sufficed to simply mention that he would no longer participate in further deliveries.

11.18. The circumstance that the defendant, according to the Court, apparently made false and incredible statements about his actions and about his knowledge of the final destination and the use of TDG for the production of mustard gas, leads the Court to the conviction that the defendant nevertheless supplied the precursor for the mustard gas to Iraq, being fully aware of the expected use and the consequences thereof.

11.19. The Court notes that, with respect to the charges under count 1. alternatively, defendant's intention did not extend to the circumstance that these doings were acts of systematic terror or unlawful behaviour against a certain group of the population. In this respect, the Court takes article 49, paragraph 4 of the Dutch Penal Code into consideration.

12. Evidentiary considerations with respect to 'causality'.

12.1. Introduction.

12.1.1. In view of the above, it is an established fact that the defendant in 1985 and the following years supplied Thiodiglycol (TDG) to Iraq, knowing that this substance is a precursor for mustard gas. The Court is of the opinion that the defendant at least must have known that is was to be expected that the produced mustard gas would be implemented on the battle field, not only in the international armed conflict in which Iraq and Iran had been involved already for years, but also against the Kurds in their own country who had chosen the side of Iran, thus engaging themselves in the conflict.

For the judgment of the charges – being an accessory to the violation of the laws (and customs) of war by the rulers in Iraq by supplying them with the aforementioned precursor TDG – it is important to establish what role defendant's deliveries have played in the production of mustard gas and the actual implementation of ammunition that had been filled with that gas, at the locations that are mentioned in the charges.

12.1.2. With respect to this question an extensive report was drawn up

by the expert witness Mr. C. Wolterbeek at the request of the examining magistrate. He also testified in court during the hearing in the first instance as well as during the appeal. Already at an earlier stage, Wolterbeek had offered assistance to the investigation team regarding the questions that are connected to this subject. From now on there will mainly be references to the 'Report' of 10 November 2005 and the 'Additional Report' of 3 December 2005 of the expert witness. In principle, Wolterbeek identifies two scenarios; one mathematical scenario which is based on a 'substances balance', which scenario he describes as 'extreme', and a 'mix scenario', which he judges much more plausible.

12.1.3. The defence has phrased many points of criticism on these reports with respect to the trustworthiness of the investigation and the figures and assumptions used therein on the one hand, and to the expertise of Wolterbeek, who they deem not to be an independent third party, on the other.

In this respect, the Court notes that in reference to the above formulated question about the connection between the deliveries by the defendant and the ammunition that has been used, the defence seems to make demands which are not supported by the law. The Court will indeed answer to the acceptable demands after the evaluation of Wolterbeek's findings, but indicates already here and now that it will not accept a mathematical conclusive 'evidence', based on the concrete data which have been established in an (actual) laboratory environment with great accuracy, and – in view of the many uncertainties – cannot except that. It is also the Court's view that 'mathematical proof' is not necessary. Moreover, the Court rejects any reproaches of bias. The defence supports its claim with the only situation in which the expert witness offered 'assistance' to the Police during the investigation. Furthermore, during the appeal session Wolterbeek was confronted with a report from which could be concluded that deliveries of TDG had taken place from the United Kingdom, which were unknown to him up till then. The Public Prosecution Service then requested him to investigate this, resulting in Wolterbeek 'going pale', according to the defence, and from being an (independent) expert to becoming part of the investigation team. Apart from the fact that Wolterbeek's report concerning

the above mentioned subject did not materialise, the Court sees no reason to assume that Wolterbeek, by not turning down the request made by the Public Prosecution Service, would become biased. His findings could have been brought up for discussion for that matter and the defence would have had the opportunity to put questions to him about this matter. The defence was offered this opportunity three times and not once did anything come up that could be an indication of the assumed bias. It is therefore that the claim is dismissed.

12.1.4. With reference to the criticism (in general sense) of the defence with respect to the trustworthiness of the investigation and the methods that were used, the Court notes the following.

The essence of the question which the examining magistrate has put to the expert witness was whether it can be concluded, based on the case file, from which moment the mustard gas that was used by the Iraqis must have been produced with the TDG that was supplied by the defendant, and what factors may have been important in this respect.

The phrasing of the question requires as exact an answer as possible, which lead to Wolterbeek setting up a 'substances balance' in order to answer this question in the most accurate way possible. For this investigation he concentrated on data from the beginning of 1980 concerning the precursors that had been supplied to Iraq, the quantities of mustard gas that were produced from them and the implementation of the mustard gas-filled ammunition on the battle field. His final conclusion is based on the said 'substances balance' of available precursors, loss during the successive phases of the production and usage process and the end situation that was reached at the end of the year, after the cease-fire in the summer of 1988. While doing this, he made numerous substantiated 'assumptions', for instance with regards to the trustworthiness and completeness of the quantitative data he could dispose of, the fact that there was no realistic alternative purpose for the TDG (which in itself is a 'dual capable' substance, e.g. for use in the textile industry), the concentration of the production of mustard gas at one location (El Muthanna State Establishment) and the incapability of Iraq to produce the relevant precursors for mustard gas themselves in those years.

12.1.5. The Court will deal with the trustworthiness and completeness of the data that have been used for this ‘substances balance’ and Wolterbeek’s expertise in this respect in more detail shortly. With respect to the other qualities of the expert witness, the Court notes the following.

The defence has a point in arguing that Wolterbeek’s academic education was not (partly) directed at the business or processing approach of the relevant synthetic (in batches) production of the new chemical substances from base material (Wolterbeek is neither a chemist nor a chemical engineer) and that he possesses no particular mathematical or statistical qualifications. However, this is no reason to push aside his analysis and conclusion as untrustworthy. In the Court’s opinion the used method is certainly relevant, transparent and easily applicable as a model. Also, there are no calculating methods which require a specific expertise: for instance, statistics were not used as a method in this investigation.

Furthermore, the Court would like to note here that in their criticism on the findings of Wolterbeek, the defence concentrates on the starting principle that is used and that they do not criticise the method itself. The Court did not receive any indication that the defence wanted to involve a methodologist for a contra expertise with respect to Wolterbeek’s approach, or that they requested the Court to do so, neither did the Court interpret the request to hear the below mentioned professor Elffers as such. Therefore, the objection by the defence with respect to Wolterbeek’s expertise is not shared by the Court.

The fact that the expert witness wanted to test his approach and views (on certain matters) against that of a statistical and methodological expert (since this is how Professor Dr. H. Elffers can be regarded, who is affiliated with the Dutch Study Centre for Criminality and Law Enforcement [Nederlands Studiecentrum Criminaliteit en Rechtshandhaving]) cannot be used against Wolterbeek; on the contrary, the Court thinks that this is proof of a healthy self-critical attitude. Now that it can reasonably be ruled out that Wolterbeek (wrongly) brushed aside an eventual different vision of Elffers, there is no imperative necessity to hear Elffers as an (expert) witness as yet. Therefore, the request made by the defence in this respect is dismissed.

12.1.6. With respect to the data which have been used in compiling

the ‘substances balance’ and Wolterbeek’s expertise in this respect, the Court considers the following.

The special qualifications of the above mentioned expert witness on this subject are supported by the fact that Wolterbeek has been a member of the “United Nations Special Commission” (UNSCOM) which from 1991 onwards was in charge of the “immediate on-site inspections of Iraq’s biological, chemical and missile capabilities”, and from 1993 onwards he was one of three chemical advisors to the management of UNSCOM. He has also been involved with the succeeding organisation, the “United Nations Monitoring, Verification and Inspection Commission” (UNMOVIC). One of the tasks of UNSCOM was the assessment of the data that, within the scope of the ‘Full Final and Complete Disclosure’ (FFCD), had been supplied to the United Nations by Iraq. This assessment was done in various manners.

Here the Court mentions the findings, during eight years, of the 2000 UNSCOM inspectors, next to the many Iraqi documents, i.e. the so-called ‘chicken farm’ documents which were received from the Iraqis, the documents that were recovered by UNSCOM when excavating the (bombed) MSE building and the data that came from the Central Bank of Iraq. But also a number of United Nations member states handed over relevant information when asked for.

It is primarily on all these data which were available to UNSCOM and which could be compared thoroughly with the data supplied by Iraq, that Wolterbeek has drawn his conclusions. Besides, he has been able to use statements made by witnesses who had been involved with the chemical weapons program in Iraq and/or had cooperated with the setting up of the FFCD. A number of these witnesses have also been heard by the examining magistrate. Finally, a last category of data could be retrieved from documents which had been handed over by the United States of America and which came from the investigation that was initiated in Baltimore. To conclude, according to Wolterbeek the Iraqis deserve credit for supplying the data with regards to the mustard gas program openly; therefore there is no reason to believe that they deliberately withheld or forged important information. This is also stated by witness Alaa.

12.1.7. With all these (also quantitative) data and based on

intermediate conclusions in his report, Wolterbeek has attempted to substantiate his approach to the questions which had been asked by the examining magistrate. As the Court noted earlier, intermediate conclusions and answers do not have a mathematical certainty. Contrary to the defence's argument however, a qualitative answer to the questions based on intermediate conclusions is very well possible. As mentioned above by the Court, as it turns out the data which have been used by Wolterbeek were also derived from findings of UNSCOM and with respect to these findings it can be concluded that they are highly reliable in a qualitative sense, partly because of the use of many different 'sources'.

In a reaction to the criticism on the reliability of the data with regards to the substances supplied for chemical weapons in the eighties by third parties – which data are supposed to be exclusively based on the Letter of Credit mentioned in the FFCD and dependent on the memory of a certain Faisal – it can be concluded that those data indeed have been compared to data from the Central Bank of Iraq and the so-called Baltimore-papers, as mentioned by Wolterbeek in note 10 on page 18 of his report. For the argument that the FFCD-data are obviously incomplete, the defence finds support in the report of July 1991 "Exports to Iraq, Memoranda of Evidence" of the Trade and Industry Committee of the House of Commons in London (which according to its contents was a key subject of the "the Iraqi long range gun project") that was brought forward by the defence during the appeal hearing. After all, Annex F on page 49 of that report mentions that in 1988 shipments of chemicals including Thiodiglycol, valued at £ 154,920 and in 1989 valued at £ 33,639, were delivered to Iraq, which shipments can neither be found in the FFCD-data, nor in Wolterbeek's report.

The Court recognises that the 'source' brought forward by the defence (these data seem more or less to be put in perspective by a second report of November 1991 "Export to Iraq, minutes of evidence" of The Department of Trade and Industry) seems to negatively affect the accuracy of the said data, although in the UNSCOM-documents, there is apparently no 'paper trail' of such (a) delivery/deliveries. However, this certainly does not nullify the value of the data in the Report with respect to the role of the defendant in the Iraqi chemical weapons program. The Court will refer to this after discussing

the most important findings of Wolterbeek. The Court deems it not necessary to hear journalist Fisk with regards to the English report which Wolterbeek mentions in a foot note. If at all necessary, it would be more reasonable to have the Department of Trade and Industry instigate such an investigation. However, the Court has no desire for such an investigation. To many other questions which could negatively affect the meaning of his findings, Wolterbeek has recently, during the hearing on appeal, given unequivocal answers. Therefore the possibility of substantial quantities of TDG having been used for non-military purposes can be excluded.

Moreover, there is no reason whatsoever to assume that during the period in question, mustard gas with (relevant quantities of) TDG as a precursor was produced and processed with ammunition, at other locations than (Al Rashad and) Al Muthanna, and/or (relevant quantities of) TDG, mustard gas were stored elsewhere, although Wolterbeek cannot exclude this possibility (with absolute certainty). It must be noted that Iraq had started to set up (in Falujah) their own chemical plant during that period, but according to Wolterbeek this factory is irrelevant within the context of this matter. Finally, the data with regards to the use of mustard gas-filled grenades and bombs have a high degree of reliability, based on the covering documents which have been drawn up in this respect.

In observance of the afore mentioned grounds for certain reticence, the Court is of the opinion that there is no reason whatsoever not to make use of Wolterbeek's (substantiated) quantitatively formulated findings for a more qualitative assessment of defendant's share in the production of mustard gas by Iraq.

12.1.8. Before concentrating on Wolterbeek's most important findings, the Court notes that the defendant is also charged with a) supplying other precursors than TDG (such as Phosphoroxychlorid [POCL3] which would also be a precursor for tabun mustard gas, b) that he supplied materials for the setting up of a factory/factories for the production of chemical weapons and c) that he gave advice for the manufacturing of such weapons. In its closing speech (pages 74 and 78/79), the Public Prosecution Service (PPS) took the position that this complicity also needs to be declared proven. However, the Court establishes that there is absolutely insufficient

support in the case file for the relevancy of any chemical weapons program and advices (and therefore for the supposed complicity) and that this is not substantiated in the closing speech either. From the official report dated 3 January 2005 (F40, p. 14), which was drawn up with the assistance of Wolterbeek, that – rendered concisely - with respect to the supplied chemicals, the data that were available at that time cannot carry the conclusion that Phosphoroxychlorid as supplied by the defendant has been used for the production of ammunition with tabun as implemented on the battlefield. It cannot be denied however that the defendant has had an important share in the supply of this substance.

However, in comparison with the total quantity of supplied precursor, the production of this poison gas (exclusively in the years from 1984 until 1986) has been limited: after the war more than half of the Phosphoroxychlorid that was supplied by various parties was destroyed. Also one third of the produced tabun was destroyed (and therefore not 'processed' into ammunition).

Further data have not been added to the file after the publication of official report F40, neither has this precursor been mentioned in the investigation and the Wolterbeek report. The same goes for other chemicals that are mentioned in the report, such as Trimethylphosphite (TMP), supposedly a basis for sarin nerve gas.

In this context and for lack of conclusive evidence for the criminal relevancy with respect to the said supplies, the defendant must be acquitted and the Court shall concentrate on the TDG which has been supplied by the defendant and its significance for the production of mustard gas in the period in the indictment, i.e. between 19 April 1984 and 25 August 1988. In the opinion of the Court, the consequence is that the defendant must also be acquitted of being an accessory to the attacks with chemical weapons by the Iraqi regime in which it cannot be determined without reasonable doubt that mustard gas was used during those attacks.

The attacks in question are those on or near Abadan (Iran, February 1986), Zewa and Birjinni (both cities in Iraq, August 1988).

12.2. The arithmetic scenario: the 'substances balance' in relation to Thiodiglycol.

12.2.1. In his report Wolterbeek approached the significance of the TDG which was supplied by the defendant according to this scenario by means of the above mentioned 'substances balance'. For this, he used a number of already mentioned starting principles, (partly) based on his statement during the appeal session, which can be presented concisely as follows:

a) during the early nineteen eighties, the Iraqi chemical weapons program was still in its 'laboratory phase'. Therefore, the stock of the precursor TDG necessary for the production of mustard gas, can acceptably be put at zero;
b) Al Muthanna State Establishment (MSE) was the only location where (in any case after 1983 up to and including 1988) the synthesis process for mustard gas took place and where TDG (the only used precursor for mustard gas, besides a chlorine donor), mustard gas and mustard gas filled ammunition were stored;
c) it has been established that, in this period, Iraq was unable to produce TDG in relevant quantities and that there was no 'dual use' of the imported TDG;
d) the figures in relation to the production process of mustard gas and the implementation on the battle field (based on figures from the Iraqi battle forces) and which have been verified and if necessary adjusted by UNSCOM, have a high degree of reliability;
e) besides some 'incidents' which have lead to the loss of substantial quantities of mustard gas, there are reliable data from experience regarding the loss percentage of base material and final product during the course of the production/usage process;
f) also, the data with respect to the stocks in the annual statement of MSE are truly reliable;
g) it can be reasonably accepted as a fact that at the end of 1988, four months after the start of the cease fire, all unused ammunition had been returned to MSE.

12.2.2. With respect to the deliveries of TDG after 1980, the FFCD (p. 19; Report p. 18) give the following statement of the Letters of Credit (LC) regarding TDG to be supplied. From this statement it appears that:

a) from 1982, LC's for the delivery of at least a total quantity of 3,225 tons of TDG were issued by Iraq;
b) 1,825 tons concern LC's to other companies than the defendant's company; the ultimate LC which concerns another supplier than the defendant, was issued in 1983;
c) based on statements from witness Alaa, it must be believed that deliveries based on these LC's materialised during the course of 1984 at the latest;
d) from 1985, three LC's, concerning a total weight of 1,400 tons, were issued in relation to companies of the defendant;
e) these concern LC's with the following numbers, quantities of TDG and the relevant company of the defendant:
   Number of LC Weight Company
   85/3/579 400 tons Companies (Incorporated SA)
   87/3/232 350 tons Companies
   87/3/2790 650 tons Oriac International

12.2.3. In the "Official Report concerning deliveries of several chemicals to Iraq", dated 5 December 2005 (F90), the various deliveries of TDG to Iraq by the defendant have been listed (based on relevant documents such as way bills and bank payment orders) and the dates and times they took place (compare Report p. 19 Table 1B). From this Report it appears that (in as far as significant within the scope of these considerations):

a) the first shipment (nr. 7, on the first mentioned LC) of TDG supplied by the defendant (48,180 kilograms) from Japan, was loaded in Osaka on 31 May 1985 (with destination Triest/Italy) and was paid for in the second half of June 1985;
b) in 1985 as well as in 1986, shipments with a total weight of 192,720 kilograms of TDG were shipped from Japan;
c) in 1987, in total 366,600 kilograms of TDG were shipped by order of the defendant from the United States to Iraq;

d) during the first two months of 1988, three shipments with a total weight of around 364,000 kilograms of TDG were shipped by order of the defendant from the United States to Iraq;
e) all shipments together account for a total weight of over 1,116 tons of TDG. With respect to the third LC (87/3/2790) concerning 650 tons of TDG, it can only be established that in reality 364 tons were delivered.

These data, derived from F90, prove that during the period between mid 1985 and February of 1988 the defendant actually delivered at least 1,116 tons of TDG to Iraq.

In comparison with the data from the LC's, with a total of 1,400 tons (2.2), there is no such proof of the actual delivery of 284 tons of TDG. Although the case file contains statements from which can be derived that the defendant supplied 1,400 tons in reality (although there is no certainty with regard to dates and times), the Court will proceed on the assumption that the defendant only supplied 1,116 tons, which is to the defendant's advantage.

12.2.4. From the figures in Wolterbeek's Report (p. 32 and further, Table 5A, 5B) the annual implementation of mustard gas (MG) filled ammunition on the battle field can be derived; these figures are based on military documents concerning the use of weapons, together with the 'payload' of mustard gas per grenade of airplane bomb (Report p. 30). This results in the (UNSCOM) figures hereunder, concerning the total annual use of mustard gas as calculated and shown in table 5B of the Report. Also, the production figures for mustard gas in that year are mentioned based on Report p. 8/9 and 21.

Year 1981-83 1984 1985 1986 1987 1988

MG-ammunition 35 198 238 334 793 765

MG-production 233 240 345 250 1000 500

12.2.5. Finally, it is possible to determine the 'end-stocks' of mustard gas (also in non-used ammunition) and TDG at the end of December 1988, based on data which have been included in the 1988 MSE annual statement and the information that became available to Wolterbeek (in a later stage) concerning the 'end-stock' of TDG on 20 December 1988. These data result

in the following figures, in which the ‘end stock’ of ammunition has been calculated in relation to the quantity of TDG necessary, via payload and the weight balances as included in the Report (p. 22). Taking the loss into account, this results in 1 ton of TDG, 0.975 ton of mustard gas and 0.925 ton of mustard gas filled ammunition.

In fact, the payload of the ammunition that was found at the end of 1988 was 120,200 kilograms, which is consistent with 129,900 kilograms of TDG. The (bulk) stock of mustard gas at the end of 1988 was 32,300 kilograms, corresponding with 33,100 kilograms of TDG. Therefore, at the end of 1988, mustard gas to an equivalent of 163,000 kilograms of TDG was present at MSE. From data with respect to the packaging size, which became available at a later stage, the expert witness has drawn the conclusion that the TDG which was present at MSE at that moment, could not have been supplied by the defendant. At the appeal hearing, he confirmed that the ‘end stock’ of mustard gas as indicated above should yet be discounted in the calculations in his Additional Report.

12.2.6. The above mentioned data result in the following outcome:

a) in a scenario in which the TDG that was supplied by the defendant was the last to be processed into mustard gas, it can be calculated based on TDG supplied (essentially) by others and the implementation of mustard gas filled ammunition, that the ammunition which was filled with TDG supplied by the defendant must have been used at the end of 1987 at the latest. (Report p. 36). However, according to the Additional Report relatively high production losses during the first years should be taken into account (up to 30%). This could have lead to the situation that TDG supplied by the defendant would have had to be used already several months earlier;

b) the scenario as described in the Additional Report, assuming that all TDG supplied by the defendant was finished at the end of 1988, results in the conclusion that the TDG of the defendant would have to be used already many months earlier in 1987. However, at the appeal hearing Wolterbeek confirmed that in those calculations the residual stock of TDG, the mustard gas and

the ammunition of that moment should be taken into account. If one does that, the answer remains: end of 1987.

12.3. The mixing scenario

A fundamentally different scenario, in Wolterbeek's eyes not an 'extreme' but the most realistic one, is that for several reasons already shortly after the first deliveries of TDG by the defendant, quantities thereof were mixed with quantities of TDG supplied by 'third parties' and that this 'mix' was used for the production of mustard gas and that this mustard gas ended up in ammunition relatively shortly after and that this ammunition was actually used. This mixing scenario is based on considerations of Wolterbeek which he mentioned respectively in his Report and during the appeal hearing:

a) warehouse management did not apply a first in/first out scenario, neither did it apply a first in/last out scenario, mainly because the containers with TDG were placed widespread over the premises for fear of possible air raids. The TDG that was used was the nearest available;
b) according to Wolterbeek's statements in his Report (p. 27/28) in that respect, the TDG was used rather quickly after arrival for the production of mustard gas;
c) depending on the size/quantity of the batch that had to be made, corresponding packages were picked out;
d) the mixing was also necessary in order to achieve the envisioned quality of the mustard gas;
e) after production, the mustard gas was stored in storage tanks, creating a mix as well.

According to this scenario it can be assumed that the defendant's TDG ended up in ammunition filled with mustard gas in the course of the third quarter of 1985 (Report p. 28).

12.4. Legal framework of the ruling

Regarding the supplies of TDG to the Iraqi regime under consideration, the question needs to be answered whether the defendant (together with his co-perpetrator(s)) by doing so provided the "opportunity

and/or means to carry out the attacks described in the charges in 1987 and 1988 on the places referred to in Iraq and Iran. Article 48 of the Penal Code does not specify which interest the provided opportunity and/or means should have had for the committed criminal offence.

From case law administered by the Supreme Court it appears that it is not a requirement that the assistance offered should be indispensable (HR 15-12-1987 NJB 1988.99) or should have made an adequate causal contribution to the main offence (HR 8-1-1985 NJ 1988.6). It is sufficient when the assistance offered by the accessory has indeed promoted the offence or has made it easier to commit that offence (HR 10-6-1997 NJ 1979.585 concerning the provision of information). From international criminal law perspective, these requirements for the contribution of the so-called 'aider or abettor' are not essentially more severe.

12. 5 Conclusion

Based on the above, the following conclusions can be made:

a) The defendant played an important part by supplying the precursor Thiodiglycol to the Iraqi regime for the production of mustard gas: at least 38% of this substance had been supplied by him in the years 1980 up to and including 1988. If any TDG would also have been supplied from the United Kingdom to Iraq in those same years, this fact does not impair the qualification of 'important' regarding defendant's part in this matter.

b) When the supplies by others eventually stopped no later than in the course of 1984, the defendant supplied at least another 1,116 tons of this precursor until the spring of 1988.

c) The first shipment of TDG supplied by the defendant arrived in Iraq towards the summer of 1985; in that year he supplied a total of approximately 197 tons. Based on the considerations written under item 12.3 above, the Court deems it very likely that in the course of that year TDG supplied by the defendant was also used for the production and finally ended up in ammunition that was used for the attacks as mentioned in the charges.

   Conclusive evidence for his co-responsibility regarding the

attacks mentioned in the charges (in so far as mustard gas was deployed in those attacks) is the following:

d) As of 1985, the supplementation of the essential precursor TDG to the Iraqi regime depended completely on the supplies made by the defendant.

e) For that reason, the unwholesome policy that was continuously carried out by the regime that from 1984 onwards seemed to find it necessary to deploy hundreds of tons of this poison gas during combat, depended to a decisive extent if not totally on those supplies.

Taking into consideration the crucial significance that the shipments of TDG supplied by the defendant since 1985 had for the chemical weapon program of the regime, the Court finds the defendant (together with his co-perpetrators) guilty of being an accessory to providing the opportunity and the means for the proven attacks with mustard gas in the years 1987 and 1988.

13. Liability to punishment on account of the proven charges

The proven charges constitute a punishable offence:

Regarding the proven charges under count 1. alternatively:

The defendant is found guilty of the offence of complicity in being an accessory to a violation of the laws and customs of war, while that offence resulted in the death or grievous bodily harm of another person or that offence was an expression of a policy of systematic terror or wrongful actions against the whole population or a specific group thereof, committed several times.

Regarding the proven charges under count 2:

The defendant is found guilty of the offence of complicity in being an accessory to a violation of the laws and customs of war, while that offence resulted in the death or grievous bodily harm of another person, committed several times.

14. Liability to punishment of the defendant

No circumstance has become plausible that would rule out the

punishability of the defendant. Therefore the defendant is liable to punishment.

15. Considerations regarding the applicable legislation

The Criminal Law in Wartime Act (WOS) which was applicable at the time of the period referred to in the charges, was amended several times afterwards; following the entry into force of the International Crimes Act (Wim) on 1 October 2003, the war crimes were devolved from the WOS to the Wim. Only the amendments to the law dated 27 March 1986 (Bulletin of Acts and Decrees (B.A.D.) 1986, 139) and dated 14 June 1990 (B.A.D. 1990, 369) are important when determining whether the later legal provisions are more favourable for the defendant than the law that was applicable during the period referred to in the charges.

Pursuant to Act of Parliament dated 27 March 1986, a new legal article 10a was inserted into the WOS, which makes it possible to impose an additional sentence provided by article 28, first paragraph, under 3°, of the Penal Code (deprive a person of his/her active and passive right to vote) on account of – inter alia – a conviction for being found guilty of war crimes, while by Act

of Parliament dated 14 June 1990, the death penalty as possible punishment was removed from the WOS.

The WOS as it reads as of 1 January 1991, after the amendment by Act of Parliament of 14 June 1990, is more favourable to the defendant in terms of an eventual penalty. From the devolvement of the penal provisions that refer to war crimes from the WOS to the Wim, as from 1 October 2003, it cannot be said that they result in more favourable provisions for the defendant. Based on the provisions in article 1, paragraph 2, of the Penal Code, the WOS will have to be the starting point as it read on 1 January 1991. Furthermore with regards to complicity, the Court has taken into consideration article 49, paragraph 2, of the Penal Code, as it read until 1 February 2006 (the date of entry into force of the Act regarding reassessment of maximum penalties). Pursuant to article 10 (old), 49, paragraph 2 (old), 57 and 78 of the Penal Code and article 8 of the WOS, as it read on 1 January 1991, viewed together and in relation to each other, the Court cannot

draw any other conclusion than that in this case the defendant is liable to a maximum term of twenty years imprisonment.

16. Grounds for the punishment

During the appeal trial, the advocate general moved that the sentence of the court of first instance be set aside and on account of the principal charge under counts 1. and 2. he demanded that the defendant be sentenced to a term of imprisonment of 15 years, less the period spent in pre-trial detention.

In making its assessment as to what penalty should be imposed, the Court has taken into account the following considerations.

During a number of years the defendant supplied raw material to the Iraqi regime for the production of chemical weapons. From 1985 until early 1988, in a total of twenty shipments he supplied at least more than 1,100 tons of Thiodiglycol (TDG) on the basis of three Letters of Credit. That substance was used for the production of mustard gas that was deployed during the war in Iran as well as in Iraq. By doing so during a number of years, the defendant has consciously made a substantial contribution to the continuing violation of the laws and customs of war committed by the Iraqi regime. Based on Dutch criminal law that was applicable at that time, a person who is found guilty of complicity in a criminal offence which carries a life sentence can be sentenced to a term of imprisonment of a maximum of 15 years. Seen the fact that the defendant committed the offence of complicity several times, in his case the penalty to be imposed will be a maximum term of twenty years imprisonment, which is based on the regulation set out in article 57, paragraph 2, of the Penal Code, concerning various offences for which one sentence is pronounced.

In determining the punishment in this case, the Court has taken into account the following circumstances, that on the one hand relate to the seriousness of the offences, the circumstances in which they were committed, as well as the intended purposes of the punishment to be considered when fixing the punishment, and on the other hand the personal circumstances of the defendant.

As results from the case file (in the period referred to in the charges),

the Iraqi regime carried out multiple attacks with (among others) mustard gas during the war with Iran on places in that country, as well as on the border region between Iraq and Iran, where Kurdish population groups lived that were suspected of collaboration with the Iranian enemy. Those attacks caused the death of at least thousands of civilians (that did not participate in the conflict) and caused

permanent and severe health problems to very many persons. It is beyond doubt that the regime in Bagdad by doing so committed extensive and extremely gross violations of the international humanitarian law by using a weapon that was already prohibited by the Geneva (Gas) Protocol of 17 June 1925.

The defendant has made an essential contribution to these violations – at a time that many, if not all other suppliers 'pulled out' with regard to the increasing international pressure – by supplying many times in the course of several years (among other matters) very large quantities of a precursor for mustard gas; in doing so the defendant made significant profits. Those supplies enabled the Iraqi regime to (almost) continue their deadly (air) attacks in full force during a number of years. Apparently the defendant did not give his deliberate support to the afore mentioned gross violations out of sympathy for the targets of the regime, but – as it should be assumed – the defendant acted exclusively in pursuit of large gains and fully neglected the consequences of his actions. Even today the defendant does not show any sense of guilt or any compassion for the numerous victims of the mustard gas attacks.

The Court recognizes that the proven offences were committed over more than twenty years ago and that the defendant is a man of advanced age, who is to be expected to spend a large part of the remaining years of his life in prison. The Court will only be able to attach limited weight to this slightly mitigating circumstance. In this case the most important aspect concerning the determination of the appropriate sanction – considering the extreme gross violation of the principles of humanitarian law that took place and the important supporting role that was played by the defendant – is to point out to the victims and survivors, as well as to the international legal community, how much value is put on the actions of the defendant and what severe

punishment can only be the consequence of these actions.

Finally in fixing the appropriate punishment, the Court has taken into account the general prevention aspect. People or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that – if they do not exercise increased vigilance – they can become involved in most serious criminal offences.

It should be made clear to them that they will have to face prosecution and long-term prison sentences, in accordance with the seriousness of the crimes they committed.

Considering all of the above, the Court concludes that the only suitable and necessary reaction in these circumstances is a nonsuspended prison sentence of a very long term as set out below.

17. Seizure

The Appeals Court will order the return of seized goods, in so far as they have not yet been returned to the defendant, according to the copy of the seizure list attached to this judgment, numbered 4 through 10, 13 through 15, 18 through 20, 23, 24, 27, 28 and 29.

Regarding the seized articles as stated on the seizure list attached to this judgment as numbers 1 through 3, 11, 12, 16, 17, 21, 22, 25, 26 and 30 through 36, the Court will order the deposit of those seized articles on behalf of the entitled party, because it is not possible to establish to whom these articles actually belong.

18. The plaintiffs' claims

In the present criminal proceedings, counsel Mrs. L. Zegveld joined as a party to the action on behalf of the injured parties (plaintiffs) and submitted a claim for damages suffered as

a consequence of the offences charged to the defendant, up to a maximum of € 680.67 each (fl. 1,500.-).

[Names of 15 persons]

In the trial on appeal this claim was asserted and submitted for the same amount as before the first instance court, which amounts to € 680.67 each.

The advocate general has moved to allow the claims of the plaintiffs.

The Court wishes to point out that the injured parties have been allowed to give an additional explanation about their claims during the hearing. To the Court this explanation was considered to be very impressive.

The lawyer of the injured parties pleaded at the appeal trial that the Court does not have the liberty to deny the plaintiffs claims based on the principle of simplicity that was first introduced by the Terwee Act. Furthermore, she argued that the claim is of a simple nature and that based on the Conflict Law on Wrongful Acts, the claim should be judged according to the Iranian/Iraqi law.

The counsels for the defence of the defendant have disputed the claims. First of all they argued that the simplicity principle from the old stipulations of articles 332-337 of the Code of Criminal Procedure can also be applied.

Furthermore, the defence asserted that they question the applicability of the Conflict Law on Wrongful Acts, the "simplicity" of the applicability of the Iranian/Iraqi law dating from the eighties, also taking into account the concept of limitation and the possibility of the defendant to anticipate the causality regarding the individual injured parties.

With respect to the above the Court has the following considerations.

The case file includes several legal articles in relation to – possibly – applicable Iranian/Iraqi law. However, within the framework of these criminal proceedings, the Court does not consider itself capable to give an unambiguous interpretation of these stipulations according to Iranian/Iraqi law, also considering the questions regarding this subject raised by the defence.

In addition there is the question whether foreign law is indeed applicable, as argued by the lawyer of the injured parties. For that matter the Court is leaning towards that point of view, because the parties involved did not have any relevant relation with the Netherlands at the time of the events in Iran and Iraq that are referred to in this particular case.

But also if Dutch civil law should be applicable in this case, the Court believes it would not be simple to apply this law, also in view of the above mentioned questions that were raised by the defence. Therefore the Court concludes that the claims submitted by the plaintiffs do not have a simple

nature and finds that taking a decision on these claims does not fit within the scope of the past and present applicable legislation concerning claims submitted by plaintiffs within the framework of a criminal case, even though that case has the extent and importance of the one under consideration.

In the opinion of the Court the old legislation concerning claims of injured parties also provides the possibility to dismiss such claims based on the circumstances that those claims – also considering the accessory nature thereof – do not have a simple nature.

In this respect the Court founds its point of view on the legal history – also referred to by the defence – of articles 332-337 (old) of the Dutch Penal Code, especially the comments made in the Schedule to the bill of the Code of Criminal Procedure by the Ort-Government Commission

(1913), as well as the observations made by the Minister regarding the draft of that Code of Criminal Procedure dated 1917-1918. The aforesaid Commission stated: "a joinder of claims (…) can only be defended if these claims relate to small amounts and relatively simple cases." The Minister in question stated that he 'wanted to continue to limit the joinder of claims' to cases of a very simple and transparent nature. The point of view of the Minister was supported by Parliament and a statutory regulation was adopted and included in the Code of Criminal Procedure, which only established the maximum amount of a civil claim.

Consequently the Court does not agree with the point of view that the maximum amount of a civil claim would be the only criterion for determining the simplicity of a civil claim, also taking into account the legal history on this matter.

For that reason the Court rules that the claims submitted by the injured parties are not allowable.

Considering the fact that the defence did not claim payment of costs of the injured parties and did not claim costs for the defence of the claims either, the Court does not need to give an order for costs of the injured parties.

19. Applicable statutory regulations

The Court has taken into consideration articles 47, 48, 49 (old) and 57

of the Dutch Penal Code and article 8 (old) of the Criminal Law in Wartime Act.

20. DECISION

The Court:

Reverses the sentence of the court of first instance and renders a new judgment.

Invalidates the initiatory writ of summons regarding the charges under count 1. and count 2., in so far as it concerns the indications of time and place “in any case at one (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iraq”, “in any case at one (or more) point(s) in time in the years 1986 and/or 1987 and/or 1988 in Iran”, as well as regarding the phrase “in any case in conspiracy”.

Declares that it has not been legally and convincingly proven that the defendant committed the offence he has been accused of under count 1. of the principal charge and therefore acquits the defendant of that charge.

Deems legally and convincingly proven that the defendant committed the offences he has been charged with alternatively under count 1. and count 2., as described in the above.

Declares not proven any additional or other charges in these proceedings, so that the defendant must be acquitted of them.

States that the proven facts constitute the above mentioned criminal offences.

Rules that the defendant is liable to punishment on account of the proven facts.

Sentences the defendant to a term of imprisonment of 17 (seventeen) years.

Stipulates that the time spent by the defendant in police custody and pre-trial detention before the execution of this penalty be deducted from this prison sentence, in so far as it has not yet been deducted from another sentence.

Orders the return of seized goods to the defendant according to the seizure list included in this sentence, numbered 4 through 10, 13 through 15, 18 through 20, 23, 24, 27, 28 and 29.

Orders the legal deposit of the seized articles listed on the seizure list attached to this sentence as number 1 through 3, 11, 12, 16, 17, 21, 22, 25, 26, 30 through 36 on behalf of the entitled parties.

Disallows the claims for damages by the injured parties [names of 15 persons].

This judgment was passed by Mr. G. Oosterhof, Chairman,

Mr. G.P.A. Aler and Mr. F. Heemskerk, Justices,

in the presence of Mrs. M.C. Zuidweg, clerk of the Court.

The judgment was pronounced at the public hearing of the Court of Appeal in The Hague

on 9 May 2007.

[End of translation]