



Network for investigation and
prosecution of 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



The Hague, February 2018

The Genocide Network

The 'European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (the 'Genocide Network') was established by the Council of the EU in 2002 to ensure close cooperation between the national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. The Network facilitates the exchange of information among practitioners, encourages cooperation between national authorities in different Member States and provides a forum for sharing knowledge and best practice. The Genocide Network is supported in its work through its Secretariat, based at Eurojust in The Hague.

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1. Introduction

This report provides an overview of the legal framework of the crime of outrage upon personal dignity and presents recent war crimes cases, which are examples of cases in which perpetrators of war crimes were prosecuted for having committed outrages upon the personal dignity of their victims or having inflicted other forms of inhumane treatment upon their victims. The cases mentioned in this report have come before courts in Germany, Finland and Sweden. These cases have in common that the prosecution used electronically recorded footage of the events, which had been stored on smartphones or disseminated through social media (e.g. Facebook, YouTube). Migrants and asylum seekers, who may have participated to the hostilities taking place in Iraq and Syria, as well as returning foreign fighters, often possess smartphones and use social media. Moreover, the armed conflicts in Iraq and Syria are civil conflicts, highly documented in social media. The data that is collected from publicly available sources and that

can be used in the context of a criminal investigation is usually referred to as Open Source Intelligence (OSINT). All the cases referred to in this report relied, at least partially, on the investigation of publicly available footage of the crimes charged or on commentary made online by the defendants about the crimes charged. The objective of this report is to highlight the importance of OSINT in the fight against impunity from core international crimes.

2. Legal framework: outrages upon personal dignity

Article 8 of the Rome Statute of the International Criminal Court (ICC) considers the commission of ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ to constitute war crimes falling under the jurisdiction of the ICC.¹ The wording of this article is identical to that of Article 3(1)(c) common to the four Geneva Conventions of 1949.² The scope of this war crime has been defined by the International Criminal Tribunal for the former Yugoslavia (ICTY).³

With respect to the *actus reus*, the *Aleksovski* Trial Chamber defined outrages upon personal dignity as particularly intolerable forms of inhumane treatment that cause ‘more serious suffering than most prohibited acts falling within the *genus*’⁴. It further stated that to be considered as an outrage upon personal dignity, the act or omission ‘must cause serious humiliation or degradation to the victim’.⁵ Since the level of seriousness of humiliation or degradation is subjective (sensitive persons would be more prone to perceive their treatment as humiliating), the Chamber added an objective element and specified that ‘the humiliation must be so intense that the reasonable person would be outraged’.⁶ This approach of the *actus reus* was confirmed in the *Kvočka* case, but the *Kvočka* Trial Chamber also approved the inclusion of the victim’s temperament or sensitivity, in addition to the ‘reasonable person’ standard, when assessing whether the act is an outrage upon personal dignity.⁷ Finally, the *Kunarac* Trial Chamber asserted that the humiliation or degradation inflicted upon the victim did not need to be lasting for the act to be qualified as an outrage upon personal dignity.⁸

With respect to the *mens rea*, the *Kunarac* Appeals Chamber approved the Trial Chamber’s assessment and stated that ‘[t]he crime of outrage upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity’.⁹ The Appeals Chamber therefore underlined

¹ See ICC Rome Statute, Article 8(2)(b)(xxi).

² See Common Article 3 to the four Geneva Conventions of 12 August 1949: Geneva Convention on the Wounded and Sick in Armed Forces in the Field (I); Geneva Convention on the Wounded and Sick and Shipwrecked of Armed Forces at Sea (II); Geneva Convention on Prisoners of War (III); and Geneva Convention on Civilians (IV). Note that although the terms of Common Article 3 to the Geneva Conventions states that the provisions contained in this article only apply to non-international armed conflicts, in practice these rules also apply to international conflicts. See Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits), *Nicaragua v US*, ICJ Rep (1986) 14, para. 218.

³ See also *Prosecutor v. Musema* (ICTR-96-13-T), Trial Judgment, 27 January 2000, para. 285.

⁴ *Prosecutor v. Aleksovski* (IT-95-14/1-T), Trial Judgment, 25 June 1999, para. 54.

⁵ *Ibid.*, para. 56.

⁶ *Ibid.*

⁷ *Prosecutor v. Kvočka et al.* (IT-98-30/1), Trial Judgment, 2 November 2001, para. 167.

⁸ *Prosecutor v. Kunarac et al.* (IT-96-23 & 23/1-T), Trial Judgment, 22 February 2001, para. 501, emphasis in original.

⁹ *Prosecutor v. Kunarac et al.* (IT-96-23 & 23/1-A), Appeals Judgment, 12 June 2002, para. 164.

that this crime only requires that the accused had knowledge of the ‘possible consequence of the charged act or omission’.¹⁰

The Rome Statute and the Elements of Crime define outrages upon personal dignity in a very similar fashion as the jurisprudence of the ICTY. The Elements of Crime require that the perpetrator ‘humiliated, degraded or otherwise violated the dignity of one or more persons’.¹¹ Therefore, the Elements of Crime consider humiliation and degradation to be examples of outrages upon personal dignity and leaves the door open for other forms of violation of dignity to be dealt with as outrages upon personal dignity.¹² With respect to the *actus reus*, both subjective and objective elements are present. On the one hand, the Elements of Crime affirm that ‘[t]he severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity’ (objective element).¹³ Alternatively hand, a footnote to the first paragraph under Article 8(2)(b)(xxi) explains that ‘the cultural background [of] the victim’ is also taken into account when assessing whether an act can be qualified as an outrage upon personal dignity.¹⁴

Therefore, the Elements of Crime preserved the subjective aspect to the offence and permitted a cultural- or religious-specific humiliation, degradation or violation of dignity to be considered as an outrage upon personal dignity even though the same act may not be considered as an outrage upon dignity when inflicted upon another person. In such situations, the objective element would be satisfied by demonstrating that the particular act would be ‘generally recognised’ as an outrage upon personal dignity when inflicted upon a person belonging to a particular cultural or religious group.¹⁵ As to the standard of *mens rea*, the Elements of Crime under Article 8(2)(b)(xxi) do not explicitly define it. As a consequence, the general mental element of Article 30 of the Rome Statute is applicable, which means that the perpetrator must have intended to commit the act concerned and was aware that this act would humiliate, degrade or violate the dignity of the victim.¹⁶ Finally, the Elements of Crime explicitly broaden the scope of potential victims of outrages upon personality since it specified that ‘[f]or this crime, “person” can include [a] dead person’, and that the victim ‘need not personally be aware of the existence of the humiliation or degradation or other violation’.¹⁷ Consequently, outrages upon personal dignity can also be perpetrated against unconscious persons, mentally handicapped persons or on dead bodies.

¹⁰ *Ibid.*, para. 165.

¹¹ International Criminal Court, Elements of Crime, under Article 8(2)(b)(xxi), para. 1.

¹² Lee, R. (2001) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers (Ardsley), p. 184; and Triffterer, O (Ed.) (1999), *Commentary of the Rome Statute of the International Criminal Court: Observers’ notes, Article by Article, Cottier et al.*, ‘Article 8’, p. 246.

¹³ Elements of Crime, under Article 8(2)(b)(xxi), para. 2.

¹⁴ Elements of Crime, under Article 8(2)(b)(xxi), para. 1, fn. 49.

¹⁵ Byron, C. (2009) *war crimes and crimes against humanity in the Rome Statute of the International Criminal Court*, Manchester University Press (Manchester and New York), p. 142.

¹⁶ See Article 30 Rome Statute, para. 2. See also Elements of Crimes, General Introduction, para. 2.

¹⁷ Elements of Crime, under Article 8(2)(b)(xx), para. 1, fn. 49.

Jurisprudence after the Second World War contains two interesting cases that exemplify outrages upon personal dignity. Firstly, the trial of *Chuichi and Others* is a good example of a situation in which the cultural background of the victims was taken into account to find the accused guilty of ill treatment of Indian Sikh prisoners of war (PoWs).¹⁸ The physical ill treatment was aggravated by the fact that the PoWs had their hair and beards cut off and one was forced to smoke a cigarette, even though this activity was forbidden by their religion.¹⁹ Secondly, the trial of *Schmid* is an example of a case in which the accused was convicted for ill treatment of the body of an unknown dead US serviceman.²⁰ The accused, a German medical officer, removed the head of the body of the serviceman, boiled it, removed the skin and flesh, and bleached the skull, which he kept on his desk for several months.²¹ The two aforementioned cases could today possibly be considered to be breaches of the prohibition to commit outrages upon the personal dignity of persons protected by international humanitarian law.

The ICC and tribunals also demonstrated that certain unlawful behaviour could be prosecuted under different charges, including outrages upon personal dignity. Indeed, in the *Furundžija* case, the Chamber found that the rapes and sexual assaults upon the victim, in front of soldiers, who were watching and laughing, caused 'severe physical and mental pain, along with the public humiliation' and therefore amounted to 'outrages upon her personal dignity and sexual integrity'.²² In the same way, the *Kvočka* Trial Chamber considered that the living conditions of the detainees at the Omarska camp constituted outrages upon the detainees' personal dignities, because they were 'forced to perform subservient acts demonstrating Serb superiority, forced to relieve bodily functions in their clothing, and they endured the constant fear of being subjected to physical, mental, or sexual violence in the camp'.

3. Open Source Intelligence (OSINT) in the context of a criminal investigation

With the development of the Internet, much more publicly available information is available. OSINT is drawn from such publicly available material, including, but not limited to:

- The Internet (especially social media, blogs and discussion fora);
- Traditional mass media (e.g. TV, newspapers, magazines);
- Specialised journals, conference proceedings and think tank studies;
- Photos and videos; and
- Geospatial information (e.g. maps and commercial imagery products).²³

OSINT is often analysed by law enforcement authorities for its potential to further an investigation or prosecution. OSINT offers the opportunity to easily access potentially useful information in the context of the fight against terrorism or international crimes, since many people nowadays use social media and openly share information about their personal lives.

¹⁸ *Tanaka, Chuichi and Others*, Australian Military Court, Rabaul, 12 July 1946, 11 LRTWC 62, 140.

¹⁹ *Ibid.*

²⁰ *Schmid*, United States General Military Government Court, Dachau, 19 May 1947, 14 LRTWC 62, 140.

²¹ *Ibid.*

²² *Prosecutor v. Furundžija* (IT-95-17/1-T), Trial Judgment, 10 December 1998, para. 272.

²³ Definition provided by the Central Intelligence Agency, available at: <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/open-source-intelligence.html>.

Perpetrators may, for example, use social media to brag about committing serious offences, including the most heinous crimes. Their posts on social media may also include specific details on where or when an offence was committed or on the members of criminal group. In this way, OSINT potentially helps investigators to gain an understanding of activities or plans of alleged perpetrators, as it provides contextual information.

However, a number of considerations need to be addressed when using OSINT information in the context of a criminal investigation. These considerations include, *inter alia*, the reliability and the content credibility of the information. Therefore, carefully analysing the material and determining whether the material is authentic are important steps. Other measures can be taken when analysing material obtained through open sources. For example, with respect to photographs or videos found on the Internet, identifying the IP address that is linked to the specific social network post that contained the photograph/video is important. In the same way, determining the date on which a particular image was taken is potentially an interesting element in the context of a criminal investigation.

4. Recent cases conducted by national authorities and primarily based on OSINT

Date of the judgement	Judicial authority	Sentence	Summary of the case
21 March 2016	Pirkanmaa District Court, Finland	16-month suspended sentence	The defendant in this case, an Iraqi migrant, was convicted of committing a war crime by holding the head of an Islamic State fighter and having shared these images on Facebook. The Court found he had desecrated the corpse of the dead fighter by posting these images on Facebook. ²⁴
22 March 2016	Kanta-Häme District Court, Finland	13-month suspended sentence	The defendant in this case, an Iraqi migrant, was also convicted of committing a war crime by posing and holding a decapitated head and having shared these images on Facebook. The Court considered that the accused had committed an outrage upon the personal dignity of the dead person to whom the decapitated head belonged. ²⁵
12 July 2016	Frankfurt am Main Higher Regional Court, Germany	2 years' imprisonment	The defendant, a German national, became a radicalised individual of Salafist Islam while living in Germany and eventually decided to travel to Syria. During his time there, three photographs were taken of him posing with the severed heads of enemy combatants impaled on metal rods. After his return to Germany, these photos were uploaded by a friend of the defendant onto a

²⁴ Source: <http://www.thejournal.ie/decapitated-head-facebook-post-war-crime-2671778-Mar2016/>.

²⁵ Source: <http://www.justiceinfo.net/en/live-feed/26473-.html>.

			Facebook page, with limited privacy settings. Additionally, the accused had stored these photos on a computer belonging to the sister of a deceased foreign fighter and on his mother's phone. The accused was charged with war crimes for gravely humiliating and degrading treatment of protected persons, in this instance the bodies of deceased soldiers. ²⁶
5 August 2016	Stockholm Court of Appeal, Sweden	8 years' imprisonment	The defendant, a Syrian permanent resident, was convicted of committing a war crime. The court found that the accused had committed an "extremely gross assault and violation of international law" after a video recording him was discovered online by the police. The video displayed the accused seriously assaulting a man allegedly affiliated to the Syrian army. ²⁷
8 November 2016	Frankfurt am Main Higher Regional Court, Germany	8.5 years' imprisonment	The defendant, a German jihadist, was convicted of membership in ISIL and committing a war crime. The Court found that the accused had committed outrages upon the personal dignity of dead Syrian soldiers in Aleppo. The accused recorded footage of himself cutting off the ears and noses of the dead soldiers, firing bullets into their heads and kicking their heads until brain matter leaked out. These war crimes were recorded with the accused's mobile phone. ²⁸
6 December 2016	Blekinge District Court, Sweden	9 months' imprisonment	The defendant, an Iraqi migrant, was convicted of committing a war crime by posing next to a decapitated head on a plate along with other bodies from which the heads had been severed, and shared images of himself on Facebook, in which he was wearing a military uniform. The police discovered the pictures on the accused's phone while investigating him for a robbery. ²⁹
17 February 2017	Stockholm District Court, Sweden	Life sentence	The defendant, a Syrian asylum seeker, was convicted of participating in the mass killing of seven captured Syrian soldiers (war crime). In September 2013,

²⁶ Source: <https://www.thelocal.de/20160712/jihadist-given-two-years-for-posing-with-severed-heads>; Coeuret, E., 'German Jihadist Convicted of War Crime', iLawyer, 14 July 2016, available at: <http://ilawyerblog.com/german-jihadist-convicted-war-crime/>; the judgement is final. For the judgement, including reasoning, see (in German): http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7812208.

²⁷ Source: <https://trialinternational.org/latest-post/mouhannad-droubi/>; <https://www.thelocal.se/20150226/five-years-in-swedish-prison-for-syrian-torturer>.

²⁸ Source: <http://www.usnews.com/news/world/articles/2016-11-08/5-islamic-state-suspects-arrested-in-germany>; the judgement is final. For the judgement, including reasoning, see (in German): http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7812208.

²⁹ Source: <https://www.alaraby.co.uk/english/news/2016/12/6/sweden-jails-iraqi-for-war-crimes-after-facebook-post>.

			the <i>New York Times</i> published a video of the killings, on which the accused appeared. The Senior Public Prosecutor involved in the case explained that the prosecution also used information found on YouTube and Facebook to determine the time and place where the capture of the soldiers took place and could therefore demonstrate that very little time passed between the capture and the execution of the prisoners (41 hours). ³⁰
1 March 2017	Berlin Higher Regional Court (Kammergericht), Germany	1 year 8 months' imprisonment on parole	The defendant, an Iraqi migrant, was convicted of committing a war crime by posing for photographs with the decapitated heads of two fighters from ISIL and sharing the images online. Police came across the photographs on his Facebook profile in July 2016, after they confiscated his tablet as part of a separate charge against him ³¹ . He was arrested the following month, after prosecutors ruled that the photographs mocked and degraded the dead, and was therefore held liable for two counts of war crimes.
25 September 2017	Södertorn District Court, Sweden	8 months' imprisonment	The defendant, a Syrian asylum seeker, was convicted of committing a war crime because he exposed five persons, who were all protected according to international humanitarian law, to humiliating or disparaging treatment with the intention of gravely insulting their personal dignity. The 32-year-old defendant fought for the Syrian Army and was photographed posing with people who were dead or seriously wounded. In the photograph, he is seen in uniform with his foot on the stomach of a person who appears to be a civilian. The civilian is one of five people lying on the ground. The crime is reported to have taken place in Damascus in January 2014. Police were tipped off by private individuals about the existence of the photographs ³² .
11 January 2018	Stuttgart Higher Regional Court, Germany	18 months' imprisonment on parole	The defendant, a 24-year-old Iraqi refugee, was convicted of posing for a photograph with decapitated heads of six

³⁰ Source: <https://www.nytimes.com/2016/03/15/world/europe/syrian-asylum-seeker-linked-to-mass-execution-is-arrested-in-sweden.html?r=0>; <https://www.nytimes.com/2017/02/16/world/europe/syrian-rebel-haisam-omar-sakhanh-sentenced.html>.

³¹ Source: <http://www.dw.com/en/ex-iraqi-soldier-on-trial-in-berlin-for-war-crimes/a-37664165> and judgement including reasoning in German http://www.gerichtssentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psm!pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=KORE239642017&doc_part=L&doc.price=0.0#focuspoint.

³² Source: <http://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6784954> and <http://www.reuters.com/article/us-sweden-syria-crime/swedish-court-sentences-syrian-asylum-seeker-to-prison-for-posing-with-war-dead-idUSKCN1C018R?il=0>.

ISIL terrorists in Iraq. The German police received a complaint that this man threatened to kill an Afghan refugee living in the same asylum camp. When police searched the Iraqi man, they found a photograph on his mobile phone, showing him posing with six heads. The photo, taken in July 2015, showed the offender standing behind the severed heads of six alleged terrorists. He was 'broadly smiling' and displaying a victory sign. The Stuttgart Higher Regional Court found him guilty of denigrating dead bodies and demonstrating his superiority over those killed in a war³³.

4.1. Outline of the judgement of the Frankfurt am Main Higher Regional Court, Germany, 12 July 2016³⁴

Legally relevant facts

The case is connected to the armed conflict taking place since 2012 in Syria. The conflict involves the Syrian government and a number of armed groups, including the Free Syrian Army, the Islamic State in Iraq and the Levant (ISIL), Kurdish fighters and Jabat al-Nusra (al-Nusra Front), the Maroof-troop and Ahrar al-Sham, which were controlling the province of Idlib (Syria) from March until May 2014, which is the period during which the accused was in Syria.

The accused was charged with war crimes after investigators discovered pictures featuring the accused with impaled heads of opposition combatants. The victims were members of the State's armed forces. These pictures had been uploaded onto Facebook by one of the men with whom the accused had lived while in Syria.

Court's ruling and analysis

Applicable law

The Court found that the *Völkerstrafgesetzbuch* (VStGB – International Criminal Code) applied to this situation because of the non-international armed conflict (NIAC) taking place in Syria. Section 1 of the VStGB gives universal jurisdiction to German courts for specific offences, such as core international crimes. The Court assessed that the level of organisation of the armed groups involved in the conflict, as well as the duration and intensity of the violence, gave rise to the application of the rules of international humanitarian law (IHL) that have been implemented into German law and are contained in the VStGB. The membership of the victims in the governmental armed forces established the *nexus* to the armed conflict that is required for an offence to be considered a war crime. The Court found the defendant guilty in accordance with Section 8(1) No 9 of the VStGB.

³³ Source: <http://www.olg-stuttgart.de/pb/.Lde/4991332/?LISTPAGE=1178276>; <https://www.stuttgarter-nachrichten.de/inhalt.oberlandesgericht-stuttgart-bewaehrungsstrafe-nach-foto-mit-abgetrennten-koepfen.87ecadb6-324f-4ac4-8dee-6663af137c26.html>; <https://www.inquisitr.com/4732098/german-court-sentences-iraqi-refugee-for-posing-with-severed-heads-of-six-terrorists/>.

³⁴ Higher Regional Court, Frankfurt am Main, Germany (Case reference: 5-3 StE 2/16 - 4 - 1/16), 12 July 2016, available at: http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7661851

Victims: protected persons under IHL?

Section 8 of the VStGB deals with war crimes committed against ‘protected persons’. The victims were enemy combatants who had been captured in order to be killed. The victims were therefore *hors de combat*. For these reasons, the Court stated that the victims were ‘protected persons’ as defined by Section 8(6)(2) of the VStGB. The Court held that the bodies of the enemy combatants should have been treated with respect and afforded protected status. The Court specified that this protection should not cease after death and that dead persons are also entitled to respect for their human dignity. Since the VStGB does not explicitly refer to deceased persons, the Court’s reasoning is based on the Rome Statute and the jurisprudence of the ICTY, which consider that the term ‘people’ applies to both the living and the dead. The Court also referred to the International Committee of the Red Cross’s rules of Customary IHL, particularly Rule 113, which applies to the protection of deceased persons.³⁵ In the appeal decision, both the judgement and the reasoning of the Frankfurt Higher Regional Court were upheld and confirmed by the Federal Criminal Court of Justice. Although the decision of 27 July 2017³⁶ does not set a legal precedent under German law, it is highly persuasive, establishing the guiding principle that deceased persons are to be classified as ‘protected persons’ under international humanitarian law as envisaged by Section 8(1) No 9 of the VStGB.

Actus reus: gravely degrading and humiliating treatment

The Court found that the conduct of the accused amounted to ‘gravely degrading and humiliating treatment’. Firstly, it stated that ‘treatment’ included any act or omission. Secondly, with respect to the gravity of the treatment, the Court underlined the trophy-like treatment that the accused gave to the dead bodies, which is highly disrespectful of the dignity of human beings and treats the bodies as objects. Finally, the Court considered that ‘any reasonable person confronted [with the photographs] would likely feel revulsion, disgust and be horrified’.³⁷

Mens rea: intent of the accused

The Court found that the accused was aware that his conduct was likely to humiliate, degrade or violate the dignity of the people who had been beheaded. The Court considered that the accused wanted to be photographed next to the beheaded bodies because of his relaxed position in the photos. Also, the Court mentioned that the accused knew the heads belonged to members of the Syrian Army and that he intended to mock their dignity.³⁸

Verdict

For all the aforementioned reasons, the Court found the accused guilty of committing the war crime of having inflicted inhumane and degrading treatment upon persons protected by the rules of IHL.³⁹

³⁵ OLG Frankfurt am Main, 12.07.2016 - 5-3 StE 2/16 - 4 - 1/16, C. Rechte Würdigung, III. Geschützte Personen.

³⁶ Source: <https://www.hrr-strafrecht.de/hrr/3/17/3-57-17.php>.

³⁷ *Ibid.*, C. Rechte Würdigung – IV. Tathandlung.

³⁸ *Ibid.*, C. Rechte Würdigung, VI. Subjektiver Tatbestand.

³⁹ *Ibid.*, D. Rechtsfolgen – II. Strafzumessung.

4.2. Outline of the judgement of the Frankfurt am Main Higher Regional Court, Germany, 8 November 2016⁴⁰

Legally relevant facts

The case is connected to the armed conflict taking place since 2012 in Syria. The conflict involves the Syrian government and the Islamic State in Iraq and the Levant (ISIL) in the battle of East Aleppo (Syria) during October and November 2013. The defendant had joined ISIL in September 2013 and left Syria in February 2014 for Turkey, where he was arrested before he was extradited to Germany in 2015. The defendant was charged with membership in a foreign terrorist organisation, including his participation in ISIL and violation of the *Kriegswaffenkontrollgesetz* (Military Weapons Control Act), including carrying a Kalashnikov AK 47. The war crimes charge was added after Turkish authorities discovered video recordings featuring the desecration of the corpse of a soldier. The victim was a member of the Syrian armed forces. The footage was stored on the mobile phone of the defendant, who had shared the recordings with his brother, and possibly with others.

Court's ruling and analysis

In this case, the Court did not invoke jurisdiction from the *Völkerstrafgesetzbuch* (VStGB – International Criminal Code), which in Section 1 gives universal jurisdiction to German courts for specific offences, such as core international crimes. Instead, the Court applied Section 7(2) No 1 of the *Strafgesetzbuch* (StGB - German Criminal Code), because the defendant was a German citizen.

The Court found the defendant guilty of a crime according to Section 8(1) No 9 of the VStGB. Section 8 VStGB deals with war crimes committed against 'protected persons'. Without reasoning explicitly on the classification of the conflict, the nexus to it or the victim's quality as a protected person, the Court referred to a habeas corpus decision of the Federal Criminal Court of 8 September 2016⁴¹ to substantiate its verdict relating to the war crimes charge. As mentioned above, the Federal Court confirmed this legal classification of deceased as protected persons under international humanitarian law in an appeal decision on 27 July 2017⁴². These decisions, which do not set a legal precedent under German law but are highly persuasive, stated that deceased persons are to be classified as 'protected persons' as envisaged by Section 8(1) No 9 of the VStGB. Since the VStGB does not explicitly refer to deceased persons, the Court's reasoning is based, therefore, on the Rome Statute of the International Criminal Court and its Elements of Crime.

⁴⁰ Source: http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7812208; see also <http://www.internationalcrimesdatabase.org/Case/3297/Prosecutor-v-Abdelkarim-El-B/>.

⁴¹ See: BGH StB 27/16 - Beschluss vom 8. September 2016 (OLG Frankfurt a. M.) <http://www.hrr-strafrecht.de/hrr/2/16/stb-27-16.php>

⁴² Source: <https://www.hrr-strafrecht.de/hrr/3/17/3-57-17.php>

Actus reus and Mens rea

The Court found that the defendant was guilty of a war crime committed as co-perpetrator with at least two other persons whose conduct amounted to 'gravely degrading and humiliating treatment'. The active part of the defendant was described as kicking the body of the deceased Syrian soldier, cutting off the nose and ears of the corpse, and finally shooting at the corpse's head. During his actions, he was recorded on video and verbally supported by other persons. The Court considered this collaborative action as based on a shared intention between at least three perpetrators, with the consequence that the acts of the others were attributed also to the defendant according Section 25(2) StGB.

Concurrences

The relationship between the crimes of membership in a terrorist organisation, violation of the Military Weapons Control Act and war crimes was considered as two separate charges of membership in a terrorist organisation and a war crime, both coinciding with violation of the *Kriegswaffenkontrollgesetz*. In this regard, the Court legally evaluated the factual situation that the desecration of the corpse represented a caesura. The consequence of this break was that membership in a terrorist organisation and the war crime needed to be considered as separate acts punishable under criminal law, while the violation of the *Kriegswaffenkontrollgesetz* forms an integral part of each of the two separate acts. As a reason for this division, the Court referred to a fundamental decision of the Federal Criminal Court that had formulated the guiding principles on the coincidence between timely persistent delicts and other offences committed during the continuation of the timely persistent delicts⁴³.

Verdict

The Court found the accused guilty of membership in a foreign terrorist organisation and of the war crime of having inflicted inhumane and degrading treatment upon persons protected by the rules of IHL combined with violation of the *Kriegswaffenkontrollgesetz* and considered 6 years' imprisonment as an appropriate sentence for each offence. Subsequent formation of an overall penalty according to Section 54(1) StGB then resulted in a sentence of 8 years and 6 months.

⁴³ See BGH 3 StR 537/14 - Beschluss vom 9. Juli 2015 (LG Köln) - <http://www.hrr-strafrecht.de/hrr/3/14/3-537-14.pdf>.

4.3. Outline of the judgement of the Blekinge District Court, Sweden, of 6 December 2016 and decision of the Appeal Court on 11 April 2017⁴⁴

Legally relevant facts

The case is connected to the armed conflict taking place in Northern Iraq. The conflict involves the Iraqi government and the Islamic State in Iraq and the Levant (ISIL). The defendant belonged to the Iraqi Army, fighting against ISIL in spring 2015. He was an asylum seeker in Sweden. He was charged with war crimes after investigators discovered pictures featuring the defendant wearing military uniform and posing with a decapitated head on a plate next to other bodies with severed heads. The incriminating photos were discovered during a separate investigation into a robbery for which he is serving a 42-month sentence. The defendant uploaded the photos on Facebook in July 2015. Whether the bodies belonged to an opposite belligerent or to civilians is not relevant, as both categories enjoy protection against inhumane treatment. The defendant claimed that his role in the Iraqi Army was in telecommunications, that he was not present at the time when victims had been killed, and that he was forced to pose with the bodies.

Court's ruling and analysis

The first instance court was confronted with two questions in its decision-making – whether the defendant's actions presented sufficient violation of existing rules and whether his actions constituted war crimes.

For the legal analysis, the court referred to the 2014 Swedish Code on international crimes, Common Article 3 of the Geneva Conventions, Article 8 of the Rome Statute and corresponding Elements of Crimes, rule 113 of the ICRC Study on international humanitarian law and judgements from Finland and Germany in similar cases. The court established the context of an armed conflict in Iraq in 2015 by invoking three reports of the United Nations Assistance Mission for Iraq (UNAMI). In addition, the court used an expert witness, a professor of Islamic theology from Uppsala University, who explained that desecrating dead bodies is prohibited by Islam since this treatment presents a violation of human dignity according to the Koran.

The first instance court further considered the nature of the photos and made a distinction between photos that represent violation and inhumane treatment and photos that merely express the joy of victory after a battle. The first instance court stressed that the prescribed sentence for this crime is one year, but with the evaluation of the distinctive nature of the photos, sentenced the defendant to 6 months' imprisonment (taking into account the defendant's prior sentence for robbery).

The Appeal Court confirmed the first instance judgement on 11 April 2017. However, it disagreed with a few points. It stressed that differentiation between the types of photos cannot be applied as a general rule, since each case requires individual evaluation. The facts of this case

⁴⁴ Judgement number B 3187-16 of 11 April 2017 of the Appeal Court of Blekinge. The judgement has not been published but may be obtained by contacting the Court.

show massacred bodies with the intention of inhumane treatment and for the purposes of propaganda. Additionally, the Appeal Court further clarified the defendant's argument of being forced to pose. It assessed the photos and concluded that the defendant was actively posing, by looking directly into the camera, putting his foot on the bodies and by showing victory gestures. Based on this evaluation, the Appeal Court increased the penalty to 9 months' imprisonment.

4.4. Outline of the judgement of the Södertorn District Court, Sweden, of 25 September 2017⁴⁵

Legally relevant facts

The case is connected to the armed conflict taking place in Syria. The defendant was serving in the Syrian Army. He was charged with war crimes of humiliating or degrading treatment, based on photos in which he is posing with persons who are dead or seriously injured (*hors de combat*). In the photos, he is wearing a military uniform and has his foot on a victim, who appears to be a civilian, and another four bodies are lying on the ground. The crime is reported to have taken place in Damascus in January 2014. The picture came to the attention of authorities based on private information.

Court's ruling and analysis

The Court established the context of a non-international armed conflict by referring to five reports of the UN Commission of Inquiry to Syria. Legally and factually, the case is similar to the case of 6 December 2016 of Blekinge Court. However, this case deserved some further attention, as the Court elaborated on the defendant's argument of duress. The defendant claimed that he knew the photographs would be used for propaganda purposes by the Syrian Army, but should he refuse to pose next to the persons he would have been killed for high treason. The Court rejected the argument of duress since no signs of imminent danger were present and referred to his active posing. The Court explained that the defendant looked directly into the camera, wore an ammunition belt, and that the photo was taken with many bystanders present (which reinforced the violation). The Court found the defendant guilty and sentenced him to 8 months' imprisonment.

5. Conclusion

The aforementioned cases are all based on evidence obtained from social media and therefore demonstrate the importance of OSINT in the fight against impunity for core international crimes. Analysing social media and the use of OSINT allows national authorities unrestricted and fairly straightforward access to significant evidentiary material, admissible by courts. The above cases show that all belligerents in the conflict in Syria and Iraq have ensured and increased their presence on social media for propaganda and recruitment purposes. This situation provides further possibilities for prosecuting perpetrators, including members of

⁴⁵ Judgement number B 11191-17 of 25 September 2017 of the District Court of Södertörns. The judgement has not been published but may be obtained by contacting the Court.

terrorist organisations, under war crime charges. The judgements mentioned in this brief demonstrate that even a photograph posted on social media can reinforce the fight against impunity for core international crimes and lead to appropriate penalties based on the evidence collected.

In conclusion, developing jurisprudence also sends an important message that violations of international humanitarian law, such as inhumane treatment of dead persons, is not acceptable and will not be tolerated in EU Member States.