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Inhoudsindicatie

Content indication: Investigation 26Clermond. Acquittal art. 6 paragraph 1 under c WIM Dutch International Crimes Act, the acts in this case do not constitute 'outrage upon personal dignity'. (search-indicators: attack and human dignity). Proven art. 140a CC Ahrar al-Sham, violation of reasonable time limit.

Partij(en)

Cause list number: 22-001283-21

Public Prosecutor's Office number: 09-748011-19

Date of judgment: 6 December 2022

JUDGMENT AFTER TRIAL

The Hague Court of Appeal

joint bench for criminal proceedings

Judgment

rendered on appeal against the decision of the District Court of The Hague of 21 April 2021 in the criminal case against the accused:

[accused],

born in [place of birth] (Syria) on

[day of birth] 1990,

currently detained at the Vught prison facility in

Vught.

Investigation name: 26Clermond

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1. List of abbreviations used

To facilitate the readability of the judgment, a list of abbreviations used is provided below.

FSA Free Syrian Army
 ICC International Criminal Court
 ICTY International Criminal Tribunal for the Former Yugoslavia
 IS Islamic State
 ISIS Islamic State in Iraq and Syria
 CA 3 Common Article 3 of the Geneva Conventions
 SCM Syrian Centre for Media and Freedom of Expression
 CC Criminal Code
 CCP Code of Criminal Procedure
 UN United Nations
 WIM Dutch International Crimes Act

2. Examination of the case

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

The Court of Appeal has taken cognisance of the request of the Advocate General and of that which has been put forward by and on behalf of the accused.

3. Procedure

In the first instance, the Public Prosecution Service was declared inadmissible in the prosecution with regard to part E of the charges under Count 2. Furthermore, with regard to the charges under Counts 1 and 2, with regard to parts A to D, the accused was sentenced to a term of imprisonment of six years, with credit for the time spent in pre-trial detention.

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

4. Indictment

The accused - after adjustment of the indictment at the hearing in the first instance – has been charged with the following:

1.

at one (or more) point(s) in time in or around the period from 1 March 2015 up to and including 27 April 2015, in or near Al-Ziyarah (Syria) and/or Hama (Syria), or at least somewhere (else) in Syria, either alone or jointly and in conjunction with (an)other person(s),

in the event of a non-international armed conflict within the territory of Syria, contrary to the provisions of Common Article 3 of the Geneva Conventions of 12 August 1949,

of one or more person(s) who were then not (or no longer) taking part in the hostilities directly, namely one or more civilian(s) and/or personnel of armed forces who had laid down their weapons and/or one or more person(s) who were placed hors de combat by sickness and/or wounds and/or detention, and/or any other cause,

assaulted his/their personal dignity (and/or) (in particular) treated him/them in a humiliating and/or degrading manner, because he, the accused and/or his co-perpetrator(s), while the aforementioned (deceased) person(s) were lying on the ground,

- stood and/or posed next to the aforementioned (deceased) person(s) and/or
- called the aforementioned (deceased) person(s) 'dogs' and/or 'carcasses of Al-Assad' and/or sang songs, and/or
- exhibited the aforementioned (deceased) person(s) and/or
- placed his foot on the body of the aforementioned (deceased) person(s) and/or
- kicked the body of the aforementioned (deceased) person(s) with his foot and/or
- spat on the body/bodies of the aforementioned (deceased) person(s) and/or
- had himself/herself filmed with one or more of the aforementioned (deceased) person(s) during the above action(s) and/or
- subsequently posted this video on social media, namely YouTube, and thereby (thus) distributed it and/or made it public;

2.

at one (or more) point(s) in time in or around the period from 1 March 2015 up to and including 1 July 2017, in or near Al-Ziyarah (Syria) and/or Hama (Syria), or at least somewhere (else) in Syria,

either alone or jointly and in conjunction with (an)other person(s), participated in an organisation such as Ahrar Al-Sham, or in any case a jihadi combat group associated with the aforementioned organisation, or at least (an) organisation advocating the armed jihad struggle, whose intent it was to commit terrorist offences, namely

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

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

In its closing speech, the Public Prosecution Service adopted the position that there is jurisdiction for the participation in an organisation whose aim it is to commit offences with terrorist intent, charged to the accused under Count 2 of the indictment, with regard to part E, for which part the District Court had declared the Public Prosecution Service inadmissible in the prosecution. For the main charge, the Public Prosecution Service believes that there is jurisdiction on the basis of Article 2 of the International Convention for the Suppression of Terrorist Bombings and, for a lesser included charge, on the basis of the report 'Bron wapenwetgeving Syrië', dated 25 October 2018, added to the file on appeal.

The defence counsel, in response to the report 'Bron wapenwetgeving Syrië' dated 25 October 2018 and added to the file by the Public Prosecution Service, did not raise any defence with regard to the existence of jurisdiction.

The Court of Appeal is of the opinion that the Court of Appeal has jurisdiction, including with regard to Count 2, part E, of the

indictment.

The Court of Appeal considers the following in this respect.

Article 8c CC reads - as far as relevant here - as follows:

Dutch criminal law is applicable to any alien who is guilty outside the Netherlands of an offence punishable by a term of imprisonment of at least eight years according to the legal description, if this alien is in the Netherlands and:

a. (...), or

b. extradition for this offence is not possible due to the lack of a treaty-based relationship, insofar as the offence is punishable by the law of the country where it was committed.

The accused is in the Netherlands as an alien. He has been charged under Count 2 with being guilty in Syria of participating in an organisation whose intent it is to commit terrorist offences within the meaning of Article 140a CC. This offence is punishable by a maximum term of imprisonment of 15 years.

Due to the lack of a treaty-based relationship with Syria – where the offence was allegedly committed and whose nationality the accused holds - the Court of Appeal assumes that the accused, who is currently in the Netherlands as an alien, cannot be extradited to Syria.

The charges under Count 2, part E are considered an offence under the Weapons and Ammunition Act and are punishable in Syria. Indeed, it transpires from the report of expert Jolen 'Bron wapenwetgeving Syrië' of 25 October 2018 that Syria has strict firearms legislation, prohibiting the possession of automatic firearms and prohibiting persons under the age of 25 from possessing a firearm. Thus, the requirements of Article 8c under b CC have been met and, for this reason alone, Dutch criminal law applies to this part of the charges under Count 2.

The Public Prosecution Service is therefore admissible to prosecute the accused (also) for part E of the charges under Count 2.

6. Request by the Advocate General

The advocate general has requested that the Public Prosecution Service be declared admissible in the prosecution of the accused for part E of the charges under Count 2. The Advocate General has further requested that the decision appealed against be set aside and that the accused be sentenced to a term of imprisonment of eight years, with credit for the time spent in pre-trial detention, with regard to Counts 1 and 2 of the indictment.

7. The decision appealed against

The decision appealed against cannot be upheld, because the Court of Appeal does not agree with it.

In the following, the Court of Appeal will first establish the facts, with the evidence listed in footnotes. Endnotes refer to literature and case law, or provide a further explanation or definition of a word or concept.

8. Establishment of facts^[1]

8.1

Introduction

On 11 November 2015, the accused, from Syria, came to Germany to seek asylum. The accused left there again on 7 December 2015. When the accused had reported himself in the Netherlands in October 2019, equally for the purpose of applying for asylum, the Dutch police received information from Germany that an alert had been issued to the name of the accused.^[2] In Germany, suspicion had arisen that the accused had been active in Syria as a fighter and regional leader of Ahrar al-Sham.

A criminal investigation was subsequently launched against the accused in the Netherlands.

8.2

Ahrar al-Sham

Purpose and ideology

Kata'ib Ahrar al-Sham was founded in November 2011 as an alliance of brigades operating in particular in northern Syria. Founders of the organisation - which was later renamed *Harakat Ahrar al-Sham al-Islamiyya* - are former Islamic political prisoners and fighters in Iraq who were imprisoned in the notorious Sednaya prison north of Damascus under Al-Assad's rule. Ahrar al-Sham leader Hassan Abboud stated in an interview with Al-Jazeera on 9 June 2013 that Ahrar al-Sham is a

radical Islamist movement that sought to contribute to and shape a Syrian national uprising or revolution against the authoritarian and repressive regime of Bashar al-Assad, with the aim of creating an 'Islamic state' based on Islamic law, the sharia.^[3] Abboud strove for a Sunni version of Iran: a theocratic republic overseen by religious scholars. The policy was not to make laws, but to allow sharia laws to apply.^[4]

Ahrar al-Sham established judicial and administrative structures in the areas that it controlled from 2013, guided by the sharia.^[5] In 2014 and 2015, the organisation had a varied administrative presence in conquered areas in Syria.^[6] Ahrar al-Sham bestows upon the sharia a much wider scope than the Syrian Arab Republic that applies the sharia to what is considered family law here.^[7] According to Abboud, the sharia is a vision of life and does not only include the aspect of offence and punishment, but also considers worldly affairs and social relations.^[8] In July 2016, Amnesty International stated that some groups in Idlib, such as Jabhat al-Nusra and Ahrar al-Sham 'have imposed a strict interpretation of Shari'a and imposed punitive measures on perceived infractions.'^[9]

Ahrar al-Sham initially followed the sectarian worldview and the agenda of sectarian hatred against Shiites and Alawites. Besides military actions/operations by the group against the Al-Assad regime, FSA brigades, Kurds and the Islamic State, these also targeted the Alawite and Shia civilian population.^[10] In the aforementioned interview with Al-Jazeera, Hassan Abboud called for the use of force against Alawite or Shia populations.^[11] After the summer of 2013, the sectarian discourse was tempered, without distancing itself from its previous explicitly sectarian violence. Thus, the group continued to see itself as a last bastion for the defence of Sunni Islam against the advancing Shia enemy, a form of defensive sectarianism.^[12]

It did not distance itself either from the violence of its allies including Jabhat al-Nusra^[13], with which organisation (from July 2016 under the name of Jabhat Fatah al-Sham) Ahrar al-Sham continued intensive military cooperation until 2017.^[14] In the course of 2015, for example, Ahrar al-Sham participated in several coalitions that Jabhat al-Nusra had entered into with combat groups, and turned out to be a loyal ally.^[15]

In September 2015, a new leader of Ahrar al-Sham was elected (Muhannad al-Misri), and there was an internal reorganisation affecting important bodies and key figures (who, among other things, were thanked for services rendered). That there was discord transpired before and during the Riyadh talks, where a representative group from the opposition to the regime had to be assembled for the peace negotiations. Although this discord was present before and during Riyadh and at a later stage would lead to several rifts within Ahrar al-Sham, the positions on the themes of the Riyadh talks were still fairly uniform.^[16]

After the signing of the so-called Riyadh declaration on 10 December 2015, a reorientation in Ahrar al-Sham's modus operandi could be noted (e.g. fighting IS instead of cooperating with it, and the nationalist element taking precedence over the sectarian one), but this never represented a '180-degree turn' in terms of Ahrar al-Sham's objectives.^[17] Even after its signing, senior leaders within Ahrar al-Sham rejected this declaration and the struggle continued as a religious one. In May 2016, Ali Omar, deputy head of the organisation, revealed that a political solution was not possible, while adding, '*So that's why what's come to the fore now is the sound of the bullet - jihad on the path of God.*'^[18]

Hostilities

While the armed conflict in Syria was already taking place before Ahrar al-Sham manifested itself in it, armed struggle also became the primary means for Ahrar al-Sham to achieve its goals.^[19]

In October 2012, Ahrar al-Sham was allegedly one of the fastest-growing combat groups in Idlib and had at the time also expanded its presence to Latakia, Aleppo and Hama. Of the combat groups present there, the group was allegedly the strongest in the use of explosives, mines, and bomb cars at that time. In 2014, Al-Jazeera estimated the number of the organisation's fighters at 25,000.^[20]

Ahrar al-Sham, Jabhat al-Nusra and ISIS took part in an offensive in the Syrian province of Latakia in August 2013. This province is considered to be the heart of the regime because the Al-Assad family is originally from a village in this region and 80 percent of the population are Alawites. In the process, a massacre of civilians - including children, women, and elderly people - took place. After their execution, they were thrown into mass graves. Although it cannot be established with certainty that Ahrar al-Sham actively participated in the massacre, Ahrar al-Sham did take part in the offensive and helped fund it. Moreover, Ahrar al-Sham never distanced itself from the massacre, nor did it condemn its allies for it. Ahrar al-Sham can therefore be held co-responsible for this sectarian massacre,^[21] just as it can be held responsible for taking civilians hostage.^[22]

Ahrar al-Sham has also been guilty of taking civilians hostage since then. The independent International Commission of Inquiry on the Syrian Arab Republic has reported that Ahrar al-Sham deliberately selects women and children to take hostage and exchange them for prisoners taken by the enemy.^[23]

Although from 2015-2016, Ahrar al-Sham's actions changed in terms of an increasingly pragmatic and moderate implementation of the sharia and reduced involvement in sectarian violence, even after 2015, Ahrar al-Sham failed to refrain from committing war crimes and crimes against humanity.^[24]

Between March 2015 and February 2016, Ahrar al-Sham held men, women, and children hostage in Idlib. From 2013 until

July 2016, women were detained in Douma by the agency of armed groups, including Ahrar al-Sham. The women were part of a group of Alawite civilians held hostage and were pressured in prison to convert to Sunniism.^[25.] Until February 2017, there were human rights violations by the entire set of armed groups in control in Aleppo, including Ahrar al-Sham.

In 2016 and 2017, Ahrar al-Sham continued to pursue its main goal of overthrowing the regime by military means and halting the advance of pro-regime forces, with Russian air support. Throughout 2016, the group continued to fight with these objectives together with Jabhat al-Nusra under the Jaysh al-Fatah umbrella, including in Idlib, Aleppo and Hama. Equally in the period 2016-2017, Ahrar al-Sham allegedly committed war crimes and crimes against humanity including the deliberate killing of civilians, hostage-taking, torture of prisoners (of war), firing on civilian targets, arbitrary detention of civilians, and recruiting and using children for military purposes.^[26.]

In 2016, it was reported that armed groups, including Ahrar al-Sham, had taken dozens of civilians hostage in Idlib in March 2015. Until February 2016, Ahrar al-Sham reportedly had held 55 hostages, including women and children, and beaten and mistreated some of them with electric shocks. The hostages received little food, no medical care, and no access to sunlight.^[27.]

Finally, Ahrar al-Sham (under the umbrella of the Islamic Front) was involved in the siege of towns and villages from 2012 up to and including 2016. The aim of this included putting pressure on the inhabitants of a town.^[28.] In the process, civilians were denied medical and humanitarian aid.^[29.]

Fuaa and Kefraya

In March 2015, the villages of Fuaa and Kefraya - two mainly Shia villages in Idlib province - were besieged by rebels, using artillery. Beside Jabhat al-Nusra, Ahrar al-Sham also participated in the siege, which lasted until December 2015 and led to a humanitarian crisis in the two villages.^[30.] During this siege, it was Ahrar al-Sham that threatened with reprisals against civilians and Iranian fighters as retaliation in case the regime continued to attack civilians in Idlib.^[31.] Amnesty International stated in November 2017 with regard to the enclaves of Fuaa (also known as Foua) and Kefraya:

'The Ahrar al-Sham Islamic Movement and Hay'at Tahrir al-Sham besieged the residents of Kefraya and Foua, restricting their access to humanitarian and medical aid. They also carried out unlawful attacks, using explosive weapons that should not be used in densely populated areas as they lack the ability to be aimed at a specific target. Some of these violations amounted to war crimes.' ^[32.]

With regard to the attacks on these localities, the UN stated that Jaysh al-Fatah (the alliance to which Ahrar al-Sham also belongs, see below) deployed nine VBIEDs (Vehicle-Borne Improvised Explosive Devices) and fired more than 1,200 rockets at the Shiite enclaves on 19 September 2015. This killed 60 people and injured 300.^[33.] In April 2016, civilians (presumably Shiites) who were being evacuated from Fuaa and Kefraya were also targeted via a VBIED attack. Although Ahrar al-Sham has always denied responsibility, it was indeed involved in the siege of Fuaa and Kefraya.^[34.]

Battle of Al-Ghab

The battle on the Syrian plain of Sahl al-Ghab (hereinafter also: Battle of Al-Ghab) was initiated by several rebel groups, including Ahrar al-Sham, around April 2015. During this period, they achieved victories in nearby Idlib city and Jisr al-Shughur. In so doing, they advanced from the north-eastern Al-Ghab plain to the west and southwest. The rebel groups were hoping as a result to overrun military regime bases on the Al-Ghab plain and checkpoints concentrated in (Alawite) pro-regime villages, so that they no longer posed a threat to rebel-controlled villages and areas, and to then be able to advance to Latakia, the regime's mainly Alawite heartland to the west, and/or to Hama to the south.^[35.] On the Al-Ghab plain, the Al-Assad regime had to make its sparse troops withdraw as far as Joureen, where a military base was located.^[36.]

On the opposition side, a local branch of the FSA and a coalition of rebel groups under the name Jaysh al-Fath fought alongside other local armed groups. Jaysh al-Fath was formed in March 2015 on the initiative of Ahrar al-Sham and with the cooperation of Jabhat al-Nusra. Within this coalition, Jund al-Aqsa, Jabhat al-Nusra and Ahrar al-Sham were the main groups.^[37.] The command of Jaysh al-Fath was shared between Jabhat al-Nusra and Ahrar al-Sham.^[38.] Most of the groups were united in the Jaysh al-Fatah coalition/Tahrir Sahl al-Ghab Operations Room. The latter served to coordinate military operations in the area. However, the various groups continued to play their own roles and retain their own responsibilities due to ongoing disagreements within Jaysh al-Fatah (particularly tensions between Ahrar al-Sham and Jund al-Aqsa) and because coalition members provided their own troops and weapons.

The combat group Liwa' al-Adiyat operated both as a brigade of Ahrar al-Sham and independently. In the latter capacity, it maintained early close ties with Ahrar al-Sham that presumably went beyond mere cooperation in military operations. During the offensive on the Sahl al-Ghab, the Liwa' al-Adiyat brigade presented itself as part of Ahrar al-Sham.^[39.] During the offensive on the Al-Ghab plain, Ahrar al-Sham was one of the groups involved in the fighting in and around the locality of Al-Ziyara.^[40.]

8.3

The video material

8.3.1

The YouTube video (video 1)

On 9 October 2019, Dutch police secured a video from the YouTube website and found that it had been posted on 26 April 2015 by a user named '[name YouTube user 1]'. The title of the video is 'Ahrar al-Sham - Liwa al-Adiyat - battle of the Al-Ghab plain (Sahl al-Ghab)'.^[41.] Below – in line with the case file – this video will be referred to as video 1.

The video concerns a compilation of various images edited together, on which the reporting officer watching the video sees and finds the following.

In the first second, a screen-filling logo can be seen, which can further be seen in smaller size in the top right-hand corner. This is the logo of Ahrar al-Sham with the addition 'Liwa' al-Adiyat'^[42.] underneath. First, the Ahrar al-Sham's Adiyat brigade can be seen firing at a MIG fighter jet. From minute 2:01, the images consist of shades of green and black, possibly made with the camera's night vision setting on. Eight or more men, partly armed and in combat dress, can be seen in the picture. Some of the men are chanting and shouting slogans. There are also three or more male bodies lying on the ground. These look lifeless and are very severely battered.^[43.]

Between minute 2:00 and 2:13, (a man, referred to as) man 1 says:

'Allah is greater, and glory is for Allah. This is unfortunate in Al-Ziyarah village. These are the carcasses of Al-Assad. We asked them for peace, but they wouldn't listen. This is the end of the shabiha'^[44.] The dogs. Allah is greater, and the glory is for Allah.'

Between minute 2:17 and 2:24, man 1 says, while enthusiastic [sic] singing songs:

'we have the glory 'Ziyarah' and have surrounded the Gargar [interpreter's note: this is the locality of Qarqur spoken in dialect] and Frecha [interpreter's note: this is the locality Frikeh spoken in dialect].'

Between minute 2:25 and 2:32, man 1 says:

'Allah is greater, and glory is for Allah. Here lie the bodies of Al-Assad's dead in 'Ziyarah' village. Allah is greater, and glory is for Allah. Here lie the shabiha.'

Between minute 2:32 and 2:39, man 1 says:

'This is the end of the dogs. We are the lions of our lord Muhammad.'

Between minute 2:57 and 3:27, man 1 says:

'In the name of God the merciful, the merciless. Allah is greater, and glory to Allah. Here lie the bodies of Al-Assad's dead in 'Ziyarah' village.

Allah is greater, and glory to Allah. (referring to his comrades) They are heroes. The heroes of 'Ziyarah' [inaudible]. Here are the bodies of the shabiha. Allah is greater, and the glory to Allah.'

Between minute 3:27 and 3:50, man 1 says:

'In the name of God the merciful, the merciless. Allah is greater, and glory to Allah. Here are the shabiha of Al-Assad. They [read: shabiha] were arrested while returning from Al-Qatwiya village [phonetic] near the locality of Al Mashik [phonetic, non-audible] and were arrested and killed. They are 7...7 carcasses. Allah is greater, and the glory to Allah. Allah is greater and the glory to Allah. This one is one of the dogs.'

An unfamiliar voice says: 'Just film it... Just film it.'

Between minute 4:02 and 4:31, man 1 says, inter alia:

'And this one is one of the dogs [his name] [name 1].'

An unfamiliar voice then asks:

'Is he an Alawite?'

After which someone replies:

'Yes, three Alawites.'^[45.]

A subtitled version of video 1 was added to the file on appeal. According to the interpreter involved here, between 4:26 and 4:30, the following statement can be heard: 'The flag of Islam is being raised at the [sic] Mashik checkpoint'.^[46.]

Video 1 was played at the Court of Appeal hearing.

At minute 2:46, a foot can be seen being placed on the body of an (apparently) dead man on the ground. At moment 3:08, the man, previously referred to as man 1, can be seen moving his left leg towards an (apparently) dead man in front of him on the ground and withdrawing it. What he does with his foot to the dead man is not visible as this is just out of frame. ij state

This man 1 is armed with a machine gun and is wearing a tactical vest. When he speaks, he regularly speaks in the direction of the camera. He utters the words shown above between minute 3:27 and 3:50, while addressing the camera and pointing at a body lying on the ground. At moments 3:19 and 3:20 respectively, two persons can be seen spitting towards a body lying on the ground. In the various fragments, man 1 is always among other men, some of whom are armed and who always remain near - by all appearances - other killed persons lying on the ground.^[47.]

8.3.2

The second video found on YouTube

(video 2)

On 18 January 2021, the police found on YouTube channel '[name YouTube user 2]' - a channel on which various videos of the battle of the Al-Ghab plain can be seen - a video entitled: 'Suqour al-Jabal Brigade (interpreter: Mountain Hawks Brigade) arrests a soldier of the regime's mercenaries in the Al-Ghab plain region'. The upload date of the video is 30 April 2015. ^[48.] Hereinafter, this video will be referred to as video 2.

In the video, several persons (referred to as A to F in the official report) can be seen and/or heard, including an arrested man and a bearded man standing next to him, holding a gun (referred to as person D). The arrested person, man B, is asked for his name and number. The persons surrounding the arrested man consistently look into the camera. The interlocutor, off camera, is man A. According to the translation of the video, inter alia the following is said:

A: 'The revolutionary brigades in the Al-Ghab plain region have arrested a regime soldier. He was serving at the regime's checkpoints in the town of Al-Ziyarah. This soldier fled after the battles that took place in the Al-Ghab plain region, specifically in the town of Al-Ziyarah.'

(...)

A: 'where did you serve?'

B: 'in Mashik.'

(...)

The owner of the YouTube channel added the following text to the description of the video:

'Suqour al-Jabal Brigade arrested a soldier of the regime's mercenaries in the Al-Ghab plain region. He was hiding in one of the houses of Zayzun village after the battle to liberate the Al-Ghab plain.'

In addition, the owner of the YouTube channel posted the following comment underneath the video:

'#Western_countryside_of_Hama

#Al-Ghab_plain

Suqour al-Jabal Brigade arrests a soldier from Mashik checkpoint. A regime mercenary who had been hiding in one of the houses of Zayzun village after the battle to liberate the Al-Ghab plain. It turned out that the soldier is from the Al Rai area in Aleppo province.

[YouTube link video 2]

[name YouTube user 2].'^[49.]

8.3.3

The use of video 1 for evidence

The counsel has argued that video 1 is insufficiently reliable as evidence and should be excluded as such. To this end, she argued - in brief - that not enough is known about this video, as it has not been established where and when it was made, from whom it originates and whether the footage is complete. In this regard, the counsel relied on the case law of the international tribunals.

It must be stated first and foremost that for a Dutch criminal court, when selecting and evaluating evidence, the rules of Dutch law of evidence always apply, even if the criminal case (partly) concerns a criminal offence within the meaning of the WIM.

Evidence such as the present (video material from public sources) is generally subject to caution in the assessment of the evidence.

Together with the defence, the Court of Appeal finds that there are aspects of the video that have not become known, such as the identity of the maker and uploader, and the exact points in time at which the video was recorded. Moreover, the material is of a poor visual quality. However, this does not make the material itself unreliable.

The following is known about this video 1, in addition to what has already been stated above. On 9 October 2019, the Dutch police received a SIENA information exchange message, sent (via Europol) by the Counterterrorism Unit of the Bundeskriminalamt in Germany. A document was attached, sharing the YouTube video with the URL [YouTube link video 1]. The user named [name YouTube user 1] has a tiger as his profile picture. The police have identified the unique ID number, upload date, and upload time of the video (see official report of findings dated 14 October 2019, LERFA19006-00013). In a further official report of findings (dated 28 March 2022, LERFA19006-160), the reporting officer, who examined the video, related the following in response to questions raised by the defence on appeal.

Video 1 was also requisitioned and obtained from Google. The video - as mentioned - had been posted by a user named '[name YouTube user 1]' and was not found on further investigation in any other place than on this channel.

The video is a compilation of five different videos, all of which - except for the logo, which cannot be seen on the five individual videos - can also be found on YouTube channel '[name YouTube user 1]'.

The authenticity of these videos was investigated; they were not encountered anywhere else on the internet and no other or earlier versions of the videos were found.

The videos were uploaded on or shortly after the day on which the incidents in Ziyara took place, which, according to the reporting officer, is an indication that the uploaded videos are original.

In all parts, made in the dark, video 1 says they are in Ziyara or refers to that place or to Mashik and Frikeh, which, like

Ziyara, are on the Al-Ghab plain.

Although manipulation of the footage is always borne in mind, in the case of video 1 there was no reason to suspect that the video had been edited (the Court of Appeal understands: other than it being a compilation and that the logo was added), as in the case of 'false context' or 'manipulated content'. Based on the combat groups, locations from the descriptions and titles of the videos and the upload data, the locations in the videos were investigated. Based on this, it can be stated that the combat groups mentioned took part in the battle of the Al-Ghab plain during the same period in which videos 1 and 2 were uploaded. It is possible to infer from this that these relate to incidents that took place in late April 2015 during the battle of the Al-Ghab plain.

The Court of appeal finds that the video is sufficiently reliable. The method of securing it has been meticulous, and investigation has yielded relevant upload information. There is no reason to assume that the content of the video was manipulated or that events were staged. Rather, the comment 'just keep on filming' indicates some spontaneity, i.e. the opposite.

That it is a compilation - and thus an edit - of various other videos does not alter this. Neither the video itself nor the five videos from which the fragments came have been found elsewhere or in any other form. The localities mentioned in the video can clearly be linked to events that occurred during the battle of the Al-Ghab plain, in which Ahrar al-Sham was one of the battling parties, and the Liwa' al-Adiyat brigade presented itself as part of Ahrar al-Sham. Both the combat group and the brigade can be seen in the logo. What can be seen and heard in the footage (e.g. that they have the glory, the dead are Al-Assad's shabiha, Alawites) also fits with the battle of Al-Ghab, in which the rebel groups - as envisaged - won victories over the military regime in Alawite, pro-regime villages. The meaning of the video is therefore clear: victory over regime fighters is shown. The date on which the video was uploaded is - the Court of Appeal agrees with the reporting officer - an indication that the uploaded video is an original. The fact that the video does not show enough visual features to determine an exact location, and that the exact time of its making is not known, is of secondary importance under these circumstances.

Finally, it is important to note that the video should not be considered in isolation. Witness [witness A], who by his own account obtained the link to the video from the accused (see official report of findings 27 May 2020, LERFA19006-3, annex 1, p. 38 final dossier) has shown it to the German police. The Court of Appeal will return to the statement of [witness A] below; at this point it is important that the statement of this witness provides support for the content and origin of the video. Indeed, [witness A] stated that in January 2016, the accused sent him a YouTube link to a video (then from a channel called [name YouTube user 3]), on which video the witness saw people being kicked and spat on. The accused said that he would kill him just as 'they' had killed those people at the time. According to [witness A], the accused had been involved in combat operations in Hama (Court of Appeal: the province in which the Al-Ghab plain is located), and had a brother, who was affiliated with Ahrar al-Sham and had died (which the accused confirmed). Finally, internet research has revealed that the Facebook account of the accused's father contains footage that can also be found on YouTube channel [name YouTube user 1] (see official report of findings of 18 December 2019 LERFA19006-00055, pp. 450 and 460 final dossier).

On balance, the Court of Appeal finds that video 1 is reliable and can be used in evidence. The defence is dismissed.

8.3.4

Videos related to Al-Ghab

The Court of Appeal establishes that both videos relate to the Battle of Al-Ghab, which - as mentioned above - took place around April 2015. The explicit reference to this battle in the title, or the comments on it unmistakably point to this and the names of the localities mentioned in this context as well as the dates on which they were uploaded (26 and 30 April 2015, respectively) also fit in with this. It should be mentioned here that these very dates also corroborate what the Middle East expert at the police found. She carried out research on the battle of Al-Ghab in combination with the locality of Ziyara referred to in the video. This revealed that, on 22 April 2015, Ahrar al-Sham and other combat groups had announced a battle for the liberation of Sahl al-Ghab. On 25 April 2015, Ahrar al-Sham and some other combat groups conquered five villages and some checkpoints in the northern part of the Al-Ghab plain south of the town of Jisr al-Sughr. On 25 and 26 April 2015, reports were circulated via Twitter indicating that 'the commander of Liwa' al-Adiyat in the Ahrar al-Sham' Abu Qasim movement (also known as Zafer Khataab), had been wounded in the battle of Sahl al-Ghab. A video from the Al-Jazeera television channel, uploaded on 27 April 2015, shows that the locality of Al-Ziyara, located in the area in question, was conquered from the regime. [\[50.\]](#)

8.3.5

Can the accused be seen in video 1 ?

The Public Prosecution Service has argued that the accused can be seen in video 1, walking among other men near bodies of fallen fighters and calling them dogs and carcasses of Al-Assad. The accused has denied being in the video. He has stated that the area where he lived was the Al-Ghab plain, but that he was in Turkey at the time of the Al-Ghab battle. *The NFI's comparative examination of a person in video 1*

The Court of Appeal has considered the fact that the Netherlands Forensic Institute (NFI) conducted comparative examination [\[51.\]](#) of the face of a person (hereinafter also: man 1) who can be seen in video 1 making a movement with one

leg in the direction of the body of a deceased person and comparative shots (photographs) taken of the accused. The NFI's conclusion - under the assumption that no close blood relative qualifies as the accused - is as follows:

'The findings of the examination are more likely if the person depicted in the disputed images is indeed the same as the person in the supplied photographs than if it were someone else with similar general facial features.'

The Court of Appeal holds first and foremost that the slight degree of probability in the NFI report - the order of magnitude of evidentiary value is 10 to 100 - has little evidentiary value in itself. However, it depends on an evidentiary construction as a whole as to whether it is justified to base the declaration of charges proven (partly) on such recognition. ^[52.]

In that context, the Court of Appeal considers the following.

The statements of witness [Witness A]

On 21 January 2016, witness [Witness A] was interviewed by the German police. He stated that he had stayed together with the accused in an asylum seekers' centre in Germany some months before. The accused acknowledged that he and [witness A] had been in an asylum seekers' centre together in Germany. ^[53.] According to [witness A], he and the accused shared a room there (with others) for several weeks. After they got into an argument about religion, the accused showed a video to [witness A]. The accused told [witness A] that he would kill him just as they (Court of Appeal: the accused and his allies) had killed those people at the time. According to [witness A], the accused had been involved in combat operations in Hama and he said that he had already massacred many people in Syria. During the interview, the police confronted [witness A] with the video he mentioned. There, [witness A] stated that he recognised the accused in the video 100 per cent through his use of language and gesturing. The accused used WhatsApp on telephone number [number]. Equally according to [witness A], a photo of the accused's deceased brother could be seen in the WhatsApp account. ^[54.]

The Dutch police interviewed [witness A] on 11 December 2019. [Witness A] then stated that the accused had sent him the YouTube link with the video from a telephone number starting with +90 - Turkey's country code - in January 2016. This YouTube channel called [name YouTube user 1] belongs to the accused as his surname '[surname accused]' is provided there. This channel was previously called [name YouTube user 3]. [Witness A] further stated that he recognises the accused in the video by his voice, the way he pronounces his Arabic. He has a Hama accent. It is the same face. He is the one singing. He is the commander. The suspect's brother was the founder of Ahrar al-Sham. He was killed during a meeting between the leaders. Finally, [witness A] stated that the accused had the nickname [nickname 1]. That was what he called himself. ^[55.]

[Witness A] was examined as a witness before the Dutch examining magistrate. He stated that the accused - who was also called [nickname 1] - sent him the link to the YouTube video via WhatsApp from Turkey in January 2016. You see someone stamping on people. [Witness A] recognised the accused in the video by his voice and face. In the video, the accused says: *look at these dogs lying on the ground*. In addition, in a voice message sent to the witness, the accused said: *look what we did to the people*. In it, he also said that he was the 'emir' (leader) of the Liwa' al-Adiyat movement. In the two voice messages from Turkey via WhatsApp he also said that his brother [name 2] was the founder of Ahrar al-Sham. ^[56.]

Twitter account [Twitter account name]

The police investigated the statement of [witness A] and in particular the social media channels with the nickname [nickname 1] attributed to the accused. This involved primarily investigating Twitter account [Twitter account name]. An image of the accused's brother named [name 2] was set as the profile photo. The accused has a deceased brother by that name, who was a well-known military leader. ^[57.] At the appeal hearing, the accused confirmed that his brother had died in September 2014. Public sources reveal that key leaders of Ahrar al-Sham were killed in a bomb attack in Idlib on 9 September 2014. ^[58.] A tweet posted by [Twitter account name] on 26 September 2015 showed a picture of three gravestones. One of them read: 'Martyr for the Islamic cause, with Allah's permission, [name 2] "[nickname 2]", may Allah have mercy on him. He died a martyr's death on 9/9/2014.' ^[59.] The death of 'heroic martyr [nickname 2]' is lamented in a tweet from [Twitter account name] of 11 January 2016. In the process, a picture of [name 2] was posted or retweeted. [Twitter account name] calls [nickname 2] his 'dear brother'. ^[60.] Taking all this into consideration in relation to each other, the Court of Appeal reaches the conclusion that the accused is the administrator of Twitter account [Twitter account name].

Interim conclusion

The Court of Appeal considers this finding important in relation to the telephone number linked to [Twitter account name]. The police requisitioned the user data of Twitter account [Twitter account name] from media platform Twitter. The data provided showed that when Twitter account [Twitter account name] was created on 20 May 2015 - before the accused and [witness A] met for the first time - telephone number [number] (hereinafter also referred to as: the Turkish telephone number) was connected. ^[61.] Therein, the Court of Appeal finds sufficient evidence to conclude that the accused was using this telephone number in January 2016. This finding strengthens the evidentiary value of the statement of [witness A], who already mentioned this telephone number in his interview of 21 January 2016 as the WhatsApp number through which he had received the YouTube link to video 1 and the voice messages from the accused.

The comparative examination of a person in video 2 by the NFI

To answer the question of whether the accused can be seen in video 1, the Court of Appeal also takes video 2 into account. The NFI has conducted investigation to answer the question of whether person D mentioned in video 2, who is standing next to the captured man, is the same person as the person from whom the NFI made the comparison shots (photographs). The

NFI's conclusion - under the assumption that no close blood relative qualifies as a suspect - is that the findings of the investigation are very much more likely if the person depicted in the disputed images is the accused, than if the person depicted in the disputed images were someone other than the accused but with similar general facial features. The Court of Appeal further points out that video 1 was uploaded on 26 April 2015 and video 2 was uploaded on 30 April 2015. It has already been established above that video 1 relates to the battle of Al-Ghab. From the time of uploading and the similarities in the localities mentioned in both videos, the Court of Appeal deduces that video 2 also relates to the battle of Al-Ghab in April 2015.^[62.]

Furthermore, the Court of Appeal points out the similarities in the locations mentioned in both videos.^[63.]

- Both videos refer to the 'battle to liberate the Al-Ghab Plain' or 'the battle of the Al-Ghab Plain',
- Both videos refer to the locality of Al-Ziyara. In video 2, according to person A, the person captured is said to have fled after the 'battles that took place in the region of Al-Ghab plain, specifically in the town of Al-Ziyarah'. In video 1, the persons speaking to the camera appear to say that they are in Ziyara at the time: 'Here lie the bodies of Al-Assad's dead in village "Ziyarah"'.^[64.]
- Both videos refer to the small locality of Mashik. In video 2, the prisoner mentions it as the place where he served. In video 1, it is mentioned as the place where nearby the seven killed persons were arrested: 'Here are the shabiha of Al-Assad. They were arrested while returning from village Al-Qatwiya (phonetic) near the locality of Al-Mashik (phonetic) and were arrested and killed.'^[65.]

Finally, the Court of Appeal establishes that the so-called ops vest of man 1 (video 1) and person D (video 2) show strong similarities.^[64.] The same applies to the firearm that the men carry.^[65.]

Interim conclusion

The Court of Appeal is of the opinion that the accused can be seen as person D in video 2. This finding reinforces the evidentiary value of the above conclusion of the NFI in video 1 given the similarities between the two videos in other areas (localities mentioned, ops vest, firearms, and data upload).

Reliability of [witness A]'s statement

Together with the defence counsel, the Court of Appeal is of the opinion that witness [witness A] did not state the same thing in every interview. However, the main line of his statement is consistent. This is that he watched a video originating from the accused and that he recognised the accused in it. In view of that which the Court of Appeal has considered about the accused's Turkish telephone number, the findings of the NFI with regard to both videos and the findings based on public sources, the Court of Appeal deems the statements of [witness A] useful for the evidence. The Court of Appeal dismisses the defence's argument that the statement of [witness A] should be excluded from the evidence.

Complementary note regarding the statement of the accused

For the sake of completeness, the Court of Appeal notes that the accused's statements about the Turkish telephone number do not seem very credible. During the court session in the first instance, he only stated about this telephone number that it does not belong to him and that the German police should have looked into that. How [witness A] got this number should not be asked the accused. The accused had a Syrian telephone number in Germany. Upon being asked about a photo posted on social media in which the accused seems to appear, he stated that he has a relative who looks like him and is called [nickname 1]. This relative, according to the accused, also has a birthmark in exactly the same place as the accused and can also be seen in video 2 next to the prisoner. He did not want to talk any more about family. During his police interrogations, he did not state anything about it. At the appeal hearing, the accused stated that the Turkish telephone number belonged to a relative in Turkey. The accused gave this telephone number to [witness A]. He did not want to make any further statements about this relative, who was called [nickname 1].

The Court of Appeal deems it unlikely that the accused - highly educated and eloquent - would omit the latter statement about the Turkish telephone number in the first instance and would only give it in appeal if it reflected the actual course of events with regard to this telephone number. Surely mistaking the person to whom the Turkish telephone number belonged for the accused who merely gave it to [witness A] would have been well worth mentioning during police interrogations^[66.] and at the hearing in first instance. The accused seems not to have attributed the Turkish telephone number to the unknown relative [nickname 1] - who, according to the accused, looks a lot like him and is residing in Turkey - only after the hearing and sentencing in the first instance. The accused is free to do so, but it does not contribute to the plausibility of an alternative scenario.

Conclusion

Against this, the inconsistencies pointed out by the defence counsel in the various statements made by [witness A] over the years carry (too) little weight. The Court of Appeal concludes that the accused can be seen as man 1 in video 1. He is the man who mainly speaks, calls the deceased fighters, dogs and carcasses and moves his foot towards a body.

The alternative scenario of the defence, according to which witness [witness A] learned of the video in a different way, thought that the person in it might resemble the accused and then identified the accused as the one who sent him the video, has not become plausible in view of the above.

8.4

Social media use

Extensive research has been conducted into the accused's social media use. Twitter account [Twitter account name], of which the Court of Appeal established above that the accused is the administrator, was inter alia used to write or share the following tweets.

On 22 May 2015, the account posted a photo of a white pickup truck containing a number of lifeless male bodies in combat clothes and at least one weapon, with the accompanying tweet: 'They got the car dirty. It needs seven washes with earth to be driven. Corpses of the dogs of the regime in Jisr al-Shughur.' [\[67.\]](#)

On 23 May 2015, [Twitter account name] posted two tweets about Jaysh al-Fatah: 'Our army Jaysh al-Fatah has conquered from them, robbed the regime and Daesh of their belongings, do not be merciful to their members, oh Jaysh al-Fath, you have crushed them' and 'The victories of Jaysh al-Fatah has shocked the whole world and the governments, made the oppressors shudder and knocked down Daesh' [\[68.\]](#) As set out above, Jaysh al-Fatah was a coalition of Jund al-Aqsa, Jabhat al-Nusra, and Ahrar al-Sham.

On 13 September 2015, [Twitter account name] tweeted: 'Our beloved movement and its new leaders should reveal the movement's greatest enemy, namely the secret of the murder of our leaders may Allah have mercy on them.' Investigations revealed that the photo that was shared with the tweet was a photo showing the leaders of Ahrar al-Sham. [\[69.\]](#)

On 26 September 2015, the account shared a tweet from account [Twitter account name 1]: 'Greetings from Al-Qassam brigades to Harkat Ahrar al Sham al-Islamiyya'. Another tweet read, 'Ahrar al-Sham battalions, [nickname 2], May Allah accept him and the martyrs.' [\[70.\]](#)

9. Considerations with regard to Count 1

Under Count 1, the accused is charged - in brief - with being guilty of committing the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment. Article 6 WIM reads - insofar as relevant here - as follows:

1 Any person who, in the event of non-international armed conflict, commits the offence of violating Common Article 3 of the Geneva Conventions, i.e. committing one of the following offences against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, of one of the following offences: (...) c. outrages upon personal dignity, in particular humiliating and degrading treatment; (...) shall be punishable by life imprisonment or a temporary term of no more than thirty years or a fine of the sixth category.

The Court of Appeal must first assess whether a non-international armed conflict exists within the meaning of CA 3. [\[71.\]](#) Furthermore, an assessment is needed as to whether the victims are persons enjoying protection under CA 3 and whether the accused had knowledge of this status. An assessment will then be made as to whether the accused's conduct constitutes outrages upon personal dignity of the victims. Finally, there must be sufficient connection between the established conduct and the armed conflict (nexus). Here again, it is important that the accused had knowledge of the factual circumstances that had led to the existence of the conflict.

For the interpretation of the elements of the criminalisation of war crimes, the Court of Appeal is guided by international law, such as the Statute of the ICC and the Elements of Crimes drawn up on the basis of Article 9 of the Statute of the ICC, and guiding rulings by international tribunals, such as the ICTY, in view of the international character of the offence charged. [\[72.\]](#)

9.1

Non-international armed conflict

Legal framework

International humanitarian law applies when there is an armed conflict in the territory of one of the contracting parties. A distinction is made between international armed conflicts and non-international armed conflicts. The rules for these two types of conflict differ in parts. A key distinction is that for the determination of a non-international armed conflict, there are requirements as to the intensity of the armed conflict.

Over the years, the ICTY has elaborated on the concept of 'non-international armed conflict' in its case law and developed criteria for assessing whether it exists. For example, the intensity of the conflict needs to be of the level of protracted armed violence and the armed groups involved need be sufficiently organised. [\[73.\]](#)

Factors that may be relevant in determining the intensity of a conflict include the number, the duration, and the intensity of the individual confrontations; the type of weapons and other military equipment; the amount and calibre of ammunition fired; the number of persons and the type of armed groups participating in the fighting; the number of casualties; the extent of the material damage; and the number of refugees from the combat zones. The involvement of the UN Security Council can also be an indication of the intensity of the conflict. [\[74.\]](#)

Inter alia the following factors are important in determining the degree of organisation of the armed groups: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of headquarters; the circumstance 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 the related logistics; the ability to determine a unified military strategy, and the use of military tactics; and the ability to speak with one voice, and to negotiate and enter into agreements (e.g. a ceasefire or a peace agreement).^[75.] A state is presumed to have armed forces that meet these organisational requirements.^[76.] Determining whether a non-international armed conflict exists is to a large extent a factual assessment that depends on the circumstances of the case.^[77.] It must be established that the accused was aware of the factual circumstances constituting the armed conflict.^[78.]

Assessment by the Court of Appeal

In previous case law, the Court of Appeal already established that a non-international armed conflict existed between Syrian government forces and various organised armed groups in Syria from 2012 up to and including 31 December 2015 - thus also during the period of the charges under Count 1.^[79.]

This involved Ahrar al-Sham as one of the belligerent parties. The Court of Appeal deems Ahrar al-Sham sufficiently organised to classify as an organised armed group, as is evident from what has been set out under 8.2. For instance, during the period to which the indictment relates, Ahrar al-Sham had inter alia a clear command structure, had territorial control, possessed weapons, carried out military operations alone or in conjunction with allies, and participated in peace negotiations. Thus, the organisational requirement was also met.

Since the period to which the indictment relates a non-international armed conflict existed, the Court of Appeal is of the opinion that international humanitarian law - in particular CA 3 and the rules of customary international law - apply.

Based on the accused's own statement, the Court of Appeal further establishes that he had knowledge of the armed conflict in Syria.

9.2

Protected persons

Legal framework

International humanitarian law determines inter alia which persons are protected at the time of international and non-international conflicts.

CA 3 defines them as persons who do not (or no longer) participate directly in the hostilities. This refers to civilians, but also includes personnel of armed forces who have laid down their weapons and person who were placed hors de combat by sickness, wounds, detention, or any other cause.^[80.] The ICTY further determined in the *Boškoski and Tarčulovski* case that the following must be established:

'[T]he perpetrator of a Common Article 3 crime knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed.'^[81.]

The ICC's Elements of Crimes provide that the victim need not be personally aware of the conduct and deceased persons can also be victims of this crime.^[82.]

By contrast, the accused needs to have been aware of the factual circumstances that form the basis of the aforementioned (protected) status.^[83.]

Assessment by the Court of Appeal

Given the specific conduct included in the indictment, Count 1 relates to what can be seen in video 1.

The Public Prosecution Service has argued that it is evident that, at the time the offences were committed, none of the victims - all deceased - were participating directly in the hostilities and that they were thus protected persons within the meaning of CA 3. The defence counsel has argued that deceased persons cannot be regarded as persons within the meaning of Article 6 of the WIM and as such do not enjoy protection within the meaning of CA 3. The Court of Appeal has ruled as follows.

CA 3 protects anyone who does not or no longer actively participates in hostilities related to the armed conflict. This stipulation is also part of customary international law. In practice, this means that civilians, combatants who have laid down their weapons or combatants who are hors de combat, e.g. because they have been captured or are sick or wounded, enjoy protection.

In the present case, the Court of Appeal finds that, in view of the clothing and equipment of the persons involved visible in video 1, the references to and expressions of joy with regard to the victims by those present, and the general context in which they all find themselves, it is sufficiently plausible that the deceased persons were combatants, belonging to a (different) party within the conflict. That the latter, also referred to as 'the bodies of Al-Assad's dead' in the video, were already hors of combat at the time of the conduct to which the indictment relates and thus no longer actively participating in hostilities is not in dispute. Who killed them is irrelevant here - indeed, the act charged under 1 took place after the victims' deaths.

Unlike the defence counsel, however, the Court of Appeal finds that deceased persons do enjoy protection within the

meaning of CA 3, despite this not being specifically mentioned as an example in CA 3. The protected interest - the dignity of the individual - belongs to all those who cannot be excluded from protection on the basis of direct participation in hostilities.^[84.] Here, it is of importance not to lose sight of the *raison d'être* of the protection - respect for human dignity – just as the ICTY rules in *Furundžija*.^[85.] Indeed, the aim is to protect the individual from assaults on his personal dignity regardless of whether such assault arises from an unlawful attack on the body or from humiliating and impairing a person's honour, self-respect or mental well-being.^[86.] The Court of Appeal fails to see that such personal dignity can no longer exist once a person is deceased.

The deceased victims were therefore among those persons protected by CA 3 and customary humanitarian law.^[87.]

9.3

Outrages on personal dignity

Legal framework

The prohibition of outrages on personal dignity, by (in particular) degrading and humiliating treatment, as charged under 1, is also enshrined in CA 3. This prohibition has been reaffirmed in the Additional Protocols and is considered to be valid customary international law. However, neither the Geneva Conventions nor the Additional Protocols define outrages upon personal dignity.^[88.]

With regard to outrages upon personal dignity, the ICTY formulated the following definition in the *Kunarac* case:

'The accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.'^[89.]

In other words, the outrage may involve an intentional act but also an omission that has caused severe humiliation or otherwise a serious outrage upon human dignity. This assessment should consider subjective criteria, such as the victim's vulnerability,^[90.] but also objective criteria related to the severity of the act.^[91.]

The ICC's *Elements of Crimes* consider the relevant aspects of the victim's cultural background.^[92.] As a result, conduct that, for example, is degrading to someone of a particular nationality, culture, or religion, while not necessarily so to others, also falls within the scope of the concept of outrages upon personal dignity.^[93.] It is a case-by-case assessment.^[94.]

As with cruel or inhuman treatment, outrages upon personal dignity may consist of a single isolated act but may also result from a combination or accumulation of different acts which, taken individually, would not qualify as cruel or inhuman treatment. The Court of Appeal adopts what was determined by the ICTY in the *Aleksovski* case:

'The seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.'^[95.]

As already established, the humiliation must be severe, but it is not a requirement that the outrage have lasting consequences.^[96.] A fleeting act of misconduct may also be serious.^[97.] Nor is special intent required, as is the case with torture.^[98.]

The Court of Appeal only cited those elements of outrage upon personal dignity by humiliating and degrading treatment from case law that are relevant to the assessment of what the accused has been charged with in the present case. This is not an exhaustive enumeration.

Assessment by the Court of Appeal

The defence counsel has disputed the argument that the seriousness of the acts is sufficient to constitute - especially towards deceased persons - degrading or humiliating treatment affecting personal dignity. The Public Prosecution Service has argued that the acts - certainly when considered in combination with one another - were of such a nature as to constitute outrages upon personal dignity. In this regard, the Court of Appeal has ruled as follows.

Insofar as relevant here, video 1 shows that the government soldiers killed are surrounded by fighters of Ahrar al-Sham.

They shout slogans, chant and comment on their own success and the defeat of the government soldiers in the battle of Al-Ghab. The soldiers killed are reviled and insulted. For a moment, one of the fighters puts his foot on one of the bodies. The accused moves his leg towards one of the bodies, and two persons spit in the direction of the bodies.

These acts by the fighters are extremely distasteful and demonstrate a disrespectful attitude towards the deceased soldiers. This does not necessarily mean that there has been an 'outrage upon personal dignity, in particular humiliating and degrading treatment' within the meaning of Article 6, paragraph 6 under c of the WIM. The bar for that is higher. The Court of Appeal will elucidate this point.

Despite the deceased enjoying protection under CA 3, they cannot be said to be suffering severely physically or mentally. Furthermore, the video shows that the bodies and their uniforms remain virtually untouched. They appear to be shown as they were found. They are indeed depicted but not (and in contrast to in an earlier case that the Court of Appeal ruled on^[99.]) displayed as trophies. The Court of Appeal further has considered the fact that the actions of the fighters summarised above last only a few minutes. The foot being placed on a body, the leg being moved, and the spitting take place once and twice respectively and always within a brief moment. One has to play the video several times to notice these actions. The fighters do not pay specific attention to this. Nor does the person filming. The emphasis is on celebrating victory at the expense of

the deceased soldiers. All this detracts to some extent from the gravity of the fighters' behaviour.

Finally, the Court of Appeal considers that the interests of surviving relatives may also play a role in the question of whether an outrage upon personal dignity has taken place. In the current case, the file provides no information on this aspect; no indication as to whether the soldiers were recognised, or otherwise revealing anything about their identity or possible relatives. Therefore, the Court of Appeal cannot further consider the interests of surviving relatives in this case.

The conclusion is that the acts described are disrespectful, but in this case do not constitute 'outrages upon personal dignity', as explained against the background of inter alia authoritative statements by the ICTY.

9.4

Conclusion

In view of the above, the Court of Appeal does not deem the charge under 1 to have been legally and convincingly proven and will acquit the accused thereof.

Under these circumstances, the Court of Appeal has excluded any discussion as to the requirement of nexus.

10. Considerations with regard to Count 2

The defence counsel disputed the fact that the accused belonged to Ahrar al-Sham and contested the terrorist intent of this organisation. She further argued that the accused did not engage in any supporting conduct, and in any case had had no intention to participate in a terrorist organisation.

In the following, the Court of Appeal will first discuss the terrorist intent, then assess whether the accused participated in it and whether acts of support on the part of the accused existed, and finally address the required intent.

10.1

Terrorist intent

Legal framework

In Article 83a CC, terrorist intent is defined as the intent to instil serious fear in a country's entire population or a specific group thereof, or to unlawfully force a government or international organisation to do, not 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.

The offence under Article 140a CC is not about the actual commission of terrorist offences but about the 'intent' to commit those offences. For that intent, the organisation's prime short-term objective may also suffice. It is not required that the commission of terrorist offences be the organisation's main *raison d'être*.

For intent to be proven, inter alia significance can be given to offences that have already been committed within the framework of the organisation, to the more sustained or structured nature of the cooperation - as may be evidenced by the mutual division of work or the mutual coordination of activities among participants within the organisation with a view to achieving the organisation's common purpose - and, more generally, to the planned or systematic nature of the activities of participants carried out for this purpose within the organisation.

In previous cases, this Court of Appeal has classified Ahrar al-Sham as a terrorist organisation.^[100] The Court of Appeal sees no reason to go back on this judgment and will explain why in the following. The conclusively evidenced period in those cases differs from the present one; therefore, the focus in the following will be on the period after 31 December 2014.

Assessment of the Court of Appeal

Ahrar al-Sham's intent

Ahrar al-Sham's intent can be inferred inter alia from the statements of its leader and the offences already committed within the framework of this organisation.

Ideology and objective Based on the findings made by the Court of Appeal above, Ahrar al-Sham can be called a radical Islamist movement, aimed at overthrowing Bashar al-Assad's regime in order to create an 'Islamic state' based on the sharia. After 2013, the sectarian discourse was toned down, but at the same time it was not renounced, and defensive sectarianism persisted.

Armed struggle was the primary means for Ahrar al-Sham to achieve its goals. In so doing, Ahrar al-Sham continued to cooperate intensively with terrorist organisation Jabhat al-Nusra and its successors until 2017.

Offences committed

Ahrar al-Sham has perpetrated (war) crimes. It can - contrary to what the counsel has argued - be held jointly responsible for the massacre in Latakia in August 2013, in which many Alawite civilians were slaughtered.

In addition, Ahrar al-Sham can be held responsible for taking civilians hostage, such as from 2013 until July 2016 in Douma and between March 2015 and February 2016 in Idlib. The hostages received little food, no medical care, and no access to sunlight. Until February 2017, there were human rights violations on the part of the entire set of armed groups that had control in Aleppo, one of which was Ahrar al-Sham.

Finally, Ahrar al-Sham was involved in besieging towns and villages from 2012 up to and including 2016, putting pressure on the inhabitants of a town and denying medical and humanitarian aid. Artillery was used in those sieges and rockets were fired at the Shiite enclaves. It was Ahrar al-Sham that threatened to retaliate against civilians in case the regime continued to attack civilians in Idlib. That the siege may sometimes (as in Fuaa and Kefraya) have been motivated by the reality of the conflict rather than by ideological, sectarian considerations, which Verhelle points out (see pp. 11 and 12 in the expert report for Ms Buruma LLM), in no way changes this.

Conclusion with regard to intent

From the above, it transpires that in the conclusively evidenced period, Ahrar al-Sham had a terrorist intent within the meaning of Article 83a CC. The organisation not only had the aim of overthrowing Bashar al-Assad's regime and establish an 'Islamic state', but also of instilling fear in part of the population. To achieve these goals, the organisation committed several of the terrorist offences listed in Article 83 CC and detailed in the indictment, such as murder and manslaughter. The defence counsel has pointed extensively to - in short - a more moderate course pursued by Ahrar al-Sham after 2013. However, it is clear from the previous findings that, in the conclusively evidenced period, Ahrar al-Sham still wanted to achieve its goals through violence, and to this end collaborated with a terrorist organisation such as Jabhat al-Nusra. For the evidence proving terrorist intent, the Court of Appeal also took into account the offences that were still being committed then and which the Court of Appeal - unlike the defence counsel - does not characterise as merely incidental. This cannot be interpreted otherwise than as partly aimed at instilling fear in the population, especially the Shiite part.

That the aim pursued by Ahrar al-Sham was also to overthrow a regime that was abject in the eyes of many, as argued by the defence, does - if correct - not affect (the unlawfulness of) the intent, since this was also aimed at instilling fear in the population, and was combined with the commission of the aforementioned offences.

The Court of Appeal dismisses the defence.

10.2

Participation and acts of support

The defence counsel argued that the accused did not (at least not after November 2015) belong to the alliance and did not perform any participatory actions.

Legal framework

Participation in a criminal organisation whose aim it is to commit terrorist offences within the meaning of Article 140a CC can only exist if the person concerned belongs to the alliance and participates in actions, or supports actions aimed at or directly related to achieving the aim referred to in that article.

A participatory action may consist of the (co-)commission of any offence, but also of aiding and abetting and (thus) the performance of acts that are not punishable in themselves, as long as the aforementioned participation or support can be said to exist.

There is no requirement for the person concerned to be found to have cooperated with or to be familiar with all other persons who are part of the organisation or that the composition of the alliance is always the same. Participation must be assessed in isolation for the person concerned. It is therefore irrelevant, for example, whether other persons did more or played a more important role than the person concerned.

Finally, for participation, it is sufficient that the person concerned be generally aware (in the sense of unconditional intent) that the organisation's objective was to commit terrorist offences. The person concerned does not need to have knowledge of one or more concrete offences intended by the organisation.

Assessment by the Court of Appeal

Participatory actions

In video 1 discussed earlier from Liwa' al-Adiyat as part of Ahrar al-Sham, the accused, looking into the lens, armed and in uniform, reported on the latest conquests in the battle of Al-Ghab. He did so in firmly religious terms. The bodies on the ground were referred to as the 'dogs of Assad', arrested and then killed by 'the lions of our lord Muhammad'. The accused and the others speaking in the video spoke condescendingly about the opponents who had been shot dead, and whose Alawite origin is apparently an important factor in this.

Actively fighting alongside Ahrar al-Sham as well as the actions observed in these videos are directly related to the realisation of Ahrar al-Sham's objective, as depicted above. Indeed, the battle of Al-Ghab being waged against the Al-Assad regime, which Ahrar al-Sham sought to overthrow. In addition, given the wording used therein for the victims (dogs and carcasses, three Alawites), the video manifests sectarian-motivated violence.

Thus, the accused made himself de facto available for and actually contributed to the armed struggle. Apparently, the accused himself also felt that he had played an important role in this struggle, partly in view of the role of emir that he ascribed to himself. Moreover, by allowing himself to be filmed in the manner seen in the videos, the accused contributed to spreading the terrorist ideology of the organisation and promoting it. The same applies to his Twitter behaviour on social media.

Knowledge of terrorist intent

The accused generally knew that this organisation's objective was to commit terrorist offences. It is a fact of general

knowledge that during the period to which the indictment pertains, but also before that period, jihadi combat groups were systematically committing serious offences on a large scale, terrorising the population living in Syria. Particularly as a fighter, the accused, who was moreover well versed in social media, must have known about this. His comment in the voice message to [witness A] in relation to video 1 (*look what we did to the people*) illustrates this. The Twitter behaviour described above shows not only that the accused felt an affinity with the organisation, but also that in the conclusively evidenced period he was well informed about the organisation, its members, and its alliances.

If the question whether Ahrar al-Sham was not included as a terrorist organisation on international sanctions lists at that time - to which, incidentally, other criteria apply - and the question whether the accused believed that it was (also) directed against an abject regime should be answered in the affirmative - the Court of Appeal leaves the answer unanswered here - this does not carry sufficient weight when set against the above considerations.

10.3

Conclusion

In view of the above, the Court of Appeal is therefore of the opinion that it can be legally and convincingly proven that the accused committed the offences of the charges under Count 2.

Unlike the Public Prosecution Service, the Court of Appeal does not deem it legally and convincingly proven that the accused was still part of Ahrar al-Sham in the period after 10 November 2015, so that he should be acquitted thereof.

11. Declaration of charges proven

The Court of Appeal deems it lawfully and convincingly proven that the accused committed the offence of the charges under Count 2, on the understanding that:

2.

~~at one (or more) point(s) in time in or around the period from 1 March 2015 up to and including 10 November 2015 4 July 2017, in or near Al-Ziyarah (Syria) and/or Hama (Syria), or at least somewhere (else) in Syria,~~

~~either alone or jointly and in conjunction with (an) other person(s), participated in the an organisation such as Ahrar Aal-Sham, or in any case a jihadi combat group associated with the aforementioned organisation, or at least (an) organisation advocating the armed jihad struggle, whose intent it was to commit terrorist offences, namely~~

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

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

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

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

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

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

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

12. Evidence-based argumentation

The Court of Appeal bases its conviction that the accused has committed the offences of the charges under Count 2 on the facts and circumstances that are included in the evidence and which substantiate the declaration of charges proven.

13. Conditional witness requests

The defence counsel conditionally requested the examination of the anonymous witnesses from the SCM investigation and

witness [witness B], an employee of the SCM, if the Court of Appeal wished to use the recognition by these witnesses in evidence.

The Court of Appeal has not used recognition by said witnesses in evidence, therefore the condition for the request has not been fulfilled, and the request does not need further discussion.

14. Criminal nature of the proven facts

The charges proven under Count 2 constitute:

participation in an organisation whose aim it is to commit terrorist offences.

15. Criminal liability of the accused

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

16. Grounds for the sentence

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

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

The accused, born and raised in Syria, joined Ahrar al-Sham there, an organisation whose purpose in the conclusively evidenced period was to commit terrorist offences.

Jihadi groups such as the one in question have committed bloody, terrifying violence and gross human rights violations. They have deaths on their conscience, and their acts of terror have been disruptive to society, have fuelled sectarian strife and have contributed to unbearable suffering and anguish for many.

The evidence used by the Court of Appeal, in particular the description of the images as observed in video 1 and video 2 in which the accused acts - in a prominent manner - shows in particular that the accused played an important role in this jihadi armed struggle.

Participation in an organisation whose aim it is to commit terrorist offences should be firmly deterred. Retribution and general prevention should be paramount in choosing the type and length of punishment to be imposed.

In the Court of Appeal's view, therefore, the response cannot be anything other than an unconditional prison sentence of long duration.

For participation in a terrorist organisation, the Court of Appeal generally uses a term of imprisonment of six years as a starting point. The Court of Appeal arrives at a slightly lower sentence because – together with the District Court - the Court of Appeal is of the opinion that although Ahrar al-Sham is a terrorist organisation, the scale on which it committed offences is less than that of, for example, IS and Jahbat al-Nusra.

In mitigating terms, the Court of Appeal has further taken into account the fact that the accused did not seek out the violence in Syria himself, as did outbound travellers from the Netherlands, but was born and raised in Syria.

The accused does not have Dutch nationality, nor does he have a residence permit in the Netherlands. In view of the charges proven under Count 2, it is not to be expected either that the accused will be able to claim legal residence in the Netherlands in the future. This implies that it is just as unlikely that the accused might be eligible for conditional release. The Court of Appeal has also taken this into account in a mitigating sense when determining the level of punishment.

The Court of Appeal has taken note of an extract pertaining to the accused from the Judicial Records dated 28 September 2022, revealing that the accused has not been previously convicted - in the Netherlands - for committing criminal offences.

The Court of Appeal has established that the reasonable time limit within the meaning of Article 6, paragraph 1 of the ECHR had been violated - both in the first instance and on appeal.

The starting point in this case, in which the accused is in pre-trial detention in connection with the offences charged, has to be that the hearing should be concluded with a final judgment within 16 months after the reasonable time limit has commenced.

In the first instance, the accused was taken into custody on 22 October 2019, at which point the prosecution commenced, and the District Court delivered final judgment on 21 April 2021. The reasonable time limit for hearing the case in the first

instance was thus violated by two months.

On appeal, the reasonable time limit has been violated by three months, since an appeal was filed on behalf of the accused on 4 May 2021 and the Court of Appeal has delivered final judgment on 6 December 2022.

In view of these violations of time limits, the Court of Appeal is of the opinion that instead of the envisaged term of imprisonment of five years and eight months, with credit for the time served in pre-trial detention, a wholly unconditional term of imprisonment of five years and four months, with credit for the time served in pre-trial detention, constitutes an appropriate and due response.

Enforcement of the imposed prison sentence will take place entirely within the prison facility, until such time as the convicted person becomes eligible for participation in a pre-release programme within the meaning of Article 4 Custodial Institutions Framework Act, or until the arrangements for conditional release, within the meaning of Article 6:2:10 CCP, come into play.

17. Applicable legal provision

The Court of Appeal has taken into account Article 140a of the Criminal Code, as it applies or applied in law.

18. JUDGMENT

The Court of Appeal:

Declares the Public Prosecution Service admissible in the prosecution of the accused with regard to part E of the charges under Count 2.

Sets aside the decision appealed against and pronounces judgment anew:

Declares not proven that the accused committed the charges under Count 1 and acquits the accused thereof.

Declares it, as considered above, proven that the accused has committed the charges under Count 2.

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

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

Sentences the accused to a term of **imprisonment of 5 (five) years and 4 (four) months**.

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

This judgment was delivered by L.C. van Walree LLM,

D.M. Thierry LLM and B. Stapert LLM, in the presence of M.J.J. van den Broek LLM and S. Patel, Court Clerks.

It was pronounced at the public hearing of the Court of Appeal on 6 December 2022.

B. Stapert LLM and S. Patel are unable to sign this judgment.

Voetnoten Uitspraak 06-12-2022

[\[1.\]](#)

Where reference is made hereinafter to an official report, this means - unless otherwise stated - an official report drawn up in the statutory form by (an) authorised investigating officer(s). Where reference is made to pages, this refers to the pages of the consecutively numbered official report number LERFA19006, of the National Crime Squad, Team International Crimes, dated 2 June 2020, with annexes, unless otherwise stated. Unless otherwise stated, when used in evidence, official reports refer to official reports within the meaning of Art. 344, paragraph 1, under 2 CCP. The evidence should be considered in connection and conjunction with each other. Documents are documents within the meaning of Article 344, paragraph 1, under 5 CCP. Insofar as the documents have been used, they have only been used in conjunction with the contents of other evidence that relate to the same fact.

[\[2.\]](#)

Official report of suspicion in accordance with Art. 27 CCP, LERFA19006-2, p. 258.

[\[3.\]](#)

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), p. 4.

[\[4.\]](#)

Document, namely Expert Report, (...) by I. Verhelle, December 2020, p. 9.

[\[5.\]](#)

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), p. 8-10;
Document, namely Expert Report, (...) by I. Verhelle, December 2020, p. 8.

[6.]

Document, namely Knowledge Document of the National Crime Squad, *Harakat Ahrar Al-Sham al-Islamiyya*, 15 November 2020, Dr J. Jolen, p. 4.

[7.]

Document, namely Expert Report, (...) by I. Verhelle, December 2020, p. 28.

[8.]

Document, namely Expert Report for L.B. Haneveld LLM by I. Verhelle, June 2022, p. 26.

[9.]

Document, namely: Amnesty International (July 2017), *Torture Was My Punishment, Abductions, Torture and Summary Killings Under Armed Group Rule in Aleppo and Idleb, Syria*, p. 5, [Amnesty.org](https://www.amnesty.org).

[10.]

Document, namely Knowledge Document of the National Crime Squad, *Harakat Ahrar Al-Sham al-Islamiyya*, 15 November 2020, Dr J. Jolen, p. 3.

[11.]

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), p. 12.

[12.]

Ibid., p. 13.

[13.]

Jabhat al Nusra has been on the UN sanctions list since 30 May 2013, see inter alia document, namely Expert Report, (...) by I. Verhelle, December 2020, p. 42, document, namely Expert Report, (...) Voor Openbaar Ministerie [For Public Prosecution] by I. Verhelle, December 2020, p. 40 and document, namely Knowledge Document Van Opstand naar Jihad, (Jihadi-) Salafistische groepen en de strijd in Syrië en Irak [From Uprising to Jihad, (Jihadi) Salafist groups and the struggle in Syria and Iraq] by Dr J. Jolen dated 18 January 2018, p. 158.

[14.]

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), p. 14, p. 21.

[15.]

Document, namely Knowledge Document 'Harakat Ahrar Al-Sham Al-Islamiyya' dated 15 November 2020 drawn up by Dr J. Jolen, p. 11, p. 14.

[16.]

Document, namely Expert Report (...) Voor Openbaar Ministerie [For Public Prosecutor] by I. Verhelle, December 2020, p. 36.

[17.]

Document, namely Expert Report for L.B. Haneveld LLM by I. Verhelle, June 2022, pp. 32-34.

[18.]

Document (open source), namely Ah El Yassir (23 August 2016), *The Ahrar al Sham Movement: Syria's Local Salafists*, consulted at <https://www.wilsoncenter.org/article/the-ahrar-al-sham-movement-syrias-local-salafists-0> on 4 November 2022.

[19.]

Document, namely Expert Report for L.B. Haneveld LLM by I. Verhelle, June 2022, p. 27.

[20.]

Document, namely Knowledge Document 'Harakat Ahrar Al-Sham Al-Islamiyya' dated 15 November 2020 drawn up by Dr J. Jolen, p. 1; document, namely Knowledge Document Van Opstand naar Jihad [From Insurgency to Jihad] dated 18 January 2018, par. 4.7.1. on p. 263.

[21.]

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), p. 34; document, namely Antwoorden op vragen van het Openbaar Ministerie [Answers to Questions of the Public Prosecution Service] (...) with regard to Ahrar Al-Sham and Jund Al-Aqsa by Dr R. Leenders dated 27 January 2021, p. 17.

[22.]

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), pp. 34-36; document, namely Expert Report, (...) by I. Verhelle, December 2020, p. 81.

[23.]

Document, namely Expert Report, (...) Voor Openbaar Ministerie [For Public Prosecution Service] by I. Verhelle, December 2020, p. 17, p. 18.

[24.]

Document, namely Report, (...) by Dr R. Leenders dated 14 June 2022, p. 39.

[25.]

Document, namely Expert Report for L.B. Haneveld LLM by I. Verhelle, June 2022, p. 16.

[26.]

Document, namely Report, (...) by Dr R. Leenders dated 14 June 2022, p. 37.

[27.]

Document, namely Expert Report, (...) by Dr R. Leenders dated 27 January 2021, p. 11.

[28.]

Document, namely Expert Report, (...) Voor Openbaar Ministerie [For Public Prosecution Service] by I. Verhelle, December 2020, pp. 22-24.

[29.]

Document, namely Expert Report, (...) Voor Openbaar Ministerie [For Public Prosecution Service] by I. Verhelle, December 2020, p. 22.

[30.]

Document, namely Expert Report, (...), First Part: Ahrar Al-Sham by Dr R. Leenders dated 15 January 2021 (rectifications 18 January 2021), p. 36.

[31.]

Document, namely Expert Report for Buruma LLM by I. Verhelle, June 2022, p. 11, p. 12.

[32.]

Document, namely Amnesty International, Syria: 'We Leave or We Die': Forced Displacement under Syria's 'reconciliation' agreements November 13, 2017, Index Number: MDE 24/7309/2017, p. 78.

[33.]

Document, namely UN Security Council S/2015/813 (22.10.2015), quoted in Jolen, *Harakat Ahrar Al-Sham Al-Islamiyya* of 15 November 2020, p. 9.

[34.]

Report of the independent international commission of inquiry on the Syrian Arab Republic, see document, namely Expert Report for L.B. Haneveld LLM by I. Verhelle, June 2022, p. 19.

[35.]

Document, namely Report, (...), by Dr R. Leenders dated 14 June 2022, p. 36.

[36.]

Document, namely Expert Report for Buruma LLM by I. Verhelle, June 2022, p. 20.

[37.]

Document, namely Expert Report for L.B. Haneveld LLM by I. Verhelle, June 2022, p. 5.

[38.]

Document, namely Expert Report, (...) Voor Openbaar Ministerie [For Public Prosecution Service] by I. Verhelle, December 2020, p. 10.

[39.]

Document, namely Report, (...) by Dr R. Leenders dated 14 June 2022, paragraphs 43 and 44 on p. 25, p. 26.

[40.]

Document, namely Report, (...) by Dr R. Leenders dated 14 June 2022, paragraph 40 on p. 23.

[41.]

Official report of findings dated 14 October 2019, LERFA19006-00013, pp. 240-245.

[42.]

Ibid. and official report of findings dated 21 October 2019, LERFA19006-00020, pp. 263-265.

[43.]

Official report of findings dated 14 October 2019, LERFA19006-00013, pp. 240-245.

[44.]

Shabiha are paramilitary militias, fighting on the side of Al-Assad (see Dienst Landelijke Recherche [National Investigation Service], Dr J. Jolen, *Van opstand naar jihad (Jihadi-)Salafistische groepen en de strijd in Syrië en Irak [From insurgency to jihad (Jihadi) Salafist groups and the struggle in Syria and Iraq]* 18 January 2018, p. 13).

[45.]

Official report of findings dated 14 October 2019, LERFA19006-00013, annex 2, p. 254, p. 255.

[46.]

Official report of findings dated 5 October 2022, LERFA19006-161, unnumbered.

[47.]

Court of Appeal's own observation and the official report of suspicion dated 17 October 2019, LERFA19006-2, pp. 258-262.

[48.]

Official report of findings dated 11 February 2021, LERFA19006-00137, p. 7 and official report of findings dated 9 March 2021, LERFA19006-00149, both included separately in the file.

[49.]

Ibid.

[50.]

Official report of findings dated 21 October 2019. LERFA19006-00020, pp. 263-265, and open sources referred to therein.

[51.]

Document, namely Rapport Vergelijking gezichtsbeelden naar aanleiding van het plegen van wandaden tegen de persoonlijke waardigheid [Report on Comparison of facial images following the commission of outrage against personal dignity], by the Netherlands Forensic Institute, drawn up and signed by Dr A.C.C. Ruifrok, pp. 654-661.

[52.]

Cf. HR 17 March 2020, ECLI:NL:HR:2020:454.

[53.]

Statement of the accused made at the court hearing in the first instance dated 19 March 2021 and 7 April 2021, p. 14.

[54.]

Document, namely Voortzetting van het verhoor van getuige [getuige A][Continuation of the hearing of witness [Witness A]] on 21 January 2016, pp. 108-110.

[55.]

Documents, namely 'Fortsetzung der Zeugenvernehmung' [Continuation of the hearing of the witness] of [witness A] on 11 December 2019, pp. 482-490.

[56.]

Official report of hearing of witness [Witness A] before the examining magistrate dated 3 February 2021, p. 9, p. 10.

[57.]

Statement of the accused made at the court hearing in the first instance dated 19 March 2021 and 7 April 2021, p. 8, p. 11.

[58.]

Document, namely Knowledge Document Van Opstand naar Jihad, (Jihadi-)Salafistische groepen en de strijd in Syrië en Irak [From Uprising to Jihad, (Jihadi) Salafist groups and the struggle in Syria and Iraq] by Dr J. Jolen dated 18 January 2018, p. 265.

[59.]

Official report of findings dated 18 December 2019, LERFA19006-00055, p. 457.

[60.]

Official report of findings dated 18 December 2019, LERFA19006-00055, p. 458.

[61.]

Official report of findings dated 8 January 2020, LERFA19006-65, p. 468.

[62.]

Official report of findings on finding YouTube Video dated 11 February 2021, LERFA19006-00137, p. 4.

[63.]

Official report of findings on finding YouTube Video dated 11 February 2021, LERFA19006-00137 p. 3, p. 4.

[64.]

Official report of findings on finding YouTube Video dated 11 February 2021, LERFA19006-00137, p. 9.

[65.]

Official report of findings on recognition/description of firearm, rifle AK56 dated 11 February 2021, LERFA19006-00144, pp. 1-10.

[66.]

See official report of interrogation of accused dated 28 and 29 October 2020, p. 24: Reporting officer: Have you ever used Turkish telephone number [number]? Accused: No. Reporting officer: This is the telephone number that is also in your file. And which was reported to the German police by [Witness A]. Do you recognise this number? Accused: No. Reporting officer: Do you know anyone who uses this number? Accused: No.

[67.]

Official report of findings dated 18 December 2019, LERFA19006-00055, p. 462.

[68.]

Official report of findings dated 27 May 2020, LERFA19006-00117, p. 611.

[69.]

Official report of findings dated 27 May 2020, LERFA19006-00117, p. 607, p. 608.

[70.]

Official report of findings dated 18 December 2019, LERFA19006-00055, p. 459.

[71.]

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[72.]

See Parliamentary Papers II, 2001-2002, 28 337, No 3, Explanatory Memorandum, p. 5.

[73.]

ICTY, Prosecutor v. Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 70; ICTY, Prosecutor v. Limaj et al., Trial Chamber, Judgement, IT-03-66-T, 30 November 2005, para. 170.

[74.]

ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 49.

[75.]

ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 60

[76.]

ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 60

[77.]

See also Parliamentary Papers II 2002-2003, 28 337, Note in response to the report, No 6, p. 7.

[78.]

ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), No 6.

[79.]

See, inter alia, The Hague Court of Appeal dated 26 January 2021 (ECLI:NL:GHDHA:2021:103).

[80.]

ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), No 3.

[81.]

ICTY, Prosecutor v. Bošković and Tarčulovski, Appeals Chamber, Judgement, IT-04-82-A, 19 May 2010, para. 66. See also ICTY, Prosecutor v. Karadžić, Trial Chamber, Public Redacted Version of Judgement Issued on 24 March 2016, IT-95-5/18-T, 24 March 2016, para. 444.

[82.]

ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), note 57.

[83.]

ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), No 4; United Nations Preparatory Commission for the International Criminal Court (PrepCom), Proceedings of the Preparatory Commission at Its Second Session, 26 July - 13 August 1999, PCNICC/1999/L.4/Rev.1, p. 69. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge: ICRC & Cambridge University Press, 2003, p. 21.

[84.]

International Committee of the Red Cross (ICRC), *Commentary on the first Geneva Convention*, Cambridge: Cambridge University Press, 2016, pp. 226-227, paras. 519-539.

[85.]

ICTY, Prosecutor v. Furundžija, Trial Chamber, Judgement, IT-95-17/1-T, 10 December 1998, para. 183.

[86.]

ICTY, Prosecutor v. Furundžija, Trial Chamber, Judgement, IT-95-17/1-T, 10 December 1998, para. 183. See also ICTY, Prosecutor v. Aleksovski, Appeals Chamber, Judgement, IT-95-14/1-A, 24 March 2000, para. 25; SCSL, Prosecutor v. Sesay et al., Trial Chamber, Judgement, SCSL-04-15-T, 2 March 2009, para. 174.

[87.]

Cf. Gary D. Solis, *The law of armed conflict*, third edition 2022, p. 269.

[88.]

ICRC, *Commentary on the first Geneva Convention*, Cambridge: Cambridge University Press, 2016, pp. 226-227, paras. 663-664. The Court of Appeal notes for the sake of completeness that Syria did not sign Additional Protocol II of 8 June 1977.

[89.]

ICTY, Prosecutor v. Kunarac et al., Trial Chamber, Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 514 and confirmed in ICTY, Prosecutor v. Kunarac, Appeals Chamber, Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paras. 161, 163; ICTY, Prosecutor v. Haradinaj et al., Trial Chamber, Judgement, IT-04-84-T, 3 April 2008, para. 132 ('severe humiliation' instead of 'serious humiliation'). Along similar lines as well in the Elements of Crimes, Article 8(2)(c)(ii) under No 2.

[90.]

ICTY, Prosecutor v. Kvočka et al., Trial Chamber, Judgement, IT-98-30/1-T, 2 November 2001, para. 167.

[91.]

ICTY, Prosecutor v. Aleksovski, Trial Chamber, Judgement, IT-95-14/1-T, 25 June 1999, para. 56; ICTY, Prosecutor v. Kunarac et al., Trial Chamber, Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 504 and confirmed in ICTY, Prosecutor v. Kunarac et al., Appeals Chamber, Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paras. 162-163.

[92.]

ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), note 57.

[93.]

ICC, Elements of Crimes, 2013, Article 8(2)(c)(ii), note 57. ICRC, *Commentary on the first Geneva Convention*, Cambridge: Cambridge University Press, 2016, pp. 226-227, para. 669.

[94.]

ICC, Prosecutor v. Ongwen, Trial Chamber, Judgment, ICC-02/04-01/15, 4 February 2021, para. 2756. See also ICTY, Prosecutor v. Kunarac et al., Trial Chamber, Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 504; SCSL, Prosecutor v. Sesay et al., Trial Chamber, Judgement, SCSL-04-15-T, 2 March 2009, para. 176; ICC, Prosecutor v. Al Hassan, Pre-Trial Chamber, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, para. 262.

[95.]

ICTY, Prosecutor v. Aleksovski, Trial Chamber, Judgement, IT-95-14/1-T, 25 June 1999, para. 57.

[96.]

ICTY, Prosecutor v. Aleksovski, Trial Chamber, Judgement, IT-95-14/1-T, 25 June 1999, para. 56; ICTY, Prosecutor v. Kunarac et al., Trial Chamber, Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, paras. 501, 503; ICTY, Prosecutor v. Kvočka et al., Trial Chamber, Judgement, IT-98-30/1-T, 2 November 2001, para. 168; ICC, Prosecutor v. Katanga and Chui, Pre-Trial Chamber, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 369; ICC, Prosecutor v. Al Hassan, Pre-Trial Chamber, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, para. 262.

[97.]

ICTY, Prosecutor v. Kunarac et al., Trial Chamber, Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 501.

[98.]

ICTY, Prosecutor v. Kvočka et al., Trial Chamber, Judgement, IT-98-30/1-T, 2 November 2001, para. 226.

[99.]

The Hague Court of Appeal dated 26 January 2021 (ECLI:NL:GHDHA:2021:103).

[100.]

The Hague Court of Appeal dated 26 February 2021 (ECLI:NL:GHDHA:2021:297 and ECLI:NL:GHDHA:2021:298).