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Vindplaatsen	Rechtspraak.nl

Uitspraak

Cause list number: 22-002229-21

Public Prosecutors Office number: 09-748001-18

Date of judgment: 14 November 2023

JUDGMENT AFTER TRIAL

The Hague Court of Appeal

joint bench for criminal proceedings

Judgment

rendered on appeal against the judgment of the District Court of The Hague of 16 July 2021 in the criminal case against the accused:

[accused],

born in [place of birth] (Syria) on [day of birth],

currently detained at the Vught prison facility in Vught.

Investigation name: 26BlackWell

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1 List of abbreviations used

ICC International Criminal Court

ICRC International Committee of the Red Cross

ICTY International Criminal Tribunal for the Former Yugoslavia

GC Geneva Convention(s)

GM Ghuraba'a Mohassan

Sr Wetboek van Strafrecht [Dutch Criminal Code]

Sv Wetboek van Strafvordering [Dutch Code of Criminal Procedure]

Wim International Crimes Act

UN United Nations

WWM Weapons and Ammunition Act

2 Examination of the case

This judgment was rendered as a result of the examination at the hearing in the first instance and the examination at the hearing in the appeal proceedings of this Court of Appeal.

The Court of Appeal has taken cognisance of the request of the Advocates General and of that which has been put forward by and on behalf of the accused and by and on behalf of the victim's next of kin.

3 Procedure

In the first instance, the Public Prosecution Service was declared inadmissible with regard to part E of the charges under Count 2. The accused was acquitted of the (remaining) charges under Count 2 and was sentenced with regard to the charges under Count 1 to a term of imprisonment of 20 years, with credit for

the time spent in pre-trial detention.

An appeal was lodged against the judgment on behalf of the accused and by the Public Prosecutor.

4 Admissibility of the accused on appeal

At first instance, the accused was, as mentioned, acquitted by the District Court of the charges under Count 2. The appeal was lodged by the accused without limitation and is therefore also directed against the decision to acquit in the first instance. In view of the provisions of Article 404, paragraph 5 of the Code of Criminal Procedure (hereinafter: Sv), the accused may not appeal against this decision. The Court of Appeal will therefore declare the accused inadmissible in the appeal lodged, insofar as this appeal is directed against the acquittal of the charges under Count 2 in the judgment appealed against.

5 Indictment

The accused has been charged with the following:

1.

Killing as a war crime

on 10 July 2012, or at least in or around the period from 1 July 2012 up to and including 18 July 2012, in or near Mohassan and/or Deir ez-Zor, or at least somewhere in Syria,

either alone or jointly and in conjunction with (an) other person(s) violating:

- Common Article 3 of the Geneva Conventions and/or
- customary international humanitarian law,

in that he, the accused, and/or one or more of his co-perpetrator(s) in the event of a non-international armed conflict within Syrian territory,

towards a person who did not (or no longer) participate(d) directly in the hostilities, namely a person of the armed forces who had laid down their weapons, and/or a person who had been placed hors de combat by sickness, wounds, detention, or any other cause, namely [victim],

committed an attack on life and/or physically assaulted (and/or) (in particular) killed the aforementioned person,

which attack on life and/or physical assault and/or killing consisted of the fact that he, the accused, and/or one or more of his co-perpetrator(s) shot (a) bullet(s) into the body of the aforementioned person several times, or at least once, with (a) firearm(s), as a result of which the aforementioned person died;

2.

Participation in an organisation whose intent it is to commit terrorist offences (as a leader)

in or around the period from 1 June 2012 up to and including 31 October 2013 in or near Mohassan and/or Deir ez-Zor, or at least somewhere in Syria,

either alone or jointly and in conjunction with (an) other person(s), participated in an organisation such as Al-Qaeda and/or Jabhat al Nusra and/or Ghuraba'a Mohassan, or at least a Jihadist militant group affiliated to the aforementioned organisation(s), or at least an organisation advocating the armed jihad struggle, an organisation intent on committing terrorist offences, namely

A. arson and/or causing an explosion, this constituting a general danger to property and/or danger of grievous bodily harm and/or danger to the life of another person, and/or this act resulting in someone's death, (within the meaning of Article 157 Criminal Code) (to be) committed with terrorist intent (within the meaning of Article 176a Criminal Code) and/or

B. manslaughter (to be) committed with terrorist intent (within the meaning of Article 288a of the Criminal Code) and/or

C. murder (to be) committed with terrorist intent (within the meaning of Article 289 in conjunction with Article 83 of the Criminal Code) and/or

D. conspiracy and/or deliberate preparation of and/or abetment to commit the aforementioned offences (within the meaning of Article(s) 176a and/or 289a and/or 96, paragraph 2) and/or

E. possession of one or more weapons and/or ammunition in categories II and/or III (within the meaning of Article 26, paragraph 1 of the Weapons and Ammunition Act) (to be) committed with terrorist intent and/or with the intent to prepare or facilitate a terrorist offence (within the meaning of Article 55, paragraph 1 and/or paragraph 5 of the Weapons and Ammunition Act),

while he, the accused, was a leader and/or founder and/or executive.

6 Jurisdiction with regard to part E of the charges under Count 2

In its closing speech, the Public Prosecution Service adopted the position that there is jurisdiction for the participation in an organisation whose intent it is to commit offences with terrorist intent, charged to the accused under Count 2 of the indictment, with regard to part E, for which part the District Court had declared the Public Prosecution Service inadmissible in the prosecution. Counsel took no position on the existence of jurisdiction.

The Court of Appeal is of the opinion that the Court of Appeal has jurisdiction, including with regard to Count 2, part E of the charges, and in this regard, it considers the following.

The accused has been charged with leading an organisation whose intent it is to commit terrorist offences as referred to in Article 140a of the Criminal Code (hereinafter: Sr). In this provision, intent refers to the immediate goal of the organisation, not of the members of the organisation.

The intent of the organisation is described in the terrorist offences included in parts A up to and including E of the indictment. Thus, it does not concern the factualisation of the intent of the accused or terrorist offences personally attributed to him.

Article 6 Sr stipulates that Dutch criminal law is applicable to anyone who is guilty of an offence outside the Netherlands insofar as a treaty or decision of an organisation under international law designated by general executive order requires the establishment of jurisdiction over that offence. This provision, in combination with the International Obligations Extraterritorial Jurisdiction Decree (hereinafter: the Decree), can provide for jurisdiction in, inter alia, terrorism cases where the place of perpetration is abroad. Article 4 paragraph 2 of the Decree stipulates that Dutch criminal law is applicable to the Dutch citizen or foreigner with a permanent place of residence or abode in the Netherlands, who is guilty of a terrorist offence outside the Netherlands or one of the offences described in that provision. Pursuant to Article 4 paragraph 9 of the Decree, this also applies if the accused has only acquired a permanent place of residence or abode after committing the offence. Article 6 Sr and the Decree entered into force on 1 July 2014.

Contrary to previous case law, the Court of Appeal sees reason to assess the jurisdiction of an indictment tailored to Article 140a Sr - for all elaborated terrorist offences that the aim of the organisation is directed towards - in accordance with the provisions of Article 6 Sr in conjunction with Article 4 paragraph 2 of the Decree. In its judgment of 20 December 2021 (ECLI:NL:GHDHA:2021:2640), the Court of Appeal found that these provisions have retroactive effect.

Jurisdiction over charged terrorist offences such as those stated in Article 140a Sr (including all terrorist offences at which the intent of the organisation is directed) is therefore determined by Article 6 Sr and the Decree, including for terrorist offences whose period that the charges pertain to is (partly) before 1 July 2014.

The Court of Appeal finds that the accused, who, on 20 October 2014, was granted a residence permit with effect from 29 April 2014, and who was registered in the municipality of [municipality in the Netherlands] from 4 March 2015 and resided there with his family until he was arrested, meets the requirements of Article 4 paragraph 2, in conjunction with Article 4 paragraph 9 of the Decree.

All this leads to the opinion that the Court of Appeal has jurisdiction in the present case for the charges under Count 2 in all its parts.

7 Request by the Advocates General

The Advocates General have requested that the judgment appealed against be set aside and that the accused be sentenced to a term of imprisonment of 26 years and six months, with credit for the time spent in pre-trial detention, with regard to Counts 1 and 2 of the indictment. Furthermore, the Advocates General have requested that the compensation measure under Article 36f Sr be imposed for the benefit of the victim's next of kin, in accordance with that which the lawyers of the victim's next of kin have contended for.

8 The judgment appealed against

The Court of Appeal will set aside the judgment appealed against because it has reached a slightly different assessment of facts proven with regard to the charges under Count 1 and at a different decision from that of the first court with regard to the charges under Count 2.

The Court of Appeal will therefore pronounce judgment anew.

9 Evidence-based argumentation

On the basis of the legal means of evidence mentioned below, the Court of Appeal has reached the conclusion that the accused committed the charges under Counts 1 and 2, as described below in the declaration of charges proven. The Court of Appeal bases its conviction on the facts and circumstances contained in the means of evidence that give reason for the declaration of charges proven. The means of evidence are attached to this judgment as Annex 1. Annex 1 forms part of this judgment.

In the further evidentiary considerations below, the Court of Appeal will clarify by footnotes the means of evidence on the basis of which the Court of Appeal has reached its findings and considerations. Endnotes will refer to sources of law.

10 Further evidentiary considerations regarding the charges under Count 1

10.1. Legal framework

The accused is alleged under Count 1 - in brief - to have committed, together with others, a war crime, namely killing a person who did not participate (or was no longer participating) directly in the hostilities. This is punishable under Article 6 of the International Crimes Act (hereinafter: Wim).

Based on Common Article 3 of the Geneva Conventions (hereinafter: GC), and the interpretation given to it by (international) case law, one can only speak of a war crime in a non-international armed conflict (which the accused has been charged with) if the following requirements have been met:

- (1) there is a non-international armed conflict within the territory of one of the contracting parties;
- (2) the perpetrator must have knowledge of the existence of this armed conflict;
- (3) the victims must belong to one of the categories of protected persons referred to in Common Article 3;
- (4) there should be a close connection between the criminal offence and the armed conflict - called *nexus* in (international) legal doctrine and case law.

In what follows, the Court of Appeal will first briefly discuss these requirements and then assess whether they have been met. In view of the international nature of the offence charged, the Court of Appeal relies on international law, such as the Statute of the International Criminal Court (hereinafter ICC) and the Elements of Crimes drawn up on the basis of Article 9 of the ICC Statute, as well as on guiding rulings by international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY).¹

10.1.1. *Non-international armed conflict and knowledge thereof*

International humanitarian law applies when there is an armed conflict in the territory of one of the contracting parties.

A distinction is made between international armed conflicts and non-international armed conflicts. The rules for these two types of conflict differ in parts. An important distinction is that for the determination of a non-international armed conflict, there are requirements as to the intensity of the armed conflict.

Over the years, the ICTY has elaborated on the concept of 'non-international armed conflict' in its case law and developed criteria for assessing whether it is present. For example, the intensity of the conflict should be of the level of '*protracted armed violence*' and the armed groups involved should be sufficiently organised.²

Factors that may be important in determining the intensity of a conflict include the number, the duration and the intensity of the individual confrontations; the type of weapons and other military equipment; the amount and calibre of the ammunition fired; the number of people and the type of armed groups taking part in the fighting; the number of victims; the extent of material damage; and the number of refugees from the combat zones. The involvement of the UN Security Council may also be an indication of the intensity of the conflict.³

To determine the degree of organisation of the armed groups, the following factors, inter alia, are important: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the circumstance that the group controls a certain territory; the ability to provide the group with access to weapons and other military equipment, recruitment and military training; the ability to plan, coordinate and conduct military operations, including troop movement and related logistics; the ability to determine a unified military strategy, and the use of military tactics; and the ability to speak, negotiate and conclude agreements (e.g. a ceasefire or a peace pact) as one.⁴ A state is assumed to have armed forces that meet these organisational requirements.⁵

Determining whether a non-international armed conflict is present is largely a factual assessment that depends on the circumstances of the case.⁶ It must be verified that the accused was aware of the factual circumstances constituting the armed conflict.⁷

Once it has been established that a non-international armed conflict is present, international humanitarian law applies, as stated above, specifically until a peace agreement has been

reached or the overall military operations have ended, throughout the territory of - in this case - Syria.⁸

10.1.2. *The protected status of the victim*

International humanitarian law aims to protect persons who do not (or no longer) take part in hostilities. Common Article 3 GC defines them as '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'.

The accused must have been aware of the factual circumstances forming the basis of the aforementioned (protected) status.⁹

The ICTY formulated this in the *Boškoski and Tarčulovski* case as follows:

[T]he perpetrator of a Common Article 3 crime knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed. ¹⁰

10.1.3. *Nexus*

The criminalisation of war crimes aims to protect against crimes that are (closely) related to war.¹¹ Moreover, war crimes should be distinguished from common crimes and other international crimes, such as genocide and crimes against humanity. Therefore, for a war crime to be proven, there must be a sufficient relation, also known as '*nexus*', between the alleged conduct and the armed conflict.

It follows from the case law of the ICTY that, in the context of *nexus*, it is not required that the conduct took place in the course of the fighting or within the area of actual combat, as long as the crimes are closely related to the hostilities.¹² The conflict must have played a substantial role in the possibility or decision to commit the crime, the manner in which the crime was committed or the purpose for which the crime was committed.¹³ Criminal liability for war crimes is not limited to the warring parties and those in close relation to one of the parties.¹⁴

The *nexus* can be established, inter alia, on the basis of the status of the victim and perpetrator in relation to the Geneva Conventions and the role they had in the hostilities, whether the crime furthers the (end) goal of a military strategy and/or whether the act(s) were committed as part of or in the context of the perpetrator's official duties.¹⁵

The perpetrator must be aware of the factual circumstances that led to the armed conflict. Specifically, to this end, the ICC considers that the accused must be aware of the hostilities between (at least two) entities, that these hostilities have a certain intensity, and that the entities are organised.¹⁶

Finally, the following is important for the assessment of the charges.

- The charged killing

Common Article 3, paragraph 1, opening words and under a, GC - insofar as relevant in this case - prohibits physical assault, in particular, inter alia, the killing, of persons not directly participating in hostilities. The ICC Statute and that of the ICTY also contain a prohibition of this war crime. As a provision of customary international humanitarian law, the prohibition is reflected in *Rule 89* in the database of the International Committee of the Red Cross (ICRC).

The elaboration of the prohibition on killing is reflected in the case law of international tribunals. Killing in common Article 3 GC refers to deliberate killing or causing death and '*reckless*' killing or causing death.¹⁷

The elements of the war crime of 'murder' are outlined in Article 8(2)(c) of the ICC Statute, which also reflects the other requirements discussed above:

1. *The perpetrator killed one or more persons, such person or persons were either hors de combat, or were civilians (...), taking no part in the hostilities.*
2. *The perpetrator was aware of the factual circumstances that established this status,*
3. *The conduct took place in the context of and was associated with an armed conflict not of an international character,*

4. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*¹⁸

- The charged co-perpetration

Finally, when assessing the indictment, the rules relating to participation in criminal offences under common (national) criminal law apply when trying war crimes (Article 91 Sr).

10.2. Establishing the facts

10.2.1. *The execution video*

The incident in question concerns the execution of a Syrian soldier on 10 July 2012 on the banks of the Euphrates River. In the investigation related to it, three videos were found showing the execution of the victim, [victim] (hereinafter also referred to as [victim]). The first video was published on YouTube on 18 July 2012. The translation of the video's title reads Execution of lieutenant Colonel / [victim] by the hands of the Free Army Syria + 18. The Police described that the footage was showing a man walking towards a river with his torso bare and the left half of his face covered in blood. Several shots are then fired, and the wounded man can be seen lying in the water. He appears to have died.¹⁹ The video had the following description: *The elimination of the Shabih Lieutenant Colonel [victim] by the hands of the heroes of Battalion Ghuraba'a Mohassan. This Shabih was shelling the civilians with the artillery in the Dair Al-Zor airport. He received from God what he deserves.*²⁰

On 16 November 2017, the Police found the second video on the Internet. The content of the videos is the same.²¹

A criminal case has been pending in Germany against those accused of the same offence (against the brother of the accused [person involved 1] and against [person involved 2]).²² On 14 July 2020, the Police received another video from the German police showing the execution of Syrian officer [victim] (hereinafter: the execution video). The German police had found the execution video in [person involved 2]'s home.²³ The accused stated that [person involved 2], a media activist, had filmed the execution at his request.²⁴

Based on the description of the images by a reporting officer in a police report, the Court of Appeal finds the following.²⁵

The execution video starts with a fragment in a car showing two men, one of whom is bending forward and appears to have ropes on his back and shoulders. The second man in the picture has been identified by the German police as [co-accused] (hereafter: [co-accused]). The camera then turns, and the hunched man can be seen to have several wounds and bruises on his face and body. On the right side of his face, he has swellings and a closed eye. The reporting officer recognises this man as the victim [victim]. In addition to the person filming, seven other persons are in the car. Several firearms are present in the car. The driver of the car is recognised by the reporting officer as the accused.

The car comes to a stop and the passengers get out. [person involved 2] can be seen with a firearm.

The accused says: *take him, take him there.*

Footage shows the accused holding a revolver in his right hand. The group of men then walk down a path, with the accused walking in front. The following is said:

[co-accused] says: *to hell and the very worst fate.*

An unknown person says: *An officer in Al-Assad's army is being led towards his inevitable fate.*

An unknown person says: *Lieutenant colonel [victim] of division seventeen ... who is now*

[co-accused] whispers: *Commander of an air defence company.*

[person involved 2] says: *Deir ez-Zor, the place Mohassan ten seven two thousand and twelve.*

An unknown person says: *Battalion Ghuraba'a Mohassan.*

[co-accused] whispers: *And Battalion Iz Al-Din Al-Qassam.*

An unknown person says: *and Battalion Iz Al-Din Al-Qassam ... is being led towards his inevitable fate.*

[person involved 2] says: *To his inevitable fate.*

An unknown person says: *To his inevitable fate.*

A little later, [person involved 2] says: *Deir ez-Zor, the place Mohassan 10/7/2012, accomplished with His help (May he be exalted) the capture of the lieutenant-colonel [victim] from the ranks of division seventeen that was bombing civilians.*

The group then arrives at the water and turns off the path. The accused points to a spot by the water and looks in the direction of [victim]. The accused says: *You ... There.* The accused brings his revolver in front of his mouth, as if gesturing to the others to be quiet. The accused then turns to [victim]. [Co-accused] points his firearm at [victim].

The reporting officer relates that it appears as if the accused is giving [co-accused] a sign not to do anything yet, after which [co-accused] stops pointing his firearm at [victim]. The accused then asks [victim] several questions:

The accused says: *The entire Syrian people are complaining to Allah.*

The victim says: *By god, I haven't killed anyone... By god, I haven't killed anyone.*

The accused says: *Your blood ... your blood boy is not worth more ... is not worth more than the blood [turns to [co-accused]]. Your blood is no dearer than the blood of ... the people being murdered.*

[person involved 2] says: *Lieutenant colonel [victim] from the ranks of division seventeen*

The victim says: *I haven't killed anyone.*

The accused says: *You have followed Bashar and made no allowance for this day*

[person involved 2] says: *[victim] by battalion Ghuraba'a Mouhassan and battalion Iz Al-Din Al-Qassam and he will the reward of any traitor anyone who bombed defenceless civilians the reward of anyone who supports Bashar al-Assad.*

The accused says: *Lift up your head ... what what do you think of this destiny... what do you think of it? Bashar ensnared you in it ... because of him you have ended up here ... what do you think of it?*

The accused says: *How much is the last amount you said I will pay, how much?*

The victim says: *Fifteen million*

The accused says: *Fifteen million is not worth a damn to me it is not worth a drop of blood of of of the blood uh of the children killed in in Deir ez Zor or in Homs or in al-Haula or in any place whatsoever.*

An unknown person says: *Forward, in God's name.*

The accused then points his revolver at [victim] and fires the first shot towards [victim]. [victim] bows his head, and water splashes up behind him.

Several shots are then fired. [co-accused] also fires his firearm. After the third shot, [victim] falls to his knees. [victim] rolls over and lands on his back on the water's edge, lying there motionless. Several shots are then fired, including several at [victim's] head.

After the shooting stops, the cameraman provides another verbal report while walking towards the victim's body:

This is the end of every traitor and of every murderer and of every criminal who preys on innocent Syrians.

Another unknown person says: *The execution of the traitor lieutenant-colonel [victim] by Battalion Ghuraba Muhassan and Battalion Iz Al-Din al-Qassam ... this is the reward of any traitor of anyone who attacks civilians and bombs civilian homes.*

After 09:25, the recording is stopped.

At the first instance hearing, the accused stated that he had a revolver with him and that he fired.²⁶

10.2.2. NFI research into the execution video

The Netherlands Forensic Institute (hereinafter: NFI) conducted multidisciplinary research into the execution video. The NFI was asked to analyse the shots and to report, inter alia, from which weapon the various shots originated, whether the shots hit the victim's body and what medical consequences the shots could have had for the victim.²⁷ Based on the NFI report, the Court of Appeal finds the following.

The footage shows several men armed with Kalashnikov variants and one man with a revolver. A total of 26 shots were fired. A revolver was used and at least one Kalashnikov. On the basis of these findings, combined with the description of the images as set out above, the Court of Appeal finds that the accused was the one with the revolver.

The first shot was fired by the accused towards the victim's head. The shot passed the victim. Just before the shot, the victim started turning his head to the left. After the shot, the victim's upper body bended over.

Thereafter, shots 2 up to and including 10 were fired with a Kalashnikov, as considered above in any case by [co-accused]. Some of these shots hit the victim. After the tenth shot, there was a pause of about 4 seconds. The victim's body showed no visible breathing or other movements.

Shots 11 and 12 were fired by the accused. The shots did not hit the victim. Shot 13 originated from a Kalashnikov and hit the victim. Shots 14 and 15 were fired from the Kalashnikov and the revolver and coincide. At least one of the shots hit the victim.

The accused fired shot 16 and hit the victim on the right-hand side of his chest. The medical consequences of the shot cannot be properly assessed. The victim showed no sign of life by then. As for shot 17, also fired by the accused, it is unclear whether it hit the victim's body.

Again a pause of about 4 seconds follows. The accused pulled the trigger of the revolver two more times without firing any shots, presumably because the revolver was empty.

Shots 18 up to and including 26 were fired from a Kalashnikov. Some of the bullets hit the victim's head.

After the shots, the body showed no visible breathing or other kind of movement.

10.3. . **Intermediate assessment**

Based on the foregoing, the Court of Appeal deems it legally and convincingly proven that on 10 July 2012 in Mohassan (Syria), the accused, jointly and in conjunction with one or more others, killed the victim [victim] by firing bullets into the victim's body, as a result of which the victim died.

Based on the images of the incident described in the means of evidence and viewed by the Court of Appeal at the appeal hearing, the Court of Appeal is of the opinion that an execution of the victim took place and was conducted by several persons in unison, with the accused making a substantial contribution by leading this execution and firing several bullets in the direction of the victim.

The accused's resolve to kill the victim and the close and conscious cooperation between the accused and his co-perpetrator(s), in which the accused played a leading role, can be deduced without a doubt from the external appearance of the actions of the accused and his co-perpetrator(s), as corroborated by the means of evidence and to be seen in the execution video described above and watched by the Court of Appeal during the appeal hearing. The Court of Appeal has taken the following in particular into account.

The accused asked [person involved 2] beforehand to film the execution, which he did. It can be deduced from this that the accused, knowing in advance that the victim would be executed, was apparently in a position to determine that, and by whom, this was to be filmed.

The accused had driven the car in which the victim was taken to the execution site by several people. The footage does not show him receiving any instructions from the other persons present while doing so. On arriving at the scene, the accused said, Take him, take him there. This instruction was followed by the other persons present. On arriving at the riverbank, the accused indicated the place where the victim should stand. This too was acted upon. He gestured toward the others to be quiet and addressed the victim. Before the accused - the only one from the group - started asking him questions, he gestured toward [co-accused], who responded by no longer pointing his weapon at the victim at that moment.

From the above, it can be deduced that the accused gave instructions that were followed by the others present, and that the accused was apparently in a position to address the victim.

At the place of execution, the accused, while he and at least one co-perpetrator were facing the victim with firearms in their hands, told the victim that his blood was not worth more than the blood of the people being murdered and then asked the victim what he thought of his fate. From these words, viewed in context and in the context in which they were uttered, it can be inferred that, at that moment, there was no doubt in the accused's mind that the victim would be executed. The accused himself has acknowledged this.

The accused also told the victim that the money that the victim had offered (the Court of Appeal understands: to be released), namely fifteen million, was not worth a damn to him. From these words of the accused, it can be inferred that the accused had no intention of releasing the victim in exchange for payment.

Finally, it was the accused who then fired the first shot toward the victim, thus initiating the execution. Immediately thereafter, the accused and one or more co-perpetrator(s) fired a total of 25 more bullets toward the victim, as a result of which the victim died. In the Court of Appeal's opinion, this course of events, viewed in conjunction with the foregoing, confirms the accused's leading role in this execution, the accused's premeditation to kill the victim and the close and conscious cooperation with his co-perpetrator(s).

The defence's position, briefly stated, that the accused had no intention to cause the victim's death and hoped until the very last moment that this could be averted, cannot, in the Court of Appeal's view, be reconciled with the foregoing and is therefore dismissed. Even if it is assumed that the accused had a good reason to keep the victim alive and that the idea to kill the victim came from someone else, as argued by the defence in this regard, it is not possible, on the basis of the foregoing, to conclude that the accused apparently still chose to direct and actively participate in the execution of the victim.

The fact that some bullets fired by the accused missed the victim would not alter the foregoing, not even if this had been intentional, as argued by the defence. By firing the first shot, the accused as it were giving the starting signal for (one or more) others to shoot, whether he hit the target or not. It cannot either detract the impossibility from the foregoing to establish whether the bullet(s) fired by the accused that did hit the victim contributed to the victim's death. The defence arguments based on this are dismissed.

10.4. Killing as a war crime

In the previous paragraph, the Court of Appeal explained that the accused, together with one or more others, killed the victim by shooting bullets into the victim's body, as a result of which the victim died.

This actions of the accused falls under the prohibition of killing in the meaning given to it by customary international humanitarian law, the case law of international tribunals and the intentional killing referred to in common Article 3 GC.

Based on the aforementioned legal framework, the Court of Appeal must further answer the following questions when assessing the charge under Count 1:

1. At the time of the charge under Count 1, was there a non-international armed conflict within Syrian territory and did the perpetrator have knowledge of the existence of this armed conflict?
2. Did the victim belong to one of the categories of protected persons referred to in Article 3 GC and, if so, did the accused know of the facts and circumstances underlying the victim's protected status?
3. Is there a nexus between the accused's alleged conduct and the armed conflict?

10.4.1. *Non-international armed conflict in Syria*

The Court of Appeal has already established in previous rulings that there was a non-international armed conflict in Syria between the Syrian government army and various organised armed groups from 2012 - and therefore also during the period to which the indictment pertains.²⁸

Since this has not been disputed by the parties, the Court of Appeal will settle for references to earlier rulings as to the existence of the non-international armed conflict as such.

The Court of Appeal is of the opinion that the accused's group, Ghuraba'a Mohassan (also referred to hereinafter as GM), was also involved in the non-international armed conflict as a warring party. The accused's statements show that GM was formed in early 2012. Most of its members were deserters from Bashar al-Assad's government army. A total of 9 to 10 people had joined the group. All those who belonged to GM had weapons, and they were skilled in carrying out bombing operations. The group used an empty school building as their base.²⁹ The accused characterised GM as a combat group of deserters.³⁰ They worked closely with the military council that commanded the Free Syrian Army brigades in the region.³¹ There was a hierarchy within GM.³² GM had the capability to plan and execute military operations, either jointly or with the help of one or more other warring parties.³³ The Court of Appeal will return to two of those operations below when discussing the offence charged under Count 2. Thus, in the opinion of the Court of Appeal, the organisational requirement has been met.

Syria is a signatory to the Geneva Conventions. Since there was a non-international armed conflict in Syrian territory during the period to which the charges pertain, the Court of Appeal rules that international humanitarian law applies.

The Court of Appeal is furthermore of the opinion that the accused had knowledge of the armed conflict in Syria and knew of the intensity of the conflict. He stated at the first instance hearing that Assad had given orders permitting anything, including rape, theft and killings. He stated that he had witnessed this with his own eyes, that it was a bloodbath and that he himself and his

son's life had been threatened by regime soldiers.³⁴

10.4.2. *Victim's protected status*

The following information has emerged about the execution victim:

[victim]

Rank: Lieutenant colonel

Place and date of birth: [place and date of birth]

Family status: Married

Martyr in: Deir ez-Zor - Mohassan - 10/7/2012

This information was found by the police on an Arabic-language website that praises 'martyrs' affiliated with the regime.³⁵ From this, it can be inferred that he was an officer in the Syrian government army.

The description of the execution video shows that several people named the victim as a soldier from Bashar al-Assad's government army. At the first instance hearing, the accused stated that the victim had been captured, and that [co-accused] had told him everything about this man and what he had on his conscience.³⁶

The Court of Appeal therefore finds that the accused knew at the time of the execution that the victim was a soldier from Bashar al-Assad's government army who had been placed hors de combat due to captivity, these being circumstances that make the victim protected by international humanitarian law.

10.4.3. *Nexus*

The execution of the victim took place in Syria, near Mohassan. The accused belonged to a combat group actively participating in the non-international armed conflict. The victim was a captured soldier who belonged to Bashar al-Assad's government army and held a certain rank there (lieutenant colonel). In the execution video, the victim's military position is mentioned several times, the accused says that the victim's blood is not worth more than the blood of the people being killed, that the victim followed Bashar and had not taken this day into account, and that the money offered by the victim was not worth a hoot compared to the children killed in Deir ez-Zor, or in Homs or in al-Haula or any other place.

Other members of the group involved in the execution expressed after the execution - in brief - that this is the fate of every traitor and murderer who targets innocent Syrians, and that execution is the reward of every traitor attacking civilians and bombing civilian homes.

It is clear from these utterances that the motive for killing the victim lies in his affiliation with the opponent, the government of Bashar al-Assad, and explicit reference is made to casualties inflicted as a result of the non-international armed conflict.

The above shows the close connection between the non-international armed conflict and the accused's actions.

10.5. **Conclusion**

All requirements for a war crime in a non-international armed conflict have been met.

The Court of Appeal finds lawfully and convincingly proven that the accused committed the offence as charged under Count 1.

11 Further evidentiary considerations regarding the charges under Count 2

The accused has been charged under Count 2 - in brief - with having participated as a leader and/or founder and/or administrator in an organisation with a terrorist intent, namely al-Qaida and/or Jabhat al-Nusra and/or Ghuraba'a Mohassan.

11.1. Legal framework

11.1.1. Terrorist intent

Under Article 83a Sr, terrorist intent means the intent to instil severe fear in the population or part of the population of a country, or to unlawfully force a government or international organisation to do, not do or tolerate something, or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The offence under Article 140a Sr is not about the actual commission of terrorist offences but about the 'intent' to commit them. For that intent, the organisation's closest objective may also suffice. The commission of terrorist crimes is not required to be the organisation's main *raison d'être*.

For a conviction under that provision, mere participation in an organisation with the terrorist intent to commit offences (of any nature) is not sufficient. According to Article 140a, paragraph 1, Sr, it must be an organisation that has the intent of committing terrorist offences. The intent of the organisation - an alliance in varying composition or not - must therefore be aimed at committing (specific) offences listed in Article 83 Sr, provided that they are committed with terrorist intent as described in Article 83a Sr.

Evidence of this intent can be derived, *inter alia*, from offences already committed in the context of the organisation, from the more enduring or structured nature of the collaboration - as may be evidenced by the internal repartition of tasks or coordination of activities of participants within the organisation with a view to achieving the organisation's common goal - and, more generally, from the planned nature or systematicity of the activities of participants within the organisation carried out with this goal in mind.

11.1.2. Participation

Participation in a terrorist organisation as referred to in Article 140a Sr can only be deemed to exist if the accused belongs to the alliance and has a share in, or supports, conduct that is aimed at or directly related to the fulfilment of the intent referred to in that article.

Such participation may consist of the (co-)perpetration of any crime, but also of the performance of services or activities that, while not necessarily punishable in themselves, nevertheless contribute to the fulfilment of the organisation's intent. It is sufficient for the person involved to generally - in the sense of unconditional intent - know that the organisation is intent on committing terrorist offences. It is not required for the person involved to have any form of intent with regard to the concrete offences envisaged by the terrorist organisation. The person involved is not required either to have participated or to participate in the commission of offences that have been or are committed by (members of) the organisation.

11.2. The organisation Ghuraba'a Mohassan

Already above when discussing the offence charged under Count 1, the Court of Appeal ruled that GM, as an armed group, was involved in the non-international armed conflict and that the organisational requirement for that offence had thus been met. Based on the same facts, the Court of Appeal found that GM was an alliance with a certain durability and structure among its members, making it an organisation as referred to in Article 140a Sr.

11.3. Ghuraba'a Mohassan's intent

11.3.1. Introduction

It is undisputed that GM was a combat group and was opposed the regime of Bashar al-Assad. This is evident, first of all, from GM's actions, to be discussed below, which were directed against supporters of Bashar al-Assad. In addition, the aforementioned article in *The Guardian* describes the accused as having become disillusioned by the inability of the rebel army to hit the regime. The attack on the carpet factory, to be discussed below, resulted in the army leaving, leading the accused to consider Mohassan liberated.

In assessing GM's intent, the Court of Appeal particularly has considered two offences committed by GM: the attack on the carpet factory and the execution of [victim]. The Court of Appeal discusses the two events consecutively.

11.3.2. The attack on the carpet factory

On 6 June 2012, a bomb attack took place on a (former) carpet factory in Mohassan, where a Syrian government army garrison was located at the time. The police found a video of this attack, on the Internet. The video shows an explosion using a tractor with a trailer. The description accompanying the video reads: The blowing up of two positions of the tyrant's army. Result: both positions were blown up, the tyrants retreated. In the video with a logo of Jabhat al-Nusra's media body, the attack is claimed by Jabhat al-Nusra. Text written on a wall shown in the video reads: Jabhat al-Nusra. A little further on, another text on the wall reads: Ghuraba'a Mohassan Company.³⁷

As a result of this attack, the Syrian army withdrew from this site.³⁸

On 30 July 2012, an article appeared in the British newspaper *The Guardian* entitled *Al-Qaida turns tide for rebels in battle for eastern Syria*. The journalist Ghaith Abdul-Ahad, known to the expert Dr G. Steinberg as a valid source³⁹, met the accused in Deir ez-Zor and wrote about it. To this journalist, the accused stated - in brief - that his group, calling themselves, according to the journalist, the Ghuraba'a, carried out this attack with the help of a group of Muslim fighters, who had called in a (bomb) expert and, after two days of work, delivered a truck loaded with two tonnes of explosives to the accused as a token of friendship, that two men brought the truck close to the gate of the base and that the load was detonated remotely. The Guardian article reports that the accused told the journalist, The car bomb cost us 100,000 Syrian pounds and there were less than 10 people involved in the operation, and Within two days of the bomb expert's arrival, we had it ready. We did not waste a single bullet. The next day, the army left and Mohassan was freed, according to the article.⁴⁰

That GM (partly) carried out the attack on the carpet factory with the help of others can be deduced from what the accused stated to the journalist of *The Guardian* in 2012, in connection with the described video of this attack, in which after the attack the name of GM can be seen on the wall of the carpet factory. Jabhat al-Nusra's claim of the attack through the media body does not contradict this, as the accused also stated in the newspaper article that that organisation had assisted them with the attack.

The defence has argued - in brief - that the accused lied to *The Guardian* journalist about the circumstances of this attack in order to please the leaders of Jabhat al-Nusra. In reality, however, the accused was not involved in the attack; at the time, six members of GM had switched to Jabhat al-Nusra without the accused's knowledge, and two of them participated in this attack without his knowledge. The accused only learnt of this switch and the circumstances of the attack after the attack, according to the defence.

This account, however, has become implausible. The Court of Appeal has taken into account the fact that the accused was staying in Mohassan at the time of the attack, that he could be regarded as the leader of GM, as considered above with respect to the charges under Count 1, that according to his statement members of GM had cooperated in this attack and that after the attack the name of GM could also be seen on the wall of the carpet factory. In view of this, the Court of Appeal finds it implausible that all this took place without the accused's knowledge and consent. The Court of Appeal does not find it plausible either that the accused stated to a journalist about involvement in an attack if this was not the case. The Court of Appeal does not find the aforementioned reason for this credible. In order to merely redress a misunderstanding between the accused and Jabhat al-Nusra - the accused allegedly called the bombing of the carpet factory terrorist and therefore wanted to grovel (see the minutes of the hearing at first instance of 15 June 2021, p. 16) - less cumbersome avenues appear to be available than organising, in a roundabout way, an extensive interview with a journalist of one of the most prominent British newspapers which, according to the accused, was mainly read by Europeans. The fact that the accused claims not to have checked the Guardian article before publication is also inconsistent with his assertion that he lied to the journalist to gain Jabhat al Nusra's approval. It would, in fact, have made sense to read the article in draft form and check whether it reflected his positive statements about Jabhat al-Nusra, in accordance with the intended goal that he had in mind. The Court of Appeal assumes that the accused truthfully stated this to the journalist.

The Court of Appeal therefore considers it proven that GM was involved in organising and carrying out the attack on the carpet factory. The video shows that the goal of the attack was to scare away Assad supporters who were in the factory. That goal was achieved: the army left the factory, and the accused deemed Mohassan liberated.

11.3.3. *The execution of [victim]*

In paragraph 10.2, the Court of Appeal has already established the facts regarding the execution of [victim]. For the assessment of the charge under Count 2, the following findings, some of which the Court of Appeal has already made when discussing the charge under Count 1, are particularly significant:

- The accused had a leading role in the execution of [victim];
- He asked [person involved 2], a media activist, to film the execution;
- The name Ghuraba'a Mohassan was mentioned several times in the video as (co-)responsible for the execution;
- It was also mentioned several times that the victim belonged to Assad's government army;
- The accused said that those who followed Bashar [al-Assad] had not anticipated this day, and [person involved 2] said that the victim [will get] the reward of anyone who supports Bashar al-Assad;
- The accused asked the victim what he thought about Bashar [al-Assad] entangling him in it and that the victim had ended up here because of him;
- The words spoken by others after the shooting about the fate of every traitor and murderer who targets innocent Syrians, and the reward of every traitor who attacks civilians and bombs civilian homes.

From the above, the Court of Appeal concludes that the accused wanted to give publicity to the execution of the victim by asking media activist [person involved 2] to film the execution. The

Court of Appeal finds the statement of the accused that he wanted to have the execution on film as evidence against [co-accused] implausible, all the more so since the Court of Appeal has already determined that the accused intentionally killed the victim together with him and played a leading role in this himself.

In the opinion of the Court of Appeal, the course of events described does not reasonably allow for any other explanation than that the video of the execution was made to convey a message to the future viewer of the video and that, with that in mind, the aforementioned texts were spoken during the execution. The Court of Appeal is of the opinion that the video conveys a clear message: this soldier supported Assad and had to pay for it with his life and anyone who supports Assad can expect to end up the same way. The accused apparently shared that intention. Otherwise, it would be incomprehensible as to why, knowing that the scene was being filmed (also by others than [person involved 2]), he uttered texts fitting that message.

GM's name was mentioned several times in the video as (co-)responsible for the execution and was thus presented as a (co-)conveyor of the message in question.

In the Court of Appeal's opinion, this message shows that GM's goal with the video was to instil severe fear in those who supported Assad, who were part of the population of Syria.

11.3.4. *Conclusion regarding Ghuraba'a Mohassan's terrorist intent*

The Court of Appeal is of the opinion that the attack on the carpet factory on 6 June 2012, which must have required several days of preparation, and the execution of [victim] on 10 July 2012, show that GM's immediate goal in the period from 1 June 2012 to 31 July 2012 was to unlawfully force the government to do something, namely to withdraw the army from Mohassan, and to instil fear in part of the population of Syria, namely the part that supported Assad, respectively.

The Court of Appeal concludes that GM had terrorist intent.

11.4. **The role of the accused within Ghuraba'a Mohassan**

The accused has denied having been the leader of GM. He has stated that the group had no leader and that decisions were taken in consultation with all members.

The Court of Appeal rejects the accused's statement on this point. The accused stated to the police that given his age and the fact that he was the first to desert from Assad's army, he commanded more respect from GM members than others.⁴¹

In the aforementioned article in *The Guardian*, the accused is portrayed as the leader of GM. For instance, the other members of GM were referred to as 'the accused's men' and the accused acted as the spokesperson of the group.⁴² Moreover, witness [witness 1] - head of the Military Council of Deir ez-zor - also stated that the accused was the leader of GM. According to witness [witness 2], the accused was the founder of GM.⁴³

Furthermore, the execution video shows that the accused had a leading role in the execution of [victim], as already discussed above when discussing the charge under Count 1.

Therefore, the Court of Appeal is of the opinion that the accused was the leader of GM.

11.5. **Conclusion**

The Court of Appeal concludes that in the period from 1 June 2012 up to and including 31 July 2012, the accused participated as a leader in GM, the latter being an organisation as referred to in Article 140a Sr, and had knowledge that GM was intent on committing the aforementioned terrorist offences,

which is also evidenced by his aforementioned participation in those offences.

The Court of Appeal finds lawfully and convincingly proven that the accused committed the charges under Count 2.

11.6. Partial acquittal for participation in

Jabhat al-Nusra

According to the indictment, the accused is alleged to have been part of terrorist organisation Jabhat al-Nusra. The Public Prosecution Service argued at the appeal hearing that there are indications that the accused became part of Jabhat al-Nusra through GM and that he functioned as an entity within Jabhat al-Nusra.

11.6.1. The aim of Jabhat al-Nusra

The Hague Court of Appeal has already ruled in previous judgments that Jabhat al-Nusra was an organisation with terrorist intent from January 2012.⁴⁴ However, that is not at issue in the present case.

Regarding that intent, expert Dr J. Jolen writes the following (rendered briefly and succinctly) in her knowledge appendix attached to the file:

It was Jabhat al-Nusra's intent not only to overthrow the Assad regime but also to kill Assad's soldiers and the Shabiha (a term for pro-regime militias). Jabhat al-Nusra also aimed to establish a strict Islamic state within Syrian territory in which the version of Sharia that Jabhat al-Nusra adhered to would be implemented.

Jabhat al-Nusra had an advisory council that headed the organisation. The advisory council set strategic policy and religious rules. Jabhat al-Nusra's military wing consisted of commando forces. Jabhat al-Nusra also had a police force, consisting of an Islamic police force that, *inter alia*, carried out corporal punishment and executions imposed by Sharia courts.

People who wanted to join Jabhat al-Nusra were screened extensively. They had to be able to demonstrate their religious devotion and military skills. They were trained by Jabhat al-Nusra according to a religious and military programme.

In addition to military operations against Assad's regime, Jabhat al-Nusra carried out operations on the Alawite and Shia civilian population. In the first half of 2012, Jabhat al-Nusra claimed several attacks in Syria, including suicide and bomb attacks.

The Hague Court of Appeal previously ruled in several cases that Jabhat al-Nusra aimed to destroy Syria's fundamental political structure and to instil severe fear in the population and that participation in the armed struggle in Syria on the side of Jabhat al-Nusra entails committing terrorist crimes.⁴⁵ Combat groups such as Jabhat al-Nusra achieve their goals partly by sowing death and destruction among anyone who does not share their extreme fundamentalist beliefs.⁴⁶

11.6.2. Assessment

The Court of Appeal is of the opinion that it has not been legally and convincingly proven that the accused and/or GM have participated in the terrorist organisation Jabhat al-Nusra. As explained above, this is only the case if the accused belongs to the alliance and has a share in, or supports, conduct that is aimed at or directly related to the fulfilment of the intent referred to in that article.

The evidence discussed at length above, suggests that GM operated and functioned as an independent entity. GM admittedly received assistance from Jabhat al-Nusra in the attack on the

carpet factory on 6 June 2012, but that mere fact is insufficient to speak of participation in that organisation as referred to above.

The accused shall therefore be acquitted of participation in Jabhat al-Nusra.

12 Declaration of charges proven

The Court of Appeal deems lawfully and convincingly proven that the accused committed the offences as charged under Counts 1 and 2, on the understanding that:

1.

~~Killing as a war crime~~

on 10 July 2012, ~~or at least in or around the period from 1 July 2012 up to and including 18 July 2012,~~
in or near Mohassan ~~and/or Deir ez-Zor,~~ or at least somewhere in Syria,

~~either alone or~~ jointly and in conjunction with (an) other person(s) violating:

- Common Article 3 of the Geneva Conventions and/or
- customary international humanitarian law,

in that he, the accused, ~~and/or~~ one or more of his co-perpetrator(s) in the event of a non-international armed conflict within Syrian territory,

towards a person who did not (or no longer) participate(d) directly in the hostilities, namely ~~a person of the armed forces who had laid down their weapons, and/or~~ a person who had been placed hors de combat by sickness, wounds, detention, ~~or any other cause,~~ namely [victim],

committed an attack on life ~~and/or physically assaulted (and/or) (in particular) killed~~ the aforementioned person,

which attack on life ~~and/or physical assault and/or~~ killing consisted of the fact that he, the accused, ~~and/or~~ one or more of his co-perpetrator(s) shot (a) bullet(s) into the body of the aforementioned person several times, ~~or at least once,~~ with (a) firearm(s), as a result of which the aforementioned person died;

2.

~~Participation in an organisation whose intent it is to commit terrorist offences (as a leader)~~

in ~~or around~~ the period from 1 June 2012 up to and including ~~31 July 2012 31 October 2013~~ in or near Mohassan ~~and/or Deir ez-Zor,~~ or at least somewhere in Syria,

either alone or jointly and in conjunction with (an) other person(s), participated in ~~an~~ the organisation such as Al-Qaeda and/or Jabhat al-Nusra and/or Ghuraba'a Mohassan, or at least a Jihadist militant group affiliated to the aforementioned organisation(s), or at least an organisation advocating the armed jihad struggle, an organisation intent on committing terrorist offences, namely

- A. arson and/or causing an explosion, this constituting a general danger to property and/or danger of grievous bodily harm and/or danger to the life of another person, and/or this act resulting in someone's death, ~~(within the meaning of Article 157 Criminal Code)~~ (to be) committed with terrorist intent ~~(within the meaning of Article 176a Criminal Code)~~ and/or
- B. manslaughter (to be) committed with terrorist intent ~~(within the meaning of Article 288a of the Criminal Code)~~ and/or
- C. murder (to be) committed with terrorist intent ~~(within the meaning of Article 289 in conjunction with Article 83 of the Criminal Code)~~ and/or
- D. conspiracy and/or deliberate preparation of and/or abetment to commit the aforementioned offences ~~(within the meaning of Article(s) 176a and/or 289a and/or 96, paragraph 2)~~ and/or
- E. possession of one or more weapons and/or ammunition in categories II and/or III (within the meaning of Article 26, paragraph 1 of the Weapons and Ammunition Act) (to be) committed with terrorist intent and/or with the intent to prepare or facilitate a terrorist offence ~~(within the meaning of Article 55, paragraph 1 and/or paragraph 5 of the Weapons and Ammunition Act)~~, while he, the accused, was a leader and/or founder and/or executive.

Any additional charges or charges formulated otherwise have not been proven. The accused should be acquitted of these.

Insofar as the indictment contains linguistic and/or writing errors, these have been corrected in the declaration of charges proven. As appears from that which was discussed during the hearing, the defence of the accused was not harmed as a result.

13 Criminal nature of the proven charges

The charges proven under Count 1 constitute:

co-perpetration in the event of a non-international armed conflict, in committing the offence of violating Common Article 3 of the Geneva Conventions, consisting of an attempt on life, in particular the killing of persons placed hors de combat by detention.

The charges proven under Count 2 constitute:

participating as a leader in an organisation whose intent is to commit terrorist offences.

14 Criminal liability of the accused

No circumstance has become plausible that might exclude the criminal liability of the accused. The accused is therefore criminally liable.

15 Grounds for the sentence

The Court of Appeal has determined the punishment to be imposed on the basis of the severity of the proven offences and the circumstances under which they were committed, and on the basis of the personality and personal circumstances of the accused, as these have appeared from the Court of Appeal hearing.

In so doing, the Court of Appeal has particularly taken the following into account.

15.1. Severity of the facts and the circumstances under which they were committed

On 10 July 2012, in Syria, in the context of a non-international armed conflict, the accused, together with one or more other persons, killed a captured soldier thus placed hors de combat, namely [victim] (Count 1). In so doing, the accused committed a severe violation of international humanitarian law, which assumes that (also) in an armed conflict persons who do not (or no longer) participate in that armed conflict deserve protection. The accused and his co-perpetrator(s) have violated this generally accepted principle of law in the most far-reaching manner, by killing the victim, who had already been placed hors de combat.

The wife and three children of the victim were deprived of their husband and father, respectively, by the accused and his co-perpetrator(s). This also caused them a great deal of suffering, as can also be concluded from what was put forward on behalf of the victims during the appeal hearing. The Court of Appeal holds the accused seriously accountable for all this.

In sentencing terms, the Court of Appeal considers the gruesome and degrading manner in which this crime was committed. The available images of the incident show that the defenceless and weakened victim, handcuffed and with clear signs of abuse, was taken by a group of armed individuals, including the accused, to the bank of a river, where the victim was humiliated, informed of his impending fate and then executed by a hail of bullets. For the victim, these last moments of his life must have been particularly frightening and painful.

The entire incident was filmed by several individuals and one or more videos of the execution circulated on the Internet over an extended period of time.

Moreover, the Court of Appeal has also factored in the aggravating circumstance that the accused led this cruel execution.

In addition, during the period of 1 June 2012 up to and including 31 July 2012 in Syria the accused was guilty of participating as a leader in a terrorist organisation, namely Ghuraba'a Mohassan.

This local organisation of insurgents against the Syrian regime led by the accused proceeded to commit terrorist crimes during the proven period and can be classified as a terrorist organisation during that period. On 6 June 2012, GM carried out a bomb attack with the help of Jabhat al-Nusra, forcing soldiers of the Syrian regime to withdraw from the location in question. GM is also (co-)responsible for the execution on 10 July 2012, proven under Count 1, which was given a terrorist character in that it was filmed, provided with the explicit warning that this would be the fate of any supporter of the Syrian regime and then distributed via the Internet.

Participating in a terrorist organisation is a severe offence. The fact that the accused acted as the leader of this organisation makes the offence even more severe.

In the Court of Appeal's opinion, the severity of both offences justifies in principle the imposition of a long-term prison sentence.

In determining the punishment, the Court of Appeal has taken into account the relatively limited period of perpetration with regard to the proven charges under Count 2. In determining the punishment, the Court of Appeal has also taken into account the fact that - unlike the Advocates General - it does not find it proven that the accused was a member of the terrorist organisation(s) Jabhat al-Nusra and/or Al-Qaida.

15.2. The personality and the personal circumstances of the accused

The Court of Appeal has taken note of an extract pertaining to the accused from the Judicial Records of 19 September 2023, revealing that the accused has not been previously convicted in the Netherlands. The Court of Appeal has not found any evidence of previous convictions abroad either.

The Court of Appeal has taken into account the circumstance that the accused did not seek out the conflicts in Syria but was confronted with them as a resident of Syria.

Moreover, in determining the sentence to be imposed, the Court of Appeal has taken into account the real possibility that the accused, whose residence permit has been revoked and against whom an order to leave the country has been issued, will not be able to participate in a prison programme in due course and will not be able to make use of conditional release, as a result of his alien status.

In principle - all-in-all - the Court of Appeal considers a wholly unconditional prison sentence of twenty-four years to be appropriate and warranted.

Finally, the Court of Appeal should take into account the fact that in the present case, the reasonable time limit for trial of criminal cases referred to in Article 6 of the European Convention on Human Rights and Fundamental Freedoms has been exceeded.

At first instance, the accused was taken into custody on 21 May 2019 and judgment was pronounced on 16 July 2021, no earlier than nearly twenty-six months later.

On 21 July 2021, an appeal was lodged by the Public Prosecution Service, and on 29 July 2021 on behalf of the accused. The file was received by the Court of Appeal on 29 July 2021. The Court of Appeal did not rule until 14 November 2023, more than twenty-seven months later, while the accused was in pre-trial detention. In the foregoing, the Court of Appeal sees reason, in agreement with the opinion of the Advocates General, to apply a six-month reduction for exceeding the reasonable time limit.

The Court of Appeal is - all-in-all - of the opinion that a wholly unconditional prison sentence of twenty-three years and six months is an appropriate and warranted response.

Enforcement of the imposed prison sentence will take place entirely within the prison facility, until such time as the convicted person qualifies for participation in a prison programme, as referred to in Article 4 Prison Principles Act, or the arrangement of conditional release, as referred to in Article 6:2:10 Code of Criminal Procedure, comes into play.

16 Claim for imposition of the compensation measure

Mrs [widow] and her three children [child 1], [child 2] and [child 3], the next of kin of the victim of the proven charges under Count 1 (hereinafter also referred to as: the next of kin), lodged a claim on 29 September 2023 for compensation of 20,000.00 per person in respect of non-material damage, as well as compensation for the costs of the work of the International Legal Institute of 2,809.62, thus totalling 82,809.62, plus statutory interest.

The Court of Appeal declared the next of kin inadmissible in their claim at the hearing of 3 October 2023 pursuant to Article 333 Sv, as they had not joined the proceedings at first instance but only on appeal, which they were not entitled to do under Article 421, first paragraph, Sv. The Court of Appeal observes that the fact that these persons only became aware of these criminal proceedings and of the possibility of joining as an aggrieved party after the end of the proceedings at first instance cannot affect this.

In their closing argument, the Advocates General requested pursuant to the provisions of Article 36f Sr, that a measure be imposed on the accused by which he is to pay compensation and to rule that the accused be required to pay a total amount of 82,809.62 for the benefit of the aforementioned next of kin, with reference to the arguments presented on behalf of the next of kin regarding the damage.

The defence put forward counterarguments, contending in brief, inter alia, that it cannot be established at present that the accused is liable towards the persons in question for the alleged damage under applicable Syrian law.

The Court of Appeal considers as follows.

Pursuant to Article 36f, second paragraph, Sr, the compensation measure can only be imposed if and insofar as it can be established that the accused is liable towards the victim under civil law for the damage caused by the criminal offence.

Given the location where the relevant offence proven under Count 1 was committed, it can be assumed, as has also been established in confesso, that questions concerning the possible civil liability of the accused towards the next of kin should be answered according to Syrian civil law.

In support of their position that their claim is admissible under Syrian civil law, the next of kin submitted an opinion from the International Legal Institute of 22 September 2023, entitled 'Quick Scan'.

In view of the above, the defence's substantive defence and having heard what all participants in the trial brought forward in this respect during the hearing, the Court of Appeal is of the opinion that in these criminal proceedings the contents of the relevant parts of Syrian civil law have become insufficiently clear to be able to establish in court whether and to what extent the accused is liable towards the next of kin under civil law for the damage caused by the proven criminal offence under Count 1. Furthermore, the

Court of Appeal is of the opinion, also in view of the late stage in the proceedings at which this subject was brought up, that launching an ex officio further investigation into this matter would place too heavy a burden on the criminal proceedings and has decided not to do so.

Based on the foregoing, the Court of Appeal sees no reason at present to impose the compensation measure requested by the Advocates General.

17 Applicable legal provisions

The Court of Appeal has taken into account Articles 47, 57 and 140a of the Criminal Code and Article 6 of the International Crimes Act, as they apply or applied in law.

18 JUDGMENT

The Court of Appeal:

Declares the accused inadmissible in the appeal insofar as directed against the decision on the charges under Count 2.

Sets aside the decision appealed against and pronounces judgment anew:

Declares, as considered above, proven that the accused committed the charges under Counts 1 and 2.

Declares that any additional charges or charges formulated otherwise than those proven above have not been proven and acquits the accused thereof.

Declares the charges proven under Counts 1 and 2 punishable, qualifies this as stated above and declares the accused criminally liable.

Sentences the accused to a term of **imprisonment of 23 (twenty-three) years and 6 (six) months.**

Orders that the time spent by the accused in any form of pre-trial detention within the meaning of Article 27, paragraph 1 of the Criminal Code before the enforcement of this judgment, shall be deducted when implementing the prison sentence imposed, insofar as that time has not already been deducted from another sentence.

This judgment was delivered by D.M. Thierry LLM,
L.C. van Walree LLM and M.A.J. van de Kar LLM, in the presence of P.M. Smit LLM, Court Clerk.

It was pronounced at the public hearing of the Court of Appeal on 14 November 2023.

The Court Clerk is unable to sign this judgment.

Endnotes

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- ¹ See Parliamentary Papers II, 2001-2002, 28 337, No 3, Explanatory Memorandum, p. 5.
 - ² ICTY, Prosecutor v. Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 70; ICTY, Prosecutor v. Limaj et al., Trial Chamber, Judgement, IT-03-66-T, 30 November 2005, para. 170.
 - ³ ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 49.
 - ⁴ ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 60.
 - ⁵ ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 60.
 - ⁶ See also Parliamentary Papers II 2002-2003, 28 337, Note following the report, No 6, p. 7.
 - ⁷ ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), No 6.
 - ⁸ ICC Ntaganda case, Trial Chamber: Judgment (8 July 2019), paragraphs 732 and 733.
 - ⁹ ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), No 4; United Nations Preparatory Commission for the International Criminal Court (PrepCom), Proceedings of the Preparatory Commission at Its Second Session, 26 July - 13 August 1999, PCNICC/1999/L.4/Rev.1, p. 69. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge: ICRC & Cambridge University Press, 2003, p. 21.
 - ¹⁰ ICTY, Prosecutor v. Boškoski and Tarčulovski, Appeals Chamber, Judgement, IT-04-82-A, 19 May 2010, para. 66. See also ICTY, Prosecutor v. Karadžić, Trial Chamber, Public Redacted Version of Judgement Issued on 24 March 2016, IT-95-5/18-T, 24 March 2016, para. 444.
 - ¹¹ See also The Hague Court of Appeal 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.
 - ¹² ICTY, Prosecutor v. Tadić a/k/a Dule, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph. 70.
 - ¹³ ICTY, Prosecutor v. Kunarac, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraphs 57 and 58.
 - ¹⁴ ICTR, Prosecutor v. Akayesu, Appeals Chamber Judgement, ICTR 96-4-A, 1 June 2001, paragraph 444.
 - ¹⁵ ICC Ntaganda case, Trial Chamber: Judgment (8 July 2019), paragraph 732.
 - ¹⁶ ICC Ntaganda case, Trial Chamber: Judgment (8 July 2019), paragraph 733; ICTY, Prosecutor v. Kunarac, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 59.
 - ¹⁷ ICRC, Commentary on Common Article 3, in 'Commentary on the First Geneva Convention', Cambridge: Cambridge University Press 2016, p. 205 and p. 207.
 - ¹⁸ ICC, Elements of crimes, 2013, Article 8(2)(c).
 - ¹⁹ Exhibit 1: An official report of findings regarding YouTube film called Execution of lieutenant Colonel / [victim] by the hands of the Free Army Syria+ 18 of 2 February 2018. Folder G: Internet findings, pp. 5 - 13.
 - ²⁰ Exhibit 2: An official report of findings regarding OSINT querying TIM after start of investigation of 22 January 2018. Folder G: Internet findings, pp. 169 - 208.
 - ²¹ Exhibit 3: An official report of findings regarding LiveLeak video called Execution of Lieutenant Colonel/[victim] by the hand of the Free Army Syria of 22 January 2018. Folder G: Internet findings, pp. 169 - 208.
 - ²² Judgment of Oberlandesgericht Düsseldorf of 26 August 2021
 - ²³ Exhibit 4: An official report of findings regarding receipt of German official report relating to the entire execution video of 18 August 2020. Folder J: Supplementary submission, pp. 17 - 360.
 - ²⁴ Exhibit 7: An official report of interrogation of the accused of 16 October 2019. Folder B: Personal file, pp. 374 - 390 and Exhibit 9: The accuseds statement made at the first instance hearing of 15 and 17 June 2021.
 - ²⁵ Exhibit 5: An official report of findings regarding full execution film of 18 August 2020. Folder J: Supplementary submission, pp. 398 - 528.

- ²⁶ Exhibit 9: The accused's statement made at the first instance hearing of 15 and 17 June 2021.
- ²⁷ Exhibit 6: An expert report, namely a report from the Netherlands Forensic Institute, The Hague, of 28 January 2021.
- ²⁸ See, inter alia, The Hague Court of Appeal 26 January 2021, ECLI:NL:GHDHA:2021:103; The Hague Court of Appeal 6 December 2022, ECLI:NL:GHDHA:2022:2421.
- ²⁹ Exhibit 8: An official report of (the fourth) interrogation of the accused [accused] of 15 October 2019, Folder B: Personal file, pp. 346-372 and Exhibit 11: A written record, namely an article in *The Guardian*.
- ³⁰ Exhibit 9: The statement of the accused made at the first instance hearing of 15 and 17 June 2021.
- ³¹ Exhibit 11: A written record, namely the article in *The Guardian* of 30 July 2012, written by Ghaith Abdul-Ahad.
- ³² Exhibit 10: The statement of expert G. Steinberg, given at the appeal hearing of 3 October 2023.
- ³³ Exhibit 11: A written record, namely the article in *The Guardian* of 30 July 2012, written by Ghaith Abdul-Ahad.
- ³⁴ Exhibit 9: The accused's statement made at the first instance hearing of 15 and 17 June 2021.
- ³⁵ Exhibit 16: An official report of findings of 19 March 2018 (p. 231 file G Internet findings).
- ³⁶ Exhibit 9: The accused's statement made at the first instance hearing of 15 and 17 June 2021.
- ³⁷ Exhibit 15: The official report of findings regarding the video called Sugar Festival - 1433 H - Jabhah Nushrah's Mujahedin release action videos of their holy war in Syria again of 16 February 2018. Folder G: Internet findings, pp. 89 up to and including 110.
- ³⁸ Exhibit 17: An expert report Dr Steinberg concerning the organisation Ghuraba Muhassan of 26 May 2021, p. 8.
- ³⁹ Exhibit 17: An expert report Dr Steinberg concerning the organisation Ghuraba Muhassan of 26 May 2021, p. 12.
- ⁴⁰ Exhibit 11: A written document, namely *The Guardian's* article of 30 July 2012, written by Ghaith Abdul-Ahad.
- ⁴¹ Exhibit 8: An official report of (the fourth) interrogation of the accused [accused] of 15 October 2019, Folder B: Personal file, pp. 346-372.
- ⁴² Exhibit 11: A written document, namely *The Guardian's* article of 30 July 2012, written by Ghaith Abdul-Ahad.
- ⁴³ Exhibit 13: An official report of examination of witness [witness 2] of 2 October 2020 by the examining magistrate; Exhibit 14: An official report of examination of witness [witness of 16 September 2020 by the examining magistrate.
- ⁴⁴ See, inter alia, The Hague Court of Appeal 3 July 2023, ECLI:NL:GHDHA:2023:1242.
- ⁴⁵ See The Hague Court of Appeal 6 October 2017, ECLI:NL:GHDHA:2017:2855; The Hague Court of Appeal, 3 July 2023, ECLI:NL:GHDHA:2023:1242.
- ⁴⁶ See The Hague Court of Appeal 25 May 2018, ECLI:NL:GHDHA:2018:1248.
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