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Uitspraak

THE HAGUE DISTRICT COURT

Criminal law

Full Chamber

Case numbers: 09/748011-19 (summons I) and 09/748004-21 (summons II)

Date of judgement: 21 April 2021

Judgement in a defended action

(Promis Judgement)

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

[name defendant],

Date of birth [date of birth] in [place of birth] (Syria),

Currently detained at the Penitentiary Institution 'Vught' in Vught.

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1 PRELIMINARY NOTE

In the spring of 2011, an uprising started in Syria against the regime of President Bashar al-Assad (hereinafter: Assad). The regime tried to suppress calls for reforms in Syria by brute force, but this did not silence the resistance. It soon turned into violence from both sides. In the years that followed, acts of violence continued and gradually spread. Already in the course of 2012 it became clear that various jihadist fighting groups were increasingly involved in the uprising. Many of these jihadist fighting groups are seen as terrorist organisations.

The defendant is accused of participating in a terrorist organisation in Syria and of committing multiple war crimes.

The hearing in court took place during the sessions of 15 January 2020, 8 April 2020, 18 June 2020, 28 August 2020, 13 November 2020, 20 January 2021 (all pro forma hearings), 19 March 2021 (substantive hearing) and 7 April 2021 (conclusion of the court hearings).

The court has taken note of the demand of the public prosecutors:

mr. J. Stad and *mr. S.C.M. Wildemors* (hereafter jointly: Public Prosecution Service) and of what has been put forward by the defendant and his lawyers, *mr. Y. Özdemir* and *mr. R. Poyraz* (hereafter jointly: the defence).

In this judgement, the court first addresses the question of whether the Netherlands has jurisdiction. Subsequently the facts will be established, whereby reference to evidence will be made in footnotes. The legal qualification will not be discussed, except with regard to the forms of participation. In separate Chapters, the court will then discuss the charges for war crimes and participation in a terrorist organisation. In each case, reference is made to the previously established facts. The positions of the Public Prosecution Service and the defence have been represented in each Chapter. Some repetition is therefore inevitable.

In this judgement, the court makes frequent use of quotations and terms in the English language. This is related to the international nature of the war crimes which the defendant is accused of. If the court refers to treaties, this will - if possible - concern the Dutch translation as can be consulted on the legislative website of the Dutch government. Endnotes refer to literature and jurisprudence.

2 THE INDICTMENT

Two summonses have been issued against the defendant, i.e. under public prosecutor's case number 09/748011-11 (hereafter: summons I) and under public prosecutor's case number 09/748004-21 (hereafter: summons II), stating the charges against him. The indictment corresponding to summons I was changed at the hearing on 28 August 2020. The text of both indictments is attached to this judgement as Annex I.

3 JURISDICTION

3.1 Introduction

The defendant is a foreign national with Syrian nationality who applied for asylum in the Netherlands. Prior to his application, he was not living in the Netherlands. The criminal offences he has been accused of were all committed in Syria in the period from 1 March 2015 up to and including 1 July 2017. The defendant can be prosecuted in the Netherlands for these offences if and insofar as the Netherlands has jurisdiction over these offences.

3.2 The position of the Public Prosecution Service

The Public Prosecution Service has taken the position that the Netherlands has jurisdiction over the alleged war crimes on the basis of Article 2, first paragraph, under a of the International

Crimes Act (hereinafter: the ICA).

The Public Prosecution Service has not taken a position with regard to jurisdiction over the alleged participation in a terrorist organisation.

3.3 The position of the defence

The defence has taken the position that the Netherlands has no jurisdiction over the alleged participation in a terrorist organisation. To this end, it has been argued that in case law jurisdiction is assumed on the basis of Article 6 of the Criminal Code (hereafter: the Criminal Code) in conjunction with Article 2, paragraph 1, under e of the Decree on international obligations for extraterritorial jurisdiction (hereafter: the Decree) for parts A to D of the indictment and this is examined against Article 8c of the Criminal Code for part E of the indictment. However, this is contrary to the intention of the legislator with regard to the extension of jurisdiction as from 1 July 2014. Moreover, the Public Prosecution Service does not make any distinction in a procedure relating to a charge under Article 140a of the Criminal Code.

The defence has not taken a position on jurisdiction over the charged war crimes.

3.4 The assessment of the court

3.4.1 War crimes

Pursuant to Article 2, first paragraph, under a of the ICA, the Netherlands has jurisdiction over anyone who commits a crime outside the Netherlands as described in the aforementioned law, insofar as the defendant is (at the time of prosecution) living in the Netherlands. At the time of his arrest, the defendant was in the Netherlands, so that jurisdiction exists over these offences.

3.4.2 Participation in a terrorist organisation

Article 6, first paragraph, of the Criminal Code states that Dutch criminal law is applicable to anyone who commits an offence outside the Netherlands insofar as a treaty or decision of an international organisation to establish an offence designated by order in council requires jurisdiction over that offence. With this Article, the Netherlands is implementing its international obligations to establish extraterritorial jurisdiction. The Article should be read in conjunction with the Decree. Article 2, paragraph 1, under e of the Decree, with reference to a series of crimes under general criminal law as defined in the Criminal Code, establishes jurisdiction on the basis of (inter alia) the universality principle insofar as these crimes fall under the description of Article 2 of the Convention against terrorist bombings (hereinafter: the Convention).¹ That treaty Article states that a person commits an offence within the meaning of the Convention if a person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal instrument on, near or in a public place, a State or a government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily harm, or with the intent to wreak havoc on any such place, facility or system, where the destruction results or is likely to result in great economic damage. The attempt to participate as an accomplice, organise, instruct others or contribute in any other way also falls under this provision.

As has already been considered in case law of the court of Appeal of The Hague in response to a comparable indictment, the actions listed in the preamble of the indictment and in parts A to D give effect to the provisions of Article 2 of the Convention.² In the opinion of the court, therefore, there is jurisdiction over these acts on the basis of Article 6 of the Criminal Code in conjunction with Article 2, first paragraph, under e of the Decree. The court sees no reason to assume that this interpretation of the law would be contrary to the intention of the legislator. Since the entry into force of the Decree, the legislator has made two changes to the regulation, but those changes did not relate to Article 2, first paragraph, under e. The

aforementioned case law of the court of Appeal of The Hague has apparently not resulted in the legislator feeling compelled to amend the Decree on that part as well. Otherwise it has not been found that the law and the Decree have been interpreted incorrectly.

With regard to the acts listed in section E of the indictment, the court, along with the defence, is of the opinion - again with reference to the aforementioned case law of the court of Appeal of The Hague - that no jurisdiction can be established on the basis of Article 6 of the Criminal Code, in conjunction with Article 2, paragraph 1, under 3 of the Decree. This is also not possible on the basis of other provisions, so that the Public Prosecution Service is declared inadmissible for that part.

4 THE ESTABLISHMENT OF THE FACTS

4.1 Introduction

In this Chapter, the court will - as far as possible - rule on the factual events related to the conflict in Syria, the Ahrar al-Sham organisation, and the acts he has been accused of. As indicated above, the court will not go into the legal qualification that might be given to these concepts. As to establishing the facts, the court bases its findings on the location of the documents in the case file as stated in the footnotes.

4.2 The position of the Public Prosecution Service

The Public Prosecution Service has taken the position that there is sufficient legal and convincing evidence that the defendant was a member of the organisation Ahrar al-Sham during the charged period (Summons I, count 2). In addition, it has been stated by the Public Prosecution Service that there is sufficient legal and convincing evidence that the defendant along with others posed next to deceased persons, called them 'dogs' and

'carcasses of al-Assad', sang songs, put his foot on the body of a deceased person, kicked the body with his foot, had himself filmed in the meantime and then distributed this video via YouTube (summons I, count 1).

Furthermore, the Public Prosecution Service has put forward that there is sufficient legal and convincing evidence that the defendant posed together with others while carrying arms during the interrogation of a detained person who was identifiably portrayed and who had to state his name, had himself filmed and subsequently had to accept the chance that this film would then be distributed via YouTube (summons II, count 1 and count 2).

4.3 The position of the defence

The defence has taken the position that there is insufficient legal and convincing evidence that the defendant was a member of the organisation Ahrar al-Sham. Furthermore, the defence has taken the position that it cannot be established that the defendant is the person who can be seen in the two videos in respect of which the defendant is accused of war crimes. In the alternative, the defence argued that it cannot be proven of which organisation the defendant is a member. It has also been submitted that it cannot be established that the persons in the video have died and that it cannot be ruled out that the video has been staged. Finally, the defence has taken the position that the report of the Syrian Centre for Media and Freedom of Expression (hereinafter: the SCM) as well as the statement of witness [name of witness 1] cannot be used as evidence, given

that the content of this report and the statement of that witness must be considered unreliable.

4.4 **The judgement of the court** ³

4.4.1 **The conflict in Syria**

4.4.1.1 The evidence

The file contains a knowledge document entitled 'From Revolt to Jihad' and a knowledge document entitled 'Harakat Ahrar al-Sham al-Islamiyya'. These documents, drawn up by [author of knowledge documents] and published by the National Criminal Investigation Department, deal with the conflict in Syria, those involved in this conflict and the Ahrar al-Sham organisation. Both documents are based on public sources such as reports from human rights organisations, news reports and social media. On the basis of these knowledge documents and the aforementioned open sources, the court establishes the following.

In the spring of 2011, the uprising in Syria began with protests to enforce reforms in President Assad's regime. The regime tried to suppress calls for reforms with brute force,

but this did not bring the resistance to an end. Shortly after the protest began, the actions of President Assad's regime were strongly condemned by a large part of the international community.

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

At the end of 2011, the opposition began to fight with armed resistance in response to the regime's violence. In doing so, revenge actions were carried out against government forces and neighbourhoods in large cities and rural areas were conquered. The Syrian regime used even more violent means against these actions. Air strikes carried out by the Syrian Air Force resulted in many civilian casualties. Human rights violations took place on the side of the government forces and paramilitary militias, as well as on the side of the armed oppositions. In 2013 and 2015, the Syrian regime allegedly launched chemical attacks, resulting in a large number of victims. In the closing months of 2013 and the early months of 2014, the Syrian regime appeared to have carried out so-called "barrel bomb" attacks. During 2014 and the first half of 2015, air strikes and barrel bomb attacks by the Syrian regime continued to cost many lives, particularly civilians, in various parts of Syria. Armed oppositions were guilty of summary executions, kidnapping and torture of imprisoned government soldiers, members of the pro-Assad militias and persons identified as informers of the Assad regime. Various fighting groups are said to have been guilty of the illegal detention of a large number of detainees, torture and executions.

In December 2015, the number of people fleeing within Syria itself was estimated at 6.6 million and the number of those who had fled the country at 4.3 million. Some 13.5 million inhabitants were in need of humanitarian aid. In November 2015, the number of deaths was around 250,000. A peace plan was negotiated several times. In 2015, various parties came together in Riyadh for peace talks, during which an agreement was signed. The United Nations repeatedly demanded an armistice.⁴

As the fighting in Syria progressed, the influence of jihadist groups increased. Islamism became the mainstream of the resistance movement. The aim of these fighting groups was not only to overthrow the Assad regime, but also to establish a strict Islamic State in the territory of Syria, where the version of Sharia they advocated would be implemented.⁵

One such jihadist group was Kata'ib Ahrar al-Sham. This organisation was founded in November 2011 from different brigades that were mainly active in the north of Syria. Later the organisation was renamed Harakat Ahrar al-Sham al-Islamiyya. The abbreviated name of the organisation that the court will use in this judgement is Ahrar al-Sham. According to the organisation's first audio message, the goal was to overthrow the Assad regime and establish an Islamic State. In addition, it described the insurgency in Syria as a jihad against an Iranian Shi'ite plot to establish a Shi'ite State from Iran, through Iraq to Lebanon and Palestine. The members of the brigades were described as jihadi Salafists. They are said to have acquired the knowledge of bomb-making from

"brothers, mujahedin from Iraq and Afghanistan", said one of the organisation's fighters.

Ahrar al-Sham was one of the fastest growing fighting groups in Idlib in 2012, but its presence expanded to Latakia, Aleppo and Hama.⁶

On 21 December 2012, Ahrar al-Sham announced the creation of a new umbrella fighting group, al-Jabhat al-Islamiyya al-suriyya, called the Syrian Islamic Front (SIF). This umbrella fighting group consisted of eleven brigades operating mainly in the large cities and/or rural areas of Idlib province and the countryside of Aleppo, and four brigades operating in Damascus and the surrounding area. The purpose of the SIF was in line with the individual goal of Ahrar al-Sham. The SIF also adhered to the Salafist ideology. In 2013 the SIF joined with the Syrian Islamic Liberations Front (SILF) to form al-Jabhat al-Islamiyya (JI). Ahrar al-Sham continued to be part of this partnership.

Ahrar al-Sham consisted of several brigades during the period charged. These in turn were divided into companies.⁷ The movement went through multiple stages under the leadership of multiple leaders. Allegedly, the organisation had access to, among other things, bomb cars, mines, explosives and other weapons.⁸

In 2014 and 2015, the organisation had administrative presence in conquered areas in Syria. For example, in 2014 the Islamic Commission for the Liberated Areas was set up in Idlib, which in 2015 functioned under the High Judicial Council of Jays al-Fateh and took care of police stations and courts in several places in the province. Those courts heard more than 5,000 cases, including criminal and civil cases. Call of Guidance was established in 2015, which provided judicial authorities, including religious courts, in Idlib. Hay'at Idarat al-Khidamat was established in 2015, ensuring the coordination of service providing agencies in northern occupied territory.⁹

Ahrar al-Sham also carried out military operations on several occasions. This involved collaboration with various combat groups (including in the partnership SIF and JI). Some of these groups are Jabhat al-Nusra (at least in the period from 2012 to 2015), Islamic State in Iraq and the Levant (at least in the period from 2012 to 2013) and Jund al-Aqsa (from 2014). Jabhat al-Nusra is internationally classified as a terrorist organisation and has been listed as such on the UN Sanctions List and the EU Sanctions List since 30 May 2013 and 29 May 2014, respectively. The 2015 Battle of the al-Ghab Plain involved other fighting groups in addition to Ahrar al-Sham, including factions of the Free Syrian

Army (FSA).¹⁰ More specifically, this concerned the "First Coastal Division" and the "13th Division" of the FSA.¹¹

The military operations affected the Assad regime as well as the Alawite and Shi'ite civilian population. For example, in August 2013, Ahrar al-Sham was involved in an offensive in Latakia province, occupying more than ten Alawite villages and killing 67 unarmed Alawite civilians. Human Rights Watch was able to determine that these civilians were unarmed when they were killed. On 4 August 2013, 190 civilians were killed, all Alawites. In 2015, several Shi'ite enclaves were attacked by Ahrar al-Sham, among others, firing 1,200 missiles and killing 60 people.

In various military operations, various violations of human rights and the law of armed conflict were committed by the organisation and/or the partnership in which the operation took place, such as the deliberate killing of Alawite civilians, summary executions, kidnapping and hostage-taking of civilians, siege of Shi'ite enclaves, starvation, torture, child recruitment, threats and censorship.¹² Alawites and Shi'ites were often - as the court understands - dismissed as *nusairi* and *rafida* in statements by Ahrar al-Sham. The Assad regime has often been referred to as Alawites.¹³

Ahrar al-Sham was also involved in the siege of the Shi'ite enclaves in the north of Aleppo province. Nubul and al-Zahra had been deprived of basic necessities and humanitarian aid since early 2013. In February 2016, these places fell back into the hands of the Syrian army.¹⁴

In 2015, Ahrar al-Sham's head of foreign political relations attended the Riyadh peace negotiations. There he signed the so-called Riyadh Declaration, which endorsed that the Syrian crisis requires a political solution in accordance with international treaties and guarantees.¹⁵ This resulted in uproar within the ranks and rejection of the declaration by senior leaders within the organisation in Turkey and Syria. For example, the deputy head of the organisation rejected the Riyadh Declaration and said that a political solution was not an option and that now it comes down to *"the sound of the bullet - jihad on the path of God"*.¹⁶ In the summer of 2016, there were two ideological currents within Ahrar al-Sham: a moderate current led by Abu Azzam al-Ansari and Abu Ezzeddine, among others, and one that strengthened military ties with Jabhat al-Nusra.¹⁷

4.4.1.2 The judgement and the considerations

On the basis of the aforementioned documents, the court has come to the following opinion with regard to the conflict in Syria, insofar as it is relevant to the assessment of the charges.

From the autumn of 2011, armed opposition groups started to oppose the Assad regime. Some of these groups were jihadist-Salafist and (partly) aimed at establishing a strict Islamic State. Large-scale military operations were frequent between the parties involved, using military weapons and vehicles such as tanks and artillery. The number of fatalities stood at more than 250,000 people at the end of 2015 and 4.3 million people had fled Syria and Iraq. A very significant number of people were in need of humanitarian aid and several towns and villages in Syria and Iraq were destroyed. A peace plan was also negotiated and the United Nations Security Council was involved.

Ahrar al-Sham is one of the resistance groups and has existed since November 2011. The organisation consists of different brigades, which in turn are divided into companies. The organisation has one leader. The organisation is jihadist-Salafist and the goal of this organisation is to overthrow the Assad regime and establish an Islamic State. Ahrar al-Sham was active in Idlib, Latakia, Aleppo and Hama in 2012. From 2012 onwards, Ahrar al-Sham operated in various cooperative ventures and umbrella fighting groups, operating in the major cities and/or rural areas of Idlib province, rural Aleppo and

Damascus and later on Al-Jabhat al-Islimiyya. In 2014 and 2015, the organisation had administrative presence in conquered areas in Syria.

In 2015, the leader of Ahrar al-Sham signed the Riyadh Declaration for Peace, which resulted in an uproar within the ranks and rejection of the declaration by senior leaders within the organisation in Turkey and Syria. In 2016, a subgroup was formed within the organisation and several brigades switched to another organisation, after which Ahrar al-Sham eventually lost control of several places in Idlib province.

Ahrar al-Sham spoke disdainfully of religious minorities, the Alawites and the Shi'ites and the Assad regime was often referred to as Alawites.

The organisation had access to, among other things, bomb cars, mines, explosives and other weapons. Ahrar al-Sham carried out military operations on several occasions, cooperating with various combat groups. Several of these organisations are jihadist-Salafist and, moreover, are classified as terrorist organisations. For example, Jabhat al-Nusra is listed as such on the UN Sanctions List and the EU Sanctions List.

In various military operations, multiple violations of human rights and the law of armed conflict were committed by the organisation and/or the partnership in which the operation took place, such as the deliberate killing of Alawite civilians, summary executions, kidnapping and hostage-taking of civilians, siege of Shi'ite enclaves to cause starvation, torture, child recruitment, threats and censorship. All this took place both before 2015 and during 2015.

4.4.2 The defendant's conduct

4.4.2.1 The evidence

The start of the investigation into the defendant following documents received from Germany

The investigation against the defendant started in Germany, where the defendant entered the country on 11 November 2015, with the aim of applying for asylum.¹⁸ The German police reported that in 2016 witness [name witness 2] contacted them. [name of witness 2] stated that he had stayed with the defendant in an asylum seekers' centre in [place name] (the court understands: in Germany), that he was informed by the defendant of a YouTube video and that the defendant used the following telephone number: [phone number]. Suspicion arose that in Syria the defendant had been involved in combat operations.¹⁹ A criminal investigation was then started against the defendant in the Netherlands after the Dutch police received information on 7 October 2019 that the defendant had been reported by Germany and that he was in a Dutch asylum seekers' centre at that time.²⁰

Dutch investigation into the YouTube video (video 1)

The Dutch police secured the video (hereafter: video 1) from the YouTube website on 9 October 2019 and determined that it was posted on 26 April 2015 by a user named [YouTube user name 1]. The video title is "Ahrar Al-Sham - Liwa Al-Adiyat - Battle of the Al-Ghab Plain (Sahl Al-Ghab)." Liwa al Adiyat is a brigade active in Hama and Latakia, according to the Institute for the Study of War. The video is a compilation of several edited images, on which the following can be seen. In the first second, a full-screen logo can be seen, which can also be seen in a smaller format in the top right corner. This is the logo of Ahrar al-Sham with the addition "Liwa al Adiyat" underneath. From minute 2:01 the image consists of green and black tones and eight or more armed men are in the picture.²¹ These men celebrate the victory over the dead persons lying on the ground.

Between minute 2:00 and 2:13 a man says:

"Allah is greater and glory is to Allah. This is unfortunate in the village of Al-Ziyarah. These are the carcasses of al-Assad. We asked them for peace, but they did not want it."

This is the end of Al-Shabiha. The dogs. Allah is greater and the glory is to Allah."

At minute 3:08 a person armed with a machine gun presses his foot on one of the remains. This person has been prominent in the picture from minute 2:01 and regularly speaks in the direction of the camera. He wears a tactical vest with which extra ammunition can be carried. Between minutes 2:05 and 2:08 it can be seen that this person makes a kicking movement towards a body lying on the ground.

Between minute 2:17 and 2:24 the aforementioned person says:

"(Sings enthusiastic songs) we have the glory "Ziyarah" and we have surrounded the Gargar [interpreter's note: this is the city of Qarqur spoken in dialect] and Frecha [interpreter's note: this is the city of Frikeh spoken in dialect]."

Between minute 2:25 and 2:32 the aforementioned person says:

"Allah is greater and glory is to Allah. Here are the bodies of the dead of al-Assad in "Ziyarah" village. Allah is greater and glory is to Allah. Here lie the Al-shabiha. "

Between minute 2:32 and 2:39 the aforementioned person says:

'This is the end of the dogs. We are the lions of our Lord Mohammed.'

Between minute 2:57 and 3:27 the aforementioned person says:

"In the name of God the Merciful, the Merciless. Allah is greater and the glory to Allah. Here are the bodies of the dead of al-Assad in village "Ziyarah". Allah is greater and the glory to Allah. (referring to his comrades). They are heroes. The heroes of "Ziyarah" [inaudible]. Here are the bodies of the Al-shabiha (presses with his foot on a body lying on the ground). Allah is greater and glory to Allah."

Between minute 03:27 and 3:50, while he turns to the camera and points at a body lying on the ground, the aforementioned person 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 [shabiha] were arrested on their return from the village of Al-Qatwiya [phonetically] near the city of Al-Mashik [phonetic, inaudible] and were arrested and killed. They are seven... seven

carcasses. Allah is greater and the glory to Allah. Allah is greater and the glory to Allah. This one is one of the dogs."

Between minute 4:02 and 4:31 this person says (among other things):

" (...kicking with his leg) and this one is one of the Dogs [his name] [name 1]. "

Thereupon an unknown voice asks:

"Is he an Alawite? "

The answer is:

"Yes, three Alawites." ²²

Between 03.18 and 03.20 it can be seen that spitting movements are made towards one of the bodies on the ground.²³

It is suspected that the defendant can be seen in the video images.

The battle of Sahl al-Ghab

Police have investigated the battle of Sahl al-Ghab in conjunction with the site of Ziyara, referenced in the video. It appeared that on 22 April 2015, Ahrar al-Sham and other fighting groups announced a battle for the liberation of Sahl al-Ghab. The target of the battle would

include Assad's forces in the places called al-Qahira and Ziyara. On 25 April 2015, Ahrar al-Sham and some other battle groups captured five villages and some checkpoints in the northern part of the al-Ghab plain south of the city of Jisr al-Sughr. On 25 and 26 April 2015, messages were sent via Twitter indicating that *'the [rank] of Liwa'al-'Aadiyat in the movement Ahrar al-Sham'* [name B] was injured in the battle of Sahl al-Ghab. A video from the television channel al-Jazeera uploaded on 27 April 2015 shows that al-Ziyara, located in the area in question, has been conquered from the regime.²⁴

The report of the SCM included in the file shows with regard to the battle of Sahl al-Ghab, among other things, that all troops and brigades that fell under Ahrar al-Sham in the al-Ghab area, such as the al-Adiyat brigade, took part in the battle of Sahl al-Ghab. Those troops and brigades bombarded the checkpoints of the government forces in (among others) al-Ziyarah with artillery and got them under their control.²⁵

Face comparison study by the Netherlands Forensic Institute (NFI) into video 1

A comparative study was conducted on the face of a person seen in video 1 and the face of the defendant, photos of which were taken by the NFI. As for the video, it is about the person making a movement with the leg in or around 3:08 minutes in the direction of the body of a deceased person lying on the ground. The NFI concluded that the findings of the study are more likely (order of magnitude of evidence 10 - 100) if the person in the video is the same as the person in the photos than if it is someone else with similar general facial features.²⁶

Witness statement [name witness 2]

The witness [name witness 2] was heard as a witness by the Dutch examining magistrate on 3 February 2021. [Name witness 2] stated that he met the defendant in November 2015 as one of his roommates in the asylum seekers' centre in Germany. Furthermore, [name witness 2] stated that the defendant sent him a YouTube link to a video with a Turkish telephone number via WhatsApp in January 2016. On that video [name witness 2] saw people being stepped on and spit on.²⁷

Internet investigation into (the family of) the defendant

The police have conducted an open source investigation on the internet into the defendant and his family. During that investigation, videos were found that related to the deaths of [name C] (a cousin of the defendant), [name D] (a brother of the defendant) and [name E] ([name F], a brother of the defendant). Regarding [name E] it was found that he was [rank] of Ahrar al-Sham and that he died a martyr's death, just like his cousin [name C] who was called [rank] of Ahrar al-Sham. They were killed in a bombing raid on Ahrar al-Sham's leadership on 9 September 2014 in Idlib. The defendant has also stated that two of his brothers, [name D] and [name E], died in a bombing raid. It also turned out that [name G], [rank] of Ahrar al-Sham, had also died in the aforementioned bombing.²⁸

A search on Twitter for the search terms [name G] [name F] [name C] led to a tweet on 26 September 2015 posted by the Twitter account [Twitter account name 1]. The tweet consisted of a photo with three tombstones and the text: "[name G] [name F]. [name E] [name C] May Allah have mercy on you and receive you into His wide paradises." The text on the tombstones referred to a martyr's death on 9 September 2014 for all three. The names of these three persons correspond with the tweet and with the names of the nephew, brother and nephew of the defendant respectively.

The Twitter account [name Twitter account 1] has a profile picture of [name E], the defendant's brother. Several times photos of [name E] have also been posted or retweeted on this account. In a tweet on 11 January 2016, the same photo as the profile photo of Twitter account [Twitter account name 1] was posted, which [name F] calls his "dear brother."

The account [Twitter account name 1] wrote or shared several tweets about Ahrar Al Sham or its brigades. On 26 September 2015, the account shared the following tweet from the Twitter account [Twitter account name 2]: "Greetings from al-Qassam

brigades to Harkat Ahrar al-Sham al-Islamiyya." Another tweet read: "Ahrar al-Sham battalions, [name F], May Allah accept him and the martyrs."

On 10 October 2015, account [name Twitter account 1] posted a tweet with a photo of [name D], the defendant's other brother, who died in 2011. The accompanying message read: *"The martyr [name D], date of martyrdom 6-10-2011."* The man in the photo was called *"beloved"* by [Twitter account name 1].²⁹

Via the Facebook profile with the name [name Facebook account 1], an alternative spelling of the name [name H], the name of another brother of the defendant, the police came across two photos of the defendant in camouflage clothing. Under one of those photos a reaction was posted by a profile with the name [name Facebook account 2]. That profile showed a number of photos of armed persons, including a photo of a person whom the reporting officer recognised as the defendant, dressed in camouflage clothing. The caption stated *"The brothers and I, [name I], [name J], and [name K] may Allah heal him."*

Two other photos were also found on this profile in which the reporting officer recognised the defendant. The first photo has the caption *"[name J] and [name I] may Allah protect you"*. The second photo has the caption *"The best cousin may Allah protect you"*. In the second photo, a profile with the name [name Facebook account 3] responded, on which profile photos were also found in which the reporting officer recognised the defendant. A third photo on this profile has the caption *"The beloved # [name I]. I swear to Allah that I miss you very much"*.

On the profile that responded to one of these photos, another photo was found in which the officer recognised the defendant, dressed in camouflage clothing with other persons.³⁰

After a search on Facebook for the name *'martyr'* [name K], the police came across a Facebook profile with a photo of [name K] on it, with the caption *'My brother the martyr' [name K]*. Also on this profile was a video on which various photos pass by as a kind of slideshow, which video was posted on 22 May 2017. [Name K] is recognised on almost all photos. In one of the photos showing two men, [name K] (carrying a weapon) and the defendant are recognised (figure 4, p. 569). The video also shows a photo of a flag with Ahrar Al-Sham's logo on it (Figure 5, p. 570).

In some videos, the reporting officer saw a (selection of) the same men on screen. In a photo he saw a man carrying a gun on his belly, which person he recognises as the defendant (figure 9, p. 574).³¹

The defendant recognised himself in court as the aforementioned figure 4.³² The court observes in this photo that the person with the weapon and the defendant are dressed in camouflage clothing.

The defendant has also recognised himself as the aforementioned figure 9.³³

The court observes in this photo that four men are depicted, all wearing camouflage clothing and carrying a weapon.

Investigation into the connection between the Turkish phone number [phone number], the Twitter account [name Twitter account 3] and Facebook profile [name Facebook account 4] .

The police investigated the telephone number that according to the witness [name witness 2] is used by the defendant and a Twitter and Facebook profile.

Twitter provided the user data of the profile associated with the aforementioned Twitter

account [name Twitter account 1]. It states that when this account was created on 20 May 2015, telephone number [telephone number] was linked to this account.

After being asked to provide the user information of accounts associated with phone number [phone number], Facebook provided the user information of one Facebook profile. This Facebook profile was created on 8 June 2016 and has the profile name [name Facebook account 4].³⁴

The content of the Twitter account [name Twitter account 1] has been investigated. In addition to what has been stated above, it was found that the account shared several photos of the leaders of Ahrar al-Sham and in an accompanying tweet to one photo, people were called '*Our precious movement and its new leaders*'. Furthermore, the account posted tweets mentioning a documentary about Ahrar al-Sham's leaders. Among the names were Abu Yahya al-Hamwi, the person who, according to Reuters, was chosen as leader of Ahrar al-Sham in September 2015. The account also repeatedly asked for the aforementioned documentary to be shown.

On 6 January 2016, the account posted a tweet with a photo with the text:

[name L]

"The patient and civilised mujahid for whom the battlefields testify.

May Allah protect you, grant you success, and light your path.

#Liwa al-Adiyat"

In the above text the hashtag '*Liwa al-Adiyat*' is mentioned, i.e. the battalion of Ahrar al-Sham which also appears in the title of video 1.

After a search on the internet for [name L] and '*Liwa al-Adiyat*', the police came across a Twitter account with the name [Twitter account name 4], with the indication in the Twitter bio '*the commander of Liwa al-Adiyat*'. That page included a background photo where the middle person was recognised as [name E], the defendant's brother.

On 23 May 2015, the account posted two tweets mentioning '*Jaysh al-Fatah*', which is said to be a loose alliance of armed rebel groups in Syria. According to an American think tank, Jaysh al-Fatah is made up of a number of groups, including Ahrar al-Sham and Jabhat al-Nusra. The account makes positive references to Jaysh al-Fatah.³⁵

Investigation into the Instagram account [name Instagram account 1] and identification of the defendant in photos on that account and on other Facebook profiles.

During the investigation, the police came across Twitter account [name Twitter account 6]. On 21 February 2016, it showed a screenshot of a photo posted on Instagram by the Instagram account [name Instagram account 1] (figure 1, p. 578). The reporting officer then recognised the defendant. The same photo could be seen on that Instagram account. The profile photo of the Instagram account featured two men (Figure 3, p. 579). The reporting officer recognised the man on the right as [name E], the defendant's deceased brother, also known by his nickname [name F]. The man on the left of the photo was recognised as Zahran Alloush, the former leader of Jaysh al-Islam, who is said to have been killed in an air raid when Alloush was meeting with members of Ahrar al-Sham. According to an American think tank, Jaysh al-Islam (Army of Islam) is a Syrian opposition group whose goal it is to overthrow the Assad regime.

The Instagram account included photos that according to the police can be related to Ahrar al-Sham:

In a photo (figure 5, p. 580) posted on the Instagram account on 8 March 2016, the

reporting officer recognised the defendant. This is the same photo posted on the Facebook profile [name Facebook account 3], with the caption "*The beloved # [name I]. I swear to Allah that I miss you very much.*" Under the photo posted on Instagram, a certain [name Instagram account 3] responded.

In a photo (figure 6, p. 581) posted on the Instagram account on 7 March 2016, the officer recognised the man on the left of the photo as the defendant.

In a photo (figure 7, p. 582) posted on the Instagram account on 20 February 2016, the officer recognised the man in the photo as the defendant.

On 11 February 2016, a photo (figure 8, p. 583) was posted on the Instagram account showing a man in camouflage clothing. The officer recognised this man as the man he had also seen in other photos in this investigation (figure 9, p. 584), including a photo in which he is depicted with [name E]. He found these photos on Twitter and in tweets the man was referred to as [name S]. After a search on Twitter for the latter name, the officer found a tweet with a photo (figure 10), in which [name S] is depicted with a weapon and is surrounded by deceased people lying in their blood on the ground. The photo has the text:

"# Ahrar_al-Sham racing to heaven

For today [name S], with God's will, travels to heaven

[name F] .. your comrades keep the promise".

In the tweet, reference is made to Ahrar al-Sham and [name F].

A photo (figure 16, p. 588) of a boy holding a flag with the logo of Ahrar al-Sham was posted on the Instagram account on 6 January 2016.

It was found that the Instagram accounts [name Instagram account 1] and [name Instagram account 2] follow each other back and forth on Instagram. On the account [name Instagram account 2] a photo was posted on 27 August 2015 with four people next to a motorcycle. The officer then recognised the defendant (as the third man from the left). The person on the far left in the photo was recognised by the officer as a person he had seen in another photo in the investigation (figure 3, p. 561) (see figure 19, third man from the right, p. 590). As shown by previous investigation, this person appears in the photo with the defendant several times and is called [name J]. This person can also be seen in the profile photo of the Instagram account [name Instagram account 2] (figure 20, p. 591).

In that profile photo he is depicted with a flag of Ahrar al-Sham behind him. The logo on the flag was used from the end of 2012 to the beginning of 2016 (figure 21, p. 591).

After a search on Facebook for the name [name I], the officer found a photo of a man with a child on Facebook profile [name Facebook account 6], which photo was posted on 27 December 2015 (figure 22, p. 592). The message accompanying the photo reads: "*[name I] with [name N], the son of martyr [name O], may Allah accept him*". The officer has recognised the man in the photo as the defendant.

The database of the Violations Documentation Centre in Syria showed that [name O] was killed in a shooting on 17 August 2013. His nickname was [name T], he was a member of the Abdullah Ibn al-Mubarak Brigade of Ahrar al-Sham and [rank] of that battalion.

Another photo was posted on Facebook profile (figure 25, p. 595). The officer then recognised the defendant (third from the left), [name K] and [name J] (*Court: this is the same photo as the aforementioned figure 9 on p. 574, on which the defendant has recognised himself*).

An image of a flag with the logo of Ahrar al-Sham was posted on the Facebook profile on 26 June 2016 (figure 26, p. 595).

After searching for the name [name I] on Facebook, the officer found a post, dated 17 April 2020 in which the Facebook profile of [name Facebook account 5] mentions the name [name

I]. On the profile photo (figure 27, p. 596) of that profile, the reporting officer recognised [name J]. A photo was posted on this Facebook profile on 15 April 2020 with people wearing balaclavas in camouflage clothing (figure 28, p. 597). They carried a flag with the logo of Ahrar al-Sham. Also on this Facebook profile one can find several photos of combat vehicles, tanks and people in camouflage suits sitting in the back of pick-ups. One of the photos showed a flag on a flagpole bearing the logo of Ahrar al-Sham.³⁶

The defendant identified himself at the court hearing in the aforementioned photo (figure 6, p. 581), which was posted on the Instagram account [name Instagram account 1] on 7 March 2016.³⁷

The police compared photos of the defendant with photos found on Instagram and Facebook. In doing so, three external characteristics that the reporting officer saw in the defendant were examined ³⁸:

- a warty birthmark under the right nostril;
- an even birthmark on the right side of the forehead;
- a crown or scar in the hairline.

The following photos of the defendant are involved in the investigation:

- a photo of the defendant from the criminal justice database (hereinafter: SKDB) of 22 October 2019 (figure 1/reference photo 1, p. 2);
- a photo of the defendant from Germany from the "Certificate of Registration as an Asylum seeker", which was taken in December 2015 (figure 3/reference photo 2, p. 4).

Figure 2 (p. 3) (*Court: adapted from figure 1*) shows the wart-like birthmark under the right nostril (in red) and the birthmark on the right side of the forehead (in blue). Compared to the birthmark on the forehead, the wart-like birthmark is slightly more towards the centre of the face. If a line is drawn between both moles, this line is slightly oblique towards the centre of the face.

In figure 4 (p. 5) (*Court: an adaptation of reference photo 2*) the crown/scar is highlighted in orange. During the interrogation on 28 and 29 October 2020, the officer saw the same Y-shaped scar on the defendant that can be seen in reference photo 2.

On the Instagram account [name Instagram account 1] a photo was posted on 7 March 2016 (figure 5, p. 7) (*Court: this is the same photo as the above photo that was posted on the Instagram account on 7 March 2016 [Instagram account name 1] (figure 6, p. 581), in which photo the defendant recognised himself in court*). The officer saw a man with the same external characteristics as the defendant, but in a mirror image because of the selfie camera angle. Figure 6 (p. 8) (*Court: adapted from figure 5*) shows that the man has a wart-like birthmark under his right nostril (in red) and that the man has a birthmark on the right side of his forehead (in blue). If a line is drawn between both moles, this line is slightly oblique towards the centre of the face. The man also has a crown or scar (in orange) at his hairline.

Both in the aforementioned reference photos 1 and 2 and in figure 6 (p. 8) the three external characteristics correspond, both in shape and relative location.

On the same Instagram account were two more photos (figures 7 and 8, pages 9 and 10) in which the officer recognised the person in figure 6 (p. 8). In addition to similarities in appearance, the person in figures 7 and 8 (p. 9 and 10) wore the same hoodie and jacket as the person in figure 6 (p. 8).

The name [name Instagram account 1] is also used by the Twitter account [name Twitter account 5]. Telephone number [telephone number] is linked to this Twitter account.

On the Facebook profile of [name Facebook account 6] a photo was posted on 23 April 2017 showing four armed men in camouflage clothing (figure 13, p. 15) (*Court: this photo is the same as the photo mentioned above, figure 9 on p. 574*). During interrogation, the defendant announced that he was the second man from the right. This man has an automatic firearm and is wearing camouflage clothing and an "OPS-vest".³⁹

Photo 1 was posted on the Facebook profile of [name Facebook account 5] on 16 December 2020. According to the police, the man in this photo shows the same external characteristics as the defendant. That photo has been compared to photos of the defendant. This comparison focussed on the following characteristics:

- a birthmark under the right nostril;
- a birthmark on the forehead;
- a scar at the hairline.

Photo 1 has been compared with the following photos of the defendant:

- a photo of the defendant from the SKDB of 22 October 2019;
- a photo of the defendant from Germany from the "Certificate of Registration as an Asylum seeker", taken in December 2015.

The police concluded that the aforementioned three characteristics in the photos correspond, both in shape and in relative location.

Eleven comments on Facebook mentioned this name [name I] under this photo 1. In almost all comments under the photo, Allah is asked to "end his imprisonment". The court concludes that the defendant was detained in the Netherlands at the time of posting this photo.

On the same Facebook profile, photo 2 was posted on 25 October 2020. The man on the left in photo 2 shows the same physical characteristics as the defendant. When comparing photo 2 with the aforementioned two photos of the defendant, photo 2 shows a wart-like birthmark under the right nostril. The man also has the same beard growth as the defendant.

The man on the right in photo 2 has been recognised by the police as [name P]. [name P] is to the right of the defendant in the photo of four armed men in camouflage clothing, on which the defendant has identified himself (*Court: this photo was also posted on the Facebook profile of [name Facebook account 6], see the aforementioned figure 13, p. 15*). On Facebook, eleven comments below this photo mentioned [name I]. In almost all comments below the photo, Allah is asked to "end his imprisonment". As stated above, the defendant was detained in the Netherlands at the time of posting this photo.⁴⁰

Investigation into the content of Twitter-account [name Twitter-account 5]

An investigation has been carried out into the content of the Twitter account found under the name [Twitter account name 5]. In the background of the account is a photo showing the deceased brother of the defendant named [name E]. From the advanced user data it appears that the phone number [telephone number] is linked to the account. The account used a logo with the text "Ahrar al-Sham battalions" as a profile photo. This logo was also tweeted several times by this account, including several times with a firearm in the background.

Furthermore, the account tweeted the following message, in which the user calls the martyrs of Ahrar al-Sham "good-hearted":

*"To those who died and after whom part of life died, may you live well in Paradise
oh you #good-hearted.
Martyrs as a result of treason
Martyrs of Ahrar al-Sham
Jund al-Af'a
Betray our mujahideen"*

A tweet with a photo of [name M] was also found. Police had already come across this photo on another Twitter account. On that page it says in the bio *"The brigades will return, God willing (Ahrar al-Sham brigades)"*. In the background of this page was a photo that includes part of the Liwa al-Adiyat logo, the same logo as seen in video 1. After a search on the internet for the name [name M], a tweet was found with a photo of a deceased man who resembles [name M]. The caption to that tweet mentions that the [rank] of *"#AhrarAlSham's # LiwaAlAdiyat"* was killed in Latakia. In tweets, [name Twitter account 5] refers to this [name M] in positive terms (good-hearted and mujahideen).

[Name Twitter account 5] also tweeted a photo of [name Q], of which the police officially knows reference is made to [name R], which allegedly means the [rank] of Ahrar al-Sham in the 'Hama sector'. An article stated that he was killed by the Jund al-Aqsa group, a fighting group mainly active in Hama and Idlib. In some tweets, [Twitter account name 5] refers to Jund al-Aqsa and tries to scare them.⁴¹

The second video found on YouTube (video 2)

On 18 January 2021, police found a YouTube video on YouTube channel [name YouTube channel 1] - a channel showing several videos of the battle of the Al-Ghab plain - a YouTube video entitled: *'Suqour Al-Jabal Brigade (interpreter: Mountain Hawks Brigade) arrests a soldier of the regime's mercenaries in the region of the Al-Ghab plain '*. The video was uploaded on 30 April 2015.

Several people can be seen and heard on the video, including an arrested man (person B) and a man with a beard holding a gun in his hand and standing next to the arrested man (person D). The arrested person is asked for his name and number. The people surrounding the arrested man keep looking into the camera. The YouTube channel owner added the following text in the description:

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

In addition, the owner of the YouTube-channel had added the following reaction under the video:

"#Western_rural_area_ of Hama

#Al-Ghab_ plain

Suqour Al-Jabal Brigade [interpreter: Mountain Hawks Brigade] arrests a soldier from Mashik checkpoint. A regime mercenary who hid in one of the houses of the village of Zayzun after the struggle to liberate the Al-Ghab plain It turned out that the soldier is from the Al Rai area in the province of Aleppo.

#[name YouTube channel 1]."

In the video, a person (the interviewer who is off-screen; person A) mentions the same places as mentioned above:

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

When asked by person A where he served, the arrested man replied: *'in Mashik'.*

The reporting officer has found that with regard to the locations mentioned, there are many similarities with the places mentioned in video 1:

- Both videos refer to the *"struggle to liberate the Al-Ghab plain"* or *"the battle of the Al-Ghab plain"*;
- In both videos reference is made to the city of Al Ziyarah. In video 2, according to person A, the person who was captured is said to have fled after the *"battles that took place in the region of Al-Ghab plain, specifically in the city of Al Ziyarah"*. In video 1, the persons speaking to the camera appear to be saying that they are in Ziyarah at the time: *"Here are the bodies of the dead of al-Assad in village of "Ziyarah"*;
- In both videos reference is made to the town of Mashik. In video 2, it is mentioned by the prisoner as the place where he served. In video 1 it is mentioned as the location where the seven killed persons were arrested nearby: *"Here are the shabiha of al-Assad. They were arrested on their return from Al-Qatwiya village [phonetically] near Al-Mashik [phonetically] and were arrested and killed."*

Video 1 was uploaded on 26 April 2015 and Video 2 on 30 April 2015. From the time of upload and the similarities in the places mentioned in both videos, police conclude that they relate to the battle of the Al-Ghab plain in April 2015 .

In the title of video 2, *"Liwa Suqour al Jabal"* is mentioned. According to The Jamestown Foundation's *"Militant Leadership Monitor"* project, this is a prominent Syrian armed opposition group fighting against al-Assad's government and its supporters and the Islamic State. According to the news organisation Radio Free Europe/Radio Liberty, Liwa Suqour al Jabal places itself under the umbrella of the Free Syrian Army. In a video dated 23 April 2015, commanders of Ahrar al Sham and Liwa Suqour al Jabal announce the battle of the Al-Ghab plain.

After comparing a still from video 2 and photos of the defendant, the reporting officer recognised person D in the video as the defendant. The officer recognised the defendant in one photo (a photo of the defendant from the SKDB of 22 October 2019) by the wart-like birthmark under the right nostril and an even birthmark on the right cheek, at the level of his nostril. The relative locations of both moles also roughly correspond. Furthermore, after comparing a still from video 2 and a section of a photo (figure 7 ⁴²) the reporting officer recognised the defendant by the hairstyle and beard growth, which correspond on the still and the photo (*Court: the photo on the right in figure 7 is a section of the photo on p. 574 as mentioned several times above, on which - as mentioned before - the defendant has recognised himself*).

Finally, the reporting officer compared two people on video 1 and video 2 who can be matched in appearance. Both people have the same length of hair that curls in the same way. Both individuals have a thick beard of the same length with short stubble at the moustache.

Both persons wear a so-called 'OPS vest' of a similar type and they wear it in the same way. The shape of the vests matches, both vests have a V-neck and a wide band at the shoulder. There is room for four magazines at the belly. Those magazines have a distinctive banana shape. Both vests have two pockets at the chest, which can be closed with a piece of fabric.

The right breast pockets of both vests seem to be closed in an identical way, because the visible part of the Velcro on both right breast pockets is almost identical. Finally, both persons carry a rifle of the type Chinese Kalashnikov

AK 56 / AK 56-1.⁴³

On 3 March 2021, the NFI released a report in response to the question (in short) whether the aforementioned person D standing next to the arrested man on video 2 is the same person as the person of whom comparison recordings were made on 12 March 2020 by the NFI. In the study, the NFI used two hypotheses:

1. The person depicted in the disputed images is the defendant;
2. The person depicted in the disputed images is someone other than the defendant, but has similar general facial features.

The NFI has concluded that similarities can be observed, in terms of shape and position, in the form of the spots on the right cheek and just below the nostril, which are strongly identifying. Similarities have also been observed in the hairline, the shape of the eyes, nose and mouth. These are weakly identifying, but together they contribute to a higher evidential value. It is concluded that the findings of the study are very much more likely (order of magnitude of evidence 10,000 - 1,000,000) if hypothesis 1 is true than if hypothesis 2 is true.⁴⁴

The defendant's statement

The defendant has stated to the police that he went to Germany in 2015. There, he stayed in a room in an asylum seekers' centre, together with [name witness 2], among others.

Furthermore, the defendant has stated that his area in Syria is the al Ghab plain and that in the area where he lived, this area belonged for 99% to Ahrar al-Sham and the Free Syrian Army. The defendant has stated that Liwa al Adiyat is a brigade operating in Hama and that the brigade supports Ahrar al-Sham.

Finally, regarding video 2, the defendant has stated that Suqour al Jabal is part of the Free Syrian Army.⁴⁵

4.4.2.2 The judgement and the considerations

On the basis of aforementioned evidence, the court judges as follows regarding the role of the defendant.

Videos 1 and 2 were made at the battle of Sahl al-Ghab

The court first of all considers that video 1 and video 2 were made in the context of the battle of Sahl al-Ghab in Syria.

The battle of Sahl al-Ghab in Syria was announced by Ahrar al-Sham and other fighting groups on 22 April 2015. All troops and brigades under Ahrar al-Sham in the al-Ghab area - including the Liwa al-Adiyat brigade - took part in that battle and those troops have taken control of the site of al-Ziyarah.

The title of video 1 refers to Ahrar al-Sham and Liwa Al-Adiyat as well as to the battle of the Al Ghab plain, Sahl Al-Ghab. The video also features the logo of Ahrar al-Sham and also mentions "Liwa al Adiyat". This video was posted to YouTube on 26 April 2015.

The title of video 2 includes that the Suqour al-Jabal arrests a soldier of the regime's mercenaries in the region of the Al-Ghab plain. Suqour al-Jabal ranks itself under the Free Syrian Army, as the defendant confirmed in his police questioning. This video was posted to YouTube on 30 April 2015.

Finally, both videos refer to the battle of Sahl Al-Ghab and the sites of al-Ziyarah and Mashik. The court therefore assumes, on the basis of the titles, the content of the videos and the time of posting on YouTube of those videos, that they relate to the battle of Sahl Al-Ghab in April 2015. The videos must therefore be seen in the context of the battle of Sahl al-Ghab announced by Ahrar al-Sham and actually waged by Ahrar al-Sham.

Video 1 shows armed persons jointly celebrating the victory over the dead

Secondly, the court finds that video 1 shows several people - singing songs - celebrating the victory over the deceased persons lying on the ground. The defence's assertion that the videos may be staged has not been substantiated in any way and the court sees no reason whatsoever to doubt that the persons lying on the ground have actually died. The armed men call the dead the carcasses of al-Assad, Shabiha of Assad and dogs. It is also said that they are Alawites. Several of these armed persons kick the deceased, spit on a body and one person places his foot on the body of a deceased person. Among other things, the armed men speak in the direction of the camera. In the opinion of the court, a close and conscious cooperation between the persons can be deduced from the images, since they - standing side by side - celebrate the victory together in the aforementioned manner.

Video 2 shows the persons interrogating a prisoner together

Third, the court finds that video 2 shows the interrogation of a prisoner. This prisoner is surrounded by several people and right next to him is a person with a weapon. He is asked for his name and is portrayed in a recognisable way.

The defendant has posted photos and messages related to Ahrar al-Sham and Liwa al-Adiyat on the social media

The defendant stayed in an asylum seekers' centre in Germany together with witness [name witness 2]. After the defendant had left there, he sent a link to video 1 with number [telephone number] to that [name witness 2]. That number is linked to Twitter account [name Twitter account 1], Twitter account [name Twitter account 5] and Facebook account [name Facebook account 4].

Twitter account [name Twitter account 1] has as profile picture the picture of [name E], the defendant's deceased brother. Photos of that brother have also been posted or retweeted on this profile and the user of this account called [name F] (the court understands, see above: [name E]) his "beloved brother". A photo has also been posted of the defendant's other deceased brother, named [name D], who is also called "beloved". The text in the photo refers to a martyr's death in 2011. Furthermore, the user of this account posts messages about Ahrar al-Sham or its brigades, including messages that speak positively about Ahrar al-Sham and its leaders, and photos of those leaders. The hashtag #Liwa al-Adiyat is also used in a message. Finally, on 26 September 2015, the user of this Twitter account posted a photo with three headstones and the text: "[name G] [name F], [name E] and [name C] *May Allah have mercy on you and receive you into His wide paradises*". This text refers to the martyr's death on 9 September 2014 of two cousins and a brother of the defendant.

On Twitter account [name Twitter account 5], the deceased brother [name E] can be seen as a background photo. The profile photo shows a logo with the text "Ahrar al-Sham battalions". This logo was tweeted several times by this account. Furthermore, a background photo has been posted on this account in which part of the logo of Liwa al-Adiyat can be seen. Also by this account a message was posted about [name M], the [rank] of Ahrar al-Sham's Liwa al-Adiyat who died in Latakia, in which message this [name M] is referred to in

positive terms (good-hearted and mujahideen) .

On the Instagram account [name Instagram account 1] a photo has been posted of [name E], the defendant's deceased brother, also known by the nickname [name F]. Furthermore, several photos in relation to Ahrar al-Sham can be seen on this account, including photos in which the defendant is recognised. The defendant was recognised on a photo posted on 8 March 2016. This photo was also posted by Facebook profile [name Facebook account 3], with the caption "*The beloved #[name I]]. I swear to Allah that I miss you very much.*"

Various photos were found on the Facebook profile of [name Facebook account 2], in which the defendant was recognised and in which captions refer to the name [name I]. A photo was also found of the defendant, with the comment "*The beloved #[name I] (...)*" was posted. A photo of a man with a child has also been posted on that Facebook profile, in which the man is recognised as the defendant. The message reads: "*[name I] with [name N], the son of martyr [name O], may Allah accept him*".

A photo was posted on the Facebook profile of [name Facebook account 2] in which the defendant (dressed in camouflage clothing) was recognised and the caption stated "*The brothers and I, [name I], [name J], and [name K] may Allah heal him*".

Photos were found on the Facebook profile of [name Facebook account 3] in which the defendant was recognised. One of those photos has the caption "*The beloved #[name I].*

I swear to Allah that I miss you very much." This photo can also be found on Instagram account [name Instagram account 1].

The Facebook profile of "martyr [name K]" shows a photo, as part of a video, of [name K] (armed) and a man recognised as the defendant, which was confirmed by the defendant. The defendant is dressed in camouflage clothing. In this video the logo of Ahrar al-Sham can be seen. The defendant is recognised in another photo. He is armed in that photo (figure 4, p. 569).

In view of the foregoing, considered in cohesion and in relation to each other, the court is of the opinion that telephone number [telephone number] and Twitter account [name Twitter account 1], Twitter account [name Twitter account 1], Instagram account [name Instagram account 1] and Facebook account [name Facebook account 4] were used by the defendant and that [name I] refers to the defendant. In the opinion of the court, it is in line with all this that photos were posted on Facebook profile of [name Facebook account 5] in October and December 2020 on which the defendant was recognised, that in reactions to those photos [name I]' has been mentioned and that Allah is asked to "*end his imprisonment*". It has been established that the defendant was detained in the Netherlands at that time. This strengthens the court's conviction that [name I] refers to the defendant.

Unlike the defence, the court has no reason to doubt the content of the statement of [name witness 2], insofar as it is used for evidence. After all, the statement by [name witness 2] that it was the defendant who sent him a link to video 1 via number [telephone number] is supported by other evidence, i.e. the aforementioned findings regarding the social media accounts from the defendant and others leading to the defendant. In addition, a telephone number is an objective fact, while the court has no indication whatsoever that [name witness 2] obtained that number other than through the defendant.

The court finds that the defendant has posted photos and messages with his social media accounts that are related to his deceased brother [name E], a former [rank] of Ahrar al-Sham who died in a bombing on 9 September 2014 and to Ahrar al-Sham and Liwa al-Adiyat.

The defendant can be seen in videos 1 and 2

Video 2 shows a captured soldier of the Assad regime being interrogated. Based on the content and conclusions in the NFI report with regard to video 2 as well as the recognition by a reporting officer, the court considers it proven that the defendant can be seen in video 2, i.e. the armed person standing directly next to the prisoner (named person D).

Based on the described similarities between videos 1 and 2 in terms of the places mentioned therein, the weapons and the OPS-vest with an identical visible portion of the Velcro on both right breast pockets, the context in which video 1 was taken and the content and the conclusions of the NFI report with regard to video 1, the court is of the opinion that the defendant can also be seen on video 1, being the armed person who puts his foot on a dead body in that video at minute 3:08 and who spoke several times

between minutes 2:17 and 3:50 (as described in the factual findings in section 4.4.2.1).

In doing so, the court ignores the defence's - otherwise not substantiated - assertion that it is not the defendant but a family member of the defendant that can be seen in the videos.

After all, that would have to be a family member who not only looks very much like the defendant, but also has a wart-like birthmark and an even birthmark in exactly the same places on his face/forehead and a scar in the hairline. The court considers this completely implausible.

In the period between March 2015 and 10 November 2015, the defendant was in Syria

From the establishment that the defendant can be seen on video 1 and video 2, which videos were made in the context of the battle of Al-Ghab, it follows that the defendant was present in Al-Ziyarah during that battle. The defendant entered Germany on 11 November 2015, so the court assumes that he stayed in Syria until then.

The court is therefore of the opinion that the defendant stayed in Syria in the area of Al-Ziyarah and Hama during the charged period from March 2015 up to and including 10 November 2015.

In the period between March 2015 and 10 November 2015, the defendant was involved in Ahrar al-Sham

Finally, the court believes that the defendant was involved with Ahrar al-Sham during this period. This finding can be deduced directly from the foregoing findings, viewed in conjunction and coherence. With regard to the circumstance that video 2, according to the title and captions, relates to the Free Syrian Army, the court notes that - contrary to what the defence argues - this is not a contraindication to the defendant's involvement in Ahrar al-Sham. After all, the Free Syrian Army and Ahrar al-Sham worked together in a coalition during the Battle of Sahl Al-Ghab.

5 COMMITTING WAR CRIMES

5.1 Introduction

In summons 1, the defendant has been charged that in the period from 1 March 2015 to 27 April

2015, in or near Al-Ziyarah (Syria) and/or Hama (Syria), together and association with another/others, posed next to a deceased person or persons, called them 'dogs' and 'carcasses of Al-Assad' and sang songs, exhibited them, placed his foot on the bodies and kicked them, spat on the bodies, had himself filmed doing this, and distributed that video via social media. In short, this suspicion amounts to an assault on personal dignity, in particular humiliating and degrading treatment, as prohibited in Common Article 3, paragraph 1, heading and under c, of the 1949 Geneva Conventions.

In summons II, count 1, the defendant has been charged with having participated in or near Zayzun (Syria) and/or Al-Ziyarah (Syria) in the period from 1 March 2015 up to and including 30 April 2015 (primary) or is complicit (in the alternative) in posing armed

next to an imprisoned person while that person is being interrogated, had himself filmed while the imprisoned person was recognisably portrayed and distributed this video or had it distributed or accepted the opportunity that it would be disseminated via social media. In short, this suspicion amounts to not treating a person who does not or no longer participate in the hostilities humanely because he has not protected this person from the curiosity of the public, which is contrary to Common Article 3 of the Geneva Conventions, Article 4 of Additional Protocol II to the Geneva Conventions and Customary International Humanitarian law.

The same behaviour was charged under count 2, but as co-perpetration or complicity in - in short - outrages upon personal dignity.

In order to answer the question whether these facts can be proven, it must first be determined whether international humanitarian law applies, since war crimes concern violations of this law. To this end, it must be considered whether there was an armed conflict in Syria at the time, which, in view of the charges, must be of a non-international nature. It will then have to be assessed whether the victims shown in the videos enjoyed protection under international law and whether the defendant was aware of the actual circumstances in this regard. Only then can it be considered whether the defendant's conduct - as established in Chapter 4 - is a violation of the requirement of humane treatment and/or the prohibition of outrages upon personal dignity and/or the requirement of protection against public curiosity. Finally, it must be established that there is a so-called nexus - a link - between the defendant's behaviour and the conflict. It must also be considered whether the defendant knew of the actual circumstances that led to the existence of the conflict. These parts are taken from the Elements of Crimes of the International Criminal Court (hereafter: the ICC).

When answering these sub-questions, the court will first of all outline the legal framework that the court will apply, then it will examine the facts and circumstances of the case.

5.2 The position of the Public Prosecution Service

With regard to all three charged war crimes, the Public Prosecution has taken the position that a judicial finding of facts can be achieved.

To this end, it was first argued that there was a non-international armed conflict on the territory of Syria during the charged period.

With regard to video 1, it has been argued that the persons in this video are deceased and therefore enjoy protection under international humanitarian law. The defendant has treated them in a humiliating and degrading manner with his behaviour. In view of case law (including from the District Court of The Hague), this is of such seriousness that one can speak of an outrage upon personal dignity. Moreover, there is a nexus.

With regard to video 2, it has been argued that the prisoner on this video was protected under

international humanitarian law because he no longer participated in the hostilities. The acts in which the defendant is involved are - given the setting - of such a nature that they are humiliating and degrading, and this is of such a nature that it constitutes an outrage upon personal dignity. To this end, it is important that the prisoner is surrounded by armed persons standing close to him, raising their voices and questioning him. The prisoner looks uncertain about the situation and his fate.

Moreover, the requirement of humane treatment for non-international armed conflicts should be interpreted in the same way as for international armed conflicts, given i) the spirit of the requirement and ii) the blurring boundaries between international armed conflicts and non-international armed conflicts, and iii) the increased importance of protecting individuals in non-international armed conflicts due to the advancing digital era. This means that the requirement to protect against public curiosity also applies to non-international armed conflicts.

There is also a nexus with regard to video 2.

5.3 **The position of the defence**

The defence has taken the position that the war crimes as charged cannot be proven.

First of all, it is not possible to establish that there is a non-international armed conflict, since the defendant did not participate in a terrorist organisation.

In addition, it cannot be established that the conflict in which Ahrar al-Sham is involved is sufficiently intensive to be able to speak of a non-international armed conflict. Furthermore, not enough is known about the degree of organisation of Ahrar al-Sham. Moreover, Ahrar al-Sham is much less organised than, for example, Islamic State.

With regard to video 2, there is no outrage upon personal dignity, now that the background of the situation must be taken into account, in particular the terrible events on both sides, but especially from the side of the militias and from the side of Assad. Nor can we speak of outrages upon personal dignity with regard to video 2, since the acts on the video provide insufficient ground to do so.

There is no nexus now that it is unclear which grouping is involved and the groups that appear in the videos are more likely to demonstrate that there is no direct connection.

Finally, the defence argued that under count 1 on summons II a violation of Article 7 of the ICA has been charged, but that this Article does not apply because it does not concern an international armed conflict.

5.4 **The assessment**

5.4.1 **The legal context**

5.4.1.1 The applicability of international humanitarian law

International humanitarian law applies when there is an armed conflict. A distinction can be made between international armed conflicts and armed conflicts "not of an international character". The latter are usually referred to as non-international armed conflicts. In the Tadić case, the International Criminal Tribunal for the former Yugoslavia (hereafter: the ICTY) has given a generally accepted definition of an armed conflict:

'an armed conflict exists whenever there is a resort to armed force between States or protracted

*armed violence between governmental authorities and organised groups or between such groups within a State.'*⁴⁶

The rules for international armed conflicts and non-international armed conflicts differ in parts. In general, the rules regarding non-international armed conflicts are less detailed than the rules regarding international armed conflicts.⁴⁷ For example, the status of combatants is formally recognised during international armed conflicts.

It is possible - and very common - for multiple conflicts to take place in a given area, some of which take place between States and others between States and organised armed groups and between organised armed groups themselves. In order to establish the existence and nature of an armed conflict during a certain period, an analysis of the actual situation is required, based on the nature and extent of the combat actions, their purpose, as well as the basis on which the actions are carried out.⁴⁸

As the suspicion only concerns a violation of the rules of international humanitarian law with regard to a non-international armed conflict, the court will not elaborate further explicitly on international armed conflicts.

Where in an international armed conflict there is no requirement for the intensity of the armed violence, this is different for non-international armed conflicts. According to the Tadić case, there must be *"protracted armed violence"*, and in addition, the armed group(s) involved must be sufficiently organised⁴⁹. These criteria are further elaborated in this and later case law. The criteria distinguish situations of non-international armed conflict from situations of, for example, internal unrest and riots.

In the Limaj case, the ICTY still considered whether there might be a specific purpose requirement in addition to the intensity and organisational requirement. However, the ICTY ruled:

*'The determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.'*⁵⁰

In the Haradinaj case, the ICTY explained that *"protracted armed violence"* refers to the intensity rather than the duration of the conflict. In that case, the relevant factors were also listed with which the intensity of the armed violence can be assessed objectively:

'These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.'

⁵¹

These factors are not limitative. In addition, they are only indicative and one single factor is not decisive.⁵²

With regard to the degree of organisation of the armed group(s), two factors are mentioned by the ICTY in the Tadić case, which were further supplemented in the Haradinaj case:

'Such indicative factors include the existence of a command structure and disciplinary rules and

*mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use of military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accord.'*⁵³

Again, the factors are indicative and it is a non-exhaustive list.⁵⁴

A State is supposed to have armed forces that meet the requirement of organisation.⁵⁵

5.4.1.2 The protected status of the victims

International humanitarian law aims to protect persons who do not or no longer participate in hostilities. In Common Article 3 of the Geneva Conventions they are defined as "persons who do not directly participate in hostilities, including personnel of armed forces who have laid down their weapons, and those who have been placed *hors de combat* by sickness, injury, imprisonment or any other cause". This can also refer to deceased persons.⁵⁶

5.4.1.3 Acting contrary to humanitarian law

The requirement of humane treatment

The four Geneva Conventions contain rules regarding the protection of persons who do not or no longer participate in hostilities in an armed conflict. The cornerstone of these treaties is the principle of humane treatment.⁵⁷ For international armed conflicts, this principle is codified (inter alia) in Articles 12 of the First and Second Geneva Conventions, Article 13 of the Third Geneva Convention, Article 27 of the Fourth Geneva Convention and Article 75 of Additional Protocol I. For non-international armed conflicts, the principle is found in Common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II to the Geneva Conventions. According to the study by the International Committee of the Red Cross (hereafter: the ICRC) into customary international humanitarian law, the order has, at least since 2005, also been a rule of customary law for international and non-international armed conflict.⁵⁸

However, none of these provisions defines the term "humane treatment". The ICRC's most recent commentary on Common Article 3 of the Geneva Conventions states that the meaning is context-specific and that the specific circumstances of each case should be recognised, taking into account both objective and subjective elements, such as the environment, the physical and mental state of the persons, as well as their age, social, cultural, religious or political background and past experiences. In addition, there is growing recognition that armed conflicts affect women, men, girls and boys in different ways. Sensitivity to the inherent status, capacities and needs of the individual, including how these differences between men and women as a result of social, economic, cultural and political structures in society, contribute to the understanding of humane treatment.⁵⁹

As stated, the aforementioned provisions include a requirement of human treatment. In each case, a number of specific prohibitions and/or obligations are included that follow from the requirement of humane treatment. It follows from the wording of and the comments on the provisions that these prohibitions and requirements are examples of what arises from the requirement of humane treatment. It is therefore not an exhaustive list. This was chosen because a comprehensive definition of human treatment would have created a framework that ran the risk of being too narrow and inflexible, and as such would not be able to

guarantee humane treatment in situations where unforeseen or special circumstances must be taken into account. At the same time, failing to provide any guidance on the meaning of humane treatment could have given the parties to an armed conflict too much leeway, leading to interpretations inconsistent with the aims of this fundamental rule.⁶⁰

The examples in Common Article 3 of the Geneva Conventions concern four prohibitions, including - important for this case - a ban on outrages upon personal dignity, in particular humiliating and degrading treatment. The examples in the other provisions contain (in part) other prohibitions or requirements. Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention both contain as examples, among other things, the injunction mentioned in this case in the indictment to protect prisoners of war or civilians from public curiosity.

Humane treatment: the prohibition of outrages upon personal dignity

Neither the Geneva Conventions nor the accompanying Second Additional Protocol contain a definition of "outrages upon personal dignity". However, the ICTY has given substance to this, for the first time in the Kunarac case:

*'the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degrading or otherwise be a serious attack on human dignity'.*⁶¹

In the later Haradinaj case, instead of "serious humiliation", the term "severe humiliation" was used.

Subjective criteria related to the vulnerability of the victim play a role in the assessment. In doing so, the relevant aspects of the victim's cultural background should be taken into account.⁶² As a result, acts that, for example, are demeaning to someone of a particular nationality, culture or religion, while not necessarily being so for others, also fall within the scope of the concept of outrages upon personal dignity.⁶³ The victim does not have to have been personally aware of the act.⁶⁴

In addition to subjective criteria related to the vulnerability of the victim, objective criteria related to the seriousness of the act should be considered.⁶⁵ This includes looking at the nature of the act, but also at the repetition or a combination of different acts:

*'[T]he 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 [ICTY] 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.'*⁶⁶

In the ICC's Elements of Crimes, the definition of 'outrages upon personal dignity' states that the humiliating or degrading treatment or other violation must be of such seriousness that it is "generally recognised as an outrage upon personal dignity".⁶⁷ In this regard, the ICRC notes in its commentary on Common Article 3 of the Treaties that this definition indicates that a violation does not require serious mental or physical pain, but that the conduct must be significant in order to be distinguished from an insult. This would also follow from the common sense of the term "outrage". It is also indicated in the literature that there is also a different view which argues that the prohibition under international humanitarian law is broader than

under international criminal law.⁶⁸

Acts that have led to convictions in international tribunals for outrages upon personal dignity include public forced nudity,⁶⁹ rape and sexual violence,⁷⁰ using prisoners as human shields or to dig trenches,⁷¹ inappropriate conditions for incarceration, being forced to perform submissive acts forced to relieve themselves in their own clothes and the constant fear of being exposed to physical, mental or sexual violence.⁷² Examples of degrading treatment based on the jurisprudence of human rights organisations include treating or punishing a person by grossly humiliating them in front of others or inducing them to act against their will or conscience,⁷³ forcing them to wear dirty clothes ⁷⁴ and cutting someone's hair or beard as punishment.⁷⁵

With regard to outrages upon personal dignity of deceased persons, war crimes have been prosecuted at national level in several European countries. In those cases, for example, judgements were rendered for mutilating deceased persons⁷⁶ and posing with the head of a deceased person and then sharing photos or videos thereof.⁷⁷ On 23 July 2019, a judgement was pronounced by the District Court of The Hague in a case where similar facts were charged.⁷⁸ This involved posing for a photo with deceased persons and subsequently distributing this photo and distributing two photos of humiliated deceased persons in which the defendant concerned did not appear himself and in which

creation he was also not involved. He was convicted for the photo in which the defendant himself had appeared. With regard to other visual material, the court ruled that the defendant in question had contributed to the further humiliation with his behaviour, namely the forwarding of this visual material, but that this behaviour was not of such a nature that it also constituted an outrage upon personal dignity. A similar conclusion followed on appeal.⁷⁹

Humane treatment: the requirement of protection against public curiosity

According to the requirement of protection from public curiosity, prisoners must be protected from insults and public curiosity at all times, regardless of whether these occur simultaneously. Even without offensive comments and actions, exposure to public curiosity is demeaning and therefore specifically prohibited. "Public" is anyone not directly involved in the treatment of the prisoners, including other members of the detaining power.⁸⁰

The commentary accompanying Article 13 of the Third Geneva Convention states that the requirement of protection against public curiosity covers different situations. For example, it refers without exception to the parade of prisoners in public, but also includes the prohibition of exposing prisoners to humiliation when they leave their camp or detention centre for work, are transferred to another facility or are repatriated. In modern conflicts, the prohibition also includes the disclosure of photographic and video images, recordings of interviews or private conversations or personal correspondence or other private data, regardless of the public communication channel used, including the Internet. While this is different from marching through a hostile crowd, such disclosure can still be humiliating and endanger the safety of the prisoners' families and of the prisoners themselves once released.

If there is an overriding public interest in disclosing a prisoner's identity (e.g. because of his seniority or because he is wanted by the law) or if it is in the vital interest of the prisoner to do so (e.g. when he goes missing), the materials can be released exceptionally, but only to the extent that the prisoner's dignity is respected. In addition, images of prisoners in humiliating or degrading situations should not be sent, published or broadcast unless there is an overriding reason in the public interest to do so (for example, to bring serious violations

of humanitarian law to the attention of the public) and the images must not reveal the identity of the persons involved.⁸¹

The requirement of protection against public curiosity is not expressly included in Common Article 3 of the Geneva Conventions, nor in Article 4 of Additional Protocol II, which refer to non-international armed conflicts. It is not clear from the text of these provisions whether the requirement falls under the prohibition of outrages upon personal dignity and/or (via customary international humanitarian law) under the general requirement of humane treatment.

For customary law it is required that there is both state practice and *opinio juris*. For a large number of rules of customary law, the study of state practice and *opinio juris* has

already been carried out in the aforementioned study by the ICRC. Although the ICRC concluded from that study that the requirement of humane treatment is a rule of customary law, the ICRC has not commented on whether the requirement of protection against public curiosity should also be considered to fall under customary law. Nor is (international) case law available in which such a conclusion has already been drawn.

5.4.1.4 The nexus

There must be a certain relationship between the act and the armed conflict, also called 'nexus'. The nexus requirement serves to distinguish war crimes from common crimes and other international crimes such as genocide and crimes against humanity.⁸² The tribunals have given ample consideration to when exactly the nexus requirement is met.

It follows from the Tadić case that the act is not required to take place in the course of the fighting, nor within the area where the battle actually takes place, insofar as the '*the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties of the conflict*'.⁸³ However, in a later case it was added that it is essential to establish the existence of a geographic or temporal link between the charged crimes and the armed conflict⁸⁴

Besides, it is not necessary that a crime is part of '*a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict*'.

Subsequently, in 2002 the Appeals Chamber of the ICTY considered in the Kunarac case:

*'What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.'*⁸⁵

In the same case, the ICTY mentioned indicative factors that can be taken into account in the assessment of whether the requirement that the perpetrator acted '*in furtherance or under the guise of the armed conflict*' has been met:

'In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military

*campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.'*⁸⁶

At the International Criminal Tribunal for Rwanda (hereafter: the ICTR) the Trial Chamber ruled in the Akayesu case that criminal liability for war crimes is limited to the warring parties and those in close relationship with one of the parties. However, the Appeals Chamber rectified this and considered as follows:

*'This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a relationship is not a condition precedent to the application of Common Article 3 and, hence of Article 4 of the Statute.'*⁸⁷

In the Rutaganda case, the Appeals Chamber of the ICTR addressed the question of what exactly should be understood by the wording "under the guise of the armed conflict" used by the ICTY in the Kunarac case. It was considered as follows:

*'the expression under the guise of the armed conflict' does not simply mean 'at the same time of an armed conflict' and/or 'in any circumstances created in part by the armed conflict'. For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute.'*⁸⁸

The assessment of the existence of a nexus is casuistic and offers scope for arriving at different outcomes in the same case.⁸⁹ The fact that - despite the factors offered by the ICTY that can aid in the assessment - the definition of the nexus requirement is open to different interpretations contributes to this. For example, in the case against Joseph M., the District Court of The Hague opted for a restrictive interpretation, which resulted in an acquittal, and the Appeals Court opted for a broader interpretation, which led to a conviction.⁹⁰

5.4.2 The judgement of the court

5.4.2.1 The applicability of international humanitarian law

The court is faced with the questions of whether it can be established that there was an armed conflict in Syria in the period charged and whether international humanitarian law was therefore applicable. Case law has already established that from 2012 there has been a non-international armed conflict between Syrian government forces and various organised armed groups. This means that international humanitarian law applies to the entire territory of Syria.⁹¹

Referring to this case law, the court once again establishes that, on the basis of the facts established above in Chapter 4, there is a requirement of "*protracted armed violence*". There were frequent large-scale military operations between those involved, using military weapons and vehicles such as tanks and artillery. The number of fatalities stood

at more than 250,000 people at the end of 2015 and 4.3 million people have fled Syria and Iraq. A very significant number of people are in need of humanitarian aid and several towns and villages in Syria and Iraq have been destroyed. A peace plan was also negotiated and the United Nations Security Council was involved. This fulfils the requirement of a certain degree of intensity of the conflict. When assessing the intensity of the conflict, it is a demonstration of an incorrect legal conception to look only at the degree of *protracted armed violence* between the government forces and the group of which the defendant was a member.

The court further establishes that Ahrar al-Sham is sufficiently organised to be referred to as an organised armed group. During the accused period, the organisation had a chain of command, had control over a territory, had access to weapons, carried out military operations, whether or not in collaboration with other groups, and participated in peace talks. The assertion put forward by the defence that Ahrar al-Sham was perhaps less organised than, for example, Islamic State, does not alter the opinion that Ahrar al-Sham - in view of the assessment framework - meets the criterion.

The court therefore concludes that from July 2012 there was a non-international armed conflict in Syria between the Syrian government army and several armed groups, including Ahrar al-Sham.

Now that it can be established that there was a non-international armed conflict in the period charged, it can also be established that international humanitarian law applies. This concerns in particular Common Article 3 of the Geneva Conventions and various rules of customary international humanitarian law. Additional Protocol II to the Geneva Conventions does not apply as Syria is not a party to this Protocol.

5.4.2.2 The protected status of the victims

The court has already established in Chapter 4 that the persons on video 1 have died and that there are no indications that this has been staged. This means that in view of the above assessment framework, the persons in the video - regardless of the answer to the question whether they were seen as opponents of Ahrar al-Sham during their lifetime - enjoyed protection under international humanitarian law.

The court believes that the defendant knew that these persons did not (anymore) participate in the hostilities, given the fact that in the video he speaks several times about "*this is the end of the dogs*", "*here are the bodies of the dead of al-Assad*", "*here are the bodies of the Al-Shabiha, they were... killed*", and "*they are seven... carcasses*."

The court has also already established in Chapter 4 that the person in video 2 is a captured soldier. Since he no longer participated in hostilities, he was protected under international humanitarian law. Since the defendant is one of the armed persons standing next to the prisoner in the video, it must have been clear to him that the person in video 2 was a prisoner.

5.4.2.3 Acting contrary to international humanitarian law

Starting point

Insofar as the defence wanted to argue that the violations of human rights and international humanitarian law committed by the Assad regime are relevant to the assessment of whether

the defendant is guilty of outrages upon personal dignity, the court notes the following. International humanitarian law is the set of rules that apply at the time of an armed conflict. It serves to protect persons who do not or no longer participate in hostilities. Failure to comply with this right by one of the parties to the conflict can therefore never be a reason for other parties to no longer consider themselves bound by the rules. The conduct of Assad's regime is therefore not relevant to the assessment of whether the defendant has acted in violation of international humanitarian law.

Humane treatment: the prohibition of outrages upon personal dignity

The court is faced with the question whether the conduct as shown in video 1 constitutes an outrage upon personal dignity, in particular humiliating or degrading treatment (summons I, count 1).

The video shows several deceased persons being called "*dogs*" and "*carcasses of al-Assad*" and one of them being spat on. In addition, songs are sung above them, one of the bodies is kicked and a foot is placed on it. In the court's opinion, this expresses that the body of the deceased should be regarded as a trophy and that the victor is superior to the deceased. This can certainly be seen as demeaning and degrading. Moreover, it has already been established in previous case law of this court that - certainly in view of its significance in Islamic culture - placing a foot on a deceased person is demeaning and degrading.⁹² All of these acts were subsequently filmed and this video was distributed through a public YouTube channel that continued the humiliation and dishonour by allowing a wide audience to learn about it. In the court's opinion, this humiliating and degrading behaviour - certainly viewed in conjunction with each other - is of such a nature that one can speak of an outrage upon personal dignity.

The court is also faced with the question of whether the conduct as shown in video 2 constitutes an outrage upon personal dignity, in particular humiliating or degrading treatment (summons II, count 2).

Video 2 shows a captured soldier being interrogated while surrounded by armed persons. The prisoner is asked for his name, origin, military number, where and how long he served in the army, why he did not desert and whether it is not *haram* for him to fight against fellow Sunnis. He is visibly portrayed. This video was then distributed over the internet, so that a large audience was able to take note of it. In the court's opinion, this interrogation does not in itself result in humiliating or degrading treatment. Although the person questioned was surrounded by armed persons who raised their voices and was uncertain about his fate, the video images show nothing of physical violence or other humiliating or degrading acts towards the prisoner. The distribution of the video with this interrogation, in which the interviewee is clearly portrayed, is without a doubt humiliating and degrading. In the court's opinion, however, this humiliation and degradation is not of such a nature that it can be considered an outrage upon personal dignity. The court will therefore acquit the defendant of the charges referred to in summons II under 2.

Humane treatment: the requirement of protection against public curiosity

Finally, the court is faced with the question whether the conduct as shown in video 2 violates the requirement of protection against public curiosity (summons II, count 1).

As the court has already explained in the legal framework - contrary to what the Public Prosecution Service stated - it does not appear from the ICRC study into customary international humanitarian law that the requirement of protection against public curiosity is part of customary international humanitarian law for non- international armed conflicts. The Public Prosecution Service has put forward arguments for the *desirability* of the existence of such customary law. However, this in itself is not sufficient to be able to state that the

requirement of protection against public curiosity *is actually* customary law. This means that the court - if it wants to prove this fact - must independently establish that there is an *opinio juris* and state practice in this area. The court has insufficient information to reach such a conclusion. Open sources have shown to the court that while many States have a requirement to protect against public curiosity, this often explicitly refers to *prisoners of war*, a term that refers to detained opponents in *international* armed conflicts. In the war manuals of only nine States, the more general term "*prisoner*" is used. This is insufficient for the court to conclude that there is an *opinio juris* and state practice that the requirement of protection against public curiosity also falls under the requirement of humane treatment in non-international armed conflicts. The court will therefore acquit the defendant of the offence charged in summons II count 1.

5.4.2.4 Nexus and knowledge of the defendant

The court is faced with the question whether the events in video 1 took place in the context of and are associated with the armed conflict and whether the defendant knew of the actual circumstances that led to the emergence of the armed conflict.

Video 1 was taken during the offensive to liberate Sahl Al-Ghab. The deceased allegedly dies during this offensive. They are called Shabiha, a term used for militias fighting for the Assad regime. The deceased therefore belonged to the opposition of Ahrar Al-Sham, to which the defendant belonged as a fighter. The outrage upon personal dignity of the deceased opponents contributes to the display of victory. Therefore, there is a nexus between the defendant's acts and the conflict in Syria.

The position taken by the defence that the defendant had no knowledge of the factual circumstances that led to the existence of an armed conflict because he could not be seen on the videos, no longer requires discussion, since it has already been established in section 4.4 that the defendant can be seen in these videos. It follows from the file that the defendant was aware of the actual circumstances that led to the existence of the armed conflict. After all, based on the videos, it can be established that the defendant was actively involved in the immediate aftermath of the combat actions. For example, in video 1 he was involved in celebrating the victory over opponents who died in a battle

that was part of the armed conflict, and in video 2 he was involved in the interrogation of a Syrian army soldier captured in that battle.

5.4.3 The judicial finding of facts

With regard to the defendant, the court declares proven that:

he, in the period from 1 March 2015 up to and including 27 April 2015, in or near Al-Ziyarah (Syria), at least in Syria,

together and in association with others,

in a non-international armed conflict in the territory of Syria,

contrary to the provisions of Common Article 3 of the Geneva Conventions of 12 August 1949,

committed outrages upon the personal dignity of persons who were not (anymore) directly involved in the hostilities, i.e.

persons who have been put out of action for any other cause,
and treated them in an (especially) humiliating and/or degrading manner,

in that he, the defendant and his co-perpetrators, while the aforementioned deceased
people were lying on the floor,
stood and/or posed next to the aforementioned deceased persons and
called the aforementioned (deceased) persons "dogs" and "carcasses of al-Assad" and
sang songs and
exhibited the aforementioned deceased persons and
placed his foot on the body of the aforementioned deceased persons and
kicked the body of the aforementioned deceased persons with his foot and
spat on the body of the aforementioned deceased persons and
was filmed with one or more of the aforementioned deceased persons during the above
actions and
then posted this video on social media, namely YouTube, and thus distributed it and made
it public.

The proven fact is punishable by law, because no facts or circumstances have become
plausible that exclude the punishability of the offence. This constitutes the criminal offence
referred to in Chapter 9.

6 PARTICIPATION IN A TERRORIST ORGANISATION

6.1 Introduction

In summons I under 2, the defendant is charged with participating in a terrorist organisation in Syria, i.e. Ahrar al-Sham, from 1 March 2015 up to and including 1 July 2017. The idea that public order must be protected against organisations that intend to commit terrorist crimes is based on the criminalization in Article 140a of the Dutch Criminal Code of participation in a criminal organisation whose aim it is to commit terrorist crimes.

In order to prove this fact, the court must establish that Ahrar al-Sham was an organisation with a terrorist objective in the period charged and that the facts established in Chapter 4 can be seen as participation in that organisation in the meaning of Article 140a of the Criminal Code. Finally, it must be established that the defendant knew in general that the organisation's object was to commit terrorist crimes.

6.2 The position of the Public Prosecution Service

The Public Prosecution has taken the position that there is sufficient legal and convincing evidence to prove the alleged participation in a terrorist organisation. With regard to the organisation and the terrorist objective, reference is made to case law of the Rotterdam District Court and The Hague Court of Appeal, which previously ruled that Ahrar al-Sham is an organisation with a terrorist objective. As a member of Ahrar al-Sham, the defendant has been part of the alliance and has performed acts that serve to achieve the purpose of that organisation or has supported those actions. His acts in relation to video 1 and video 2 show that the defendant was aware of the organisation's intent to commit terrorist crimes. After all, he takes part in them himself.

6.3 The position of the defence

The defence has taken the position that the defendant must be acquitted of the alleged participation in a terrorist organisation. To this end, it has been argued that Ahrar al-Sham cannot be defined as a terrorist organisation in the accused period, at least from 1 March 2015 up to and including 31 December 2015. In the assessment, the context and the nature of the circumstance that the Assad regime has committed many atrocities should be taken into consideration. It cannot be argued that Ahrar al-Sham has a terrorist objective. Since 2013, the organisation has undergone a development in which more and more distance has been taken from the Islamic ideology and instead a nationalist ideology has been developed. The group, which signed the Riyadh Declaration, has repeatedly stated that it has no hatred for Shia, Alawites or Christians. Ahrar al-Sham is also not on the European terrorism list nor on the national terrorism list. The considerations of the Dutch legislator not to place the organisation on the national terrorism list must outweigh the recent (non-irrevocable) case law of the Rotterdam District Court and The Hague Court of Appeal.

6.4 **The assessment**

6.4.1 **The legal context**

6.4.1.1 The existence of an organisation with a terrorist aim

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

echelons. The more intimate and sustainable, the sooner the requirement of a partnership with a certain structure will be met. Such a partnership can arise accidentally and over time because one gradually discovers that one has a common goal, the realisation of which is served by sustainable cooperation. Such a partnership does not depend on rules, explicit agreements or hierarchical relationships, but can very well be sustainable and derive a certain structure from working on a common goal. If there is a looser form of cooperation - no permanent participants in the partnership, the participants only know each other partially - then the requirement of the partnership in particular may mean that the mutual relationship between the participants or some of them in the partnership, gives some structure. The fact that two persons of a group have worked together in a structured context for approximately the same time is considered sufficient to also consider the other persons of that group as belonging to the organisation, without the establishment of such a structure between these persons in the cooperation.

In order to prove the criminal offences referred to in Article 140a of the Criminal Code, it is also required that the organisation has the intention to commit terrorist crimes. That intention is described in Article 83a of the Criminal Code as the intention to seriously intimidate the population or part of the population of a country, or to unlawfully compel a government or international organisation to do, not do or tolerate something, or seriously disrupt or destroy the basic political, constitutional, economic or social structures of a country or an international organisation.

The objective primarily refers to the immediate goal: that which one imagines as directly wanted. The criminal organisation does not have to have a purely criminal main objective, it

can also - partly - have a legal purpose. There is, however, a dual purpose: there must be an intention to commit crimes with a terrorist intent. The immediate goal must therefore be to commit terrorist crimes.

For the purpose of proving the intention, meaning can be attributed to crimes that have already been committed in the context of the organisation, to the more permanent or structured nature of the cooperation, as may be apparent from the mutual division of activities or mutual coordination of activities of participants within the organisation with a view to achieving the common goal of the organisation, and, more generally, with regard to the planning or systematic nature of the activities of participants within the organisation carried out for this purpose.

The terrorist crimes on which the purpose must be aimed are referred to in Article 83 of the Criminal Code.

6.4.1.2 Participation in a terrorist organisation

It must be assumed that one can only speak of participation in a terrorist organisation if the person concerned is part of the alliance and has a share in, or provides support for conduct that serves or is directly related to the realisation of the object of the organisation. Any such contribution, also called act of participation, to an organisation can be punishable. An act of participation may consist of committing or co-committing any crime, but also of performing practical and ad hoc services and (therefore)

performing acts that are not in themselves punishable, as long as reference can be made to the aforementioned share or support. Just sympathise with an organisation not sufficient. Examples of acts of participation are the granting of monetary contributions or other material support to the organisation or money or recruiting persons for the organisation. It is not necessary for a defendant to have participated in crimes committed (or attempted to commit or prepared) by other participants within the organisation.

To speak of participation it is sufficient for the person concerned to know in general that the organisation intends to commit (terrorist) crimes. Any form of intent on concrete terrorist crimes targeted by the organisation is not required.

6.4.2 The judgement of the court

6.4.2.1 Qualification of Ahrar al-Sham as a terrorist organisation

In answering the question whether Ahrar al-Sham is a terrorist organisation as referred to in Article 140a of the Criminal Code, the court considers as follows.

According to the facts established in Chapter 4, Ahrar al-Sham was established in 2011 and the organisation consists of several brigades that sometimes change in composition and operate in northern Syria, in Hama, Latakia and Aleppo. The organisation has several leaders headed by one overall leader. The common goal is to overthrow the Assad regime and establish an Islamic state. In the court's opinion, this constitutes a partnership with the necessary permanency and structure.

As indicated above in Chapter 4, Ahrar al-Sham's goal is to overthrow the Assad regime and establish an Islamic state. However, the court believes that the fight that Ahrar al-Sham is waging against the regime is not purely motivated by political considerations. This is evident from the message conveyed by the leadership of Ahrar al-Sham and the military actions that

Ahrar al-Sham (co-)carries out. Religious minorities are spoken of disdainfully by Ahrar al-Sham, Alawites and Shi'ites are often referred to as *nusairi* and *rafida* in statements by Ahrar al-Sham. The organisation has been involved in the killing of Alawite civilians and the siege of Shi'ite enclaves. The Assad regime is often referred to as Alawites. This shows that the fight against the Assad regime is not solely based on political considerations, but is also a religious one. Ahrar al-Sham tries - according to the facts stated in Chapter 4 - to achieve all these goals by means of several of the terrorist crimes referred to in Article 83a of the Criminal Code, including murder, manslaughter and the commission of attacks, partly directed against the civilian population.

Since the autumn of 2015, Ahrar al-Sham has been showing a moderate trend and divided leadership. This is evidenced by the signing of the Riyadh Declaration by Ahrar al-Sham's head of foreign political relations on 10 December 2015, endorsing that the Syrian crisis requires a political solution in accordance with international treaties and guarantees. However, Ahrar al-Sham's military actions, in 2015 and beyond, in no way indicate the pursuit of such a political solution. There are also high-ranking persons within Ahrar al-Sham who reject a moderate movement and the Riyadh Declaration.

In the opinion of the court, the organisation Ahrar al-Sham had a terrorist objective in 2015 as referred to in Article 83a of the Criminal Code. Ahrar al-Sham can therefore be regarded as a terrorist organisation. Contrary to what has been argued by the defence, the court finds that the prosecution of (alleged) members of Ahrar al-Sham does not conflict with the *lex certa* principle, because it is crystal clear under international and national law that killing someone because of his or her race, background and/or religion is a criminal offence.

The fact that Ahrar al-Sham is not included on the European terrorism sanctions list and/or the national terrorism sanctions list does not lead to a different opinion. In a letter to the Chairman of the Dutch Parliament (Lower House of the States General) of 9 May 2019, the Minister of Foreign Affairs⁹³ explained that politicians and the courts look at the question of whether an organisation is terrorist from different perspectives. For example, for inclusion on the national terrorism sanction list, it is important whether the organisation poses a threat to *national (court: Dutch) security*. This criterion means that Ahrar al-Sham cannot be placed on this list, since there are no indications that this organisation is engaged in (attempted) terrorist activities in or from the Netherlands or is involved in the facilitation thereof, or has a realistic violent international agenda. Whether or not an organisation is placed on a terrorism sanction list is therefore independent of the question answered by the court.

6.4.2.2 The defendant's participation in the terrorist organisation Ahrar al-Sham

Already in Chapter 4 the court has considered that the defendant was involved with Ahrar al-Sham during the charged period. It is now faced with the question of whether this involvement can be qualified as deliberate participation in a terrorist organisation.

The court answers this question in the affirmative. According to video 1, the defendant was actively involved in the immediate aftermath of the battle of Sahl Al-Ghab (partly) waged by Ahrar al-Sham. Video 1 shows that he and others, armed with a machine gun, celebrate the victory over opponents killed in that battle, including by placing his foot on the body of a deceased person. This indicates that the defendant actively fought with Ahrar al-Sham in the battle of Sahl Al-Ghab. From the context of this video, as described in section 4.4.2.2, the court infers that the defendant did this as a member of a brigade belonging to Ahrar al-Sham. The active struggle with Ahrar al-Sham as well as the acts that can be observed in

these videos are directly related to the realisation of the purpose of Ahrar al-Sham as shown above. After all, the battle of Sahl Al-Ghab was fought against the Assad regime, which Ahrar al-Sham wants to overthrow. Thus, the defendant participated in the terrorist organisation Ahrar al-Sham.

The defendant's intent also follows from the acts committed by the defendant. That the intent of the defendant and the brigade of which the defendant was a part did not (exclusively) refer to the overthrow of the regime, but also to sectarian violence against minorities, is apparent in the court's opinion from video 1, in which the defendant is

portrayed and where he also speaks and asks one of those involved whether the deceased are Alawites, to which another, apparently a member of the brigade, replies: *"Yes, three Alawites"*.

In conclusion, on the basis of all the foregoing the court considers to be legally and convincingly proven that in the period from 1 March 2015 up to and including 10 November 2015 the defendant participated in Ahrar al-Sham, which organisation had the object of committing the terrorist crimes referred to in the judicial fact finding. The court will acquit the defendant with regard to the charged period of 10 November 2015 up to and including 1 July 2017, as there is insufficient relevant evidence.

The court also considers it proven that the defendant committed the proven facts together and in association with others. The defendant can be seen together with others in video 1, which shows a close and conscious collaboration, as already considered in Chapter 4.

6.4.3 The judicial finding of facts

With regard to the offences the defendant is charged with, the court considers it proven that he:

in the period from 1 March 2015 up to and including 10 November 2015 in or near Al-Ziyarah (Syria) and Hama (Syria), at least elsewhere in Syria together and in association with others, participated in the organisation Ahrar Al-Sham,

which organisation had the object of committing terrorist crimes, i.e.:

A. deliberately setting fire and/or causing an explosion, where general danger to goods and/or danger of serious bodily injury and/or danger to life for another may be expected to ensue from the act and/or this act results in someone's death (as meant in Article 157 of the Criminal Code), committed with a terrorist objective (as meant in Article 76a of the Criminal Code,) and/or

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

C. murder (to be) committed with a terrorist intent (as meant in Article 289 in combination with 83 of the Criminal Code) and/or

D. the conspiracy and/or deliberate preparation and/or promotion of the aforementioned offences (as meant in Article 76a and/or 289a and/or 96 paragraph 2).

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

offence referred to in Chapter 9.

7 THE DEFENDANT'S PUNISHABILITY AND PENALISATION

7.1 Introduction

The defendant is punishable, because no circumstances have appeared that preclude his being punishable.

The court declared proven that the defendant is guilty of a war crime and of participating in a terrorist organisation. Pursuant to Article 5 of the ICA, the war crime can be punished with a maximum of life imprisonment or a temporary imprisonment of a maximum of thirty years or a fine of the sixth category. Pursuant to Article 140a of the Criminal Code, a maximum of fifteen years' imprisonment or a fine of the fifth category can be imposed for participation in a terrorist organisation.

The punishment to be imposed must be in accordance with the seriousness of the offences committed and the circumstances under which they were committed and be based on the person and the personal circumstances of the defendant, as appeared during the hearing of the case in court.

7.2 The Public Prosecution's demand

The Public Prosecution Service has demanded that the defendant be sentenced to prison for a period of ten years, minus the time that the defendant has already spent in pre-trial detention. The Public Prosecution Service deems a prison sentence of seven years to be appropriate for the alleged participation in a terrorist organisation, and a prison sentence of three years for the war crimes as charged.

7.3 The position of the defence

The defence has taken the position that if and insofar as the court reaches a conviction, a considerably lower sentence than the one demanded by the Public Prosecution should suffice. The Public Prosecution Service takes insufficient account of the context and the acts committed by the Assad regime, against which the population is opposed. All this means that according to the defence, the Public Prosecution Service's demand is exorbitantly high.

7.4 The judgement of the court

The war in Syria

At the start of the "Arab Spring" in Syria, the regime of President Assad used extreme violence in their attempts to quell protests. This led to armed resistance from various opposition groups. During the armed conflict that arose, the Assad regime frequently violated human rights and the law of armed conflict. The regime has come under a lot of international criticism. It has also ensured that many people have a certain degree of understanding for the (armed) resistance against the regime. However, that understanding is clearly limited when this resistance leads to frightening the civilian population and committing war crimes.

Ahrar al-Sham is one of the groups that, in addition to fighting the regime, focuses on instilling fear among the Alawite population. The attacks carried out by this group against Alawite civilians are reprehensible and prohibited under both terrorism legislation and international humanitarian law. The way in which - as in the current criminal case - defeated opponents were treated cannot be tolerated either. The fact that the Assad regime can also be accused of many wrongdoings can

never be a license for opposition groups to focus on instilling fear among the civilian population and committing war crimes. Precisely because casualties cannot be prevented in a war, it is

all the more important to protect civilians and persons who do not (or no longer) participate in acts of violence.

The defendant's acts

The defendant has actively fought as a member of Ahrar al-Sham. In this way he contributed to the aim of the organisation. The defendant has also committed a war crime by spitting on deceased opponents, kicking them, putting his foot on them, cursing them and singing battle songs over them. The defendant and his co-perpetrators filmed all this and this video was subsequently posted on YouTube. The defendant has a leading role in this video.

Starting points

The Public Prosecution Service has referred to earlier jurisprudence of this court with regard to the punishment of the war crime. In that case, a prison sentence of two years and six months was used as the starting point for posing next to a deceased person and subsequently distributing this photo.⁹⁴ It was also taken into account that the deceased was portrayed in a very recognisable way and that the next of kin of that person could therefore be confronted on the internet with the inhumane treatment of their loved one. In the present case, however, the court has reached a lower sentence with regard to this offence, since the deceased are not or hardly recognisable on the video. However, because respect for international humanitarian law is of great importance, the court nevertheless considers - from the point of view of establishing moral standards - that the imposition of a prison sentence of considerable length is appropriate. The court will take a prison sentence of two years as the starting point for the war crime.

In case law of the court of Appeal of The Hague, a prison sentence of six years is taken as the starting point for participation in a terrorist organisation.⁹⁵ In the present case, the court arrives at a lower starting point. The aforementioned case law relates to cases in which the defendant concerned had travelled from the Netherlands to participate in a terrorist organisation in another country. This is not the case here. Unlike the Public Prosecution Service, the court is of the opinion that the fact that the defendant is not a traveller, but a Syrian born and bred who was already living in the relevant area in Syria when fighting broke out there, should lead to a lower starting point for sentencing. In addition, although Ahrar al-Sham is a terrorist organisation, the scale on which this organisation commits crimes is smaller than is the case with a number of other groups such as Islamic State. In addition, the organisation is not internationally oriented, which is also the reason that it is not included on the national terrorism list. All this means that the court will take a prison sentence of four years as a starting point.

The defendant as a person and his personal circumstances

The defendant does not have a criminal record in the Netherlands, so there is no question of recidivism that would increase the sentence. Equally, the court has not found any circumstances that should lead to a deviation from the aforementioned starting points, neither in an increasing nor in a reducing sense regarding the severity of the sentence.

The sentence to be imposed

In view of the foregoing, the court considers the imposition of a prison sentence of six years to be appropriate and necessary. The time spent by the defendant in pre-trial detention will be deducted from this sentence.

8 THE APPLICABLE LAW ARTICLES

The sentence to be imposed is based on Articles:

- 47, 57 and 140a of the Criminal Code,
- 6 of the International Crimes Act.

These regulations have been applied, as they were legally valid at the time of the judicial finding of facts or as they were legally valid at the time of this judgement.

9 THE DECISION

The court:

declares the Public Prosecution Service inadmissible in the prosecution with regard to the charges referred to in summons I with public prosecutor's office number 09/748011-19 under part E of count 2;

declares that it has not been legally and convincingly proven that the defendant committed the offences charged in summons II with public prosecutor's office number 09/748004-21 under 1 primarily and in the alternative and 2 primarily and in the alternative and acquits the defendant thereof;

declares legally and convincingly proven that the defendant has committed the offences charged in summons I with public prosecution office number 09/748011-19 under 1 and 2, as proven under 5.4.3 and 6.4.3, and that the proven offences consist of:

with regard to summons I, count 1:

co-perpetration of violation of Common Article 3 of the Geneva Conventions, consisting of outrages upon personal dignity, in particular humiliating and degrading treatment of persons who have been placed *hors de combat* for any other cause, committed in a non-international armed conflict;

with regard to summons I, count 2:

co-perpetration of participation in an organisation which has the intention to commit terrorist crimes;

declares the facts proven and the defendant liable for punishment;

declares not proven all other or more offences the defendant has been charged with differently than those stated above and acquits him thereof;

sentences the defendant to:

a term of imprisonment of **6 (SIX) YEARS;**

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

This judgement was given by:

E.A.G.M. van Rens, LL.M. Chairman,

S.M. van der Schenk, LL.M. Judge,

B.W. Mulder, LL.M. Judge,

In presence of J. Biljard, M.R. Ekkart and F. Kok, Clerks,

and pronounced at the public hearing of this Court on 21 April 2021.

Appendix I: The indictment

Summons I

1.

that he, at one or more points(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), at least (elsewhere) in Syria,

together and in association with (an)other(s), at least alone,

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

committed outrages upon the personal dignity of
one or more person(s) who (then) did not (anymore) directly participate in the hostilities, 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 had been placed *hors de combat* by
illness and/or injury and/or imprisonment and/or any other cause,
and/or treated these persons in a particularly humiliating and degrading manner,

in that he, the defendant and his co-perpetrator(s), while the aforementioned deceased
was/were lying on the ground,

stood and/or posed next to the aforementioned (deceased) person(s) and
called the aforementioned (deceased) person(s) "dogs" and "carcasses of al-Assad" and/or sang
songs and/or
exhibited the aforementioned deceased person(s) and
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
spat on the body of the aforementioned (deceased) person(s) and
had himself filmed with one or more of the aforementioned (deceased) person(s) during the above
action(s) and/or
then posted this video on social media, i.e. YouTube, and (thus) distributed it and made it public;

2.

that he, at one or more points(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), at least (elsewhere) in Syria,
together and in association with (an)other(s), at least alone,

participated in an organisation such as Ahrar Al-Sham, or at least a Jihadist fighting group affiliated
with the aforementioned organisation, or at least (an) Organisation that advocates the armed jihadi
struggle,

which organisation had the intention of committing terrorist crimes, i.e.:

A. deliberately setting fire and/or causing an explosion, where general danger to goods and/or danger of serious bodily injury and/or danger to life for another may be expected to ensue from the act and/or this act results in someone's death (as meant in Article 157 of the Criminal Code), committed with a terrorist objective (as meant in Article 76a of the Criminal Code,) and/or

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

C. murder (to be) committed with a terrorist intent (as meant in Article 289 in combination with 83 of the Criminal Code) and/or

D. the conspiracy and/or deliberate preparation and/or promotion of the aforementioned offences (as meant in Article 76a and/or 289a and/or 96 paragraph 2).

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

Summons II

1.

that he, at one or more points 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), at least (elsewhere) in Syria,

together and in association with (an)other(s), at least alone,
violated the laws and customs of war while

- that act consisted of an outrage upon personal dignity, in particular humiliating and degrading treatment;
- that act consisted of forcing another to do, not to do or to tolerate something;

in that he, the defendant and/or one or more co-perpetrator(s), then and there in violation of

- the provisions of "common" Article 3 of the Geneva Conventions of 12 August 1949 and/or
- the provisions of Article 4 of Additional Protocol II of 8 June 1977 and/or
- international humanitarian customary law and/or
- (in particular) the international customary law requirement of humane treatment and/or
- (in particular) the international customary law requirement of protection against the curiosity of the public,

in connection with an (non-international) armed conflict in the territory of Syria,

- treated inhumanely and/or
- did not protect from the curiosity of the public,

a person who did not (then) participate directly in the hostilities (anymore),

namely a civilian and/or personnel of armed forces who had laid down their weapons and/or a person who had been placed *hors de combat* due to illness, injury, imprisonment or other cause ,

in that he, the defendant and/or one or more of his co-perpetrator(s),

posed (armed) next to the aforementioned (imprisoned) person, (while the person was interrogated by them) and/or

had themselves filmed with the aforementioned (imprisoned) person (while the person was interrogated by them and/or was recognisably portrayed) and/or

then posted this video and/or had it posted and/or accepted the chance that this video would subsequently be posted on social media, i.e. YouTube, and (thus) distributed and/or made it public.

In the alternative, if the foregoing should not or could not lead to a finding of fact and/or a conviction:

one or more others, together and in association, at one or more points in time, in or around the period from 1 March 2015 up to and including 30 April 2015, in or near Zayzun (Syria), and/or Al-Ziyarah (Syria), at least (elsewhere) in Syria,

violated the laws and customs of war while

- that act consisted of an outrage upon personal dignity, in particular humiliating and degrading treatment;

- that act consisted of forcing another to do, not to do or to tolerate something;

in that they, then and there in violation of

- the provisions of "common" Article 3 of the Geneva Conventions of 12 August 1949 and/or

- the provisions of Article 4 of Additional Protocol II of 8 June 1977 and/or

- international humanitarian customary law and/or

- (in particular) the international customary law requirement of humane treatment and/or

- (in particular) the international customary law requirement of protection against the curiosity of the public,

in connection with an (non-international) armed conflict in the territory of Syria,

- treated inhumanely and/or

- did not protect from the curiosity of the public,

a person who did not (then) participate directly in the hostilities (anymore),

namely a civilian and/or personnel of armed forces who had laid down their weapons and/or a person who had been placed *hors de combat* due to illness, injury, imprisonment or other cause ,

because they,

posed (armed) next to the aforementioned (imprisoned) person, (while the person was interrogated by them) and/or

had themselves filmed with the aforementioned (imprisoned) person (while the person was interrogated by them and/or was recognisably portrayed) and/or

then posted this video and/or had it posted and/or accepted the chance that this video would subsequently be posted on social media, i.e. YouTube, and (thus) distributed and/or made it public,

for or during the commission of which (aforementioned) crime the defendant, at one or more periods in time, in or around the period from 1 March 2015 to 30 April 2015, in or near Zayzun (Syria) and / or Al-Ziyarah (Syria), at least (elsewhere) in Syria,

was intentionally helpful and/or provided the opportunity and/or means and/or information, because he then and there intentionally

- posed (armed) next to the aforementioned (imprisoned) person, (while the person was interrogated by him and/or others) and/or
- allowed himself to be filmed with the aforementioned (imprisoned) person (while the person was interrogated by him and/or others and/or is recognisable on the screen) and/or
- subsequently posted this video and/or had it posted and/or accepted the chance that this video would subsequently be posted on social media, i.e. YouTube, and (thus) distributed it and/or made it public.

2.

that he, at one or more points in time, in or around the period from 1 March 2015 up to and including 30 April 2015, in or near Al-Zayzun (Syria), and/or Al-Ziyarah (Syria), at least (elsewhere) in Syria, together and in association with (an)other(s),

in case of an (non-international) armed conflict in the territory of Syria,

- committed an outrage upon the personal dignity of and/or
- treated in a (particularly) humiliating and/or degrading manner,

a person who did not (then) participate directly in the hostilities (anymore),

being a civilian and/or personnel of armed forces who had laid down their weapons and/or a person who had been placed *hors de combat* due to illness, injury, imprisonment or other cause ,

posed (armed) next to the aforementioned (imprisoned) person, (while the person was interrogated by them) and/or

had themselves filmed with the aforementioned (imprisoned) person (while the person was interrogated by them and/or was recognisably portrayed) and/or

then posted this video and/or had it posted and/or accepted the chance that this video would subsequently be posted on social media, i.e. YouTube, and (thus) distributed and/or made it public,

In the alternative, if the foregoing should not or could not lead to a finding of fact and/or a conviction:

one or more others, together and in association, at one or more points in time, in or around the period from 1 March 2015 up to and including 30 April 2015, in or near Zayzun (Syria), and/or Al-Ziyarah (Syria), at least (elsewhere) in Syria,

in case of an (non-international) armed conflict in the territory of Syria,

- committed an outrage upon the personal dignity of and/or treated in a (particularly) humiliating and/or degrading manner,

a person who did not (then) participate directly in the hostilities (anymore),

being a civilian and/or personnel of armed forces who had laid down their weapons and/or a person who had been placed *hors de combat* due to illness, injury, imprisonment or other cause, in that they

posed (armed) next to the aforementioned (imprisoned) person, (while the person was interrogated by them) and/or

had themselves filmed with the aforementioned (imprisoned) person (while the person was interrogated by them and/or was recognisably portrayed) and/or

then posted this video and/or had it posted and/or accepted the chance that this video would subsequently be posted on social media, i.e. YouTube, and (thus) distributed and/or made it public,

for or during the commission of which (aforementioned) crime the defendant, at one or more periods in time, in or around the period from 1 March 2015 to 30 April 2015, in or near Zayzun (Syria) and / or Al-Ziyarah (Syria), at least (elsewhere) in Syria,

was intentionally helpful and/or provided the opportunity and/or means and/or information, because he then and there intentionally

- posed (armed) next to the aforementioned (imprisoned) person, (while the person was interrogated by him and/or others) and/or

- allowed himself to be filmed with the aforementioned (imprisoned) person (while the person was interrogated by him and/or others and/or is recognisable on the screen) and/or

- subsequently posted this video and/or had it posted and/or accepted the chance that this video would subsequently be posted on social media, i.e. YouTube, and (thus) distributed it and/or made it public.

Appendix II: Endnotes

¹ Convention for the Suppression of Terrorist Bombings (New York, December 15, 1997), Trb. 1998, 84 (Dutch translation Trb. 1999, 16).

² The Hague Court of Appeal 12 July 2017, ECLI:NL:GHDHA:2017:3573.

³ When reference is made hereafter to an official report, this means - unless stated otherwise - an official report, drawn up in the legal form by (an) authorised investigating officer(s). Where reference is made to pages, this concerns the pages of the consecutively numbered official report with reference number LEFRA19006, of the National Criminal Investigation Department, International Crimes Team, dated 2 June 2020, with appendices, unless stated otherwise.

⁴ Written text, being a knowledge document entitled "From Revolt to Jihad" dated 18 January 2018, separately added to the file, Chapter 2.

⁵ Written text, being a knowledge document entitled "From Revolt to Jihad" dated 18 January 2018, separately added to the file, Chapter 2.

⁶ Written text, being a knowledge document entitled 'Harakat Ahrar al-Sham al-Islamiyya' of 15 November 2020, separately added to the file, Chapter I to II.

⁷ Written text, being a knowledge document entitled "From Revolt to Jihad" of 18 January 2018, separately added to the file, Chapter 4.7.

⁸ Written text, being a knowledge document entitled "From Revolt to Jihad" of 18 January 2018, separately added to the file, Chapter 4.7.

⁹ Written text, being a knowledge document entitled 'Harakat Ahrar al-Sham al-Islamiyya' of 15 November 2020, separately added to the file, Chapter IV.

¹⁰ Written text (open source), being a 'Syria Situation Report: April 20-28 2015' of the Institute for the Study of War, drawn up by Christopher Kozak, consulted on 7 April 2021 on <http://www.iswresearch.org/2015/04/syria-situation-report-April-20-28-2015.html>

¹¹ Written text (open source), being an article entitled 'Second Idlib Stronghold Falls to Jabhat al-Nusra and Rebel Forces' of the Institute for the Study of War, drawn up by Jennifer Cafarella, consulted on 7 April 2021 on <http://www.iswresearch.org/2015/04/second-idlib-stronghold-falls-to-jabhat.html>

¹² Written text, being a knowledge document entitled 'Harakat Ahrar al-Sham al-Islamiyya' of 15 November 2020, separately added to the file, Chapter VI and VII; written text (open source), namely G. Steinberg, 'Ahrar al-Sham: the "Syrian Taliban"', May 2016, consulted on 7 April 2021 on https://www.ssoar.info/ssoar/bitstream/handle/document/46961/ssoar-2016-steinberg-Ahrar_al-Sham_-_the_Syrian.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2016-steinberg-Ahrar_al-Sham_-_the_Syrian.pdf, p. 2; written text (open source), namely Human Rights Watch "You Can Still See Their Blood", Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Latakia Countryside, dated October 2013, consulted on 7 April 2021 on https://www.hrw.org/sites/default/files/reports/syria1013_ForUpload.pdf, p. 98-101; written text (open source), namely UN Security Council S/2015/813, dated 22.10.2015, consulted on 7 April 2021 on https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_813.pdf, p. 2.

¹³ Written text (open source), namely G. Steinberg, 'Ahrar al-Sham: the "Syrian Taliban"', May 2016, consulted on 7 April 2021 on https://www.ssoar.info/ssoar/bitstream/handle/document/46961/ssoar-2016-steinberg-Ahrar_al-Sham_-_the_Syrian.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2016-steinberg-Ahrar_al-Sham_-_the_Syrian.pdf, p. 2.

¹⁴ Written text, being a knowledge document entitled 'Harakat Ahrar al-Sham al-Islamiyya' of 15 November 2020, added separately to the file, Chapter VI; written text (open source), namely UN Security Council S/2014/31, of 27 January 2014, consulted on 7 April 2021 on https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_31.pdf, p. 13-14; written text (open source), being the news report 'Aid convoy enters Nubl and al-Zahraa towns after breaking the siege' of the Syrian Observatory for Human Rights, of 11 February 2016, consulted on 7 April 2021 on <https://www.syriahr.com/en/?p=44052>.

¹⁵ Written text, being a knowledge document entitled 'Harakat Ahrar al-Sham al-Islamiyya' of 15 November 2020, added separately to the file, Chapter II.

¹⁶ Written text (open source), namely Ali El Yassir, 'The Ahrar al-Sham Movement: Syria's Local Salafists,

of 23 August 2018, on 1 April 2021 consulted on <https://www.wilsoncenter.org/article/the-ahrar-al-sham-movement-syrias-local-salafists-0>.

¹⁷ Written text, namely Charles Lister, 'Profiling Jabhat al-Nusra', 24 July 2016, on 7 April 2021 consulted on https://www.brooking.edu/wp-content/uploads/2016/07/iwr_20160728_profiling_nusra.pdf, p. 27.

¹⁸ Written text, being a Decision on refusal of entry alert, obtained from the German authorities, p. 102-103.

¹⁹ Written text, being a Continuation of the hearing of witness [name of witness 2] of 21 January 2016, obtained from the German authorities, p. 108-110.

²⁰ Official report of suspicion of 17 October 2019, official report no. LERFA19006-00002, p. 258-262.

²¹ Official report of findings of 14 October 2019, official report no. LERFA19006-00013, p. 240-245 and official report of findings of 21 October 2019, official report no. LERFA19006-00020, p. 263-265.

²² Official report of findings of 14 October 2019, official report no. LERFA19006-00013, p. 240-245 and official report of suspicion of 17 October 2019, official report no. LERFA19006-00002, p. 258-262.

²³ Court's own observation on video 1

²⁴ Official report of findings of 21 October 2019, official report no. LERFA19006-00020, p. 263-265.

²⁵ Written text, being a report from the Syrian Centre for Media and Freedom of Expression with the title 'Investigation into possible crimes committed by a member of Harakat Ahrar al Sham in the period between 22-04-2015 and 26-04-2015', p. 527.

²⁶ Written text, being a report from the Netherlands Forensic Institute of 1 April 2020 on Comparison of facial images as a result of committing atrocities against personal dignity, p. 653-661.

²⁷ Official report of witness examination [name witness 2] by the Examining Magistrate of 3 February 2021, added separately to the file.

²⁸ Official report of findings of 18 December 2019, official report no. LERFA19006-00055, p. 441-462.

²⁹ Official report of findings of 18 December 2019, official report no. LERFA19006-00055, p. 441-462.

³⁰ Official report of findings of 19 March 2020, official report no. LERFA19006-00094, p. 558-565.

³¹ Official report of findings of 29 April 2020, official report no. LERFA19006-00103, p. 566-576.

³² The defendant's statement, rendered in court on 19 March 2021.

³³ Official report of interrogation of defendant [name defendant], official report no. LERFA19006-0130, added separately to the file, p. 61.

³⁴ Official report of findings of 8 January 2020, official report no. LERFA19006-65, p. 468-469; official report of findings of 27 May 2020, official report no. LERFA19006-00113, p. 470-471.

³⁵ Official report of findings of 27 May 2020, official report no. LERFA19006-00117, p. 604-612.

³⁶ Official report of findings of 27 May 2020, official report no. LERFA19006-00112, p. 577-600.

³⁷ The defendant's statement at the court hearing on 19 March 2021.

³⁸ When a figure number is mentioned in the following paragraphs, reference is made to a page number of the supplementary official report dated 12 November 2020, p.1 to p.16).

³⁹ Official report of findings of 12 November 2020, official report no. LERFA19006-00131, added separately to the file.

⁴⁰ Official report of findings of 1 March 2021, official report no. LERFA19006-00146, added separately to the file.

⁴¹ Official report of findings of 27 May 2020, official report no. LERFA190067-118, p. 620-629.

⁴² Official report of findings of 11 February 2021, official report no. LERFA19006-00137, added separately to the file, p. 7.

⁴³ Official report of findings of 11 February 2021, official report no. LERFA19006-00137, added separately to the file; official report of findings of 11 February 2021, official report no. LERFA19006-00144, added separately to the file; official report of findings of 9 March 2021, official report no.

LERFA19006-00149, added separately to the file.

⁴⁴ Written text, being a report of the Netherlands Forensic Institute of 3 March 2021 concerning Comparison of Facial Images, added separately to the file.

⁴⁵ Official report of examination of defendant [name defendant], official report no. LERFA19006-0130, added separately to the file.

⁴⁶ ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.

⁴⁷ D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International Law and the Classification of Conflicts*, Oxford: Oxford University Press, 2012, p. 34.

⁴⁸ *Parliamentary papers II*, session 2001-2002, 28 337, nr. 3, p. 12.

⁴⁹ ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.

⁵⁰ ICTY, *Prosecutor v. Limaj et al*, Trial Chamber Judgement, IT-03-66-T, 30 November 2005, paragraph 170.

⁵¹ ICTY, *Prosecutor v. Haradinaj*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 49.

⁵² ICTY, *Prosecutor v. Haradinaj*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 49; S. Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, volume 91 (873), p. 76.

⁵³ ICTY, *Prosecutor v. Haradinaj et al*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 60.

⁵⁴ S. Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, volume 91 (873), p. 76.

⁵⁵ S. Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, volume 91 (873), p. 77; L. Cameron a.o., 'Article 3: Conflicts not of an international character', ICRC, *Commentary on the First Geneva Convention*, 2016, paragraph 429; ICTY, *Prosecutor v. Haradinaj et al*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 60.

⁵⁶ ICC Elements of Crimes, 2011, Article 8(2)(c)(ii), footnote 49 + supplementary other stipulations)

⁵⁷ Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 204.

⁵⁸ Rule 87 of the ICRC study of customary international humanitarian law.

⁵⁹ ICRC, *Article 3: Conflicts not of an international character*, in 'Commentary on the Third Geneva Convention', Cambridge: Cambridge University Press 2020, paragraph 587.

⁶⁰ ICRC, *Article 3: Conflicts not of an international character*, in 'Commentary on the Third Geneva Convention', Cambridge: Cambridge University Press 2020, paragraph 588.

⁶¹ ICTY, *Prosecutor v. Kunarac*, Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, paragraph 514 and Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 161 and 163.

⁶² ICC, Article 8(2)(c)(ii), in: *Elements of Crimes*, 2011, footnote 49.

⁶³ ICRC, 'Article 3: Conflicts not of an international character', in: *Commentary on the First Geneva Convention*, 2016, paragraph 669.

⁶⁴ ICC, Article 8(2)(c)(ii), in: *Elements of Crimes*, 2011, footnote 49.

⁶⁵ ICTY, *Prosecutor v. Aleksovski*, Trial Chamber Judgement, IT-95014/1-T, 25 June 1999, paragraph 56 and *Prosecutor v. Kunarac*, Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, paragraph 504 and Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 162 and 163.

⁶⁶ ICTY, *Prosecutor v. Aleksovski*, Trial Chamber Judgment, IT-95-14/1-T , 25 June 1999, paragraph 57.

⁶⁷ ICC, Article 8(2)(c)(ii), in: *Elements of Crimes*, 2011.

⁶⁸ ICRC, 'Article 3: Conflicts not of an international character', in: *Commentary on the Third Geneva Convention*, 2020, paragraph 704.

- ⁶⁹ ICTY, *Kunarac* Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, paragraph 766–774.
- ⁷⁰ ICTY, *Prosecutor v. Furundžija*, Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998, paragraph 270–275; ICTR, *Prosecutor v. Ndindiliyimana*, Trial Chamber Judgment, ICTR-00-56-T17 May 2011, paragraph 2158.
- ⁷¹ ICTY, *Prosecutor v. Aleksovski*, Trial Chamber Judgment, IT-95-14/1-T, 25 June 1999, paragraph 229.
- ⁷² ICTY, *Prosecutor v. Kvočka*, Trial Chamber Judgment, IT-98-30/I-T, 2 November 2001, paragraph 173.
- ⁷³ European Commission of Human Rights, *Greek case*, Report, 1969, paragraph 186.
- ⁷⁴ European Court of Human Rights, *Hurtado v. Switzerland*, Judgment, 1994, paragraph 12.
- ⁷⁵ European Court of Human Rights, *Yankov v. Bulgaria*, Judgment, 2003, paragraph 114 and 121.
- ⁷⁶ See: European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union, February 2018, in which reference is made to (among others) the Higher Regional Court of Frankfurt am Main, 8 November 2016.
- ⁷⁷ European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union, February 2018, in which reference is made to (among others) the District Court of Pirkanhaa (Finland), Judgment, 18 March 2016, R 16/1304; District Court of Kanta-Häme (Finland), Judgment, 22 March 2016, R 16/214; Higher Regional Court Frankfurt am main (Germany), Judgment, 12 July 2016, case reference 5-3 StE 2/16 - 4 - 1/16;
- ⁷⁸ The Hague District Court, The Hague 23 July 2019, ECLI:NL:RBDHA:2019:7430.
- ⁷⁹ The Hague Court of Appeal 26 January 2021, ECLI:NL:GHDHA:2021:103.
- ⁸⁰ ICRC, *Article 13: Humane treatment of prisoners*, in 'Commentary on the Third Geneva Convention', Cambridge: Cambridge University Press 2020, paragraph 1622-1629.
- ⁸¹ ICRC, *Article 13: Humane treatment of prisoners*, in 'Commentary on the Third Geneva Convention', Cambridge: Cambridge University Press 2020, paragraph 1622-1629.
- ⁸² H. van der Wilt, 'War Crimes and the Requirement of a Nexus with an Armed Conflict', *Journal of International Criminal Justice*, vol. 10 (5), p. 1116.
- ⁸³ ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.
- ⁸⁴ ICTY, *Prosecutor v. Stakić*, Appeal Chamber Judgment, IT-97-24-A, 22 March 2006, paragraph 342.
- ⁸⁵ ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgment, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 57 and 58.
- ⁸⁶ ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgment, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 59.
- ⁸⁷ ICTR, *Prosecutor v. Akayesu*, Appeals Chamber Judgment, ICTR 96-4-A, 1 June 2001, paragraph 444.
- ⁸⁸ ICTR, *Prosecutor v. Rutaganda*, Appeals Chamber Judgment, ICTR-96-3-1, 26 May 2003, paragraph 570.
- ⁸⁹ H. van der Wilt, War Crimes and the Requirement of a Nexus with an Armed Conflict, *Journal of International Criminal Justice*, vol. 10 (5), p. 1124.
- ⁹⁰ The Hague District Court 23 March 2009, ECLI:NL:RBSGR:BI2444; The Hague Court of Appeal 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.
- ⁹¹ The Hague District Court 23 July 2019, ECLI:NL:RBDHA:2019:7430, The Hague Court of Appeal; The Hague Court of Appeal 26 January 2021, ECLI:NL:GHDHA:2021:103.
- ⁹² The Hague District Court 23 July 2019, ECLI:NL:RBDHA:2019:7430.
- ⁹³ Parliamentary papers II 2018/19, 32 623, no. 258.

⁹⁴ The Hague District Court 23 July 2019, ECLI:NL:RBDHA:2019:7430.

⁹⁵ The Hague Court of Appeal, 6 December 2019, ECLI:NL:GHDHA:2019:3879.
