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Uitspraak

THE HAGUE DISTRICT COURT

Criminal law

Full Trial Chamber

Case numbers : 09/748001-18

Judgement date : 16 July 2021

Judgement in a defended action

(Promis Judgement)

On the basis of the indictment and following the examination in court, the District Court of The Hague rendered the following judgement in the case of the Public Prosecutor against defendant:

[Name defendant],
born in [place of birth] on [date of birth],
Registered address (BRP): [address]
currently detained at 'Vught' Penitentiary Institution in Vught.

Investigation reference: 26Blackwell

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1 Criminal investigation and investigation at the hearing

On 25 October 2016, the German police shared information with the Dutch police about a person called "[defendant]" and "[nickname defendant]". Allegedly, he had been part of the Free Syrian Army and then of Jabhat al-Nusra and IS. Part of the information was a link to a 30 July 2012 article in The Guardian featuring an interview with a certain [defendant's nickname]. The German authorities asked the International Legal Aid Centre of the National Police (IRC-LE) to identify this man who was said to be living in the Netherlands. The IRC-LE transferred the information to the International Crimes Team (TIM) of the National Criminal Investigation Service. After an investigation, the TIM found the defendant. On 26 June 2017, investigation '26Blackwell' was started.

The article in The Guardian describes how [nickname] had switched from the Free Syrian Army to Jabhat al-Nusra and mentions that he is the commander of Ghuraba'a Mohassan, a fighting group from Mohassan in Syria. Additional internet searches into the initial information revealed a video of the battalion Ghuraba'a Mohassan, including a photo of [nickname defendant] from the German initial information. A video of the execution of a Syrian soldier named [victim] (hereinafter also: [victim]) was found. This execution is said to have been carried out by the Ghuraba'a Mohassan battalion.

In the context of this investigation, the person involved was designated as a suspect on 5 March 2018. He is accused of participating in a terrorist organisation and committing a war crime. He was arrested on 21 May 2019.

Various investigative methods were used during the criminal investigation. For example, telephones were wiretapped, confidential communication recording (OVC) was used in the defendant's home and there was an undercover operation. Via requests for legal assistance, witness statements made abroad were added to the file. In addition, an investigation was conducted by the examining magistrate. This investigation consisted of appointing experts who in turn drew up reports. In addition, a large number of witnesses were heard, partly abroad, and one threatened witness. The entire investigation has been laid down in a file of about 8,000 pages and a certain quantity of video material.

The examination at the hearing was conducted during the court sessions of 2 September 2019, 18 November 2019, 10 February 2020, 16 April 2020, 18 June 2020, 14 September 2020, 3 December 2020, 2 March 2021, 26 May 2021 (all pro forma-hearings), 15 June 2021, 17 June 2021 and 2 July 2021 (substantive hearing).

The court has taken note of the demand of Public Prosecutor W.J. Veldhuis and of what has been put forward by the defendant and his counsel A. Seebregts and M. Levy (hereinafter jointly: the defence).

In this judgement, the court first examines the question of whether the Netherlands has jurisdiction over the war crime charged and its competence to hear this case. The court

then proceeds to establish the facts. The court will then discuss the war crime and participation in a terrorist organisation in separate chapters. Reference will always be made to the previously established facts. Endnotes refer to literature and case law. Each chapter presents the views of the Public Prosecutor and the defence.

2 Indictment

The defendant is charged with the following:

- 1.

Killing as a war crime

That he, on 10 July 2012, 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, at least in Syria, together and in association with (an) other(s), at least alone, violated:- Common Article 3 of the Geneva Conventions and/or customary international humanitarian law, because he, the defendant, and/or one or more of his accomplice(s) in the event of a non-international armed conflict on Syrian territory, has committed an attempt on the life of and/or physical violence against a person who (then) was not (or no longer) directly participating in the hostilities, i.e. a person from the armed forces who had laid down their arms and/or a person who had been put *hors de combat* by illness, injury, imprisonment or any other cause, namely [victim] (and/or) (in particular) has killed the aforementioned person,

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

2.

Participation (as leader) in an organisation whose object is to commit terrorist crimes

That he, 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, at least in Syria, together and in association with (an) other(s), at least alone, participated in an organisation such as Al-Qaeda and/or Jabhat al Nusra and/or Ghuraba'a Mohassan, at least a Jihadist fighting group affiliated with the aforementioned Organisation(s), or at least (an) organisation that advocates the armed jihadi struggle, which Organisation had the purpose of committing terrorist crimes, being

- A. deliberately setting fire and/or causing an explosion, while a common danger to property and/or danger of grievous bodily harm and/or life to another is feared and/or this fact results in someone's death (as referred to in Article 157 Criminal Code), (to be) committed with terrorist intent (as referred to in Article 176a of the Criminal Code) and/or
- B. manslaughter (to be) committed with terrorist intent (as referred to in Article 288a of the Criminal Code) and/or
- C. manslaughter (to be) committed with terrorist intent (as referred to in Article 289 in conjunction with 83 of the Criminal Code) and/or
- D. the conspiracy and/or intentional preparation of and/or promotion of the aforementioned offences (as referred to in Article 176a and/or 289a and/or 96 paragraph 2 of the Criminal Code) and/or
- E. the possession of one or more weapons and/or ammunition of categories II and/or III (as referred to in Article 26, paragraph 1 of the Weapons and Ammunition Act) with a terrorist intent and/or with the intent to prepare or facilitate a terrorist offence (as referred to in Article 55 paragraph 1 and/or paragraph 5 of the Weapons and Ammunition Act) while he, the defendant, was the leader and/or founder and/or manager;

3 Jurisdiction and competence

The indicted offences were committed in Syria in the period from 1 June 2012 up to and including 31 October 2013. The defendant can be prosecuted in the Netherlands for these offences if and insofar as the Netherlands has jurisdiction over these offences.

The Public Prosecutor and the defence have not taken a position on jurisdiction and competence.

3.1 War crimes

Pursuant to Article 2, first paragraph of the International Crimes Act (hereinafter: ICA), the Netherlands has jurisdiction over anyone who is guilty of a crime outside the Netherlands as described in the aforementioned law, to the extent that the defendant (at the time of the prosecution) is in the Netherlands. At the time of his arrest, the defendant was in the Netherlands, so that there is jurisdiction over these facts.

Pursuant to Article 15 of the ICA, the District Court of The Hague is competent to take note of the charged war crime.

3.2 Participation in a terrorist organisation

Article 6, first paragraph, of the Criminal Code states that Dutch criminal law is applicable to anyone who commits an offence outside the Netherlands insofar as a treaty, designated by a general order in council, or decision of an international organisation has established jurisdiction over that fact. Article 2, first paragraph, under e of the International Obligations Extraterritorial Jurisdiction Decree (hereinafter: the Decree) establishes jurisdiction, with reference to a series of general crimes from the Criminal Code, on the basis of (among other things) the principle of universality insofar as these crimes fall under the description of Article 2 of the Convention against Terrorist Bombings.¹ In the opinion of the court, there is jurisdiction over conduct referred to in the preamble of count 2 under A up to and including D, on the basis of Article 6 of the Criminal Code in conjunction with Article 2, first paragraph, under e of the Decree.

With regard to the conduct listed in part E of the indictment, the court is of the opinion – with reference to, inter alia, case law of the Court of Appeal of The Hague ² – that no jurisdiction can be established on the basis of Article 6 of the Criminal Code in conjunction with Article 2, first paragraph, under 3 of the Decree. This is also not possible on the basis of other provisions, so that the Public Prosecution Service is declared inadmissible for that part.

4 Establishment of the facts

4.1 Introduction

In this chapter, the court will establish factual findings with regard to the conflict in Syria, the organisation Jabhat al Nusra and Ghuraba'a Mohassan, and the alleged conduct. The legal qualification that can be given to this is not yet discussed, with the exception of the charge of 'co-perpetration'.

4.2 Position of the Public Prosecutor

The Public Prosecutor has taken the position that there is sufficient legal and convincing evidence that the defendant killed [the victim] in close and deliberate association with others.

4.3 Position of the defence

The defence has taken the position that there is no evidence that the defendant, whether or not together and in association with one or more others, killed [the victim]. The defence argued that the defendant did not want to kill [the victim], but wanted to exchange him for his imprisoned brother. When this failed, the defendant did not distance himself, but took charge of the execution himself, because otherwise he would make himself suspicious. In addition, the defendant deliberately shot next to the victim [victim] and the defendant may only have hit once when [the victim] had already died. These acts also provide insufficient evidence that the defendant cooperated closely and knowingly with others in the killing of [the victim]. After all, it was established that [the victim] would be killed, while this decision had already been made by someone other than the defendant.

4.4 Assessment of the court³

4.4.1 Conflict in Syria

4.4.1.1 Evidence

The file contains a knowledge document with the title 'Knowledge Appendix 140a Criminal Code Jabhat al-Nusra/Jabhat Fatah al-Sham/Hay'at Tharir al-Sham'. This document, which was drawn up by Dr. [expert] (hereinafter: [expert]) and published by the National Criminal Investigation Service, discusses the conflict in Syria, the parties involved in this conflict and the organisation Jabhat al-Nusra. The knowledge document is based on public sources such as reports from human rights organisations, news items and social media.

On the basis of this knowledge document and the aforementioned open sources, the court has established the following.

The uprising in Syria

In the spring of 2011, the uprising in Syria began with protests to enforce reforms in President Assad's regime. The regime tried to suppress calls for reforms with brute force, but this did not bring the resistance to an end. Shortly after the protest began, the actions of President Assad's regime were strongly condemned by a large part of the international community.

United Nations Secretary-General Ban Ki-moon determined in the summer of 2011 that President Assad had lost all legitimacy. Western States pushed for his resignation and sanctioned his regime.

At the end of 2011, the opposition began to fight with armed resistance in response to the regime's violence. In doing so, revenge actions were carried out against government forces and neighbourhoods in large cities and rural areas were conquered. The Syrian regime used even more violent means against these actions. Air strikes carried out by the Syrian Air Force resulted in many civilian casualties. In the summer of 2013, United Nations inspectors determined that on 21 August 2013, an attack involving the nerve gas sarin had taken place in Damascus. In the final months of 2013, there were indications that the Syrian regime had stepped up its attacks with barrel bombs.⁴

Human rights violations took place on the side of government forces and paramilitary militias, as well as on the side of the armed opposition. The armed opposition's violations include

summary executions, kidnapping and torture of imprisoned government soldiers, members of the pro-Assad militias and individuals identified as informants of the Assad regime. Various combat groups are said to have been guilty of illegally detaining a large number of detainees, of torture and executions. At the end of 2012, the Independent International Commission of Inquiry on the Syrian Arab Republic (IICISAR) reported that the intensity of violence increased in 2012, including in new areas. The report mentions several attacks in, among others, the Deir ez-Zor region. The estimates of the number of victims of the hostilities up to and including July 2012 range from 7,928 people to 22,000 people.⁵ In 2012, the United Nations High Commissioner for Refugees reported that the number of displaced persons in Syria was estimated at 2 million and more than half a million civilians had fled Syria.⁶

The Free Syrian Army

One of the insurgent groups involved was the Free Syrian Army (al-jaysh al-suri al-hurr), an alliance of armed groups that fought against the Syrian government with the aim of overthrowing the Assad regime and establishing a democracy. This partnership was established in 2011 after a number of soldiers from the Syrian army had deserted.

However, the Free Syrian Army lacked central leadership. The group tried to improve on this in the course of 2012 by establishing a military council in areas under their control that claimed leadership over the groups fighting in that area.

Jihadist combat groups

As the struggle in Syria progressed, the influence of jihadist groups increased. Islamism became the mainstream of the resistance movement. The aim of these militants was not only to overthrow the Assad regime, but also to establish a strict Islamic state on Syria's territory, where their advocated version of Sharia would be implemented. At the end of 2012, Islamist and jihadist groups seemed to have gained the upper hand at the expense of the Free Syrian Army. In 2012, the presence of Al-Qaeda fighters in Syria was confirmed by Free Syrian Army commanders. In mid-2012, commanders of the Free Syrian Army further indicated that the influence of jihadist groups was growing stronger and that they were gaining more ground and that, unlike the Free Syrian Army, these groups appeared to have no problems in financing their fight against the Syrian regime. Despite differences in future visions with regard to the form of government, (parts of) the Free Syrian Army did not appear to reject cooperation with jihadist groups in the fight against the Assad regime in the summer of 2012. The influx of money and weapons seemed to encourage moderate Islamists and even secular fighters to join the jihadi Salafist groups.⁷ A July 2013 report by the IICISAR noted that ongoing violence in Syria had accelerated the radicalisation of anti-government fighters. This allowed radical groups, especially Jabhat al-Nusra, to expand their influence.

Jabhat al-Nusra

In January 2012, Jabhat al-Nusra (in full: '*Jabhat al-Nusra li-ahl al-Sham min mujahidin al-Sham fi sahat al-jihad*') (Auxiliary Front for the Syrian People from the Mujahidin of (Great) Syria in the jihad arenas)) announced its creation through a video message. Abu Mohammed al-Jawlani was at the head of Jabhat al-Nusra. The aim of this combat group was not only to topple the Assad regime, but also to kill the soldiers of Assad and the shabiha (pro-regime militias) and the establishment of a strict Islamic state on the territory of Syria, where their advocated version of Sharia would be implemented. In April 2013, [Leader 1] confirmed ties to Al-Qaeda and took the oath of allegiance to Al-Qaeda leader Al-Zawahiri.

Jabhat al-Nusra had an advisory council (*majlis al-shura*) that headed the organisation and set strategic policies as well as religious rules. The Council had representatives in the various areas controlled by Jabhat al-Nusra in Syria. Several members of the advisory board were

confidants or members of Al-Qaeda. Jabhat al-Nusra had a military branch (*Jaish Nusra*, the army of al-Nusra), consisting of commando troops. In addition, Jabhat al-Nusra had its own police force, *as-shurta al-islamiyya*, an Islamic police force that, among other things, carried out corporal punishment and executions imposed by the

shari'ah courts in the territory they occupied. In order to become a member of Jabhat al-Nusra, a certificate (*tazkiya*) was required, in which a witness attested to the aspiring member's honourable reputation. The sponsor had to be able to vouch for the religious devotion and military skills. New recruits underwent training in a training camp consisting of a religious program and a military program.

The military operations of Jabhat al-Nusra targeted both the Assad regime and the Alawite and Shia civilian population. In the first half of 2012, al-Nusra Front claimed several attacks in Syria, including suicide attacks and attacks using so-called IEDs (Improvised Explosive Devices). In April and May 2013, mortars and missiles were fired at Shia enclaves, among other things. The IICISAR reported in 2014 about public executions in Tal Abyad by al-Nusra Front in 2013 and that such executions were carried out to ensure their presence in the region and to instil fear in the civilian population.⁸

4.4.2 The defendant's conduct

4.4.2.1 Evidence

The execution videos

On 13 July 2017, the police found a video on YouTube that was posted on 18 July 2012 (hereinafter: video 1). The title of the video translated from Arabic is 'Execution of lieutenant Colonel [Victim] by the hands of the free Army "Syria" + 18'. Below it reads: '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 at the Dair Al-Zor airport. He received from God what he deserves.' The police issued a statement that the images show a man with a bare torso and a bloodied left half of his face walking towards a river. Several shots are then fired and the injured man can be seen lying in the water. He seems to be dead.

On 16 November 2017, the police found a video on YouTube that resembles the images described above (hereinafter: video 2). A comparative study of video 1 and video 2 has led the police to the conclusion that they are two different versions of the same video, with video 2 showing a larger image because unlike video 1 it is not zoomed in.⁹

The police prepared a so-called OSINT report (open source intelligence) about the bare-chested man who can be seen on the execution videos and who allegedly is [victim]. The report states that an Arab site promoting regime-affiliated martyrs states that [victim] was born in [victim's birthplace] in [victim's year of birth], that he is married,

that he holds the rank of lieutenant colonel and that he is a martyr in Deir ez-Zor, Mohassan, 10 July 2012.¹⁰

Geolocating was used to determine the location where the videos were recorded. The investigation revealed that the site is located near the town of Al-Muhasan (the court understands: Mohassan) in the Syrian governorate of Deir ez-Zor. It was also noted that a water treatment plant is located to the west of the alleged execution location, which falls within the district [district 1]. This concerns the district where the defendant lived during the revolution.¹¹

Before the German police [Involved person 1] (hereinafter: [Involved person 1]), a Syrian living in Germany, stated that he was one of the makers of the execution videos. In Germany, a search was carried out in the home of [person involved 1] on 12 September 2019, during which various data carriers were seized. On 22 July 2020, the German police provided the Dutch police with a CD-ROM containing, among other things, video file [video file 1] (hereinafter: video 3).

Video 3 is a video of 9 minutes and 26 seconds and partly shows the same incident as can be seen in videos 1 and 2. The spoken texts are in the Arabic language and have been translated by a sworn interpreter and included in the official report of the Dutch police. The video starts with a fragment in a car in which two men can be seen, one of whom is sitting bent 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 [person involved 2] (hereinafter: [person involved 2]). The camera then turns and the bent over man has several (open) wounds and bruises on his face and body. The right side of his face is swollen and one eye is closed. The police recognise this man as [victim], who can be seen on videos 1 and 2. The images show that, in addition to the person who is filming, seven people are in the car and several firearms are present in the car. The driver of the car is recognised by the officer as the defendant.

After minute 02:15 the car comes to a stop and the defendant and passengers get out of the car. A man is then seen with a firearm. This man has been identified by the German police as [person involved 1]. [Involved person 1] says: 'Redemption will come to you soon.' The defendant says, 'Take him, take him there.' Then the defendant disappears from view. [Involved person 2] says: 'Go behind the house... take him to the back of the house, just walk.' The footage shows the defendant holding a revolver in his right hand. The group of men then walks down a path, with the defendant leading the way.

At minute 03:14 one can hear:

[Person involved 2]: 'To hell and the worst destiny.'

At minute 03:18:

X: 'An officer of Al-Assad's army is led to his inevitable fate.'

X: 'Lieutenant colonel [victim] of the seventeenth division ...who is now

[Person involved 2]: [whispering] 'Commander of an air defence squad'

[Person involved 1] (Court: [person involved 1]): 'Deir ez-Zor, the city of Mohassan ten seven two thousand and twelve.'

X: 'Bataljon Ghurabaa Mouhassan.'

[Person involved 2]: [whispering] 'And Battalion Iz AI-Din AI-Qassam.'

X: 'and Battalion Iz AI-Din AI-Qassam ... led to his inevitable fate.'

[Person involved 1]: 'To his inevitable fate.'

At minute 04:03:

[Person involved 2]: 'Allahu akbar.'

[Person involved 1]: 'The fate of every traitor who bombs civilians.'

At minute 04:43:

The defendant: '[victim] ...'

X: 'With God's help, Lieutenant Colonel [victim] has been captured from the ranks of the treacherous division seventeen which is a pawn of Bashar Al-Assad and Israel.'

After minute 05:52 [person involved 1] says:

'Deir ez-Zor, the city of Mohassan ten seven two thousand and twelve, with His help (may He be exalted) the capture of the lieutenant colonel [victim] from the ranks of division seventeen who was bombing civilians was accomplished.'

The group then arrives at the water and turns off along the trail. After minute 06:50 one can see that the defendant points to a spot by the water and looks in the direction of [victim]. The defendant can be heard saying: 'You... There...'. The defendant can be seen putting his revolver in front of his mouth, as if signalling the others to be quiet. The defendant then addresses [victim]. [Person involved 2] points his firearm at [victim]. The police state that after minute 07:05 it seems as if the defendant is giving a sign to [person involved 2], who has aimed his firearm at [victim], that he is not allowed to do anything yet. Then the defendant asks [victim] several questions and [person involved 2] stops pointing his firearm at [victim].

The defendant: 'All the Syrian people complain to Allah'

[Victim]: 'By God I didn't kill anyone...I didn't kill anyone by God.'

The defendant: 'Your blood... your blood, boy, is worth no more... is worth no more than the blood... your blood is not dearer than the blood of ... the people who are murdered.'

[Person involved 1] (Court: [person involved 1]): 'Lieutenant colonel [victim] from the ranks of the seventeenth division.'

[Victim]: 'I didn't kill anybody.'

The defendant: 'You have been following Bashar and not taken this day into account.'

[Person involved 1]: 'With His help (May He be exalted) the capture of the lieutenant colonel.'

X: 'The prisoner lieutenant colonel [victim].'

[Person involved 1]: '[victim] by battalion Ghurabaa Mouhassan and battalion Iz AI-Din AI-Qassam and he will reward every traitor anyone who bombed defenceless civilians, the reward of anyone who supports Bashar Al-Assad.'

The defendant: 'Lift your head... what do you think of this fate... what do you think? Bashar got you entangled in it... because of him you are here... what do you think?'

X: 'How much money did you offer us to release you?'

The defendant: 'How much is the last amount you said you would pay, how much?'

[Victim]: 'Fifteen.'

The defendant: 'How much?'

[Victim]: 'Fifteen... million.'

The defendant: 'Fifteen Whaaat?'

[Victim]: 'Fifteen million.'

The defendant: 'Fifteen million is worth nothing to me it is not worth a drop of blood to me of of of of the blood eh of the children killed in Deir ez Zor or in Homs or in al-Haula or any place.'

X: 'Will you leave him here?'

[Victim]: 'I haven't killed anyone, by God I haven't killed anyone.'

X: 'Come on, in God's name.'

After minute 08:19, the defendant can be seen aiming the revolver in his right hand at [victim]. After minute 08:20, according to the reporting officer, one can hear and see that the defendant fires the first shot in the direction of [victim]. [victim] bows his head and the water splashes up behind him. Then several shots are fired. [person involved 2] also shoots with his firearm. After the third shot, [victim] can be seen falling to his knees. [Victim] rolls over and lies on his back at the water's edge. After minute 08:27 it is shown that [victim] is lying motionless on the water's edge. After that, several shots are fired, including several times to the head of [victim]. After minute 08:44 one can hear:

X: 'This is the end of every traitor and of every murderer and of every criminal who preys on [unintelligible word because A begins to speak here] innocent Syrians.'

The defendant (the Court understands 'X' and not 'the defendant', having regard to page 104 of folder D): 'The execution of the traitor lieutenant colonel [victim] by battalion Ghuraba Muhassan and battalion Iz AI-Din al-Qassam . . . this is the reward of any traitor to anyone who attacks civilians and bombs civilian homes.'

X: 'Let's move him, unclean one, let's move him because of the stench of decomposition.'

After minute 09:25 the recording stops.¹²

The Netherlands Forensic Institute (hereinafter: NFI) examined the execution video (videos 1 and 3) and concluded that a total of 26 shots were fired, using a revolver and one or more Kalashnikovs. Given the effects of the shots from the revolver, the ballistics expert suspects that it is a double action revolver with which .38 Special rounds are fired. Most revolvers of this type can hold up to six cartridges. The NFI report states that it is visible and/or audible that the revolver is shot five times (shot 1, 11, 12, 16 and 17).

The first shot was fired by the man with the revolver in the direction of the victim's head and presumably passed the victim. Then nine shots are fired by a man with "Kalashnikov 1" (the court understands: in the hands of [person involved 2]). The victim is hit by some of these shots. After shot 10, the victim's body only shows physical effects of bullet impacts and it is likely that from that moment on and possibly earlier there is loss of brain and/or spinal cord function. The man with 'Kalashnikov 1' moves to the left and disappears from view. The body shows no visible breathing or other movement.

Shots 11 and 12, fired with the revolver, pass the victim. The NFI has reported that shot 14 and 15 coincide, and that the images of shot 14 best match a shot from the revolver, followed by a shot from a Kalashnikov. One of the two bullets hits the victim's abdomen. The bullet from shot number 16, fired with the revolver, hits the victim in the right chest. In any case, the victim shows no visible signs of life. Shot 17, fired with the revolver, passes the victim. After shot 17, it can be seen that the revolver's trigger is pulled, without any shots being fired.

Subsequent shots are fired with a Kalashnikov in the direction of the victim's head and upper body and appear to hit the head, upper body and/or the ground near the victim's head. Movement of the body is noticeable in some of the shots, especially at the height of the head. The body shows no visible breathing or other movement.¹³

In the execution video (video 3) one can see two Kalashnikovs and one person with a revolver, being the defendant.¹⁴

The defendant stated that he was a professional soldier from 1991 to 2011. He deserted on 8 August 2011; from that time he was hiding in different houses in Mohassan. Around April 2012, he formed the group Ghuraba'a Mohassan together with eight or nine other men. Ghuraba'a Mohassan belonged to the Free Syrian Army and came under the Military Council, according to the defendant.¹⁵

With regard to the victim [victim], the defendant stated that the night before the execution he learned that [victim] had been arrested and imprisoned by people from a village about 300 kilometres from Mohassan. He was subsequently transferred to the brigade of [person involved 2], i.e. battalion Iz Al-Din al-Qassam. [Person involved 2] was the commander of Iz Al-Din al-Qassam and Iz Al-Din al-Qassam was part of the Free Syrian Army. The defendant then heard that [person involved 2] had the plan to kill this [victim].

The next morning, at around 5:00 hrs, he went to the school and there he spoke to [person involved 2]. [Person involved 2] told the defendant all about [victim] and that he planned to kill [victim] at the river bank. The defendant then drove with [person involved 2] and a number of other men to the bank of the river, the defendant being the driver of the vehicle. [Victim] stood in the water at the bank and the defendant had a short conversation with [victim] and fired shots in the direction of [victim]. The defendant recognises himself as the person with the revolver, who can be seen in video 3.¹⁶

4.4.2.2 Interim conclusions

Based of the above evidence, the court establishes the following.

Video 3 was shot near the Syrian town of Mohassan in the Syrian governorate of Deir ez-Zor, on the banks of the Euphrates. On the basis of the evidence, the court further establishes that the person who is being shot at in the video is [victim]. This video shows eight people sitting in a car, including [victim]. The defendant is driving this car. The car comes to a stop, the group gets out and then together they walk down a path to the bank of the Euphrates. The group has two Kalashnikovs, the defendant is holding a revolver. [Victim] was a captured soldier of the Syrian army.

After the defendant has had the last conversation with [victim] on the bank of the Euphrates, the defendant fires the first shot in the direction of [victim] with a revolver. In total twenty-six shots are fired at or in the direction of [victim] with the revolver and one or more Kalashnikovs. The NFI has reported that it is visible and/or audible that the revolver fires five times (shot 1, 11, 12, 16 and 17) and that the images of shot 14 best match a shot from the revolver. After shot 17, the trigger of the revolver is pulled, but it is visible that no more bullets are fired. This theory matches the one of a revolver that can shoot six bullets and all six have already been fired. In view of the above findings, the court considers it probable and plausible that shot 14 was also fired with the revolver. The court thus establishes that six shots were fired with the revolver, of which at least one shot hit [victim].

The court finds the defence's assertion that another person with a revolver was present at the execution implausible. The court has found that only one person in the execution video can be seen with a revolver, being the defendant. In addition, there are no leads to assume that another person was present with a revolver. The defendant was also unable to identify

who the other person was in the execution video with a second revolver. The court therefore also assumes that the defendant is the (only) person with the revolver in

the execution video. Furthermore, the court sees no reason to doubt the conclusions of the NFI. The court therefore also finds the defendant's statement that he only had three cartridges in his revolver implausible.

[Victim] shows no signs of life after the shooting. The court established that [victim] was killed by bullets on 10 July 2012 in Syria. It is not established that the defendant hit [victim] with one of the shots with the revolver while [victim] was still alive. The court cannot therefore establish with certainty that the defendant 'alone' can be held responsible for the death of [victim].

On the basis of the statement of the defendant, the court further establishes that during this period the defendant was involved in the combat group Ghuraba'a Mohassan, consisting of deserted professional soldiers. Ghuraba'a Mohassan had weapons and was involved in the Free Syrian Army and the Military Council. Ghuraba'a Mohassan was active in and near Mohassan, in the province of Deir ez-Zor.

Co-perpetration

The question is submitted to the court whether the defendant can be held accountable for the death of [victim] by means of the indictment of 'co-perpetration'.

The court states first and foremost that involvement in a criminal offence can be declared proven as co-perpetration if it has been established that there was sufficiently close and conscious cooperation in committing the offence.

In the opinion of the court, a close and conscious cooperation between the defendant and others can be inferred from the following facts and circumstances. [Victim] is escorted by the armed group to the site of the execution to be carried out, first in a car driven by the defendant and later on walking to the bank of the Euphrates. In doing so, the defendant and [person involved 2] give instructions in which direction the group should walk to the Euphrates River and then [person involved 2] and the defendant lead the way for some time. Other members of the group film [victim] and tell him that he is going to meet his inevitable fate. On the bank of the Euphrates, the defendant points out the spot where [victim] should stand in the water and puts his revolver in front of his mouth as if signalling to the group that they should be quiet. The defendant then turns to [victim] again and it can be seen that [person involved 2] is pointing his firearm at [victim]. The defendant then turns to the right and gestures with his head in the direction of [person involved 2], after which [person involved 2] points his weapon upwards. The defendant then has the last conversation with [victim]. After the defendant fires the first shot in the direction of [victim], [person involved 2] fires several shots with a Kalashnikov in the direction of [victim]. It is likely that shots were also fired by another person from the group with a Kalashnikov. After all, the defendant fired six of the twenty-six shots in the direction of [victim]. After that, it can be seen on the images that [person involved 2] fires nine shots in the direction of [victim] but then disappears from view.

It can be deduced from the foregoing that the defendant, together with others, consciously and closely cooperated in the execution of [victim], with the defendant

playing a leading role. There has been no evidence of a subordinate role, as the defendant

has stated. On the contrary, there are indications that [person involved 2] played a subordinate role to that of the defendant. After all, based on the video, it appears that the defendant steers the actions of [person involved 2] several times and takes the lead in the run-up to the execution, while instructions from [person involved 2] can neither be heard nor seen.

Contrary to the defence, the court is of the opinion that the execution video does not show any facts and circumstances from which it can be deduced that the situation forced the defendant to shoot because of danger to his own life. In the execution video, for example, there is nothing to be seen of any discussion between the defendant and [person involved 2] about the possible transfer of [victim] to the defendant for the purpose of a prisoner exchange. Shortly after getting out of the car [person involved 1] says to [victim] '*Redemption will come to you soon*', which contradicts the statements of the defendant and [person involved 1] that the defendant (still) had the intention to try and exchange [victim] for his brother. The other observations in the execution video also fit with a targeted execution of [victim] to which the defendant has made an essential contribution with his leading role.

Together with the Public Prosecutor and the defence, the court established that during the investigation the defendant made various statements about the execution that contradict each other on essential parts. The court therefore only uses the statement of the defendant for the evidence insofar as it is plausible in view of the content of the execution video.

The court leaves open whether the defendant has intentionally misfired, since that does not remove the criminal liability established above. This is especially true because by shooting first, the defendant urged [person involved 2] and one or more others to do the same. After all, the defendant knew that [person involved 2] wanted to kill [victim].

Contrary to the defence, the court is of the opinion that there has been sufficiently close and conscious cooperation between the defendant and others, which essentially consists of joint execution. The court therefore finds the alleged co-perpetration proven.

5 Count 1: Committing a war crime

5.1 Introduction

The court has established in chapter 4 that the defendant killed [victim] together and in association with others. The court is faced with the question of whether the defendant is thereby guilty of the war crime of killing a person who is no longer taking part in the battle, as prohibited in the common article 3 of the Geneva Conventions of 1949 (hereinafter: GC) . In the Netherlands, this is punishable as a war crime in Article 6, first paragraph, part a of the ICA.

5.2 Position of the Public Prosecutor

In his closing speech, the Public Prosecutor demanded the charged offence to be declared proven as a war crime.

5.3 Position of the defence

With regard to the question of whether the participation in the killing of [victim], deemed proven above, constitutes a war crime, the defence referred to the judgement of the court.

5.4 Assessment of the charges

Article 6 of the ICA, which concerns the punishability of the commission of war crimes, reads as follows insofar as relevant:

Any person who, in the event of a non-international armed conflict, is guilty of a violation of common Article 3 of the Geneva Conventions, i.e. committing any of the following crimes against persons not directly participating in the hostilities, including personnel of armed forces carrying arms or persons put hors de combat by sickness, injury, imprisonment or any other cause:

a. attacks on life or physical assault, in particular killing by any means, mutilation, cruel treatment or torture;

shall be punished with (...).

The court must assess whether on the basis of the established facts there is a non-international armed conflict within the meaning of common article 3 GC, whether the defendant has killed a person who falls under the protection of common article 3 GC and whether there is sufficient connection between the established conduct and the armed conflict (nexus) to be able to speak of a war crime. In answering these sub-questions, the court first outlines the legal framework that it applies, then discusses the facts and circumstances of the case.

For the explanation of the criminal elements of the punishability of war crimes, the court relies on international law and the Elements of Crimes of the International Criminal Court (hereinafter: the ICC).¹⁷

5.4.1 Legal framework

5.4.1.1 Applicability of international humanitarian law

War crimes are violations of international humanitarian law. International humanitarian law applies when there is an armed conflict on the territory of one of the parties who have ratified the treaty.

With regard to the question of whether there is an armed conflict, a distinction can be made between international armed conflicts and non-international armed conflicts.¹⁸ In view of the fact that the indictment focuses on a war crime during a non-international armed conflict, the court will limit itself to the non-international armed conflict in the assessment framework for determining the type of armed conflict and assessing it.

The International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) has further elaborated the concept of non-international armed conflict and formulated criteria for assessing whether this is the case. According to established case law, a non-international armed conflict exists if there is persistent armed violence (*protracted armed violence*) and the armed group(s) involved are sufficiently organised.¹⁹ Factors that may be important for determining the intensity of the violence are the number, duration and intensity of the confrontations, the amount and type of ammunition fired, the type of weapon and other military equipment used, the number of victims, the extent of material damage and the number of internally displaced persons. The involvement of the UN Security Council can also be an indication of the intensity of the conflict.²⁰

The following factors are important for determining the degree of organisation of the armed groups in this context: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group

controls a particular 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 movements and associated logistics; the ability to define a unified military strategy and the use of military tactics; and the ability to speak with one voice and negotiate and conclude agreements such as a ceasefire or a peace pact.²¹

If it has been established that there is a non-international armed conflict, international humanitarian law will apply until a peace agreement has been concluded or when the general military operations have ended.²²

This makes international humanitarian law applicable to the entire territory of Syria.²³ According to the case law of the ICTY, a decrease in violence or a reduced degree of organisation within an armed group is no indication that there is no longer a non-international armed conflict.²⁴

5.4.1.2 Protected status of the victim

The purpose of international humanitarian law is to protect persons who do not or no longer participate in hostilities. Common Article 3 GC defines them as "persons who do not participate directly in hostilities, including personnel of armed forces who have laid down their arms, and those who have been put *hors de combat* by illness, injuries, imprisonment or any other cause". The defendant must be aware of the circumstances that led to the victim's protected status.

5.4.1.3 Prohibition to use violence, in particular the killing of persons who do not directly participate in the hostilities

The four Geneva Conventions contain rules for the protection of persons who do not or no longer participate in hostilities in an armed conflict. In common Article 3, first paragraph, preamble and under a, GC - insofar as it is relevant in this case - a prohibition is laid down on the use of force, in particular, inter alia, the killing of persons who do not participate directly in the hostilities. Common Article 3 GC does not prohibit the imposition and execution of the death penalty as a sentence, unless this is done without prior trial by a duly constituted court offering all judicial guarantees.²⁵ Rule 89 of the customary law study of the International Committee of the Red Cross (hereinafter: ICRC) also lays down the prohibition of violence against the lives of civilians and persons who are *hors de combat*, i.e. persons who do not or no longer participate in the hostilities.²⁶ In common Article 3 GC, killing refers to intentional killing or causing death and "reckless" killing or causing death.²⁷

5.4.1.4 Nexus

For a war crime to be proven, there must be sufficient connection, also known as a 'nexus', between the alleged conduct and the armed conflict.

It follows from the case law of the ICTY that the nexus does not require that the conduct took place in the course of the fighting or within the area where the actual combat took place, insofar as the crimes are closely related to the hostilities.²⁸ A connection is not required, but the conflict must have played an essential role in the possibility or decision to commit the crime, the manner in which the crime was committed or the purpose with which the crime was committed.²⁹ Criminal liability for war crimes is not limited to the warring parties and those in close relationship with one of the parties.³⁰

The nexus can be determined, among other things, on the basis of the status of the victim and the perpetrator under 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) was/were committed as part of or in the context of the offender's official duties.³¹ The perpetrator must be aware of the factual circumstances that led to the armed conflict. It is not required that the defendant has made a legal analysis as to whether there was a (non-) international armed conflict. It must be established whether he or she was aware of the

actual circumstances of the armed conflict. Specifically, the ICC considers that the defendant must be aware of the hostilities between (at least two) entities, and that these hostilities have a certain intensity and the entities are organised.³²

5.4.2 Assessment of the court

In order to assess whether the charged war crime can be proven legally and convincingly, the court must answer the following questions:

1. Was there a non-international armed conflict in Syria and Iraq at the time of the alleged offence?
2. Is [victim] protected by common article 3 GC and if so, was the defendant aware of the facts and circumstances underlying the victim's protected status?
3. Did the defendant kill [victim]?
4. Is there a nexus between the offending conduct of the defendant and the aforementioned armed conflict?

5.4.2.1 The applicability of international humanitarian law: was there a non-international armed conflict?

In previous criminal cases, this court has already established that from 1 January 2012 there was a non-international armed conflict in Syria between Syrian government forces and fighters from various armed groups.³³

With reference to this jurisprudence, the court again establishes that on the basis of the facts established above in chapter 4, in the period from July 2012 there was a non-international armed conflict in Syria between the Syrian government army and various organised armed groups, including Jabhat al -Nusra. In the opinion of the court - at least during that period - the requirement of protracted armed violence has been met. There were frequent large-scale military operations between the parties, using military weapons and explosives. The estimates of the number of victims of the hostilities up to and including July 2012 range from 7,928 people to 22,000 people. In 2012, the United Nations High Commissioner for Refugees reported that the number of displaced persons in Syria was estimated at 2 million and more than half a million civilians had fled Syria. This satisfies the requirement of a certain degree of intensity of the conflict.

In addition, in the opinion of the court, the requirement of sufficient organisation has also been met - at least with regard to the armed group Jabhat al-Nusra. After all, in the aforementioned period, this organisation had access to military weapons, including missiles, and was able to carry out large-scale military operations. The organisation also had an organisational structure, consisting of, inter alia, an advisory council and a police force. In addition, there were partnerships with other organisations.

Now that the court has established that there was a non-international armed conflict in Syria at the time of the indictment, it can be concluded that the rules of international humanitarian law with regard to non-international armed conflicts were applicable. This concerns in any

case common Article 3 GC and the prohibition of violence against the

lives of civilians and persons who are *hors de combat*, a rule of customary international humanitarian law.

5.4.2.2 Is the victim protected by international humanitarian law, in particular common Article 3 GC and if so, was the defendant aware of the facts and circumstances underlying the victim's protected status?

The court has already established in chapter 4 that [victim], the person in video 3, is a captured soldier. Since he no longer took part in the hostilities, he enjoyed protection under international humanitarian law. Based on the statement of the defendant and the fact that the video mentions that [victim] is a soldier of the Syrian regime, the court further establishes that the defendant knew that [victim] was a prisoner and no longer participated in the hostilities. Thus, he was aware of the facts and circumstances underlying the victim's protected status.

5.4.2.3 Did the defendant kill [victim]?

The court has established in chapter 4 that the defendant deliberately killed the captured soldier [victim] on 10 July 2012 together and in association with others. It has also been established that [victim] was protected under international humanitarian law. In the opinion of the court, there is therefore a violation of the prohibition as included in common Article 3, first paragraph, GC.

5.4.2.4 Is there a nexus between the alleged conduct of the defendant and the aforementioned armed conflict?

The execution of [victim] took place in Syria, where an armed conflict was going on during the period referred to in the indictment. In the video, many references are made to the fact that [victim] is an imprisoned soldier of Assad's army. The video shows that after the execution, Lieutenant Colonel [victim] is said to have been executed and that this is the reward of any traitor who attacks civilians and bombs homes. Thus, the court is of the opinion that there is a nexus between the conduct of the defendant and the conflict in Syria.

It follows from the file that the defendant was aware of the factual circumstances that led to the existence of the armed conflict. After all, it has been established that the defendant was actively involved in the armed struggle as a member of the combat group Ghuraba'a Mohassan.

5.4.2.5 Conclusion

On the basis of all of the above, the court considers it legally and convincingly proven that the defendant committed the war crime charged against him.

5.4.3 Conclusive evidence

With respect to the defendant, the court declares that it has been proven that:

he, on 10 July 2012, ~~at least in or about the period from 1 July 2012 up to and including 18 July 2012, in or near Mohassan and/or Deir ez-Zor, at least in Syria, together and in association with (an) other(s), at least alone,~~ has violated:- Common Article 3 of the Geneva Conventions and/or customary international humanitarian law, in that he, the defendant, ~~and/or one or more of his accomplice(s) in the event of a non-international armed conflict on the territory of Syria, committed an attack on the life and/or physical violence against a person who (then) was not (or no longer) directly involved in the hostilities, i.e. a person of the armed forces who had laid down their arms, and/or a person who had been put hors de combat by illness, injury, imprisonment or any other cause, i.e. [victim], (and/or) (in particular) killed the aforementioned person,~~

which attack on life ~~and/or physical assault and/or death~~ consisted in the fact that he, the defendant, ~~and/or one or more of his co-perpetrators, several times, at least once with (a) firearm(s) has/have shot (a) bullet(s) into the body of the aforementioned person, as a result of which the aforementioned person has died.~~

6 Count 2: Participation in a terrorist organisation: Acquittal

6.1 Introduction

Under count 2 the defendant is charged with the following – in short – that, in the period from 1 June 2012 up to and including 31 October 2013 in Syria, whether or not as a leader, he participated in a terrorist organisation, namely Al-Qaeda and/or Jabhat al-Nusra and/or Ghuraba'a Mohassan. In the further discussion, the court only focuses on Ghuraba'a Mohassan and Jabhat al-Nusra, since Jabhat Al-Nusra at the time of the indictment can be seen as the Syrian branch of Al Qaeda from Iraq.

Participation in a (terrorist) criminal organisation is punishable under Articles 140 and 140a of the Criminal Code. The criminalisation in Article 140a Criminal Code of participation in a criminal organisation with the intent to commit terrorist crimes is based on the idea that public order must be protected against organisations that intend to commit terrorist crimes.

In order to prove this fact, the court must establish that Jabhat al-Nusra and/or Ghuraba'a Mohassan were organisations with a terrorist objective in the period referred to in the indictment and that there was participation in that/these organisation(s) within the meaning of Article 140a Criminal Code. Finally, it must be established that the defendant generally knew that the intent of the organisation(s) was/were to commit terrorist crimes.

6.2 Position of the Public Prosecutor

The Public Prosecutor has taken the position that the offence charged under 2 can be legally and convincingly proven. To this end, the Public Prosecutor argued that the defendant participated in and was leader of the organisation Ghuraba'a Mohassan. According to the Public Prosecutor, it can be legally and convincingly proven that Ghuraba'a Mohassan intended to commit terrorist crimes, namely:

1. Ghuraba'a Mohassan had joined Jabhat al-Nusra. By joining Jabhat al-Nusra, flying the flag of Jabhat al-Nusra, performing deeds in their name and presenting themselves as a battalion of Jabhat al-Nusra, Ghuraba'a Mohassan was part of Jabhat al-Nusra in the sense of 140a Criminal Code. It is also a well-known fact that al-Nusra Front was a terrorist organisation in the period referred to in the indictment.

2. Two specific crimes have been committed by Ghuraba'a Mohassan with terrorist intent, namely the bomb attack on 6 June 2012 on a former carpet factory in Mohassan where the government army was located and the execution of [victim] on 10 July 2012. These crimes have also been claimed by Jabhat al-Nusra. Furthermore, Ghuraba'a Mohassan co-committed the kidnapping of Colonel [person involved 3] and the (claiming of) shooting of the MIG during the period that they had joined Jabhat al-Nusra. These crimes have therefore been committed to achieve the goals of Jabhat al-Nusra.

According to the Public Prosecutor, the terrorist aim and the intent of the defendant with regard to the terrorist aim can also be deduced from the evidence. In support of his position, the Public Prosecutor has referred to:

- The promotional video of Ghuraba'a Mohassan, which includes the flags of Jabhat al-Nusra and the tawhid gesture.
- The Guardian article describing Ghuraba'a Mohassan's affiliation with Al-Qaeda and using Al-Qaeda explosives to carry out the June 6, 2012 bombing. In the article, the defendant propagates the message of Jabhat al-Nusra/Al-Qaeda.
- The Guardian article and the promotional video by the defendant's son [son of defendant] have been posted on the internet, with [defendant's son] referring to his father as commander of Ghuraba'a Mohassan in his post about the article in The Guardian.
- The video of the aforementioned bombing, which shows that the attack is claimed by a battalion of Jabhat al-Nusra. On the wall of the building the text "Ghuraba'a Mohassan Jabhat al-Nusra" is shown.
- On his Twitter account the son [defendant's son] has posted several references to his father as commander/leader of Ghuraba'a Mohassan and to Jabhat al-Nusra. [Son of the defendant] talks about the jihad battles in Syria. He also speaks of the "Mujahids of Ghuraba'a Mohassan" and of his father as "Mujahid".
- In the execution video, the defendant is present in word and deed as the leader of Ghuraba'a Mohassan.
- In the video claiming the shooting of the MIG, the defendant stands prominently in the front next to [leader 2], the leader of the Military Council.
- The wife of the defendant said during the search: "We have distanced ourselves from what happened in Syria and Jabhat al-Nusra".
- In June 2017, while the defendant was already in the Netherlands, he expressed support for an attack carried out by IS on the parliament of Iran.

Finally, in support of his position, the Public Prosecutor referred to the statements of witnesses [witness 1], [witness 2], [witness 3], [witness 4] and [witness 5].

6.3 Position of the defence

For the charge under count 2, the defence has pleaded for acquittal and to that end submitted the following arguments. Counsel referred to the court's judgement as to whether the defendant participated in and/or was the leader of Ghuraba'a Mohassan.

According to the counsel, however, it cannot be legally and convincingly proven that the defendant ever became a full member of Jabhat al-Nusra. Nor can it be concluded from the mere fact that Ghuraba'a Mohassan at some point started collaborating with Jabhat al-Nusra that Ghuraba'a Mohassan participated in Jabhat al-Nusra. The counsel referred to a judgement of the Rotterdam District Court of 11 March 2021, and to a judgement of the Supreme Court of 8 January 2019.³⁴

Furthermore, it cannot be legally and convincingly proven that the defendant and/or Ghuraba'a Mohassan were involved in specific terrorist offences. There is insufficient evidence that the defendant and/or Ghuraba'a Mohassan played any role in the downing of the MIG. In addition, the question is whether the downing of the MIG can constitute a criminal offence, as this was a defensive action against the Syrian army.

The exchange of the Colonel [person involved 3] for the two brothers of the defendant was out of

a personal interest of the defendant. There has been no evidence of any terrorist motive on the part of Ghuraba'a Mohassan and/or Jabhat al-Nusra. The above cannot therefore contribute to the evidence of participation in a terrorist organisation. In

addition, this act of the defendant is not punishable because he can successfully invoke force majeure in the sense of a state of emergency.

The Facebook message of the brother of the defendant and the article in The Guardian are insufficient to establish a proven statement that the defendant was involved in the bomb attack on 6 June 2012. If the court is of the opinion that from the article in The Guardian does indeed follow that the defendant was involved in the aforementioned attack, the defence wishes to hear the author of the article as a witness, with reference to the Vidgen and Keskin judgements of the ECHR. Should the court find that the journalist's request not to be heard should be granted, and/or that the journalist can successfully invoke his journalistic nondisclosure right, the article in The Guardian should be excluded from the evidence .

In addition, according to the counsel, the witness statements must be treated with restraint. The witness statements can only be used as evidence if these statements are supported by solid supporting evidence. As an example, counsel referred to the statements of the witnesses regarding the flag of Jabhat al-Nusra on the vehicles of Ghuraba'a Mohassan. These statements are in no way supported by any other evidence. With regard to the execution of [victim], counsel referred to his position with regard to count 1.

6.4 The assessment

6.4.1 Legal framework

6.4.1.1 Organisation

An organisation within the meaning of Article 140a of the Criminal Code is understood to mean a partnership with a certain durability and structure between the defendant and at least one other person. It is not required that it is established that one must have collaborated, or at least must have been known, with all other persons who are part of the organisation or that the composition of the partnership is always the same. Indications for the existence of such a partnership can be, for example: common rules, conducting consultations, joint decision-making, a division of tasks, a certain hierarchy and/or sections.

The closer and more permanent cooperation is, the more likely the requirement of a partnership with a certain structure is met. Such a partnership can arise coincidentally and over time because people gradually discover that they have a common goal, the realisation of which is served by long-lasting cooperation. Such a partnership does not depend on rules, explicit agreements or hierarchical relationships, but can very well be long-lasting and derive a certain structure from working towards a common goal. If there is a looser form of cooperation – no permanent participants in the partnership, the participants only know each other partly – then the requirement of the partnership in particular may entail that the mutual relationship between the participants or some of them in the partnership provides some structure. The fact that two persons of a group have worked together in a structured context for approximately the same time is

considered sufficient to also consider the other persons of that group as belonging to the organisation, without such a structure in the collaboration being established for them.

6.4.1.2 Intention to commit terrorist crimes

Furthermore, for a finding of fact in relation to Article 140 of the Criminal Code, it is required that the organisation must have the intention to commit crimes. The intention is primarily aimed at the immediate goal: that which one imagines to be directly realised. The criminal organisation need not have a purely criminal main objective, it can also – partly – have a legal aim. The organisation may also have the intention to commit crimes if these crimes are committed for the realisation of a reasonable or noble end goal in the image of the organisation. Article 140a Criminal Code, the article on the criminal terrorist organisation, furthermore requires a double objective: there must be an intention to commit crimes with a terrorist objective. In order to prove the existence of a criminal terrorist organisation, the immediate aim must therefore be to commit terrorist crimes.

For the terrorist objective to be proven, relevance may be given to crimes that have already been committed within the framework of the organisation, among other things, the more durable or structured nature of the cooperation, as may be apparent from the mutual division of activities or mutual coordination of activities of participants within the organisation with a view to achieving the common goal of the organisation and, more generally, to the methodical or systematic character of the activities of participants within the organisation carried out for this purpose.

In Article 83 of the Criminal Code, the legislator has determined which criminal offences qualify as terrorist crimes. What they have in common is that they must have been committed with a terrorist objective. This is defined in Article 83a of the Criminal Code as “the intent to seriously intimidate the population or any part of the population of a country, or to unlawfully compel a government or international organisation to do, not to do or to tolerate something or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation”.

6.4.1.3 Participation

It must be borne in mind that participation in a terrorist organisation can only take place if the person involved belongs to the partnership and has a share in, or offers support to, behaviour that is aimed at or directly related to the realisation of the objective of the organisation. Any such contribution, also known as an act of participation, to an organisation may be punishable. An act of participation may consist of committing a crime or co-perpetrating a crime, but also aiding and abetting and (therefore) performing acts that are not punishable in themselves, as long as the aforementioned share or support can be referred to. Just sympathising with an organisation is not enough. Examples of acts of participation are the granting of monetary contributions or other material support to the organisation or the raising of funds or recruitment of persons for the benefit of the

organisation. It is not necessary that a defendant within the organisation has participated in crimes committed (or attempted or prepared to commit) by other participants.

For participation, it is sufficient that the person involved knows in general that the organisation intends to commit (terrorist) crimes. Any form of intent on the concrete terrorist offences specifically intended by the organisation is not required.

6.4.2 Assessment of the court

6.4.2.1 Was Ghuraba'a Mohassan an organisation in the period referred to in the indictment?

In paragraph 4.4.2.2, the court has already established that Ghuraba'a Mohassan was a combat group in the Deir ez-Zor region that opposed the Syrian army in the region. The defendant has stated that around April 2012, he formed the group Ghuraba'a Mohassan together with eight to nine men. Ghuraba'a Mohassan had weapons and vehicles, and belonged to the Free Syrian Army. The group was in contact with and at one point was part of a partnership, i.e. the Military Council. According to the defendant, he had the most respect within the group, as he was the oldest deserted soldier. Several witnesses have stated that the defendant was the leader/commander of Ghuraba'a Mohassan, including [leader 2] who was the head of the Military Council at the time.

Furthermore, the defendant stated that after the bombing of the carpet factory on 6 June 2012, when the Syrian army left the region, a number of members of Ghuraba'a Mohassan, including [person involved 4] and [person involved 5], switched to Jabhat al-Nusra. Only the defendant and two others stayed with Ghuraba'a Mohassan. From that moment until the departure of the defendant from Syria, according to the defendant, Ghuraba'a Mohassan was a group that maintained order and security in Mohassan with Ghuraba'a Mohassan being involved in, among other things, (coordinating) the manning of checkpoints. [Leader 2] has stated accordingly.

It can be deduced from the foregoing that with regard to Ghuraba'a Mohassan there was to a certain extent a structured organisation. The defendant was co-founder and the leader/commander of Ghuraba'a Mohassan. The organisation was part of the Free Syrian Army and came under the Military Council. The court therefore concludes that Ghuraba'a Mohassan was an organisation and that the defendant was its leader. The court assumes that Ghuraba'a Mohassan remained an organisation even after the bomb attack. The defendant stated that Ghuraba'a Mohassan continued to exist after the departure of the Syrian army from the region and carried out activities in the interest of order and security. The fact that a number of people had defected to Jabhat al-Nusra does not change that judgement.

Was Jabhat al-Nusra an organisation in the period referred to in the indictment?

The court answers this question in the affirmative and refers to what is included in chapter 4. In summary, the court establishes that there is an organised and structured partnership as referred to in Article 140 and 140a of the Criminal Code. Jabhat al-Nusra was officially established in January 2012, formed an organisation and had a leader. Furthermore, Jabhat al-Nusra was organised in such a way that it could carry out major attacks and manage and control the conquered area.

6.4.2.2 (Derivative of) terrorist intent? And if so, participation?

The court is now faced with the question whether Ghuraba'a Mohassan had an independent terrorist objective (or derived from Jabhat al-Nusra) in the period referred to in the indictment and, if so, whether the defendant participated in it.

To this end, the court first considers that the Deir ez-Zor region, where the defendant was staying, was a war zone at the time referred to in the indictment. This involved many fighting groups, all opposing the Assad regime but with different goals; some fighting groups sought to establish a democracy, while others sought to establish a strict Islamic state. These battle groups sometimes switched objectives over time, merged with other groups or ceased to exist. The fighting groups had varying loyalties and cooperation was sought with other

combat groups in order to successfully oppose the Assad regime.

In that region there is an age-old tribal culture that is characterised by mutual conflicts, both internal and external. This meant that during the period referred to in the indictment, one tribesman could be affiliated with the Free Syrian Army and another member of the same tribe could be affiliated with a jihadist fighting group.

The court establishes that the witness statements that are incriminating for the defendant in this case are mutually contradictory, were reversed or amended at a later date and that many witnesses stated that they only have their knowledge 'from hearsay'. All this makes it difficult to obtain a clear and unambiguous overview of the presence of various combat groups in the Deir Ez-Zor region in 2012 and 2013, and subsequently to identify these combat groups unambiguously with regard to the goal (intention) that these groups advocated. The court will therefore assess below whether there is other (objective) evidence in the file to establish a terrorist intent. After all, the court must answer the question whether it can be established *beyond reasonable doubt* that Ghuraba'a Mohassan was an organisation with an independent terrorist objective, or whether this organisation had a derived terrorist objective through collaboration with the terrorist organisation Jabhat al-Nusra.

Terrorist intent Jabhat al-Nusra

In the court's opinion, it has been established without doubt that Jabhat al-Nusra was a terrorist organisation during the period referred to in the indictment. They were the Syrian branch of Al Qaeda in Iraq. When it was founded in January 2012, the founding video already showed that Jabhat al-Nusra adhered to a violent Salafist ideology and saw itself as a Mujahidin. As previously considered, their ultimate goal was the establishment of a strict Islamic state in Syria's territory, where their advocated version of Sharia would be implemented. The attacks by Jabhat al-Nusra targeted the Assad regime as well as the Alawite and Shia civilian population. Jabhat al-Nusra thus had the intent to commit terrorist crimes.

However, even if there are indications, the court cannot establish beyond reasonable doubt on the basis of the case file that Ghuraba'a Mohassan at any time had a (derived)

terrorist intent during the period referred to in the indictment in which the defendant also participated. To this end, the court considers as follows:

The article in The Guardian of 30 July 2012

The main indication for a switch from Ghuraba'a Mohassan to Jabhat Al-Nusra and therefore the presence of a terrorist objective at Ghuraba'a Mohassan, in which the defendant also participated, is the article of 30 July 2012 in The Guardian. In the aforementioned article, in an interview with the defendant, it is described that after the bomb attack on 6 June 2012, he left the Free Syrian Army and swore allegiance to Al-Qaeda in Syria, Jabhat Al-Nusra, and that he supported the jihadist ideology of Jabhat Al-Nusra and now serves as the leader of one of their battalions. In the article, the defendant conveys the message of Jabhat al-Nusra/Al-Qaeda.

About the content of the article the defendant has stated that he did indeed give such an interview to a journalist from The Guardian, but that what he told the journalist was incorrect. The reason for this was that he had discovered that Ghuraba'a Mohassan had collaborated with Jabhat Al-Nusra in the bombing of 6 June 2012. He was not involved in that

himself. His arm was badly injured at the time and he was staying at the house of his wife's sister during the bombing, and added that the bombing was a surprise to him. After the bombing, he called Jabhat Al-Nusra a terrorist organisation. As a result, he got into trouble with Jabhat Al-Nusra. The members of Ghuraba'a Mohassan who had switched in the meantime advised him to pledge allegiance to Jabhat Al-Nusra and told him about the Guardian journalist who wanted to interview someone from Jabhat Al-Nusra. They said he might be able to resolve the conflict with Jabhat Al-Nusra by saying positive things about Jabhat Al-Nusra. The defendant did that but in the end this did not lead to a solution.

Although the statement of the defendant initially appears to be implausible, in view of what has been considered above (6.4.2.2. beginning) the court cannot rule out that during the interview there was indeed (some) opportunism on the part of the defendant. In addition, there is the fact - of even greater importance - that although the file does contain supporting evidence for the content of the article in The Guardian, comments can be made about this evidence and, moreover, there are also strong contraindications in the file that the organisation Ghuraba'a Mohassan actually had a (derived) terrorist objective at the time that the defendant took part in it. To this end, the court considers as follows:

The execution of [victim]

As considered extensively under count 1, the defendant along with others executed lieutenant colonel [victim] on 10 July 2012. This execution took place more than a month after the bombing and a few weeks before the publication of the interview in The Guardian. However, in the video related to this execution, only the combat groups Ghuraba'a Mohassan and battalion Iz Al-Din Al-Qassam are mentioned. If, as the Public Prosecutor argues, this execution would have been (also) committed under the flag of Jabhat al-Nusra, the court finds it much more likely that the name of Jabhat al-Nusra would also be mentioned in the execution video, but this is not the case. Furthermore, the execution video does not contain any facts and circumstances that indicate the propagation of the Salafist ideologies of Jabhat al-Nusra. On the contrary, the video contains references to the Free Syrian Army and indications that the execution was an act

of revenge against the regime following the massacre in Al Houla. Also noteworthy is that in another video, in which [victim] is interrogated by a number of men, including [person involved 2] who belongs to the battalion Iz Al-Din Al-Qassam, [victim] is told that he should advise other soldiers to switch to the Free Syrian Army. The court also sees a strong contraindication in this that this execution was carried out by or in collaboration with Jabhat al-Nusra.

On the basis of the above, the court considers it much more likely that the execution was carried out as an act of revenge for the massacre in Al Houla caused by the Syrian regime. Although the execution was claimed in a communiqué by Jabhat al-Nusra in September 2012 on the website [website 1], the file shows that Jabhat al-Nusra more often claimed attacks that were committed by other groups, so that insufficient significance can be attributed to this against the above-mentioned counter indications. In view of the foregoing, the court cannot determine that the execution of [victim], in which the defendant participated, was committed with terrorist intent. The execution cannot therefore contribute as supporting evidence for the defendant's participation in a terrorist organisation.

The "promotional video" of 18 October 2013

With regard to the video referred to by the Public Prosecutor as 'promotional video', posted by the defendant's son, the court considers as follows. This video was published on 19 October 2013 under the title: 'Free Syrian Army. Battalion Ghuraba'a or Mohassan. Implemented by the reporters of Battalion Ghuraba'a of Mohassan'. It concerns a series of

photos, mainly of armed men, including the defendant, which are placed one after the other with singing in the background and (cannon) shots and explosions can be heard in between. The video, which has been designated as a promotional video by the Public Prosecutor, does not make a very professional impression on the court. It is not possible to determine who made this video. However, it can be concluded from the detailed properties of the video that the medium was created on 18 October 2013 at 16:31 hrs, i.e. well after the founding of Ghuraba'a Mohassan and the significant events in this file. The defendant had already left Syria around this period.

The court has established that the video is not an official publication of Jabhat al-Nusra and that there are contraindications that the video was actually made under the authority of Jabhat al-Nusra. After all, the video shows elements of both the Free Syrian Army and Jabhat al-Nusra, such as the flags of both combat groups. The video also shows actions that cannot be reconciled with Jabhat al-Nusra, such as smoking and drinking. The defendant appears several times in the photos, but not in combination with elements of Jabhat al-Nusra.

Once a man (not the defendant) can be seen in the video making a tawhid gesture, but otherwise the jihadist struggle is not glorified nor another terrorist ideology propagated. The defendant appears several times in the photos, but not with features such as flags or gestures of Jabhat al-Nusra.

In view of the foregoing, the court is therefore of the opinion that, even if this video had been made to promote Ghuraba'a Mohassan, in view of the time of making this video and in view of its content, it cannot be used as supporting evidence for a (derived) terrorist intent of Ghuraba'a Mohassan at the time of the charged facts. The video can therefore not contribute as supporting evidence for the participation of the defendant in a terrorist organisation.

The bomb attack on 6 June 2012

With regard to the bomb attack on the carpet factory, the court considers that in the video the attack is claimed by Jabhat al-Nusra. The wall of the building in the video also bears the text "Ghuraba'a Mohassan Jabhat al-Nusra". It can be deduced from the foregoing that there are strong indications that there was collaboration between Jabhat al-Nusra and Ghuraba'a Mohassan in this bomb attack that was aimed at forcing the Syrian army to leave the Deir Ez-Zor region and therefore also a (derived) terrorist intent.

Be that as it may, the defendant has denied involvement and has stated that members of Ghuraba'a Mohassan who subsequently moved to al-Nusra Front committed the bombing. The defendant further stated that in mid-May 2012, he was seriously injured in his arm by a gunshot wound. As a result, he was hospitalised for ten days in June 2012 and underwent surgery for his injury. The fact that he was seriously injured during that period is not in dispute and it is not inconceivable that the defendant was not involved in the bomb attack by members of Ghuraba'a Mohassan due to his injury. The file does not provide sufficient evidence to the contrary. Therefore, in the opinion of the court the video of the bomb attack cannot serve as supporting evidence for the defendant's participation in a terrorist organisation.

Shooting down the MIG on 2 November 2012

With regard to the downing of the MIG, the court considers that there is no evidence in the file that the defendant or Ghuraba'a Mohassan had any involvement or a specific role of any significance in the downing of the MIG. For example, several witnesses testify that another battalion was responsible for the downing of the MIG. Although the defendant stood prominently next to [leader 2], chairman of the Military Council, when he claimed in a video that the MIG had been brought down, this is insufficient to establish the involvement of the

defendant in Ghuraba'a Mohassan. It has also not been found that the MIG was brought down in collaboration with or under the flag of Jabhat al-Nusra. Therefore, the downing of the MIG cannot contribute as supporting evidence for the participation of the defendant in a terrorist organisation.

Exchange of Colonel [person involved 3] against defendant's brothers in January-February 2013

It appears from the file that the defendant kept Colonel [person involved 3] of the Syrian regime imprisoned and at one point exchanged him for his two brothers who had been captured by the regime. The defendant used [person involved 3] as a means of exchange to get his brothers free. This concerns a personal interest and motive. There has been no evidence of any involvement by Ghuraba'a Mohassan in this, whether or not with a terrorist purpose. The exchange of Colonel [person involved 3] cannot therefore serve as supporting evidence for the defendant's participation in a terrorist organisation.

Twitter activities of defendant's son

With regard to the various messages on the Twitter account of [son of the defendant], the son of the defendant, the court considers as follows. [The defendant's son] has made references to his father as commander/leader of Ghuraba'a Mohassan and to Jabhat al-Nusra several times, most notably in June 2013. He also spoke about the jihad battles in Syria, about the "Mujahidin of Ghuraba'a Mohassan" and about his father as "Mujahidin".

These reports are incriminating in the sense that apparently according to [son of the defendant] Ghuraba'a Mohassan was part of Jabhat al-Nusra and that Ghuraba'a Mohassan was sympathetic to the ideologies of Jabhat al-Nusra. These messages, however, were posted during the period when [son of the defendant] stayed with his mother, brothers and sisters in a refugee camp in Turkey and the defendant was still in Syria. It is unknown whether [defendant's son] had (intensive) contact with the defendant during that period and whether he was fully aware of his father's actions in Syria. [Son of the defendant] was a child at the time of posting of the messages, he was twelve years old. Due to the aforementioned comments, the court considers this evidence, however incriminating, insufficiently convincing to contribute as supporting evidence for the defendant's participation in a terrorist organisation.

Finally, this also applies to the single comment made by the wife of the defendant during the search in 2019 and to the fact that in June 2017 the defendant expressed support for an attack on the parliament of Iran carried out by IS. The comment made during the search is open to several interpretations. All kinds of things can be found about the statement of support, but it took place well outside the period referred to in the indictment. Therefore, both remarks cannot contribute in a convincing way as supporting evidence for the defendant's participation in a terrorist organisation.

6.4.2.3 Conclusion

On the basis of the evidence discussed, the court concludes that, although there are strong indications, it cannot be established beyond reasonable doubt - not even when viewed in relation to each other - that insofar as Ghuraba'a Mohassan was at any time an organisation with a (derived) terrorist intent, the defendant then participated in it.

The court will therefore acquit the defendant of the charges under count 2 . In view of this, counsel's conditional request to hear the Guardian journalist as a witness no longer needs discussion.

7 Punishability of the proven offence

The proven offence is punishable by law, because no facts or circumstances have become plausible that exclude the punishability of the offence.

8 Punishability of the defendant

The defendant is punishable by law, because no facts or circumstances have become plausible that exclude his punishability.

9 Imposition of punishment

9.1 Public Prosecutor's demand

The Public Prosecutor has demanded that the defendant be sentenced in respect of both offences to a prison term of 27 years less the time spent in pre-trial detention.

9.2 Position of the defence

In so far as is relevant, the defence has taken the position that, in the event of a finding of fact, account must be taken of exceeding the reasonable term. It is important here that the pre-trial detention in charges such as in this case is extra severe and that the daughter of the defendant initially had a life-threatening illness at the time of the defendant's remand. Furthermore, the defence has asked to take into account a recent change in the regulation of the Conditional Release (hereinafter: CR). With a demand of 27 years non-suspended prison sentence, the defendant would have to be detained for 7 years longer under the new CR scheme than under the old CR scheme.

9.3 Assessment of the court

The sentence mentioned below is in accordance with the seriousness of the offence committed and the circumstances under which it was committed and is based on the person and the personal circumstances of the defendant, as established at the investigation during the court hearing. The court takes into account in particular the following.

The seriousness of the crime

Out of revenge, the defendant committed a war crime together with others by executing [victim], a prisoner of the Syrian regime, near the town of Mohassan in Syria.

These acts took place during the armed conflict in Syria, in which, among others, the Assad regime committed frequent violations of human rights and the law of war. Internationally, the regime has come under a lot of criticism. This has led to many soldiers deserting the Syrian army, including the defendant, which is punishable by the death penalty in Syria. Several combat groups formed by deserted soldiers have opposed the Syrian regime. The (war) crimes committed on the part of the Syrian regime have also ensured that many people have a certain degree of understanding for the (armed) resistance against the regime. However, the fact that the Assad regime can also be blamed can never be a license for opposition groups to execute soldiers who have been placed out

of combat without trial. Not even when the human rights of these opposition groups themselves are violated.

The prohibition on killing civilians and persons who no longer take part in combat (*hors de combat*) during an armed conflict concerns the right to life and the protection of physical integrity. The prohibition is mandatory law, a rule that is considered so fundamental to the international legal order that it cannot be deviated from and the rule takes precedence over other rules of international law. The execution of a captured opponent by the defendant and [person involved 2] is not only a murder, but also a flagrant violation of the written and unwritten rules of international humanitarian law and universal human rights. The execution shows a disregard for fundamental basic standards that apply during armed conflict, which the court seriously blames on the defendant.

Criminal record

The court has taken into account the criminal record of 18 May 2020 of the defendant, which shows that the defendant has not previously been irrevocably convicted for (similar) crimes.

Sentence to be imposed

In view of the nature and seriousness of the offence, in the opinion of the court only the imposition of a long non-suspended prison sentence is appropriate. To this end, the court considers as follows.

The maximum penalty for the war crime 'killing' as referred to in Article 6, paragraph 1, under a of the ICA, is a life sentence or a temporary prison sentence not exceeding thirty years.

The present facts and circumstances can be called unique for a Dutch criminal case and the court therefore has no orientation points for the war crime 'killing', nor other Dutch criminal cases that are virtually comparable. Criminal cases concerning war crimes in which persons were indirectly responsible for the killing of several victims are known (Guus K. and Frans van A.). They were given non-suspended prison sentences of 19 and 17 years respectively.³⁵ In a Congolese criminal case, a 20-year non-suspended prison sentence was imposed on an executive who ordered the killing of five people.³⁶

The court also took into account the fact that in the Netherlands the same penalty can be imposed for murder as for the war crime of 'manslaughter' and that in liquidation cases the district courts and appeal courts take a non-suspended prison sentence of 20 years for a single liquidation (on broad daylight and on public roads) as a starting point.³⁷ In this case, the court attributes weight to the special circumstances that the execution took place in a country where a non-international armed conflict was taking place at that time, which also had major consequences for the defendant. In view of the foregoing, the court is of the opinion that a non-suspended prison sentence of 16 to 20 years can be taken as the starting point in a case such as this.

Aggravating circumstances

In an aggravating sense, the court takes into account that the defendant assumed a leadership role in carrying out the execution and that he started shooting at the victim.

Moderating circumstances?

Contrary to the defence's request, the court does not take into account that the new CR regulation, as it applies under the Penalties and Protection Act and which entered into force on 1 July 2021, would result in a shorter CR duration than under the old regulation. The fact that under the old CR regulation a convicted person would by definition only have to serve two thirds of his sentence in the event of long-term prison sentences does not hold true. As is now the case with the new CR scheme, this was dependent on several factors, such as the defendant's behaviour

during his detention, whether he adhered to the conditions of the long probationary period and his status as an alien. The CR can be revoked, postponed and even adjustment of the CR can take place. The court therefore imposes a penalty that, in its opinion, does justice to the offence without taking into account a possible CR period, because it is currently impossible to say whether the defendant will qualify for this.

The reasonable term

Contrary to the defence, the court is of the opinion that the reasonable term has not been exceeded. It is true that the defendant has been in pre-trial detention for more than 16 months at the time of pronouncing the judgement in this case, i.e. almost 26 months. However, this is a complicated case with an extensive preliminary investigation in which

many witnesses, also abroad, had to be heard. The necessary diligence was always exercised during the preliminary investigation and shortly after the hearing of the last witness, the case was heard in court. The court therefore does not take into account, in a moderating sense, the fact that the defendant has been in pre-trial detention for more than 16 months.

In view of the foregoing, the court concludes that there are no moderating circumstances.

Conclusion

In view of all of the foregoing, the court considers a non-suspended prison sentence for a term of 20 years, less pre-trial detention, appropriate and warranted. This sentence is less than the one demanded by the Public Prosecutor due to the fact that the court will acquit the defendant of the offence charged under 2.

10 Applicable articles of the Criminal Code

The sentence to be imposed is based on the following articles:

- 47 of the Criminal Code,
- 6 of the International Crimes Act.

These regulations have been applied as they were legally applicable at the time of the proven facts or as legally applicable at the time of this judgement.

11 Judgement

The court:

declares the Public Prosecution Service inadmissible in the prosecution with regard to

the charge under part E of count 2;

declares not legally and convincingly proven that the defendant has committed the offence as charged under count 2 and acquits him thereof;

declares legally and convincingly proven that the defendant has committed the offences charged under count 1, as stated above, and that the proven offence constitutes:

complicity in violating Common Article 3 of the Geneva Conventions, consisting in the killing of a person placed *hors de combat* by captivity, committed in a non-international armed conflict,

declares the offence proven and the defendant punishable;

declares not proven what has been charged against the defendant additionally or differently than has been declared proven above and acquits him thereof;

sentences the defendant to:

imprisonment for a term of **20 (twenty) years**;

stipulates that the time spent by the convicted person in custody and preliminary detention prior to the enforcement of this judgement shall be deducted in full in the enforcement of the imprisonment imposed on him, insofar as that time has not already been deducted from another sentence.

Enforcement of the imposed prison sentence will take place in full within the penitentiary institution, until the time when the convicted person is eligible for participation in a penitentiary program, as referred to in Article 4 of the Penitentiary Principles Act, or the regulation of conditional release, as referred to in Article 6:2:10 Code of Criminal Procedure, is up for discussion.

This judgement was rendered by:

J.A. van Steen, LL M President,

E.C. Kole, LL M Judge,

J. Holleman, LL M Judge,

in presence of F. Kok, LL M and W.H. Ng, Clerks,

and pronounced during the public hearing of this court on 16 July 2021.

Appendix I: End notes

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- ¹ Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997) Treaty Series 1998, 84 (Dutch translation Treaty Series 1999, 16).
- ² The Hague Court of Appeal 12 July 2017, ECLI:NL:GHDHA:2017:3573.
- ³ When reference is made hereinafter to an official report, this means - unless stated otherwise - an official report, drawn up in the legal form by (an) authorised investigating officer(s). Where reference is made to pages, this concerns the pages of the sequentially numbered official report with reference LEFRA19006, of the National Criminal Investigation Department, International Crimes Team, dated 2 June 2020, with appendices, unless stated otherwise.
- ⁴ Document, being a knowledge document titled 'Knowledge Appendix 140a Criminal Code Jabhat al-Nusra/Jabhat Fatah al-Sham/Hay'at Tharir al-Sham' of 2 August 2018, drawn up by Dr. [expert], added to official report number 180806-2, folder E, page 141 and further, Chapter 1.
- ⁵ Document, being a report from the *Independent international commission of inquiry of the Syrian Arab Republic*, drawn up on 16 August 2012, document code A/HRC/21/50.
- ⁶ Document, being a report from the High Commissioner for Refugees of the United Nations (UNHCR), *UNHCR Global Report 2012, Syrian Arab Republic*, drawn up in June 2013.
- ⁷ Document, being a knowledge document titled 'Knowledge Appendix 140a Criminal Code Jabhat al-Nusra/Jabhat Fatah al-Sham/Hay'at Tharir al-Sham' of 2 August 2018, drawn up by Dr. [expert], added to official report number 180806-2, folder E, page 141 a.f, Chapter 1.
- ⁸ Document, being a knowledge document titled 'Knowledge Appendix 140a Criminal Code Jabhat al-Nusra/Jabhat Fatah al-Sham/Hay'at Tharir al-Sham' of 2 August 2018, drawn up by dr. [expert], added to official report number 180806-2, folder E, page 141 a.f. Chapter 3.
- ⁹ Official report of findings of 19 March 2018, official report number LERFA17012-00137, p. 232 (Internet Findings).
- ¹⁰ Official report of findings of 19 March 2018, official report number LERFA17012-00137, p. 230-231 (Internet Findings).
- ¹¹ Official report of findings of 19 December 2018, official report number LERFA17012-01038, p. 237-244 (Case file 6 ICA).
- ¹² Official report of findings of 18 August 2020, official report number LEFRA17012-001097, p. 398-528 (Sent later).
- ¹³ The expert report, on 28 January 2021 drawn up and signed by W. Kerkhoff, D.L. van der Vloed, B. Hoogeboom and D.J. Rijken, experts of the Netherlands Forensic Institute in the fields of weapons and ammunition, speech and audio research, image research and biometrics and forensic pathology respectively (p. 1-14, with appendices).
- ¹⁴ Court's own observation at the court session of 17 June 2021.
- ¹⁵ Defendant's own statement at the hearing of 16 June 2021.
- ¹⁶ Defendant's own statement at the hearing of 17 June 2021.
- ¹⁷ In this respect, explicitly see: Parliamentary Documents II, 2001-2002, 28 337, no. 3, Explanatory Memorandum, p. 5.

- ¹⁸ See Common Article 3 of the Geneva Conventions, 1949.
- ¹⁹ ICTY, *Prosecutor v. Tadić*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.
- ²⁰ ICTY, *Prosecutor v. Haradinaj*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 49.
- ²¹ ICTY, *Prosecutor v. Haradinaj et al*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 60.
- ²² ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, paragraph 67, 70; ICTY, *Prosecutor v. Gotovina*, Trial Chamber Judgement, IT-06-90-T, 15 April 2011, paragraph 1694.
- ²³ The Hague District Court 23 July 2019, ECLI:NL:RBDHA:2019:7430, The Hague Court of Appeal; The Hague Court of Appeal 26 Jabhat al Nusrauuri 2021, ECLI:NL:GHDHA:2021:103.
- ²⁴ ICTY, *Prosecutor v. Gotovina*, Trial Chamber Judgement, IT-06-90-T, 15 April 2011, paragraph 1694.
- ²⁵ ICRC, *Commentary on Common Article 3*, in 'Commentary on the First Geneva Convention', Cambridge: Cambridge University Press 2016, p. 205.
- ²⁶ Regulation 89 of the ICRC's Customary Law studies.
- ²⁷ ICRC, *Commentary on Common Article 3*, in 'Commentary on the First Geneva Convention', Cambridge: Cambridge University Press 2016, p. 207.
- ²⁸ ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.
- ²⁹ ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 57 and 58.
- ³⁰ ICTR, *Prosecutor v. Akayesu*, Appeals Chamber Judgement, ICTR 96-4-A, 1 June 2001, paragraph 444.
- ³¹ ICC *Ntaganda* case, Trial Chamber: *Judgment* (8 July 2019), paragraph 732.
- ³² ICC *Ntaganda* case, Trial Chamber: *Judgment* (8 July 2019), paragraph 733; see from an earlier date also ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 59.
- ³³ See for example The Hague District Court 10 December 2015, ECLI:NL:RBDHA:2015:14365 and The Hague District Court 23 July 2019, ECLI:NL:RBDHA:2019:7430.
- ³⁴ Rotterdam District Court 11 March 2021, ECLI:NL:RBROT:2021:2057; Supreme Court 8 January 2019, ECLI:NL:HR:2019:12.
- ³⁵ The Hague Court of Appeal, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676 and 's-Hertogenbosch Court of Appeal, 21 April 2007, ECLI:NL:GHSHE:2017:1760.
- ³⁶ Military Garrison Court of Ituri at Bunia, Appeals Chamber, Democratic Republic of the Congo, *Bongi Massaba* case, 4 November 2006.
- ³⁷ Court of Appeal Arnhem-Leeuwarden, 3 March 2021, ECLI:NL:GHARL:2021:1918.
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