

15/02147, Jesuratnam

1. Cassation proceedings

The appeals in cassation were lodged by the defendant and by the Advocate General at the Court of Appeal.

(...)

2. The contested judgment

2.1.1. In paragraphs 6 and 11 of his advisory opinion the Advocate General summarised the essence of this case as follows:

‘The offences for which the defendant is being prosecuted and has been convicted by the Court of Appeal are all connected with activities of the Liberation Tigers of Tamil Eelam (LTTE), known more generally as the Tamil Tigers, and/or the Tamil Coordinating Committee (TCC). The Court of Appeal also convicted four co-defendants along with the defendant.

(...)

The facts and circumstances set out in the indictment (...) are closely connected with the violent conflict that took place in Sri Lanka (formerly known as Ceylon) for more than 25 years.’

2.1.2. Summarised, the charges against the defendant included the following:

- 1.A. participation (as leader and/or member of the leadership) in the period from 10 August 2004 up to and including 26 April 2010 in an organisation whose aim is the commission of terrorist offences;
- 1.B. participation (as leader and/or member of the leadership) in the period from 1 October 2003 up to and including 26 April 2010 in an organisation whose aim is the commission of serious offences (*misdrifven*);
- 2. participation (as leader and/or member of the leadership) in the last-mentioned period in an organisation whose aim is the commission of serious offences (*misdrifven*).

The charges set out in the indictment under counts 1.A and 1.B concern participation in the international criminal (terrorist) organisation LTTE. The charge set out under count 2 concerns participation in a national criminal organisation, specifically the TCC.

2.1.3. The Court of Appeal's findings included the following, which are uncontested in the cassation proceedings:

(i) that within the territory of Sri Lanka and at least during the period referred to in the indictment, the Sri Lankan government troops on one side and the LTTE fighters on the other were engaged in a long and intensive armed conflict and that in that period Sri Lanka was not engaged in an armed conflict with another sovereign state (consideration 10.4.2.3.4), and (ii) that the experts A.J. Keenan and G.E. Frerks made the following findings, which were evidently adopted by the Court of Appeal (consideration 11.3.1.2):

‘However in most cases it is a generally known fact, accepted both by critics and supporters of the LTTE and commonly cited and accepted as true by almost all researchers, that the LTTE was responsible for attacks on civilian targets – be it the mass murders of Sinhalese or Muslim villagers in the Eastern Province and the northern ‘border villages’, the murders of political leaders or the bombings of civilian targets. The fact that the LTTE was responsible for hundreds of attacks on civilians is not disputed in the academic or historical literature’;

and also

(iii) (in consideration 11.3.1.2) that

- the LTTE carried out an attack on Katunayake international airport near Colombo on 24 July 2001 in which several passenger planes were destroyed, six Sinhalese soldiers and a technician were killed, a journalist was injured and hundreds of civilians had to flee;
- on 2 February 2008 in or in the vicinity of Dambulla the LTTE detonated an explosive device on a bus, killing at least 12 people including a child, injuring dozens and entirely destroying the vehicle; and
- on 8 January 2008 in or in the vicinity of Jah Ela, north of Colombo, the LTTE killed minister D.M. Dassanayake and his bodyguard using an explosive device, thereby also injuring 12 other individuals.

2.2. The Court of Appeal found the following proven against the defendant:

- under the heading ‘The international criminal organisation’, that:

‘1.A.

in the period from 10 August 2004 up to and including 26 April 2010, in Utrecht and/or Nieuwegein and/or Schagen and/or The Hague and/or Breda and/or Zeist, and/or elsewhere in the Netherlands and/or in Sri Lanka, he did, in each case together and in association with T. Elavarasan and/or R. Selliah and/or L. Thambiayah and/or V. Pirabaharan (alias V. Prabakaran) and/or V. Manivannan (alias Castro) and/or Amirthap (alias Amuthab) and/or others, participate in an organisation (namely the

Liberation Tigers of Tamil Eelam (LTTE)), whose aim was the commission of terrorist offences namely:

a) possessing and/or passing on firearms and ammunition in categories II and/or III (within the meaning of section 26, subsection 1 and section 31, subsection 1 of the Firearms, Ammunition and Offensive Weapons Act), with a terrorist aim (within the meaning of section 55, subsection 5 of the Firearms, Ammunition and Offensive Weapons Act) and

b) with a terrorist aim (within the meaning of article 176a of the Criminal Code) intentionally causing a fire and/or an explosion while there is reason to fear that this will present a general danger to property and/or cause another person serious bodily injury and/or endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 157 of the Criminal Code), and

c) with a terrorist aim (within the meaning of article 176a of the Criminal Code), intentionally and unlawfully sinking and/or grounding and/or crashing and/or destroying and/or rendering unusable and/or damaging a vessel and/or vehicle and/or aircraft, while there is reason to fear that the act will endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 168 of the Criminal Code) and

d) manslaughter (intended to be) committed with a terrorist aim (within the meaning of article 288a of the Criminal Code) and

e) the intentional preparation and/or facilitation of and/or conspiracy to commit the aforementioned offences and

d) conspiracy to commit murder with a terrorist aim (within the meaning of article 289a of the Criminal Code)'

and

'1.B.

that at various times in the period from 1 October 2003 up to and including 26 April 2010, in Utrecht and/or Nieuwegein and/or Schagen and/or The Hague and/or Breda and/or Zeist, and/or elsewhere in the Netherlands and/or in Sri Lanka, he did, in each case together and in association with T. Elavarasan and/or R. Selliah and/or L.

Thambiayah and/or V. Pirabakaran (alias V. Prabakaran) and/or V. Manivannan (alias Castro) and/or Amirthap (alias Amuthab) and/or one or more others, or alone, participate (whether within the meaning of article 140, paragraph 4 of the Criminal

Code or otherwise) in an organisation (namely the Liberation Tigers of Tamil Eelam (LTTE)) whose aim was the commission of serious offences (*misdrijven*) namely:

a) recruitment for armed conflict in Sri Lanka, without the permission of the King (within the meaning of article 205 of the Criminal Code, commencing on 10 August 2004) and

b) conscripting and/or enlisting children under the age of fifteen years into military service or using them to participate actively in hostilities in a non-international armed conflict (in the territory of Sri Lanka) (within the meaning of section 6, subsection 3(f) of the International Crimes Act) and

c) imprisonment and/or severe deprivation of physical liberty (of civilians in Sri Lanka) in violation of fundamental rules of international law, committed as part of a widespread and/or systematic attack directed against the/a (Tamil) civilian population (in Sri Lanka) (within the meaning of section 4, subsection 1(e) of the International Crimes Act) and

d) possessing and/or passing on one or more firearms and/or ammunition in categories II and/or III (within the meaning of section 26, subsection 1 and/or section 31, subsection 1 and section 55, subsection 1 of the Firearms, Ammunition and Offensive Weapons Act) and

e) intentionally causing a fire and/or an explosion, while there is reason to fear that this will present a general danger to property and/or cause another person serious bodily injury and/or endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 157 of the Criminal Code), and

f) intentionally and unlawfully sinking and/or grounding and/or crashing and/or destroying and/or rendering unusable and/or damaging a vessel and/or vehicle and/or aircraft, while there is reason to fear that the act will endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 168 of the Criminal Code) and

g) manslaughter (within the meaning of article 287 of the Criminal Code) and

h) murder (within the meaning of article 289 of the Criminal Code) and

i) the intentional preparation of the aforementioned serious offences (*misdrijven*).';

- and furthermore under the heading 'The national criminal organisation', that:

'2.

in the period from 1 October 2003 up to and including 26 April 2010, in Utrecht and/or Nieuwegein and/or Schagen and/or The Hague and/or Breda and/or Zeist,

and/or elsewhere in the Netherlands, he did (as leader and/or member of the leadership) in each case together and in association with T. Elavarasan and/or R. Selliah and/or L. Thambiayah and/or others, participate in an organisation whose aim was the commission of serious offences (*misdriven*) namely:

d) habitual money laundering (within the meaning of articles 420ter and/or 420bis of the Criminal Code) and

e) violation of section 1 of the Betting and Gaming Act, committed intentionally and

f) duress (within the meaning of article 284 of the Criminal Code) and

h) the intentional preparation of the aforementioned serious offences (*misdriven*).’

2.3. The Court of Appeal discharged the defendant from prosecution on a point of law with respect to:

‘ - 1.A. part (e), in so far as it concerned the conspiracy referred to in 1A. part (a);

- 1.B. part (a), in so far as it concerned recruitment for the armed conflict in Sri Lanka;

- 1.B. part (i), in so far as it concerned 1.B. parts (a) and (d);

- 2. part (h), in so far as it concerned parts (d), (e) and (f).’

2.4. The Court of Appeal sentenced the defendant to a term of imprisonment of two years and three months.

3. Assessment of the first ground of appeal in cassation lodged on behalf of the defendant

3.1. The ground of appeal in cassation concerned the Court of Appeal's findings concerning the charges set out in the indictment under count 1.A. It argues *inter alia* that the Court of Appeal violated common article 3 of the Geneva Conventions by ‘wrongly ruling that the acts of the LTTE (...) in the course of the non-international armed conflict in Sri Lanka (...) can be regarded as acts of a terrorist organisation’, or at least that the Court of Appeal provided incorrect, insufficient and/or inexplicable grounds for this finding in view of the argument entered by the defence ‘that a distinction must be drawn between international humanitarian law on the one hand and counterterrorism law on the other’.

3.2. The following provisions are relevant to the assessment of the ground of appeal in cassation:

- common article 2 of the Geneva Conventions of 12 August 1949 (Dutch Treaty Series 1951, 72-75) (hereinafter: ‘the Geneva Conventions’):

‘In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'

- article 1, paragraphs 2 and 3 of the First Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Dutch Treaty Series 1978, 41) (hereinafter: 'AP I'):

'2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.'

- article 43 of AP I:

'1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.'

- common article 3 of the Geneva Conventions:

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

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

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

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

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

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

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.’

- article 83a of the Criminal Code:

“‘Terrorist aim” is understood to mean for the purpose of seriously intimidating the population or a section of the population; or unduly compelling a government or international organisation to perform, to abstain from performing, or to tolerate any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.’;

- article 140, paragraphs 1 and 4 of the Criminal Code:

‘1. Any person who participates in an organisation whose aim is to commit serious offences (*misdrijven*) is liable to a term of imprisonment not exceeding six years or a fifth-category fine.

4. Participation as defined in paragraph 1 includes lending monetary or other material support as well as raising funds or recruiting persons for the benefit of such an organisation.’

- article 140a of the Criminal Code:

‘1. Anyone who participates in an organisation whose aim is to commit terrorist offences is liable to a term of imprisonment not exceeding fifteen years or a fifth-category fine.

2. Founders, leaders and members of the leadership of such an organisation are liable to life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fifth-category fine.

3. Article 140, paragraph 4 applies *mutatis mutandis*.’

3.3. The ground of appeal in cassation assumes, as the Court of Appeal did, that at the time of the offences proven under count 1.A the conflict between the LTTE and the Sri Lankan government was an armed conflict not of an international character within the meaning of common article 3 of the Geneva Conventions. The ground of appeal is founded *inter alia* on the view that under common article 3 of the Geneva Conventions the members of the LTTE forces are combatants within the meaning accorded to this term in international humanitarian law, and therefore have the right to participate directly in hostilities – and the associated immunity from prosecution and punishment for acts that do not violate the laws and customs of war – and that, pursuant to the aforementioned article 3 of the Geneva Conventions, international humanitarian law applies, to the exclusion of the general criminal law or at least the provisions of general criminal law criminalising terrorist acts perpetrated by members of the LTTE forces (hereinafter: fighters). There is no support for this view in the law, including international humanitarian law, and to this extent the ground of appeal therefore fails. In reaching this decision the Supreme Court has taken the following into consideration.

3.4. Common article 3 of the Geneva Conventions prohibits – in summary, in so far as is relevant for these purposes – any party involved in an armed conflict not of an international character (hereinafter: ‘an internal armed conflict’) from committing violence to the life or person of anyone who is not taking part or has ceased to take part in the hostilities. Both the Netherlands and Sri Lanka are parties to the Conventions. The *travaux préparatoires* of article 3 show that the conclusion of that provision arose from the desire to make the rules of international humanitarian law applying to international armed conflict that are laid down in the aforementioned Conventions and recognised as essential by civilised nations applicable to internal armed conflicts as well. The aim was therefore to protect the persons concerned in the case of an internal armed conflict and also to create a legal basis for humanitarian intervention by the International Red Cross or any other impartial international relief organisation, without the possibility of any such intervention being regarded as unlawful interference in the internal

affairs of the state involved in the conflict. Article 3 lays down minimum standards with which the parties to the conflict must comply in relation to such persons, and, as has already been noted, is intended to protect them. The fact that this provision – which does not entail an obligation for the High Contracting Parties to make certain acts a criminal offence – is applicable does not detract from the power of a State concerned to prosecute and punish criminal offences committed by members of an armed opposition group in connection with an internal armed conflict under its own general criminal law. It therefore does not follow from the nature of article 3 that persons other than those not participating in the conflict are not entitled to protection against violence on their life or person. This article does not legitimise such acts. The view that in the case of an internal armed conflict international humanitarian law applies exclusively, therefore rendering general criminal law inapplicable, is incorrect. (See Supreme Court 7 May 2004, ECLI:NL:HR:2004:AF6988, NJ 2007/276).

(...)

3.6. In view of the foregoing and taking into consideration that, as set out in 2.1.3 above, the Court of Appeal ruled that in the period described in the indictment there was a non-international armed conflict in Sri Lanka between Sri Lankan government troops and LTTE fighters and found that in the course of that conflict the LTTE targeted attacks on persons not directly participating in the hostilities, for these reasons alone and in light of common article 3 of the Geneva Conventions, the Court of Appeal's ruling that the defendant participated in an organisation whose aim was the commission of terrorist offences and that he can therefore be prosecuted and punished under general Dutch criminal law does not reflect a misinterpretation of the law and is not inexplicable.

(...)

5. Decision

The Supreme Court of the Netherlands dismisses the appeals in cassation.

15/04689, Thambiayah

1. Cassation proceedings

The appeals in cassation were lodged by the defendant and by the Advocate General at the Court of Appeal.

(...)

2. The contested judgment

2.1.1. In paragraphs 6 and 11 of his advisory opinion the Advocate General summarised the essence of this case as follows:

‘The offences for which the defendant is being prosecuted and has been convicted by the Court of Appeal are all connected with activities of the Liberation Tigers of Tamil Eelam (LTTE), known more generally as the Tamil Tigers, and/or the Tamil Coordinating Committee (TCC). The Court of Appeal also convicted four co-defendants along with the defendant.

(...)

The facts and circumstances set out in the indictment (...) are closely connected with the violent conflict that took place in Sri Lanka (formerly known as Ceylon) for more than 25 years.’

2.1.2. Summarised, the charges against the defendant included the following:

- 1.A. participation (as leader and/or member of the leadership) in the period from 10 August 2004 up to and including 26 April 2010 in an organisation whose aim is the commission of terrorist offences;
- 1.B. participation (as leader and/or member of the leadership) in the period from 1 October 2003 up to and including 26 April 2010 in an organisation whose aim is the commission of serious offences (*misdrifven*);
- 2. participation (as leader and/or member of the leadership) during the last-mentioned period in an organisation whose aim is the commission of serious offences (*misdrifven*).

The charges set out in the indictment under counts 1.A and 1.B concern participation in the international criminal (terrorist) organisation LTTE. The charge set out under count 2 concerns participation in a national criminal organisation, specifically the TCC.

2.1.3. The Court of Appeal's findings included the following, which are uncontested in the cassation proceedings:

- (i) that within the territory of Sri Lanka and at least during the period referred to in the indictment, the Sri Lankan government troops on one side and the LTTE fighters on the other were engaged in a long and intensive armed conflict and that in that period Sri Lanka was not engaged in an armed conflict with another sovereign state (consideration 10.4.2.3.4), and
- (ii) that the experts A.J. Keenan and G.E. Frerks made the following findings, which were evidently adopted by the Court of Appeal (consideration 11.3.1.2):

‘However in most cases it is a generally known fact, accepted both by critics and supporters of the LTTE and commonly cited and accepted as true by almost all researchers, that the LTTE was responsible for attacks on civilian targets – be it the mass murders of Sinhalese or Muslim villagers in the Eastern Province and the northern ‘border villages’, the murders of political leaders or the bombings of civilian targets. The fact that the LTTE was responsible for hundreds of attacks on civilians is not disputed in the academic or historical literature’;
and also

(iii) (in consideration 11.3.1.2) that

- the LTTE carried out an attack on Katunayake international airport near Colombo on 24 July 2001 in which several passenger planes were destroyed, six Sinhalese soldiers and a technician were killed, a journalist was injured and hundreds of civilians had to flee;
- on 2 February 2008 in or in the vicinity of Dambulla the LTTE detonated an explosive device on a bus, killing at least 12 people including a child, injuring dozens and entirely destroying the vehicle; and
- on 8 January 2008 in or in the vicinity of Jah Ela, north of Colombo, the LTTE killed minister D.M. Dassanayake and his bodyguard using an explosive device, thereby also injuring 12 other individuals.

2.2. The Court of Appeal found the following proven against the defendant:

- under the heading ‘The international criminal organisation’, that

‘1.A.

in the period from 10 August 2004 up to and including 26 April 2010, in Utrecht and/or Nieuwegein and/or Schagen and/or The Hague and/or Breda and/or Zeist, and/or elsewhere in the Netherlands and/or in Sri Lanka, he did in each case together and in association with T. Elavarasan and/or J.M. Jesuratnam and/or S. Ramalingam and/or R. Selliah and/or V. Pirabaharan (alias V. Prabakharan) and/or V. Manivannan (alias Castro) and/or Amirthap (alias Amuthab) and/or others, participate in an organisation (namely the Liberation Tigers of Tamil Eelam (LTTE)) whose aim was the commission of terrorist offences, namely:

- a) possessing and/or passing on firearms and ammunition in categories II and/or III (within the meaning of section 26, subsection 1 and section 31, subsection 1 of the Firearms, Ammunition and Offensive Weapons Act), with a terrorist aim (within the meaning of section 55, subsection 5 of the Firearms, Ammunition and Offensive Weapons Act) and

- b) with a terrorist aim (within the meaning of article 176a of the Criminal Code) intentionally causing a fire and/or an explosion while there is reason to fear that this will present a general danger to property and/or cause another person serious bodily injury and/or endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 157 of the Criminal Code), and
- c) with a terrorist aim (within the meaning of article 176a of the Criminal Code), intentionally and unlawfully sinking and/or grounding and/or crashing and/or destroying and/or rendering unusable and/or damaging a vessel and/or vehicle and/or aircraft, while there is reason to fear that the act will endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 168 of the Criminal Code) and
- d) manslaughter (intended to be) committed with a terrorist aim (within the meaning of article 288a of the Criminal Code) and
- e) the intentional preparation and/or facilitation of and/or conspiracy to commit the aforementioned serious offences (*misdrijven*) and
- f) conspiracy to commit murder with a terrorist aim (within the meaning of article 289a of the Criminal Code)';

and

'1.B.

that at various times in the period from 1 October 2003 up to and including 26 April 2010, in Utrecht and/or Nieuwegein and/or Schagen and/or The Hague and/or Breda and/or Zeist, and/or elsewhere in the Netherlands and/or in Sri Lanka, he did, in each case together and in association with T. Elavarasan and/or J.M. Jesuratnam [and/or] S. Ramalingam and/or R. Selliah and/or V. Pirabaharan (alias V. Prabakaran) and/or V. Manivannan (alias Castro) and/or Amirthap (alias Amuthab) and/or one or more others, or alone, participate (whether within the meaning of article 140, paragraph 4 of the Criminal Code or otherwise) in an organisation (namely the Liberation Tigers of Tamil Eelam (LTTE) whose aim was the commission of serious offences (*misdrijven*) namely:

- a) recruitment for armed conflict in Sri Lanka, without the permission of the King (within the meaning of article 205 of the Criminal Code, commencing on 10 August 2004) and
- b) conscripting and/or enlisting children under the age of fifteen years into military service or using them to participate actively in hostilities in a non-international armed

conflict (in the territory of Sri Lanka) (within the meaning of section 6, subsection 3(f) of the International Crimes Act) and

c) imprisonment and/or severe deprivation of physical liberty (of civilians in Sri Lanka) in violation of fundamental rules of international law, committed as part of a widespread and/or systematic attack directed against the/a (Tamil) civilian population (in Sri Lanka) (within the meaning of section 4, subsection 1(e) of the International Crimes Act) and

d) possessing and/or passing on one or more firearms and/or ammunition in categories II and/or III (within the meaning of section 26, subsection 1 and/or section 31, subsection 1 and section 55, subsection 1 of the Firearms, Ammunition and Offensive Weapons Act) and

e) intentionally causing a fire and/or an explosion, while there is reason to fear that this will present a general danger to property and/or cause another person serious bodily injury and/or endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 157 of the Criminal Code), and

f) intentionally and unlawfully sinking and/or grounding and/or crashing and/or destroying and/or rendering unusable and/or damaging a vessel and/or vehicle and/or aircraft, while there is reason to fear that the act will endanger the life of another person, and/or this offence results in a person's death (within the meaning of article 168 of the Criminal Code) and

g) manslaughter (within the meaning of article 287 of the Criminal Code) and

h) murder (within the meaning of article 289 of the Criminal Code) and

i) the intentional preparation of the aforementioned serious offences (*misdrifven*).';

- and furthermore under the heading 'The national criminal organisation', that:

"2 . in the period from 1 October 2003 up to and including 26 April 2010, in Utrecht and/or Nieuwegein and/or Schagen and/or The Hague and/or Breda and/or Zeist, and/or elsewhere in the Netherlands, he did (as leader and/or member of the leadership) in each case together and in association with T. Elavarasan and/or J.M. Jesuratnam and/or S. Ramalingam and/or R. Selliah and/or others, participate in an organisation whose aim was the commission of serious offences (*misdrifven*) namely:

d) habitual money laundering (within the meaning of articles 420ter and/or 420bis of the Criminal Code) and

e) a violation of section 1 of the Betting and Gaming Act, committed intentionally and

f) duress (within the meaning of article 284 of the Criminal Code) and

h) the intentional preparation of the aforementioned serious offences (*misdrifven*).’

2.3. The Court of Appeal discharged the defendant from prosecution on a point of law with respect to:

- ‘ - 1.A. part (e), in so far as it concerned the conspiracy referred to in 1.A. part (a);
- 1.B. part (a), in so far as it concerned recruitment for the armed conflict in Sri Lanka;
- 1.B. part (i), in so far as it concerned 1.B. parts (a) and (d);
- 2. part (h), in so far as it concerned parts (d), (e) and (f).’

2.4. The Court of Appeal sentenced the defendant to a term of imprisonment of 19 months.

3. Assessment of the first ground of appeal in cassation lodged on behalf of the defendant

3.1. The ground of appeal in cassation concerned the Court of Appeal's findings regarding the charges set out in the indictment under counts 1.A and 1.B. It challenges *inter alia* ‘the Court of Appeal's finding that in the period referred to in the indictment there was not an international armed conflict and that therefore in assessing counts 1.A and 1.B international humanitarian law does not apply exclusively, (if only) for the reason that the Indian Peace Keeping Force (IKPF) had withdrawn before the period referred to in the indictment.’

3.2. The Court of Appeal held *inter alia* as follows:

- in consideration 10.4.2.3.3:

‘The Court of Appeal notes (...) that first of all it must be concluded that the indictment refers to the period from 1 October 2003 up to and including 26 April 2010.

The defence bases its argument that the conflict in Sri Lanka must be deemed an international armed conflict on the intervention by the Indian Peace Keeping Force (IPKF) in 1987. The defence argues that from 1987 to 1990 (elsewhere the defence refers to the period from 1983 to 2002) there were at least two states involved in the armed conflict, namely India and Sri Lanka, which means that the conflict can be deemed an international armed conflict, all the more so because the IPKF became involved in fighting with the LTTE and therefore became a party to the conflict. Since the indictment refers to a later period, this argument put forward by the defence fails for this reason alone.

In so far as the defence also wished to argue that the armed conflict in Sri Lanka until 2002 must be deemed an international armed conflict and that the accompanying legal regime continued to operate after 2002, given India's involvement in Sri Lanka which continues to this day, as a result of which the period referred to in the indictment is

also covered, the Court of Appeal would also reject this argument for the following reasons.

(...)

From the documents in the action it is evident that India withdrew the IPKF and that that withdrawal was completed in March 1990. Since no facts or circumstances have been satisfactorily established that demonstrate India had any (substantial) role in the armed conflict in Sri Lanka after March 1990, of a military nature or other nature relevant to the laws of war, the defence's argument on this point also fails.';

- in consideration 10.4.2.3.4:

‘On the basis of the foregoing and the evidence presented, the Court of Appeal concludes that in the period referred to in the indictment and in any case until 18 May 2009 there was an armed conflict in Sri Lanka of a non-international armed **[noot vertaler: deze tweede ‘armed’ lijkt niet op zijn plaats]** character. In this connection it has been established that the Sri Lankan government troops on the one side and the LTTE fighters on the other were involved in a long and intensive armed conflict during, in any case, the period referred to in the indictment.’

- and in consideration 10.5:

‘The Court of Appeal considers (...) that the Supreme Court established in the Kesbir judgment that during an internal armed conflict both humanitarian law/law of war and general criminal law apply.

The Court of Appeal also notes that the European courts take the view that, in summary, the applicability of international humanitarian law to an armed conflict situation and to acts performed in that context does not exclude the applicability of European Union law on terrorism.’

3.3. The following provisions are relevant to the assessment of the ground of appeal in cassation:

- common article 2 of the Geneva Conventions of 12 August 1949 (Dutch Treaty Series 1951, 72-75) (hereinafter: ‘the Geneva Conventions’):

‘In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed

resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.

They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'

- article 43 of AP I:

'1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.'

- article 83a of the Criminal Code:

“‘Terrorist aim’ is understood to mean for the purpose of seriously intimidating the population or a section of the population; or unduly compelling a government or international organisation to perform, abstain from performing or tolerate any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.’

- article 140, paragraphs 1 and 4 of the Criminal Code:

'1. Any person who participates in an organisation whose aim is to commit serious offences (*misdrijven*) is liable to a term of imprisonment not exceeding six years or a fifth-category fine.

4. Participation as defined in paragraph 1 includes lending monetary or other material support as well as raising funds or recruiting persons for the benefit of such an organisation.'

- article 140a of the Criminal Code:

‘1. Anyone who participates in an organisation whose aim is to commit terrorist offences is liable to a term of imprisonment not exceeding fifteen years or a fifth-category fine.

2. Founders, leaders and members of the leadership of such an organisation are liable to life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fifth-category fine.

3. Article 140, paragraph 4 applies *mutatis mutandis*.’

3.4. The argument contained in the ground of appeal in cassation, as set out in consideration 3.1 above, must, according to the explanation accompanying it, be viewed against the backdrop of the position taken by the defence in the appeal proceedings that ‘during the period covered by the indictment there was an international armed conflict in Sri Lanka, which means that international humanitarian law applied exclusively and general criminal law was therefore inapplicable.’

3.5. The considerations of the Court of Appeal, as set out in consideration 3.2 above, include the Court of Appeal's finding that ‘India withdrew the IPKF and that that withdrawal was completed in March 1990’ and also that ‘[n]o facts or circumstances have been satisfactorily established that demonstrate India had any (substantial) role of a military nature or other nature relevant to the laws of war in the armed conflict in Sri Lanka after March 1990’. These findings of fact by the Court of Appeal have not been disputed in the cassation proceedings. The Court of Appeal's ruling, based on these findings, that in the period referred to in the indictment and at least until 18 May 2009 there was an armed conflict of a non-international character in Sri Lanka, which meant that general criminal law was applicable, does not, for this reason alone, reflect a misinterpretation of the law and sufficient grounds were given for it.

3.6.1. The ground of appeal also argues that, contrary to article 359, paragraph 2, second sentence of the Code of Criminal Procedure, the Court of Appeal failed to specify the reasons for which it departed from an explicitly substantiated position presented by the defence entailing that the LTTE was a *de facto* state and that for this reason (also) there was an international armed conflict, ‘namely a conflict between two states, i.e. Sri Lanka and the LTTE (...) to which international humanitarian law applied in full.’

3.6.2. According to the explanation accompanying the ground of appeal in cassation, this refers in particular to the passages in the memorandum of oral pleadings appended to the record of the appeal hearing of 23 June 2014, the essence of which is stated in the advisory opinion of the Advocate General in paragraphs 122 and 123:

‘Even without the armed intervention of the IPKF resulting in an international armed conflict or at least in conjunction with paragraph 3.3, the Court can consider the legal regime of international armed conflict applicable to the period referred to in the indictment as far as the actions of the LTTE are concerned.

This part of the argument is connected with the concept of ‘statehood’. If in the period referred to in the indictment the LTTE had the essential characteristics of a ‘state’, there could also be an international armed conflict, since the LTTE could then be regarded as the other state required for the categorisation ‘international armed conflict’ to apply. As stated above, for there to be an international armed conflict there must be an armed conflict involving two states, irrespective of the duration and intensity of the conflict. (...)

The LTTE [satisfied] in any case criteria 1 to 3, while the fourth criterion [‘capacity to enter into relations with other states’, Advocate General] arose for consideration in the peace negotiations and the declaration that brought the LTTE under article 96, paragraph 3 of Protocol I (letter to the UN and International Red Cross).’

3.6.3. The arguments put forward at the hearing in the appeal proceedings by the defence regarding the circumstance that the LTTE must be considered a ‘*de facto* state’ for the purposes of applying international humanitarian law can hardly be understood in any other sense than as a position that was clearly presented to the Court of Appeal, supported by arguments and accompanied by an unambiguous conclusion. In its judgment the Court of Appeal departed from this explicitly substantiated position but, contrary to article 359, paragraph 2, second sentence of the Code of Criminal Procedure, did not specify the reasons that led it do so. The ground of appeal rightfully challenges this. However this need not lead to cassation because, on the grounds of the following, the Court of Appeal could only have rejected the arguments put forward at the hearing.

3.6.4. The arguments put forward at the hearing were connected with background of the defence's view, set out in 3.4, that since at the time of the acts described in the indictment there was an international armed conflict in Sri Lanka, international humanitarian law applied exclusively and general criminal law was therefore inapplicable. However, this view is incorrect because the facts and circumstances put forward by the defence – which all concern local consequences of the control that the LTTE was able to exercise in a certain part of Sri Lanka during a certain period – do not warrant the conclusion that there was an international armed conflict to which international humanitarian law applied in the manner described in 3.4.

3.6.5. Therefore the ground of appeal cannot succeed.

4. Assessment of the second ground of appeal in cassation lodged on behalf of the defendant

4.1. This ground of appeal challenges the finding that count 1.A was proven. It argues that ‘the Court of Appeal, in reaching its decision, wrongly did not interpret articles 83 and 140a of the Criminal Code consistently with international humanitarian law and therefore used an incorrect – or at least a too limited – assessment framework.

4.2. Further to the provisions set out in 3.3, common article 3 of the Geneva Conventions is also relevant to the assessment of this ground of appeal in cassation:

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

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

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

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

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

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

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

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.’

4.3. The ground of appeal is founded *inter alia* on the view that the LTTE cannot be regarded as an organisation whose aim was the commission of terrorist offences. The basis for this is that members of the LTTE forces are combatants in the sense accorded to this term in international humanitarian law, and therefore have the right to participate directly in hostilities, and the associated immunity from prosecution and punishment for acts that do not violate the laws and customs of war. The conclusion is then drawn that under international humanitarian law, general criminal law cannot be applied to terrorist acts committed by members of the LTTE forces.

4.4.1. The Court of Appeal ruled that in the period referred to in the indictment and in any case until 18 May 2009 there was an armed conflict of a non-international character in Sri Lanka. The Supreme Court has discussed and dismissed the arguments submitted against this finding.

4.4.2. Common article 3 of the Geneva Conventions prohibits – in summary, in so far as is relevant for these purposes – any party involved in an armed conflict not of an international character (hereinafter: ‘an internal armed conflict’) from committing violence to the life or person of anyone who is not taking part or has ceased to take part in the hostilities. It does not follow from the nature of article 3 that persons other than those not participating in the conflict are not entitled to protection against violence against their life or person. This article does not legitimise such acts. The view that in the case of an internal armed conflict international humanitarian law applies exclusively and general criminal law is therefore inapplicable is incorrect. (See Supreme Court 7 May 2004, ECLI:NL:HR:2004:AF6988, NJ 2007/276, consideration 3.3.7).

4.5. For these reasons alone, and also in light of the Court of Appeal's finding set out in 2.1 that in the course of the above-mentioned conflict the LTTE (also) targeted attacks on persons not directly participating in the hostilities, the Court of Appeal's ruling that the defendant participated in an organisation whose aim was the commission of terrorist offences and that he can therefore be prosecuted and punished under general Dutch criminal law does not reflect a misinterpretation of the law and is not inexplicable.

5. Assessment of the third ground of appeal in cassation lodged on behalf of the defendant

5.1. This ground of appeal in cassation challenges *inter alia* the Court of Appeal's rejection of the defence submitted by the defendant in relation to count 1.B that the international

principle of individual responsibility stands in the way of prosecuting the defendant for participation in an organisation within the meaning of article 140 of the Criminal Code.

5.2. Article 6, paragraph 2 opening words and (b) of the Second Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (8 June 1977, Dutch Treaty Series 1980, 88) (hereinafter: ‘AP II’), to which the Netherlands is party, reads as follows:

‘No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility’.

5.3. Article 140, paragraphs 1 and 4 of the Criminal Code provides as follows:

‘1. Any person who participates in an organisation whose aim is to commit serious offences (*misdrijven*) is liable to a term of imprisonment not exceeding six years or a fifth-category fine.

4. Participation as defined in paragraph 1 includes lending monetary or other material support as well as raising funds or recruiting persons for the benefit of such an organisation.’

5.4. In so far as the argument is founded on the view that a conviction for participation in a criminal organisation in the sense of article 140 of the Criminal Code cannot by its nature be regarded as a conviction for a criminal offence on the basis of individual penal responsibility within the meaning of article 6, paragraph 2 opening words and (b) of the AP II, it is based on a misunderstanding of the law. In this respect the Supreme Court takes into consideration that article 140 of the Criminal Code criminalises the personal involvement of the defendant in an organisation whose aim is to commit serious offences (*misdrijven*), and that in this connection participation in the organisation requires that the defendant not only belonged to the organisation but also actually played a part in or assisted acts aimed at or directly connected with the realisation of the organisation's criminal aim (see Supreme Court 3 July 2012, ECLI:NL:HR:2012:BW5161, NJ 2012/657). To this extent this ground of appeal fails.

(...)

7. Decision

The Supreme Court dismisses the appeals in cassation.