Introduction

On September 7 2007 the court rejected the petition for preventive detention because of insufficient serious complaints against the suspect.

The court's decision was motivated as follows:

Without prejudice to the legitimate suspicion that the suspect in the charged period an important role had within the aforementioned organization, the file however does not offer sufficient concrete links for the suspicion that the suspect in the Netherlands was in an conscious and tight cooperation with the perpetrators in the Philippines that committed that which he is accused of. Therefore the court considers the serious complaints with regards to the participation not valid.

Neither are there any decisive links to be found for the presumption of the serious accusation of inciting these deeds. The sworn statements of the widows and riflemen, on which the OM is basing itself, contain nothing more than that even they presume that the killings were committed on the orders of the CC of the CPP and thus came from the suspect as chairperson. That is however not sufficiently concrete to consider the existence of serious complaints.

The OM finds the decision of the court incorrect and incomprehensible and therefore filed an appeal. This appelmemorie shall summarily delve into the facts and eventually on the participation of the suspect.

The Facts:

On January 23, 2003, Romulo Kintanar was shot dead in the Philippines and Ruel Murakami and Edmundo Ruiz y Martinez were wounded. On September 26, 2004, Arturo Tabara suffered the same fate. Tabara and his son-in-law Stephen Ong, who happened to be with him, were also shot to death.

Kintanar and Tabara belonged in the past to the (personnel) of the New People's Army, the military branch of the Communist Party of the Philippines (CPP), but left the movement in the 90's because of differences of opinion with Sison. There occurred a split in the movement between the "rejectionists" (among which Kintanar and Tabara, and "reaffirmists". The reaffirmists, among which Sison, currently constitute the CPP/NPA.

In a series of publications1, Sison – under his own name (persoonlijke title) – has already branded Kintanar in 1992 a "renegade", among others, and accused him of crimes and cooperation with the government.

The murders of Tabara and Kintanar were almost immediately claimed by the NPA in Ang Bayan. The reasons given for the murders of Kintanar and Tabara – in summary – were that they were criminals and counterrevolutionaries who were sentenced to death by the so-called People's Court, an internal court of justice of the movement.

As regards Kintanar it was remarked that he was already sentenced to death in 1993 but this was not yet implemented to give him a chance to rectify his wrong-doings. Afterwards, according to Ang Bayan, Kintanar committed crimes anew, among which the failed attempt on Sison in the Netherland, after which he was killed by a special unit of the NPA.2

It appears from a published document of the NDF "Declaration of Undertaking"3, that the NPA is the armed branch of the NDF and CPP and that the NPA is under the absolute leadership of the CPP. The NPA must implement all decisions of (the Central Committee) of the CPP. This document is by the way signed by Armando Liwanag, chairman of the Central Committee (CC) of the CPP. He signed this document in the name of the CPP and the NPA.

This document describes, amongst others, how enemy spies should be dealt with in a so-called People's Court and that these could be meted the death penalty. It was explicitly stated that the death penalty cannot be given unless a higher authority has looked into it and given its consent.

Also from the other declarations, like those of the widows of Tabara and Cruz, it appears that it is the CC that makes decision regarding the (execution) death penalty when it pertains to persons with high positions in the party.

In 2006, three witness, Rafael Y Glemao Cruz, Arnel Y Salazar Alonzo and Frederick Maico Pabalan were heard, and they declared that they have been members of the NPA and that they, under orders from the NPA, have committed the murders of Kintanar and Tabara. They aver that the order came from the CC, which at that moment was headed by Sison.4

Unlike the postulation of the court, the declarations of the shooters and the widows do not just aver that the orders to commit the murders came from Sison. The shooters heard this from Leo Velasco, Vicente Cayetano, respectively, Ka Baste.5 The widows have been longtime

members of the CPP and describe extensively the party structure and the manner in which decisions are made. What's more, the Declaration of Undertaking supports the declarations of the shooters and the widows.

Despite the denial of Sison – according to him he is but a political adviser of the NDF, the political branch of the CPP/NPA – there are sufficient indications that he is, as such, the party leader of the CPP, and with it, of the CC and the NPA. Even the court, in its decision, seems to realize this.

From diverse documents and declarations it appears, in any case, that from 1992, the leader of the CPP/NPA is a man named Armando Liwanag. From the declarations of diverse witnesses (among which Nathan Quimpo and Grace Cabactulan6) it appears that Armando Liwanag is a pseudonym of the suspect, Sison. We refer you further to what is written in the dossier and the raadkamertoelichting.

More and more documents out of the searches confirm these declarations. In the house of Sison a diskette was found with the text of an article by Armando Liwanag dated 29 March 2002.7 Research on this document shows that it was written in 13 March 2002 and was last changed on 23 March 2002. More research is being made on this document, but it is more than probable that it was made by Sison. In this speech, reference is made to "incorrigible opportunists and revisionists and unrepentant criminals" who have now been purged from the revolutionary movement.

It also appears from the documents found during the search that Sison would in any case be informed about "nonfunctional" staff members. Refer to the so-called Al-2 and Benz document(8), wherein it is said that a high ranking staff member is lax in attending meetings and makes false accusations against others within the movement. AIDA is asked to undertake measures. The witness Cabactulan gave some clarification on the document and said that AIDA is a short name for the International Department of the CPP. The higher members of AIDA are members of the CPP.

The openbaar ministerie is of the opinion that this document is an underscoring of the previously named declarations over the role of Sison (and the party leadership) on decisions over members of the movement who do not adhere to the "rules".

Participation of the Suspect

From the substantiation (motivering?) of the court it is obvious that it is verily deduced that the suspect had and still has a leading position within the CPP/NPA, but that there is insufficient concrete evidence of participation, now that it is not shown that there is a conscious and tight cooperation between the suspect and the shooters. Over the question of incitement, the court remarked that from the diverse witnesses only the assertion/postulation exists) that the suspect gave the order for the murders. The court considers this insufficient to make serious complaints/pleas (bezwaren?) on this point.

Co-conspiracy? (Medeplegen)

It is an established jurisprudence of the HR that there is said to be co-conspiracy if it can be proven that there is conscious collaboration and joint implementation. Out the jurisprudence of the HR follows however that the judge thereby lends more weight on the intensity of the

cooperation and less importance on each one's concrete actual participation/contribution to the carrying out of the offence. (9) For proof of co-conspiracy it is moreover not required that all the components of the offence can be ascribed to each of the different collaborating persons.(10)

The HR has in the decision of 9 June 1992 decided that with respect to co-conspiracy: (11)

"these persons, in relation to said facts, form such a tight, intensive and schematic, close collaborating perpetrators' group that it is not important who among these persons in fact performed what role by or around the commission, nevertheless, each of them can be considered as co-conspirators of said facts and consequently as perpetrators."

The HR thereby found noteworthy the fact that no one from the said group distanced himself from the conduct/behavior of the other. The criterium of non-distancing was later reversed in other decrees of the HR. (12)

The HR has further decided that a suspect "who kept fulfilling his role" in the murder of another, by continuing to be present, doing nothing to stop the violence and not withdrawing himself, can be convicted of conspiracy.(13)

In the matter of the shootout in a school in Veghel, the HR decided that the father of the shooter was considered a con-conspirator because of his organized and guiding (sturende) role. (14) General rules of practice also play a role in determining if there can be said to be co-conspiracy. The HR decided that according to general rules of practice a conscious and tight collaboration with one or more suppliers out Colombia is required to produce quantities of plastic pallets containing cocaine. (15)

That someone need not be physically present to be considered a co-conspirator (accomplice) has long been determined in jurisprudence. The Court in Den Bosch ruled in a case in which a murder was committed abroad the following:

"The involvement of suspect consisted of the giving of orders in connection with the murder and the [aansturen] of the eventual doer. The court is of the judgement that between the suspect, who is staying in the Netherlands, and (concerned 1), (concerned 1) and the [pleger] of the act, a very close cooperation existed, which is not other than the [gericht] of the death of [victim 1]. The suspect must then also be considered a co-conspirator and in that it is irrelevant that the suspect was not physically present."

Finally the HR has argued in another case of co-conspiracy:

"In the meantime (?) [in het middle] In the tracks of a petition for higher appeal the position is brought in that there has been purely the case of passive presence of the suspect in the theft of freedom. The court in its further consideration of the evidence has otherwise ruled and has expressed that the suspect through his actions has contributed that his co-executor the (bewezenverklaarde) actions could carry out and that the victim was not free to go and to stand where he wanted. That judgment is in the light of the (gebezigde) means of evidence not hard to understand. Given this, the judgment of the Court that there was such a conscious and close cooperation between the suspect and his colleague such that they together and in association have committed the theft of freedom and its continuation, does not appear to be an unjust legal opinion.

The criterium conscious and close cooperation includes in jurisprudence more facets than one on one relation between [daders]. The suspect Sison – in so far as can now be determined – has had no direct contact with the executors of the murder. Within the strictly led party structure of the CPP/NPA – (wordt verwezen) here is directed to the Declaration of Undertaking and the statements of witnesses – there exists however a sound [degelijk] relation between the leader [leidinggevende] Sison and the special unit of the NPA which upon instruction, with the consent and provided with the mean by the leadership carries out liquidations. It is – paying attention on this structure (gelet op deze structuur) – not necessary that Sison had direct contact with the executors or knew their identity.

In addition Sison at no moment distanced himself from the behavior (gedragingan) of the shooters. On the contrary! Even less has he prevented [weerhouden] them from committing the murders, while he had the possibility to do this given his – also established by the court – leading role in the (underground) activities of the CC, the CCP and the NPA.

Encitement [uitlokking]

Conditions for [straafbarheid] of the inciter are:

1. intent of the inciter
2. the oddering (aanzetten) of another person (the incited)
3. use of one or more means of inciting
4. the incited crime must be carried out [gevolg]
5. the incited must be criminally liable

Conditions

The conditions which are mentioned under points 4 and 5 do not require further elucidation and shall therefore become enough with the elucidation of the other conditions.

Intent of the inciter

The inciter must intentionally incite and he cannot be held responsible for cases that he would not have wanted. The inciter can be held responsible for other criminal acts, in case he conditionally (voorwardelijk) has had the intent in regard to these acts.

The ordering (Het aanzetten) of another

The inciter must call on the will of another to commit a crime. From the statements of the shooters it appears that they have committed the act upon the order of another, to wit the chairman of the CC. This means that they have been ordered to commit the murders.

From the history of law it does not appear that it must definitely happen (vast moet komen te staan) that the doer and the inciter make appointments with each other. From the words of article 47 Sr "the act intentionally incite" can be concluded that the relationship between inciter and incitee is not relevant, if the inciter achieves what he wants to achieve. So it is unimportant whether the incited recruits more other persons.

Misuse of power

In the opinion of the openbaar ministerie is in any case a case of means of incitement (sprake van het uitlokkingsmiddel) a misuse of power. Misuse of power must be broadly interpreted, so can the power also be in connection with parents, teachers, master and a leader of a movement. Rozemond states (stellen) that a request to commit a criminal act within an existing power relation can be considered a misuse of power.

Functional daderschap

It is not necessary to accept the accusation that the suspect has acted through another person or that the iron criteria (ijzerdraadcriteria) is applicable. The judge can decide to functionally explain a criminal act. In this case the accusation is seen at the same time as functional daderschap, what the court apparently has recognized.

Of functional daderschap is the case when someone has not himself committed the criminal act, but has let another carry it out, but is considered as the executor of the crime.

For functional daderschap is required that it can be assumed that the punishable act can be committed by someone who lets someone else carry out the criminal act. Murder (art. 289) is a crime which fulfills this criteria, according to the HR.

De Hullu has stated that for the proof (evidence) of functional daderschap the physical or observable is not primary, but other criteria is exactly present, like power to provide and responsibility (acceptance). Generally the functional dader does exceptionally nothing physically, because for power and responsibility little action is required.

The power to provide (beschikkingsmacht), according to the De Hullu, is present if the leadership actually, really controls the forbidden behavior. He must be able to intervene and there must be a case of an organizational connection. Given the strong hierarchical relationship within the CPP/NPA and the role of Sison in them there are sufficiently strong accusations (ernstige bezwaren) on this point

Acceptance of a concrete act, according to De Hullu, is not always determinable, but does not touch the core of the accusation that exactly is directed at the pattern of the behavior. In that systematicity, normality of the behavior is found the foundation for the imputation.

From the statements of the shooters it appears that they, as members of the NPA, have received many orders for committing murders and these orders also always carried out. Rule one of the “code of discipline” of the NPA in fact states: “Obey orders in all your actions”. This is confirmed by the document “Declaration of Undertaking” which prescribes the killing of “counter-revolutionaries” and “traitors”.

Serious accusations of guilt (bezwaren)

The openbare ministerie is the following facts and circumstances:

-- Sison as chairman (under the pseudonym Armando Liwanag) has played a leadership role within the CPP, the CC and the NPA from the time of the order to the actual implementation of the murders;
-- Sison has personally labeled Kintanar and Tabara as enemies of the party and traitors and therewith actually their death sentence declared;

-- Sison was updated that Kintanar and Tabara possibly had planned a possible murder plot against him and this murder plot was given in Ang Bayan as one of the reason given for the attack on Kintanar;
-- As chairman or as member of the CC he has (co) ordered or given his consent to the killing of Kintanar and Tabara;
-- He has in any case not used (applied) his position and his authority (power) to prevent the murder;
-- The murder fits in the normal and systematic behaviour of the members of the NPA, for which Sison as leader is responsible.

The dossier contains in the opinion of the openbaar ministerie, partly taking account (mede gelet) the above, at this moment certainly serious accusations of guilt (ernstige bezwaren) that Sison has made himself guilty of (co) committing – or as functional doer – or the incitement of the murder or their attempt.

Ground temporary custody

Apart from the shocked legal order the other grounds are also applicable. Here is directed to the raadkamertoelichting.

About the basis of the investigation it must be specifically observed that the release of Sison has made a serious violation (lit. break in) [inbreuk] on the investigation. There exists much fear among (possible) witnesses because of the violence that the CPP/NPA/ uses and their practice of reprisal on people who are declared traitors is well known. Now that the investigation for the most part consists of approaching witnesses (or at the instance (?) of found documents) the National Investigation (service) encounters great resistance because the suspect again is free to go around.

Conclusion

Given the above the openbare ministerie thinks that the decision (beschikking) of the court in this case must be destroyed [repealed] (vernietigd) and that the imprisonment (gevangenhouding) must again be ordered.

Rotterdam, 24 September 2007

The prosecutor (officer of justice)

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