

## **Explanation of the grounds for the decision not to prosecute in the case of Asadabad War Crimes**

### **Executions in the Asadabad district**

In the night of 19 to 20 April 1979, Mujahedeen fighters entered Asadabad, the capital city of Afghanistan's Kunar Province. The attack was repelled by the Afghan communist government forces, stationed there to protect the city. After their attack had been repelled, the Mujahedeen fighters stayed behind in the inhabited areas of Asadabad and its surroundings. In the morning of the 20<sup>th</sup> of April, government soldiers besieged these areas and cleaned them up, killing hundreds of civilians and dozens of Mujahedeen fighters that had been put out of action (*hors de combat*). The estimated numbers of civilian casualties vary from six hundred to twelve hundred. Some civilians and Mujahedeen were shot on site. Other civilians were taken away and executed at other locations. Government soldiers gathered most of them, hundreds of people, in two fields in Kerala, at the eastern bank of the Pech river and shot and buried them - dead or alive - with a bulldozer. To this day, the mass graves are still there as silent witnesses to the executions in 1979. These executions are a historic fact and belong to Afghanistan's turbulent modern history. It is known as the *Kerala Massacre* and this massacre marked the continuing wars in Afghanistan deeply. Some people even view it as a turning point. From that moment, the laws of war no longer applied. As historian David B. Edwards puts it, 'the massacre at Kerala (...) forever changed the terms of engagement (...); traditional rules no longer applied.' (*Before Taliban: genealogies of the Afghan Jihad*, 2002, pp. 145-146).

### **Start of the Dutch investigation**

In 2006, a former mayor of Asadabad and dozens of fellow-villagers came forward and filed a complaint with the Secretary General of the United Nations. In this complaint several Afghan soldiers and executives were held responsible for the executions. One of them was Sadeq A., at the time the commander of Command Unit 444. The report titled  *Casting Shadows: War Crimes and Crimes against Humanity 1978-2001* by the Afghan Justice Project (AJP) from 2005, also connected A. with the *Kerala Massacre*. After the fall of the communist regime, A. came to the Netherlands. He is now sixty-six years old and holds Dutch nationality. After the complaint reported to the Secretary General of the United Nations came to the attention of the International Crimes Team of the Dutch police, the Dutch National Prosecutor's Office of the Public Prosecution Service started a criminal investigation in 2008.

### **Prosecution in the Netherlands for war crimes committed in Afghanistan**

Within the framework of an armed conflict, executions of civilians and fighters who have been put out of action (*hors de combat*) constitute violations of common Article 3 of the Geneva Conventions. These violations have been punishable in the Netherlands since 1952. There is no statute of limitations for these crimes. Since A. is in the Netherlands and holds Dutch nationality, the Netherlands has jurisdiction.

Previously, three generals of Afghan security service KhAD who lived in the Netherlands were brought before the court. Two of them were convicted for their involvement in torturing Afghan prisoners in the 80s and 90s under the communist regime. They were sentenced to 9 and 12 years' imprisonment for these war crimes. The third general was acquitted. Another Dutch investigation

into Afghan war crimes and enforced disappearances was prematurely terminated because of the death of the suspect. However, the investigation did make clear what happened to thousands of Afghan people who had been rounded up and murdered by the regime in power at the time. The Dutch Public Prosecution Service posted death lists and transport orders on the internet that had been discovered by the Dutch police.

War crimes are the most serious crimes known to humankind. That is the reason why the Netherlands tries its utmost to trace the people responsible for these crimes and bring them before court. Also when the crimes were committed in Afghanistan in 1979. The Netherlands does not want to be a safe haven for war criminals.

### **Course of the investigation**

Since the start of the investigation in 2008, a small but passionate and tenacious police team has done a lot. Seventy-five witnesses were interviewed, including victims and relatives, government soldiers, Mujahedeen fighters and civil members of the communist regime. Some of them were interviewed more than once. Members of the investigation team travelled to Afghanistan, Denmark, Norway and Germany to conduct these interviews. For security reasons, they could not carry out an investigation in Asadabad itself. Witnesses from that region were interviewed in Kabul. Nor could a forensic investigation be carried out at the crime scene. No photos or film footage have been found of the executions and military operations in the Asadabad region in 1979. To get a picture of the crime scene, the team used satellite photographs of 16 June 1979, military aerial photos made by the Soviet military in the early 80s, and topographic maps. The team carried out a thorough investigation into any possible military commands and reports both in and outside Afghanistan. Official requests were repeatedly but unsuccessfully submitted to the Afghan Ministries of Justice and Defence. In the absence of technical evidence, visual material and documents, evidence in this case has to be based entirely on witness statements. This is not unusual in investigations into crimes committed within the scope of an armed conflict. To assess the reliability of those witness statements, other means of investigation were used, including wiretaps and undercover operatives.

The local inhabitants were important eyewitnesses for the investigation. Many of them were relatives of the victims of the executions. These witnesses appeared unable to identify the soldiers concerned, because they had not known those soldiers previously or could not indicate what they thought they knew them from. Soldiers such as A. often came from another region and had limited contact with the local population. Also, it has remained unclear whether the different military units could be distinguished from one another. According to some witnesses, the soldiers from A.'s unit could be distinguished by their camouflage uniforms (*palangi*). According to other witnesses, the commandos were wearing the same uniforms as the government soldiers. Investigation has demonstrated that A.'s unit did have other distinguishing characteristics, such as insignia, folding-stock Kalashnikovs and different boots, but these were less visible. Victims rarely observed these details, or didn't remember them.

That is why the investigation focused on tracing witnesses that were in more regular contact with A. and his subordinates (*insiders*). There was also a special focus on the determination of the positions and operations of the military units involved. Through these two routes, the role A. and his subordinates played had to be established. The investigation team traced several insider witnesses:

soldiers and officers belonging to the different units at the site, a staff member of the security service at that time, civil members of the communist regime (including the provincial party secretary, the head of political affairs at the Ministry of Defence, the head of the communications department of the Ministry of Defence and the Minister of Education), a police officer and several students who were members of the communist party and had been given security tasks in the Asadabad region. Some of these witnesses had also lost relatives on the 20<sup>th</sup> of April 1979. In addition to Afghan insiders, the investigation team also tried - unsuccessfully - to interview former Soviet advisors to the Afghan army. For the determination of the military positions and operations performed by the units of the government forces, the investigation team also talked to several Mujahedeen fighters and commanders.

The Dutch police searched the houses of A. and three Afghan-Dutch witnesses. On 27 October 2015, A. was arrested and following his arrest the Dutch police interviewed him several times. A. was detained up to and including 18 December 2015 and was subsequently released on parole by the Court of Appeal in The Hague. In 2016, a Dutch investigative judge heard three witnesses in Afghanistan and Norway.

Soon after A. had been arrested, the Public Prosecution Service issued a press release, also in a Dari and a Pashtu translation, asking witnesses to report to the Dutch police by telephone or e-mail. This did not result in any new information.

### **Investigation results**

On the basis of the investigation, the following facts can be established.

#### *War crimes*

After the failed attack on Asadabad, several Mujahedeen fighters entrenched themselves in Kerala. Some of them hid in the house of village chief Said Ghafour. This house was shot at with a tank and government soldiers subsequently surrounded Kerala and cleaned it up. Men were taken from the houses. Dozens of civilians - including Wazir Mohammad Salarzai (principal of a girls' school), Mia Gul and Daud - and a number of Mujahedeen who had been put out of action (*hors the combat*), were shot dead. Six other individuals - Said Ghafour (village chief), Akhtar Mohammad (civil servant), Faqir Mohammad (former soldier, Daud's father), Wazir Mohammad (ambulance driver and not Wazir Mohammad Salarzai), Dost Mohammad Salarzai (a minor) and Mohammad Wali (a minor, Said Ghafour's son) - were arrested and taken across the bridge over the Pech river into Asadabad. Ambulance driver Wazir Mohammad was shot dead on the bridge. In Asadabad, arrestees Said Ghafour, Akhtar Mohammad and Faqir Mohammad were lined up against the wall of a military command post - known as *Sharwali* - and shot dead. This happened in front of the eyes of minor arrestees Dost Mohammad and Mohammad Wali. Apart from Kerala, civilians were also apprehended in Dam Kelai, Doshakhel and Chagan. Several of them were gathered in a small, one-room building - known as *Qamaruddin* - opposite the same military command post in the *Sharwali*. One of the arrestees, Moalem Khoshal (from Chagan), was shot dead in the *Qamaruddin* by a government soldier. At the other side of the Pech river, in Kerala, government soldiers gathered hundreds of civilians in two fields and shot them. They were buried - dead or alive - with a bulldozer.

The following classification was made: i) the executions in Kerala of dozens of civilians and Mujahedeen fighters who had been put out of action (*hors de combat*) and one civilian on the bridge

to Asadabad; ii) the executions in Asadabad of four civilians who had been arrested; and iii) the executions in Kerala of hundreds of civilians who had been gathered together.

These war crimes were committed by government soldiers. The question is whether A. was responsible for these crimes.

#### *Military tasks and positions*

On 20 April 1979, Infantry Regiment 69, Mountain Regiment 30 and Command Unit 444 were stationed in the Asadabad region. Then there was also a smaller signals unit, belonging to Regiment 52, and smaller, unidentified artillery, tank and reconnaissance units. The various units together constituted one operational group, led by front commander Nezamuddin. The 69<sup>th</sup> Regiment belonged to the 11<sup>th</sup> Division. This Division camped in Jalalabad and stood under the command of Bahramuddin. Command Unit 444 was headed by A., in the rank of captain. His Unit did not belong to the 11<sup>th</sup> Division, but did belong to the operational group commanded by Nezamuddin. The operational group was in radio contact with the 11<sup>th</sup> Division's base in Jalalabad. Through Jalalabad, and possibly also directly, the operational group was in contact with the staff of the Ministry of Defence in Kabul, headed by Yaqoub.

The then commander of Regiment 69 was repeatedly interviewed as a witness. Yaqoub, Bahramuddin and Nezamuddin died before the investigation started.

No written orders or reports about the executions were ever found. Witnesses, including the senior officials of the political affairs department and the communications department of the Ministry of Defence as well as a member of the signals unit in Asadabad, stated they never saw such documents. They had only heard about what happened in Asadabad in a general sense.

During the Mujahedeen attack, Regiment 30 was further away from Asadabad, in the hills near Marawara. Regiment 69 and Unit 444 were directly responsible for Asadabad's defence. The statements about the positions of these two units vary: according to some people the 69<sup>th</sup> was responsible for the lowlands and 444 for the highlands on both sides of the Pech river; according to others the 69<sup>th</sup> was responsible for the defence of the east side of the Pech river, at the side of Kerala, and 444 for the west side. No decisive answers have been found. The *Sharwali* is said to be the headquarters of the 69<sup>th</sup> and Unit 444. The headquarters of the operational group was also in Asadabad, near the *Sharwali*.

On 20 April 1979, the most important commanders – Bahramuddin, Nezamuddin, the commander of Regiment 69 and A. – were all in Asadabad.

#### *Evidence of the involvement of A.*

A. denies any involvement in the executions. He holds the commander of Regiment 69 responsible. According to A., he was on the bridge between Asadabad and Kerala during the Mujahedeen attack in the night of 19 to 20 April. He walked to the post on the hill of Gorgan (above Asadabad) in the morning to congratulate his men on having fended off the attack. He then went back to Asadabad for a meeting of the operational group. After that, he walked across the bridge through Kerala to his post in the height of Chagan. After sunset he walked back to Asadabad. He didn't see any executions or dead bodies that day.

This is implausible. The mass executions and the mass grave in Kerala dug soon after the executions can hardly have escaped A.'s notice. Which evidence do we have, however, that proves his involvement in the executions?

(i) The executions of civilians and Mujahedeen in Kerala and on the bridge over the Pech river

No evidence was found of his direct involvement in the executions of the dozens of civilians and a number of Mujahedeen put out of action (*hors de combat*) in Kerala and of one arrestee on the bridge over the Pech river (i). There isn't a single witness who saw him here, or heard or saw him give the order for these executions. The question then is whether it can be proven that these war crimes were committed by his subordinates. As their commander he might be held responsible for these crimes. Several witnesses stated that a tank and some soldiers came down from the highlands of Chagan to cut off the Mujahedeen's retreat. That would point to a small unit of commandos moving with a tank from their post at Chagan down into Kerala. Were they operating there alone? That is uncertain. According to an eyewitness, other soldiers in armour-plated vehicles were also advancing and the Mujahedeen were sieged. This witness was not able to see which unit or units these soldiers belonged to. According to the commander of the 69<sup>th</sup>, this area came under the exclusive responsibility of his regiment. Although he said that he had not been there that day, he thinks it is possible that – unknown to him – his units had been given instructions by the operational group to clean up Kerala. Following the military positions and the military tasks of Unit 444 and the 69<sup>th</sup> regiment, it means that no definite answer can be given about the involvement of subordinates of Unit 444 in the executions. Soldiers of Regiment 69 could just as well be responsible for these crimes. As stated above, these units could not be easily distinguished. The sister of victims Wazir Mohammad Salarzai and Akthar Mohammad stated that the soldiers came to her home and took her brothers and her uncle Said Ghafour and her cousin Faqir Mohammad. She herself didn't know which unit the soldiers belonged to, but heard soon after that they were commandos. Her other brother heard that too. Since they don't remember who told them this, that identification could not be verified. This means there is still a real possibility that the commandos of Unit 444 and the soldiers of the 69<sup>th</sup> Regiment were interchanged. There is insufficient evidence that these war crimes were committed by A.'s subordinates of Unit 444.

(ii) The executions in Asadabad in front of the *Sharwali* and in the *Qamaruddin*

The following can be stated concerning the executions in Asadabad of Said Ghafour, Akthar Mohammad and Faqir Mohammad in front of the *Sharwali* and of Moalem Khoshal in the *Qamaruddin* (ii). These victims were taken to Asadabad together with other civilian arrestees. Some of them, including victims Said Ghafour, Akthar Mohammad and Faqir Mohammad, were arrested when Kerala was cleaned up. As explained above, it cannot be established that these arrests were made by the commandos of Unit 444. Soldiers of the 69<sup>th</sup> Regiment may also have done it. At the other side of the Pech river, in Dam Kelai, civilians were arrested. According to one of A.'s subordinate officers and two arrestees from Dam Kelai, commandos were involved in these arrests. These different groups of arrestees, from - among others - Kerala and Dam Kelai, came together at the headquarters of 444 and the 69<sup>th</sup> (*Sharwali*). From this course of events, it cannot be concluded that the arrestees who were killed came within the exclusive responsibility of A. or his subordinates. The commander of Regiment 69 or his subordinates may also have been responsible.

The investigation team found seven eyewitnesses of the executions that took place against the wall of the *Sharwali* and in the *Qamaruddin*. Two of those eyewitnesses were Mohammad Wali and Dost Mohammad Salarzai, the underage arrestees from Kerala. They stated they saw how an officer ordered the shooting and killing of Said Ghafour (Mohammad Wali's father), Akhtar Mohammad (Dost Mohammad Salarzai's brother) and Faqir Mohammad (Dost Mohammad Salarzai's uncle) in front of the *Sharwali*. According to them, that same officer himself shot and killed Moalem Khoshal at the *Qamaruddin* later. Mohammad Wali and Dost Mohammad Salarzai didn't know who this officer was or which unit he and his subordinates belonged to. They didn't know these soldiers. According to Mohammad Wali he was later released by the same officer. Two other witnesses, brothers and arrestees from Dam Kelai, made similar statements. One of the brothers saw the executions in front of the *Sharwali* and in the *Qamaruddin*. According to him, one and the same officer was responsible for this. Just like Mohammad Wali, he was later released by that same officer. The other brother only saw the execution carried out by the officer in the *Qamaruddin*. At that moment, these two witnesses also did not know this officer. The provincial party secretary was involved in release of these four witnesses. He was interviewed as well. This party secretary pointed out A. as the officer releasing the arrestees. According to the statements made by Mohammad Wali and one of the arrestees from Dam Kelai, A. would in that case be responsible for the executions. This conclusion depends heavily on the reliability of the identification of A. by the party secretary. What was his recognition of A. exactly based on? The party secretary made contradictory statements about this. He also mixed up the roles and locations of the different commanders who were in Asadabad that same day: Bahramuddin, Nezamuddin, the commander of Regiment 69 and A. This means it cannot be established with sufficient certainty that A. was the one who released the arrestees and was also – according to the other two witnesses – responsible for the executions in front of the *Sharwali* and in the *Qamaruddin*.

With regard to the fifth eyewitness, the possibility of mistaken identity actually occurred. This witness was also arrested in Kerala and then taken to the *Qamaruddin* in Asadabad, where he saw that Moalem Khoshal was shot dead by an officer. He stated to a Norwegian journalist that he recognised this officer as the commander of the 69<sup>th</sup>. Later, he stated to the Dutch police that it was A. When the police confronted him with the difference, the witness came to the conclusion that he didn't know the officer concerned, but that it had definitely been someone else than A. or the commander of the 69<sup>th</sup>.

The sixth eyewitness was a soldier of the 52<sup>nd</sup> Signals Regiment. He saw the executions in front of the *Sharwali*. It happened on the order of an officer. According to this witness, he heard from other people standing there with him that this officer was A. The witness himself had never seen A. before, nor has he come across A. since. The witness did not remember from whom he heard it was A. This means the reliability of that recognition cannot be verified.

The seventh eyewitness, finally, was a police officer. He also witnessed the executions in front of the *Sharwali*. The executions were carried out by an officer. To the Afghan Justice Project and also in a short telephone conversation with the Dutch police, he said that A. had done this. When a Dutch investigative judge heard him in more detail later, this witness stated that he did not know who this officer was. He never knew A., so he couldn't recognise him. This witness did hear A.'s name being

mentioned later. This may explain why he mentioned A.'s name in his conversations with the Afghan Justice Project and the police.

(iii) The mass executions of civilians in Kerala

Only four witnesses were traced who could make a statement from their own observations about the identity of the perpetrators who executed hundreds of civilians that were gathered in Kerala (iii). One of them, a local inhabitant, saw that A. gave the order to shoot and kill the inhabitants of Kerala gathered there. He would have recognised A. from his appearance, because A. had him taken to hospital once, and also by his insignia and the major's insignia on his shoulder. This statement raises some questions. During two interviews, the witness mentioned different positions where he would have seen A. giving the order. Also, it is hard to imagine how he would have been able to identify insignia at the distance of each of these positions. Finally, this witness doesn't make a clear distinction between what he had seen himself and what he had heard from others. In the case of another occurrence, he made a contradictory statement whether it was his own observation or that of another individual. This raises questions about the reliability of the observations of this witness. On the other hand, there are exculpatory statements made by three other eyewitnesses. They are all soldiers: two officers of 444 and a soldier belonging to the 52<sup>nd</sup> Signals Regiment. All three of them stated independently that they saw how an officer gave the order to shoot and kill the civilians gathered there. The two officers of 444 identified this man as the commander of Regiment 69. What should be noted is that these officers did not spare A. in other respects in their statements. The soldier of the 52<sup>nd</sup> could not name the responsible officer to the Dutch police, but excluded the possibility of A. being the responsible officer. The soldier got to know A. shortly before as the commander of 444. In 1983, this witness also made a statement at the so-called Oslo Conference, where he pointed out front commander Nezamuddin as the person who had the inhabitants of Kerala gathered in the fields. In 2014 he didn't remember this. With regard to this witness it cannot be said either that he wished to protect A. Horrified by the events in Kerala, he defected to the Mujahedeem and joined commander Massoud. Apart from these four witnesses, no direct evidence has been found related to the identities of the soldiers or the units involved in the mass executions. Nor can it be established that this came within the exclusive area of responsibility of Unit 444. This means there is insufficient evidence for the involvement of A. in the mass executions in Kerala (iii).

### **Conclusion**

Despite a thorough and lengthy investigation, only a few eyewitnesses of these war crimes have been found. Only a few of them pointed out A. or his subordinates as the ones who were directly responsible. These recognitions appeared to be rather weak. Often these witnesses didn't remember well what they had recognised A. or his subordinates by. In some cases witnesses contradicted each other or a witness retracted his previous recognition. Due to the course of time, the fact that different military units and commanders were in the Asadabad region at the same time and the circumstance that most eyewitnesses themselves had not known the soldiers before, errors and the possibility of mistaken identities have to be taken into account. In those cases where A. and his subordinates are mentioned as perpetrators, the real possibility of errors and mistaken identities cannot be ruled out. Instead of A., one or more other commanders may have been responsible for the executions. Therefore, the Dutch Prosecution Service decided not to prosecute A. Other commanders have meanwhile died or do not come within Dutch jurisdiction.

This decision may be reviewed on the basis of new information. If victims and surviving relatives do not agree with this decision, they can lodge a complaint with the Court of Appeal in the Hague on the basis of Article 12 of the Dutch Code of Criminal Procedure.